that respect the obligation is open and general. I should read it in the absence of evidence to construe it, as meaning either cash or on credit. But there is this further reason for thinking that the parties must have contemplated credit, that a guarantee is not much sought after except in credit transactions. When a party pays cash, a guarantee is not required, and it is a mistake to say that nothing is cash but when the money is paid at once before delivery of each parcel of goods. That is the meaning of a cash sale when the subject is one specific article delivered once for all; but in a course of dealing, when a retail dealer gets delivery of some quantity of goods, on twenty out of every thirty days in a month, it is out of the question that the money is to be paid on each occasion in cash over the counter, and, therefore, in all such trades cash is *prompt payment,* that is, within the time customary in the trade, and that must have been known to the parties here.

But it is said that the time of payment was precisely fixed by the invoices, which show the nature of the business of Bowe & Christie, and that they limited all their customers to payment within a certain time. That view is adopted by the Lord Ordinary. I do not so read the invoices. They stand thus:—"Terms, cash in 14 days, less 2½ per cent. discount." Does that mean that Bowe & Christie deal on no other terms but on receiving cash in 14 days? No; but it means that if the customers will pay in 14 days they will get 2½ per cent. discount. But that does not interfere with the discretion of Bowe & Christie in granting an extension of credit to customers whom they can trust, or for whom they hold a guarantee; and no one granting such a guarantee can rely on such an entry in an invoice as excluding credit. It is only necessary to look at any of the accounts to see how impossible it is to apply the doctrine of absolute cash payments. In the month of May there were on nine different days nine different parcels. Is it to be supposed that there was to be a separate cash payment for each parcel? Certainly not. There must be settling days, and the invoices say that parties on settling within 14 days will get 2½ per cent. discount. That is cash payment. That being so, the terms of the invoices do not affect this matter, or preclude Bowe & Christie from giving any reasonable extent of credit to their customers. The credit they give is three months, and that is neither unusual nor unreasonable. It is a matter of general knowledge that three months is a very ordinary term of credit in trade, and it has not been shown that in this particular trade it is an unusually long term, or that the arrangements between buyer and seller are different in this from what they are in other trades. By taking these bills the pursuers did nothing out of the ordinary course of trade, and nothing but what was contemplated by the guarantee. The Lord Ordinary says that the effect of taking these bills was to innovate on the original transaction, and was, in fact, equivalent to a loan of money. That is an extraordinary doctrine. The only effect of extending the term of credit to Andrew Hutchison, and of his availing himself of it, was, that he lost his discount, and in one particular case he had to pay interest besides. But that is not inconsistent with the ordinary giving of credit. If you get discount, provided you pay cash, then if you don't pay cash, you lose your discount. That is nothing like giving time, so as to liberate the cautioner.

The result is, that the pursuers are entitled to a judgment for their entire claim, for the question of indefinite payment does not arise in the view I take of the case.

The only other matter for consideration is, whether we can sustain the item of £60 in the account, sued on under date 18th March 1866. It seems to me that if that is a good charge against Andrew, and if he could not object to it, it is a good charge against the cautioner, if within the guarantee. So the cautioner has conceded on record, for he says he "knows nothing of the state of accounts between the pursuers and the defender Andrew Hutchison; but he will, under reservation of his whole pleas, hold as correct the said state of accounts, as it may be adjusted in this process." That is, the state of accounts as libelled. Now, what is this state of accounts? It is spoken to in the second article of the condescendence:—"The pursuers accepted of that guarantee, and in implement of the arrangement, and on the faith of the said guarantee, supplied the defender Andrew Hutchison with sugar from time to time to a large amount. The said sugar was sold to him, or furnished to him on his order. An account of these sales to him, and his payments, is produced and referred to. The defender Andrew Hutchison had invoices and full details regularly furnished to him. He never objected to the amount of the account, or asked for further information." And what is Andrew Hutchison's answer? He says:—"The furnishings, for which payment is demanded under the present action, were not made exclusively on the faith of the said guarantee. Admitted that the said furnishings were made on the defenders' order, and that he had invoices and full details supplied to him, and that he never objected to the accuracy of the accounts so furnished." Now, there were various accounts in connection with those dealings, and, *inter alia,* two which formed the basis of the transaction of 1866. His Lordship then examined the accounts, for the purpose of tracing the history of this item of £60, and continued—It is impossible that Andrew Hutchison can be heard to ask a voucher for this sum. He has confessed the item to be correct. It is part of the transactions of payment for goods furnished in 1866. Therefore, it is unnecessary to inquire whether the I O U could be received as a voucher of account, not being holograph, and on that I give no opinion. The result at which I arrive on the whole matter is to give judgment for the pursuer.

