least follow that the widow can claim *jus relictæ* out of a fund which had no existence at the date of the testator's death. No precedent was cited for any such demand and it must accordingly be repelled. I find it difficult, however, to understand upon what principle, in a case of resulting intestacy, an heir *in mobilibus* was thought entitled in *Logan's* case to point out that certain rents of heritable estate had been lawfully accumulated in pursuance of testamentary directions, and to found upon this fact a claim to money the right to which formed no part of the moveable *hæreditas jacens* but was an indirect though undisposed of fruit of the heritable estate. The Court, however, was a very strong one, and the judgment upon the point in question was unanimous. Accordingly I should not have ventured to express my doubts but for the fact that I am not alone in thinking that the case of *Logan's Trustees* and the case which it followed, *Campbell's Trustees* v. *Campbell*, 18 R. 992, ought to be reconsidered in so far as they applied the law of resulting intestacy differently in the case of the income from heritable and in the case of the income from moveable property. The other point might be reconsidered at the same time.

LORD JOHNSTON was absent.

The Court answered the first question in the negative, the first branch of the second question in the affirmative, and the third question in the negative.

Counsel for the First Parties—Maclaren. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Second Parties—Blackburn, K.C.—A. M. Mackay. Agents—Simpson & Marwick, W.S.

Counsel for the Third Parties—Moncrieff, K.C.—R. C. Henderson. Agents—Webster, Will, & Co., W.S.

Counsel for the Fourth Party—Wilson, K.C.—Lippe. Agents—Maxwell, Gill, & Pringle, W.S.

Wednesday, June 6.

FIRST DIVISION.

[Sheriff Court at Kilmarnock.

WOODBURN *v.* ANDREW MOTHERWELL, LIMITED.

Contract—Sale—Transfer of Property and Risk—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 17, 18, *and* 35—*Hay Sold and Destroyed by Fire after being Baled by the Buyer for his Own Purposes.*

Ricks of hay containing an estimated quantity were sold at a price per ton. Under the contract the buyer was to send his machinery and bale the hay at the seller's farm (the buyer was under contract to the War Office to supply hay to them baled in a particular way); the seller was to cart the baled hay to a railway siding, where it was to be weighed, and from the weight of the hay so ascertained the total purchase price was to be ascertained. The buyer arranged with the railway company for the carriage of the hay. A considerable number of bales of the hay were destroyed by fire while still in the seller's stackyard. *Held*, in an action by the seller for the value of the hay, that the property in the hay had been transferred to the buyer prior to the fire, because prior to the fire the buyer had, within the meaning of the Sale of Goods Act 1893, section 35, by baling done an act in relation to the hay inconsistent with the ownership of the seller.

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71) enacts—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 35—"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller. . . ."

Andrew Woodburn, farmer, Galston, *pursuer*, brought an action in the Sheriff Court at Kilmarnock against Andrew Motherwell, Limited, grain dealers, Glasgow, *defenders*, for payment of £94, 1s., being the value of hay purchased by the defenders from the pursuer.

The *facts* of the case appear from the following findings of the Sheriff-Substitute (J. A. T. ROBERTSON)—"Finds in fact (1) that on 31st March or 1st April 1915 the pursuer sold and the defenders purchased two specific ricks of threshed hay, estimated to contain 8-10 tons, at £3 per ton, and four specific ricks of green-cut hay, estimated to contain 30-35 tons, at £3, 15s. per ton; (2)

that by custom of the trade in the district, known to and relied upon by both parties to the contract, it was part of the contract (*a*) that the defenders should send their own engine, baling machine, and balers to the pursuer's farm and there truss and bale the hay purchased by them; (*b*) that the pursuer should cart the baled hay to the Garrochburn siding of the Glasgow and South-Western Railway Company; (*c*) that the weight of the hay sold and purchased, as ascertained by the railway company on their weights for the purpose of fixing the carriage, should be accepted by the parties as determining the sum due by the purchasers to the seller; (3) that it was part of the contract that the hay in question should be baled and removed before the end of May 1915; (4) that the defenders made all the arrangements for the supply of railway waggons at Garrochburn and for the carriage of the hay by the railway company, and did so in order to suit their own convenience in baling the hay; (5) that on 3rd May 1915 the defenders commenced to bale the said hay, and they were baling the green-cut hay in accordance with the special requirements of the army authorities in order to use it to fulfil a contract they had made to supply hay for the army; (6) that on 5th May 1915 a considerable quantity of the baled hay was destroyed by fire in the pursuer's stackyard."

