would have fetched a good price if sold. The fact that the pursuers' father had given £100 for it, so long after the truster's death, could not be left out of account. If a sum was realised for goodwill, it was bound to be credited as such, whether any goodwill existed or not. The trustees must make good the loss which had occurred owing to their failure to realise a valuable asset of the trust-estate.

At advising—

LORD PRESIDENT—There is one feature of the case which does not strike me as of great importance, namely, the fact that Mr Donald offered and paid £100 for the goodwill of the deceased's business. In answer to a challenge by the defender's counsel, when in the witness-box, he said he was willing to give £100, and he proceeded to carry out that offer afterwards. I regard that as merely a natural and quite legitimate step for a litigant to take, and it does not affect my mind as an element of evidence in the case.

But when we come to look at the facts, I am inclined to take a broad view of the matter. The deceased John Hodgart for a number of years prior to his death made a good deal of money out of a business he carried on. The business consisting in the supply of cotton presses and other kind of machinery to the order of cnstomers in India. The figures speak to a substantial yield from this business, whatever it may be called. The next fact—and it is of great importance in view of the Indian aspect of the question—is that John Hodgart had been long in India, and had a wide acquaintance among persons in that country who were likely to require presses of the kind which he was ready to supply. Gentlemen acquainted with the facts and the country say that the business was really of great importance and value, and it is not unimportant to notice that they tell us that it is the habit of Indian traders to stick to a merchant who has served them well, and to whom they have been in the habit of resorting, to a much greater extent than is usual with people in this country. That being so, it does not appear to me to be of very much importance to enter on an analysis of the grounds on which the connection rested, or to say to what extent they were logical or sound. The fact remains that it did exist.

Coming to the time of John Hodgart's death, it might, I think, have been debated by the trustees whether there was then a substantial or appreciable goodwill to realise, because the business of the deceased was of a peculiar description, but I do not think the trustees ever considered the position, or were in a condition to do so impartially, and that owing to the position of some of them, for example, Mr Jones. But on the question whether there was a goodwill, I am of opinion that there is real evidence that there was, for while there were no premises, no plant, no establishment, no staff, to which a person might succeed, Mr Jones in fact assumed the title of successor, and addressed his customers in India as such. This fact seems to me pretty decisive of the question, and really amounts to a declaration on the part of this one of the trustees that Mr Hodgart's business did not necessarily die with him, which is the present contention of the defenders. I am not disposed after that to doubt that there was a goodwill worth getting hold of, and I am therefore disposed to hold that there was a saleable goodwill for which the trustees are bound to account.

That result being reached, it is I think hardly possible to challenge the pecuniary finding of the Lord Ordinary, and no ground has been suggested for overthrowing it, except that there was no goodwill at all, and I hold on real and undisputable evidence that there was one.

The only other point is as to the delay which has occurred in bringing the action. On that point it is to be observed that the pursuers are young girls, and it is idle to say that they could have checked or supervised the action of the trustees. As to their father's conduct, while any earlier action taken by him might have been evidence of his opinion in the question as to whether there was a goodwill or not, it cannot constitute a bar against his children. It is clear, however, that Mr Donald was at arm's length with the trustees, and even were this action to be regarded as Mr Donald's action, the challenge was made within a reasonable time of the winding-up of the estate. I only mention that to meet the suggestion that it was a mere afterthought.

I think there is evidence that there was a goodwill, and I am not prepared to interfere with the Lord Ordinary's finding in the matter of amount.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

Counsel for the Pursuers—C. S. Dickson—Constable. Agents—N. Briggs, Constable, W.S.

Counsel for the Defender—Jameson—G. W. Burnett. Agents—F. J. Martin, W.S.

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*Friday, December 8.*

## SECOND DIVISION.

[Sheriff of Lanarkshire.

## BARR *v.* WALDIE.

*Sale—Contract—Equal Monthly Quantities—Breach of Contract.*

On 5th March 1891 a coalmaster addressed to a buyer a sale-note in these terms—"I confirm sale to you of 2500 tons of Skaterigg cannel coal, for shipment in equal monthly quantities to Brussels, in lots of 300 tons maximum;" and the letter enclosing this sale-note contained the words—"And

confirm further arrangements that if necessary you are to extend the period of delivery somewhat." A monthly delivery of between 270 and 280 tons would have completed the contract in nine months. The buyer took no coal in March or April. In May he required and got delivery of 24 tons, in June 4 tons, and at the end of January 1892 he had in all asked and received delivery of 1070 tons.

