passed, the word used being a word of popular signification. I should think that the uniform practice, extending over a period of more than forty years, under which these public undertakings, not carried on for profit, had been valued by the Assessor of Railways and Canals, is very strong evidence of the meaning attributable to the words at the time when the Act was passed. I agree with your Lordship in thinking that the existing method of valuation ought not to be disturbed. I think the Lord Ordinary has stated the construction in a way to which no exception can be taken; but his Lordship has not given sufficient weight to the practice, or rather to the history of the past usage, following upon the Act, and which I think ought to be decided in the ordinary and popular sense.

LORD KINNEAR concurred.

The Court repelled the 3rd plea-in-law for the defenders, recalled the interlocutor reclaimed against, and remitted back to the Lord Ordinary.

Counsel for the Pursuers and Reclaimers —Wilson. Agent—James Hope, W.S.

Counsel for the Defenders and Respondents — H. Johnston — Graham Stewart. Agents—M'Neill & Sime, W.S.

Friday, July 6.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

IRELAND & SON *v.* THE MERRYTON COAL COMPANY.

Contract—Coal Company—Construction of Contract—Contract to Deliver a Quantity of Coal in Equal Monthly Quantities—Measure of Damages.

A company of coalmasters offered to deliver to a firm of coal exporters 3000 tons Ell coal "over next four months in average monthly quantities, delivery in shipping lots of 4/600 tons at a time on due notice being given," and the coal exporters accepted the above quantity, "delivery in about equal monthly quantities over the next four months."

Held that the coalmasters were not bound under the contract to deliver 3000 tons in all, the quantity not delivered in one month being delivered in another, but that the contract was for monthly deliveries of about 750 tons of coal until 3000 tons had been delivered during the four months, each month's delivery being separate and separable, although the rights and obligations *hinc inde* arose out of one contract for 3000 tons of coal.

On 1st May 1893 David Ireland & Son, coal merchants and exporters, Dundee, wrote to the Merryton Coal Company, coalmasters, Merryton, near Hamilton—"We have an inquiry for Hamilton Ell, shipment during the next few months, and might arrange 3000 tons at 7s. f.o.b. Grangemouth, in lots of 4/600 tons." On 2nd May the Merryton Coal Company replied—"We have your memo. of 1st inst. We would take the 3000 tons Ell coal at 7s. per ton f.o.b. G'mouth, for delivery over next four months in average monthly quantities. Delivery in shipping lots of 4/600 tons at a time on due notice being given. We don't guarantee delivery during strikes or stoppage of pits." On 8th May David Ireland & Son accepted the offer of the Merryton Coal Company by letter in the following terms—"Referring to yours of 2nd, we are glad we have now succeeded in placing the 3000 tons of Ell, and accept this quantity at 7s. f.o.b. Grangemouth, delivery in about equal monthly quantities over the next four months."

In November 1893 the Merryton Coal Company raised an action against David Ireland & Son for £274, 1s. 7d. as damages for breach of the above contract.

In December 1893 David Ireland & Son raised a counter action against the Merryton Coal Company for £238, 17s., also as damages for breach of the contract.

The actions were conjoined, and a proof allowed, the result of which, so far as it bears upon the legal question at issue, sufficiently appears in the opinions of the Lord Ordinary (STORMONTH DARLING) and Lord Trayner.

On 20th March the Lord Ordinary pronounced the following interlocutor:—"Decerns against David Ireland & Son for payment to the Merryton Coal Company of the sum of £157, 4s. 9d. sterling: Finds the Merryton Coal Company entitled to the expenses of the action at their instance against David Ireland & Son up to 9th January 1894: Finds David Ireland & Son entitled to the expenses of the action at their instance against the Merryton Coal Company up to the date of the conjunction of the processes, and to expenses in the conjoined processes to the extent of one-half of the taxed amount thereof, &c.

"*Opinion.*—There are various questions raised on record in these cross actions, but the only matter which went to proof and remains for decision is a claim of damages for breach of contract by Ireland & Son against the Merryton Company.

"The contract was concluded on 8th May 1893, and was for the sale by the company to Ireland of 3000 tons of Ell coal at 7s. per ton f.o.b. at Grangemouth, delivery during the next four months, in about equal monthly quantities, and in shipping lots of 4/600 tons at a time, on due notice being given. The sellers also stipulated that they did not guarantee delivery during strikes or stoppage of pits.

"The parties differ as to the meaning of the contract. Ireland, the purchaser, maintains that the contract was essentially one for the sale of 3000 tons, and no less, to be reasonably spread over the period of delivery, and that this period was either the months of June, July, August, and September, or at all events the period from 8th May to 8th September. The

seller, on the other hand, maintains that the contract was equivalent to four separate and distinct contracts for the sale and delivery of 750 tons in each of the months of May, June, July, and August.

