[HOUSE OF LORDS.]

MACKAY . . . . . APPELLANT;
DICK AND ANOTHER . . . . . RESPONDENTS.

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Contract—Condition Precedent—Implement of Condition prevented—Remedy.

If, in the case of a contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied.

By a written contract *A.* agreed to buy of *B.* a digging machine, if it fulfilled certain conditions, one of which was that it should be capable of excavating a given quantity of clay in a fixed time on a "properly opened-up face" at the *C.* railway cutting. The machine failed at another cutting to excavate the required quantity, and on its being removed to the "*C.*" cutting and tried at a face not a "properly opened-up" one, and breaking down, after a few days work, *A.* refused to give it any further trial or to pay the price of the machine:—

Held, affirming the decision of the Court below, that *B.* was entitled to a decree against *A.* for payment of the price of the machine.

Judicature Act of Scotland, 1825 (6 *Geo.* 4, *c.* 120), *s.* 40—*Process—Appeal—Cases commenced in Sheriff's Court—Matters of Fact found by the Court of Session—Remit to Court below—Proof.*

The 40th section of the *Judicature Act* of *Scotland*, 1825, enacts, *inter alia*, that the judgment in cases commenced in the Sheriff's Court shall be subject to appeal to the House of Lords only so far as the same depends on, or is affected by, matters of law; but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor.

In appeals falling within the scope of this section, the House of Lords has no concern with the proof which has been led in the Sheriff's Court. When it can be shewn that the Court of Session has not exhausted the issue before it, and that there are material questions of fact left undetermined, a remit will be made to the Court below to pronounce findings upon these questions, but that can only be shewn by a reference to the record, and not to the proof. And if the questions are not raised by the record, no remit will be made.

APPEAL from a judgment of the First Division of the Court of Session, *Scotland*, pronounced in an action raised in the Sheriff's Court of *Lanarkshire*.

Previous to September, 1876, the Appellant, Mr. *John Mackay*,

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railway contractor, *Wishaw*, had entered into a large contract for the construction of a branch line near *Wishaw* for the *Caledonian Railway Company*. This contract required the excavation of an extensive cutting, called the *Wishaw Cutting*, one end of which was known as the *Carfin Cutting*, and the other as the *Garriongill Cutting*.

The Respondents, Messrs. *Dick & Stevenson*, engineers, had about the same time invented a steam excavator or navvy, which was capable of saving a good deal of manual labour. The parties entered into negotiations, and the question was whether the Appellant was bound in law to take delivery of one of these steam excavators and to pay the price, £1115, conformable to a written contract.

The contract between the parties is contained in the following letters:

To *John Mackay*, Esq. Sept. 21, 1876.

Dear Sir,—We beg to confirm the arrangement made between you and Mr. *Stevenson* yesterday in regard to supplying a patent steam excavating machine for your cutting at *Carfin*, which is as follows:—Machine to be as per accompanying specification, and capable of digging and filling into waggons at least 350 cub. yds. of the clay or other soft substances in said cutting—you supplying waggons as fast as they can be filled; and should it fall short of digging and filling this quantity after it is fairly tried on a properly opened-up face, you are not to be bound to keep the machine, but may return it at any time within two months. We, to uphold the machine for twelve months after its delivery, inasmuch as we will repair or replace, free of cost to you, all parts that may prove defective during that time, excepting the steam boilers and lifting ropes. The machine to be delivered, erected, and tested in the cutting before February next. Price to be £1115, one half payable when machine is delivered, one quarter in three months thereafter, and remainder within six months; or, if you prefer, the whole to be paid when the machine has been tested and proves capable of digging the work specified.

Dick & Stevenson.

To Messrs. *Dick & Stevenson*. 22 Sept. 1876.

Dear Sirs,—I have your favour of 21st instant, stating the terms upon which you will supply the above machine, and enclosing a general specification of same. The terms, which I now beg to corroborate, are:—

1st. That the machine will be capable of excavating and filling 350 cub. yds. into waggons in a day of ten hours, and that of the material in the *Carfin* cutting, which is now open for your inspection.

2nd. That the machine will be erected and tested in the said *Carfin* cutting before the month of February next.

3rd. That the machine will be so constructed as to fulfil all the requirements

necessary to admit of its travelling along any main line on its own wheels, along with, and as part of, any luggage train.

4th. That if the machine does not fulfil the terms of these stipulations, you shall remove the same at your own expense before the end of February next.

5th. That if I accept the machine after seeing its capabilities, you will maintain the same in all its parts, with the exception of the boilers and lifting ropes, for a period of twelve calendar months from the date of its commencing regular work.

6th. That I shall pay you for the said machine the sum of £1115 (eleven hundred and fifteen pounds sterling).

7th. That all the expenses connected with the bringing, erection, and trial of the machine are to be borne by you.

On these terms you may at once proceed with the construction of the machine—Yours, &c. *John Mackay.*

John Mackay. 26 Sept. 1876.

