held liable for the full price of the iron irrespective of his contra account. He thinks, on the contrary, that the defender is, in the circumstances, and especially having regard to the insolvency of the Messrs Christie, declared so early as the 18th of February, only liable to the extent to which he has been subjected by the prefixed interlocutor.

The pursuers reclaimed.

The Court adhered.

Counsel for Pursuers—Guthrie Smith and Taylor Innes. Agents—Boyd, Macdonald & Lowson, S.S.C.

Counsel for Defender—Millar, Q.C., and Strachan. Agent—James S. Mack, S.S.C.

*Tuesday, October* 15.

## SECOND DIVISION.

[Sheriff of Dumbartonshire.

### BRIGHAM & BICKERTON *v.* RALSTON.

*Sale—Suspensive Condition*—Mora.

Circumstances in which the Court *held* that there had been an agreement to buy under certain suspensive conditions; that, these conditions not being fulfilled, the sale was not completed, and that there had been no such delay on the part of the proposed purchaser as to deprive him of his right to return the article in question.

This was an action raised in the Sheriff-court of Dumbartonshire by Messrs Brigham & Bickerton, agricultural implement makers, &c., Berwick-on-Tweed, against Mr James Ralston, farmer, Gartshore, Kirkintilloch, for the price of a Buckeye Junior Mowing and Reaping Machine, which they alleged they had sold and delivered to him. The defender contended that by the agreement upon which the machine came into his hands he was to become purchaser of the machine if, upon cutting his crops with it, he was satisfied with its capacity for the work. The pursuers, upon the other hand, although they did not contend for an absolute sale, but admitted that the defender was entitled to be satisfied with the cutting of the machine, averred that by agreement the trial cutting was limited to five acres, and that by continuing to work the machine throughout the season the defender had signified his satisfaction with, and completed the purchase of, the machine.

A proof having been led, the Sheriff-Substitute (STEELE) pronounced the following interlocutor;—"The Sheriff-Substitute having heard parties' procurators *vivo voce*, and resumed consideration of the process, Finds that, about the month of May 1869, Mr Adam William Dunn of Glasgow, an agent of the pursuers for the sale of their reaping-machines, called upon the defender and pressed him for an order for one of these machines, to be furnished to him, but this order the defender declined to give; Finds that, shortly afterwards, a reaping-machine was sent to the defender by the pursuers, or by their agent Mr Dunn; Finds that defender immediately waited upon Mr Dunn, and remonstrated with him for sending the machine without authority, whereupon Mr Dunn urged the defender to allow the machine to remain with him on trial, and to cut his crops with it for the season, assuring him that he would not be bound to keep the machine unless he were thoroughly satisfied with it; Finds that, upon this understanding, the defender agreed to make use of the machine, and accordingly, at his first trial of it in cutting his hay crop, Mr Dunn came to the farm, and started the machine, and gave instructions in regard to it; Finds that on that occasion the operation of the machine was tolerably good, though not in accordance with the defender's expectations; but, in conformity with his arrangement with Mr Dunn, he resolved to retain it till the corn was ripe, that he might have an opportunity of trying it upon that crop; Finds that the defender accordingly tried the machine in cutting the grain crop, but he found that it was incapable of performing this work satisfactorily, and, in particular, that in every journey or course it made through the field it left uncut a strip of grain of from one to three inches broad, and which was trod down and destroyed; Finds that the defender informed Mr Dunn of this, and he sent Mr Jamieson, a friend of his, to see what was wrong, and endeavour to rectify it; but Mr Jamieson, though he tried several experiments on the machine, was unable to effect any improvement; Finds that, after the reaping of the grain was completed, the defender repeated to Mr Dunn the complaints he had already made of the machine, and intimated his intention of returning it, in terms of their agreement; and he also wrote to the same effect to the pursuers in answer to a letter from them asking payment of the price of the machine; Finds, in these circumstances, that the defender is entitled to be relieved of the claim now made against him by the pursuers; Therefore, and for the reasons stated in the annexed note, sustains the defences, and assoilzies the defender from the conclusions of the action; finds the pursuers liable in expenses, in so far as these have not yet been disposed of; appoints an account thereof to be given in, and remits to the auditor to tax the same, and to report, and decerns."

The pursuers appealed to the Sheriff-Depute (BLACKBURN), who pronounced the following finding:—

"*Edinburgh, 7th May* 1872.—The Sheriff having heard parties' procurators on the pursuers' appeal, considered the proof and whole cause, Finds that, on the 15th of May 1869, the pursuers sent by railway to Kirkintilloch station a combined mowing and reaping machine, addressed to the defender; Finds that the arrival of the said machine was duly intimated by the station-master to the defender; Finds that the defender shortly afterwards sent for and took delivery of the said machine; Finds that on 8th June following the defender duly received an invoice of the said machine, together with a separate note from the pursuers, copies whereof are Nos. 7/1 and 7/2 of process; Finds that the machine had been sent to the defender by order of Mr Dunn, the pursuers' agent in Glasgow; Finds that the pursuers are in use to allow five acres of grass or grain to be cut on trial, before holding a purchaser bound to keep their machines; Finds that the defender used the machine sent to him for cutting his whole hay crop, amounting to sixteen acres; Finds that, at the conclusion of the hay cutting, he expressed no dissatisfaction with the machine, nor offered to return it; Finds that he thereafter kept the machine in his stackyard until the grain harvest, about the end of August; Finds that he then again used the machine to cut the grain crops; Finds that the machine did not cut them well, and in particular that it left a strip of about three inches wide in each course uncut and pressed down: Finds that the defender complained of this to Mr Dunn; Finds

