The following was the declaration:—
"But declaring that this modification, and the settlement of any locality thereof, shall depend upon its being shown to the Lord Ordinary that there exists a fund for the purpose."

LORDS ADAM, M'LAREN, KINNEAR, and LOW concurred.

Counsel for the Minister — Constable. Agent—J. B. M'Intosh, S.S.C.

Counsel for the Heritors — Pitman. Agents—J. & F. Anderson, W.S.

COURT OF SESSION.

Thursday, January 14.

FIRST DIVISION.

[Lord Low, Ordinary.

THE ELECTRIC CONSTRUCTION COMPANY, LIMITED *v.* HURRY & YOUNG.

Sale — Disconformity to Contract — Purchaser's Alternative Remedies— Whether Purchaser Barred from Retaining Goods and Claiming Damages by Election to Reject—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 11, 35, 53.

The purchaser of a dynamo made complaints of its working, but continued to use it for a period of seven months, at the end of which he wrote instructing the seller to remove the machine, in terms which amounted to a rejection of it. He continued, however, to use it for three more months, when the seller raised an action for recovery of the price.

The Court, after a proof, *found* that the dynamo was disconform to contract, but *held* (*rev.* the judgment of Lord Low) (1) that the purchaser had forfeited his right of rejection; (2) (*diss.* Lord Kinnear) that having elected to exercise his right of rejection under section 11, sub-section 2, of the Sale of Goods Act 1893, he was not entitled to recal his election and adopt the alternative remedy of a claim for damages in respect of breach of warranty, as provided by section 53 of that Act.

Opinion (*per* Lord Kinnear) *contra*, that the purchaser's election to reject having in no way prejudiced the seller's position, the purchaser was entitled, on the failure of his rejection, to adopt the alternative remedy provided by the statute, viz., a claim for damages.

Process—Expenses—Partial Success.

The defender in an action in which the Court had granted decree in terms of the conclusions of the summons, and had made a general finding of expenses against him, on the motion being made for approval of the Auditor's report, objected, on the ground that the Auditor had included the expenses of a proof in which the defender had been successful though unsuccessful in the action.

Held that the objection was made too late. *Murray* v. *Macfarlane's Trustees*, November 6, 1895, 23 R. 81, *followed.*

This was an action at the instance of the Electric Construction Company, Limited, London, against Messrs Hurry & Young, electrical engineers, Edinburgh, concluding for payment of £50, being the price of a dynamo erected by the pursuers, on the order of the defenders, in the shop of a customer of the latter.

After certain preliminary correspondence the defenders ordered the machine in a letter dated 22nd September 1894, in the following terms:—"Please supply us with the following: One No. 3 dynamo giving 115 volts, 40 ampères, at approximately 400 revolutions, with extra bearing and slides for tightening belt, and also balance-wheel about 1 cwt. (compound wound) as per quotation, £57, 16s., of the 10th and 13th September." . . .

The dynamo was duly forwarded to the defenders, and was received by them on 11th October, and was put up in the shop of Messrs Latimer, Lothian Road, for whom it had been ordered. Complaints having been made by them as to the working of the machine, the pursuers on 20th December agreed to supply a new one in its place, and in February 1895 they sent a new dynamo. In consequence of complaints as to its working, a new armature was supplied by the pursuers.

Messrs Latimer continued to make complaints as to the working of the dynamo on the ground that after it had been at work for some hours there was an excessive fall in voltage, with the result that the lights in the shop and premises gradually lost brilliancy, and after a few hours were quite insufficient for their purpose.

The pursuers sent down a representative to test the working, and suggested various expedients for keeping up the voltage. A correspondence followed, Messrs Latimer continuing to use the machine, till on the 14th September the defenders wrote to the pursuers stating that "if you cannot make the machine work without a loss of more than 4 volts you will have to remove it, as both Messrs Latimer and ourselves are satisfied that the machine is not right. You may take what action you care to, and we will do our best to defend ourselves in the matter."

The pursuers did not remove the machine, and on the defenders refusing to pay the contract price, on 18th December 1895 raised the present action. Messrs Latimer continued to use the machine.

The pursuers averred (Cond. 5)—"The defenders have retained the said dynamo for a period of nearly a year after the pursuers intimated to them that they maintained that same was in accordance with the contract, and they are not now entitled to reject or to refuse to pay the contract price."

