very strongly, that if the rents fell short, the deficiency should be charged on the capital of the heritable estate.

"The Lord Ordinary does not think that the defenders' view as to the incidence of this burden is well founded. He thinks the question is one depending upon the intention of the truster, for the maintenance of Mrs Wighton senior is one of the unexhausted purposes of the trust. The direction of the trust-deed is that his widow's maintenance be paid out and from 'the yearly income of my trust estate'—that is, from the income of his whole trust-estate, both heritable and moveable. It is a bequest from annual proceeds, and not an heritable debt of the truster. The supervening intestacy which has occurred makes it necessary now to distinguish the estate into heritable and moveable, and equity requires, in order to do justice as between heir and executor, that the catholic burdens be rateably divided between the two.

"The same result is reached by viewing the provision made to Mrs Wighton senior as coming in place of her legal rights of terce and *jus relictæ*. Her terce would have been a burden on the heritage, her *jus relictæ* on the moveables. The surrogate provision must in equity be laid rateably both on the heritable and on the moveable estate.

"The trustees of Mr Wighton senior very properly took no part in the discussion. Their only object is to obtain exoneration by paying or denuding under the order of Court, and although the present action is not in form a multiplepoinding, it falls to be disposed of on similar principles.

"In strictness, the trust cannot be wound up during the life of Mrs Wighton senior, but perhaps parties might arrange to reserve a fund sufficient for her maintenance, so as to permit of the trustees being relieved of the rest of the estate. Probably, however, this is rather a matter for extrajudicial arrangement."

The defenders relaimed, and it was further urged by them that the trustees of the said William Wighton senior having been infeft *qua* trustees in his heritable estate took such infeftment for behoof of and as representing William Wighton junior, the party beneficially interested in said estate, and that accordingly his widow is entitled to claim terce from said estate in which her husband was constructively vested. (*Rose* v. *Fraser*. Ross' L.C.)

This question not having been raised on record or before the Lord Ordinary, the Court adjourned the case to hear parties upon it. When the case was called, the Solicitor-General, for the defenders, stated that on inquiry he had found that no infeftment had been taken by the trustees until after the death of William Wighton junior, who only survived his father seven months, and that accordingly it was unnecessary to discuss the question.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming-note for Mrs Elizabeth C. Barns or Wighton, and William Grant, her trustee, against Lord Gifford's interlocutor of 4th November 1873, refuse said note, and adhere to the interlocutor complained of: Find the reclaimers liable in expenses from the date of the Lord Ordinary's interlocutor, and remit to the Auditor to tax the same and to report: and remit to the Lord Ordinary to proceed with the cause, with power to decern for the expenses now found due; and decern."

Counsel for Pursuers (Respondents)—Solicitor-General (Clark), Q.C., and Jameson. Agents—W. & J. Cook, W.S.

Counsel for Trustees—J. H. A. Macdonald. Agents—Lindsay, Paterson & Hall, W.S.

Counsel for Defenders (Reclaimers)—Guthrie. Agent—W. S. Stuart, S.S.C.

Saturday, January 10.

FIRST DIVISION.

[Sheriff of Midlothian and Haddington.

BEGG AND OTHERS (TRUSTEES FOR DEACONS' COURT OF NEWINGTON FREE CHURCH) *v.* JACK.

Process—Interdict and Removing—Summary Application—Mutual Wall.

The respondent in this case erected a gable wall partly on the site of a mutual wall between his property and that of the complainers. The latter, though repeatedly, in the course of a correspondence, objecting to his interfering with the height of said mutual wall, took no legal steps to prevent the gable being proceeded with, but allowed the respondent to continue his operations until said gable had reached the height of four storeys. The complainers having then presented a petition to have the wall removed, *Held* that, in these circumstances, the present case was not one suited for a summary application—the Court being of opinion that it was quite unreasonable to delay until a building had been all but completed, and then apply summarily to have it pulled down.

Counsel for Complainers — Solicitor-General (Clark) and Jameson. Agent—John Auld, W.S.

Counsel for Respondent—Lord Advocate (Young) and Campbell Smith. Agent—J. B. W. Lee, S.S.C.

Tuesday, January 13.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

GREIG *v.* BARCLAY AND OTHERS.

Contract—Reduction—Error—Facility and Fraud.

Circumstances in which *held* that there were no relevant grounds of action.

