guard it ought to have been shut at the time this accident happened. No doubt the machine must be set in motion to get up speed before the threshing begins, but until the "feeder" is in his place, and the other workers in position, the guard ought not to be opened.

The only difficulty then is, whether there is sufficient here to satisfy us that there should have been a guard. It is perfectly true that no owner is bound to have all the latest appliances, and that he does his duty if he has what are generally known to the trade as proper precautions. But the precaution of a guard is well-known and recognised as a proper precaution, and therefore the defender must be liable because he had not taken that proper precaution.

I am the more moved to this view because accidents of this sort, owing to the want of a cover to the drum, have been somewhat frequent, and on the whole matter I am of opinion that there is no sufficient ground here for interfering with the judgments of both the Sheriffs.

LORD YOUNG—I am of the same opinion, and I can state in a few sentences the exact views on which I proceed. The Sheriff-Substitute and the Sheriff-Principal are both of opinion, and have so found, that this young woman lost her foot in consequence of the defective and dangerous condition of the threshing machine in question. I think there is reasonable evidence to support that view. Now, that being the fact as found by the Sheriffs upon reasonable evidence, what is the law?

The machine was supplied by the defender along with the services of two men to work it under a contract by which he undertook to do the threshing at the farm where this accident occurred. It was not exactly a contract of letting out the machine but of doing the threshing at the farm, sending not only the machine but men to work it, the farmer being only bound to supply men to feed it. This is the contract averred, and, I think, the contract proved. The defender himself says in evidence—"I have occasionally threshed for Mr Edwards. A few days before we went to the threshing at Mr Edwards he came to see about it. On that occasion I said to Mr Edwards that I would come soon. I found that I was so busy that I could not get soon. I accordingly saw him one night, and told him that I would send a mill. I said that the Taylors had got a mill out and that I would send them. . . . When I cannot get to a place I try to get another mill to go. On such occasions I draw the money and I pay the man that I send the same money that I get." We can pay no attention to the view that he did not contract himself but only acted as an intermediary. Now, was it his duty to send a safe machine? I think under the contract it was. I agree with the Sheriff-Substitute that a person who supplies such a machine under such a contract is at fault when he sends out a machine without a guard. If there had been no previous accidents it might have been pleaded that such a precaution was unnecessary, but the Sheriff-Substitute tells us that this is the third serious injury to girls from unguarded machines of this kind which have been made the subject of action in the Sheriff Court within a comparatively short time.

The Sheriff, after referring to the statute in England making guards to threshing machines compulsory, observes that while that statute is applicable to England only, the common law of Scotland implies as much, and I am with him in that opinion. The case becomes so clear as this. Assuming the facts as found proved by the Sheriffs and the law as they think it to be, is there any escape from liability on the part of the defender? The only thing to be said is that the farmer was present and seeing the state of the machine allowed his daughter to feed it. I cannot agree with the view that that act by the farmer bars his daughter from suing this action with his consent and concurrence. This case is by no means a gross one. It is a narrow case, but I do not feel justified in setting aside the judgment of both Sheriffs either in fact or law.

LORD RUTHERFURD CLARK — This case is attended with some difficulty, but on the whole I agree with your Lordships.

LORD LEE concurred.

The Court pronounced this interlocutor:—

"Find in fact that the defender on 5th October 1887 contracted with David Edwards, father of the pursuer, Jessie Helen Edwards, to thresh out part of the grain crop on the farm of the latter, and next day sent an engine and threshing machine with attendants to do the work: Find the machine supplied by the defender for that purpose was defective and dangerous in respect there was no guard to the drum, and that the injury sustained by the said pursuer when taking her place on the machine to assist said attendants as feeder is attributable to the want of such guard: Find in law that the defender is liable to her in damages accordingly: Therefore dismiss the appeal and affirm the judgments of the Sheriff and Sheriff-Substitute appealed against: Of new assess the damages at £150 sterling."

Counsel for the Pursuer — Gloag — Glegg. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defender—M'Lennan. Agents—Macpherson & Mackay, W.S.

Friday, May 31.

FIRST DIVISION.

[Sheriff of Dumfriesshire.

MATHESON *v.* MATHESON AND OTHERS.

Judicial Factor — Curator Bonis — *Inventory—Statement of Accounts—Exoneration and Discharge.*

In June 1880 an executor *qua* factor for three pupil children was appointed and confirmed by the Sheriff of Inverness. In August 1882 he was appointed their *curator bonis* by the Sheriff of Dumfries, the children having meanwhile succeeded to certain legacies. The inventory and accounts

lodged with the Accountant of Court included both estates.

In administering the executry estate, which consisted chiefly of the stock of a farm, large losses were incurred, and the last account lodged with the Accountant of Court closed with a balance due to the *curator bonis*.

