he was at a station, then they were liable for any injury sustained by the passenger as the result of his having got out of the train—*Siner* v. *Great Western Railway Company*, February 9, 1869, L.R., 4 Ex. 117, *per* Hannen, J., at page 124; *Whittaker* v. *Manchester and Sheffield Railway Company*, L.R., 5 C.P. 464, note (3) *per* Willes, J., at page 465, note. See also *Cockle* v. *London and South-Eastern Railway Company*, May 10, 1870, L.R., 5 C.P. 457; and *Petty* v. *Great Western Railway Company*, L.R., 5 C.P. 461, note (1). *Bridges* v. *North London Railway Company*, L.R., 5 C.P. 459, note (5), referred to by Willes, J., in *Whittaker cit.*, was reversed, June 22, 1874, L.R., 7 H. of L. 213. Here it was averred that the pursuer believed and was justified in believing that he was at the station (1) because the defenders were in the habit of leaving Elderslie Station unlighted, and (2) because of the resemblance of the top of the wall to a station platform. The averment of habitual failure to light, was a relevant averment of fault against the Railway Company, because but for such habitual failure the pursuer would not have got out when he did. This case was ruled by *Whittaker cit.* The only distinction between that case and the present was that here there was no calling out of the name of the station by the porters. That element was not of vital importance. It was absent also in the cases of *Roe* v. *Glasgow and South-Western Railway Company*, November 9, 1889, 17 R. 59; and *Aitken* v. *North British Railway Company*, May 22, 1891, 18 R. 836.

LORD JUSTICE-CLERK—This is a curious case. It is not alleged that anything the Railway did or failed to do at the place where the accident took place was the cause of the accident, but the fault alleged is something done at another place. The allegation made is that when the train stopped the pursuer made the mistake of getting out, believing he was at the station, and stepped out on to the parapet of a bridge, in the belief that he was stepping on to the platform. One would have expected some other explanation, but such is the averment. I cannot conceive how he could make such a mistake. It was impossible, unless it was so dark that he could not see at all. It was a mistake for which I cannot see that the company are responsible. To say that if an accident happens because of the train stopping anywhere except at a station the railway company is responsible, is absurd. There is here no relevant case.

LORD YOUNG—The only doubt I have arises from *Whittaker's* case, but that case is distinguishable. The train there had arrived at the station, and the name of the station was called out, so that the judge and jury thought it was a reasonable invitation to a passenger to alight. The train overshot the platform, and the passenger answered the invitation by getting out. Here the train had not reached the station, and nothing took place which could be regarded as an invitation to alight—nothing to show arrival at the station. The pursuer thought he had arrived. What was the actionable fault? The pursuer says that Elderslie station, which was 300 yards off, was never lighted, and that the pursuer might reasonably think he was at the station. That is not a sufficient averment, and does not bring this case within the rule in *Whittaker*.

LORD TRAYNER concurred.

LORD MONCREIFF was absent.

The Court dismissed the appeal, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuer—A. J. Young—Munro. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Defenders—Balfour, Q.C.—Guthrie. Agents—J. C. Brodie & Sons, W.S.

Wednesday, June 24.

SECOND DIVISION.

[Sheriff of Fife.

ROBERTS & COMPANY *v.* YULE.

Sale—Disconformity to Description—Rejection—Sale of Goods Act 1893 (56 *and* 57 *Vict. c.* 71), *sec.* 11, *sub-sec.* 2, *and sec.* 13—"*Failure to Perform Material Part of Contract.*"

A firm of machinery merchants contracted to supply a second-hand gas-engine at the price of £47, 10s., which they described as "in excellent order," "running up to within about a week ago," and "a great bargain at this price." When the engine was delivered on 22nd October it could not be made to work by the engineer employed by the buyer, and he then intimated to the sellers that he rejected it. The rejection was not accepted, and thereafter the sellers sent an engineer to inspect the engine, but he was also unable to make it work. He reported that it would require an expenditure on repairs of £8, 10s. to put the engine right, and the defenders offered, on 16th December, to execute these repairs. This offer was refused by the buyer, who had in the meantime supplied himself with another engine.

In an action for the price, the pursuers led evidence to show that the defects in the engine were trifling, and that it could have been made to work "as a second-hand engine" at a cost of £1 or £1, 10s., their offer of 10th December including the renewal of parts that were worn so as to make it as good as new.

Held that the engine was disconform to description, and that the defender was not bound to accept the pursuers offer to repair it.

