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

& Son wrote to the Corporation—"We confirm telegrams of date regarding cargo of about 900 tons coke, and enclose booking order. We are sorry you cannot meet us by entering at 5s. 3d. als., as at 5s. 6d. we barely clear expenses. This order is the result of the sample box sent recently, and in order to make a beginning we are willing to pass the cargo at cost. You must, however, allow us 2d. per ton for cash on shipment instead of the usual penny." The booking order was in the following terms:—"Please book the 'Venus' s.s. for 900 tons of your best coke. Vessel is expected at Grangemouth about 27th curt." On 22nd December David Ireland & Son again wrote to the Corporation—"Referring to ours of y'day with order for 'Venus,' we to-day have instructions from our friends to be particularly careful about quality of the cargo as on this future business depends. Please give particular orders to load the coke as clean as possible. On 30th December the coke was forwarded to Grangemouth, where it was shipped for Hamburg. On its arrival at that port on 5th January it was rejected by Mr Drude, the foreign buyer, as disconform to sample. On 7th January 1893 Messrs Ireland & Son wrote to the Corporation—"We have yours of y'day with invoice for coke per 'Venus.' The receiver refuses to take delivery of the cargo, alleging that it is not up to sample; we are, however, meantime denying responsibility. We hope you have not sent anything inferior." To this letter William Foulis replied on 9th January as follows:—"In reply to your favour of 7th inst., the coke sent for shipment per 'Venus' was of our usual quality, and in every respect similar to sample. We have nothing else to send."

Various letters thereafter passed between the parties. Messrs Ireland & Son, on the one hand, maintained that the sale was by sample, and that if the cargo was found (as alleged by the buyer of the coke in Hamburg) to be disconform, they were not liable in the price. On behalf of the Corporation it was maintained that the coke despatched was of the usual quality, and was conform to sample. It also appeared from these letters that the buyer of the coke in Hamburg had raised an action in the German Courts against Messrs Ireland & Son in order to recover the price payable by them therefor on the ground that the coke was disconform to sample.

On 13th June 1894 the Lord Provost, Magistrates, & Council of Glasgow raised an action against Messrs David Ireland & Sons for the sum of £240, 3s. 5d., as the price of the coke.

The pursuers pleaded, *inter alia*—"(1) The defenders having purchased from the pursuers and taken delivery of the coke, the price of which is now sued for, and having failed to pay the price thereof, the pursuers are entitled to decree therefor."

The defenders pleaded, *inter alia*—"(1) The action should be sisted to await the issue of the litigation in Germany regarding said coke; (2) the said cargo not having been conform to sample by which it was sold, the defenders are not bound to pay the price."

On 12th December the Lord Ordinary (KYLLACHY) allowed parties a proof of their averments, reserving in the meantime the averments of parties with respect to the conformity or disconformity of the cargo of coke to the alleged sample.

The result of the proof was to establish the facts above narrated.

On 6th March 1895 the Lord Ordinary decerned against the defenders in terms of the conclusions of the summons.

"*Opinion.*—In this case there has been a full production of the correspondence and such parole proof as seemed necessary to exhaust the case. The two questions involved are (1) whether the sale of the coke was a sale by sample; and (2) whether, assuming disconformity to sample, the rejection was timeous. It was agreed, as recorded in the interlocutor allowing proof, that if those questions are both answered in the affirmative, the matter of conformity or disconformity to sample should be left over to await the issue of the German suit.

"I have come to the conclusion that the sale was not a sale by sample, that is to say, that the contract of sale contained no warranty that the cargo of coke should be conform to the sample forwarded to the pursuers in response to the defenders' letter of 2nd December 1892. The sale may have been induced by that sample; and the defenders, if the facts admit, may have redress on the ground of fraudulent misrepresentation. But the sale was not, in my opinion, a sale by sample, and that is the only case which I have at present to consider.

"The distinction between a sale by sample and a sale induced by sample is founded on obvious grounds, and is well established—see Bell's Com. 1470, and cases cited on the note. It is true that in this case the sale was not made by contract note, but by letters, or letters and telegrams, passing in the course of correspondence; and that no doubt makes it proper that the correspondence should be read as a whole. But so reading it, I fail to see that the sample of 2nd December was imported into the contract. The parties had no verbal communication. There was nothing in their opening letters to connect the proposed cargo with the sample which had been sent some weeks before. That sample is only mentioned in the letter of 21st December, by which the bargain was closed; and it is not, in my opinion, so mentioned as to make it enter into the contract. The letter first accepts the pursuers' terms, and encloses booking order, and then it goes on to say, by way apparently of explanation, that 'the order is the result of the sample box sent recently, and in order to make a beginning we are willing to pass the cargo at cost.' The defenders' letter of 22nd December confirms this view. In it the defenders say:—'Referring to ours of yesterday, with order for 'Venus,' we to-day have instructions from

our friends to be particularly careful about quality of the cargo, as on this future business depends. Please give particular orders to load the coke as clean as possible.'