This was an action at the instance of Peter Greig, residing in Crail, only surviving son and heir-at-law of the deceased Andrew Greig, shipowner and hotel-keeper, Newhaven, against Clementina Barclay, wife of Richard Cockerton, 82 Cornwall Gardens, South Kensington, London, and Richard Cockerton for his interest, Margaret A. P. Barclay, wife of Thomas Watson, writer, 56 W. Regent Street, Glasgow, and Thomas Watson for his interest, Mary Stewart Barclay, wife of D. L. Foggo, broker, Glasgow, and D. L. Foggo for his interest, as heirs *in mobilibus* of the late Thomas Barclay, auctioneer, Glasgow,

The summons called upon the defenders to produce, *First*, a pretended minute of agreement. bearing date the 3d day of August 1853, entered into between Captain Robert Cook, Leith, for Mr Thomas Watson, Glasgow, factor for the children of the late Mr Thomas Barclay, Glasgow, and for the representatives of the said Mr Thomas Barclay, on the one part, and Mr Andrew Greig, Chain Peir, Newhaven, for himself, and as representing and taking burden on him for the pursuer, on the other part, by which the parties agreed; Captain Cook, on the one part, to cede all claims competent to Mr Barclay or his heirs against Andrew Greig and the pursuer in connection with the affairs of the Edinburgh and Dundee Steam Packet Company, and to abandon an action of count and reckoning then depending at Mr Barclay's instance against Andrew Greig, and the pursuer to relieve Andrew Greig and the pursuer of all claims arising out of the collision between the brig "William" and the steamer "Bold Buccleuch," and also of all claims at the instance of the Western Bank of Scotland relative to a bill for £2,000, held by the bank, and generally to relieve Andrew Greig and the pursuer of all claims whatever in connection with the affairs of the Edinburgh and Dundee Steam Packet Company, and of all expenses incurred in connection with the affairs of the Company, which it was agreed to hold as amounting to £150. Andrew Grieg, for himself and for the pursuer, on the other part, gave up all claims against Thomas Barclay or his heirs in connection with the affairs of the Company, and agreed that Thomas Barclay's heirs should have right to all its funds and effects, and he agreed to concur in any discharge which might be arranged to be granted in favour of the judicial factor on the estate of the company. *Second*, a pretended assignation and discharge, bearing date the 15th and 16th days of August 1853, entered into between the defenders on the one part and Andrew Greig for himself and the pursuer on the other, in implement of the terms of the minute. There were also conclusions for reduction of the two documents in question, and thereafter, on examination of the accounts, for payment of such sums as should appear as the balance of Thomas Barclay's intromissions, with interest.

The pursuer stated that the minute of agreement and assignation and discharge were elicited and impetrated by the defenders under essential error on the part of Andrew Greig, and under the undue influence of his law agents, and through gross fraud and circumvention on the part of the defenders, and facility on his part, without any onerous or just cause. The true state of the company's affairs was concealed from the two pursuers, and they averred that it was made to appear that the company was insolvent or nearly so, when in point of fact it was worth £25,000 or thereby; that Andrew Greig was old and infirm, and Mr Barclay's representatives took advantage of this and of his reduced circumstances to use harrassing diligence, whereby he was induced to enter into the minute of agreement, and grant the assignation and discharge.

Further, the pursuer averred that his father and Barclay and he carried on business at Trinity and other ports, for some years with success, until the Fife Railways came into operation, when the trade became unproductive and was discontinued. Previous to this period Mr Barclay having falsely alleged that Mr Greig was indebted to him in the sum of £1,000, began to assume the entire management of the concern and appointed Mr Dodds to take entire charge of the books of the business. Mr Greig, it was asserted, had been erroneously led by Mr Barclay to believe that he was under a heavy obligation to him, and was consequently obliged to submit to this management; and the pursuer having only a small share in the business, and also believing that Mr Barclay was a large creditor, allowed him to take the entire charge of the business. The pursuer said he had now discovered that Mr Barclay grossly deceived both his father and him, and that instead of £1,000, the debt did not exceed £250, and that sum was amply compensated by counter claims.

The whole of the statements as to error, facility, and fraud were denied by the defenders, who, in answer, explained that for some time after the co-partnery was formed the management of the business was left entirely in the hands of the pursuer and his father, who kept no proper books, and failed to account for large sums due to the co-partnery, and after vainly endeavouring to get them to keep proper books, and render proper accounts, Mr Barclay got them to agree to the appointment of Mr Dodds, who was at the time an entire stranger to him, and who occupied a similar situation in a shipping office at Berwick. Mr Dodds continued from the time of his appointment to keep the books down to the stoppage of the business in 1849, and quarterly balances were made up and regularly submitted by him to the partners.

