Lord Ordinary has deducted public burdens, I think he has dealt quite rightly with the mineral rent in question.

The Court adhered.

Counsel for Pursuer (Respondent)—Solicitor-General (Balfour) — Moncreiff. Agent—Daniel Turner, S.L.

Counsel for Defenders (Reclaimers)—Asher—W. C. Smith. Agents—Pringle & Dallas, W.S.

Friday, May 21.

FIRST DIVISION.

[Sheriff of Lanarkshire.

DICK & STEVENSON *v.* MACKAY.

Obligation—Contract—Failure to Implement Condition.

Where a party to a contract prevents the implement of a condition thereto, the condition is to be held as fulfilled, and he liable in terms of the contract.

A agreed to purchase a steam-navvy from B under certain conditions, one of which was that it should be capable of excavating a given quantity of specified substance in a certain time on a "properly opened-up face" at a certain railway cutting. The machine was first tried at another cutting, where it failed to excavate the required amount, and on being subsequently removed to the original cutting, to a face which appeared on proof to be not a "properly opened-up" one, it was temporarily damaged a day or two after it began to work. A thereupon refused to accept it, or to give it any further trial. *Held (diss.* Lord Deas) that though it was not clear from the evidence whether the machine could or could not have performed the work had such trial been given it, yet A having prevented this condition of the contract from being implemented, was liable in the price of the machine as concluded for.

Process—Proof—Expenses of Conjunct Probation in Sheriff Court Disallowed.

At a proof before a Sheriff-Substitute the pursuers were allowed a conjunct proof at the close of defender's evidence, notwithstanding objection thereto by defender as incompetent and unnecessary. The case having subsequently been appealed from the Sheriff to the Court of Session on the merits, and the pursuers having succeeded, the Court *disallowed* them the expenses of the conjunct proof so led.

Messrs Dick & Stevenson, engineers in Airdrie, sued John Mackay, railway contractor, for £1115, being the contract price of a patent steam-navvy or digger which they had constructed, and of which they alleged him to be the purchaser.

The terms of the contract as disclosed by the parties' correspondence was that the pursuers should supply the defender with a machine capable of digging and filling 350 cubic yards of the clay or other soft substances in a certain railway cutting which the defender was about to make at Carfin, in a day of ten hours—the machine to be erected and tested at a properly opened-up face in said cutting before February 1877, and to be removed if it did not fulfil the guarantee before the end of that month. The pursuers were to uphold it for twelve months after delivery, and the price was to be £1115. The stipulation as to the date of trial was departed from by mutual consent—the machine, on the one hand, not being ready by the time named, and the defender, on the other hand, not having begun to open up his cutting at Carfin until August 1877; the machine accordingly was not delivered till July 1877, and was then taken, not to Carfin but to Gariongill, where the defender was making another cutting. The navvy was erected and worked at Gariongill from 24th March to 22d May 1878, during which time several alterations and breakages occurred involving loss of time, these being due, according to the pursuers, to the insufficiency of the defender's rails on which the machine worked, and the carelessness of the man in charge, but as the defender alleged, to the fault of the machine itself. In the proof which was subsequently led it, appeared that on no occasion while at Gariongill did the navvy excavate the stipulated quantity of soil, though the evidence was conflicting as to the amount which it actually did succeed in excavating. On 22d May the navvy was taken to pieces, parts of it being removed to the pursuers' works at Airdrie, and was subsequently re-erected at the Carfin cutting, where it was ready for work on 9th September. The face to which it was there applied appeared from the proof (though the evidence as to its dimensions was conflicting) to fall distinctly short of a "properly opened-up" one. A day or two afterwards a serious crack was discovered in the machine—an old one according to the pursuers; a new one according to defender—whereupon the defender refused to purchase the machine or to give it any further trial, on the ground that it had failed in the stipulated conditions.

The present action was accordingly raised by Messrs Dick & Stevenson before the Sheriff-Substitute of Lanark.

The pursuers pleaded—"(1) The pursuers having supplied the defender with the machine in question at the price stated, and the same being still due and unpaid, they are entitled to decree as libelled. (2) The pursuers being, and having all along been, ready to fulfil their part of the contract libelled, and the defender refusing or failing to fulfil his part, the pursuers are entitled to decree for the stipulated price. (3) Or, alternatively, the defender is liable to the pursuers in damages on account of his breach of the contract libelled. (4) The pursuers having, in terms of their contract, supplied to the defender the machine in question at Carfin cutting, and the same being still in the possession of the defender, he is liable in payment of the price sued for."

The defender pleaded—"(2) The machine having failed on trial, the defender is not bound to accept it. (3) The sale of the machine being conditional on the trial, which has failed, the defender is not liable in the price thereof. (4) The defender not having committed any breach of contract, is not liable in damages."

The Sheriff-Substitute (BIRNIE) allowed to both parties a proof of their averments, and to the pursuers a conjunct probation, and on 24th May 1879, after proof led, he pronounced an interlocutor finding that "the defender was bound to give the pursuers' steam-navvy a fair trial at Carfin, and that he did not do so," and decerning against him accordingly. He added this note:—

"*Note.*—[*After narrating the facts*]—The defender argues that he was entitled to reject the machine (1st) because Gariongill was substituted for Carfin, and the machine did not fulfil its guarantee there; (2d) because he allowed it to be removed to Carfin on the condition that the pursuers were to remove it if there was another breakage; and (3d) because, apart from that condition, keeping in view the breakages and delays at Gariongill, he was entitled to reject it on its breaking at Carfin.

"1st, I do not think that it was contemplated either by the pursuers or the defender that the machine was undergoing its guarantee trials at Gariongill. It seems to me that when Mr Stevenson entered into the agreement with Campbell, he did contemplate that it might be tried at Gariongill and taken over by the defender without an additional trial at Carfin; but there is not in the evidence that call on the one hand, or attempt on the other, to fulfil the guarantee which binds either side.

"2d, The defender no doubt warned the pursuers that Carfin cutting must be completed by a certain time, and that he could not tolerate the same stoppages as at Gariongill, but he did not stipulate that he was to be entitled to reject the machine for one breakage.

"3d, I have had great difficulty with this point. It may be urged with much justice that after the breakages and delays at Gariongill, and the additional breakage on the re-erection of the navvy at Carfin, the defender was not bound to take the risk of further delays; but I have come to be of opinion that he was still bound to give it a fair trial, and was not entitled to reject it for one breakage. The three serious breakages at Gariongill seem to me to be accounted for by external causes—not intrinsic defects in the machine. The machine was strengthened and altered in the knowledge of the defender after it left Gariongill, and the balance of evidence is in favour of the crack at Carfin being an old crack.

"4th, I think it proved that the defender did not afford a sufficient face at Carfin. . . .

"5th, I suggested both at the commencement and during the proof that the machine should yet be tried at the sight of a neutral reporter. The defender was agreeable to this, but the pursuers objected unless they were guaranteed the expense. The cutting is now nearly finished, and the machine would require to be taken down and re-erected. It has also remained exposed to the weather since September of last year. If I am right in holding that the defender was in fault in not affording the machine a proper face when demanded, the pursuers are not bound now to test it unless guaranteed the expense.

"6th, As the pursuers completed their part of the contract by erecting the machine and offering it for trial, the defender is liable in the price."

The defender appealed to the Sheriff. The following minute was lodged for him, repeating an offer made by him during the proof before the Sheriff-Substitute—"Johnstone for the defender hereby repeats his offer to have the machine mentioned on record tested at the sight of any reporter to be named by the Court, and upon a face of such dimensions as may be fixed by said reporter, the face to be prepared in the meantime at the expense of the defender, and the machine to be brought to the face at the expense of the pursuers; and this on the footing that the expenses of both parties of and attending said test shall be dealt with as expenses of process." This offer, however, was refused by the pursuers unless the defender undertook to bear all the expenses of such a trial (which they estimated at not less than £700) whatever the result of it might be.

