into the break clause, which of itself prescribes no place, and makes no reference to the plan. The reference to the plan in another part of the contract is for another and more general purpose.

On the other hand, I am unable to hold with the trustee that the comparatively cheap operation of deepening two existing pits, which as matter of fact were never intended for any such purpose, would be a compliance with the condition of the break clause. Holding as I do that the pits stipulated for might have been sunk at another place than that indicated in the plan, I am at the same time satisfied that to meet the condition they must be of such construction as would involve expenditure very much larger than the modest sum indicated by the trustee's witnesses for the deepening of the existing pits. Tied apparently to the theory which I reject, the trustee has not led evidence to show what would be the expense of proper pits at such a position as a tenant would naturally choose for the purpose. Accordingly, I have no reason to suppose that it would be anything so much less than the appellants estimate as to largely increase the probability that the sub-tenants would have fulfilled the conditions and terminated the lease. At the same time the chance that this might have occurred is appreciable and must be allowed for. The difficult question, how much should be allowed, has been solved by the Lord Ordinary in a way for which I cannot suggest any substitute which would be better supported by reason.

The remaining question is as to pumping. Now, I must say that I was at first adverse to the idea that the full claim should be allowed, and that simply because it is hard of belief that the best thing a man can do with a profitless colliery is to go on pumping for seventeen years. A closer consideration has led me to a different conclusion. In the first place, the appellant company are themselves bound to their landlord for this pumping. Now, I go upon the theory, which I have already adopted, that the mine will not be worked, and the questions then arise, shall the appellant company pump? or shall they cease pumping? It is, of course, plain that if you cease pumping your colliery will be drowned, and loss will result from the drowning. Well, I could have understood the trustee saying—"I face that, and I shall prove that a prudent man in the position of the appellant company would intimate his intention to break his obligation to his landlord, and he would not have been compelled to fulfil it." But there is no evidence of this. Again, it might have been said that for all concerned the best thing would be to let the colliery drown, and the appellant company would only have to find the cost of putting it in order after the seventeen years are out. But then this is a question of fact, and there is no evidence to support the proposition that this course is practicable, and that it would cost less than pumping. On the other hand, the witnesses for the appellant company expressly affirm that owing not merely to the rights of the landlord, but to the rights of the adjoining mine-owners, the company would have no choice but to pump, and that no prudent man would do anything else. What those witnesses say in discussing the question a good deal removes the *prima facie* objection to the course which they support, and what is still more important, the trustee, after cross-examining these witnesses, brought none of his own to support the only alternative course, that of letting the mine drown.

As the duty of pumping would last as long as and no longer than the duty to pay dead rent, the Lord Ordinary deducts 25 per cent. from the claim for pumping as well as from the claim for dead rent. I am satisfied with these conclusions, and am for adhering to the interlocutor.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Appellants—Johnston, Q.C.—Salvesen. Agents—Bell & Bannerman, W.S.

Counsel for the Respondent—Sol.-Gen. Dickson, Q.C.—Wilson. Agents—Millar, Robson, & M'Lean, W.S.

Friday, January 14.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MORRISON & MASON, LIMITED *v.* CLARKSON BROTHERS.

Sale — Sale of Machinery — Completion of Sale — Rejection on Ground of Disconformity to Contract—Personal Bar.

A firm of contractors accepted the offer of a firm of hydraulic engineers to supply them with a pump to "throw the water 329 feet vertical." The pump was delivered on 11th March 1895, and was at once placed by the contractors in the shaft at a depth of 120 feet, where it was used for about ten days. The price was paid on 1st May 1895. After the ten days' trial referred to the contractors removed the pump, took it to pieces, and left the pieces lying in the open air, till in November 1895 the pump was put together and placed at the bottom of the completed shaft 320 feet from the surface. The pump failing to do its work, the makers, at the contractors' request, sent a fitter in December to examine the pump, and thereafter made sundry alterations on it without, however, making it more efficient. The contractors intimated their rejection to the makers on February 1896.

In an action raised by the contractors against the makers to recover the price of the pump, and for payment of a sum for extra wages and loss of time due

to its failure, *held* (*rev.* judgment of Lord Kincairney) that the sale being completed by the pursuers' acceptance of the pump, and they having failed timeously to exercise their right of rejection, they were not entitled to the relief sought.

This was an action raised by Morrison & Mason, Limited, contractors, Glasgow, against Clarkson Brothers, hydraulic engineers, Glasgow, concluding for payment of £1579, 2s. 9d.

