married before his death, then unquestionably the condition must needs have applied, and he would never have taken anything. But survivance of the liferentrix is not a condition at all. The payment is postponed in her case for the purpose of securing her. It is not a matter personal to the legatee at all. And so, if the children of Mrs Gilbert or Mrs Graham had attained majority during their mother's lifetime, and then died, predeceasing their mother, the share would have vested beyond all doubt, simply because it was no part of the condition that these legatees should survive the liferentrix. The condition was that they should attain majority or marriage.

Well, in the case of James Taylor was it a condition that the liferentrix should die without leaving issue? I think that is not a condition. It is a contingency which must be ascertained before it can be discovered whether the devolution has taken place or not. That is a totally different matter from a condition. The real meaning of the clause of devolution is this, that if there are no children, or if they do not attain majority, that which they would have taken, had they attained majority, shall devolve upon James Taylor. That is the meaning of it. That is not a condition at all. That is a condition which, when purified, denotes who the fiar was for whom the trustees held from the date of the majority or marriage. That is my view. It was no doubt a clause under which, when James Taylor attained majority he was presumptive fiar, and if he was never displaced he remained absolute fiar; but he might be displaced by the appearance of a nearer heir. But that is a thing which stands entirely distinguished from the conditions. It is in no respect a condition of the legacy. It is only an event before the arrival of which it cannot be known whether the devolving clause has or has not taken effect in favour of the conditional institute. But when that is once ascertained, James Taylor simply takes from the date of his majority or marriage; that is to say, it vests, and whether he predeceases or survives the liferentrix is a matter of no moment. These are the views which have occurred to me about this matter. There is some complication in the way in which they would be worked out in this particular case, but I have thought it right to give expression to them, because the general view which I take is, that it is only conditions personal to the legatee that can have the effect of suspending the vesting.

The Court therefore held that the parties of the second part were entitled to the whole of the two-third shares of the residue.

Counsel for M'Cullochs (Second Parties)—Balfour—H. E. Gordon; for M'Larens (Second Parties) — M'Laren — G. Watson. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Taylor's Representatives (Third Parties)—Trayner—Omond. Agents—Frasers, Stodart, & Mackenzie, W.S.

Saturday, November 3.

SECOND DIVISION.

[Lord Adam, Ordinary.

UNION BANK OF SCOTLAND *v.* BUTTERY & COMPANY AND OTHERS.

Obligation—Contract, Construction of—Proof of Intention.

A signed written contract with shipbuilders to make certain alterations on a ship for a certain sum, contained, *inter alia*, this clause—"The plating of the hull to be carefully overhauled and repaired, but if any new plating is required, the same to be paid for extra." The last fourteen words were deleted from the contract before signature, but remained legible, and the deletion was initialed by both parties. In a claim by the shipbuilders for payment on account of a considerable amount of new plating which they said was outwith the contract, *held* (in the result *revg.* the Lord Ordinary, Adam—*diss.* Lord Gifford), that in order to ascertain the understanding of parties the Court were entitled to be placed in the position in which the parties were before they signed the contract; and that upon the evidence and correspondence, and looking to the "surrounding circumstances" of the case, the work, payment of which was claimed, must be held to have been within the contract.

Opinion per Lord Justice-Clerk that the Court were entitled to get assistance in interpreting the contract from the letters of the parties before the contract was signed, and from the initialed deletion of the disputed clause in the contract.

Opinion contra per Lord Gifford, and *observations* by his Lordship on the law regarding the admissibility of evidence as affecting the interpretation of formal written contracts.

Observations per Lord Ormidale on the meaning of the expression "repair" as used above.

This was a multiplepoinding raised in name of the Union Bank of Scotland. The fund *in medio* consisted of a sum of £1260, 0s. 10d. (which was consigned in the Union Bank), the price of a quantity of new iron plating which formed part of the repairs executed by Messrs Inglis, shipbuilders, Glasgow, one of the claimants, upon the ship "United Service," to the order of Messrs Buttery, the other claimants of the fund.

In March 1875 Messrs Buttery & Company, as agents for the owners of the steamship "United Service," entered into a contract with Messrs Inglis to execute certain alterations and repairs on that vessel for the sum of £17,250. After the ship was placed on Messrs Inglis' slip it was found that the shell-plating of the hull required renewal to a considerable extent. Messrs Inglis intimated this to Messrs Buttery & Company, and informed them at the same time that they did not consider that the renewal of this plating was covered by the contract price. Messrs Buttery did not admit this reading of the contract, but it was agreed that Messrs Inglis should proceed with the work, under reservation of the pleas of both parties, conform to minute dated 30th July 1875, endorsed on the original memorandum of agreement. The only question between the parties was whether or

not the work was included in the original contract and covered by the contract price of £17,250. The contract between the parties consisted of a memorandum of agreement, with certain specifications annexed, dated 24th and 27th March 1875.

The following are excerpts from the specification:—

"*Lengthening.*—The hull of vessel to be lengthened 40 feet midships, or as nearly thereto as possible. The scantling, frames, reverse frames, stringers, floors, keelsons, stanchions, beams, decks, ceiling, and all iron and wood work of this portion of the vessel, to be entirely new and complete, of the best material and workmanship, in accordance with Lloyds' rules to class the vessel A 100.

"*Iron Work.*—The plating of the hull to be carefully overhauled and repaired. Deck beams, ties, diagonal ties, main and spar deck stringers, and all ironwork, to be in accordance with Lloyds' rules for classification, *but if any new plating is required, the same to be paid for extra.*—(*Fourteen words deleted*—A. & J. I.; D. G.")

Messrs Inglis, *inter alia*, stated in their condescendence—"(Cond. 3) The third clause of the relative 'specification of lengthening, alterations, and repairs,' headed 'ironwork,' bears 'the plating of the hull to be carefully overhauled and repaired.' . . . It is admitted that in point of fact these words were originally followed by the words 'but if any new plating is required, the same to be paid for extra'; but as it was not contemplated that any renewal of plating would be required, the last-mentioned words were at Messrs Buttery's request deleted from the specification. (Cond. 7) It was not within the contemplation of either of the parties at the time the contract was entered into that a renewal of the said plating was necessary. At all events, it was not within the contemplation of the claimants, and they did not take the same into account in estimating the contract price."

Messrs Buttery stated, *inter alia*—"(Cond. 5) In framing the said specification the defenders Messrs Inglis, under the head 'ironwork,' proposed that the agreement between them and the claimants should run thus—'The plating of the hull to be carefully overhauled and repaired, but if any new plating is required, the same to be paid for extra.' The claimants objected to the said proposal in so far as it contained the stipulation embraced in the last fourteen words of the clause quoted. Upon 25th March 1875 they wrote to Messrs Inglis, *inter alia*, in these terms—'We have all throughout understood, and your memo. of agreement before us clearly stipulates, that the sum of £17,250 covers lengthening, new engines, &c., and all repairs and alterations necessary to class the steamer A1 100 at Lloyds.' Messrs Inglis agreed to this, and said stipulation was accordingly deleted from the contract, and the deletion stands attested by the said Messrs Inglis and the claimants. The agreement of parties was, that all work necessary to obtain the vessel classed A1 100 at Lloyds was to be done by Messrs Inglis for the price of £17,250 sterling; and the work, for which Messrs Inglis claim the fund *in medio* was required in order that she should obtain the said class."

