a refreshment bar, depending I suppose upon chance custom, and not a course of dealing with regular customers, I cannot see cause for inferring that the customer attached any notion to the demand for a glass, except that it was such a quantity, more or less, as is usually consumed in a wine glass. The vessels said to be measures were measures between the appellant and his servants, or, it may be, between the Exhibition Committee and the appellant, but were not used as such in the sale of spirits to the public. So far as the trade carried on by the appellant is concerned, I think the supply of glasses of spirits was a course of dealing by price, in which the quantity to be supplied was left to the seller, and that the appeal should therefore be sustained.

Conviction quashed.

Counsel for Appellant—R. V. Campbell—Baxter. Agent—Alex. Wylie, W.S.

Counsel for Respondent—D.-F. Mackintosh, Q.C.—Graham Murray. Agent—P.-F. of Edinburgh Burgh Court.

COURT OF SESSION.

Tuesday, June 15.

FIRST DIVISION.

[Sheriff of Dumfries and Galloway.

DUNLOP *v.* CRAWFORD.

Sale—Warranty—Mercantile Law Amendment Act 1856 (19 *and* 20 *Vict. cap.* 60), *sec.* 5.

A dairy farmer purchased from a cattle dealer a number of milk cows and took delivery of them. Thereafter he sought to reject certain of them as having been in the sense of the Mercantile Law Amendment Act 1856 sold for the "specified and particular purpose" of being milk cows suitable for a dairy farm, and being unsuitable for that purpose. *Held* that this being the ordinary use of the subject of sale, was not a "specified and particular purpose," and *therefore* that section 5 of the Mercantile Law Amendment Act 1856 did not apply.

Gabriel Dunlop, cattle dealer, Stewarton, raised an action in the Sheriff Court of Dumfries and Galloway at Kirkcudbright, against William Crawford, farmer, Gatehouse-of-Fleet, concluding for payment of £95, 5s., being the balance of the price of a lot of cows, 31 in all in number, purchased by the defender from him. The balance was disputed on various grounds, some of which have no bearing on the present question. A payment to account had also been made. The question here reported had reference to the price of two cows rejected by the defender. The defender consigned £66 in process as the whole sum remaining due, claiming to be entitled to reject the two cows, the total price of which two animals was £25, 10s.

The defender pleaded—(1) that the cows were purchased for a specified purpose, and being unfit for that purpose were properly rejected; (2) that one of the cows was disconform to warranty, and that as the other was not one of the cows purchased by the defender decree could not be given for the price of it.

The cows about which there was a dispute were sold by warrant of the Sheriff pending the dispute.

The Sheriff-Substitute (NICOLSON), after a proof, found in law (after certain findings in fact) "that the two cows in question having been sold for a specified purpose, for which they were not fit, the defender was justified in returning them and refusing to pay for them: Assoilzies him from the conclusions of the summons: Appoints the Sheriff-Clerk to pay to the pursuer the sum of £66, 15s. consigned in Court by the defender: Finds the pursuer liable in the expenses of process, as the same shall be taxed by the Auditor of Court, to whom remits the accounts when lodged to tax and report, and decerns.

"*Note.*—I do not think it necessary to enter into a detailed comment on the proof. There is, as usual, a strong conflict of evidence as to the soundness and health of the two cows in question, which some witnesses for the pursuer declare to be as sound and healthy as cows can be. I have no difficulty in preferring the evidence for the defender. As usual, also, it was contended for the pursuer that there was no express warranty of the animals. Whether express or not, they were sold as sound and healthy cows for a dairy, and for that express purpose which by sec. 5 of the Mercantile Law Amendment Act is equivalent to warranty,—in fact, they were not merchantable articles, for the purpose for which they were sold. The delay of the defender in returning them was quite excusable and creditable. He wished to give them a chance, and to test them fairly, and he did so. Milch cows are not like dead goods, the quality of which can be ascertained in a few minutes."

The pursuer appealed to the Court of Session.

The alleged express warranty not being proved, the argument rested entirely on the applicability to the case of the statute.

The Mercantile Law Amendment (Scotland) Act 1856 (19 and 20 Vict. cap. 60), sec. 5, provides—"When goods shall after the passing of this Act be sold, the seller if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods with all faults shall be at the risk of the purchaser unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered without such warranty to warrant that the same are fit for such purpose."

Argued for pursuer—The cows in question were not sold for "a specified and particular purpose" in the sense of the statute. They were sold for the ordinary purpose for which milk cows would be sold. The provisions of the Mercantile Law Amendment Act were not applicable, because a sale of an article for the ordinary purpose for which such an article was used was not a sale for a "specified and particular purpose."

Authorities—*Hardie* v. *M'Aslan*, May 25, 1870, 8 Macph. 798; *Rough* v. *Moir & Birnie*,

March 5, 1875, 2 R. 529; *Hamilton* v. *Robertson*, May 31, 1878, 5 R. 839.