The pursuer *pleaded*—"1. The defenders having purchased from the pursuer six ricks of hay at a price agreed on, and said hay having been specifically appropriated to the contract of sale, the property therein and risk thereof passed from the pursuer to the defenders at said date of sale. 2. The pursuer having sold and delivered to the defenders the said six ricks of hay, and payment of the value thereof having been withheld, he is entitled to decree therefor with expenses. 3. The said hay having been delivered to the defenders, and they having done an act in relation thereto inconsistent with the pursuer's ownership thereof, have accepted the same, and are liable to pay the value thereof to the pursuer."

The defenders pleaded—"1. The property in the goods which were destroyed by fire not having passed to defenders, the same remained at the risk of the pursuer, and defenders should be assoilzied, with expenses."

On 14th June 1916 the Sheriff-Substitute, upon the findings in fact above quoted, "Finds in law (1) that the property in the said hay had passed to the defenders prior to the said fire; (2) that the risk of loss by fire was with the defenders; (3) that the defenders are due to the pursuer the price of the hay destroyed: With these findings continues the cause in order that the parties may have an opportunity of adjusting the amount due: Grants leave to appeal."

Note.—[*After narrating the facts*]—"The green-cut hay was intended by the defenders to fulfil a contract which they had made with the army authorities, and it was being baled by them in a special size of bale, bound in a particular way, to meet the requirements of these authorities. They had, on 24th April 1915, informed the military authorities that they had the hay in question available to fulfil the contract which they had made with these authorities.

"Upon these facts it was argued by the defenders that the property and risk had not passed to them. The sole ground of their arguments, as I understand it, was that something remained to be done by the pursuer in the way of weighing the hay in order to ascertain the price claimable by him, and that until this price was ascertained exactly there was not a sale but only an agreement to sell. They founded upon section 18, rule 3, of the Sale of Goods Act 1893.

"I cannot sustain this argument. It is clear that the pursuer had not under the contract to weigh the hay. The contract, as explained by custom and understood by both parties, was that the total price should be determined as the result of the weighing by the railway company, and the fact that the total price is not exactly ascertainable will not by itself prevent the passing of the property. See *Kennedy's Trustees* v. *Hamilton & Manson*, 25 R. 252, 35 S.L.R. 205.

"If any rule of section 18 of the statute is applicable to the circumstances of this case it is rule 1, under which the property would pass on the completion of the bargain for the subject-matter of the sale was specific, and so far as the pursuer is concerned nothing required to be done to put it into a deliverable state.

"The cardinal rule of law, however, is that the transfer of the property takes place when the parties intend that it should, and the intention of the parties must be gathered from a consideration of all the circumstances. Upon consideration of the facts I have come to the opinion that the parties intended that the property in the hay should belong to the defenders when the bargain was made. The defenders had power immediately thereafter to send their engine, machine, and balers to the farm, and there take possession of and bale the hay in the manner that suited their own requirements or those of their customers; they could arrange with the Railway Company to have the necessary waggons at the siding to suit themselves; all that the pursuer had to do or could do was to cart the bales of hay between his farm and the siding.

"In any case, and this would be sufficient for the pursuer's case, inasmuch as only baled hay was destroyed by the fire, I think it is very clear that parties intended that after the defenders had taken possession of and baled the hay it should be their property."

The defenders appealed, and argued—The property in the hay passed when the parties intended it to do so—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), section 17 (1)—and their intention was to be gathered from the whole circumstances of the case—section 17 (2). The property did not pass with the contract for the goods were not deliverable, and something remained to be done to ascertain the price. The Sheriff erred in thinking section 18, rule 1, applied, for the hay