"If this be so it is not necessary to consider the question of timeous rejection; but it is perhaps right to say that if the sale had been one by sample I should have had difficulty in holding that the defenders were bound to have made the necessary comparison with the sample at the port of shipment, and to have rejected there and then. The question of timeousness is always a question of circumstances, and I doubt whether, in the circumstances of this case, an examination at Grangemouth could be held to have been within the contemplation of the contract. As I have said, however, it is not necessary to decide that question. The defence being rested exclusively on disconformity to sample, fails, if I am right, at the outset, and I must therefore give the pursuers decree in terms of the summons."

The defenders reclaimed, and argued—(1) The sale was one by sample. The order was distinctly stated to be the result of the sample, and this was clear from the whole correspondence between the parties. (2) Assuming that the sale was by sample, the goods had been timeously rejected. The purchaser abroad had possession of the sample, and rejected the coke whenever he compared it with the sample.

Argued for the pursuers—(1) The Lord Ordinary's interlocutor was right. The contract was contained in the booking order, and there was no reference to this sample in the order. Therefore the sale was not one by sample—*Meyer* v. *Everth*, 1814, 4 Campbell's Reps. 22; *Gardiner* v. *Gray*, 1815, 4 Campbell's Reps. 144. (2) Assuming the sale to have been one by sample, the coke had not been timeously rejected. The defenders in this case had never formally rescinded the contract—*Couston* v. *Chapman*, 1872, L.R. 2 Sc. App. 250. In order that the rejection should be timeous the defenders ought to have examined and rejected the coke at Grangemouth—*Pini & Company* v. *Smith & Company*, May 29, 1895, 32 S.L.R. 474.

At advising—

LORD TRAYNER—In the month of December 1892 the pursuers sold to the defenders a cargo of coke, for the price of which they now sue. The defence is that the cargo was sold to the defenders by sample, that on delivery at its port and destination it was found disconform to sample and rejected by the buyers. The questions discussed before us, as before the Lord Ordinary, were two—(1) was the coke sold by sample? and (2) assuming that it was, and also that it was disconform to sample, was it timeously rejected? The Lord Ordinary is of opinion that the sale was not a sale by sample, and has therefore given the pursuer decree, indicating an opinion at the same time that, if the sale had been a sale by sample, he would have been inclined to hold that the rejection of the coke, if warranted by disconformity to sample, was timeous.

On the first and leading question I have come to be of a different opinion from that of the Lord Ordinary. The contract in question is contained in the letters and telegrams which passed between the parties. Taking their contents along with the parole evidence of the pursuer's manager Mr Foulis, the facts of the case seem to be as follows—On 2nd December 1892 the defenders wrote to the pursuers that they had a chance of introducing the pursuers' coke to a new market, but that the buyers were "desirous of seeing a sample first," and requested the pursuers to send a small box or bag "addressed to us c/o Messrs James Currie & Company, Leith." The pursuers on 5th December sent as requested a box of coke to the address given. Mr Foulis explains that the defenders' letter of 2nd December left no doubt in his mind that the buyer the defenders had in view was resident abroad, and that he "took a sample and despatched it in terms of that letter." Some telegrams then passed as to the price of the coke, which was ultimately fixed by the defenders' letter of 21st December, in which they gave an order for 900 tons of coke to be shipped at Grangemouth and said, "This order is the result of the sample box sent recently." On 7th January following the defenders intimated that the buyer had refused to take delivery of the cargo "alleging that it is not up to sample," to which the pursuers replied that the cargo "was of our usual quality, and in every respect similar to sample. We have nothing else to send." Various letters thereafter passed between the parties which it is unnecessary specially to refer to, but in all of which the defenders maintain the position that the sale was by sample, and that if the cargo was found (as alleged by the foreign buyer) to be disconform to sample, they were not liable for the price. These being the facts, I am of opinion that the sale in question was a sale by sample, and not as the Lord Ordinary has held merely a sale induced by a sample. The defenders asked for and got a sample of the coke which the pursuers were ready to sell. The order which followed was distinctly stated to be "the result of the sample box sent recently," which I cannot read as meaning anything else than an order for 900 tons of coke the same as the sample. And I think it is plain that the pursuers so understood it. Throughout the long correspondence which followed, while the defenders were maintaining that the sale was by sample, and that the bulk of the cargo was disconform to sample, the pursuers never once suggested that the sale was other than as represented by the defender. The pursuer's position throughout was that the cargo was conform to sample, a position they did not need to maintain, and had no interest to maintain if the contract was what they now contend it was.

