mentary, as laid by the respondents (pursuers in the Sheriff-court), are quite irrelevant and untenable. They are laid on a promissory-note, and conclude for payment of its contents; but it is not even averred that the pursuers (respondents) are *in titulo* of the promissory-note, or creditors for its contents. Their own statements are inconsistent, rather than otherwise, with that assumption. On this ground, as well as others referred to by the Sheriff-substitute in the note to his interlocutor of 22d January 1866, the Lord Ordinary thinks that he rightly dismissed the pursuers' action, and the Lord Ordinary has, in effect, repeated the Sheriff-substitute's judgment."

The respondents reclaimed.

Hall (J. C. Smith with him), for reclaimers, did not press the plea of incompetency, but argued the case on the merits.

Pattison and Burnet, for Cockburn and Others, were not called on.

At advising—

Lord President—The conclusion of this summons is [*reads conclusion*]. I don't think there is anything incompetent in that conclusion; but then, to enable a party to insist as pursuer in such a conclusion, he must put himself in one of two positions in respect of title. He must either show that, being the original debtor to this promissory-note, he became the creditor, or at least acquired a title to the note itself from having retired it, or in some other way; or he might show that he had retired it with his own funds, and that the proceeds when discounted have been applied for behoof of the defender, and then he would have had a good action of debt. But when we look at the condescendence in the Inferior Court, and look for an allegation of title, we look in vain. It is not said that they did from their own funds retire it when due, or that they had a title in any other way. On the contrary, as Lord Deas said, not only is there an absence of any averment that this note was retired from their own funds, but there is something very like a careful avoiding of such averment, creating some suspicion of want of good faith. But it is clear that they desired to avoid a statement of title, for in the supplementary action they had another opportunity of making the matter plain, and yet in that condescendence too there is the same absence of any allegation sufficient to found a title to sue. For these reasons I think we ought to adhere. I don't quite agree with the Lord Ordinary in his view as to the relevancy, but he is right in his conclusion.

Lord Curriehill concurred.

Lord Deas—A statement that these two parties granted the bill and got the money for behoof of the members of the Society, and then applied it for their behoof, would be sufficient to entitle them to insist in this action, if they were really the parties who retired the bill. But it was not granted by them alone, but by the treasurer also for behoof of the society, so that the possession of the bill by them does not let us know whether it was not retired by the treasurer, without any allegation that they retired it from their own funds. On looking at the conclusions of the first action they are apt to impose on one, and at first sight they imposed on me; for it looks as if it was meant that the pursuers had on their own responsibility and from their own funds paid that sum to the different members. But it is plain that that is not the real meaning of the pursuers from the very conclusions of the summons. It only means that the money was got and paid over, but has no reference to the retirement of the bill; and that is clear from the statements in the record. In the supplementary action it is still clearer that the pursuers avoid the question; for articles 10 and 11 cannot be read without seeing that they purposely refrain from stating a title. They say that the bill was granted, and that the bank raised diligence on it, and then they applied for the names of the members to enable them to raise an action against them. But it is clear that they avoid saying how they got the bill. They jump from the statement that the bank threatened diligence, to this, that they then brought an action, without any intermediate step. The statements on the record are purposely vague and irrelevant, and it would only be creating expense to the parties to allow an amendment of the record, even if that were competent.

Lord Ardmillan—I am not sure whether, if it were pleaded that there had been an accidental omission of the statement, that the bill had been retired with the funds of the pursuers, it might not have been competent to permit an amendment. If it was clearly an omission, the parties might have caused that to be stated at the bar. But it is plain that counsel are in *bona fide* ignorance of the fact, while there has not been *bona fides* on the part of the party sending them here. The party entitled to sue is the party who paid the bank and obtained the right to sue. But the pursuers not only have not made any statement to that effect, but in the 10th article they avoid that question, and entirely omit, between the statement as to the bank having raised diligence and the statement of their bringing the action, any averment of their right to the bill; and even now, at the bar, they do not propose to add any such averment.

Adhere.

