not to participate in the residue, and if so to what extent.

For the reasons above indicated institutions in Glasgow or Paisley which are benevolent but not charitable fall, in my opinion, within the scope of the testator's bounty, and they ought not to be deprived of the chance of participating in the residue merely because of something which has been said or done by judges, however eminent, with reference to a similar but different controversy. It is not stated in the Special Case that the trustees are unable to perform the duty entrusted to them by the testator because of their inability to decide whether certain institutions in Glasgow or Paisley are or are not benevolent. Even if that statement had been made I should have been slow to believe it.

For the reasons indicated in the opinion of Lord Stormonth Darling in the case of *Shaw's Trustees* v. *Esson's Trustees* (1905, 8 F. 52, 43 S.L.R. 21)—an opinion which was referred to with approval in the case of *Turnbull's Trustees* v. *Lord Advocate* (1918 S.C. (H.L.) 88, 55 S.L.R. 208)—I have come to the conclusion that as the law at present stands no ground exists for setting aside the residuary bequest.

LORD CULLEN—I am of opinion that the question submitted is ruled by the cases of *Hill* v. *Burns* (1826, 2 W. & S. 80) and *Miller* v. *Black's Trustees* (1837, 2 S. & M'L. 866), and that it should be answered in the negative.

The LORD PRESIDENT (CLYDE) was absent.

The Court answered the question of law in the negative.

Counsel for the First Parties—M'Robert, K.C.—Fenton. Agents—Cowan & Stewart, W.S.

Counsel for the Second Parties—Sandeman, K.C.—T. Graham Robertson. Agents—J. & J. Ross, W.S.

Tuesday, June 22.

FIRST DIVISION.

[Lord Sands, Ordinary.

GAVIN'S TRUSTEE *v.* FRASER.

Contract—Sale—Right in Security—Sale or Security—Contract in the Form of Sale with Pactum de Retrovendendo—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 61 (4).

A contractor agreed on 18th October 1917 to haul timber to rail for a timber merchant at 12s. 6d. per ton, providing his own plant, horses, &c. Soon after that contract began, the contractor got as advances from the timber merchant two sums of £200 and £400 respectively, and credit of £5, the price of coals supplied. He applied in December for further money; the timber merchant was unwilling to give him more. On 24th December 1917 the parties interchanged letters which bore that the timber merchant had bought the contractor's plant, horses, &c., for £1200, the previous advances being imputed *pro tanto* against that sum, the timber merchant agreeing to return the plant, horses, &c., to the contractor "say by 31st December 1918" on repayment of the £1200 plus interest at 6 per cent. per annum. A payment of the balance of £1200 was made *unico contextu* with the agreement. The price of £1200 represented an adequate price for the plant, horses, &c. There was no personal obligation of repayment upon the contractor's part, and no obligation to account for the proceeds on the timber merchant's part if he sold the plant, horses, &c. The plant, horses, &c., were left on the haulage contract, the terms of which remained unaltered. There was no arrangement for the repair and upkeep of the plant. The contractor was sequestrated in May 1918, the first deliverance in the sequestration being dated 20th May 1918. The trustee in the sequestration thereafter sued the timber merchant, who had taken possession of the plant, horses, &c., for delivery thereof and for damages for retention thereof. *Held* (1) that the transaction between the contractor and timber merchant was in form and in substance a sale, and (2) (*rev.* Lord Sands) that it was not a transaction "intended to operate by way of mortgage, pledge, charge, or other security," in terms of section 61 (4) of the Sale of Goods Act 1893, in respect that the act which the parties were agreed in intending to produce was a sale, though their ultimate motives may have been in effect to create a security, and defender *assoilzied.*

Observations per the Lord President (Clyde) and Lord Skerrington on the class of transactions falling under section 61 (4) of the Act of 1893.

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), enacts, section 61 (4)—"The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security."

William Craighead, trustee on the sequestrated estates of Duncan Loggie Gavin, farmer and contractor, *pursuer*, brought an action against George Lindsay Fraser, timber merchant, *defender*, concluding (1) for decree of delivery of "(First) eight horses which were at or about the months of November and December 1917 and January, February, March, and April 1918, or any of the said months, in the possession, custody, and control of the said Duncan Loggie Gavin, the bankrupt, together with the harness for the said horses; (Second) five lorries, one steam-engine, and two waggons attachable thereto, one steam waggon with detachable trailer, one steam waggon without trailer, and five wood waggons, all of which were, at or about the dates foresaid or any of them, in the possession, custody, and control of the said Duncan

Loggie Gavin the bankrupt;" and (2) for damages "of (First) the sum of £512, 10s. sterling, with interest thereon at the rate of 5 per centum per annum from 1st November 1918, and (Second) the sum of £20 sterling for and in respect of each week betwixt the said 1st day of November 1918 and the date of the decree to follow hereon, during which the defender retains and withholds from the pursuer the possession, custody, and use of the horses, engines, waggons and others aforesaid."

The following *correspondence* had passed between the bankrupt and the defender:—

"Letter, Mr Fraser to Mr Gavin.
18th Oct. 1917.

"Mr Duncan Gavin, Drumtochy Mains, Auchenblae, Kincardineshire.

"Dear Sir—*Gelston Estate*—I confirm having contracted with you to lift, cart or traction, and load at station the whole timber as per specn. handed you, at 12s. 6d. per ton dead weight, the whole work to be performed to my satisfaction and in accordance with the conditions specified by the proprietor. It is understood that you are to put sufficient plant on the job and try to finish in a year if possible, or at least 18 months.—Yours faithfully, G. L. Fraser.

"Letter, Mr Gavin to Mr Fraser.
"*Drumtochty Mains, Auchinblae, 30th Oct.* 1917.

"To Mr G. L. Fraser, Holmfield, Moffat.

"In consideration of you advancing me the sum of Four hundred pounds (£400) in addition to the Two hundred pounds (£200) already advanced, I agree to allow Twenty pounds (£20) per week to be deducted from my account against Gelston Castle contract until the capital sum is repaid.
Duncan L. Gavin.

"Received the sum of Six hundred pounds (£600). Duncan L. Gavin."

"Letter, Mr Gavin to Mr Fraser.
22nd Dec. 1917.

"Dear Sir—I confirm having sold you my plant as detailed under and inspected by your Mr M'Cormack for the sum of One thousand two hundred pounds stg. (£1200). I have received on account the sums as follows, viz.—Oct. 20th, £200; do. 29th, £5; do. 30th, £400; and await your cheque for the balance. viz., £595 stg.—Yours faithfully,
Duncan L. Gavin.

"*Details of Stock sold as stated above*—15 horses and harness for same, 6 lorries, 1 steam engine with two waggons, 1 steam waggon and trailer, 1 steam waggon, 5 wood waggons.

"Received balance £595 stg. December 24th 1917. Duncan L. Gavin.

"Letter, Mr Fraser to Mr Gavin.
"*Moffat, N.B., 24th Dec.* 1917.

"Mr Duncan Gavin, M'Nae's Temperance Hotel, Castle-Douglas.

"Dear Sir—I have received your favour of yesterday confirming the sale of your plant and horses as undernoted and enclose cheque for £595 in settlement. I agree to hand these back to you say by 31st December 1918 on repayment of the capital sum, viz.—One thousand two hundred pounds stg. (£1200) plus interest @ 6 % per annum.

"Kindly acknowledge receipt.—Yours faithfully, G. L. Fraser.

15 horses and harness for same, 6 lorries, 1 steam engine with 2 waggons, 1 steam waggon and trailer, 1 steam waggon, 5 wood waggons."

"Letter, Mr Gavin to Mr Fraser.

"Mr G. L. Fraser. *Jan. 21st* 1918.

"Dear Sir— . . . I have been thinking about the handing over of my plant to you for a year. Thing is right enough, but I have been thinking if anything came over me before the year is up its not near its value. I have been valuing it as near as I can, and by what I can make the figures out to be, is about Two thousand three hundred pounds. Now I have made up my mind that if you should make it Two thousand pounds we can put on your name on the articles you have on this paper and I will sign my name to it and get things made right and I would like if you make it out to be payable in January, because if I have not enough in the bank at that time my cattle would be fat and I would have two chances to pay you back. Now Mr Fraser I think it's only but a fair deal that I want, and if anything should go wrong with me during the year the plant that you have on your paper would be yours. I have no wish to die but we never know. . . . It is you and me that's doing this and I will pay you the 6 per cent. of interest you want, and, as I say, if you make it out for the month of January I will make myself able to meet it, and, as I say, if anything goes wrong with me during that time the plant that you have on this paper will belong to you without any bother.—I am, dear sir, your obedient servant,
Duncan L. Gavin,
c/o Mrs M'Nae, Queen Street, Castle-Douglas.

"*P.S.*—I could call and see you if you wish.

"Letter, Mr Fraser to Mr Gavin.
"*Moffat, N.B., 22nd Jan.* 1918.

"Mr Duncan Gavin, c/o Mrs M'Nae, Queen Street, Castle-Douglas.

"Dear Sir—I have yours of yesterday and am not disposed to increase my commitments on your plant. I increased same from £1000 to £1200 at your request and now you ask for more. My suggestion to you is to get on with your contract without delay. I expect to be in Castle-Douglas this week, or failing, next week, but get busy and deliver the goods.—Yours faithfully, G. L. Fraser.

"*P.S.*—I return your contract letters.—
G. L. F.

"Letter, Mr Gavin to Mr Fraser.

"Mr G. L. Fraser. *Jan.* 31, '18.

"Dear Sir—I was disappointed that I did not see you to-day before you went away. . . . Now Mr Fraser I want to get the thing settled up as I don't want your money and not making things right. I offered to hand over that stock to you for one year at six per cent. and intend doing so, but as I said in my last letter I made a mistake handing over the stock at such a small figure as 1200 pounds. I valued the stuff at two thousand three hundred pounds. The way things are

to-day they would make more, but if you give me two thousand pounds and give me to the end of January 1919 I will sign over all the stock as mentioned here, 15 horses and harness, five wood bogies, six lorries, engine and four waggons, steam waggon and trailers, steam waggon. Now Mr Fraser I would not like you to be angry about this, but when I took a right thinking about this I think it's only right, because if anything comes over me this property belongs to you, so I would like you to get it settled at once as I would like to get on with your work as fast as I can now when the good weather is in. If you make out the thing and send it to me I will sign it and return the same to you as soon as possible, but I would like it done to keep everything right. Trusting to hear from you soon.—I am, dear sir, your obedient servant, DUNCAN L. GAVIN,
c/o Mrs M'Nae, Queen Street,
Castle Douglas.

"Letter, Mr Fraser to Mr Gavin.
"*Moffat, N.B.*, 4*th Feb.* 1918.
"Mr Duncan L. Gavin, M'Nae's Hotel,
Castle-Douglas.

