there was any necessity for a consultation. I therefore think that the objection should be repelled.

Again, there was a consultation on 12th May 1873 with a view to the debate in the debate roll. The propriety of this fee depends very much upon the fees which counsel received during the course of the debate. We see six guineas and five guineas were sent with instructions for debate. The debate led to a sort of parenthetical proceeding in the shape of a proof, and for this eight guineas and six guineas were sent to counsel, and then there were continuance fees of four guineas and three guineas. So the fees appear to have been ample without the additional charge for consultation fees. The Auditor has come to this conclusion, and I think that we should approve of his decision.

The only other point in the Outer House is the proposal to charge for the agent going to London to the examination of havers. That charge is inadmissible. Such a charge is never allowed except where there are very peculiar circumstances, and there are no such circumstances here.

In the second place, as to the objections applicable to the Inner House.

There are many cases in which it is quite proper that three counsel should be employed, but not just that the unsuccessful party should pay for the three counsel. This is such a case. It was a heavy and difficult case, and the agent was quite right to employ three counsel, especially as the leading counsel was absent in the Outer House. If, when the case came to the Inner House the agent had dropped out one of the two counsel employed in the Outer House he would have acted injudiciously. That however is not the question, but, is this the kind of case in which the unsuccessful party must pay for three counsel? This was a difficult case in point of law, but in a case, however difficult, which turns upon matters of law, the counsel who actually conducts the argument must apply himself to every point in the case. The kind of case in which three counsel are chargeable against the unsuccessful party are cases in which there may be a sub-division of labour, as in the case of a heavy trial by jury, when the labour of preparing may be divided among the counsel, and in many other cases, such as the deathbed case between the parties to this case, where it is easy to see that there may be sub-division of labour. But there could be none here, for the same labour must have been gone through by each of the three counsel. I am therefore for disallowing the charge for three counsel.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the Auditor's report on the defender Sir Archibald Douglas Stewart's amount of expenses, No. 209 of process, and also on the notes of objections for the defender and pursuer respectively, Nos. 211 and 210 of process, —Repel all the said objections, but disallow the charge of £43, 12s. 4d. for a third counsel, reserved by the Auditor for the determination of the Court: Approve of the Auditor's report subject to the disallowance aforesaid, and decern accordingly against the pursuer for payment to the defender of £503, 17s. 6d., being the balance of the said amount as taxed which remains after deduction of the sum now disallowed."

Counsel for Pursuer—Keir. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defender—Mackay. Agents—Dundas & Wilson, C.S.

Thursday, March 5.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

TURNBULL *v.* M'LEAN & CO. *et e contra.*

Contract—Delivery—Breach--Ground for Rescinding.

A having contracted to deliver to B a quantity of coals f.o.b., at a certain port, and to supply so much of them per month, *Held* that on B's refusal to pay for the coals of the past month, alleging small counter claims, A was entitled to stop delivery.

On 20th May 1873 an action, was raised at the instance of George Vair Turnbull, merchant in Leith, against Hugh M'Lean & Co., coal merchants, Glasgow. The summons concluded for payment of (1) £113, 8s. 5d., and (2) £1261, 7s. 6d.—in all £1374, 15s. 11d., under deduction of £484, 0s. 11d., the balance of an account due by the pursuers to the defenders.

There was also a counter action raised on May 27, 1873, by Messrs M'Lean, and concluding for a sum of £680, 0s. 7d.

The Lord Ordinary, on 24th June 1873, conjoined the two actions.

On 21st February 1872 Hugh M'Lean & Company made an offer to Turnbull, Salvesen, & Company, merchants in Leith (of which firm the pursuer and Christian Salvesen, merchant, Leith, were the only partners) in the following terms:—"Sold to Messrs Turnbull, Salvesen, & Coy., Leith, Five thousand tons Clelland Ell coal as per sample, at the price of Nine shillings and eightpence per ton f.o.b. Granton, or if shipped at other ports the excess dues to be added, or if less than the Granton dues, to be deducted from said price." On 23d February 1872 Turnbull, Salvesen, & Company accepted the offer formally, but added the following condition. "We also stipulate the forfeiture of threepence per ton for all coals which are sent to us and not addressed to ourselves. We do not expect that you have any objection, as in a previous letter you intimated to us that addressing the waggons to your good selves should be discontinued." On 26th February 1872 the defenders wrote to the pursuer *inter alia*, —"We cannot agree to the forfeiture of threepence per ton on coal not addressed to you. We are quite willing, however, to address the coal to you provided it does not interfere with our getting the shipping allowance of fourpence per ton. If you guarantee us this, we shall address them all to you." The next letter was also from the defenders, —"*Glasgow, 4th March* 1872.—Dear Sirs,—According to verbal arrangement with your Mr Turnbull, we confirm having sold to you Ten thousand tons Wishaw Main coals at Nine shillings and threepence per ton f.o.b. Granton. Delivery in equal quantities per month during the course of the present year. Please reply confirming." To this letter the following reply was sent:—*Leith, 5th March* 1872.—Dear