The Lord Ordinary (ADAM) on 21st December 1876 ranked and preferred the claimants Messrs A. & J. Inglis to the whole fund *in medio*, and added the following note:—

"*Note.*— . . . . The clause of the specification under the head 'ironwork' commenced in the following terms:—'The plating of the hull to be carefully overhauled and repaired.' Then follow these words, which were deleted—'but if any new plating is required, the same to be paid for extra.' It was admitted that these words were deleted before the contract was signed. It was proposed by Messrs Buttery & Company to refer to the correspondence passing at the time with the view of explaining why these words had been deleted. The Lord Ordinary was not referred to any authority in support of the competency of doing so. He is of opinion that it is not competent, and that the clause of the specification must be read exactly as if these words were not there.

"It was maintained by Messrs Buttery & Company that Messrs Inglis were under the contract bound to execute for the contract price of £17,250 all the work which might be necessary to obtain the classification of the vessel A1 100 at Lloyds. It is not disputed that the work in question (renewing the shell-plating of the hull) was necessary for that purpose. The Lord Ordinary thinks that while Messrs Buttery probably intended that the repairs and alterations which were to be executed should be such as would entitle the ship to a classification, they did not contract with Messrs Inglis to that effect. The ship is stated in the first article of the memorandum of agreement to be delivered to them 'for the purpose of being lengthened and supplied with new machinery.' The second article of the memorandum and relative specification sets forth in detail the whole work to be executed, and specifies certain particular work, materials, &c., which are to be in accordance with Lloyds' rules for classification; but it is nowhere provided that Messrs Inglis shall do all the work that may be necessary to obtain classification.

"It was maintained, however, by Messrs Buttery and Company that the work falls under the clause of the specification dealing with 'ironwork.' It is in these terms:—'The plating of the hull to be overhauled and repaired. Deck-beams, ties, . . . stringers, and all ironwork, to be in accordance with Lloyds' rules for classification. The Lord Ordinary, however, does not think that the extensive renewal of iron plating which was found to be necessary was intended by the parties to be included under the head of overhauling and repairing the plating of the hull.

"It was averred by Messrs Buttery that at the time the contract was entered into neither the claimants nor the principals knew, or had the means of knowing, the condition in which the hull of the ship was. Messrs Inglis were equally ignorant, and in this state of their knowledge it is not likely that the parties had in view any extensive re-plating of the hull, or anything more than ordinary repairs.

"Further, the memorandum of agreement and relative specification provide in detail for all the work which was to be executed under the contract, but there is no mention of the renewal of plating of the hull as a part of such work. The Lord Ordinary cannot help thinking that if renewal of the plating was intended to have been

included in the contract, it would have been specifically provided for. In short, he does not think that the renewal of the plating falls under the head of 'repairs' in the sense of this contract, and not being otherwise included therein, must be paid for as additional work not covered by the contract price."

Messrs Buttery reclaimed, and the Court, after hearing parties, allowed both parties a proof before answer. The proof was then led, and the purport of it sufficiently appears from the opinions of the Court, and especially of the Lord Justice-Clerk.

The Messrs Inglis argued—The contract must be held to express the understanding of the parties, and to be the outcome of their negotiations. Nothing else can be looked at, and the deleted clause must be held *pro non scripto*. Surely if the deletion had been on the draft it could not have been looked at, and the contract itself was no better than a draft until signed. You must look at the contract as if it had been written out again without the deleted words. The clause was deleted merely because the claimants were led to understand, through the innocent misrepresentations of the other parties, that no such replating would be necessary as was found afterwards to be necessary, and the claimants were therefore in essential error as to the amount of work they were undertaking—[Lord Justice-Clerk—The proper category of essential error is mutual error; if the error is not mutual there must be fraud at the bottom of it.]—Farther, no correspondence between the parties could be looked at, for the contract arose out of the correspondence, and expressed the intention of the parties at the close of the negotiations. The letter of the 25th March was in the same position as all other correspondence for it merely related to the terms of the then unsigned agreement. You could no more admit these than you could admit parole evidence as to the previous communings of the parties. The words "overhaul and repair" in the contract could not be held to include the extensive renewal which was here necessary to procure Lloyd's certificate. Such a renewal was entirely out of the contemplation of the parties, and must be paid for extra.

Authorities—Bell's Prin. 534; *Rogers* v. *Hadley*, 32 L.J. Exch. p. 241; *Adamson* v. *Glasgow Water Works*, 23d June 1859, 21 D. 1012; *Wilson* v. *Caledonian Railway*, 6th July 1860, 22 D. 1480 *M'Laurin* v. *Stafford*, 17th Dec. 1875, 3 R. 265.

Argued for the Messrs Buttery—The first question here was, What constituted the contract between the parties? No doubt previous communings must, as a rule, be excluded, but the letter of 25th March and its answer were a part of the contract, for they arose out of a proposal to make the payment of extra plating a specific part of the contract. The deleted clause must also be read with the contract for it showed what the demand of the Messrs Inglis was which was not agreed to. In mercantile contracts of this sort, the Court were entitled to know as much as the parties, and therefore the Court were entitled to construe the contract by the aid of the letter referred to and the deleted clause. If these letters and the clause was read, the meaning of the contract was perfectly plain. The Messrs Inglis were to do everything necessary to classify the ship 100 A1 for a certain slump sum; they wished to have a clause in the agreement stipulating for payment in addition for any new plating that might be necessary, but this the Messrs Buttery would not agree to, and the agreement was concluded without any such clause, the Messrs Inglis taking the risk of any new plating that might be necessary. Bnt even without these aids to construction under the contract itself, the words "overhaul and repair" would include what was here done by Messrs Inglis. Supposing this was a case of mutual error, the consequences of the error must fall upon the party taking the risk which Messrs Inglis here did.

Authorities—*Magistrates of Dundee* v. *Morris*, May 1, 1858, 3 Macq. pp. 134-171; *Robertson* v. *Duff*, Jan. 14, 1840, 2 D. 279; Story's Equity Jurisprudence, p. 252, sect. 272; Young's Nautical Dictionary *v.* "Overhaul and Repair."

At advising—

Lord Justice-Clerk—In this case, which has raised some important questions and has given rise to a great deal of consideration on our part as well as discussion at the bar, we are now to give judgment.