The Sheriff (CLARK) issued the following interlocutor and note:—

"*Glasgow, 2d December* 1879.—Having made avizandum with the cause and considered the evidence and whole process, Finds that the pursuers contracted to supply the defender with a 'steam-navvy,' capable of doing a certain specified amount of excavation; that on being erected it was to be submitted to a test of trial; that if it then satisfied the guarantee, the pursuers were to be paid as its price £1115, but that if it failed to do so they were to remove it: Finds that the machine was in due time erected at Gariongill cutting, and was there tested: Finds that it did not satisfy the guarantee, but completely broke down, notwithstanding the pursuers had every opportunity afforded them during nearly two months of altering, amending, and adjusting as they thought proper: Finds that thereafter another opportunity was given them to prove that the machine satisfied the guarantee, and that they accordingly erected it at Carfin, where it was again tested: Finds that this testing proved equally unsatisfactory with the former, and that in consequence it was definitely rejected by the defender: Finds, in point of law, that the defender was entitled to do so, unless it could be established by the pursuers that the failure of the machine to satisfy the guarantee was atttributable to circumstances for which the defender was responsible, or for which at least they were not accountable: Finds that the pursuers have failed in discharging the *onus* thus laid upon them: Finds, therefore, that the pursuers having failed to satisfy the conditions of their contract, the defences fall to be sustained: Therefore recalls the judgment appealed against, and assoilzies the defender from the conclusions of the action: Finds the defender entitled to expenses; allows an account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and report; and remits to the Sheriff-Substitute to decern for the amount of said expenses when taxed, and decerns.

"*Note.*—This is one of those cases but too common in the present day, where a machinist induces one of the public to give him an order for a machine, which he guarantees to accomplish certain work, but which on delivery and trial is found unsuitable or insufficient in terms of the guarantee. In such cases, as apparently in the present, the conception of the machine and the principles intended to be utilised may be sound in theory, and all that is necessary is to give them such practical form that a workable machine

may be produced. This last, however, is often the most difficult part of the undertaking—a part which the machinist should fully satisfy himself about before he undertakes any contract—otherwise the party with whom he contracts, instead of getting a machine which on erection shall satisfy the guarantee, may have to abide the issue of numerous trials, in the course of which the invention may indeed be perfected, but at a cost of time and annoyance which forms no part of the contract.

"In the present case the pursuers for a certain price undertook to supply the defender with an excavating machine called a 'navvy,' which they guaranteed was to do a certain amount of work and to satisfy a certain trial or test. It did not do this; on the contrary, it twice entirely failed—in short, it utterly broke down. Every opportunity appears to have been given during and between these two several trials to put it in proper working order. It was in fact taken down and in some sense reconstructed, yet it failed to satisfy the guarantee. It remained useless for the purpose intended. It is not proved, but it is not improbable, that through the experience gained by the pursuers in the course of a series of trials it might ultimately be made to work and take its place among useful inventions; but assuming this to be so, the defender was not bound to wait the issue of experiments. That formed no part of his contract. It is said that the machine did not get a fair trial on either occasion, because the face on which it was set to work was not suitable. This certainly, if established, would go far to support the pursuers' contention, but it is plainly open to the observation that the pursuers, who must have been the best judges of whether the circumstances under which the trials took place were suitable or not, did not object and refuse to proceed, as they would have been entitled to do. But furthermore, on looking into the evidence in process, it will, I think, be found that the pursuers have failed to satisfy the *onus* thus laid upon them. There is a considerable conflict of evidence, and the utmost that can be said for the pursuers, on the evidence as it stands, is that they have raised certain doubts, but have not succeeded in distinctly making out their contention. If the matter stood thus, the defender would, I think, be entitled to prevail, but there are other elements which greatly strengthen his case. At an early period of the cause, and also at a later stage, the Sheriff-Substitute suggested that a renewed trial should be given. There seemed no objection of a substantial kind to that suggestion being adopted, and the defender professed his willingness to agree to it. The pursuers, however, rejected this suggestion. When the case came up on appeal, the same offer was formally made by minute on the part of the defender, and on the very fair terms that the expense, whatever it might be, of such new trial should abide the issue and follow the rule of the expenses of process. It is difficult to conceive a fairer offer than this. The pursuers, however, again rejected it. In these circumstances I am of opinion that it being clearly proved that the machine did not satisfy the guarantee, and the pursuers having failed to show that this failure was attributable to fault on the part of the defender, or for which he is answerable, the pursuers must be held to have failed in implementing their contract, and that the defender is entitled to absolvitor."

The pursuers appealed to the Court of Session.

The following authorities were cited in support of the proposition that where a party to a contract prevents implement of a condition thereto, the condition is to be held as fulfilled, and he liable in terms of the contract.

