plea is retention in respect of no delivery, is not exactly the same as the case of *Hansen*, where the question was one of risk. But still, in judging of the effect of a delivery-order presented or intimated to a custodier, we must consider whether anything remained to be done by the seller, and, if so, whether what did remain to be done had the effect of suspending delivery. It is not said that in this case anything remained to be done by the seller for ascertainment of the subjects sold, or of the number, weight, measure, or price thereof. Anything of this kind might have had a suspensive operation. But that has not been maintained; and is at all events out of the case.

I think that the sale was here completed by the granting and due intimation of the delivery-order, and that any arrangement by the parties in regard to sacks was not so made as to be an intrinsic quality in the transaction of sale, and to be a condition suspensive of delivery. Accordingly, I concur with your Lordships in adhering to the judgment of the Sheriff; this opinion being formed irrespective of the question of specification, on which, however, I do not mean to indicate any difference of opinion.

Advocation refused, with expenses.
Agent for Advocators—John Ross, S.S.C.
Agent for Respondents—D. J. Macbrair, S.S.C.

Friday, December 13.

SECOND DIVISION.

MURRAY AND OTHERS *v.* MUIR.

Trust—Power of Trustees to enter into a Submission—Personal Bar. Held (1) that trustees, on whom a power to submit had not been conferred, had no power to enter into a submission in reference to a claim of £700 said to be due to the trust-estate under an alleged partnership; (2) that although the arbiter had decided in favour of the trustees, the opposite party was not bound to implement the award, an objection founded on the trustees' want of power having been taken before the arbiter had issued his award, but after he had issued notes of his proposed findings; and (3) that the opposite party was not barred from taking the objection.

This was an action for payment of a sum of money found due by an arbiter under a submission. The pursuers were the trustees of David Thomson, a contractor in Dundonald, and the defender is the sole surviving executrix-nominate of James Thomson, a coach-builder in Dundonald. David and James Thomson were brothers, and are both now dead. They were partners in business, as the pursuers alleged, from 1838 to 1854, when David died. In 1865 the pursuers raised an action of count and reckoning in regard to David's share of the profits of the business, and for payment of £700 as the balance due to him at his death. The defence was—(1) a denial of the partnership; and (2) no resting-owing. After defences were lodged, the parties agreed to refer the whole questions raised by the action to Dr William Alexander, of Dundonald. The arbiter accepted the reference, and shortly thereafter the defender admitted that there had been a partnership, but denied that any balance was due. On 11th September 1865, the arbiter issued notes of the findings proposed by him. He intimated his intention to find that £600 was due to the pursuers. Both parties lodged representations. On 5th December 1865, the parties met the arbiter for the purpose of being heard on the representations. At this meeting the defender's agent, for the first time, objected to farther proceedings, in respect that the pursuers had no power either at common law or under their trust-deed to enter into a reference. The agents of the parties were then heard, and signed a minute renouncing probation. On 9th May 1866 the arbiter issued his award, in which he found the defender liable to the pursuers in the sum of £623, 5s. 4½d., with interest from 27th June 1854, and also in expenses, which he modified to £27. This action was now raised for payment of these sums.

The defender pleaded:—"The defender is not bound to implement the said decree-arbitral in respect the said minute of reference, and the whole proceedings following thereon, including the decree-arbitral, are inept and invalid, inasmuch as the pursuers had no power by the deed under which they act to enter into the reference.

A proof was led before the Lord Ordinary, from which it appeared that the trust-deed under which the pursuers acted had been prepared in the office of the defender's agent, and that an extract of it had been produced in Court along with the summons in the action which was referred. The defender and her agent, however, deponed that when the reference was entered into they believed that the pursuers had power to refer.