Dear Sir,—We were duly favoured with yours of 22nd inst. and agreeable to same are now proceeding with construction of the digging machine for *Carfin* cutting. . . . In erecting the machine for trial, it is to be understood that you are to lay and arrange the rails for the proper application of the machine, and also to supply waggons as fast as it can fill them. We neglected to say formerly that we will require the use of one of your jib cranes for a week or so in erecting the machine. The fifth clause of your letter would be more explicit were it put thus: "5th, That I will accept of the machine if it performs the stipulated work; and if so, you will maintain, &c., &c." No doubt this is what you intend, and on that understanding we have much pleasure in proceeding with the construction.—Yours, &c. *Dick & Stevenson.*

The material portions of the condescendence for the Respondents (Pursuers), and the answers thereto for the Appellant (Defender), are as follows:

(Cond. 5.) The cutting at *Carfin* was not in a condition to admit of the machine being erected and tested in it by or during the month of February, 1877, nor for a long time afterwards. Subsequently to that month the Defender (Appellant) agreed with the Pursuers (Respondents) to have it erected and experimented with in a cutting of the Defender's at *Garriongill*, pending the necessary preparation for the application of the machine at the *Carfin* cutting.

The machine was erected there. Denied that the cutting at *Carfin* was ready for the trial of the machine in February, 1877, as stated by the Defender. The cutting at *Carfin* was in the same state in February, 1877, as it was in July, the date at which the Defender says no further work could be done. Further explained that the Defender failed to have the cutting ready in February, 1877, and in consequence additional time was given Pursuers to complete the machine. The machine was in many respects of an entirely unprecedented construction and arrangement, and both parties were alike anxious to take advantage of the experiments offered by the Defender at *Garriongill*, particularly with a view of testing the strength of its parts.

(Ans. 5) The cutting at *Carfin* was ready for the trial of the machine in

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February, 1877, at which date the Pursuers were bound to have the machine ready for trial.

They failed to have the machine ready until July, 1877, at which date, owing to the state of the Defender's works, it was impossible to do more cutting at *Carfin* until a viaduct across the *Calder* should be completed. The parties accordingly agreed that the machine, instead of being tested at the *Carfin* cutting, should be tried at the *Garriongill* cutting.

(Cond. 6.) The conditions under which the machine had been worked at *Garriongill* did not admit of its capability to excavate and fill the stipulated quantity of material being tested. The material, whilst generally of a similar kind to those seen at *Carfin*, had a hard rib or layer of stony substance running through the cutting, which was not seen when it was proposed to send the machine to *Garriongill*, and the machine was made to tear through this rib. . . .

(Ans. 6.) Denied—The conditions of trial were more favourable to the machine at *Garriongill* than at *Carfin*. . . . The machine, however, while at *Garriongill* was constantly breaking down, and was proved to be entirely inadequate to its stipulated rate of work. It arrived at the cutting about the end of July, 1877, and between that date and the 26th of March, 1878, several unsuccessful efforts were made to get it started. On the 26th of March, after several alterations were made upon it, the machine was again started, and the trial continued continually down to the 22nd of May, 1878, under the most favourable conditions. During the whole period from July, 1877, to May, 1878, the total cutting performed by the machine was about 954 cubic yards.

The Defender expressed to the Pursuers his dissatisfaction with the machine, and his belief that it was quite incapable of performing the stipulated amount of cutting.

(Cond. 7.) The machine was then, by the Defender's instructions and concurrence, removed to and re-erected at *Carfin*, in terms of contract. This erection of the machine at *Carfin* was completed on or about the 9th of September, 1878. But here the conditions under which the machine was intended to be worked had been entirely changed from what existed or was contemplated at the time of making the contract, and did not admit of the application of the machine in the way intended, and so did not admit of its capability to excavate and fill the stipulated quantity of material being properly or fairly tried. In particular, the face of cutting to which it was to have been applied was entirely destroyed, so far as the proper application of the machine was concerned, by the introduction of men who carried forward by far the largest portion of the face of the cutting, so that there remained only a small portion, which could not and did not nearly furnish the machine with full work, or full scope to work. . . . The fair and proper working of the machine was not compatible jointly with manual excavators. Such a course of procedure was never contemplated, and, in fact, has never been attempted at any other work. The Pursuers repeatedly asked the Defender to afford them a fair opportunity of letting the machine be applied to its work properly, and, as was necessary, with a full face and without interruption, but he did not do so. Undert he terms agreed on, had these necessary conditions been furnished or observed by the Defender, the machine was capable of excavating and filling the stipulated quantity. Denied that it was at request of Pursuers that the machine was taken to *Carfin*. The taking it to *Carfin* was in terms of the

contract. Explained that the machine had never before been tried at *Carfin*. Denied that Defender was in a position to allow the machine to be tried on the 3rd of August, and considerable delay was occasioned on account of his not being even ready at the 9th of September, 1878, the date at which the machine was ready. Denied that the Defender made any conditions about the removal of the machine in the event of it breaking again. Admitted that the machine started work at *Carfin* on the 14th of September. Denied that it worked till the 9th of October. Explained that the machine only wrought a very inconsiderable number of hours at *Carfin* altogether, through the actings of the Defender. The machine was fit for the contemplated work.

