pursuer as explained by Mr Morison. But taking it so, it is clear that the margin of money recovered at the time when the piano was sold, over and above the debt and expenses, was too small to admit of an action of damages on the ground of oppression or illegality. It would be necessary for that purpose to shew that the creditor had gone on with the sale after the amount of his debt has been materially and considerably exceeded. As regards the pursuer's complaint that the piano need not have been sold at all, the pursuer had a clear and easy means of preventing the result by going to the Sheriff or the judge of the roup, and this course he failed to take.

The Court dismissed the appeal.

Counsel for Pursuer and Appellant—T. B. Morison—Chree. Agents—P. Morison & Son, S.S.C.

Counsel for Defender and Respondent—Campbell, K.C.—J. H. Henderson. Agent—William Considine, S.S.C.

Thursday, June 1.

FIRST DIVISION.

[Sheriff Court at Glasgow.

MUIRHEAD & TURNBULL *v.* DICKSON.

Contract—Sale or Hire—Purchase of Piano—Question whether Contract Sale on Credit or Hire-Purchase—Words Used by Party Maintaining Hire-Purchase Consistent with the Contract being Understood by the Other as Sale on Credit—Failure to Pay Monthly Instalment—Claim for Delivery.

A firm of piano merchants brought an action in the Sheriff Court setting forth that they had hired a piano to the defender at the rate of 15s. a-month, and concluding for delivery of the piano in respect that the defender had failed to pay the monthly payments. The defender maintained that the piano was his property in virtue of a verbal contract of sale between the pursuers and himself, in which payment was conditioned to be made by instalments. On a proof it appeared that the pursuers, in contracting with the defender, had in their mind to let out the piano to him on the hire-purchase system, but the words used by them were consistent with the contract being understood by the defender as a sale of the piano at a price payable by monthly instalments, and they were so understood by the defender. It also appeared that though the pursuers had printed forms for signature by parties making hire-purchase contracts, the defender had not signed one, though on several subsequent occasions he had been asked to do so. *Held* that the contract proved was one of sale with deferred payment and not a hire-purchase agreement, and that the pursuers in these circumstances had no claim for the delivery of the piano, their proper remedy being an action for the instalments of the price so far as not paid, and defender assoilzied.

Observations on hire-purchase contracts. *Helby* v. *Matthews*, [1895] A.C. 471, *commented on.*

This was an action in the Sheriff Court at Glasgow at the instance of Muirhead & Turnbull, piano merchants, Glasgow, pursuers, against James Dickson, Westmuir Street, Glasgow, defender, in which they craved the Court to ordain the defender to deliver to them a piano "hired by the pursuers to the defender," and presently in his possession.

The pursuers averred—"(Cond. 1) On or about 26th November 1902 the pursuers agreed to hire to the defender an M. & T. piano at a rent or hire of 15s. per month. A month's trial or approval was allowed. (Cond. 2) The first month's rent or hire of the said piano became due and payable on the 26th day of December 1902, and was paid by the defender upon 29th December 1902. The second month's rent became due on 16th January 1903, and was paid by defender on 16th February 1903. The third month's rent became due on 26th February 1903, and was paid on 30th March 1903. The fourth month's rent became due on 26th April 1903, and was paid upon 27th April 1903. Since that date the defender has made no payments towards the said rent, with the exception of 3s. paid upon 18th January 1904. (Cond. 3) The pursuers delivered to the defender a book containing the receipts for the said rents or hire, which bears that the said piano is on hire at 15s. per month, as per hire contract. The defender is called on to produce this receipt-book. (Cond. 4) The defender has been repeatedly requested either to pay up the arrears of rent of the said piano or to deliver it up to the pursuers, but he declines to do either the one or the other, which makes the present application necessary."