Sirs,—We are in receipt of your favor dated yesterday, and now beg to confirm having purchased from you Ten thousand tons (10,000) Wishaw Main coal at Nine shillings and threepence per ton (9/3) f.o.b. Granton. If we should require any to be shipped at other places, the excess dues to be added, or if less than the Granton dues, to be deducted from above-named price. The coals to be of good quality and equal to the best Wishaw Main coal, well screened and fresh drawn, and the trucks to be addressed to us in order that we may recover the export drawback for our benefit." The two following letters followed:—"*Glasgow, 6th March* 1872.—Dear Sirs,—In your written acceptance of our offer of 10,000 tons of coal you omit to confirm regarding the time of delivery. We suppose, however, you know that delivery end of year and equal monthly quantities was the arrangement."—"*Leith, 9th March* 1872.—Dear Sirs,—In reply to the last part of your favour of the 6th inst. we beg to add to the purchase terms contained in our respects of the 5th inst. that delivery will be taken during the course of the present year as much as possible in equal monthly quantities."

On 15th April 1872 the firm of Turnbull, Salvesen, & Company was dissolved, and it was arranged between the firm and its individual partners, on the one part, and the defenders, on the other part, that the first-mentioned contract for 5000 tons Ell coal should, to the extent of 1657 tons 17 cwt., belong to the pursuer George Vair Turnbull, as an individual, and that the second contract for 10,000 tons Main coal should, to the extent of 4277 tons, belong to the pursuer as an individual; and the defenders to that extent became liable to the pursuer as an individual to implement to him the said contracts. This arrangement was confirmed by the correspondence produced.

It was maintained to be in accordance with usage in the trade generally for Turnbull, Salvesen, & Co., upon finding vessels to export the coal, to make the defenders aware of this, and state the lay-days available for loading the respective vessels; and that thereiore the defenders should have forwarded the coals so that the vessels might be loaded within the laydays, always subject to the understanding that no more than the stipulated monthly quantities or thereabouts should be demanded.

The defenders denied any agreement beyond what was contained in their contract. The pursuer on 28th September 1872 telegraphed, and on the same day wrote, to the defenders, stating that a vessel, the "Ernst August" was at Granton ready to be loaded, and that her lay-days commenced on 28th September, so that she had only eight days to load, and urging the defenders to push forward the coals. The coals, however, were not sent forward; and on 5th October 1872 the pursuer again wrote to them, repeating that the vessel's lay-days expired on the Monday thereafter, and that if she were not then loaded he would claim from them any demurrage that might be incurred. The quantity demanded was, it was averred, a reasonable proportion of the monthly quantity due. With reference to Turnbull's claims, M'Lean & Company wrote as follows:—"Regarding the 'Ernst August,' we have done the *very best* we could for you, and cannot hold ourselves liable in this or any other case for demurrage. We have to pay demurrage daily on vessels which we have chartered ourselves, and we never expect to receive a farthing from the coalmasters we buy the coals from." The defenders denied liability to forward coals for this vessel within her lay-days, and said they had not reasonable notice. The demurrage which became due and was paid to the master by Mr Turnbull was £22, 2s. 5d., the vessel being detained until October 11th.

Subsequently demurrage had to be paid, and was paid, by Mr Turnbull for several other vessels, the sums being respectively £37, 10s., £18, and £3, and the dates October 31, November 8, and November 15. On 27th November 1872 the pursuer requested the defenders to forward to Granton for shipment per "Isis" 220 tons, and per "Auguste" 220 tons of the coals, to complete the defenders' quantity for the month of November, informing them of the lay-days of the "Isis" and of the time the coal required to make up the cargo would require to be at Granton. No coals, however, were forwarded. It was admitted that the defenders in the beginning of December 1872 had ceased altogether to forward coals under the contracts. This was, the pursuer averred, a gross breach of contract; but the defenders stated on record that at the beginning of December there was a sum of upwards of £800 past due to them for coals delivered under the contracts, which the pursuer refused either to pay or grant his acceptance for. The defenders in consequence stopped further deliveries, and for this sum raised the counter-action against the pursuer. The pursuer asserted that there remained still to be delivered 1151 tons 6 cwts. of the Main coal, and 698 tons 4 cwts. of the Ell coal, to be delivered, and that he had to purchase at the greatly increased prices to which coal had risen in the interim, whereby he sustained loss and damage upon the said Main coal to the amount in all of £1261, 7s. 6d. The defenders denied this, and stated that when they stopped delivery the quantity of coal delivered subsequent to the emendation of 6th October, and either actually received by the pursuer or lying at the termini addressed to him, amounted to about 2300 tons. The sum of £113, 8s. 5d. sued for was made up of the demurrage payments and of a further disputed account for £32, 16s. for wood sold to the defenders, who alleged that this had been paid. The defenders in the beginning of October 1872 encountered great difficulty in fulfilling their contract, and besought the pursuer to agree to an alteration of the terms thereof. The stipulations proposed were expressed in the following letter, addressed by the defenders to the pursuer on 6th October 1872:—"*Glasgow, 6th October* 1872.—Dear Sir,—As we find it impossible to carry out our engagements with you, whereby we are bound to deliver to you before the end of the current year 4277 tons best Wishaw Main coal, fresh drawn, at 9s. 3d. per ton, f.o.b. Granton, and 1657[17] tons best Wishaw Ell coal, fresh drawn, at 9s. 8d. per ton, f.o.b. Granton, on which contracts we have still to deliver you about 3000 tons of the contract for Main coal, and about 600 tons of the contract for Ell coal, we beg to make the following proposal, namely—that as our difficulty chiefly consists in the delivering of the Main coal, we shall give you in exchange for fifteen hundred tons of this contract, that quantity (1500 tons) of best Wishaw Clelland Ell coal, at eleven shillings and eightpence sterling (11s. 8d.) per ton, f.o.b. Granton, or the corresponding price at any other shipping port, and we further undertake to deliver the bal-