(Ans. 7.) Admitted that on the request of the Pursuers the Defender permitted them to make a further trial of the machine at *Carfin*. A suitable face there was ready for trial on the 3rd of August, 1878. In consenting to a further trial at *Carfin*, the Defender informed the Pursuers that if the machine again broke down it would have to be removed, so as not to interfere with the progress of that cutting, which had to be proceeded with with the utmost despatch. The machine accordingly started work at *Carfin* on the 14th of September, 1878, and continued till the 9th of October, 1878, when the Pursuers' men ceased to work it, and it has not done anything since. During the above period, the total cutting done by the machine was about 126 cubic yards. For the whole period from July, 1877, to the 9th of October, 1878, the cutting done by the machine amounted in all to only 1080 cubic yards, or about three days' work. *Quoad ultra* denied.

(Cond. 8.) The Defender called on the Pursuers to remove the machine from *Carfin*, as he alleged it had not excavated and filled the stipulated quantity. The Pursuers refused to do so, and the machine is still at *Carfin*. The machine was delivered to Defender at *Carfin*, and is still in his possession there.

(Ans. 8.) Admitted.

The Appellant's pleas in law were as follows:

(1.) The Defender (Appellant) not being due the Pursuers (Respondents) the sum sued for, or any part thereof, is entitled to absolvitor. (2.) The machine having failed on trial, the Defender is not bound to accept. (3.) The sale of the machine being conditional on the trial, which has failed, the Defender is not liable in the price thereof. (4.) The Defender, not having committed any breach of contract, is not liable in damages. (5.) The action being unfounded in fact and law, the Defender is entitled to absolvitor, with expenses.

A proof was allowed by the Sheriff substitute. From that it appeared that there had been a mutual alteration of the contract, so far as that the machine should be furnished by February, 1877. The reason for this alteration the Appellant alleged was, the machine was not ready. When, however, the machine was ready, the Appellant, through the alteration of the railway company's plans, was not ready to give the required test at *Carfin*, and it was agreed that the machine should be sent to the *Garriongill* cutting;

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the Appellant said on the footing that it should be tested there instead of at the *Carfin* cutting. The Respondents, on the other hand, alleging that the machine was sent to *Garriongill* for the purpose of experiment, with a view to its being strengthened before it was tested at *Carfin*. The proof also contained the following facts. That in March, 1878, the machine commenced work at *Garriongill*, and worked on and off till the end of May. In that month the machine broke and was removed to the Respondents' workshop. During the three months it had excavated 477 waggons of 2½ cubic yards each.

On the 28th of May the Appellant wrote to the Respondents, requesting them before they took the machine to *Carfin*, to go and see the cutting there, and satisfy themselves as to whether they could excavate the amount of cutting with the machine that they guaranteed, and stating that that cutting would soon be commenced, and that he could not tolerate the stoppages to his work there, which had occurred at *Garriongill*. On the 2nd of August the Appellant wrote to the Respondents, "if you are again intending to try the digger, I trust you will do so at once." On the 9th of September, 1878, the Respondents wrote that the steam digger was ready for work at *Carfin*, and that as soon as the Appellant had rails laid for its application they would proceed to prove its capabilities to dig and fill 130 waggons of 2½ yards per day, as agreed to. On the 18th of September the machine commenced work at *Carfin*, on which day it excavated one waggon load; on the 19th it excavated thirteen waggons or 3½ cubic yards; on the 21st, three waggons, and then broke down. On this the Appellant wrote to the Respondents, that the machine had never even approached the guaranteed quantity to be excavated, and trusted they would remove it.

The Respondents replied, "The breakage was due to the experiments at *Garriongill*, which had no connection with the stipulated obligations at *Carfin*. At *Carfin* you are bound to give the machine a fair application to the material there, and after that to give us a month to test its capabilities at a fair face. Instead of that, you destroy the face by the introduction of men in place of the steam digger, and ask us to try it at a straggling end of a side piece of clay and boulders, in such a way as no machine of

the kind was ever tried before, and where the machine could not, by any possibility, do one-sixth of its work. You have explained to us the difficulty between you and the railway company as to time, &c., but whilst we have every disposition to accommodate you as much as possible, we must nevertheless insist that you allow the machine to get a full and fair trial in fair stuff, after which, if it fails in the quantity now stipulated, viz. 350 yards, we will take it away free of cost to you, but not till then."

Again, on the 10th of October, the Respondents wrote, that the machine had been again put to work at a face at which it had not proper scope. In acknowledging that letter, the Appellant, on the 15th of October, said: "You refer to the unreasonableness and illegality of my request to have the digger removed from *Carfin*. You must be well aware that these expressions are quite unjustifiable, as I expressed in my letter of the 28th ult., that the machine has never even approached the carrying out of your guarantee. It is now more than three months since the *Carfin* cutting was ready for the application of your machine, and in that time it has excavated about fifty waggons, or less than two cubic yards of earth per day. After looking at these figures, I think there is nothing unreasonable in again requesting you to remove the machine." The Respondents, *inter alia*, reply: "You say the machine has never even approached the carrying out of the guarantee. Did you or any reasonable man, ever expect such a thing so long as the machine was only applied to an eight or ten feet face, with one quarter compass instead of fifteen or twenty feet, one with a full compass?" And they demand again a proper trial; and that demand was repeated in a subsequent letter. The Appellant then repudiated any liability connected with the machine, the essential conditions on which alone he was willing to purchase not having been fulfilled.

