The method whereby the workman's present earning capacity is ascertainable is left to the discretion of the arbitrator, with this qualification, that section 3 of the schedule, which appears to apply to a process of review as well as to an initial assessment of compensation, prescribes that the arbitrator shall take an average. The period of time chosen by the arbitrator for striking his average was the three months preceding the issue of his award. The appellants contend that the period chosen ought to have included the months from May 1920 to November 1921, during which wages were abnormally large. I am unable to hold that the method adopted by the arbitrator was so obviously unjust as to warrant this Court in reversing his decision on this matter of fact. On the contrary, I think I should have followed the same method of ascertaining the present earning capacity of the respondent as was chosen by the arbitrator.

I therefore agree that the case should be disposed of as suggested by your Lordship.

LORD ORMIDALE did not hear the case.

The Court answered the second question in the affirmative and the third question in the negative.

Counsel for the Appellants — Graham Robertson, K.C. — Marshall. Agents — W. & J. Burness, W.S.

Counsel for the Respondent—Lord Advocate (Murray, K.C.)—Fenton. Agents—Simpson & Marwick, W.S.

Thursday, October 26.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

NEWTON *v.* NEWTON.

Trust—Donation—Proof—Writ or Oath—Disposition of Heritage — Delivery — Disposition by Prospective Husband to Fiancée in Contemplation of Marriage —Supervening Marriage—Act 1696, *cap.* 25.

A man in contemplation of marriage bought a house and directed that the titles should be taken in his prospective wife's name. An *ex facie* absolute title was duly recorded in the Register of Sasines and the titles handed to her. After the marriage the husband brought an action against his wife for declarator that the property was really held in trust for him, and that the defender should be ordained to grant a valid disposition of the subjects in his favour. The defender averred that she had received the property as a gift. *Held* (*rev.* judgment of Lord Blackburn, Ordinary) that notwithstanding the defender's averments of donation the onus of proof was on the pursuer, and that the proof fell to be restricted to the defender's writ or oath.

Observations of Lord President Dunedin in *Brownlee's Executrix* v. *Brownlee* (1908 S.C. 232, at p. 240, 45 S.L.R. 184) *commented on.*

James Martin Newton, grocer, Paisley, *pursuer*, brought an action against Mrs Agnes Money or Newton, his wife, *defender*, for declarator that certain subjects in Paisley, which she held on an *ex facie* absolute conveyance registered in the Register of Sasines, were truly held by her under that disposition for the pursuer and his heirs and assignees, and that the defender should be ordained to grant and deliver to the pursuer a valid disposition thereof. The pursuer purchased the subjects from a Miss Cumming at a time when he was engaged to the defender as a home for them after their marriage. He averred that for certain reasons which he gave he got the title taken in his fiancée's name, and handed the title-deeds to her "to be kept by her for him" in the house. The defender averred that she got the subjects by way of gift.

The pursuer pleaded, *inter alia*—"1. The title to the said heritable subjects having been taken by the pursuer's instructions in favour of the defender, in exercise of a disclosed intention that the defender should hold the subjects on behalf of the pursuer and his heirs and assignees, and without any intention of making a donation, decree of declarator should be pronounced as concluded for. 2. The said subjects described in the summons and known as 'Argyll' being held by the defender for the pursuer and his heirs and assignees as condescended on, decree should be granted in terms of the declaratory conclusion of the summons."

The defender pleaded, *inter alia*—"2. The defender being the absolute proprietrix of the subjects described in the summons, should be assoilzied. 3. The defender never having undertaken any trust for behoof of the pursuer in respect of said subjects, should be assoilzied. 4. Any such alleged trust in the defender being only provable by her writ or oath, proof should be so limited. 5. The pursuer having conveyed said subjects to the defender absolutely and irrevocably as a gift to her in view of his approaching marriage with her, the defender should be assoilzied. 6. The defender having been in no relationship to the pursuer, either of contract, trust, or otherwise, which could give rise to a claim of damages, the pursuer's fourth plea-in-law should be repelled and the action dismissed *quoad* its third conclusion."

On 7th July 1922 the Lord Ordinary (BLACKBURN) before answer allowed parties a proof of their averments.