During this period the seller had repeatedly pressed the buyer to take delivery of larger quantities, and finally refused to deliver more, and the buyer sued him for breach of contract.

The Court *assoilzied* the defender, *holding* that the pursuer was himself in breach of the contract, the true construction of which was that deliveries of the coal were intended to be made in equal monthly quantities, as nearly as might be, of 300 tons, but never to exceed that amount.

On 5th March 1891 James Waldie, coalmaster, Glasgow, sold to Thomas Barr, coalmaster, Glasgow, 2500 tons of Skaterigg cannel coal in terms of the following sale-note—"I confirm sale to you of 2500 tons of Skaterigg cannel coal, for shipment in equal monthly quantities to Brussels, in lots of 300 tons maximum." The sale-note was enclosed in this letter—"Referring to your Mr Urquhart's call yesterday evening, I enclose sale-note for the cannel then arranged for, and confirm further arrangements that, if necessary, you are to extend the period of delivery somewhat." . . .

Barr did not require and did not receive any coal in March or April. Waldie wrote remonstrating, and complained that Barr had failed to implement the contract.

Upon 12th May 1891 Waldie wrote—"Referring to my recent calls and conversation with your Messrs Urquhart and Clarkson, I confirm what I then stated, viz., that if you cannot take up the cannel now due for delivery under contract, I cannot bind myself to give it later on; and I am disappointed that after the assurances your Mr Urquhart gave me that you would keep the pits clear, that you should have again overrun the date of delivery." And on 17th June—"I am still waiting your orders for Skaterigg cannel, delivery of which is now overdue under contract." And on 27th June—"Please note I am still without a reply to mine of 17th, and have again to ask you to see that orders are sent at once for the Skaterigg cannel, delivery of which is now much overdue under contract." Further correspondence followed, and upon 25th December 1891 Waldie wrote—"As to your contract, the period expired on 5th inst., and any arrears are through your not taking it up in about equal monthly quantities, as per my letter to you of 17th and 22nd June last, and repeated verbal communications during its currency." And on 5th February 1892 he wrote—"Yours of yesterday received, and as stated by me in the conversation referred to, your last contract with me for Skaterigg cannel has expired. If you wish further supplies of the cannel, I should be glad to quote."

The following were the deliveries asked for by pursuer and made under the contract:—1891. May, 24 tons 19 cwt.; June, 4 tons 17 cwt.; July, 95 tons 6 cwt.; September, 5 tons 11 cwt.; October, 668 tons 13 cwt.; November, 38 tons 4 cwt.; December, 227 tons 7 cwt.; 1892. January, 6 tons 3 cwt.—being in all, 1071 tons 5 cwt.

Barr then raised an action in the Sheriff Court at Glasgow for £250. He averred that at 5th February 1892 there were still 1428 tons 18 cwt. of the coal undelivered, and the difference between the contract price and the price at which it stood at the date of the action, viz., 31s. per ton, amounted to the sum claimed as damages.

The defender averred that he had supplied all the coal demanded, and that the pursuer would not take the whole quantity (2500 tons) although he was ready to deliver it as specified in the contract. He was anxious to oblige the pursuer, and did not insist, as he was entitled to have done, on the pursuer taking delivery each month of 276 tons or thereby, or paying damages for his failure to do so, but he tendered regularly the monthly quantities, and urged the pursuer to take delivery, but the pursuer failed to do so.

The pursuer pleaded—"(1) The defender having illegally and unwarrantably cancelled said contract when the quantity of coal condescended on was undelivered, and the market value of the coal undelivered at the date of cancelling being at least equal to that stated, decree ought to be granted as craved with costs."

The defender pleaded—"(1) On a correct interpretation of the contract pursuer was bound to accept and the defender to deliver 276 tons of coal or thereby not exceeding 300 tons in each month, and the defender having tendered, and the pursuer having failed to take delivery, during each month of the same, the contract was each month cancelled by pursuer to the extent of 276 tons or the undelivered quantity, and has been fully implemented by defender. (2) The period of the contract having expired at the end of November 1891, and the pursuer having failed, in breach of the contract, to take delivery of the coal tendered to him during that period, or a reasonable time after the expiry thereof, he is not entitled to delivery now from defender or to damages. (3) *Esto*, that there was no period in the contract, the defender having tendered equal monthly deliveries to the full quantity in the contract, and the pursuer having failed to accept same, the contract was thereby cancelled by pursuer."