On 17th October 1895 Messrs Roberts & Company, machinery merchants, Leeds, contracted to supply Mr David Yule, spinner, Abbotshall Mills, Kirkcaldy, with a second-hand gas-engine. The contract

was embodied in the following letter dated 16th October:—"We have pleasure in bringing to your notice, 10245 one 4 h.-p. 'Stockport' by the well-known makers Messrs Andrews & Co., with tank and all accessories. This engine is in excellent order, and was running up to within about a week ago, when we pulled it out to replace with a new 8 h.-p. nominal. There was no fault of it being taken out, but simply because it was too small. It would be put on rails, Leeds, for £47, 10s., and as it is really in excellent condition, it is a great bargain at this price, and will soon go. You need not be afraid of ordering it without seeing, but of course we should be only too pleased to show it you, or to anyone else you may depute, by giving us a clear day's notice, so that our Mr Roberts could be about."

On 17th October the following telegrams passed between the parties "Yule to Roberts & Co.—Offer forty-five delivered Kirkcaldy. Will forward immediately if accepted." "Roberts & Co. to Yule—Will deliver Kirkcaldy for £47, 10s. Cannot do better. Bargain. Wire instantly." "Yule to Roberts & Co.—Accept your offer. Send at once."

On the same day Roberts & Company wrote to Yule—"Thanking you for your order for gas-engine. You will be pleased to hear that we have been looking at it this afternoon personally, and have to say that it is about the best second-hand gas-engine we have ever sold, and you have really got a bargain. All the parts are very good and scarcely worn; in fact it has done very little work, and we have replaced it with a larger one."

The gas-engine arrived at Kirkcaldy on 22nd October, and a gas engineer was employed to erect and start it. After three days spent in various attempts, he found that it could not be made to work, and reported to Yule's manager accordingly. On 12th November Yule wrote to Roberts & Company—"I engaged a practical man to put up the Stockport gas-engine bought from you. The engine is now erected, but it will not work. The engineer says that it is on account of the cylinder being round, and the new rings not fitting same. The gas is therefore being passed out by the piston. Please forward on receipt certain the old piston rings, which I have no doubt will fit the cylinder. I may say that I engaged this engineer to put the engine up and set it agoing, and I am sure to have extra expense owing to the deficiency. Please note that I must hold you responsible for such extra outlay."

The old piston rings were sent, but the engine still could not be made to work. Sundry letters then passed between the parties in which Roberts & Company indicated that it was fault of those employed to put it up that the engine would not work. Yule wrote to Roberts & Company on 21st November—"Since writing you I have again made some attempt to start the engine, but without any result. . . . Of course I cannot accept an engine that will not work, and I must therefore ask you what I am to do with it." . . .

After this, however, negotiations were resumed between the parties, and an engineer named Price, in the employment of the makers of the engine, Messrs Andrews & Company, was sent to examine it on behalf of the sellers. He visited the defenders' premises on 9th December and tried to start the engine but failed. He discovered that one of the three working piston rings was broken, also one of the junk rings, and one of the compression rings. These breakages were what prevented the engine from working. He also found that the mushroom valve was a little worn, and that the cylinder lining was worn to the extent of one-sixteenth of an inch. He reported that he could make the engine right by putting in a new liner, a new set of rings, a new mushroom valve, and a new compression ring. On 16th December Roberts & Company wrote to Yule—"Referring to 4 h.-p. 'Stockport gas-engine we sold to you, we have been having some considerable correspondence with works respecting this matter, and we have decided to make it right by putting in a new liner and new piston rings, and a new mushroom valve box, &c., as recommended by the engineer who came to inspect on our behalf. We have requested the works to have this done immediately, and you may rely upon it being done in a business-like manner, and it will then work all right. This will be a very serious thing to us indeed, but we do it rather than put you to any more inconvenience, and to keep up to the description given you. Of course, we cannot get any redress, and must lose very seriously by this gas-engine. We always meet our customers wherever it is possible to do so." Yule, however, replied that he could not keep the gas-engine now, and that as he had been unable to wait longer he had been obliged to get an engine elsewhere.

On 22nd January Roberts & Co. brought an action in the Debts Recovery Court at Kirkcaldy for the price of the engine. A record was made up and a proof before answer allowed.

