the pursuers entitled to the expenses of the appeal, and remit the account thereof," &c.

Counsel for Pursuers (Respondents)—Sandeman, K.C.—R. S. Horne. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Defenders (Appellants)—Hunter, K.C.—Hon. W. Watson. Agents—Robson & M'Lean, W.S.

Tuesday, December 21.

FIRST DIVISION.

Sheriff Court at Dingwall.

GAMAGE LIMITED *v.* CHARLESWORTH.

Sale—Fraud—Bankruptcy—Seller's Right to Rescission and Restoration in Question with Buyer's Creditors—Failure to Prove Fraud Inducing Cause of Contract—Mora.

A firm of outfitters who had sold goods to A brought an action against her for their restoration on the ground that she had obtained them by fraud. The evidence showed that at the time of the sale, viz. in July 1908, A had stated to the firm's counting-house manager that she was entitled to money in September following; that this statement was reported to the firm's managing director on whose instructions the goods were then sold and delivered; that A had on a previous occasion bought goods from the same firm on credit, which she had afterwards paid for; and that when she obtained the goods in question, A, who was then subsisting solely on credit, had represented herself as the tenant of a sporting estate in the Highlands, to which the goods were sent without any further inquiry on the part of the firm. The managing director did not appear as a witness. The action for rescission was raised on 18th January 1909. On 30th January 1909 A's estates were sequestrated and a trustee appointed thereon, who was duly sisted as defender. No appearance was made for A.

Held that the defender must be assoilzied—*per* Lord Kinnear, on the ground that the pursuers had, in the absence as a witness of their managing director, failed to prove that A's statement, though false and fraudulent, was the inducing cause of the contract; and *per* Lord Johnston, on the additional grounds (1) that rescission, being an equitable remedy, ought not to be granted where as here (*a*) the remedy would if given be inequitable to other creditors, and (*b*) the representations made were so unreliable in their nature that they ought not to have received any credence; and (2) that the pursuers were barred by *mora*.

Dissenting Lord Salvesen, who held that rescission should be granted on the grounds (1) that the sale was induced by the fraudulent statement in question, and (2) that the action for rescission was raised prior to A's sequestration.

Opinion reserved (*per* Lords Kinnear and Johnston) as to whether A's supervening sequestration prevented rescission of the sale. *Opinion* (*per* Lord Salvesen) that it did not, A's trustee taking the property *tantum et tale* as it stood in A.

On 18th January 1909 Messrs A. W. Gamage, Limited, general outfitters, London, brought an action in the Sheriff Court at Dingwall against Miss Violet May Gordon Charlesworth, Flowerburn House, Ross-shire, for declarator that certain articles of furniture purchased by her in July 1908 were obtained by fraud, and that the pursuers were entitled to rescind and had rescinded the sale. There were also conclusions for redelivery of the articles sold, and for interdict against their sale or disposal. The defender's estates were sequestrated on 30th January 1909, and a trustee, Munro, appointed, who was duly sisted as defender. No appearance was made for Miss Charlesworth.

The *facts* were narrated thus by Lord Johnston—". . . Messrs Gamage Limited, who are general outfitters in Holborn, London, sold certain articles of household plenishing to a Miss Charlesworth in July 1908. They now seek to rescind the sale and to recover the articles, on the ground that the sale was induced by Miss Charlesworth's fraud. The conclusions of their summons were to have it declared that the pretended sale of said articles by them to Miss Charlesworth on or about 24th or 25th July 1908 was induced by her fraud; that the pursuers were entitled to rescind, and had validly rescinded, said pretended sale; further, to have her ordained to redeliver the articles, which were described as "presently in Flowerburn House, Ross-shire," to them; and failing her doing so, to authorise them to remove the said articles from Flowerburn House, and meantime to interdict her selling or disposing thereof.

"The action was raised on 18th January 1909, and I do not find it alleged that the pursuers had done anything prior to that date to rescind the contract of sale. The rescission they found on is merely the adoption of the present proceedings, and therefore does not date back beyond 18th January 1909, or six months after the sale. Interim interdict was granted on 18th January 1909 along with warrant to cite, and service was made on the 19th January. There is no information on the record or in the evidence indicating when Miss Charlesworth became notour bankrupt, or when proceedings for her sequestration were commenced. But from No. 22 of process, which is a certified copy of Lord Skerrington's interlocutor of 22nd June 1909 recalling the sequestration, in respect that it was superseded by the English bankruptcy, I gather that the first order in the petition for seques-

tration was dated 22nd January 1909, and that sequestration was awarded on 30th January 1909. There is also a statement in the reclaiming petition for the trustee in the sequestration to the effect that Miss Charlesworth was pressed by creditors and was notour bankrupt on 19th January 1909, 'as can be ascertained from the sequestration process which has been produced in the case,' and from the inventory of process, the process of sequestration appears as No. 17 of process. It has, however, been withdrawn from process and I am unable to refer to it. The statement to which I have referred is in itself an *ex parte* statement, and, moreover, does not indicate either when or how Miss Charlesworth became notour bankrupt, and as I do not know on whose application she was sequestrated I cannot judicially accept the fact that she necessarily was notour bankrupt, though doubtless she was pressed by creditors prior to her sequestration. So far, however, as my judgment is concerned, it is enough that the rescission of the contract involved in the raising of this action and the sequestration occurred almost *unico contextu*, and, from what we know otherwise, that total and hopeless insolvency had preceded both. The present proceedings therefore are virtually an attempt on the part of one creditor to obtain an advantage in a question with the estate and the creditors generally.

"Sequestration having been granted on 30th January, Mr C. J. Munro, C.A., Edinburgh, as trustee on Miss Charlesworth's sequestrated estate, was on 26th February sisted as a party defender in the case, and the summons was shortly afterwards amended so as to direct its conclusions against him as well as against the bankrupt. The Scots sequestration has been superseded by an English commission in bankruptcy, and the English trustee has since been sisted in room of Mr Munro. But for the purposes of this case this change has been treated as immaterial. . . .