"Dear Sir—I have yours of 31st Jan. and do not think your stock is value for £2000, and in any case with an advance of £1200 you have all the less to pay back. You can have it all back in your name on repayment of the £1200. I do not want to take any advantage over you, but I must protect my own interests, and it is for you to finish your contract as quickly as possible, repay me the £1200, and the business is finished. . . .
G. L. FRASER.

"Letter, Mr Fraser to Mr M'Cormack.
"*Moffat, N.B.*, 4*th Feb.* 1918.
"Mr H. M'Cormack, Normandale,
Castle-Douglas.

"Dear Sir—I enclose copy letter received from Mr Gavin, also copy of my reply. I do not feel like altering my mind in regard to this matter. I trust your security is all right as regards our name on the plant. If we give Gavin £2000 it would be a first class sale for his old plant and he would probably walk off and turn farmer or take another job. He must stick in and finish his contract. . . . G. L. FRASER."

The parties *averred* — "(Cond. 1) The estates of Duncan Loggie Gavin were sequestrated on the 30th May 1918. The date of the first deliverance on the petition by the Lord Ordinary on the Bills is 20th May 1918. . . . (*Ans.* 1) Admitted. (Cond. 2) . . . In particular from or about October 1917 [the bankrupt] undertook at Castle-Douglas, Kirkcudbrightshire, a haulage contract which he had entered into with the defender George Lindsay Fraser, who is a timber merchant, carrying on business in Glasgow and Moffat and elsewhere. The contract was for the haulage of wood on the Gelston estate. (*Ans.* 2) Admitted. . . . (Cond. 6) The said plant is not the defender's property, and he has no right to maintain possession thereof against the pursuer's claim to make his right to possession effectual. The circumstances of defender's relations to the matter are as set out in the following condescendences:—(Cond. 7) In view of the bankrupt's taking up the Gelston haulage contract aforesaid the bankrupt applied to the defender for a loan, as he was in difficulty how to finance his operations. The defender advanced him £200 on loan on or about 20th October 1917, gave him credit on 29th October for £5, the price of coals supplied, and advanced £400 on loan on 30th October of the same year. These loans were at the time unsecured. In or about December 1917 the bankrupt approached the defender for a further loan of £600. The defender agreed to give him some assistance in the way of loan provided he would assign over his plant for a certain time by way of security. The bankrupt fell in with this arrangement, and agreed to give an assignation in security for a limited time. A year was mentioned as the duration of the pretended assignation. The defender then told his agent, Mr M'Cormack, to get a letter prepared, and on a subsequent occasion, in December 1917, within the Douglas Arms Hotel, Castle-Douglas, M'Cormack presented for the bankrupt's signature a document in the following terms as the temporary assignation arranged for:—'. . . [*The letter of* 22*nd December* 1917 *was quoted*] . . .' The said pretended sale was not truly a sale, and was a fictitious transaction, the true bargain intended, and really carried through, being one of security for a limited time only, and the value stated as the price of the plant being grossly inadequate as the real value on sale. No transfer of possession of any of the moveables mentioned took place. The bankrupt continued to possess and control by his own servants the whole of the said plant, and to carry on through his said servants the operations required by his haulage contract. The arrangement for security was to cover 6 per cent. interest upon the principal sum advanced. If the sum of £595 was paid as averred by the defender it was simply as the remaining advance of a total loan of £1200. . . . (*Ans.* 6 *and* 7) The defender admits the loans of £200 and £400 and the credit of £5; that the loans were unsecured, and that in December Gavin approached him for further assistance. The letter of 22nd December 1917 is correctly quoted, and is referred to for its terms. *Quoad ultra* denied. Explained that after making the three loans above mentioned the defender refused to lend any more money to Gavin, but in order to secure the completion of his own contract, which was for the supply of timber urgently required for national purposes, he, after negotiation, agreed to enter into a transaction of a different character with Gavin, namely, to purchase the plant in question from him outright at a price of £1200, to account of which the foresaid sums of £200, £5, and £400 should be treated as payments, the loans being written off as discharged. Gavin agreed to sell, and did sell, the plant upon that basis, and granted the letter quoted by pursuer in confirmation of the sale. On 24th December 1917 the defender paid the balance of the price, viz., £595, to Gavin by a cheque

for that amount. Gavin on the same date cashed the cheque at his bank, drew £150 of the amount in cash, and paid in the balance of £445 to the credit of his current account. At the same time the defender voluntarily came under an obligation to re-sell the plant to Gavin, if called upon to do so, by 31st December 1918, in exchange for a price equal to repayment of the price of £1200, with interest at 6 per cent. Explained that the transaction was intended to be and was a genuine sale of the property in question to the defender, and was entered into by the defender in good faith upon representations made by Gavin and believed by the defender that the whole of the plant in question belonged to Gavin, and that the said price of £1200 was a fair price, and would be sufficient to enable Gavin, and would be used by Gavin, to clear off all his outstanding liabilities. . . . (Cond. 8) By letters passing between the bankrupt and defender, of dates 30th October 1917, and 21st January, 22nd January, 31st January, and 4th February 1918, the true nature of the intended transaction is clearly exposed. Copies of said letters are produced, and the statements made therein as to the intention of parties are held *brevitatis causa* as recited, and as forming part of these pleadings. . . . (*Ans.* 8) The correspondence is referred to for its terms. . . . (Cond. 9) On or about 9th February 1918 the period of constructive bankruptcy of the bankrupt commenced, notour bankruptcy being established on 9th April 1918. It was well known to the defender, at least as early as the said 9th February, that the bankrupt was then *vergens ad inopiam*, and that he was in fact insolvent, and that bankruptcy proceedings could not long be avoided. The defender indeed knew all these matters as early as 22nd December 1917. . . . (*Ans.* 9) The dates of constructive bankruptcy and notour bankruptcy are not known and not admitted. . . . (Cond. 10) On or about 16th April 1918 the defender . . . ordered a stencil cutting of the words 'G. L. Fraser' to be prepared with a view to the painting over with these words the name of the bankrupt upon the plant. The workmen to whom the order was given suggested instead tin plates to be nailed on, and on or about 19th April sixteen such nameplates were delivered to Mr M'Cormack as the defender's servant or agent, and it is believed and averred were subsequently, upon the defender's instructions, painted with his name and affixed to certain of the waggons and lorries on or about the 22nd or 23rd of April 1918. No change whatever was made on the naming of the other plant, and the horses were, of course, not identified. The explanation in answer is denied. (*Ans.* 10) Admitted that about the date mentioned the defender had plates bearing his name affixed to the waggons and lorries. *Quoad ultra* denied. Explained that shortly after the sale of the plant to defender he had cards bearing his name affixed to the waggons and lorries, but that these were not sufficiently durable, and the plates were subsequently used in their place. (Cond. 11) The said re-naming was entirely collusive, and was a simulate proceeding if and in so far as indicating any act of possession or evidence of ownership. There was no transfer of possession of even the re-named items. They were controlled, as before, by the bankrupt. . . . In any event, the said operation of re-naming was collusive and fictitious. If any transfer of possession took place, which is not admitted, it was a transfer within the days of constructive bankruptcy in further security of prior debts. (*Ans.* 11) Denied under reference to the preceding answers."

The pursuer *pleaded, inter alia*—"1. The horses, waggons, and other plant libelled being part of the trust estate under the pursuer's charge, decree of delivery should be pronounced as concluded for. 2. The pretended right of the defender to the ownership of said plant being founded on a fictitious sale which was never really carried out or intended by either party to the said pretended contract, the defender's title to refuse delivery is not valid to any effect. 3. The said pretended transaction between the bankrupt and the defender being an attempt to create a security *retenta possessione*, are ineffective in law, and in any event should be set aside *ope exceptionis*. 4. The transactions between the said parties being taken in fraud of other creditors and during the known insolvency of the bankrupt, fall in any event to be set aside both at common law and under the Act 1621, cap. 18, as fraudulent preferences. 5. The said pretended transactions being an alienation, during constructive bankruptcy, of property of the debtor in further security or satisfaction of a prior unsecured debt, fall to be set aside as in contravention of the Act 1696, cap. 5."

The defender pleaded, *inter alia*—"2. The pursuer's material averments being unfounded in fact the defender should be assoilzied. 3. The plant in question having been purchased by the defender in good faith and for a substantial consideration, and in the ordinary course of business, he is entitled to be assoilzied."

On 22nd November 1919, after a proof, the Lord Ordinary (SANDS) pronounced the following interlocutor:—"The Lord Ordinary, in respect that parties have agreed that the value of the plant specified in the summons shall be taken at £1100, but without prejudice to the defender's right to reclaim upon the general question, decerns the defender to pay to the pursuer the said sum of eleven hundred pounds sterling: Further, decerns the defender to pay to the pursuer the sum of two hundred and seventy-five pounds sterling, with interest at the rate of five per centum per annum from 1st November 1918 till payment in full of the first petitory conclusion of the summons, and the sum of two hundred and seventy-five pounds sterling in full of the second conclusion: Assoilzies the defender from the conclusion of the summons for delivery of said plant, and decerns."

Opinion.—"The facts of this case, so far as they appear to me to be material, do not, I think, admit of serious dispute. The defender had purchased wood in Galloway, and in

October 1917 he negotiated a contract with Gavin, an Aberdeenshire farmer and contractor, with whom he had no previous acquaintance, for the haulage of the wood. With what appears to have been somewhat guileless good nature the defender made Gavin two advances in that month, amounting in all to £600, without any security. Gavin entered upon the contract. In the beginning of December Gavin wanted more money; £400 was mentioned and subsequently £600. Defender, however, had by this time made up his mind not to go deeper without some security. He knew that a loan ostensibly on the security of Gavin's plant would not do without delivery, and as the plant was the only security Gavin had to offer he proposed a purchase at a price of £1200, of which one-half was the old advance and one-half was now to be advanced. Gavin, with some apparent reluctance, agreed to defender's proposal. Defender got a rough estimate of the value of the plant from his foreman, but he had no such valuation or particulars as an ordinary purchaser would have required. Defender did not really want to become the purchaser of the plant, which was of an inferior and somewhat ramshackle character. He desired to protect himself in making a further advance to Gavin. He was moved to make this advance partly, I think, by good nature, but mainly by a desire to make sure of Gavin getting on with his contract. It may be that it was in the back of his mind that it might be well in view of the circumstances of the time to have this plant to use either himself or through some other contractor if Gavin burst up. But it is not satisfactorily proved that he contemplated and desired to make provision for such a contingency, still less is it proved that the other party to the contract had any appreciation of such an object on defender's part. The arrangement made was embodied in documents which are in the following terms:—'. . . [*His Lordship quoted the letters of 22nd and 24th December* 1917.] . . .'

