ruary, but was furniture of a different and greater value.

The case so made has been negatived by the Lord Ordinary, and the case that we have to consider is of a different character; and in regard to the impossibility with justice to the pursuer of looking at the case from that point of view, I agree with the observations which your Lordship in the chair has made. The result is this, that we are now asked to look at the representation which the defender originally said was true as a statement which was false, that is to say, that the furniture he was induced to purchase was not the furniture which had been taken over by the pursuer from the previous tenant at £554, but was substantially different as regarded the articles which composed the furniture.

[*His Lordship then went into the merits.*]

The Court recalled the Lord Ordinary's interlocutor, and granted decree in terms of the conclusions of the summons.

Counsel for the Pursuer and Reclaimer—G. Watt, K.C.—Mitchell. Agents—Winchester & Nicholson, S.S.C.

Counsel for the Defender and Respondent—Morison, K.C.—Ballingall. Agent—John Sturrock, Solicitor.

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*Friday, December* 23.

## FIRST DIVISION.

[Sheriff Court at Glasgow.

## ALEXANDER MUNRO & COMPANY *v.* A. BENNET & SON.

*Sale—Breach of Contract—Rejection—Timeous Rejection—Delay in Rejection Caused by Misrepresentations of Seller—Measure of Damages—Expenses of Buyer's Action against Sub-Vendee—Sale of Goods Act* 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 11 (2), 35, *and* 56.

M. contracted to supply a pump for an artesian well bored by him for a County Council. M. contracted to buy the pump from B., who were aware of the purpose, the specification in the sub-contract being in conformity with the requirements of the County Council. M. set up the pump in May 1907. Complaints were made by the County Council that the pump was not working satisfactorily, and these complaints were made known by M. to B., who replied on 21st May 1907 that if the pump was fitted up properly it would be all right. B., on M.'s request, went himself to inspect the pump, and on 5th June 1907 wrote to M. that he had put the pump all right. Further complaints were made by the County Council, who declined to pay, and eventually M. raised an action against the County Council for payment of the price. In January 1909, while M. was preparing for the proof in this action, he was informed by B. that the pump was not performing certain of the requirements, and further, that it was impossible for these requirements to be fulfilled. M. thereupon dropped the action against the County Council and raised an action against B. for damages for breach. B. retorted by raising an action for the price, and maintained that the rejection was not timeous.

The Court, who were of opinion that M. had not the scientific skill to know whether the pump could be made to do the work required and was entitled to rely on the skill of the seller, *held* (1) that the rejection was timeous, and (2) that the expenses of M.'s unsuccessful action against the County Council arose directly from B.'s breach of contract and fell to be included in the damages arising therefrom.

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), enacts—Section 11, sub-section 2—"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." Section 35—"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." Section 56—"Where by this Act any reference is made to a reasonable time, the question what is a reasonable time is a question of fact."

A. Bennet & Son, millwrights and engineers, Foundry Street, Dunfermline, of whom Alexander Bennet junior was the sole partner, raised in March 1909 an action in the Sheriff Court at Glasgow against Alexander Munro & Company, artesian well engineers, Bothwell Street, Glasgow, of whom the sole partner was Alexander Munro, "for payment of the sum of £44, 10s. sterling for goods sold and supplied to the defenders."

Alexander Munro & Company in May 1909 raised a cross action against A. Bennet & Son "for payment of the sum of £152, 7s. 9d. sterling, being amount of loss and damage sustained by the pursuers through the defenders' breach of a contract entered into between the parties in or about January 1907 for the supply by the defenders of a deep-well pump and gearing to the pursuers."

