legitim. In short, I concur substantially with the judgment of the Sheriff-Substitute, while I have thought it right to make the observations I have now made as to the application of the statute to the circumstances, and as to the necessity of the wife in the circumstances establishing her claim as a creditor.

The case was argued on 20th October before the appointment of the Lord Justice-Clerk.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff-Substitute of 12th January 1888, and whole interlocutors subsequently pronounced in the Inferior Court: Find that the defender's liability, as executrix of the deceased James Tawse, to account to the pursuer for her *legitim* out of the estate of the said James Tawse is not now disputed; and with regard to the account produced by the defender, and the pursuer's objection thereto . . . . (2) Find as to the balance due upon two accounts kept with the Dundee Savings Bank in name of the deceased and the defender, 'to be repaid to either of them and the survivor,' that the same consisted to the extent of one-half, or £130, 18s. 3d., of earnings gained by the defender as a washerwoman subsequent to April 1881, and did not form part of the deceased's estate; (3) find that no part of the balance due by the Dundee Provident Property Investment Company has been recovered or intromitted with by the defender, and that she was not in right of the same excepting in so far as she might have proved the sums to have consisted of earnings by her as aforesaid subsequent to 1st January 1878, and find that she has not proved that any part of said balances was composed of such earnings: Subject to these findings, approve of the charge side of the account: Further, as to the discharge side of the account, Find that the defender, as executrix under the trust-settlement of the deceased husband, has no claim in name of alimony out of his estate; and therefore sustain the objection to the item of £28, 2s. 6d.: Repel also the pursuer's objection to the charge for expenses of administration, and with these findings remit the case to the Sheriff that effect may be given thereto, and decern."

Counsel for the Appellant—Sol.-Gen. Darling, Q.C.—Chisholm. Agent—David Milne, S.S.C.

Counsel for the Respondent—Rhind—Baxter. Agent—Robert Menzies, S.S.C.

Tuesday, December 18.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WOODSIDE STEEL AND IRON COMPANY *v.* DICK & STEVENSON.

Contract—Executory Sale—Delay—Disconformity to Contract.

Under a contract for the supply of machinery which specified no time for completion of the work, the price was payable, one-half upon delivery, one-fourth upon the machinery being started, and the remaining fourth three months thereafter. The first instalment and part of the second were paid at the time stipulated. In an action against the purchaser for the balance of the second instalment he sought to set off alleged loss from undue delay in delivery, and from disconformity to contract, and pleaded that the pursuers, being themselves in breach of the contract, were not entitled to sue under it.

Held that the allegations of disconformity were relevant, but did not form a sufficient defence, seeing that the third instalment, which exceeded the abatement claimed, had become due.

Messrs Dick & Stevenson, engineers, Airdrie Engine Works, Airdrie, by letter of specification dated 5th February 1883, offered to supply The Woodside Iron and Steel Company, Coatbridge, with a horizontal 3-cylinder engine with Stevenson's Patent Rolling Mill Clutches, at the price of £2680, and their offer was accepted by letter dated 12th February. The following were the important parts of said letter of specification—"The price of the whole is to be £ , one-half payable when the principal parts of the materials of the engines and gearing are delivered at place of erection, one-fourth on the same being started, and the remaining one-fourth within three months thereafter. . . . . We undertake to uphold the whole machinery herein specified for the space of twelve months from date of starting, inasmuch as we will supply and fit up, free of charge, parts to replace every part which may prove defective during that time, and will re-adjust all parts which may wear out of order within the time named; and, in short, we guarantee that the whole will be left by us in as good and perfect working order at the end of twelve months from date of starting as at first, excepting (of course) ordinary wear and tear and such wasting or breaking of parts as may be caused by accident or by derangement of the mills or other parts of machinery not embraced in this specification, and excepting also the doings of ill-disposed or malicious persons."

By letter dated 20th February 1883 the engineers offered to change the engine from horizontal to vertical form, and to make certain other alterations in the specification on condition of the price being advanced to £2830, and this was agreed to. No precise time was specified within which delivery was to be given.

