Now, if it had been shown that this practice was unknown to the defender, and that he was not aware that the pursuers were following it in carrying-over, he might not have been bound, even although no loss was caused, by that system being adopted. The form of the carry-over contracts must have made it quite plain to the defender that the pursuers were acting as principals, because they all bear to be "bought from" and "sold to" Messrs J. A. Hope & Company, and not bought for or sold for them. The pursuers say—and there is no evidence to the contrary—that they had warrants with which they could at any time have implemented the sales had their client desired it.

The facts of the case being as I have stated, it is clearly distinguished from the cases relied on by the defender—*Robinson* v. *Mollett* and *Maffett* v. *Stewart & Others*—especially in this respect that here it is proved that the defender was from time to time apprised both in regard to the averaging of prices and the footing on which the contracts were carried over. In agreeing that the Lord Ordinary's judgment should be affirmed I proceed not so much on the complete *bona fides* of the pursuers, which I think has been established, as upon the thorough knowledge which I am satisfied the defender had of the mode in which his interests were being attended to.

The Court adhered.

Counsel for the Pursuers and Respondents—Balfour, Q.C.—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Defender and Reclaimer—R. V. Campbell—Clyde. Agents—Drummond & Reid, S.S.C.

Friday, June 18.

FIRST DIVISION.

BROWN'S TRUSTEE *v.* BROWN.

Minor — Power to Test — Price as Surrogatum of Heritage.

A *curator bonis* during the pupilarity of his ward, and as an act of administration of his estate, sold heritable property belonging to the ward. *Held* that the minor was entitled to test upon the price of the heritage, although if he had died intestate it would have fallen to his heir in heritage.

Mr John Brown, innkeeper, Cross Keys Inn, Perth, died intestate on 5th September 1894, predeceased by his wife and survived by eight children, of whom William, born 7th June 1882, was the eldest son. At the date of his death John Brown was possessed of moveable estate of something less than £200 in value, and of the Cross Keys Inn. William as his father's heir in heritage succeeded to the inn.

On 6th November 1894 Mr William James Wood, accountant, Perth, was appointed factor *loco tutoris* to William Brown, and for some time after his appointment he carried on the business of innkeeper there by the aid of a servant. He subsequently applied to the Sheriff for authority to sell the inn on the ground of the hazardous nature of the business, the possibility of the forfeiture of the licence, and the resulting loss to the estate. The Accountant of Court having reported favourably on the application, power to sell was granted by the Sheriff, and on 25th March 1895 the inn was sold for the sum of £2140, which was invested partly in heritable securities, and partly in 3 per cent. Canadian Inscribed Stock.

William Brown attained the age of fourteen on 27th June 1896. On 30th July in that year he executed a holograph settlement in the following terms:—"I hereby assign my whole property, in the event of my death, to Andrew Muir, brewer, Perth, as my trustee and executor, in order that he may realise the same and divide it equally among my brothers and sisters who may then be alive.—WILLIAM BROWN, 30th July 1896." Prior to doing so he was informed by his legal adviser that if he died intestate his property might fall to his younger brother, and he thereupon stated his desire that his estate should be divided equally among his brothers and sisters, and executed the above settlement. He had at that time no interest in any other estate than the proceeds of the sale, and was aware that the heritable property had been sold. William Brown died in October 1896 survived by five brothers and sisters.

A special case was presented by (1st) William Brown's executor, and 2nd, his heir-at-law, as to the succession to the proceeds of the sale of heritage.

The contentions of the parties as set out in the case were—"The first party maintains that said free proceeds were moveable estate in the person of the said William Brown at the date of his death, in respect (*a*) that the sale of said inn was in reality a compulsory one; (*b*) that the said free proceeds fall to be administered in terms of the settlement of the said William Brown, the said William Brown having approved of and ratified said sale; and (*c*) that in any event, said proceeds are carried by the deceased's settlement. The second party, on the other hand, maintains that said free proceeds were heritable estate in the person of his brother William Brown at the date of his death; that no part thereof was carried by his settlement, but that said proceeds fall to him as his brother's heir-at-law in heritage."

The questions submitted for the opinion of the Court were—"(1) Are the free proceeds derived from the sale of the said Cross Keys Inn payable to the first party in order that they may be distributed by him in terms of the settlement of the said William Brown? or (2) Do said proceeds now fall to the second party as heir-at-law in heritage of the said deceased William Brown?"

The Court on 18th March 1897 appointed Mr James Adam, advocate, tutor *ad litem*

to the second party, and Mr Adam put in a minute adopting the special case as adjusted on behalf of his ward.