Munro & Company averred that the pump and gearing were disconform to contract, and made up their claim for loss and damage sustained by them as follows:—

"(1) Account against the Lismore Rural District Council for supplying and erecting said pump and gearing, pumping, &c. . . . . £80 2 6
Less pursuers' account . 39 9 6
£40 13 0
(2) Visits of pursuers' representatives and workmen to Lismore on five separate occasions as condescended on . . . . . 66 13 0
(3) For removing pump from bore hole, carriage of plant, pump, and gearing to and from Lismore and Glasgow 21 15 0
(4) Law agents' expenses, Dublin and Glasgow, in respect of action against Lismore Council . . . . . 23 6 9
£152 7 9"

Alexander Munro & Company contracted to supply a pump for an artesian well which they had bored for the Lismore Rural District Council, Ireland. Munro & Company did not make the pump themselves, but on 23rd January 1907 they sent a rough sketch and specification of the pump in conformity with the requirements of the Lismore Council to A. Bennet & Son, and entered into a contract with them to supply the pump. The specification was in the following terms:— "The Council requires a quotation for a suitable deep-well pump, with all connection rods, standard, &c., to lift from 6 to 8 gallons per minute from 112 feet. It should be easily worked by a lad of sixteen years, by wheel and gearing. . . ." In fulfilment of this contract Bennet & Son duly supplied a pump, but after it had been erected by Munro & Company at Lismore, the engineer of the Lismore Council complained to Munro & Company that it was not giving the results required, and on 20th May Munro & Company communicated this complaint to Bennet & Son. In their reply of next day Bennet & Son said—"If you fit the pump up properly and put everything where it should be it will be all right," and Munro & Company then suggested that Mr Bennet, a member of the firm of Bennet & Son, should himself go to Lismore to examine everything and put the pump to rights. Mr Bennet accordingly went to Lismore, and following on his visit there Bennet & Son wrote a letter on 5th June to Munro & Company, in which they made these statements—"We put the pump right at Lismore," and "Mr O'Riordon (the Lismore Council's engineer) was satisfied as to the easiness of working." The Lismore Council, however, continued to be dissatisfied with the pump, and although Munro & Company attempted themselves to put it to rights they refused to accept it. In December 1908 Munro & Company raised an action against the Lismore Council for payment of the price in the High Court of Justice in Dublin. In the course of preparing for this action Munro & Company, with a view to ascertaining whether the pump was really capable of fulfilling the conditions which the Lismore Council had specified, wrote on 12th January 1909 to Bennet & Son asking Mr Bennet to make certain calculations regarding it. Bennet & Son replied next day, 13th January, and in their reply they said—"We have yours of yesterday's date about Lismore pump. We will forward all particulars in the course of a day or two. In the meantime a lad is unable to pump 6 to 9 gallons per minute from a depth at which said pump is working." Thereupon Munro & Company at once rejected the pump as being disconform to contract, and settled the action against the Lismore Council after having first ascertained from Bennet & Son that the latter did not wish to continue the action on their own behalf. Munro & Company had throughout their correspondence with Bennet & Son taken up the position that they would keep the matter open as regards them until payment was obtained from the Lismore Council, and Bennet & Son did not in writing at anyrate repudiate this view, and when Bennet & Son now made a peremptory demand for payment Munro & Company refused to pay. [For more detailed narrative of facts see Lord Mackenzie's opinion *infra*].

On 9th June 1909 the Sheriff-Substitute (BOYD) conjoined the two actions, and on 15th October 1909 pronounced the following interlocutor—"Finds that the party Bennet & Son contracted to deliver to the party Munro & Company a deep-well pump which should deliver from 6 to 8 gallons of water per minute from 112 feet, and should be easily worked by a lad of sixteen years by wheel and gearing; that the pump supplied by Bennet & Son could not deliver the specified quantity of water when worked by a lad of sixteen with wheel and gearing, and that Munro & Company rejected the same as disconform to contract: Finds that they were justified in so doing, and that the rejection was timeous: Finds that Munro & Company incurred loss through the failure of Bennet & Son amounting to £144, 12s. 9d., and that they are entitled to payment thereof: Therefore assoilzies the party Munro & Company from the conclusions of the action against them, and decerns against the party Bennet & Son for the said sum of £144, 12s. 9d. sterling in the action against them: Finds the party Munro & Company entitled to expenses in both actions, &c."

With regard to the amount of the loss which the Sheriff-Substitute found Munro & Company had suffered, in his note he said—"Munro & Company submit a statement of loss occasioned to them by Bennet & Son's failure, and I think that it is sufficiently proved, except the estimated expenditure in removing the pump and returning it to Glasgow. This amounts to £21, 15s., and the actual expenditure was £14. Accordingly from £152, 7s. 9d., which appears as the total, there falls to be deducted the difference between £21, 15s. and £14, namely, £7, 15s., which leaves a result of £144. 12s. 9d."