Upon 25th July 1892 the Sheriff-Substitute (GUTHRIE), after a proof, pronounced this interlocutor—"Finds that the defender on 5th February wrongfully refused to implement the contract he had made with the pursuer to sell him 2500 tons of coal as libelled, whereby the pursuer has sustained loss and damage: Finds that the damages are correctly stated in the condescendence, therefore decerns as craved," &c.

Upon appeal the Sheriff (BERRY) adhered.

The defender appealed to the Court of Session, and argued — The pursuer had broken the contract, not the defender. The maximum amount to be delivered in any one month was 300 tons; that made the time during which the contract was to extend nine months. The confirming letter only agreed that a slight extension of time was to be given; it was in the defender's favour, and it therefore lay with him to say what the extension was to be. A fair amount of time would have been about a year, but the pursuer was not willing to take the amount given to him, and the only remedy therefore was to put an end to the contract. This case did not fall under *Tyers* v. *The Rosedale & Ferryhill Iron Company*, May 15, 1875, L.R., 10 Ex. 195, because in that case there was a definite time fixed within which the iron was to be delivered, while here there was only a reasonable time, and the pursuers would not take the coal within a reasonable time.

The respondents argued—The original time within which the contract was to be concluded was nine months, but that was changed by the letter of 5th March, and accordingly a reasonable time must be taken; eighteen months would have been a reasonable time. The meaning the parties attached to the contract was explained by their actings. They had agreed to come and go with each other, so as to deliver and receive the coals at the times most suitable for each. This was shown by the correspondence and the table showing the quantity of coal delivered each month. This case fell under that of *Tyers, supra*, because the defenders here, as in that case, had acquiesced in not carrying out the conditions of the contract strictly until it became advantageous to them to find an excuse for breaking the contract.

At advising—

LORD YOUNG—This is an action for breach of contract, the pursuer averring that he purchased 2500 tons of Skaterigg cannel coal from the defender, and that he has received only 1071 tons, leaving 1429 tons undelivered, which he says he is entitled to have.

The contract alleged to be broken is in writing, and is in these terms—[*Here his Lordship read the terms of the contract.*] It is not according to fact, as I understand, and indeed it is not alleged, that the defenders ever refused to deliver 2500 tons in equal monthly quantities in lots of 300 tons maximum.

It appears, on the other hand, from the evidence that it suited the purpose and business of the pursuer to take delivery of no coal in the first month of the contract, the month of March, nor in the month of April. In the month of May he asked for and got delivery of 24 tons, in June he asked for and got delivery of 4 tons, and it appears that between the months of June 1891 and January 1892 he asked for and got delivery of about 1000 tons. In all, from the date of the contract in March, until January, when the supply ceased, he asked for and got delivery of 1071 tons; that leaves a balance of 1429 tons, which he says the defender has refused to deliver, and the refusal of which is the breach of contract alleged.

The defender repeatedly remonstrated with the pursuer for the slowness and irregularity with which he took delivery of the coal but without result, and at last he declined to go on any further. At the end of January 1892, when the defender thought that the time which had been allotted for delivery of the whole quantity of coal had come to an end, and the pursuer wanted him to go on delivering it as asked for, the defender declined to do so, and the question in this case is, whether that was breach of contract or not?

We put it to the pursuer's counsel within what time and in what quantities was the defender, according to his interpretation, bound under the contract to deliver the amount of coal which had not been delivered by January? Was it all to be delivered at once, or in equal quantities, and if so, in what equal quantities? We got no answer, and therefore it is impossible to sustain the pursuer's contention that there was a breach of contract by the defender. But assuming, which is contrary to my own opinion, that the pursuer was otherwise right, it would be impossible for us to give damages to him unless he could satisfy us as to what quantities and within what time the defender ought to have delivered this coal.

Upon the whole matter, and without going into details, my opinion is that when the pursuer made his demand that the defender should continue the deliveries under the contract he was himself in breach of it; he had not observed its terms, because I concur in the interpretation which is put upon the contract by the defender. I think the rational meaning of it is that the deliveries were intended to be made in equal monthly quantities of about 300 tons a month, but never to exceed that quantity, and it is not alleged, nor indeed is it according to fact, that the defender ever refused to give delivery of coal on the footing that that was the true construction of the contract. In my opinion, therefore, we must reverse the judgment of the Sheriff and assoilzie the defender.