The pursuers averred that to enable them to carry out a contract on which they were engaged in Radnorshire they had in December 1894 accepted an offer from the defenders to supply a "Champion" pump of certain dimensions; that the pump had been delivered in March 1895; that after giving it a short trial they had left it unused till November 1895, when upon trying it again they found it quite unable to perform its work; that the defenders, on being informed of this, sent workmen to repair the pump, but to no purpose; and that the pursuers finally rejected it in February 1896. The pursuers further averred that they had sustained great loss and damage because of the failure of the pump. The sum sued for was composed of the following items—the price of the pump, extra coal and wages of men for keeping out water while the defenders' men were repairing the pump, and delay to the works, and time of miners and engineers lost.

The defenders explained that the pump was reasonably fit for the purpose specified, and was accepted as such by the pursuers. They averred that the price had been paid by the pursuers on 1st May 1895, and that no complaint was made in regard to the pump until December 1895.

The pursuers pleaded, *inter alia*—"(3) The pursuers never having accepted the said pump as sufficient, and having timeously rejected same as disconform to warranty, are not barred from insisting in the present action."

The defenders pleaded, *inter alia*—"(2) Personal bar—in respect of the pursuers' acceptance of said pump in implement of said contract, and use of it after trial and without intimation to the defenders of any defect."

A proof was allowed, of which the material results may be summarised as follows:—By offer dated 12th, and acceptance dated 18th December 1895, the parties contracted for the purchase by the pursuers from the defenders of a "Champion" direct double-acting ram pump, which, in the words of the offer, "will throw the water 320 feet vertical with pressure of steam 45 lbs. per square inch." The price was £157, and the pump was duly delivered to the pursuers on 11th March 1895. At that date the pursuers were sinking a shaft to a tunnel on which they were engaged in connection with the Birmingham Waterworks scheme; and on the arrival of the pump they placed it at the lowest point to which the shaft had yet been sunk, viz., 120 feet. They there used it for about ten days for the purpose of pumping water out of the shaft, and then removed it and took it to pieces, and left them lying exposed to the weather till the shaft was completed to the depth of 320 feet. The pursuers paid the defenders the price on 1st May. After the completion of the shaft, the pursuers on 4th November 1895 set up the pump at the bottom and began to use it for throwing water to the surface. It failed to perform this work satisfactorily. In the course of its ten days' trial, or during the interval of disuse, the pump had met with one or two accidents, *e.g.*, the air chamber had burst, and in December, it having appeared from the further trial that the pump could not do its work, the defenders, at the pursuers' request, sent a skilled fitter to examine it, which he did at the bottom of the shaft. After this inspection the pump was fitted by the defenders with a new and larger dome, with a new shaft, and with certain other improvements. It continued, however, to be a failure. On 15th February 1896 the pursuers removed it from the workings, and on 17th February they intimated to the defenders a heavy claim against them for loss and delay. [A considerable amount of evidence was led as to the cutting of certain bossheads, circular centre projections in the valve cover, designed to keep the spindle or ram in the valve firmly in its position. The radical defect in the pump was maintained by the defenders to be the unsteadiness of the spindle owing to the bossheads having been cut away, as they maintained, by the pursuers. That the bossheads had been cut down was not denied, but there was a strong conflict of testimony as to when and by whom it had been done. It is unnecessary, however, to go further into the point, although the Lord Ordinary founded his judgment mainly upon it.]

On 27th January 1897 the Lord Ordinary (KINCAIRNEY) found, *inter alia*, that the pursuers rejected the pump in or about February 1896, and that the pursuers had not accepted said pump, and that said rejection was timeous; and therefore decerned in favour of the pursuers for the sum of £211, 9s. 2d.

Opinion.— . . . "The pursuers are contractors, and were in the course of constructing a tunnel in Wales, and this case is about a pump which they purchased from the defenders for the purpose of raising the water from the tunnel; and my judgment proceeds on the footing that this claim of the pursuers is founded on the rejection by them of the pump. I understood that the case was so taken by the parties, and on no other footing could the pursuers have made repayment of the price of the pump an item in their claim. The pursuers' third plea-in-law is based on the fact of rejection.

"The contract was constituted by an offer by the defenders, dated 12th, and accepted by the pursuers, dated 18th December 1894. The offer was to supply one of the defenders' 'Champion Direct Double-Acting Ram Pumps,' with a steam cylinder of 14 inches diameter, a pump of 16 inches diameter, a stroke 12 inches long, and with

suction and discharge pipes of 4 inches diameter. The offer bore that the pump would 'throw the water 320 feet vertical with pressure of steam 45 lbs.' It is proved that the pursuers had explained to the defenders that they required a pump which would raise the water to that height.

