narrative taken by itself it is plain that the subject sold and the subject intended to be disposed was an estate of superiority only, and that all the lands referred to and intended to be dealt with were lands belonging in property to Moir. It seems, therefore, to be the fair and necessary inference that the words "all as possessed by J. M. Moir and his tenants" were not introduced for the purpose of drawing a distinction between the reserved coal within the lands to which those qualifying words apply, and the coal within the other lands specified in the dispositive clause. But being introduced as a definition of the lands of Hillfoot without any such special object, they do show, I think, very clearly that the intention of the parties in the dispositive clause was the same as the intention apparent on the face of the narrative, and the weight and effect of their introduction is not, I think, to be limited to the lands of Hillfoot only.

LORD FIELD—My Lords, the great conflict of opinion between the learned Judges of the Court of Session would seem to show that the case is not unattended with difficulty. But the very clear and complete exposition of the arguments and reasoning upon which the differing judgments of their Lordships rest has enabled me to estimate them and follow them, and I have come to the conclusion that the reasoning of the minority ought to prevail, and that the judgment of the Court of Session cannot therefore be supported.

The question is, as your Lordships are already aware, whether the coals in the lands comprised in the disposition of the 28th of July 1837 passed by that deed to the respondents' author. There is no doubt that at the date of it, and before its execution, these coals were vested in the disponer Scott, the trustee of the estates of Crawfurd Tait, as a separate tenement and as part of the barony and estate of Campbell, or that he was also entitled to the superiority and feu-duty of those lands which, except the coals, belonged in property to the respondents' author. It is equally clear that the superiority and feu-duty had been purchased by the latter either by public roup or private bargain, and that the disposition of 1837 was executed for the purpose of implementing those purchases, and I think those purchases only. But it is also, I think, clear that the language of the dispositive clause is sufficiently large in itself and taken by itself to have included the coals; and therefore if I had been compelled to have regard to that clause alone I should have been obliged to hold that the coals did pass, whatever might have been my view as to the real intention of the parties apart from the deed. Certainly I should have also done so, and willingly, if the dispositive clause in the deed, or the deed in any other part, had contained language expressly or by necessary implication referring to the coals as part of the disponed property. I agree that clear and unambiguous language of the dispositive clause cannot be cut down by other language leading to a contrary intention. But then (and this is where I differ from the majority of the Court of Session) it seems to me that the language of the clause, although habile to pass the whole tenement from the sky to the centre of the earth, is equally habile, having regard to the practice of conveyancing and to what I understand to be the legal theory as to lands which have been feued remaining within the title of the superior, to pass the mere superiority and feu-duty, of which the excepted coals form no part, for they are part of the original proprietorship of the whole barony.

I need not trouble your Lordships with a further expression of my views, for they have been clearly and fully expressed to your Lordships by my noble and learned friends who have preceded me, but the result is that of the two possible interpretations of the language of the dispositive clause the narrower one is the true one; and this view has the great advantage of carrying out what I am quite satisfied was the real intention of the parties.

The House found that the appellant is entitled to a decree of declarator that he has the sole and exclusive right to the coals within the lands mentioned in the terms of the summons; and that the case be remitted with that declaration to the Court below.

Counsel for the Appellant—Solicitor-General for Scotland (Asher, Q.C.)—Graham Murray, Q.C.—Morison. Agents—Grahames, Currey, & Spens, for Alexander Morison, S.S.C.

Counsel for the Respondent—Lord Advocate (J. B. Balfour, Q.C.)—MacWatt. Agent—A. Beveridge, for Carmichael & Miller, W.S.

COURT OF SESSION.

Tuesday, March 14.

FIRST DIVISION.

[Sheriff of Lanarkshire.

HIGGIN *v.* PUMPHERSTON OIL COMPANY, LIMITED.

Sale — Delivery by Instalment—Condition that each Delivery shall Constitute a Separate Contract—Measure of Damages.

By contract-note dated 26th March 1890, an oil company sold to a candle-maker 20 tons paraffin wax, "to be delivered free . . . during the next twelve months, in about equal monthly quantities, . . . to be taken delivery of when tendered, and paid for by cash within fourteen days."

The contract-note contained this clause—"Each delivery shall constitute a separate contract."

The only deliveries during the twelve months were 1 ton in September 1890

and 2 tons in February 1891. During the other ten months the purchaser did not demand and the sellers did not offer delivery of any quantity, and no complaint was made on either side until March 1891, when the purchaser claimed delivery of 17 tons, but the defenders refused to deliver more than the monthly instalment of 2 tons.

The purchaser sued the sellers for the difference between the contract price for 17 tons of wax and the market price as at April 1891, by which date the price had advanced considerably.

