supply for the pulpit of the said church was provided during the pursuer's said absence; and whether the said church was closed during the said period?"

The Lord Ordinary (ADAM) approved of the issue proposed by the pursuer, and disallowed the counter issue proposed by the defender.

The defender reclaimed.

At advising—

LORD PRESIDENT—I think that in some respects this case is a very singular one. When an action is raised for slander, written or verbal, one always looks, in the first place, to see what is the real complaint of the pursuer, and the first item of his complaint always is that the statements complained of are false; the second, that there is something actionable in what is said or written; and thirdly, that he has suffered injury. Now, it appears to me that in the present case the first of these elements is entirely wanting. The statements in the letter are not in the least degree ambiguous. In the first place, it is quite distinctly stated that this minister absented himself from his charge for six weeks, and that during these six weeks the church was shut up and no service held at all; and, in the second place, it is suggested, not quite broadly stated, but suggested very distinctly, that this must have been without the knowledge or consent of the Presbytery, because they made no supply for the pulpit. These are the facts charged against him, and I do not think that there are any more facts in the letter. Now, the pursuer does not say that he was not absent for six weeks, or that the Presbytery knew and approved of his conduct in the matter. On the contrary, he abstains very carefully from saying anything on that subject, and therefore I think that we are entitled to assume in dealing with the relevancy of this record that the facts are as stated in the letter. What, then, is the position of the pursuer if that be so? He comes into Court substantially saying—"I admit that I went away for six weeks, and shut up my church without making any provision for public worship there during my absence, and I admit that I had no communication with the Presbytery on the subject, and therefore I complain that you have said that what I have done is neglect of duty and conduct unbecoming a minister of the Gospel, and deserving of the censure of the ecclesiastical courts." Now, I think that this is quite irrelevant. I do not say that it is a bad innuendo—quite the reverse; but no man can come into Court with a mere innuendo; he must have facts and circumstances as well as innuendo, and a statement that the facts and circumstances are false. Here there is no such statement, but a statement that the facts are practically true. In these circumstances I think that this record is quite irrelevant.

LORD DEAS—I agree with your Lordship that this is not a relevant record.

LORD MURE—I concur. I think there is a great want in this record of any allegation of the falsehood of the facts alleged. On the contrary, the main facts are not denied, and that being so, I think we are entitled to assume that they are true. I am therefore of opinion that this record is irrelevant.

LORD SHAND—I agree with your Lordships. I think that an innuendo in order to be good as part of an issue must, in a reasonable sense, be justified by the article complained of, or rather in a reasonable and not absurd or extravagant way may be extracted from the article read in the light of the facts stated by the pursuer. You must look at these facts as he states them on record in order to see whether the innuendo may reasonably be taken from the article, and is not altogether extravagant. Now, applying that principle to this case, I agree in the view taken by your Lordships. The point complained of is that this church was not used for six weeks through the neglect of the clergyman, and that being the point of the accusation, if the pursuer meant to found an issue with an innuendo of this kind, I think that it would have been necessary for him to add one or other of two things—either to say that the facts alleged were false, or to explain that there were other facts truly in the mind of the writer, as, for instance, that there was a *fama* against this minister relating to something else current in the parish which the writer of the letter meant to support, and that the public of the neighbourhood would so understand his statements; but without a denial of the facts directly pointed out in the letter, and without an averment of other facts such as I have mentioned, I think that this innuendo is extravagant, and ought not to be allowed.

The Lords recalled the Lord Ordinary's interlocutor, disallowed the issue proposed by the pursuer, and dismissed the action as irrelevant.

Counsel for Pursuer — Murray. Agents—Adam & Sang, W.S.

Counsel for Defender — Jameson. Agent — F. J. Martin, W.S.

Friday, January 20, 1882.

FIRST DIVISION.

[Lord Fraser, Ordinary.

FLEMING & COMPANY (LIMITED) *v.* THE AIRDRIE IRON COMPANY.

Sale—Warranty—Implied Warranty—Particular Purpose.

An ironfounder contracted to make and supply certain cast-iron stills, the contract bearing that they were "to be first-class castings of Scotch iron of best quality." The stills were to be used in the distillation of rosin oil, which involved the application of great heat. There was no express reference in the contract to the purpose for which the stills were purchased, but the ironfounder visited the oil-works before entering into the contract, and had an opportunity of seeing what was required. The stills became useless after having been three months in operation—the ordinary life of a still in the manufacture of rosin oil being three years. The oil manufacturer raised an action of damages for breach of contract. He admitted that the stills were "first-class castings of Scotch

iron of best quality" if no special purpose had been in view. *Held* that the defender was liable, as having failed to supply iron castings of a quality suitable for the distillation of rosin oil.