Bennet & Son appealed to the Sheriff (MILLAR), who on 27th December 1909 pronounced this interlocutor—". . . Recals

the interlocutor of 15th October last: Finds in fact that the party Bennet & Son contracted to deliver to the party Munro & Company a deep-well pump which would deliver from 6 to 8 gallons of water per minute from 112 feet, and should be easily worked by a lad of sixteen years by wheel and gearing; that the party Bennet & Son supplied a pump similar to that which had been contracted for on 18th April 1907; that towards the end of May 1907 Mr Bennet, sole partner of Messrs Bennet & Son, went to Lismore, where the pump had been erected, and executed certain alterations and repairs, and intimated to Messrs Munro & Company by letter that he had put the pump right at Lismore; that thereafter the party Bennet & Son made frequent application to the party Munro & Company for payment; that the party Munro & Company intimated that they could not do so until the pump had been accepted by their customers at Lismore; that the party Munro & Company finally intimated that they rejected the pump upon 15th January 1909: *Finds in law* that the pump was not rejected within a reasonable time after delivery in terms of the Sale of Goods Act 1893: Therefore assoilzies the party Bennet & Son from the conclusions of the action against them, and in the action Bennet & Son against Munro & Company decerns as craved against the party Munro & Company: Finds the party Bennet & Son entitled to expenses in both actions (including the expenses of the appeal)," &c.

*Note.*—[*After narrating the facts*]—"The question that arises is, Is that rejection within a reasonable time? The only case with regard to rejection after several months which was referred to was that of *Aird & Coghill* v. *Pullan & Adams*, 7 F. 258. The contract there was different from that in the present case. The Lord Justice-Clerk says—'This machine was ordered for a particular work to be done, and was bought under an agreement whereby the defenders were to put it into and leave it in good order in the pursuers' premises. Now I think the evidence is quite clear and distinct to the effect that that was never done. It is quite true that there was a very long time occupied between the time when the machine was first put in and the time when the pursuers rejected it, but during the whole of that time the defenders, through Mr Pullan, were professing their ability to put matters right, and to bring the machine the pursuers had paid for into such working order that they could not reject it.' And Lord Trayner says—'The next objection was that the machine was retained too long. If the machine had been kept as accepted for the period stated it would certainly have been too late to reject it. But why was it kept so long? From the very outset it was apparent to the pursuers that the contract of the defenders had not been fulfilled, and they called on the defenders time after time to fulfil the contract by putting that machine into thoroughly good working order. The defenders accepted liability for doing that, and they tried to do it month after month, and when the pursuers had lost their patience over these innumerable trials, which were of no avail, and intimated to them that they would wait no longer for the machine, the defenders again asked "Give us another chance and we will see what we can do. We are certain that we can put it right." That was done. Well, the thing could not be accomplished. But the reason for the retention of that machine was not to enable the pursuers to make up their mind whether they were to keep it—for it would have been too long a time to retain merely for that purpose—but to enable the defenders to fulfil their obligation.' That seems to me a very different case from the present, for Mr Bennet had intimated in June 1907 that he had put the machine right, and the long delay after that was due to the attempt by Messrs Munro to put it right, and to get the engineer of the Parish Council to accept it. Mr Bennet was not called upon after June to put it right, nor was the delay through any request of his. Accordingly I think Messrs Munro have not rejected the machine within a reasonable time under the statute.

"With regard to the claim of damages, it is made up by the cost of the journeys of the workmen to the pump in Ireland, and of the legal expenses of the action in Dublin. Mr Bennet gave no authority for either of these expenses being incurred, and I think Messrs Munro would require some authority from Messrs Bennet before they could incur costs to the extent of £144, 12s. 9d. in connection with a pump that was to cost £36. Accordingly I think that Messrs Bennet & Son's claim should be sustained, and that they should be assoilzied from the action at the instance of Messrs Munro & Company."