The defenders maintained that by the pursuers' failure to supply a dynamo conform to contract, and by delivery of which

the defenders could implement their contract with Messrs Latimer, they had suffered damage to the extent of £500.

They pleaded—"(2) The pursuers having failed to implement the contract between them and the defenders, the price of which is sued for, by delivering a dynamo conform to the defenders' order, the defenders are not liable in payment of said price, and should be assoilzied from the conclusions of the action. (3) The defenders having suffered loss and damage to an extent greatly exceeding the sum sued for in consequence of the pursuers' failure to implement their contract as aforesaid, are entitled to absolvitor."

The Lord Ordinary (LOW) allowed parties a proof.

The result of the proof, as indicated in the opinions of the Lord Ordinary, and of Lord M'Laren and Lord Kinnear, was to show that the fall in voltage of the dynamo was excessive, and that accordingly the machine was not conform to contract.

The Lord Ordinary on 18th June issued an interlocutor by which he sustained the second aud third pleas of the defenders, and assoilzied them from the conclusions of the action.

His Lordship, after examining the evidence, proceeded as follows:—"I have therefore come to the conclusion that the dynamo was not conform to contract.

"The next question is, whether it is still open to the defenders to refuse payment of the contract price. As the law stood prior to the Sale of Goods Act 1893, I think that it is extremely doubtful whether, in the circumstances which have occurred, the defenders could have pleaded breach of contract to the effect of resisting a claim for the price.

"The defenders, no doubt, all along objected to the dynamo, and called upon the pursuers to make it right, and finally they told the pursuers that if they could not make it work without a fall of more than 4 volts they must remove it. The pursuers did not remove it, and it has continued to be worked in Messrs Latimer's shop until the present time. Under the old law I think that the defenders would have put themselves in the wrong by continuing to work the dynamo. When it became apparent that the pursuers would not or could not put it right, I think that it would have been incumbent upon the defenders to replace it as soon as possible, and either to return it to the pursuers or to put it in safe keeping at their risk.

"But the Sale of Goods Act has made an important alteration upon the law. A buyer is no longer bound to reject or return goods which are disconform to contract, and to repudiate the contarct, but if he has not expressly or by implication accepted the goods, he can retain them and claim damages, or set up the breach in diminution or extinction of the price.

"That I take to be the effect of the 11th, 35th, 53rd, and 62nd sections of the Act.

"By section 11 (2) it is provided that in Scotland 'failure by the seller to perform any material part of the contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.'

"The buyer's remedies are further specified in section 53. It is there, *inter alia*, provided that, 'Where there is a breach of warranty by the seller, the buyer may (*a*) set up against the seller the breach of warranty in diminution or extinction of the price.'

"By the 62nd section it is enacted that 'As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.'

"Now, I think that if the construction which I have put upon the contract between the pursuers and the defenders is sound, there was a failure to perform a material part of the contract, and that the defenders were entitled to retain the goods and treat the failure as a breach of warranty entitling them to diminution or extinction of the price.

"The pursuers founded upon the 35th section, and argued that the defenders must be held to have accepted the goods, and could not now either reject them or resist an action for payment of the price.

"The 35th section provides that the buyer is deemed to have accepted the goods (1) when he intimates to the seller that he has accepted them; (2) 'when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller;' and (3) when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

"It was admitted that the defenders were not in the first or third of these positions, but it was argued that by continuing to use the dynamo they had acted in a way inconsistent with the ownership of the seller. I am of opinion that the argument is untenable. The right to retain given by the Act involves the right to use, and use would only imply acceptance if there had been no timeous rejection of the goods. In this case I think that there was timeous rejection of the goods. The defenders from the first complained that the dynamo was not conform to contract, and when it became apparent that the pursuers could not put it right, the defenders told them that they might remove it. That, in my opinion, was rejection within the meaning of the Act.

"I am therefore of opinion that the defenders are entitled to set up the breach of contract as in extinction or diminution of the price."

