

Wednesday, March 17.

SECOND DIVISION.

SMITH BROTHERS & CO. v. SCOTT.

Sale—Timeous Rejection—Waiver—Mora.

A firm of engineers in Glasgow contracted to furnish to a party in Edinburgh a punching and shearing machine, which they warranted to be of the best quality. On arrival at Edinburgh the punching part of the machine was at once taken to the premises of the purchaser, and was found to be defective in quality. This was intimated to the sellers, and some negotiation followed, which ended in the purchaser agreeing to accept delivery, and pay the price in terms of the original contract. The shearing part of the machine, which had been lying meanwhile at the railway station, was then taken to the premises of the purchaser, and this part also was discovered to be defective. The purchasers having rejected the machine as disconform to contract—*held*, on proof—(1) that the defects complained of were material, and such as to entitle the purchaser to reject; but (2) (reversing the Lord Ordinary's interlocutor) that the purchaser was barred from rejecting by the above-mentioned agreement (*disc.* Lord Gifford, who held that the agreement had been made in ignorance of the defects in the shearing part of the machine, and referred only to that part which had been examined, and that the purchaser's right of rejection was not barred either by contract or by delay).

Messrs Smith Brothers & Co., engineers and boiler-makers in Glasgow, raised this action against Thomas Scott, iron merchant in Edinburgh, for recovery of the price of a punching and shearing machine and cranes, which the pursuers had sold and delivered to the defender, but which the latter had rejected on the ground of certain alleged defects.

On 24th November 1873, the pursuers wrote the following letter to the defender:—

“Sir,—We offer to furnish and deliver here in Glasgow a punching and shearing machine, as described below, at the price stated.

“One of our improved punching and shearing machines, suitable for punching and shearing 1½ inch thick plates; punching 28 inches, and shearing 24 inches from the edge. Eccentric shaft made of best tilted scrap malleable iron. Machine fitted with double power spur gear. The whole of the wheels having capes for strengthening, cast on both sides of teeth. Heavy fly wheel. Fitted also with a steam engine for driving. Machine is supplied with one punch holder and bolster, and one pair of steel shears. All complete for the sum of £330 sterling.—Yours respectfully, SMITH BROTHERS & Co., p. T. PATERSON.

“P.S.—The above machine to be fitted with angle iron cutter for the additional sum of £70 sterling, and to be delivered at the railway station in Glasgow about the 16th January 1874.—SMITH BROTHERS & Co.”

The defender replied on 3rd December in the following terms:—

“Dear Sirs,—Referring to your offer of 24th ultimo, I hereby agree to accept of your offer to

furnish the machine, as therein specified, for the sum of £330; and with angle cutting apparatus for £70 sterling additional. The whole to be of the best description and warranted, and delivered at Edinburgh on or about the 16th day of January 1874. The above price includes free delivery at railway station Glasgow.—Yours truly, THOMAS SCOTT.”

In accordance with this arrangement the machine was despatched by the pursuers from Glasgow to Edinburgh on 7th February to the address of Messrs Tod & Son, Leith Walk, for whom, as it turned out, the defender had ordered the machine. The punching part of the machine was, soon after its arrival, taken by Messrs Tod & Son from the railway station to their works, and they then discovered that it was cracked in the centre web. This was at once intimated to the pursuers, and some correspondence followed, in which the pursuers maintained that the machine was free from defect when despatched from Glasgow, and that at any rate the alleged cracks were not of such a nature as injuriously to affect the machine. In a letter to the defender, of 23rd February, they made the following offer:—“Rather, however, than have any dispute about the matter, we will acquiesce in the proposal contained in yours of the 20th, and cancel the contract; or, if it suits your friends better, we will take back the machine and make another with all convenient speed. It must, however, be distinctly understood that we make this offer to avoid disputes, and not because we are under any legal obligation to do so. In the circumstances we must know at once what course you resolve upon, and unless we hear from you by Thursday first, agreeing to one or other of the above proposals, we will assume that you elect to keep the machine as an implement of our contract.” This proposal was not acceded to, but an arrangement was ultimately come to in terms of the following letter from the pursuers to the defender:—“Glasgow, 27th February, 1874.—Dear Sir,—We have your second letter yesterday this morning. To avoid disputes, we will consent to this arrangement—viz., that you take delivery of the machine now, and pay the price. Should the headstock break in consequence of the cracks now visible in the centre web within twelve months, we will put in a new headstock, you paying one half the expense thereof, and we paying the other. Please let us have your answer by telegraph.” To this letter the defender replied by telegraph in these terms:—“Edinburgh, 28th February 1874. Agreed. Please send me invoice by first post.” The pursuers then, on 28th February, wrote the defender with their account or invoice of the price of the machine and cranes, amounting to the sum of £418, as now concluded for. The differences between the parties thus seemed to be so far arranged. During this interval, however, the shearing part of the machine was still lying at the railway station; and on its being taken to the works of Messrs Tod & Son it was discovered that it also was sprung inside in two places. This was at once intimated by Messrs Tod to the defender, and by him to the pursuers by telegram of 5th March. One of the partners of the pursuers' firm having thereupon gone from Glasgow to Messrs Tod's works, and inspected the machine, wrote the defender on 6th March that the matter was trifling and did not affect the strength of the machine. The pursuers received no further communication on the subject till about five weeks after this, when

