of the testatrix, was her spontaneous and unbiassed act, and was not due to the abuse of the confidential position in which he stood to her.

The burden, such as it was, has, I think, been satisfactorily discharged. Apart from the explicit disavowal by Mr Stuart Grace, which, looking to his high personal and professional character, is entitled to consideration, the circumstances connected with the execution of the will (some of which were exceptional) are of themselves almost sufficient to rebut the charge of undue influence.

There is here no question of facility or failing mental or physical powers. In 1881 the ladies were shrewd intelligent women in good health with several years of life before them. No doubt undue influence may exist and prevail where there is no facility, but the mental and physical health of the person said to have been influenced is a material matter in such cases.

There is also this peculiarity that as far as the evidence discloses, the letter, memorandum, or jotting dated 5th March 1881, which contains all the essentials of the will, was prepared by the ladies themselves without any communication with Mr Stuart Grace. All that the will did was to give formal effect to the intentions disclosed in that writing. If it is the case that the ladies came to the determination expressed in that letter of their own free will, and uninfluenced by Mr Stuart Grace, this is almost conclusive of the case.

Again, there is this unique feature in the present case, that the will which the pursuers seek to reduce was executed sixteen years before the death of Miss Margaret Brown. At any time during that period it might have been revoked. It was repeatedly brought under the notice of Miss Margaret Brown, who added two codicils to it with her own hand at different dates; she therefore knew that she could revoke or alter it at pleasure. It was in her own possession for some years before her death. The fact that she let it remain unaltered as regards the provision to Mr Stuart Grace and his family is strong evidence of her deliberate and fixed intention that the money should go to them.

Further, there is no evidence that Mr Stuart Grace made any attempt to isolate the ladies, or to prevent any of their friends and relatives from having access to them. They evidently had likes and dislikes. They liked some of their friends and relatives, and gave them presents or left them legacies. But they do not seem to have liked the pursuers of this action, although Mr Stuart Grace succeeded in obtaining a present of £300 for Mrs Key in 1893.

But it is said that the testatrix had no independent legal advice. It cannot be laid down as an abstract proposition that in all such cases there must be independent advice. The absence of it may be fatal, and in most cases it will be a material point against the validity of the gift or bequest. For instance, where a substantial gift is made *inter vivos* by the client to the agent, by which the client is impoverished, the absence of independent advice may be conclusive. But in the present case there was no gift *inter vivos*, the ladies remained and intended to remain during their lives in full possession and control of their property. In these circumstances I think that a legal adviser would discharge his duty to his client if he satisfied himself that the directions he received for the preparation of a will represented their deliberate wishes and intention, and therefore, assuming that here there was need of separate legal advice, I think it was given. The will was not prepared by Mr Stuart Grace, and I think that the Misses Brown had as much legal advice as the occasion called for. Mr Lyon was a man of scrupulous integrity in his profession, and although he did not himself discuss the terms of the wills with the ladies, he sent an experienced confidential clerk, Mr Robertson, with the draft, and he tells us that he was quite satisfied that the ladies thoroughly understood what they were doing, and that they had quite made up their minds as to the terms of the settlement. Again, when the will was executed, Mr Logan, W.S., read over the extended deeds to them before they signed.

Unless it was incumbent on Mr Lyon to remonstrate and endeavour to dissuade them from making such a will, I do not see what more could have been done. My impression, after reading the whole of the evidence, is that both of the ladies were determined to dispose of their money in that way, and that no legal adviser, however independent, would have succeeded in altering their determination. I am satisfied on the evidence that the defenders are entitled to our judgment.

The Court adhered.

Counsel for the Pursuers—Sol.-Gen. Dickson, Q.C.—Dundas, Q.C.—Christie. Agents Simpson & Marwick, W.S.

Counsel for the Defender—The Dean of Faculty — H. Johnston, Q.C. — Kincaid Mackenzie. Agents — Mackenzie & Kermack, W.S.

Wednesday, December 14.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MILLAR *v.* BELLVALE CHEMICAL COMPANY.

Contract—Breach of Contract—Damages—Measure of Damages—Loss of Prospective Profits—Loss of Business Reputation.