"The first question I have to consider is what was the legal effect of these documents? (1) Defender purchased the plant *en bloc* for £1200. (2) There was no special stipulation as to time of delivery, and defender could have demanded delivery at once. (3) Gavin was entitled to repurchase the articles upon 31st December 1918 at the price of £1200, with interest at 6 per cent. The contract says 'by' 31st December, which might be construed to mean at any time up to that date when you chose to tender the money. I doubt, however, if there was any obligation in the terms of the contract to hand back before 31st December, but the point is not material. If the parties had been careful they would probably have said 'at any time up to' instead of 'by,' and that may possibly be the reasonable construction. It is of little importance, but the date or dates from which interest was to run are not stated. (4) There is no stipulation that Gavin was to have the use of the plant in the meantime or as to the terms upon which he was to have such use, nor is there any stipulation as to the upkeep, repairs, and renewals between the date of sale and 31st December 1918, a very important consideration as regards plant of this kind.

"In my opinion this was a contract of sale, not of loan. After entering into it defender could not have sued Gavin as his creditor in any part of the £1200 either before or after 31st December 1918. In the view, however, which I take of the law this does not end the question. It is necessary to inquire what was the real intention as distinct from the legal effect of the contract. The intention was, I think, that matters should go on just as before. Gavin was to keep the plant in his own hands and pay nothing for the use of it, and to be responsible for repairs and renewals. He was not to be precluded from paying back the £1200 until 31st December 1918, but might do so at any time, in which case defender's interest in the plant was to cease. On the other hand, if defender did not want to keep the plant and preferred his money Gavin was to pay him his £1200, if able to do so. What was to happen if Gavin could not pay £1200 at December 1918 was not contemplated or considered—whether the parties were just to be quits, or whether Gavin was to pay something for the use of the plant for a year or to get any price for it other than the roughly fixed £1200.

"Whilst I indicate what I hold to have been the intention underlying the contract I must be careful to make it clear that the understanding had no legal validity, and that it is not proved that either party had any belief that it had or that the other was under any but a moral obligation to carry it out, and was not bound in law by the contract literally as it was expressed in writing.

"Under the common law of Scotland a transaction such as that here in question could not be sustained against a creditor, for it is not argued that there was timeous and effective delivery, and without delivery property does not pass on sale. This rule was modified by the Mercantile Law Amendment Act 1856, section 1, which gave a right to the purchaser to demand delivery in preference to the creditors of the seller. There were a number of cases as to the effect under this section of ostensible contracts of sale in which there was an element of security for debt. It is not easy to reconcile these cases, but I think that the rule came to be recognised that if the legal effect of the contract construed as a whole was sale, it did not matter what might have been the real object of the parties in entering into it, or the unexpressed understanding beneath it.

"This section of the Mercantile Law Amendment Act was repealed by the Sale of Goods Act 1893. Under that Act (sections 18 and 19), however, property passes on sale without delivery. But this is qualified by a provision (section 61 (4)—'The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.'

"Accordingly section 1 of the Mercantile Law Amendment Act being swept away, the defender here must either rely upon the common law, or he must show that this contract was a contract of sale which was not 'intended to operate by way of mortgage, pledge, charge, or other security.' As I have already stated, he does not profess to rely upon the common law, and therefore the matter reduces itself to this—Whether the contract was 'intended to operate by way of mortgage, pledge, charge, or other security?' The crucial words are—was 'intended to operate by way of.' Two views have been suggested. One view is 'intended to operate by way of' means 'intended to have the legal effect,' or in other words, 'to create the legal relations of borrower and lender on security.' The other view is that 'intended to operate by way of' means 'intended to have the practical effect,' or in other words, 'intended, notwithstanding its form and its strict legal effect, to serve the purpose of.' It appears to me that I am bound by the opinion of the majority of the Judges in the case of *Robertson* v. *Hall's Trustees* (24 R. 120, 34 S.L.R. 82) and *Rennet* v. *Mathieson* (5 F. 591, 40 S.L.R. 421) to adopt the latter construction. In both these cases Lord Young dissented. In the former case he appears to adopt the first of the two above constructions. His reasoning in the latter case is curious. He points out, rightly perhaps, that sub-section 4 of section 61 of the Sale of Goods Act seems to recognise the legality of a contract in the form of a sale but intended as a security. All that it does is to provide that the provisions of the Act shall not apply to such a contract. This then, as he represents, throws us back upon the common law, under which *M'Bain* v. *Wallace* (8 R. (H.L.) 106, 18 S.L.R. 734) was decided. Lord Young seems, however, to ignore the consideration that *M'Bain* v. *Wallace* cannot be rested upon the common law without the aid of section 1 of the Mercantile Law Amendment Act which is repealed. I do not know whether it may have been in his mind, but I can understand the argument that in regard to such a contract section 1 of the Mercantile Law Amendment Act though repealed in general must be treated as in force. Otherwise a provision of the Sale of Goods Act, viz., the repeal of that section of the Mercantile Law Amendment Act would be made applicable to a class of contract to which in terms of section 61 (4) the Sale of Goods Act is not to apply. There is a certain dialectical ingenuity in this argument, but I do not think that it is based upon sound principles of statutory construction.

Taking it then, as I think I must, that the contract here is ineffectual as a contract of sale if it was intended by the parties to it, notwithstanding its form and the legal relations which it created of seller and purchaser, simply to serve the purpose of affording the defender some security for his advances as against other possible creditors of Gavin's, I am of opinion that it falls under the exception in section 61 (4) of the Sale of Goods Act, that the property did not pass, and that accordingly the defender's claim to it fails.

"The parties have agreed that the value of the plant shall be taken at £1100, and that without prejudice to defender's right to reclaim upon the general question decree should be pronounced for that sum. The question of payment to the pursuer in respect of being deprived of the use of the plant is rather a puzzling one. It was not argued —I do not suggest that it could have been argued successfully—but at all events it was not argued that defender having taken possession of pursuer's plant in April 1917, and being ordained to pay its value as at that date, any further claim is limited to interest. On the other hand, if defender is to pay in respect of taking the use of the plant until now, I confess that it would have appeared to me to be logical that he should pay as price the value of the plant at this date, which in view of its wasting character would have been a very different figure after eighteen months' use from its original value. I have no doubt that if a hirer had been found upon the spot a very considerable sum per week might have been obtained for this plant on a contract for a few weeks or a few months. But it appears to me very improbable that it could have been hired continuously at such figures as are suggested without breaks, and without serious expense for transport from one place to another. Further, the plant or some parts of it was somewhat obsolescent and otherwise unsatisfactory. It was all of a wasting character, and an owner who hired it out would have had very heavy expenses for repairs and renewals at a time when it was extremely difficult to get repair work done or to replace plant. This burden would have become more onerous as time went on and things got worn out. Keeping all these things in view, and particularly that pursuer is debited with no outlay during the period, I think that £550, or one-half the original value of the plant, is a fair allowance in respect of pursuer having been deprived of the use of the plant for the period covered. I estimate that if pursuer had been obliged to maintain the plant, replace all parts worn out, execute all repairs, and replace horses worn out or deceased as an owner letting out for hire, it would have cost him at least another £550 to date. I propose to divide the £550 equally between the shorter first period down to the raising of the action and the longer later period, and I shall give decree for £275 with interest at 5 per cent. from 1st November 1918 under the first petitory conclusion, and for £275 under the second."

The defender reclaimed, and argued—(1) If the transaction between the bankrupt and the defender was in substance a contract of sale, then sections 17 and 18, rule 1, of the Sale of Goods Act 1893 (56 and 57 Vict. cap. 71) applied, and there being no contrary intention the property in the goods passed at the date of the contract, and delivery could have been demanded immediately thereafter. If that view was correct, then the property in the plant had passed to the defender before the end of 1917, *i.e.*, some months before the date when constructive bankruptcy began. All that was founded

on to exclude that result was the terms of section 61 (4) of the Act of 1893. That section did not apply, for the transaction between the defender and the bankrupt was both in form and substance a contract of sale. In form it certainly was a sale, and the evidence showed it was also a sale in substance. The only other alternative suggested was that the transaction was a loan with a simulate sale of moveables by way of security. But there was no obligation upon the bankrupt to repay the price, nor was there any stipulation that he should pay interest. The only stipulation for interest was that it should be paid upon the price if and when the bankrupt re-purchased. But that interest was to be taken as the hire of the plant to the bankrupt. If the bankrupt never re-purchased or never paid interest the defender did not, like a security holder, require to enter into possession, and no personal liability would have continued to attach to the bankrupt if the plant had not upon realisation fetched the amount of the money supposed to have been advanced. The bankrupt had merely a right to re-purchase with a possible accessory right to prevent removal of the plant, and to insist that it should be kept intact against his option to re-purchase. The whole transaction was perfectly explicable in view of the interests of the two parties, particularly in view of the fact that no change was made on the terms of the haulage contract. The bankrupt's interest was to obtain ready money; the defender's interest was to get the bankrupt to fulfil his contract. The latter explained why the defender allowed the plant to remain upon the contract, and why, though the contract stipulated for the bankrupt to provide plant, the defender when the plant became his did not insist upon modification of the haulage contract, which had become less onerous thereafter to the bankrupt. The sum given for the plant was admittedly a fair sum as the price of the plant. Further, the defender had actually entered into possession of the plant in April 1918. Both of those considerations were consistent only with sale. Upon that point the Lord Ordinary was in favour of the defender. To satisfy the provisions of section 61 (4) it was necessary to prove that though clothed in the form of a sale the juristic act which the union of the two parties' intentions was meant to create was not a sale but some other transaction. Their motives inducing them to that juristic act were irrelevant, and so was (and there the Lord Ordinary erred) the practical effect of their act. So long as the intention of parties was to buy and to sell, section 61 (4) did not apply. But where the intention of parties was not to buy and to sell, but, *e.g.*, to lend and create a security—a juristic act of a different quality—section 61 (4) did apply though the transaction might take the form of a sale. The quality of the act intended by the parties was to be inferred from the whole circumstances. In *Robertson* v. *Hall's Trustee*, 1896, 24 R. 120, 34 S.L.R. 82; *Rennet* v. *Mathieson*, 1903, 5 F. 591, 40 S.L.R. 421; *Jones & Company's Trustee* v. *Allan*, 1901, 4 F. 374, 39 S.L.R. 263; *Hepburn* v. *Law*, 1914 S.C. 918, 51 S.L.R. 342; and *Scottish Mercantile Discount Company* v. *Romanes*, 1905, 13 S.L.T. 169, the circumstances showed that no sale was in the intention of parties, but merely the creation of a security. Thus the motive inducing such a transaction as the present might be to create a security, yet if the transaction was in actual fact a sale section 61 (4) did not apply—*M'Bain* v. *Wallace*, 1881, 8 R. (H.L.) 106, 18 S.L.R. 734. That view was supported by the saving in the Act of 1893, section 61 (3), of the law relating to bills of sale in England. Transactions by bills of sale were sales, but they were intended to create securities. *Madell* v. *Thomas & Company*, [1891] 1 Q.B. 230, and *Beckett* v. *Tower Assets Company*, [1891] 1 Q.B. 638, were referred to. (2) But if section 61 (4) applied the defender took possession in April 1918 during the period of constructive bankruptcy, but his title was good, for he had obtained the goods in implement of a specific antecedent obligation on the bankrupt. He had accordingly not obtained the goods voluntarily in satisfaction or further security of a prior debt, which was the kind of transaction struck at by the Act 1696, cap. 5—Goudy, Bankruptcy (4th ed.), p. 82; *Taylor* v. *Farie*, 1855, 17 D. 639. Further, though section 60 repealed the Mercantile Law Amendment Act 1856 (19 and 20 Vict. cap. 60), section 61 (1) saved the rules in bankruptcy relating to contracts of sale. The rule laid down in section 1 of the Act of 1856 was such a rule in bankruptcy, and therefore to that extent at least section 1 was still operative, and under it the defender's title was good. *Sim* v. *Grant*, 1862, 24 D. 1033, and *Edmond* v. *Mowat*, 1868, 7 Macph. 59, 6 S.L.R. 67, were distinguished, for in them it was not a case of the goods being allowed to remain with the seller because it was inconvenient for the buyer to take delivery; they remained with the seller, who had the full beneficial use of them, not mere custody, for his convenience. The Lord Ordinary's interlocutor should be recalled.

