fore, from the complainer being prejudiced by the proceedings of the Board complained of, it is manifest that he must be considerably benefitted, for he will be entirely relieved from the disagreeable, troublesome, and expensive duty of enforcing at his own instance payment of the school fees. Nor can it avail the pursuer anything to say that the trouble he formerly had in collecting and enforcing payment of his fees was taken on his own account, so far as taken at all, while now the comparatively trifling portion of the trouble to which he will still be subjected will be taken by him on behalf of the Board, for any such reasoning as this proceeds on an obvious fallacy. The school fees formerly collected and received by the pursuer were no doubt appropriated by him as his own, but so also will still be all the school fees that may be paid. Neither can it with truth be said by the pursuer that he will be subjected to any new hardship by being obliged to enter in a book or register, to be furnished to him, the payments that may be made by the scholars, in order that the School Board may always know who have, and who have not paid, for such a note in some form must always have been kept by him.

The only other question that remains for consideration is, whether it was within the competency or power of the School Board to regulate, so far as regulation was necessary, the very small matters of detail about which the pursuer has raised the present dispute. Of this I am unable to entertain any doubt. By the 23d section of the Education Act it is provided that all the schools in the parish "shall be vested in and be under the management of the school board of such parish," which shall, with respect to the school management, "and generally with respect to all powers, obligations, and duties, in regard to such schools now vested in or incumbent on the heritors qualified according to the existing law, and the minister of the parish, supersede and come in place of such heritors and minister." And, again, by the 76th section of the Act the duties imposed upon the schoolmaster of a parish by previous statutes, "and any other duties not relating to teaching, which according to any law or statute in force at the date of the passing of this Act are imposed upon the schoolmaster of a parish, shall be performed by the schoolmaster of the parish in office at the date of the passing of this Act, so long as he continues to be teacher of a public school in the parish." Keeping these statutory enactments in view, and also bearing in mind that prior to the passing of the Act it was, beyond all question, the duty, according to the invariable practice of the parish schoolmaster, to collect his fees, I must repeat that I am unable to see how it can be reasonably maintained that the School Board have exceeded their powers by the proceedings complained of. That they have not done so appears to be clear, as well on a consideration of the statutory provisions as on the broad, and, as I think, indisputable ground, that the pursuer has not been required to do anything more than what is naturally and fairly incidental, on the one hand, to his position of schoolmaster, and, on the other hand, to the position of the School Board, as having the management and control both of him and the school. It does not, indeed, seem to be disputed on the part of the pursuer that it was within the competency and power of the School Board to do all they did. All he says is that they were not entitled to do what they did "unconditionally," but what he means by that he has not stated in the record.

On the grounds, and for the reasons I have now adverted to, I am of opinion that the interlocutor of the Lord Ordinary is well founded and ought to be adhered to, with the explanation or a finding if thought the preferable mode, to be inserted in the interlocutor of adherence, that the pursuer is only to receive the school fees that may be paid to him by the scholars attending his school, at the same time entering in the appropriate book or books, to be furnished to him for the purpose by the School Board, the payments so received by him, and the names of the scholars by or for whom such payments have been made. And, if thought in the least necessary, the interlocutor of the Court adhering to the Lord Ordinary's interlocutor may also contain an explanation or finding to the effect that the pursuer is not to be at any trouble in regard to the heating or cleaning of the school, and that the receipts, if any, which he may require to give his scholars for the fees paid by them shall be furnished by the School Board or their treasurer. With some such explanations or findings as these, the pursuer will be saved from all risk of any undue burden being laid upon him.

The Court pronounced the following interlocutor:—

> "The Lords having resumed consideration of this cause, with the assistance of three Judges of the Second Division, and heard counsel on the reclaiming note for the pursuer against Lord Curriehill's interlocutor dated 23d December 1874, after consultation with the said three Judges, and in conformity with the opinion of a majority of the seven Judges present at said hearing, Adhere to the said interlocutor reclaimed against, and refuse the reclaiming note; find the defenders entitled to additional expenses; allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Counsel for Pursuer—Dean of Faculty (Clark) and Low. Agents—J. & J. Turnbull, W.S.

Counsel for Defenders—Solicitor-General (Watson), Guthrie Smith, and Taylor James. Agents—Keegan & Welsh, S.S.C.