In this case the pursuers were A. B. Fleming & Company (Limited), chemical manufacturers, Granton, near Edinburgh, and the defenders were the Airdrie Iron Company, and Messrs Martin and Adamson, the partners of that firm. On 18th March 1880 the pursuers sent to the defenders a specification of certain stills and other cast-iron work for the supply of which the pursuers wished to have estimates. The specification bore that all the articles to be supplied were "to be first-class castings of Scotch iron of best quality, to be free from flaws or sand-cracks, all bottoms to be cast 'bottom downwards.'" On 23d March the defenders offered to supply the articles conform to this specification. On 29th March the pursuers in part accepted this offer, and agreed to purchase from the defenders, *inter alia*, six large and four smaller stills, "the whole to be a good and satisfactory job to our Mr Irvine, and delivered at our works by 15th May 1880." In point of fact the deliveries were not completed till September, but the pursuers took delivery and paid the price.

When the pursuers received the still which was first delivered in May 1880 they noticed what appeared to be certain flaws in it, with reference to which they wrote to the defenders intimating that if the flaws extended to the body of the metal they would reject the still and all others in the same condition. The defenders replied that they were thoroughly satisfied of the solidity of the still and its fitness for work. This still, and the two which followed it, broke down within three months after they had been put into use, and on the defenders denying liability the pursuers raised this action, in which they claimed damages, estimated at £680, being £180 as the value of the three stills, which they had to replace, and £500 for the loss of time during which their works were partially standing idle for want of the stills.

The pursuers averred—"In November 1880 certain defects, which had hitherto been latent, were discovered in two of the large still bottoms; and these still bottoms dropped down. It was then discovered that the castings for these two stills were defective and disconform to contract, that they were made of material altogether unsuited to the work contracted for, and were of defective moulding. The dropping down was occasioned by the defective construction of the stills. A third of the still bottoms supplied by the defenders under the foresaid contract broke down in the month of December 1880, and from the same causes. The breaking down of the castings was at once intimated to the defenders by the pursuers, who called upon them to replace the defective stills, but this the defenders refused to do."

The defenders answered—"Believed to be true that certain of the still bottoms supplied by the defenders dropped or broke down after being in use for some time. Denied that this was caused by any fault on the part of the defenders, the work supplied being in every respect conform to the contract. If the stills failed through defects (which is denied), it was through such defects as were easily ascertainable, and ought to have been ascertained by the pursuers on delivery—as were inherent in the specification. The defenders believe and aver that the failure of the stills was due to overheating, caused by the faulty erection and grossly unskilful or careless treatment of the stills by the pursuers."

The pursuers pleaded—"(2) The still bottoms referred to having given way on account of defective materials and workmanship, and having been disconform to contract, the pursuers are entitled to be indemnified by the defenders for the loss they have sustained thereby. (3) The pursuers having suffered loss in the circumstances condescended upon, through the fault of the defenders or those for whom they are responsible, to the extent libelled, the pursuers are entitled to decree in terms of the conclusions of the summons, with expenses."

The defenders pleaded—"(2) The work supplied by the defenders being in all respects conform to the contract, and any failure therein being caused by the pursuers' faulty erection or use of the stills, the defenders should be assoilzied. (3) The pursuers having accepted delivery of the articles supplied, and having used the same for a considerable time without objection, are barred from now rejecting them or claiming damages."

After a proof, the import of which sufficiently appears from the note and opinions *infra*, the Lord Ordinary (Fraser) pronounced this interlocutor:—"Finds that the defenders in March 1880 agreed with the pursuers to furnish to the latter, *inter alia*, six large stills, to be made according to specification, to be first-class castings of Scotch iron of the best quality, and to be delivered at the pursuers' works on 15th May 1880: Finds that the stills were not delivered at the appointed day, but were only delivered in parcels in the months of June and July, and that in consequence of such delay the pursuers were subjected to much inconvenience: Finds that the stills were put *in situ* in the months of July and August, and were wrought from these months down to December, when one of the stills was found to be cracked, and leaked and became useless, and that in a week or two thereafter the other two stills cracked and likewise became useless: Finds that in February 1881 they were removed from their seats and broken up for the purpose of examining the material of which they were composed: Finds that the defenders were unable to procure other stills to supply the place of those stills that had been removed for a period of forty-four days, and were in consequence unable to turn out during that period the rosin oil in which they deal to the extent they otherwise would have been able to do, and thereby they suffered loss and damage: Finds that these stills which had become useless as aforesaid were composed of iron not suited for the purpose intended by the contracting parties, viz., stills requiring the application thereto of great heat: And further, finds that the workmanship was defective, and thus the stills furnished became useless through the fault of the defenders: Therefore finds in law that they are liable in damages: Assesses the same at £250."