Authorities—Bell's Prin., sec. 50; Pothier's Law of Obligations (Evan's tr.) vol. i., sec. 212; Benjamin on Sale, 2d. ed. p. 453, and authorities in *note* there; *Hothan* v. *East India Company*, Feb. 12, 1767, 1 Durnford and East (Terminal Reports) 638; *Hall* v. *Conder and Others*, June 17, 1857, 26 L.J. (Com. Pleas) 288.

At advising—

Lord Shand—In this action, which originated in the Sheriff Court of Lanarkshire, the question raised between the parties is, Whether the defender Mr Mackay was bound to take delivery of a steam-navvy or excavator which was built under a contract between him and the pursuers Messrs Dick & Stevenson, and to pay the contract price of £1115? It appears that the defender, before the contract in question was entered into, had accepted an important contract with the Caledonian Railway Company, part of which consisted in the execution of a very large amount of excavation, and as Messrs Dick & Stevenson claimed to have invented a navvy or excavator worked by steam, which was capable of saving a great deal of manual labour, they entered into negotiations for the sale by them to Mr Mackay of one of these navvies.

[*After narrating the terms of the contract and examining the evidence his Lordship proceeded*]—The result of the evidence is, that while Mr Mackay was bound to provide the means of testing this machine by a properly opened-up face, he failed to do so. He rejected the machine and declined to give a test. The machine was not tested because the defender declined to fulfil his obligation to give a properly opened-up face.

The question, and the only question, that remains is one of law—What follows from the defender having taken up this position? I think the pursuers' obligation to furnish a machine capable of excavating and filling 350 cubic yards of material into waggons in a day of ten hours must be held as fulfilled, because the defender declined to afford the means of a test, and I am accordingly of opinion, as the Sheriff-Substitute was, that the pursuers are entitled to succeed in the action. The test was one for which the defender alone could furnish the means, and all that the pursuers could do was to bring the machine forward for the test. The defender having declined to give the means of carrying out the stipulated test, I think it must be held that the test has been fulfilled. The law applicable to the case is stated in section 50 of Bell's Principles—"If the debtor bound under a certain condition have impeded or prevented the event, it is held as accomplished. If the creditor have done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement." And that view is supported by Pothier, founding upon passages from the Roman law. In the translation by Evans of Pothier's Work on Obligations, § 212, the following passage occurs—"It is the rule common

to all conditions of obligations that they be taken to be accomplished when the debtor who is obliged under such condition has prevented its accomplishment—quicunque sub conditione obligatus, curaverit ne conditio existeret nihilominus obligatur.—L. 85, sec. 7, de verborum obligationibus. Pro impleta habetur conditio cum per eum stat, qui si impleta esset, debiturus erat esset.—L. 81, sec. 1, de conditionibus et demonstrationibus." It follows that the pursuers under the circumstances in which we are unfortunately placed are entitled to decree in this action. I say unfortunately, for I regret that the decision does not turn upon the merits of the machine, with full evidence to enable the Court to say whether it was fit to execute the amount of work in a given time contracted for. It would have been more satisfactory to me if we had been able to decide upon whether the machine was able to do its contract work. The reason why we are not able to do so is, that although the machine was present and ready for the trial, the defender declined to provide the means necessary for the trial. Having done so, he must take the consequences and make payment of the price of the machine.

I must notice only a single point before concluding, and that relates to the proposals made after the case came into Court, that the machine should still have a trial, on the footing that the expenses of this should be held as expenses in the cause. No doubt that looks a very reasonable proposal on the part of the defender, but in the circumstances I am not prepared to say that the pursuers acted unreasonably in declining to agree to what was proposed. From the minute for the pursuers it appears that the condition of matters was entirely changed by the time that this offer came to be made. They had formerly had the machine ready in circumstances in which it could have been tried without further expense. The machine was in working order and at the face, and all that had to be done was to cut away the benches in front so as to present a sufficient face of earth in front, and to bring it forward. But before the proposals for a new trial were made months had elapsed. For more than half-a-year in winter the machine had been constantly exposed to the effects of weather and rain. Parts of it had become rusted and dilapidated, and before a trial could have been made it would have been necessary to remove the machine to the pursuers' workshops, to take it down, repair or renew parts of it, put it up again, and then take it to a new face, which with rails, waggons, and other appurtenances must have been furnished. All of these would have been necessary before a new trial could have been made, and at a cost of several hundred pounds. The pursuers said—If you wish to have this done, you can have it done at your own expense, but we decline to increase our stake in the case by so large a sum as this. In declining to do so they no doubt took their risk of establishing their case otherwise. I cannot say they acted unreasonably. But, in any view, for the reasons I have stated, I think they are entitled to succeed, and their right cannot be affected by the proposals to which I have referred, and I would propose that the interlocutor of the Sheriff should be recalled, and that we should revert to the judgment of the Sheriff-Substitute, but with special findings as to the facts on which the judgment is based.

