Sept. 19, 1831. The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellant's Authorities.—Gib. 14th March 1634 (Mor. Dec. 6116); M'Gregor, 22d Jan. 1820 (F. C. xx. 86. No. 18).

Respondent's Authorities.—M'Diarmid, 17th May 1826 (4 S.D. 581); Hardie, 12 Feb. 1823 (2 S.D. 213;) 1 Bell's Com. p. 648, 5th edit.; Palmer v. Bonnar, 25th Jan. 1810 (F.C.); Gaywood, 3d June 1828 (6 S.D. 909); 1 Ersk. 6, 18; 1 Bank. 5, 99; Earl of Eglinton ——— (Mor. Dec. 6151); Crammond, 4th Jan. 1757 (Mor. 6157); Lawson, 28th Nov. 1797 (Mor. 6157); Scott and others, 10th Aug. 1776 (Mor. 6108); M'Gillan, 22d Dec. 1758 (——); Stewart, 22d Nov. 1769 (Mor. 6100).

SPOTTISWOODE and ROBERTSON,— JOHN M'QUEEN,— Solicitors.

No. 37. WILLIAM M'DONALD of St. Martins, Appellant.

MACKIE AND COMPANY, Respondents.—*Dr. Lushington.*

Process—Reparation.—A person raised an action against tradesmen employed by him to furnish pipes for supplying his house with water, concluding for repayment of the sums paid to account of the price, and for damages in respect of the insufficiency of the work; held (reversing the judgment of the Court of Session), that having stated the facts on which he founded in his summons and condescendence, which the defenders fully and explicitly answered, it was too late thereafter to deny the relevancy of the facts condescended on, and therefore the case remitted to the Court of Session, with instructions to direct an issue to be framed to try the question.

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2D DIVISION. Lord Medwyn.

WILLIAM M'DONALD of St. Martins raised an action against Mackie and Company, plumbers in Perth, setting forth, that wishing to supply his house of St. Martins with water, he contracted with the defenders to execute the work, and furnish pipes for the same, of proper materials, and in a sufficient and workmanlike manner; that the defenders, having thus undertaken the work, proceeded in the execution of it; and that every thing was done exclusively under the direction of them or their workmen; that their operations being completed, it was discovered that the pipes laid by them were totally inefficient for the purpose which had been in view; that at no time

did they furnish a sufficient supply for the pursuer's house, although there was no want of water at the fountain-head; and that on many occasions, and for long periods of time, they ceased to work at all, and the pursuer's family were left wholly without water, except such as they were forced to procure by other means; that, after repeated complaints, the defenders endeavoured to account for the failure of their work by attributing it to the want of fall or descent from the fountain-head to the house; but even had this been the case the blame would still entirely have lain with them, for the fountain was built and a cut made in the line and direction pointed out and ordered by themselves or their foreman; that various attempts were made, or pretended to be made, by the defenders, to remedy the defects and inefficiency of their first work, and they from time to time amused the pursuer with the strongest assurances that every thing would yet do well; in consequence of which they succeeded, not merely in gaining time, but in impetrating payments from the pursuer to account until the price of their work was nearly paid up; that subsequent to this the pursuer could not get the defenders to do any thing; and they having at last declared that they could do nothing further to remedy the evil, and that the pursuer might employ whom he pleased. He ultimately was obliged to call in another tradesman, when it was discovered that the pipes laid by the defenders were of insufficient materials and bad quality; that in consequence great part of the water escaped through numerous pores in the metal, and that this, even independently of the unskilfulness displayed by the defenders in the laying of the pipes, was a main cause of the water not coming to the house; that the pursuer insisted that the defenders should remove the defective pipes, and either replace them by others of a sufficient and workmanlike description, making reparation to the pursuer for the damage which he had sustained in the meantime, or, failing their doing so, that the pursuer himself should be entitled to follow out the proper remedies for his own benefit, the defenders relieving him, both for the time past and for the future, of all loss and damage to which their improper and unworkmanlike proceedings had exposed or might expose him; that another workman having stopped with solder the different holes in the pipes, and repaired the air-cocks, and the air having been expelled, the water once more flowed abundantly into the.

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cistern, but from what has been already stated it is evident that this supply may be but temporary; that the pursuer made various payments to account of the work. He therefore concluded—1. For removal of the pipes;—2. For repayment of the 300*l.* paid to account; and, 3. For 200*l.* of damages, &c.

Condescendences and answers were lodged, in which the whole facts on both sides were specially detailed. In the plea of law annexed, the pursuer pleaded, that the defenders were bound, not only to furnish good and sound materials for the work which they undertook to perform, but also to complete that work in a proper, sufficient, and workmanlike manner; and having failed in both or one or other of these particulars, they were liable in damages, and to repair the loss, injury, and inconvenience which he had sustained or might sustain, either through the original defects in the materials furnished, or in consequence of the negligent or unskilful manner in which the work was performed. The defenders, on the other hand, pleaded—1. That the pursuer's case, as contained in his summons, and still more as explained in his condescendence, was irrelevant to support the conclusions of the summons; and, 2. That the pursuer was precluded from insisting in all or any of the conclusions, not only by his having made payments to the defenders to such an amount during the progress and after the completion of the contract between the parties, but even more strongly by his subsequent transactions with another workman, and by that person's interference with the defenders' workmanship, without either their consent or the authority of a court of law.