We have now the facts clearly ascertained, and these facts are substantially as follows:—

Messrs Buttery & Company, who apparently were acting for foreign correspondents, made an application to Messrs A. & J. Inglis, shipbuilders on the Clyde, asking "a tender for the following work," and then there is a short enumeration of the things which were to be done—"to contract and fit on board the steamer 'United Service' a pair of compound engines and boilers;" and then it says—"It is proposed to lengthen the ship 40 feet midships, and classify in Lloyds or Liverpool book. We require (1) a tender for the whole work as above indicated; (2) a tender for lengthening the ship only; (3) a tender for the other work (new engines, boilers, &c.) exclusive of lengthening vessel. State time required for execution of work." The result was that a tender was given for the whole work as above indicated. There was a letter on 17th February 1875 offering to execute the following repairs and alterations—1st, To take out the present engines, boilers, and machinery, and to make some alterations on them; 2d, to take out the present engines and boilers, cut the vessel asunder, and lengthen her 40 feet amidships, of the same scantlings of materials as at present; and then there are a variety of separate things which are undertaken — 3d, to lengthen the vessel and execute all the alterations as described above for the sum of £18,200 besides the old materials. "The time for completion of the whole work, including lengthening, will be about six months."

On 25th February Messrs Buttery write—"Against your tender of £17,250 the owners of the 'United Service' have sent us a counter offer of £15,000, and they say they wish to know what would be the cost of putting in the new machinery and restoring the vessel to a seaworthy state without classification;" and after some further letters a specification is prepared—prepared, I fancy, on the part of the employer, which seems to be the general practice. It is a specification for the lengthening of the vessel and for overhauling and repairing the hull. These are the two parts that are important in the

matter. It contains a variety of other matters. The object was to have the vessel classed at Lloyds, and the specification itself sufficiently indicates the general view of the parties to the contract. The specification contained among other things an obligation on the part of the employers, the persons giving the order, to this effect, that if any additional material was required for plating, that is to say, that if this new plating in the hull was required to be renewed, there should be an extra charge paid to the contractors as the price of that work. That brings the matter down to 25th March 1875, when this letter was written by Messrs Buttery, London, to Messrs A. & J. Inglis—"We have gone carefully over the documents, and send them on to Glasgow to Mr Gilchrist, who holds the procuration of our firm, and who will sign the contract when in order. He will call on you to-morrow." (Mr Gilchrist was the foreman in Messrs Buttery's establishment, and he had been sent down to Glasgow for the purpose of adjusting the contract). "The memorandum of agreement," say Messrs Buttery, "appears all in order, but in the specifications under the heading 'ironwork' we must ask you to erase all the stipulations after the word 'repaired.' We have all throughout understood, and your memo. of agreement before us clearly stipulates that the sum of £17,250 covers lengthening, new engines, &c., and all repairs and alterations necessary to class the steamer A1 100 at Lloyds." Now, the document in which that provision was made ran thus—It had been sent by Messrs Inglis to London in order that it might be signed there, or, at all events, it had been actually signed by them—"The plating of the hull to be carefully overhauled and repaired, but if any new plating is required, the same to be paid for extra." These are the words which Messrs Buttery said must be omitted, for this reason—"We have all throughout understood, and your memo. of agreement before us clearly stipulates, that the sum of £17,250 covers lengthening, new engines, &c., and all repairs and alterations necessary to class the steamer A1 100 at Lloyds." It is also shewn by the proof that Mr Gilchrist, who was only the representative and attorney for Messrs Buttery, was distinctly instructed that he was on no consideration to agree to the contract standing without these words being erased. Gilchrist states that in his evidence. He says he represented to Mr Inglis when he arrived "that the contract as it had reached London with the objectionable clause was contrary to the view held by John Buttery & Company from the commencement, and that I had received instructions that morning that under no circumstances could they agree to it." The result of that was that either those words must go out or there was no contract, for Gilchrist had no authority either to sign or to contract on any other condition. Messrs A. & J. Inglis write on 26th March, next day—"We are in receipt of yours of yesterday, and have just seen your Mr Gilchrist, and expect to get the clause arranged as you desire it." And it appears that after considerable discussion between Messrs Inglis and Mr Gilchrist, Messrs Inglis, in the belief—induced by the statement of the captain, as they say—and I see no reason to disbelieve it—that there would be very little work to do under the clause in the specification as altered, took their risk of it, expunged the words, and so the contract was signed. It seems that at that time the machinery was still in the vessel, and the vessel was still afloat, and accordingly it was impossible, or at least Messrs Inglis say so—and I take it for granted that it is a fact—to ascertain with accuracy the state of the plating. But the vessel was taken into dry dock, and on the 29th of June, which is before, I suppose, a single hammer had been used in the vessel itself, they have taken out the machinery and inspected the vessel. That is two months after the date of the contract. On 29th June Messrs Inglis wrote—"'The United Service' has to-day been inspected by Lloyds' surveyor, with a view to ascertaining condition of old part of hull, the ceiling in holds having been removed for that purpose. It was found that the reverse bars in holds were much decayed, and require renewal in some places, also that the shell plating was greatly wasted, having been originally unprotected by cement, and it is accordingly recommended by the surveyor that the whole of the plating between the bulkheads of the machinery space be renewed and replaced by new plating. As the cost of these repairs will be considerable, and as they do not come within our contract, we have to request that you will consider what is to be done in the matter."

Now, the clause in the contract about which the discussion took place was, that if any new plating was required, it was to be paid for. That was objected to, and it was put out upon the express understanding insisted upon by Mr Buttery that it should be undertaken by the contractor without any additional charge; and so he says, for on the 30th he writes—"Classification is a necessity, and therefore the work must be proceeded with as required by Lloyds' surveyor. We take a different view from you as to who is to pay this additional expense. We think the contract, more particularly under the heading "ironwork," clearly shows that you are to provide any plating required to classify the vessel. We had some correspondence on this subject; it was fully discussed and arranged by you and Mr Gilchrist, and in consequence before the contract was signed, fourteen words, under the heading "ironwork," were deleted.

Now the answer to that is of the greatest materiality. It expresses Mr Inglis' view on this matter. He does not say that the deletion of the clause had nothing to do with his liability for the ironwork. He takes no ground like that; but he says—"The clause deleted was struck out in consequence of it being represented to us by the captain that the vessel had been recently surveyed, and that there were only two defective plates in the bottom, which we agreed to replace or repair, thus rendering the clause unnecessary. After the vessel has been stripped, however, it appears that a large portion of the plating is in such a state as to require renewal and removal. This it was impossible to foresee, and consequently our estimate included only the lengthening, the additional strengthening, required by Lloyds, the repair indicated to us by the captain, and sundry items specified in detail." Now, in that state of matters Messrs Buttery say we must have the vesssel classed at Lloyds, therefore go on and do the work; and the parties ultimately agreed that the work should be done, and the price consigned to await the judgment of the

Court upon the true construction of the agreement between the parties.