The seventh article of the condescendence set forth that during the years 1845 to 1849 inclusive, Thomas Barclay, with Mr Dodds, a conjunct and confidant person, clerk and book-keeper to the company, falsified the books and accounts of the company to suit his own purposes, and fraudulently misrepresented and concealed the true state thereof from the pursuer and his father; but it was explained that the whole of Barclay's cash transactions were set forth in the quarterly balances submitted to the partners, and checked by Mr Philip, the judicial factor, after he was appointed on 9th February 1850, and to this explanation no answer was made.

The eighth article set forth that in June 1849 Mr Barclay presented a petition to the Sheriff of the County of Edinburgh, praying for warrant to sell certain vessels, and appoint Mr Dodds to collect the assets and pay the debts of the company, and interdict Messrs Greig from sailing said vessels. A lengthened litigation followed on this petition, and the Sheriff ultimately dismissed the application, with expenses, against Mr Barclay. The Sheriff-Substitute, and on appeal the Sheriff, found that, notwithstanding Mr Greig's bankruptcy, the partnership "continued to subsist without any new stipulation different from the original contract, the terms of which must be held to be still binding on the parties, excepting only the new arrangement that was made as to the proportion of the shares held by the several partners." At the time this application was made by Barclay, one of the vessels, the "Fair Trader," was under contract by the Magistrates of Kirkcaldy until the 31st October following, and the Sheriff found that Mr Barclay was bound by this contract, and that certain modes of terminating the copartnery were provided in the contract, none of which Barclay had availed himself of.

According to the report of the judicial factor, at 15th January 1852 the assets of the company were £4,665, or thereby, and the liabilities to external creditors £2,463, or thereby; this report also showed that upon the partners' accounts a sum of £2,365, 19s., stood at the credit of Mr Barclay, while Andrew Greig was indebted to the concern in a sum of £920, or thereby, and the pursuer in the sum of £250, or thereby. Before issuing his report, Mr Philip submitted it in draft to Mr Barclay, as well as to Andrew Greig, on his own behalf and that of the pursuer. Several meetings then took place before the factor, at which the said Andrew Greig attended with his law agent, who also gave in written objections on his behalf, and every thing which the parties had to suggest with respect to the proposed report was fully considered. Mr Philip gave in his final report on 14th January 1853, at which date he had on hand £4,750, or thereby, while the outstanding claims amounted to about £2,462. Various disputes and differences existed between Mr Barclay and Mr Greig in regard to these, during which Mr Barclay died, and after considerable negotiation, the arrangements embodied in the deeds sought to be reduced were come to. These arrangements were, the defender stated, very advantageous for the pursuer and his father; under the arrangement the pursuer and his father received £150, and a discharge of the amounts owing by them to the concern, which at the date of settlement were as follows:—the pursuer's father Andrew Greig, £955, 6s. 2d., and the pursuer, £255, 6s. 4d. The defender took over the whole outstanding liabilities, and after settling these, the amount which remained was about £765. As the books showed the amount of Mr Barclay's interest in the firm to be £2,642, or thereby, his representatives sustained under the arrangement a loss of £1,877.

The pursuer pleaded—"(1) The said minute of agreement and assignation and discharge being vitiated and erased *in substantialibus*, and otherwise defective in the solemnities required by law, they ought to be reduced and set aside. (2) The said minute of agreement and assignation and discharge having been elicited and impetrated by the defenders under essential error, and through facility on the part of Andrew Greig, and through fraud and circumvention on the part of the defenders, and by the undue influence of the law agents of the said Andrew Greig, the said minute of agreement and assignation and discharge ought to be reduced and set aside. (3) The defenders, at the date of the deeds challenged, having no legal title to represent the estate of Thomas Barclay, and they have not bound themselves as his representatives, but as individuals, the said deeds are ineffectual in law to operate any discharge of the estate of the said Thomas Barclay, or to form a defence to the pursuer's present claim for an accounting. (4) The defenders, Margaret Barclay or Watson, or Mary Barclay or Foggo, being in a state of nonage at the date of the deeds challenged, could not be, and were not, legally bound by them, and that being so, the pursuer was also free, and declarator ought to be pronounced to that effect. (5) The late Mr Barclay having intromitted with the funds and effects of the company, in which he and the pursuer and his father were partners, his representatives are bound to account to the pursuer, as sole surviving partner of the company, and as heir-at-law of his said father, for such intromissions. (6) Failing the defenders producing an account of the intromissions called for, they are liable to the pursuer in the sum sued for, under the alternative conclusion of the summons, with expenses. (7) The late Mr Barclay having caused loss, injury, and damage to the pursuer through the said litigation in the Sheriff-Court of Edinburgh, maliciously and without probable cause, ought to be found liable in damages as concluded for."