they received the following letter from the defender:—

“Edinburgh, 13th April, 1874.

“Messrs Smith Brothers & Co.

“Dear Sirs,—The punching machine sent some time ago has been purposely left unerected; and since you were here last I am sorry to say the cracks have not only increased in numbers, but also in size and extent. It would, therefore, be quite useless to put it up, as it would only incur needless expense. I can see nothing for it but that you take it away, as the opinion of several of the most eminent practical men who have seen it is that the machine is faulty and very far from being what it should be. Waiting your instructions.—Yours truly, THOMAS SCOTT.”

To this letter the pursuers replied as follows:—

“Glasgow, 15th April, 1874.

“Thomas Scott, Esq., Edinburgh.

“Dear Sir,—We have your letter of the 13th curt., and are surprised to find that the punching machine has not been erected. We are perfectly satisfied of the sufficiency of the machine, and must now request payment of the price. The arrangement come to, and embodied in our letter to you of 27th February we abide by, and we cannot entertain any proposal to alter the agreement then arrived at. We hope to have a remittance in the course of this week.—Yours respectfully, SMITH BROTHERS & Co.”

The defender having refused payment, the pursuers raised this action for recovery of the price, and maintained that the machine could not be held as faulty or disconform to contract in respect of the existence of the cracks, these not being of a nature to impair the strength of the machine, or to entitle the defender to reject it; and, farther, that the defender had barred and precluded himself from rejecting the machine and refusing to pay the price by the arrangement concluded by the letters of 27th and 28th February. The defender, on the other hand, maintained that the machine was so faulty and disconform to contract as to entitle him to reject it, and that the arrangement founded on by the pursuers could not bar him from rejecting the whole machine, as it had reference solely to the only defects then known to the defender, and not to the defects subsequently discovered in the shearing part of the machine.

The Lord Ordinary (CURRIEHILL) allowed the parties a proof of their averments. The import of the proof, so far as material to the decision of the case, will be found in the Note to the Lord Ordinary's interlocutor.

The Lord Ordinary pronounced the following interlocutor:—

“Edinburgh, 28th December 1874.—The Lord Ordinary having heard the counsel for the parties, and considered the Closed Record, Proof, and Productions, and whole proceedings: Finds that the pursuers agreed to furnish and deliver to the defender at Edinburgh on or about the 16th January 1874, and the defender agreed to purchase, one of the pursuers' improved punching and shearing machines, suitable for punching and shearing 1½ inch thick plates, for the sum of £330, and fitted with angle-iron cutter for the sum of £70 additional, the whole to be of the best description, and warranted: Finds that the pursuers, on or about the 7th February 1874, forwarded to the defender a punching and shearing machine, with angle-iron cutter, but that the same was not of the best de-

scription, and was defective and cracked in material parts: Finds that the defender was entitled to reject, and did timeously reject, the said machine; therefore assolizes the defender, and decerns; Finds the defender entitled to expenses, and appoints an account thereof to be lodged, and when lodged, remits the same to the Auditor to tax and to report.

“Note.—In this action Messrs Smith Brothers & Company, engineers and boiler-makers in Glasgow, claim from Thomas Scott, iron merchant and wholesale ironmonger in Edinburgh, the sum of £418 sterling, being the price of a punching and shearing machine, fitted with an angle-iron cutter and two cranes, to be used in working the machine, all of which were ordered by the defender from the pursuers, but have been rejected by the defender on the ground of certain alleged defects in the machine.