The defender denied the pursuers' averments under reference to a statement of facts, in which he averred as follows:—"(Stat. 1) On or about 26th November 1902 the defender purchased from the pursuers for his daughter an M. & T. piano at the price of £26. No written contract was entered into between the parties, nor was one then suggested by the pursuers, but it was arranged that payment of the price was to be made by instalments extending over a period of years, the purchaser to pay as often and by as large sums as he possibly could—15s. per month being talked about as a sum that would be acceptable. The piano was duly delivered by the pursuers and accepted by the defender on that understanding. At the time of purchase the defender had in contemplation early payment of the price, and but for unavoidable circumstances, as after mentioned, there would have been no cause for complaint as to his failure in that respect,"

He further averred that after a month's trial of the piano he commenced paying the instalments, but after paying £3 to account he was unavoidably prevented from continuing to pay them. He was still willing however to continue paying them, and to pay from time to time as much as he could until the debt was extinguished. He further stated—"When the defender perused for the first time the receipt book given by the pursuers he at once deleted the reference thereon to a hire contract, as no such contract was made or discussed and none exists, the transaction being an unqualified sale with no suspensive condition attached."

He further averred that in December 1903 representatives of the pursuers called on the defender's wife and tried to get her to sign a hire contract, and that in January 1904 they again called and endeavoured to get the defender himself to sign it. Neither the defender nor his wife agreed to do so.

The pursuers pleaded—"(1) The piano in question being the property of the pursuers, and having been hired to the defender, and he having fallen into arrear with the rent, they are entitled to delivery thereof from him. (2) *Esto* that the parties have not been *ad idem* in the contract, no right of property in the piano has passed, and the pursuers are entitled to get it back on return of the money received by them, less a reasonable sum for its use."

The defender pleaded—"(1) The action is irrelevant. (3) The pursuers having sold and the defender having purchased and obtained delivery of the piano in question, and the property therein having passed to the defender, the present action is incompetent."

A proof was allowed.

The import of the evidence sufficiently appears from the opinion of the Lord President.

On 15th July 1904 the Sheriff-Substitute (DAVIDSON) assoilzied the defender on the ground that as the pursuers had sold the piano to the defender for a price payable by monthly instalments they had no claim for delivery—their proper remedy being an action for the price.

Note.—"The pursuers aver what is known as a hire-purchase agreement; the defender a sale, the price payable by instalments. The first-named of these bargains differs essentially from the second. A sale with deferred payment of the price is a sale pure and simple; the bargain about the price is merely a subsidiary one. A hire-purchase transaction is a sale with special conditions—one being suspensive, to the effect that in a certain event the sale is to be held as void. It appears to me that it rests with the person who wishes to establish that special form of contract, to do so by clear evidence; there is a presumption in favour of a simple sale. Here there is the evidence of Mr Grant on the one side, and of the defender and his wife on the other. It may be argued that the pursuers could not in the nature of things be expected to have any other evidence. But there is a piece of very valuable evidence which they might have had, and which it is their custom in similar transactions to procure—I mean a signed contract of hire-purchase, for which they have printed forms. I cannot but feel that the absence of such a contract increases the presumption against them. It seems to me to be of small importance whether the defender obliterated the words "hire-contract" in the receipt book before or after his payments; he might easily fail to notice it, and also the page at the end of the same book. I think, therefore, that the remedy the pursuers have asked for is not open to them; but in consideration of the loss they have sustained and the leniency they have shown to the defender I have modified the expenses to one-half."

The pursuers appealed to the Sheriff (GUTHRIE), who recalled his Substitute's interlocutor, and found that it had not been proved either that there was a sale or a hire-purchase contract, there being no mutual agreement to transfer the property, and possession having been given by the pursuers upon a supposed hire-purchase contract, to the terms of which the defender did not agree; that the defender therefore had no title of possession; and that the pursuers were entitled to delivery.