Argued for first party—The proceeds of the sale were moveable, the pupil having ratified it on attaining minority, for he had no estate beyond that fund, and assigned his whole property to be divided. It was true that the factor *loco tutoris* had remained on in the capacity of *curator bonis*, but the minor was practically in the position of one without curators, this curator not having been selected by the minor, and having been appointed not as guardian of the pupil's person but of his estate. It was conceded that a minor without curators could sell heritage, and surely he could test upon it when he found it had been already sold. Moreover, the power of a minor to test on what was heritable only *destinatione* was greater than in the case of what was heritage *in forma specifica*—*Brand's Trustees* v. *Brand's Trustees*, December 19, 1874, 2 R. 258, 3 R. (H.L.) 16. The sale had in point of fact been a compulsory one, and not a mere act of administration, for it was certainly made "for weighty reasons," and accordingly it had effected a conversion — Erskine, i. 7, 18; *Accountant of Court* v. *Gilroy*, May 21, 1877, 10 Macph. 715; *Bontine's Curator*, July 13, 1870, 8 Macph. 977.

Argued for second party—(1) The sale of the property by the curator did not operate conversion, as it was not a compulsory sale. Nothing short of a compulsory sale could have this effect. It was not enough that the sale should be for the benefit of the estate—*Macfarlane* v. *Greig*, February 26, 1895, 22 R. 405—*Kennedy* v. *Kennedy*, Nov. 15, 1843, 6 D. 40; (2) If there was no conversion, then the estate was heritable. The minor could no doubt have sold with his curator's consent, but it did not follow that he could adopt the sale by the curator so as to test on the price. The authorities conclusively settled this question in the negative —*Sharp* v. *Cripton*, July 19, 1671, M. 16,285; *Advocate-General* v. *Anstruther*, December 23, 1850, 13 D. 450, at pp. 454, 455; Fraser on Parent and Child, 261; Erskine, i. 7, 18; M'Laren on Wills and Succession, vol. i. 238. But in point of fact there was no adoption. If making a will were to be held as adoption of a sale, then the rule that a minor cannot test upon heritage could never have any application, since the making of the will would *ipso facto* convert the estate into moveable estate.

At advising—

LORD ADAM—The facts which raise the questions, or rather the question, of law in this case are simple, and are these:—The late John Brown died intestate on the 5th September 1894 survived by eight children, of whom William, who was born on 7th June 1882, was the eldest son.

John Brown at the date of his death was possessed of the Cross Keys Inn, Perth (in which he carried on business as an innkeeper), and of some moveable estate of small amount.

William, as his father's heir in heritage, succeeded to the Cross Keys Inn.

A Mr Wood was appointed factor *loco tutoris* to him, and in the course of his administration of the pupil's estate he applied to the Sheriff for authority to sell the Cross Keys Inn. The authority craved was granted, and on 25th March 1895 the inn was sold for the sum of £2140, which was invested by the tutor in name of his ward partly in heritable securities and partly in 3 per cent. Canadian Inscribed Stock.

William attained minority on 27th June 1896. On 30th July following he executed a holograph settlement in the following terms:—"I hereby assign my whole property, in the event of my death, to Andrew Muir, brewer, Perth, as my trustee and executor, in order that he may realise the same and divide it equally among my brothers and sisters who may then be alive."

William died on the 29th October 1896. He was possessed of no other property than the proceeds of the sale of the inn.

The question of law is whether the proceeds of the sale of the inn were validly disposed of by the settlement executed by the minor.

The parties to the case are Mr Muir, the trustee named in the settlement, of the first part, who maintains the validity of the settlement, and John Brown, William's immediate younger brother and heir-at-law, who maintains that the proceeds of the sale in question were heritable estate in the person of his brother, and were not carried by the settlement.

Now, I think that if William had died intestate, the proceeds of the sale, being the *surrogatum* for heritable estate belonging to the pupil sold during his pupilarity, would have gone to his heir-at-law. The sale was not a compulsory sale. I do not in the least doubt that the sale was a most expedient act by the tutor in the interest of his pupil, but nevertheless it was a mere act of administration, which it is quite settled does not affect the heir's right of succession.

But that is not the question in this case. The question is whether a minor who is in possession of what is in fact moveable estate, although it may be the *surrogatum* for heritable estate sold during his pupilarity, may not deal with it just as freely as he may with any other moveable estate belonging to him. He may invest it as he pleases; he may spend it as he pleases, and I see no reason why he may not dispose of it by will if he pleases. Moreover, it will be observed that even if the Cross Keys Inn had not been sold during his pupilarity, it was in the minor's power to have sold it, and if he had done so, to have disposed of the proceeds by will. When on attaining minority he found that the property had been already sold, and the price was in his possession, I see no reason why he should not equally have the power of disposing of it by will. No decision to the contrary effect was cited to us. I am therefore of opinion that the settlement in question was habile to convey the price of the inn to the trustee, and that the first question should be answered in the affirmative.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court answered the first question in the affirmative.