“The defender acted in the transaction as a middleman, the machine having been ordered by him, not for himself, but for Messrs James Tod & Son, Leith Walk, Edinburgh, who had contracted for the iron work connected with the widening the North Bridge, Edinburgh, and required a punching and shearing machine for that and other purposes of their business. Mr Scott advertised for such a machine, and on 24th November 1873 Mr Osborne Smith (one of the pursuers) handed to the defender, in his office in Edinburgh, the offer, No. 65 of process, which is in the following terms:—

“Sir,—We offer to furnish and deliver here in Glasgow a punching and shearing machine, as described below, at the price stated.

“One of our improved punching and shearing machines, suitable for punching and shearing 1½ inch thick plates; punching 28 inches, and shearing 24 inches from the edge, eccentric shaft made of best tilted scrap malleable iron; machine fitted with double power spur gear. The whole of the wheels having capes for strengthening, cast on both sides of teeth; heavy fly-wheel; fitted also with a steam-engine for driving; machine is supplied with one punch-holder and bolster, and one pair of steel shears—all complete for the sum of £330 sterling.

“P.S.—The above machine to be fitted with angle-iron cutter for the additional sum of £70 sterling, and to be delivered at the railway station in Glasgow about the 16th January 1874.

“Mr O. Smith at the same time advised the defender to go to Glasgow, telling him that his brother (Hugh Smith) would take him to see one of the machines in operation in the shipbuilding yard of Messrs John Elder & Sons. The defender accordingly went to Glasgow on 3d December 1873, and in company with Mr Hugh Smith he visited John Elder & Sons' yard, where he saw one of the pursuer's punching machines at work. This machine was one of what the pursuers term in their offer their ‘improved’ machines, and it contained in the hollow interior of the punching apparatus a web of iron (called throughout the Proof the ‘centre-web’). This web, which is a plate of iron about an inch and a-half thick, is designed to add firmness and strength to the machine. And the pursuers admit that it constitutes one of their ‘improvements’ in the manufacture of punching machines.

“The defender was satisfied with what he saw of the machine, and he on the same day (3d December 1873) wrote and handed to the pursuers an acceptance of their offer in the following terms:—

'Dear Sirs,—Referring to your offer of 24th ultimo, I hereby agree to accept of your offer to furnish the machine as therein specified for the sum of £330, and with angle-cutting apparatus for £70 sterling additional. The whole to be of the best description, and warranted, and delivered at Edinburgh on or about the 16th day of January 1874. The above price includes free delivery at railway station Glasgow.'

"This acceptance, it will be observed, is not precisely in terms of the offer, because in it the defender expressly stipulates that the whole apparatus is to be of the best description, and 'warranted,' and that the delivery is to be at Edinburgh, and not at Glasgow, as was proposed in the original offer. These variations upon the offer were not objected to by the pursuers, who thereupon proceeded to manufacture the machine for the defender.

"It appears to me that the introduction of the stipulation as to warranty had the effect of making that warranty an inherent condition of the contract, so as to entitle the defender to rescind the contract and reject the machine unless it came up in every particular to the warranty. The law on this point is well summarised as follows in Smith's Leading Cases, ii. 27—'But where the subject-matter of the sale is not in existence, or not ascertained at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty but a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because the existence of these qualities, being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted.'

"The first questions, therefore, to be answered are—Did the machine forwarded to the defender possess the qualities which it was guaranteed to possess? Was it of the best description? I think these questions must be answered in the negative.

"As the machine was to consist chiefly of cast-iron, and as the pursuers themselves are not founders, they had the necessary castings made at the foundry of Messrs Allison, and sent to their own works to be fitted together. When the work was nearly complete (*viz.*, on 22d January), the defender, accompanied by Mr Blackie, a partner of the firm of James Tod & Sons, for whom the machine had been ordered, went to Glasgow and inspected the machine in the works of the pursuers, and neither of them then observed any defect. But as the machine, which is of great weight, was then standing on its base, no flaw in the interior of the machine could be seen; and as cracks visible on the outer surface were not to be expected, it is not wonderful that the defender and Blackie did not look narrowly for such faults. The machine was not completed until more than a fortnight after that visit, and it was not sent out of the pursuers' works until 7th February, when it was addressed to Messrs Tod & Sons, Leith, and given by the pursuers to the Caledonian Railway Company for conveyance to Edinburgh. The whole apparatus arrived in due course at the Edinburgh station of the Caledonian Railway, and was taken off the trucks and deposited in the station, as Messrs Tod, owing to the crowded state of their yard, could not take immediate delivery.