Munro & Company appealed, and argued, *inter alia* — (1) *Timeous rejection.* — The pump was disconform to contract and they were entitled to reject it "within a reasonable time after delivery"—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), section 11 (2), and what was a reasonable time was a question of fact—section 56. Impossibility of performance was no defence—*Gillespie & Company* v. *Howden & Company*, March 7, 1885, 12 R. 800, 22 S.L.R. 527; *Thorn* v. *Mayor of London* (1876) 1 A.C. 120. The appellants had timeously rejected the pump, because any delay in the rejection was caused by the respondents themselves. They had led the appellants, who were entitled to rely on their skill, to believe that the pump was conform to contract. Moreover, the respondents never seriously pressed for payment, but allowed the appellants to postpone making a decision as to their accepting the pump until it should be seen whether payment could be got from the Lismore Council. The mere fact that an attempt had been made to put the pump to rights could not bar rejection. The respondents themselves had shared in these attempts, and the correspondence showed that the respondents acquiesced in what had been done by the appellants. In

the case of machinery the rejection need not be made so soon as in the case of other classes of goods, because machinery could not be tested without a considerable amount of use—*Fleming & Company (Limited)* v. *Airdrie Iron Company*, January 20, 1882, 9 R. 473, 19 S.L.R. 405; *Aird & Coghill* v. *Pullan & Adams*, December 14, 1904, 7 F. 258, 42 S.L.R. 292; *Pearce Brothers* v. *Irons*, February 25, 1869, 7 Macph. 571, 6 S.L.R. 372. The cases of *The Electric Construction Company, Limited* v. *Hurry & Young*, January 14, 1897, 24 R. 312, 34 S.L.R. 295; *Croom & Arthur* v. *Stewart & Company*, March 14, 1905, 7 F. 563, 42 S.L.R. 437; and *Lupton & Company* v. *Sculze & Company*, June 30, 1900, 2 F. 1118, 37 S.L.R. 839, were different from this one. In all those cases there had been timeous rejection, but after the buyer had validly rejected the goods he had continued to retain and use them, or, as in *Lupton & Company's* case, had refused to return them, and thus had disentitled himself from founding on the rejection. The case of *Aitken, Campbell, & Company, Limited* v. *Boullen & Gatenby*, 1908 S.C. 490, 45 S.L.R. 354, was also different from this one, because in that case the question was not whether the buyer had timeously rejected the goods, but whether he was entitled to reject part only of the goods. (2) *Expenses of their action against the Lismore Council.*—These expenses flowed directly from the breach of contract. The appellants had been induced by the respondents to believe that the pump was conform to contract, and therefore it was a reasonable proceeding on their part to raise the action—*Agius* v. *Great Western Colliery Company*, [1899] 1 Q.B. 413; *Hammond & Company* v. *Bussey*, 1887, 20 Q.B.D. 79. Reference was also made to *Duff & Company* v. *Iron and Steel Fencing and Building Company*, December 1, 1891, 19 R. 199, 29 S.L.R. 186; *Grêbert-Borgnis* v. *Nugent* (1885), 15 Q.B.D. 85; *Millar* v. *Bellvale Chemical Company*, December 14, 1898, 1 F. 297, 36 S.L.R. 214.

Argued for the respondents—(1) *Timeous rejection.*—The rejection was not timeous. On a fair construction of the correspondence the appellants had intimated their acceptance of the pump. Further, an act which was inconsistent with the ownership of the sellers was to be deemed acceptance—Sale of Goods Act 1893, sec. 35. The attempt to repair the pump was such an act and barred rejection—*Mechan & Sons, Limited* v. *Bow, M'Lachlan, & Company, Limited*, 1910 S.C. 758, 47 S.L.R. 650. In any event the rejection was unduly delayed, and was not made within a reasonable time after delivery—*Hyslop* v. *Shirlaw*, June 29, 1905, 7 F. 875, 42 S.L.R. 668. There was a duty on the appellants to make an early inspection of the goods—*Pini & Company* v. *Smith & Company*, May 29, 1895, 22 R. 699, 32 S.L.R. 474. (2) *Expenses of the action against the Lismore Council.*—These expenses were incurred through the laxity of the appellants themselves. They were not damages which could fairly and reasonably be considered to arise naturally from the breach of the contract itself, nor such as might reasonably be supposed to have been contemplated by the parties at the time they made the contract, as the probable result of breach. Accordingly the respondents were not liable for them. Reference was made to *Parker* v. *Palmer*, 1821, 4 B. and Ald. 387, and *Loutill's Trustees* v. *Highland Railway Company*, May 18, 1892, 19 R. 791, 29 S.L.R. 670.

