Friday, March 9.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

IRELAND & SON *v.* ROSEWELL GAS COAL COMPANY, LIMITED.

Proof—Admissibility of Parole Evidence—Alleged Agreement to Alter Term in Contract Originally Verbal but Subsequently Committed to Writing—Contract.

A company of coalmasters entered into a contract with a firm of coal exporters to deliver 5500 tons of coal between 15th April and the end of August 1898, in as nearly as possible equal portions per month, shipments to be made as might be mutually arranged. The terms of this contract were originally arranged verbally, but immediately after the bargain was concluded the sellers sent to the buyers a sale-note stating in detail all the conditions of the contract, and it was never disputed by the buyers that this document correctly stated the contract between the parties as originally concluded. At the end of August the total quantity of coal which had been delivered under the contract was about 672 tons less than 5500 tons. The sellers admitted that they were bound to deliver this balance in August if demanded.

In an action of damages for breach of contract the buyers alleged and proved by parole evidence that on 16th August the sellers had agreed to deliver this balance in September in consideration of the buyers not insisting upon further deliveries in August. *Held* that it was competent to prove this alleged agreement by parole evidence upon the ground that the original contract was a verbal contract as distinguished from a contract constituted by writing.

Held also *per* Lord Young that even if there was here a written contract, the quantity to be delivered in each month was, under it, a matter for mutual arrangement between the parties, and that consequently the alleged agreement, being merely an arrangement for delivery in September of a balance admitted to have been due in August, was valid and binding upon the sellers.

This was an action at the instance of David Ireland & Son, coal exporters, Dundee, against the Rosewell Gas Coal Company, Limited, carrying on business as coalmasters at Lassodie Mill Colliery, in which the pursuers concluded for payment of the sum of £134, 8s. as damages for breach of contract alleged to be due in respect of the non-delivery of 672 tons of coal agreed to be delivered to the pursuers in September 1898.

The pursuers averred a contract for the delivery of a certain quantity of coals to them by the defenders in nearly equal portions per month between 15th April and the end of August 1898, and produced and referred to a sale-note embodying the provisions of the contract. They also averred short delivery, and a subsequent verbal agreement to deliver in September a balance of coals which should have been delivered in August.

The defence was (1) that there was in fact no agreement to deliver in September, and (2) that the alleged agreement involved a displacement or variation of a previous written agreement, and that it could therefore only be proved *scripto*.

The Lord Ordinary (KYLLACHY) before answer allowed a proof *habili modo*. Proof was led accordingly, parole evidence as to the subsequent verbal agreement being admitted under reservation of all questions as to its effect. From the proof it appeared that in March 1898 the pursuers entered into a contract with the defenders for the purchase of coals upon certain terms which it was admitted were correctly stated in a certain sale-note sent by the defenders to the pursuers immediately after the conclusion of the negotiations between the parties, and accepted by the pursuers without comment. This sale-note so far as material to the present question was as follows:—"*Quantity.*—We hereby confirm having sold to you five thousand five hundred tons of Lassodie Mill Screened Coal, to be shipped, being 15th April 1898 to end of August 1898 ensuing, in as nearly as possible equal portions per month; the shipments to be as may be mutually arranged. The contract for any quantity of which delivery is not taken within the month stipulated, may, in our option, be cancelled, but under reservation of our claim for the damages suffered. *Place of Loading.*— . . . Burntisland or Methil. . . . *Price.*— . . . Seven shillings . . . with rebate of 3d. (threepence) to Cronstadt and St Petersburg." . . .

The quantities of coal delivered under the contract and the dates of delivery were as follows:—May 5, per "Mars," 1250 tons, 18 cwt.; June 11, per "Folda," 968 tons, 18 cwt.; July 23, per "Cumbrian," 1136 tons, 9 cwt.; August 20, per "Eol," 761 tons, 9 cwt.; August 29, per "Concurrent," 710 tons, 13 cwt.

The pursuers got as much coal as they had asked for up to the beginning of August, but after that date they wanted to get more than the defenders were willing to supply. On 22nd July the pursuers asked the defenders to book the "Eol" for 1000 tons, ready Methil, 4th August. The defenders replied that they could not undertake this, and said that as they were just finishing "Cumbrian" the pursuers could not expect to get a further similar quantity so early. They offered later to give the "Eol" 400 tons. Afterwards they wrote saying that the reason why they could not supply the coals for the "Eol" was because they did not have them. On 13th August the pursuers proposed to take 250 tons of the "Eol's" quantity in the "Kurland." At this time they wanted from 1000 to 1200 tons for the "Eol." On this same day they wrote "You must

arrange to give us balance contract at once." In reply the defenders telegraphed "Cannot give any for 'Kurland' and cannot increase for 'Eol.'" On 15th August the pursuers asked the defenders to book the "Concurrent" for 800 tons, ready Methil 20th August. This was the last shipment asked for by the pursuers in August.