"It is necessary here to explain that the machine

consists of several parts, two of the largest and most important of these being what are termed the 'punching-cheek' and the 'shearing-cheek,' the angle-iron cutter being attached to the latter. These cheeks are of great weight—the one weighing 96 cwt., and the other 110 cwt. The centre-web, already spoken of, occupies the centre of the hollow interior of the punching-cheek, and what is called 'the box,' occupies part of the hollow interior of the shearing-cheek, and is designed to give strength and internal support to that part of the machine.

"On the 17th February 1874 Messrs Tod & Sons directed the Railway Company to bring the punching-cheek to their works. It had not previously been examined at the railway station, but before it was taken off the lorry which brought it to the works it was examined by James Wight, Messrs Tod's manager, who discovered the centre-web to be cracked and sprung in more than one place. He reported the matter to his principals, who at once communicated with the defender, at whose request the pursuer Mr Osborne Smith went to Edinburgh on the following day (18th Feby.), and examined the cracks, which it is admitted were then quite visible, and of considerable extent. There is some conflict in the evidence as to whether such cracks so materially affected the soundness of the machine as to warrant the defender in rejecting it, but I am of opinion that the great preponderance of the evidence is favour of the defender's view—that the existence of such cracks in the machine before it had ever been tried at work, would have justified its rejection, unless they had been caused by undue violence after delivery. Not only is there no evidence of such violence having been used, but I think it is satisfactorily proved that no violence to which it could have been exposed during or after the transit by railway, not even in a collision of trains, could have produced either the cracks in the centre-web of the punching-cheek, or those to be afterwards noticed in the shearing-cheek, without shattering the whole machine.

"I am further of opinion that it is proved that the crack in the centre web of the punching-cheek had begun to shew itself before it left the pursuers' work. Indeed, one of the founders (Archibald Allison) admits that the cross bar which is connected with the bottom of the centre-web was slightly cracked before it was sent from the foundry to the pursuers' works at all; and he also admits, and other witnesses corroborate him, that the main crack in the centre-web is continuous with that crack in the cross-bar. It is also proved that before the machine was sent off by the pursuers it was painted on the side which would be visible while the machine was in a horizontal position before being erected for work. This appears to be an unusual thing with the interior parts of large castings; but if the defender is to be believed—and I see no reason to doubt his veracity—the crack in the cross-bar and the crack at the lower part of the centre-web had been filled with putty before the paint had been applied. This was, indeed, pointed out by him to the pursuer Osborne Smith on his visit to Tods' works on 18th February. It is therefore quite clear that the centre-web was partially cracked before it left the pursuers' works; and as it is proved that the tendency of such cracks in large castings is to extend indefinitely (as indeed the cracks in question appear to have

done since they were first seen by the defender), it is obvious that the existence of such a crack must destroy all confidence in the machine, and the defender would therefore have been justified in at once rejecting the machine as being undoubtedly not of the best description.

"The machine was not, however, at once rejected, and some correspondence took place between the parties; and an arrangement was ultimately made, which is embodied in two letters, dated respectively 26th and 27th February 1874, by which the defender agreed to take delivery of the machine at once, and pay the price, on condition that if the head-stock should break within twelve months in consequence of the crack then visible in the centre-web, the pursuers should put in a new head-stock at the joint expense of them and of the defender.

"Two points here deserve attention, viz.—(1) that up to this date (27th February) the defender had not taken delivery of any part of the machine; and (2) that the one-half of it, viz., the 'shearing-cheek,' was still lying at the railway station in Edinburgh, and was not known by the defender to be cracked or in any way defective. It is true that Wight had seen it at the station between the 17th and 27th February; but it is not wonderful that he failed there to discover the cracks presently to be noticed, seeing that the pursuers themselves and some of their witnesses deny to the present hour the existence of any cracks in that part of the machine. It cannot be doubted that the agreement of 26th and 27th February was entered into on the part of the defender in ignorance of the existence of any defect in the shearing-cheek, and in reliance upon the warranty of the pursuers that the machine was of the best description; and I am of opinion that if that part of the machine on being brought to the works was found to be materially cracked, this agreement cannot bar the defender from rejecting the whole machine.

"What, then, was in point of fact the condition of the 'shearing-cheek?' It was brought to the works of Messrs Tod by a railway lorry, on or about 5th March 1874; and before it was completely unloaded, the workmen who were engaged in taking it off the lorry discovered that it was cracked in two places. Wight and William Tod (a son of one of the partners of James Tod & Son) then examined the cheek, and found the cracks referred to, one being in front of 'the box,' and penetrating through and through the front web of the cheek, and the other being at what is called 'the bracket.' The pursuers deny the existence of any such cracks, either at 5th March or even at the present day. But the evidence of the defender and of his witnesses, among others of Professor Fleeming Jenkin, all of whom tested the machine with naphtha, places it beyond doubt that the crack extending from the box and through the centre-web not only does exist, but was in existence on 5th March; and it is, I think, equally clear from the evidence that the crack is owing not to any violence used after the cheek left the pursuers' works, but to some defect in the casting,—probably some parts of the box and front web having been made too slight relatively to the other parts of the machine, and thus creating great inequality in the thickness, and consequently in the rapidity in cooling of the casting, and thus giving rise to unequal strains which naturally result in cracks.