The other Judges concurred, LORD DEAS and LORD ARDMILLAN expressing their opinion that an I.O.U., if not holograph, could not be made the foundation of an action.

Agent for Pursuers—T. Maclaren, S.S.C.
Agent for Defenders—D. Curror, S.S.C.

Friday, March 13.

KER'S TRUSTEES *v.* JUSTICE AND OTHERS.

(5 Macph. 4; 2 Macph. 371.)

Liferent—Assignee—Trust-estate. Held, that trustees who held a trust-estate for the purpose, *inter alia,* of paying an annuity, securing provisions to younger children, &c., were not bound to convey the liferent of the estate to the party entitled to draw the annual rents and profits thereof, or to his assignee, as the effect of that would be to bar them from the management of the estate and prevent them from discharging the duties imposed on them by the testator.

The late Mr Ker of Argrennan, conveyed his whole estate, including Argrennan, to trustees, for the purpose of paying certain provisions to younger children, of providing an annuity to his widow, and of conveying the residue to his eldest son, Robert Ker junior, on his attaining the age of twenty-five. If any of the truster's children conducted themselves so as not to merit the approbation of the trustees, the trustees had power to limit the right of such child to a liferent. It has already been held by the Court (1) that the right of Robert Ker junior was effectually limited to a liferent by a resolution of the trustees, and (2) that, by virtue of an assignation executed by Robert Ker junior, Mr Justice, and the Caledonian Insurance Company in his room, were entitled to be ranked and preferred to the rents, interests, and annual profits of the late Mr Ker's trust-estate, in preference to the trustee under the marriage-contract of Robert Ker junior. A question now arose as to whether the trustees of the late Mr Ker were bound to execute a conveyance of the liferent of the estate of Argrennan to Mr Robert Ker junior, or to Mr Justice, his assignee.

The Lord Ordinary (Kinloch) pronounced an interlocutor, finding "that the raisers, the trustees of the deceased Robert Ker of Argrennan, are bound to execute a deed of conveyance in favour of Robert Ker junior, now of Argrennan, the eldest son of the said deceased Robert Ker, or of the claimant Walter Justice, as his assignee, as shall be required of them by the said Walter Justice, of the liferent right and interest in the lands of Argrennan, and other subjects, which, by prior interlocutors in the cause, has been found to pertain to the said Robert Ker junior: But this always subject to the burden and fulfilment of the trust-purposes of the disposition in favour of the said raisers, so far as the same are yet unfulfilled, and are preferable to the right of the said Robert Ker junior."

The trustees reclaimed.

Crichton for reclaimer.

Pattison and Macdonald for respondents.