He added this note:—"The specification in this case provides that the articles were to be 'first-class castings of Scotch iron of best quality,' and the acceptance of the defenders' offer, dated 29th March 1880, adds this additional condition to the contract—'The whole to be a good and

satisfactory job to our Mr Robert Irvine, and delivered at our works by 15th May 1880.'

"The time within which the articles were to be made and delivered was soon found by the defenders to be much too limited. From the correspondence produced, it appears that the pursuers kept pressing the defenders to have the work done within the contract time, they being very much in need of the stills; and, on the other hand, the defenders made very earnest appeals for an extension of the period, urging that they had put aside other profitable contracts in order to fulfil this one, were working night and day at the job, and paying heavy charges for overtime to their men. To this cause it is thought that a good deal of the failure of the defenders to supply a satisfactory article must be attributed. The defender Mr Adamson himself assigns it in some measure to this urgent haste for the completion of the work. That the defenders had too short time for the fulfilment of their contract was a misfortune to them, but it was no excuse. They entered into the bargain with their eyes open; and they were the best judges as to whether or not they had capabilities sufficient to enable them to come up to time.

"Three stills broke down altogether after being in use for three months. They became bagged and blistered, and all three were cracked—a result which the pursuers aver, and which the Lord Ordinary has found, to be the consequence of using iron unfitted for the purpose, and of hasty and defective workmanship. On the other hand, the defenders allege that the stills were not fairly treated, and that the explanation of the disaster was the overheating them in a way that no still could be expected to survive, and which maltreatment the defenders could not have anticipated when they entered into the contract.

"It is proved that the furnace bars were 3 feet 6 inches from the still, and there is evidence on both sides as to whether this distance was what ought to have been adopted. The witnesses for the defenders maintain that there ought to have been a distance of 7 feet, so that the heat could not play upon the still with the same intensity as it must do when the distance is shorter. But the experience of the witnesses varies very much. Some of them never heard of the distance being so small as 3 feet 6 inches, and have found 5 and 6 feet even to be too short, and have been obliged, as Norman Henderson, the manager of the Broxburn Oil-Works, states, to increase the distance to 7 feet. The same result of saving the still from the heat is obtained by Thomas Jeffrey, a partner of the Stanriff Oil Company, in another way. His stills are only 2 feet 3 inches from the fire bars, and stand very fairly; but then he protects the stills by a brick arch thrown over the fire, with holes therein, through which the heat may pass upwards. All this is met by evidence of an equal number of experts, of the same experience and respectability, who are of opinion that 3 feet 6 inches is not an unusual, and is a proper distance to adopt. There is a circumstance which in this conflict of evidence leads to a conclusion against the defenders. Besides the stills obtained from the defenders, there were at Granton, in the pursuers' works, nineteen other stills obtained from Hawthorn of Leith, which were set in the same way as were the defenders' stills, and were subjected to the same treatment at the hands of the same workmen, and all these stills have had an average life of three years, while the defenders' stills came to an end in three months. Further, the defender Mr Adamson himself had an opportunity before he made his offer of seeing the precise conditions on which his stills were to be wrought. He visited the pursuers' works, and saw the use to which the stills were to be applied, and he could then have ascertained what was the distance between the fire-bars and the stills, which were in operation at the time of his visit. He says that he was not asked to look at this; nor did he ask anything about it. Whose fault was that? If it was an essential matter, surely he who came to inspect the premises where his article was to be worked ought to have made himself acquainted with it. The whole works were thrown open to him; and the very fact that he did not make himself acquainted with this point indicates that at the time he considered it of no moment, seeing that he ascertained that Hawthorn's stills, which had been wrought in the works, had the usual average life of well-constructed articles.

"There is, moreover, direct evidence that there was no maltreatment of the stills by overheating. The workmen employed to look after the stills when they were being wrought were all very positive on the point. But besides this, there is a material interest to be served in preventing over-heating. When that takes place the oil from the rosin becomes gas, and hence a careful watch is put at the discharge pipe as to whether over-heating is taking place. It is only at the discharge pipe that this can be learned; and James Barclay, the watchman told off to perform this duty, says that when he noticed any over-heating he immediately took means by the use of the damper to check it.

