were taken in their own name. The prices for the goods included freight and insurance to Glasgow.

No doubt if on arrival of the goods at Miramichi they had been delivered to the buyers or their agent it might have been held that transit was at an end; but this was not done. The goods were put on board the vessel by the sellers and were still on board when the stoppage took place.

The only clause on which the claimant Reid can found is that in the agreement—"The goods are deliverable in the usual and customary manner at Miramichi," &c.

But this clause must I think be read in the light of the rest of the document, and so read amounts to no more than this, that the goods were to be brought to Miramichi in due time to be shipped there during the shipping season.

The second question is whether the claim for the sellers is barred by their having endorsed the bills of lading in exchange for acceptances by M'Dowall & Neilson. In my opinion the payment so made was conditional, and as the acceptances were immediately found to be worthless owing to the insolvency of the buyers, Snowball Company, Limited were unpaid sellers in the sense of section 44 of the Sale of Goods Act, and were entitled to stop the goods *in transitu* and resume possession of them. The acceptances were not those of a third party but those of the buyers themselves, and they could not have been discounted.

In these circumstances I am of opinion that the mere addition of the word "approved" has not the effect of depriving the payment of its conditional character. I am therefore of opinion that the Lord Ordinary has rightly sustained the claim for the sellers J. B. Snowball Company, Limited.

The Court adhered.

Counsel for the Claimant and Reclaimer M'Dowall & Neilson's Trustee—Clyde, K.C. — MacRobert. Agents — Drummond & Reid, W.S.

Counsel for the Claimants and Respondents J. B. Snowball Company, Limited—Salvesen, K.C. — C. N. Johnston, K.C. — Horne. Agents—Webster, Will, & Company, S.S.C.

Saturday, November 12.

FIRST DIVISION.

[Bill Chamber — Lord Stormonth Darling, Ordinary.

TRAIN *v.* STEVEN.

Bankruptcy—Process—Procedure in Petition for Sequestration—Citation of Debtor—Voucher of Debt under Suspension—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 26.

In a petition presented by A for the sequestration of B's estates, A produced as a voucher of the debt an *ex facie* valid assignation to her by C of a decree in his favour against B for upwards of £50 (the statutory limit), together with the execution of charge. Previous to the presentation of the petition arrestments for more than the sum in the decree had been used in B's hands by certain creditors of C (the assignor of the decree), and B in turn had raised a suspension of the charge and relative warrant and also an action of multiplepoinding, the fund *in medio* in which was the sum in the decree. Both the suspension and multiplepoinding were in dependence at the date of the presentation of the petition.

Held (*rev.* judgment of Lord Stormonth Darling, who as Lord Ordinary on the Bills had dismissed the petition on the ground that the voucher produced was under suspension) that the procedure prescribed by section 26 of the Bankruptcy (Scotland) Act 1856 was peremptory, and that warrant to cite the debtor must in the first instance be granted, any question as to the sufficiency of the voucher produced falling to be considered thereafter.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), section 26, enacts—"When a petition for sequestration is presented without the consent of the debtor . . . the Lord Ordinary or Sheriff to whom it is presented shall grant warrant to cite the debtor . . . to appear within a specified period, if he be within Scotland, by delivering to him personally, or by leaving at his dwelling-house or place of business, or the dwelling-house or place of business last occupied by him, a copy of the petition and warrant, and if the debtor or his successor be furth of Scotland, to cite him to appear within a specified period by leaving such copy at the Office of Edictal Citations, at the dwelling-house or place of business last occupied by him . . . to show cause why sequestration should not be awarded; and the Lord Ordinary or the Sheriff shall, if desired, grant diligence to recover evidence of the notour bankruptcy or other facts necessary to be established."

On September 9, 1904, Miss Isabella Train, residing at Wesley Cottage, Eskbank, presented a petition for sequestration against William Charles Steven, C.A., Edinburgh.

The petitioner stated that she was a creditor of Steven to the extent of £61, 13s. 10d.,

conform to the state of debt and vouchers produced; that Steven was on 16th August 1904 made, and still was, notour bankrupt, conform to decrees dated 17th May and 11th June 1904 and execution of charge dated 1st August 1904; that he had within a year previous to the petition resided in and had a place of business in Scotland; and that his estates were liable to be sequestrated in terms of the Bankruptcy (Scotland) Act 1856 and Acts amending the same.