Note.—"The proof having been before Sheriff Strachan, neither Sheriff Davidson nor I have seen the witnesses. My perusal of the notes leads me to doubt whether the defender, who avows his knowledge of the nature of a hire-purchase agreement, is not somewhat too astute to take advantage of the pursuers' laches in not having a formal agreement signed at first or on the expiry of the month of trial. But it is not necessary to formulate this possible view. Sheriff Davidson in his judgment deals with the case as it stands upon a strict view of the pleadings. But even so, I doubt, with all respect, whether the sound view of the situation is not the reverse of what he has held, viz., that in truth both parties made the hire-purchase agreement referred to in the receipts which passed between the parties. There can be little doubt that the price was fixed by the pursuers on the footing that they were making one of their usual contracts, and that it would have been higher if the very easy terms of sale contended for by the defender had been agreed to. But there is not the usual formal agreement, and, as I have indicated, the defender *may* have honestly thought that he was buying outright. I think that the absence of a plea-in-law which can always be supplied, is not a reason why it should not be held, as it seems right and reasonable to hold, that when the instrument was delivered and approved there was no *consensus in idem*. In other words, there was mutual mistake in regard to the nature of the contract, so that there was no valid contract at all, and the true owner is entitled to restitution. (Erskine iii. 1, 10; Bell's Pr. 11 (5), 526-531 *seq.*)"

The defender appealed, and argued—The Sheriff-Substitute was right. The evidence showed that this was a sale with deferred

payments, and not a hire-purchase agreement. The defender had paid some instalments of the price, and was ready to pay the balance as soon as he could. The principle of no *consensus in idem*, which was the ground of the Sheriff's judgment, was inapplicable where the parties were at one as to the subject, the value, and the transference of the thing. It was not open to the party transferring to say that the transaction was not a sale, as the evidence showed that a sale was consistent with what had been expressed, and that the defender had so considered it. No contract of hire-purchase had been signed by the defender, and he had expressly refused to do so.

Argued for the respondents—This was a hire-purchase agreement and not a sale. That being so, the property in the piano had not passed to the defender. The owners were therefore entitled to get it back—*Helby* v. *Matthews* [1895], A.C. 471. The only contracts which the pursuers' firm made were sales for cash down or sales on the hire-purchase system. They never made sales on the deferred payment system where the property passed at once. This was well known to the defender. *Esto* that the defender had not signed the hire-purchase contract, that did not make it any the less a hire-purchase, for the contract-note could have been signed at any time, and the pursuers relied on the defender signing it. If the contract were not one of hire-purchase, the parties had misunderstood each other, and there was no *consensus in idem*, and the judgment of the Sheriff was right—*Duke of Hamilton* v. *Buchanan*, January 25, 1877, 4 R. 328, 14 S.L.R. 545, *affd.* 5 R. (H.L.) 69, 15 S.L.R. 513.

Lord President — This is an appeal from the Sheriff of Lanarkshire, in which the pursuers, who are piano merchants, sue the defender, who is resident in Glasgow, and pray for an order upon the defender to deliver to the pursuers a certain piano hired by the pursuers to the defender on or about 26th November 1902, and now in his possession. The case is not, I think, either free from difficulty or satisfactory for your Lordships' determination. I find considerable difficulty in understanding the pleadings as they are, and still more in arriving at the meaning of the precise form of questions which have been put to the witnesses. The action is laid with the prayer which I have quoted, and sets forth in the condescendence a mere agreement to hire a piano at the rate of 15s. per month. Then follows the statement that whereas for a certain time the 15s. were paid, further payments were not duly made, and that, those payments not having been made, the pursuers are entitled to re-delivery of the piano. The defence proposed to this demand is that the piano is the property of the defender in virtue of a contract of sale entered into on the said 26th of November, and verbally concluded between Mr Grant, one of the partners of the pursuers' firm, and the defender, by which contract the piano was sold to the defender for £26, payment being conditioned to be made by instalments. The averment as to the instalments is certainly in a peculiar form, because it is said that the piano was to be paid by instalments extending over a period of years, the purchaser to pay as often and by as large sums as he possibly could —15s. per month being talked about as a sum that would be acceptable. The learned Sheriff-Substitute before whom the case depended assoilzied the defender from the conclusions of the action, pronouncing a finding that the pursuers sold to the defender on the date specified in the petition a a piano at the price of £26, payable by instalments at the rate of 15s. per month, his view being that that sale having been truly effected, the pursuers had mistaken their remedy, the true remedy being, not of course to sue for re-delivery of the piano, which was not theirs, but to sue for the instalments remaining unpaid. The Sheriff on appeal recalled that interlocutor, and pronounced a set of detailed findings, all of which I need not read, but the crucial one of which I think is this—"Finds that in these circumstances it is not proved either that there was a sale or a hire-purchase contract, there being no mutual agreement to transfer the property, and possession having been given by the pursuers upon a supposed hire-purchase contract, to the terms of which the defender did not agree: Finds therefore that the defender has no title of possession." In other words, the view to which the Sheriff came was that, although the defender had not proved the contract which the Sheriff-Substitute held proved, the pursuer on his part had not proved that upon 26th November he had made out a hire-purchase contract, so that in law there was no *consensus in idem*—no contract at all—and that consequently the only title to the piano being in the original proprietors of the instrument, the pursuers, they were entitled to delivery.