"Therefore the explanation of the failure of the defenders' stills must, if not attributable to the hasty execution of the job, be attributed to the material that they used. Here, again, there is the same conflict betwen the expert witnesses. Those for the pursuers say that the metal which was used, being No. 2 Langloan and No. 3 Gartsherrie, was not fitted for stills to which great heat must necessarily be applied, while the very reverse is testified to by the witnesses for the defenders. But some of these witnesses apparently do not trust entirely to stills composed of this mixture standing without some assistance. Mr Jeffrey, of the Stanriff Oil Company, as already stated, protects the still with a brick arch, and Mr Henderson, of the Broxburn Oil Company, when he orders stills, gets them of this mixture, but he always specifies that they shall be twice cast (which was not done by the defenders), the effect of which is to make the iron closer in the grain and harder. The preponderance of evidence is in favour of hard iron as a resister of heat, and this seems to be the explanation why Hawthorn's manufacture has stood so well. The specimen produced of a part of one of these is, according to the unanimous opinion of the witnesses, much harder and closer than the specimen part of the defenders' stills. Therefore the conclusion must be arrived at, that the defenders did not use the Scotch iron of the best quality—that is, of a quality fitted for the purpose, seeing that they did not use iron of a closer grain (like the Haw-

thorn's), and this is proved by the different fates of the two stills.

"The defenders must therefore pay damages. According to the evidence the pursuers have been put to the following direct expenditure in consequence of the failure of the stills :—

Hawthorn's account for other stills -	£98	6	6
Bricklayers' account - - - -	60	19	10
Time of the pursuers' men actually paid for - - - - - -	16	2	4
Tools and nuts supplied for the new work - - - - - -	2	10	0
	£177	18	8

"Besides this direct expenditure, the pursuers lost the profits from the work of three stills for forty-four days, which Mr Harris, the commercial director, estimates at a large sum, depending upon a number of hypotheses which cannot be adopted, and the Lord Ordinary thinks that justice will be done by assessing the whole damage at £250, keeping in view the fact that the pursuers did obtain three months' good work out of the stills they received from the defenders."

The defenders reclaimed, and argued—The stills supplied were conform to contract. They were "first-class castings of Scotch iron of best quality." That was not disputed. What was said was that they were unfit for the peculiar purposes of the pursuers' works. Now, there was not a word about these purposes in the contract. It might be that the defenders were bound to supply stills suited for the general purposes of stills. That might be implied from the terms of the contract. But the pursuers' methods involved the application of very great heat to the stills—and of this nothing was said. It was said that Hawthorn's stills stood the test. But the defenders when they undertook the contract were told nothing about Hawthorn's stills. Hawthorn might have been told something of the secrets of the pursuers' operations (which they refused to disclose at the proof), and thus be able to make the stills of a quality sufficient to withstand the chemical or other results which the pursuers' process of distilling caused in the stills. The pursuers said that by double running the iron or by the admixture of scrap-iron the stills would have been made suitable for the distillation of rosin. If that was the case the contract should have so stipulated. The defenders had complied with all that the contract required by supplying castings of the quality of iron specified, and fit for the ordinary purposes of stills. Further, the pursuers themselves had caused the injury to the stills by allowing them to be overheated. Lastly, if they intended to reject the stills they should have done so sooner. They were barred by delay.

Replied for pursuers—A person who contracts to supply an article for a particular purpose was held to warrant the article as fit for that purpose. The defenders had so contracted here, and had not fulfilled their contract. They knew (for one of their number had visited the works) exactly the purpose for which these stills were wanted—at least they might have known if they had asked. And Hawthorn's stills showed that suitable stills could easily be made. An express warranty—if "first-class castings," &c., was an express warranty—did not exclude an implied warranty that the goods were fit for the purpose intended—*Cooper & Aves* v. *Clydesdale Shipping Company*; *Bigge* v. *Parkinson*. There was no evidence of overheating, and as to the delay in returning the stills, the pursuers were entitled to test them fairly before returning them.