Lord Deas—I agree entirely in the observation made by my brother Lord Shand that it would have been a great deal more satisfactory if we could have disposed of this case upon what may be called its merits—I mean in reference to the question whether this machine was or was not fit to do the work which the pursuers guaranteed that it would do? It would be very useless on my part to go over the evidence and give my views of the import of the proof as regards the facts, which of course are entirely in the hands of the majority of the Court.

The choice is between adopting the interlocutor and reasons of the Sheriff-Substitute, or adopting the interlocutor and reasons of the Sheriff. The reasons are clearly and ably given in both of these. On the whole, I am disposed to agree with the interlocutor and the reasons for that interlocutor given by the Sheriff. I do not mean to deal with these reasons or the grounds for them, but I wish to say only that I agree with the Sheriff in thinking that the application made by the defender to have another trial of this machine upon a properly opened-up face at Wishaw in presence of a qualified judge or judges was reasonable, and I think that should have been acceded to. That application was made very early after the case came to depend before the Sheriff-Substitute. And he says in his note—"I suggested both at the commencement and during the proof that the machine should yet be tried at the sight of a neutral reporter. The defender was agreeable to this, but the pursuers objected unless they were guaranteed the expenses." And then he goes on to say at the end of the paragraph—"If I am right in holding that the defender was in fault in not affording the machine a proper face when demanded, the pursuers are not bound now to test it unless guaranteed the expense." And that same reason for not agreeing to the request is given in the answer by the pursuers to the renewed and more formal minute lodged in process by the defender. That minute is as follows —"Johnstone for the defender hereby repeats his offer to have the machine mentioned on record tested at the sight of any reporter to be named by the Court, and upon a face of such dimensions as may be fixed by said reporter, the face to be prepared in the meantime at the expense of the defender, and the machine to be brought to the face at the expense of the pursuers, and this on the footing that the expenses of both parties of and attending said test shall be dealt with as expenses of process." I understand that to mean that if the machine was found by the reporter capable of doing its work at a properly opened-up face at Wishaw, then the whole expense of that trial should be borne by the defender, and if, on the other hand, it was found not to be capable of doing its proper work, then the expense of the trial should be borne by the pursuers. That is the meaning of this minute as I read it, and I think that was understood to be the meaning of this offer by both parties—that the expenses were to be dealt with as if they were expenses of process, and given to the party who was successful in the action. Now, I would be disposed to think that that would have been a reasonable and proper course for the parties to follow, and that it was not reasonable on the part of the pursuers to say

that the whole expenses of that trial must be borne by the defender whether the machine turned out to be fit for its work or not. It is very true that the state of matters was somewhat changed at that time—that is to say, that a great deal had taken place, and very considerable expense had been caused—but I think it is a strong answer to make to this offer, after all that took place at Gariongill at the trials there, which extended over a long time, and were attended with great expense, and all acquiesced in by the pursuers. I do not think there was any agreement that Gariongill was to be substituted for Wishaw; still the fact remains that all that took place was done with the acquiescence of the pursuers, and that I think indicates that although there was no agreement for making Gariongill the testing place, yet the machine proved such an utter failure there that the defender might think he was justified in refusing as unnecessary any further test at Carfin, or at anyrate a test which was to be borne by him in the first instance, or at all events if the machine did not succeed. I think that goes to show that there was at least a misunderstanding in his mind about that, and I am strongly in favour of the view that the defender, finding there was a misunderstanding as to the test, desired there should be no misunderstanding in the end, and that there should be such a trial as the pursuers were contending for, and so he made this offer for a new trial. He did not understand what these trials at Gariongill could mean if they were not to decide whether the machine was fit to do the contract work or not. I think there was a misunderstanding on the defender's part. He desired to correct that if he was wrong, and being sure that the machine had failed to do its work he was not afraid to stand another trial. All these trials at Gariongill had gone on with the mutual consent and at the mutual expense of both parties, and that goes strongly in favour of the Sheriff's view that the machine should be properly tested at an open face, and that the expense of that should be borne by the party who turned out to be in the wrong. I do not see sufficient grounds entitling the pursuers to say "We must have the whole of these expenses," and I do not agree in that part of the interlocutor of the Sheriff which deals with that, and if it had depended upon my judgment I should have been disposed to say that I agree with the Sheriff and not with the Sheriff-Substitute.