Agent for Reclaimers—James Somerville, S,S.C.
Agent for Respondents—William Mason, S.S.C.

Wednesday, May 27.

NORTH BRITISH OIL AND CANDLE CO. (LIMITED) *v.* SWANN.

Agreement—Construction. Held, on construction of agreement between manufacturers of oil and a coalmaster, that the latter was only bound to supply coal to the former for the purposes of their manufacture.

In 1865 the pursuer entered into an agreement with the defender James Swann, lessee of a coal field at Riggside, for supply of coal and coal tripping. The agreement bore that "whereas the said company are erecting certain buildings and works at or near Lanark, North Britain, for the purpose of manufacturing paraffin burning oils and other products from petroleum coal or shale: And whereas the said James Swann is desirous of supplying the said company with cannel or oil coals for the purposes of their manufacture from his coal pits situate at Riggside . . . . the said James Swann doth hereby agree to supply in every week to the said company, and the said company do hereby agree to receive in every week from the said James Swann, as much cannel or oil coal as the said company shall require, but so that the quantity to be supplied in any one week shall not be less than 75 tons of 20 hundredweight each ton, or more than 150 tons of 20 hundredweight each ton: And also any quantity of coal-tripping which the

said company may require (it being understood and agreed that the said company shall take from the said James Swann the whole coal-tripping which they may require at their said works for distilling or working the cannel or oil coal which they may take from the said James Swann), at the prices and subject to the stipulations hereinafter declared: That is to say— . . . *Thirdly*, the first weekly delivery of cannel or oil coals and coal-tripping shall be made as soon as the said works of the said company shall be finished, and notice thereof shall be given to the said James Swann by the said company. . . . . *Sixthly*, during the continuance of this contract, the said James Swann shall not supply any cannel or oil coals to any other person or company, for the purpose of distilling or manufacturing paraffin or other oils, &c., at a less price in the works of such other person or company than that paid by the said company, without making a corresponding reduction in the price to be paid by the said company for the cannel and oil coals so, as aforesaid, to be supplied to them."

The pursuers now sued the defender, concluding for declarator, "*First*, that by articles of agreement entered into between the pursuers on the one part, and the defender on the other, dated the 1st and 9th days of August 1865, the defender is, aye and until the term of Whitsunday 1873, bound to supply to the pursuers, from the coal pits worked by him at or near Riggside, as much cannel or oil coal as the pursuer shall require him to supply, but so that the quantity to be supplied in any one week shall not be less than 75 tons, nor more than 150 tons; and *Second*, that the pursuers are entitled to sell, use, and dispose of in any manner they think proper, the cannel or oil coal supplied, or to be supplied by the defender to them under the said agreement: And the defender ought and should be decerned and ordained by decree foresaid to deliver to the pursuers as much cannel or oil coal aforesaid as they shall require him to supply, but so that the quantity to be supplied in any one week shall not be less than 75 tons, nor more than 150 tons, and that aye and until the term of Whitsunday 1873."

The defender pleaded:—"1. Under the articles of agreement libelled, the pursuers are not entitled to require delivery of any coal from the defender, except for the purposes of manufacture therein specified, or to use the coal supplied to them by the defender, excepting for such purposes."

The Lord Ordinary (Barcaple) pronounced this interlocutor:—"Finds, that by the articles of agreement libelled on, according to the true construction of the same, the defender is only bound to supply to the pursuers cannel or oil coal for the *bona fide* purpose of being used by them in their manufacture at their works: Therefore assoilzies the defender from the conclusions of the action, and decerns; reserving to the pursuers all right of action competent to them against the defender, to fulfil the foresaid obligation, in terms of the said articles of agreement, and to him his defences as accords: Finds the pursuers liable in expenses."

The pursuers reclaimed.

Clark and A. Moncrieff for reclaimers.

Watson for respondent.

