whole work at the hatch. But he had also to work himself. His duties are described by one of the witnesses, a witness for the pursuer himself, thus—[*His Lordship read Farrell's evidence, ut supra*].

Accordingly, another stevedore who is examined, speaks of such a man as "both a labourer and a foreman." The description given by the particular man in question in this case—Thomas Murray—gives practically the same account of his duties and work, adding that when goods are to be put on a truck he assists at that if they are heavy—a thing which another witness, who does the same work, describes as "part of his duty," to help to load the stuff into the truck.

Such being the nature of the hatch-mouth man's employment, I am unable to hold that he was a superintendent for whom the defenders are responsible. I think he is shown to have been a man who had ordinarily to work himself, while at the same time looking after others, as distinguished from a man whose sole or principal duty is to superintend others, not being ordinarily engaged in manual labour.

I am therefore of opinion that the decision of the Sheriff was right and ought to be adhered to.

LORD YOUNG—I agree with the Sheriff-Substitute. I think it is clearly established that Murray was entrusted with superintendence, and that in the very matter which is proved to have led to the accident. I think further that this accident would not have happened if the girder had been properly slung. It was Murray's duty to see that it was properly slung, and I think it was substantially his sole and certainly his principal duty. It is said that Murray took the chain, carried it to the quay, and attached it to the sling. I agree with the Sheriff-Substitute that this was a very subsidiary part of his work, and that his principal duty was to superintend the men who were working under his instructions. I am not surprised that the Sheriff reached a different conclusion with regret—a conclusion which allows the employer, who from economy had not provided a sufficient staff, to escape liability.

LORD TRAYNER—I agree with the Sheriff. I think the man Murray was not a person who had superintendence entrusted to him within the meaning of the Act. On the contrary, he was a man ordinarily engaged in manual labour, and was engaged to perform and did perform manual labour at the very work in the course of which the pursuer was injured.

LORD MONCREIFF concurred with the Lord Justice-Clerk and Lord Trayner.

The Court dismissed the appeal, found in terms of the Sheriff's interlocutor of 12th June 1900, and assoilzied the defenders.

Counsel for the Pursuer and Appellant—Orr—Munro. Agents—Patrick & James, S.S.C.

Counsel for the Defenders and Respondents—Salvesen, Q.C.—M'Clure. Agents—Simpson & Marwick, W.S.

Thursday, November 22.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MATTHEW PAUL & COMPANY, LIMITED *v.* CORPORATION OF GLASGOW.

Sale—Sale of Moveables—Offer and Acceptance—Warranty—Express Warranty—Correspondence—Warranty in Advertising Circular not Imported into Contract—Implied Warranty—Patented Apparatus—Sale of Goods Act 1893 (56 *and* 57 *Vict c.* 71), *sec.* 14 (1).

On 9th March 1897 a company, who were the sole licensees and makers of an apparatus called "Paterson's Smoke Preventing Suction Draught for Land and Marine Boilers," wrote to the Engineer of the Corporation of Glasgow, that as they understood the Corporation had under way a number of new boiler installations for city institutions, they enclosed a descriptive circular of the "Paterson's" apparatus, and directed their attention to the combination under the system of a means both for greatly increasing the boiler capacity "and for largely reducing or entirely preventing smoke." The circular enclosed set forth as one of the advantages of the apparatus "absolute prevention of smoke," and in the general description stated—"The smoke prevention is absolute."

After certain correspondence the makers of the apparatus, by letter dated 8th Febuary 1898, offered to make an installation at one of the city wash-houses for a certain sum. By letter dated 1st March 1898 the Corporation Treasurer, under reference to the makers' letter of 8th Febuary, and to two other letters written by them in January 1898, intimated acceptance of their "offer contained in these letters" to supply and erect "an installation of Paterson's Suction Draught" at the wash-house in question. In none of these letters was there any reference to the letter of 9th March 1897 or the circular enclosed therewith, or to the prevention of smoke. The installation of the apparatus was thereafter made, but the Corporation ultimately rejected it, caused it to be removed, and refused to pay for it.

In an action for payment of the contract price, the only defence stated was that the pursuers had warranted that the apparatus would secure the absolute prevention of smoke, and that it had totally failed to do so.

The Lord Ordinary (Kincairney) having allowed a proof, the pursuers reclaimed, and renounced probation.