The engine and gearing were begun to be laid down in the Woodside Company's works in Octo-

ber 1883. On 3rd December £1000 was paid to the engineers, and on 16th May 1884 a further sum of £400, leaving a balance of £15 still unpaid on the first half of the price. The engine and gearing were started on 30th September 1886, when a further instalment of £707, 10s. became due. An *interim* payment of £500 had been made on 25th January 1885, of which one-half, or £250, went to reduce said sum of £707, 10s., leaving a balance of £457, 10s. This, with the above sum of £15, left £472, 10s. due to the engineers, and for this sum they raised an action against the Woodside Company in the Sheriff Court at Airdrie in November 1886. They admitted that the defenders had a claim of £13, 4s. against them which would be given effect to on a final settlement taking place. The defenders admitted that under the contract the sum sued for was due, but they alleged that the engine and gearing were not timeously delivered; that while they were in course of erection objection had repeatedly been taken to parts thereof; that they were not conform to contract, and were worth less by upwards of £472, 10s. than those contracted for; and that the defenders had sustained loss and damage through the pursuer's delay in completing their contract to the amount of upwards of £4000, which sum the defenders claimed to set off against the balance of the contract price.

The pursuers pleaded—. . . "(2) The defenders' counter claim being illiquid, cannot be set off against the sum sued for."

The defenders pleaded—"(1) The engine and gearing in question not being yet completed in terms of the contract, the pursuers are not entitled to any further payments to account. (2) The defenders having sustained loss and damage through the pursuers' failure timeously to implement their contract, they are entitled to set off such loss and damage against the contract price. (3) The engine and gearing not being conform to contract, and the pursuers having refused or failed to complete the same, the defenders are entitled to deduct from the contract price the difference in value to them between the engine and gearing as delivered and said price."

The Sheriff-Substitute (MAIR) on 16th December 1886 pronounced this interlocutor—"Repels the pleas-in-law for the defenders, and decerns in terms of the prayer of the petition against the Woodside Steel and Iron Company, Coatbridge, and John Allan, and James Allan junior, individual partners of the company, for the sum of £472, 10s., but under deduction of the sum of £13, 4s. admittedly due by the pursuers, with the legal interest on the sum of £459, 6s. from the 30th September 1886: Finds the said defenders liable in expenses, &c.

"*Note.*—The case for the pursuers is practically admitted by the defenders, and the defence itself as appears from their pleas resolves itself into a claim of damages for breach of contract. The claim of the pursuers is clearly a liquid one constituted by the contract between the parties, while that of the defenders is as clearly illiquid and of uncertain amount. The pursuers on 5th February 1883, by letter of specification, offered to supply the defenders with a horizontal three cylinder engine with Stevenson's Patent Rolling Mill Clutches at the price of £2680, and on the 12th of that month the defenders by letter accepted of said offer. By letter dated 20th February 1883 the pursuers offered to change the engines from horizontal to vertical form, and to make certain other alterations on the specification on condition of the price being advanced from £2680 to £2830, and this was agreed to by the defenders. By said letter of specification the pursuers stipulated that one-half of the price was payable when the principal parts of the engine and gearing were delivered at the place of erection, one-fourth on the same being started, and the remaining one-fourth in three months thereafter. The defenders in their defences refer to the documents above referred to, copies of which are in process, and they admit that the instalments of the price were to be paid as stated in the contract between the parties. The pursuers aver—and the averment is also admitted by the defenders—that the principal parts of the engine and gearing were delivered to the defenders at the place of erection, and that on 3rd December 1883 they paid the sum of £1000, and on 16th May 1884 a further sum of £400, making together £1400 on account of the one-half of the price of the engine and gearing as stipulated in the contract, leaving a balance of £15 of the said one-half still unpaid. The pursuers further aver that the engine and gearing were started on 30th September 1886, and were then and are now at work manufacturing iron, and that one-fourth of the purchase price, viz., £707, 10s., then became due and payable. The defenders' answer to this averment is as follows — 'Admitted that the engine and gearing were started shortly after 30th September 1886, and have since been at work.' The pursuers also say that the defenders on 25th January 1885 made an interim payment of £500 to account of said engines and gearing, half of which, in terms of letters dated 15th and 19th January 1885 (copies of which are in process), was applicable in reduction of the said instalment of £707, 10s., leaving the balance of £457, 10s. due and payable on 30th September 1886, and the present action has been brought for payment of this sum and of the £15 before referred to, making together £472, 10s. Practically, as I have said, the case for the pursuers is admitted by the defenders. It is admitted that the principal parts of the engine and gearing were delivered to the defenders; it is admitted that one-half of the contract price was then to be paid, and that that half less £15 has been paid; it is admitted that one-fourth of the contract price was payable on the engine and gearing being started, and it is admitted that the engine and gearing were started on 30th September 1886 or shortly thereafter. So standing these admissions, the pursuers' case is established, and unless there is something in the defences to prevent it they are entitled to instant decree. What, then, is the defence set up? It is simply this—that there was great delay on the part of the pursuers in furnishing the engine and gearing, and that the defenders in consequence sustained considerable loss to the extent of upwards of £4000, which they claim to set off against the pursuers' claim for the contract price of the engine and gearing. On the face of it, therefore, this is an attempt to set up an illiquid claim against one which, by the terms of the contract and the admissions of the defenders, is a