The A company, manufacturers, contracted to supply B, a wholesale dealer, with golf balls, which were to be of two kinds, one a medium-priced ball to take the place of re-made balls, and the other a higher class of ball fit to be sold at the same price as the ordinary first-class ball. Both classes of balls were to be manufactured for

and supplied to B only. Nothing was definitely arranged as to the duration of the contract, or the number of balls to be delivered, but it appeared that the intention and object of B in entering into the contract was to establish an extensive wholesale trade in the golf balls to be supplied under it, and that this was known to the A company. The balls of both kinds supplied under the contract proved to be unfit for playing, and therefore unmerchantable and disconform to contract. They were returned in large numbers to B by his customers. *Held* that B was entitled in name of damages for breach of contract, not only to an allowance for the profit on balls actually supplied and returned by customers, with the expenses incurred in connection therewith, but also to an allowance for the prospective profits which he would have made, according to the evidence, upon the number of balls which his customers would have taken during one year if the balls had been conform to contract.

Opinions reserved by the Lord Justice-Clerk and Lord Moncreiff as to whether in such a case damages were allowable for loss of business reputation through the bad quality of the balls supplied under the contract.

There were here four conjoined actions, all raised in the Sheriff Court at Glasgow, viz.—(1) a debts recovery summons brought by the Bellvale Chemical Company, Bellvale Chemical Works, Glasgow, against Charles Lochhead Millar, in which the pursuers claimed £20, 19s. 11d. as the price of golf balls supplied by them to the defender; (2) an action at the instance of Millar against the Bellvale Chemical Company, and A. S. Bryce junior as the sole or only known partner thereof, in which the pursuer claimed £1000 as damages for breach of the contract under which the golf balls were supplied; (3) a debts recovery summons brought by Bryce & Robertson, the successors of the Bellvale Chemical Company, against Millar for £25, 3s. 10d., being the price of golf balls supplied by them to the defender; and (4) an action by Millar against Bryce & Robertson for £1000 as damages for breach of the contract under which they had supplied him with the golf balls above mentioned.

The debts recovery cases were remitted to the ordinary Court; the four actions were conjoined (the action *Miller* v. *The Bellvale Chemical Company and Another* being the leading action), and a proof before answer was allowed in the conjoined actions.

It appeared that in May 1896 and July 1897 Millar, who was an agent or merchant dealing wholesale in golf balls and golf appliances in Glasgow, contracted with the defenders the Bellvale Chemical Company, who were manufacturers, to supply him with (*a*) a medium-priced golf ball made of a good class of gutta-percha, such as would take the place of ordinary re-made balls, and (*b*) a higher class of golf balls of the best gutta-percha, fit to be sold at about the same price as the ordinary first class of golf balls. It was agreed that these balls should be marked 2 XL and 1 XL respectively, and should be made for and supplied to Millar only. The balls were made and delivered in large quantities to Millar, and re-sold by him to his customers. Large numbers of the 1 XL balls were returned by the buyers to Millar as being unplayable, and therefore unmerchantable. The 2 XL balls turned out to be to a very large extent worthless, and they were also returned in large numbers to Millar. It was ultimately admitted that the balls marked 1 XL supplied to Millar were in point of fact unmerchantable balls and not fit for golf playing, and that they were disconform to contract. It was also admitted that the balls marked 2 XL supplied to Millar were in point of fact disconform to contract.

In May 1897 the Bellvale Company agreed to take back all the 1 XL balls so returned as unmerchantable, and a considerable number of balls were returned by Millar for which he was allowed credit. He had still however on hand, and offered to return, 64 dozen 1 XL balls, which the Bellvale Company were bound to take back, their invoice value being £23, 11s., a sum exceeding the sum sued for by them. Millar had also still on hand 104 dozen 2 XL balls, returned by his customers, which Bryce & Robertson were bound to take back, and which Millar was ready and willing to deliver to them, the invoice value being about £26, a sum exceeding the amount sued for by Bryce & Robertson.