At the proof Mr Arthur Roberts deponed—"[Shown witness' letter of 16th December]—The renewals mentioned in that letter came to £8, 10s. That is not a large amount to spend on a second-hand engine of this sort. These repairs, if executed, would make the engine as good as new. These are the very parts which would be expected to be worn through ordinary tear and wear in a second-hand engine. . . . The cost of a new 4 h.-p. gas engine is about £95. I certainly would not sell an engine which had just been fitted up by Messrs Andrew & Co. for £56. I know that they are in the habit of making such repairs to second-hand engines and selling them. They will be able to sell a 4 h.-p. gas engine overhauled in this way for £75." Smith, an engineer in Leeds, deponed that he had worked the engine regularly until early in October, when it was taken away by Messrs Roberts, and that it worked satisfactorily when under his charge. Price deponed—"On examining the engine

I found that it was not erected as it might have been—that is to say, there was not such a good job made of it as might have been of the erection. . . . A person acquainted with gas engines would not expect to get a second-hand 4 h.-p. engine thoroughly overhauled for £47, 10s. He would assume from the price that such a 4 h-.p. engine would require some overhauling. It is a usual thing for me to execute these very repairs on second-hand engines which have been working for a period." He further deponed that apart from the breakages in the rings, which prevented the engine from working at all, the wear and tear of the various parts of the cylinder would have entailed a depreciation of horse-power to the extent of 1½ in 7, the actual horse-power of an engine of 4 horse-power nominal. He further deponed—"The engine would work with a good deal less than my report; three new piston rings and a new compression ring would make it work as a second-hand engine. The price of a newly overhauled 4 h.-p. second-hand engine of ours is about £72 to £78. Roughly speaking, the cost of three new piston rings and a compression ring, which would make it go as a second-hand machine, would be £1 to £1, 10s."

On 26th March the Sheriff-Substitute (GILLESPIE) issued an interlocutor which, after sundry findings in fact to the effect above set forth, proceeded as follows—"Finds in law that the gas engine fairly corresponding with its description, the defender was not entitled to reject it, though he was entitled to get the broken rings renewed at the pursuers' expense, and that in any view the pursuers' offer of 16th December 1895, to which they still adhere, was an adequate offer; Finds that on that offer being satisfactorily carried out the pursuers would be entitled to the price, or, more simply, that they are now entitled to the price less the estimated cost of the proposed operations: Therefore ordains and decerns the defender to make payment to the pursuers £39: Finds the pursuers entitled to expenses, subject to a deduction of one-fourth from the taxed amount thereof," &c.

The defender appealed to the Sheriff (MACKAY), who by interlocutor dated 15th May adhered.

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71) enacts, section 11, sub-section 2, as follows—"In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages; and section 13—"Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description.' . . .

The defender appealed to the Court of Session, and argued—This was a sale of goods by description. The engine was described as being in excellent condition, and running up to within about a week before, and a great bargain at this price. It did not correspond with this description, for it would not work at all. This was a breach of a material part of the contract, and the defender was entitled to reject—Sale of Goods Act 1893, section 11, sub-section 2, and section 13. The rejection was timeous, as the period which elapsed was only "a reasonable time" for the trial of the engine. This case was really a contrast to the case of *Bradley & Co.* v. *G. & W. Dollar*, May 20, 1886, 13 R. 893, cited by the pursuers, as there the defects were trifling, and the machine always went quite well when worked by the sellers' own men. The opposite was the case here in both respects.

Argued for the pursuers—This was a second-hand engine, and fairly corresponded with the description given of it. The defender was not entitled to have an engine as good as new at the price he paid, and the defects which required to be repaired in order to make it work as a second-hand engine were trifling, and not such as to justify rejection—*Bradley & Co.* v. *G. & W. Dollar*, *cit.* They did not constitute a failure to perform a material part of the contract in the sense of the Sale of Goods Act 1893, section 11, subsection 2. The expression "excellent condition" was not a warranty, it was simply a representation, and it was an honest representation, for the engine had been going within a week. The rejection was not timeous.

At advising—

LORD JUSTICE-CLERK—This case relates to a not very large sum of money, and it has been decided in the same way by both the Sheriffs, although on different grounds. But it is a case relating to the construction of a contract, and the question is whether that contract has been fulfilled or not. The contract was made by letter, the pursuers offering to send a gas engine, which they say "is in excellent order" and "a great bargain at this price." This offer was accepted by the defender, and the engine was sent to Kirkcaldy. When it arrived it could not be got to work. A man, who is said to have had large experience in fitting up such engines, was sent to examine it, and he could not start it. Then a man called Price was sent by Messrs Andrews, the makers of the engine, and he could not make it work either. He took it to pieces, and found that one of the piston rings was broken, and also one of the junk rings and one of the compression rings. He also discovered that the mushroom valve was a little worn, and that the cylinder lining was worn to the extent of one-sixteenth of an inch. He reported that he could put the engine right by putting in a new liner, a new set of rings, a new mushroom valve, and a new compression ring. Then he gives evidence that the defects found by him were defects which it would require an expenditure of about one-fourth of the price paid for the engine to rectify, and that if it were only repaired sufficiently to make it go at all, it could only work up to five and

a-half horse power instead of seven. It is difficult to say that an engine could be in "excellent working order" which required such repairs.