The Respondents finding that the Appellant would not give them the opportunity of trying the machine at a fair face, raised this action in the Sheriff's Court, concluding for payment of the price of the machine, £1115. The Sheriff substitute pronounced an interlocutor, finding that the Appellant was bound to give the Respondents' steam-navvy a fair trial at *Carfin*, and that he had not done so, and therefore he was liable as concluded for. The

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Appellant having appealed, the Sheriff, on the 2nd of December, pronounced, *inter alia*, the following interlocutor:

. . . . Find that the machine was in due time erected at *Garriongill* cutting, and was there tested: Find that it did not satisfy the guarantee, but completely broke down notwithstanding the Pursuers had every opportunity afforded them during nearly two months of altering, amending, and adjusting, as they thought proper: Find that thereafter another opportunity was given them to prove that the machine satisfied the guarantee, and that they accordingly erected it at *Carfin*, where it was again tested: Find that this testing proved equally unsatisfactory with the former, and that, in consequence, it was definitely rejected by the Defender: Find, in point of law, that the Defender was entitled to do so, unless it could be established by the Pursuers, that the failure of the machine to satisfy the guarantee was attributable to circumstances for which the Defender was responsible, or for which at least they were not accountable: Find that the Pursuers have failed in discharging the *onus* thus laid upon them: Find, therefore, that the Pursuers having failed to satisfy the conditions of their contract, the defences fail to be sustained: Therefore recalls the judgment appealed against, and assoilzies the Defender from the conclusions of the action.

The Respondents thereupon appealed the cause to the First Division of the Court of Session, who pronounced the following interlocutor on the 21st of May, 1880.

Recall the interlocutor of the Sheriff, of date the 2nd of December, 1879: (1.) Find that the Pursuers undertook to supply, and the Defender undertook to purchase and pay £1115 for, a steam-digging machine, in terms of the letters dated respectively the 21st and 22nd of September, 1876: (2.) Find that it was a condition of the said contract, that the Defender should not be bound to accept and pay for the said machine if it should fall short of digging and filling into waggons 350 cubic yards of clay, or other soft substances, within a day of ten hours, in a certain railway cutting which the Defender was about to make, called the *Carfin* cutting, after it is fairly tried on a properly opened-up face: (3.) *Find that it was impossible that the machine should have the stipulated fair trial, unless the Defender provided a properly opened-up face at the said Carfin cutting*: (4.) *Find that the Defender failed to provide such properly opened-up face, notwithstanding repeated demands on the part of the Pursuers, and thus prevented the machine from being tested in the manner provided by the contract*: (5.) *Find that the Defender has failed to prove that the Pursuers agreed to substitute for the Carfin cutting any other cutting as the place for the trial of the said machine: Therefore repel the defences, and decern against the Defender to pay to the Pursuers the sum of* £1115, *with the interest prayed for, in terms of the petition*: (6.) *Find the Pursuers entitled to expenses in both Courts, but subject to deduction of the expense of the conjunct probation, which was incompetent, and ought not to have been admitted; and remit to the auditor to tax the account, or accounts, of said expenses, and to report* (1).

Against the findings 3, 4, 5, and 6, the Appellant appealed to

(1) Court Sess. Cas. 4th Series, vol. vii., p. 778; 17 Scot. Law Rep. 565.

this House. A petition was lodged by the Respondents against the competency of the appeal under the *Judicature Act* of *Scotland* (6 Geo. 4, c. 120), s. 40, being a case commenced in the Sheriff's Court, and the findings appealed against being findings of fact, and not of law. But at the Bar this petition was abandoned by the Respondents, on the ground that they could not support the allegation that the findings were findings of fact only, and did not involve any question of law.

Jan. 31 and Feb. 1, 3. *Sir F. Herschell, S.G.*, and *Mr. Johnstone*, contended for the Appellant, the essential obligation of the contract here was to supply a machine by February, 1877, capable of doing a certain amount of work within a certain time. That obligation could not be cut down by any stipulation as to a properly opened-up face. In February, the Respondents, it was clearly proved, were not ready with the machine. Accordingly the contract was altered as to time. In August, the Appellant was ready to give the test at *Carfin*, but not till the 14th of September is the machine furnished, and after four days it breaks down, having utterly failed to do anything like the stipulated quantity of work. Under these circumstances they submitted the Appellant was entitled, having regard to the failure at *Garriongill*, where it had an ample face and every necessity for a good trial, to say "you have not delivered to me within a reasonable time a machine capable of doing the amount of digging contracted for, and therefore I am not bound to give it another trial." It could not be the true construction of the contract as altered, that whenever the Respondents chose to furnish a machine, even though manifestly incapable, that the Appellant must go to the expense and inconvenience of giving it a trial at a properly opened-up face.

The evidence adduced in the Sheriff's Court amply established that a sufficient trial of the machine had been given to make it manifest to all that it did not conform to the contract. They submitted that issue was clearly raised by the Appellant's pleadings. But the interlocutor of the Court below contained no finding as to whether or not the machine conformed to contract, and as to other matters of fact raised by the Appellant, which if found in his favour would entitle him to absolvitor. On these

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grounds they asked that the case should be remitted to the Court below to pronounce findings on these matters of fact.