"The next question is, Were these cracks so

material as to justify the rejection of the machine? The pursuer and his witnesses all answer this question in the negative; but as these gentlemen deny the existence of the cracks, their evidence on this point is of no weight. The defender's witnesses, on the other hand, are all clearly of opinion that the cracks are in dangerous proximity to an important part of the machine, viz. the angle-iron cutter, and that that strain when the cutter is in use would tend to enlarge the crack and break up the whole machine. I have no doubt whatever that the existence of this crack constitutes a material defect in the machine.

"A great deal of so-called scientific evidence was adduced by the pursuers for the purpose of proving that, even assuming the existence of the cracks, the machine had so much superfluous strength that its breaking strain could never be reached or even approached. But the simple answer to all such speculative opinions is contained in the following words of Professor Fleming Jenkin:—'All our formulæ deal with sound machines; we have no formulæ for cracked metal. The view I take is, that I should accept no machine with cracks in it, whatever the calculations might show.

"I am therefore of opinion that the defender, on discovering the existence of the crack in question was entitled to reject the machine.

"The only question which remains is, Was the defender's rejection timeously and effectually made?

"On this point I have no doubt. Immediately on making the discovery the defender telegraphed to the pursuers on 5th March:—'Shearing-cheek of machine sprung in two places; come through and see it.' The pursuer Osborne Smith went to Edinburgh on 6th March and saw the machine, but he disputed the existence of the cracks, and would not admit that the machine was in any way defective. The defender and Messrs Tod & Sons then consulted skilled professional men, whose examination and experiments made it clear that the cracks did exist; and on 18th March the defender wrote the pursuers stating that the cracks had increased in number and in size and extent, and that 'I can see nothing for it but that you take it away, as the opinion of several of the most eminent practical men who have seen it is that the machine is faulty, and very far from being what it should be. Waiting your instructions, yours truly.' The pursuers replied on the 15th March, objecting to take back the machine, and maintaining (in my opinion erroneously) that the defender was barred from rejecting it by the arrangement of 27th February. The defender on the same day answered that letter by another, in which he positively declined to take back the machine, and desired all further communications to be addressed to his law agents. This was a distinct, and, in my opinion, a timeous rejection of the machine; and on the whole matter I am of opinion that the defender is entitled to absolver, with expenses."

The pursuers reclaimed against this interlocutor

At advising—

LORD JUSTICE-CLERK—[*After narrating the facts*]
I think it quite clear upon the proof that the defender was entitled to reject this punching machine on the ground of the defects alleged, had nothing further taken place. But the question is, Did he bar himself by his subsequent negotiations with

the pursuers from maintaining his right of rejection? The letter from the pursuers to the defender of 23d February is very important, in which the pursuers say—"Rather than have any dispute about the matter we will acquiesce in the proposal contained in yours of the 20th, and cancel the contract; or if it suits your friends better we will take back the machine, and make another with all convenient speed. Unless we hear from you by Thursday first, agreeing to one or other of the above proposals, we will assume that you elect to keep the machine as an implement of our contract." In my view, the pursuers having made that alternative proposal, and the goods being in the possession and under the control of the purchaser, the latter was bound either to reject at once or to take the article with all its apparent faults. The pursuers' offer was not accepted. Further negotiations followed, and then we have the pursuers' letter of 27th February proposing a final arrangement, to avoid disputes. The defender's telegram in answer is short, but quite to the point; and now we have this specific agreement, quite outside of the contract of sale, by which the defender elected not to reject the machine.

My Lords, I am of opinion (though I do not deny that the case is a narrow one in some views) that this specific contract applied to the whole machine, and that the price of the whole was thereby undertaken to be paid. There is certainly some difficulty in the fact that the shearing part of the machine was still lying at the station. But I think that the defender was bound to examine the whole machine, and must be held to have done so. I am of opinion that he cannot now reject on the ground of defects which were apparent then, and would have been discovered had examination been made. It would have been otherwise had the defects been latent, or if it had turned out on experiment that the machine was wholly unfit for the purpose for which it was designed. But looking to this particular defect, which alone is founded on, it would be contrary to the good faith of the contract to allow the defender to reject the machine.