Held (*diss.* Lord Young) that proof was unnecessary, and that the pursuers were entitled to decree for the sum sued for, in respect (1) that, the contract here being for the supply of a specified article under its patent or trade name,

in terms of the Sale of Goods Act 1893 section 14 (1) there was no implied warranty as to its fitness for any particular purpose; and (2) that even assuming the circular enclosed with the letter of 9th March 1897 to have contained expressions which might have amounted to an express warranty with regard to the prevention of smoke, that circular had not been made part of, or imported by reference into the contract between the parties.

Opinion (*per* Lord Moncreiff) that the circular itself did not contain a warranty.

This was an action at the instance of Matthew Paul & Company, Limited, Levenford Works, Dumbarton, against the Corporation of the city of Glasgow, concluding for payment of £400, being the sum due to the pursuers for making an installation of a Patterson's Smoke-Preventing Suction Draught Apparatus at the defenders' Kennedy Street wash-house.

The pursuers averred that they were the sole licencees and makers of "Patterson's Smoke-Preventing Suction Draught for Land and Marine Boilers;" that this was the well-known trade name of a specific process designed for adaptation to boilers for the purpose of effecting increased power with a saving of fuel and the prevention of smoke; that the apparatus was one in which, by the use of a fan in the main flue leading from the boiler to the chimney, the intensity of the draught and steam production were regulated according to the speed of the fan; that on 9th March 1897 the pursuers wrote to Mr A. B. Macdonald, the defenders' engineer, as follows — "We understand that the Glasgow Corporation have at present under way a number of new boiler installations for city institutions, and we enclose herewith a descriptive circular of Patterson's Suction Draught arrangement, which you may find of interest at the present time. We would direct your attention specially to the combinations under this system of a means both for greatly increasing the boiler capacity, and for largely reducing or entirely preventing smoke, which, so far as we are aware, is not done jointly in any other system. . . . On hearing from you we shall be glad to submit a proposal for any of the installations you have at present in progress." The circular referred to contained the following words—"Advantages. For Land Boilers." . . . 4. Absolute prevention of smoke. . . . General Description. . . . The smoke prevention is absolute, and is obtained by a proper arrangement of air admission, which in no way complicates the furnace fittings, together with the washing of the gases by the water spray as they pass through the fan."

The pursuers further averred that, after certain members of the Baths and Washhouses Committee and certain of the defenders' officials had visited the pursuers' works and seen the Patterson apparatus in operation, certain correspondence passed between the parties with regard to proposed installations in wash-houses at Stobcross and Bain Square, which in the end were not proceeded with, and in particular two letters from the pursuers dated respectively 14th and 25th January 1898 regarding the size of the fans required to do the work as described, the amount of work to be done by the pursuers and the Corporation respectively in connection with the installations, and the price to be paid for them; that on 3rd February 1898 the pursuers received from Mr Macdonald a letter requesting them to submit sketches for an installation of the apparatus at a wash-house in Kennedy Street; that on 8th February 1898 the pursuers accordingly made an offer by letter for the said installation, in which, *inter alia*, they said—"Our price for this installation will be the same as for the other, viz., £370, and an iron chimney 30 feet high and 2 feet 6 inches diameter will cost about £30 additional;" that on 1st March 1898 the Corporation Treasurer wrote to the pursuers a letter in the following terms:—"Dear Sirs,—Having regard to your letters addressed to Mr A. B. M'Donald, City Engineer, of date, 14th January, 25th January, and 8th February, with relative tracings, I beg, on behalf of the Corporation Police Department, to intimate their acceptance of your offer contained in these letters to supply and erect at the Kennedy Street wash-house an installation of Patterson's Suction Draught, with 60-inch fan, engines, iron chimney, &c., all as specified, for the sum of four hundred pounds sterling (£400)." None of these letters contained any reference to the letter of 9th March 1897 or the circular enclosed therewith, or to the prevention of smoke.

The pursuers also averred that no warranty as to the results to be obtained by the apparatus was either asked or given, and that the defenders relied on the technical skill of their engineer, and on the knowledge of the members of committee who had seen the apparatus in operation; that the pursuers proceeded with the fitting up of their apparatus at the Kennedy Street wash-house, and completed it on 9th February 1899; that when erected it was in every respect conform to contract, and in all material respects similar to the apparatus which the defenders' committee saw in operation before the said contract was made, but that after repeated demands the defenders, by letter dated 30th January 1900, refused to make payment of the contract price.

The pursuers pleaded, *inter alia*—"(2) The pursuers having supplied to the defenders the apparatus as contracted for are entitled to payment of the price. (4) *Separatim*, the apparatus in question having been sold to the defenders without any warranty, the defenders took the risk of its fitness for the purposes to which it was put. (5) The apparatus in question being a specified article, sold under its patent or other trade-name, there was no implied condition as to its fitness for any particular purpose. (7) The defences are irrelevant."