that Mr Dunn sent a Mr Jamieson to see what was wrong; Finds that the defender and Mr Jamieson tried several experiments to remedy the defect, but without success; Finds that the defender nevertheless did not then offer to return the machine, but continued to use it; Finds that, shortly after, in course of use, the connecting rod of the machine broke; Finds that the defender, nevertheless, did not then offer to return the machine, but had the rod repaired by a neighbouring smith, at his own expense, and without reference either to Mr Dunn or the pursuers; Finds that the said rod is now one and a-half inches too short; Finds that thereafter the defender continued to use the machine, and finished the corn-cutting, to the extent of upwards of thirty acres, without offering to return the machine; Finds that thereafter, on 25th September, the pursuers wrote for payment: Finds that the defenfender replied to their demand on the 28th, and then for the first time intimated his dissatisfaction with the machine, and that he would return it; Finds that the pursuers refused to take back the machine; Finds that the machine still remains in the defender's possession; Finds that the defender has failed to prove the special bargain founded on in his minute of defence, under which he claims right to return the machine without any payment; and finds that he was not entitled to return it as on the 28th September 1869; Therefore, sustains the appeal; recals the interlocutor appealed against; repels the defences; and decerns in favour of the pursuers for the sum of £26 as libelled, with legal interest thereon from the date of citation in this action; finds the pursuers entitled to expenses; allows an account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and report."

In a Note appended to this judgment the Sheriff, *inter alia*, makes the following remarks;—"But, assuming that the defender is right in saying —what the Sheriff understands to be the import of the minute of defence, viz., that the machine was on trial for the season, and to be returned by the defender without payment if not satisfied with it—the Sheriff still thinks the defender on the facts proved must fail in his defence.

"If the failure of the machine to cut the three inches which it left uncut was the ground of his dissatisfaction, the defender was bound at once to have ceased to use the machine, and to have returned it when the attempts to remedy the defect proved unavailing. If, again, he meant to return it because of the fracture of the connecting-rod, he ought not to have had that repaired and thereafter continued the use of the machine, but should have returned it at once. And, finally, if after his crops were all cut he had reason to be dissatisfied, he was bound at once to have said so to the pursuers, and was not entitled to wait until pressed for payment before intimating his intention to return it, and without assigning any cause."

The defender appealed to the Second Division of the Court of Session.

Authority cited, *Pearce* v. *Irons*, Feb. 25, 1869, 7 Macph. 571.

The Court were of opinion that, as the defender had not ordered the machine, or entered into an ordinary contract of sale, but merely accepted it when sent, under conditions, he was entitled to reject it even so late as he did, these conditions not having been fulfilled; Therefore sustained the appeal, altered the judgment appealed against, and assoilzied the defender, with expenses in both Courts.

Counsel for Pursuers—Shand and Macintosh. Agent—Alexander Sholts Douglas, W.S.

Counsel for Defender—Balfour. Agents—Muir & Fleming, S.S.C.

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*Wednesday, October* 16.

## SECOND DIVISION.

[Lord Gifford, Ordinary.

### LORD PROVOST AND MAGISTRATES OF EDINBURGH *v.* THE COMMON AGENT.

*Teinds—Locality—Liability—Valuation—Proof.*

Circumstances in which—an interim scheme of locality being objected to on the ground that, although the teinds of certain lands were *ex facie* not exhausted, they were really so,—the Court repelled the objection. An averment being made at the Bar that the rental of the lands had decreased since the last valuation, the Court allowed a proof.

This was a question which arose between the Lord Provost and Magistrates of Edinburgh, and the Common Agent in the process of locality of the stipend of the parish of St Cuthberts. In the interim scheme of locality the objectors were, *inter alia*, localled on for old stipend as follows. For lands of Lochbank and others, 18 b. 1 f. 2 p. 0 l. of meal. For lands of Bruntsfield Links and the Meadows, 79 b. 0 f. 2 p. 2¼ l.

Against this the Lord Provost and Magistrates of Edinburgh lodged objections in the following terms:—"In localling the augmentation the case is dealt with as if the 18 b. 1 f. 2 p. 0 l. of barley was payable for Lochbank alone, whereas a considerable portion is in point of fact payable and paid for Bruntsfield Links and Meadows, being the lands referred to under the words 'and others.' The consequence of this error is that the lands of Bruntsfield Links and Meadows (the free teind of which is exhausted by the interim locality) is localled upon for a larger share of the augmentation than they ought to have been, the whole old stipend actually paid by them not having been taken into account. According to the locality of the augmentation granted in 1805, the allocation on the City of Edinburgh therefore stood thus—

| | Barley. | | | |
|---|---|---|---|---|
| | B. | F. | P. | L. |
| On Lochbank, . | 8 | 0 | 0 | 0 |
| On the City's other lands, there called 'The Lands belonging to Town of Edinburgh, 3 b. 1 f. 2 p. 0 l. × 7 b. 0 f. 0 p. 0 l. | 10 | 1 | 2 | 0 |
| In all | 18 | 1 | 2 | 0 |

"Now these 'other lands,' though not named, must have been Bruntsfield Links and the Meadows, because, with the exception of the lands of Drumdryan and Broughton, which had been previously feued out and built upon, and which were then, and still continue to be, separately localled upon in name of the city and its feuars, the city had no other lands in the parish. But this matter is put beyond all doubt by the interim schemes of locality made up in the last process of locality, and by the receipts granted by the ministers for their stipends. In the interim locality the allocation is as follows: