importance that we should enforce the strict observance of rules which are intended as securities for the liberty of the subject. One can easily see that if a dispensing power were permitted to be exercised by the judge, or if deviations from this proper and regular form of proceedings were allowed in one case, it might be that in other cases injustice or oppression might result. In consequence of the failure to observe them in this case, I think the bill of suspension must be sustained.

LORD KINNEAR concurred.

The Court suspended the conviction with expenses.

Counsel for the Complainer—Orr. Agents—George Inglis & Orr, S.S.C.

Counsel for the Respondent—Constable. Agent—N. Briggs Constable, W.S.

COURT OF SESSION.

Wednesday, June 26.

SECOND DIVISION.

[Lord Moncreiff, Ordinary.

ELLIS *v.* ELLIS' TRUSTEES.

Succession — Trust — Fee and Liferent — Manufactory carried on by Testamentary Trustees — Deduction from Profits for Depreciation of Plant.

A testator provided the liferent of the residue of his estate to his widow, and authorised his trustees with her consent to carry on a manufacturing business belonging to him "in such way and manner as to my trustees shall seem in their discretion best for the interests of my trust-estate." After the testator's death the trustees carried on the business with the widow's consent. In doing so they expended large sums out of revenue in repairing the plant and buildings, and in addition they annually set aside a percentage of the profits as a depreciation fund. Part of the funds so set aside were employed in renewing the plant, but a considerable amount accumulated in the hands of the trustees.

In an action brought by the widow ten years after the testator's death it was proved that the buildings and plant were then in as good a condition as they had been at the testator's death.

Held (*rev.* judgment of Lord Moncreiff) that the trustees were only entitled to charge against revenue, for depreciation of plant or buildings, sums actually expended in the reasonable maintenance, repair, and renewal of buildings and plant, and that the surplus accumulated in the hands of the trustees fell to be paid to the widow.

Thomas Ellis, iron manufacturer, proprietor of the North British Ironworks, Coatbridge, died in July 1884, survived by a widow and children, and leaving a trust-disposition and settlement, whereby he conveyed his whole estate to trustees, of whom his wife was one. The trustees were directed to pay the whole free income of the residue of the estate to the testator's widow, and subject to this liferent to hold the residue for behoof of his children. The deed further provided—"I hereby authorise and empower my trustees to wind-up or carry on, or concur in winding-up or carrying on, any business or adventure in which I may be engaged either on my own account or in conjunction with partners at the time of my decease, and especially to wind-up or carry on, but during the lifetime of my said wife in the event of her surviving me only with her consent and concurrence and subject to her approval, the business presently carried on by me at the North British Iron works aforesaid, in such way and manner as to my trustees shall seem in their discretion best for the interest of my trust-estate, and to enter into such arrangements as may be most suitable in their opinion for that purpose."

After the testator's death the trustees, with the widow's consent, carried on the testator's business.

In October 1894 the widow brought an action of count and reckoning against the trustees, her surviving children, and the representatives or issue of deceased children. In the second place she concluded for declarator that "in the said accounting by the first-mentioned defenders, the said trustees, to the pursuer, and in ascertaining the whole free income or annual produce of the residue and remainder of the means and estate of the said deceased Thomas Ellis payable to her, or to which she is entitled as aforesaid, the first-mentioned defenders are not entitled to set-off against the pursuer, as charges against income, any sums by way of depreciation on buildings or plant other than sums actually expended by the said trustees in the reasonable maintenance, repair, and renewal of buildings and plant forming part of the residue of the said estate, and in particular it ought and should be found and declared by decree foresaid that the first-mentioned defenders, the said trustees, as in a question with the pursuer, are not entitled to charge against income the sums already written off by the defenders, the said trustees, in the books of the North British Iron Works, Coatbridge, on account of depreciation on buildings and plant in so far as these do not represent amounts actually expended by the said trustees in the reasonable maintenance, upkeep, and renewal of the buildings and plant under their charge."

The pursuer averred that the trustees had not only expended large sums out of revenue in repairing the plant and buildings, but had also annually deducted a percentage (amounting to 5 per cent down to 1888, and 7½ per cent. thereafter) from the profits of the business as a depreciation fund. "The total amount so written off and

deducted as aforesaid during the said period amounts to £23,854, 14s. 11d., out of which, however, has been paid the nett cost of additions, amounting to £8693, 4s. 3d., leaving a balance of £15,161, 10s. 8d., which has been added to capital at the expense of revenue." The plant and buildings had been kept in a state of thorough repair, and were in a better condition than they had been at the date of the testator's death.