The Lord Ordinary (Jerviswoode) pronounced the following interlocutor:—

"*Edinburgh, 15th February* 1867.—The Lord Ordinary having heard counsel on the evidence led before him, and on the whole cause, and made avizandum, and considered the said evidence, record, productions, and whole process: Finds, in point of fact, 1st, that after certain procedure in the action referred to in the third statement of facts for the defender, a proposal was communicated by William Alexander, M.D., to the defender, with the knowledge of the pursuers, that the action referred to in the third statement of facts should be made subject of reference, and that a minute of reference was thereafter entered into to the said Dr Alexander as arbiter; 2d, that no question was at first mooted in the reference, or otherwise, as to the power of the trustees to enter into the said reference, and that the defender entered into the same on the assumption of the power of the pursuers so to do; 3d, that thereafter, and more particularly on the occasion of a meeting on the subject-matter of the reference at Irvine, on the 5th December 1865, an objection was taken before the arbiter by the defender, or on her behalf, in terms of the minute No. 32 of process, to any farther procedure in the reference, on the special ground that the trustees (pursuers) held no power sufficient to authorise them to enter into the reference; 4th, that thereafter the arbiter, disregarding the said objection, proceeded to issue the award or decree-arbitral on which the present action is rested; 5th, that the trust-deed under which the pursuers act contains no clause purporting to confer power on the pursuers, as trustees, to enter into arbitration in relation to the property conveyed in trust; and finds, in point of law, that the subject-matter of the submission to the arbiter, Dr Alexander, under which the said decree-arbitral was pronounced, was

not such as, in the absence of express power to that effect, was within the competency of the pursuers, as trustees, to refer to arbitration: Therefore sustains the first plea in law for the defender, and assoilzies her from the conclusions of the summons, and decerns: Finds the pursuers liable to the defender in the expenses of process, of which allows an account to be lodged, and remits the same to the Auditor to tax, and to report.

"CHARLES BAILLIE."

"*Note.*—This, as it appears to the Lord Ordinary, is a case of considerable importance as respects the general question of power of trustees to submit a matter involving the right to the subject-matter of the trust to arbitration where the trust-deed is silent on the subject. The authorities in the books are not so direct as, perhaps, might have been expected on such a point. But the opinion of the late Mr J. M. Bell, in his work on Arbitration, sect. 204, seems explicit against the existence of the power where not expressed; and the Lord Ordinary is induced, on principle, to take the same view, so far at least as applicable to all cases where, as here, the question at issue and proposed to be submitted relates to the right of property in the subject-matter of the trust-estate itself. The Lord Ordinary can conceive cases arising in the course of, and truly within the administration of the trust, in which, as a prudent step of management, a reference to a person who, from professional skill in the special subject-matter of a dispute, might, as arbiter, form the most proper and unobjectionable tribunal for the determination of the question. But this view can have no application here, where important rights of property, involving the whole trust-estate, was placed in the hands of a person respectable in general position no doubt, but in no respect skilled in the particular subject of the reference.

"C. B."

The pursuers reclaimed.

SOLICITOR-GENERAL (MILLAR), YOUNG, and BURNET, for them, argued—1. Trustees have at common law power to submit when submission is a fair and reasonable mode of obtaining the settlement of a claim due to or by the estate. (Bell's Prin., § 1998; *Anderson*, 7th March 1855, 17 D., 596.) In this case it was a most expedient course to resort to, because the matter in dispute was a simple accounting in regard to the funds of a partnership, the members of which were brothers. 2. The opposite party, who has lost her cause, is not entitled to plead this objection to the prejudice of the trust-estate, and for her own benefit. The beneficiaries are not challenging the pursuers' act, and have no interest to do so. Besides, the beneficiaries are the trustees themselves in their character of tutors and curators of the truster's children. 3. The defender is further barred from taking the objection by reason of the time at which it was taken. The cases of *Brown*, M., 16,359; and *Warwick* v. *Bruce*, 2 Maule & Selwyn, 205, were referred to.

CLARK, SHAND, and THOMSON, for the defender, replied—1. Trustees had no power to refer until the passing of the recent Trusts Act, 30 and 31 Vict., c. 97, unless it was given them in the trust-deed. 2. The defender having stated the objection as soon as it came to her knowledge, she did all that could be expected of her.

The Court adhered.