Argued for the pursuer—The transaction between the bankrupt and the defender though in the form of a sale was really intended to operate as security for a loan. That was the just inference from the facts. The bankrupt had at the date of the transaction obtained two sums of £200 and £400 from the defender and had granted receipts therefor. Those, in default of evidence to the contrary, established an obligation to repay—*Bishop* v. *Bryce*, 1910 S.C. 426, 47 S.L.R. 317. If it had been a sale it was inconceivable that no alteration should have been made upon the terms of the haulage contract, for the result of a sale would have been to release the bankrupt from his obligation under that contract to provide plant for it and upkeep that plant. There was not even a stipulation for payment of hire of the plant. Instead interest was to be paid on the "purchase price." The plant was simply allowed to remain in the bankrupt's possession as it had been before. There was no arrangement for delivery or for the upkeep of the plant or for the passing of property. The fact that the plant was allowed to remain with the bankrupt raised a presumption against sale

—*Sim's* case (*cit.*), *per* Lord Justice-Clerk Inglis at p. 1038. Section 61 (4), applied. The words "intended to operate by way of mortgage, &c.," had two aspects (*a*) as between the parties, *i.e.*, the transaction was in form a sale but they understood that it was not to be worked out as such; and (*b*) in a question with the public, *i.e.*, the transaction might be in form a sale but that form was used to screen from the public the true intention of the parties. The former was quite intangible but the latter turned on considerations of the practical effect of the whole transaction and that was what the statute meant to strike at — Gloag & Irvine, Rights in Security, pp. 199, 219, and 221. Section 61 (4) contrasted substance with form; the form might be an unqualified sale, but the whole circumstances could be examined, and if it appeared that the parties had really in view the creation of a security, that was enough to allow the section to operate. The "intention" was the "intention" applicable to the transaction, not to the formal contract of sale. Transaction and contract of sale were contrasted in section 61 (4), and transaction meant the whole acting of parties in reference to the matter. After the passing of the Mercantile Law Amendment Act 1856 (*cit*) the creation of a security over moveables by way of *ex facie* sale without delivery had been frequently carried out with success. Indeed, the Act of 1856 was passed to dispense with the necessity of delivery in the case of personal contracts of sale—*M'Bain's* case (*cit.*), *per* Lord Watson at p. 116. Section 61 (4) was passed to meet that very situation —*Robertson's* case (*cit.*), *per* Lord Moncreiff at p. 135. The result of it was to throw the whole actings of parties open to scrutiny, and if it appeared that they transacted to operate a security though they adopted the form of a sale section 61 (4) applied. The cases of *Robertson*, *Rennet*, *Hepburn*, *Allan*, and *Romanes* all supported that view, though none of them went so far as to decide that a moral obligation to repay the advances was enough, but that did not arise in the present case. An exactly similar question arose in England under the Bills of Sale Acts 1878 (41 and 42 Vict. cap. 31), and 1882 (45 and 46 Vict. cap. 43). The English cases supported the pursuer—*In re Watson*, 1890, 25 Q.B.D. 27; *Madell's* case (*cit*)., *per* Lord Esher, M.R., at p. 234, and Kay, L.-J., at p. 236; *Beckett's* case (*cit.*), *per* Fry, L.-J., at p. 644; *Mellor* v. *Maas*, [1903], 1 K.B. 226 affirmed, *Maas* v. *Pepper*, [1905] A.C. 102. Consequently the property in the plant had not been transferred to the defender under the Act of 1893. Section 1 of the Act of 1856 was repealed by the Act of 1893—Brown, Sale of Goods Act, p. 408. The transfer of possession in April was struck at by the Act 1696, cap. 5, for it was by way of satisfaction or in further security, for if there was a sale there was no obligation to give delivery in April, and if there was no sale it was clearly the giving of further security.

At advising—

LORD PRESIDENT (CLYDE) — The trustee on the sequestrated estate of Gavin, farmer and contractor, sues for delivery of certain haulage plant (including horses) described in the summons as having been "in the possession, custody, or control" of Gavin between November 1917 and April 1918. There are also conclusions for damages in respect of defender's alleged illegal detention of the plant, and for £1100 failing delivery. The date of the sequestration was 20th May 1918, but Gavin became notour-bankrupt on 9th April 1918, and the days of constructive bankruptcy therefore commenced on 9th February 1918.

It was in or about November 1917 that Gavin started work on a contract made with the defender in the previous month, whereby he engaged to haul the timber which the defender—a timber merchant—was felling on the Gelston estate and to put it on railway waggons at 12s. 6d. per ton. Gavin was to supply the haulage plant, and the job was expected to last rather more than a year.

The pursuer's first three pleas-in-law, slightly expanded so as to relate them more clearly to the facts averred, accurately present his case. (1) The plant in dispute is the plant which Gavin brought to Gelston for the contract; it was his, and therefore belongs to the sequestrated estate. (2) The defender alleges title to it by purchase from Gavin in December 1917, but this title is bad, because the sale was a fictitious one, never really carried out or intended by either party. 3. The real nature of the transaction of December 1917 was an attempt to create a security in the defender's favour; and this attempt was ineffectual because Gavin retained possession of the plant, and a security over moveables *retenta possessione* is bad by the law of Scotland. The defence is that the transaction was a genuine sale for a substantial price. It is to be added that, notwithstanding the transaction, whatever its true character, Gavin continued in the "possession, custody, or control" of the plant, and used it for the haulage contracted for by him until a date subsequent to his notour bankruptcy. The pursuer craves in aid section 61 (4) of the Sale of Goods Act 1893, and the defender craves in aid Rule 1 of section 18 of the same statute. As the pursuer does not state any alternative plea founded on section 17, or make any alternative case to the effect that even if the sale was genuine yet it was not the intention of parties that the property should be transferred until (say) the haulage contract was completed, the case raises the plain but somewhat nice issue of fact rather than of law between sale and security. It is on that footing that the case is pled on record, that parties went to proof, and that argument has been submitted to us.

The letters of 22nd and 24th December 1917, quoted at length in the Lord Ordinary's opinion, are the centre of the whole controversy. The earlier of the two records an unequivocal sale of the plant by Gavin to the defender for £1200, payment of the price being made partly in the form of sums already paid to account and partly cash down. The later in date is contem-

poraneous with the acknowledgment of the payment in cash down appended to the earlier letter, and records an option in favour of Gavin to repurchase the plant at any time before the end of 1918 at a figure equivalent to the price plus interest at 6 per cent. from the date of the transaction until exercise of the option. This is an example of the *pactum de retrovendendo*. Notwithstanding its reversionary character such a paction is quite consistent with a genuine contract of sale; indeed it proceeds on the assumption that the rights flowing from the sale are effectual. Stair says of it (i, xiv, 4) that "though ordinarily it is used in wadsets (which though they be under the form of sale yet in reality they are not such, there being no equivalent price), yet reversion may be where there is a true sale, and this paction is no real quality or condition of the sale, however it be conceived, but only a personal obligement on the buyer, which therefore doth not affect the thing bought nor a singular successor."

The evidence discloses that Gavin at or very soon after the date of his contract got from the defender financial assistance to the extent of £605, and that the transaction of December 1917 was the outcome of a request by Gavin for more. It is worth observing that the £605 was not a loan or loans, but an advance against Gavin's earnings under his contract, it being agreed that deductions were to be made from the weekly instalments of those earnings until the money was restored. If the contract had not gone on the defender's remedy would have been on the principle of *condictio causa data causa non secuta*, not by action on any contract of loan, for there was none. Gavin's shortage of ready cash continued to be so acute that these deductions were not in point of fact made; and the defender met Gavin's applications for further assistance with a perfectly definite refusal to put up any more money except as the price on sale of the plant. The upshot was the preparation and signature of the letters in question, and the settlement of the transaction by payment to Gavin of the further sum of £595, making £1200 in all.

It is a prominent feature of this case that if the transaction was really security and not sale, there was no personal obigation on Gavin's part to be secured. This feature distinguishes the case from each of the four cases already decided in this Court under section 61 (4). The back-letter in *Robertson* v. *Hall's Trustee* (24 R. 120, 34 S.L. 82) obliged the seller to repay the price in half-yearly instalments. In *Jones & Company's Trustee* v. *Allan* (4 F. 374, 39 S.L.R. 263) there was a contract of loan supported by promissory-notes renewed from time to time. In *Rennet* v. *Mathieson* (5 F. 591, 40 S.L.R. 421) the purchaser admitted that the transaction was one of loan, and gave receipts which identified periodical payments as interest on the loan. In *Hepburn* v. *Law* (1914 S.C. 918, 51 S.L.R. 342) there was an admitted indebtedness on personal obligation by the seller to the purchaser which remained undischarged notwithstanding the pretended sale. Gavin, it is true, had an option to repurchase, but he was under no obligation either to repurchase the plant or to repay the price. It is, perhaps, possible that one can have a transaction which operates, or is intended to operate (within the meaning of section 61 (4)), by way of security, although there is no personal obligation to be secured—as, for instance, the transaction so much discussed in *M'Bain* v. *Wallace* (8 R. 360, 18 S.L.R. 226, *affirmed* 8 R. (H.L.) 106, 18 S.L.R. 734), or that which was considered in *Queensberry* v. *Scottish Union Insurance Company* (1 D. 1203, *affirmed* 1 Bell's App. 183). A may make advances to B in exchange for a transfer of property, from the proceeds of which, and from these alone, A is to recoup himself, accounting to B for any profit he makes; and it may be that this is a transaction by way of security within section 61 (4), though I express no opinion on the point. But in the present case the defender was neither under obligation to realise the plant nor to account for profits to Gavin if he did.

