of *Electric Construction Company* v. *Hurry & Young*, 24 R. 312. The Judges of the Second Division thought that case did not apply on the facts here, but that case has been more than once doubted (*Croom* v. *Stewart*, by Lord Kyllachy, 7 F. 563), and I may say at once that I think it was wrongly decided. I agree with Lord Kinnear, who dissented from the judgment which reversed the judgment of Lord Low.

I need not do more than say that I adopt entirely his reasoning, which will be found on page 324 of the report. In the same case Lord Kinnear lays down, I think, quite correctly, the standard of damages when the buyer elects to keep the goods. He says (page 325)—"I presume that the claim should be measured by the difference between the value of the machine actually supplied and the value which it would have had to the defenders if it had been in all respects conform to contract."

That brings me to the question of damage. Taking Lord Kinnear's rule, what was the damage suffered by the respondent having to face the fishing season with this insufficient engine, not absolutely useless, for he could get to the fishing sometimes and by slow degrees, but quite inefficient as compared to the engine as it ought to have been? The Lord Justice-Clerk, acting as a juryman would act, has cut down the sum of £1885 as sued for to a sum of £783, 6s. 8d., to which he has given effect by assoilzieing from the conclusions of the action for the balance of the price of £283, 6s. 8d., and giving a decree in the action of damages for £500. The estimate is necessarily rough, but I see no reason why your Lordships should interfere with it. I at one time had doubts as to whether it was right to assoilzie from the conclusions for the price, but looking at the terms of section 53 (1), coupled with the interpretation of the clause as to the meaning of warranty in Scotland, 62 (1) *ad fin.*, I have come to be of opinion that the course taken by the Second Division was allowable and should not be altered.

I have purposely omitted all reference in the matter to English authorities. The law of Scotland was different from that of England in several particulars before the passing of the Sale of Goods Act. It was assimilated to the law of England in some particulars, *e.g.*, the passing of the property by the contract, but the assimilation was not made complete, and there are still extant a good many differences. Examples of some of them will be found in the judgment of Lord Chelmsford in the case of *Couston & Company* v. *Chapman*, 10 Macph. (H.L.), at p. 80.

I think the appeal fails and should be dismissed with costs, and I move accordingly.

Viscount Haldane, Viscount Cave, Lord Parmoor, and Lord Wrenbury all concurred in Lord Dunedin's opinion.

Their Lordships dismissed the appeals with costs.

Counsel for the Appellant — Dean of Faculty (Sandeman, K.C.) — Normand—B. S. Sandeman. Agents—J. & J. Ross, W.S., Edinburgh — William A. Crump & Son, Solicitors, London.

Counsel for the Respondents — Mackay, K.C.—Carmont—Wishart. Agents—Alex. Morison & Company, W.S., Edinburgh — Beveridge & Company, Westminster.

COURT OF SESSION.

Saturday, October 28.

FIRST DIVISION.

(Single Bills.)

PATERSON *v.* M'VITIE & PRICE, LIMITED.

Expenses — Jury Trial — Verdict for Less than £50 — Modification — Sheriff Court Scale—Codifying Act of Sederunt (*F, iii*, 3).

In an action of damages in respect of a road collision, the damages being laid at £120, the jury returned a verdict in favour of the pursuer, assessing the amount of damages at £35. The defenders moved that inasmuch as the pursuer had been awarded less than £50, the pursuer's expenses should be modified to such an amount as would have been recoverable if the action had been raised and concluded in the Sheriff Court. The Court *refused* the motion.

Opinion per the Lord President that this particular form of modification was competent, although it was without sanction in practice.

The Codifying Act of Sederunt 1913, F, iii, 3, enacts—"Where the pursuer in any action of damages in the Court of Session, not being an action for defamation or for libel, or an action which is competent only in the Court of Session, recovers by the verdict of a jury £5, or any sum above £5 but less than £50, he shall not be entitled to charge more than one-half of the taxed amount of his expenses unless the judge before whom the verdict is obtained shall certify that he shall be entitled to recover any larger proportion of his expenses not exceeding two-third parts thereof."

Mrs Elizabeth Johnston or Paterson, hawker, wife of James Paterson, contractor, Slateford, brought an action against M'Vitie & Price, Limited, biscuit manufacturers, Edinburgh, in which she craved decree for £120 as damages sustained through a collision between a motor van belonging to the defenders and a horse-drawn lorry belonging to her.

After a trial at the sittings before the Lord President and a jury a verdict was returned in favour of the pursuer, the damages being assessed at £35.