Friday, June 11.

FIRST DIVISION.

[Lord Shand, Ordinary

PETER MACBRIDE *v.* HAMILTON & SON.

Contract—Damages—Set-off.

> In a case where a contractor bound himself to set up certain machinery within a stipulated time, but failed to complete his contract till after that time had expired—*Held*, in an action for the contract price, that the defenders were entitled to set-off against his claim a claim of damages for breach of contract, even though illiquid.

This was an action by Peter Macbride, copper and tinplate worker and plumber, Glasgow, to recover from Messrs Hamilton, calenderers, the price of a set of steam drying cans and a steam engine

which he contracted to set up on their premises within a certain time. The defenders did not dispute the amount, but pleaded that in consequence of the pursuer having failed to fulfil his contract within the time stipulated they had sustained loss to an amount greater than the contract price, against which they held that the amount of their loss must be set off.

The Lord Ordinary (SHAND) pronounced the following interlocutor:—

"*Edinburgh, 6th April* 1875.—Having considered the cause, Repels the pursuer's third plea in law, and appoints the cause to be enrolled to fix the mode of trial: Reserves all questions of expenses, and allows the pursuer, if so advised, to reclaim against this interlocutor.

"*Note.*—In October 1873 the pursuer undertook to make and fit up for the defenders, in their premises in Glasgow, a set of steam drying cans with framing, and a double cylinder diagonal steam engine.

"In accepting the pursuer's offer to execute this work the defenders stipulated in writing that the work 'shall be completed and ready for starting by the middle of January 1874, or earlier if possible.' By letters, dated 13th and 15th November 1873, the parties agreed that an engine of larger dimensions should be substituted for that first contracted for, but no stipulation was made that farther time should be required or given for the execution of the work.

"The pursuer, having completed the work, now sues for the contract price, which is admitted to have been £475. The defenders decline to pay the amount, on the ground that the pursuer failed to execute his contract within the time stipulated, and thereby occasioned them loss and damage to an amount exceeding the sum sued for.

"The question between the parties which was discussed in the Procedure Roll is, whether the defenders' claim for loss thus sustained is maintainable as an answer to the pursuer's demand?

"The pursuer maintains that he is entitled to have instant decree, and that the defenders must constitute their claim by a separate action of damages, and cannot maintain it to any extent as a defence to this action. I am of opinion that the defence may be maintained in this case without a counter action, and that consequently the pursuer is not entitled instantly to the decree which he asks.

"The case is not one of mutual debts unconnected with each other, in which the defenders seek to set off a claim of compensation arising out of a totally different transaction from that which is the subject of the pursuer's claim. To that class of cases the statute of 1592 applies, but I think that statute has no application to a case like the present.

"The dispute between the parties arises here in reference to their mutual obligations under the same contract; and (1) It seems to be only proper and just that if the pursuer has not fulfilled his contract in all its essentials, and that the defenders have not obtained the advantage for which they stipulated, they should not be bound to pay the pursuer the contract price, but should be entitled to resist payment to the effect of obtaining implement of the obligation in their favour, and if that cannot now be given on the terms arranged, then as a substitute the loss and damage they have sustained; and (2) It is desirable in such cases if possible to avoid the necessity for two actions between the parties where one will serve the purpose.

"The case is distinguishable from the ordinary one of goods sold and delivered in respect the defenders had to give over their premises to the pursuer for the execution of his contract, and that the work to be executed and services to be performed were such as required a special contract, with sufficient time to enable the particular machinery to be prepared and afterwards fitted up. Time must, I think, be regarded as of the essence of the contract, because the defenders expressly stipulated in the contract that the work should be done by a day fixed. A certain indulgence or relaxation of the stipulation on this subject was apparently given by the defenders; but it appears from their statements, with reference to which no explanation has been given by the pursuer at the adjustment of the record, that the machinery was not fitted up until the 4th of August, notwithstanding repeated complaints and remonstrances regarding the delay, and an intimation that the defenders' business was in the meantime stopped or seriously interfered with, and that the pursuer would be held liable in the damages thus resulting. Copies of letters complaining of the delay, dated 14th April, 20th May, 5th and 15th June, and 7th and 11th July 1874, have been produced, confirming these statements. But in the meantime, and with reference to the present question, the statement itself is of importance as showing that the work was completed in the knowledge on the part of the pursuer that the defenders did not abandon the stipulation for the execution of the work within a certain time beyond any limited indulgence which their actings may be held to have sanctioned, and that although they permitted the work to go on, they did so under notice that a claim to be reimbursed the loss and damage which they were suffering from the non-implement of the contract would be made.