LORD NEAVES concurred.

LORD ORMDALE—[*After narrating the facts*].—The case undoubtedly presents some questions of importance and difficulty. After a careful consideration of the argument, and of the voluminous proof, I am of opinion, in concurrence with the Lord Ordinary, that the weight of the evidence as regards the cracks and consequent faulty character of the machine, as furnished by the pursuers, is on the side of the defender; and if there had been nothing else in dispute the interlocutor of the Lord Ordinary now under review would fall to be adhered to.

But, although not without considerable hesitation and difficulty, I have come to be of opinion that the defender is barred and precluded by the arrangement of 27th and 28th February from rejecting, on any of the grounds now founded on by him, the machine in question and refusing to pay its price. It must be borne in mind that the machine was despatched from Glasgow to Edinburgh on the 7th of February, and arrived at the station there next day. From that date the machine must be held to have been delivered to and at the risk of the defender, and under his control exclusively, and this I did not understand to

be disputed. It can hardly be questioned therefore that the defender had ample time and opportunity between the 8th and 28th of February, when the arrangement was entered into upon which the pursuers found, of fully examining the machine in all its parts, and satisfying himself as to its efficiency and freedom at least from patent and visible faults, which, on the defender's own showing, the cracks in question were. Nor am I able to see how in this matter it can affect the pursuers that the defender for his own convenience, or that of his constituents Messrs Tod & Son, allowed the machine, or a portion of it, to remain for between two and three weeks at the railway station, where it is said a proper examination of it could not be made. Neither can I find any satisfactory evidence to the effect that the pursuers were aware that the machine in all its parts had not, prior to the arrangement being entered into on the 28th of February, been removed from the railway station to the works of Tod & Son and thoroughly examined. I am not indeed satisfied that the machine or such parts of it as had been allowed to remain at the railway station till after the date of the arrangement might not have been examined there, to the effect at least of the cracks on which he now founds being seen by him. All these cracks were, according to his shewing in the proof, capable of being observed, and therefore it cannot well be taken from him that they were latent. Mr Blackie, one of the two partners of Tod & Son, says that "I was a party to the arrangement of 27th and 28th February. I think that Wight" (the managing clerk) "had been sent to look at the shearing-cheek at the railway station before that arrangement was come to." Mr John Tod, again, says, "The machine in question was intended for our firm. After it arrived at Edinburgh railway station it was examined there, and delivery was refused because it was found to be faulty." It is true that this witness afterwards says, "I do not know of my own knowledge about the machine being examined at the railway station. I knew it from Mr Wight." And it is also true that Mr Wight, when asked if he inspected the machine at the railway station, says, "I inspected nothing at all," but he adds, what appears to me to be very important, "I knew about the arrangement of 27th and 28th February. At that time I had ample opportunity of examining the whole machine."

It was in these circumstances that the arrangement was come to between the parties on the 27th and 28th of February. It relates unquestionably not merely to the punching portion of the machine, but to the whole together—the shearing as well as the punching portion of it. The machine was in the arrangement treated as a *unum quid*, and was of a description, as well from its construction and otherwise, which required that it should be accepted or rejected as a whole. Accordingly the price of the whole was asked for by the defender, and requested to be at once transmitted to him. Now, in this view, viz.—that the agreement was entered into in reference to the whole machine, it is very important that, except what is said in it about the headstock breaking, the arrangement is quite general and absolute, and is not made subject to any condition or qualification whatever. In particular, it contains no condition or qualification to the effect of reserving the rights of the defender to reject the machine, and to refuse to pay its price should it be found by him on further examination that the shearing por-

tion of it should turn out to be cracked or defective. I must suppose that the parties had in the interval between the 28th February, when the agreement was entered into, and the 5th of March, when it is said the shearing portion of it, as well as the punching portion, was discovered to be cracked, left it to an arbiter to say whether the pursuers were not entitled to immediate payment of the whole price, I cannot doubt that it would be so determined.

