satisfy the Lord Ordinary that in *Henderson's* case the Court must have been influenced by the specialty that the party there charged stood in the position of a judicial cautioner in a process of advocation, and that in *M'Donald's* case the alleged cautioner was, in the special circumstances which there occurred, viewed and dealt with as being in no better or more favourable a position than the principal debtor himself. The Lord Ordinary must therefore hold that the authority of Stair, Erskine, and Bell remains unaffected by the cases of *Henderson* and *M'Donald*, and that the cases of *Arnot* v. *Abernethy*, Mor. 3587; *Stewart* v. *Fisher*, Mor. 3588; *Brisbane* v. *Monteith*, ib.; *Milin* v. *Græme*, ib.; and of *Douglas* v. *Lindsay*, Mor. 8125,—which appear to be very much in point, must still be held to be governing precedents.

"If the Lord Ordinary be right so far, he thinks there can be no doubt that the defenders, Mr and Mrs Vulliamy, are now entitled to absolvitor, and that it would be imposing on them a hardship for which there is no sufficient justification to keep the present action depending over them any longer."

The pursuer appealed.

RHIND, for her, pleaded that a cautioner could not be relieved, except by a positive act of the creditor in giving time, by arrangement, and that mere delay or forbearance was not sufficient. Cases quoted—*Crichton* v. *Ranken*, 26th May 1840, 1 Robinson's App. 132; *Young* v. *Edmunds*, 6 Bingham's Rep. 84.

SHAND and MACLEAN, for Mrs Vulliamy, answered that there was no authority where the delay had been so great as in the present case.

At advising—

LORD JUSTICE-CLERK—The Lord Ordinary has dismissed this action on the ground that the principal creditor has not been discussed. I am inclined to agree with his Lordship, because I think that the proceedings in the search were collusive; but I prefer to put my judgment on another ground. I am of opinion that there is a prejudicial plea which is sufficient to dismiss the action, viz., that the cautioner is relieved from his obligation, in respect that the creditor has allowed twenty-six years to elapse without taking any steps to realise the debt; and further, that there have been transactions between the creditor and debtor which are sufficient of themselves to loose the cautioner. Even if it were made in good faith, a claim against a cautioner which is delayed for twenty-six years ought not to be sustained, not on the ground that the creditor has given the debtor time, which implies an arrangement by which the position of the debtor is improved and that of the cautioner injured, but on the ground of lapse of time. Simple delay for so long a time is sufficient to loose the cautioner. But there are statements in the record by the defender, admitted by the pursuer, which show that proceedings took place between the parties sufficient to release the cautioner. It appears that the executry-estate consisted mainly of shares in a vessel called the 'Falcon,' and it is not denied that in 1850 John Fulton Anstruther became proprietor of one-half of the ship 'Falcon,' during the lifetime of John Macfarlane, father of the pursuer. Thereafter it is alleged by the defender that John Fulton Anstruther executed a bond and vendition in security for £1500 over his share of the ship 'Falcon,' in favour of his sisters, including the mother of the pursuer, which bond was granted and received by the parties as payment and discharge of all claim at their instance against the executry-estate of Dugald Anstruther. That statement is denied in words by the pursuer, but the bond and vendition is admitted, and it is explained that the deed was granted in connection with a claim of the grantees for their shares in their father's estate, and not in the estate of their brother Dugald. I think that transaction amounts to a payment of Mrs Macfarlane's share of the executry-estate. Looking to the whole circumstances of the case, which has been in Court since 1864, I think we shall only do justice by dismissing the action, and holding that the cautioner has been liberated by the lapse of time and the actings of the parties.

LORDS COWAN, BENHOLME, and NEAVES concurred.

Defender assoilzied accordingly.

Agent for Pursuer—James Barclay, S.S.C.

Agents for Defender—J. & R. D. Ross, W.S.

Thursday, November 10.

FIRST DIVISION.

GOURLAY AND OTHERS *v.* WATT AND MACMILLAN.

Contract — Fraud — Relevancy — Issues. Circumstances in which the purchasers of a vessel were not allowed an issue in an action of damages against the sellers, except upon a relevant allegation of fraud; and there having been a contract test or criterion fixed upon, viz., that the ship should be *de facto* classed A 1 at Lloyds for a certain number of years, which test had been complied with, issue of breach of contract refused. Amendment of record allowed so as to admit a more specific allegation of fraud; and issue of fraud adjusted and approved.

In January 1869 Messrs Henry Gourlay & Company, acting for the pursuers, purchased from the defender Watt a ship named the 'Spray of the Ocean.' A sale note passed between the parties in the following terms:—"*Dumbarton, 20th January* 1869. —Messrs Henry Gourlay & Company, Glasgow.—I have this day sold you the ship 'Spray of the Ocean,' of 805 tons register, to be classed nine years A 1 at Lloyds from the date her first class expires, with sails repaired, for the sum of £5600 sterling, £2000 cash down, and balance when finished. The ship to be at our risk till out of the Leven. (Signed) WILLIAM WATT." The ship was at this time in the dry dock of Messrs A. Macmillan & Sons, Dumbarton, of which firm the defender Macmillan is a partner. The pursuers immediately paid the £2000 as agreed on. The defenders proceeded to make certain repairs in the ship, and on 15th February delivered her to the pursuers, who on 19th February paid the balance of the price, and on 25th February she was registered in the pursuers' names as owners. In March the defenders handed to Messrs Henry Gourlay & Company a certificate of character of the vessel from Lloyds, stating that she had been classed and entered in the register book of the said society with the character A 1 for nine years from 1867.