Now, your Lordships will notice that in detailing the Sheriff's judgment I have used the words as he used them, "hire-purchase contract," and the whole endeavour of the pursuers in the proof was to make out that the true bargain upon 26th November was a hire-purchase bargain. A hire-purchase bargain is not perhaps a term actually known to the law as a term of art, but it is a form of contract which has become common enough in modern times, and it was judicially inquired into and noticed in the case of *Helby* v. *Matthews* [1895], A.C. 471. It is a form of bargain by which the sellers of these instruments, who wish to push their sales, have tried to get round the doctrine of common law, uncomfortable to them, that you cannot give a person a moveable and at the same time hold that moveable in security of the debt which that other person may owe, or in security of the contract in respect of which the moveable is transferred. I am not by any means suggesting that the proceeding is not a perfectly proper one. It was held to be quite legal in the case before the

House of Lords, and although perhaps there might be something said upon whether the old view of the common law was not one which was more conducive to advantageous dealing between citizens, I do not think these considerations are for a court of law, so long as the form of contract is a perfectly legal form. The particular class of bargain which these pursuers admittedly wished to enter into on that date is shown by the form No. 11 of process, which is the hire-purchase form in ordinary use by the pursuers' firm, and which was the form which after that date they made several efforts to induce either the defender or the defender's wife to sign, which they refused to do. I ask your Lordships' attention to this for the reason that here we have the first peculiarity of the case as regards the position of the pleadings to which I alluded in my opening remarks. The form No. 11 of process is a form of agreement by which the person signing it agrees to hire from Muirhead & Turnbull such and such a piano of the value of so much, to pay to them the sum of so much "on signing this agreement, in consideration of the option of purchase herein given, and for which credit will only be given in the event of the purchase being effected as herein provided; and for the use thereof the sum of.....per month, the first payment to be made upon ...." Then there are certain stipulations for taking care of the piano, and allowing persons to inspect it and so on; and a provision that the one party is to return the piano if he allows one monthly payment to run into arrears. He is also bound to pay its full value if it should be damaged or destroyed, and then it goes on—"Declaring that at any time during the hiring (subject to the conditions aforesaid) the said Muirhead & Turnbull shall be bound on demand to sell said pianoforte to me at the price of £26 sterling, in which case I shall receive credit for all payments previously made under this agreement. I shall be at liberty to return the said instrument after I have paid hire for a period of three months, and in that case I shall only be liable for hire up to date of return, but not for less than three months' hire in any case. Notwithstanding of anything herein contained, I shall have no right of property in said pianoforte until after a sale in terms of the foregoing obligation, and this is declared to be a suspensive condition."