I cannot therefore see anything either in the terms of the arrangement itself, or in the circumstances in which it was entered into, to warrant the interpretation of it contended for by the defender, viz., that it had reference solely to the defects in the punching portion of the machine. It appears to me, on the contrary, that the terms of the arrangement import a settlement by compromise or transaction of all disputes regarding cracks or faults in the machine or any part of it, or regarding at least all cracks or faults which were not then latent. As already noticed, the machine in all its parts had been delivered and out of the possession and power of the pursuers, and was lying at the risk and under the control exclusively of the defender. And as I have also already noticed, the defender—or what is the same thing his constituents—had previous to the arrangement of the 27th and 28th February an ample opportunity of examining the whole machine. Having regard to these circumstances, and to the fact that at and prior to the date of the arrangement the parties had been disputing about the machine and the nature and effect of the cracks which had been observed on it, the cause or reason of their entering into the arrangement, as expressly stated in it, viz., “to avoid disputes,” is very material as showing that it must now be held to bar or preclude the defence. To arrive at any other result would be tantamount to nullifying entirely the arrangement in question. The defender may have been rash or imprudent in entering into it, but as he has not attempted to get it set aside on the ground of fraud or any other ground, I can see no alternative but to allow to it its full effect, for I do not see how it can be read as limited merely to the cracks in the punching portion of the machine—which I understood was the contention of the defender—without materially altering its terms. It is a different matter altogether, what would be the rights and liabilities of the parties if the machine, after being put up and in operation, turned out wholly insufficient owing to cracks or defects which could not be observed previous to the arrangement—the warranty of the pursuers might then come into operation, and a different question from that at present before us would arise, in regard to which I can say nothing at present.

For the reasons I have now referred to, I am of opinion that it ought to be found that the defenders are, by the arrangement of 27th and 28th February, barred from rejecting the machine in question, and from now refusing to pay its price, on any of the grounds stated by them; and therefore that the Lord Ordinary's interlocutor ought to be recalled, and decree pronounced in favour of the pursuers as concluded for.

LORD GIFFORD—I agree with your Lordships as to the nicety of this case. I am unable, however, to concur in altering the Lord Ordinary's interlocutor. On the contrary, I am of opinion that it is

well founded. The machine was sent off by the pursuers about the 7th of February, and arrived at the Caledonian station at Edinburgh a day or two after. It lay there for the Messrs Tod. The machine consisted of two main portions—the punching part and the shearing part. These were taken by the Messrs Tod at different times. The punching portion was first taken. It arrived at their premises about 17th February. There is no plea that the defender was not entitled to object to the machine then on the ground of defect. He did object, and at once intimated his objection to the pursuers. Now, I take this as a rejection of the whole machine because a portion of it was defective. I do not say whether it was justifiable or not, but it was *de facto* a rejection of the whole machine. This led to much negotiation, extending over a considerable period, but all this time the machine was rejected. During the whole interval which preceded the agreement of 27th and 28th February the machine was in the position of a rejected article. I think it clear that the Messrs Tod were not bound to examine the other portion which was lying at the station, having rejected the whole on account of the defect of the one portion which they had examined. It would have been unreasonable to expect them to examine the other portion until the portion which was with them had been arranged about. I am of opinion that that arrangement related only to the punching portion of the machine, and had no relation to the other portion which had not been examined, and which the defender doubtless took for granted was in terms of the pursuers' warranty. Delivery is then taken of the shearing part of the machine, and the discovery that it also was sprung in two places was communicated to the pursuers on 5th March. I am of opinion that this challenge also was timeously made.

I agree with all your Lordships that the defects discovered were material, such as would entitle a purchaser to reject as disconform to contract. Has the defender barred himself from rejecting? When an essential defect is found proved it needs a strong case to make a purchaser accept the article and pay for it as if it were perfect according to stipulation. I am of opinion that he was not barred from rejecting. I think he was not barred by *delay*, for the lapse of time was occasioned by the discovery of one defect and negotiations thereanent. The whole interval down to 28th February is thus accounted for, and falls to be deducted, and I do not think the remaining time, from 29th February to 5th March, was material, or sufficient to constitute *mora*. Neither do I think that the agreement of 27th and 28th February implied a *waiver* of all objections. The defender did not know then of any defects in the shearing-check, and it would be a strong thing to hold that an agreement made in ignorance of a defect was an agreement to waive all objections on the ground of that defect, or on the ground of any other defects that might appear. On the whole matter I do not think that the purchaser's right of rejection in this case was barred either by contract or by delay.