The defenders denied that no warranty as to results had been given by the pursuers, and also that the apparatus as erected was conform to contract, and made reference to their statement of facts. They referred to the correspondence and the pursuers' circular for their terms, and admitted that they refused to make payment. In a separate statement of facts they averred as follows:—"(Stat. 1) The pursuers in their said circular claimed as one of the advantages to be derived from the application of their apparatus to land boilers, and warranted the 'absolute prevention of smoke' coupled with a 'large reduction in cost of chimney.' The said circular contains the following warranty:—'The smoke-prevention is absolute, and is obtained by a proper arrangement of air admission, which in no way complicates the furnace fittings, together with the washing of the gases by the water-spray as they pass through the fan.' (Stat. 2) Relying on the statements and warranty contained in the said circular, and in order to obviate the erection of a large brick chimney stalk, the defenders ordered an installation of the Patterson apparatus for the Kennedy Street wash-house, which after great delay and many remonstrances from the defenders thereat the pursuers erected. The fan was to be delivered in the end of May 1898, but it was not delivered till seven months afterwards, and the pursuers did not complete the erection of the apparatus until the last week of March 1899. After frequent trials the fan was found to be a failure, but the pursuers informed the defenders in September 1899 that it was only a temporary one, and that they had now put a copper fan in hands. . . . The defenders intimated to the pursuers by letter of 13th September that the buildings were ready for the erection of the apparatus. (Stat. 3) When the apparatus came to be tried it was found that it did not prevent smoke. On the contrary, black smoke issued on all occasions in great quantities through the chimney from the boiler, alike when the apparatus was worked (as it frequently was) by or in presence of the pursuers' men and by the defenders' men. (Stat. 4) On this coming to the knowledge of the pursuers, they on 1st April 1899 wrote to Mr Macdonald stating 'that it would be necessary to give more air admission over the bars either by leaving the door slightly open, or by providing new doors with bigger openings for air supply through them, or by perforating the fronts above the door.' The pursuers by said letter undertook 'that with a sufficient air supply over the bars the smoke will be absolutely prevented.' (Stat. 5) The defenders agreed to allow the pursuers to make the necessary alterations on the furnace front for the admission of air, and the pursuers accordingly had new perforated furnace doors made and fitted. (Stat. 6) On the apparatus being again tested after the alterations of the furnace doors, the apparatus was still found not to be able to pervent smoke. (Stat. 7) Thereafter the pursuers made repeated attempts by bricking over the back length of the boiler bars so as to reduce the grate area, by substituting a copper fan for the original one supplied, which they stated had been only a temporary one, and otherwise, to make the apparatus conform to their warranty. These attempts, however, entirely failed. (Stat. 8) On 2nd December 1899, on the failure of the attempts by the pursuers, the defenders wrote to the pursuers giving them an opportunity of putting the apparatus to their satisfaction within ten days. The pursuers did not avail themselves of this opportunity, and after some correspondence, and after the pursuers' workmen had vainly attempted to work the engine successfully themselves, the defenders, on or about 30th December 1899, rejected the said apparatus as not being conform to warranty, and thereafter caused it to be removed." . . .

The defenders pleaded, *inter alia*—"(2) The pursuers' averments, so far as material, being unfounded in fact, the defenders ought to be assoilzied with expenses. (3) The apparatus supplied by the pursuers to the defenders being disconform to warranty, and having been rejected by the defenders, the defenders ought to be assoilzied with expenses."

The Sale of Goods Act 1893 (56 and 57 Vict. c. 71), enacts as follows:—Section 14—"Subject to the provisions of this Act, and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:—(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the sellers' skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an impled condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade-name, there is no implied condition as to its fitness for any particular purpose."

On 10th July 1900 the Lord Ordinary (KINCAIRNEY) before answer allowed the parties a proof of their respective averments on record, and to the pursuer a conjunct probation.

The pursuers reclaimed. During the debate they renounced probation.

