scheme; and therefore, that the minister was entitled to decree in terms of the conclusions of his summons.

Agents for Pursuer—M'Ewen & Carment, W.S.
Agent for Defender—Anthony Murray, W.S.

Thursday, February 25.

FIRST DIVISION.

PEARCE BROTHERS *v.* IRONS.

Sale—Machinery—Obligation to replace imperfect Machinery—Bar. A pinion furnished by machine-makers along with other machinery worked badly for twelve months, the furnishers making repeated attempts to remedy the defects, and then broke, the price being by this time paid. A new pinion was put up by the furnishers. *Held* that the purchaser was not liable for the expense of putting up the new pinion, the former one having broken through defects for which the furnishers were liable, and that his non-liability was not affected by his having already paid the price.

Interlocutor — Consent — Remit — Proof. Circumstances in which an interlocutor remitting to a reporter was held to be "of consent," though not expressly so stated, and the parties held barred from objecting in an advocation to the mode of proof thereby fixed.

The pursuers, who are engineers in Dundee, sued the defender, who is a millowner there, for the price of certain machinery furnished to him. The defender objected to a charge of £97, 18s. 8d. for work and materials in putting in a new pinion in connection with an engine, and maintained that, as the old pinion which it replaced, and which had been furnished fourteen months before by the pursuers, had been defective and not suitable for its purpose, the pursuers were bound to furnish the new pinion at their own cost.

The Sheriff-substitute (GUTHRIE SMITH), after various procedure, remitted to a man of skill to report as to the sufficiency of the first pinion, and, upon advising the report returned, found for the defender. The Sheriff (HERIOT), upon appeal, adhered. The pursuers now advocated, pleading as an additional plea that the report of the man of skill was incompetent, as proceeding, not on his own examination and opinion as a man of skill, but on evidence, and that the interlocutor remitting to him was also incompetent, in so far as it authorised the taking of evidence. It was also pleaded that the defender, having accepted the original machinery as sufficient, was barred from pleading its insufficiency.

CLARK and BALFOUR for advocators.

GORDON and LANCASTER for respondent.

At advising—

LORD PRESIDENT—This question raises several questions which are not unimportant. The connection between the parties commenced with an order to Pearce Brothers in September 1864 by the respondent for a 40-horse power horizontal condensing engine. The engine, machinery, and gearing are otherwise more fully described in a letter of 14th September, in which the pursuers undertook to furnish the respondent with the required machinery for £800, to be paid in three bills —one at two months, for £280; one at four months, for £200; and one at six months, for £300—all from this date. It would appear that there was some alteration of the terms of that contract afterwards; and although we do not see the details of that alteration, the result is apparent, because the total claim by the pursuers was £756, and instead of bills in terms of the original contract, there was but one bill for £400, due on 4th July. That left unsettled a balance claimed by Pearce Brothers of £356, 5s. 9d. In the meantime the engine had been put up and was working, but not very satisfactorily. I think the view given by the respondent's counsel of the relation of the parties at this time is correct. This is not a case of goods sold and delivered. When a man buys goods and takes delivery of them, and pays for them, there is an end of all controversy. For since he takes the goods he cannot afterwards raise the question as to the fulfilment of the contract, unless there is some latent imperfection, which does not disclose itself. But in furnishing machinery these principles do not apply. No one can tell whether machinery is according to contract, or is put up in an efficient way, until it is tried, and that can only be done on the premises; and accordingly, often after machinery is put up in a work it goes well for a while, and then it shows imperfections, which the furnisher of the machinery is clearly bound to remedy. Therefore it rather appears that, when the machinery was put up, it was to be the subject of study for some time to see if it would answer its purpose. Now, it was not working satisfactorily. It was working roughly, which is a great objection to any machinery, and is often the cause of great danger. Considerable pains were taken by the pursuers to put it right, and this was going on in the spring of 1866. Now it is in these circumstances that, on 19th June, Pearce Brothers write to the respondent and remind him that there is a large balance of the contract price unpaid. They say,—"Would you allow us to draw on you for £350 to act. of that £356, 5s. 9d. still standing over between us; by doing so you would confer a favour, as lying out of this money such a lengthened time puts us to considerable inconvenience; time slips by so quickly that you will no doubt be surprised when we remind you that it is seven months since we started your engine and completed the gearing, which latter delayed the start a long time, as Mr Kerr refused to undertake it at the last moment; the account for this gearing, and the piping, &c., &c., of engine, was not sent in to you till three months after the start, and now, at the expiry of four months from the rendering the account, we trust you will excuse us in applying for a settlement,—We are, &c." This leads to some correspondence, of which the result is that, after a dispute as to some deductions not affecting the present question, the parties come to an understanding on 14th July, that the balance payable to the pursuers is £271, 9s. 8d., and the respondent gives a bill for that amount at four months. The question is, whether, by granting that bill, and retiring it when it fell due, the respondent has barred himself from the plea which he is now maintaining? It appears to me that the respondent had only one alternative on 14th July. He must either pay, or go at once into Court and challenge the due performance of the contract, and refuse to pay because the contract was not performed. I can quite understand that he did not feel in a position to do that. The engine was still working badly, and the pursuers were still doing what they could to improve it, and it was likely