Opinion. — "The pursuer James Martin Newton was married to the defender on 20th April 1920. Before marriage, but while the parties were engaged, he on 22nd February 1918 purchased a house for their home after marriage, and directed that the titles should be taken in the defender's name. This was done and the titles were handed to the defender. The marriage was not a success, and in this action the pursuer asks declarator that 'the subjects are truly held by the defender under the said disposition for the pursuer and his heirs and assignees.' He asks further that the defen-

der should be ordained to grant a valid disposition of the subjects in his favour. In January 1921 the defender did grant a deed purporting to reconvey the subjects to the pursuer, but immediately before the summons in the present action was signeted she herself had raised an action of reduction of this deed against her husband. The grounds of reduction were that the deed had been impetrated from her, and that it was lacking in certain necessary formalities. The two actions were heard at the same time in the procedure roll, and in the reduction the husband admitted that the deed fell to be reduced as not having been formally executed, but denied that it had been impetrated. Under these circumstances I granted decree of reduction in that action.

"In the present action the defender avers (answer 2) 'that the reason for so taking the title was to make a gift to the defender,' and in answer 3 that she 'has always understood, as is the fact, that the title was taken in her name because the subjects were given to her.' These are averments of donation. In answer 4, however, she avers that the pursuer when he handed the titles to her said 'that they were hers so long as she lived, and that she was to take care of them,' which seems to represent the transaction in a somewhat different light.

"At the discussion it was argued for the defender that as absolute proprietor of the subjects *ex facie* of the title she was entitled to absolvitor in terms of her second plea-in-law. Alternatively it was argued that if a proof was allowed it should be restricted to writ or oath in terms of the fourth plea-in-law.

"For the pursuer it was admitted that a trust could only be proved by writ or oath, but it was maintained that the defender having pleaded that the subjects were a donation from the pursuer, which he denies, the onus is on her to establish that in carrying through the transaction the pursuer was actuated *animo donandi*. On this footing it was argued that there should be no restriction placed on the character of the proof allowed. In support of this argument the opinion of Lord President Dunedin in *Brownlee's Executor* v. *Brownlee* (1908 S.C. 240) was founded upon. A very similar question was raised in a case recently before me (*Sinclair* v. *Sinclair*), where the titles to a house purchased by a mother (defender) had been taken in name of her daughter (pursuer), who averred that the subjects had been donated to her. The action was one of accounting against the mother for past intromissions with the rents of the property and a proof was allowed. As a result of the proof I found that in taking the title as she did the mother was not actuated *animo donandi*, and I held in accordance, as I think, with Lord Dunedin's expressed opinion that while the recorded title was in itself evidence of delivery, the fact that the daughter had pleaded donation put the onus upon her of proving *animus donandi*, and that she had accordingly failed to establish her right to the subjects. There is a passage in the opinion of Lord Skerrington in *Carmichael's Executors* (1919 S.C. 655) which is to the same effect as that of Lord Dunedin in *Brownlee's* case. What principally distinguishes this case from *Sinclair* v. *Sinclair* is that the first conclusion of the summons is a declarator of trust, and the only evidence by which the pursuer can support this conclusion is writ or oath. Accordingly, even if the defender fails to establish donation, no decree could be granted in terms of this conclusion. But the second conclusion of the summons asks for a reconveyance of the subjects, and if the defender fails to discharge the onus which in my opinion now rests upon her owing to the form her pleadings have taken, it would be possible to grant a decree in terms of this conclusion. Accordingly I propose to allow a proof, but I do not propose to confine it to the question of donation alone, as I think that in a case of this sort it is better, particularly in view of the defender's averment in article 4, which very nearly amounts to an admission of trust, to have the whole facts expiscated before a final decree is pronounced.