liquid one, and the question to be considered is, whether this is to be allowed in the present action? Erskine, iii. 4, 16, says 'compensation is not regularly receivable where the debts of both sides are not clear beyond dispute. They must be ascertained either by a written obligation, the oath of the adverse party, or the sentence of a judge, or as put up by Professor Bell (Prin., sec. 572)—'The debts must both be liquid *certum an et quantum debeatur*, it being, however, sufficient that the debt shall be instantly verified by writ or oath.' It is true that an exception has been admitted to the rule thus laid down by the authorities where the illiquid claim arises out of a mutual contract, but this only where there has been a failure on the part of the party seeking to enforce his liquid claim to fulfil a stipulation in the contract. Was this the case here? The claim for the defenders, as I have said, is really one of damages for delay in the delivery of the engine and gearing. But when the contract is looked at, it will be found that there is not a syllable in it from beginning to end as to when the engine and gearing were to be delivered. There was thus no provision as to time, and therefore no failure on the part of the pursuers so far as the contract was concerned. But the defenders say that the pursuers ought to have delivered the engine and gearing within a reasonable time, and that they took an unreasonable time, and hence the defenders say they sustained the loss and damage. In such a case, however, the defenders cannot be allowed to plead their illiquid claim in the present action against the pursuers' liquid claim. In the case of *M'Bride* v. *Hamilton*, June 11, 1875, 2 R. 775, it was held that where no time is expressly stipulated within which work is to be completed, a claim of damages on the ground that the work was not completed within a reasonable time cannot be pleaded *ope exceptionis*. In that case the Lord President (Inglis), referring to the case *Johnston* v. *Robertson*, 1861, 23 D. 646, says:—'There was a careful and precise stipulation that the building was to be completed and the keys delivered over by a specified day. There could be no doubt there was a breach of contract in point of time. I think it was the opinion of all the Judges that if there had been no express provision in the contract as to time, and the only complaint of the employers had been that the work was not completed in reasonable time—which is an implied condition in all contracts—that would not have led to the same result, since there would not have been a breach of the particular contract sued on, and the plea would not have been available in the same way against the contractor that he had not performed his part of the contract, and therefore could not recover.' Lord Ardmillan in the same case said—'If the contract had borne some specific date for the delivery of the machinery—that is, for erecting it in the premises of the defenders—I should have no doubt that the contractor could not have sued for the contract price without laying himself open to a claim for damages for delay in fulfilling his contract. If no specific time for completion had been mentioned in the contract, there would have been more difficulty. I am disposed to think that if no time for completion was stipulated, and if it was necessary to go into an inquiry as to what was a reasonable time, then that would have been a different case from the present, and the defender would not have been entitled in such a case to maintain *ope exceptionis* a claim of damages against the pursuer in respect of unreasonable delay in fulfilling the contract.' The observations I have quoted from the two eminent Judges have a striking application to the present case. In the same case it was further remarked by the Lord President—'If this defence is not pleadable *ope exceptionis*, there is no defence to the present action, and the pursuer is entitled to instant decree.' Upon this authority, therefore, I have no alternative but to refuse to allow the defenders a proof of their counter claim, and must accordingly give instant decree to the pursuers. I have, however, deducted from the sum sued for £13, 4s. claimed by the defenders as set forth in article 6 of their statement in connection with certain accumulators. The pursuers admit this claim, but they say credit will be given for it on a final settlement taking place. I see no reason, however, why it should not now be deducted from the sum sued for. With reference to the statement in the same article as to certain additions having been made to the engine and gearing, and certain governors connected therewith, which the defenders say have necessitated the employment of a man night and day, this, in my opinion, is sufficiently answered by the provision in the contract under which the pursuers undertook 'to uphold the whole machinery herein specified for the space of twelve months from the date of starting,' &c. If the defenders have any ground of complaint with reference to the engine and gearing, they have their remedy under this guarantee, but it cannot be entertained as a defence to the claim now made by the pursuers."

