The defender pleaded — "(5) The pursuer is bound, *ante omnia*, to prove the tenor of the alleged back-letter in a regular action of proving the tenor; and, *separatim*, he is bound to aver and to prove delivery. (6) The disposition of 16th April 1838, being absolute in its terms, and no competent proof being offered that it was granted in security, the defender is entitled to absolvitor. (7) The allegation that the defender holds the subjects in dispute in trust for the pursuer can be proved only by writ or oath. 9) The pursuer's averments being unfounded in fact and untenable in law, the defender ought to be assoilzied, with expenses."

The Lord Ordinary pronounced the following nterlocutor:—

"12*th June* 1873.—The Lord Ordinary, in respect the defender has now appeared and deponed in terms of the preceding interlocutor, and having considered the deposition of the defender, No. 17 of process, and heard counsel thereon, finds the oath of the defender to be negative of the reference: Therefore assoilzies the defender from the conclusions of the summons, and decerns: Finds the pursuer liable to the defender in expenses, and remits the account when lodged to the auditor to tax and report."

The pursuers reclaimed.

Argued for them—(1) The disposition was truly in trust, and this was known to the defender. (2) The price has been repaid.

The Court advised the case without calling on defender's counsel.

LORD JUSTICE-CLERK—I think that it is quite manifest that the interlocutor of the Lord Ordinary, so far as this oath is concerned, is perfectly right. At the date to which the document founded on as establishing a trust is referred, this gentleman, Mr Sprott, was only eleven years of age. At a subsequent period, many years after, he finds among his papers, not the document itself, but a copy, the original not being forthcoming. From this discovery, and from a perusal then of the paper found, is derived his whole knowledge and understanding of the transaction. He, in the most explicit and straightforward way, tells us about the matter, and says he does not know anything more, and your Lordships cannot hold that there is anything more than this before the Court. It seems to me that this was a purchase, and a purchase out and out, with power to dispose of the property, though admittedly under certain restrictions. The case, as it stands, is perfectly clear, and I think the pursuer should consider whether it would not be best for him at once to close with the offer made by the defender on record—if indeed it is still open to him to do so. I can only add that throughout the case the conduct of the defender, the Rev. Mr Sprott, reflects much credit upon him; he has been most straightforward in the matter.

LORD COWAN—A declarator of trust in property, of which the title is in the person of the disponee, can only be proved by writ or oath. In this action the pursuer has not any writ, and has referred to the oath of the defender; this oath is completely negative, I think, of the reference; by the result of the oath the pursuer fails entirely to instruct the existence of a trust. The whole case as on record, and as we have it from the defender on oath, is brought out in a light most creditable to the reverend gentleman.

The other Judges concurred.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuer — Lang. Agent — Thos. Carmichael, S.S.C.

Counsel for Defender — Balfour and Mitchell. Agents—Ronald, Ritchie & Ellis, W.S.

R. Clerk.

Saturday, November 15.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

ALEXANDER AND AUSTIN *v.* YUILLE.

Bill of Exchange—Sequestration— Composition — Instalments.

A sued B on two bills of exchange, B had been sequestrated subsequent to granting them, but his creditors had accepted under an arrangement a composition of 4s. in the £, to be paid by certain instalments.—*Held* that B, not having been discharged, had by failure timeously to pay the third instalment, suffered the original debt to revive, and that the pursuers were entitled to decree for the amount, less the two instalments as paid.

This case came up by reclaiming note against an interlocutor of the Lord Ordinary (Mackenzie). The summons, containing warrant to arrest, was dated 3d March 1873. The pursuers are glass-bottle manufacturers in London, and the defender is a practical chemist and oil merchant in Glasgow. The conclusions of the summons were for payment of two sums of £70, 9s. 6d. and £55, 11s. 10d., with interest as from 8th October 1871 till payment, but subject to deduction of two sums of £7, 17s. 6d. and £8, 7s. The pursuers averred that, by bill of exchange, dated 5th June 1871, they ordered the defender to pay them or their order, four months after date, the sum of £70, 9s. 6d. for value, and by another bill of exchange, dated 1st September 1871, they in like manner ordered him, four months after date, to pay them the sum of £55, 11s. 10d. for value. The defender duly accepted both of these bills, and they were dishonoured at maturity. The total amount of the two bills is thus £126, 1s. 4d. The defender made a payment of £7, 17s. 10d. on 31st May 1872, and another payment of £8, 7s. on 4th November 1872, on account of the principal sum contained in these bills, and the two sums of £70, 9s. 6d. and £55, 11s. 10d. were said to be due by the defender to the pursuers under deduction of the two partial payments of £7, 17s. 10d. and £8, 7s. The defender also owed to the pursuers the interest on these sums from the respective dates of the bills falling due, at the rate of 5 per cent. per annum. These claims the pursuers stated that the defender would not acknowledge. Further, Yuille's estates were sequestrated on 20th September 1871, before the bills in question fell due, and at the meeting of creditors held on the 9th day of October thereafter, for the election of a trustee, it was unanimously resolved that the estates should be wound up under a deed of arrangement, and that an application should be presented to the Sheriff to sist procedure in the sequestration for a period not exceeding two months from the date of the meeting. That resolution having been