On 16th August Mr Ireland and the defenders' representative had an interview. The evidence as to what took place was conflicting, but the nature of what was held by the Court to have been arranged between the parties sufficiently appears from the Lord Ordinary's opinion quoted *infra*.

On 23rd August the defenders' representative, Mr Monteith, who had throughout carried on all the negotiations with the pursuers, wrote to the defenders, "Our next shipment is 700 tons *ex* Ireland's contract, which will leave 700 tons to complete this contract."

The pursuers did not intimate any claims for balances short delivered in any particular month, nor did they at any time before the end of August buy in against the contract.

In his evidence Mr Monteith deponed that all along the arrangement had been mutual between the parties as to quantities, and that the pursuers always tried to get more than the defenders were able to give. He also deponed that in his view the pursuers were entitled in the end of August 1898 to demand delivery of 680 tons of coal, but that the defenders could have supplied that amount if it had been asked for in August. He admitted that at the meeting of 16th August he indicated the defenders had difficulty in supplying coals, but explained that the position might have been different at the end of the month.

On 7th September the pursuers asked the defenders to book the "Eol" due Methil 20th-21st September for 675 tons, being the balance of the 5500 tons still undelivered. The defenders refused to execute this order upon the ground that the contract expired upon 31st August. The pursuers bought in 672 tons against the contract at 10s. 9d. per ton, and thereafter raised the present action for the difference between the contract price at 6s. 9d. per ton (being 7s. less 3d. rebate) and the buying-in price. It was admitted that assuming the pursuers to be entitled to damages for breach of contract at all the amount claimed was the proper sum due.

On 29th December 1899 the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary (KYLLACHY) having considered the cause, decerns against the defenders in terms of the conclusions of the summons: Finds the pursuers entitled to expenses," &c.

Opinion.—[*After stating the nature of the case, and his opinion upon the reliability of the evidence led by each of the parties*]—"But I require to decide whether the defenders' objection to the competency of parole evidence is well founded, and that involves two points—(1) whether what the defenders call the original agreement was an agreement in writing—that is to say (if the point is to have any relevancy), an agreement constituted by writing; (2) whether the verbal agreement on which the pursuers found involved a displacement or variation of that original agreement. There is also, perhaps, involved (3) the further question whether there is ground for the defenders' contention that a variation of a written agreement respecting the sale of moveables requires (although *ex hypothesi* well constituted) to be proved *scripto*. It is of course enough for the pursuers if any of those questions receives a negative answer. As, however, the case may go further, I shall state my view upon each.

"In the first place, the only ground on which it is said that there was here an original written agreement is that a certain contract for the sale of coals made verbally between the parties in March 1898 was 'confirmed' by a letter recording its terms addressed next day by the sellers to the purchasers. It seems to be thought that such a contract—although made verbally and not requiring writing, and as to which there was no agreement that it was to remain open until reduced to writing—is yet to be held as a written contract—that is to say, a contract constituted by writing. I must acknowledge that I am not acquainted with such a doctrine. No authority for it was cited, and unless bound by authority I cannot assent to it. It may very well be desired to preserve a written record of the terms of a verbal agreement, and a note of its terms may, by arrangement or otherwise, be furnished by one of the parties to the other. But the contract is, I apprehend, binding from the moment that it is verbally made. At least it is so unless there is an agreement otherwise, and of such agreement there is no evidence here. I therefore hold that there was here no written contract in any relevant sense of these words.

"In the next place, even if the contract of March 1898 was a written contract, I am not satisfied that the arrangement made on 16th August between Mr Ireland and Mr Monteith (the arrangement on which the pursuers found) effected or involved any displacement of the terms of the written contract. The transaction of 16th August came in substance, I think, only to this. The contract expiring in the end of August, and the pursuers desiring in August delivery of the balance of the contract quantity, the defenders, through Mr Monteith, said in effect—'Without prejudice to our contract or our respective rights under it, I undertake and agree that if you allow the contract to expire without asking further deliveries, the defenders will in the month of September deliver you on the same terms the balance of your contract quantity.' The pursuers acceded—that is to say, they allowed the contract to expire without pressing their demand, which while the contract lasted they might have made; and they now seek fulfilment of Mr Monteith's undertaking, which it is not

disputed was within his authority. In doing so, they do not, in my opinion, demand any displacement or variation of the original contract.