The defenders appealed to the Sheriff, and upon 10th November 1887 were allowed to put in a condescendence of *res noviter*.

They alleged that on 19th May 1887 the engine and gearing had broken down owing to original defect in the engine, and that the pursuers, notwithstanding the clause of guarantee in their letter of specification, declined to interfere; and they pleaded—"(1) The engines and gearing in question having been all along defective and disconform to contract, and having in consequence thereof broken down during experimental working by the defenders, and the pursuers having refused to put said engines into good and perfect working order, in terms of contract, the defenders are entitled to absolvitor, with expenses. (2) *Separatim*—The pursuers are not entitled to insist upon payment of the contract price until they have made the engines and gearing complete in terms of contract."

The pursuers replied that the breakdown was entirely owing to a subsidence of the foundations on which the machinery rested, for which the defenders were alone responsible, and that the defenders had begun to patch the engines themselves instead of informing them at once of what had occurred.

The Sheriff (BERRY) on 7th March 1888 pronounced the following interlocutor:—"Under reference to the annexed note, refuses a proof of the condescendence of *res noviter:* Adheres to the interlocutor appealed against: Finds the

pursuers entitled to the expenses of the appeal, and decerns.

"*Note.*—[*After stating the facts and pleadings of parties*]—Is it, then, competent to allow this liquid claim to be compensated by the illiquid claim of damages which the defenders set up? The authorities lead to the conclusion that it is not competent. There have of recent years been various decisions on the competency of setting off an illiquid against a liquid claim where the two claims arise out of mutual obligations of the same contract, and the general result of these seems to be that a defender may be allowed to liquidate a counter claim which is illiquid at the time of action brought, provided that the existence of the counter claim is not doubtful, although its amount be unascertained. In applying this principle to a defence of damages through delay in the completion of work the price of which is sued for, the Courts have laid it down that if the time for the completion of the work is definite and specified, and that time has been exceeded, the defence of damages through the delay will be admitted although the amount of damage is illiquid, seeing that the fact of a breach of contract on the part of the pursuer is undoubted. But if, on the other hand, the time for completion is left indefinite—that is, if the parties have left their rights to be regulated by the implication of law that the contract shall be completed within a reasonable time—a defence founded on alleged delay will not be allowed, inasmuch as the question whether there has been unreasonable delay requires investigation, and it may turn out that there has not been any breach of contract in respect of time on the part of the pursuers. This, I think, is the principle recognised in *Macbride* v. *Hamilton & Son*, 2 R. 775, and other cases on this subject. In the present case it was urged that the fact of unreasonable delay cannot be doubted, inasmuch as the contract was concluded in February 1883, whereas the start of the engine founded on by the pursuers was not until 30th September 1886. There may however have been circumstances possibly in the conduct of the defenders themselves by which this delay may be so explained as to show that it was not unreasonable, and it seems impossible to say that inquiry into the facts is unnecessary. I am of opinion therefore that the defenders cannot be allowed to resist the pursuer's claim in the present action by the defence of delay which they seek to set up.

"A good deal of this reasoning applies to the defence of alleged defect in the engine and its non-conformity with contract. Except to the extent of £13, 4s., which the pursuers admit, and for which the Sheriff-Substitute has properly allowed a deduction, the pursuers deny that there were defects in the engine, and the question whether these existed would therefore require investigation. The claim of the defenders is altogether doubtful and uncertain.