The defender reclaimed, and argued—Donation was established unless trust was proved against the defender. But trust could only be proved by writ or oath—Bell's Prin., 10th ed., section 1995; Dickson on Evidence, sections 936 and 937; Maclaren, Court of Session Practice, p. 552. The formal deed and signature showed effective *animus*, and was the best kind of real evidence of donation—*Brownlee's Executrix* v. *Brownlee*, 1908 S.C. 232, *per* Lord President Dunedin at p. 239, 45 S.L.R. 184. *Animus donandi* was effectively shown by delivery and parting with control—*Cameron's Trustees* v. *Cameron*, 1907 S.C. 407, and *per* Lord Kyllachy at p. 419, Lord Kinnear at p. 421, and Lord Low at p. 425, 44 S.L.R. 354; *Carmichael* v. *Carmichael's Executors*, 1919 S.C. 637, 1920 S.C. (H.L.) 195, 57 S.L.R. 547. The averment of donation did not deprive the defender of her right to have the proof restricted, though she might have stood on her formal title alone—*M'Farlane* v. *Fisher*, 1837, 15 S. 978, where sale was alleged; *Chalmers* v. *Chalmers*, 1845, 7 D. 865, where donation was averred; *Leckie* v. *Leckie*, 1854, 17 D. 77, satisfaction of debt. There was no question of agency here, and the onus of proof was on the pursuer. The case of *Anderson* v. *Anderson's Trustees*, 1898, 6 S.L.T. 204, founded on by the pursuer, did not apply, because the position of an engaged person could not be assimilated to that of a married person. On the restricted interlocutor that might be pronounced, counsel referred to *Copland* v. *Lord Wimborne*, 1912 S.C. 355, 49 S.L.R. 280.

Argued for the pursuer and respondent—The defender had not taken up the position that she had a valid absolute title, good against all the world. In that case the Act 1696, cap. 25, would have applied, but she took up the position that she had not a good title unless the donation on which she founded was a good donation. She therefore held the property on a special title, and the Act did not apply.

Where there was an admission that the document founded on did not give a true account of the transaction, then proof at large was not restricted—*Grant's Trustees* v. *Morison*, 1875, 2 R. 377, 12 S.L.R. 292. The defender must prove *animus donandi*. The presumption of the law was against donations. Registration had no effect one way or another, and the pursuer had put the deed on the Register reserving delivery —*M'Aslan* v. *Glen*, 1859, 21 D. 511. Even if the question of trust did arise, still the averments of the defender amounted to an admission on record which elided the Act—Dickson on Evidence, sections 587 and 1035. Further, consideration must be had to the fact that this was an arrangement made by two people in consideration of marriage, and for this reason the statutes did not apply—*Anderson* v. *Anderson's Trustee*, 1898, 6 S.L.T. 204.

At advising—

LORD HUNTER—In this action the pursuer, who is the husband of the defender, seeks a declarator that a certain heritable property to which his wife has *ex facie* absolute title is really held by her in trust for behoof of him, his heirs and assignees. According to the pursuer's averments he purchased the property in 1918 prior to the marriage of the parties, and instructed his law agents to prepare a disposition from the seller in favour of the defender, the intention being that the house should be a home for him and the defender after their marriage. A disposition was prepared in terms of these instructions and recorded in the Register of Sasines in favour of the defender, to whom the pursuer handed the titles of the property. In answer to the pursuer's case the defender alleges that the property belongs to her absolutely, as it was conveyed to her irrevocably as a gift in view of the pursuer's approaching marriage to her. The Lord Ordinary has allowed parties a proof of their averments, and has ordained the defender to lead. Against this interlocutor the defender has reclaimed, and maintains that any proof allowed ought to be limited to her writ or oath.