"As to the third point, I do not require or propose to decide anything as to the possibility of varying the terms of a written contract by a mere verbal agreement, however proved. But I am not, as at present advised, prepared to assent to the proposition that a verbal agreement relating to the sale of moveables followed by *rei interventus* requires to be proved *scripto*, even where it involves a displacement or variation of an existing written agreement. A verbal agreement, even where it relates to moveables, may require *rei interventus* to make it effectual—that is to say, to bar *locus pœnitentiæ*. But the mode of proof of the agreement is, in my opinion, a different matter, and that is the point to which the defenders' plea-in-law is directed.

"I am therefore of opinion that the parole evidence of what passed on 16th August was competent evidence, and that the pursuers have proved their case, and are entitled to decree in terms of the summons."

The defenders reclaimed, and argued—An agreement to alter a written contract could only be proved *scripto*, or by proof of facts and circumstances which necessarily implied acquiescence in the alterations alleged — *Sutherland* v. *Montrose Shipbuilding Company*, February 3, 1860, 22 D. 665; *Kirkpatrick* v. *Allanshaw Coal Company*, December 17, 1880, 8 R. 327; *Bargaddie Coal Company* v. *Wark*, March 15, 1859, 3 Macq. 467; *Carron Company* v. *Henderson's Trustees*, July 15, 1896, 23 R. 1042. The contract here was in writing. There was no evidence of a previous verbal contract. In his condescendence the pursuer founded upon the sale-note as a written contract, and did not aver any previous verbal contract. But apart from this, as regards the present question, there was no justification for the distinction taken by the Lord Ordinary between the contract and the evidence of the contract. When a contract originally verbal was afterwards embodied in writing, the rule with regard to proof of alleged alterations applied. The ratio of the rule was that better evidence was not to be contradicted by worse —Dickson on Evidence, section 1015. In this view it made no difference whether there was a previous verbal contract or not. In almost all cases there was first of all a verbal agreement between the parties, and if the reasoning of the Lord Ordinary was sound, then in the case of nearly all contracts relating to moveables the rule would not apply unless there was a special agreement that the contract should be reduced to writing. This was certainly not the law. On the contrary, the rule was that when there was a written document embodying all the terms of the contract that was the contract, and it did not matter whether there was a previous verbal agreement or not—*Clark* v. *Clark's Trustees*, November 30, 1860, 23 D. 74. In this case the defenders at the date of the alleged alteration were under no obligation to deliver any more coal. Under such a contract as the present the defenders were only bound to supply coals when they were asked to do so, and when a ship was provided to take them, and they were not bound to make up short deliveries in one month by delivering more than the proper monthly quantity in a subsequent month —*Ireland & Son* v. *Merryton Coal Company*, July 13, 1894, 21 R. 989. Formal cancellation of the contract as regards the amount short delivered in any one month was not necessary. The defenders delivered all the coal that was demanded of them up to the end of July. In August they delivered more than the proper monthly quantity. There was therefore no reason here for their having agreed to the alleged extension of time. The facts and circumstances in this case therefore, rather than otherwise, led to the inference that no such alteration upon the contract as was alleged had been agreed to by the defenders. No doubt the pursuers might have proved a verbal agreement upon 16th August to supply coals in September upon the same terms as expressed in the written contract, but this was not the case averred by the pursuers upon record.

The argument for the pursuers and respondents sufficiently appears from the opinions of the judges. They pointed out that the sellers had not exercised their option of cancelling the contract as regards any quantity not taken within the month stipulated, and that they admitted their objection to deliver the whole balance of 680 tons in August.

LORD JUSTICE-CLERK—I think the contract here was made verbally. One of the parties thought proper to express the terms of the contract in writing, and apparently he did so correctly, because the other party took no objection, but the contract was a parole contract and therefore the rules as to adding to or modifying written contracts do not apply.

The question then comes to be, whether this parole contract was innovated upon by a subsequent parole agreement. That is a question of fact, and upon that question of fact I agree with the Lord Ordinary.