"Beyond the general objection to the competency of the counter claim, the right of the pursuers to payment of the balance of the instalment sued for in this action seems necessarily to follow from the stipulation in the contract providing for its payment on the engine being started. On the other hand, the possibility of such defects as the defenders allege is provided for by the guarantee clause, to the effect that the pursuers shall uphold the machinery for twelve months after the date of starting, and shall fit up and replace parts that may prove defective. That clause seems impliedly to exclude a claim to retain the instalment payable on the engine being started in respect of alleged defects.

"I have not in what I have said had in view the condescendence of *res noviter*, but that does not seem to me to alter the case or to justify the admission of the counter claim. The fact that the engine broke down last May may not be attributable to any defect in the engine as supplied by the pursuers, and if they were responsible for it, it was one of those contingencies against which the guarantee clause was intended to provide. From what I have said it follows that I cannot give effect to the defenders' request that this action should be conjoined with the action of damages at their instance against the present pursuers."

The defenders appealed to the Court of Session, and argued—The respondents were not entitled to the second instalment of the price here sued for under a contract in which they had themselves failed to perform their part. They had (1) unduly delayed to furnish the article contracted for, and they had (2) supplied an article disconform to contract. The article supplied was of less value by more than £472, 10s.—the sum here sued for—than the article contracted for. The Sheriffs, relying on the case of *Macbride*, had held that there being here no time specified for delivery the respondents were not barred from suing under the contract, and the appellants could not set off an illiquid claim for damages against the price sued for, but must constitute their claim in a separate action. Now, the opinions in *Macbride* as to the law where no time is specified were *obiter*. Besides, the Sheriffs had ignored the appellants' second ground of defence. It was only where delay was the sole ground of action that the law as laid down by them applied. The appellants had raised an action of damages against the respondents. They sought to have their defences in the present action considered together, and to have the two actions conjoined. With regard to the respondents' argument that any complaints as to the engines not being conform to contract were met and obviated by the maintenance clause in the contract, the appellants pointed out that that clause referred to keeping up engines conform to contract when started. In this case the engines had never been started conform to contract, and therefore the second instalment here sued for was not due.

Argued for the respondents—1. The appellants in their condescendence based their claim for damages entirely on undue delay. That was an illiquid claim, and could not be set off against their admitted debt—*Macbride* v. *Hamilton*, June 11, 1875, 2 R. 775; *Pegler* v. *Northern Agricultural Implement Company*, February 2, 1877, 4 R. 435. 2. The engines were admittedly started upon 30th September 1886, when accordingly the second instalment became due, and their starting was *prima facie* evidence that they were conform to contract. 3. As to the *res noviter*, it was a maxim of law *pendente lite nihil innovandum*, and yet the appellants sought to strengthen their case by reference to a breakdown which actually took place months after the

Sheriff-Substitute had issued his interlocutor. For twelve months after the starting of the engines the respondents were bound, under the clause of guarantee in the letter of specification, to make good any deficiencies, but their money must be in their own pocket. What the appellants proposed was to litigate with the respondents' money.

At advising—

Lord Rutherfurd Clark—The contract does not specify any time within which the engine and gearing were to be delivered. It was therefore conceded by the defenders that they could not retain the instalment of the price sued for in this action against any loss which had been caused by reason of the delivery having been unduly delayed. They took this point to be settled by authority, and we need not further consider it.

But the defenders contended that the engine and gearing were not, in various particulars, conform to contract, and that in consequence they were of less value by "upwards of £472, 10s. than those contracted for." The pursuers answered that this was an illiquid claim which could not be set off against a liquid claim.

In my judgment the plea maintained by the defenders is not properly a plea of compensation. It is based on the consideration that the article contracted for was not furnished, and that the price is not due. In a proper contract of sale the remedy of the buyer would be to reject. But this remedy is not applicable in the case of an executorial contract like the present. Inasmuch as the article cannot or need not be returned, the remedy must consist in a right to refuse to pay more than its true value. In other words, the seller cannot claim the contract price if the article furnished is not conform to contract, and the buyer must be entitled to deduct the sum which represents the difference between the value of the article contracted for and that actually furnished. The defence therefore is not a plea of compensation. If well founded it proves that the price sued for is not due.

