but of the whole sums contained in their two bills, with interest, under deduction of the two instalments which were paid, with corresponding interest from the date of payment.

"The condition of the deed of arrangement was that the defender should pay the agreed on composition at the stipulated periods, and it was in respect of the defender's obligation to that effect that the pursuers and the other creditors agreed to accept that composition in satisfaction of their whole debt. The creditors did not accept the deed of arrangement as a satisfaction of their debts, and in respect of the granting of that deed, discharge the defender. The creditors granted no discharge, but only accepted the composition payable as specified in the deed. Payment of each of the three instalments of composition at the stipulated period, or at all events within a reasonable time thereafter, was therefore an essential condition of the contract; and non-fulfilment of that condition, by failure in the payment of any of these instalments, would, in the opinion of the Lord Ordinary, annul the composition arrangement, and revive the original debt. Such being, as the Lord Ordinary thinks, the legal effect of such a deed, and the defender having failed to pay to the pursuers the third composition on their debt, or even to intimate his readiness to pay the same before the present action was raised, the pursuer's original debt revived, and they are entitled to decree for the same, but under deduction of the two sums paid to them on account of the first and second instalments of the composition. Bell's Comm., 5th edition, ii. 472; *Paul* v. *Black*, 19th December 1820, F. C.; *Horsefall*, 24th November 1826, V. ȝ 36; *Edwards* v. *Coombe*, 7, Law Reports, C. P. 519. In re Hatton, 7 Law Reports, Ch. Ap. 723."

The defender reclaimed.

The Court after hearing junior counsel on each side, unanimously adhered.

Counsel for Yuille—J. C. Lorimer and Maclean. Agent—D. J. Macbrair, S.S.C.

Counsel for Alexander and Austin—Solicitor-General (Clark) Q.C. and Balfour. Agents—J. A. Campbell & Lamond, C.S.

Wednesday, November 19.

SECOND DIVISION.

[Lord Gifford, Ordinary.

THE ALLIANCE AND DUBLIN CONSUMERS GAS COMPANY *v.* CUNNINGHAM AND OTHERS (FERGUSON'S TRUSTEES).

Contract of Sale—Offer—Acceptance—Mora.

Terms of contract for the sale of 1000 tons of gas coal, under which *held* that the sale was conditional and subject to approval by the vendee of a trial cargo, and that he having failed to take delivery of the trial cargo, or to intimate that the condition was waived, or that the bulk was approved, for five months after the contract was made, the vendor was entitled to refuse to implement the contract.

This action was brought to recover damages from the trustees of the late James Ferguson, coalmaster, Lesmahagow and Glasgow, in respect of an alleged breach of contract. The Gas Company set forth that in February 1872 they contracted with Ferguson for the supply of one thousand tons of coal throughout the course of a year, in parcels of 100 tons each, at a price of 22s. 6d. per ton, free on board, and that he had failed to implement the contract. The letters which were said to constitute the contract between the parties were as follows. The first, from Messrs Ferguson to Mr Stevenson, the Assistant Secretary of the Gas Company, was dated 12th February 1872.

"Dear Sir,—We have very carefully considered our position with regard to making an offer for 'Wee' gas coal, and find we could not well contract for more than 1000 tons for the year, and that in say 100 ton parcels. We are quite unable to give despatch certainly to bind ourselves to such large vessels as 600 tons in twelve hours.

"Our price for this quantity would be 21s. 6d. per ton, f.o.b. at terminus, Glasgow. Terms nett.

"We shall willingly book our promised trial cargo of 100 tons, but should you wish more than this, it must be at an advance; prices are still going up, and we are very chary of large contracts."

The next, dated 20th February, from Mr Stevenson—

"Gentlemen,—We are desirous of having the trial cargo of 'Wee' Lesmahagow as soon as possible. We also accept the 1000 tons at 21s. 6d., as per your offer of the 12th February, and will be glad to know how you propose shipping it. Would you undertake to send 100 tons on receiving say twelve hours' notice of the arrival of the vessel which could take it as part cargo."

And the third, dated 23d February, from Messrs Ferguson to Mr Stevenson—

"Dear Sir,—We are favoured with your acceptance of our offer of 1000 tons 'Wee' Lesmahagow gas coal at 21s. 6d., shipped at Glasgow.

"Respecting the trial cargo, we would engage a vessel at Glasgow to take all the 100 tons at once, if you approve of this.

"We could not despatch 100 tons on twelve hours' notice, as it would take a day to get waggons to load, and the journey to Glasgow never takes less than six to eight hours, and often much longer, and over this at all; but we think with two days' (48 hours') clear notice, we could manage to despatch 100 tons at a time, in so far as we are concerned.

"There is very little room at the terminus, and we can hardly ever get a cargo completed at once without a stoppage.

"The reason we are at such a disadvantage with this 'Wee' coal is, that until now we have been selling all that was raised to an oil company here, who have now stopped operations, and all our arrangements are suitable for this delivery only, but we shall be able to do better by and by, when we get more sale by railway.

"We shall be glad to receive your instructions about shipping the trial cargo."