The pursuers reclaimed, and argued—(1) The contract had not been broken, there being no ground for inserting in it an implied warranty that the voltage was not to vary more than 3 or 4 per cent. This was a sale of a specific article to which section 14, sub-section 2, of the Sale of Goods Act 1893 applied, excluding the notion of such an

implied warranty. (2) But in any view the defenders, by their having used the machine, were barred from rejecting it at the end of so long a time after its delivery. That was undoubtedly the rule of common law—*Chapman* v. *Couston, Thomson, & Company*, March 10, 1871, 9 Macph. 675; *Croan* v. *Vallance*, May 18, 1881, 8 R. 700. The 1893 Act was merely a codifying statute, and the rule of common law prevailed where not expressly altered. Section 36 was simply a statement of the old law, viz., that a rejecting purchaser was not bound to return the goods, but if he used them he lost his right of rejection. (3) As to the claim for damages, they were not entitled to treat this as a breach of warranty entitling them to set off damages against the pursuers' claim for price. The words "material part" in section 11, sub-section 2, could not be read as meaning "any part," and accordingly the remedy provided in that section did not apply here. But assuming that it did, the defenders, by electing to exercise their right of rejection, had lost any right to the alternative remedy of damages. Moreover, they would in no case be entitled to claim for damages after the time when they became aware, or ought to have become aware, of the defects in the dynamo—*Wilson* v. *Carmichael & Sons*, March 20, 1894, 21 R. 732. If any damages were due, the true measure of them was the difference between the contract price and the price of a new machine which would have done the work satisfactorily. There was no principle in the method by which the Lord Ordinary had assessed the damages as equal to the price of the machine.

Argued for respondent—(1) There had been here a breach of a "material part" of the contract, and the defenders were accordingly entitled, in terms of section 11, sub-section 2, either to reject or to claim damages. (2) The defenders had validly exercised their right of rejection, and the fact of their using the machine was not in any way inconsistent with the pursuers' rights of ownership. The common law was not as stated by the pursuers on this point. The case of *Chapman* only applied to fungibles, the use of which implied destruction of a certain part, not to the case of machinery built into a purchaser's premises. The retention of such a subject, as authorised by section 36, necessitated its being used. The defenders had fully complied with the provisions of that section by intimating rejection. Nor was their right of rejection defeated by the fact that the machine had been in the possession of a third party—*Magistrates of Glasgow* v. *Ireland & Son*, June 27, 1895, 22 R. 818; *Roberts & Company* v. *Yule*, June 24, 1896, 23 R. 667. (3) Failing rejection, they were entitled to treat the disconformity as a breach of warranty giving rise to a claim for damages which might be set off against the price in terms of section 53. Warranty in Scotland was merely a condition of sale, and that being so, even if it were not a "material part" in the sense of section 11, the defenders had the right to claim damages. Accordingly, if the Court held that they had failed to adopt the first remedy of rejection provided by section 11, the fact of their having unsuccessfully attempted it ought not to bar them from using the second method, viz., damages for breach of warranty.

At advising—

LORD M'LAREN—The defenders, who are designed electrical engineers and contractors, after some preliminary correspondence, ordered from the pursuers "one No. 3 dynamo, giving 115 volts, 40 amperes, at approximately 1100 revolutions," at the price of £57 16s., "to be delivered by earliest." The order was on September 22, 1894, and was accepted in course. The descriptive words "No. 3 dynamo" refer to the corresponding number in the pursuers' trade catalogue; but I observe that the specification does not precisely correspond to the catalogue, because the nearest specification in the catalogue is that of a machine designed to give an electro-motive force of 100 volts at 1100 revolutions per minute. This is partly explained by the preliminary correspondence, and partly by the defenders' letter of 7th September, where they say, "the E.M.F. would be 115, and the machine to run about 1200 or 1250. We suppose that machine would do if it were speeded up." But I do not think it necessary to clear up this discrepancy, because if the pursuers chose to accept an order for a machine which was to furnish a definite number of amperes at a definite electromotive force, and at a given price, it is no answer to say that their number 3 machine would not be equal to the demand made upon it. The makers were bound by their contract to provide a machine capable of performing a definite amount of work, and if this could only be done by a larger or more powerful machine than a No. 3 they must bear the loss. It is of course a circumstance to be taken into consideration, that the order was given by an electrical engineer, who would presumably have knowledge of the capabilities of such machines; but I do not think that this circumstance would absolve the pursuer from their obligation to furnish a dynamo capable of producing 115 volts, 40 amperes, at approximately 1100 revolutions per minute.

The dynamo was intended for the use of a customer, Mr George Latimer, in his place of business, Lothian Road, Edinburgh. Mr Latimer was dissatisfied with the dynamo first supplied to him (October 1894); this was taken back, and another dynamo was supplied in February 1895. In consequence of complaints as to its performance, a new armature was afterwards supplied. I mention these particularly, because it is fair to the pursuers to keep in view that they gave due attention to the defenders' demands so long as these amounted only to a requirement that the machine should be made complete and put into good order, and did not take the shape of a claim to reject or rescind the contract of sale.