In terms of the Act 1696, cap. 25, it is provided that "no action of declarator of trust shall be sustained, as to any deed of trust made for hereafter, except upon a declaration or back-bond of trust lawfully subscribed by the person alleged to be the trustee, and against whom, or his heirs or assignees, the declarator shall be intented, or unless the same be referred to the oath of party *simpliciter*." In *Marshall* v. *Lyell*, ((1859) 21 D. 514) Lord President Inglis, then Lord Justice-Clerk, said (at page 521)—"It appears to me that wherever the question arises in a proper declarator of trust between the trustee or persons in his right and the truster or persons in his right, and relates to the trust character of a title depending on a deed of conveyance conceived in terms *ex facie* absolute, it is impossible to dispute the application of the statute." The present action is essentially a declarator of trust, but it is said for the respondent that as the appellant has admitted that she got the property by way of gift, parole proof is competent, although it is not now maintained that the Lord Ordinary was right in putting the burden of proof upon the defender. According to the pursuer, proof would necessarily have been limited if the defender had said nothing about how she acquired the property, but it is said that the Act is inapplicable as the defender has not stood simply upon her title. I confess that I do not follow this reasoning, and I know of no authority which supports it. If the defender's averment had contradicted her title, the position would have been different, but it is as competent to acquire property by irrevocable gift as by purchase. In *Chalmers* v. *Chalmers* (1845, 7 D. 865) the defenders were held entitled to insist that an alleged trust should be proved by writ or oath although it was admitted that, contrary to the narrative of the deed, no price had been paid by them for the conveyance in their favour. The Lord Ordinary reaches the conclusion which he does largely upon the strength of a dictum of Lord Dunedin in *Brownlie's Executrix* v. *Brownlie* (1908 S.C. 232, at page 239), where he says—"The rule seems to be this—When a person is asked to give up something, be it land, corporeal moveables, or money, which he has reduced into possession, he can assume the defensive and put the claimant to show his title. But if in answer to the claimant he is willing or forced to admit that the something only came into his possession by donation from a person whom the claimant, whether by special or universal title, represents, then the onus is put upon him to prove the *animus donandi* as well as the delivery of the thing." That statement shows that possession alone does not establish gift, and the person in possession alleging gift must prove the *animus donandi* of the alleged donor. It has, however, no bearing where the person in possession produces a title that in itself contains evidence of the *animus donandi*. In *Cameron's Trustees* v. *Cameron* (1907 S.C. 407) Lord Dunedin said (at page 413)—"Now, if A, infeft in land, dispones gratuitously that land to B, and then registers the disposition in the Register of Sasines, the donation is perfected, not, I think, because of the publication in the Register of A's deed, but because by the constructively effected sasine the land itself, the subject of the gift, has been delivered by A to B in the only way in which land can be delivered." For the pursuer it was contended that the same inference of delivery could not be drawn where the granter was not the donor himself but a third party from whom the donor had purchased the subjects. It is true that in the special circumstances of the case of *Cameron's Trustees* it was held that recording of a bond in the Register of Sasines did not operate delivery of the bond to the daughter of the creditor in the bond who had got the debtor to grant the bond in name of himself as trustee for his daughter. There is, however, no specialty in the present title, for the circumstance that the conveyance does not flow from the pursuer is of no moment if he, being the real pur-

chaser, allowed the conveyance to be taken in another name—*per* Lord President Inglis in *Marshall*, 21 D. 514, at page 521.

The pursuer alleges in the fourth article of the condescendence that he handed the titles to the defender to be kept by her for him. It was contended that this was an averment of agency that could be proved by parole. It appears to me, however, that it is only another way of stating the alleged trust. Reliance was also placed by the pursuer on a statement made by the defender that the pursuer said when handing her the titles to the subjects, that they were hers as long as she lived, and that she was to take care of them. If this statement amounted to an admission of trust it could be founded on, but it refers to the titles, and whatever may be its true signification it does not justify relaxation of the rule of evidence laid down in the statute.

In my opinion the interlocutor of the Lord Ordinary ought to be recalled, the fourth plea-in-law for the defender sustained, and the case remitted to the Lord Ordinary to allow a proof restricted to the writ or oath of the defender.

LORD ANDERSON—The reclaimer challenges the Lord Ordinary's interlocutor on two grounds—(1) because he has laid the *onus probandi* on the defender, and (2) because in a declarator of trust a parole proof has been allowed.

