case; but apparently the challenge of his appointment was made shortly after the testator's death. Probably the testator did not contemplate the difficulty which has arisen; but the question must be decided on the terms of the settlement, and in it I find no words which authorise the appointment of one of the trustees as manager of the business.

The Court adhered.

Counsel for the Pursuers and Respondents—Findlay. Agents—Gill & Pringle, S.S.C.

Counsel for the Defender and Reclaimer Robert Brown *tertius*—Jameson, Q.C.—Cook. Agents—Davidson & Syme, W.S.

Agent for the Defenders Robert Brown's Trustees—F. J. Martin, W.S.

Wednesday, June 20.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

SHAW, MACFARLANE, & COMPANY *v.* WADDELL & SON.

Contract—Breach of Contract—Right to Rescind—Failure to Delivery Timeously—Time of Essence of Contract.

S. & Company, a firm of coal merchants, entered into a contract with W. & Son, coalmasters, under which they agreed to purchase from W. & Son a quantity of coal for shipment in a particular steamer. The contract was made partly by verbal communications and partly by writing. In the course of the correspondence S. & Company wrote upon 4th April, "We have booked steamer to load 12th, 16th." In reply to this W. & Son sought to guard themselves as to liability for demurrage in the event of detention of the steamer waiting for her cargo. In another letter on the same day S. & Company wrote—"We have now to advise you that the vessel will be ready to load on Wednesday 13th, and we will expect you to have the coal forward in good time." To this letter W. & Son replied on the 5th April confirming the terms of their previous letter as to liability for demurrage. On the same day S. & Company wrote—"The vessel must be loaded on the date indicated, and we shall hold you responsible for any loss we may sustain should you fail to supply the cargo as purchased."

On the 19th April W. & Son, hearing that the steamer would not be ready for three or four days, wrote rescinding the contract. The steamer did not arrive at Grangemouth till April 22nd, and was not ready for loading till the 23rd.

In an action of damages against them at the instance of S. & Company for breach of contract, it appeared that 740 tons of coal to fulfil the pursuers' contract were loaded on trucks at the defenders' colliery before 19th April, and that in consequence of the pursuers' failure to take delivery the sidings at and near the colliery were blocked.

Held, after a proof, that time was of the essence of the contract, and that in the circumstances the defenders were entitled to cancel it.

An action was raised in the Sheriff Court of Lanarkshire by Messrs Shaw, Macfarlane, & Company, coal merchants, Glasgow, against Messrs Waddell & Son, coalmasters, Glasgow, concluding for payment of the sum of £138, 15s. as damages for breach of a contract to supply the pursuers with a cargo of coal for shipment in a particular steamer.

The pursuers averred, that in consequence of the failure of the defenders to implement the contract they had been obliged to supply a cargo of coal for the steamer at a loss of 3s. 9d. per ton, their total loss amounting to the sum sued for.

The defenders averred that the pursuers had failed to take timeous delivery of the coal, that in consequence all work had to be suspended at their colliery owing to the sidings having been blocked with waggons for the pursuers' contract, and that their business had been seriously dislocated thereby. They maintained that in these circumstances they were entitled to cancel the contract.

The following narrative of the facts is (with the exception of the two final paragraphs) taken from the opinion of the Lord President:—"It appears to be common ground, and both the Sheriffs have found, that in the beginning of April 1898 the pursuers entered into a contract with the defenders under which they agreed to purchase from the defenders 740 tons of their splint coal to be shipped at Grangemouth by the steamer 'L'Avenir,' the pursuers alleging, and the Sheriff-Substitute finding, that the probable days of loading were to be 12th to 16th April, and the defenders maintaining, and the Sheriff finding, that the agreement was more specific, viz., to load 12th to 16th April. The contract was made partly by verbal communications and partly by writing, the material letters being dated 4th and 5th April. Different quantities were mentioned in the earlier letters as the subjects of the purchase or purchases; but in a letter from the pursuers to the defenders, dated 4th April, they said—'We have booked steamer, 740 tons, to load 12th to 16th as mentioned to Mr Hamilton on Friday, and will advise you when she is ready to load.' In their reply of the same date, 4th April, the defenders sought to guard themselves both as to quantities and as to liability for demurrage and the consequences of a strike; and in answer to this communication the pursuers, still on 4th April, wrote, *inter alia*—'We mentioned the size of the steamer, 740 tons, to your Mr Hamilton in our office on Friday, and gave him the probable date of loading, 12th to 16th, and he agreed to load her if we gave him plenty of time. We have now to advise you that