LORD RUTHERFURD CLARK—The contract on which this action is laid is dated in March 1891, and is thus expressed—"I confirm sale to you of 2500 tons of Skaterigg cannel coal for shipment in equal monthly quantities to Brussels, in lots of 300 tons maximum." The deliveries under it were very irregular. The pursuer ordered no coal and took delivery of no coal in the first two months. He ordered and received 24 tons in May and 4 in June. At the end of January 1892 he had ordered and received 1071 tons. The defenders refused to make any further delivery. Hence the pursuer has brought this action of damages.

The pursuer maintained that he was entitled to require the defender to deliver in the first month such reasonable quantity

of coal as he might prescribe, not exceeding 300 tons, and that that quantity became the amount deliverable during each succeeding month until the contract was completed. Subject to such restraint as is involved in the word reasonable, he claims the right of fixing the duration of the contract, as its duration would necessarily depend on the amount required in the first month of its existence. But from his difficulty in defining, and in indicating the means of defining, a reasonable quantity, he did not confine himself to this view. His ultimate position was that he was entitled to order for the first month any quantity he chose, and that that quantity became the amount deliverable in the succeeding months.

The defender, on the other hand, contended that the only fair construction of the contract is, that deliveries were to be made of about 300 tons in each month.

The case of the pursuer depends on the fact that a maximum is fixed. It is said that by fixing a maximum without defining the amount of the monthly deliveries, the contract necessarily gave to the buyer the power of ordering for the first month any amount within the maximum. I am unable to hold that he had any such power. A mercantile document like that which is before us must be construed reasonably, and I could not imagine a more unreasonable construction than to hold that a power was given to the buyer by which he might indefinitely prolong the execution of the contract and reduce it to an absurdity. If we are to judge of the meaning of the parties by their actions it is very plain that it never occurred to either to give to the contract any such interpretation. The pursuer did not imagine that he was limited by the amount of his first order. He acted under the very opposite belief.

Nor can I see how this construction would avail the pursuer. He ordered no coal during either of the first two months. On his theory the contract would be brought to an end; for he could not demand in any month more than he ordered in the first. His first order in the third month was for 24 tons. If the deliveries were to be regulated by this amount, it is very unlikely that he could take benefit under such a contract.

But if we cannot hold that the buyer has the power of determining the amount of the monthly deliveries, we must find from the contract what these deliveries are to be. If we cannot, the contract is incapable of execution, and therefore incapable of sustaining any claim for damages, for we would be unable to declare what are the obligations or rights of the parties. Any such result must if possible be avoided, and I think that if it were necessary we would be justified in doing some violence to the language of the contract in order to avoid it.

The words are "in equal monthly quantities in lots of 300 tons maximum." The word "maximum" expresses a stipulation in favour of the seller, so as to limit his obligation to deliver. It is against the buyer in so far as it deprives him of the right to require the delivery of larger quantities. It suggests that the buyer has the power to take delivery in smaller lots. But there is nothing more than a suggestion unless we can find from the contract itself what these smaller lots may be. I cannot do so when I have rejected the construction that the deliveries can be fixed at the pleasure of the buyer. If, then, the contract is to have any force, I am driven to the conclusion that its true meaning is that deliveries were to be made and taken in equal monthly quantities as nearly as might be of 300 tons, but never to exceed that amount.

Nor in my opinion is there anything unreasonable in such a construction. When a buyer enters into a contract in which the seller stipulates for a maximum, we may without any unfairness infer that he is desirous of getting in every month as large a delivery as he can, and that the amount which is called a maximum is inserted as an approximate statement of the monthly deliveries—approximate because there cannot be exact equality. It is a construction which can harm neither party, and which, so far as I can see, furnishes the only rule for the execution of the contract.

The pursuer suggested another method of fixing the deliveries. Giving up the absolute power for which he contended, he said that he was bound to take a reasonable quantity per month, or, in other words, to fix a reasonable quantity for the first delivery. He did not claim to be the judge of what was reasonable; but he could not say how the quantity was to be determined. The obligations of parties to a contract cannot be settled by the judgment of others except in the sense of interpretation. The contract does not furnish the means of determining a reasonable amount, and if a court or jury attempted to do so, they would, in my opinion, be stepping out of their province. For the application of a rule which is not furnished by the contract is necessarily an addition to the contract.

Again, the pursuer contended that he had a right to the delivery of 300 tons per month. I agree that he had a right to the delivery of that amount for each successive month after the date of the contract until the quantity was exhausted. The deliveries were to be made monthly, and in equal quantities. If he did not choose to take delivery within these months, he had no further right. For the contract necessarily expired with the time required for the delivery of the total amount.