The defence was that no concluded contract was entered into, that the delivery of the 1000 tons was contingent on the pursuers' approval of a trial 100 tons, which they never took or approved of. They also pleaded, alternatively, that the pursuers abandoned the contract, if any there were, by their unreasonable delay in taking delivery of the coal contracted for. They stated that they placed the 100 tons in waggons ready for delivery to the pursuers, but as they never took or made arrangements for taking de-

livery of the trial cargo, they were obliged to dispose of it otherwise, and that it was not until 30th July 1872, when the price of gas coal had risen greatly, that the pursuers wrote offering to take delivery of coal in lots of 100 tons.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 12th June* 1873.—The Lord Ordinary, having heard parties' procurators, and having considered the Closed Record, proof adduced, and whole Process: Finds that, according to the true construction of the contract between the pursuers and defenders, the sale by the defenders to the pursuers of 1000 tons of gas coal was conditional, and subject to approval by the pursuers of a trial cargo of 100 tons, which were to be furnished in addition to or separate from the 1000 tons: Finds that the pursuers failed to take delivery of the trial cargo although offered to them under the contract and failed to intimate any approval thereof, or to intimate that they waived the condition of approval, or held the bulk as approved, till 31st July 1872, being upwards of five months after the contract was made; Finds that this delay on the part of the pursuers was undue, and that the defenders were thereupon entitled to refuse to supply the 1000 tons of gas coal: Finds that the defenders are not chargeable with breach of contract: Therefore assoilzies the defenders from the whole conclusions of the action, and decerns: Finds the pursuers liable in expenses, and remits the account thereof, when lodged, to the Auditor of Court to tax the same, and to report.

"*Note.*—It was strenuously contended by the pursuers' counsel that the Lord Ordinary and the Court were not entitled to read any part of the correspondence between the parties, excepting only the three letters dated 12th, 20th, and 23d February 1872. These three letters, it was urged, constituted the contract, which could not be explained by anything else.

"The Lord Ordinary cannot assent to this view. He thinks that in the present case, as in most cases of mercantile contracts embodied in correspondence, it is essential to see the whole letters in order to decide what the true contract was, and without any hesitation he admitted the whole letters as evidence in the present case.

"Reading the correspondence as a whole, the Lord Ordinary thinks that the contract for the 1000 tons of gas coal was conditional on the pursuers' approval of a previous trial cargo. It was only subject to such approval that the pursuers were open to an offer at all, as is expressly mentioned in their letter of 9th February. The defenders stated in their letter of the 12th, that they would not contract for more than 1000 tons in all, and the trial cargo of 100 tons could only have reference to the 1000 tons. There was nothing else in view of which it could possibly be a trial cargo.

"If this be so, the pursuers were bound to take the trial cargo and declare their approval or disapproval within a reasonable time. They could not keep the defenders in suspense, and hold them bound to deliver the whole 1000 tons at any time the pursuers pleased. The 1000 tons were to be delivered during the course of one year, and a few weeks should have sufficed for declaring the result of the trial cargo.

"It is sufficiently proved that the defenders tendered the trial cargo repeatedly in February and March, and that the pursuers failed to send for it. It is clear that the pursuers' letter of 26th February never reached the defenders, and the pursuers should have known this from the terms o the defender's successive letters. The result is that the trial cargo, though ready, was never sent for by the pursuers, who did nothing whatever for five months and a-half, and then, when the price of coal had greatly risen, and half the currency of the intended contract had elapsed, the pursuers, without a trial cargo at all, at once demanded the 1000 tons. The Lord Ordinary thinks they were not entitled to do so. In a contract like the present, five months and a-half was certainly an undue delay in taking the trial cargo, and declaring approval thereof, or in waiving the necessity of a trial cargo at all. To hold the defenders liable after such unjustifiable delay on the part of the pursuers would be unjust. It would be to give the pursuers the benefit of a rise in the price of coal without any risk of a falling price. There was therefore no breach of contract on the part of the defenders, and they are entitled to absolvitor."

The pursuers reclaimed.

The Court unanimously adhered.

Counsel for Reclaimers—Lord Advocate (Young), Trayner, and Miller. Agents—Miller, Allardice & Robson, W.S.

Counsel for Respondents—Balfour and Watson Agents—Hamilton, Kinnear & Beatson, W.S.

Wednesday, November 19.

SECOND DIVISION.

SPECIAL CASE—MRS E. C. DUNDAS OR STIRLING AND CAPT. STIRLING'S TRUSTEES.

Succession—Marriage-Contract—Construction.

Terms of settlement and codicil under which a surviving spouse found entitled to payment of interest upon a capital sum which belonged to herself prior to her marriage, in addition to certain special provisions out of her husband's estate.

This was a Special Case submitted for the opinion and judgment of the Court by the widow and the trustees of the late Captain James Stirling of Glentyan, R.N. On the marriage of Captain Stirling and Mrs Stirling in 1844, he became bound by ante-nuptial contract to pay her a jointure of £600 a-year for her life, in the event of her surviving him, but under a condition that the income arising from £5000 then belonging to her should be imputed *pro tanto* in the payment of the jointure The contract contained a further liferent provision to Mrs Stirling of the house and grounds of Glentyan, and furniture of the house. The £5000 was conveyed of consent to the marriage-contract trustees, for payment of the interest thereon to her during life, the capital to be held by them for the Captain if he should survive her and should there be no issue of the marriage, who were otherwise to get it. There was no issue, and Captain Stirling died on 23d December last, and at his death the whole sum of £5000 formed a debt due by him to the marriage-contract trustees, and secured partly on his estate. By a trust-settlement of 30th December 1870, the Captain left Mrs Stirling the option of taking for life the whole income of his trust-estate, and of continuing to reside at Glen-