ance of about 1500 tons of Main coal and the balance of about 600 tons of Ell coal at the prices and on the conditions already arranged. We further agree to give you delivery of the above mentioned quantities, namely—1500 tons Ell coal at 11s. 8d. p. ton, f.o.b. Granton; 600 tons Ell coal at 9s. 8d. p. ton, f.o.b. Granton; 1500 tons Main coal at 9s. 3d. p. ton, f.o.b. Granton—between this and 31st December next in the following proportions, viz.—Twelve hundred tons before 31st October current, 1200 tons before 30th November next, and the balance of about 1200 tons before 31st December next; and failing our doing so, we hereby authorise you to purchase, at our expense, at the rates current at the ends of each month, any quantities which may then be short delivered.—Yours truly, HUGH M'LEAN & Co."

The pursuer replied on 8th October 1872 agreeing to this proposal.

Messrs M'Lean delivered coal under the agreement of October 6th during all that month, and at the close of it sent to Mr Turnbull a draft at thirty days for £500. This was accepted by him, and returned to them. A balance of some £200 was left outstanding. At the end of November an account of over £800 (inclusive of the balance of £200) was again rendered to Mr Turnbull, but a similar draft for £600 was refused by him, and returned unaccepted. The coals lying at Leith and Granton were stopped by Messrs M'Lean *in transitu*. The M'Leans averred that all the coal due for November had either been delivered or was lying addressed to Turnbull at the Leith and Granton termini, and that delivery orders had been duly sent to Turnbull. When their draft was refused, they intimated to Turnbull that unless their account was paid at once they would hold the contract at an end and stop all further deliveries. In their action against Turnbull the M'Leans sued for the price of the whole coals delivered to him, less the quantities stopped *in transitu*, and the balance formed the £680, 0s. 7d., the amount concluded for as owing at 31st December 1872. Turnbull denied that there was any arrangement as to monthly settlements, while the M'Leans contended that the usual practice of the trade was that coals should be paid for either in cash on delivery or by bill at thirty days from the time when they are delivered for shipment; and further, that they are held as delivered f.o.b. when delivered at the terminis and a delivery order lodged in the buyer's hands. At first, under this contract, the accounts were rendered at irregular intervals; but after October 6th the M'Leans rendered a monthly account.

In the first action the pursuer, Mr Turnbull, pleaded: — (1) That the defenders having been bound to send forward the coals for shipment on board the vessels within their lay-days, and having wrongfully failed to do so, were bound to pay him the demurrage which he incurred in consequence. (2) That he was entitled to decree for the account for wood which was owing, and which the M'Leans refused to pay. (3) That the defenders, in breach of contract, failed to deliver the coals contracted for to the extent condescended on, and that he was therefore entitled to the damages claimed.

The defenders pleaded: — (1) The statements of the pursuer are not relevant or sufficient to support the conclusions of the action. (2) The defenders are entitled to absolvitor, in respect:— 1. The statements of the pursuer are unfounded in fact. 2. The defenders are not indebted or resting owing any sum to the pursuer, who is on the contrary largely indebted to the defenders. (3) The pursuers having wrongfully and in breach and violation of the said contract refused to pay the past due price of coals delivered to him, the defenders were entitled to stop further deliveries of coals.