The Court pronounced the following interlocutor:—

“Recall the interlocutor complained of; find that the machine in question was transmitted by the pursuers, the sellers, in Glasgow on the 6th of February 1874, and arrived at

the railway station in Edinburgh on the 7th of the same month; find that the machine was on the 17th of February found to be defective in the centre web of the punching sheet, and that the defender then intimated to the sellers that he declined to accept delivery thereof; find that after some negotiation, during which the pursuers offered to cancel the contract, the parties agreed on the 27th and 28th of February that the defender, on the terms mentioned in the pursuers' letter of the 27th, should accept delivery and pay the price; find that this agreement related to the whole machine; find that on the 5th of March the defender intimated to the pursuers that the shearing part of the machine was defective, and that this defect has been proved; but find that the defender is precluded by the agreement of the 27th and 28th of February from rejecting the machine, or refusing to pay the price, on the ground of defects which were then apparent; therefore repel the defences, and decern against the defender in terms of the conclusions of the summons, and find him liable in expenses (with the exception of the expenses of the proof), subject to modification, reserving the question as to the amount thereof until the account is taxed, and remit to the Auditor to tax the expenses and to report."

Counsel for the Pursuers—Balfour and Brand.
Agent—A. Kirk Mackie, S.S.C.

Counsel for the Defender—Guthrie Smith and Campbell. Agents—Macnoughten & Finlay, W.S.

Thursday, March 18.

FIRST DIVISION.

[Lord Craighill, Ordinary.

COFTON v. COFTON.

Proof—Court of Session Act 1868, § 15—Interlocutor Sheet.

Held that the provisions of the 15th section of the Court of Session Act of 1868, as to proving the tenor of a summons, petition, or other original writ or pleading, does not apply to an interlocutor sheet.

Friday March 19.

FIRST DIVISION.

[Lord Mackenzie, Ordinary

KENNY v. TAYLOR AND OTHERS.

Entail—Revocation—Substitute—Fee.

In 1816 a proprietor disposed his estate to himself in liferent, and to Ernest and the heirs-male of his body in fee, whom failing to Andrew and other substitutes under the fetters of a strict entail. The deed contained no disposition *hereditibus nominandis*, but reserved power to the grantor to alter the course of succession and gratuitously dispoise, declaring that all such alterations should be understood and taken as part of the entail, and should be as

effectual as if inserted therein. In 1828 the entailer executed a deed of revocation and new disposition, whereby, on the narrative of the deed of 1816, and of the reserved power therein, and that he had resolved to alter the course of succession therein contained so far as regarded Andrew and the whole other persons substituted, he disposed his estate to himself in liferent, and to Ernest in fee, whom failing to the heirs-male of his body, whom failing to the heirs-female of his body, whom failing to K— and the heirs-male of his body, whom failing to certain other substitutes, under the conditions, provisions, &c., contained in the said deed of entail, all which clauses (the procuratory of resignation and precept of sasine, and whole other clauses of that deed of entail) he thereby confirmed and assigned to his said dispoonees and heirs of entail—declaring that the said Ernest and persons substituted to him should be entitled to possess the said lands "under the foresaid deed of entail, and these presents, and under no other right or title whatever." This deed of revocation did not contain any of the fetters of entail and the whole substitutes, with the exception of Ernest and the heirs of his body, were different from those mentioned in the deed of entail of 1816. Held (1) that the deed of entail of 1816 was revoked and superseded by the deed of 1828; and (2) that in virtue of the latter deed, Ernest became fee-simple proprietor of the said estate.

This was an action of reduction and declarator at the instance of James William Gammell Kenny, late of the Honourable East India Company's Service, against Mrs Rosa Ann Bertram Gammell or Taylor and others, her trustees.

The following narrative is taken from the note of the Lord Ordinary (MACKENZIE);—

"By the disposition and tailie of 1816 James Gammell disposed to himself in liferent, and to Ernest Gammell and the heirs-male of his body in fee, whom failing, to Andrew Gammell and the other substitutes therein mentioned, under the fetters of a strict entail, the lands of Portlethen and others. The pursuer, Mr Kenny, is not one of these substitutes, and is not mentioned in the deed. There is no substitution in that deed of entail *hereditibus nominandis*. But the entailer thereby reserved power to alter the order and course of succession contained in the deed, and to revoke or alter all or any of the conditions, provisions, and irritancies therein contained, and to revoke the deed, and also to sell, burden, or even gratuitously dispose of the said lands as he might think proper, by writing under his 'hand,' which writing he provided 'shall be understood and taken as a part of this present deed of entail, and shall be as effectual to all intents and purposes as if the same had been inserted therein.'

"By the deed of revocation and new disposition of 1828 the entailer James Gammell, on the narrative of the previous deed of entail of 1816, and of the reserved power above mentioned, and that he had resolved to alter the course and order of succession therein contained, in so far as regards Andrew Gammell and the whole other persons substituted to Ernest Gammell and the heirs male and female of his body, revoked the said