At advising—

Lord Ardmillan—This case, which relates to a contract for supply of oil to the pursuers, the North British Oil and Candle Company, has been disposed of by the Lord Ordinary on a footing which I think is quite correct. I agree both with his decision and with the principles on which it is based. The result of my opinion is, that on a fair construction of the agreement, the defender is only bound to supply to the pursuers coal for the *bona fide* purpose of being manufactured. The pursuers' case is very well brought out in the conclusions of their summons (*reads conclusions*). The construction insisted on by the pursuers is that the word *require* is equivalent to the word *demand*. I think that this agreement, fairly construed as an agreement between parties engaged in mercantile business, cannot bear that meaning. In the first place, the agreement sets out that the pursuers are erecting works for a particular purpose, secondly, that the defender is desirous of supplying the company with cannel coal, and then that the defender is to supply to the company, and the company are to receive from the defender in every week, as much cannel or oil coal as the said company shall require. Now if the word *require* is to be read as equivalent to *demand*, it is brought into this singular relation to the word *receive*, that the pursuers undertake to receive as much coal as they demand. That is absurd. It is a view of their obligation which cannot reasonably be taken. In the next place, the word *require* occurs in two other parts of the agreement, in both of which it appears to me that it cannot mean *demand*, but that it means require for use, or for the purposes of the company. Then the delivery of the coal is only to begin when the works are finished, but if the pursuers are right in their contention, they are entitled to be supplied with cannel coal without any reference to the finishing of the works, and are entitled to receive it and dispose of it in the way of export or in any way they choose, and there is no meaning in delaying delivery until the works are completed. Next, there is a distinct agreement that the defender shall not supply any cannel coal to any other person or company for manufacture of paraffin or other oil at a less price than the pursuers pay. That, as I read it, is a stipulation for the protection of the pursuers against the defender selling at a cheaper rate to persons who should compete with the pursuers. I think it is not consistent with this agreement that these parties shall be entitled to stop their works, and yet continue to demand a supply of coal. Suppose they had no works at all, or suppose they could get coal elsewhere which would suit their purpose here, and were to export this coal obtained from the defender, instead of using it at their works, they would then be entering into competition with the defender. I think that is contrary to the spirit of the agreement, and that they are not entitled to demand a supply of coal from the defender without reference to the purpose of manufacture. Construing the agreement on a just and equitable footing, I cannot agree to give effect to the demand of the pursuers.

Lord Deas concurred.

Lord Curriehill differed. What the Court was asked by the defender to do was to add to the word *require* these words *for the works*. He was not satisfied that the defender had made out that part of his case. And as to the second part of the case, he could not see on what ground the pursuers could be prevented from selling, or disposing of in any way they liked, the coal which had been supplied to them and had become their property.

Lord President—It seems to me that the question raised by this summons is, Whether the defender is bound to supply cannel coal to the pursuers for any other purpose than consumption at their

works? and I think that is a question which is attended with considerable difficulty.