The M'Leans in the action at their instance pleaded that they were entitled to decree for the balance of the price of coals delivered by them to Turnbull under the contracts, while Mr Turnbull pleaded that he should be assoilzied, in respect that the M'Leans were owing him under the same contracts sums greatly in excess of that claimed by them.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 22d November* 1873—The Lord Ordinary having heard the counsel for the parties, and considered the closed records, proof, and joint minute for the parties in the conjoined actions: Finds that Hugh M'Lean & Company were not bound, under their contracts condescended on, to deliver the coals therein mentioned so that the same should be shipped on board the vessels specified in the summons at the instance of George Vair Turnbull within their lay-days, and that they were not bound to pay the demurrage which he paid in respect of the detention of the said vessels: Finds that Hugh M'Lean & Company wrongfully failed, in breach of their said contracts with George Vair Turnbull, to deliver to him the coals contracted for to the extent of 1269 tons 6 cwt. of Main coal, and 428 tons 4 cwt. of Ell coal, to his loss, injury, and damage: Finds that the said loss, injury, and damage amount to the sum of £860: Finds that the said George Vair Turnbull is not entitled to the abatement of £51, 14s. 9d. made in the account libelled on in the summons at his instance from the price of the coals delivered under the said contract: Finds that the sum due by George Vair Turnbull to Hugh M'Lean & Company for coals delivered under the said contract amounts, after deducting the sum due by them to him for wood to £571, 18s. 9d. as at 27th May 1873, being the date of the summons in their action: Therefore decerns in favour of the said George Vair Turnbull under the conclusions of the action at his instance for the said sum of £860, but under deduction of the said sum of £571, 18s. 9d. and of interest thereon at the rate of 5 per cent. per annum from 27th May 1873 to this date: Finds the said George Vair Turnbull entitled to expenses in the conjoined actions (subject to modification); allows an account," &c.

"*Note.*—Mr Turnbull seeks to recover from the defenders M'Lean & Company, in the action at his instance—*First*, The sum of £80, 12s. 5d., being the amount of demurrage paid by him on four vessels which were detained beyond their lay-days, in consequence, as he alleges, of the wrongful failure of the defenders to forward coals which they had contracted for, so that the same might be shipped on board these vessels within their lay-days: *Second*, The sum of £1261, 7s. 6d., as the loss, injury, and damage sustained by him by the defenders having, in breach of their contract, failed, as he alleges, to deliver 1151 tons 6 cwt. of Main coal, and 698 tons 4 cwt. of Ell coal: *Third*, The sum of £51, 14s. 9d., being a forfeit of 3d. per ton due by the defenders under their contracts on 4139 tons 11 cwt. of coal which they had not ad-

dressed to him: And *Fourth*, The sum of £32, 16s. for wood sold and delivered to the defenders.

"Messrs M'Lean & Company, in the action at their instance, conclude for payment of £680, 0s. 7d. as the balance due to them for coal supplied under their contracts to Mr Turnbull, after crediting him with all sums paid to account, and with £41, 14s. 7d. on account of the price of the wood bought from him, with interest on said sum of £680, 0s. 7d. from 31st December 1872.

"During the course of the proof Mr Turnbull abandoned his claim for the sum of £51, 14s. 9d. and as M'Lean & Company admitted that they were indebted to him for wood in a larger sum than £32, 16s., and credited him in their action with £41, 14s. 7d. for wood. There remain only three questions on which the parties are at issue in the conjoined actions, namely, Mr Turnbull's claims on account of the demurrage payments, and for damages for non-delivery of part of the coal contracted for, and M'Lean & Company's claim for the price of the coal which they supplied to Mr Turnbull before they stopped the deliveries.

"Mr Turnbull's claim for repayment of the demurrage is maintained on the ground that the coals sold to him by M'Lean & Company were purchased for foreign export, and that it was understood and agreed, and was according to the course of dealing between them, and the custom and usage of the trade, that M'Lean & Company should, on receiving notice of the vessels on which the coals were to be shipped, and of the lay-days of each vessel, forward the coals so that the vessels might be loaded within the lay-days, always subject to the understanding that no more than the stipulated monthly quantities should be demanded. The Lord Ordinary is of opinion that it is not proved that there was any such understanding, agreement, or course of dealing between the parties, or any such custom or usage of trade. There was no stipulation to that effect in the contracts of February and March 1872, and by these contracts, and the agreement entered into by the letters of 6th and 8th October 1872, which made certain alterations on the original contracts, M'Lean & Company were bound to deliver, free on board at Granton or other port, the balance of the coals between 6th October and 31st December 1872 in the following proportions, viz., 1200 tons before 31st October current, 1200 tons before 30th November next, and the balance of about 1200 tons before 31st December next; 'and failing our doing so, we hereby authorise you to purchase at our expense, at the rates current at the end of each month, any quantities which may then be short delivered.' There is no obligation in the contracts as to the delivery of the coals into the vessels. On the contrary, the obligation is that M'Lean & Company should deliver the specified quantities before 31st October and 30th November, and the balance before 31st December, and in the event of their failing to do so, Mr Turnbull's remedy was to purchase at their expense at the end of each of these months the coals then short delivered.