Now, my Lords, upon that statement of the facts it does not seem to me that there is room for any reasonable doubt. It is perfectly true that the Messrs Inglis could not tell when they agreed to strike out that clause what amount of new plating would be required, because the machinery was still in the vessel; but that was their own look out. They had thought it necessary to insert, as they did insert in the specification, a clause protecting them in that matter, but Messrs Buttery quite distinctly repudiated that, and Messrs Inglis as distinctly acquiesced in adopting and giving effect to that repudiation. And therefore, upon the good faith of the contract and the substance of the agreement, it does not appear to me that there remains the slightest doubt, and the only doubt that has been suggested depends upon two propositions in point of law.

The first I understand to be that the Court are not entitled to look upon the transaction out of which this mercantile missive, which is not a regular document, though quite sufficient for the purpose, arose, in order to put themselves in the position of the parties before they signed the agreement.

The second proposition is that the Court are not entitled to know, or at least knowing are bound to give no effect to the fact, that there was a proposal to settle the matter of liability for extra cost by specific agreement; that that proposal was withdrawn, and was withdrawn upon a specific contract that no such extra payment should be made; and that this was the condition upon which alone the contract was signed and delivered. They say you have no right to know anything about that; you must read the contract as not only without the words, but as if the words had not been proposed, and as if there never had been any transaction or contract about it.

It is said, in the third place, that after eliminating what would rather seem to be the substance and essence of the real agreement, we are to construe the specification by itself, and in so construing it to find that this was not within the work intended to be done by the Messrs Inglis, and that therefore it must be paid for as extra work, because if not within the estimate it is not within the undertaking. I cannot listen to any of these propositions. I think them entirely unfounded in law, and I think them at direct variance with the manifest justice and intention of the parties.

In the first place, it is trite law—so trite that I do not think it necessary to quote authority on the subject—that in all such mercantile contracts, whether they be ambiguous or unambiguous, whether they be clear and distinct or the reverse, the Court are entitled to be placed in the position in which the parties stood before they signed. If it were in the slightest degree necessary to go into that matter, it extends a great deal further than anything that is done here. That is quite plain. But in this case it is not necessary to look round the contract at all. What we find is a distinct written agreement on the part of Messrs Inglis on the one hand, and Messrs Buttery on the other, that there shall be no contract except upon the condition of there being no charge for extra plating. That is the condition on which alone the contract is concluded. The letter of Messrs Buttery on the 25th is not a letter making a stipulation that that clause shall be added. The stipulation is that the obligation shall not be undertaken to furnish any new plating required without charge, and the putting of that clause out of the contract was a very effectual way of giving effect to the express arrangement of the parties, but it was only because it was giving effect to the express arrangement of the parties to except that condition, for without that there was no contract at all. The idea of construing Messrs Buttery's letter as if it only stipulated for the expunging of a claim in the missive which added nothing to the specification before it was inserted, and took nothing from it when it was expunged, is entirely contrary to the words of the letter itself, because the words of the letter are that the clause must be erased because "we have all throughout understood, and your memo. of agreement before us clearly stipulates, that the sum of £17,250 covers lengthening, new engines, &c., and all repairs and alterations necessary to class the steamer A1 100 at Lloyds" — that is, all new plating and so forth. Messrs Inglis could not in good faith or sincerity say that that was not their understanding of it, because they say—"We expect to get the claim arranged as you desire it." And therefore the operation of these two written documents is really outside altogether the doctrine of law about not going into previous communication. It is a specific agreement given effect to in the way the parties intended.

But it is said, not only are we to read the missive as if these words were not there, but we are not entitled to know that they ever were there. What that means is more than I can understand. The erasure is initialed. It is a specific contract superinduced on the original draft or extended agreement. It would have made no difference if it had been on a separate paper. But further, I can have no doubt that the specification and memorandum of agreement necessarily implied that the new work was to be completed and the vessel to be overhauled and repaired so that everything should be done which was necessary to have her classed at Lloyds. That, as a matter of course, was to a certain extent controlled by usage of trade. There were some operations which it is quite plain the parties were agreed did not fall within it; but that the shipbuilders could have returned the vessel as overhauled in terms of the contract leaving the whole of these decayed plates without any renewal, is to my mind entirely out of the question, and if there had been no such agreement as that I have referred to, and if we had only to consider the specification as it stands I should have been quite prepared to hold that the terms of the specification necessarily implied that the iron work, if it was defective, was to be replaced and renewed as well as repaired, or rather that repair included all these things.

It is very easy to put extreme cases. According to Messrs Inglis' contention they were not bound to repair those two plates that they say they undertook to repair. On the other hand, I do not say that a shipbuilder is bound to reconstruct. Clearly not; and the real case, I think unfortunately omitted in this discussion, is not that they did not undertake the renewal of these plates—for they clearly did—but that it turned out to be something far beyond what either of the parties anticipated. I should myself have been very much inclined to have

listened to a plea of that kind addressed to the equitable consideration of the Court, as the parties had agreed that the contract should be fulfilled, and it could not now be rescinded. But that is not the ground on which the question has been discussed, and as we are driven to decide the case on the terms of the contract, I have no doubt whatever as to the substance of the contract, or its legal signification, or its technical signification; and I know of no law whatever which in the least militates against the view that I have now suggested, namely, that this matter as to rebuilding was distinctly settled, as is proved under the handwriting of the parties, entering into the very essence of the contract and being the condition of the contract, without which it never would have been executed; and holding that, I am of opinion that the interlocutor of the Lord Ordinary must be altered, and that the Messrs Buttery are entitled to our judgment.

Lord Ormidale—The grounds upon which I have arrived at the same conclusion as your Lordship are somewhat different and more simple than those which I understand have chiefly influenced your Lordship.

The parties having differed as to the meaning and effect of the contract in question, Messrs Buttery & Company consigned £1260, 0s. 10d., which, in the event of their being held to be wrong in their contention, will fall to be paid to the Messrs Inglis; while, on the other hand, if Messrs Buttery & Company shall be found to be right in their contention, they will be entitled to uplift and retain that sum.

The Lord Ordinary having decided against Messrs Buttery & Company, they have reclaimed against his judgment, and the Court has now, after a full and able argument from the bar, to dispose of the Reclaiming Note.

Although various points were made or attempted to be made on either side at the debate, I am willing to deal with the case on the footing that the contract in question is a written one, and that it is embodied in the Memorandum of Agreement and relative specification, No. 9 of process, without the deleted words on which so much of the argument turned being taken into account or read at all.

The question then is, What must be held to be the true meaning and construction of the written contract as regards the iron plating of the hull of the vessel therein mentioned? Does it oblige the Messrs Inglis, not merely to mend or patch up the old plating, but to renew it so far as necessary for the classification of the vessel at Lloyds.