It would be difficult and indeed impossible to find as matter of fact that the engine was sent as it was stated to be in the letter by which it was offered for sale, "in excellent order." The repairs which required to be done to it involved an expenditure of £8, 10s. If the pursuers had offered to make these repairs at an early stage, when there had been no loss to the defender by delay, there might have been a different question, although I do not say that even then the defender would not have been entitled to reject. The defender did his best for the engine. He required it for immediate use and for a temporary purpose. I am unable to hold that when he rejected it he was not within his legal right in rejecting, or even that he was acting harshly to the pursuers. The engine was useless to him, and the repairs which it required to make it of use were not trifling repairs but material and essential. The letter of 16th December is practically an admission that this was so. On the whole matter I am of opinion that the defender was entitled to reject.

LORD YOUNG—I am substantially of the same opinion. I really expressed the view which presses on my mind in the last question I put to pursuers' counsel. The question I asked was whether we could find in fact that this engine conformed to the description given of it by the pursuers. We must here pronounce findings in point of fact. I could not find as the Sheriff-Substitute has found, or use the expressions which he has used when he finds that the gas-engine fairly corresponded with its description. We shall have to find that the contract was as expressed in the offer contained in the letter of 16th October, and accepted by the defender. I desire to say, because I am convinced it is so, that I think the pursuers acted in all integrity, and with an honest belief that the engine was in the condition described in their letter. I am sure they were not intentionally exaggerating or acting otherwise than might have been expected from any perfectly respectable business man. But taking the contract as made in the letter to which I have referred, we must find that the engine was not according to contract. In terms of the pursuers' own letter of 16th December, the engine would require £8, 10s. to make it right. The Sheriff accepts that view, and he uses language which shows that he was somewhat doubtful as to his judgment. He proceeds on the view that £8, 10s. was necessary to make the engine according to contract, and proceeding on that view, I cannot affirm his judgment, for if £8, 10s. was required to make the engine according to contract, then the legal conclusion is that it was not according to contract before, and that the buyer was entitled to reject. I think there was perfect integrity in the seller, but I think there was perfect integrity on the part of the buyer also. He fairly and repeatedly tried the engine and found that it would not work. He had bought it for a temporary purpose, which was explained to the pursuers, and he required it immediately. I think he was perfectly entitled to reject. With an interlocutor expressing these views I am prepared to concur. I think we should alter the judgment of the Sheriffs, and assoilzie the defender.

LORD TRAYNER—I agree. I think it right to express my concurrence with what Lord Young has said as to the good faith of the pursuers. I do not think they were trying to palm off an engine which they knew was totally disconform to the description they gave of it. On the other hand, the defender was not rejecting the engine because it was more convenient for him to do so, or on trivial grounds which he had set himself to discover.

The contract is in writing. The pursuers offer to sell and do sell an engine "in excellent order" delivered at Kirkcaldy for £47, 10s. I think that the letter of 17th October is of some importance. It is true that as it followed the conclusion of the contract, it cannot be read as qualifying the contract, or as increasing the burden laid upon the sellers, but I think that it may legitimately be read as a contemporary interpretation of what the pursuers meant by the contract. They tell the defender "We have been looking at it this afternoon personally, and have to say that it is about the best second-hand gas-engine we have ever sold, and you have really got a bargain. All the parts are very good and scarcely worn." That letter shows what kind of engine they understood they had sold, and were to deliver to the defender. But without attributing too much weight to that letter, and reverting to the undoubted terms of the contract as contained in the letter of 16th October, the question is whether the engine in question was delivered in excellent order and condition. It is rather curious that the engine should have been running within a week, and that it would not work at all when tried at Kirkcaldy. It was not merely that it would not work properly, it would not work at all. The defender was so anxious to get the use of the engine for his temporary purpose, that he sent for and got a man from the makers to try and make it go. That man says very distinctly that he tried various ways, but that the engine could not be made to work. In short, it never could be made to work in defender's premises at all. An engine in such a state cannot be said to be in excellent condition. Then we find that after giving it a fair trial, and being unable to get it to work, the defender rejected it about a month after it had been sent to him. Various suggestions by the pursuers follow. In their letter of 16th December they offer to repair it, as recommended by their own engineer. For what purpose was it to be repaired? They say in their letter that if certain things are done, which they purpose to do, then it (the engine) will work all right. Without the repairs it would not work. That, as

your Lordship has said, is a practical admission, after a report by their own engineer, that it was not in excellent working condition when it was sent.