In view of these facts it was ultimately conceded that Millar was entitled to absolvitor in the actions brought against him, and the sole question between the parties came to be, on what principle should the damages due to Millar for breach of contract be calculated, and to what amount of damages was he entitled. Millar claimed damages (1) for expenses incurred in pushing the sale of the balls; (2) for loss of profit on balls supplied to him by the Bellvale Chemical Company and Bryce & Robertson; (3) for loss of profit which he would have obtained on balls not in fact supplied to him, but which he would have been able in all probability subsequently to take and dispose of if he had been provided with balls conform to contract; and (4) for the loss of business reputation sustained by him through the inferior quality of the balls.

When the contract between Millar and the Bellvale Chemical Company was entered into nothing was arranged as to the duration of the contract, or as to the quantity of balls which the parties were to be bound to deliver or to take respectively. It appeared, however, that the full benefit from such a contract could not be reaped by either party at first owing to the initial difficulties in the way of introducing a new article on the market. It appeared, moreover, that it was known to the defenders that the pursuer's intention and object in

entering into the contract was to carry on an extensive wholesale trade in the sale of golf balls to be supplied by the defenders, and to give them large orders for balls, and, moreover, that he intended to give up a trade which he had formerly carried on in re-made balls.

The loss of profit on balls actually returned to Millar by his customers at the date when the action was brought, with a proportionate amount of the expenses incurred by him in pushing the sale of the balls, was about £30, or with an allowance for sundries, £40. The defenders admitted that Millar was entitled to this sum in name of damages.

The total invoice value of the balls supplied to Millar was £346, 17s. 9d. Out of this total about £95 worth was actually returned at the date when the actions were in dependence. The total amount spent by the pursuer in advertising, in labels for golf-ball boxes, and in travelling expenses and salary for himself and his traveller at the time he was pushing the sale of the golf balls supplied under the contract, was about £45, but part of the advertising and the travelling expenses and salaries was properly chargeable to other business.

In addition to 15 per cent. on the total invoice value of balls supplied and an allowance for expenses, Millar claimed £285, being 15 per cent. on the value of balls which various customers of his said they would have taken from him in one year if the balls had realised expectations. He also claimed 15 per cent. on the amount of two years' golf-ball business as formerly done by him, which he alleged had been ruined by the bad name he had acquired in the trade owing to the inferior quality of the XL balls, but the Court did not find it necessary to consider this part of his claim.

When Millar began to push the sale of the XL balls he inserted a highly laudatory advertisement in *Golfing*, in which it was stated that the new No. 1 XL golf ball was guaranteed to be made of the finest gutta-percha, to be practically unbreakable, and to fly further than any ball yet put on the market, and it was also stated that the No. 2 XL golf ball supplied the long-felt want of a thoroughly reliable good medium-priced ball, that it was guaranteed not to split, and would stand as much punishment as the usual 1s. ball. The balls supplied failed in every respect to justify the statements in this advertisement.

It appeared that if satisfactory a new golf ball has generally a good sale for a time, once it has been fairly introduced to the public, its novelty being rather than otherwise an advantage. It also appeared that there was a great demand for a good medium-priced ball.

On 16th May 1898 the Sheriff-Substitute (GUTHRIE) issued an interlocutor, practically in the same terms as the interlocutor of the Court *infra*, whereby he assoilzied the party Millar in the actions against him, and decerned against the Bellvale Chemical Company and A. S. Bryce junior, and against Bryce & Robertson, for the sums of £150 and £75 in the actions brought by Millar against them respectively, and found Millar entitled to expenses in the conjoined actions. He added the following

Note.—"As far as I am able to make out from the somewhat complicated materials in process, each of the trading accounts, *i.e.*, that of the Bellvale Company and that of Bryce & Robertson, is more than compensated by bad balls still held by the party Millar, and of which they are bound to relieve him. As to the quality of the balls, there is I think little doubt, and although it may be that there were many merchantable and fairly good balls among both classes, it is clear that there was such a percentage of trash as vitiated the whole deliveries. The makers themselves seem to confess this.