At advising,

LORD JUSTICE-CLERK—This action is brought to enforce a decree-arbitral pronounced in a submission between the trustees under a post-nuptial contract executed by the late David Thomson and Jean Hopkin, his wife, and Mary Dale Muir, executrix-nominate of James Thomson, coachbuilder, in Dundonald. The pursuers had raised, in January 1865, an action in this Court against James Thomson's executors for a balance said to be due on alleged intromissions of the deceased James Thomson with funds belonging to the company of Mathew Thomson & Sons, of which firm it was said that David Thomson was a partner. The summons concluded for payment of a sum of £700, on failure to account. The action having made some progress, was put an end to by a minute of agreement and reference between the pursuers and defender. By this minute the pursuers, described as trustees nominated and appointed by David Thomson and Jean Hopkin under their post-nuptial contract, on the one hand, and the defender as then representing the executry estate of James Thomson, agreed that the action in Court should be withdrawn, and that the matter in dispute should be referred to the amicable decision and decree-arbitral of Dr William Alexander, a friend of the family. No judicial step seems to have been taken in the process, but no further step was taken in the action, and Dr Alexander accepted of the reference, proceeded to make the necessary inquiries to enable him to dispose of it, and, on the 11th September 1865, issued notes to the parties who had appeared and taken part in the proceedings before him. In the notes issued by him, he proposed to affirm a fact which was at one time in dispute, but then admitted, that David Thomson was a partner of the firm up to his death. He further proposed to find that James and David were the sole partners of the firm, and after observations in reference to the state of the accounts, proposed to fix a balance as due by the present defender in her character of executrix of £600, but without interest and without expenses.

At this stage the defender, through her agent, raised the following objection. "As agent for Mary Dale Muir, I object to further proceedings of any kind being taken in this submission, in respect that the trustees had no power or authority to enter into the reference either under their title or at common law, and that the submission is therefore *ab initio* illegal and inept, and entirely *ultra vires*." The arbiter, holding the objection to involve a question of law, subject to which his decree-arbitral would fall to be pronounced, proceeded to consider the case with a view to a final judgment, the defender taking part in the discussion, and both parties acquiescing in the arbiter issuing his award without further notes. The result was the award sought to be enforced. The award was more unfavourable to the defender than if the views in the notes had been adhered to, inasmuch as interest was allowed on the balance found due since 1854, a balance slightly in excess of that pointed at was found due, and the expenses of the reference awarded against the defender. The pursuers represented beneficiaries who were under age, and some of them in pupillarity at the date of the submission, and who could only be bound, if the trustees had power to enter into such a submission under the deed under which they acted. The defender maintains that the contract of submission having been entered into by parties who had no power to bind the beneficiaries, was *ab initio* invalid. The objection was met by a plea of personal bar, founded on the fact of the defender having entered into the submission, taken part in the process, and only intimated her objection when the

arbiter had indicated unfavourable views. It would appear that the unfavourable indication of opinion led the defender's agent to inquire into the matter of the power of the trustees to submit, and that the objection was taken by him, on behalf of his client, so soon as discovered. It is said that he should have made the discovery before, having means of knowing. There seems no ground for holding that the defender proceeded to act under the submission in the knowledge of the objection without disclosing it, and, certainly, at the date when the objection was taken, nothing definitive had been done. The arbiter was not bound by the issue of notes, and he accordingly altered his views after issuing them. I do not see, therefore, that the circumstances of the case, as to the lodging of the objection, preclude the defender from raising the objection. Subsequently, the share of the proceedings taken by the defender must be viewed as under protest. If the objection, therefore, is a good one, the contract of submission was bad, and the decree-arbitral, the validity of which necessarily depends upon the validity of the contract of submission, must fall. If there was no power to submit, the power could not be conferred by the proceeding, and if there was a binding contract at the beginning, it renders her challenge invalid. The case of a submission terminated before objection may be different. The question then is, Whether by the deed the pursuers had power to enter into the reference? They were named tutors and curators to the children of the contracting parties, and as tutors may enter into contracts of submission, it was argued that these powers must be held to have been contemplated by the trusters to be exercised by their trustees. The answers made to this argument, viz., that they never took upon them the office, and that they entered into the agreement and reference in their separate and distinct character of trustees seem sufficient. That the trustees might, if entering upon another office, have validly exercised a power incident to that office is a reason why the truster may not have thought it necessary to confer on them that power in their separate character of trustees; but it is certain that, in defining the powers of his trustees, he gives them no special authority in the matter of submissions, and they never exercised, or pretended to exercise, powers higher than those of trustees.