"The claim on account of demurrage paid to the master of the 'Ernest August' is for £22, 2s. 5d., while £16 only were paid, the difference of £6, 2s. 5d. being charged on account of loss sustained through M'Lean & Company not having shipped the full quantity in that vessel, and Mr Turnbull having been obliged to supply that deficiency. The coals for the 'Ernest August' were sent in October, and it is admitted in the joint minute for the parties that the deliveries of coal by M'Lean & Company in the month of October amounted to 1197 tons 19 cwt., or within 2 tons 1 cwt. of the 1200 tons which fell to be delivered before the last day of that month. There are no grounds therefore on which this sum of £6, 2s. 5d. can be claimed by Mr Turnbull.

"The Lord Ordinary is of opinion that M'Lean and Company committed a breach of their contracts in stopping the delivery of 244 tons 12 cwt. or thereby of the coals, which on Mr Turnbull's orders they had sent in November to Leith and Granton, and in refusing to deliver in November these coals, and the balance of the October and November deliveries, amounting to 15 tons 2 cwts., and also in refusing to deliver the remainder of the coals due under the contracts which they were bound to deliver before 31st December 1872. There is no stipulation in the contract of October, or in the previous contracts, with reference to the time when payment of the price of the coals should be made. But as the obligation in the contract of 6th and 8th October is to deliver 1200 tons in each of the months of October and November, and the remainder in December, the Lord Ordinary considers that the right to demand payment of the price for each month's deliveries only arose when the whole quantity for each month had been delivered. Until such delivery should be made the contract for any particular month would not be implemented, and the price for that month's quantity would not be payable.

"Now, on 29th November, when M'Lean & Company demanded payment of £600, or a bill at thirty days for that amount, from Mr Turnbull, on account of the small unpaid balance of the October account and of the coal supplied in November, the November quantity of 1200 tons had not been delivered to Mr Turnbull, but only 942 tons 7 cwt. had been delivered. No doubt 244 tons 12 cwt. of coals were either at Leith or Granton, or on the way from the pits to Mr Turnbull. But these had not been delivered in terms of the contract, and when Mr Turnbull refused to accept a bill for £600 to account of the November supplies and the unpaid balance of the October account, M'Lean & Company stopped the delivery of these 244 tons 12 cwt., and refused to make any further deliveries under the contract. In so doing the Lord Ordinary considers that M'Lean & Company acted wrongfully, and in breach of their contract. Not only was Mr Turnbull not indebted to them in that amount for coal delivered in terms of the contract but the contract for the November supply of 1200 tons not having been implemented, M'Lean & Company were not then entitled to demand any payment on account of that month's supplies. Mr Turnbull's refusal to accept that bill was not a sufficient ground for M'Lean & Company's refusal to continue the deliveries in terms of the contract. M'Lean & Company were, the Lord Ordinary thinks, in no better position when Mr Turnbull, on or about the 23d December, upon being again applied to, refused to pay so small a sum as £250 to account. No doubt Mr Turnbull endeavoured to set off his claims on account of demurrage against the balance which he considered to be due for the coal delivered to him, and offered on 9th December payment of £409, 16s. 10d., as the balance due after deducting these and other claims objected to, amounting to £168, 3s. 5d., demanding at the same

time a letter guaranteeing that the deliveries would be continued in terms of the contract. Mr Turnbull was wrong in this attempt to set off these claims against the contract prices. But that did not, the Lord Ordinary thinks, alter the position in which M'Lean & Company stood with reference to their failure to deliver the full quantity of 1200 tons in November in terms of their contracts, and it did not warrant their refusal and failure to deliver before 31st December the remainder of the coals contracted for.

"The quantity of coal short delivered on 30th November was 259 tons 14 cwt., and the entire quantity not delivered in December was 1269 tons 6 cwt. of Main coal, and 428 tons 4 cwt. of Ell coal. The Lord Ordinary has, after full consideration of the proof, assessed the loss, injury, and damage which Mr Turnbull sustained in consequence of M'Lean & Company's wrongful failure to deliver these coals in terms of their contract at £860.

"The parties have by their joint minute agreed that the sum due as at the date of their summons to M'Lean & Company under the conclusions of their action, and after crediting Mr Turnbull with the price of the wood supplied by him, amounted to £571, 18s. 9d. This sum, with the interest thereof from the date of M'Lean & Company's summons to the date of the prefixed interlocutor, will fall to be deducted from the damages, amounting to £860.

"As regards the question of expenses, the Lord Ordinary considers that Mr Turnbull is only entitled to expenses subject to modification, in consequence of his having insisted in his claims for repayment of the demurrage, and of the abatement of £51, 14s. 9d. on account of 4139 tons 11 cwt. of coal not addressed to him."