"I think it would be waste of time to consider the grounds of action as stated in the summons, and that it is better to go directly to the evidence to ascertain not what is alleged but what is proved. The *species facti* are that Miss Violet May Gordon Charlesworth was a young lady of twenty-four, who had no means and no rational expectations. She had, under what circumstances are not disclosed, managed in the summer of 1908 to obtain a lease—I believe for seven years—of Flowerburn House and shootings in the Black Isle, Ross-shire, the rent of which she had no means of paying, and one of her first operations was to negotiate with Messrs Gamage for a supply of certain articles, rather of luxury than of necessity, for the purpose of supplementing its furnishing to her taste. She had had one previous transaction with Messrs Gamage, from whom she had obtained credit in October 1907 to the extent of £75. The account had remained unpaid for nine months, and £70 was by some means or another—probably out of advances made to her by a certain Welsh doctor—paid, but only on 13th July 1908. How Messrs Gamage regarded this transaction we are not told. The fact of the transaction, of the delay in payment, and of the ultimate payment to account, only comes out incidentally, and I should say that, if considered at all, the circumstances of such prior transaction must have cut two ways in the estimation of Messrs Gamage in determining whether to give Miss Charlesworth further credit. But we are left entirely in the dark as to whether this prior transaction was considered at all, or even whether Miss Charlesworth was recognised as the same person who was engaged in it. It was certainly entirely unknown to the two employees of the firm most closely concerned with the new transaction of July 1908.

"What then occurred was this—On 24th July 1908 Miss Charlesworth called at Messrs Gamage's establishment in Holborn, and ordered a large portion of the articles afterwards forwarded to her at Flowerburn, but no contract of sale was then concluded as the order was not complete. By arrangement, Mr Dennis and Mr Hampton, one of the assistant counting house managers, and the other the managing furniture salesman with Messrs Gamage, called on Miss Charlesworth at the Inns of Court Hotel, London, to exhibit to her some valuable skin rugs, and as Mr Dennis says, 'to see about payment.' 'When the rugs had been selected,' Mr Dennis proceeds, 'I explained the object of my visit to Miss Charlesworth. I asked Miss Charlesworth to let me have a cheque, as our business terms were cash. Miss Charlesworth told me it was not convenient to give me a cheque on that day. She then proposed that on delivery of the goods at Flowerburn she would forward me a cheque for half the amount, which at that moment we thought would be about £100, and that the remaining half would be paid at the end of September when she was entitled to a large sum of money. These were her exact words according to my recollection.'

"The fraudulent induction of the contract of sale is, when the whole case for the Messrs Gamage is carefully considered, based entirely upon the falsity of the representation that at the end of September Miss Charlesworth was entitled to a large sum of money. Mr Dennis is not very strongly corroborated by his colleague Mr Hampton, but I cannot do better for Messrs Gamage than take his statement at its highest. But there are one or two other incidentals bearing upon the question of inducement. Miss Charlesworth made it a point that the goods should be delivered to her at Flowerburn before the 12th of August, and Mr Dennis adds that she told him, as her reason, that she was having a shooting party at Flowerburn on the 12th. I think it is also admitted by Mr Dennis that he was impressed by Miss Charlesworth's appearance and manner, and he certainly adds 'We occasionally have credit customers, and it is part of my business to gauge their responsibility from their appearance and from what they say.'

"At a date unknown, as the letter is undated, Miss Charlesworth subsequently wrote from Flowerburn, Fortrose, Rossshire, N.B., the letter addressed to Messrs Gamage:—'Dear Sir—I beg to confirm my promise to your counting house manager, namely, that upon delivery of goods ordered to me at my house I will forward cheque for £100, the remainder to stand over until my end of Sep. quarter. Please see that goods leave London not later than Wednesday next, so as to be unpacked and placed in their position before the 12th August.—Yours truly, V.. Gordon Charlesworth.' It is not proved that this letter was received in time to be considered, or was considered by Messrs Gamage, when they determined to accept Miss Charlesworth's order, and instructed the forwarding of the goods. I think the contrary is to be inferred, and certainly Mr Dennis does not found upon it as in itself a representation inducing to the contract. That he should not do so raises my opinion of the fairness of his evidence. But the letter, if not a direct inducing representation, is a very strong corroboration of the evidence of Messrs Dennis and Hampton, and satisfied me that they truly state that Miss Charlesworth represented that she was entitled to a sum of money coming to her in the end of September, and that the reason for her urgency in obtaining delivery of the goods was the approach of the 12th of August, when she wished to be prepared to receive a shooting party. Needless to say there was no money coming to Miss Charlesworth at the end of September. Neither was there any shooting party for the 12th. Before leaving this letter I may add a bearing on another aspect of the case, that its receipt ought to have awakened Messrs Gamage's suspicion. It is not actually illiterate. But the handwriting and whole appearance of the letter betokens a half-educated person.

"Mr Dennis next states that he told Miss Charlesworth that he must report her proposals to his principals; that he believed absolutely that Miss Charlesworth was telling the truth when she said she was coming into a large sum of money in September. 'If I had not done so I would not have executed the order. Had I not relied upon the statement I need not have advised Gamages to execute the order. Had it not been for my belief in her statement the transaction would have fallen through there and then.' Mr Dennis and Mr Hampton on their return to Messrs Gamage saw Mr Gamage, the managing director, and impressed on him the expediency of passing the transaction. Mr Hampton explains his position thus—'Because I thought the money would be all right. I had little doubt that the money was right. (Q) Upon what was your freedom from doubt based?—(A) I was rather impressed by the style of the lady herself, by the fact that she was living in a good house in the north, by the hotel where she was then residing, and the whole circumstances of the case. (Q) Did you place much importance upon the statement that she was entitled to receive a sum of money in September?—(A) I believe every importance was placed on that statement. I myself made a strong point of that in placing the matter before Mr Gamage.'