Held (1) that the effect of the clause constituting each delivery a separate contract was, that as soon as the seller refused delivery of any monthly quantity, the buyer was entitled to buy in against him, and claim as damages the difference between the contract and the market price at the time of the breach; and (2) that the conduct of the parties here amounted to a mutual abandonment of their claims for the omitted deliveries.

On 26th March 1890 the Pumpherston Oil Company, Limited, 24 St Vincent Street, Glasgow, agreed to sell to Richard Higgin, tallow chandler, Manchester, 20 tons of paraffin wax, conform to the following contract-note:—"*March* 26, 1890.—Sold this day, in accordance with the regulations of the Scottish Mineral Oil Association, to Mr R. Higgin, 255 Great Ancoat Street, Manchester, 20 tons of semi-refined paraffin wax, of usual good merchantable quality, guaranteed melting point 118/20° Fahrenheit, at threepence and five thirty-seconds of a penny (3 5-32d.) nett per pound. To be delivered free by us to Manchester during the next twelve months, in about equal monthly quantities. The wax to be taken delivery of when tendered, and paid for by cash within fourteen days from date of delivery." The next clauses contained stipulations as to the melting point of the wax, and a condition that the wax sold under the contract was for the express purpose of candlemaking. "If on the part of the producers there should be any failing, in the opinion of the Executive Committee of Candlemakers, to carry out their undertaking, then the candlemakers holding contracts will be free to cancel the same. Should any question arise with regard to melting point or colour of any delivery made on this contract, a certificate furnished by Mr Boverton Redwood shall be conclusive between the parties. Each delivery shall constitute a separate contract. Should strikes of workmen, fire, or other unexpected and exceptional causes suspend or partially suspend manufacturing operations, the deliveries under this contract may be postponed until such interruption is removed, the buyer having the option of cancelling the portion of the contract of which delivery has been so suspended by giving written notice to the seller within thirty days following the month during which the suspension took place. Any dispute arising under this contract to be settled by arbitration in the usual way.—For THE PUMPHERSTON OIL COY., LIMITED—W. W. M'MILLAN."

Under this contract one ton of wax was delivered in September 1890 and two tons in February 1891, both of which were paid for.

On 7th March 1891 Mr M'Millan, salesman for the Pumpherston Oil Company, wrote to Mr Higgin in the following terms—"We hereby beg to tender you delivery of 17 tons 118/20° wax, due this month under contract of March 26th /90, and we shall be glad if you will favour us with early forwarding instructions." In his reply dated 14th March Mr Higgin ordered on the 17 tons. But on 16th March the company replied as follows—"We are in receipt of your favour of 14th inst. We observe that we have inadvertently tendered you 17 tons while you are only entitled to one month's delivery in terms of your contract with us. We sold you 20 tons wax, to be delivered in about equal monthly quantities over the year, so that all we have now to send you is the March delivery. We endorse invoice for 2 tons, which we shall send on, in receipt of your remittance. We would not ask for cash for this, but you took excessive credit before, which we cannot permit." On 24th March Mr Higgin intimated to the company by letter that he had paid the value of the 17 tons into the bank, and that if delivery was not given before the end of the month he would buy against them and claim damages as well. The company replied in course renewing their offer to deliver the quantity of wax they considered Mr Higgin was entitled to claim, viz., one month's proportion.

In June 1891 Mr Higgin presented a petition against the company in the Sheriff Court of Lanarkshire at Glasgow, in which he averred that in consequence of their refusal to implement their contract, he had to supply himself with 17 tons of wax, the undelivered portion of his contract, in the open market at an enhanced price, and craved decree for £74, 7s. 6d., being the difference between the contract price and that paid by him. The defenders pleaded that the action was irrelevant, and this plea was sustained by the Sheriff-Substitute and the Sheriff; but, on appeal to the First Division of the Court, their interlocutors were recalled and a proof was allowed.

The import of the proof appears from the following findings of the Sheriff-Substitute (GUTHRIE)—"Finds that the letter from the defenders to pursuer of March 7th 1891 was written and sent by Mr M'Millan, salesman for defenders, in error as to the contract between defenders and pursuer, and was corrected by the defenders in their letter of 16th March, and finds that their offer of 17 tons to be then delivered is of no effect in law: Finds that there is nothing in the correspondence or communings of the parties from which a mutual intention to postpone the deliveries of wax may be inferred: Finds that, according to the true construction of the contract, the wax was to be delivered within the twelve months following the date thereof, in about

equal monthly quantities, each monthly delivery being a separate contract: Finds that the pursuer not having ordered, and not having complained of the defenders' failure to tender the monthly quantities of wax beyond those above specified, and the defenders not having tendered, and not having complained of the pursuer's failure to order on the several monthly quantities except as aforesaid, mutually passed from and abandoned their claims under the contract or contracts as to each monthly delivery up to February 1891: Finds that in March 1891 the defenders wrongfully refused to deliver the last monthly delivery to which pursuer was then entitled except for payment in cash, the pursuer being entitled by the contract to pay only in fourteen days: Finds that the pursuer is entitled to damages in respect of this breach of contract; Assesses the damages at the sum of £7, 4s. 5d. sterling, for which decerns against the defenders, with interest as craved."