"The claim for damages is of a very speculative kind, and it is difficult to give effect to it as Mr Millar desires. It is clear that the purchaser must have lost all his expected profit on the balls, but it is equally certain that he is greatly exaggerating the profit he could possibly make in the time on a new ball unknown to the golfing world. It is therefore unavoidable that the assessment of damages should be to a large extent conjectural. The sums decerned for include the items of carriage, &c., in the counter claim, and the expense of journeys. As Mr Charles Millar was pushing a new business, which comprised many things besides golf balls, it would not be reasonable to include all or nearly all the expense of these journeys.

"The law of the matter in dispute is exemplified in the recent case of *Duff*, 19 R. 199, and in the text, notes, and cases cited in Bell's Prin. 31 and 32." . . .

The parties, the Bellvale Chemical Company and A. S. Bryce junior, and the parties Bryce & Robertson, appealed to the Sheriff (BERRY), who on 28th July 1898 issued the following interlocutor:—"Adheres to the interlocutor appealed against, with the variation that the damages awarded are reduced to £60 sterling against the Bellvale Chemical Company and A. S. Bryce junior, and to £20 against the defenders Bryce & Robertson: Finds the appellants entitled to the expenses of the appeal," &c.

Note.—"The argument on the appeal has been limited to the question as to the amount of damages awarded by the Sheriff-Substitute. His finding that the balls were unmerchantable is accepted by the appellants, but it is maintained that the damages awarded are excessive.

"In the absence of explanation of the grounds on which the Sheriff-Substitute has proceeded in making his award, I cannot help thinking that he has erred on the side of excess. The total trade done by the pursuer with the Bellvale Company was £266, 14s. 6d., and with Bryce & Robertson £80, 3s. 3d. The proof shows that 15 per cent. on these sums may be regarded as a liberal profit, and taking the pursuer to be entitled to an allowance for loss of profit, which the decision in *Duff* v. *Iron and Steel Company*, 19 R. 199, seems in the cir-

cumstances to justify, he would at that rate be entitled to about £40 in the one case and £12 in the other. As regards expense of journeys and traveller's salary it would be impossible to charge the whole as applicable to golf balls, and it seems to me that £20 is a sufficient allowance to give to the pursuer under that head, which may be divided between the two sets of defenders in the proportions of £15 against the Bellvale Company and £5 against Bryce & Robertson. If to the aggregate of these different sums be added £5 in the one case and £3 in the other to cover any additional small items, I think the pursuer is sufficiently compensated. This brings out £60 as the award against the Bellvale Company, and £20 against Bryce & Robertson. . . .

"A large portion of the case before the Sheriff-Substitute was occupied with evidence bearing on the merchantable or unmerchantable character of the balls, and I am not disposed to interfere with his award of expenses. I think, however, that the defenders are entitled to the expenses of the appeal."

Millar appealed.