"The case is thus different from that in which goods are furnished or services performed after the stipulated time without notice that the party is held to have committed a breach of contract, and a claim intimated and reserved. In a case in which no such notice had been given, and no clam intimated, I should be disposed to hold that the defender was not entitled to resist instant decree by pleading a claim of damages in defence.

"The present case, as presented, is one in which the defenders deny that the pursuer has duly implemented his contract, although it is admitted that if he had done so the sum for which he sues would be the correct amount payable. In one sense the stipulated price or condition is the counterpart of the material supplied and services performed; but the defenders agreed to give the price only for the work done by a certain day, and as time enters essentially into the contract the defence is that the pursuer failed to perform his part, and so is not entitled to decree for the full amount, but only for any sum due after deduction of the amount of the defender's loss, which in this particular case is stated to have been greater even than the amount sued for. In this view it is denied on the facts, as appearing from the record, that the pursuer's claim is liquidated. The amount payable is, no doubt, fixed by the contract, if it be assumed the pursuer's contract was implemented, but this the defenders dispute. The pursuer maintains that having allowed him to perform the work the

contract must be taken to have been executed, and the amount due is therefore liquid, and now prestable; but I think this argument is unsound, for the pursuer was substantially in possession of the defenders' premises, and I do not think the defenders were bound at the last moment, and it may be after part of the work had been done, to turn him out, and to enter into a new contract with another person, with all the consequent loss, unless they were prepared to allow the pursuer to go on, on the footing of holding the contract as duly executed. Indeed it is not maintained that the defenders have no claim of damage, but only that their claim cannot be pleaded in defence to this action.

"If the contract had contained a stipulation for a reasonable sum per day by way of pactional penalty, in the event of delay on the pursuer's part in executing the work, it appears to me the case would have been directly within that of *Johnstone* v. *Robertson*, March 1, 1861, 23 D. 646. In that case it is no doubt true the circumstance that the rate of compensation for delay had been settled was mentioned by several of the Judges as entering into their judgments, but it appears to me that the rule should be the same whether the parties have or have not fixed the rate of compensation. A claim is not liquidated until the period of time to which the claim of loss applies has been ascertained, and the defence does not therefore admit of instant verification, even where a rate of pactional penalty has been fixed, any more than the present.

"I think the sound general rule, which may be the subject of exceptions arising from special circumstances, or the special terms of a particular contract, is that in cases of mutual contract a party in defence is entitled to plead and maintain claims in reduction or extinction of a sum due uuder his obligation where such claims arise from the failure of the pursuer to fulfil his part of the contract. Claims thus arising were sustained in defence in the cases of *Taylor* v. *Forbes*, 2d December 1830, 9 S. 113; *Stewart* v. *Campbell*, 12th November 1834, 13 S. 7, and in the case of *Johnston* already mentioned, while in the case of the *Scottish North-Eastern Railway Company* v. *Napier*, 10th March 1859, 21 D. 705, the Lord President illustrates what appears to me to be the general rule by reference to the case of master and servant, where he expresses the view that a claim for wages may be met by a claim for loss caused by misconduct in the service,—a view acted on in ordinary practice in the Sheriff-courts, where such cases are generally sued.

"In the case of an action for freight, resisted on the ground that the goods carried have been damaged, it is not, I think, so clear in principle as in the present case that the claim may properly be maintained in defence, because the damage is not necessarily the result of carelessness on the part of the carrier, but may arise from inherent defect, or the perils of the sea, and a tedious inquiry with doubtful results may be necessary. In the case of landlord and tenant it has been frequently held that a claim of rent cannot be well met in defence by claims of damage, but I think the explanation is to be found in the fact that the two obligations are not contemporaneous. Where they are so, or where it is plain that the landlord has failed to perform an essential condition of the contract, I am of opinion that a defence may be pleaded in the action at his instance for payment of rent. Thus, if a landlord sued for a year's rent, and the defence were stated that access to the premises could not be and was not obtained until four months after the term of entry, it appears to me the defence claiming a deduction would be properly taken up in the action at his instance. The same principle, I think, applies to the present case.