The office of a trustee involves that of a mandatory of the truster and a depository of the trust-estate. The mandate is to manage and administer; the deposit or holding of the estate is to aid in the administration and management, and secure fulfilment of the trust purposes. While, therefore, such powers as are necessarily or properly incident to administration must be inferred from the appointment, powers in excess of what is necessary or proper administration cannot be so. When consideration is had of the act done in this instance, I cannot view it as an act occurring in the ordinary administration of an estate—as one of those acts incident to management—as an act necessary, or proper, or usual, to be done by a mere manager or administrator of a trust-estate. If an act of administration at all, it is certainly an act of extraordinary administration. It is not the mere management of an estate, but an act by which a voluntary delegation is made to an individual to determine whether to a great extent there shall or shall not be any estate to administer. Questions as to whether the truster was or was not a member of a firm? whether there were two or three partners in that firm, of which he is said to be a partner? and whether, as a liability resulting from intromissions with the affairs of the company, there was such intromission as to subject the estate in liability for such a sum as £700? were of the most vital and important character to this trust. To refer to a private party to solve them cannot, I think, be truly described as an act of ordinary administration, or be held to be warranted by a mere appointment to administer the estate. The truster reposed confidence in his trustees. Had the question been one of compromise, and the trustees, exercising their own judgment, been clear as to the expediency of a settlement, on terms as to which they had come to a conclusion that they should be entered into, the case would be wholly different. The difficulty here is, that the truster cannot be conceived to have placed the decision of such matters in the hands of a party of whom he may never have heard, and who may possibly be the very worst qualified person in the world to adjudicate upon the matter. There is all the difference in the world between a reliance on the judgment of one selected by oneself, and a reliance on the possible views of one chosen by another in a matter so vital. The truster can scarcely, by the nomination of a manager, be presumed to have placed in the arbitrament of that manager to select a judge through whose ignorance or folly his whole executry may be unjustly handed over to parties having no right to it. The very selection and appointment of the trustees, as implying special confidence in the trustee individually, is opposed to such a delegation of power as is implied in the act of submission. It would be very difficult to find anything to show, in the fact of appointment, that such an act as conferring upon a doctor of medicine a power to adjudicate upon a question of partnership and partnership-accounting was meant to be authorised by the truster. As to the authorities, Mr Erskine, who is no doubt writing as to the power of the mandatory of a living mandant, says:—"It is inconsistent with the duty of a mandatory, who is himself named by the mandant *propter delectum personæ*, to sub-commit the whole or the principal parts of his trust to a delegate"—(Ersk., 3, 3, 34). And views opposed to the power to refer are expressed by the late Mr Mongomerie Bell in his excellent treatise on Arbitration, and by Professors Menzies and Bell in their Lectures on Conveyancing. The fact of the recent statute having been passed, by which the matter is for the future set at rest, is not of much consequence in affirming any indication of the view of the Legislature as it may be held to have originated in the fact of the matter being considered doubtful and unsettled by any expressed decision. The only case which appears to bear the other way, is that of *Anderson*, where the Court refused a petition for power to compromise as unnecessary. We have not been referred to any cases in which the Court refused as unnecessary a petition for power to refer. The allusion of Lord Curriehill in the case of *Anderson* can scarcely be held to go so far as to sanction the doctrine that any submission is under the power of trustees. There are references which do fall within ordinary administration—such as reference for the ascertainment of value, or the fixing of an amount due—as, for example, on a professional account. The matter is referred rather as a means of the ascertainment of facts than a proper submission, and would fall under the power of trustees. There may be a disposal in the ordinary course of administration of matters of minor moment; the specialty here is, that the act is one

of such grave importance as to be far beyond, in its operation and effect, a mere ordinary act of administration. On these grounds, after considering the able argument addressed to us for the pursuers, I have reached the conclusion that the interlocutor of the Lord Ordinary is right.

The other judges concurred.

Agent for Pursuers—John Thomson, S.S.C.

Agent for Defender—John Ross, S.S.C.

Friday, December 13.

ROBERTSON *v.* MACKINTOSH BROTHERS.

Minor — Bill — Lesion — Charge — Suspension. Circumstances in which *held* that a bill had been accepted by a minor, not for his own behoof, but as manager for his father, and charge on the bill *suspended* on the ground of minority and lesion.