Lord Mure—I have come to the same conclusion as Lord Shand and the Sheriff-Substitute, and as Lord Shand has so fully explained the import of the evidence and correspondence, I think it unnecessary to do more than state shortly the grounds of my opinion.

I think there can be no doubt that under the original contract the agreement was for a machine or digger to be tested at a properly opened-up face at the cutting at Carfin. That is the distinctly expressed language of the letters by which the contract was made. By the first of these letters the pursuers undertake that the machine shall be capable of digging and filling a specified quantity of material in a certain time at the cutting, and that if it should fall short of digging and filling this quantity, after it is fairly tried on a properly opened-up face, the defender was not to be bound to keep it, but might return it at any time within two months, and that it was to be delivered at Carfin. In the letter of acceptance these stipulations are substantially repeated. That letter also contains provisions as to the cost and maintenance of the machine, and I think it is pretty clear from the correspondence that the nature and character of the material at the place of cutting was an important element for consideration in ascertaining whether the machine was adapted for turning out the stipulated quantity. The Carfin cutting, however, was not ready for work when the machine was completed, and it was by arrangement sent to Gariongill, with the view, as I understand, of being tried experimentally at a face there before being fully tested at Carfin, and when worked there it does not appear to have done so to the satisfaction of either party.

It is in these circumstances that it is contended on the part of the defender that the Gariongill cutting was substituted for the cutting at Carfin, and that as the machine failed on trial at Gariongill he is not bound to accept it. Now, on that point I think the defender's evidence fails; and as to this I observe that the Sheriff does not differ from the Sheriff-Substitute—because in his interlocutor the Sheriff finds that after the trials at Gariongill another opportunity was given the pursuers "to prove that the machine satisfied the guarantee, and that they accordingly erected it at Carfin, where it was again tested;" and I think that the result of the evidence on this branch of the case is clearly that at which both Sheriffs have arrived. I am of opinion, therefore, that the case must be disposed of in the same way as if the machine had never been at Gariongill, and the question that remains to be solved is whether any proper trial was given to the digger at Carfin? With regard to that I agree in the result at which Lord Shand and the Sheriff-Substitute have arrived—viz., that there was not at the Carfin cutting that "properly opened-up face" which the pursuers stipulated they should have for testing the machine, and which was an essential condition of the contract. The face which was offered to the pursuers at Carfin was neither in width or height adapted for showing whether the machine could turn over the stipulated quantity of work, and when a demand was made by the pursuers for a properly opened-up face the correspondence results in a refusal to give one. In the view I take of the case, it was an essential condition of the contract that a face should be opened-up at Carfin of such a description as would enable the pursuers to bring the powers of the machine into full and fair operation. That was, in my opinion, not done, and on that ground it appears to me that the Sheriff-Substitute has come to a sound conclusion.

The suggestion in the Sheriff-Substitute's note as to a further trial of the machine, which was agreed-to apparently by the defender and not acceded to by the pursuers, at first created some hesitation in my mind as to the result at which the Sheriff-Substitute has arrived; but further consideration of the evidence has satisfied me, that having regard to the time which elapsed after what had taken place at Carfin and before the Sheriff-Substitute made that suggestion, and to the great expense which would attend the taking down and putting up the machine with a

view to another trial, the Sheriff-Substitute was right in refusing to insist on a further trial for the reason stated in his note.

LORD PRESIDENT—I entirely concur in and adopt the views of Lord Shand.

On the motion of the pursuers (appellants) for expenses, the defender asked that the costs of a conjunct probation which the pursuers had led in the Court below at the conclusion of the defenders' proof, and to which the defender had then objected as being unnecessary and incompetent, should be deducted from the expenses to which the pursuers were to be found entitled.