The Court, (9th March 1830,) found, "that in the special "circumstances set forth in the summons and other pleadings of "the pursuer, there is no relevant ground for a claim of damages "against the defenders, which ought to be remitted to the Jury "Court: Sustain the defences; assoilzie from the conclusions of "the summons, and decern: Find expenses due to the defenders, "the account to be given in, taxed, and reported on in common "form."*

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* *Lord Cringletie* observed, I do not see any thing that can be sent to a jury. It is not averred that Mackie and Company agreed to bring water into the house, or to construct fountains, but only to lay pipes; and all I see stated distinctly is, that a few feet near the fountain were insufficient, which were taken up by another tradesman without warning them to attend. Before touching them, the pursuer should have

M'Donald appealed. Sept. 21, 1831.

Appellant.—Independent of and in addition to the plea in law maintained in the Court below, it is plain, that if the appellant's statement on the record be true, the judgment of the Court below, assoilzieing the respondents, is untenable; and the appellant being prepared and having offered to establish its truth by competent evidence, the justice of the case entitled him to be let into such proof, and the Court ought, as in other questions where there is disputed matter of fact, to have remitted the cause for trial in the Jury Court. It is indisputable that the time is past for demurring, if a full and explicit answer has been put in, of facts amounting either to a plea of general issue, or to some special pleas other than general issue.

The *Respondents* urged the same reasons as in the Court below, and denied, as applicable to the question, the rule of pleading stated by the appellant.

Lord Chancellor.—My Lords, it appears to me, that notwithstanding all the natural advantages of jury trial, instead of it being

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sent for these gentlemen to see them opened, and that they were fairly managed. The whole loss is from his being his own engineer.

Lord Pitmilly.—This case is attended with several important specialties. If it were an action for breach of contract, we could only have allowed a proof; but this is a different case, and I am inclined to concur. For what did the defenders undertake? Only to furnish a certain quantity of pipe, but nothing as to the reservoir. It is evidently necessary that the pipes must have been proved before they were laid; but, after they were laid without objection, it is too late to complain; and this alone is sufficient to exclude the claim. But there is a great deal more. Instead of taking up the pipes at the sight of the defenders, the pursuer employed another person to do it out of their sight. Then, what are the conclusions of the summons? To take up the pipes, and repay the money, with a subordinate conclusion for damages. I think all claim is now excluded, first by acceptance of the pipes, and payment of the price; and, second, by employing another tradesman, at the back of the defenders, to lift and relay the pipes.

Lord Justice-Clerk.—I have little to add, as I agree with your Lordships that nothing remains which can be made the subject of issue. The conclusion for taking up the pipes is now given up, as it is admitted there is now a good supply, and the pursuer substantially confines his claim to the conclusion for damages, as a solatium for the want of a proper supply for two years; and though the case were free from specialties, I would scarcely consider it relevant; but the specialties are quite sufficient to exclude the claim. The pursuer should have called the workman himself to lift the pipes; or, if he refused, he should have applied to judicial authority, and have obtained the appointment of a neutral man; and, besides, the whole price was paid in the very years when the supply was deficient.—8 Shaw and Dunlop, p. 686.

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a blessing to the inhabitants of Scotland, they will, on the contrary, have to curse us for the gift if it is to be so dispensed, and if the system of the Courts auxiliary to the jury process is to be so administered, as it appears to have been in this case; for here, instead of having at once a short answer, admitting or denying the fact alleged in the summons and condescendence, the parties have gone into all the statements of the case on both sides. Not only has the plaintiff stated that there was a contract made, and that the contract was broken to his damage, which is all that he ought to have done, and not only has the other party said that the contract was not made, and if made was not broken, and then left it to the Coúrt to try the fact thus put in issue, but another and very different course has been taken, namely, that of the pursuer alleging every one particular fact and circumstance which ought to have been made the evidence to support his averment. He has averred his whole evidence by pleading in the course of the summons and condescendence (both argumentative too from the beginning to the end); and the defender, on the other hand, has pleaded every one circumstance of evidence, every one matter of fact from which a conclusion might be drawn, either directly or by implication, impeaching the claim of the plaintiff. Then the whole of these matters being before the Court, it never seems to have occurred to their Lordships that it was too late to deny their relevancy, which is the office of a demurrer to the declaration, and that by answering and entering fully into the whole of this matter the defendants admitted that the declaration contained a relevant charge against them. Their Lordships, on the contrary, after this explicit answer to so explicit a statement of the case, take up a demurrer, and they say, admitting all this answer to be out of the case, admitting all the facts to be true as alleged in the pursuer's statement, yet there is nothing here which gives the pursuer a claim against the defenders; but their Lordships, though they at first appear to take this course—though I say they affect to take that course, (which it was too late for them to take) they clearly do not take it for any one moment in the progress of their argument; for they no sooner begin arguing whether, admitting these to be the facts, any claim lies against the defenders, than they instantly fly off from that, and take from the answer matter of defence, by way of showing that it is not likely the facts should be as stated by the pursuer. A greater confusion could not possibly be made. I speak it with all possible respect; for it is not the fault of the learned persons who have fallen into this most inconsistent course, but it is the fault of the system under which they have been so long accustomed to act, and which has induced the inveterate habit of confounding the fact with the law. Now the keeping fact and law asunder is one of the great advantages of jury trial in England; and