"The pursuer, in argument, maintained that, in a case of goods sold and delivered, a defence of loss on account of non-performance of the contract by delivery of the goods within the time stipulated would not be competent, and that this case was in no different position.

"For the reason already stated, I think this case materially differs from that now supposed, but I am not prepared to hold that even in such a case the counter claim could not be competently sustained in the action on the contract. If, after a buyer of goods has suffered damage from the seller's delay to supply them within the stipulated time, and has intimated his claim for the loss sustained, and that he is about to buy in goods against the contract in the open market, the other party should still offer to supply the goods, the buyer would, I think, be right in taking them in place of buying from others, and if he did so under reservation of his claim for loss caused by the seller's delay I should hold that in that case, as in the present, in an action on the contract for the price he would be entitled to set up his counter claim for loss caused by the failure of the seller to fulfil the contract in one of its essential particulars.

"I have thought it right to state fully the ground of my judgment in this case, because it raises a point of general importance, and I am not aware of any previous case which has occurred for decision in which the question has arisen so purely as here."

The pursuer reclaimed, and pleaded—"(1.) The pursuer, having performed the work stipulated, is entitled to payment of the contract price. (2.) The defenders being indebted to the pursuer in the sum sued for, the pursuer is entitled to decree as libelled. (3.) The defenders are not entitled to set off their alleged illiquid claim of damages against the pursuer's claim for work done and machinery supplied."

The defenders pleaded—"The pursuer not having duly executed his contract, and the defenders having in consequence sustained loss and damage to an amount in excess of the sum sued for, the defenders are entitled to absolvitor."

At advising—

LORD PRESIDENT—My Lords, this action has been raised for the purpose of recovering the sum of £475, being the contract price of a certain piece of machinery made and fitted up by the pursuer for the defender. The defence is that "The pursuer not having duly executed his contract, and the defenders having in consequence sustained loss and damage to an amount in excess of the sum sued for, the defenders are entitled to absolvitor." This defence is founded on an allegation, not that the contract was unskilfully performed, or that the apparatus when finished was not fitted for its purpose, but only that the pursuer was too late in fitting it up. The amount of damages claimed by the defenders is of course illiquid, but they maintain that defence, and say that the damages are liquidated because the claim arises out of the

conditions of the contract itself; that the pursuer seeking performance of the contract, in the terms of which he is insisting, cannot object to a claim arising out of the same contract. On the other hand, the pursuer replies by his third plea in law, which is as follows:—"The defenders are not entitled to set off their alleged illiquid claim of damages against the pursuer's claim for work done and machinery supplied." That plea the Lord Ordinary has repelled, thereby holding that the defender is entitled to have his damages liquidated and the amount set off against the contract price. Now, the question whether a claim of this kind can be maintained *ope exceptionis* is always one of some nicety. The general rule is clear enough, but it must be kept in view that this contract is in a certain sense peculiar, being not a simple sale of goods, but a contract to make and fit up a machine on the employers' premises. If the article supplied were good it would be a very unusual thing for the employer to refuse to receive it on the ground that it was too late of being finished, and therefore it is well understood that if there is a breach of contract as to time, that gives rise, not to rejection of the thing supplied, but to a claim of damages, and it is certainly undesirable to interfere with that established custom by resorting to subtle distinctions of law. All that, however, just renders the question more difficult and delicate. In the case of *Johnstone* v. *Robertson*, referred to by the Lord Ordinary, the employers were found entitled to set off their claim of damages against the contract price, but one distinguishing feature was that the damages were liquidated by the contract itself, which fixed them at £5 a day, not by way of penalty but as liquidated damages—but that was only one point in the case, and though it was a conspicuous one there was another point independently of it. Damages liquid or illiquid might be set off against the pursuer's claim, though there was no breach of contract in the matter of time. There was no doubt a breach of contract in the matter of time. It is the opinion of all the Judges that if there had been no express provision as to time, and the only complaint had been that the contract was not performed in reasonable time, that would not have led to the same result as that at which we have arrived. In order to solve the question before us we must look at the terms of the contract. It is contained in certain letters. The first is from the pursuer to the defenders, and begins:—"*Glasgow*, 10*th July* 1873.—Gentlemen,—I hereby offer to make and fit up for you framing for one set of steam drying cans, 30″ × 7 ft.; cast-iron framing and column for do., having two branches for supplying steam to cans." Then follows the specification and price of the work, and the letter ends with these words—"The above all fitted up to your entire satisfaction. The favour of your order will oblige, yours, &c., P. MACBRIDE, *p.* W. W."