reported to the Sheriff in terms of the statute, he found that it had been duly carried, and he sisted procedure accordingly. Within the period of the sist there was produced to the Sheriff a deed of arrangement entered into and executed between the defender on the one part, and the creditors or mandatories for creditors of the defender therein named and designed (among whom, according to the defender's statements, were the pursuers), constituting in all four-fifths in number and value of the creditors, on the other part, by which it was arranged and agreed that the defender should pay as at the date of the sequestration of his estates a composition of 4s. per pound sterling on the respective debts due to his creditors, and that in three equal instalments, payable at four, eight, and twelve months respectively from the date of the deed of arrangement being approved of by the Sheriff, and the sequestration declared at an end. And the creditors on the other part accepted this composition, payable as aforesaid. The defender also bound himself to grant promissory-notes for the instalments of composition in favour of his creditors, when required by them to do so. This deed of arrangement was found duly entered into and executed, and to be reasonable, and was approved of by the Sheriff, and the sequestration was declared at an end. The interlocutor of the Sheriff is dated 8th January 1872, and became final on the 17th of that month. The amount claimed by the pursuers against the defender, conform to their affidavit lodged in the process of sequestration, was £125, 4s. 8d., the composition on which amounted to £25, 1s., payable in three sums of £8, 7s. each. The defender stated that in implement of obligation he had paid the pursuers the first two of these instalments, and had also been all along willing and ready to pay the third and last instalment, but the same was never asked, and the pursuers did not acknowledge receipt of the second instalment. Immediately after this action was raised the defender tendered payment of the third instalment to the pursuers, but it was refused. The defender consigned £8, 7s., with interest thereon since it fell due. The defender was never asked to grant bills for the composition. The bills sued on, he averred, were not the property nor in the possession of the pursuers when this action was raised. They were lodged in the sequestration process, which is in the custody of the sheriff-clerk at Glasgow, from whom they were borrowed on the 19th day of March 1873. They are the property of the defender, and should have been delivered up to him as his documents when the deed of arrangement was approved of by the Sheriff. A copy of the foresaid deed of arrangement and a certified copy of the interlocutor of the Sheriff of Lanarkshire, were produced. These statements on the defender's part were denied by the pursuers, who averred that they were no parties to the arrangement, and that the deed was not signed by them or by any one authorised by them, the signer having no such authority.

The pursuers pleaded—"(1) The defender being justly indebted and resting-owing to the pursuers in the said principal sums and interest, under deduction as aforesaid, they are entitled to decree against him therefor, with expenses as concluded for. (2) The defender's statements are not relevant or sufficient to sustain his pleas in defence. (3) The deed of arrangement founded on in the defences is of no effect against the pursuers, in respect that they were no parties thereto, and that the same was not signed by any one having their authority. (4) *Separatim*, the signature of Thomas Landells Selkirk is not effectual against the pursuers, in respect that the said Thomas Landells Selkirk was an instrumentary witness to the signatures of other parties to the deed. (5) Assuming the said deed of arrangement to have been originally binding and effectual against the pursuers, the defender has lost the benefit thereof by his failure to pay the instalments of composition in terms of the said deed. (6) Generally, in the circumstances above set forth, the pursuers are entitled to decree with expenses, in terms of the conclusions of the summons."

The defender pleaded—"(1) The action is excluded by the deed of arrangement referred to, and ought to be dismissed, with expenses. (2) The defender, having carried out the said deed of arrangement, ought to be assoilzied, with expenses. (3) The action having been unnecessary and uncalled for, and being oppressive, the same should be dismissed. (4) The defender not being indebted to the pursuers to any greater extent than the sum consigned, he ought to be assoilzied, with expenses."

The Lord Ordinary found for the pursuers, with expenses. His Lordship's interlocutor was as follows:—"*Edinburgh, 20th June* 1873.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record and joint minute for the parties, No. 29 of process, with the productions and process, decerns again the defender for the sum of £70, 9s. 6d. with the interest of said sum at the rate of 5 per cent per annum from 8th October 1871 until payment; and for the sum of £55, 11s. 10d. with the interest of said sum at the rate of five per cent per annum from 4th January 1872 until payment; but under deduction of the sum of £8, 7s., with the interest thereof at the rate foresaid from 29th May 1872 and of the sum of £8, 7s., with the interest thereof at the rate foresaid from 4th November 1872: Finds the defender liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the Auditor to tax, and to report.

"*Note*—By the deed of arrangement granted by the defender after his sequestration in September 1871, he bound himself to 'pay to his whole just and lawful creditors, as at the date of the sequestration of his estates, a composition of 4s. per pound sterling on the respective debts due to them, and that in three equal instalments, payable at four, eight, and twelve months respectively, from the date of this deed being approved of by the Sheriff, and the sequestration declared at an end,' and the subscribers, among whom were the pursuers, accepted the said composition payable as aforesaid. The said deed of arrangement was approved of by the Sheriff, and the sequestration declared at an end on 8th January 1872, so that the composition on the debt due to the pursuers under the two bills libelled on consisted of three sums of £8, 7s., payable on 8th May, 8th September, and 8th January 1873. Although the two first instalments were not paid on the dates when these were respectively payable, yet they were accepted by the pursuers. The third instalment was not paid or tendered by the defender on 8th January 1873, or on or prior to 3d March 1873, when the pursuers raised the present action, in which they conclude for payment, not of that unpaid composition of £8, 7s.

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

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

The defender reclaimed.

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

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

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

Wednesday, November 19.

SECOND DIVISION.

[Lord Gifford, Ordinary.

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

Contract of Sale—Offer—Acceptance—Mora.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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