There is no doubt that the defender has a very material interest in restricting the supply which he is bound to make under this contract, and he had so at the time when the contract was entered into. It was therefore in his power, if he thought fit, to express this condition, that he was not to be bound to supply the pursuers with coal for any other purpose than for the works. There is no such condition expressed, and the question is, Is it implied? There is a good deal of difficulty in construing the agreement. The leading provision is, that the coal shall be supplied as the pursuers require it—the coal, when supplied, becoming the property of the pursuers, which in ordinary circumstances they may dispose of as they think fit. But, on the whole matter, I agree with the majority of your Lordships. My opinion is that the condition is implied, and that because of three portions of the contract. In the first place, that which relates to the coal-tripping. In the second place, the third article of the contract, regulating the delivery of coals and coal-tripping. And, in the third place, the sixth article. I attach the greatest importance to the first of these. The obligation on the parties is that the defender is to supply, and the company is to receive, any quantity of coal-tripping which the said company may require—I omit the parenthesis at present—at the prices and subject to the stipulations hereinafter declared. That contract for the giving and taking delivery of coal-tripping is as much a substantive part of the agreement as the contract for giving and taking delivery of cannel coal. No doubt coal-tripping would not have been in the contract if the coal had not been there; but, being there, it is a substantive part of the contract. But then the measure of this demand and supply is more clearly seen when you read the parenthesis, for it is there stated to be agreed that the Company shall take from Swann the whole coal-tripping which they may require at their works for distilling or working the coal taken from Swann. Now, how is the measure of that coal-tripping to be ascertained if the cannel coal is not to be used at the works? It does not imply that so much coal-tripping is to be taken as corresponds to the cannel coal, but all the coal-tripping which is in fact necessary to distil the cannel coal; and that quantity cannot be ascertained unless the company distil the cannel coal; so that the contract cannot be wrought out unless the cannel coal is distilled. That is a strong indication that the cannel coal is not to be used except for the purpose of distillation. Taking this and the other clause I have mentioned together, I think it is sufficiently clearly implied that coal was only to be delivered for the purpose of manufacture in the pursuers' works. Therefore the pursuers are not entitled to decree of declarator in terms of the first conclusion of their summons, which refers to future time. And I cannot give them decree to the extent of a mere fraction of their declaratory conclusion for saving any rights as to coal now in their possession. That question is not properly raised in this summons. The proper question is that raised by the conclusions and the first plea for the defender, which seems to afford a perfectly good and sufficient defence to meet the whole conclusions of the summons. That plea is [*reads plea*]. If at this moment, when the pursuers have given up using cannel coal, they have on hand unused any quantity of coal supplied by the defender, the question may remain whether they may not dispose of that otherwise than by distilling it. But that question is not raised here, and I only give my opinion on the general effect of the agreement.

Agents for Pursuers—Hill, Reid, & Drummond, W.S.

Agent for Defender—John Gillespie, W.S.

Wednesday, May 27.

SECOND DIVISION.

WALKER AND ANOTHER (SALMON'S TRUSTEES), PETITIONERS.

Trust—Removal of Trustees—Failure to act—Intimation. Four trustees accepted a trust, a majority being a quorum. Two of them, A. and B., having been sequestrated in 1855, ceased thereafter to reside in Scotland, and made no answer to applications regarding the management of the trust. On a petition by the other two trustees, concurred in by the beneficiaries, alleging that a certain beneficial act of management could not be performed owing to the position of the trust, and praying for removal of A. and B, the Court ordered intimation, through the post-office, to A. and B., and also intimation to their last known agents, with certification, and thereafter they *removed.*

Salmon died in 1847, leaving a trust-disposition and settlement whereby Merrilees, Walker, Scott, and Salmon's two sons, John Salmon and Peter Salmon, were nominated trustees, the quorum to consist of a majority of the trustees accepting and surviving. All the parties named, except Merrilees, accepted the trust. In 1855 John Salmon and Peter Salmon were sequestrated, and Mackenzie was appointed trustee on their estates. The remaining trustees, Walker and Scott, now presented a petition for removal of John and Peter Salmon from office. They alleged that it would be greatly for the interest of the trust-estate to sell a certain property under powers contained in a bond and disposition in security, narrated in the petition, "but in the present position of the trust the petitioners have no power to act. The said John and Peter Salmon left Scotland shortly after their bankruptcy as above set forth. The petitioners believe them to be at present resident in England, but are not aware of their present address. The petitioners frequently communicated with them on the subject of this trust after they left Scotland, urging them either to co-operate with them in the management of the trust, or to resign, but they have persistently abstained from making any answer to these applications. Mr and Mrs Aiken, the sole beneficiaries under the deed, have made similar applications, and with the same result. The petitioners have also communicated with Mr William Mathieson, writer in Glasgow, who acted as the agent for the Messrs Salmon, with a view of ascertaining what they proposed to do in this matter, but Mr Mathieson has not been enabled to give any reply on their behalf."

The petitioner prayed the Court, after intimation and service, "to remove the said John Salmon and Peter Salmon from the office of trustee under the said deed; or, without removing the said John Salmon and Peter Salmon, to authorise the petitioners to act in the said trust with as full powers as if they were a majority of the said trustees; or