The answer of the defenders was as follows:—

"*Glasgow*, 31*st October* 1873.

"Sir,—We hereby accept of your offer of 10th July, to make and fit up in our works, Smith's Court, Candleriggs, a set of steam cans, framing and engine, all complete, in strict accordance with your offer, for the nett sum of three hundred and ninety-five pound sterling (say £395), in terms of your offer of 10th July and note of 31st October.

"It is understood that the above shall be completed and ready for starting by the middle of January 1874, or earlier if possible.—Yours, &c.,

"ROBT. HAMILTON & SON."

On the 13th November the pursuer wrote as follows:—

"Gentlemen,—In connection of my offer dated 10th July, I hereby offer to make the following alteration: To supply and fit up one double cylinder diagonal steam engine, diam^{r} of cylinders 7½ inches, length of stroke 14″, with double mall. iron crank shaft, mall. iron connecting rod, with buts and straps on both ends bushed with brasses, gibs and cutters, gearing to connect mangle shaft and steam can shaft with friction plate, pape pulleys, lever guides, screws, and brackets, main shaft and upright shaft, fly-wheel for engine to be turned on edge and rim—all of the best material and workmanship, for the sum of £142, say one hundred and forty-two pounds.—I am, &c.

"P. MACBRIDE."

The answer of the defenders was as follows:—

"*Glasgow*, 15*th November* 1873.

"Sir,—We hereby accept of your offer of 13th November 1873, to supply and fit up one double cylinder engine, all in terms of your offer, for the sum of one hundred and forty-two pounds (say £142).

"The above replaces previous estimate for engine, dated 10th July.—We are, &c.,

"ROBT. HAMILTON & SON."

I think the stipulation as to time in the defenders' letter of October 31st is an express stipulation, and if the case had stood there that defence might have been stated with considerable effect. But on November 13th an alteration was offered by the pursuer in the size of the engine, and that alteration was accepted by the defenders in their letter of November 15th. In this alteration there was nothing said about the time of delivery, and I think the original time remained part of the contract. It is not suggested that any more time was wanted to make the second engine, and it is quite certain that none was either asked or given. But the time, it is admitted, ran out without anything being done, and so the contractor was in breach, and if he had then fitted up the machine and sued the defenders for the price, it would have been open to them to plead the breach of contract. But it is plain that the defenders gave indulgence and relaxed the provision as to time to a certain extent, and if after that there had been a question as to whether the contractor was entitled to demand his full price, it might have raised a peculiar question, and it might have been maintained that the clause had been departed from, and that damages only were due for failure to perform in reasonable time. But then there was a new agreement which the defenders state thus:—"The pursuer having been bound as aforesaid, under the original agreement, to fit up said machinery by the middle of January 1874, represented to the defenders, towards the end of 1873, that he would be unable to overtake the work by that time. The defenders agreed to allow delay on condition of the work being completed shortly after the time fixed. The pursuer, however, failed to take any steps for beginning the work, and in the month of April the defenders wrote him complaining of the delay, and thereupon a meeting took place between the defenders and pursuer, when an agreement was made to the effect that the defenders should forthwith sell off

their old cans and frames, so as to have their premises cleared for the pursuer, and that on getting three days' notice of the time when the premises should be clear the pursuer should proceed to fit up the new machinery, and should have the same completed and ready for working within a fortnight after the premises had been cleared." That is a more precise contract than the original one. No doubt it is a verbal one, but it seems to me that it comes in place of the original one, and it was a contract first modified by the alteration as to size, and then as to time, so that the contract is one consisting of the original letters, of the letters of November, and of the verbal agreement, and unless the pursuer can show that he has performed *that* contract, he cannot recover. I think that brings the case under the authority of *Johnston*. I agree with the Lord Ordinary.