The trustees lodged defences. They admitted that, in addition to charging ordinary trade repairs to income, a sum of £23,854, 14s. 11d. had been written off for depreciation, and that out of it £8693, 4s. 3d. had been paid for renewal of plant and machinery worn out, but denied that the sum set aside for depreciation was excessive.

The pursuer pleaded—"(3) The first mentioned defenders are not entitled, as in a question with the pursuer, to set off against income any sums on account of depreciation, in respect that in point of fact there has been no depreciation or deterioration chargeable against the income payable to the pursuer."

The defenders pleaded—"(2) By trust-disposition and settlement the system of accounting to be adopted in the management of the business is a matter entirely within the discretion and judgment of the trustees. (5) In respect that the defenders are, in the just administration of the trust, entitled and bound annually to charge against revenue such sum as they may deem necessary to cover the annual depreciation in value of the buildings, machinery and plant, decree of absolvitor should be pronounced. (6) The trustees are entitled in their discretion to make provision out of revenue for possible losses of capital which may be incurred in the conduct of the business."

Proof was allowed, the result of the evidence being to show that the plant and buildings were in as good, if not a better condition than at the date of the testator's death.

Mrs Ellis died in February 1895, and upon 21st February her son and executor was sisted in her place as pursuer of the action.

Upon May 16th 1895 the Lord Ordinary (MONCREIFF) assoilzied the defenders from the conclusions of the summons.

"*Opinion.*—[*After referring to the settlement and quoting the clause giving power to the trustees to carry on the testator's business*]—In virtue of this power and with the express consent of the widow the trustees carried on the business from and after July 1884. In addition to making the necessary repairs upon the plant and machinery, and debiting the cost of such repairs and additions to revenue, the trustees wrote off and charged against revenue a certain percentage of depreciation—5 per cent. up to 31st December 1888, and 7½ per cent. after that date. The pursuer's statement in condescendence 6 is that the total amount so written of and deducted was £23,854, 14s. 11d., out of which £8693, 4s. 3d. was paid as the nett cost of additions, leaving a balance of £15,161, 10s. 8d., 'which has been added to capital at the expense of revenue,' thus diminishing the widow's income. The complaint made in this action is, that this course was unwarrantable; that the works are now in fully as good a state as they were at the commencement of the trust, having been kept in thorough repair, and large sums having been expended on additions; and the pursuer demands that repayment of the sums thus improperly appropriated should now be made.

"The defenders answer that all that was done was done with the express consent of Mrs Ellis; and further, that as under the powers conferred in the deed they were entitled to carry on the works, they were entitled in accordance with the usual rules of good management of such works, and the truster's own practice, to create a depreciation fund, and that the percentages adopted were not excessive.

"At the conclusion of the discussion the impression left on my mind was that the pursuer had failed to prove his case, and that impression has been confirmed on fuller consideration.

"It will be observed that under the deed the trustees could only carry on the business with the consent and concurrence of Mrs Ellis. If that consent had not been given, the works must have been sold as a going concern, and might have been expected to bring their value as at July 1884. But Mrs Ellis gave her consent, and until her death she derived a substantial income from the works. Her consent having been given, the question must be considered just as if her consent had not been required. Now, power was given to the trustees to carry on the business 'in such way and manner as to my trustees will seem in their discretion best for the interest of my trust-estate, and to enter into such arrangements as will be most suitable in their opinion for that purpose.' The question is whether, in writing off the sums in question for depreciation, the trustees exceeded the discretionary power thus conferred upon them—a power which was to be exercised not merely in the interests of the liferentrix but also of the fiars. As I have already indicated, the pursuer has failed to satisfy me that the trustees exceeded their powers, or acted otherwise than prudent traders might be expected to act in the conduct of their own business.

"It is, perhaps, of itself sufficient for the defence that, in annually writing off a sum for depreciation, the trustees followed the course which was adopted, at least during the later years of the truster's lifetime. Between 1880 and 1884 that practice was followed; and it is to be assumed that in giving his trustees power to carry on the works, the truster expected and intended that the practice should be continued.

"But, further, I do not think that the pursuer has succeeded in establishing that, in their mode of carrying on the works, and keeping the books, the defenders acted otherwise than in accordance with the rules and practice of a prudent trader.