Their further argument is fully dealt with by the Law Peers in their opinions.

[They commented on—question of remit: *Fleeming* v. *Orr* (1); *Duncan* v. *Scott* (2).]

Mr. *E. E. Kay*, Q.C. (with him Mr. *Webster*, Q.C.), maintained for the Respondents, that it was one of the essential conditions of the contract, that the machine should be tested as capable of digging the material at the "*Carfin* cutting," that it was impossible to do that until the Appellant, in whose possession the cutting was, gave facilities for it, namely, waggons, rails, and a "properly opened-up face."

It could not be said that the legal conclusion drawn from the facts was wrong—there was a contract of sale and delivery which made acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer by his act prevents the possibility of the seller fulfilling the condition. Upon these facts the Court held as a matter of law that the condition must be held as implemented: See *Bell's* Prin., sect. 50; *Erskine*, 3, 3, 35; and *Hunter* v. *Earl of Hopetun* (3).

Secondly, the Appellant could not shew that a fact material to the legal result remained undisposed of. Instances of such omission might be found in *Fleeming* v. *Orr* (1); *Steel & Craig* v. *State Line Steamship Company* (4), but here no such fact was left unfound by the Court.

The Appellant did not contend that the machine was disconform to the specification, but he did contend that—notwithstanding there was no trial at *Carfin* on a properly opened-up face—that there ought to have been a finding that the machine was capable. The reason for the absence of such a finding was obvious. The test of what was a suitable machine was here expressly provided for by the terms of the contract. A sufficient machine under the contract was a machine which would do the stipulated amount of work at the stipulated trial at *Carfin*.

(1) 2 Macq. 14.
(2) Court of Sess. Cas. 4th Series, vol. iii. (H. of L.) at p. 73.
(3) 4 Macq. 972.
(4) 3 App. Cas. 72.

Also, as the Appellant had not raised on his pleadings the contention that he was relieved from complying with the stipulation of supplying a properly opened-up face and allowing a trial, by reason of there having been a demonstration of the incompetency of the machine by a trial which he had made, he was not able to have a remit to have that fact found in the findings. On these grounds he submitted that the findings of the Court below were conclusive against the Appellant.

[He also cited *Hotham* v. *East India Company* (1); *Planché* v. *Colburn and Another* (2).]

Sir F. Herschell, S.G., in reply.

The Lords having taken time to consider judgment, pronounced the following opinions:—

Mar. 7. LORD BLACKBURN:—

My Lords, this is an appeal against an interlocutor of the First Division of the Court of Session, pronounced in reviewing the judgment of the Sheriff's Court of *Lanarkshire*, proceeding on proof taken on a record made up in the Sheriff's Court.

The Court of Session, in reviewing the judgment, had full power to find the facts on the proof, and to determine the law also. But the Legislature have, by the *Judicature Act* of *Scotland*, 6 Geo. 4, c. 120, s. 40, provided that—

When in causes commenced in any of the Courts of the Sheriffs, ... or other Courts, matters of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matter of law, but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor.

The old rules of pleading in force in *England* at that time were founded on the strictest logic, often carried to an extreme hich, when the pleadings were not managed by very skilful

(1) 1 Durn. & East, 638–645. (2) 8 Bing. 14.

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hands, worked injustice, but always founded on a principle. And those which regulated special verdicts, to which the Legislature here refers, were no exception. They are very accurately and fully stated by Chief Baron *Comyns* in his Digest, title Pleader. The following, I think, bear on the question what the Legislature intended:

> The jury may find by their verdict all things given in evidence, if it be not contrary to the evidence or the admission of the parties. S. 4.
>
> They cannot find a matter contrary to the record, and if they do, the verdict is void as to that. S. 16.
>
> So the jury ought not to inquire of a thing which is agreed by the parties to the issue. S. 17.
>
> So the jury cannot find matter out of the issue, ... though the matter out of the issue destroy the Plaintiff's title. S. 18.

The reason of this last rule, which at first glance may seem harsh, is that the Defendant ought to have obtained in proper time leave to amend his pleadings, and not to rely on getting the jury to find on the evidence something never alleged by him, and which the Plaintiff was not called upon to be prepared to contest.

Whether we take these rules of English pleading as our guide, or the rules of sense and logic on which they are founded, it seems to me clear that the Court of Session need not in their interlocutor notice anything on which the parties are agreed. It may be convenient to do so in order to make the other findings clear, but it cannot be necessary. And they ought not to find anything, even if destructive of the Plaintiff's title, if it is not included in the issues joined; if it is necessary for the purposes of justice, they may, I suppose, allow an amendment, and remit the amended issue to the Court below for further proof, or dispose of it on the proof already given, as justice may require; but they ought not to find it in their interlocutor, on the record as it stands; and no complaint can be made in this House against them for not doing what they ought not to have done. This view of the statute of Geo. 4 renders it important to see what the record or issue is.

I have had the advantage of perusing the opinion of my noble and learned friend who is to follow me (Lord *Watson*), and as I agree entirely in all he says on this subject, I shall not repeat it (1).

(1) *Post*, p. 266.