"A pump of the dimensions specified was supplied on 11th March 1895. To that extent the sellers fulfilled the contract. At that time the pursuers were engaged in sinking a shaft down to their tunnel, and they were therefore not ready to put the pump to the purpose for which it was intended; but they placed it, soon after it arrived, in the shaft, at the point which they had reached in sinking it, which was then about 120 feet below the surface, and used it for about ten days for pumping the water from thence as they proceeded to excavate the shaft. They then took it away and laid it outside their works until they had completed the shaft and reached the level at which they were to make their tunnel, which was at a depth of 320 feet. Meantime the pursuers paid the price of the pump, £157, on 1st May 1895.

"They reached the bottom of the shaft on 31st October, and in November (the precise day does not, I think, appear) they set up the defenders' 'Champion' pump there, and began to use it for throwing up the water to the surface. It failed, and I think failed completely, to do so; and the pursuers, after various efforts to remedy its defects, in which they were assisted by the defenders, removed it in February 1896, and substituted another pump, with which, I understand, the work has been satisfactorily done. Various repairs were made on the pump, but there is no clear proof of any complaint about it until January 1896, and it was not, as I understand, rejected until February. It was removed to Glasgow under an order of Court pronounced in this process. . . .

[*Here his Lordship examined very fully the evidence as to the boss-heads.*]

"If I am right so far, then it follows that sections 11 and 14 of the Sale of Goods Act (56 and 57 Vict. cap. 71) apply, and that the pursuers as buyers were entitled within a reasonable time after delivery to reject the pump and treat the contract as repudiated.

"The defenders refer also to section 35 of the Act, which must be read along with sections 11 and 14, and which provides that the buyer is deemed to have accepted the goods 'when the goods have been delivered to him and when 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.'

"The defenders have maintained that the rejection was not in a reasonable time, and that the pursuers have done acts in relation to the machine inconsistent with the ownership of the sellers. The pursuers maintain that their rejection was timeous, having been made when after various attempts to remedy the machine it was discovered to be incapable of being made fit for its purpose.

"These contentions raise questions of difficulty. The time which elapsed between the delivery and the rejection was about eleven months. That was a long period, but the mere lapse of that time, considering that this is a case about the rejection of machinery (which has always been considered as an exceptional case) does not in my opinion of itself bar rejection. In the case of *Pearce Brothers* v. *Irons*, 25th February 1869, 7 Macph. 571, the purchaser of a steam-engine, which he had used for fourteen months, was held entitled to insist that the seller should furnish a new pinion at his own expense to replace a pinion which had broken through defect in its structure. In this case there is a somewhat noticeable peculiarity, viz., that when the pursuers bought the pump they were not ready to put it to the use for which they wished it. They were not ready to do that until November. There may, I think, be cases in which if a man chooses to purchase a machine long before he needs it, he may not be entitled to reject it, if when he comes to try it, it is found insufficient. No such case was quoted. It seems to be a question of circumstances and of degree. Here there was, I suppose, from the nature of the work to be done, a certain amount of uncertainty as to the time when the sinking of the shaft to the tunnel would be fully completed; and I think that the pursuers, having regard to the nature of their contract, and in particular the penalty clause, for failure to complete the work within the stipulated time, were entitled to take care that they had a pump ready for them when they were ready for it. They were entitled to avoid all risk of having to wait for their pump, and in the circumstances the fact that they got their pump rather earlier than they needed it should not in my opinion materially affect their claim.

"But then they did in fact put it to some use when they got it, and the defenders contend that, as they were discontented with it, they should have rejected it then, instead of which they manifested their satisfaction by paying the price. But the action of the pump did not then disclose its inability to throw up the water to the height required. Most of the witnesses on both sides seem to be agreed that at 120 feet below the surface it did throw up such water as there appeared. What was then complained of was its vibration to such an extent as to terrify the miners who had to work below it. M'Crindle, a witness for the defenders, says that it worked fairly well when first put up at that level. I think it cannot fairly be said that at that time the pursuers were in a position to reject it, or that they had had a reasonable opportunity of examination for the purpose of ascertaining whether it would do the work for which it was bought. For aught that then appeared, when the pump was placed on a solid foundation at the bottom with no workmen below it, the

vibration might diminish, as certainly it would become less objectionable. The pursuers seem entitled in these circumstances to appeal to the 34th section of the Sale of Goods Act as supporting their contention, that they should not at that time be deemed to have accepted the pump.