I pass from the admitted facts of the case

to the question in dispute, as to which a proof was taken before the Lord Ordinary. Mr Latimer was still dissatisfied with the performance of the dynamo; and it appears from the evidence that he had some reason for dissatisfaction, because, while it was no doubt possible in the early part of the evenings to get an electro-motive force of 115 volts from the dynamo, yet after it had been run for two or three hours the voltage fell off to the extent of 8 to 10 per cent., and continued falling; this of course involved a diminution of light in an even greater ratio, though the precise difference of illuminating effect is not matter of evidence.

It is common ground that every dynamo which has been run for two or three hours suffers a certain diminution of the electromotive force produced, and if it is not admitted, I think it is proved as a scientific fact that this effect is greater when the machine is worked up to the limit of its powers than it would be if a more powerful machine were substituted which could be run with less strain and at a lower speed. The Lord Ordinary in his analysis of the evidence has given weight to the view of the defenders' witnesses on this subject, which is to the effect that the fall in voltage ought not to exceed from 2 or 3 volts in the 100, and that a fall of from 8 to 10 per cent. is altogether excessive. I think it is perfectly plain that so considerable a fall as 8 per cent. would be incompatible with good lighting, unless the downward tendency could be corrected in some way. This is not seriously disputed by the pursuers; but their answer is, that the defenders, when they ordered a No. 3, which is a small machine, knew, or must be taken to know, that the voltage could not be depended on, and that their remedy was to increase the speed of the dynamo when the voltage fell.

As a matter of fact, I have no doubt that the explanation given by the pursuers is correct, and that the cause of the faulty performance is that the No. 3 machine was not equal to the work required; and again, I do not doubt that by "speeding-up" the engine from time to time the voltage might be restored to the proper standard. It is not said that this was not in fact done. But this observation is not an answer to the defenders' objections; and, as already indicated, I think that the pursuers having undertaken to supply a machine producing 115 volts, at a speed of 1100 revolutions a minute, are not excused by saying that what they promised was impossible with a machine of the given size and pattern. It was open to them to decline the order if they were unable to execute it as given, and in my opinion they do not fulfil their contract by supplying a machine which deviates from the prescribed electro-motive force by a greater percentage than is usual in the case of machines supplied by good makers. It follows that if the defenders, or their customer Mr Latimer, had taken proper measures for putting an end to the contract of sale they would have been within their rights.

I now come to the consideration of the legal aspects of the case, and I may begin by saying that I shall assume for the purposes of the argument that the defenders' letter to the pursuers, of date 14th September 1895, amounts to an unqualified rejection of the dynamo. I shall also assume that the rejection in the month of September of a machine which was delivered in February, and whose defects had been manifest to the defenders from the beginning did not come too late. I am not giving a legal opinion in that sense. I only assume for the purposes of argument that the rejection did not come too late. Under the Sale of Goods Act it is not necessary that the buyer should return the goods; it is enough that he intimates his rejection, and that he holds the goods at the disposal of the seller. But the Act of Parliament does not say that a buyer may reject the subject of sale and go on using it as if it were his property. It would be a very strange theory of law which should give rise to such a result, because it amounts to this, that when a buyer has an imperfect machine or article of any kind supplied to him, if he only goes through the form of a rejection, he may continue to use the article as long as he pleases without paying for it.

Now, the rejection of the subject of sale by a buyer is in legal effect a rescission of the contract of sale on the ground of the seller's non-performance or imperfect performance of his obligations. But if a purchaser claims right to rescind the contract of sale, he must, of course, be prepared to make reasonable restitution—that is to say, if he cannot restore the goods altogether unimpaired by use, he must at least do nothing subsequent to the rescission which would injure or affect their saleable quality.

But it is admitted that the defenders' sub-vendee (who in this question I identify with the defenders) has continued to use the dynamo just as if he had accepted it in fulfilment of the contract. This use was in fact continued from 14th September, the date of the nominal rejection of the dynamo, down to and after the raising of the action in December 1895. It is not necessary to consider the case of such a slight or temporary use of the article as might be taken by a buyer consistently with a *bona fide* intention of rejecting it, because we are here dealing with a case of use continued for three months, and following on a longer use while the machine was under trial. Now, as the sale of goods is regulated by Act of Parliament, I must say that in my opinion, when the Act speaks of the buyer's right of rejection, this must be taken to mean a rejection according to known legal conditions, one of which is that the buyer must not break bulk further than is necessary, or use or consume the article in the case of goods sold for use or consumption.