Against this interlocutor M'Lean & Co. reclaimed.

Argued for reclaimers—On the facts of the case we are entitled to decree.

Argued for respondents—[counsel divided the argument into three heads, 1 and 2 on the facts, and] 3. Our clients never were in breach of contract. But even supposing they were so, did that justify the rescinding of the contract? We maintain it did not. It is only where two things are simultaneous and reciprocal, or where one proceeds directly from the other, that the failure to implement the one does rescind the other. [Lord Justice-Clerk—Then you had no right of retention.] That is so: What they intimated in their letter of 29th November was quite clear—"We shall hold the contract at an end." In one case (*Withers* v. *Reynolds*) there was an obligation to deliver straw at so much per month, to be paid on delivery. For some months the purchaser did not pay, and then he said he would not pay, except always in future one month in arrear; this practically was an announcement that he would not in *future* fulfil his contract and ground a rescision. Here we have no refusal to pay in *future* for coal—Mr Turnbull only said he would not pay the past amount unless this demurrage claim were settled. [Lord Justice-Clerk—If he did so unreasonable a thing as keep £800 because he claimed £80, was it unreasonable of the other side to suppose he would do so in future?] I think it was (*Johannsohn* v. *Young*). [Lord Neaves—Is it not the case that when parties dispute about an insulated matter, that will not ground a rescision of a contract, but when the dispute is about the essential grounds of a contract, then it will?] (*Simpson*). The deduction to be drawn is that though there be a clear breach as to a separable part of the contract, if there be any other remedy adequate without rescinding the contract that must be adopted. Here the remedy was to sue for the price. [Lord Neaves—Are you bound to go on with a contract for 12 months if every month he refuses to pay a shilling, although never saying he would not do so in future?] I think so, but of course there might be such a series of breaches as to lead to the irresistible conclusion of non-intention to fulfil in the future. [Lord Justice-Clerk—All your cases relate to a question in dispute; this is not so, for you refused to settle though the disputed matter were reserved.] [Lord Benholme—You claim say £600 for demurrage, and say I owe you £800 and I will not pay till you admit my claim. Now that is something more than a set off. The refusal is to pay a larger sum.] There was no intimation here, and there is no inference to be drawn as to the future—the question was only as to the past. [Lord Benholme—Do you say that wherever the breach can be remedied by an action at law, the contract cannot be rescinded?] I do not think the general law goes quite that length. The Judges seem to have distinguished between those contracts which are separable, as in a case where they extend over several months, and contracts settled off-hand, as in a sale over a counter; Parsons on Contracts; Bell's Comm.

Reclaimer's Authorities—*Withers* v. *Reynolds*, 2 Barnes, and Ad. 882; Bell's Comm. (M'Laren) i. 454; *Simpson*, L. R., Q.B. 14, 26 Nov. 1872; Bell's Illustr. 79; *Barclay & Co.* v. *Anderston Foundry Co.*, 18 D. 1190, 3 July 1856.

Respondent's Authorities—*Johannsohn* v. *Young*, 32 L. J., Q. B., 385, 24 June 1863; Parsons on Contracts, vol. 2, 678, 679.

At advising—

The Lord Justice-Clerk read the following opinion:—

The only question which was argued to us in support of this reclaiming note related to the second finding in the Lord Ordinary's interlocutor, which is as follows—(*reads*). The claim of damages to which this finding applies is the difference between the contract and the market price in the month of December 1872. Messrs M'Lean & Co. having in that month declined to continue to furnish coals under their contract, Mr Turnbull bought the amount in the market, and he now makes a claim for the difference of price.

There were two contracts between the parties, one for 5000 tons of Ell coal at 9s. 8d. per ton, and the other for 10,000 tons of Wishaw Main coal at 9s. 3d. per ton. The terms of these two contracts were as follows—(*reads*). On these two contracts as they stand, I am of opinion—1st, that they each constituted an obligation to deliver a certain quantity of coal, the provision in regard to the amount to be delivered each month regulating to that extent the time at which delivery should be made and taken; 2dly, that if the contract had stood by itself, the price which is fixed was payable on delivery, or at all events was not postponed until all the deliveries had been made; and 3dly, that as delivery was stipulated to be free on board, not only did the seller undertake the expense of putting the goods on board, but the delivery was not completed until that was done.

It appears, however, that, apart from the words of the written offer and acceptance, the contract was to a certain extent modified by the understanding of the trade and the course of dealing between the parties. In the first place, as regards payment of the price, it seems to have been the usage, and certainly was the understanding of parties, that the price should be the subject of monthly settlements, and I am therefore of opinion that the completion of the monthly delivery, and the obligation to settle the price for the goods furnished within the month, were concurrent.