At advising—

LORD MACKENZIE—These are cross actions arising out of a dispute about the supply of a deep-well pump. The sellers, Bennet & Son, a firm of millwrights and engineers in Dunfermline, sue for the price. The buyers, Munro & Company, who are artesian well engineers in Glasgow, claim damages for breach of contract, and maintain that the pump supplied was not in conformity with the terms of the specification. The pump was ordered by the latter to enable them to fulfil a contract with the Lismore District Council in Ireland.

The terms of the contract between Bennet & Son and Munro & Company are contained in letters dated 23rd and 25th January and 25th February 1907. In their letter of 23rd January Munro & Company enclosed a rough sketch and specification which were in conformity with the requirements of the Lismore Council. The specification was in the following terms:—"The Council requires a quotation for suitable deep-well pump, with all connection, rods, standard, &c., &c., to lift from 6 to 8 gallons per minute from 112 feet. It should be easily worked by a lad of 16 years by wheel and gearing. The nozzle should be for a 6-feet length of armoured hose, and should be at least 6 feet over ground level, or 5 feet 6 inches over base of standard." Bennet & Son replied on 25th January—"We have yours *re* pump and gearing. We will make the lot for you, frame as sketch, and we will put on a fly-wheel with handle in same, and supply tube same as before with a tee-piece 6 feet above ground, all d/d here for the sum of thirty-six pounds stg." On receipt of this Munro & Company quoted to the Lismore Council, and on making the contract with them accepted Bennet & Son's offer. This they did verbally, and on 25th February confirmed the order.

In the proof Mr Bennet takes up the position that the letter of 23rd January did not contain either sketch or specification. Both the Sheriff and the Sheriff-Substitute disregard this evidence, and I agree with them that it is impossible to hold that the sketch and specification were not sent with the letter. A reference to the letter written by Munro & Company to him on the 20th May 1907 seems conclusive upon this point.

The position of matters therefore is that in February 1907 Bennet & Son undertook to supply a deep-well pump which should (1) be capable of lifting from 6 to 8 gallons per minute from 112 feet, and (2) should at the same time be easily worked by a lad of sixteen years by wheel and gearing. The peculiarity of the present case is that

Mr Bennet admits that it is an impossibility for a lad to pump 6 to 8 gallons per minute from 112 feet. He gave this opinion whenever he was faced up to the question by Munro & Company. As soon as they got this opinion from him they at once rejected the pump. Mr Bennet, however, according to his evidence, did not discover that he had undertaken under the contract to supply a pump to perform an impossibility until the month of January 1909.

There is no doubt that it was a material part of this contract (which was unconditional in its terms) that the pump when worked by a lad should be able to lift the specified number of gallons per minute from the depth given. There was failure on the part of the seller to perform a material part of the contract. Accordingly under sec. 11 (2) of the Sale of Goods Act 1893, the buyer was entitled 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 as a breach giving rise to a claim for compensation or damages.

In the judgments in the Sheriff Court the question considered is whether there was timeous rejection. The Sheriff-Substitute held that there was, and the Sheriff held that there was not. In my opinion the Sheriff-Substitute is right.