Authorities—*Baird* v. *Aitken*, February 13, 1788, M. 14,243; *Seaton* v. *Carmichael*, January 28, 1680, M. 14,233; *Jaffe* v. *Ritchie*, December 21, 1860, 23 D. 242; *Cooper & Aves* v. *Clydesdale Shipping Company*, March 19, 1863, 1 Macph. 677; *Hutchinson & Company* v. *Henry & Corrie*, Nov. 26, 1867, 6 Macph. 57; *Pearce Brothers* v. *Irons*, Feb. 25, 1869, 7 Macph. 571; *Hardie* v. *Austin & M'Aslan*, May 25, 1870, 8 Macph. 798; *Hardie* v. *Smith*, May 25, 1870, 42 Scot. Jur. 454; *Hamilton* v. *Robertson*, May 31, 1878, 5 R. 839; *Couston, Thomson, & Company* v. *Chapman*, July 19, 1872, 10 Macph. (H. of L.) 74, L.R. 2 Sc. App. 250; *Bigge* v. *Parkinson*, February 10, 1862, 7 Hurls. and Norm. 955, 31 L.J. Exch. 301; Bell's Comm. 5th ed. p. 438, 7th ed. p. 440.

At advising—

Lord Mure—In this case the defenders contracted to supply certain cast-iron stills to the pursuers, and the Lord Ordinary has found that these stills, which became useless shortly after they were delivered, were composed of iron not suited for the purpose intended by the contracting parties, viz., stills requiring the application of great heat; and he has further found that the workmanship was defective, and that the stills became useless through the fault of the defenders. He has therefore found that in these circumstances the defenders are liable in damages to the pursuers, and the question which we have now to determine is whether the Lord Ordinary has come to the right conclusion in this matter.

The question is raised under a contract which was entered into in March 1880. This contract bears reference to a specification, which is printed among the documents before us, and which asks for estimates for the supply of a variety of cast-iron work, including the stills in question, and after giving the details of the articles to be supplied, concludes with the condition—"all to be first-class castings of Scotch iron of the best quality, to be free from flaws or sand-cracks, all bottoms to be cast 'bottom' downwards." This specification was sent by the pursuers to the defenders in the month of March 1880, and, as I understand the evidence, it was sent after Adamson, one of the defenders, had had an opportunity of fully examining the pursuers' works, and of ascertaining for what purpose the stills were to be furnished. On the 23d of March the defenders' company made an offer to the pursuers bearing reference to the specification, and, *inter alia*, they offer to furnish six large stills; and on the 29th this offer is accepted, under the proviso that the whole is "a good and satisfactory job to our Mr Robert Irvine, and delivered at our works by 15th May 1880." Now, in point of fact it appears on the evidence that these stills were not delivered by the time specified in the contract, because the correspondence shows that the greater portion of the stills were received after that date. There was some correspondence with reference to apparent defects which the pursuers had observed on some of the tops, and it is clear upon the evidence that the defenders were pressed for time, because they

allege that these defects arose from the rapidity with which they were obliged to put the orders into execution. Nevertheless the stills and other articles were from time to time received, until it appears that three of the stills were put up and ready for use somewhere about the end of August. The evidence is not very distinct, but that was about the time when the stills were put into full operation in the pursuers' works. Now, it appears on the evidence that it was about six weeks after that that the defects of which the pursuers complain began to show themselves distinctly; and by the end of October it was quite plain to the pursuers that these three stills were not going to answer the purpose for which they were intended. That was intimated to the defenders about the 25th of November, and after the nature of the defects had been pointed out to Mr Adamson, who visited the pursuers' works for the purpose, it was explained to the defenders that they would be held responsible to make good the loss caused by these defects. That was disputed by the defenders. The pursuers then took steps to remedy the defects by getting new bottoms, and they now claim damages for the loss they have suffered in having to repair the stills, and also for the loss of time during the period in which the stills were out of use.