"I cannot agree with the extreme contentions on either side. With regard to time, if I had been construing the contract without aid from the subsequent correspondence I should have said that the four months were to run from the 8th of May. But Ireland's letters of 15th, 17th, and 22nd August show conclusively that he, like the sellers, regarded the period as beginning on the 1st of May and ending on the 31st of August. On the other hand, I do not think that each month's delivery was a hard and fast quantity of 750 tons, and that a portion remaining undelivered at the end of any month was necessarily wiped out of the contract without reference to the cause of non-delivery. In short, I regard the contract as one contract, and not four contracts, but I think that the deliveries were to be spread over the months of May, June, July, and August in nearly equal proportions, with the result that if the purchaser failed to take something like the proper proportion in any month, he was not entitled to demand delivery of that quantity in succeeding months, and that if the seller failed to give delivery of the proper proportion for any month when asked, he was not thereby relieved of the duty of delivering that quantity, but must make it up as soon as possible provided the purchaser were still willing to take it.

"Now, the facts are these—In their letter of 9th May confirming the contract the sellers asked Ireland when his first boat was expected, so that they might prepare. The answer next day was that he hoped to send the first order in a day or two, but that the navigation to Cronstadt was reported still unsafe. On 17th and 27th May the sellers repeated their inquiry, but not till 7th June did Ireland send his first order, and that was for a vessel not expected to be ready till 13th or 14th June. It may be that the state of the Baltic made it difficult to procure tonnage, but the sellers have proved that six vessels sailed from Grangemouth for Cronstadt in May 1893 taking large cargoes of coal, and in any case I do not see that the purchaser can be relieved on that ground from the consequences of what was clearly a breach of contract on his part. The sellers did not at once intimate that they regarded the first month's instalment as cancelled, but the result, I think, was the same unless they chose to carry forward the delivery. So far from being willing to do that, the whole subsequent correspondence consisted of demands for coal by Ireland to an extent considerably exceeding the contract quantity, and excuses by the sellers for non-delivery, except of comparatively small shipments, on the ground that their men were not working full time. It is in evidence that during the summer of 1893 there were difficulties with the miners in the west of Scotland, but the Merryton Company's average output was something like 400 tons a-week, and I have heard no satisfactory reason why the deliveries were not much larger than they were. On the whole, down to the last delivery in the early part of September the quantity delivered was 1594 tons 9 cwt. The balance undelivered was thus 1405 tons 11 cwt. From this I deduct 750 tons, as representing the quantity which Ireland failed to take in May, leaving 655 tons 11 cwt. for non-delivery of which I hold the Merryton Company responsible.

"In the view which I take of the case it is unnecessary to analyse the correspondence, or to inquire how far short of the required quantity the Merryton Company were in any particular month. From the beginning of June onwards they were, I think, continuously in default. The only remaining question is, whether the purchaser was bound to treat them as in default at the end of each month, and buy in against them at once, or was entitled to wait until the termination of the contract. I do not doubt that when a seller intimates unequivocally that he intends to make no more deliveries it is the right and duty of the purchaser forthwith to buy in against him at the market price of the day. But that rule applies to the case where there is an absolute repudiation of the contract. I do not find in this correspondence any positive refusal on the part of the sellers to make further deliveries until their letter of 28th August. The contract was treated by both parties as in full vitality till then, and although the sellers had once or twice asserted their view that they were not bound to deliver more than 750 tons per month, these were rather of the nature of excuses for short deliveries, and not binding declarations on which the other party would have been justified in acting.

"I hold it proved that at the end of August the price of Ell coal had risen from 7s. to 10s. 3d. a ton, and Ireland is therefore entitled to the difference of 3s. 3d. on 655 tons. 11 cwt., being £106, 10s."

The Merryton Coal Company reclaimed, and argued, *inter alia* — The Lord Ordinary's view of the contract was wrong. The contract must be treated as four separate contracts for delivery of 750 tons of coal in each of four successive months, and the damage sustained must be calculated as if this were so—*Brown* v. *Muller*, June 8, 1872, L.R., 7 Exch. 319; *Roper* v. *Johnson*, February 6, 1873, L.R., 8 C.P. 167; *ex parte Llamsamlet Tin Plate Company, in re Voss*, March 17, 1873, L.R., 16 Eq. 155.