I do not understand the pursuer's witnesses to dispute that, in ordinary circumstances, it is proper and necessary annually to write off a sum for depreciation. The works may, in their present condition, be quite sufficient for their purpose, or they might be made so by repairs. But none the less, through tear and wear, they year by year deteriorate, and will ultimately have to be entirely renewed, in order to bring them up to their original value. The primary object of a depreciation fund is to make good this deterioration or depreciation; and therefore, in works conducted on proper commercial principles, an adequate percentage must be written off before striking and dividing profits.

"But depreciation covers a good many other things, such as the likelihood of new inventions, processes, or machines coming into use, which may supersede or render obsolete those whose value are in question, and other losses and contingencies to which such works are subject. This is very candidly admitted by Mr J. A. Robertson in the evidence which he gave for the pursuer.

"The pursuer's objection is rather that the trustees have made a double charge against or deduction from income. Mr Robertson states it thus—'The principle upon which the books have been kept and accounts made up has been to charge under the headings repairs, trade charges, and wages the whole cost, not only of repairs, but also of renewals; it is only anything in the nature of extension or addition or increase that is put against the buildings and plant account. In addition to the £57,000 charged against revenue accounts for renewals and repairs, there has also been written off general depreciation for doing what I maintain has already been done. The purpose of the fund created by general depreciation was to do the thing which was done out of the £57,000. The natural result of that is that, under the head of general depreciation, there is a surplus of £15,000 of unused money, which has all been taken out of income. That, as the accounts are stated, all goes to capital. None of it has been used in the upkeep of the works; it is all there at this moment.'

"It is not, however, established to my satisfaction that such a double charge has been made. New machinery has always been charged to capital account. It is true that the charges for new parts of the machinery, such as pistons, cylinders, and portions of steam hammers, have been charged against repairs; but I think that this course is sufficiently justified on the grounds, first, that that was the practice when the trustees took over the works; and secondly, that the propriety of charging the expense of the renewal of such parts of machinery against repairs depends, to some extent, upon the amount that is written off for depreciation; and, if such partial renewals had not been charged against repairs, the percentage of depreciation would have been proportionately higher. No doubt there is considerable conflict of opinion upon this point; but, to state the case for the defenders at its lowest, it is not, in my opinion, established that they exceeded their powers in doing what they did.

"It is said that the works are worth as much now as they were in 1884; and that the depreciation fund was not required, and is extant to the extent of £15,000. I do not think that it is proved that the works are as valuable now as in 1884; but even if this had been established, it does not follow that the pursuer might succeed in recovering payment of the sums written off. What Mrs Ellis was entitled to, was the free produce of the works year by year. If in any one year there had been a loss on the business, she would have got nothing that year; but if, in the following year, there had been a profit, she would, I apprehend, have been entitled to it, and the trustees would not have been entitled to deduct from or set against her claim the loss of the previous year—*Gow* v. *Forster*, L.R., 26 Ch. Div. 672. It seems to follow that, when, in accordance with practice, a sum was in any one year written off for depreciation, the liferentrix would not subsequently be entitled to demand payment of the sum so set aside, although it might not have been found necessary to expend it at the time. In short, by consenting to the works being carried on, Mrs Ellis impliedly agreed that they should be conducted on the usual footing, her claim for the free produce of each year being year by year satisfied on receiving payment of the free profits which resulted from the trade so carried on.

"It is said that Mrs Ellis did not understand that the money written off was in excess of the sum required for repairs and renewals actually made from year to year. I am not satisfied of this. But it is sufficient for my decision in favour of the defenders that, in what they did, they acted in accordance with the previous practice of the truster, and that, to take the most favourable view of the evidence for the pursuer, it is not proved that the defenders acted otherwise than in accordance with the usual practice in the conduct of such works.

"With the amount written off I do not think that I can interfere. It may or may not have been advisable and necessary in 1889 to raise the percentage from 5 to 7½ per cent.; but even if I thought that that rise was uncalled for or excessive, I should not feel warranted in interfering with the wide discretion with which the truster invested his trustees.

"I shall therefore assoilzie the defenders."