That being the state of matters looking to the broad leading facts, the first thing that occurs to one is that the stills were either not fitted for the purpose for which they were furnished, or that they were improperly used. These appear to me to be the two main points in dealing with this evidence. Now, by the terms of the contract which I have read, the stills were "to be first-class castings of Scotch iron of best quality, and free from flaws and sand-cracks." There is a difficulty as to the precise meaning of these words, but it appears to me that they are to be read with reference to the purpose which the parties had in view when the stills were ordered. Men of skill were examined, and they are clear that the words do not mean first-class castings of iron No. 1, or any other particular description of iron, but first-class castings for the purpose for which the stills were wanted. Now, the evidence shows distinctly that the stills which the defenders supplied were not of that description, because if all the other stills used by the pursuers, in precisely the same way as those now in question, lasted upon an average for three years, it stands to reason that if the defenders' stills gave way in less than three months they must have been made of materials not fitted for the purposes for which these stills were got. That being so, the question is reduced to this—Was there any overheating of the nature set forth in the defences, for the defenders say that they "believe and aver that the failure of the stills was due to overheating, caused by the faulty erection and grossly unskilful or careless treatment of the stills by the pursuers;" and their main plea is that the defenders were to blame for the faulty erection and use of the stills. On that point the evidence is very clear that these stills were treated both in the matter of building in and fixing, and in the manner of their use, in precisely the same way as all the other stills. Mr Irvine, the manager of the pursuers' works, is quite distinct on that point, and Crombie, the head stillman, is equally so. The stills were built in by Jacobs, apparently at a slightly greater distance from the fire than the average of Hawthorn's stills. Jacobs says that the stills supplied by the defenders were built in at a distance of 6 feet 10 inches from the fire, and though there is evidence that in other kinds of oil-work the distance is somewhat greater, his evidence is plain that they were built in at no greater distance than is usual in rosin-works. It is also important to keep in view that Mr Adamson, when he examined the pursuers' works before undertaking the contract, was quite well aware that the stills were to be used for the manufacture of rosin-oil, and that for that great heat was required, so that he knew that the stills he was to make would have to stand a great deal of heat. He does not seem to have been aware of the precise distance from the fire at which the stills were to be placed, but he frankly admits that he might have asked, and that he had a full opportunity given him of ascertaining whatever he wanted.

Now, if the stills were to be built in and used in this way, so as to stand a great heat, the next question which we have to consider is, whether there is any evidence of the stills having been overheated? On this point it is, I think, clear on the evidence that overheating proves very detrimental to the oil, and consequently it was a thing about which the workmen required to be particularly cautious. The foreman Crombie, and also Barclay and Wilson, stated that they kept a regular watch, day and night, to see whether there was any overheating, as it was necessary to check it, but no instance occurred during the three months the stills in question were in use. On this evidence, therefore, I think that the defenders have failed to show that there has been any fault in the use of the stills on the part of the pursuers, and that being so, and taking into account the fact the stills have given way, I think that there is sufficient evidence to warrant the Lord Ordinary in the conclusion he has come to, unless there is anything to be said on the ground that the pursuers have not timeously rejected the stills. But on this point I think that the period of time at which we must look is when the defect in the stills was fairly disclosed, and it was not until October that it was made clear to the parties using the stills that they were unsuited to the purpose for which they had been got, and assuming that to be so, I think that there was sufficiently timeous rejection and intimation to the defenders to entitle the pursuers to demand damages.

As to the amount of damages, I think the Lord Ordinary has taken the correct view. He has, in the first place, found the pursuers entitled to the actual expenses which they have incurred—that is, Hawthorn's account for new stills, the bricklayer's account, and certain other accounts for actual outlay, making in all about £177; and he has also given what seems a fair and reasonable sum in the circumstances for loss of time while the stills were at work—the gross sum of damages being £250.

Lord Shand—I have come to the same conclusion as your Lordship, and very much on the same grounds. It is to be observed that this is not a sale of goods extant and ready for delivery at the date of the contract. The defenders under-