Nor do I think that the defenders' claim for abatement can be met by the plea that they have their proper remedy under that clause of the contract which provides that the pursuers shall uphold the machinery, and make good defects for twelve months from the time of starting. This clause assumes that the contract engine and gearing have been furnished, and imposes on the pursuers the additional obligation of maintenance.

It seems to me therefore that the defenders have so far stated a relevant defence when they say that the article supplied was not according to contract, and was of less value than the article contracted for by £472, 10s. They say "upwards" of that sum. But I cannot attach any meaning to that phrase, and for the purposes of this case I must disregard it.

The question now comes to be, whether in the face of that defence the pursuers are entitled to the decree for which they ask? and some important matters have to be considered under this head.

By the contract one-half of the price was to be payable when the principal parts of the materials of the engine and gearing were delivered, one-fourth on the same being started, and the remaining fourth within three months thereafter. The engines were started on 30th September 1886, and the sum sued for is the balance of the instalment which then became due; a portion of that instalment having it appears been previously paid. There remains due the fourth instalment, amounting to £707, 10s.

The instalment sued for was thus due at a fixed date, and should have been paid unless there was a sufficient defence to the contrary. The only defence—which is in any way relevant—is, that the engine as furnished was of less value by £472, 10s. than the engine contracted for. I should have held this to be a relevant defence to the effect that the defenders could not have been required to pay the whole contract price until their allegations had been inquired into, because in my opinion it means that the contract price is not due to the amount above stated. But I do not think that it has any further virtue. For it acknowledges that the contract price is due except to that extent, and considering that another instalment became due in the course of three months, which exceeded the sum which the defenders claim to have abated from the price, I think that the defence is not sufficient, and that the pursuers are entitled to decree. The last instalment more than covers the abatement which they claim.

I have hitherto considered the original defence only. But after the Sheriff-Substitute had decided in favour of the pursuers the defenders were allowed to put in a condescendence of *res noviter*.

I do not think that discoveries of defects after the instalment was payable form a relevant defence. On the record, as it originally stood, the pursuers were in my opinion entitled to decree. The engine had been started, and the instalment was then due. The only reason assigned against paying it was an abatement was claimed But, as has been seen, that abatement was claimed not against the instalment alone, but against the whole price, of which more than the abatement was shortly to become due. As that was in my opinion an insufficient defence the defenders were bound to pay the sum sued for. I think that the additional condescendence should not have been allowed, nor is it relevant, for in my opinion the right of the pursuers to recover was to be determined by reference to the defences which were stated and were stateable when the instalment became due. It is said that the defects in the engine were only discoverable after it had been sometime in use. But that means nothing else than that the defenders could not assign other reasons for not paying the instalment which had become due, and their delay in satisfying their obligation cannot, I think, place them in a better position.

I think therefore that the pursuers are entitled to decree. But I decide nothing more than that they are entitled in the meantime to payment of the sum sued for. All claims on either side will be reserved, and if it be eventually found that the defenders are entitled to a larger abatement the fact that they have paid the sum sued for will form no bar to the just settlement of the claims. The pursuers will be bound to repeat if it be ascertained that they have received more than is justly due to them.

Lord Young and Lord Lee concurred.

[The LORD JUSTICE-CLERK had not been appointed when the case was argued.]

The Court dismissed the appeal and affirmed the judgment of the Sheriff-Substitute.

Counsel for the Appellants—D.-F. Mackintosh—Ure. Agents—Dove & Lockhart, S.S.C.

Counsel for the Respondents—Balfour, Q.C.—Jameson. Agents—J. & J. Ross, W.S.

Tuesday, December 18.

SECOND DIVISION.

[Sheriff of Argyll.

CURRIE *v.* CAMPBELL'S TRUSTEES.

Property—Feu-Charter—Description by Boundaries Inconsistent with Measurements—Plan.

A feu-charter described the subject by boundaries. It also described it by measurements, and referred to a plan annexed. The measurements and plan agreed, but they were inconsistent with the boundaries specified. In a question as to the extent of the subject, *held* that the boundaries must prevail.

Lord Young *dissented*, on the ground that the intention of parties was that shown by the measurements and plan.

In 1881 Archibald Currie, shoemaker, Tarbert, Argyllshire, applied to the late George Colin Campbell Esq. of Stonefield, for a piece of ground in Tarbert upon which to erect a dwelling-house.