In subsequent correspondence between the parties during January and February 1918 some expressions are used with reference to the relations of parties under the transaction which are more or less ambiguous, but it is clear from these letters that Gavin realised the effect of the transaction to be that should he die within the year, and without having exercised his option, the plant would remain the defender's property; and it is not, in my opinion, possible to read the defender's references to his "commitments on your plant" and to the "advance of £1200" as implying any obligation on Gavin's part to make repayment of the £1200, or any admission by the defender that his title was one, not of property by way of purchase, but of charge by way of security. When first examined in bankruptcy Gavin said in reference to these letters, "I was afraid when I saw these difficulties coming on that I had done wrong and sold the plant too cheap; I did not think anything about it at the time, but then I thought I might not manage to get it back"; and again, "I would never have sold the things to" the defender "if I had known that this was to happen; I just did it to tide me over." He gives a different version in the witness-box. But I see no more reason than the Lord Ordinary does to doubt that both he and the defender honestly meant to effect a real sale, and thought they had achieved their object by the transaction of December 1917.

Further, there was no marked disparity between the price paid and the value of the plant. In other cases a disparity of this kind has provided evidence that a true sale was not intended. The defender and his manager say that the plant was roughly, if conservatively, valued for the purpose of the transaction at £200 less than the price. The trustee, who had known the plant generally (other than the engine) in the summer of 1917 puts its value at £250 more than the price; while Halliday, a local wood merchant, who saw the plant casually

while in use at Gelston in December, says £1200 was a good price for it. Gavin's valuations, made for the purpose of his state of affairs, are considerably higher. But it is not, in my opinion, proved that any such disparity between price and value existed as to throw any doubt on the adequacy of the £1200 as a consideration for sale.

The pursuer, however, makes an indirect but formidable attack on the genuineness of the sale founded on the fact that Gavin went on with the contract work as before, though disabled from implementing the contract obligation to supply the plant, and had the possession and use of what had *ex hypothesi* become the defender's property without charge or deduction from the contract rate. Gavin still fed the horses and made repairs, but the burden of supplying the plant and the risks of loss by wastage were transferred from his shoulders to those of the defender without any consideration; in effect, the contract terms were materially improved in Gavin's favour. The defender put the proposal for sale to Gavin colloquially thus —"I will buy the plant from you now, *and you execute your contract*, and you can buy it back from me"; and he says that after the transaction the arrangement was that Gavin should carry on and complete the contract under his manager's supervision; that Gavin really ceased to have the power to carry out the contract except with his permission; that Gavin was to get the same contract price as before without paying anything for the plant which the defender had bought; and that this was understood, but never discussed. The point of all this in the pursuer's argument is to cast discredit on the credibility of the defender and his manager. It is said to be incredible that a business man like the defender would have left the relations of parties to the contract in the air in this fashion, and that the true inference is that parties were seeking to make a security over the plant in forgetfulness of the rule which requires transfer of possession.

It would be no easy matter to define, in the absence of express agreement, what the true legal relations between the parties were with regard to the haulage contract in the three or four months which elapsed between the transaction and Gavin's bankruptcy. But the sting of these considerations is very largely removed when they are brought into relation with the conditions which were imposed on the parties by the national emergency which prevailed at the time and by Gavin's labouring financial circumstances. The position was this. The defender was under pressure from Government to hasten delivery of the timber, and was getting behind with supplies to the coal companies, and could ill afford to let the Gelston job stop under any circumstances. Moreover, he was apprehensive that Gavin's financial difficulties might make him unable to go on, or even lead to his deserting the contract, in which case the defender would be left in the lurch. Now the purchase had the effect of putting Gavin in funds, while the prospect of reaching a position at the end of the contract in which he could buy his plant back (made all the more attractive by the material improvement in Gavin's favour of the contract terms resulting from the transaction) tied Gavin to the job. In short, the concession to Gavin was the sacrifice which the defender made in order to make sure of getting the contract work performed. Viewed in this, as I think the true, light, the loose and unbusinesslike footing on which the contract was left (remarkable as it was) is robbed of the significance which the pursuer attributes to it.

The Lord Ordinary's decision in favour of the pursuer really turns on the meaning which his Lordship assigns to Section 61 (4). That enactment excludes from the application of the Act "any transaction in the form of a contract of sale which is intended to operate by way of . . . security." It is not clear whether the important relative clause refers to the "contract of sale" or to the "transaction" as its true antecedent. I think it refers to the "transaction," but the point is of no moment for purposes of construction, at least in this case. Further, I think that by the words "in the form of a contract of sale" it is not meant to limit the clause to transactions which receive formal expression from the parties *only* in sale form; it is enough that they employ sale form in making their transaction. It is implied that there are other constituent elements of intention in the transaction, and to these the parties may or may not give formal expression. But the point on which I definitely part company with the Lord Ordinary is as to the meaning of the relative clause. The exclusion applies in terms, not to transactions which while they employ sale form *actually* operate by way of security, but to transactions which, while they employ sale form *are intended* so to operate. The latter class logically includes but is wider than the former. The former class could not in any case fall within the application of an Act dealing only with sale; at any rate, if section 61 (4) applies to them at all it does so only to the effect of stroking the t's and dotting the i's of the law as existing without it. But the latter class, in so far as its content exceeds that of the former, falls directly within the application of the Act. Now a transaction which actually operates by way of security is one which produces the legal relations of security-holder and reversioner. In like manner a transaction which is intended so to operate is one which is intended to produce those legal relations. The intention of parties with regard to the operative effect of a transaction into which they enter one with another is the same thing in substance and in quality as that common intention which is the vital ingredient in all forms of agreement. It "must refer to legal relations; it must contemplate the assumption of legal rights and duties as opposed to engagements of a social character"—Anson on Contract, i, 1, 4. The intention may miscarry on technical grounds

or on account of other legal defect, but that is another matter.

Midway in his opinion the Lord Ordinary arrives at the conclusion that the transaction in the present case was a contract of sale not of loan, and adds—rightly, as I think—that, "after entering into it the defender could not have sued Gavin as his creditor in any part of the £1200 either before or after 31st December 1918." So much for the legal rights of parties under the transaction. But the Lord Ordinary goes on to contrast with this what he calls the "intention" of the parties. That "intention" was, the Lord Ordinary says, *inter alia*, that (notwithstanding the sentence above quoted) "if the defender did not want to keep the plant and preferred his money Gavin was to pay him his £1200 if able to do so." The Lord Ordinary is at pains to make it clear that by "intention" in this passage is meant, not any contractual intention, but an understanding which "had no legal validity," and as to which "it is not proved that either party had any belief that it had, or that the other was under any but a moral obligation to carry it out, and was not bound in law by the contract literally, as it was expressed in writing." My examination of the evidence has failed to disclose any trace of any such understanding or moral obligation. But the Lord Ordinary goes on to construe the relative clause in section 61 (4) as covering "intention" in this sense, and arrives at the conclusion that the transaction was not attended with a transfer of property, because it was "intended"—in the sense explained in the passage referred to—"by the parties to it, notwithstanding its form and the legal relations which it created of seller and purchaser, simply to serve the purpose of affording the defender some security for his advances as against possible creditors of Gavin." I am unable, for the reasons already given, to agree with the interpretation of the relative clause on which this conclusion is based. It appears to me that there underlies it a confusion between the motive which may have inspired the transaction and the contractual intention with which the actual transaction was made. The case of *Robertson* v. *Hall's Trustees* does not, as I read it, lend any support to the Lord Ordinary's interpretation, for the decision rested substantially on the contractual intention of the parties formally expressed in the back-agreement. Indeed, it would appear that the result in that case might have been reached without resort to section 61 (4), inasmuch as the documents, taken as a whole, made out no more than a colourable sale, and in reality a contract of security. The same remarks apply to *Rennet* v. *Mathieson*, where the so-called sellers and lessees were bound expressly to repay the so-called price and take back the articles sold on demand and got in exchange for their payments of so-called hire written receipts for "interest on loan."

I think, therefore, that the interlocutor reclaimed against should be recalled and the defender assoilzied from the conclusions of the summons.

LORD MACKENZIE—The decision of this case depends upon the proper inference to be drawn from the facts. The conclusion I come to is that the transaction in question was in reality a sale by the bankrupt to the defender Mr Fraser of his plant. This negatives the only case made for the pursuer, the trustee in the sequestration, on record, which is expressed in his second plea-in-law—"The pretended right of the defender to the ownership of said plant being founded on a fictitious sale which was never really carried out or intended by either party to the said pretended contract, the defender's title to refuse delivery is not valid to any effect." In other words the view I take is that the transaction was not one intended to operate by way of security, the contract of sale being one only in form.

The issue is the same as in the latest case in this Division—*Hepburn* v. *Law* (1914, S.C. 918, 51 S.L.R. 342)—where there was merely the form of a contract of sale without the reality, and in the English case of *Maas* v. *Pepper* ([1903], 1 K.B. 226, [1905] A.C. 102), in which the Lord Chancellor used the expression that the sale was colourable. The word "colourable" is defined in the Oxford Dictionary as "covert, pretended, feigned, counterfeit, collusory, done for appearance only." None of these expressions can be applied with justice to the transaction here. If not, and if the contract amounts in reality to a contract of sale, it matters not, in my opinion, what the ulterior object may have been. A real contract of sale is not struck at by any rule of the common law or by the provisions of section 61 (4) of the Sale of Goods Act.