"*Note.*—I cannot accept the pursuer's somewhat peculiar view of the contract. He received and retained the sold-note of March 26th 1890, and when it suits his purpose he refers to it in writing to the defenders. It is impossible, in my view, to deal with the controversy between the parties except on the footing that this written contract is the foundation and the rule of the relation between them. There was therefore, at 26th March 1890, a sale by the defenders to the pursuer of 20 tons of paraffin wax, to be delivered by instalments as set forth. The question is, whether the conditions of that sale as to deliveries were modified by the mutual agreement or actings of parties. The case of *Tyers* v. *Rosedale* has been appealed to as showing, as I understand the argument, that postponement of deliveries is to be presumed, where deliveries do not take place at the stipulated times, that the parties remain bound by the contract, and that when a breach takes place at any time the party refusing to perform is liable in damages, usually calculated, as found in *Ogle* v. *Vane*, according to the market price at the time of the breach.

"I am humbly of opinion that the case cited is not similar to this. There was there a postponement at the express request of the buyers, and it was held as the effect of the evidence that the conduct of the parties indicated not an intention to be free from the contract, but only to postpone the deliveries to subsequent months. It is still more important that the contract was different, being, and being regarded in the judgment as a single indivisible contract for the sale of one quantity by deliveries in lots. The correspondence was also quite different in its effect. Here the sale-note expressly provides that 'each delivery shall constitute a separate contract,' a clause which did not occur in any of the previous reported cases. On the contrary, they all have been decided on the distinct ground that the contract for the whole quantity sold was one and the same.

"It was suggested that the stipulation that each delivery shall constitute a separate contract is inserted only for a special purpose—namely (if I remember aright), to govern the immediately preceding arbitration clause. But it is more consistent with principle to give the words their full and fair meaning, viz., that there are to be twelve distinct contracts under this sale-note.

"It appears to me that in this contract time was essential. Although it was not pleaded or insisted on in argument, it is a very pregnant circumstance that, as appears incidentally, the price of paraffin wax is fixed by trade combination annually, and remains the same for a year. It naturally follows that contracts are made, as in this case, for a year, and so I think the indefinite prolongation of the contract by mere silence into another year is negatived."

The pursuer appealed, and argued—The view taken by the Sheriff-Substitute that the contract was severable was not adopted by either party, as the evidence showed; it was not pleaded on record, and it was not well founded in law. The pursuer acted on the belief that he was bound to take the wax within the year, but that he could take it when he liked, and he was encouraged by the defenders in that opinion. The executory clause in the contract, "the wax to be taken delivery of when tendered," put the *onus* on the seller to show that he had tendered delivery, or to explain the reason why he had not done so. The rule adopted in Scots law was that where one party refused or failed to perform anything that was material or of the essence of the contract, the other party was entitled either to insist for implement, claiming damages for the breach, or to rescind the contract altogether—*Turnbull* v. *MacLean*, March 5, 1874, 1 R. 730. A slight delay in giving delivery or in making payment under a contract providing for delivery over the year could not be held to indicate an intention to repudiate the contract—*Mersey Steel Co.* v. *Naylor*, 1884, 9 App. Cas. 434. The principles applicable to such a contract were similar to those applied in the case of a future contract—*Frost* v. *Knight*, 1872, 7 Ex. 111; *Roper* v. *Johnson*, 1873, L.R., 8 C.P. 167; *Tyers* v. *Rosedale Company*, 1875, 10 Ex. 195 (Exchequer Chamber); *Mersey Steel Company* (*supra*). On the proper measure of damages, *Warin & Craven* v. *Forrester*, Nov. 30, 1876, 4 R. 190, was referred to.