Counsel for First Party—Sol-Gen. Dickson, Q.C.—Craigie. Agents—Carmichael & Miller, W.S.

Counsel for Second Party—W. Campbell—Graham Stewart. Agent—John Hay, Solicitor.

Thursday, June 24.

SECOND DIVISION.

[Lord Pearson, Ordinary.

HOOD *v.* HOOD.

Jurisdiction — Domicile — Husband and Wife—Separation and Aliment

A wife residing in Scotland raised an action of separation and aliment, and for custody and aliment of the two children of the marriage against her husband, an engineer residing in England. The defender was born and married in Scotland, but had resided in England for eleven years in the employment of engineering firms in different towns. He stated that he had no doubt that he would come back to Scotland to work if he could get as good a wage there as he was earning in England.

Held (*rev.* judgment of Lord Pearson *—diss.* Lord Young) that the defender had not lost his domicile of origin, and that the Court had jurisdiction.

On 10th December 1896 Mrs Mary Smart or Hood, residing at 182 East High Street, Forfar, wife of Charles Hood, engineer, "presently residing at No. 48 Shere Road, Deptford, London," raised an action against the said Charles Hood praying the Court to declare that the defender had been guilty of cruelly maltreating the pursuer, to find that the pursuer had full liberty to live separate from the defender, and to ordain the defender to separate himself from the pursuer *a mensa et thoro* in all time coming; further, to find the pursuer entitled to the custody of John Hood and Isabella Smart Hood, the children of the marriage, and to ordain the defender to make payment to the pursuer of the sum of £40 yearly for aliment to herself during the joint lives of herself and the defender, and of the sum of £12 yearly for aliment to each of her said children so long as they should be unable to earn a livelihood, and should remain in the custody of the pursuer, and to interdict the defender from interfering in any way with his children, or with the pursuer as the custodier of them.

No defences were lodged by the defender, but when proof was led he appeared and defended in person.

The proof showed the following facts:—The defender was born in Inverkeillor, Forfarshire, in 1863. In 1886 he went to England and worked there as an engineer. On 27th December 1889 he was married at Forfar to the pursuer, who was also a native of Forfarshire. After a few days the defender returned to Newcastle, where he was then employed, the pursuer accompanying him. They resided there about eleven months, and then went to London. They were there about two months, and then removed to Portsmouth, where they lived seven months. In September 1891 they returned to London, where they lived ten months, and then removed to Newcastle. In the summer of 1893 they again went to London, and lived there in lodgings in various districts till April 1896, when the pursuer left the defender and returned to the residence of her parents in Forfar. Two children, John Hood and Isabella Smart Hood, were born of the marriage, on 1st December 1890, and 18th September 1894, both being born at the residence of the pursuer's parents at Forfar.

The pursuer deponed—"I have been eleven years with London firms since I left Scotland, and have only been a fortnight out of work all the time. I have been with Humphrey Tennants, London, about eight years out of the eleven. During the other three years I have been in the employment of other engineering firms. . . . *By the Court*—I only lived two or three days in Scotland with my wife after we were married; we went straight to Newcastle, where I was employed. I had been working in England for some years before that. I was born in Forfar thirty-four years ago, and I have been eleven years in England. I was brought up in Forfarshire, and served my apprenticeship in Forfar. After my time was out I worked in Dundee and Arbroath for a few months, and then went to England. With that exception, and the few days after my marriage, I have been in England ever since. . . . *Cross.*—I was born in Inverkeillor. My father died some ten years ago in Forfar, and was buried there. My mother is still living in Forfar. I have three sisters living with my mother. I was working in Arbroath for a short time when I was in Scotland looking after the case in the Sheriff Court. If I got as good a wage in Scotland as I have been getting in England, I do not doubt but I would go there to work. I only want a living wage. *By the Court*—. . . I would go back to Scotland to work if I got a good job. I would not expect to get the same money as I have, but if I got something steady I would be quite willing to go."

On 23rd March 1897 the Lord Ordinary (PEARSON) pronounced the following interlocutor:—"Finds that the defender is domiciled in England, and in respect of no jurisdiction dismisses the action, and decerns."

Note.—"A general proof has been led in this case, and if the merits were now to be decided I should have no doubt that the pursuer was entitled to decree. Her wit-