

The other Judges concurred.  
 Agent for Complainer—D. Curror, S.S.C.  
 Agent for Respondent—G. L. Sinclair, W.S.

Wednesday, February 24.

## SECOND DIVISION.

MINISTER OF KILMORACK *v.* CHISHOLM

BATTEN.

*Teinds—Final Locality—Valuation of Teinds—Decree of Valuation—Reservation of Locality as an interim Rule of Payment—Minister's Stipend.*  
 A heritor who was localled for a certain amount of stipend in a final locality afterwards led a valuation of his teinds, and ultimately obtained a decree reducing the locality. The decree of valuation contained an express reservation of the force of the locality as an *interim* rule of payment, and no new locality has been made up. *Held* that the minister was entitled to his stipend, in virtue of the reservation in the decree of reduction, according to the old locality.

By the final locality of the parish of Kilmorack the defender, Mr Chisholm Batten, was localled upon for a certain amount of stipend. Having thereafter led a valuation by which his teind was fixed at a less sum than that localled, he brought a reduction of the locality. This reduction contained no conclusion for having a new locality made up, and decree of reduction was accordingly granted, reserving the force of the locality as an *interim* rule of payment till a new locality should be obtained. No new locality has yet been obtained, and, in these circumstances, the minister now sues Mr Chisholm Batten for his stipend according to the old locality.

In defence, it was pleaded (1) that the action was incompetent, because, if the decree of locality was good, it authorised a direct charge upon letters of horning; (2) that the action was bad upon the merits, in respect it sought to make the heritor liable in more than the amount of his teind as fixed by the valuation, which was not a result within the powers of the Court, notwithstanding of the reservation in the decree of reduction, which the defender pleaded as *ultra vires* and incompetent.

The Lord Ordinary (ORMIDALE) held the action incompetent, adopting the defender's plea to that effect. The following is the Lord Ordinary's interlocutor:—"Edinburgh, 24th November 1868.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings—Sustains the first plea in law for the defenders, dismisses the action, and decerns: Finds the defenders entitled to expenses; allows them to lodge an account thereof, and remits it when lodged to the auditor to tax and report.

"*Note*—It was not disputed that the pursuer could have proceeded at once to enforce payment of the sums of money he now sues for, by diligence under the decree of modification and locality already held by him; and it was conceded by the pursuer that it would be incompetent for a party holding an ordinary decree of this Court for a debt to institute a second action in order to obtain another decree for the same debt. It appears to the Lord Ordinary that it is also incompetent for the pursuer to seek by the present action to obtain a decree for payment of sums of money which have been already constituted in his favour, although not at his instance, by a decree of the proper Court, in virtue of which diligence is just as available to

him as it would be by the decree he has concluded for in this action.

"Letters of horning at the instance of ministers holding decrees of locality and modification, are by the Act 1633, cap. 8, authorised to be issued, under which a charge of payment within ten days may be given; and, by Act of Sederunt, 22d June 1687, it is declared that 'where a decree of locality is obtained by a minister for his stipend, any succeeding minister needs not obtain a decree conform thereupon, but upon a bill given in by him to the Clerk of the Bills in the ordinary way, and production of his presentation, collation, and institution, with the decree of locality obtained by his predecessor, letters of horning may be direct against those liable in payment of his stipend, notwithstanding any form, custom, or practice to the contrary.' There can be no doubt, therefore, that the pursuer might, without the necessity of any action such as the present, have proceeded with diligence on the existing decree of locality to enforce payment of the sums in question, and why he did not do so does not appear, and has not been explained.

"The only ground on which the pursuer supported the present action was, that under a decree of modification and locality, differing, as he said, in this respect from an ordinary decree of the Court of Session, diligence would be incompetent at the instance of his assignee or other representative, as found in the old case of *Livingstone*, 17th December 1612, Mor. 10,320; but to this it seems sufficient to answer that the present action is not at the instance of an assignee or other representative. Besides, the case of *Livingstone* having occurred prior to the Act of Parliament and Act of Sederunt above referred to, cannot be treated as of authority in the present discussion, the more especially when the provisions of the Personal Diligence Act, 1 and 2 Vict. c. 114, are kept in view. By section first of that Act provision is made for decrees in the Court of Session, Teind Court, and Court of Justiciary, containing warrants to arrest and poind; and by section seventh provision is made for any person acquiring right to such decrees either by 'assignment, confirmation, or other legal evidence of such acquired right,' to have diligence at his instance, in virtue of them, to the same effect as the original creditor therein.

"The Lord Ordinary, for the reasons now adverted to, has been unable to see any sufficient ground for sustaining the present action. He thinks that to have done so would be acting contrary to the obvious policy of the enactments bearing on the matter, and be productive of unnecessary litigation and expense. In the present instance, the pursuer, through his counsel, stated, in answer to an inquiry by the Lord Ordinary, that he not only did not depart from, but insisted in his conclusion for expenses against the defenders; and this just shows that the defenders have a material interest in resisting the action, and maintaining that it should be dismissed."

The pursuer reclaimed.

The Court recalled the Lord Ordinary's interlocutor, sustained the competency of the action, and continued the cause to be heard on its merits.

CLARK and WATSON for pursuer.

LEE and MACKAY for defender.

After argument upon the merits, the Court held that the heritor having taken his decree of reduction subject to the reservation contained in it, that reservation must receive effect; that, in virtue of the reservation, the old locality subsisted as an *interim*

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 advocacy 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 advocates.

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