the vessel will be ready to load on Wednesday 13th, and we will expect you to have the coal forward in good time.' To this letter the defenders replied on 5th April, and in answer to their reply the pursuers on the same day wrote a letter in which they said, *inter alia*—'Our object in asking Mr Hamilton to call at our office was to get him to undertake the loading of the full cargo, 740 tons, and this, after slight demur at the quantity, he agreed to, on condition that he would have reasonable notice and time to collect the coal;' and they further said—'the vessel must be loaded on the date indicated, and we shall hold you responsible for any loss we may sustain should you fail to supply the cargo as purchased.' On the same day, 5th April, the defenders wrote to the pursuers, *inter alia*—'We can do nothing more in the meantime than revert to the terms of our previous letters.'

"It appears that on the morning of the 19th of April the defenders inquired at the agents of 'L'Avenir' and learned that nothing had been heard of her, and that Mr Hamilton telephoned to Mr Shaw cancelling the contract, but that later on the same day information was received that she had on that day sailed from Antwerp. This was communicated to Mr Hamilton, and he wrote to the pursuers the letter of 19th April mentioning that they had loaded (*i.e.*, on trucks), 740 tons splint coal, to be shipped per the ss. 'L'Avenir' at Grangemouth between the 12th and 16th of the month (April), that they were advised that 'L'Avenir' would not be ready to load the coal before Thursday (the 21st), and concluding—'We have now to intimate that we have to-day been obliged to dispose of the coal otherwise, and that we cannot now undertake to supply any coal under this order.'

"'L'Avenir' did not arrive at Grangemouth until the 22nd of April—she discharged her inward cargo on that day and night, and she was not ready to load outward cargo until the 23rd—ten days after the 13th, to which the pursuers had endeavoured to tie down the defenders as the day for loading, and seven days after the 16th mentioned by the pursuers as the second limit of the 'probable days' for loading."

At the time the contract was entered into a strike of the miners in Wales was imminent, and the price of Scotch coal was rising rapidly.

On 18th April the whole of the 740 tons required to fulfil the pursuers' contract were ready loaded on trucks at and near the defenders' colliery, and in consequence the sidings at and near their colliery were blocked, with the result that the working of the colliery would have been seriously interfered with if the coal had not been disposed of otherwise. The trucks could not be forwarded to Grangemouth till traffic was opened by the railway company for a particular ship.

On 22nd February 1899 the Sheriff-Substitute (STRACHAN) after a proof pronounced an interlocutor finding that the defenders were not justified in cancelling the contract, and that they were liable in damages to the pursuers, assessing the same at £138, 15s., and decerning for payment of that sum with expenses.

The defenders appealed to the Sheriff (BERRY), who on 26th July 1899 issued an interlocutor whereby he found that the defenders were justified in cancelling the contract, and therefore recalled the interlocutor appealed against and assoilzied the defenders with expenses.

The pursuers appealed to the Court of Session, and argued—Time was not of the essence of the contract. Section 37 of the Sale of Goods Act 1893 (56 and 57 Vict. c. 71) showed that this was a question depending on the terms of the contract. The correspondence showed clearly that the defenders had not regarded the contract in this light. But in any case it was their duty to tender delivery of the coal, which they had not done. Moreover, they had failed to show that they had any good reason for breaking the contract even if they had a right to do so.

Counsel for the respondents were not called upon.

At advising—

LORD PRESIDENT—[*After narrating the facts of the case as quoted above, his Lordship proceeded as follows*]—Under these circumstances the important question is, whether the defenders were entitled to rescind the contract on 19th April as they did, and I concur with the Sheriff in thinking that they were. It appears to me that time was of the essence of the contract, especially in view of the state of things existing when it was entered into. A strike of the miners in Wales was imminent, the price of Scotch coal was rising rapidly, and other conditions existed which seem to me to have made the time at which delivery of the coal would be taken of the essence of the contract. It would not, in my judgment, have been reasonable to expect that the defenders should allow the coal to stand loaded in trucks for ten days, or even for half of that time, without any vessel coming forward to receive it, even if the railway authorities would have allowed this, which seems improbable. Whether the waggons belonged to the railway company or to the defenders, their being used merely as storing places for coal for such periods when they were or might be required for carriage would be inconsistent with the usages and exigencies of business—to say nothing of the impediment which rows of loaded waggons would or might cause to the work of the defenders and the railway company. Even assuming "12th and 16th" to have been mentioned only as the probable days of loading, as the Sheriff-Substitute finds, it seems to me that the pursuers took too great a latitude in not having a vessel forward ready to receive the coal until the 23rd. In this connection it is to be kept in view that the pursuers had stated to the defenders in writing that the vessel would be ready to load on Wednesday the 13th, that they would expect the defenders to

have the coal forward in good time (*i.e.*, for loading on that day), and again that the vessel must be loaded on the date indicated—that is, as I understand, the 13th.