"But the difficulty is that neither Mr Dennis nor Mr Hampton can say what passed in the mind of Mr Gamage, and Mr Gamage himself is not called to state what really induced him to accept Miss Charlesworth's order, and so conclude the contract of sale and instruct delivery to be made. I am, however, unwilling, having regard to what I understand are the views of one of your Lordships, to proceed upon this defect in the proof, although to my own mind it is sufficient for the disposal of the case. I prefer to deal with the question on broader grounds."

The pursuers pleaded, *inter alia*—"(2) The sale to the defender Charlesworth having been induced by false and fraudulent representations, is void, or at any rate is voidable, *ab initio*. (3) The defenders having determined, upon the true position of matters becoming known to them, to rescind the contract, and having done so by adopting the present proceedings, they are entitled to delivery of the goods in question, and to their expenses. (5) The defenders are not entitled to found upon the sale and delivery of the said goods to the prejudice of the pursuers, and without paying the price, in respect that the said sale and delivery were fraudulently procured. (6) The sale having been rescinded prior to the defender Charlesworth's bankruptcy, the property in the goods did not pass to the defender Munro. (7) *Separatim*, the defender Munro, as representing the general creditors on the sequestrated estate, has no higher or better right than the bankrupt."

The defender (the trustee), *inter alia*, pleaded—"(2) The action is irrelevant as stated. (5) The alleged misrepresentations and others not being material, and not forming the inductive cause of the contract, cannot support an action for rescission thereof. (6) *Esto* that the contract is rescindable on the ground of fraud, the pursuers having failed to exercise their right to rescind within a reasonable time, the action should be dismissed, with expenses. (7) The estates of the defender Charlesworth being sequestrated, the pursuers are barred by the Bankruptcy Acts from taking or insisting in these proceedings, and must claim in the sequestration."

On 21st May 1909 the Sheriff-Substitute (MacWatt) found in law that the delivery of the articles in question having been induced by a false representation on the part of Miss Charlesworth, her trustee took them *tantum et tale* as they stood in her, and that the pursuers were entitled accordingly to rescind the sale and recover them from the trustee.

The defender appealed to the Sheriff (Reid), who on 11th September 1909 recalled his Substitute's interlocutor, found that the pursuers had failed to prove that the sale of the articles in question had been induced

by the false and fraudulent representations of Miss Charlesworth, and assoilzied her trustee from the conclusions of the action.

The pursuers appealed, and argued—The Sheriff-Substitute was right. The evidence showed that the statements made by Miss Charlesworth were false in fact, that they were known by her to be false, and that they were the inducing cause of the contract. But for her representation that she was entitled to money which was coming to her in ordinary course and at a definite time, the goods would not have been sent her. But for her fraud the contract would not have been entered into, and the pursuers therefore were entitled to recover the goods delivered—Bell's Com. i, 261, *et seq.*; *Watt* v. *Findlay*, February 20, 1846, 8 D. 529; *Muir* v. *Rankin and Others*, May 23, 1905, 13 S.L.T. 60; *Laird & Sons* v. *The Bank of Scotland*, [1909] 2 S.L.T. 247; *Clough* v. *London and North-Western Railway Company*, L.R., 7 Ex. 26, at pp. 34-5; *in re Eastgate*, [1905] 1 K.B. 465. The case of *Richmond* v. *Railton*, January 26, 1854, 16 D. 403, relied on by the respondents was distinguishable, for there the purchaser had already become bankrupt before the action for rescission was raised, and the property therefore had passed to his creditors. Moreover, in that case there was novation of the original contract, for the purchaser had taken a bill for the price. In the present case no third parties had acquired interests in the goods when the pursuers' action was brought, for the act of bankruptcy was subsequent to and not prior to the raising of the action. On 18th January, when the warrant to cite was granted, Miss Charlesworth had full control of the goods in question, and the first embargo laid on them was the pursuers' interim interdict. Reference was also made to *M'Dowall and Neilson's Trustee* v. *J. B. Snowball & Company, Limited*, November 8, 1904, 8 F. 35, 42 S.L.R. 56.

Argued for respondent—The Sheriff was right. This was a sale on credit, and if the appellants relied on the statements made to them, *sibi imputent*. The case was ruled by *Richmond* (*cit. supra*). *Esto* that in *Richmond* an act of bankruptcy had occurred prior to the raising of the action, the *ratio decidendi* was that delivery of the goods had been attained by deceit. In the present case fraud had not been proved, and without proof of fraud the pursuers could not succeed—Bell's Com., i, 264 *et seq.*; *Campbell, &c.* v. *Shepherd, &c*, 2 Paton's App. 399. *Esto* that there was a promise to pay and of ability to pay, that was not sufficient to justify rescission of the contract—Bell's Com., i, 265-6. Neither was a general representation by a buyer that he was in good circumstances—*Richmond* (*cit. supra*), at p. 405. In *Watt* v. *Findlay* (*cit. sup.*), relied on by the appellants, the buyer was insolvent at the time he obtained delivery of the goods. It was not proved that Miss Charlesworth's statements were false, for the appellants had failed to show that she had no reasonable grounds for her statements. There could be no action of deceit for the statement of an opinion honestly entertained—Kerr on Fraud, 3rd ed., pp. 46-7—although it would be otherwise were the statement false and dishonest. *Esto* that a misrepresentation as to the state of a man's mind was a misstatement of fact—*Edgington* v. *Fitzmaurice*, L.R., 29 C.D. 459, *per* Bowen, L.J., at p. 483—the misrepresentation had not been proved. Even if misrepresentations had been proved that was not enough, for they must be shown to have been the inducing cause of the contract—*Smith* v. *Chadwick*, L.R., 9 A.C. 187, *per* Lord Blackburn at p. 196. This the appellants had failed to do. The wish to do business, and the fact that credit had been given before, were all elements in inducing the appellants to make the contract. The act of bankruptcy was a bar to recovery—*Tennent* v. *City of Glasgow Bank*, January 22, 1879, 6 R. 554, 22 S.L.R. 238. [LORD KINNEAR referred to *Oakes* v. *Turquand*, L.R., 2 Eng. & Ir. App. 325.] The rule that property acquired by the fraud or deceit of the bankrupt could not be retained by the trustee—Goudy on Bankruptcy, 3rd ed., 275—only applied where the fraud had occurred during sequestration. It was so in the cases cited by Goudy, viz., *Douglas, Heron, & Company*, 1786, M. 10,229; *Watt* v. *Findlay* (*cit. supra*); *Molleson* v. *Challis*, March 11, 1873, 11 Macph. 510, 10 S.L.R. 315. The fraud alleged to exist if proved, and if material to the contract, was antecedent to the bankruptcy, and the rule therefore did not apply.