The interlocutor finds that the contract was in terms of the two letters, 21st and 22nd September, 1876. It is a question of law what the effect of those letters was. I do not feel much doubt about that. The Pursuers were to supply a machine capable of digging and filling into waggons at least 350 cubic yards of clay in a day. It was to be brought to the Defender's cutting at *Carfin*, erected, and tested before February, 1877. Both agreed that the event of the testing was to be conclusive. If the machine did not answer the test, the Pursuers were to remove it before the end of February; if it did answer the test the Defender was to keep it and pay the agreed price.

I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances. In a very early case in *England*, in the Year Book of 9th Edward IV., Easter Term, 4 A., where the Defendant was sued on an obligation, the condition of which was that, if the great bell of *Mildenhall* should be brought, at the cost of the men of *Mildenhall*, to the house of the Defendant in *Norwich*, and there weighed and put in the fire in the presence of the men of *Mildenhall*, and the Defendant made a tenor of it to agree with the other bells of *Mildenhall*, the obligation should be void. *Choke*, then Chief Justice, and *Littleton*, and *Moile*, then Judges, held that a plea by the Defendant that the bell was not weighed nor put in the fire was bad, for the Defendant, being a brazier, it was his part to weigh it and put it in the fire; *Needham*, who was the fourth Judge, thought that the weighing of the bell required no particular skill, and might as well have been done by the men of *Mildenhall* or those they employed as by the Defendant. But he said that the putting it into the fire was the part of the artificer. And as I understand it, for the rest of the report is not very clear, a further point was mooted, and the Serjeants agreed that if the Defendant had put the bell in the fire, without seeing it weighed, he would have waived that which was but an incident, and been

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as much bound to fulfil that which was the substance of the contract, viz., to make a proper tenor, as if he had had it weighed. I mention this old case, decided in 1469, because it is on it that the different digests laying down the principle are all founded, and because I think it is obvious good sense and justice. Now, applying this principle to the present case; both agree that the machine shall be tested at *Carfin*, and therefore the Pursuers agreed that they would bring the machine to the *Carfin* cutting, and there erect it on the Defender's land, and there do their part in working it till there had been a fair test; and the Defender agreed that he would do his part, and even if there had been no express mention in the letters of a properly prepared face, the nature of the thing shews that he agreed to let the Pursuers have access to a part of the cutting, put by the Pursuers in such a condition that the machine could be fairly tested by working at it, and to assist in working it there until there had been a fair test. If, then, the averments on the record had been that, before the end of March, 1877, the machine had been brought to *Carfin* cutting and there delivered to the Defender, who required the Pursuers to remove it, and it was still in his possession there, I think there could be no doubt that the four first findings in the interlocutor put a proper construction on the contract, which, being a matter of law, your Lordships are entitled to inquire into, and that, if they find the facts truly, into which your Lordships have no right to inquire, it would follow in point of law that the Defender, having had the machine delivered to him, was by his contract to keep it, unless on a fair test according to the contract it failed to do the stipulated quantity of work, in which case he would be entitled to call on the Pursuers to remove it. And by his own default he can now never be in a position to call upon the Pursuers to take back the machine, on the ground that the test had not been satisfied, he must, as far as regards that, keep, and consequently pay for it.

But the time when the machine was brought to *Carfin* and the Defender refused a further trial was long after February, 1877; it was in September and October, 1878. Unless both parties had agreed to enlarge the time, the original bargain would have come to an end by efflux of time in 1877.

But it is agreed on the record that the time was enlarged, and the bargain in all other respects still in force at least as late as July, 1877, and the Court of Session was not called upon to repeat in the interlocutor what was agreed on the record by both parties. There is a controversy on the record as to the terms on which the time was enlarged; and the question raised on that, which is a question of fact, is disposed of by the last finding in the interlocutor, into the accuracy of which, it being a finding of fact, your Lordships are not entitled to inquire.

It was, however, argued at your Lordships' bar that that was another ground of defence appearing on the evidence. I think I state fairly, and as favourably to the Pursuers as I can, the argument thus:—

It was said that the repeated failures of the machine between July, 1877, and October, 1878, though, not being on the stipulated place and in the stipulated manner, they were not the test, nevertheless, coupled with the other evidence, shewed that the machine was not such as could possibly in substance satisfy the contract. And that, therefore, the Defender was justified, or at least excused, in refusing to incur further expense and trouble in putting in force a test which could not possibly turn out favourably to the Pursuers, and that he was entitled to throw the machine back on the Pursuers' hands, not on account of the terms of the bargain, but on the general ground that a purchaser is entitled to return a thing which has been delivered to him in fulfilment of a contract, and to demand back the price if paid, or refuse payment if not yet paid, if the thing delivered is not in substance the thing contracted for. On the principle of the civil law expressed in the Digest, lib. 18, title 4: "*Si æs pro auro veneat non valet.*"

I do not think it desirable to express an opinion on a point which it is not necessary now to discuss. I will, therefore, only say that the view I took of the law on this point in 1867 is expressed in a judgment of the Queen's Bench, which I delivered in *Kennedy* v. *Panama Mail Company* (1). The other Judges of that Court adopted that exposition of the law, and I have not yet seen any reason to change my opinion. But I agree that if such a defence had been raised on the record in this case, the Court of

(1) Law Rep. 2 Q. B. 580, at p. 586.

