Counsel for Appellant—Strachan. Agent—W. Manuel, S.S.C.

Counsel for Trustee—Pattison. Agent—J. Somerville, S.S.C.

Wednesday, June 11.

SECOND DIVISION.

[Lord Ormidale.

WEST LIMERIGG COLLIERY COMPANY *v.* ROBERTSON.

Obligation—Contract—Implement—Counter Claims.

A colliery company contracted to supply for steamers 400 to 500 tons of coal per month for six months, payment to be made monthly. After two months a dispute arose to which month a certain delivery was imputable. The defenders having refused to pay for the delivery of the two preceding months,—*held* that they were bound to implement the contract to this extent, and that they were not entitled to go elsewhere for coals and charge the price against the sum due to the pursuers, who had not declined to fulfil their obligation.

This case came up by reclaiming-note against the Lord Ordinary's (ORMIDALE) interlocutor. The summons concluded for the several sums of £164, 19s. 2d., £64, 11s. 4d., and £133, 14s. 8d. respectively, with interest and expenses. On 5th March 1872 a contract was entered into by Mr Simpson, for the Limerigg Colliery Co., and Mr Robertson in the following offer:—"I beg to confirm having sold to you to-day, for 6 months, dating from 1st of present month, say 4 to 500 tons per month of West Limerigg steam coal, delivered alongside of your steamers at Broomielaw, Glasgow, at the rate of (12s. 1d.) twelve shillings and one penny sterling per ton of 20 cwt., less 5 per cent. discount. In the event of steam coal being reduced, say 6d. per ton, to Messrs Handyside & Henderson (Messrs R. Baird & Co.'s price to regulate), you to have a discount of 7½ per cent., but no further discount to be given let prices fall what they may during the six months. Cash to be paid one month after each shipment." This offer was formally accepted on March 6th by a letter also produced in process. No coals were ordered or delivered in March. In April the defender ordered and took delivery per 'Crusader' of $232\frac{1}{20}$ tons. In May he ordered and took delivery

per 'Mirfield,' . . .	$250\frac{2}{20}$ tons.
and per 'Violet,' . .	255
and per 'Venezia,' . .	25
Total for May,	$530\frac{2}{20}$

This was in excess of the contract quantity, but the pursuers, as they had the coals at the time, agreed to let the defender have them. He, however, requested other 220 tons to be delivered in May at Grangemouth, but this the pursuers refused, the order being both as to its amount and the place of delivery unwarranted by the contract. On 17th June the defender wrote the pursuers—"Please note 250 to 260 tons Limerigg steam coal will be required at Broomielaw for 'Crusader,' about this day week." And this order he subsequently increased to from 350 to 360 tons. The pursuers accordingly sent forward their trucks with coals to the College depot of the Railway Company, with a view to their being carted thence to the Broomielaw for delivery. On arrival at the College depot the defender could not take delivery of the coals owing to there not being clear wharfage access to the vessel, and the trucks were detained several days, causing a stoppage of the pits and serious loss. The pursuers alleged that the defenders were not ready to take any of them till Friday and Saturday 28th and 29th June, when he took 112½ tons, and refused to take any more. The remainder of the coals the pursuers had forwarded to College depot were afterwards taken delivery of in July, and were invoiced as part of the July delivery. In addition, on 26th June the defenders wrote—"Please forward, in addition to what is already ordered, 200 tons best Limerigg steam coal, this week certain. I will instruct M'Gill as to delivery." In July the defender, on being applied to for payment of invoice No. 1 (the first of the conclusions of the summons), which was then nearly three weeks past due, insisted on having the 233 tons in invoice No. 3 (viz. £133, 14s. 8d.), and the additional 200 tons above mentioned, reckoned as June shipments, and to have 500 tons in addition to these quantities delivered in July, and refused payment of the past due invoice. The pursuers averred that none of the vessels for which the defender nominally purchased coals were in Glasgow during the months of July or August 1872, except the "Crusader," which left on 5th July for Odessa.