Ground was laid off by Mr Campbell's factor, and buildings erected upon it by Mr Currie. The ground allotted was subsequently enlarged on the south-east and a feu-contract entered into between the parties.

By feu-charter dated 3rd and 6th and recorded 17th February 1882 the whole subjects feued were described as follows:—"All and whole that area or piece of ground situated in the town or village of Tarbert aforesaid, bounded on the west by the public street called Kintyre Street, along which it extends 40 feet 9½ inches or thereby; on the north partly by ground belonging to the said Colin George Campbell, and presently occupied by Finlay Smith and Duncan M'Arthur, along which it extends 41 feet 7 inches or thereby; on the east partly by the house also belonging to the said Colin George Campbell, and presently occupied by Donald Johnston, fisherman, along which it extends 14 feet 9 inches or thereby; and again on the north by the said house, along which it extends 20 feet or thereby; and again on the east, partly by Burnside Lane, along which it extends 26 feet 9½ inches or thereby; and on the south by ground feued to Robert Lyon Dawson, along which it extends to Kintyre Street 62 feet or thereby, as the said area or piece of ground is shown on a plan or sketch thereof annexed and signed by the parties of even date with the said feu-contract as relative thereto, together with the houses and other buildings erected on the said area or piece of ground."

The plan or sketch referred to had the figures mentioned in the feu-charter placed upon the appropriate lines, but it was not drawn to scale and was more of the value of an illustrative sketch than of a formal plan.

A difficulty subsequently arose as to the boundaries of the feu on the north-east. "The house, . . . occupied by Donald Johnston, fisherman," when the feu-charter was signed, was taken down in 1883, and the site was disponed by the superior to another person. In 1886 Currie began to build a wall upon a part of the site as being within his feu. Mr Campbell obtained an interim interdict against this proceeding, and Currie thereupon brought an action of declarator against Mr Campbell in the Sheriff Court at Campbeltown, to have it declared that his feu was bounded "again on the north by a stone wall erected by the pursuer on the site of said house (Donald Johnston's house) along which it extends 20 feet or thereby."

After protracted proceedings before both the Sheriff-Substitute (RUSSEL BELL) and the Sheriff (FORBES IRVINE), in the course of which Mr Campbell died and his trustees were sisted as parties to the action, the pursuer brought the case by appeal before the Second Division of the Court of Session. It appeared that it was impossible to reconcile the boundaries given in the feu-charter with the measurements therein given and with the plan thereto attached; and it was

Argued for the appellant—The plan and the measurements, which agreed with one another, and supported his contention as to the limits of his feu, must prevail over the boundaries given in the feu-charter, or rather that the plan agreeing with the measurements must prevail over the description by boundaries, which did not so agree. The portion of ground claimed belonged to the respondents, and therefore this was not an error which could not be rectified. Moreover, the respondents' agent had prepared the feu-contract and the plan, and their factor had marked off the ground. They were therefore responsible for any mistake that had been committed, and were not entitled to take advantage of their agent's actings to the detriment of the appellant—*North British Railway Company* v. *Magistrates of Hawick*, December 19, 1862, 1 Macph. 200; *North British Railway Company* v. *Moon's Trustees*, February 8, 1879, 6 R. 640. The removal of Johnston's house was in contemplation at the time of the feu-contract.

Argued for the respondents—Although the question at issue was of small money value, they were brought to contest it in the interests of the person to whom the ground built upon by the appellant had been feued. This declarator was the only way of getting the interdict question settled. The boundaries were perfectly distinct, and could not be altered by a rough sketch not drawn to scale, and only intended to illustrate the feu-charter. Their case was the same as if there had been no plan, but if looked at at all it was in their favour, for it showed Johnston's house to be outside of the feu altogether. The measurements were demonstrative not taxative. The appellant would not have had a stateable case but for the fact that the ground in dispute belonged to them, and really that made no difference upon the law on the subject. What bounded a feu could not form part of the feu. Besides, in 1882 Donald Johnston's house was standing, and the appellant's boundary could not go through a house which bounded his feu—*Reid* v. *M'Coll*, October 27, 1879, 7 R. 84.