LORD DEAS—I agree with a great deal of what your Lordship has said. If the provision as to time in the written agreement had stood, there can be no doubt that the pursuer must have been held not to have performed his work in time. However, the parties seem to have changed that and to have substituted for it a *reasonable* time, and I agree with your Lordship that if the time had been fixed originally as a *reasonable* time, damages could not have been pleaded by way of exception. I am disposed to think that, even then, though the damages were not pleadable by way of exception, if a counter claim had been brought and the two actions had gone on simultaneously, and stood at the same point, the question would have stood in much the same position.

LORD ARDMILLAN—This is not a mere question of compensation, but rather arises out of the enforcement of a mutual contract, and I think the violator of that contract cannot enforce it against the other party. If the contract had borne that the machine was to be put up by a given day, and the contractor had not done so, he could not have enforced the contract. No doubt indulgence was granted for a time, but the matter was not allowed to rest on mere reasonableness; the pursuer was bound to finish within a fortnight—a definite date. I think the defender is entitled to plead his claim of damages against the pursuer's claim for the contract price.

LORD MURE—I concur, and on the same grounds.

LORD PRESIDENT—I cannot agree in attaching the importance to a counter action which Lord Deas does. If the defenders' claim is not pleadable *ope exceptionis*, there is no defence to the contractor's claim.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming-note for Peter Macbride (pursuer) against the interlocutor of Lord Shand, Ordinary, of date 6th April 1875, Adhere to the said interlocutor, and refuse the reclaiming-note; find the pursuer liable in expenses since the Lord Ordinary's interlocutor, and remit to the Auditor to tax the account of the said expenses, and report to the Lord Ordinary; and remit the cause to the Lord Ordinary, with power to his Lordship to decern for the expenses now found due."

Counsel for Pursuer—Dean of Faculty (Clark), Q.C., and Trayner. Agents—Frasers, Stodart, & Mackenzie, W.S.

Counsel for Defender—Solicitor-General (Watson), Q.C., and Balfour. Agents—J. & R. D. Ross, W.S.

Friday, June 11.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

NEIL LAMONT *v.* DANIEL CUMMING.

Property—Mutual Gable.

Held that when a proprietor has built the gable of his house half on his own and half on his neighbour's ground, the latter is entitled to all reasonable use of the gable, such as making vents and fire places therein, and building it higher.

The pursuer of this action was proprietor of a house in Renfrew, and his object was to have it declared that the west gable of his house was his exclusive property, or otherwise that the gable was a mutual gable, and that his neighbour on the west had acted illegally in making openings for joists therein, by raising the height of it, and altering the chimneys.

The Lord Ordinary (CURRIEHILL) pronounced the following interlocutor:—

"*Edinburgh, 4th January* 1875.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and whole proceedings, Finds that the pursuer is not the sole and exclusive proprietor of, aad has not the sole right to and interest in, the west gable of the house belonging to him, situated on the south side of the High Street of Renfrew, and described in the summons: Finds that said gable is a mutual gable, and is the common property of the pursuer, as proprietor of said house, and of the defender, as proprietor of the subjects adjoining said gable on the west: Therefore decerns and declares in terms of the alternative declaratory conclusion of the summons to that effect: Finds that the operations of the defender complained of in this action were not illegal or unwarrantable: Assoilzies the defender from all the other conclusions of the action, reserving to the pursuer any claim competent to him against the defender for payment of part of the value of said mutual gable, and to the defender his defences thereagainst as accords, and decerns: Finds the defender entitled to expenses: Appoints an account thereof to be given in, and, when lodged, remits the same to the Auditor to tax and to report.

"*Note.*—In this action, as amended, the pursuer, who is proprietor of a house in the High Street of Renfrew, adjoining on the west certain subjects belonging to the defender, seeks to have it declared that the west gable of his house belongs to himself as sole and exclusive owner, and that the defender has no right or title to said gable; or alternatively, that the gable is a mutual gable between the properties of himself and of the defender; and in either event he seeks to have it declared that cer-