On the second question, I agree with the view which the Lord Ordinary has indicated. It was maintained before us that the quality and character of the cargo could easily have been discovered if it had been examined at the port of shipment, and

that it should have been rejected there if disconform to sample, and therefore disconform to contract. In support of this view reference was made to the opinion which I delivered recently in the case of *Pini & Company*. I think the cases quite distinguishable. The case of *Pini* was not the case of a sale by sample, but a contract for the furnishing of metal pipes according to a certain specification. The buyer had the specification in his hands, and could by himself or his agent have ascertained the conformity or disconformity by examination of the delivered goods at the port of shipment, which was the place of delivery to the buyer. But here the defenders had no such opportunity. They had not the sample; it had been sent, as the pursuers knew, abroad, to the foreign buyer, and so far as appears, the defenders had never seen that sample, and had never been intended to see it. They could not therefore compare the cargo at the port of shipment with a sample they did not possess and had never seen. The sample had been sent to the foreign buyer in order that he might consider whether he would buy coke of that description, and it remained with the foreign buyer in order that he might compare it with the bulk when it arrived. It was at the port of destination only, therefore, that it could be ascertained whether the cargo was or was not conform to contract, and there was no want of timeous rejection there. Accordingly, I think, the Lord Ordinary's interlocutor should be recalled, and that we should find that the sale in question was a sale by sample, and *quoad ultra* continue the cause. I would propose to make no finding at present as to the timeous rejection because it has not yet been finally determined as between the defenders and their foreign buyer whether the cargo was or was not conform to sample.

LORD JUSTICE-CLERK — That is the opinion of the Court.

The Court recalled the interlocutor reclaimed against; found that the sale of the coke in question was a sale by sample; and *quoad ultra* continued the cause.

Counsel for the Pursuers—Ure—Cooper. Agents—T. J. Gordon & Falconer, W.S.

Counsel for the Defenders—C. S. Dickson—Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Friday, June 28.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

COWAN *v.* MILLAR.

Trade Name—Name Descriptive of Premises—Exclusive Title to Name—Interdict.

The respondent carried on business as an ironfounder for some years in premises in Kennedy Street, Glasgow, of which he was tenant. He had acquired the business from a firm which had built the foundry twenty years previously, and which had carried on business there, first as owners and afterwards as tenants. The premises had all along been known as the "Sun Foundry, Glasgow." In 1894 the respondent transferred the business to new premises situated about twelve miles from Glasgow, and took an office in Robertson Street, Glasgow. He continued to designate his works as the "Sun Foundry, Glasgow," and arranged with the post office authorities that letters so addressed should be delivered to him at his office. The owner of the premises in Kennedy Street being about to start business as an ironfounder there brought an action of interdict against the respondent to have him prevented from using the name "Sun Foundry, Glasgow" as designative of his works or in connection with his business. The complainer did not claim an exclusive right to the name "Sun Foundry," but maintained that the respondent was not entitled to call his works the "Sun Foundry, Glasgow." The Court (*rev.* judgment of Lord Kyllachy) *granted* the interdict craved.

In 1857 a firm of ironfounders, Messrs George Smith & Company, began business in premises in Port Dundas Road, Glasgow, of which they were the tenants. They called these premises the "Sun Foundry, Glasgow," and that was their trade address.

In 1871 they removed to Kennedy Street, Glasgow, where they built a foundry which was their own property, and to which they transferred the name by which their former foundry had been known.

In 1887 Messrs George Smith & Company failed, and Gavin Bell Millar bought from their creditors the whole concern, premises, goodwill, and right to use the firm's name included. In September of the same year G. B. Millar transferred to a new firm, of which he himself was a partner, the whole assets of the business, including goodwill and the right to use the firm's name. He retained to himself the premises, including machinery and patterns, but these he let to the firm on lease for a period of years. The firm carried on business under the old name of George Smith & Company, continuing to use "Sun Foundry, Glasgow" as their trade address.