Argued for David Ireland & Son—There were not here four separate contracts for delivery of 750 tons of coal at the end of each of four months, but one contract for 300 tons of coal deliverable if possible in equal monthly quantities. The other side laid far too much stress on the mode of delivery, and far too little upon the quantity expressed in the contract. The contract was one complete contract and not split up into as many contracts as theer were to be deliveries. The contract did not draw a hard and fast line, but showed

that a reasonable allowance as regards the periods of delivery was to be made on both sides, provided that the 3000 were delivered and taken within the four months. Deliveries which were not demanded or made within one month could be demanded, and if demanded, were bound to be made during the other months unless parties acted unreasonably — *De Oleaga & Company* v. *West Cumberland Iron and Steel Company*, July 3, 1879, 4 Q.B. 492; *Ogle* v. *Earl Vane*, February 11, 1867, L.R., 2 Q.B. 275—*aff.* February 1, 1868, 3 Q.B. 372; *Tyers* v. *Rosedale and Terryhill Iron Company*, May 15, 1875, L.R., 10 Exch. 195; *Mersey Steel and Iron Company* v. *Naylor, Benzon, & Company*, March 28, 1884, 9 App. Cas. 439. A contrast to the present case was *Higgins* v. *Pumpherston Oil Company*, March 14, 1893, 20 R. 532, where such delivery was declared in the contract to constitute a separate contract. There was no such declaration in the present contract.

At advising—

LORD TRAYNER—This is an action of damages for breach of contract; and the questions for determination are—(1) What is the contract between the parties? (2) have the defenders (the sellers) committed a breach of the contract? and (3) if so, what damage is due to the pursuers (the buyers) in respect of said breach.

1. The contract between the parties is contained in the seller's letter of 2nd May 1893, and the buyer's reply on 8th May following, the first of these letters being in effect an offer which by the second letter was accepted. The contract was this. The defenders undertook to deliver to the pursuers 3000 tons Ell coal at 7/ per ton f.o.b. Grangemouth, to be delivered over the "next four months" in average (or "about equal") monthly quantities; and to be delivered in shipping lots of from 400 to 600 tons at a time on due notice being given.

I agree with the Lord Ordinary in holding that this was one contract for the whole 3000 tons of coal, and not four contracts, each for 750 tons. I think this is quite clear. But it is equally clear that while the contract was for 3000 tons, it was a contract for the delivery of that quantity not in slump but in four monthly quantities of equal or about equal extent. Accordingly what the defenders were bound to deliver, and the pursuer entitled to demand, was 3000 tons of coal in quantities of about 750 tons during each month over which the contract extended. So far I think parties are practically agreed. They differ, however, as to the *terminus a quo* the four months over which the contract extended are to be computed. The defenders say that their offer dated 2nd May was for delivery over the next four months, that is, the month of May and the three succeeding months; while the pursuers maintain that the contract not having been completed until the date of their acceptance, being 8th May, the four months of the contract must be held to run from the 8th of May to the 8th of June and so on; the contract time, according to the one view, lapsing on 31st August, and on the other view not until the 8th September. For the latter view, what is maintained by the pursuers, there is a good deal to be said. The contract time can scarcely be held to commence before the contract is concluded, and this was only done when the acceptance dated 8th May was given. On the other hand the acceptance is an acceptance of what was offered, and the offer dated 2nd May was to deliver within the then next four months. This might either be read as meaning that the month of May was the first month of the four, or that the next four months meant the four months following the month of May, that is, commencing with the month of June. Neither of the parties suggest the latter of these two readings, and I therefore come to the opinion that the month of May was the first month of the contract period. This is, further, in accordance with the pursuers' own reading of the contract before any question arose as to damages for breach of contract. Throughout their correspondence they repeat that the 31st of August is the termination of the time within which they can demand or the defenders be called on to deliver coals under the contract in question. Apart from these letters I should have inclined to the opinion that the month of May was the first of the four months referred to in the contract; but it appears to me that the pursuers' letters settle all controversy on this point, as they show what the pursuers intended to contract for, and thought they had contracted for. On this point I agree with the Lord Ordinary's conclusion. Taking it, therefore, that under the contract in question the defenders were bound to deliver about 750 tons of coal in each of the months of May, June, July and August, we come to the second question.

2. Did the defenders commit a breach of their contract? In the month of May the pursuers were not in a position (from want of a vessel) to take delivery of any coal, and they asked for none. The defenders tendered none, because, I suppose, they could otherwise dispose of the produce of their colliery during that month. But there was no breach of contract in not delivering what the pursuers did not want, did not ask for, and could not take. In June the pursuers asked for one shipment and got it. Again there was no breach of contract. In July demands were made for the whole monthly quantity, which the defenders failed to deliver to the extent (as is argued) of 262 tons; while in August there was delivery only of the monthly quantity, less 71 tons. Accordingly there was a breach of contract on the part of the defenders in the months of July and August, for which they must answer. And that leads to the third question.