At advising—

Lord Curriehill—This is a question arising in a multiplepoinding. The fund *in medio* in that action consists of the trust estate of the late Mr Ker of Argrennan, and the competition has arisen as to the portion of the estate which the testator left to his eldest son, but which was subjected to certain conditions by a codicil. There has been a great deal of discussion in this case already. Robert Ker junior, before this right had opened to him, had conveyed it in favour of Mr Justice. The first question was as to the limitation by the trustees of the right, which had originally been constituted in favour of the eldest son, to a liferent. It was finally decided that that limitation was effectual. Then came the competition between the assignee of the eldest son, Mr Justice, and the Caledonian Railway Company, and the marriage contract trustees, as to the limited right remaining to Robert Ker junior, after that limitation. On the 13th January 1866, the Lord Ordinary pronounced an interlocutor preferring the assignee, and that judgment was adhered to, so that it is now settled that these assignees of Robert Ker junior are entitled to the emoluments of the trust estate provided to the oldest son. But another claim is made under the claim lodged for Mr Justice, a claim upon the trustees in whom the fee of the estate is still vested, to grant a deed of conveyance in favour of these assignees of a real right to the liferent. What is meant by that is, that the assignee insists upon a deed under which he could be infeft in the liferent of the estate. The Lord Ordinary has pronounced this interlocutor, finding that the trustees are bound to execute the conveyance sought, and that interlocutor is reclaimed against. I confess I should like to have seen what kind of disposition it is which is demanded, under which the reclaimers could be infeft in Robert Ker's right of liferent in the lands of Argrennan. I have some difficulty in seeing how such a deed could be framed. A consideration of that difficulty has led me to consider very attentively the argument which has been submitted to me. The conclusion to which I have come is, that Mr Justice is not entitled to have his claim sustained, and that the interlocutor of the Lord Ordinary ought to be altered. I have come to that conclusion on two grounds. The first is that Mr Robert Ker himself would not be entitled to succeed in his demand, and for this reason, that the estate left by the truster is vested feudally in the trustees, for the purposes of the trust. They are to hold the estate so as to enable them to perform these purposes, and they could not perform their functions if they were to relinquish possession of the trust estate, and grant any such deed as is here demanded. The intention of the testator was that the feudal right to this estate should remain in the person of these trustees without qualification or restriction until all the purposes of the trust were accomplished. On examining the deed we see that it is framed on that footing. There are many purposes which the trustees could not fulfil if they divested themselves of the estate. They are to give the house to the mother who is still alive. Then there are provisions to children, depending on a variety of conditions not yet fulfilled, and then they are to hold the residue in trust for Robert Ker, and the heirs of his body, whom failing a series of substitutes, until they attain the age of majority, and then follows the declaration on which the former case depended, as to the conduct of the beneficiaries. Now the trust is so constituted that the trustees shall retain the whole estate vested in themselves until the trust is at an end, and that the beneficial interest of the different parties must be given effect to by the trustees. Accordingly Robert Ker junior, having attained the age of 21, became entitled to the emoluments of the trust estate, so far as not required for the other trust purposes. But he was entitled to get these free rents and revenues from the trustees. He had a right to demand them from the trustees, but that was his right, and I don't think the trustees were under any obligation to infeft him in the right to the trust estate or to limit their own right in that respect. I think that if this demand had been made by Robert Ker junior himself, it could not have been granted. Mr Justice, as in his place, has a right to uplift these rents by the judgment I have referred to. But he says he is entitled to have a feudal right to the lands themselves. I do not think that such a right is possible. I do not think that even if Robert Ker junior had himself been infeft as a liferenter, that right could possibly have been assigned to his assignee. By the law of Scotland, such a liferent right is intransmissible. It cannot be communicated, or conveyed in any way whatever, and no person except the original liferenter can be infeft in the liferent. The authorities are quite clear on that point. (Stair ii. 6, 7; Erskine ii. 9, 41). On these grounds, I think that the demand here made by Mr Justice

cannot be complied with, and that he has already got all he is entitled to.

Lord Deas—In this case the Lord Ordinary has found [*reads interlocutor*]. I agree with Lord Curriehill that these parties are not entitled to this conveyance. It is clear that in the ordinary case of a disposition and deed of settlement in favour of trustees, where the trustees are to hold the heritable subjects under that deed for behoof of a party in liferent, and the issue of that party, born or unborn, in fee, they cannot be called on when the trust subsists, and they are not getting any decree of exoneration, to convey that liferent, or, in other words, to denude of the trust to that extent. The trustees are entrusted by the truster with the duty of holding the subjects for certain purposes, for behoof of the liferenter and fiars. When the time comes for denuding of the fee, a conveyance may be granted by the trustees to the liferenter in liferent, and to the fiar *nominatim* in fee, and to whatever substitutes the truster has appointed, and they will be entitled to exoneration. But till then, their duty is to hold for behoof of the different parties. I never heard of a case in which trustees under such a settlement was required to denude of the liferent when they could not dispose of the fee. So long as the purposes are unfulfilled, the responsibility lies on the trustees of managing the estates; but if they should grant such a conveyance of the liferent as is here asked, they would have nothing more to do with the estate until the time came for disposing of the fee. If, in the meantime, any one interfered with the estate—if, for instance, any question arose as to the cutting of wood, it is difficult to see how the trustees could interfere, notwithstanding the duty imposed on them by the truster. If they were to denude, they could not grant a lease, or perform any act of administration. Is there anything in this deed to make a conveyance of the liferent competent, more than in the ordinary case? I don't think there is [*reads directions in trust-deed*]. To none of these parties could the trustees convey until the proper time came. It has been found already that the trustees had power to restrict Robert Ker's right to a liferent. They did so restrict it, and the effect of that is, that they now hold as if the deed had directed them to hold for him in liferent, and for the others in fee.