His counsel intimated that they were satisfied with the interlocutor of the Sheriff-Substitute. Millar was entitled to the damages which might have been reasonably anticipated by the parties as the result of a breach. There was no other absolute rule—*Hadley* v. *Baxendale* (1854), 9 Ex. 341. What damages where allowable under that rule was a question of circumstances in each particular case—*Watt* v. *Mitchell*, July 4, 1839, 1 D. 1157; *Dunlop* v. *Higgins*, February 24, 1848, 1 H. L. Ca. 381, *per* Lord Cottenham, L.C. at page 403. It was to be observed that a continuous contract was here in contemplation. Millar was to be the only person from whom these golf balls could be obtained. It was also clearly within the contemplation of parties that there should be sub-sales. Moreover, this was not an article with which the purchaser could supply himself in the open market. This was clear as regards the lower priced balls, and it was practically the case as regards the other balls too, because Millar could not get balls of the desired quality except by paying as much for them as his customers would give him; and further, what he stipulated for was a superior ball to be supplied only through him, and to be associated in the trade with his name. In these circumstances the result of the application of the general rule above stated to the facts of the present case was that Millar was entitled, in addition to an allowance for loss of profit on the balls delivered, to an allowance (1) for expenses incurred, (2) for loss of future profits which he would have got if the balls had been conform to contract, and (3) for loss of business reputation. Damages for all loss of profit resulting from the breach were allowable by the law of Scotland—*Dunlop* v. *Higgins*, February 24, 1848, 1 H.L. Ca. 381, *per* Lord Cottenham L.C. at pp. 401 and 403; Mayne on Damages (5th ed.) 58; *Watt* v. *Mitchell*, *cit.*; *Duff & Company* v. *Iron and Steel Fencing and Buildings Company*, Dcember 1, 1891, 19 R. 199. The law of England probably differed from the law of Scotland upon this question—*Dunlop*, *cit.*, and Mayne, *loc. cit.* English cases such as *Thol* v. *Henderson* (1881), 8 Q.B.D., were therefore not in point. The purchaser was entitled to the profits which he would have made upon sub-sales—*Dunlop*, *cit.* In this case, from the nature of the contract which was for a continuing supply of the articles contracted for over a considerable period, a continuing supply which the respondents could not give, something should be allowed for loss of future profits. At any rate, when, as here, the purchaser could not supply himself in the open market, he was entitled to an estimated amount for loss of profits—*Duff & Company* v. *Iron and Steel Fencing and Buildings Company*, *cit.* Even in England if he had fair notice of the action the original seller was liable for the damages and costs recovered from the purchaser in an action for breach of contract by a sub-vendee, provided that sub-sales, as in this case, were within the contemplation of the parties to the original sale—*Hammond & Company* v. *Bussey* (1887), 20 Q.B.D. 79; see also *Barkley & Sons* v. *Simson*, January 16, 1897, 24 R. 346. (2) As to damages for loss of business reputation, these were also allowable—*Thomson & Company* v. *Dailly*, July 20, 1897, 24 R. 1173. Such damages were due when the amount of the injury could be proved with reasonable certainty, and the injury was a natural consequence of the wrong and could not have been avoided—Sedgwick on Measure of Damages (7th ed.) 138, note (*a*). All these conditions were fulfilled in the present case. [LORD TRAYNER referred to Shearman and Redfield on Negligence, par. 597]. The damages claimed here were not more remote or consequential than those allowed in the cases of *Robertson* v *Conolly*, February 25, 1851, 13 D. 779; *Smith* v. *Green* (1875), 1 C.P.D. 92. Even if nothing were allowed for loss of business reputation, the amount of damages awarded by the Sheriff-Substitute was amply justified by the evidence as to the loss of prospective profit.

Argued for the respondents—(1) The appellant was not entitled to damages for loss of business reputation. In no case had such damages been allowed, although in very many actions of damages for breach of contract such loss could have been established. *Thomson & Company* v. *Dailly*, *cit.*, was an action of damages for a wrong perpetrated by means of a fraud, and not an action of damages for breach of contract. Moreover, apart from the general question, no such damages should be allowed where the article to be supplied was in the nature of an experiment which proved unsuccessful. The appellant had to take the risk of that. This was especially so when the object in view was to supply a good article at a specially low price. (2) Where damages were claimed on account of the article supplied not being conform to contract, as here, the damages allowable were limited to loss on the articles delivered and rejected

as not conform to contract, and further consequences could not be considered—*Hadley* v. *Baxendale, cit.*; *Watt* v. *Mitchell, cit., per* Lord Medwyn at page 1166. In *Duff & Company* v. *Iron and Steel Fencing and Buildings Company, cit.*, the damages were limited to the loss of profit on huts actually supplied and returned. Here the respondents were prepared to admit liability for loss of profit in connection with the goods actually supplied and returned. There was no case in which anything more had been allowed. It was to be observed that there was here no contract for a supply of balls for any particular period. Nothing was arranged as to the duration of the contract. It was only in exceptional circumstances that anything for loss of profit was allowed at all. Even damages obtained by subvendees in consequence of the original seller's breach were not allowable unless the original seller knew that a subsale was intended—*Thol* v. *Henderson, cit.*; *Grébert Borgnis* v. *Nugent* (1885), 15 Q.B.D. 85, *per* Brett, M.R., at page 89; Mayne on Damages (5th ed.) 41. These cases were *a fortiori* of the present. As to the other authorities cited for the appellant, the statement in *Sedgwick, cit.*, was only in a note to the second edition; the passage quoted from *Shearman* and *Redfield, cit.*, occurred in the chapter on the measure of damages in actions for negligence; *Robertson* v. *Connolly, cit.*, was a case of damages for negligence or fault; in *Smith* v. *Green* the action was laid on warranty, and here there was no warranty. Even if as a general rule damages for loss of future profits and of business reputation were allowable they should not be awarded here, because what the balls failed to do, so far as the appellant's customers were concerned, was to justify the appellant's laudatory advertisement which promised articles far superior to those contracted for. When the customers deponed that they would have taken large quantities of the balls if they had answered expectations, they were referring to the expectations held out in the advertisement, for which the respondents were not responsible. The respondents were not liable for loss of profits which might have been obtained if the balls had fulfilled the promise made in the puff which the appellant had seen fit to insert in a newspaper.