3. What amount of damage must the defenders pay in respect of such breach? The Lord Ordinary has answered this question by finding that the defenders are liable to the pursuers in 3s. per ton on each ton of the whole 3000 short delivered, 3s. per ton

being the difference between the contract rate and the market price of the same coal on 1st September, the day after the contract period expired, his view being that under the contract the defenders were bound to deliver 3000 tons in all, and that what was not delivered in one month should have been delivered in another. I am unable to concur in that view of the contract. I have already stated that in my opinion the contract was one for delivery of 3000 tons of coal, but for delivery of that *cumulo* quantity in about equal quantities in each of the four specified months. Even these monthly quantities could only be demanded in shipping lots of from 400 to 600 tons "on due notice being given," so that the pursuers had no right to demand, and the defenders no obligation to deliver the whole monthly quantity at one time. The defenders fulfilled their obligation if they gave 400 tons at one time on due notice being given to them. But there is no stipulation that if the quantity asked or got in one month was less than the monthly quantity agreed on, that such quantity short delivered was to be made up in the following month, or otherwise during the currency of the contract. If that had been intended I should have expected to find it expressed, or something at all events leading by clear implication to the view that that was the contract intention of the parties. There is, however, nothing of the kind. The want of such a stipulation did the pursuers no harm if they wanted the whole coal they had contracted for within the contraet time. For each month that there was a short delivery they could have gone into the market and bought in coal to supply the deficieney at the defenders' expense. Just as, on the other hand, the defenders could have sold elsewhere any coal which the pursuers did not take, and charged them with the difference between the price obtained and the contract price had the former been less than the latter. In a word, the contract was for monthly deliveries of about 750 tons of coal until 3000 tons had been delivered between 1st May and 31st August. Each monthly delivery was separate and separable although the rights and obligations *hinc inde* arose out of one contract for 3000 tons of coal. If this view of the contract be the right one, the damage due by the defenders for breach of contract is easily ascertained. There was no breach in May or June. In July there was a breach in respect of a short delivery of 262 tons. On 1st August the market price of the coals was 1s. per ton on advance of the contract price, and at that price the pursuers could have bought in against the short delivery. Had they done so they would have been in the same position as if the defenders had fulfilled their contract, but this would have cost them £13, 2s., and that is the amount of their damage. In like manner there was a breach of contract in August by a short delivery of 71 tons. The market had advanced 3s. per ton on the contract rate; the pursuers therefore could have supplied the deficiency at a cost of £10, 13s., which is their damage in August through the defenders' breach. I think the pursuers' have thus sustained damage through the defenders' breach of contract to the extent of £23, 15s., which they are entitled to put against the amount sued for by the sellers.

LORD RUTHERFURD CLARK—I coneur. If I were to construe this contract with reference to the writings only, I confess I would have considerable difficulty in holding that the monthly payments were to be at the beginning of May. But as that is the meaning which David Ireland & Son put on the contract it is probably the right one.

The LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Lord Ordinary reclaimed against: Decern against David Ireland & Son for payment to the Merryton Coal Company and Wallace Thorneycroft of the sum of £240, 0s. 2d. sterling: *Quoad ultra* dismiss the actions: Find the Merryton Coal Company and Wallace Thorneycroft entitled to expenses (1) in the action at their instance to the date of conjunction; (2) in the action at the respondents David Ireland & Son's instance from 27th December 1893, the date of the defenders' tender in that action, to the date of conjunction; and (3) in the conjoined actions from the date of conjunction: Find the said David Ireland & Son entitled to expenses in the action at their instance up to the said 27th December 1893."

Counsel for David Ireland & Son—Ure—Aitken. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Merryton Coal Company—Dundas—Salvesen. Agents—W. & J. Burness, W.S.

Friday, July 6.

SECOND DIVISION.

HUNTER'S TRUSTEES *v.* HUNTER.

Succession—Trust—Construction of Testament—Equitable Rule—Property Received and Consumed in Good Faith by One not Entitled thereto.

By antenuptial contract of marriage A B bound himself to pay or allow to be retained from his salary as an Indian Civil Servant such contribution as would secure to his widow the usual annuity from the Bombay Civil Fund, and he undertook, if from any cause his widow should not get the benefit of the fund, that she should receive an annuity of £300 after his death.

By his trust-settlement A B provided to his widow an annuity of £600 out of his heritable estate, the annuity his