At advising—

LORD KINNEAR—The question raised in this action, according to its present form, is whether a sale of goods by the pursuers Messrs A. W. Gamage Limited, who carry on the business of general outfitters in London, to Miss Violet Charlesworth was obtained by fraud so as to enable them to recover the goods which they say were fraudulently obtained, from Mr George John Gradon, C.A., who is designed as trustee of the property under a receiving order on the estate in England.

The case as it is put seems at first sight to be inconsistent with the perfectly settled rule of this Court that when a competent Court, by proceedings in bankruptcy, has vested a trustee or assignee in the estate of a bankrupt for the purpose of distribution amongst his creditors, no part of the bankrupt's moveable estate wherever situated can be touched except through the proceedings in bankruptcy or by the order of the courts of the country in which these proceedings have been taken. But when the history of this action is examined it becomes evident that there is no irregularity of that kind; that the Sheriffs in the Court below were bound to entertain the action, and that we are bound to entertain the appeal. It appears that the action was originally brought against Miss Charlesworth herself. Before the record was closed, however, a Mr Munro appeared and asked to be sisted on the averment that, after

what is styled in a recent statute the initial writ had been served, the estates of Miss Charlesworth had been sequestrated under the Bankruptcy Act, and that he had been appointed trustee; and accordingly the trustee in the Scottish bankruptcy was sisted as the defender and maintained the defences in place of Miss Charlesworth, adding an additional plea founded upon the effect of the sequestration as excluding the pursuers' proceedings. Upon that state of the record the Sheriff-Substitute pronounced judgment; and then, after his decision had been pronounced, the present defender Mr Gradon came forward, and he and the Scottish trustee concurred in representing to the Sheriff that the Scottish sequestration had been recalled on the ground that England was the more convenient *forum* for the bankruptcy proceedings, and that Mr Gradon had been appointed receiver as trustee on the bankrupt's property. Under his receiving order Mr Gradon thereupon took up the position which had previously been held by Mr Munro. He was sisted and Mr Munro went out, and he maintained Mr Munro's pleas on appeal before the Sheriff. No additional plea is added by him, and it is not now suggested on his behalf that he can raise any other point or appeal to any other law than the points which the Scottish trustee raised upon the Scots law before the Sheriff.

The question, therefore, that we have to decide appears to me to be really exactly the same—but for one consideration, to which I will revert afterwards—as if the action were still brought against Miss Charlesworth herself. The main question is whether Miss Charlesworth obtained these goods by fraud so as to entitle the vendors to set aside the contract and get back their goods. As to the law by which that question must be determined, I do not think there is any real difficulty. It has been repeatedly decided that to buy goods with the intention of not paying for them is a fraud going to the foundation of the contract, and if that fraudulent intention were proved against the buyer I apprehend it would not be necessary to go further and inquire into any particular statements and representations which may have been made by him to the vendor, because his conduct in buying is itself a representation that he intends to pay; and it must always be presumed that the seller parts with his goods only in the expectation of being paid for them. Therefore if the case can be brought up so far as to establish this, that the buyer had bought with the wrongful intention of taking the goods and not paying for them, I do not think any other inquiry would have been necessary. But, then, that is a very difficult case to prove, as it is always difficult to prove the state of a person's mind at a particular time, and so the pursuers do not undertake to establish it.

Their case is that the contract for the sale of the goods was obtained by a fraudulent representation. Now if that be the ground of action I think it clear in law that the pursuers must prove two things. In the first place they must prove that the buyer made statements that were false in fact, knowing that they were false; and secondly, that these false statements were the cause of the contract. As to the first point, that is, that false statements were made by Miss Charlesworth with a knowledge of their being false, I am disposed to agree with the Sheriff-Substitute, and upon a question of fact of that kind I should not have been ready to differ from his judgment. I should therefore be prepared to hold that Miss Charlesworth did make definite and specific statements as to her means of paying for the goods, that these statements were not true, and that she knew them not to be true. I only add that I think, with the Sheriff-Substitute, that her explanations of the reason why she made the statements cannot be accepted, and rather tend to confirm the view which the Sheriff-Substitute has taken, that she knew that what she was saying was not true.

The specific statement on which the pursuers rely is that she was entitled to money in September and would then pay for the goods. That statement was made to the witness Mr Dennis, who is the pursuers' counting-house manager, and Mr Dennis believed it and reported it to the pursuers' manager. If the contract of sale had been made then and there between Miss Charlesworth and Mr Dennis, it would have been difficult to my mind to resist the conclusion that it had been induced by the fraudulent statement to which I have referred. I do not think it makes any difference that it appears, as was suggested in the argument, that Mr Dennis was impressed by certain other considerations also, and, in particular, by the manner and appearance of his customer, and by the way in which she was living at an hotel in London. In the first place, plausibility of manner and apparent command of money are just the means by which a false representation is made to tell. If the representation is false and a tradesman believes it, it seems to me to alter the character of the fraud in no way to say that the person making it had very plausible manners which were calculated to impress the person to whom it was made. And secondly, if the representation is in itself material and the vendor has acted upon it, it is of no consequence that he was impressed also by other considerations which tended in the same direction. The point is that there is a material representation which is false, and which contributes to the conclusion of the contract.