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the office of juror and the office of judge being kept distinct, it is the great duty of the pleader to be ancillary to the maintenance of that distinction, so as to make it impossible that the two shall ever be confounded. My Lords, if I had desired an instance of the most flagrant description to show the great advantages of our system of pleading, and of our system of jury trial, I should have taken the case now before your Lordships as furnishing exactly such an instance; for it appears that the course has here been mistaken from the beginning to the end of the cause. In the first place, their Lordships have mistaken the shape in which it was brought forward; secondly, they have mistaken their office, in dealing with the answer and the condescendence at that stage; and, last of all, even if they had been right in the period of time of so dealing with it, if it had been a motion in arrest of judgment, or a motion for entering up judgment *non obstante veredicto*, or an argument upon demurrer, yet, in the third place, they have confounded two utterly distinct subjects of consideration, namely, the question of law, whether or not the pursuer's averment amounted to a claim in law, and the question of fact, whether this averment was true or not.

My Lords, having thrown out these general observations, I shall say one word, as I am about to move your Lordships to reverse the interlocutor, in explanation of the particular manner in which the miscarriage has occurred. The contract is most inartificially pleaded; it is most imperfectly set forth. Taking the whole of the summons, with the revised condescendence and the re-revised condescendence, it is not easy to say precisely how far the contract went, and what obligation by force of it was imposed upon the defenders; therefore it remains somewhat doubtful upon the face of these pleadings whether the defenders undertook to do more than furnish lead pipes. If I were to state the inclination of my opinion from the first part of the summons, I should be inclined to say that they did undertake to do more than furnish pipes; for there is some ground for saying that they undertook to lay the pipes, that is, so as to enable the pipes to carry water, (when I say that they undertook, I do not mean in point of fact, but as to what it is alleged they undertook). I am inclined to think that there is some allegation in the first part of the summons of their having so done. If so, there is an end of the question; but I say, put that out of the case, and suppose that there is no such averment, one thing is quite clear, that they undertook to furnish pipes, by which M'Donald avers most distinctly (and he is right in averring) that they were bound to furnish pipes of sufficient materials to carry water. M'Donald avers that distinctly two or three times over in the part of the pleadings which is said to be a retraction or a departure from his averment, but I look upon it as only a confirmation and re-affirmance

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of that averment; he says, that those pipes were of insufficient and bad materials; not only that the cock was insufficient, but that even the pipe was insufficient; and he shows how it was insufficient. Then can your Lordships say that there is no right of action because he has not done certain things which it is said he ought to have done? These are very fit matters to go before a jury, and they are very likely to help the pursuer and damage the defenders before a jury; but in this Court and in this form of pleading they have just as little to do with this case as they had with the case last before your Lordships, or with the case that is next to be heard. Therefore I should humbly move your Lordships that these interlocutors be reversed, and that the case be remitted, with instructions to the Jury Court to direct an issue to be prepared which will try the question in proper form by a jury; and I cannot but wish that the rule were adopted in the Court of Session which common sense dictates in every other Court, and which I take to be the true Scotch rule as well as the English, that the time is past for demurring, if a full and explicit answer has been put in, of facts amounting either to a plea of the general issue, or to some special pleas other than general issue, but covering the whole demand and raising a mere question of fact.

The House of Lords ordered and adjudged, That the interlocutor complained of be reversed.

ALEXANDER FRASER—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 38. WILLIAM DOWNE GILLON, Appellant.—*Mr. Serjeant Spankie—Dr. Lushington.*

ARCHIBALD MACKINLAY and others, for the Edinburgh and Leith Shipping Company, Respondents.—*Mr. J. Campbell—Mr. Tinney.*

Partnership.—Proof.—What facts and circumstances held (affirming judgment of the Court of Session) sufficient to establish that a party was a partner of a trading company.

Process.—Observations on the mode of pleading in the Scotch Courts.

Sept. 22, 1831.

2d DIVISION. Ld. M'Kenzie.

WILLIAM DOWNE, proprietor of Downe's Wharf, was one of the original partners of the company of Downe, Bell, and Mitchell, wharfingers, London, in which he held a one third