The defenders pleaded—"(1) The pursuer's statements are not relevant or sufficient in law to support the conclusions of the summons. (2) The pursuer's whole material statements being unfounded in fact, the defenders ought to be assoilzied. (3) The action and the pursuer's claims are excluded by *mora* and acquiescence. (4) The action being altogether groundless and untenable, and the defenders not being indebted to the pursuer in any money, they ought to be assoilzied with expenses."

On 30th September 1873 the Lord Ordinary pronounced the following interlocutor and note:—"The Lord Ordinary having heard counsel for the parties, and considered the arguments and proceedings, repels the first, third, and fourth pleas in law for the pursuer, and, under a reservation in the meantime of all questions of expenses, appoints the case to be enrolled, that parties may be heard on the pursuer's pleas, so far as not now disposed of.

"*Note.*—This action, which has for its object to reduce and set aside, after the lapse of upwards of twenty years, a minute of agreement, and relative discharge and assignation, is a very peculiar one in many respects.

"The pursuer at the debate stated that he was not to insist on the ground of reduction referred to in his first plea in law, which he admitted was without any true foundation; and that plea has now, accordingly, been repelled.

"The pursuer, however, insisted in his third and fourth pleas in law, and desired that they should be disposed of before the rest of the case wes entered upon. On the other hand, it was maintained for the defenders, rightly as the Lord Ordinary thinks, that these pleas are, in the circumstances, untenable. The pursuer nowhere says that either he or his father was deceived in any way as to the right or title of the defenders to enter into the compromise, and to execute the deeds in question. Nor does the pursuer even say that the defenders have in any way whatever repudiated or threatened to repudiate these deeds, or either of them. And farther, it is plain that these deeds must have been long since fully implemented, that the pursuer has taken and obtained all the benefit they were calculated to afford him. In this state of matters, the Lord Ordinary has been unable to see how he could have sustained the pursuer's third and fourth pleas in law. Even supposing, although the Lord Ordinary sees no sufficient reason for holding so, that the defenders were not, owing to non-age, or for some other reason, legally bound by the deeds referred to at the time they were executed, it is surely enough not only that they have never objected to them, but, on the contrary, have fully implemented them, and are now in the present action resisting a challenge of them. A stronger practical confirmation of the deed, and waiver of all objection to them, could not well be imagined.

"But it is a different question altogether whether the deeds in question are not reducible at the pursuer's instance on the grounds of error, facility, and fraud, as referred to in his second plea in law. On this question the pursuer will now have an opportunity of being heard, if he seriously intends to insist in his second plea in law. From what passed at the last debate, it rather occurred to the Lord Ordinary that, supposing the pursuer was not successful in supporting his third and fourth pleas, there would be an end to the action."

Proposed issues in the cause were then lodged to the following effect:—(1) Whether the signature of Andrew Greig to the minute of agreement, was obtained under essential error on the part of the said Andrew Greig, induced by misrepresentation or undue concealment, as set forth in the summons? (2) Whether at the date of the minute of agreement, Andrew Greig, being of a weak and facile state of mind, was induced to enter into the same by fraud and circumvention of Captain Cook or of the defenders. (3) Whether the signature of Andrew Greig to the minute of agreement was obtained by the undue influence of his law agents? Similar issues as to the assignation and discharge followed, and the 7th issue was expressed thus: "(7) Whether the late Thomas Barclay, in or about the month of June 1849, maliciously and without probable cause instituted and persisted in a litigation in the Sheriff-Court of Edinburgh, for the purpose of ousting the pursuer and his father from the 'Edinburgh and Dundee Steam Packet Company,' to the loss, injury, and damage of the said Andrew Greig, and of the pursuer. Damages £3000 sterling."

Thereafter, on 14th November 1873, the following interlocutor and note was issued:—"The Lord Ordinary having heard counsel for the parties and considered the arguments and proceedings, dismisses the action so far as not formerly disposed of, as irrelevant and insufficient as laid, and decerns: Finds the defenders entitled to expenses: Allows an account thereof to be lodged, and remits it when lodged to the Auditor to tax and report.