The pursuers averred that when the vessel was delivered she was in an utterly unseaworthy condition; that the defenders knew that to be the case; but nevertheless induced the pursuers to

take delivery by false and fraudulent representations that she was in a sound and seaworthy condition. This averment was substituted in the Inner House for one of collusion between the defenders and Lloyds' surveyor. They further averred that Lloyds' certificate had been issued on the report of the surveyor, after a very negligent and insufficient examination; that an examination such as is in use to be made, and such as was the duty of the surveyor to make, would have disclosed the unsound state of the ship, and that the surveyor's report was based on representations made by the defenders. The pursuers' statement proceeded—that the ship on 10th March 1869 sailed for Bombay with a cargo; that she was soon found to be unseaworthy; that she was obliged to put into Rio Janeiro in a sinking condition; that on examination her defects were found to arise from rot and decay, and that she was quite worthless, the amount of repairs required far exceeding the value of the vessel when repaired. In consequence of the loss which they had sustained by loss of voyage and uselessness of the vessel, the pursuers claimed £9000 as damages, and tendered back the ship.

The Lord Ordinary (ORMIDALE) found the pursuers' statements irrelevant, and insufficient to support the conclusions, and dismissed the action.

The pursuers reclaimed.

SOLICITOR-GENERAL, WATSON, and MACLEAN, for pursuers, argued—On a sound construction of the contract the defenders were bound to put the ship in a reasonably suitable condition. The obligation to get the ship classed A 1 at Lloyds was intended as an additional guarantee in favour of the pursuers. It was not intended that Lloyds' surveyor should be the sole arbiter of the condition of the ship. There was a contract to put the vessel in a certain condition, viz., that she should be worthy to be classed, and the pursuers are entitled to an issue on breach of contract, as well as on misrepresentation.

LORD ADVOCATE, SHAND, and ASHER, for defenders, argued—There was here a contract criterion, viz., that the defenders should *de facto* get the vessel classed. The defenders have implemented their contract, which was intended to exclude such questions as the present.

At advising—

LORD PRESIDENT—The parties by their contract appealed to a certain test, viz., that the vessel should *de facto* be classed A 1 at Lloyds, and I am of opinion that, unless the pursuers can prove fraud on the part of the defenders, they have no case. The pursuers' averments on the head of fraud, as now amended in the Inner House, are, however, relevant, and entitle them to an issue on that point.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—The present is a very peculiar case. For it is a case in which the pursuers, having purchased a ship from the defenders, and taken delivery, and paid the price, and employed the ship for several months, propose to throw her back on the hands of the sellers, and to obtain from them repayment of the price, and damages.

The case of the pursuers further exhibits this unfavourable feature, that according to the contract of sale, all that was stipulated from the sellers was, that the vessel was "to be classed nine years A 1 at Lloyds from the date her first class expires, with sails repaired." And it is not disputed that the defenders obtained the vessel to be classed A 1 at Lloyds.

I agree with the Lord Ordinary in thinking that, on the principles which govern an ordinary contract of sale, untainted by fraud, the pursuers are not entitled to the relief sought by them. But I cannot agree with him in holding that the pursuers are excluded from maintaining a case of fraud against the defenders. Undoubtedly it was contemplated between the parties that the classing at Lloyds should be taken as indicating the sufficiency of the vessel as a subject of sale. But this was plainly on the assumption (there could be no other) that this classing should proceed on the understood ascertainment of soundness and seaworthiness implied in being so classed. If to the knowledge of the pursuers the vessel did not possess such soundness and seaworthiness, and the inspection on which the classing proceeded was a mere sham, and in this knowledge the defenders fraudulently prevailed on the pursuers to take delivery of the vessel, I cannot doubt that this is a fraud against which the pursuers are entitled to be relieved. I cannot at present speculate on the extent to which the alleged fraud is or is not rendered improbable by the circumstances of the case. The averment is made, and made I think in terms sufficiently specific and relevant.

I am of opinion that the pursuers are entitled to an issue to prove such a case, but to no other issue.

Accordingly an issue for the pursuers was framed, and approved of in the following terms:—

"It being admitted that by contract dated 20th January 1869 the defenders sold to the pursuers the ship 'Spray of the Ocean,' 805 tons register, to be classed nine years A 1 at Lloyds from the date her first class expires, at the price of £5600;

"It being farther admitted that the said vessel was classed A 1 at Lloyds for nine years following on the expiry of her former first class, and that a certificate of such classification was delivered by the defenders to the pursuers;

"Whether the defenders, on or about 15th February 1869, well knowing that the said vessel was not in such a condition of repair and seaworthiness as to be fit to be classed A 1 for nine years at Lloyds, fraudulently induced the pursuers to take delivery of the said vessel as in implement of the said contract, to the loss, injury, and damage of the pursuers."

Damages laid at £9000 sterling.

Agents for Pursuers—Messrs J. & R. D. Ross, W.S.

Agent for Defenders — Mr James Webster, S.S.C.

Thursday, November 10.

COWIE'S TRUSTEES *v.* THE AIRDRIE MINERAL OIL COMPANY (LIMITED).

Jury Trial—Motion for New Trial—Circumstances under which a new Trial was refused, the judgment being held not contrary to evidence, and the damages not excessive. The correspondence between the parties showed that the defenders had during the existence of a contract made one objection, in which they were held totally wrong by the arbiter, to whom the matter was referred. At the trial they attempted to set up, as a defence, quite another objection, the same in kind, but different specifically. The fact weighed strongly with the Court in refusing a new trial.