The defenders stated that the coal bought by the defender was to supply steamers whose arrivals were irregular, and that he only refused to pay for the coals delivered already to him when the pursuers intimated their intention to make no further deliveries. He then intimated that he had been obliged, and would be obliged, to supply himself in the market, and at advanced rates. The result was, that after crediting the pursuers with the price of the coals received, and the quantity the defender was entitled to get, and debiting them with the price of the coals purchased in their place, there remained a balance due to the Coal Company of £15, 18s. 2d. A cheque for this balance was, on 16th August 1872, sent by the defender to the pursuers, but was returned by them.

The pursuers pleaded—(1) That the goods of which the prices are sued for having been sold and delivered by them to the defender, the price being resting-owing, they were entitled to decree, with expenses. And (2) The statements and pleas of the defender being unfounded in fact and in law, the defences ought to be repelled.

The defender pleaded *contra* that (1) The pursuers, having violated their contract with the defender, were not entitled to obtain implement of his part of the same. And (2) The pursuers having refused to deliver coal to the defender in terms of their contract, and having thus compelled him to purchase elsewhere at increased prices, the defender was entitled to withhold payment of the sums sued for, and to apply the same in the said purchases, and should be assoilzied, with expenses.

After a proof, and hearing counsel, the Lord Ordinary (ORMIDALE) pronounced (on 23d November 1872) the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof:—Finds it proved that under the

contract between the pursuers and defender, constituted by the letters of 5th and 6th March 1872, set out in the first article of the defender's statement of facts, the sums sued for are resting-owing by the defender to the pursuers, for coals sold and delivered in the months of April, May, and June 1872: Finds it also proved that the pursuers were ready and willing fully to implement said contract so far as incumbent upon them, by delivering any further supplies of coal the defender might require in terms thereof: but that the defender refused to pay the sums now sued for, or to take delivery of any further supplies of coal, except upon a footing and conditions inconsistent with the agreement of parties under said contract: Finds, therefore, the defender liable to the pursuers in payment of the sums sued for, with interest, in terms of the conclusions of the summons, and decerns: Finds the pursuers entitled to expenses, &c.

"*Note.*—There is in reality no dispute that the coals, for the prices of which the pursuers now sue, were supplied by them to the defender under the contract referred to, and that the dates from which interest arises, and the dates of the supplies, are accurately stated.

"But the parties have, unfortunately, differed as to the footing upon which the pursuers were bound to continue to deliver to the defender further supplies of coals, the pursuers maintaining that certain deliveries which were made by them in the month of July were to be imputed to account of the quantity which it was incumbent on them to supply under the contract for that month of July, while the defender insisted that the deliveries referred to must be imputed to account of the supplies for the month of June preceding, and refused to implement his part of the contract by paying the price of the coals he had already received, viz., the prices now sued for, except on that footing.

"That such is substantially the nature of the dispute between the parties sufficiently appears from the defender's own account of the matter in the third article of his statement of facts; and from that statement it may be also inferred that it was the rise in the market price of coals about the time when the dispute arose which led to it. The market price of coals in July being higher than the contract price, the pursuers had good reason to object to supply in that month more than was bargained for, while the defender, on the other hand, had an interest, and may have been desirous of obtaining as large a quantity as he could at the comparatively low contract prices.

"In order that it may be ascertained which of the parties is right in this controversy, the essential conditions of their contract require at the outset to be carefully attended to. Now, whatever difference of opinion may be entertained regarding some points in the contract, the Lord Ordinary thinks it clear that, besides the prices and dates of payment, about which there has been no dispute—1st, That the supplies of coals undertaken to be made by the pursuers were to be in certain monthly quantities, viz., between 400 and 500 tons a month for each of the six months over which the contract extended; and 2d, That the coals were to be delivered to the defender as he required them, alongside a steamer at the Broomielaw. Whether the steamer required to be one of the six identical vessels which were under the charge of the defender at the time the contract was entered into, or any other steamer, whether under his charge, or only secured by him for taking on board the pursuers' coal, may be a question attended with doubt; but it is one which, according to the view taken by the Lord Ordinary of the case otherwise, it is of little or no consequence to determine. In regard, however, to the other two points, the Lord Ordinary can entertain no doubt.