Lord Trayner—This is an action to recover damages for breach of contract. The terms of the contract are not in dispute. Nor is the breach of it matter of dispute. The question is as to the damages which are due for the breach. How are they to be measured? Allusion has been made upon that question to the terms of an advertisement which the pursuer Millar issued, in which he spoke in very high terms of the golf balls which he was prepared to sell. I do not say that the defenders were bound to supply him with golf balls for his trade such as he had advertised. But they were bound to supply him with a good ball such as would compete with other good balls already in the market and might even take precedence of them. They failed to do so, and are therefore in breach of their contract. The Sheriff-Substitute and the Sheriff have differed in their respective assessment of the damages thence arising. I am not sure that sitting as a judge of first instance I should have arrived at precisely the same result with either the Sheriff or Sheriff-Substitute. But I am satisfied that the amount awarded by the Sheriff-Substitute was warranted by the evidence, and am not satisfied that the Sheriff has stated any good reason for interfering with it. The elements contained in the award of the Sheriff-Substitute are loss of profit on balls actually supplied to the pursuer by the defenders, and loss of profit on those which he would in all probability, as the evidence shows, have disposed of in the course of one year after the breach. I think it is needless to go further and to consider whether anything is to be awarded beyond that on the ground of injury to trade. I am satisfied that the pursuer's trade has been injured, and that it will take at least a year or two for it to recover from the injury done. But I think that if we give damages sufficient to cover the two grounds of loss which I have mentioned, we are giving the damage which, in this case is the direct consequence of the breach, and a consequence which might reasonably have been in the contemplation of the parties when the contract was made.

I think we should revert to the judgment of the Sheriff-Substitute.

Lord Moncreiff—I agree. The Sheriff appears to have construed the Sheriff-Substitute's judgment as if it proceeded on the footing that the pursuer Millar was only entitled to loss of profit upon the balls which were actually sold to him by the defenders, and to outlays and expenses incurred in connection with the sale of those balls. If that view were correct, then the damages awarded by the Sheriff Substitute were undoubtedly excessive. But on examining the Sheriff-Substitute's interlocutor and note I think it sufficiently appears that the damages which he awarded were not merely for loss of profit on the balls actually sold to the pursuer, but also for loss of prospective profit upon the sale of balls to be afterwards supplied according to the contract if the balls had proved to be merchantable. In that view, and if damages are to be allowed on the head of loss of prospective profit, I am of opinion that there is evidence to support the Sheriff-Substitute's award, and I see no ground for interfering with his award, although I think it ample.

The question then comes to be, whether the pursuer is entitled to damages for loss of such prospective profits. That depends upon the question whether, when the contract between the pursuer and the defenders was entered into, it was known to the defenders that the pursuer intended to carry on an extensive wholesale trade in the sale of balls to be supplied by the defenders. Now I think we must take it that the defenders knew that the pursuer in-

tended to give them large orders for balls, and to embark on an extensive trade; and moreover, to give up his own old trade in made-up balls. I think further that if the defenders had furnished the pursuer with a really merchantable ball, it is clear on the evidence that he would have done a considerable trade in them, and made a considerable profit on them for at least a year. In estimating damages for loss of such profits we must be cautious; I should not be prepared to go beyond the profits for one year. But the evidence shows that, allowing £40 as the damages due on the balls actually sold and rejected, the difference between that sum and £225, the sum awarded by the Sheriff-Substitute, is sufficiently made up by what the professionals examined say the pursuer would have made during one year if the balls had been such as the defenders contracted to supply.