In determining this question the written contract itself must be first examined, for it is only in the event of it being impossible with reasonable certainty to ascertain from the language in which it is expressed what is its true meaning and construction, that it may be necessary to invoke the aid of extrinsic evidence to clear up ambiguity or to interpret technical or trade expressions.

In regard to the language in which the written contract is expressed, I find that the memorandum of agreement, looked at by itself, is in such terms as to throw very little light on the disputed point. It specifies, however, a great many things which are to be done on the vessel, and adds—"all complete, and as more fully detailed in the annexed specification, for the sum of £17,250, besides the old materials." The specification which is thus referred to for full details bears under the heading "*Iron Work*"—"The plating of the hull to be carefully overhauled and repaired. Deck beams, ties, diagonal ties, main and spar deck, stringers, and all iron work, to be in accordance with Lloyd's rules for classification." Now, it is not disputed that the plates, the renewal of which is the matter in dispute, consist of iron; and neither is it disputed that they were indispensable according to Lloyd's rules. It is not therefore very easy to see why the Messrs Inglis should not be held as bound to renew the plating where necessary by the express terms of the written contract, without going out of it at all, except for their own admission or statement in article 4 of their condescendence and claim, to the effect that the plates were necessary in accordance with Lloyd's rules.

It was argued, however, for the Messrs Inglis, that by the article of the specification which has been quoted they became bound merely to repair, in the restricted sense of merely mending or patching, and not renewing or replacing, the plating, but how this argument can be maintained by them I must, after full consideration, own my inability to understand, seeing that whatever may be the meaning of the expression "repair," looked at by itself and in a restricted sense, it must, I think, be held as meaning to renew, when taken in connection with the only object it was used to serve, viz., to make the hull of the vessel in accordance with Lloyd's rules. Besides, and independently of this consideration, it will be found that the expression "to repair" must mean renewal or restoration, as well as mere patching or mending. Thus, in Young's Nautical Dictionary, the expression to overhaul and repair is stated to mean to see "that any defect is made good," thereby very clearly implying, I think, that if the defects in the plating in question were so great that no mere mending or patching would suffice, there must be renewal. So also, the meaning of "to repair" is stated in Judd's Johnson's Dictionary to be—"To restore after injury or dilapidation," and again, "to fill up anew by something put in the place of what is lost." And in Webster's Dictionary "to repair" is stated to be—"To restore to a sound or good state after decay or partial destruction—as to repair a house, a wall, or a ship; to repair roads and bridges; to rebuild a part decayed or destroyed; to fill up, as to repair a breach; to make amends as for an injury by an equivalent."

It is, therefore, with some confidence I have formed the opinion that looking at the written contract in question by itself, and giving to its terms, exclusive of all extrinsic aid, their fair meaning and construction, the Messrs Inglis must be held to have bound themselves to renew, so far as requisite for the classification of the vessel at Lloyds, the plating in question. And this view is, I think, materially supported by the circumstance that under the head of "ceiling" in the contract it is expressly stated that "any ceiling renewed, to be paid for extra." It is thus shewn that when renewal was to be paid for extra, it is so stipulated in the contract, while in reference to ironwork no such stipulation is to be found.

Supposing, however, that the contract is to be

held as ambiguous, or to contain language of a trade or technical character requiring interpretation, then in that assumption it is competent to look at the correspondence and proof, not for the purpose of controlling or altering the written contract, but only for the purpose of ascertaining the true meaning and effect of its terms, and of placing the Court in, as nearly as possible, the position of the parties themselves when they executed it, in order the better to understand what was their intention in entering into it, and in that way clearing up any ambiguity attending it, and interpreting any trade or technical expressions it may contain. That such is the law and practice of Scotland is sufficiently clear from Dickson's Treatise on Evidence (paragraphs 202 and 204) and the decided cases there referred to, and that the law and practice of England is to the same effect, appears from Addison on Contracts (page 164-5) where he says, "To enable us to get at the real intentions of the parties, and to make a correct application of the words and language of the contract to the subject matter thereof, and the objects professed to be described, all the surrounding facts and circumstances may be taken into consideration," and in support of this proposition the learned author refers to several decided cases, and amongst others to that of *M'Donald* v. *Longbottom*, 29 L.J.,Q.B., 256.

Now, it appears to me that notwithstanding a certain degree of conflict which the parole proof exhibits, it preponderates, especially when taken together with the correspondence, in favour of Messrs Buttery & Company and the construction of the contract for which they contend. But it is right to mention that in examining the proof and correspondence, and taking the benefit of such aid as it affords, I have endeavoured to eliminate and disregard everything except those circumstances which can be fairly and legitimately comprehended by the expression "surrounding circumstances" in its legal sense.

For the reasons I have now stated, I am of opinion that the interlocutor of the Lord Ordinary reclaimed against is erroneous and ought to be recalled, and that Messrs Buttery & Company ought to be found entitled to the consigned money. I have arrived at this result without entering on the question which was argued at the debate, whether the proof and correspondence may not be considered for the purpose of seeing whether it did not establish as a continued collateral agreement, or as an addition to the main agreement, that the deletion in the contract as it stands was made by Buttery & Company, and assented to by the Messrs Inglis, for the very purpose of excluding any claim on the part of the latter for the renewal of the plating. I do not say whether this might or might not be competent, as I have not thought it necessary to determine that question, which I am disposed to think is one of great difficulty in the circumstances which have occurred.

I have only, in conclusion, to add, that I am unable to satisfy myself that the Court could, on the ground that the Messrs Inglis had been induced to agree to the contract through error, give them such redress as it might be thought they are entitled to, by reforming the contract or rescinding it in whole or in part. I cannot see that the requisite elements for adopting such a course are either in the record or proof as they now stand before the Court; and, besides, the contract has been carried into effect.

Lord Gifford—This case in some of its aspects is attended with a good deal of difficulty, but I have ultimately come to agree in all respects with the view which the Lord Ordinary has taken.

When the case was argued before us upon the reclaiming note various points were taken which do not seem to have been urged or insisted in before the Lord Ordinary. For example, among other questions, it was maintained on the part of Messrs Buttery & Company that the words occurring in the specification—"the plating of the hull to be carefully overhauled and repaired"—meant, according to the usage and practice of the trade, that all plates which might be found on inspection to be defective or worn should be renewed by the contractor to whatever extent this might be found necessary, and that as part of his contract. The parties were also at issue as to the technical meaning of other words occurring in the contract, and Messrs Buttery contended that at the time the deletion in the specification was made it was specially stipulated and agreed to that if new plating was required it should be furnished by Messrs Inglis as included in the slump contract price. There was a serious question how far any proof on this last point was competent, but as there could be no doubt of the competency of proving the facts and the circumstances in which the parties stood at the date of the contract, and of proving that technical words used in a contract had a fixed and technical meaning, we thought it better, in order to exhaust the case, to allow both parties a proof before answer. This proof has now been led, parties have been again heard, and the case is now ripe for final decision.