"It is obvious that if the supplies of coal by the pursuers in each month of the six over which the contract extended are not to be confined to that month, the reference to monthly deliveries in the contract would be altogether unmeaning. But a contract cannot be so dealt with. It is besides plain that the pursuers had good and substantial reasons for this arrangement, for otherwise the defender might have it in his power to order, and the pursuers would be bound to deliver, in any one month the whole quantity of coal—that is to say 2700 tons—to which the defender would have any right during the six months, a view which the terms of the contract itself obviously excludes; and accordingly neither party has suggested that such is the true meaning of their agreement. On the contrary, the evidence for the defender shows that as no coal was required or ordered by him in March, the first month of the six, the obligation on the pursuers under the contract for that month has all along been held by him as discharged, and in like manner the quantities which were delivered in April and May respectively were held to have discharged the pursuers' obligation under the contract for these months. All this is, indeed, apparent from the testimony of Mr Wilkie himself, who appears from his evidence to be a partner of the defender.

"Then, in regard to the other essential condition of the contract, viz., the obligation on the one hand of the pursuers to deliver the coals at the Broomielaw alongside a steamer, and the obligation of the defender on the other hand there to receive them, there appears to be no possible room for doubt, the terms of the contract being in this respect quite explicit. It is no doubt true that the proof shows that in two instances deliveries of coal were made by the pursuers, not at the Boomielaw, but at Stobcross and Grangemouth; but that was done, not because the contract required it, but to oblige the defender, and for his accommodation, on his paying the difference of carriage, in terms of a special arrangement to that effect.

"Assuming, then, that the Lord Ordinary is right in the views now expressed by him in regard to what may be held to be two essential conditions of the contract, he think it follows, on a sound estimate of the proof, that the operations under the contract ceased not through any breach or fault of the pursuers, but entirely in consequence of the erroneous and mistaken ground taken up by the defender. He has come to this conclusion on a consideration, in particular, of the evidence given by the pursuers' manager, Simpson, the contracting carter, M'Ghie, and the defender's partner, Mr Wilkie. According to Simpson's evidence, the pursuers had great difficulty in the month of June, when an order was given for coals by the defenders, to ascertain from them where they were to be sent to, in order to be delivered—that is to say, at what berth or part of the Broomielaw the steamer lay, alongside of which the coals were to be taken to be delivered. The written evidence, consisting chiefly of telegrams passing between the parties, sufficiently corroborates the evidence of Mr Simpson in this re-

spect, and Mr M'Ghie, the contracting carter, gives also satisfactory corroborative evidence. And further, having regard to what Mr Simpson and M'Ghie say, and to the written evidence, the Lord Ordinary can arrive at no other conclusion than that the pursuers duly and without any unnecessary delay discharged the duty incumbent on them, and that it was entirely owing to the fault and failure of duty on the part of the defender himself, in not being prepared to take delivery of the coals ordered for June by him, that they were not fully received by him before the close of that month. All this is indeed apparent from the testimony of the defender's partner, Mr Wilkie, himself. It is clear from what he states that not only no answer was timeously given to the pursuers' enquiry where they were to deliver the coals, but also that they had no vessel at the Broomielaw requiring them till the 27th of June, and that even then, and during the remaining days of that month, the coals, in place of being taken delivery of as they were brought forward by the pursuers, were refused. And as the Lord Ordinary must hold it to have been the duty of the defender to take care that the coals could be taken delivery of as they were brought forward, he has been unable to see the force of the excuses suggested for him in the course of the proof for not being able to take delivery. If he had no wharf or berth at the Broomielaw of his own, and if the public quays were otherwise so much occupied as not to admit of the coals being laid down and taken delivery of as they were brought forward, the defender, and not the pursuers, must suffer the consequences. The pursuers obviously undertook no duty in regard to that matter. So far as the Lord Ordinary can see, the pursuers were neither bound, nor indeed entitled, to interfere in the matter. It lay entirely with the defender to order the coals as he required them, and it was for him to make the necessary and timeous arrangements for taking delivery of them.