But then the contract does not depend upon Mr Dennis' opinion. The pursuers' case is, as set out in their condescendence, that Mr Dennis had no authority to agree to Miss Charlesworth's proposal, and did not do so, but stated that he would report what she had said to the managing director. There was, therefore, no contract made by him; the goods were ultimately sold and delivered upon the agreement of the pur-

suers themselves, that is to say, their managers or managing director, and it appears to me that in order to satisfy the burden which lies upon them of proving that the representations they allege were the cause of the contract, that is to say, the cause which determined their mind to agree to the contract of sale, it was indispensable that they should prove that by the best evidence, that is to say, by putting the managing director himself in the box and proving out of his mouth what induced him to make the contract. It may be, very probably, that he acted simply upon Mr Dennis' report, but we cannot take that from anybody except himself. There is no competent evidence that he did so act, for it is not a mere technical rule, but a fundamental principle, that the best evidence of which a fact is susceptible must be advanced, and I think that that point is strengthened by a consideration to which the learned Sheriff adverts, for the Sheriff says that it appears that Miss Charlesworth had been accustomed to deal with this firm. He points out that on a previous occasion she apparently had bought something from them, that she had then been asked for a reference to a banker, that the transaction was concluded upon that reference, and that the goods were sold. In the absence of any evidence one way or the other from the manager I think it impossible to say how far that previous transaction entered into his mind to induce him to deliver the goods on the present occasion. Or, indeed, any other motive may have affected him, for we cannot assume that because the only motive known to us was misrepresentation he was in fact moved by misrepresentation unless he goes into the witness-box to say so.

I am therefore of opinion, with the learned Sheriff, that the pursuers have failed to prove that the contract of sale was induced by the false and fraudulent representations of Miss Violet Charlesworth. If that be so, then the question of law which was argued as to whether the pursuers are now entitled to rescind the contract and get back their goods does not arise, but as it was fully argued, and as I know that one of my brethren finds it necessary to decide it, I may state in a few words what appears to me to be the law of the matter.

I take it to be quite clear that a contract obtained by fraud can be set aside on discovery of the fraud, and the defrauded person restored against it, so long as it is possible to restore him, unless in the meantime third persons have, in good faith and for value, acquired an interest in the property. The only question which was raised on that head in this case was whether other creditors of Miss Charlesworth had acquired an interest in the goods so as to debar rescission at the instance of the pursuers, and the only ground upon which it was maintained that they had was that the effect of the sequestration in bankruptcy of Miss Charlesworth's estate was to give such an interest to her other creditors.

There may be a question, as to which I desire to express no opinion at present, whether the sequestration will have any such effect or not. But I think the point is excluded by the antecedent consideration that the rescission was made in this case before the sequestration. The pursuers had rescinded their contract and served their summons before Miss Charlesworth's estates were sequestrated, and that appears to me to exclude the argument against rescission to which I have adverted. My own ground of judgment, however, does not involve a decision of that question, since I hold that the pursuers have failed to prove that the sale was induced by the misrepresentations alleged. I am therefore of opinion that we ought to find in terms of the Sheriff's judgment in fact and in law and dismiss the appeal.

LORD JOHNSTON—I agree in the result at which the Sheriff has arrived, and am for affirming his judgment, though I reach that result on grounds which somewhat differ from his. . . . [*His Lordship narrated the facts, v. sup.*] . . .

I think that rescission of a sale of goods on the ground of fraud tainting the contract is a remedy which the Court will not lightly countenance where, as here, it is resorted to on the very eve of sequestration, and where the result would be virtually to give one creditor a preference over the general body, many of whom may be, and probably are, *in pari casu*, and that it is the Court's duty to scan with special strictness the grounds on which that claim of rescission is based. . . . [*His Lordship narrated facts.*] . . .

I am in the first place satisfied that though Miss Charlesworth may not have ordered the goods with the deliberate intention of not paying for them, she did order them knowing that she had no rational expectation of paying for them, trusting that something might turn up to enable her to pay, but entirely reckless as to whether she would ever be able to pay or not. She was in fact a pure adventuress, who by address and assurance was enabled for a considerable time to impose on the world, and particularly on the world of tradesmen. I accept that it is a fraud upon a tradesman to enter into a contract of purchase and sale with him under such circumstances. So far, therefore, I am with Messrs Gamage, and agree that on this ground, and apart from express misrepresentation, they were defrauded, though what the tradesman's remedy may be in such circumstances is another thing.

An English authority was quoted—*Eastgate* v. *Ward*, L.R. (1905) 1 K.B. 465—in which Bingham, J., in a somewhat similar though much stronger case, sustained the right of a seller, on discovering a similar fraud of the purchaser, *brevi manu* to retake possession of his goods even after an act of bankruptcy by the purchaser, consisting of absconding two days after