The circumstances in which the petition was presented were stated by the respondent in a minute which he lodged *pendente processu* to be as follows:—By decree dated 11th June 1904 pronounced in another process the respondent had been decerned to pay £59, 7s. 4d. of expenses to A. W. Gordon, solicitor, as agent-disburser for a compearer, and on 1st August he (Steven) was charged at Mr Gordon's instance to pay him that amount with £1, 12s. as dues of extract. On 13th June and 13th August, before the sum in the decree had been paid, arrestments were lodged in the respondent's hands for £12 and £60 respectively by two creditors of Mr Gordon. On 15th August the respondent was requested by Mr Gordon to pay the said sums of £59, 7s. 4d. and £1, 12s. to the petitioner. On 30th August the respondent raised in the Sheriff Court at Edinburgh an action of multiplepoinding calling the arresters, the petitioner, and A. W. Gordon, the fund *in medio* being the sum in the decree. On 7th September the respondent lodged in the Bill Chamber a note of suspension against Mr Gordon for suspension of the said charge, and whole grounds and warrants thereof, in respect of the double distress created by the arrestments and also in respect of the action of multiplepoinding. On 9th September the present petition was presented by Miss Train, to whom on 11th August the said decree had been assigned by Mr Gordon.

The prayer of the petition craved the usual warrant to cite the respondent, and the usual order directing notice of the warrant and diet of appearance to be made in the *Edinburgh Gazette*, &c.

Caveats having been lodged in the Bill Chamber, the Lord Ordinary officiating on the Bills (STORMONTH DARLING) heard parties both in the sequestration process and in the suspension, and on 9th September pronounced this interlocutor — "The Lord Ordinary having heard parties on the caveat, in respect the voucher produced with the petition is under suspension, dismisses the petition."

The petitioner reclaimed.

In his minute the respondent averred — "The sum stated in the petition as £61, 13s. 10d. is incorrect. . . . The respondent is perfectly solvent and is prepared to pay the amount in the decree to the person or persons having just right thereto. *Ex facie* of the taxed account on which the decree proceeded, £25, 4s. or twenty-four guineas thereof consists of counsel's fees, besides £2, 10s. of their clerks' fees, which the respondent avers have not been paid to counsel or their clerks by Mr Gordon, and the decree for which is not assignable by Mr Gordon, he being personally bound to account to counsel and their clerks therefor when recovered. That these fees have not been paid has been admitted by Mr Gordon. The petitioner did not give any consideration for the assignation of said fees to her, the consideration set forth in her assignation being only £25. The petitioner is thus not a creditor of the respondent, whose debt amounts to not less than £50, as required by section 14 of the Bankruptcy (Scotland) Act 1856. The petition is therefore incompetent." He further averred—"He is willing and hereby offers to consign said amount in the present process if your Lordships should be of opinion that such consignation can be competently and appropriately made, and is necessary for the affirmance of the interlocutor reclaimed against."

Argued for the petitioner and reclaimer—The usual first order ought to have been pronounced. The statute was peremptory, and warrant to cite ought to have been granted—*Hope* v. *Macdougall*, November 7, 1893, 21 R. 49, 31 S.L.R., 47.

Argued for the respondent—No proper voucher, as required by section 21 of the Bankruptcy (Scotland) Act 1856, had been produced, as the decree was under suspension. Further, the sum in the decree had been claimed by several parties and was the subject of a multiplepoinding. [LORD KINNEAR—Section 26 is the section that deals with procedure, not 21]. The debt was below the statutory value, for it partly consisted of counsel's fees, and these were not assignable. [LORD PRESIDENT—But the assignation is *ex facie* valid]. To constitute notour bankruptcy there must be concurrence of an expired charge and insolvency—section 6 of the Debtors (Scotland) Act 1880—and the respondent was perfectly solvent. [LORD KINNEAR—That is just the same question in another form; the point is, what is the proper time to prove all that?] There had been satisfaction of the debt by consignation—section 30 of the Bankruptcy Act 1856—and the petition should therefore be dismissed—Goudy on Bankruptcy (3rd ed.), p. 154; *Alexander* v. *Barclay*, January 14, 1845, 7 D. 264. [LORD KINNEAR—Any discretion which existed under the Act of 1839 was put an end to by the Act of 1856.]