Argued for the pursuers and reclaimers —The only question raised by the defence as stated on record was, whether or not the pursuers had warranted that the apparatus erected by them would absolutely prevent smoke. There could be no implied guarantee in a case like this, because in terms of the Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sec. 14, sub-sec. (1), in the case of a contract for the sale of a specified article under its patent name there was no implied condition as to its fitness for any particular purpose. This enactment only applied the common law rule, that where the buyer could judge of the article for

himself, he did not need to rely on the seller's skill or knowledge—*Chanter* v. *Hopkins*, 1838, 4 M. & W., 399: *Rowan* v. *Coats Iron & Steel Company*, January 6, 1885, 12 R. 395. The question therefore resolved itself into this, had the pursuers ever given an express guarantee that this apparatus would absolutely prevent smoke? Whether they did so or not could be judged of from the correspondence, all of which was in process. There were no averments on record of anything said or done at any interview between the parties which would modify the contract. There was thus no necessity for a proof, all the material for deciding the case was already before the Court. The circular sent to the pursuers on 9th March 1897 was a "puff" or advertisement in glowing terms descriptive of the patent, and was not a warranty at all, but merely a representation. Even if the terms of the circular constituted a warranty, these had never been imported into the contract. The letters constituting the contract made no reference to the circular or the letter enclosing it, and were all written nine months after the sending of the circular. In such circumstances it was plain that the defenders had given no express guarantee—*Hopkins* v. *Tanqueray*, 1854, 23 L.J. C.P. 162; *Chalmers* v. *Harding*, 1868, 17 L.T. (N.S.) 571; *Malcolm* v. *Cross*, June 9, 1898, 25 R. 1089.

Argued for the defenders and respondents—It would be unsafe to decide the case without proof being led as ordered by the Lord Ordinary. All the cases cited were decided after a proof. Their case was, that the warranty in the circular had been undertaken by the pursuers in the contract, and this would be shown by proof of what passed at interviews between the parties, and by the terms of the correspondence. If the article were patented, there might be no implied warranty, but that did not affect the question of express warranty, which was a question of fact on which proof should be led—*Prideaux* v. *M'Murray*, 1860, 2 F. & F., 225. Their position was, that they relied on the circular sent them on 9th March 1897 by the pursuer, and that the warranty therein had been imported into the contract. This would be brought out by the proof. The Lord Ordinary's interlocutor should be affirmed.

LORD JUSTICE-CLERK—The pursuers sue the defenders for the price of a smoke-prevention apparatus supplied on the defenders' order. It is not contended that the apparatus supplied was not the apparatus which was ordered by the defenders. Their own statement is that they ordered the apparatus to be installed at the defenders' premises, "relying on the statements and warranty" contained in a circular which had been sent to them by the pursuers. They nowhere state that the apparatus supplied was not the apparatus described in the circular, nor do they deny the pursuers' statement that it was. Practically the defence is that the pursuers gave a warranty that by the apparatus "the smoke prevention is absolute." The order and the supply of the article ordered not being denied, the question is narrowed down to this point, whether the defenders have upon record any statements relevant to be remitted to probation for the purpose of proving that the pursuers gave a warranty which they have failed to make good. Now, the only warranty alleged is that already referred to, namely, the trade circular containing the statement above quoted. But the fact is stated and not denied that that circular was sent to the defenders not at the time of the bargain of sale, but many months before any negotiations for a sale took place between the parties. It was sent on 9th March 1897, and no communication took place between the parties until 27th December of the same year. It is thus plain that the circular was sent as an advertising circular only, stating that the pursuers had an article to sell of which they expressed a high opinion as to its efficiency for the purpose for which it was intended. I am unable to see how the sending of that circular in the spring of 1897 can be held to be a warranty in regard to a sale of a specific article (which did not take place till January 1898) by offer and acceptance in which no allusion is made to any statement regarding the efficiency of the apparatus contained in the trade circular. It was frankly admitted by Mr Lees in his argument that if the letters of contract did not embody the circular there was no warranty upon which he could support his case. Being of opinion, as I have already said, that the circular cannot be connected with the letters so as to make it part of the contract, even assuming what was contained in the circular might constitute a warranty, I must hold that the defenders have no relevant defence to the demand that, having purchased a specified article they should pay the price. I see no ground for allowing the defenders a proof, nor what averment they have made which, if they could prove it, would be an answer to the pursuers' case, and therefore I would move your Lordships to recal the Lord Ordinary's interlocutor and to grant decree.