The question is, whether the cost of very extensively renewing a large portion of the old plating of the hull of the screw-steamer "United Service" is or is not included in the slump contract price of £17,250 mentioned in the memorandum of agreement of 24th and 27th March 1875, or whether that renewal forms extra work, the cost of which must be paid for by Messrs Buttery in addition to the contract price admittedly due by them. The parties agreed at the time that the plating in dispute should be renewed by Messrs Inglis, leaving the question open whether they were entitled to be paid therefor as extra work or not. The cost of the renewal was £1260, 0s. 10d., which sum was by arrangement consigned in the Union Bank of Scotland, and forms the fund *in medio* in the present action. If Messrs Inglis are entitled to be paid for the renewal as extra work, then they will fall to be preferred to the fund *in medio*. If, on the other hand, the renewal be held to form part of the contract, and to be included in the slump contract sum, then Messrs Buttery will be entitled to the fund *in medio*.

Now, the first question is, What constitutes the contract between the parties?—which contract the Court has to interpret. Is the contract a written contract, and if so, in what writings is it contained, or is the contract partly parole or verbal, so that besides the written documents the Court must take into view the oral testimony of the parties or of witnesses. There is a further question which was very keenly argued by the parties, and it is this, that even supposing the contract

to be held to be a strictly written contract, whether certain deleted words therein—words deleted by consent of both parties before the contract was signed—can yet be read with the view of interpreting the undeleted words which admittedly stand as part of the contract.

I am of opinion, in the first place, that the contract between Messrs Buttery and Messrs Inglis is a written contract, and is not to any extent a parole or verbal contract, and I agree with the Lord Ordinary that the contract consists, and consists exclusively, of the formal memorandum of agreement, No. 9 of process, dated 24th and 27th March 1875, with the specifications attached thereto. I think this agreement with the specifications attached forms the written instrument which, and which alone, the Court has to interpret and construe. I think this was the intention of the parties. They carefully framed the memorandum and specifications as embodying their agreement, and the whole of their agreement. They had, it appears, considerable discussion as to the terms of the memorandum and specifications, that discussion being partly oral and partly in correspondence, but they ultimately finally adjusted the terms of the contract, and were agreed thereon as correctly embodying and setting forth what their contract really was, and having thus agreed upon its precise terms the contract was formally signed by both parties or their authorised agents before witnesses, and it is admitted that the memorandum, No. 9 of process, with the relative specifications as they now stand, and as they are now on the table of the Court, are the documents which the parties signed as their final contract and agreement. These documents constitute the *consensus in unum placitum.*

Now, I think it is quite fixed—and no more wholesome or salutary rule relative to written contracts can be devised—that where parties agree to embody, and do actually embody, their contract in a formal written deed, then in determining what the contract really was and really meant, a Court must look to the formal deed and to that deed alone. This is only carrying out the will of the parties. The only meaning of adjusting a formal contract is that the formal contract shall supersede all loose and preliminary negotiations — that there shall be no room for misunderstandings which may often arise, and which do constantly arise, in the course of long and it may be desultory conversations, or in the course of correspondence or negotiations during which the parties are often widely at issue as to what they will insist in and what they will concede. The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings partly consisting of etters and partly of conversations. The written contract is that which is to be appealed to by both parties, however different it may be from their previous demands or stipulations, whether contained in letters or in verbal conversation. There can be no doubt that this is the general rule, and I think the general rule strictly and with peculiar appropriateness applies to the present case. The deed which we have to interpret as the contract consists of the memorandum and specifications and of nothing else.

Of course if the deed itself contain technical expressions—words of art which have in the trade a peculiar and a fixed meaning—proof may often be necessary as to what such words and expressions really mean. But such proof is not for the purpose of adding to or importing into the written contract something that is not already in it, but merely for the purpose of interpreting or translating the words which both parties have chosen to use. This question arises in a future part of the present case. I am only now fixing in what the contract is embodied, and I really have no doubt whatever that what we have to look to is exclusively the memorandum and specifications, No. 9.

Now, this view excludes from consideration—

First, all previous correspondence between the parties and their agents—I mean, all correspondence previous to the actual subscription of the formal memorandum. Some of that correspondence was referred to at the debate. I think myself bound to lay it altogether out of view. If it contains stipulations or proposals or expressions of intention which are not embodied in the formal deeds, then I must hold that the omission so to embody them was intentional and *ex proposito*, because the stipulations or proposals were not agreed to or because the parties had changed their minds. There may indeed be some purposes for which a preliminary correspondence may be referred to, for example, to ascertain the identity of a *locus* or thing or person, but no questions of that kind arise in the present case. As forming *pars contractus*, I think the preliminary letters are entirely excluded. In particular, I exclude the letters of 25th or 26th March 1875, regarding the proposed deletion in the extended deed, because I cannot read these letters without seeing that they are simply letters about the terms of the then unadjusted or unsigned agreement, and I can no more admit them as part of the agreement than if what they contain had been said verbally across the table between the respective agents or conveyancers of the parties.

Second—Still more clearly, preliminary verbal communications or alleged understandings are inadmissible in construing the written contract. The very purpose of the written contract was to exclude disputes inevitably arising from the lubricity, vagueness, and want of recollection, or want of accurate recollection, of mere oral conversations occurring in the course of negotiations more or less protracted. On this I need not insist. Neither of the parties proposed to override the written contract by proving previous negotiations.

Third—I think the rule of law also excludes the consideration either of letters or of conversations subsequent to the date of the formal written contract, unless it can be shown by the clearest evidence that such letters, or in some exceptional cases such verbal conversations or verbal agreements, were intended by both parties to add to or to alter the written instrument. If it can be shown by competent evidence that the written instrument was by the deliberate consent of both parties altered or added to in any particular respect, then this would be to set up and establish a new agreement, and of course there is nothing to prevent parties who have made a formal written agreement from adding to it or altering it by another and a new agreement, and although such new agreement must generally be in writing,

there are cases where writing may be dispensed with, particularly where there is anything like actings of the parties or *rei interventus*. But nothing of this kind occurs in the present case. There was no intention in either of the parties either to alter or to add to the written contract, and therefore I lay out of view not only all negotiations written or verbal which passed prior to the date of the contract, but also all negotiations written or verbal which took place after the date of the contract. I look to the written contract alone, and to nothing else, and in doing so I am satisfied that I am only doing what both parties intended should be done.

The next question, however, is a more difficult question, for the contract itself as it lies before us exhibits in the specification as to ironwork a very important deletion of the following words, "but if any new plating is required, the same to be paid for extra." It is admitted that these words were deleted by consent and agreement of both parties before the contract was signed by the parties as their final and mutual deed. The deletion is authenticated by a marginal note, "fourteen words deleted," which marginal note is initialed by both parties, and there is no dispute that the deleted words do not form part of the written agreement—that is, the deletion must be given effect to. But the deleted words, though deleted, can still be read under the deletion, that is, under the deleted ink-line which passes through them, and the contention of Messrs Buttery is that although the words are deleted, and not to be read as part of the contract, they can still be read and looked at for the purpose of interpreting and giving a meaning to the words which are undeleted, that is, to the contract as it at present stands.