LORD YOUNG—I agree that this is a parole contract. But even if it were not I would have arrived at the same conclusion. The shipments here were to be as mutually arranged, and throughout there were negotiations as to the quantities to be delivered at any particular time. Mr Monteith's own evidence is to the effect that the pursuers were always trying to get more than the defenders were able to give, and that throughout there had been mutual arrangements between the parties as to the quantities to be delivered in each month. All along it was a matter of arrangement. In August the sellers delivered a small quantity more than they were bound to deliver in that month, if it were not the case that they had arranged to make up the deficiencies in the previous

deliveries. But apparently that was the arrangement, for when Mr Monteith is asked this question, "(Q) In the end of August 1898 what was your view as to the balance which they (that is, the buyers) were entitled to demand under the contract?" his answer is, "(A) 680 tons." In August it was still, as Monteith himself says, a matter of mutual arrangement, and the arrangement entered into then was that the buyers were not to insist strictly upon their rights to delivery in August if they got delivery in September. If the case here had been that the sellers were endeavouring to enforce this arrangement, and had tendered the shortage in September, it would have been absurd to say that the buyers were not bound to take it because they should have taken delivery in August. To say that that would have been the result of the original contract, even taking it to have been a written contract, in my humble opinion appears to be extravagant. It does not matter whether the original contract was written or verbal. The pursuers are entitled to say, if you do not fulfil our arrangement as to delivery in September, then you must pay damages for your failure to deliver in August.

On the whole matter I think that the Lord Ordinary arrived at the right conclusion, and that his interlocutor should be affirmed.

LORD TRAYNER — The contract here, which was a verbal contract as distinguished from a contract constituted by writing, was entered into in March 1898. Under this contract the defenders were bound to deliver a certain quantity of coal in as nearly as possible equal quantities per month. The meaning and effect of such a contract was the subject of decision in the case of *Ireland & Son* v. *Merryton Coal Company*, 21 R. 989, and that case must be followed so far as applicable. Upon this contract before us certain monthly deliveries were made. It appears from the statement of the pursuers that in some months there were full deliveries, and that in some there were not. No demand seems to have been made for larger deliveries in these months when delivery fell short of the average quantity, and in August, the last month of the contract, more was delivered than the average monthly quantity. In that month the parties had a meeting, and recognised mutually that there were some 700 tons still to be delivered under the contract. Whether the defenders were right or wrong as to their legal position when they made that admission it is needless to inquire, because they then agreed to deliver this balance of 700 tons in September, on the same terms as regards price as those set forth in the contract. That agreement they failed to fulfil, to the damage of the pursuers. For that damage the pursuers are entitled to decree, and no question is raised as to the amount of it. It is just the difference between contract price and the price paid by pursuers in the market for coal bought by them to supply the place of what the defenders had failed to deliver.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for Pursuers—Solicitor-General (Dickson, Q. C.) — M'Clure. Agents — Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Defenders—W. Campbell, Q.C.—Constable. Agents — Constable & Johnstone, W.S.

Tuesday, March 13.

SECOND DIVISION.

[Sheriff-Substitute at Edinburgh.

GREENHILL *v.* CALEDONIAN RAILWAY COMPANY.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 4—*Railway—Sub-Contractor—Work Ancillary or Incidental to Railway Business.*

A railway company charged for the conveyance of certain goods, including barrels of beer, by the railway, a through rate inclusive of all charges for delivery and collection of the goods. Certain carting contractors had a contract with the railway company whereby they were entitled to a certain portion of the through rates on goods which were collected or delivered by them and which were sent by the railway.

A lorryman in the employment of the contractors died from injuries received while transferring a barrel of beer from a lorry on the railway platform, within the railway company's goods station, to a goods train, for transmission by the railway, in pursuance of the contract between the railway company and his employers.

Held that the work in which the carter was engaged at the time of the accident was a part of the business carried on by the railway company within the meaning of the Workmen's Compensation Act 1897, sec. 4, and that compensation was payable by the company in respect of his injuries.

This was a case stated for appeal by the Sheriff-Substitute (HAMILTON) at Edinburgh in an arbitration under the Workmen's compensation Act 1897, in which Anne, David, and Marion Greenhill, respondents, claimed from the Caledonian Railway Company, appellants, the sum of £171, 12s., in respect of the death of their father James Greenhill, lorryman.

The case stated—"The deceased James Greenhill was at the time of his death a lorryman in the employment of Wordie & Company, carting contractors, Edinburgh. The appellants, who are carriers, charge a through rate for the conveyance of certain goods and, *inter alia*, of barrels of beer by their railway. This through rate is inclusive of all charges for collection and