As to the first point, I am clearly of opinion that the burden of proof is on the pursuer. The defender in answer to the pursuer's action tables a probative disposition which in terms confers on her an unlimited right of ownership in the heritable property in question. It is common ground (1) that the said disposition and the other property titles were handed to the defender by the pursuer in 1918; (2) that she has made her right to the property real by infeftment; and (3) that she has been in possession of the property since 1918. These admitted facts raise a strong presumption that the defender is the owner of the property, and the burden of rebutting this presumption is plainly on the pursuer. There appear to be two considerations which led the Lord Ordinary to place the *onus probandi* on the defender—(1) the pursuer's averment that he gave the titles to the defender "to be kept by her for him in 'Argyll.'" But surely it is for the pursuer to prove that the titles were handed to the defender merely for safe custody. (2) The other matter which apparently weighed with the Lord Ordinary on this point was the defender's explanation in her pleadings that she received the property from the pursuer as a gift. Donation being alleged and denied, the burden, it is said, is on the party averring donation to prove that a gift has been made. This rule of evidence undoubtedly holds in certain questions relating to the transmission of moveable rights, but I am not satisfied that it can be applied at all in a case like the present. In a declarator of trust the question to be determined always is—Is there a trust? When so stated the burden of proof is obviously on the party alleging trust. It may be said that it is just another way of putting that question to inquire whether or not there has been donation, but even if this be so, I am satisfied that in circumstances like those disclosed in this action the burden of proof is on the pursuer. I can conceive no better *prima facie* proof of donation of heritage (to put it no higher) than the fact that it is possessed on an *ex facie* unrestricted title of ownership. Therefore even if the foresaid rule of evidence applies, the burden of proof would seem to be on the pursuer.

As to the second and more important point, I have reached the conclusion that the pursuer's averments are provable only by the defender's writ or oath. It is to be kept in mind that the action, in form and in fact, is a declarator of trust. The first and leading conclusion of the summons is for such declarator. There is, indeed, a second conclusion, whereby decree is sought against the defender ordaining her to reconvey the subjects to the pursuer. But in my opinion this conclusion is merely ancillary to and executorial of the main conclusion of declarator. The Lord Ordinary expresses the view that the second conclusion could be given effect to although the first conclusion were refused. I am unable to assent to this. The second conclusion, in my opinion, becomes abortive if the first conclusion is refused. The action, then, being one of declarator of trust, the mode of proof is prescribed by statutory enactment. The Act 1696, cap. 25, provides "that no action of declarator of trust shall be sustained as to any deed of trust made for hereafter, except upon a declaration or back-bond of trust lawfully subscribed by the person alleged to be the trustee, and against whom, or his heirs or assignees, the declarator shall be intented, or unless the same be referred to the oath of party *simpliciter*." There is no case in the books in which in an action of declarator of trust any other mode of proof than that prescribed by the statute has been allowed. On the other hand, there are numerous decisions whereby in declarators of trust the Court has refused to allow a wider mode of proof. (See *Duggan* v. *Wight*, (1797) M. 12,761, (1797) 3 Pat. 610; *Mackay* v. *Ambrose*, (1829) 7 S. 699; *M'Farlane* v. *Fisher*, (1837) 15 S. 978; *Chalmers* v. *Chalmers*, (1845) 7 D. 865; *Leckie* v. *Leckie*, (1854) 17 D. 77; *Dunn* v. *Pratt*, (1898) 25 R. 461.) The defender in an action of this nature may allege a consideration for the conveyance of the property—as, that it was purchased, disponed in satisfaction of a prior obligation, or, as here, bestowed as a gift. But the presence of such averments in the defences does not open a door for the admission of parole proof—see *Chalmers*. Admissions on record by a defender in an action of declarator of trust may be sufficient to prove a trust—Dickson on Evidence (Grierson's ed.), section 587; *Chalmers* — and the Lord Ordinary seems to attach some importance to the averment of the defender in the first sentence of answer 4. The Lord Ordinary considers that the aver-

ment "very nearly amounts to an admission of trust." This point is not before us, but if it were I should find great difficulty in assenting to the Lord Ordinary's view.

An argument was submitted by the reclaimer's counsel which apparently was not advanced to the Lord Ordinary. It was decided by Lord Low in the case of *Anderson*—(1898) 6 S.L.T. 204—that the Act 1696 has no application in a question between husband and wife, inasmuch as a wife is legally disabled from contracting with her husband, and a husband stands in a fiduciary relation to his wife as her curator or guardian. It was urged that the *ratio* of this decision covers the relationship of parties engaged to be married. I am, however, unable to hold that a *fiancée* has either the privileges or disabilities of a wife.

I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled and the defender's fourth plea-in-law sustained.