the issue of a County Court writ by the same seller. The learned Judge indicated that he did not approve the *brevi manu* proceedings, but added—"but in my opinion Mr Bowling was only taking, though taking in a wrong way, that which was his own." And this conclusion proceeded on the following reasoning—"Now, did the property at the time he took it back form part of the estate of the bankrupt? I do not think it did, and for this reason. I think that the trustee acquired the interest of the bankrupt in the property subject to the rights of third parties. One of these rights in this case was the right of the vendors of the goods to disaffirm the contract and to retake possession of the goods." The conclusion of Bingham, J., may have been correct, or it may not, in the particular circumstances of that case. But I cannot admit its general applicability. I think that the property of the goods in the present case was in the purchaser from the date of delivery at least, as we do not know exactly when or how the contract of sale was completed by acceptance of Miss Charlesworth's order; that it continued in her at the date when these proceedings were taken, 18th January 1909; and that the mere initiation of proceedings to recover the property in the goods, involving as it did *ipso facto* a rescission, but so far only as the seller could by his own expression of will rescind the contract of sale, did not restore the property in the goods to the sellers. Though the sale was tainted by fraud, the property had passed. The contract was not void, but only voidable. The remedy of rescission and recovery of the property is an equitable remedy, and though as between seller and buyer a *brevi manu* operation may be effectual, it requires, where other interests are concerned, the interposition of the Court. I cannot regard a mere declaration of rescission, or even the raising of an action to have the right to rescind declared, and to lay the embargo of interdict, not as diligence or attachment on the goods, but as a personal restriction on the seller, or even the granting of such interdict, as so divesting the purchaser of the property and restoring it to the seller that the Court are bound, if they find that the original contract of sale was in fact tainted with fraud, to sustain the claim of the seller and enable him to vindicate his property. The remedy is an equitable remedy, and the Court is bound, I think, to look all round and to consider whether there are not counter equities. Where, as here, there is not one seller imposed on, but evidently there are or may be many, and where the alleged rescission by one particular seller is made on the very eve of a hopeless bankruptcy, I think that it is the proper course for the Court to refuse the remedy asked, as impossible to be granted without giving a practical preference to one creditor over others. Diligence lays a nexus on property. The race of diligence is recognised as competent and proper to be allowed. Yet when bankruptcy intervenes, it has been thought proper by statute to place even the race of diligence under control, that equal justice may in a rough fashion be done to all creditors on the estate. A declaratory action and incidental interdict is not a diligence and lays no nexus, and I am unable to see how the Court, administering an equitable remedy, can give it an effect which even diligence would not have. As there is no statutory guide, as in the case of diligence, the giving of the remedy can only be a question of circumstances, and the circumstances here emphatically demand that, so far as the pursuers' demand is based on this ground, it be refused.

But if Messrs Gamage's case is based, not on this general fraudulent course of dealing, but merely on the false representation made to them, as differentiating their position from that of other creditors, I am equally unable to sustain their contention, or to find that they have established such fraud inducing the contract as gives them a right to rescind. The circumstances inducing to this contract were complex. They consisted of the undoubted representation that Miss Charlesworth was entitled at a definite date to a sum of money coming to her; but they consisted also, and I think to a very large degree, of the fact that she was able to represent herself as the tenant of a well-known place in the north, coupled with the suggestion that she was in a position to be entertaining a shooting party for the 12th, and the vague impression of position and means which this carried with it to a London tradesman; also possibly of the fact that she was able to append the name "Gordon" to that of "Charlesworth;" and certainly of the fact that she had an imposing appearance and address. The fact that she had made to the firm a substantial payment about a fortnight before may or may not also have had some influence. But I am far from convinced that the Court can take it off the hands of Messrs Gamage that such a representation, made in such circumstances, either was the inducing cause of the contract or was one which by reason of its falsity requires the Court to interpose for their protection. I think that I am bound to look to the nature of the representation and to the conduct of Messrs Gamage in accepting it. In order that a false representation should justify itself as an inducing cause of a contract, with a view to rescission, it must not only be a lie, but a lie with a circumstance, and I think that the Court is bound to weigh the circumstantiality of the circumstance, and to consider whether it is one which an ordinary prudent man in the conduct of his affairs would have accepted and be justified in saying that he relied on.

The first thing that strikes me is that Messrs Gamage had warning that Miss Charlesworth had taken nine months to pay even a sum of £70 to account of a former purchase, and they were now trusting her to the tune of £250. I do not, however, found expressly on this, as I am not told whether the fact was present to the mind of Mr Gamage. Next, Messrs Gamage ought to have reflected that Miss Charlesworth candidly admitted at the

outset that for her to grant a cheque for £100 on 25th July was "not convenient." It was rather a draught upon Messrs Gamage's credulity to be asked to believe, without explanation, that a lady, to whom it is "not convenient" to grant a cheque on 25th July, would find herself able to grant a cheque, or at least one that would be honoured, the following week. Further, I think it ought to have occurred to Messrs Gamage that it was something out of the ordinary that a young woman of 24, of whom they knew nothing, should be renting a Highland shooting, and proposing to entertain a shooting party for the 12th, and that some inquiry about her personal history and about her tenancy of Flowerburn would not have been inappropriate. Anyone acquainted with Ross-shire would probably have hinted to them that the idea of the shooting party for the 12th was a bit of a draw at a venture, as Flowerburn is not a grouse shooting, and a reference to such a familiar authority as a "Sportsman's Guide" would have at once confirmed this. But what is the actual representation itself but a generality—a lie with a circumstance indeed, but a circumstance of such generality that no ordinary prudent man would have accepted it without requiring the generality to be converted into something more particular, into the truth of which inquiry might have been possible. The representation on which Messrs Gamage found is so flimsy and transparent as well as general, that view it by itself, still more view it in the light of the incidental or introductory circumstances to which I have referred, Messrs Gamage cannot, in my opinion, be heard to found upon it as a ground calling for the Court's interposition in their favour.