In regard to the delivery of the coal, the course of dealing between the parties was for the sellers to send forward the amount by railway to Granton, transmitting at the same time a delivery order, which seems to have been made out in triplicate, one remaining with the seller, and two being forwarded to the purchaser. This delivery order enabled him to require delivery from the railway company at Granton without any further intervention on the part of the seller. When, therefore, the coals had arrived at Granton, and the delivery order had been received by the purchaser, the time and period of delivery depended on the purchaser himself, and the seller had performed all that was necessary as an offer or tender of delivery. On the other hand, until the coals were delivered on board ship the *transitus* was incomplete, and the Railway Company were in the hands of the seller.

Under these stipulations, so modified, considerable deliveries of coals were made by M'Lean & Company. A variation was made on the contract in the course of October 1872 in regard to the quality of coal to be shipped, but one not material to the question now at issue. In the month of November the deliveries stood as follows, as admitted in a joint minute for the parties:—9427 tons had been delivered under the contract prior to the 29th of November 1872, while 257 tons had been dispatched from the colliery, and were at the end of the month in the railway trucks at Granton. I think it sufficiently proved that delivery orders, in ordinary course, were duly transmitted to Turnbull for the last mentioned parcels of coal; and indeed that seems sufficiently admitted by Mr Turnbull's letter of the 9th December 1872. If these last are to be held as delivered, the amount due for November was substantially furnished.

On the 29th of November it appears that Mr M'Lean had an interview with Mr Gledhill, Turnbull's manager, for the purpose of obtaining a settlement of the monthly account. In the meantime, however, Mr Turnbull had made a claim for an allowance for demurrage, which forms the subject of the first finding of the Lord Ordinary's interlocutor, and he also made a claim for 3d. per ton on the waggons not addressed to him, which has since been abandoned. I think it proved by the evidence of Mr M'Lean, and that of Mr Turnbull, as well as by the subsequent correspondence in process, that Turnbull refused to make any settlement of the monthly account unless the claims for demurrage were allowed, and that this refusal was persisted in down to the 26th of December. The Lord Ordinary has found the claim for demurrage to be unfounded.

Although M'Lean had failed to obtain any settlement of the monthly balance, the coals do not appear to have been stopped on the railway until the 3d of December; and they had been until then ready for delivery when that should be demanded. It appears from the correspondence that Messrs M'Lean were willing to take a payment to account for the November deliveries, and to continue their implement of their contract, and that this had been declined by Turnbull, although the sum which was due amounted in any view to between £400 and £500, and the claim for demurrage did not exceed £80. The coals remained with the railway ready for delivery, provided Turnbull would pay £250 to account of the November deliveries down to the 26th December, when M'Lean & Company rescinded the contract, disposed of the coal, and refused all further deliveries. Thereupon Turnbull bought in against them in the market, and now makes the claim which is the subject of this advising.

I am of opinion that the claim is ill-founded. It has now been decided that Turnbull was altogether wrong in regard to his claims as to demurrage: and as this was the only ground on which he refused to settle for the monthly deliveries, he was wrong in that refusal. He now says that the coals which were on the railway trucks at Granton were not delivered. As, however, he had delivery orders for them, he might have required delivery on the 29th and 30th of November, and 1st and 2d of December, but did not do so. But apart from this, as he had intimated an intention of withholding the price, it was quite enough that the Messrs M'Lean were ready to deliver on a settlement of the price; and I think they were justified in withholding delivery while the refusal to settle continued unrecalled. This is the more clear that the demurrage claimed involved a principle, found to be unsound, which would have been applicable to the remainder of the contract.

It is said, however, and this formed the main ground of Turnbull's contention, that the settlement of the price of the November deliveries was a matter altogether apart from the obligation to deliver in December,—that the time of payment was not of the essence of the contract, and that however long the settlement was delayed the obligation to continue the supply remained. I think this a position entirely untenable. Assuming that by the usage and course of dealing, payment of the deliveries within the month was postponed until the end of it, the completion of the monthly delivery and the obligation to pay the monthly price were in this contract concurrent, both from its general import and because it was plainly contemplated that the sellers, who were not coalmasters, were to be assisted in their monthly deliveries by the settlement of the price from time to time. It therefore cannot be said that the time of payment was less of the essence of the contract than the payment itself. But, apart from this, I understand the law of Scotland in regard to mutual contracts to be quite clear—1st, that the stipulations on either side are the counterparts and the consideration given for each other; 2d, that a failure to perform any material or substantial part of the contract on the part of one will prevent him from sueing the other for performance; and 3d, that where one party has refused or failed to perform his part of the contract in any material respect, the other is entitled either to insist for implement, claiming damages for the breach, or to rescind the contract altogether,—except so far as it has been performed. We had an ample reference to the English authorities for the purpose of establishing that the settlement for the November deliveries