The pursuer reclaimed, and argued—Under the terms of the trust-deed the widow was entitled to get the whole income arising from the business after the necessary expenses had been paid. Wages and salaries were necessary expenses, so were the repairs to the machinery and the renewal of any machinery that was worn out, but the trustees were not entitled to take a farther sum under the name of a depreciation fund and add it to

the capital, so depriving the liferentrix every year of part of her income. It was proved that the works were in as good a state in 1894 as they had been previously; that was all the fiars could claim and they had been maintained out of income which would otherwise have gone to the liferentrix. The purpose for which this fund was said to be retained could never arrive, because all repairs were charged at the time under that head, and any renewals were charged to capital. It was proved that the liferentrix never really understood that this fund was being written off yearly so that she could not be held to be barred from now raising the objection. It might be a good thing for a trader to write off a depreciation fund, but that was merely as between himself and his creditors; it did not affect the rights of trustees in such a case as this—*Rogers, &c.* v. *Scott, &c.*, July 19, 1867, 5 Macph. 1078; *Gow* v. *Forster*, 1884, L.R., 26 C.D. 672.

The defenders argued—It was true that the trustees were bound to pay over the proceeds of the business yearly to the widow, but that was only the free annual profits after all the necessary expenses had been deducted, and one of the necessary expenses in such a business as this was to make provision for the depreciation which constantly went on in the plant and buildings, and to renew the machinery as new machines were invented—*Strain's Trustees* v. *Strain*, July 19, 1893, 20 R. 1025, L.J.-C. 1028. If the trustees had not provided for such depreciation the works would have been worn out at the end of some years, and so the power of producing any income would have been lost; it was therefore really in the interests of the liferentrix that this fund had been accumulated—*Dent* v. *London Tramways Company*, November 16, 1830, 16 C.D. 344. As regarded the complaint that the sum set aside had been deducted from the widow's income and added to the capital of the estate, the directors of a company were entitled to say what should be income and what capital—Buckley on the Companies Acts 512. If directors were entitled to act in such a manner with the funds under their charge, much more could trustees decide what was really capital and what income. The whole question was whether trustees in whom the truster had reposed such exuberant trust, and with whom the widow had consented to carry on this business, should or should not be allowed to carry it on in the same way as a prudent business man would carry on his own business. It was admitted that the trustees had merely pursued the same mode of dealing with the depreciation fund as the truster had done during his life, and it was proved that this was the ordinary practice of all prudent business men. The result was that the plant, buildings, &c., had been kept in an efficient state and the value of the works was the same as at the testator's death, viz., some £43,000. The value as it now stood in the books according to the pursuer's own statement was £27,866, and if to that was added the £15,000 claimed as having been put into the depreciation fund the amount was £42,866. (2) The liferentrix by attending the meetings of the trustees and signing the minutes had acquiesced in the trustees acting as they had done, and was barred from now objecting.

At advising—

LORD YOUNG—I have already said that I regret that the Lord Ordinary has not proceeded with the case in regular form, and the more so that this is not the first time his Lordship has followed a similar course, it having been pointed out in previous actions of count and reckoning, where the liability to account was not disputed, that the cases had not been proceeded with in the ordinary way. Not only is the pursuer of an action of accounting, as we have frequently pointed out, interested in the accounting, but also the defender. The defender, if he has given an account before the action or gives accounts in the action, is entitled to have them judicially examined and ascertained to be correct and declared to be correct; or if there is any error to have that error pointed out.

Now the point in controversy here, as I understand, upon any anticipated accounting, is that which is the subject of the conclusion of the summons which follows the conclusion for count and reckoning. [*His Lordship read the second conclusion of the summons.*] Now, that is a declarator with reference to the accounting which is asked and which must be rendered, and the argument has very properly been confined to that, upon the assumption that the error fallen into by the Lord Ordinary would be corrected, and an account ordered with reference to that declarator, if we pronounce it.

Now, the case is this. I am not going through the details of the facts, but the case in substance is this, and it may be stated very shortly:—The testator here who was in this trade provided a liferent of the whole residue of his estate to his widow, and authorised his trustees, with her concurrence, to carry on his business of iron and steel works, or something of that kind, for her behoof as the liferentrix of the residue of his estate. There were two ways, as I have already observed, of giving her the liferent of this part of the residue of his estate, the first being to realise his business and the plant with which it was carried on. That would have to be realised after her death, but it might have been realised in her lifetime; and in that case, her liferent interest would have been the income from the price which was got for it on being realised. The other way which the trustees, with her concurrence, were authorised to follow was to carry on the business and give her the profits; and that alternative was chosen. And for the ten years of her life during which she survived her husband, the business was carried on and the profits to a certain extent were handed over to her. Now, I think it is not doubtful that in ascertaining the profits which ought to be handed over to her—or ought to have been, for I must