that matters would go on for some time in that way. After that the engine goes on till February, and then the pinion breaks. No doubt that was known all along to be the cause of the roughness, but when the breakage occurs, the contention is that the payment of the balance of the contract price in July previous bars Irons from going to the machine makers, and saying, "There is proof of the imperfection of your work, which is now beyond all doubt; and, of course, you are bound to replace it." I cannot entertain the proposition that Irons, in these circumstances, was barred from maintaining that plea. He was quite entitled so to say to the machine makers. In point of fact, Pearce Brothers were called on to come and make the necessary repairs, nothing being said as to who was to pay for them. But then, afterwards, Pearce Brothers bring this action, making a claim, among other othings, for £97, as the expense of putting in a new pinion, and the question is, Are they entitled to recover that amount? They are entitled to recover it if the breakage of the old pinion was no fault of theirs; but if it be the case that it broke in pieces in consequence of insufficiency and malconstruction, I think they are bound to replace it. That question was before the Sheriff-substitute, and he thought, not unnaturally, that that was a question for a remit to a man of skill. No doubt the man of skill must go, and not merely use his eyes, but obtain information as to the history of the contract of which he is to judge. A remit to a man of skill, with the expectation that he is to do nothing but look at the machinery, and then report, is a wild suggestion; and any one could have seen from the interlocutor of the Sheriff-substitute that he did not expect anything of this kind. The questions he called on the man of skill to answer required some investigation. These questions are,—(1) "Whether the engine and gearing furnished by the pursuers to the defender, in implement of their letter of 14th September 1864, No. 10 of process, were reasonably sufficient? (2) Whether any of the furnishings charged in the account sued for were rendered necessary in consequence of the engine and gearing as originally furnished being so faulty and defective as to be disconform to contract? and (3) Whether the furnishings contained in the account sued for, in so far as the same are objected to by the defender, are reasonably sufficient and fairly charged?"

The reporter seems to have gone about his work in a reasonable and sensible way, considering the matter on which he was to report. Then he reports,—"(1) That the engine and gearing furnished by the pursuers to the defender, in implement of their letter of 14th September 1864, No. 10 of process, were reasonably sufficient. "(2) That the first motion pinion, gearing into and driven by the cogged fly-wheel of engine, (which was not included in the above contract or tender), was furnished by the pursuers to the defender on his order; that it was noisy, rough, and unsatisfactory in working; that it subsequently broke in February 1867, after having driven the mill for about fourteen months. That no other cause has been shown for the breakage except said rough working, which, in the opinion of the reporter, was sufficient to account for it. There is no evidence of the existence of any original 'flaw,' as suggested by the defender, in the first pinion; it was of sufficient strength, fairly proportioned, and cast of good metal. The defect lay in its being too large in diameter, and consequently a slight degree too large in 'pitch.'"

But it is said that he could not have ascertained all that as matter of fact without taking evidence. This depends on the meaning you attach to the word evidence, and I don't think he could have found all that out without calling the parties before him, and hearing them on the matter. I think an opinion so formed is entitled to all weight. There is no reason for attaching to it anything but the weight due to the opinion of a man of skill, merely because he got all the information he could from other parties. I think the report on these two heads is a very satisfactory answer to the questions put to the reporter. But the pursuers say that this is unsatisfactory, because there are averments on record which have not been remitted to probation, and we are now asked to throw aside the report and allow a proof on the questions on which the liability depends. To take that course would, I think, be contrary to a whole series of precedents. I hold this remit to have been "of consent," in the same sense as in any other case. The interlocutor of the Sheriff-substitute does not bear to be expressly of consent—that is, it does not bear it in so many words; but whether it might or might not be desirable that these words should be in the interlocutor when the remit is of consent, it is settled that the want of these words is not decisive, and, if the question arises, the answer may be gathered from the other circumstances of the case. The Sheriff-substitute put his interlocutor in an unusual form, apparently for the purpose of showing that he was fixing by the finding what was the nature of the proof, for he says,—"The Sheriff-substitute having heard parties' procurators on the closed record, revives the action; Finds that, before answer, it will be proper to obtain a report from a skilled person on the following points."—"Before answer," no doubt, but not before answer as to the mode of proof—merely before answer as to the pleas of parties. If the pursuers disapproved of this mode of proof, they might have appealed to the Sheriff, and asked some other mode of proof; but they don't do that. Or they might have advocated at this stage on that very question; but they do not do that either. On the contrary, they go before the reporter and explain the case to him, and argue it before the Sheriff-substitute. They appeal to the Sheriff, and still nothing is said against the propriety of this mode of proof. It is only here, for the first time, that they raise the question whether they are not entitled to lay aside that report and have a proof at large? I cannot consent to that. The result of the report is that the pinion broke in consequence of being unfit in point of construction, and I think the pursuers are alone responsible for that. The customer relies on the skill of the engine-makers, and if they furnish a motion pinion which is too large in diameter and pitch, and if the consequence is that it breaks, I cannot see any ground on which we can hold them not to be liable. Therefore I come substantially to the conclusion of the Sheriff and Sheriff-substitute; but I cannot affirm that part of the Sheriff-substitute's interlocutor which finds that the new pinion is as bad as the old, for that question does not enter the pleadings.

The other Judges concurred.

Agents for Pursuers—Maclachlan & Rodger, W.S.

Agents for Defenders—Lindsay & Paterson, W.S.