"The Lord Ordinary, for the reasons now stated, must hold that it was no fault of the pursuers that the coals which it is proved were supplied by them, and taken delivery of by the defender during the first four days of July, were not taken delivery of before the close of the month of June; and if so, he must also hold that the pursuers were right in their contention that all the deliveries made by them in the beginning of July fell to be imputed to account of the quantity incumbent on them to supply for that month, and not for the preceding month of June. And it necessarily follows from this that the pursuers are entitled to prevail in the present action, for had it not been for the unjustifiable position which was taken up by the defender when the difference between the parties occurred, and which he has persisted in maintaining as his defence to this action, the contract in question would, so far as the pursuers were concerned, have been fairly carried out, and fully implemented.

"The Lord Ordinary has said nothing in regard to the evidence of the defender, Mr Robertson, because, however fair and honest in his intentions that gentleman may be, the loose notions which he seems to have of how a specific written contract can be dealt with, render his evidence of little or no weight.

"Neither is it necessary for the Lord Ordinary, in the view he has taken of the case, to enter into a consideration of the question how far the claim set up by the defender, as a set-off to the sums admittedly incurred to the pursuers for coals actually delivered by them, are well founded or not. He will only remark on that subject that he is not satisfied on the proof that these claims are in any view of the case well founded, for it rather appears to him that the defender has failed to show by satisfactory evidence that he was prepared to take delivery, in terms of the contract, of any coals beyond those which were actually received by him, and for the prices of which the present action concludes."

The defender reclaimed, and argued that the contract was not carried out owing to an accident for which neither party was answerable. The mere fact of the wharf being inaccessible to the pursuers' coal-carts, and their being for that reason delayed in delivering their supplies, was not to prejudice the defender in his rights to have a monthly supply of 500 tons, the same having been timeously ordered by him. The *onus* of risk lay with the pursuers, the defender having done all that lay in his power to implement his obligations. Authority—*Johnston* v. *Robertson*, March 1, 1861, 23 D. 646.

The pursuers maintained that the point at which parties broke away was the positive refusal to pay for coal delivered in May, and payment for which was over due. In his correspondence the defender says, with reference to the imputing of the order of 26th June to July—"If you still refuse this, I must refuse your account in case of having to buy otherwise." The pursuers' argument comes to this—Bear this in mind, you are disputing as to a certain order for coals, but we are still entitled to payment for what is due now six weeks, whereas the contract says it must be delivered within a month.—The account being thus admittedly due, has the defender any reason for not paying them? Subsequent to this disputed transaction no order was given until after the action was raised. By this view the question as to the rights and wrongs of the disputed 233 tons does not require consideration. Is it possible for the defender to establish a breach of contract against the pursuer when he was himself in breach by non-payment for what had been actually delivered? Authority—Ersk. iii. 3, § 84.

At advising—

Lord Justice-Clerk—[His Lordship first proceeded to narrate the facts of the case]. With regard to the order of June 26th, I think that it was clearly not in terms of the contract, and I read the correspondence in the view of its showing no real foundation for any claims of damage for the months of July and August. The point of dispute raised on the question as to whether the coals ordered in June, and the delivery of which was not completed till after July 1st, were to be attributed to the amount for June or that for July. If we were to decide the question on the construction of the contract, my impression is against the respondents. I think they were not entitled to throw the order for June into July, even although delivery was delayed by casual occurrences beyond June. But the point becomes one which it is not necessary for your Lordships to decide, because there remained in any view a balance of *nearly 270* tons in July, even regarding the order for 233 as ascribable to that month; and there were only required by the defenders during the month 54 tons for the steam-ship "Crusader." Further, the order

for 600 subsequently does not appear to have been for any steamer then at the Broomielaw, and to have been given merely to test whether the pursuers would or would not implement it. On these grounds, I am for adhering, and I incline to put our judgment on the footing that there has not been adduced sufficient, or indeed any, proof of damage suffered by the defender from non-delivery of coals, and that consequently the defence fails.