"After it was put down at the bottom in November, it underwent a series of accidents, for which in my opinion the pursuers are not responsible; and a number of experimental efforts were made to improve it, both by the pursuers and by the fitter sent by the defenders, who did not act as if they considered themselves as relieved from responsibility. I think it fairly deducible from the proof that it was during the time between November and February, or the greater part of it, undergoing examination for the purpose of seeing whether its faults could be discovered and remedied. Perhaps the pursuers might have rejected the pump sooner, but they gave the defenders an opportunity of remedying its defects if they could. That caused delay, but not delay to which the defenders can object. I am therefore not prepared to say that the objection was not timeous in respect of the lapse of time, having regard to the circumstances.

"But then it is said that the pursuers did acts in connection with the pump inconsistent with the ownership of the seller.

"In the first place, they paid for it, which was certainly in a sense inconsistent with the ownership of the seller. But the mere act of payment is not sufficient to bar rejection in a case regarding machinery. That occurred in the case of *Pearce*, before quoted, and also in the case of *Fleming & Co., Ltd.* v. *Airdrie Iron Co.*, 31st January 1882, 9 R. 473, but in neither case was payment of the price held to bar the remedy of the purchaser. The Sale of Goods Act does not seem to affect the law on that point, for the acts there spoken of are acts done in relation to the thing sold, which the payment of the price cannot on a reasonable construction be held to be.

"Secondly, they used the pump in the execution of the work in which they were engaged. That is true, and in many cases such use would bar rejection, but not always or generally in cases as to machinery. Such use was the best, and probably the only mode of examining the pump. The buyer was entitled to examine it, and if in examining it he put it to use and profit, that is not an act necessarily inconsistent with the ownership of the seller. No other mode of using it is suggested.

"Then it is said that the machine has suffered damage in the using of it, and that, besides, the pursuers made certain alterations on it unwarrantable in any one who was not an owner.

"The principal accidents which the pump suffered were the bursting of the dome (which is a continuation of the barrel of the pump), and the breaking of the crank shaft. There is no proof that either of these injuries was caused by the fault of the pursuers. I am inclined to attribute them to the faults of the pump; but it seems enough to say that they have been remedied, and that no question about the expense of remedying them is involved in this case.

"The only material alteration which the pursuers made was the insertion of air cocks. These appear to have been put on without the previous sanction of the defenders or of their representative M'Laren; but I think the act was done in the course of an endeavour to get the pump to work in which the pursuers and defenders were working together, and it was sanctioned and approved of by M'Laren. The point is not without difficulty, but I think that this act ought not to be regarded as necessarily an act of ownership implying acceptance and barring rejection.

"Assuming that the sellers have failed to fulfil a material part of the contract, and that the buyers are not barred from rejection, and have rejected, the next question is what remedy can they have in this action and on this proof. I think they are entitled to repayment of the price and of the expense of carriage and cartage, and of fitting the pump in the bottom of the shaft, and of taking it out of the shaft. These are Nos. 1, 2, 3, 4, and 6 of their Statement of Claim, amounting to £211, 9s. 2d. These sums seem sufficiently proved, and I think their right to this extent was not contested by the defenders, if the pursuers should succeed at all."

The defenders reclaimed, and in support of the argument that the plea of personal bar was well founded, referred to *Pearce Brothers* v. *Irons*, February 25, 1869, 7 Macph. 571; *Fleming & Company Limited* v. *Airdrie Iron Company*, January 31, 1882, 9 R. 473; *Newlands* v. *Leggatt*, March 13, 1885, 12 R. 820; *The Electric Construction Company, Limited* v. *Hurry & Young*, January 14, 1897, 24 R. 312; *Paton & Sons* v. *Payne & Company Limited*, November 13, 1897, 35 S.L.R. 112; and The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), secs. 11, 14, and 35.

The pursuers in defending the Lord Ordinary's judgment referred to *Duff & Company* v. *Iron and Steel Fencing and Buildings Company*, December 1891, 19 R. 199.

At advising—

LORD M'LAREN—In this case we have a very careful and complete review of the evidence by the Lord Ordinary, and even if I were less assured than I am as to the validity of his Lordship's conclusions as to the matters of fact which he has considered, I should not be disposed to differ as to any of these conclusions.