It is a separate matter whether they might give to Robert Ker or Mr Justice actual possession of the estate. No question as to that is raised here, and on that matter I give no opinion. It may be a question of circumstances whether, when an estate is directed to be held for one party in liferent, and for others in fee, the trustees can put the estate into such a position. If they did, they would still be responsible. Besides that, I have all along wished to know what sort of deed it was at which the Lord Ordinary pointed. The trustees now hold Mr Robert Ker junior, in liferent, and for others in fee. Robert has a *jus crediti* for his liferent. He has made a conveyance of that, but it stands in the position of a *jus crediti* still. The only deed that could be granted would be not an assignation, but a constitution of a liferent. I never saw a conveyance of a liferent, not to the liferenter, but to some one else. It would be quite against the will of the testator for the trustees to give away their power of management.

Lord Ardmillan—In reviewing this interlocutor, the first thing we have to do is to see if we understand what the Lord Ordinary means. He finds:—"That the raisers, the trustees of the deceased Robert Ker, of Argrennan, are bound to execute a deed of conveyance in favour of Robert Ker junior, now of Argrennan, the eldest son of the said deceased Robert Ker, or of the claimant Walter Justice, as his assignee, as shall be required of them by the said Walter Justice, of the liferent right and interest in the lands of Argrennan, and other subjects, which, by prior interlocutors in the cause, has been found to pertain to the said Robert Ker, junior." Now, in the first place, what is it which, by previous interlocutors, has been found to belong to Robert Ker junior. I am satisfied that nothing more has been decided than that Mr Justice is entitled to the rents in the hands of the trustees, and that there has been no finding of any right of liferent other than to receive from the trustees the rents which they draw. Whether he had such a right as he now claims was not touched by our former judgment. Lord Colonsay said:—"If Mr Justice is entitled to a conveyance of the estate, I do not see that in the Lord Ordinary's interlocutor, and this judgment does not foreclose that question." And Lord Deas and myself expressly reserved the question. The second point is, whether the Lord Ordinary here meant a direct conveyance to Mr Justice. He says the trustees are to convey either to Mr Robert Ker or to Mr Justice. If Mr Justice asks them to convey to him, I agree that that is out of the question. It is impossible to make Mr Justice liferenter in the estate. He may have an interest in the rents assigned to him, but he cannot be a liferenter. That leaves the question whether Mr Robert Ker or Mr Justice is entitled to a conveyance to Mr Robert Ker, and on that matter I concur with your Lordships. This is a trust constituted for a long period. The trustees hold for many beneficiaries, with many important duties arising from time to time; and I am clearly of opinion that it is not in the power of Mr Robert Ker to break up the trust before the trustees can be fully exonered. He is entitled to receive the rents from their hands, but to no more.

The Lord President, not having heard the argument, took no part in the advising.

Agents for Reclaimers—Waddell & M'Intosh, W.S.

Agent for Respondents, Thomas Ranken, S.S.C.

Friday, March 13.

SECOND DIVISION.

RUTHERFORD *v.* LAWRIE AND OTHERS.

Legacy—Averment of Payment—Proof—Writ or Oath—Acquiescence. Circumstances in which *held* that an averment of the payment of a legacy to the father of a lady to whom it was due, in terms of a trust-deed, could only be proved by the writ or oath of party, and moreover was an irrelevant averment, looking to the terms of the trust-deed. Averments of acquiescence held irrelevant and too vague.

This was an advocation from the Sheriff-court of Kirkcudbright of an action brought by Mrs Jane Robertson Wood or Rutherford, daughter of the late Rev. George Wood, minister of the United Presbyterian Church, Kirkcudbright, against the representatives of the trustees and executors of the late