It is hardly necessary to quote authority on a point which is so well understood. But this condition of the right of rejection is laid down by Bell in the Principles, sec. 99, nearly in the words which I have used, and it is fully recognised in the opinions of the

Lords in the important case of *Couston, Thomson, & Company* v. *Chapman*, 10 Macph. (H.L.) 76, 80.

If in this case the sellers had assented to the rejection of the dynamo, and had agreed to take it back, the contract would then have come to an end, and any subsequent detention and use of the machine by the buyer could only give rise, as I conceive, to a pecuniary claim. But the makers did not in fact assent to the proposed rejection of their machine, and the validity of the rejection could only be determined by subsequent agreement, or by the decision of a court of law.

Now, I consider that pending a decision as to a buyers' claim to reject, the goods must be treated as if in neutral custody, and this whether the buyer be himself the custodier (as he may be under the Act of Parliament), or whether he places them in the custody of a third party. The condition that the buyer does nothing in relation to the goods which is inconsistent with the ownership of the seller, is in my opinion, especially applicable to the period when the parties are at issue as to the determination of the contract, and this view receives indirect confirmation from the language of the 35th section, where the doing of an act which is inconsistent with the seller's ownership is declared to be equivalent to the acceptance of the goods.

The importance of maintaining the integrity of the principle has led me to dwell on the qualification which the law attaches to the buyer's right of rejection at perhaps unnecessary length. I must now examine more closely the Lord Ordinary's ground of judgment.

The Lord Ordinary has sustained the defender's second and third pleas-in-law. Now, these pleas appear to me to be inconsistent, and only capable of being maintained as alternative propositions; because the second plea affirms that the pursuers have failed to implement their contract, and as a consequence, that the defenders are not liable in payment of the price; while the third plea amounts to a claim to set off the damages for breach of contract against the price. Now, under the statute (sec. 53), it is only where there is a breach of warranty by the seller that a claim of damages may be set up in extinction or diminution of the price. The reason of this is evident; if the goods are rightly rejected, the price is not due, and no question of compensation or set-off can arise. Without dwelling further on this point, it may be well to consider whether the defenders are in a position to treat the case as one of breach of warranty. By the 11th section of the statute it is provided that in Scotland "Failure by the seller to perform any material part of the contract of sale is a breach of contract which entitles the buyer, either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages."

Under this enactment the common law of Scotland is radically altered, but it is not made identical with the law of England. Why this change should have been made I do not know, but we have nothing to do with the policy of the statute. The clause as it stands gives the buyer an unqualified right of election either to treat the contract as repudiated, or to affirm the contract and put forward a claim in diminution of the price; but the clause does not entitle the buyer to do two inconsistent things. In this case I conceive that the defenders made their election on 14th September 1895 to treat the contract as repudiated. They are not in a position to found on their election, because they have taken the use of the dynamo; but having made their election, and thus raised the issue which this action is brought to settle, the defenders, in my opinion, are not entitled to recal their election and to set up a claim as for breach of warranty. The introduction of breach of warranty into the case is a contribution by counsel, who were probably right in thinking that the case should have been so treated from the beginning. But I can find no trace of such a claim in the evidence or the correspondence subsequent to 14th September, which is the actual date on the point of election.

I ought to add, that even if the election had been different, I could not agree with the Lord Ordinary that damage is proved equal to the price of the machine. The evidence only establishes a certain amount of inconvenience experienced by the buyer in the use of the machine, and I cannot admit that a buyer who has the means of supplying himself with an efficient machine by purchase is entitled to go on using the defective article until he has set up an amount of damage which is sufficient to extinguish the price. The question may arise in other cases, and I should desire to reserve my opinion upon it. On the main question I am of opinion that the Lord Ordinary's judgment should be recalled and decree granted for the price.

LORD KINNEAR—I agree with the Lord Ordinary that the dynamo supplied by the pursuers to the defenders was not conform to contract. I think this question depends, not upon any evidence as to the conditions upon which a dynamo may in general be held to be a satisfactory machine, but upon the construction of a written contract, by which it is stipulated that the dynamo to be supplied shall give 115 volts, 40 amperes, at approximately 1070 revolutions.