I call your Lordships' attention to that, because I think your Lordships will see that it truly does not square with the pursuers' condescendence at all. The pursuers' condescendence simply narrates a naked agreement of hire, and when we called the attention of Mr Lees to that fact, his answer was that the hire-purchase agreement of his clients was truly a hire and not a sale. That it is a hire I have no doubt, but it is a hire and something more. It is a bi-lateral contract which gives the person the option to convert the hire into a sale. The great difference which seems to me to lie between that agreement and an ordinary naked hiring arrangement which had no term in it to show that it was a bargain of hire for a certain time—what would in the case of other subjects have been a lease—is that the latter could at any moment have been put an end to. If, for example, you hired a piano at will you could at any moment put an end to that contract. It is perfectly clear that under an agreement such as I have read the person who gets the piano, although it is still truly a hiring agreement, has his creditor under an obligation that if he does certain things the transaction will be turned into a sale. And if he chooses to pay the balance he becomes proprietor. That is truly in its essence a perfectly different agreement from the agreement which we should gather from reading the condescendence. So much for the pleadings of the pursuer. The pleadings of the defender are really not much better, because though he says that there was a sale, and a sale with a superadded condition that the price should not be paid at once in cash, but should be paid in instalments, when he goes on to say what the instalments are, he sets forth in the paragraph I have read what, I do not say is impossible, but what is so unlikely, that it is difficult to believe a piano merchant would ever enter into such a bargain. In cases which are begun in the inferior courts — however much your Lordships may deplore the irregular pleadings—this Court has never been in use to deprive litigants of justice because their procurators have written their pleadings badly, and accordingly I do not think your Lordships should dispose of this case upon the pleadings either of the one side or the other. To dispose of it on the strict view of pleadings would result in turning the case out of Court altogether, finding neither party entitled to expenses and pronouncing no operative order. But I do not think your Lordships can do that, and therefore I propose to examine what is the position of affairs as it would have been if the pleadings had been rectified.

There is one thing which is not a matter of pleading. Your Lordships cannot change the actual form of the action. The action is one for delivery and nothing else. We cannot turn it into a petitory action for money. Now, it is certain that the piano is in the place where it is—that is to say, in the custody of the defender—in consequence of an arrangement come to between the pursuer and the defender. The defender did not get hold of the piano by any trick or subterfuge. He did not borrow it or steal it or get it by some false pretence. The pursuer is coming here to invert the present possession. I make that observation because I think something might turn upon the onus. We have therefore to inquire and come to the best conclusion we can as to what was the bargain made between these two people. Now, the description of the bargain is given by three witnesses. It is given by the pursuer or the person who is the manager of the pursuing firm, and it is given by the de-

fender and by the defender's wife. The crucial part of it is contained in a very few sentences, and here I find the justification for the other observation I made as to the way in which the witnesses have been examined. The one thing that is not asked either on the one side or the other is what the people said, and yet of course it is on what the people said that the whole question depends. But your Lordships must take the evidence and see what it comes to. Mr Grant, the pursuers' manager, says that there were present at the interview the defender, his wife, and himself, and then he goes on—turning his evidence into *oratio directa*—as follows:—"We sell pianos for cash, the full sum being paid in cash, and we sell on the hire-purchase system, and also let out on hire. I offered defender an instrument at the value of £26, payable 15s. per month." Now, I agree that if that evidence is taken fairly to Mr Grant it means that he had in his mind to let out this instrument upon his own hire-purchase system. Your Lordships see that he details three methods in which he conducts his business—selling pianos for cash, the whole sum being paid down, hire-purchase, and mere hire.

Now, the offer which he details is an offer of the piano for £26, payable 15s. per month.

This cannot be the first of his methods of business, because it is not a sum in cash; and it cannot be the third, because it is not a mere hire; and therefore it is the middle kind according to his views.