"*Note.*—The Lord Ordinary by a preceding interlocutor, of date the 30th September last (1873), repelled the pursuer's 1st, 3d, and 4th pleas in law, and he has to refer to his note attached to that interlocutor for an explanation of the grounds upon which he then proceeded—an explanation which, as having some bearing on the rest of the action, ought now to be kept in view.

"The Lord Ordinary had been, as stated in the note to his interlocutor of 30th September, in the belief that the pursuer was not to insist longer or farther in the action, but upon his enrolling the case and intimating his intention to continue the litigation, it was thought right, before disposing of the remaining questions, that the pursuer should lodge the issues he proposed. That having accordingly been done, the parties were heard, the defenders contending that the action was wholly irrelevant, and that the proposed issues were in themselves such as could not, in any circumstances, be allowed.

"The Lord Ordinary is of opinion that the defenders' contention is well founded, and he has accordingly dismissed the action.

"The pursuer's proposed issues serve to illustrate the kind of case he thinks he has a right to insist in.

"His 7th issue is so obviously untenable that the Lord Ordinary thinks it unnecessary to comment upon it.

"The other issues proceed upon the assumption that the pursuer has made upon the record allegations relevant and sufficient to entitle him to cut down the two deeds which he challenges on the grounds of fraudulent misrepresentation, undue concealment, facility, and essential error. But the Lord Ordinary has been unable to satisfy himself that any case has been laid revelant and sufficient to cut down deeds which were executed upwards of twenty years ago, and have been since not only acted upon, but fully implemented. The material statements of the pursuer are to be found in articles 2, 6, and 7 of his condescendence. And it is thought that it is only necessary to read these articles to see that they are too vague and indefinite to be held as sufficient in such a case as the present. For example, beyond a very general averment, which in itself really gives no information, article 2 of the condescendence does not state in what the alleged misrepresentation and concealment consisted, or when, or how, these were practised. And this observation is equally applicable to the pursuer's statements in the 6th and 7th articles of the condescendence. Not only so, but according to the pursuer's own showing in articles 8th and 9th of his condescendence, it appears that all the matters now brought by him into question had been the subject of a lengthened litigation, to which he was himself a party a few years before the deeds sought to be reduced were executed. It cannot, therefore, be taken from the pursuer that when he became a party to the deeds referred to he did not know perfectly well how matters stood.

"The issues also are in themselves objectionable, as mixing up various distinct grounds of action, and various alternatives."

The pursuer reclaimed.

At advising—

Lord Justice-Clerk—I am of opinion that there is nothing in the objection to the validity of these two deeds which has been raised under the fourth plea. When we come to the statements made upon record, we have it quite specifically averred in the condescendence (Act 7) that Mr Barclay falsified the books of the company; but then in article 8 it is stated that a petition was presented in the Sheriff-Court at his instance, that a protracted litigation ensued; and that the petition was ultimately dismissed, but not one word there occurs as to this alleged falsification, although at the time the whole affairs of the company must have been under close consideration, and it cannot be said at this long distance of time that any such points can be entered into when nothing in the proceedings immediately subsequent, and having direct reference to the matter, indicates anything of the nature of fraudulent and false entries as alleged in article 7. Immediately on the termination of the proceedings under this application, Mr Barclay (article 9) applied for and obtained the appointment of a judicial factor. In such a litigation the falsification of the books, if there was any, must have come out at once, and the parties had every opportunity of making statements on that matter at the time. I have therefore come to the conclusion that in this action we have nothing to go upon, and that the statements as to falsification are made merely at random.

I think, my Lords, we should dismiss this action; as to what further remedy the pursuer may have it

is for him to consider. I think the cause as on record is irrelevant.

LORD BENHOLME—I think the Lord Ordinary has done full justice to the cause, and I am satisfied that he has pronounced an interlocutor which is quite correct.

LORD NEAVES—I am quite of the same opinion. In an action of this kind, a reduction setting aside certain proceedings, the lapse of time is a very material consideration—we cannot allow an investigation of this kind upon merely haphazard statements. Such a course would involve the granting of an inquisitorial right to go and enquire into other people's affairs. There is no statement here sufficient to ground an action of this nature.

The Court adhered, with additional expenses.

Counsel for Pursuer (Reclaimer) — Campbell Smith. Agent—R. Veitch, S.S.C.

Counsel for Defenders (Respondents)—Watson and Balfour.—Agents—Webster & Will, S.S.C.