We had a very able and ingenious argument upon this point, and the counsel for Messrs Buttery not only maintained that the deleted words must be read for purposes of interpretation, but also insisted that he was entitled to shew by correspondence and by parole proof why the words were deleted, and *quo animo* and with what intention both parties agreed to their deletion.

Here also I agree in opinion with the Lord Ordinary. I think that when parties who are about to sign a formal deed agree that certain words shall be deleted before signing it, the meaning of such agreement is that the deleted words shall not be read to any effect whatever. Deletion, however executed on the paper, means entire deletion and blotting out. The words are to be abolished and held *pro non scriptis*, just as if they had never been there. The deed is to be read without them, the agreement come to is an agreement without the words, and I see neither reason nor authority for holding that although both parties stipulate that the words shall form no part whatever of the agreement, they are yet to be read as interpreting it, that is really as part of it, or as an explanatory note embodied therein.

Surely an agreement to delete means an agreement to delete effectually and to all intents whatever. It is not an agreement partially to delete or to delete *ad hunc effectum tantum* and not as to other effects. If this was meant this would require to be specially stipulated and explained on the margin or otherwise, but the only agreement is contained in the marginal note, the "fourteen words deleted"—that is, absolutely put out—put away—not there. Can anything depend upon the mode in which the deletion is accomplished—the blackness of the deleting ink—the number of deleting lines to be drawn through the exterminated words—the possibility or impossibility of deciphering or guessing what once was there through the deleting medium—the partial or imperfect obliteration of the whole or of some of the words in question. Is anything to turn upon the clearness of sight with which some keen eye—the eye of an expert or an eye armed with a microscope or spectroscope—can manage to see some or all of the deleted letters? Surely not! Deletion means either abolition or it means nothing. Suppose the parties had chosen, they might have erased the words, that is, scraped them off the paper altogether by removing that part of the paper's texture which was stained with the offending ink. It is impossible to argue that a consent to delete certain words is to have a totally different effect from a consent to erase the same words. Both mean the same thing. The words are to be no longer there, and an authentication of a line erased is precisely the same as that of a line deleted. Both are mechanical means of removing words, and expunging or chemical extinction would be just the same.

Accordingly the counsel for Messrs Buttery boldly contended that if the words had been undecipherable or erased, or cut out, he would have been entitled to prove parole what they once were. To be logical he was obliged to maintain this. No authority for so startling a proposition was quoted, and I do not wonder at it, for it would lead to the most startling results.

Supposing the parties, instead of simply deleting the words, had insisted that the deed of agreement, or that sheet of it, should be rewritten for signature with the words left out, could the deleted and unsigned sheet be recovered or proved parole for the purpose of interpreting the only signed sheet and the only signed agreement? I think plainly not, and if not it is impossible to give one effect to an authenticated delineation and another effect to a rewritten deed, or sheet with the words deleted omitted. In truth, the deletion was simply made to save the trouble of rewriting the sheet, and the effect must be the same in both cases.

In substance, and when narrowly looked at, the attempt to read these deleted words for any purpose whatever is just an attempt to control a final and formal deed by proving the preliminary communings of the parties. The words ultimately deleted were originally inserted in the deed by the draftsman, whoever he was. The deletion, though ultimately made upon the extended copy, was just a deletion which might have been made and which should have been made upon the draft deed or on any of the successive drafts, if there were more than one. But surely it was never heard of that a signed and formally executed deed is to be interpreted upon a review of any number of preliminary drafts, containing clauses and successively altered clauses, unauthenticated and unagreed to, and all which were deleted by mutual consent, and do not appear in the finally executed deed. To control a final deed by clauses which of consent were deleted from the draft deed or from any

number of successive drafts of the deed was surely never seriously proposed.

The absurdity is hardly enhanced when Messrs Buttery proceed further to insist that they are entitled to show and to prove *quo animo* or with what intention the words in question were deleted. No ingenuity can make this proposal reasonable. Whose intention is it proposed to prove? Messrs Buttery say the intention of the parties and their agents—but that must mean, or might mean, the intention of the draftsman employed to frame or to revise the deed. You must get into his breast and thoughts to know why he deleted some words and inserted others—and you cannot stop at the draftsman, for the words of the deletion might have been suggested by the draftsman's clerk, or by the draftsman's pupil, or by some combination of them—and we must ask *quo animo* the suggestion was made, and the intention in view—and the framer of the deed might have one intention and the reviser of the deed might have another intention, and the intentions of both might differ from the intention of the parties, either or both of them—and you would have proof regarding the red ink alterations and more proof regarding the blue ink alterations, made by successive hands or it may be a series of successive draftsman. I need not multiply illustrations. All such proof is incompetent in all its degrees.

I take therefore the agreement and specifications alone, and I read them without the deleted words—just as if these words had never been there. I am sorry to have dwelt so long on preliminary matter, but the questions are important, for Messrs Buttery's argument really came to this, that by reading the deleted words and the object of their deletion they were enabled to read into the contract an express stipulation that Messrs Inglis should have no claim for renewed plating however much that should be required and supplied.

Applying the contract fixed as I have above proposed to the question at issue—Is the disputed plating part of the work contracted for or not?—I agree with the conclusion reached by the Lord Ordinary.

There is nothing in the memorandum or specifications bearing expressly that any of the original plating is to be renewed, and there is nothing to shew that the renewal of the original plating was intended or contemplated by either party. The purpose for which the ship was delivered to Messrs Inglis is defined in the first clause of the agreement thus—"for the purpose of being lengthened and supplied with new machinery." When anything is to be renewed it is expressly mentioned. For example, a new spar-deck of teak between poop and forecastle is stipulated, new anchors, new chains, and windlass are mentioned, and the new machinery is specially enumerated. The rest of the specification, speaking generally, refers to repairs, and it may be noticed that when the renewal is contemplated there is some special stipulation regarding it. A striking example occurs in reference to the ceiling of the ship, and as part of this required to be lifted it was foreseen that it might be necessary to substitute new ceiling if any of the old was unfit for replacing. The bargain about this is "any ceiling renewed to be paid for extra." When it is remembered that the ceiling of the ship is the inside lining corresponding to the outside plating of the hull, it is very remarkable that while provision is made for renewed ceiling, no provision is made for renewed plating. The remark may cut two ways, but my inference from it is simply this, that while both parties had in view that ceiling might require to be renewed, neither party contemplated the possibility of the original plating requiring renewal.

The only clause in the contract and specification upon which Messrs Buttery relied was that occurring under the head "ironwork," which, omitting the deleted words, reads thus—"The plating of the hull to be carefully overhauled and repaired. Deck-beams, ties, diagonal ties, main and spar-deck stringers, and all ironwork, to be in accordance with Lloyds' rules for classification."