At advising—

LORD PRESIDENT—I am for disallowing the expenses of this conjunct probation, and I think it right to make it known that we shall do the same in other cases of the kind. Wherever an incompetent conjunct proof has been allowed, whether the fault be that of the Sheriff or of anyone else, we shall not allow the expenses of it.

LORD DEAS and LORD MURE concurred.

LORD SHAND—I think it is a very bad and loose practice in some Sheriff Courts that after the pursuer of the issue, who ought in the first instance to lead full evidence, not only in support of the ground of his action but in anticipation of any ordinary defence, has closed his proof and the defender has led his evidence, the pursuer is thereafter allowed a second proof, for that is what it practically comes to. This practice ought to be checked, and I hope this decision as to expenses will aid in checking it. In this case the pursuers in the first instance very properly adduced evidence on the whole points in controversy, thus at once leading their proof-in-chief and the conjunct proof allowed to them in anticipation of the defence, of which they had full notice. But, again, after the defender had led evidence, the pursuer recalled certain witnesses and examined others practically on the leading points which had already been the subject of his original proof. This ought not to have been allowed. The result was to cause considerable additional expense, for witnesses had to be brought back a second time, and the defender had not an opportunity of expressly meeting that evidence. Of course I distinguish between conjunct proof and proof in replication, which may be properly had in reply or in regard to any incident or matter of which notice has not been given, or of which it may fairly be said proof in anticipation could not be expected.

The Court pronounced this interlocutor:—

"Recal the interlocutor of the Sheriff of date 2d December 1879: Find that the pursuers undertook to supply, and the defender undertook to purchase and pay £1115 for, a steam digging machine, in terms of the letters dated respectively 21st and 22d September 1876: Find that it was a condition of the said contract that the defender sheuld not be bound to accept and pay for the said machine if it should fall short of digging and filling into waggons 350 cubic yards of the clay or other soft substance within a day of ten hours, in a certain railway cutting which the defender was about to make, called the Carfin cutting, after it is fairly tried on a properly opened-up face: Find that it was impossible that the machine should have the stipulated fair trial unless the defender provided a properly opened-up face at the said Carfin cutting: Find that the defender failed to provide such properly opened-up face, notwithstanding repeated demands on the part of the pursuers, and thus prevented the machine from being tested in the manner provided by the contract: Find that the defender has failed to prove that the pursuers agreed to substitute for the Carfin cutting any other cutting as the place for the trial of the said machine: Therefore repel the defences, and decern against the defender to pay to the pursuers the sum of £1115, with the interest prayed for, in terms of the petition: Find the pursuers entitled to expenses in both Courts, but subject to deduction of the expense of the conjunct probation, which was incompetent, and ought not to have been admitted," &c.

Counsel for the Pursuers (Appellants)—Mackintosh—Murray. Agents—Finlay & Wilson, S.S.C.

Counsel for Defender (Respondent)—Johnstone—Asher—W. C. Smith. Agents—J. Smith Clark, S.S.C.

Tuesday, May 25.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

MURRAY *v.* PEDDIE AND OTHERS (TRUSTEES OF ALLAN'S MORTIFICATION, STIRLING).

Property—Barony—Servitude—Real Right—Salmon-Fishing.

The Crown titles of the barony of T. contained a clause by which there was conveyed to the vassal the right and privilege of one tide's fishing of salmon yearly, whensoever he should make his option, within certain specified boundaries which were beyond the boundaries of the barony. The exercise of this right was uninterrupted from 1676. *Held* that the right was valid against the proprietor of certain salmon-fishings within the specified boundaries, whose titles contained no reference to the burden.

Question—Whether the right was of the nature of a servitude?

The following narrative in this case is taken from the opinion of the Lord Ordinary (CURRIEHILL):—"The pursuer Lieutenant-Colonel Murray is infeft upon Crown titles in the barony of Touchadam, including, *inter alia*, 'the lands of Polmaise, Saint Clare, . . . lying within the sheriffdom of Stirling, with the fishing of one boat upon the Water of Forth belonging thereto; as also with the right and privilege of one tide's fishing of salmon yearly whensoever the deceased William Murray of Touchadam, or his heirs of