At the same time Mr Grant—and I think it right, in fairness to Mr Grant, to say that I see no reason to suppose that he was anything but perfectly honest and upright in the evidence he has given—says in cross-examination—"I cannot say that I made it clear to defender that it was a trial hire." Now, the defender says that Grant called and stated he would "be pleased to let me have a piano. I left it with himself because I was no judge. After discussing terms I agreed to purchase the piano in dispute at the price of £26. I told him I was unable in the meantime to pay the full value, and that he would require to take it by the instalment principle. He said that was all right." The defender's wife's view is substantially the same. She says—"He (Grant) said we would get the piano by paying 15s. every month, and if it was paid in three years there would be a good discount. My husband and I were present on that occasion. Nothing was said about a hire-contract." Now, my Lords, of course if the matter really was as to what in their inmost hearts people thought, I think that, taking these people as honest people on both one side and the other, what they thought would lead me to the conclusion at which the Sheriff has arrived, namely, that Grant thought he was selling on the hire-purchase system, and the other person thought he was buying upon some instalment plan. But commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say, and accordingly I come to the conclusion that what was said here was, in the words of Mr Grant himself, that he offered the defender an instrument of the value of £26, payable 15s. per month, and that the defender accepted that offer, namely, to buy a piano at £26 but payable on the instalment principle at the rate of 15s. a-month. In other words, I think the finding of the Sheriff-Substitute which I read is a true finding in fact, because I think that was the meaning of Grant's words which the defender was entitled to accept according to their ordinary meaning. Grant could have made it clear if he had liked that his meaning was not the ordinary meaning of these words, but that their meaning was that he really wanted a hire-purchase agreement by producing the hire-purchase agreement on the spot. But he admits himself that he did nothing of the sort, and that as matter of fact the hire-purchase agreement was never put before the defender till long after when certain of the instalments had been paid.

Mr Lees made an attempt to show that really the defender proved the pursuers' case by saying that he used the words that he would require to get it on the instalment principle, and Mr Lees argued that the instalment principle really meant the hire-purchase system. I do not think it is possible to arrive at that result. In the first place, if a man says "I will take a thing on the instalment principle," I do not think that in ordinary language he does anything more than say "I will take it by paying up instalments." When you have a word like instalment principle you can only give it a meaning by one of two methods. It has either the ordinary meaning of the English language, or you can show by appropriate evidence that instalment principle means a certain sort of arrangement. I think you can only do that by showing that a certain custom is so well known that it has become part of the general law merchant, and nobody suggests that that is the case here; or you can show that a particular custom has been so generally accepted in a particular trade that it has become an implied part of every bargain made in ordinary course of that trade. But in order to do that you must have appropriate averments and appropriate proof. Mr Lees said that everybody in Glasgow knew about it. But I should say that the knowledge of it in Glasgow is of a fluctuating character, and there is no better illustration of that than by comparing the agreement in the case quoted to us—*Murdoch & Company* v. *Greig*, 16 R. 396—with the agreement in the present case. They both represent the laudable efforts of instrument makers to sell their instruments and at the same time get security for their debts. But, as your Lordships will remember, Lord President Inglis held in the case of *Murdoch* that it was a sale out and out, but a sale under suspensive conditions, whereas I agree with Mr Lees that the agreement sought to be brought forward in this case is an agreement which will square with the agreement in *Helby's* case, with the option of a sale if certain condi-

tions were fulfilled. All that accentuates the fact that by merely using the word "instalment principle" you cannot bring in the very peculiar and very particular stipulations of the agreement I have read to your Lordships.

That is my view of the case, and the result is that in this case the petition falls to be dismissed. I do not mean to say that in some ways it is a very satisfactory result, but I do not think the Court ever does much good by speculating upon the particular moral results of a judgment between two parties. The plain lesson to be derived I hope from the judgment is this, that when parties wish to bind persons to a contract with unusual stipulations they must bring that contract clearly to their knowledge, and that, on the other hand, if they use words which are capable of ordinary interpretation, they must expect the persons who hear them to take them up in their ordinary significance.

LORD ADAM—I concur.