On this ground I am of opinion that the defenders might have rejected the machine and refused payment of the price had they not retained it in their possession and continued to use it as their own for so long a time as to preclude their afterwards rejecting it. But I agree with your Lordships, for the reasons that have been already given, that it is now too late for them to repudiate the contract.

I am, however, unable to concur in the opinion that they are also deprived of the alternative remedy given by the statute to

a buyer when the seller has failed to perform any material part of the contract of sale, viz., that of retaining the goods, and treating the failure to perform such material part as a breach which may give rise to a claim for compensation or damages. They cannot be deprived of this remedy by reason of their having accepted the goods, because that is the very condition upon which the right arises to treat the failure of a material part of the contract as a breach giving a claim for damages. Nor does it appear to me that they are barred from claiming damages on this ground by any final election to resort to a different and inconsistent remedy. The argument, as I understand it, is that they are not entitled to retain the goods and claim damages for breach of a material part of the contract because they had intimated to the pursuers that they claimed to reject the goods and to treat the contract as repudiated. But we are all agreed that their attempted rejection is ineffectual, and that they are not entitled to treat the contract as repudiated. It seems to me somewhat inconsistent to hold that they cannot reject the goods because they have in effect elected to retain them, and, at the same time, that they cannot claim damages on the assumption of their retaining the goods because they have elected to reject them. I can quite understand that a buyer might be barred from maintaining one alternative remedy if by maintaining the other he had done anything to alter the seller's position to his prejudice. But I do not see that the pursuer's position is in any way prejudiced by the defenders' conduct. It is true they called upon the pursuers to remove the machine as not being conform to contract, adding "You can take what action you care to, and we will do our best to defend ourselves in the matter." But this in no way prejudices the pursuers in any plea which they might otherwise have taken to meet the alternative case which the defenders now maintain. When the pursuers brought their action for payment of the price, I think it was still open to the defenders to maintain, firstly, that the machine is not conform to contract, and therefore that they are entitled to reject it; and, secondly, that if they cannot reject it, they are, at least, entitled to claim damages for breach of a material condition. I think the argument on the merits of this latter plea arises now under exactly the same conditions as if they had intimated from the first that they would not reject the dynamo, but that they would claim damages for the breach of the condition in question. If that be so, there is no room for a plea-in-law, for the defenders cannot be barred by their conduct from maintaining a legal right unless they have led the other party to alter his position in reliance on some implied undertaking or indication of an intention not to maintain it.

Your Lordships hold that it would be unjust to allow the defenders, who have received a part of the consideration, for which they contracted, to keep the machine and pay nothing because the contract has not been fully performed. I think the statute enables them in these circumstances to treat the condition which has been broken as if it were a warranty or independent agreement giving rise to a claim for damages, and to set up their claim for damages against the sellers in diminution or extinction of the price. On this point, therefore, I agree with the Lord Ordinary. I have some doubt, however, whether the amount of the damages has been satisfactorily made out. The damage claimable for breach of one condition would not necessarily be the same as for the breach of the entire contract. 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. I think the evidence upon this point is not altogether satisfactory, but it is a point upon which I should not be disposed to differ from the Lord Ordinary if we were to adhere to his interlocutor.

As your Lordships are of opinion that the interlocutor should be recalled, it is unnecessary to consider it further, since my opinion will have no effect upon the judgment.

The LORD PRESIDENT and LORD ADAM concurred with Lord M'Laren.

The Court pronounced the following interlocutor:—

"The Lords having considered the reclaiming-note for the pursuers, the Electric Construction Company, against the interlocutor of Lord Low, dated 18th June 1896, and heard counsel for the parties, Recal the said interlocutor, and decern in favour of the pursuers in terms of the conclusions of the summons: Find the pursuers entitled to expenses, and remit the account thereof to the Auditor to tax and to report."

On February 7th, on counsel for pursuers moving for approval of the Auditor's report, the defenders objected on the ground that while there had been a general finding for expenses in favour of the pursuers, they had failed on one part of the case, viz., the proof. They moved, accordingly, to remit to the Auditor with directions to allow them expenses on that part of the case — A. S., July 15, 1876 (General Regulations).