The pump in question was delivered in Ireland and fitted up there by May 1907. Mr O'Riordan, the engineer to the Lismore Council, on 18th May reported to Munro & Company that he found the pump to work "very stiff"—"It would take two strong men to work it for five minutes at a time and then only lift 3¼ gallons per minute." He added that this would not do, and that Munro & Company should remedy the defects immediately. This complaint was sent on by Munro & Company to Bennet & Son by their letter of 20th May, in which they say—"We sent you on the 23rd January specification of their requirements, and unless we can get it to work tolerably well we might find it returned to us." Even if Mr Bennet had not read the specification when he got it in January, this letter imposed an obligation upon him to make sure that he then understood what the terms of the contract were which he was executing. Apparently he did not. In his reply of 21st May he refers to the fact that the pump had worked "very easy" in his hands, and said—"If you fit the pump up properly and put everything where it should be it will be all right." This I think Munro & Company were entitled to rely on as a representation that if the pump was not doing the work contracted for it was merely a question of fitting. It was in consequence of the belief so induced that they continued to endeavour to satisfy the requirements of the District Council's engineer. They in the first place suggested that Bennet should himself go over to examine everything and put it right to the satisfaction of Mr O'Riordan. Bennet went to Ireland, and as a result of his visit wrote the letter of the 5th of June 1907, in which he makes the statement "We put the pump right at Lismore," and says Mr O'Riordan was satisfied as to the easiness of working. It is at this point that I think Munro & Company were misled by the statement made to them by Mr Bennet. It sufficiently appears that Mr Munro had not the necessary scientific knowledge to enable him to form an opinion whether the pump supplied was capable of performing the specified work or not. Mr Bennet had the requisite skill. Mr Munro was entitled to rely upon the latter's knowledge, and if he believed the statement made by Mr Bennet he had no ground for rejecting the pump at that time. If at the close of the day he had called in a neutral man of skill to test the pump, and had rejected it upon his report, there would be force in the contention that he should have called him in at an earlier stage. The man of skill on whose report he rejected the pump was Bennet himself. I do not overlook the fact that just before he communicated with Mr Bennet he had consulted Mr Stewart. It was, however, on Mr Bennet's opinion that he proceeded. The case is different from the case of *Hyslop* v. *Shirlaw*, 7 F. 875. Nor is the case similar to that of *Pini* v. *Smith & Company*, 22 R. 699, where the objection to pipes ordered from an ironfounder was that they were different in weight and shape from those ordered. In that case it was held there was a duty to inspect in this country before the pipes were shipped abroad. Nor is it like *Meechan & Sons, Limited* v. *Bow, M'Lachlan, & Company*, 1910 S.C. 758, in which the shipbuilders incorporated the tanks supplied with the structure of the vessel which they were building and were held to take the risk of the tanks ultimately passing the Admiralty Inspector.

If the view is correct, as I think it is, that Bennet should in the month of June 1907, instead of reporting that the pump was all right, have told Munro that he had stipulated for an impossibility, this goes a long way to bar Bennet from pleading that there was not timeous rejection.

In the correspondence which follows Munro & Company take up the position that they would keep the matter open as regards Bennet until they got a settlement from the Lismore Council. Thus on 6th June they wrote to him that Mr O'Riordan was not satisfied with what he had done. They point out that it will be to the "interest of both to get the pump passed, and the expense will have to be shared by us." Following on this intimation that the expense would have to be shared Munro himself went over in July, and sent men in September. The Council did not take the pump off his hands, and on 13th December 1907 they wrote to Munro & Company that the agreement had not been carried out according to specification, and until that had been done they must decline payment. This was communicated by Munro to Bennet & Son on 17th December, in a letter in which they say they are afraid the pump and gearing will have to come back. There was further correspon-