My reasons for drawing the inference that the transaction was in reality a sale are, in the first place, the documents of 22nd and 24th December 1917, which admit of only one construction—that the transaction was in reality one of sale; and in the second place the parole evidence, the weight of which is entirely in favour of the view that these documents gave effect to the intention of parties and represent the truth of the arrangement made between the bankrupt and the defender. The pursuer fails to prove his averment that the price paid was grossly inadequate. The price paid was £1200, and even the pursuer in his evidence does not put a higher value on the plant sold than £1450. The position taken up by the bankrupt is that the transaction was not one of sale but of security. The question naturally arises—Security for what? The case the trustee for the bankrupt makes on record is that the £1200 was a loan. There is no hint in the two crucial letters of an obligation to repay the £1200, and there is not sufficient evidence in the case from which any such inference can be inferred. The bankrupt in his examination in bankruptcy on 9th July 1918 deponed that he was afraid he had done wrong and sold the plant too cheap. The letter of 24th December contains a *pactum de retrovendendo*, but this does not affect the reality of the sale. This bargain to re-sell is quite intelligible, keeping in view the relation of the bankrupt and the defender. The bankrupt

combined with the business of a farmer near Peterhead the business of cartage and haulage contractor in other parts of Scotland. One of these ventures was the contract under which he undertook the haulage of wood on the estate of Gelston, near Castle-Douglas, for the defender, a timber merchant. The terms of this haulage contract are evidenced by the letter of 18th October 1917 written by Mr Fraser, the defender, to Mr Gavin, the bankrupt. Under this contract Gavin was to uplift, cart or traction, and load at station the whole timber at 12s. 6d. per ton dead weight. The letter stated—"It is understood that you are to put sufficient plant on the job, and try to finish in a year if possible, or at least eighteen months." Mr Fraser agreed by the letter of 24th December to hand back the plant to Mr Gavin by 31st December 1918 on repayment of the £1200. Mr Gavin accepts the position of matters as being this, that if he did not repay the £1200 by 31st December 1918 the plant would become Fraser's. It is difficult to reconcile this with Gavin's contention that the transaction was throughout one to operate by way of security only.

The precise effect of the contract of sale upon the contract of haulage was not thought out by the parties. For my part I think Fraser did intend to get and did get the whip hand of Gavin by his purchase of the plant. The property in the plant passed to Fraser; he was the only person legally entitled to use it; any right Gavin thereafter had to use it was by arrangement with Fraser; Gavin thereafter had no plant; he had the use of Fraser's plant. At the same time Gavin knew that the extrinsic conditions were such that, provided he got on with the work he could rely on Fraser not enforcing his legal rights. This was Gavin's safeguard, coupled with this, that in virtue of his right of repurchase he would probably have had a right to prevent any use of the plant which would involve undue depreciation. Fraser's interest in acquiring the plant is obvious. He was dealing with an impecunious contractor to whom he had advanced first £200 and then £400, and who was urging him to make a further loan of £400. Mr Fraser explains the position he was in—he was being pressed by the Government; Gavin was getting behind and was not turning out wood soon enough; Fraser was under heavy contracts to coal companies, and did not want the job to stop under any circumstances; Fraser wanted the work to go on, and that was what was in his mind when he made the suggestion to buy the plant. Fraser refused to put down more money on the footing of loan; he said he would only put it down on condition that Gavin sold him the plant. Mr Fraser is corroborated by Mr M'Cormack. It is impossible to take it off Mr Gavin's hands that he did not read the letter, a copy of which had been sent him; nor is it possible to believe him when he says there was no word of selling the plant.

It was contended that the subsequent actings of parties and the correspondence show that the transaction was intended to operate merely by way of security. There are expressions in some of the letters that can be used against Mr Fraser, but the correspondence read as a whole shows that Mr Gavin knew that he had sold the plant, but thought (as he said in his examination in bankruptcy) that he had sold it too cheap. He endeavoured to get Mr Fraser to increase the amount to £2000. Mr Fraser, as appears from his letters, shrewdly concluded that if Mr Gavin got £2000 he would probably walk off and leave the haulage contract unfinished. It is not unfair to infer that the price at which Mr Fraser bought the plant was such that the prospect of repurchasing at that figure would operate as an incentive for Gavin getting on with the work. As Mr Fraser says in his letter of 4th February to Mr Gavin, "With an advance of £1200 you have all the less to pay back."

As regards the actings of parties, the pursuer founded on what Mr M'Cormack says in his evidence, that after the letters had been exchanged the arrangement was that Gavin should go on and carry on the contract as before. It appears to me that Mr Fraser's account is probably more correct when he says that no terms were mentioned; the matter was not discussed, but it was understood the profit on the contract would go to Gavin. I think it certain that if there had been no sequestration, and if Gavin had gone on and finished the contract, he would have been entitled to receive the haulage rate of 12s. 6d. per ton. No doubt that figure was fixed on the footing that Gavin was to supply the plant, and no provision was made for hire being paid by Gavin for the plant which had become the property of Fraser. The dominant consideration, however, with Fraser was to get the work done. He had paid a not inadequate price, but I think it may well be described as a moderate one. If Gavin believed the plant to be worth more than the £1200 he had sold it for this would be a powerful inducement to him to do his best for the haulage contract, at the end of which he was to have the right to repurchase. All this may have been in Fraser's mind when he was content to let the plant be used in an adventure in which he and Gavin were jointly interested. Innovations were made upon the haulage contract as occasion required. The seller was allowed by the buyer to use the plant, but under an obligation to keep and maintain it.

If the view above expressed be correct then it is not necessary to go into the question when possession was actually taken by the buyer of the articles sold. Under section 17 (1) of the Sale of Goods Act the property was transferred to the buyer at the time the parties intended it to be transferred. Section 17 (2) provides that 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. Having regard to these matters, I am prepared to hold that in this case the property passed on payment of the money and completion of the sale.

The defender is therefore entitled to

absolvitor from the conclusions of the action.

Lord Skerrington — Seeing that the plant the property of which is in dispute originally belonged to the bankrupt Gavin, and that he continued to have the beneficial use of it until the defender took possession within sixty days of Gavin's notour bankruptcy, it lies upon the defender to aver and prove a title to it preferable to that of the pursuer, who is the trustee on Gavin's sequestrated estates. He avers in his defences that about 22nd December 1917 he bought this plant from Gavin at the price of £1200, of which sum he states that he paid £595 by cheque on 24th December, the remainder, £605, being discharged by treating as payments to account of the price "loans" amounting to £605 which he had made to Gavin between 20th and 30th October 1917. It is proved that to the extent of £600 these so-called loans were really advances which Gavin, by a letter dated 30th October 1917, had agreed should be repaid by deducting £20 a-week from the amount which he expected to earn under a contract which he had made with the defender a few days previously, viz., on 18th October, for the carting and haulage of timber by horse and steam from the estate of Gelston to the railway station at Castle-Douglas. The defender had bought the growing trees on Gelston estate, and had sold the manufactured wood either directly or indirectly to the Government. Under his carting contract Gavin was to receive from the defender 12s. 6d. for every ton loaded by him at the railway station. It was expressly bargained that Gavin was to put sufficient plant on the job and try to finish it in a year if possible, or at least (*sic*) eighteen months. The plant (including horses) referred to in the conclusions of the summons was the plant which Gavin had brought to Gelston for the purpose of carrying out his carting contract. Obviously a considerable part of the 12s. 6d. per ton was in respect of the plant which Gavin was under contract to provide, and it represented interest on capital, cost of transport from the north to the south of Scotland, depreciation, and insurance. Gavin appealed to the defender not to enforce the deduction of £20 a-week, and in point of fact no deduction on account of these advances was ever made from the payments made to him at the end of each week.

The state of account between Gavin and the defender at the date of the alleged purchase of Gavin's plant was that the latter had received seven weekly payments on account of the work which he had performed, amounting to £510 in all. So far as appears these payments represent the full contract price of his work. In addition Gavin had received the sum of £600 already referred to on account of work which he had not done but hoped to perform in the future. It is not to be wondered at that the defender, while ready and willing to finance a man whose services were of great value to him, came to the conclusion that the system of advancing or "lending" money to Gavin should be discontinued.

The alleged purchase, whatever may have been its real meaning and its legal effect, is proved to have been made by word of mouth at meetings which took place between Gavin on the one side and the defender and his manager M'Cormack on the other side between 20th and 24th December 1917. The defender at the request of Gavin, who was not a ready writer, prepared a letter for his signature confirming the terms of the verbal bargain. This letter, which Gavin signed on 22nd December and sent to the defender, if it is accepted as a correct and complete record of the agreement, is unambiguous in its terms, and makes it clear that the contract was a sale and not a loan of money on the security of the plant. Without attributing to the defender any improper motive for the omission, I hold it proved that the letter which he drafted does not record two essential stipulations which though both in favour of Gavin emanated from the defender himself, viz., firstly, that the sale if agreed to should not interfere with Gavin's right to continue to execute the carting contract, and secondly, that Gavin should have right to buy back his plant at the completion of that contract and at the same price at which he sold it. The implications from these two stipulations I shall consider hereafter. For the moment I am concerned with the fact that these terms were proposed by the defender and were agreed to by Gavin, unless indeed, as the pursuer strenuously maintained, the whole transaction was merely a sham sale intended to conceal a security for a loan. The defender's account of what passed on the first occasion on which he mooted the proposal to buy the plant is important. After describing Gavin's request for a loan of "other £400," his own emphatic refusal to "put down more money" except "on the condition of a sale," Gavin's dismay at the suggestion, and his complaint that the price was a small one, the defender proceeded—"I said, 'Well, of course, you do not need to take it unless you like, Gavin.' I did not want to take advantage of him, and finally I said, 'I will buy it from you now, and you execute your contract, and you can buy it back from me.' (Q) Was anything said about the price at which he would buy it back?—(A) The purchase price. (Q) The same price?—(A) Yes. At that meeting on 20th December the price was £1000—that is to say, £400 in addition to the £600 which I have already mentioned. At this time I was being pressed by the Government. Gavin was getting behind, he was not turning out the wood soon enough, and I was under heavy contracts to the coal companies, and I did not want the job to stop under any circumstances. (Q) What was in your mind when you made this suggestion that you should buy the plant?—(A) It was just this, that I wanted the work to go on, and I did not want to see Gavin robbed in any way or taken advantage of. I had a verbal report from Mr M'Cormack about the plant and I had seen some of the plant myself, and I thought £1000 was quite sufficient. At anyrate the less the price at which I bought it, it would be easier for Gavin to pay back. He assured me that he

was in a first-class financial position." The defender further deponed that Gavin ultimately agreed to sell his plant if the defender would increase his offer from £1000 to £1200, which was done, and that the price was paid and settled on 24th December partly by cheque for £595, and partly by treating the advances of £600 and a sum of £5 which Gavin was due for coal as payments to account of the purchase price.