Such a question as the present can only arise where the bankruptcy of the alleged fraudulently contracting party has occurred, and where therefore the interests of other parties are concerned. The contract of purchase and sale, when induced by fraud, is, as I have said, not void—it is only voidable. Its voidance is an equitable remedy. And I am prepared to regard the matter in either of two alternative views. In the first place, when I regard, as Mr Hampton says, "the whole circumstances of the case," I come to the conclusion that Messrs Gamage have not established that the particular false representation on which they found was the inducing cause of the contract, and are not entitled to single it out and dissociate it from the many other considerations actuating them. In *Attwood* v. *Small*, 1838, H.L., 6 Cl. & Fin. 232, at p. 444 (49 R.R. 138), Lord Brougham says that where a representation contrary to the fact, and known to be contrary to the fact, is made the ground of rescission, it is, in his Lordship's view, necessary "that it should be this false representation which gave rise to the contracting of the other party. *Dolus dans locum contractui* is the language of the civil law, not *dolus malus* generally—not the mere fraudulent conduct of the party trying to overreach his adversary—not mere misconduct and falsehood throughout unless *dedit locum contractui*." I think his Lordship's words are very apposite to this case. There are plenty signs of the endeavour to overreach, of misconduct and falsehood throughout. But I do not find anything which satisfies me that there was a knowingly false representation *dans locum contractui*.

In the second place, I think that there is much virtue in the old maxim *vigilantibus non dormientibus jura subveniunt*, and that the law exists to protect a contracting party from the fraud of the person with whom he is dealing, and not from his own folly. In my opinion Messrs Gamage were defrauded as much by their own folly and disregard of ordinary business precaution as by Miss Charlesworth's fraud, and that in these circumstances they are not to be heard to rescind the contract they have made, and recover their goods, where such remedy necessarily brings their interest into conflict not merely with that of the purchaser but with that of the general creditors. At the same time I wish to reserve my opinion as to whether a seller, who has without fault of his own been defrauded through the representation and conduct of a purchaser, is entitled to vindicate his property in a question with a trustee in the sequestration of the purchaser where the goods are still in the hands of the purchaser at the date of the sequestration. I doubt whether the doctrine of *tantum et tale* can be carried so far. A subject held on a title with a latent trust seems to me to be a very different thing from one acquired on a contract tainted with fraud, and to apply the doctrine to the latter as to the former appears to me to come very near to treating fraud in a contract as a *vitium reale*.

But there is a further plea, No. 6, for the defence, on which, though it was not pressed, I think that the case admits of being disposed of, viz., that admitting the contract to be voidable, the pursuers are barred by their delay from rescinding. Miss Charlesworth's representation and promise was not merely that she would pay the balance in the end of September, but that she would send her cheque for £100 on the goods being delivered to her at Flowerburn. The goods were delivered but she never sent the cheque. It seems to me that this should have aroused the suspicions of Messrs Gamage, and warned them at once to make the inquiries which they had failed to make before they completed the transaction. Had they done so and taken immediate measures for their own protection, they would have deserved greater sympathy, though I rather think that any such action on their part would have promptly burst Miss Charlesworth's bubble and have only precipitated her sequestration. But Messrs Gamage did nothing for three months, and then did nothing more for the three months following than write gentle reminders. It was only when other creditors began to move, and the history of Miss Charlesworth's transactions came to light, that Messrs Gamage thrust forward the action, on which they

found as in itself a rescission which justifies their recovery of the goods. As I have pointed out, to allow of this would place them at an advantage in a question with other creditors. For this their delay and neglect of all reasonable precaution appears to me to entirely disentitle them. On this ground also I should be prepared to affirm the Sheriff's interlocutor.

LORD SALVESEN—In this case the Sheriffs have differed; but they are substantially agreed on two of the three questions of fact on which, as the Sheriff says, the decision of the case depends. Their judgment on these two questions was challenged by the respondent, but in my opinion quite unsuccessfully. The evidence of the pursuers' witnesses satisfies me that Miss Charlesworth made a statement to them to the effect that money was coming to her at the end of September, which would enable her to pay the balance of the account. I entertain equally little doubt that the statement so made was false in the knowledge of Miss Charlesworth, and was made with a view to inducing the pursuers to give her credit. At the time when she made it she was in debt to the extent of many thousands of pounds. She had no means whatever, actual or prospective, of paying her debts, and was subsisting solely on credit—a credit induced by the appearance of prosperity which she managed to maintain for a few months. She says that she had previously got large sums of money from a Dr Jones, who has lodged a claim in her sequestration for over £5000, and that she hoped he would again supply her with money. Dr Jones, however, was not examined, and it is not even said by Miss Charlesworth that between the dates when the goods supplied by the pursuers were delivered and the time when full payment ought to have been made she applied to Dr Jones for further supplies. The inference that I draw from her evidence as a whole is that she never troubled her mind as to whether she would be able to pay the debts which she contracted so long as she managed to obtain on credit the goods which she wanted. The expectation which she says she had that money would be obtained from other sources may be entirely dismissed as resting on no solid foundation whatever, and, indeed, having no existence except in her imagination. If it were necessary, I should be prepared to affirm, as the result of the evidence, that Miss Charlesworth never had any intention of paying for the goods supplied by the pursuers, as it is apparent that she never had any money or prospect of obtaining money which would enable her to pay the debts which she so recklessly contracted.

The Sheriff's main ground, however, for holding that the pursuers are not entitled to rescind the contract is that he thinks they have failed to prove that the sale of the goods which are now sought to be recovered was induced by the fraudulent statement made by Miss Charlesworth to their representative at the time of the sale. His reason for saying so is that Mr Gamage, who had to decide whether the sale was to go on or not, was not called as a witness, and that in his absence it could not be affirmed that the sale was induced by Miss Charlesworth's representation as to her prospective means, although proved to have been conveyed to Mr Gamage. In so holding I think he has underrated the effect of the evidence of Dennis, the assistant counting house manager with the pursuers. Dennis says that his special duty was to judge whether in the case of the proposed sale to Miss Charlesworth the cash terms on which the pursuers usually did business were to be departed from; that he would not have recommended Mr Gamage to execute the order but for his believing the statement that she was coming into means in September; and that but for his belief in the statement the transaction would have fallen through there and then. He is corroborated by the witness Hampton, who was present at the meeting with Mr Gamage which resulted in the pursuers agreeing to deliver the goods to Miss Charlesworth. The result of the evidence is that the favourable report which Dennis gave to his employer was induced by fraud, and that the decision of Mr Gamage to complete the sale followed upon that favourable report. I feel the force of what Lord Kinnear has said as to Mr Gamage not being examined as a witness in this case, but I think his view is too technical. Mr Gamage might have died in the meantime or have forgotten what passed, and have so stated in the witness-box. In either of these cases I do not see how the inference could be resisted, that at least a material inducing cause of the contract was the fraud of Miss Charlesworth. In any case I think it is a fair inference, in the absence of anything to the contrary, that but for the favourable report of the man whose special duty it was to make it, the transaction would never have been carried through, and that the *onus* is upon the defender to show that Mr Gamage would have given credit even although Dennis had reported unfavourably. On this matter I prefer the judgment as well as the reasoning of the Sheriff Substitute.