A good deal has been said as to whether the defects were material. Surely they were, when without their being remedied the engine would not work at all. But on this point it is important to observe that according to the evidence of the pursuers' own witness, the engine as delivered (sold as an engine of 4 h.p.) could not be worked much above three-fourths of that power, and that to bring it up to the description in the contract, would require an expenditure on repairs to the extent of about a fifth of the whole price.

I am of opinion that there were material defects in the engine, and that the pursuers failed to fulfil their contract.

I agree with Lord Young's observations on the Sheriff-Substitute's findings.

I think that the appeal should be sustained, and the defender assoilzied.

LORD JUSTICE-CLERK—As your Lordships have both expressed an opinion as to the *bona fides* of the parties in this case, and as it might be supposed, if I remained silent on that matter that I was of a different opinion, I think it right to say that I entirely concur with what your Lordships have said as to the perfect *bona fides* of both the parties.

LORD MONCREIFF was absent.

The Court pronounced the following interlocutor:—

> Sustain the appeal, and recal the interlocutors appealed against: Find in fact (1) that the contract for the sale of the gas-engine in question was contained in the letter from the pursuers to the defender, and telegrams dated respectively 16th and 17th October 1895; (2) that the said gas-engine was not conform to contract, and was timeously rejected by the defender: Find in law that the defender was entitled to reject the engine as disconform to contract: Therefore assoilzie the defender from the conclusions of the action, and decern: Find him entitled to expenses in this and in the inferior Court, &c.

Counsel for the Pursuers—J Wilson—J. J. Cook. Agents—Wishart & Sanderson, W.S.

Counsel for the Defender—Salvesen—T. B. Morison. Agent—Peter Morison junior, S.S.C.

Thursday, June 25.

SECOND DIVISION.

[Lord Low, Ordinary.

URIE'S TRUSTEES *v.* URIE.

Succession—Legitim—Clause of Forfeiture—Whether Applicable to Person Taking No Benefit under the Settlement.

A testator directed his trustees, after the death or second marriage of his wife, to hold, apply, pay, and convey one-fourth of the residue of his estate for behoof of his son A in liferent, and to the children of A in fee, and made similar provisions for other sons and children of sons. He provided that these provisions were to be in full of all legal claims, "declaring that in the event of any of my sons or their descendants repudiating this settlement, or by any means preventing it from taking effect, in whole or in part, then such sons as well as their descendants shall forfeit their whole right and interest in those portions of my means and estate that I am entitled to dispose of," such right and interest to pass to the sons and descendants of sons abiding by the settlement. By a codicil he revoked the liferent in favour of A, and conferred it upon A's children, and with this alteration confirmed the settlement in every respect. On the death of his father A claimed and was paid legitim. *Held* that the clause of forfeiture did not affect A's children, as A was entirely unprovided for by his father's testamentary dispositions, and the clause was only intended to apply to the acts of a son for whom a provision was made in the will.

George Urie, blacksmith in Glasgow, died on 28th June 1885, leaving a trust-disposition and settlement dated 28th November 1876, and codicil thereto dated 5th May 1879, whereby he conveyed to trustees therein mentioned, for the purposes therein set forth, his whole means and estate, heritable and moveable, then owing and belonging to him, or which should be owing or belonging to him at his decease. The first trust purpose was payment of debts, and the second was payment of the whole free annual income of the estate to the widow during all the days of her viduity. The third purpose proceeded as follows:—"My trustees shall, upon the lapse of the foresaid liferent, by the death or second marriage of my said spouse, or upon my own death should she predecease me, hold, apply, pay, and convey the whole rest, residue, and remainder of my means and estate as follows, viz.:—One-fourth part or share thereof to and for behoof of my son John Urie for his liferent alimentary use allenarly, not affectable by his debts or deeds or the diligence of his creditors, and to and for behoof of his lawful children alive at the period of payment after mentioned, jointly with the lawful issue of any