I do not understand the defender's position in regard to the two stipulations which he omitted from the confirmatory letter. In his defences he represents the *pactum de retrovendendo* as an obligation which he "voluntarily came under" after he had bought the plant on the terms stated in the letter of 22nd December, but this is certainly a mistake. Again, when cross-examined as to the meaning of a letter which he wrote to Gavin on 22nd January 1918, he deponed as follows:—"(Q) Did you intend Gavin to understand by that letter that you were the owner of the plant?—(A) Well, I do not know what I intended Gavin to take from that letter at all. It is my evidence now that by that letter I meant that I was the owner of the plant, and therefore the only person entitled to use it, so that if Gavin had any right to use it at all it must be by arrangement with me. He really ceased to have the power to carry out his contract except with my permission. (Q) Further on in your letter you say—'My suggestion to you is to get on with your contract'; he had no plant according to you at that time at all?—(A) No; he had no plant, but he had the use of my plant. (Q) On what terms?—(A) There were no terms mentioned; the contract speaks for itself. If there was any profit on the contract it went to him; any profit that accrued would be his. (Q) That was never discussed? (A) It was understood." The "profit" here mentioned obviously refers to the 12s. 6d. per ton, which was Gavin's stipulated reward under his carting contract, and which he would be entitled to demand provided he duly fulfilled that contract. The defender did not depone that he at any time said anything to Gavin which ought to have warned the latter that if he agreed to sell his plant he might go on with his work under the carting contract but would be liable to dismissal, and I presume also would be entitled to throw up his contract at any moment. I regard this suggestion on the part of the defender as an afterthought and as inconsistent with the whole evidence in the case. In point of fact Gavin continued to enjoy the full beneficial use and possession of his plant until some time in April 1918, when the defender took possession of it *via facti* in respect of what, in any view of the purchase agreement, was a breach of contract on the part of Gavin, viz., allowing the stabling accounts to fall into arrear and thus subjecting the horses, which formed part of the plant, to the lien of the stable-keeper.

Such being the terms of the contract which the defender, on my reading of the evidence, has proved that he made with Gavin (so far, at least, as words and form can make a contract), the next question is whether the sale and purchase of the plant was intended by the parties to be a sham or a reality, and if the latter whether their agreement was in law effectual to confer upon the defender a title to the plant preferable to that of the pursuer. In consequence of the manner in which the pursuer pleaded his case, the evidence and the arguments were mainly directed to the question whether the sale was fictitious.

The defender, like any other person who founds upon a contract made by word of mouth, must satisfy the Court that contractual words were spoken seriously and meant what they naturally implied. He has, in my view, done enough to shift the burden of proof and to make it incumbent on the pursuer to demonstrate by reference to the evidence as a whole that the transaction, though in the form of a sale, was really a loan. This he attempted to do, in the first place, by showing a specific agreement on the part of Gavin to repay to the defender the sum of £1200, the nominal price of the plant. This attempt was a failure. In the second place, the pursuer tried to prove by reference to the surrounding circumstances and to the words and actings of the parties, both at the time of the transaction and afterwards, that when they used the language of sale they did so in vulgar parlance "with their tongues in their cheeks," really meaning a loan on the security of the plant. Much time and effort were, I think, wasted in a minute criticism of expressions occurring in the correspondence and in the oral evidence, which counsel represented to be more consistent with a loan on security than with what Erskine (ii, 12, 45) describes as a "sale under reversion." For my own part I regard it as futile to expect unvarying accuracy of legal language from a busy wood merchant and a semi-literate farmer in a region where eminent lawyers are liable to express themselves inaccurately. Thus in a case which arose out of the purchase from an heir of entail by an insurance company of a redeemable annuity payable during the life of the vendor (the annuity being fixed so as to represent 6 per cent. on the price plus the amount of the annual premiums on policies of life insurance), Lord Cottenham was at pains to explain that the transaction though "known by the somewhat inconsistent term of borrowing upon annuity" was one where the consideration for the advance of the money was the annuity during the life of the landowner "and a return of the principal by means of the policies, and by these means only, and therefore at such times only as these policies were payable" (*Queensberry* v. *Scottish Union Insurance Company*, 1 Bell's App. 183, at p. 201). None the less he refers to the insuranee company as a "lender" and to the heir of entail as a "borrower." The case is also instructive as illustrating a familiar fact which the pursuer's counsel persistently ignored, viz., that there may be a legal security for the return of money disbursed without the existence of the relation of debtor and

creditor between the person who received and the person who made the advance.

It is unfortunate that the Lord Ordinary, while deciding in favour of the defender a question of pure fact largely depending upon considerations of credibility, has given his verdict in a form which suggests that he thought that he was deciding upon the construction and "legal effect" of "documents." In any view of the matter, however, his verdict is not in favour of the pursuer upon the issue whether the transaction, though a sale in point of form, was really a sham and a fraud. The important part which credibility plays in the present case becomes apparent if one considers what is really the most powerful argument in favour of the view of the transaction presented by the pursuer, viz., the extraordinary character and consequences of the contract to which, on the defender's theory, the parties desire to bind themselves. These are so anomalous that I should have followed the example of Lord Halsbury in a case which raised a similar question—*Maas* v. *Pepper* ([1905] A.C. 102)—and have declined to believe that the parties seriously intended to make such a contract, if the defender, whose printed testimony and proved conduct impressed me favourably, had not gone into the witness-box and given what appears to me to be a credible and on the whole a satisfactory explanation of his intentions and actings in the very unusual and serious position in which he found himself owing to the conditions brought about by the war. None the less it is true that if one accepts the pursuer's theory, the conduct of the parties, however reprehensible, is intelligible and consistent with the object which each of them had in view. Gavin wanted a further loan; the defender had strong business reasons for financing him, and agreed to advance an additional £600 on receiving security for the whole £1200, which security it was thought judicious to conceal from Gavin's creditors. The opposite theory, to the effect that the parties acted honestly, bristles with difficulties. I have already mentioned the *ex post facto* legal opinion elicited from the defender under the stress of cross-examination to the effect that his purchase of the plant entitled him to demand immediate delivery, and thus to bring the carting contract to an end at any time when it might suit him to do so. It would follow that Gavin also was released from his obligation to cart the defender's timber from Gelston to the railway station. For reasons already indicated I reject this opinion, and indeed I regard it as extravagant. But the difficulties are still serious even if one holds that it was a term of the purchase that Gavin should continue to fulfil his carting contract. If that was what the parties intended, one would have expected that from the first moment when a sale of the plant was canvassed they would have discussed the terms on which Gavin should have the use of it, and that a hiring agreement which did justice to each of them would have been adjusted either as part of the original transaction or shortly afterwards. In point of fact the subject was never discussed by either of them, though I think that they both assumed and acted on the assumption that for any work which Gavin performed under his carting contract he was entitled to receive his full stipulated reward or "profit" of 12s. 6d. per ton. While I appreciate the urgency of the reasons which induced the defender to thirl to his service the horses, carts, steam waggons, &c., employed on the Gelston contract, and also if possible the man who worked them, the defender was not asked to explain and did not explain why he was so unnecessarily generous and so careless of his own interests as to give Gavin the use of the plant in return merely for the food and stabling of the horses and the ordinary upkeep of the waggons and machinery, and without making any provision for the certainty of depreciation and the probability that some of the horses would die, as actually happened. It may be conjectured that if the question had been asked his reply would have been that Gavin would not have agreed to pay a weekly hire for the plant, and that in the circumstances it was prudent not to try to put matters upon a more business-like footing.

Upon one view of the evidence it might, I think, have been argued with some plausibility that if the defender and Gavin really intended to buy and sell the plant there was no *consensus in idem* between them, because the contract of sale which the defender had in view was what section 1 (3) of the Sale of Goods Act 1893 describes as a "sale," whereas all that Gavin had in view was an "agreement to sell"—in other words, that their intentions were not at one in regard to the time at which the property in the plant should be transferred to the defender. Further, if the doctrine of reputed ownership still forms part of the law of Scotland the present might have been a proper case in which to invoke it. Neither of these points was argued.

So far as I am entitled to express an opinion as to the credibility of the witnesses, I regard the testimony of the defender and his manager as more satisfactory than that of Gavin, some of whose statements I find it impossible to accept. While Gavin asserted in general terms that the transaction was a loan, and repeated with parrot-like fidelity that it was a "security," he never stated the terms and conditions on which the money was lent to him.

Upon the evidence taken as a whole I am of opinion that the pursuer has failed to show that the transaction was a sham sale, but that, on the contrary, the defender has proved a contract of sale which transferred to him the property in the plant at the time when the contract was made. As regards the latter part of this finding I have kept in view the terms of sections 17 and 18 of the statute, and I have tried to give due weight to the difficulties in which the defender involved himself by his omission to take the steps which would in ordinary circumstances have been natural and usual on the part of a business man who believed that he had become the owner of a quantity of

perishable plant which was being used and must continue to be used for a considerable time by the vendor. I have, however, come to the conclusion that the defender's conduct, when properly understood in the light of the circumstances in which he was placed, was not inconsistent with the existence of an intention on the part of both seller and purchaser that the property should be at once transferred to the latter.

While the Lord Ordinary's decision was in favour of the defender on the main question, he pronounced judgment against the defender upon the ground that section 61 (4) of the Sale of Goods Act 1893 placed the particular contract of sale proved and relied on by the defender outwith the purview of that Act. For the purposes of the present judgment it is not necessary to express a definite opinion as to the object and effect of this sub-section. The language used is wide enough to include a case where an attempt has been made to conceal a loan under the disguise of a sale. I am disposed, however, to think that the Legislature had primarily in view transactions in which a lender stipulates for and obtains a property title as a security for his loan, and by a transparent and innocent legal fiction is represented to be a purchaser, and also sales where by a collateral agreement the purchaser undertakes to account to the seller for any profit which he may make on a re-sale after recouping himself with interest for his outlays, including the price which he paid for the goods. There seem good reasons why the warranties implied in such transactions, and the legal consequences following from such contracts and from the breach thereof, should be determined by the common law rather than by the statute, more especially in view of the fact that such contracts though perfectly lawful and honest depend for their practical consequences not merely upon the intention of the contractors, but also upon considerations of public policy which may modify their operation both as between the parties themselves and also in a question with strangers. As regards the case now before us, I am of opinion that the facts established at the proof do not justify the Lord Ordinary's finding to the effect that the transaction between the parties was intended to operate by way of security. There is no evidence to the effect that the parties intended to subject themselves to any "moral obligation" different from or additional to their legal obligations. Even if there had been evidence to that effect I should not have regarded as material an "intention" which the parties deliberately deprived of any legal efficacy.

For these reasons I am of opinion that the Lord Ordinary's interlocutor should be recalled and that the defender should be assoilzied. I do not need to express any opinion as to an argument which was urged on behalf of the defender, viz., that even if the property in the plant did not pass to him on the making of the contract, Gavin's conduct in subjecting the horses to a stableman's lien entitled the defender to take possession of the property *via facti*, and that the possession thus acquired gave him a right of property which could not be challenged as a voluntary preference acquired within sixty days of notour bankruptcy.

LORD CULLEN—The letter of 27th December 1917 signed by Gavin and the letter of 24th December 1917 signed by the defender are on their terms good written evidence of a sale by Gavin of his plant to the defender at the price of £1200, accompanied by a *pactum de retrovendendo* in favour of Gavin. It is on the sale so evidenced that the defender stands.