took to make and furnish to the pursuers iron stills to be built in with furnaces at the pursuers' works, and then used there. Now, in order to arrive at an answer to the question whether the stills supplied were in terms of the contract, the first thing to be determined is the meaning of the contract, for when that is settled it rather appears to me there is practically an end of the matter in dispute between the parties. The important words are to be found at the close of the specification—"All to be first-class castings of Scotch iron of best quality." Without some evidence it might have been difficult to say what the precise meaning of these words is, for it might be that the term "first-class castings of Scotch iron" always denoted castings from pig-iron of a particular number and brand, or of a certain mixture. But on the evidence I do not think there is any difficulty in determining what is meant. I turn to what is said by two of the defenders' witnesses—Henderson and Stevenson. Mr Henderson, a man of large experience in the distillation of shale oil, says—"All the numbers of Gartsherrie iron are the best Scotch iron in a certain way—it depends upon what kind of casting you want. (Q) Is No. 1 Gartsherrie the best Scotch iron?—(A) For many purposes, but not used alone. It should be mixed. To call anything best Scotch iron depends a good deal upon the purpose for which it is to be used. No. 4 is often mixed with No. 1, and No. 2 with No. 3. There is none of it in any of the numbers used alone. When you talk of best Scotch iron, you always take into account the purpose for which it is to be used. I never had any experience of distilling rosin oil—only shale oil." And again in a subsequent part of his evidence he says—"I would not say that a mixture of No. 2 Langloan and No. 3 Gartsherrie was as good a mixture as an oil-still could be cast from, but I consider it was as good a mixture as could be used considering the specification, viz., Scotch iron of the best quality. (Q) Do you mean that a better mixture would be other than Scotch iron?—(A) I specify the same kind of iron, but generally twice cast, and I have to pay extra for it. I am in the habit of putting that into my specifications." So also Mr Stevenson says—"A mixture of No. 2 Langloan and No. 3 Gartsherrie could not be improved for foundry purposes, including the casting of oil-stills, heaters, and all those things. (Q) In your opinion, does such a mixture fall within the description of Scotch iron of best quality, even taking into account that it is to be used for oil-stills?—(A) It is the only best quality for such a purpose, and it would be no quality at all for forge purposes or grate castings. I think it is a mistake to speak of the numbers indicating quality; they only indicate the suitability for particular purposes." Having regard to this evidence it is obvious that the words "Scotch iron of best quality" relate directly to the use to which the castings are to be supplied. Scotch iron of best quality will mean one kind of iron if the casting is to be used for one purpose, and another kind if for a different purpose. The pursuers say that the purpose in this contract was the distillation of rosin oil. The defenders admitting after the evidence given that the purpose must be taken into view, say the purpose was the distillation of oils generally—shale or any other oil, but not rosin oil specially. It appears to me that the pursuers are right. The defenders were aware that the pursuers' works were rosin oil-works, and that the stills were required for the distillation of rosin oil. They visited the works before making a tender. I do not say that this fact affects the meaning of the words of the contract, but it shows that the defenders were fully aware of the purpose for which the stills were bought. In these circumstances I am of opinion that the defenders in undertaking to supply "first-class castings of Scotch iron of best quality," understood to supply castings suitable, not for the distillation of shale oil or other oil, but for the distillation of rosin oil. In the ordinary distillation of rosin oil it appears that the bottom of the stills are subjected to a greater degree of heat than in the case of the distillation of other oils. Taking it so, I think the defenders were bound to see that the stills were made of the quality of iron suitable for this purpose.

There is a conflict of evidence as to whether the stills were or were not suitable; but all the other stills in the works served the purpose completely, while those supplied by the defenders gave way after short periods of use. It is not made out that the defenders' stills were subjected to any unusual degree of heat. They were treated in the same way as the other stills, and the only explanation of what occurred appears to me to be that they were not first-class castings of Scotch iron of best quality suitable for the purpose of distilling rosin oil. There are means by which the castings would have been made suitable. The evidence as a whole leads to the conclusion that if the metal used had been twice cast, or if there had been a proper admixture of scrap-iron, a casting of the quality suitable for the particular purpose would have been produced.

It was maintained that the pursuers are barred from insisting in this claim because they retained and used the stills after they knew of the defects. But, in the first place, the evidence shows that the pursuers were only gradually made aware of the defects, and were obliged to go on working the stills to see whether these defects were serious or not. And secondly, I do not think that in a contract of this nature the pursuers were under the same obligation as to returning the articles sold as in the case of goods sold and delivered in bulk, such as grain and the like. What is it suggested that they should have done? The stills were accepted, and were built in and used as it was intended they should be used, till it became plain that they were unsuitable for the work, and by that time they were really of no value as stills. The defenders gave due notice of the defects as these appeared. It is said that if the pursuers intended to return the stills they ought to have stopped the work and taken them down, after they had been built in, on the defects appearing. I am not prepared to hold that. I think the pursuers are entitled to use the stills until the defects were fully disclosed, as they did, and that the fact of their having done so cannot bar the present claim.

Lord President—I agree with your Lordships that the decision of this case depends primarily on the meaning of the provision in the specification "all to be first-class castings of Scotch iron of best quality." This is not a contract for the sale of goods *in specie*. It is not a contract for