Replied for the defender — The cattle were sold and bought as suitable for use in a dairy, and that was "a specified and particular purpose."

At advising—

Lord President—The subject of sale in this case was milk cows for dairy purposes, and the 5th section of the Mercantile Law Amendment Act is applicable to the case according to the view of the evidence taken by the Sheriff-Substitute. Now, according to the provisions of section 5 of this statute the seller, if he is without knowledge of any defect or bad quality of the article sold, is not to be held as giving a warranty except in two cases specially provided for—first, when he gives "an express warranty," and second, when he sells the goods for a "specified and particular purpose." If the goods are sold for the ordinary purposes for which they are commonly used, then it is clear that the exceptions provided for in this clause cannot apply. In order to let in the exceptions the purposes must be in the words of the Act "specified" and "particular." Can it be said that there is anything "particular" in the use to which the cows were to be put? They were sold to the defender to be used by him for the purposes of his dairy, and that use of milk cows cannot in any sense be called a particular purpose, and therefore I am of opinion that the provisions of this statute are not applicable.

Lords Mure, Shand, and Adam concurred.

The Court pronounced the following interlocutor:—

"Find as a matter of fact (1) that the transaction libelled was a bargain for milk cows; (2) That the defender has failed to prove that it was for a specified and particular purpose: Therefore sustain the appeal: Recal the interlocutor of the Sheriff-Substitute of 13th November last: Decern against the defender for payment to the pursuer of the sum of £25, 10s. sterling, with interest as libelled: Grant warrant to the Sheriff-Clerk to pay to the pursuer the sum of £66, 15s. consigned by the defender in the Inferior Court, with all interest accrued thereon, and decern."

Counsel for Pursuer—Comrie Thomson—Ure. Agent—T. Carmichael, S.S.C.

Counsel for Defender—Dickson. Agents—Smith & Mason, S.S.C.

Tuesday, June 15.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

ALLEN *v.* MILLER AND OTHERS.

Succession—Division per capita *or* per stirpes.

A testator disponed his heritage to his children in liferent equally for their liferent allenarly, and to their children also equally in fee (under certain specified preferences for sons over daughters), declaring that in case any of his children should die without lawful issue, the share of such child should "accresce and be equally divided among my surviving children in liferent only, and to their lawful issue equally in fee." *Held*, on a construction of the clauses of the deed, that the intention of the testator was that whatever was liferented by a child should descend *per stirpes* to his children, and not be divisible *per capita* among his (testator's) grandchildren.

The deceased James Ballantine, who died in Glasgow in 1815, by disposition dated 2d September 1807, conveyed and disponed to the parties mentioned in the deed his whole heritable estate, consisting, *inter alia*, of certain plots of building ground in Glasgow. The terms of the conveyance were—"To and in favour of James, John, Margaret, Ann, and Jean Ballantine, my children, and to any other lawful child or children I may have at my death, in liferent equally, during all the days and years of their lifetimes, for their liferent uses allenarly, and to their lawful children also equally, in fee and property, but always under the preferences provided to my sons and their lawful children over my daughters and their lawful issue, as after specified." The conveyance, which was burdened with certain provisions to the testator's widow, provided by its third purpose as follows:—"I ordain that after satisfying and paying the foresaid provisions to my wife, and the expenses of repairing and insuring said subjects against fire, paying feu-duties and all other public burdens thereon, the rents thereof shall be divided at Whitsunday and Martinmas, half-yearly, equally among my children during their respective lives, but each of my sons shall have and be entitled to £10 sterling yearly therefrom more than their equal shares thereof, or than each of my daughters, and which preference of £10 sterling to my sons shall, when the succession to the fee of said heritable subjects takes effect, descend to their children equally, and the same shall be valued accordingly above the shares thereof due to the children of my daughters; and in case any of my said children die unmarried or without leaving lawful issue, the shares or share of such shall accresce and be equally divided among my surviving children in liferent only, and to their lawful issue equally, in fee and property as aforesaid."

After the testator's death his children, who all survived him, were infeft in liferent in the heritable subjects already referred to, and also in another piece of ground acquired by the testator subsequent to the date of the deed, but always in the terms and under the conditions set forth therein.

James and John Ballantine, the testator's sons, both died without issue. Ann married a person named Brown, and died leaving issue.

In 1842 the three heritable subjects were acquired by the Glasgow, Paisley, Kilmarnock, and Ayr Railway Company, and the price, amounting to £5050, was consigned in the Royal Bank of Scotland in name of John Wilkie, writer, Glasgow, for behoof of the parties interested, and subject to the orders of the Court of Session.

On 16th July 1842, on an application by the children of the testator's daughter Ann Ballantine or Brown, authority was granted to pay the petitioners, as fiars of one-third of the said three plots