LORD COWAN—I am of opinion that the delivery on July 1st, 2d, and 3d, must, in the circumstances, be ascribed to the month of June. I cannot think that in a mercantile contract such as this, the mere fact of the intervention of a Sunday, or the delay of a day or two in taking delivery, is to cause orders intended for June to come into the July account, and exclude the 233 tons of coals from being computed in reckoning the monthly allowance of 500 tons for June. The delivery came to be the matter of dispute. I do not think that this, however, was really made by the pursuer a ground on his side for annulling the contract. It must be borne in mind that although 54 tons were bought elsewhere by the defender to fill up what was wanted in the supply for the s.s. "Crusader," yet the defender need not have gone elsewhere for this, as he had in any view still 270 tons of the July supply over and above the disputed orders, which he could have had if he had required them. The only question is, Whether the claim for damages for breach of contract in July and August has been relevantly set forth and established? As to this, I think that, as the pursuer afterwards was willing to supply coal if called on so to do, there cannot exist such a claim, and any damage resolves into the matter of the 54 tons, and the difference between market and contract prices therefor. That point, as I have said, also fails.

The parties here, however, on both sides, have been a little sharp in taking advantage of slips, and this may modify the finding as to expenses.

LORD BENHOLME—Although in the main I concur with your Lordships, in one slight particular I differ, for I am of opinion that, upon the strict view of this contract, coals furnished in the beginning of July were properly attributed by the furnisher to that month. But supposing that I am mistaken, and that your Lordships are right in that view of the contract, which is based rather upon equitable considerations, all that the shipper could need would be furnished by the other contracting party, and I think it a very foolish thing for parties to have gone on with this dispute.

LORD NEAVES—I cannot say that I could have concurred in all the views of the Lord Ordinary, either in his interlocutor or his note, as I think there was a good deal of strictness, and judaical strictness too, in the pursuers' conduct towards the defender, holding him so strictly to the letter of the contract. There is no doubt that during the period of the contract the market price of coals had undergone very extensive fluctuations; it had risen largely, and the coals to be supplied at 12s. 9d. a ton could not be purchased in the open market under some 15s. or 16s. These influences, I think, told heavily in this case, as in such cases they almost invariably do. It does not appear to me that there was any sufficient failure of duty, or that the defenders established an amount of damages against the pursuers, entitling them to set off the price already due by them for the coals undoubtedly delivered during April and May. I concur with your Lordships in the interlocutor we are about to pronounce, and at the same time I entirely agree in the propriety of the Court's considering whether the whole expenses should be given or not.

SOLICITOR-GENERAL—I should call your Lordships' attention to the fact that in this case the whole expense in reality was caused by the fictitious orders for coals given by the defenders when they had not ships in port requiring a supply, and merely to establish some ground of defence. In this view, it will be a great hardship to my clients if they do not receive the full amount of taxed expenses.

LORD JUSTICE-CLERK—There are certain pleas of the pursuers on record to which we are not prepared to give force, and accordingly the expenses will be modified to three-fourths.

The Court pronounced the following interlocutor:—

"Recall the interlocutor complained of; Find that the contract in question remained in force until the termination of the six months for which it was entered into, and that the dispute between the parties as to the sum deliverances did not operate to rescind the same: Find that the pursuers were willing to deliver 267 tons for July, and 500 tons for August; Find that the defender did not require 267 for July, but only 54 tons: Find that the defender declined to receive the amount which the pursuers were willing to furnish: Find that the defender has not established that damage resulted from the acts of the pursuers, of which he complains: Find that the defender has not proved any defence to this action: Therefore decern for payment to the pursuers by the defender of the sums sued for, with interest, in terms of the conclusions of the summons: Find the pursuers entitled to expenses, remit to the Auditor to tax the same and to report, but under deduction to the extent of one-fourth of the taxed amount."

Counsel for Pursuers—Solicitor-General (Clark), Q.C., and Asher. Agents—Boyd, Macdonald, & Lowson, S.S.C.

Counsel for Defenders—Millar, Q.C., and Paterson. Agents—J. & A. Peddie, W.S.

R., Clerk.

Wednesday, June 12.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

MACKENZIE AND OTHERS *v.* MACKENZIE'S TRUSTEES AND OTHERS.

Mora—*Taciturnity—Acquiescence.*

Held, mere lapse of time not a bar to widow's claim of *jus relictæ*. Circumstances in which claim *held* not barred by *mora* and taciturnity or discharged by acquiescence.

This was an action brought by three of the surviving children of the late Murdo Mackenzie, of