But while accepting the Lord Ordinary's findings in fact, I am unable to admit that the pursuer is entitled to the relief which he seeks; because I think it must be taken that the pursuer accepted the subject of sale; and even assuming that it was affected with a latent defect or infirmity, yet as the subject of sale is a machine, and as it was accepted and used, the pursuer's remedy, if he has any, is not recission of the contract of sale, but indemnification for the costs which he may

incur in having the machine put into working order. Such being the ground of the judgment which I propose, it is not necessary to offer any elaborate statement of the case. The subject of sale was a steam-pump to be used by the pursuers for pumping water out of a tunnel which they were in the course of constructing in Radnorshire. The contract of sale was made by offer and acceptance in December 1894, and the steam-pump was supplied in March 1895. When the pump arrived, the pursuers were engaged in sinking a shaft down to the level of the tunnel. The shaft was to be 320 feet in depth, but had then only been excavated to the depth of 120 feet. The pump was placed near the lowest point of the excavation, and was used for a short period (the Lord Ordinary says for ten days) in keeping this shaft clear of water. I should consider that ten days' use was a sufficient trial to test the performance of any ordinary machine, barring latent defects; and I must assume that the result of the trial was satisfactory, because on 1st May 1895 the pursuers paid the price, making no reservation of a claim to reject, and thereby, as I hold, accepted the machine.

The contract was then completely executed. The buyer's obligation was fulfilled by the payment of the price, and the seller's obligation was fulfilled by the delivery of the subject of sale to, and its acceptance by, the buyer.

After the trial in March, the pump was not again used until November 1895. The shaft by this time was finished, and the pump was set up at the bottom of the shaft to throw water to the surface, but its performance was not satisfactory. I do not think that the pursuers have clearly explained their reasons for allowing the pump to remain inactive for seven months subsequent to its trial. Their case is that they had purchased the pump under a contract "to throw water 320 feet vertical," and that until that depth was reached, they thought it better to use a less powerful pump as being more suitable to the work that had to be done. They do not say that there was no other place in the tunnel in which the performance of the pump could have been tested at a depth approximating to that prescribed. In the evidence of Mr Morrison, the pursuers' manager, it is stated that the tunnel (which was leading water from Wales to Birmingham) is 7600 yards, or more than four miles in length, and that more than one shaft had to be sunk for the purposes of the work.

Be this as it may, a purchaser who accepts a machine after a trial satisfactory to himself, and then keeps it for seven months unused, is not in a favourable position for the exercise of the right of rejection—a right which in ordinary circumstances only exists while *res sunt integræ*, and ceases when the parties are agreed that the contract of sale has been performed. It appears that the pump, either while it was underground and exposed to injury from blasting, or after it was brought to the surface, had been a good deal knocked about. The air-chamber was broken, and some minor injuries were sustained which necessitated repairs. The Lord Ordinary holds that these injuries were not the cause of the faulty performance of the pump when it was brought into use in November, and I accept his Lordship's judgment on the matter of fact. But this hardly meets the defender's case. If I buy corn as first quality, which is really only second quality, and leave it without examination and improperly stored until it has suffered from decay, I cannot thereafter reject the corn on the ground that it was disconform to contract, because I have altered the seller's position to his disadvantage, and he is no longer able to sell the goods as second-class goods. Then if I buy a machine which I am entitled to reject on the ground of some defect which could be rectified at a moderate cost, and leave it exposed for months to rough usage until it is injured and useless for the purposes of re-sale, have I the right of rejection? This would be a very extreme assertion of the buyer's rights. But this is not all. In the interval between November 1895 and February 1896, when the pursuers abandoned the pump as useless for their purposes, alterations were made upon it with the object of improving its efficiency. The dome of the pump, that is, the chamber in which the plunger works, was thought to be too small, and the defenders supplied a somewhat larger dome, with more "clearance" for the water. They also, at the pursuers' request, sent a skilled fitter to examine the pump and put it into working order. The attempt was unsuccessful, but it is fair to the defenders to point out that their fitter only had the opportunity of examining the pump in its position in the underground workings, and it is quite possible that if the pump had been brought to the surface and taken to pieces in daylight the defect in the valve covers, which the Lord Ordinary holds to be the cause of its faulty performance, would have been discovered. If that is so, there can be no doubt that new valve-covers could have been supplied at a very small cost to the sellers, and the machine would then have been in order. In so saying I have digressed a little from the point to which my statement was intended to lead, and which is this—the sending for assistance to the maker is consistent with the theory that the pursuers had accepted the pump and held the makers bound to rectify latent imperfections, but is altogether inconsistent with the supposition that the contract of sale was unexecuted and with the existence of a right of rejection on the part of the buyer.