This was a suspension of a charge on a bill, the suspender being John Robertson, residing at Carrbridge, Inverness-shire, and the chargers Messrs Mackintosh Brothers, merchants in Leith. The grounds of suspension were that the bill in question was granted by the suspender while only seventeen years of age; that it was granted by him as manager for his father, who was a shopkeeper at Carrbride and Kingussie; and that it was so granted by him at the solicitation of the chargers, who were at the time in course of accepting a composition from his father on all the claims against him, and who wished to obtain the contents of the bill in addition to the composition, with a view to obtaining a preference over the other creditors.

The answer for the chargers was that the defender had carried on, or represented himself as carrying on, business on his own account at Kingussie; that he was, or represented himself as being, major while he did so; and that the bill in question was granted by him, not for behoof of or for any debt due by his father, but for a debt properly due by himself.

A proof having been led of a somewhat conflicting character, the Lord Ordinary found for the suspender, on the ground that he was a minor; that the goods for which the bill was granted were ordered by him as his father's manager; that, therefore, he had no interest personally in the value received for the bill; and that that being so, the same must be held to have been granted to his lesion.

The Lord Ordinary explained the grounds of his judgment as follows:—The Lord Ordinary has had little hesitation, also, on consideration of the whole proof, in arriving at the conclusion that the goods for which the bill charged on, and the prior one of which it was a renewal, were accepted by the complainer for goods ordered by him as the assistant or servant of his father, and in reference, not to any business of his own, but to the business of, and carried on for, his father alone. There are many and various pregnant circumstances established by the proof which have satisfied the Lord Ordinary in regard to this matter. (1) The complainant was little more than seventeen years old when the goods were ordered and furnished. (2) The business at Kingussie, for the purposes of which the goods were ordered and furnished, was carried on in a shop, having outside and above the door, not the complainer's name, John Robertson, but the name of his father, William Robertson. (3) The invoices or accounts for goods sold in the shop were made out and rendered in the name, not of the complainer, but of his father, William Robertson. (4) Actions in the Small Debt Court against customers were prosecuted in the name and at the instance, not of the complainer, but of his father. (5) The attempted sales in the summer of 1863, by public advertisements in the newspapers, and by printed handbills, of the business and stock-in-trade, were in the name, not of the complainer, and as for him, but in the name and as for his father. (6) The general repute and understanding in Kingussie were that the business was the father's, and not the complainer's. (7) The positive testimony to that effect of both father and son. And (8) The fact that on the insolvency of the father, the whole stock-in-trade of the business in Kingussie, and cash balances in the shops and in bank connected with that business, were taken possession of by the trustee for the father's creditor's, including the respondents, who ranked upon his estate, composed in part of said stock-in-trade and cash balances, and received dividends therefrom on the express footing that the business at Kingussie was the father's. His Lordship also held that the respondents had failed to prove their counter case—that the complainer had represented himself as being major and as being in business for himself.

The chargers reclaimed.

GIFFORD and ASHER for them.

SOLICITOR-GENERAL and MACLEAN in answer.

At advising—

Their Lordships held that it was proved that the minor had no interest in the Kingussie business except as manager for his father; and that, that being so, there was here proved that absence of consideration which constituted lesion, and was sufficient to let in the plea of minority. With regard to the alleged misrepresentation by the minor, it was necessary that such a case, if it was to be made at all, should be made out clearly. There was here some conflict of evidence on that subject; but, on the whole, the charge of misrepresentation was not made out; and it rather appeared that the chargers had themselves to blame for their misapprehension of the suspender's position, if such misapprehension existed.

Agent for Complainer—W. B. Glen, S.S.C.

Agents for Respondents—Murdoch, Boyd, & Co., W.S.

Friday, December 13.

WATT *v.* BENSON & CO.

Employment—Railway Stock—Balance of Loss on Transactions. Circumstances in which *held* that a party who employed merchants in London to buy and sell railway stock for him, was liable under his employment to relieve the sellars of a balance of loss on the transactions.

This was an advocation from the Sheriff-court of Lanarkshire. The facts are these:—In February 1866 Watt, the defender and advocator, employed the respondents, who are merchants in London, to buy and sell on speculation certain American railway stocks, which they accordingly did, and on which transactions, extending from 12th to 27th February 1866 inclusive, there arose a loss or difference against the advocator of £516, 17s. 6d.