The only other matter argued turned on the question whether—assuming the sale was reducible as in a question with Miss Charlesworth—the pursuers are nevertheless precluded, in consequence of the supervening sequestration, from claiming to take the goods out of the possession of the trustee. It does not seem to me that any real difficulty arises in this case, because the action had been brought and interim interdict granted before Miss Charlesworth had committed any act of bankruptcy, and the rights of the pursuers must be determined as at the time when the matter was made litigious. Even if it had been otherwise I think there is ample authority for holding that a sequestration is not a bar to a claim for rescission of a contract which has been induced by fraud on the part of

the bankrupt. The trustee takes the estate *tantum et tale* as it stood in the person of the bankrupt, and the other creditors cannot complain that property is taken out of the sequestration which would not have fallen into it but for the fraud of the bankrupt. The passage in Bell's Comms. and the decisions in the cases of *Watt*, *Muir*, and *Eastgate* cited at the debate, amply support this proposition in law, which, so far as I know, has never really been controverted. The difficulty in all such cases is to prove that the contract was induced by fraud, but once this is established, a claim for rescission emerges, if it has not been barred by the conduct of the person defrauded or by rights having been meanwhile acquired by *bona fide* third parties.

The defender further pleaded that the pursuers' delay in asserting their rights, and the negotiations which they had with a view to taking a bill for their debt put them out of Court. This might have been so if they had been in knowledge of the fraud which had been practised upon them, but, so far as they were aware, the representation made by Miss Charlesworth might have been a perfectly honest one at the time when it was made. After they came to suspect the fraud there is no ground for maintaining that they were in *mora* in asserting their rights. On this matter, therefore, I am also against the defender.

I am accordingly of opinion that the judgment of the Sheriff-Substitute should be restored.

The LORD PRESIDENT, who was presiding at the advising, gave no opinion, not having heard the case.

LORD M'LAREN was absent.

The Court dismissed the appeal.

Counsel for Pursuers (Appellants)—Blackburn, K.C. — Macmillan. Agents — Carmichael & Miller, W.S.

Counsel for Defenders (Respondents)—Constable, K.C.—J. B. Young. Agents—Purves & Simpson, S.S.C.

Thursday, December 16.

FIRST DIVISION.

(SINGLE BILLS.)

CAMPBELL AND COWAN & COMPANY *v.* TRAIN.

Process — Sheriff — Appeal — Competency — Value of Cause — Conjunction of Two Causes ob contingentiam — Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 7.

The Sheriff Courts (Scotland) Act 1907, section 7, enacts that causes not exceeding fifty pounds in value shall not be subject to review by the Court of Session.

A motor and a lorry collided. Separate actions were raised in the sheriff court at the instance of the driver of the lorry, and the proprietors of the lorry, against the proprietor of the motor, concluding for £25 and £50 respectively. These actions were on the motion of parties conjoined, and after a proof decree was given for £10 in the first action and £50 in the second. On appeal the Sheriff assoilzied the defender in the conjoined actions. The pursuers appealed. The defender objected to the competency of the appeal.

Held that the appeal was competent.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), section 7, enacts—"Subject to the provisions of this Act and of the Small Debt Acts all causes not exceeding fifty pounds in value exclusive of interest and expenses competent in the Sheriff Court shall be brought and followed forth in the Sheriff Court only, and shall not be subject to review by the Court of Session. . . ."

James Campbell, carter, 15 Williamson Street, Glasgow, raised an action in the Sheriff Court at Glasgow against John Train, building contractor, Burnside, Rutherglen, for damages laid at £25, in respect that on 25th October 1908, while he was leading a horse yoked to a lorry out of a gate at 400 Springfield Road, Glasgow, a motor car belonging to the defender collided with said horse and lorry and he sustained personal injuries owing to the fault and negligence of the driver of the motor, the defender's servant.

Messrs Cowan & Company, cartage contractors, the owners of the said horse and lorry, also raised an action in the same court against the same defender concluding for £50 as damages to the horse and lorry in the same accident.

The following narrative of the *facts* and *procedure* is taken from the opinion of the Lord President:—"The point raised in this case at this stage is one of competency. There was an accident owing to a collision between a motor and a lorry, and separate actions were raised at the instance of the driver of the lorry and the proprietors of the lorry, who were cartage contractors, against the proprietor of the motor. These actions concluded for £25 and £50 respectively, and were brought in the Sheriff Court. After the records had been closed a motion was made in the action concluding for £25—that is, Campbell's action—and an interlocutor was pronounced by the Sheriff-Substitute (Balfour) in these terms—'On the motion of parties remits this action to the action at the instance of Cowan & Company against the present defender for conjunction *ob contingentiam*.' Then in the other action, Cowan & Company's action for £50, this interlocutor was pronounced on the same day—'On the motion of parties conjoins herewith the action at the instance of James Campbell against the present defender, which has been remitted hereto of this date for conjunction *ob contingentiam*.'