dence in February regarding a proposal to take back the gearing in which Munro asked Bennet to allow the matter of his account to remain over until the Lismore Council were settled with one way or another. According to Munro's evidence Bennet was wanting payment of his account, but he (Munro) took up the position that if the pump had not been taken off Munro & Company's hands by the Council they would not pay him (Bennet). This position was emphasised by the expression which is used in the letters of 2nd and 30th April that Munro & Company and Bennet & Son "are in the same boat." There appears to be no written repudiation by Bennet of this view, and according to Munro's evidence Bennet acquiesced in matters remaining in that position. If Bennet had then intimated that he must get payment of his account whatever Munro might be able to recover from the District Council, this might have affected Munro's right subsequently to reject, but Bennet did not do so. The last letter that it is necessary to refer to in this connection is the one of 21st August 1908 from Munro & Company saying that they are hopeful of the Lismore Council accepting the pump and "so soon as we have payment we will be only too pleased to send you a cheque." The Council did not accept the pump, and Bennet raised action against them in Dublin in December 1908 for payment. It was not until preparation was being made for this case that Munro, in consequence of what Mr Stewart told him, communicated with Bennet and asked him to work out the number of strokes required to discharge six to nine gallons per minute with a two-inch bucket. He replied on 13th January 1909 saying he would forward all particulars in a day or two. "In the meantime a lad is unable to pump six to nine gallons per minute from a depth at which said pump is working." In his evidence Bennet says—"I had no hesitation the moment that was put to me." He further says in the proof—"There was no difficulty in finding out the quantity of water that could be delivered per minute by this pump; that could be ascertained the moment it was fixed and ready for work." The first intimation that Munro had from Bennet of the true state of matters was when he received his letter of 13th January 1909. Munro at once rejected the pump and gearing. He asked Bennet & Son if they wished to continue the action for themselves, and if not, where they wished the pump sent to. They declined to have anything to do with the matter. Munro & Company then settled the action. Now Bennet had the means of ascertaining how the facts stood so far back as January 1907, when the specification was sent him which was the basis of the contract. He should then, or at latest in May 1907, have communicated the state of matters to Munro. The delay was thus, in my opinion, due to fault on the part of Bennet, and he cannot plead that there has not been timeous rejection. I am unable to hold in the circumstances that Munro & Company must be deemed to have accepted the goods within the meaning of section 35 of the Sale of Goods Act. The result, therefore, is that Munro & Company are entitled to absolvitor in the action brought by Bennet & Son for recovery of the price.

As regards the claim of damages made in their action against Bennet & Son, there was no objection by the defenders' counsel to the first item £40, 13s., which represents loss of profit. The next branch of the statement of damage covers the cost of visits by Munro & Company's workmen to Lismore for the purpose of putting the pump right. It was contended on behalf of Bennet that Munro had no business to send workmen and that his duty of rejection arose at the outset. It was further argued that the labour proved unremunerative. Munro, however, acted as he did because he believed that the pump could be put right, and as this belief was induced by statements made by Bennet, I think they are entitled to recover these items, amounting to £66, 13s. As regards the next branch, amounting to £21, 15s. (reduced to £14), the cost of removing the pump from the bore-hole and returning it to Glasgow, it was contended that this was unnecessary as the pump might have remained where it was. It is, however, stated in the pleadings in the present case that the action against the Lismore Council was settled on the footing that the pump and gearing were to be removed. I think Munro & Company are entitled to recover these expenses. This leaves only the expenses of the unsuccessful action brought by Munro & Company against the Lismore District Council which was abandoned. It was objected that although the amount of expenses reasonably incurred in defending an action might be allowed, as had been done in *Agius* v. *The Great Western Colliery Company*, 1899, 1 Q.B. 413; and *Hammond & Company* v. *Bussey*, 20 Q.B.D. 79, expenses had never been allowed in a case where the buyer had brought an unfounded action and lost it. The answer, however, in this case is, I think, that the sellers assured the buyers that the contract had been well performed and thus led them to bring their action. These damages flow directly from the sellers' breach of contract.

I am therefore of opinion that the interlocutor of the Sheriff should be recalled and the Sheriff-Substitute's judgment affirmed.

In these circumstances it is not necessary to consider the question that was raised in the case of the *Electric Construction Company* v. *Hurry & Young*, 24 R. 312, or to express an opinion upon whether in the present case, if the buyer had lost his right to reject, he could, under the alternative in section 11 (2) of the Sale of Goods Act 1893, have retained the goods and claimed damages for breach of contract.

The LORD PRESIDENT—LORD KINNEAR concurs in that opinion, and I concur also.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

". . . Sustain the appeal: Recal the interlocutor of the Sheriff dated 27th December 1909: Revert to and affirm the interlocutor of the Sheriff-Substitute dated 15th October 1909: Repeat the findings in fact and in law therein, and of new assoilzie the party Munro & Company from the conclusions of the action against them, and of new decern against the party Bennet & Son, all in terms thereof: Find the party Munro & Company entitled to additional expenses since the said 15th October 1909. . . ."