speak in the past tense as her life is at an end now—account must be taken of the tear and wear of the plant and the upkeep of it in order to carry on the business and earn profits. I think we are familiar with the rule that what is necessary to keep up the plant in an efficient state must be deducted before profits are ascertained and handed over to whomsoever may have best right to them, just as much as the wages and salaries of those who were employed in the business. Now we are told—and it appears to be the case from the somewhat premature proof which has been taken here at very great length—that the plant was kept up by these trustees out of the profits of the business, and that it is or was at the end of the widow's life in as good condition and of as much value as it was at the beginning of the trustees' administration. But then it appears from the accounts that by laying aside a large sum annually under the head—it is very well understood—of depreciation, they had a sum of £15,000 in hand. Well, if the fact be that the plant was kept up efficiently for carrying on the business, and was at the date of the action and at the termination of the widow's life as good and valuable as it was at the commencement of the trust, that is a sum saved and stored up out of the profits of the business, not necessary to maintain the plant for carrying on the business in as good and valuable a condition as it was originally. Therefore, whatever may be said as regards the trustee's conduct in laying it aside with a view to the future, in point of fact, the time has not come when that sum stored up out of the profits required to be expended in order to maintain the plant in a useful condition, and in a condition as valuable as its original one. Now, what is to be done with it? The trustees say—"It is fortunate for those who are entitled to the fee of the estate that the liferent has terminated without it being necessary for the money to be so expended, and that they must have it." The widow's representative says—"On the contrary, as the money was not needed to keep up the plant in order to carry on the business, to the profits of which she was entitled, and as the plant has been kept up out of the profits without this £15,000, I must have it as profits which ought to have been paid to me, or which ought to have been paid to the widow, whose representative I am." The accounting with the trustees must be upon the footing expressed in the conclusions which I have read, that they were not entitled to lay aside a fund for depreciation, and to store up more than was necessary to maintain the plant. *Prima facie*, they did lay up to the full extent of £15,000 more than was necessary for that purpose; but I am not disposed to foreclose further procedure in the accounting in order to rectify any error in that view, or to do more than to find, in terms of the conclusions which I have read, that the widow was entitled to have that fund, and that in the accounting the trustees are not entitled to credit for more by way of depreciation than was necessary to keep up the plant. They are crediting the surplus to capital, and so are storing it for the benefit of those entitled to the capital. I think that they were not entitled to do that to any greater extent at any time than was necessary to keep up the plant, and that whatever sum in excess of that amount may appear to have been set aside, whether the whole amount of £15,000 or anything within that, the widow as liferentrix was entitled to it, and now that she is dead her representative is so entitled. With that finding in terms of those conclusions which I have read I should remit the case to the Lord Ordinary to proceed with the accounting.

LORD TRAYNER—I agree with what has been stated by Lord Young. The reasons which the Lord Ordinary has given in his opinion for the result at which he has arrived do not appear to my mind to be at all satisfactory or necessary at all to lead to the result which he has reached. He says that something like £15,000 is now extant which has been stored up by the trustees over a period of years certainly out of the profits of this business. Now, *prima facie*, these profits should all have gone to the widow, and the argument that was offered by Mr Ure, that the trustees were entitled to lay past any part of the profits as floating capital to be added to the capital of this concern, and therefore to be held by the trustees for behoof of the fiars, is an idea which is absolutely inconsistent with the direction of the truster. The truster directed that his wife should have the whole free proceeds of the residue of his estate; and if it is shown that this £15,000 is part of the produce of the residue of his estate, then by his direction, specific and clear enough in itself, it goes to the widow and not to the fiars. The Lord Ordinary seems to think that it was quite sufficient to warrant the action of the trustees that the truster himself during his lifetime wrote off a certain amount in his books every year as depreciation of his capital. That is perfectly intelligible and perfectly right. Every man in business writes off year by year as his machinery and premises depreciate so much per annum as depreciation, but that is with a view to ascertain what is the capital of his estate. In this particular case the trustees might have done that reasonably enough to some extent in the interests of the fiars to see how much capital was remaining in their hands entrusted to them for administration. But it was never intended by the truster, and it was not consistent, as far as I know, with any practice in administering trusts, that they should take from the proper profits of the business directed to be given to the liferentrix, and add them to the capital so as to increase it; or to use it so as to practically increase the capital at the cost of the liferentrix. It seems to my mind to be almost conclusive of this case when we get an admission from the trustees' council that the £15,000 was profits. If profits, then they belong to the widow. There might have been something said for the proposition that they would be en-

titled to lay up a sum of money in one year, in the immediate prospect of it being required in the next, not to increase capital, but to make the works efficient as profit producing subjects. That might have been done, but when we are told that this £15,000 was stored up out of the profits, and that it has not been needed for the purpose of producing profits, and that in point of fact it has not been expended either on repairs or in making good depreciation, I do not see an answer to the widow's claim. Therefore, upon the ground stated by Lord Young, and upon the ground I have stated, I am clearly of opinion that the Lord Ordinary has not only gone wrong in form but in substance, and that the judgment ought to be as proposed by Lord Young.