the sale of a particular quantity or weight of Scotch pig-iron, or of pig or bar iron generally, or of iron of any sort *in specie*. It is a different sort of contract altogether. If the contract had simply specified Scotch iron of the best quality, then any Scotch iron of the best quality, without reference to the purpose for which it was to be used, would have satisfied the contract. But when we are dealing with castings the case is quite different, because a casting is made for the purpose of being used for some particular apparatus or machine. It must take a particular form, and that form specifies the purpose for which the casting is to be used, and accordingly in this contract the purpose is very clearly explained. The casting is to be of the form of a still, and the still is ordered for the purpose of distilling oil from rosin, and therefore the castings must be of such a quality as will be suitable for that purpose. The nature of the contract makes it imperative that the castings must be of such a quality, and consequently in construing the contract so far I require no evidence whatever. At the same time the evidence, which in your Lordship's view is necessary, is to be found extremely well stated in what Mr Stevenson says—"In dealing with what is best quality or not best quality you always do so with reference to the purpose to which the iron is to be applied. To say 'of best quality,' apart from a consideration of what it is to be used for does not mean anything at all." That being so, the question comes to be whether the defenders did supply castings of the best quality suitable for the purpose for which they were intended?

Now, on this point Mr Adamson, one of the defenders, states very distinctly that the stills were made of No. 2 Langloan and No. 3 Gartsherrie in equal proportions, and it is not disputed that if he had been supplying pig-iron that combination would have been a perfectly good fulfilment of his contract, or if he had been supplying bar-iron, without reference to the purpose for which it was ordered, that such a mixture would probably have been equally suitable in that case also; but the complaint of the pursuers is that No. 2 Langloan and No. 3 Gartsherrie does not make a combination which is suitable for castings intended to withstand great heat, and it is on this point that the controversy arises. Mr Adamson says—"No scrap-iron was used. The addition of well picked Scotch scrap would have made the metal a good deal harder. If the metal which we did use had been twice melted it would have been made perhaps closer, and possibly harder. Hardness is not necessarily consistent with closeness. (Q) But it would have made the metal harder if twice run?—(A) Yes." So that, upon his evidence, it is clear that he was quite aware of the difference that would be produced by one or other of two alterations in the quality of the iron used—namely, either by the addition of scrap-iron or by having the casting twice run. Now, the question on the evidence is, whether in order to produce the article which was specified in the contract it was not necessary to have had one or other of these things done to make the iron suitable for the purpose, and I agree that the preponderance of the evidence is clearly in favour of the pursuers' contention that the castings furnished were unsuitable for the purpose for which they were intended. I agree therefore in the main ground of the Lord Ordinary's judgment when he "Finds that these stills, which had become useless as aforesaid, were composed of iron not suited for the purpose intended by the contracting parties, viz., stills requiring the application thereto of great heat."

I do not think that it is necessary to say much on the defenders' third plea-in-law, that "the pursuers having accepted delivery of the articles supplied, and having used the same for a considerable time without objection, are barred from now rejecting them or claiming damages," because I think that such a plea is not applicable to a case of this kind except under very peculiar circumstances. Goods of this kind, delivered for a particular purpose, to be set up and used in a manufactory or in the shape of machinery, cannot be tested without a considerable amount of use, and if within a reasonable time of the discovery of a defect intimation of that defect is made to those who had supplied the goods, I think that that is all that can be expected. The judgment of the Court will therefore be to adhere to the interlocutor of the Lord Ordinary with expenses.

Lord Deas was absent.

The Lords adherred.

Counsel for Pursuers — Trayner — Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders—Lord Advocate (Balfour, Q.C.)—Pearson—Dickson. Agents—J. & A. Hastie, S.S.C.

Thursday, January 26.

FIRST DIVISION.

[Dean of Guild, Edinburgh.

PITMAN AND OTHERS *v.* SANDFORD AND OTHERS (BURNETT'S TRUSTEES), AND OTHERS.

(*Ante*, July 7, 1881, vol. xviii, p. 659, 8 R. 914.)

Statute—Edinburgh Municipal and Police Act 1879 (42 *and* 43 *Vict. cap.* 132), *secs.* 127, 129, *and* 163—*New Streets—Height of Houses in Existing Streets—Ventilation.*

Held that the 127th section of the Edinburgh Municipal and Police Act applies only to new streets.

The 129th section of the Edinburgh Police Act provides that "houses or buildings in any existing street or court shall not be increased in height above the prescribed height of one and one half times the width of the street or court in which such houses or buildings are situated, without the sanction of the Magistrates and Council." A house in an existing street was to be rebuilt so as to extend back to a narrow meuse lane. *Held* that with reference to this provision the house was to be considered as entirely within the street which it faced on the other side from the meuse lane, and its height both to the back and to the front regulated accordingly.

Question—Whether a house might be situated in two streets within the meaning of the above provision?

Held that regulations provided by the 163d section of the Edinburgh Police Act with re-