LORD SANDS—I acquiesce in the judgment which your Lordships propose. I do so with reluctance, both on account of dislike of the rigidity of the statutory rule in general and of the *prima facie* impression which the averments in this case make in particular. I should have been prepared with the Lord Ordinary to accept the opinion of Lord Dunedin, concurred in by Lord M'Laren and Lord Kinnear, in *Brownlee's Executrix* (1908 S.C. 232), as a sufficient warrant for the recognition of an exception to the application of the statutory rule as interpreted by decision if I had been able to read the dictum of Lord Dunedin founded upon as directed to cases which fall under the statute. I am unable so to read it. As his Lordship points out in *Brownlee's* case, most of the decisions which were under review in that case were cases concerning deposit-receipts, and he deprecates the suggestion that deposit-receipt cases are a class by themselves, to which the ordinary rules do not apply. I accept that view, but the class of case to which deposit-receipts belong is not the class falling under the statute where there is a deed which is alleged to be qualified by a trust, but the class where possession has been acquired without any such deed. A deposit-receipt is not a deed of trust within the meaning of the Act 1696, cap. 25—*Cairns* v. *Davidson*, 1913 S.C. 1054, 50 S.L.R. 850. The effect given to the distinction between cases where there is a deed of conveyance and cases where there is none may be somewhat arbitrary, but the rule seems clear. If A hands B a bearer bond, A may prove *prout de jure* that B holds the bond or its proceeds in trust for A. But if the bond happens not to be a bearer one, and a transfer or some other form of assignation be necessary to put B in possession, then proof that B holds the bond or its proceeds in trust for A must be limited to writ or oath. The use of the word *land* in Lord Dunedin's dictum suggests a doubt, for it is not clear how land could be "reduced into possession" without a deed, or how, if it were averred that this deed was qualified by a trust, the contention could be resisted that this was an alleged deed of trust within the meaning of the statute. It would, however, in my view, be laying too much stress upon the use of the word "land" in the passage founded upon to read the dictum as recognising an exception to the application of the rule of the statute in a case to which the statute applies. If I thought that this case was governed by the dictum of Lord Dunedin in *Brownlee's* case, I should be of opinion that the Lord Ordinary applied that dictum logically in laying upon the defender the burden of leading in the proof. Lord Dunedin in the passage referred to is dealing with the question, not of *modus probationis* but of onus, for in *Brownlee's* case there was no question of a deed of trust or of the mode of proof competent under the statute. I take it that what he means is this. When something has been transferred from A's possession to B's possession and A claims that it is really his, B may stand simply upon the fact of possession and leave to A the burden of showing that the article in B's possession really belongs to A, and of explaining how if that be so B happens to be in possession of it. But if instead of standing upon his possession B admits that the article belonged to A and avers that A put him in possession of it by way of donation, the burden is upon B of proving the *animus donandi*. A transfer of possession without consideration may go a long way towards showing the *animus donandi*, but I doubt if in circumstances such as the present it shifts the formal burden of leading in the proof.

The consideration, however, that Lord Dunedin was dealing with the question of onus, and not with the question of the mode of proof, brings me to the real difficulty I have in connection with his dictum and its logical application apart altogether from the use of the word "land." If the dictum be interpreted as a statement of the law applicable to cases under the statute, it appears to me to conflict with previous decisions, and I am not satisfied that Lord Dunedin had the statute or these decisions in contemplation. But I leave this aside for the moment and consider the logic of the dictum as applicable generally to cases where the proprietary right of some-one in property which he has reduced into his possession is called in question. The statute is peculiarly worded, but it has always been interpreted as meaning that the trust which the pursuer avers he must prove by writ or oath. Now where the right of a person to whom property has been conveyed by deed is challenged he is quite entitled to say—"I am in possession; if you say that I hold the property in trust for you, then it is for you to prove that, and on what footing I do so, and under the statute you can do so only by writ or oath." But where, as here, the defender admits that legal possession of the property was acquired from the pursuer, admits that there was no consideration, and avers that it was a gratuitous donation, has the pursuer to prove anything?