was not deliverable prior to baling, and further, the pursuer had to cart the hay to the railway and have it weighed, for until then his obligations were unfulfilled and defenders were not bound to take delivery —section 62 (4). The property did not pass after the baling; the baling did not make the hay deliverable in the sense of section 18 (2); it was intended merely to effect the packing of the hay, and it was not an act inconsistent with the continued ownership of the pursuer, for the hay was not converted by the baling into something different from what it was before. Under the contract it was the duty of the pursuer to have the hay weighed, *i.e.*, to do some act with reference to the goods for the purpose of ascertaining the price. Consequently section 18 (3) applied. If, however, the weighing was not the act of the pursuer alone but of both parties the case was not covered by the statute, and at common law the rule was that the property did not pass till the act in question had been done—*Gilmour* v. *Supple*, 1858, 11 Moore's P.C. Cas. 551; *Wallace* v. *Breeds*, 1811, 13 East, 522; *Simmons* v. *Swift*, 1826, 5 B. & Cr. 857. But in any view the pursuer had still to do an act with reference to the *res vendita* and that suspended the passing of the property—Benjamin on Sale, p. 324; *Turley* v. *Bates*, 1863, 2 H. & C. 200. The place of delivery was also important—*Walker* v. *Langdale's Chemical Company*, 1873, 11 Macph. 906, 10 S.L.R. 663. Here the place of delivery was the railway. The present case was covered by *Hanson* v. *Craig & Rose*, 1859, 21 D. 432. Consequently the property had not passed prior to the fire, and the defenders should be assoilzied. Further, section 35 did not apply, for the hay would not have been accepted by the defenders except at the railway.

Argued for the pursuer—The Sheriff-Substitute was right. The ruling provision was section 17. The rules in section 18 were merely intended to be applied where the intention of the parties was not ascertainable otherwise. But here the intention of the parties obviously was that the property was to pass with the contract. Immediately thereafter the defenders could have come and baled the hay; that was an act inconsistent with the continued ownership of the pursuer; it was purely for the purpose of the defenders, *i.e.*, to meet the terms of their contract with the War Office, and it converted the hay into quite a different article of commerce. Consequently in any event the property passed when the hay was baled—*Martineau* v. *Kitching*, 1872, L.R., 7 Q.B. 436. The rules in section 18 did not apply; the carting did not make the contract of sale a conditional contract in the sense of rule 1. Rule 2 did not apply, for the hay was in a deliverable state at the time of the contract, for all the defenders could demand was the hay. Rule 3 did not apply, for the weighing was not an act to be done by the pursuer. In any event, the hay was accepted by the defenders when it was handed over for baling, and section 35 applied. In *Walker's* case (*cit.*) it was a term of the contract that the goods should be delivered at Newcastle. In *Hanson's* case (*cit.*) there was an express stipulation for remeasurement.

LORD PRESIDENT—The facts in this case are simple and undisputed. In April 1915 the defenders purchased from the pursuer 40 ricks of hay. The price was stipulated to be 60s. and 75s. per ton respectively for the different kinds of hay. It was one of the terms of the contract that the buyers should have the hay placed at their disposal in order that they might convert it from ricks into bales. That was for the purpose of enabling them to fulfil a contract which they had made with the War Department to sell to them a quantity of hay packed in bales of a certain density and of a certain weight. The farmer undertook, when the hay had been so converted, to carry it from his farm to the railway station where there was a weighing machine at which its weight might be determined for the purpose of fixing the carriage, and both parties agreed that the weight as it turned out on the railway company's scales should be accepted as determining the price.

Now when the defenders appeared upon the scene in the month of May to convert the hay from ricks into bales for the purpose of fulfilling their contract, it appears to me that they undertook an operation which, to use the words of the 35th section of the Sale of Goods Act, was inconsistent with the ownership of the hay remaining in the seller; and if I am correct in that view the 17th section of the statute is clearly applicable, for there was then performed an act which indicated quite clearly the intention of the parties, that although the hay remained on the seller's premises, yet an act had been done by the buyer which was inconsistent with the ownership remaining with the seller, and accordingly that the property then passed.

If so, then it is immaterial that the farmer performed the subsequent carting operations. No doubt what he did comes within the very letter of rule 3 of section 18, because he did an act with reference to the goods which was necessary in order that the weight might be ascertained and the price fixed. But that section is only an expansion of section 17. The rules in section 18 are merely intended to be a guide in ascertaining the intention of the parties. But if the intention of the parties is quite plain—as I think it is in this case—that the property should pass at the time when the goods were placed at the disposal of the buyer that he might convert them into bales, then the rules of section 18 do not come into play at all.

This is in substance the conclusion which has been reached by the Sheriff-Substitute. If it is a correct conclusion it is decisive of the case, because we are then justified in finding in law that at the date when the fire took place the property had passed from the seller to the buyer, and accordingly that the seller's claim must be sustained. The amount of the claim the learned Sheriff-Substitute indicates may be ascertained without very much procedure.