I am therefore of opinion that the Sheriff-Substitute's award of damages was made upon the correct principle; that there is evidence to support it as regards amount, and that consequently we ought not to disturb it.

I may add that in what I have said I leave out of view altogether damages claimed in respect of injury to the pursuer's business.

Lord Justice-Clerk — If it had been necessary to decide whether the pursuer was entitled to damages for injury to his business, I would have desired more time to consider our judgment, but as I agree with your Lordships that this case can be decided without considering that question, I think we are now in a position to give our decision. I agree with your Lordships that the pursuer was entitled not only to the profit which he would have made on the balls actually rejected, but also to the profit which it can be reasonably estimated that he would have made during one year if he had been supplied by the defenders with a ball such as they contracted to give him. In this view there is ample evidence to support the judgment of the Sheriff-Substitute, and I can see no reason for interfering with it as the Sheriff has done.

Lord Young was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff dated 28th July 1898, as also the interlocutor of the Sheriff-Substitute dated 16th May 1898: Find in fact (1) that in May 1896 and July 1897 the party Millar, who is an agent or merchant dealing wholesale in golf-balls and golf appliances in Glasgow, contracted with the defenders, who are manufacturers, to supply him with (*a*) a medium-priced golf ball made of a good class of gutta-percha, such as would take the place of ordinary re-made balls; and (*b*) a higher class of golf balls of the best gutta-percha, fit to be sold at about the same price as the ordinary first class of golf balls; (2) that it was agreed that these should be marked 2 XL and 1 XL respectively, and should be made for and supplied to the party Millar only; (3) that the balls were made and delivered in large quantities to the party Millar, and resold by him to his customers; (4) that large numbers of the 1 XL balls were returned by the buyers to Millar as being unplayable, and therefore unmerchantable, and that in May 1897 the parties, the Bellvale Chemical Company, agreed to take back all the 1 XL balls so returned as unmerchantable; (5) that the balls marked 1 XL, so supplied to Millar, were in point of fact unmerchantable balls not fit for golf playing, and were disconform to contract, and not such as the Bellvale Chemical Company were bound to supply; (6) that besides those already returned, the party Millar has on hand and has offered to return 64 dozen of said balls which the parties, the Bellvale Chemical Company, are still bound to take back, amounting to £23, 11s. in value—a sum exceeding the amount sued for by the Bellvale Chemical Company: Therefore assoilzie the defenders in the action the Bellvale Chemical Company and Millar, and decern: Find (7) that the 2 XL balls turned out to be to a very large extent worthless, and were returned in large numbers to the party Millar; (8) that the said balls marked 2 XL supplied to Millar were in point of fact disconform to contract, and not such as the said Bryce and Robertson were bound to supply; (9) that Millar has at present 104 dozen which the said Bryce and Robertson are bound to take back, and which he is ready and willing to deliver to them, the invoice price being about £26; (10) that this exceeds the amount sued for in the action by Bryce and Robertson and Millar: Therefore assoilzie the defender in that action, and decern, but supersede extract of the decrees of absolvitor in both actions until a receipt has been lodged in process bearing that the party Millar has delivered the balls in his hands as above stated: Find that by the breaches of contract as above found, the party Millar has suffered serious loss of profit, and that he also incurred expenses in carriage, advertising, and otherwise: Find in law that the said Bellvale Chemical Company and Bryce and Robertson are respectively liable for such loss and damage: Therefore find the said Bellvale Chemical Company and Bryce and Robertson respectively liable to the party Millar in damages: Assess the same as against the parties the Bellvale Chemical Company and A. S. Bryce junior at the sum of £150 sterling, and as against the parties Bryce and Robertson at the sum of £75 sterling, for which decern in the actions against the said parties respectively at the instance of the party Millar: Find the party Millar entitled to expenses in the Sheriff Court in the conjoined actions, including additional allowances for making

investigations prior to the proof to the witnesses Dr Clark, Morris, Simpson, and Campbell as allowed by the Sheriff-Substitute, as also to the expenses of process in this Court," &c.