LORD JUSTICE-CLERK—I entirely agree with your Lordships. I think the moment you come to the conclusion that these works are now, with the amount expended upon them, in an efficient state to do the work which they have to do at the time of distribution--and I think that is not disputed —it becomes almost unarguable that the trustees should be entitled to retain such a large sum in their hands out of profits, which they laid aside to meet contingencies, which contingencies have not arisen. Having reached the period at which there must be a settlement in regard to the interests of the liferentrix, and there being this sum actually unexpended in the hands of the trustees, which unquestionably is of the nature of profit, I think the view which Lord Young has stated is the sound one, and that we should find accordingly that this sum was not needed at the time when this action was raised for the purpose of keeping the business going, and that it was not a sum which the trustees were entitled to withhold from the executor of the liferentrix, and practically to hand over to the fiars of this estate. Therefore we will recal the interlocutor, find in terms of the second conclusion of the summons, and remit to the Lord Ordinary to proceed.

The Court pronounced this interlocutor:—"The Lords having heard counsel for the parties on the reclaiming-note for the pursuer against the interlocutor of Lord Moncreiff dated 16th May 1895, Recal the said interloeutor reclaimed against: Find that the pursuer is entitled to obtain an accounting from the defenders, the trustees of the deceased Thomas Ellis, as concluded for, in respect of the right of liferent conferred on Mrs Sarah Leonard or Ellis by the trust-disposition and settlement of the deceased Thomas Ellis: Find and declare in terms of the second conclusion of the summons: Remit the case to the Lord Ordinary to proceed therein as accords," &c.

Counsel for the Pursuer—H. Johnston—Wilson. Agents — Gray & Handyside, S.S.C.

Counsel for the Defenders—Ure—Graham. Agents—Fraser, Stodart, & Ballingal, W.S.

Thursday, June 27.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

MAGISTRATES OF GLASGOW *v.* DAVID IRELAND & SON.

Contract—Sale—Sale by Sample—Timeous Rejection.

A B, a firm of coal exporters, wrote to C D, proprietors of gaswork:—"We have a chance of introducing your coke to a new market, but our buyers are desirous of seeing a sample first," and requested C D to send a small box. C D sent the box as requested, and without examining the coke A B forwarded the box to their prospective buyer abroad. Thereafter A B wrote C D, enclosing a booking-order for 900 tons of coke, and saying—"This order is the result of the sample-box sent recently." The order was in the following terms:—"Please book the 'Venus' s.s., for 900 tons of your best coke." When the coke arrived at the port of destination abroad it was rejected by the buyer as disconform to sample, and without delay A B intimated to C D that the buyer had refused to take delivery of the cargo "alleging that it is not up to sample," to which C D replied, "The coke was of our usual quality, and in every way similar to sample."

In an action by A B against C D for the price of the coke, *held* (1) (*rev.* judgment of Lord Kyllachy) that the sale was a sale by sample, and (2) that the rejection was timeous.

The Lord Provost, Magistrates, and Council of the city of Glasgow, acting under the Glasgow Corporation Gas Acts 1869 to 1892 had various gasworks in Glasgow, where they produced considerable quantities of coke as one of the residuals of gas manufacture, and they were in the habit of selling the coke.

On 2nd December 1892 David Ireland & Son, coal exporters, Dundee, wrote to the Corporation—"We have a chance of introducing your coke to a new market, but our buyers are desirous of seeing a sample first. Please therefore send a small box or bag addressed to us, c/o Messrs James Currie & Company, Leith."

On 5th December the Corporation sent as requested a box of coke to the address given, and in accordance with Ireland & Sons' instructions this box was forwarded to their agents at Hamburg, by whom it was handed to Mr Drude, the prospective foreign purchaser. The sample was not examined by Ireland & Son before being sent abroad. Ireland & Son having thereafter been informed by their agents at Hamburg that the sample had found favour with the buyer, some further correspondence took place between them and the Corporation with reference to the price of the coke. On 21st December Ireland