Counsel for Alexander Munro & Company (Appellants)—Constable, K.C.—D. P. Fleming. Agent—J. S. Morton, W.S.

Counsel for A. Bennet & Son (Respondents)—M'Clure, K.C.—Moncrieff. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

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*Friday, December* 23.

## FIRST DIVISION.

[Sheriff Court at Dumbarton.

## A. E. ABRAHAMS, LIMITED *v.* CAMPBELL.

(*Ante November* 30, 1910, *supra, p.* 191.)

*Contract — Performance — Termination — Subject-matter Ceasing to Exist — Inability to Implement.*

A tradesman agreed in March 1907 with an advertising contractor to take six glass slides "on the electric cars running at Dumbarton" for a period of five years from 11th June 1907 at one shilling per glass per week. The then existing tramway company was in the beginning of 1908 taken over by another tramway company, who by the end of June 1908 had widely extended their system, so that, whereas up to the time that the original company was taken over the advertisements were shown on six cars running in Dumbarton all day, thereafter they were only shown on six cars out of thirty, and these six were sparsely used and ran over the extended system. On the tradesman declining to pay for the slides after June 1908, the assignees of the advertising contractor raised an action on the contract.

The Court, on the ground that the subject-matter of the contract had ceased through the original company being taken over by the one with an extended system, *held* that the pursuers were not *in titulo* to demand implement by the defender, but in respect that the defender acquiesced in the action being treated as one of *quantum meruit*, decerned against him for a certain sum as such.

(Reported on the competency of the appeal November 30, 1910, *supra*, p. 191).

A. E. Abrahams, Limited, advertising contractors, Stratford, Essex, as assignees of Abram Emmanuel Abrahams, advertising contractor, sometime carrying on business as the Tramway Advertising Company, Stratford, Essex, and the said Abram Emmanuel Abrahams for his interest as an individual, raised an action in the Sheriff Court at Dumbarton against William Campbell junior, furniture dealer, Dumbarton, for payment of the sum of £43, 16s. (subsequently restricted by minute to £39, 18s.), "being amount due in terms of agreement executed by defender and dated 1st March 1907, for advertising on 6 glass slides on the electrical cars running at Dumbarton for 146 weeks commencing 11th June 1907, at the cost of 1s. per week each glass, viz., 6s. per week in all, under reservation of pursuers' rights to any and all sums yet to become due by defender under said agreement."

The following *facts* were admitted, partly on record, partly by a subsequent minute of admissions:—The company pursuers were advertising contractors carrying on business in Stratford, Essex, and were in right of the business formerly carried on there by the individual pursuer under the style of The Tramway Advertising Company. By agreement, dated 9th September 1909, pursuers are assignees of the individual pursuer of all contracts for the lease of advertising spaces current at the time of their acquisition of his business, as well as of the agreement made with defender for advertising, as after mentioned. Amongst the advertising rights taken over by them in terms of said agreement were the advertising rights on and in the electric cars running at Dumbarton, being those originally belonging to the Dumbarton Burgh Tramway Company, Limited, and now to the Dumbarton Burgh and County Tramway Company, Limited. On 20th February 1907 electric tramway cars were inaugurated in the burgh of Dumbarton by the Dumbarton Burgh Tramway Company, Limited. The routes were Dumbuck to Dalreoch and to Barloan and *vice versa*, and the cars on the route were six double deckers. The defender, by agreement dated 1st March 1907, made a contract with the individual pursuer in the following terms, viz.—"1st March 1907. I, Wm. Campbell jr. do hereby agree to take six glass slides on the electric cars running at Dumbarton, for a period of five years, commencing from the day the advertisement is first exhibited, at the cost of one shilling per week each glass. . . . (Sgd.) Wm. Campbell. *Witness*—(Sgd.) Benj. Colgrave." In terms of said agreement the individual pursuer supplied and had fixed on said cars defender's advertisement. The date upon which said advertisement was first exhibited on said cars was 11th June 1907, and in accordance with the said agreement the rent then began to run. The defender had no complaint with reference to pursuers' fulfilment of above contract up to the end of June 1908. In the beginning of 1908 said Burgh Tramway Company was taken over by the Dumbar-