LORD YOUNG—I differ entirely from the opinion which your Lordship has expressed, and I agree with the judgment of the Lord Ordinary—that we cannot decide this case without evidence. I am not of opinion, looking to the record, that the pursuers' case that they put up the apparatus in question according to contract is admitted by the defenders. I think that, so far from being admitted, is very distinctly denied. I do not think it is the purchase of a specific article—such as going into a shop and buying an article which you see, or purchasing a horse, or anything of that kind, where you must look at the thing for yourself and take it or not as you please, but without warranty, unless something passes which constitutes a warranty. I think the contract here was that the apparatus should be constructed and modified and put up so as to answer the purpose which the pursuers here were distinctly

informed the purchasers had in view. Now, it is averred distinctly that what was done was not according to contract. A long correspondence has been produced here, all of which I do not doubt may be referred to in evidence, but we cannot decide the case upon the evidence thereby afforded, unless the parties renounce probation, which they have not both done. My present impression is, that if both parties were to renounce probation we should have to decide the case against the pursuers, for I think there is nothing on record, and nothing of the nature of written testimony, which would entitle them to judgment upon the footing that their case was admitted. But probation is not renounced, and the defenders desire to have evidence of what they state upon record—that this apparatus was not according to contract. No doubt the word warranty is used in the plea-in-law—"The apparatus supplied by the pursuers to the defenders being disconform to warranty, and having been rejected by the defenders, the defenders ought to be assoilzied, with expenses." Now, in the ordinary case—indeed in every case—the seller warrants that the article furnished shall be according to contract. I take the whole evidence here to be that it was according to the contract between the parties that the apparatus should be constructed for the defenders with such modifications as were necessary, and should be put in their premises so as to accomplish the end which it is stated they had in view, and which it is averred was well known to the pursuers. That being the contract, I hold distinctly in point of law that there is a warranty by the sellers here that the apparatus should be according to contract. It is impossible, in my humble opinion, to look at the record here without seeing that the parties are very much at variance upon matter of fact. Take condescendence 3—the pursuers say, "In response to inquiries made by the pursuers, Mr Macdonald, in letters dated 30th December 1897 and 4th January 1898 respectively, informed the pursuers, *inter alia*, that the Cornish boilers would burn '45 tons breeze' per month of 248 working hours, and the Babcock boiler '70 tons breeze' per month. This information, as was explained to Mr Macdonald, was necessary to enable the pursuers to determine the capacity of the fans, which formed the essential part of their apparatus." Then take condescendence 4—"No particulars were given, but the tracing sent by Mr Macdonald to the pursuers showed a boiler of the same type and of like dimensions as the Lancashire boiler previously proposed to be erected at Stobcross, and the pursuers accordingly proceeded upon the footing that the conditions as to coal consumpt were identical with those for which they estimated in connection with Stobcross." Well, there is no admission, and the defenders in their statement of facts (Stat. 2) say—"After frequent trials the fan was found to be a failure" (the fan that was constructed so as to suit the apparatus), "but the pursuers informed the defenders in September 1899 that it was only a temporary one and that they had now put a copper fan in hands"—that is, to be made. Then the statement in answer is denied, and then in Statement 4, at the end of the statement they say—"The pursuers" (by letter which is founded upon) "undertook that with a sufficient air supply over the bars the smoke will be absolutely prevented." And again the pursuers say in their answer to the defenders' statement 8, "On receiving the said letter"—that is, the letter complaining that it was not answering the purpose—"from the defenders the pursuers sent a man to investigate the apparatus, when it was discovered that throughout all the previous trials the conditions of the contract with regard to the consumpt of coal as stated in articles 3 and 4 of the condescendence had been violated." That is distinctly denied by the defenders, and then at the end of this answer the pursuers say—"Under the conditions provided for, the pursuers aver it would give satisfactory results and the defenders have illegitimately rejected it." I should therefore have been somewhat surprised, I confess, if the Lord Ordinary had seen his way to dispose of this case without allowing evidence, but he having come to the conclusion, and so informed us, that he could not decide the case without evidence, and having allowed evidence accordingly, but before answer, so as not to prejudice any plea of the pursuers, I see no ground for interfering with that conclusion of the Lord Ordinary, and I state my own opinion distinctly that I think he was right, and that his judgment ought to be affirmed.