LORD PRESIDENT — I think the Lord Ordinary has erred here, and that he should have ordered service in the ordinary way. The reason which he gives for not doing so is that the voucher produced with the petition is under suspension. It is not said that it is bad *ex facie*, or even that it could be instantly verified to be bad, but merely that it is challenged—it may be on good grounds or without good grounds—and the result of the interlocutor being allowed to stand would be, that while the question of the vouchers is being considered in proceedings quite extrinsic to this petition, the order of service would not be made. It seems to me that if this were to be sus-

tained as a sufficient reason for refusing an order to cite, it would place an impediment in the way of sequestration with the benefits which it confers in the way of cutting down or preventing the acquisition of preferences which would be most unfortunate. It seems to me therefore that the Lord Ordinary should have granted a warrant to cite the debtor, seeing that there was no instant verification of anything which would be a ground for refusing that order.

LORD ADAM—I had occasion to express my opinion upon this question in the case of *Hope* v. *Macdougall*, and I remain of the opinion, which was the opinion of the Court, that the proper course in such circumstances as were present here was to pronounce an order for service.

LORD M'LAREN—I concur.

LORD KINNEAR—I agree. I think the procedure prescribed by the statute is peremptory. It may turn out that this petition for sequestration is not competent or not sufficiently supported, but meantime the statutory course must be followed. It may be that if the petitioning creditor fails to produce any account or vouchers as required by the 21st section the petition may be dismissed *de plano*. But if a question arises as to the sufficiency of vouchers actually produced it cannot be decided or considered until after citation.

The Court allowed the minute for William Charles Steven to be received, recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary on the Bills to grant the usual order of citation of William Charles Steven, and to proceed as might be just.

Counsel for the Reclaimer—W. Thomson. Agent—A. W. Gordon, Solicitor.

Counsel for the Respondent—M'Lennan—Munro. Agents—Macdonald & Stewart, S.S.C.

Wednesday, November 16.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

MARQUESS OF BUTE'S TRUSTEES *v.* ROMAN CATHOLIC BISHOP OF ARGYLL.

Succession—Trust—Bequest—Conditional Bequest for Building Churches—Literal Fulfilment of Conditions Impossible Owing to Lack of Endowment—Intention of Testator—Cy-près—Proposal to Accumulate Held ultra vires—Lapse of Bequest.

A testator directed his trustees to expend two sums of £20,000 each upon the erection of two Roman Catholic churches or monasteries, or "such smaller sum or sums as may be necessary . . . my intention being merely to have such church and church or monastery completed although it may be at a less cost than £20,000 each." Any unexpended balance was to revert to the residue of his estate. Except for a provision of £10,000 for the endowment of one of the two churches the trust-disposition and settlement contained no provision for endowment. Upon the completion of the buildings the trustees were directed to convey them, on certain specified conditions, to trustees to be appointed by two Roman Catholic Bishops named.

After the death of the testator the Bishops, who were the ecclesiastical authorities by whom the conditions could alone be carried out, stated their inability to accept the bequests under the conditions specified, on the ground that owing to lack of endowment the conditions could not be implemented. The Bishops proposed that the testamentary trustees should either accumulate the funds till they amounted to a sum sufficient to build and endow the churches, or immediately expend a portion of the funds on the erection of the buildings and set aside the remainder to form an endowment fund. The trustees were willing to accede to this proposal if authorised by the Court.

Held (*rev.* judgment of Lord Kyllachy, Ordinary) that the proposal was contrary to the truster's intention and *ultra vires*, and that the bequests having lapsed owing to the refusal of the Bishops to accept them on the conditions specified, the two sums of £20,000 reverted to residue.

The Marquess of Bute died on 9th October 1900, leaving a trust-disposition and settlement dated 13th July 1894. By it he bequeathed, *inter alia*, "to such trustees as may be named for the purpose by the Right Reverend George John Smith, Roman Catholic Bishop of Argyll, whom failing, by his successor in that office for the time, a sum of £10,000, the income of said sum to be applied by them for the upkeep of daily Roman Catholic Cathedral service at Oban in the church to be built there by my trustees, or elsewhere in Oban. . . . To my trustees the sum of £40,000 (in lieu of a sum of £60,000, which I have now reduced by £20,000, being the sum which I have undertaken to provide in connection with the transference of Blairs College to St Andrews), and that for the purpose of erecting and completing by themselves, or in conjunction with others, according to plans to be approved of by my trustees, a Roman Catholic church at Oban and a Roman Catholic church or monastery at Whithorn (the said church at Oban and church or monastery at Whithorn to be built by my trustees at the said places in the order in which they are above named, and that at a cost to my trustees of not more than £20,000 for said church at Oban, and £20,000 for said church or monastery at Whithorn, but my trustees shall not expend in these erections or either of them more than £10,000 in any one year; and they shall build said church or monastery