Supposing what it is very difficult to admit, that the right of rejection continued to exist until the time when the machine was tried at the low level, then when the result of that trial was unsatisfactory the pursuers had to consider whether they would disaffirm the contract or whether they would have the machine put into working order at the makers' expense. They chose the latter alternative, and very

naturally called on the makers to do what was deemed necessary instead of putting the machine into other hands. I am not to be understood as implying that in the case supposed a buyer is entitled to reject a machine which he has used if the defect is capable of being supplied without detriment to the buyer's interests. In the very carefully considered case of *Pearce Brothers*, 7 Macph. 571, it was decided that in such a case the right of the purchaser was to have the defective part of the machine replaced at the seller's expense. Of course there may be cases where machinery is throughout defective, badly constructed, or made of bad material. But then that would not be a case of latent insufficiency, because every purchaser of a machine for personal use must be credited with such knowledge of the tools with which he works as will enable him immediately, or after a short trial, to find out that the thing is radically insufficient. But if the defect is not immediately discoverable, and the machine breaks down after use, then it is considered to be inequitable that the damaged article should be thrown on the maker's hands, and the right of the buyer is to have the machine put into proper repair by the seller or at his expense.

When the pump was sent to Glasgow it was found that the four valves on which its working depends were all affected by the same fault. The valve is a small cylinder with a spindle fixed in its axis of symmetry, on which a circular disk rises and falls alternately, admitting and excluding the water. The spindle ought, of course, to be rigidly attached to the upper and lower faces of the cylinder, and then the disk will move vertically, preserving its parallelism. In order that the valves may be cleaned, the valve cover or upper face of the cylinder is fixed only by screw bolts, and in its centre there is a small projection or "boss" with a hole in it, into which it is intended that the end of the spindle shall be inserted, and held fast when the cover of the cylinder is screwed down. It was found that part of the "boss" in each valve cover had been cut away, so that the spindle was not fixed at its upper extremity, and it was evident from marks of wear that the disks had not been working properly. There is some evidence to the effect that the "bosses" had been cut while the pump was in the pursuers' hands, it is supposed for the purpose of giving a greater range or amplitude to the movement of the disks. The Lord Ordinary has rejected this evidence as untrustworthy, and has fixed the responsibility for the defective structure of the valves on the maker. Now, the patterns from which the valve covers were cast are produced, and the founder (who is not connected in business with the pursuers) depones that he supplied the covers cast from these patterns. I find it hard to believe in the face of this evidence that the valve covers, when sent out by the makers, were minus the part cast on them for the reception of the ends of the spindles. Besides, I should imagine that with a loose spindle the valve would not work for a single day without breaking down. But I understand that your Lordships are all of opinion that on a pure question of evidence it would not be right to question the Lord Ordinary's opinion, and I only state the substance of the evidence on this point, especially the real evidence, because so much was made of it in the argument, and that it may not be supposed that the point was overlooked. Assuming the correctness of the Lord Ordinary's view, it by no means interferes with the ground of judgment which I propose, because if this was a makers' defect, and if, as the Lord Ordinary has held, it is the true *fors et origo mali*, then it is a defect which the most casual examination of the valves would have made evident to a skilled mechanic, and it is a defect which could have been put right by supplying new castings, the cost of which would be relatively small. The result of my opinion is that the interlocutor should be recalled and the action dismissed.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for the Pursuers—W. Campbell—Guy. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Defenders—Salvesen—J. C. Watt. Agent—John Martin, L.A.

Tuesday, October 26, 1897.

OUTER HOUSE.

[Lord Stormonth Darling.

BROWN'S TRUSTEES *v.* INLAND REVENUE.

Proof—Confidentiality — Communications Addressed to Inland Revenue Authorities.

In an action of damages against a party for statements alleged to have been made by him to the Inland Revenue authorities respecting duties due by the pursuer, a diligence to recover documents was obtained by the pursuer. The Solicitor of Inland Revenue refused to produce letters addressed to his office by the defender, on the ground that to do so would be prejudicial to the public service. *Held* (*per* Lord Stormonth Darling, Ordinary), following *Arthur* v. *Lindsay* March 8, 1895, 22 R. 417, that the Solicitor was entitled to refuse production.

This was an action at the instance of the trustees of the late Mr William Brown, distiller, Elgin, against Mr Hay, auditor there, concluding, *inter alia*, for damages for statements made by him to the Inland Revenue authorities regarding the duty which ought to have been paid on the distillery business conducted by the late