LORD TRAYNER—I should not have interfered with the Lord Ordinary's interlocutor allowing a proof had I been able to find in this record any point, probation in regard to which could have assisted us in determining the question submitted to us. The case appears to me to be a very simple and clear one. The pursuers offered to supply and erect for the defenders an installation of Patterson's Suction Draught Apparatus for £400, and this offer the defenders accepted. The apparatus known by that patent or trade name was supplied, but it did not produce the results which the defenders expected, and they decline to pay the contract price, not on the ground that what was supplied was other than the apparatus contracted for, but because it did not produce results which they say the pursuers warranted that it would produce. No doubt in the answer to the sixth article of the condescendence the defenders deny that the apparatus was conform to contract, but they do so under reference to their own statement of facts. In that statement there is no objection stated to the apparatus supplied on any ground except that it did not prevent smoke as the defenders allege the pursuers warranted it would do. And the defenders' pleas-in-law show that their only defence is disconformity "to warranty." The only question therefore is, did the pursuers warrant the apparatus as the defenders allege. There is here no case for implied warranty, for

according to the provisions of the Sale of Goods Act 1893 (sec. 14, sub-sec. 1), when an article is sold by its patent or trade name (as this apparatus was), there is no implied condition as to its fitness for any particular purpose. The warranty therefore must be express, and as the contract was in writing, it is to the contract we must look for the warranty if it exists.

The apparatus in question was brought under the notice of the defenders by a letter from the pursuers dated 9th March 1897, in which they enclosed "a descriptive circular of Patterson's Suction Draught Arrangement." That circular described as one of the advantages of the arrangement "absolute prevention of smoke;" but in the letter I have referred to, in which this circular was enclosed, the pursuers told the defenders that the arrangement was one "for largely reducing or entirely preventing smoke." So that even when first brought before them, the defenders were informed that the absolute prevention of smoke might not be obtained. But we are not called on to consider whether the terms of the circular amounted to warranty or merely to the laudation of his goods by a seller, which the buyer must check for himself, because neither the circular nor the letter of March 1897 were made part of or even referred to in the contract, which was not made until 1st March 1898. The contract then made contains no allusion to the results which the apparatus is calculated or expected to produce; its smoke-preventing capacity or quality is not mentioned. The only defence to this action, however, is that the pursuers warranted that the apparatus would prevent smoke, and that this warranty has not been fulfilled. I think it plain on the terms of the contract that there was no warranty, and that therefore there could not be the breach of contract on which the defenders alone rely. The defence accordingly in my opinion fails, and the pursuers are entitled to decree.

Lord Moncreiff — This is an action brought to recover the price of an apparatus called "Patterson's Smoke-Preventing Suction Draught for Land and Marine Boilers," of which the pursuers are the sole licencees and makers, which was sold by them to the defenders in March 1898.

The only defence is that the pursuers warranted that the apparatus would secure the absolute prevention of smoke coupled with a large reduction in the cost of chimney, that the apparatus was purchased on the faith of that warranty, but totally failed to satisfy the representations made by the pursuers.

The warranty is said to be contained in a circular issued to the public by the pursuers, in which, among the advantages of the apparatus, absolute prevention of smoke appears.

The Lord Ordinary has allowed a proof before answer. The first question we have to decide is whether this proof is necessary and should be allowed. The second is whether the statements in the circular constitute a warranty.

On the first question, viz., the admissibility of proof, I should be slow to exclude any inquiry which would bear upon the question of law which we have to decide. But the matter is brought to a very sharp point by the pursuers renouncing probation; that is to say, we must take the case on the footing that the defenders' statements as to the inability of this apparatus absolutely to prevent smoke are true. Now, if this is conceded, nothing remains except the question of law which arises upon the circular and correspondence.

The question of implied warranty depends on the 14th section of the Sale of Goods Act 1893, which begins by enacting that, subject to the provisions of this Act, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows. The first exception is where the buyer makes known the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment. Pausing there—on the statements of parties I think there might be a serious question whether the defenders did rely on the seller's skill and judgment or not, because the defenders' engineer made a most careful examination of the apparatus before it was taken over.

But there is an exception from the exception in these terms—"Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

Now, this was a contract for the sale of an article the patent or trade name of which was "Patterson's Smoke-Preventing Suction Draught for Land and Marine Boilers." Therefore under the statute there was no implied warranty.

The question remains whether there was an express warranty. The letters which constitute the contract do not contain one. The circular which was sent a year before is not imported. But if we can look at the circular it does not contain a warranty. What is contained in the circular is at most an undue laudation of the pursuers' patent.

If I am correct in holding that the real question between the parties would not derive any aid from the parole proof, and that on a fair construction the circular and the pursuers' letters do not amount to a warranty, the Lord Ordinary's interlocutor should be recalled, and decree given as concluded for.

The Court recalled the interlocutor reclaimed against and granted decree against the defenders in terms of the conclusions of the summons.

Counsel for the Pursuers—Ure, Q.C.—Horne. Agent—A. S. Douglas, W.S.

Counsel for the Defenders—Lees—Guy. Agents—Campbell & Smith, S.S.C.