Counsel for the Pursuer Millar — Ure, Q.C.—Aitken. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Defenders—C. K. Mackenzie—J. J. Cook. Agents—Gill & Pringle, W.S.

Thursday, December 15.

FIRST DIVISION

[Lord Kincairney, Ordinary.

HOPE *v.* HOPE'S TRUSTEES.

(*Ante*, Feb. 19, 1896, vol. xxxiii., p. 352, and 23 R. 513; July 28, 1898, vol. xxxv., p. 971.)

Appeal to House of Lords—Leave to Appeal.

Leave to appeal to the House of Lords against an interlocutor appointing a case to be tried before a jury *refused*.

An action was raised by James Hope, W.S., Edinburgh, and others, against the trustees of the deceased John Hope, W.S., concluding for reduction of his trust-disposition and relative codicils, and for declarator that he died intestate.

The truster had left his estate for charitable purposes, and in particular for the promotion of teetotalism and the prevention of the spread of the doctrines of the Church of Rome, and the pursuer averred that he was subject to insane delusions on these topics.

The Lord Ordinary (KINCAIRNEY) and the First Division held that these averments were irrelevant, but the House of Lords, on August 1st 1898, reversed the interlocutor and remitted the case to the Court of Session.

The pursuers contended that the case should be tried before a jury, while the defenders asked for proof.

The Lord Ordinary (KINCAIRNEY) on 28th October found that the inquiry should be by jury trial, and the defenders having reclaimed against this interlocutor, the First Division on 13th December refused the reclaiming-note.

The defenders presented a petition craving for authority to appeal to the House of Lords.

Argued for petitioners — There were special causes here why the case should not go before a jury. The delicacy and difficulty of it rendered it far more appropriate to be tried by a Judge.

Argued for respondents — This was a question for the discretion of the Court, and no cause had been shown for granting the application—*Scottish Rights of Way Society* v. *Macpherson*, November 16, 1886, 14 R. 75.

LORD PRESIDENT—It is admitted that this is a question of procedure and is within the discretion of the Court. In these circumstances it is only on special grounds that we should depart from the ordinary rule, and I have not heard any such stated.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court refused the prayer of the petition.

Counsel for the Petitioners—J. Wilson. Agents—Macpherson & Mackay, W.S.

Counsel for the Respondents—C. K. Mackenzie. Agents—Dundas & Wilson, C.S.

Friday, December 16.

FIRST DIVISION.

[Sheriff Court of Edinburgh.

BROATCH *v.* PATTISON.

Process — Appeal from Sheriff — Value of Cause—Petition for Cessio.

Held that an appeal against an interlocutor of the Sheriff pronounced in a petition for cessio was competent, though the amount of the debt stated in the statutory notice was under £25.

Process—Appeal from Sheriff—Caption.

An order of caption is an order of a court for the recovery of documents belonging to itself, and is not an interlocutor in a cause, and accordingly the refusal by a Sheriff-Substitute to grant caption *held* not to be subject to review by the Court of Session.

A petition was presented in the Sheriff Court of Edinburgh by Mr Robert Broatch, solicitor-at-law, Edinburgh, against Mr Peter Pattison, watchmaker, Edinburgh, craving the Court to order the defender to execute a disposition *omnium bonorum* for behoof of his creditors, and to appoint a trustee to manage his estate.

The pursuer averred that he was a creditor of the defender to the extent of £12, 9s. 2d., conform to a debts recovery decree and expenses of diligence thereon, and that the defender having been duly charged, the charge had expired without his making payment.

The defender lodged a caveat, and the Sheriff-Substitute (ORPHOOT) on 22nd February 1898 refused the petition.

The pursuer appealed to the Sheriff (RUTHERFURD), who on 16th March pronounced an interlocutor whereby he adhered to the interlocutor of the Sheriff-Substitute, and found no expenses due to or by either party.

The defenders' agent having demanded caption for return of the proceedings in the cessio, the Sheriff-Substitute (DOVE WILSON) on 15th April pronounced an order whereby he "refuses the sheriff-clerk's application for caption."

The defender appealed against the interlocutor of 16th March and the order of 15th April.