[*R.*, Clerk.

Thursday, January 15.

SECOND DIVISION.

[Sheriff of Aberdeen.

DAVIDSON *v.* WEAR & COLLEY.

Contract—"Iron Scrap"—Disconform to Contract—Implement—Damages.

A firm in Aberdeen contracted to deliver 200 tons "heavy iron scrap" at Newcastle on a certain day. The English firm refused to take the goods as not of the contracted quality. *Held* that the scrap as delivered was disconform to contract, and damages awarded calculated on the mean between the contract price and the market price during the months of delivery.

This case came up by appeal from the Aberdeen Sheriff-court. The action was at the instance of James and Alexander Davidson, merchants in Aberdeen, and was directed against Wear & Colley, merchants in Newcastle-on-Tyne, and the summons concluded for payment of £230, as damages sustained by the wrongful failure of the defenders to deliver at Newcastle quarry, 200 tons of iron scrap, at £3, 17s. per ton, conform to contract entered into between the parties by letters of date September 20th, 1871, being letter of offer by the defenders, and letter of acceptance of the offer by the pursuers. The pursuers averred that certain of the iron delivered, but refused, was not of the contracted quality. The first shipment of iron scrap was on October 27th, 1871, and the defenders maintained that it was of the kind arranged for. The pursuers on arrival of the ship, after taking a few tons, objected to the iron on the ground that it was not of the quality contracted for. On November 13 the pursuers called on the defenders to supply them with the first 100 tons of the 200 contracted for, and this they refused to do. The defenders were by letter of 12th December reminded that the second supply of 100 tons was due on December 12, but this was not delivered. The market-price of this kind of iron rose by the month of December to £5 per ton. The counter statement asserted that "in consequence of the pursuers having refused to take delivery of the first instalment of the iron, the defenders declined to forward more unless the pursuers either paid for it in cash before it left Aberdeen, or would promise to honour the defenders' draft on demand. This the pursuers declined to do, and the defenders accordingly sent them no more iron. The defenders were all along willing and offered to fulfil their part of the contract on the pursuers fulfilling theirs."

The pursuers pleaded—"the defenders having failed to implement the contract libelled on, to the loss and damage of the pursuers, the latter are entitled to decree against the defenders for the amount of profit they have lost by the defenders' said failure."

The defenders pleaded—"1. The defenders having performed their part of the contract, and the pursuers having failed to perform theirs, the defenders were justified in refusing to furnish more iron, and in holding the contract at an end, and resiling therefrom. 2. In any view, the damages claimed are excessive. 3. The terms of the written bargain being ambiguous, the defenders are entitled to a proof of the surrounding and other circumstances to explain it."

The Sheriff-Substitute (DOVE WILSON) pronounced the following interlocutor and note:—

"*Aberdeen, 22d August* 1873—Having considered the cause; Finds, as matter of law, that the defenders were bound under the contract libelled to deliver iron of the kind denoted by the terms used, as such terms were understood at the place where the contract was made, and that they were not bound to deliver other or superior iron: and Finds, as matter of fact, that the pursuers have failed to prove that the iron tendered by the defenders for delivery was not such iron as was contracted for; therefore assoilzies the defenders from the conclusions of the libel, and decerns: Finds the defenders entitled to expenses.

"*Note.*—The pursuers claim damages from the defenders for having failed to deliver, in terms of their contract to that effect, 200 tons of a certain kind of iron. The contract is admitted. About 60 tons were tendered for delivery in terms of it, and these were rejected by the pursuers as not being of the kind of iron contracted for. The defenders maintained they were, and declined to deliver other iron. The question therefore comes to be, whether the iron which was tendered was of the kind specified in the contract.

"The kind of iron specified is 'good, malleable, heavy, rough, iron scrap.' Nothing turns on the signification of any of these words, except the word 'heavy.' The other words are used in their ordinary signification, but the word 'heavy' is a technical word in the trade, and the parties are at issue as to its import. The pursuers maintain that what the defenders tendered for delivery was not the kind of iron known in the trade as 'heavy scrap,' inasmuch as it contained too much of 'light scrap,' of nut iron, and of rubbish.

"In regard to the meaning of the term 'heavy scrap' in the iron trade, and to the way in which it is to be distinguished from other kinds, three sets of witnesses have been examined, who gave respectively the understanding of the trade in Aberdeen, Newcastle, and Glasgow.

"The Aberdeen witnesses made thickness the