The defender by his admission rules out all other footings on which the property was transferred to him and stands upon gratuitous donation. But the presumption of law is against gratuitous donation. I am aware that it is suggested that where a person who is married or about to be married—for I do not think that in this regard it matters much which—takes the title to a house which is contemplated as the matrimonial home in the name of his wife or future wife, then (even though, as here, he subsequently spends a great deal of money upon it) this is sufficient to overcome the legal presumption against donation and to raise the presumption that he intended an absolute gift, so that if his wife died next year a relative of hers would be the heir to the house. I am not clear as to this (the title may have been so taken for some such other reason as the pursuer here suggests), but even if it be so this is only a presumption of fact arising from the circumstances of the particular case and not a presumption of law. May this presumption not be redargued by parole evidence? No doubt it may be said—If you try to redargue it by parole you are doing indirectly the very thing the statute says you are not to do—proving a trust by parole. I am not clear, however, as to this. The pursuer is not seeking and is not required to prove affirmatively any trust which he has averred. He is simply negativing what the defender avers, viz., donation. If he negatives that he need do no more. The house, donation being negatived, is his house. Defender pretends no other right to it. For these reasons it is only because I feel constrained to follow the cases under the statute, and not because I am satisfied that these cases are consistent with the reasoning of Lord Dunedin, whose attention was not particularly directed to the statute, that I acquiesce in the judgment proposed.

LORD ORMIDALE did not hear the case, and the LORD JUSTICE-CLERK (ALNESS) had not taken his seat on the bench.

The Court recalled the interlocutor of the Lord Ordinary, sustained the fourth plea-in-law for the defender, and remitted the case to the Lord Ordinary to allow a proof restricted to the writ or oath of the defender.

Counsel for the Pursuer and Respondent—Carmont—J. C. Watson. Agents—J. & J. Ross, W.S.

Counsel for the Defender and Reclaimer—C. H. Brown, K.C.—J. O. Taylor. Agents—Bonar, Hunter, & Johnstone, W.S.

HOUSE OF LORDS.

Monday, July 17.

(Before Viscount Haldane, Viscount Cave, Lord Dunedin, Lord Parmoor, and Lord Wrenbury.)

W. & S. POLLOCK & COMPANY *v.* MACRAE.

MACRAE *v.* W. & S. POLLOCK & COMPANY.

Sale—Disconformity to Contract—Conditions—Conditions Excusing Seller from Damage Arising from Insufficiency of Part of Machinery—Effect of Congeries of Defects—Sale of Goods Act 1893 (56 and 57 *Vict. cap.* 71), *sec.* 11 (2).

In a contract between a firm of engineers and the owner of a fishing boat for the supply of a twin-screw set of motor engines, the sellers incorporated certain conditions providing, *inter alia*, that they should not be liable for "any direct or consequential damage arising from defective material or workmanship." The buyer having brought an action of damages against the sellers on the ground that the engines were disconform to contract, the sellers pleaded the conditions in defence. *Held* on the facts that there was such a congeries of defects as to destroy the workable character of the machine and amount to a total breach of contract; and on the law, that though the conditions might excuse from damage arising from the insufficiency of a part or parts, they had no application to damage arising from a congeries of defects amounting to a total breach of contract.

Sale—Disconformity to Contract—Rejection—Effect of Rejection on Right to Retain Goods and Claim Damages—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 11 (2).

In a contract between a firm of engineers and the owner of a fishing boat for the supply of a twin-screw set of motor engines, the buyer retained the engines and claimed damages on the ground that they were disconform to contract. The sellers maintained that the buyer having in the first instance elected to reject the goods, could not now avail himself of the alternative remedy provided by the Sale of Goods Act 1893, sec. 11 (2), viz., of retaining the goods and claiming damages. *Opinion* that even if the buyer had rejected the engines he was not thereby barred from subsequently retaining them and claiming damages.

Electric Construction Company, Limited, v. *Hurry & Young*, 1897, 24 R. 312, 34 S.L.R. 295, *disapproved.*

W. & S. Pollock & Company, engineers, Glasgow, *pursuers*, brought an action against Donald Macrae, fishcurer, Stornoway, *defender*, for payment of £283, 6s. 8d., being the balance of the price of a twin-