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Session ought, in their interlocutor, to have found how much, if any, of the allegations were proved in fact. It is because, having carefully read the record, and having had the advantage of reading my noble and learned friend (Lord *Watson's*) observations on the record, I am clearly of opinion that no such defence was raised by the issue: that, I think, the Court of Session were not bound in their interlocutor to deal with it, even if it was made on the argument before them, which I think it was not.

I am, therefore, of opinion that the appeal should be dismissed, with costs.

LORD WATSON:—

My Lords, this appeal is brought against a judgment of the First Division of the Court of Session, by which the Appellant, *John Mackay*, railway contractor, *Wishaw*, has been decerned to make payment to the Respondents, who are a firm of engineers in *Airdrie*, of the sum of £1115 sterling, being the price of a patent steam-excavating machine, manufactured and supplied by them to the Appellant, as in implement of a written contract of sale entered into between the parties in the month of September, 1876.

The action was raised, and a proof was allowed and taken in the Sheriff Court; and it became the duty of the Court of Session, in reviewing the judgments of the sheriff's proceeding on that proof, to specify in their interlocutor, as required by sect. 40 of the *Scotch Judicature Act* (6 Geo. 4, c. 120), the several facts material to the case which they found to be established by the proof, and to express how far their judgment proceeded on the matter of fact so found, or on matter of law, and the several points of law which they meant to decide.

The specific findings upon which the decerniture against the Appellant is rested in the judgment under appeal, are as follows:— [Reads the interlocutor of the Court below (1).]

In so far as these findings consist of matters of fact, the review of this House is excluded by the clause of the *Judicature Act* already referred to (2).

The first two findings relate exclusively to the constitution and construction of the written contract upon which the action is laid,

(1) *Ante*, p. 258. (2) *Ante*, p. 261.

and are, therefore, matters of law. No appeal has been taken against these findings, and the Appellant must be held to admit that they are sound. But the Appellant is not thereby precluded from founding upon other conditions of the contract, or upon other views of the contract, so long as these do not involve the negation of what is affirmed by the findings in question.

In my opinion the third and fourth findings involve law as well as fact, in so far as they assume or imply that the Appellant was, by the conditions of the contract, bound to provide the "properly opened-up face" on which the machine was to be tried. So far as it is thereby found that, of the two contracting parties, the Appellant alone had it in his power to provide a properly opened-up face in the *Carfin* cutting, and that the Appellant did not provide such face, notwithstanding repeated demands on the part of the Respondents, nothing appears to me to be involved except matter of fact.

The fifth finding appears to me to be one of fact only.

The Appellant challenges the interlocutor under appeal upon two grounds. First of all, he maintains that, in respect there is no finding to the effect that the digging machine was conform to contract, the facts as found are insufficient to sustain a decree for the contract price. Alternatively he asserts that there were important issues of fact raised by him in the Court below, to which his proof was directed, but which the Court has not disposed of; and he contends that, assuming the facts already found to warrant the decree appealed against, he will, upon these issues being decided in his favour, be entitled to decree of *absolvitor*. And it was contended that the House ought, with a view to the final disposal of the case, to remit to the First Division of the Court to pronounce findings upon these matters of fact.

In order to a due understanding of the interlocutor under appeal, and of the Appellant's contention, it is necessary to refer to the closed record, which is the issue to which the proof of the parties was directed, and to which the findings of the Court apply.

The Respondents, in their condescendence (Articles 1 and 2), set forth the two letters of the 21st and 22nd of September, 1876, which have been held to constitute the contract. The first in date bears to be a confirmation by the Respondents of a verbal arrange-

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ment between one of their partners and the Appellant. [His Lordship read the first letter (1).] The letter of the 22nd of September, which is a confirmation of the preceding by the Appellant, recapitulates the terms of the agreement in language somewhat different, but having, for all practical purposes, the same meaning.

The parties are agreed upon the record as to the following facts:—(1) that the machine was not ready, and was not sent to *Carfin* cutting before or during February, 1877; (2) that it was afterwards sent to *Garriongill* cutting, and remained there from July, 1877, till May, 1878; and (3) that thereafter, certain repairs and alterations having been made upon it, the machine was sent to *Carfin* cutting about the middle of the month of September, 1878, where it still remained at the time the action was raised. They are also agreed that from July, 1877, to August, 1878, the Appellant was unable to proceed with his work at the *Carfin* cutting owing to a change of the plans of the railway company.

The parties join issue, however, upon the points following:—(1) the Appellant alleges, but the Respondents deny, that he was in a position to give a proper working face for testing the machine at *Carfin* cutting in February, 1877; (2) the Respondents state that the machine was sent to and kept at *Garriongill* cutting merely for the purpose of experiment, with a view to its being improved and strengthened before it was tested at *Carfin*, whereas the Appellant avers (Ans. to Cond. 5) that the parties "agreed that the machine instead of being tested at the *Carfin* cutting should be tried at the *Garriongill* cutting."