Argued for pursuers—The objection was too late, and should have been taken at the time when expenses were allowed—*Welsh* v. *Russell*, May 19, 1894, 21 R. 769; *Murray* v. *Macfarlane's Trustees*, November 6, 1895, 23 R. 80.

LORD PRESIDENT — The Court are of opinion that the objections come too late.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court repelled the objection, and approved of the Auditor's report.

Counsel for Pursuers — Salvesen — Constable. Agents—Wallace & Pennell, W.S.

Counsel for Defenders—Sol.-Gen. Dickson —Clyde. Agent—Richard Johnstone, S.S.C.

Saturday, January 23.

FIRST DIVISION.

NISBET, PETITIONER.

Writ—Authentication—Proof of Improbative Will — Attestation — Conveyancing Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 39.

A person died leaving a will and codicil, partly printed and partly written, bearing to be subscribed by herself and attested by two witnesses, whose designations were neither contained in the will and codicil nor appended to their signatures. The executor appointed by the said will and codicil presented a petition under sec. 39 of the Conveyancing Act 1874, craving a proof, and thereafter to have it declared that the deed was subscribed by the granter and witnesses. The Court *allowed* a proof by commission, and thereafter *found* and *declared* as craved.

This was a petition presented, under section 39 of the Conveyancing (Scotland) Act 1874, by Robert Nisbet, executor of the deceased Miss Agnes Nisbet, Glasgow. The petition stated that Miss Agnes Nisbet died on 6th January 1896, leaving, among other testamentary writings, a will and codicil dated 26th November 1892; that the said will and codicil were subscribed by Miss Agnes Nisbet, and bore to be attested by William Barton, and Dorothea S. Kerr; and that the designations of the said witnesses were not contained in the will and codicil, nor appended to their signatures.

The petition further stated that the said will and codicil were prepared on the instructions of Miss Agnes Nisbet by Mr William Meikle, Actuary of the Glasgow Savings Bank; that the will was partly written and partly printed, the printed part being a form supplied by the said Bank, and the written form being in Mr Meikle's handwriting, with the exception of the date in the testing clause, which was in the handwriting of Dr David Smith, Glasgow, and that the codicil was also written by Mr Meikle, with the exception of the date, which was written by Dr David Smith.

The prayer was in these terms—"To allow the petitioner a proof of the averments contained in this petition, and thereafter to declare that the will and codicil above mentioned were subscribed by the said Agnes Nisbet, the granter or maker thereof, and by the said William Barton and the said Dorothea Stewart or Kerr, the witnesses by whom the said will and codicil bear to be attested."

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 39, enacts that 'No deed, instrument, or writing subscribed by the grantor or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the grantor or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and such proof may be led in any action or roceeding in which such deed, instrument, or writing, is founded on or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such grantor or maker and witnesses."

On 16th December 1896 the Court allowed the petitioner a proof of the averments contained in the petition, that the will and codicil mentioned and founded on therein were written, subscribed, and witnessed by the persons, and as mentioned in the petition; and granted diligence at the instance of the petitioner against witnesses and havers; and granted commission for their examination to Professor Moir, Glasgow.

The import of the proof thus allowed, and as reported by the Commissioner, was that the will and codicil had been signed and subscribed and averred.

The petitioner cited *Addison, &c.*, February 23, 1875, 2 R. 457, and argued that in terms of sec. 39 of the Conveyancing Act of 1874 the petition should be granted. It made no difference that the will was partly printed and partly written. [LORD KINNEAR referred to sec. 149 of the Titles to Land Consolidation Act 1868 (31 and 32 Vict. cap. 101).]

LORD ADAM—I think this petition should be granted. In my opinion the petitioner has discharged the burden placed upon him by the latter clause of the 39th section of the Conveyancing Act 1874, and has proved that the deed was subscribed by the granter and witnesses by whom it bears to be subscribed. That is all the statute requires of him.

LORD M'LAREN—I agree with Lord Adam. In calling attention to the fact that the deed was partly written and partly printed I did not intend to support any doubt that such a deed was valid if authenticated by two instrumentary witnesses, but of course it is always right to look at the statutory enactments when such a difficulty occurs.

LORD KINNEAR—I am of the same opinion. We are not at present called upon to express any opinion as to the legal effect of the instrument where it has been so far set up, as the declaration which Mr Aitken asks for will set it up. At the same time, as the question has been mooted, I do not think it out of place to say, that, so far as I see, there probably would have been a question