I propose that we should adhere to his interlocutor.

LORD JOHNSTON—I agree. The question is, what was the intention of the parties. Now I do not suppose the parties had any particular intention except what must be imputed to them from their actings, and their actings consist of the terms of the contract they made, their conduct afterwards, and the general circumstances of the case. But in using these various considerations to arrive at the intention to be imputed to the parties we are told by section 18 of the Sale of Goods Act 1893 that certain rules are to be applied. Now without looking at these rules, and looking merely at the circumstances of this case, I should hold that the turning-point of it was the fact that the buyer was himself under contract to sell to the Government upon very special terms, and, *inter alia*, upon the special terms that the whole hay was to be delivered in bales of a certain density and of a certain weight. The buyer therefore had imposed on him the necessity of seeing that the hay was put into such bales, or else he could not have fulfilled his contract. The seller on the other hand was not concerned with this.

Now the custom under which the parties worked was that the hay was—I do not say to be delivered, as that would be begging the question—but was to be put in the power of the buyer in order that the buyer might bale it for himself. From that I should have deduced the conclusion that at that point delivery was complete, and that the mere fact that the carting of the bales to the station was undertaken by the seller in no way affected the passing of the property.

The only difficulty arises from section 18, rule 3, which enacts that "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." If the fact had not been as stated by the Sheriff-Substitute, that "one of the conditions agreed upon was that both parties should accept the weight of the hay as ascertained on the railway company's weights for the purpose of carriage as determining the total amount payable to the pursuer by the defender," I think there might have been some difficulty in applying the rule in relation to the facts. But I do not think that the agreement to accept the railway company's weights for freight as the weights for the fixing of the price can be said to be equivalent to leaving it to the seller himself to weigh, measure, &c., in terms of the statutory rule.

I therefore cannot see any ground for impugning the Sheriff-Substitute's reasons for his conclusion.

LORD SKERRINGTON—The question is whether the risk of certain hay which was sold rested with the seller or had passed to the purchaser. In the absence of some other agreement the risk is upon the owner. That is enacted by section 20 of the Sale of Goods Act 1893. It is not said that there was any agreement, express or implied, as to the risk. Accordingly we are driven to ask whether the property was in the seller or the purchaser on the day of the fire. In order to find the answer we must be guided by sections 17 and 18 of the statute.

The seller was bound to cart the hay to the station in order that it might be transmitted by rail to the nominee of the purchaser, but also in order that it might be weighed and the price thus fixed. This consideration if it stood alone would suggest that according to the intention of the parties the property still remained with the seller. There is, however, another consideration which points in the opposite direction and which is in my opinion of greater significance, viz., that the purchaser had a contractual right to deal with the hay in a manner difficult, if not impossible, to reconcile with any theory except that of ownership. I accordingly think that the property, and therefore the risk, was with the purchaser.

LORD MACKENZIE was absent.

The Court adhered.

Counsel for the Pursuer (Respondent)—Blackburn, K.C.—Lippe. Agents—W. Croft Gray, S.S.C.

Counsel for the Defenders (Appellants)—Anderson, K.C.—Hamilton. Agents—Macpherson & Mackay, S.S.C.

Friday, June 8.

SECOND DIVISION.

[Sheriff Court at Glasgow.

MUIRHEAD *v.* MEIKLE.

Bankruptcy — Sequestration — Trustee — Votes of Creditors—Unstamped Assignations of Claims on the Estate.

Bankruptcy—Appeal—Competency—Election of Trustee—Error in Procedure—Bankruptcy (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 20), *secs.* 67 *and* 166.

Held that in a competition for trustee in a sequestration, where one of the candidates was founding on assignations which were unstamped, the Sheriff-Substitute should have allowed a motion on his behalf to be allowed to consign the amount of the stamps and penalties, and should thereafter have given effect to the documents in the competition.

Held that the Sheriff-Substitute's refusal of the motion was an error in procedure which it was competent to bring under review notwithstanding section 67 of the Bankruptcy (Scotland) Act 1913.

Tennent v. *Crawford*, 1878, 5 R. 433, 15 S.L.R. 265, *followed.*

The Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20) enacts—Section 67—"The judgment of the Sheriff declaring the person or persons elected to be trustee or trus-