Whether the contract is read as being "to load 12th to 16th April" or as merely mentioning 12th to 16th April as probable dates of loading, it did not, in my judgment, warrant the pursuers in not having a vessel at Grangemouth ready to receive the coal until the 23rd of April, and I consider that when on the 19th it appeared that the vessel could not arrive sooner than the 21st, and that probably, as the result proved, it would not arrive until later, they were entitled to cancel the contract as they did. I therefore think that the judgment of the Sheriff is right.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Recal the interlocutors of the Sheriff-Substitute and of the Sheriff dated 22nd February and 26th July 1899 respectively: Find (1) that the pursuers entered into a contract with the defenders by which they agreed to purchase from the defenders 740 tons of their splint coal to be shipped at Grangemouth by the steamer 'L'Avenir,' to load 12th to 16th April; (2) that 'L'Avenir' did not arrive at Grangemouth between 12th and 16th April, and that on the 19th April information was received by the pursuers and communicated to the defenders that she had sailed on that date from Antwerp for Grangemouth; (3) that the ordinary duration of the voyage of such a vessel as 'L'Avenir' from Antwerp to Grangemouth is about two or three days; (4) that 'L'Avenir' did not arrive at Grangemouth until 22nd April, and that she discharged her inward cargo during the day and night of 22nd April, and (5) that she was not ready to receive outward cargo until 23rd April; (6) that the time for having 'L'Avenir' at Grangemouth ready to receive the said coal was of the essence of the said contract, and (7) that on 19th April the defenders cancelled the said contract and refused to deliver under it; (8) that in the circumstances they were justified in doing so: Therefore of new assoilzie the defenders, and decern; Find the pursuers liable to them in expenses both in this and in the Sheriff Court, and remit," &c.

Counsel for the Pursuers—W. Campbell, Q.C.—A. S. D. Thomson. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders—H. Johnston. Q.C.—Cook. Agent—Al. C. D. Vert, S.S.C.

Thursday, June 21.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

GIBSON *v.* M'KEAN.

Process—Reclaiming-Note—Material Error in Print of Interlocutor Prefixed to Reclaiming-Note — Competency — Court of Session Act 1825 (6 *Geo. IV. c.* 120) (*Judicature Act*), *sec.* 18.

In an action brought against two defenders the Lord Ordinary pronounced an interlocutor in these terms, "Sustains the first plea-in-law for the defender W, and the second plea-in-law for the defender M," and dismissed the action. In a reclaiming-note presented by the pursuers the interlocutor prefixed thereto was printed thus—"Sustains the second plea-in-law for the defender W."

The Court *refused* leave to correct the error, and *dismissed* the reclaiming-note as incompetent.

The Court of Session Act 1825 (6 Geo. IV. c. 120) (Judicature Act), sec. 18, provides—"That when any interlocutor shall have been pronounced by the Lord Ordinary, either of the parties dissatisfied therewith shall be entitled to apply for a review of it to the Inner House, . . . provided that such party shall . . . print and put into the boxes appointed for receiving the papers to be perused by the judges a note reciting the Lord Ordinary's interlocutor."

In an action at the instance of Mrs Jane Helen Gibson, with consent of her husband Robert James Gibson, S.S.C., against James Calder M'Kean and John Robert Weddell, defences were lodged for both defenders. The defender M'Kean pleaded (2) that the action was irrelevant. The defender Weddell pleaded—"(1) The action is irrelevant."

The Lord Ordinary (KINCAIRNEY) on 22nd February 1900 pronounced the following interlocutor;—"The Lord Ordinary having heard counsel for the parties in the procedure roll, *Sustains the first plea-in-law for the defender Weddell, and the second plea-in-law for the defender M'Kean:* Dismisses the action, and decerns: Finds the defenders entitled to expenses," &c.

The pursuers reclaimed.

In the interlocutor prefixed to the reclaiming-note, in place of the words printed in italics as above, were printed the words—"Sustains the second plea-in-law for the defender Weddell."

The respondents objected to the competency of the reclaiming-note, and argued—Section 18 of the Judicature Act provided that the reclaimer must lodge a note reciting the interlocutor reclaimed against. What was printed was not the interlocutor pronounced by the Lord Ordinary. It omitted all reference to one of the defenders, and in the case of the other it sustained the wrong plea. The Act was