was not what is called in that system a condition precedent of the obligation to deliver the amount stipulated for December. From any study that I have been able to give to the English cases, I do not think they indicate any material difference in principle from our own rules on this subject. A condition precedent rather states a result than a principle. But a certain amount of technicality has been attributed to the term from the fact that it is truly a phrase of technical pleading. Prior to the Common Law Procedure Act of 1852 it was necessary for the plaintiff in an action founded on breach of contract, not only to set out in his declaration that he had performed those parts of the contract incumbent on him, but to specify the particular parts which he had so performed, and an omission to specify any material part was fatal to his declaration. The case of *Withers*, which was referred to in the debate, and is entirely analagous to the present, is an example; for there the point was raised on demurrer, and the plaintiff was nonsuited because he had not set out in his declaration that he had paid for the straw already furnished. The ordinary reply to such an objection was, that the condition omitted was not one precedent to performance, and therefore not necessary to be stated in the declaration. Hence arose many refinements as to dependent and independent conditions, which have never found place in our system, and since the Common Law Procedure Act of 1852, which altered the nature of the declaration, the views as to conditions precedent have been considerably relaxed, and the intention of parties in the contract more regarded. With us, as I have already said, all the conditions of a mutual contract are dependent on their counterparts, as a general rule, when they are of a substance of or material to the subject matter of the contract itself. (Stair i, 10, 15.) Exceptions may no doubt arise either from the special nature of the contract or in regard to stipulations which are incidental or accidental to the subject matter, or in regard to which, from their comparative insignificance, equity will interfere to prevent contract from being rescinded. For instance, if Turnbull had contented himself with retaining the £80, or if M'Lean had delivered 100 tons short in any one month, these, although in breach of the contract, might not have availed to justify its rescission. But if M'Lean had only delivered half his quantity in November and had given notice that he meant to deliver no greater quantity in December, Turnbull would have been no longer bound, and as the latter, in the present case, refused to make any payment for November, on a ground equally applicable to the December deliveries, and which has now been found to be in breach of his obligation, I cannot doubt the right of M'Lean & Company to rescind the contract as they did.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for Hugh M'Lean & Company against Lord Mackenzie's interlocutor of 22d November, 1873, recal the second finding of said interlocutor, and assoilzie Hugh M'Lean and Company from the claim of damages on the part of George Vair Turnbull. Find Hugh M'Lean & Company entitled to the sum of £571, 18s. 9d. with interest thereon, as concluded for, for which decern. Further, recal the finding of the Lord Ordinary as to expenses; *Quoad ultra* adhere; and find Hugh M'Lean & Company entitled to expenses both in the Inner and Outer House, and decern."

Counsel for M'Lean & Company—Asher and Mackintosh. Agents—W. & J. Burness, W.S.

Counsel for Turnbull—Watson and Balfour. Agents—Hill, Reid, & Drummond, W.S.

[*R.*, Clerk.

Wednesday, March 4.

FIRST DIVISION.

[Lord Mure, Ordinary.

CHRISTINA MARY CARMICHAEL OR RITCHIE *v.* ROSS AND OTHERS.

Divorce—Reclaiming Note—Right of third parties to sist themselves.

A husband obtained decree of divorce in the Outer House against his wife, who reclaimed; before the reclaiming note came on for hearing the husband died and the case was dropped. The wife thereafter raised an action against her husband's trustees for payment of her conventional or legal provisions as widow,—*held* that the trustees were entitled to sist themselves in the action of divorce and to defend the decree obtained by the husband.

The pursuer of this action was married to George Ritchie in 1852, and on Feb. 28, 1872, Lord Ormidale pronounced decree against her in an action of divorce at the instance of her husband on the ground of adultery. A reclaiming note against this judgment was presented by Mrs Ritchie on March 20, 1872; her husband died on June 27 of the same year. The reclaiming note came before the First Division on July 18, 1872, and was dropped from the roll by order of the Court. On Jan. 23, 1873, Mrs Ritchie raised the present action against Sir David Ross and others, her husband's trustees and executors, for payment of £30 as an allowance for mournings, £150 *per annum*, being an annuity secured to her under her husband's trust-disposition, or the sum of £5000, or whatever other amount might be held to be the amount of her share of her husband's estate as his widow. The trustees resisted this claim on the ground that the pursuer's legal and conventional provisions were only payable in respect of her marriage, and that the marriage had been dissolved.

The Lord Ordinary pronounced the following interlocutors:—

"*3rd June* 1873.—The Lord Ordinary having heard parties' procurators, and considered the closed record and productions, sists process for one month from this date, that the pursuer may take steps by action of transference or otherwise for having the decree of divorce founded upon in the defence recalled or set aside.

"*Note*—Until the decree of divorce here founded on is recalled, or otherwise held to have become inoperative in consequence of the pursuer of the action having died before the reclaiming note was disposed of, it must, it is thought, be held to be a valid decree in dealing with the claim made in the present action. For although it seems to be settled that it is a good defence against decree of divorce