Counsel for the pursuer subsequently appeared in the Single Bills of the First Division, and moved the Lord President—as the Judge presiding at the trial — to grant a certificate allowing the pursuer to charge more than one-half of the taxed

amount of her expenses. Counsel referred to the Codifying Act of Sederunt, F, iii, 3. The motion was refused.

LORD PRESIDENT — The verdict in this case was for £35. Under the Codifying Act of Sederunt (F, iii, 3) I am asked—as the Judge who presided at the trial—to certify the case as one in which the successful pursuer is entitled to charge more than one-half of the taxed amount of her expenses. The action was for damages in respect of a road collision, the damages being stated at £120. Having regard to the evidence adduced at the trial I think the case was of a relatively trumpery character for submission to a jury especially in the Court of Session. It raised no question of general interest or importance. I thought the jury's award both just and discriminating, and if it had been as high as £50 I should have thought it over-generous, In these circumstances the case seems to me a typical one for the application of the maximum prescribed by the Act of Sederunt. The Act establishes what may be called a rule of general application, and if a certificate is to be granted, it must be because there is something to take the case out of the ordinary rule. I do not think there is anything of the kind here and therefore I think no certificate ought to be granted.

Counsel for the pursuer thereupon moved the Court to apply the verdict and award half of the expenses as taxed.

Counsel for the defenders objected, and moved that the Court modify the pursuer's expenses to such an amount as would have been recoverable if the action had been raised in the Sheriff Court.

Argued for the defenders—Half expenses being the maximum in a case like the present, it was in the discretion of the Court to grant expenses on a lower scale, or even in certain circumstances none at all. Half expenses would here exceed the amount awarded to the pursuer. Counsel referred to *Jamieson* v. *Hartil* (1898, 25 R. 551, 35 S.L.R. 450, *per* Lords Trayner and Moncreiff), and to the Codifying Act of Sederunt (F, iii, 3).

LORD PRESIDENT—The unsuccessful defenders' motion to the Court is that we should modify the pursuer's expenses to such an amount as would have been recoverable if the action had been raised and concluded in the Sheriff Court. I do not doubt that the provision in the Act of Sederunt, which limits the amount of expenses for which motion can be made by the successful party in cases to which the Act applies, derogates nothing from the power of the Court to modify expenses further, or even in circumstances where the justice of the case demands it to refuse expenses altogether. The particular form of modification proposed is, no doubt, one which it would be within the competency of this Court to adopt, but it is, so far as I am aware, without sanction in practice. Apart, however, from any question with regard to form, I do not see anything in the circumstances of the case to take it out of the category to which the provisions of the Act of Sederunt normally apply, and in which the application of the Act of Sederunt is sufficient to do justice. Although the case was a small one and the pursuer recovered only £35 of her claim for £120, she was entitled to come to this Court and have her case tried by jury here.

LORD SKERRINGTON and LORD CULLEN concurred.

The Court refused the defenders' motion and modified the pursuer's expenses to one-half of the taxed amount.

Counsel for the Pursuer—Fraser, K.C.—Walker. Agent—J. M. Gow, Solicitor.

Counsel for the Defenders—Watt, K.C.—Jamieson. Agent—R. S. Rutherford, Solicitor.

HOUSE OF LORDS.

Friday, July 14.

(Before Viscount Haldane, Viscount Finlay, Lord Dunedin, and Lord Shaw.)

FORSLIND *v.* BECHELY-CRUNDALL.

Contract — Breach — Repudiation — Delay and Evasion Equivalent to Repudiation.

A B having entered into a contract with a landed proprietor for the purchase of eleven lots of timber growing on his property, on terms that forbade him cutting or removing more than four lots at one time, on 3rd May 1918 sold one of the lots delivered on rail to C D without disclosing to him the above limitation. At the time that the contract of sale to C D was entered into, cutting operations were going on on four lots. The contract with C D provided that the purchase price of £10,000 should be paid to the extent of £5000 forthwith and £5000 when timber to that value had been railed. The purchaser paid the first instalment of £5000, and the seller was proceeding to fell the trees on the lot sold when he was stopped by the proprietor on the ground that he was thus exceeding the four lots to which simultaneous operations were restricted. The purchaser pressed for fulfilment of his contract or return of the instalment, and the seller while endeavouring to obtain the landlord's consent alleged various reasons for not carrying out the contract, such as the state of the roads and unsettled claims which he had against the purchaser. The seller obtained the proprietor's consent in October 1918, but no deliveries were made before April 1919 under various excuses, when the purchaser commenced an action of damages against him for breach of contract. *Held* (*rev.* judgment of the Second Division, *diss.* Viscount Finlay) that the purchaser was entitled to treat the seller as having repudiated the contract in respect that