In a petition for discharge of the curatory, on the ground that the whole estate was exhausted, and for decree against the wards for the balance, *held* that the wards were entitled to an account of the curatory estate apart from the executry estate, and that the petitioner was only entitled to discharge on payment of any balance due to them on that account.

John Matheson, farmer, Garbole, Inverness-shire, died on 5th November 1879. He was predeceased by his wife and survived by three daughters, all in pupillarity.

On 17th June 1880 Daniel Matheson, a brother of the deceased, was appointed by the Sheriff of Inverness factor for the said children, and was confirmed as executor-dative *qua* factor. He gave up an inventory of the personal estate of the deceased, amounting to £3051, and consisting principally of farm stock, crop, and implements on the said farm of Garbole.

In 1881 the children of the deceased became entitled under the will of a relative to a share of the residue of his estate, amounting to £1037, divisible equally among them. In June 1882 Daniel Matheson was, upon the application of a maternal uncle of the children, appointed *curator bonis* to them in the Sheriff Court of Dumfries, and thereafter, down to 31st December 1885, he duly lodged with the Accountant of Court annual accounts of his intromissions.

In 1887 Daniel Matheson presented a petition in the Sheriff Court of Dumfries for the recal of his appointment as *curator bonis*.

He averred that the Accountant of Court had found the whole of the accounts correctly stated and properly vouched; that in making up his original inventory he had, at the desire of the Accountant of Court, included not only the funds to which the wards succeeded as legatees, but also the executry of their late father, and that he had intromitted with the whole estate as *curator bonis*. He further averred that he had succeeded in getting the landlord's consent to a renunciation of the lease of the farm of Garbole at Whitsunday 1884, and that the farm stock and implements had been sold by public roup; that owing to the very unfavourable seasons the whole curatorial funds had been used, and that there remained a balance due to him as at 31st December 1885 of £363, 7s. 4d.

The wards, in answer, claimed that the petitioner should state a separate account with reference to the £1037, which came to them in their own right, and was not liable to the diligence of their father's creditors.

The petitioner pleaded that he was entitled (1) to discharge, as the estate was exhausted, and (2) to decree for the balance due to him.

The respondents pleaded, *inter alia*—"(2) The estate coming to the defenders in their own right not being liable to their father's debts, the defenders are entitled to an account of the pursuer's intromissions therewith, apart from his intromissions with their father's executry estate, and the pursuer is not entitled to his discharge until he has made payment to them of the balance ascertained to be due on such account."

The Sheriff-Substitute (Hope) on 12th February 1889 pronounced the following interlocutor:—"Finds that in accounting for his intromissions with the estate under his charge as *curator bonis* for the respondents, the petitioner is not entitled to take into account his intromissions with the estate under his charge as factor *loco tutoris* under the appointment made by the Sheriff of Inverness-shire: Therefore sustains the second plea-in-law for the respondents, and decerns; and appoints the petitioner to lodge an account, framed with reference to the above finding, of his intromissions with the curatory funds within ten days; and allows the respondents to lodge objections thereto, if they any have, within ten days thereafter."

The petitioner appealed to the Court of Session, and argued—That throughout all his actings he had acted in good faith, and for the best interests of the respondents. His actings in the matter of carrying on the farm must be looked at as at June 1880, when he had to decide whether the farm was to be carried on or the lease abandoned, and not as at 1882, when the respondents unexpectedly succeeded to their maternal grand-uncle's bequest. As there were thirteen years of a lease to run if the farm had been abandoned, damages to the extent of £1300 would have been incurred to the landlord. He could not anticipate the depression of farming interests which succeeded his appointment. The two estates were included in the inventory and accounts with the knowledge and authority of the Accountant of Court."

Counsel for the respondents were not called upon.

At advising—

Lord President—The Sheriff-Substitute and the Sheriff seem to have taken great trouble over this case, and to have perplexed themselves unnecessarily. The last interlocutor pronounced by the Sheriff-Substitute on 12th February 1889 seems to be quite well founded, except that the mode in which it is expressed is not quite so explicit as it should be, and I shall subsequently suggest that it should be varied in a way that will render it more applicable to the present position of this case.

Mr Matheson, the appellant, was appointed to act as *curator bonis* to the three pupil children of his deceased brother, who was a farmer in Inverness-shire. The object of his appointment was that he should take charge of a legacy which had come to these three children in their own right, and which was the only property belonging to them in their own right. Their father was, as I have said, a farmer in Inverness-shire, and his personal estate consisted only of the stocking of his farm. Mr Matheson, the same gentleman as was appointed *curator bonis* to the three pupil children, applied to the Commissary of Inverness-shire to be decerned executor-dative for the purpose of taking up the personal estate of his deceased brother, and after being confirmed as executor he entered into possession of that estate, and went on to take possession of the farm as the executor of his deceased brother, and in

the course of carrying on the farm he incurred very considerable losses.