It was contended that under the stipulation that the plating of the hull is to be carefully overhauled and repaired, renewal is included; and if this had been the technical meaning of these words of course it must have been given effect to. But that was one of the matters sent to probation, and I think the result of the proof is that these words are not technical words having an established meaning in the trade. Different evidence has been given regarding their meaning by different witnesses, and the very fact that there are such differences between witnesses in the trade is sufficient to exclude the contention that they have a technical meaning. I think that the substance of the proof is that it cannot be said that either party has established that these words have any technical meaning.

If that is so, we must take the words in their ordinary meaning. I do not think it was contended that overhauling by itself means renewal of the plating, and it was on the combined force of the words "overhaul and repair" that it was contended that the plating of the ship was to be renewed if that was necessary. Now, I do not think that in the specification where renewal is mentioned—wherein it is contemplated—we can hold that under the words "overhaul and repair" an extensive renewal of the original plating was contemplated by either party, or by either party included in the contract. I come to that conclusion upon various considerations. In the first place, repair is surely different from renewal; and if parties use the word "repair" when they speak in other parts of the contract of renewing other things, I think they must mean by repair a different thing from renewal. In common language the words have a different meaning. To repair is so to mend, patch, or make up the old material as to serve the purpose. It is a different word from "renew," and has a different meaning. In the next place, in this particular case the renewal of the plates was not required because of there being holes in them. They had not given way or been destroyed in that way, except perhaps the two plates referred to. On the contrary, it was because they were worn—worn so as not to be so thick as they originally were, and their not being protecting plates. It also appears in evidence that in order to discover whether they were thick enough to suit Lloyds' requirements they had to be drilled. Now, a man who says "I will overhaul and repair the plating," does not mean that he will drill holes, and if the plates have been worn by the action of time or corrosion beyond a certain thickness he will put in new ones. But that is

the contention of Messrs Buttery; for the plates were taken out not because they were letting in water, but because they were not thick enough for the purpose of classification.

That leads me to the last point—that there was embodied in the contract an undertaking by Messrs Inglis to do anything that was needed for the classification of the ship. Now, I cannot read that in the contract. I do not think that is the meaning of it. There is no such clause in the contract, and although it was the intention of Messrs Buttery to have the ship reclassed, I think the contract is carefully so expressed as not to exclude that. And accordingly the particular work specified is to be in accordance with Lloyd's requirements or rules; but it is nowhere said that anything necessary for the classification of the ship was to be done.

On the whole matter, according to the fair meaning of the writing, which I think alone forms the contract, my opinion is that the work now in question was not within what Messrs Inglis undertook to do, and I therefore think that the Lord Ordinary's interlocutor should be adhered to.

The Court gave Messrs Buttery & Company their expenses from the date of the proof.

The following interlocutor was pronounced:—

"Recal the interlocutor of the Lord Ordinary complained of: Rank and prefer the reclaimers John Buttery & Company to the whole fund *in medio*, in terms of their claim: Ordain Messrs Roberton & Ross, writers in Glasgow, to endorse the deposit-receipt for the consigned fund, and, if in their possession, to deliver it to the agents of the reclaimers: And grant warrant to the Union Bank of Scotland to pay to the reclaimers the consigned fund of £1260, 0s. 10d., with interest thereon since date of consignation."

Counsel for Respondents — Asher — Pearson. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Reclaimers—Lord Advocate (Watson)—Trayner. Agents—J. W. & J. Mackenzie, W.S.

REGISTRATION APPEAL COURT.

Monday, November 5.

[County of Perth.

KILGOUR *v.* HALLY.

Election Law — County Franchise—Schoolmaster—Defeasible Title—Statute—Education Scotland Act 1872, *sec.* 55.

The teacher of a public school was appointed "during the pleasure of the School Board," and on the understanding that he "would occupy the teacher's house." *Held* that his occupation of the house being terminable along with his employment, did not qualify him for the franchise, and that it would have made no difference if it had been stipulated that the engagement was "terminable on either side by two months' notice in writing."

In 1875 the School Board of Kincardine appointed Kilgour teacher of the public school "during the pleasure of the School Board," at a salary of £55, with a proportion of school fees and Government grant. The minute of meeting at which he was appointed bore that "it was also understood that Mr Kilgour would occupy the teacher's house." The teacher's house and garden were entered in the valuation roll as of the annual value of £15. Kilgour having personally occupied them for a year prior to 31st July 1877, claimed to be enrolled in the register of voters for the county of Perth as tenant and occupant of the subjects. Sheriff Lee rejected the claim, and a case was required for the Court of Appeal.

Argued for Kilgour—There was no connection between his tenure of office and tenancy of house. The presumption was that the house was held for a year. The side schoolmaster had been admitted—*Wardrop* v. *Cockburn*, November 4, 1874, 2 Rettie 6, 12 Scot. Law Rep. 33. The bank agent's case, *Murray* v. *M'Gowan*, October 28, 1869. 8 Macph. 4, 7 Scot. Law Rep. 78, was clearly one of precarious tenancy. Here, at least, a three months' notice would be required—*Morrison* v. *School Board of Abernethy*, July 3, 1876, 3 Rettie 945. The test was whether there was an "air of permanency" in the office—*Robbie* v. *Meiklejohn*, December 19, 1868, 7 Macph. 296. A contract of lease for a year certain was not required; otherwise the six months' tenancy common among the artisan class would not qualify.

Argued for the objector—In *Robbie's* case the minister was on the roll as liferenter, and it was held that the objector had not proved defeasibility. The present case was much weaker than that of the military chaplain, *Cole* v. *Raeburn*, October 24, 1870, 9 Macph. 13, 8 Scot. Law Rep. 22; or of a month's notice, *Darnley* v. *Stewart*, December 19, 1868, 7 Macph. 313.

At advising—

Lord Ormidale—This case presents no serious difficulty, and I think the Sheriff has rightly rejected the claim. The claimant is a schoolmaster under the Act of 1872, and he is employed by the School Board under a contract of service. What is the nature of that contract, and what is the tenure of the claimant's office? Under the statute, and according to the words of this particular appointment, the tenure of office is clearly defeasible at the will of the School Board without cause assigned. Did the claimant then hold his house and garden on any different conditions? They are clearly part of his emoluments for services rendered under the contract of service, and the presumption surely is that remuneration ceases when the services cease. Perhaps a separate and independent arrangement might have been made by a School Board with regard to the occupation of the house and garden. I doubt if such a special contract exists, and I should also doubt its legality if made. The School Board has powers under the statute to levy rates for the purpose of remunerating the teacher under a contract of service terminable without notice, but not for the purpose of securing the teacher in the occupancy of a house and garden. In the present case there is no evidence of a special contract. It has been argued that a School Board will not dismiss their teacher capriciously or except for