Argued for the defender—The Sheriff-Substitute was right in basing his judgment on the original contract note, and passing by any misunderstandings of the parties which did not amount to the setting up of a new agreement or to a plea in bar. The opening clause was not an entire contract for 20 tons; it only fixed a limit; it was followed by a stipulation which contemplated the delivery of a proportionate quantity at the end of each month. The *Mersey* case did not apply, for there the contract was dealt with as an entire contract for the purchase of a quan-

tity of iron—see p. 439. It was not the seller's duty to tender delivery; the purchaser's order was, according to the evidence, to be the initial step. The effect of the cases was that if the date was exceeded in a contract where time was of the essence, the lapse of time was sufficient to extinguish the contract and to put an end to the right to enforce delivery, except where there was an arrangement or request to postpone delivery. In this case the seller did not tender delivery because the buyer did not want delivery, and it must be held that there was a waiver of the contracts from month to month. If not, and if the defenders were in breach in not tendering delivery, then the pursuer was bound either to go into the market as each periodical breach occurred, and buy in against them, or to intimate his claim of damage from month to month. If he had done so, it was admitted that the wax could have been procured at the contract price; but in fact he only made his demand when the price of wax rose. The following additional authorities were cited—*Ogle* v. *Earl Vane*, 1868, 2 Q.B. 275; 3 Q.B. 272; *Brown* v. *Muller*, 1872, L.R., 7 Ex. 319; *ex-parte Llansamlet Tin Plate Company*, 1873, L.R., 16 Eq. 155.

At advising—

LORD PRESIDENT—I think that the Sheriff has decided this case rightly.

The characteristic feature of this contract-note is the clause declaring that each delivery shall constitute a separate contract. The effect is that if, for example, the vendor refused to deliver a monthly quantity the buyer's claim of damages would at once emerge, and his duty would be to buy against the seller the quantity of which he had been disappointed. Again, it is sufficiently plain that unless the parties agreed to a postponement of any monthly delivery or series of monthly deliveries, the one party could not enforce acceptance, or the other party demand the delivery of the belated quantity.

What happened here, however, was that as regards ten of the monthly instalments the time passed without delivery being either offered or demanded. Now, no doubt, under the contract, the duty of the seller was to tender delivery. But then the evidence shows that the reason no delivery took place was, that in the knowledge of both parties the purchaser did not want delivery. On the other hand, there was no agreement for postponed delivery. In this state of facts I agree with the Sheriff-Substitute that the parties mutually passed from and abandoned their claims for those omitted deliveries.

The only remaining question is as to the offer of 17 tons, which was made by the defenders. Now that the facts are ascertained, I think that it comes to nothing. It was made under error, and it was not truly made on the terms of the contract, for it is shown to have been on the footing of a cash payment.

I am quite satisfied with the Sheriff-Substitute's interlocutor, which seems to me accurately to state the facts and the law.

LORD ADAM—On 26th March 1890 the defenders sold to the pursuer 20 tons of paraffin wax, "to be delivered during the next twelve months in about equal monthly quantities." The pursuer received three tons of wax, and the present claim is for damages in respect of the defenders' failure to deliver the remaining 17 tons. Now, the action is brought under the contract of 26th March 1890, for the pursuer avers that "in consequence of the refusal on the part of the defenders to implement said contract he had to supply himself with 17 tons wax, the undelivered portion of his contract, in the open market, and he accordingly, about the beginning of April 1891, bought said quantity at the market price of threepence and five-eighths of a penny per pound, or fifteen thirty-seconds of a penny per pound dearer than the contract price. . . . The difference between the contract price and that paid by pursuer for said 17 tons was therefore £74, 7s. 6d., the sum sued for." Therefore the only question in the case is, whether or not there was a failure to deliver under the contract of March 1890. Now, the first clause is, as I have said, an agreement by which the defenders sold 20 tons of wax, to be delivered free in Manchester during the next twelve months in about equal monthly quantities, to be taken delivery of when tendered and paid for by cash within 14 days from date of delivery. If the obligation to sell and deliver the 20 tons had stood on these clauses only there would be a great deal to be said for the pursuer's case; but we have another clause giving a different complexion to the contract—"each delivery shall constitute a separate contract"—*i.e.*, if there was any failure in tender or delivery, then the duty of the pursuer was to go into the market and buy as against that breach. That was his duty throughout the whole twelve months. But his case is that the whole contract was one contract for 20 tons, and that demand for delivery might be made at any time within twelve months. That is not my reading of the contract, and on that short ground the pursuer must fail. The facts are shortly these—There was no tender and no complaint; the one did not desire to have it, and the other did not care to tender; and the pursuer did not go into the market to have the price ascertained. The Sheriff-Substitute has fixed the value of the last monthly delivery which the defenders wrongfully refused to deliver. We have no means of saying whether he has assessed the damages rightly or not.

LORD M'LAREN and LORD KINNEAR concurred.

The appeal was dismissed.

Counsel for Pursuer and Appellant—Vary Campbell — Younger. Agents — Wylie, Robertson, & Rankin, W.S.

Counsel for Defenders and Respondents —C. S. Dickson—M'Clure. Agents—Cairns, M'Intosh, & Morton, W.S.