Prima facie, the pupil children are in no way liable for these proceedings. If the appellant had been in a position as executor to pay over a free balance to himself as *curator bonis*, he might as *curator bonis* very properly have received that free balance, because it would certainly have belonged to his wards. But there being no such balance, there is no connection between the estate in Inverness-shire, which he holds as executor, and the estate in Dumfriesshire, which he holds as *curator bonis*. Therefore I quite concur in the result arrived at the by the Sheriff and Sheriff-Substitute, that Mr Matheson must not be allowed to mix up the two things when he comes here to obtain his discharge as *curator bonis*.

The interlocutor of the Sheriff-Substitute of 12th February, as I propose to alter it, will stand thus:—"Finds that, in accounting for his intromissions with the estate under his charge as *curator bonis* for the respondents, the petitioner is not entitled to take into account his intromissions with the estate under his charge as executor-dative *qua* factor under the appointment made by the Sheriff of Inverness-shire and confirmation following thereon: Therefore sustains the second plea-in-law for the respondents, and decerns; and appoints the petitioner to lodge an account, framed with reference to the above finding, of his intromissions with the curatory funds within ten days; and allows the respondents to lodge objections thereto, if they any have, within ten days thereafter."

Now, the second plea-in-law for the respondents is in these terms:—"The estate coming to the defenders in their own right not being liable to their father's debts, the defenders are entitled to an account of the pursuer's intromissions therewith, apart from his intromissions with their father's executory estate, and the pursuer is not entitled to his discharge until he has made payment to them of the balance ascertained to be due on such account." I think that is quite a sound plea, and it has been given effect to by the Sheriff-Substitute. The result is therefore that Mr Matheson must lodge a statement of his accounts as *curator bonis*, and if he attempts to bring into that account any losses he may have sustained as executor, that will no doubt be objected to.

LORD SHAND—I am of the same opinion. In August 1882 the petitioner was appointed *curator bonis* to these three girls. This is an application on his part to be discharged of that office and his intromissions therein. *Prima facie*, there is no question that when a *curator bonis* is asking his discharge his account should embrace only his transactions as *curator bonis*. But here he proposed to bring into the account a number of intromissions relative to matters which as executor he thought fit to undertake as representative or factor for these children, his object being to recoup himself for losses sustained in his capacity of executor. I am of opinion that he cannot bring in these items. It is quite true that if in his character of executor he held a free and unencumbered fund, which was also the property of these young women, he might as curator assume possession of that fund and bring it into his account, but if he is in possession of a liability and not a fund, he cannot bring that into his account as curator in order to relieve himself of liability as executor. The case may be illustrated by supposing that another brother had taken the office of executor. There was a certain amount of moveable property on the farm, and, on the other hand, heavy obligations. These circumstances would make it matter for consideration whether the farm should be meddled with. But if he, assuming the character of executor, were to take the farm, and loses money in carrying it on, he cannot be allowed to throw the burden of that upon the children, but must bear it himself.

It has been argued that the children were not really injured by giving up their legacy if against that large obligations had to be set. But if an executor takes upon himself to act for young children, he cannot be allowed to throw on them the loss he may incur. Suppose, as I have said, that the executor is a different person from the curator, and he comes to the *curator bonis* and demands half the children's legacy for losses incurred in carrying on the farm, it would be the duty of the *curator bonis* to pupil children to say, "Pay the loss yourself." That being my view if the executor and curator are different persons, I cannot see that it makes any difference if they are the same person. If as executor that person, it may be from motives of kindness, chooses to do certain acts, still it is as *curator bonis* that he must give account for his actions here, and he is not entitled to mix up therewith proceedings undertaken by him in his capacity of executor.

LORD ADAM concurred.

LORD MURE was absent.

The Court pronounced the following interlocutor:—

> "... Vary the said interlocutor [of Feb. 12, 1889] by deleting the words 'factor *loco tutoris*'... and substituting therefor the words 'executor-dative *qua* factor,' and also by inserting after the word 'Inverness-shire' the words 'and confirmation following thereon:' *Quoad ultra* adhere to the said interlocutor; ... *quoad ultra* refuse the appeal."

Counsel for the Petitioner — Shaw—Walton. Agent—Thomas White, S.S.C.

Counsel for the Respondents—Law—Dudley Stuart. Agent—R. C. Gray, S.S.C.

Tuesday, June 4.

SECOND DIVISION.

[Lord Lee, Ordinary.

FRASER (M'DOUGALL'S TRUSTEE) *v.* GIBBON.

Bankruptcy—Illegal Preference—Act 1621, *c.* 18 *—Act* 1696, *cap.* 5*—Reduction.*

A trader being indebted to a creditor arranged with a friend to join him in giving a promissory-note to the creditor. This friend was not at the time his creditor in any sum, and in security of his obligation on the