If I am right, there is an end of the pursuer's case in so far as it is laid on the contract alone. I think that he was in flagrant breach of it, and that he did not and would not take delivery at the time at which alone he was entitled to demand it. Even if the views which he has put forward with respect to the construction of the contract were sound, he did not act in conformity with them. He is in breach of the contract on his own construction of it. For he did not take equal monthly

deliveries or make any provision under which the deliveries should be equal. On the contrary, he refused to take any quantity except that which suited him for the time, and he has so acted that if I were to hold that the contract was still in force, I do not see how I could determine the obligations of the seller under it. If I were to hold that the seller was bound to deliver the balance in equal monthly quantities, I think that I would be making an entirely new contract.

When we heard the case, the pursuer claimed damages under the contract alone. But as I read the record, his claim is founded more on a new agreement to be discovered from the course of dealing, and I think that it was on this view that his case was presented in the Sheriff Court. I can find no such agreement. The pursuer was in evident breach of the contract very soon after it was made. The defender complained of the breach, and desired orders for equal monthly quantities. On 12th May 1801 he wrote—"If you cannot take up the cannel now due for delivery under contract, I cannot bind myself to give it later on." Nothing could be more distinct. While the pursuer was in breach of the contract the defender adhered to it, and he never altered his position. He gave great accommodation to the pursuer, but he made no new contract. I must say that I have no sympathy with the pursuer. He has, I think, been very generously dealt with, and I am surprised that he should have brought such an action as the present.

The LORD JUSTICE-CLERK concurred.

LORD TRAYNER was absent.

The Court assoilzied the defender.

Counsel for the Appellant—C. S. Dickson—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Respondent—Salvesen—A. S. D. Thomson. Agent—A. C. D. Vert, S.S.C,

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*Friday, December 8.*

## FIRST DIVISION.

## FURNESS & COMPANY *v.* THE LIQUIDATORS OF THE "CYNTHIANA" STEAMSHIP COMPANY AND "FELICIANA" STEAMSHIP COMPANY.

*Company—"Fully Paid-up" Shares—Representation—Agreement—Companies Act* 1867 (30 *and* 31 *Vict. c.* 131), *sec.* 25—*Transfer—Liquidation—Rectification of List of Contributories.*

In April 1891 C. F. & Company, under agreements, lent two steamship companies sums of money, receiving in security mortgages, assignments of freight, and "scrip" of the companies. There was no registered agreement as to the scrip under the 25th section of the Companies Act 1867, and no payment was made other than the loans, but shares in the companies, upon which nothing had been paid, were allotted by M and S, the directors, to C. F. & Company, with receipts for all possible calls, and with certificates representing that the shares were fully paid-up.

In November 1891 C. F. & Company, becoming apprehensive of liability, transferred the shares to S, who was then insolvent but not bankrupt. By inadvertence the transfers were not included in the annual returns, but with the authority of the Registrar of Joint-Stock Companies the return was rectified in March 1892. By mistake, however, the shares transferred to S were differently numbered from those held by C. F. & Company, although admittedly the same, and C. F. & Company's names still remained on the register although jottings opposite these shares stated that they were "transferred." The companies went into liquidation in June 1892, and the liquidators put the names of C. F. & Company on the "A" lists of contributories. C. F. & Company petitioned to have their names removed, on the ground (1) that their shares must be treated as fully paid-up, because they had only accepted shares represented to be so; and (2) that these shares had been duly transferred, and that there had been undue delay in removing their names.

*Held* that the shares could not be regarded as fully paid-up, but that they had been timeously transferred, and that accordingly C. F. & Company were entitled to have their names removed from the "A" lists, although they would require to go upon the "B" lists should such be made up.

*Opinion* expressed that under a petition for rectification of the list of contributories it is competent incidentally to rectify the register of shareholders.

The Cynthiana Steamship Company, Limited, was registered and incorporated under the Companies Acts 1862-1890 on 15th November 1890, having its registered office in Scotland. The nominal capital of the company was £400,000 divided into 800 shares of £50 each.

By sec. 55 of the company's articles of association Messrs Maclean & Sutherland, 71 Queen Street, Glasgow, were appointed managers, and it was provided that "so long as the said managers hold office they shall possess the whole powers and rights conferred by these articles or by law as directors.

Sec. 2 provides that "the company may decline, in respect of all shares not fully paid-up, to register any transfer of shares made by a member who is indebted to them . . . or bankrupt, and every transferror who is aware or suspects that his transferee is . . . bankrupt shall be bound to intimate his knowledge or suspicion to the directors. No member shall cease to