LORD M'LAREN — I am of the same opinion. As regards the pursuers' right to have his piano returned, which was the object of the action in the Sheriff Court, three different views have been taken. There is the view of the Sheriff Court action, to wit, that the piano was given to the defender on a contract of hiring, because neither in the prayer nor in the condescendence is there any reference made to the hire-purchase system or any indication given that this alleged contract of hiring might in certain circumstances or conditions be converted into a contract of sale. The second view is the view which the pursuer supports by his evidence, and the theory he puts forward—I do not say the legal effect of his evidence—but the theory he advances in his evidence, is that the piano was delivered on what he calls a hire-purchase contract, and in explanation of what is meant by that the form is tabled. The general effect of that form, in cases where it is the basis of the contract, is that the piano is let on hire at so much a month, with the condition that the contract is converted into one of purchase by paying up the agreed-on price less the amount of the instalments already paid. Then the third view of the pursuers' claim is that taken by the Sheriff, which is that no contract was ever entered into, because the parties were not agreed as to the terms upon which the piano was given over, and consequently that the piano being the pursuers' property but in the custody of the defender must be delivered.

The defender has only one contention, and perhaps it is an advantage to him that he is consistent throughout. He says that the piano was sold to him on credit, and that while he has not been able to pay the price that does not give the vendor any right to have the instrument returned. That is an intelligible contention and if consistent with the facts is I think sound in law. With regard to the Sheriff's ground of decision, I am unable to agree with it, and for this reason. The ordinary case, what we may call the typical case, of parties being remitted to their original rights in consequence of no effective contract being entered into, is the case of ambiguity. *Buchanan* v. *Duke of Hamilton*, 5 R. (H.L.) 69, a case in the House of Lords between landlord and tenant, is an instance of that kind. There were two offers. One party honestly believed that possession was given upon the faith of the two offers taken together, while the other party contended that it was only the second offer which was meant to be effective, and that the first had been impliedly withdrawn. The ambiguity did not arise upon the words of either instrument, but upon the time and manner in which the two offers were made. The much more common case is where the words of a contract are ambiguous and it is impossible for the Court to say that each party is not honestly entitled to put his own meaning upon it. But I see no ambiguity in this case. There is here really nothing but a question of evidence. What are we to spell out of statements not entirely consistent regarding the terms upon which the piano was delivered? Now, the pursuers' statement is different from that put forward in the record. But I agree with your Lordship that the pursuers' statement as noted in the evidence is capable, in the absence of any specification of the words used, of being read with the defender's statement, which is that this was a sale on credit, the price being payable in instalments. It is true that the pursuer states that he has three modes of doing business, but there is nothing to show that his customers had such a knowledge of his business that they knew all the different methods in which he was prepared to deal. There is no reason to suppose that in this case the defender knew anything more about the pursuers' conduct of business than what he was told at the time. The pursuers' statement is that he offered the piano on a month's trial, the instrument being of the value of £26, payable by monthly instalments of 15s. each. It may be that the pursuer had in his mind that this was to be a hire-purchase contract, but he does not say that he told the defender that there was to be an option. On the other hand—and here I agree with the Sheriff in thinking this an important point—he never put into the defender' shands one of the printed forms applicable to the hire-purchase system. Against that you have the statement of the defender and his wife that they said they were unable to pay the piano at once, and that it would have to be on the instalment principle. I agree with your Lordship that that means a sale upon credit. The result of the evidence, which is not quite consistent, but as it seems to me not absolutely contradictory, is that there is nothing proved but a contract of sale with deferred payment, and I think the result which I should arrive at upon the parole evidence is confirmed by the proceedings which the pursuer thought it necessary to take, because evidently he was not very sure of his rights, and he

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

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

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

The Court pronounced this interlocutor—

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

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

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

Wednesday, March 1.

OUTER HOUSE.

[Exchequer Cause.

LORD ADVOCATE *v.* MACKENZIE'S TRUSTEES.

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

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

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

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

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