The pursuer alleges against these documents that there was no sale of the plant by Gavin to the defender. His case stated on the record (condescendence 7) is that the sale which the documents purport to record was a "fictitious transaction," and that the true and only transaction between the parties was one of loan by the defender to Gavin on the security or intended security of an assignation of Gavin's plant, unaccompanied by possession of it.

There is thus raised a sharp issue of fact which was remitted by the Lord Ordinary to probation *prout de jure*. The *onus* lies on the pursuer. He has undertaken to displace the *ex facie* meaning and effect of the letters of 22nd and 24th December by proof *aliunde* that there was no sale but only a contract of loan on security, of which a simulate sale was the vehicle.

On the issue of fact so raised the Lord Ordinary, on a consideration of the evidence adduced, is of opinion "that this was a contract of sale not of loan." I agree with his verdict. The oral evidence for the defender, on which the Lord Ordinary throws no discredit, is corroborative of the documents of sale. The oral evidence to the contrary for the pursuer is substantially that of Gavin, who depones that there was no sale, that he never intended to sell, and that the only transaction between the parties was one of loan on security. Gavin, however, has not been consistent. When examined in bankruptcy regarding his actings following on the said documents of 22nd and 24th December and his increasing financial difficulty at that period, he made these statements—"I was afraid when I saw these difficulties coming on that I had done wrong and sold the plant too cheap. I did not think anything about it at the time, but then I thought I might not be able to get it back. (Q) And did you apply to him for more money—(A) I said to him that I thought it was worth a good bit more money if I had realised it." Gavin thus depicts himself as a seller who rued having sold his plant for a price which he had come to think was inadequate, and who was minded to work on the purchaser for an *ex post facto* augmentation. I find it impossible to understand how Gavin could have made these statements if there never was a sale at all, and in his evidence in the present case he was unable to explain them away. Further, Gavin's evidence as to there having been only a transaction of loan does not seem reconcilable with the fact that he gave no document of indebted-

ness. If the sale was a mere sham and if the reality was a loan, it is in a high degree improbable that the defender would have been content to go without a document of debt of some kind, either expressly binding Gavin to repay or at least acknowledging receipt of a loan. That no such document passed is certain. What did pass regarding repayment was the letter of 24th December 1917, which gives Gavin right to repurchase within a limited time without any obligation resting on him.

The pursuer founds on the terms of some of the letters which passed between the defender and Gavin subsequent to 24th December 1917 as corroborating Gavin's evidence to the effect that there had been only a transaction of loan on security. I think these letters ineffectual for the purpose. *Ex hypothesi* of the defender's case, the defender had not bought the plant for the sake of buying but to help Gavin in his money troubles. Gavin on his part had not desired to sell; he wanted a loan and only sold reluctantly because the defender refused to give him money on loan. Thereafter Gavin wanted more money and kept pressing the defender, who refused to give it. I do not think it is remarkable that loose expressions should have crept into the defender's letters such as "my commitments on your plant," and "an advance of £1200," &c. The defender had, in fact, provided or advanced the money to meet Gavin's necessities in buying the plant, and he had the expectation that the money which he had so made available for Gavin's behoof would return to him through the exercise by Gavin of the right of repurchase under the letter of 24th December 1917.

On a full consideration of the evidence I am of opinion that the pursuer, on whom the *onus* lies, has failed to establish the case made by him on record, to wit, that the defender only made a loan of his money to Gavin and that the sale of the plant which the documents of 22nd and 24th December 1917 purport to record was a fictitious transaction.

A good deal was said at the discussion by pursuer's counsel as to the disturbing effects of a sale of the plant upon the contractual relations of the defender and Gavin under the haulage contract. I do not think we are called on to decide or form an opinion on such questions relating to the haulage contract. They are not put in issue in this action, the averments remitted to probation are not directed to them, and we have not adequate materials before us for their solution. It does not appear from the evidence, so far as it goes, that any explicit agreement was made on the subject. But if the parties acted in a loose and unbusinesslike manner in this respect, it must be kept in view that the circumstances were exceptional. The defender had large timber engagements in hand of the most pressing nature, and was engrossed by the paramount necessity of getting on with the work required for fulfilling them. Gavin's plant was needed for the work, and the defender seems at the time to have rested content with the fact that he had secured its application to his requirements.

The pursuer's counsel further presented, but only slightly, the contention that, *esto* there was a real sale of the plant to the defender, the passing of the property therein was not regulated by rule 1 of section 18 of the Sale of Goods Act 1893, in respect that the parties had a different intention. No such contention seems to have been made before the Lord Ordinary, and it is sufficient to say that the averments and pleas of the pursuer do not raise it. Moreover, there is no evidence that the seller and the buyer in fact entertained any such different intention or as to what it was.

While the Lord Ordinary holds that the contract between the parties was one of sale, and that there was no contract of loan, thus disposing of the issue of fact raised on record in favour of the defender, he has gone on to decide that rule 1 of section 18 does not apply to the case. He holds it excluded by section 61 (4) of the Act, which provides —"The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security." The pursuer has no plea expressly directed to this enactment. I confess to having some difficulty in grasping quite clearly the Lord Ordinary's view in this part of his judgment. He has held that the contract of December 1917 was a true contract of sale, attended with no contractual reservation or collateral engagement, apart from the *pactum de retrovendendo*, which in itself did not make the sale any the less a true sale. Accordingly, the "intention" that the said sale should operate "by way of mortgage, pledge, charge, or other security," which the Lord Ordinary finds to have existed, would seem to have been nothing contractual in nature, but only some state of mind, presumably common to both parties, which bound neither, and which each was free to modify or desert entirely at pleasure. I have difficulty in supposing that this is what is postulated in section 61 (4) by the word "intended," but assuming that it is, I am, unlike the Lord Ordinary, unable to find evidence of its existence in the present case. I do not find proof that the parties to this contract of sale were minded in common that it should operate by way of mortgage, pledge, charge, or other security. The defender's evidence is to the contrary effect. Gavin's evidence, for what it is worth, is to the effect that there was no contract of sale but only a contract of loan, a presentation of the facts the truth of which has been negatived. Under reference, however, to the cases which the Lord Ordinary says he has followed, the pursuer's counsel argued that if a transaction which embraces a contract of sale is, on all its terms taken together, such that, when it is put in operation according to its terms, the resulting rights and obligations *hinc inde* are just those appropriate to a simple and explicit contract of loan on security, then the transaction, in respect of such *modus operandi*, falls under the ban of section 61

(4). This may or may not be right, but it does not appear to me to apply to the present case. It is not a true description of the *modus operandi* of the contract here in question to say that it was equivalent to that of a mere security transaction. The contract had alternative modes of operation. If Gavin had exercised his power of repurchase by paying to the defender the £1200 with interest, the parties would, no doubt, have stood in the end in the same position in which they would have stood as the result of a loan given and repaid. There would, however, have been these differences, that the defender during the interval stood owner of the plant, and that Gavin was under no obligation to repay the money. On the other hand, in the event, which happened, of Gavin failing to exercise his power of repurchase, the *modus operandi* of the contract was to leave the defender owner of the plant as by right of purchase, freed from the spent *pactum de retrovendendo.* A transaction by way of security only does not operate to such an effect.

For these reasons I concur with your Lordships in the view that the Lord Ordinary's interlocutor should be recalled and that the defender should be assoilzied.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender.

Counsel for the Pursuer (Respondent)—Mackay, K.C.—D. M. Wilson. Agents—Mackay & Young, S.S.C.

Counsel for the Defender (Reclaimer)—Moncrieff, K.C.—Gentles. Agents—Ronald & Ritchie, W.S.

Saturday, June 26.

FIRST DIVISION.

[Lord Sands, Ordinary.

BARRIE AND OTHERS *v.* SCOTTISH MOTOR TRACTION COMPANY, LIMITED.

BINNIE *v.* Do.
HULBERT *v.* Do.

Expenses—Taxation—Jury Trial—Adjustment of Issues—Fees to Senior Counsel.

In single actions of damages for personal injuries where the adjustment of the issues was not a matter of difficulty and delicacy, either owing to questions of relevancy or complicated subject-matter, *held* that the Auditor had properly exercised his discretion in disallowing fees to senior counsel for adjusting issues which were in ordinary form.

Expenses—Taxation—Jury Trial—Agreement in Three Actions to Hold Evidence in One as Evidence in the Others—Expenses Prior to, and at, Applying Verdict.

Three separate actions of damages were brought in respect of injuries to different individuals in the same motor accident. They proceeded independently until after adjustment of issues, when by minute of agreement the parties agreed that the evidence in one of the actions should be held as applying to the other two. The pursuers obtained verdicts in all three actions, and on a motion to apply the verdicts were awarded expenses. In the two actions in which the evidence was not led in the ordinary way, the Auditor taxed off half the charges incurred before the lodging of the minute of agreement, and also half the charges for attendance applying the verdicts in those two actions. *Held*, upon a note of objections, that the pursuers were entitled to full expenses up to the lodging of the minute of agreement and for the attendance in Single Bills when the verdicts were applied.

Mrs Barrie and others, her infant children, *pursuers*, brought an action of damages against the Scottish Motor Traction Company, Limited, *defenders*, concluding for £2000 for herself, and £1000 for each of her children, in respect of the death of her husband, alleged to have been caused by the fault of the defenders. Mrs Binnie and others, *pursuers*, brought a similar action of damages against the same defenders, in respect of the death of her husband, who was killed in the same accident. Arthur George Hulbert, *pursuer*, brought a similar action against the same defenders for injuries received by him in the same accident.

The three actions proceeded independently till after adjustment of issues, when a minute of agreement was lodged whereby the parties agreed that the evidence in Mrs Barrie's action should apply to the other two actions. The records did not raise any question of relevancy. Mrs Binnie's case was tried before Lord Mackenzie and a jury, who returned a verdict for the pursuers. Similar verdicts followed in the other cases.

The pursuers in all the actions lodged *notes of objection* to the Auditor's reports on their accounts of expenses. In all three actions the pursuers objected to the disallowance of a fee to senior counsel for adjustment of issues. In Binnie's case and in Hulbert's case the pursuers further objected to the report, in respect that it allowed only half fees for items beginning with "framing summons" up to and including "framing joint-minute concurring to the three cases being tried by the same jury and on the same evidence." These pursuers also objected to the report in respect that it allowed only half fees for "attending Single Bills—verdict applied and pursuer found entitled to expenses."

The same agents acted for the pursuers in all three actions.

Argued for the pursuers—(1) The practice was to allow fees to senior counsel for adjustment of issues—*Stevenson* v. *M'Ilwham & Company*, 1832, 10 S. 337; *Dunlop & Company* v. *Lambert*, 1840, 2 D. 646; *Gardiner* v. *Black*, 1851, 13 D. 843. Adjustment of issues was such a critical step in the proceedings it was reasonable to have the assistance of senior counsel. (2) There was no question of conjunction of the