The Respondents (Cond. 7) aver in substance that the machine was sent to *Carfin* in order to its being subjected to the contract test,—that a proper working face was not provided by the Appellant whilst the machine was at work there,—that the machine could not in consequence be fairly tried, and that "the machine was fit for the contemplated work." The Appellant (Ans. Cond. 7) admits that, "on request of the Respondents," he "permitted them to make a further trial of the machine; a suitable face then was ready for trial on 3rd August, 1878. In consenting to a further trial at *Carfin*, the Defender informed the Pursuers that, if the

(1) *Ante*, p. 252.

machine again broke down it would have to be removed so as not to interfere with the progress of the cutting, which had to be proceeded with with the utmost dispatch." The Appellant meets the Respondents' allegations as to his failure to provide a suitable working face, and the fitness of the machine, with a direct negative, thereby asserting that he did provide a proper face whilst the machine was working at *Carfin*, and that the machine was not capable of performing the amount of work required by the conditions of the contract.

The 8th article of the condescendence for the Respondents is in these terms:—"The Defender (Appellant) called on the Pursuers (Respondents) to remove the machine from *Carfin*, as he alleged it had not excavated and filled the stipulated quantity. The Pursuers refused to do so, and the machine is still at *Carfin*. The machine was delivered to the Defender at *Carfin*, and is still in his possession there." The Appellant's answer is, "Admitted."

The foregoing answer appears to me necessarily to imply an admission on the part of the Appellant that the machine was delivered to him at *Carfin* cutting by the Respondents as an implement of the contract, and that he rejected it because of its incapacity to perform the amount of work stipulated in the contract. And that must be read in connection with his previous assertion that the "further trial" at *Carfin* was made on a proper face. Taking all his averments together, they appear to me to disclose no ground of defence to the action, except one, that the machine was disconform to contract, as was evidenced by the fact that it had been subjected to the contract test by working at a suitable face, and had failed to perform the stipulated amount of work. And it is a notable circumstance that, neither in the opinion of Lord *Shand*, who carefully states the respective contentions of the parties, nor in the judgment delivered by Lord *Mure*, is there to be found the least indication of any other controversy having been raised before the Court of Session by the Appellant.

This view of the Appellant's record is borne out by his pleas in law. The only pleas which indicate any substantive defence to the Respondents' claim for the contract price are these:—

"2. The machine having failed on trial, the Defender is not bound to accept it.

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"3. The sale of the machine having been conditional on the trial, which has failed, the Defender is not liable in the price thereof."

Such being the shape of the record or issue to which the findings of the Court of Session are applicable, I am of opinion that the findings in the interlocutor appealed against are in themselves sufficient to entitle the Respondents to decree for the price of the machine. The terms of the contract seems to me to imply very plainly that it was incumbent on the Appellant, and not upon the Respondents, to provide "a properly opened-up face" for the trial of the machine. Then the Court negatives the existence of the agreement, alleged by the Appellant, to substitute *Garriongill* for *Carfin* cutting as the place of trial; and find in substance that the Appellant failed to provide a proper face at *Carfin* cutting, "notwithstanding repeated demands" on the part of the Respondents. The Respondents were only entitled to receive payment of the price of the machine on the condition that it should be tried at a proper working face provided by the Appellant, and that on trial it should excavate a certain amount of clay or other soft substance within a given time. They have been thwarted in the attempt to fulfil that condition by the neglect or refusal of the Appellant to furnish the means of applying the stipulated test; and their failure being due to his fault, I am of opinion that, as in a question with him, they must be taken to have fulfilled the condition. The passage cited by Lord *Shand* from *Bell's* Principles (§ 50) to the effect that, "If the debtor bound under a certain condition have impeded or prevented the event, it is held as accomplished. If the creditor had done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement," expresses a doctrine, borrowed from the civil law, which has long been recognised in the law of *Scotland*, and I think it ought to be applied to the present case.

It was argued for the Appellant that the condition was only intended to operate in his favour, and that he might therefore dispense with it and defend himself upon the ground that the machine was, in point of fact, disconform to contract. But I cannot regard the stipulation in that light; it was so obviously for the interest of the manufacturers of this new patent machine

to have the question, whether it was or was not conform to contract, determined by reference to a simple and definite test, instead of being left to the uncertainty of speculative opinion, aggravated by the risk of litigation.

I now proceed to consider whether, before disposing of this case, any remit should be made to the Court below.

As I understood the Appellant's argument, he desired to have an opportunity of asking findings from the Court of Session to the effect that (1) the machine was disconform to contract, and (2) that the trials of the machine, though not to be regarded as equivalent to the test provided by the contract, made its disconformity to contract apparent to all concerned. Various other points were suggested for remit, but these appeared to me to be mere afterthoughts, and being unable to find any trace of their having been made grounds of defence in the record, I take no further notice of them. In the case lodged for the Appellant, his pleadings upon the facts, which include a great deal of unnecessary observation upon the proof led in the cause, are thus summed up (Case, p. 36): —"The only fact found by the interlocutor is that the Appellant failed to provide a properly opened-up face at the *Carfin* cutting. It is submitted that this finding does not, in point of law, warrant the finding that the Appellant is liable to pay the sum of £1115 and expenses. It is consistent with the facts found that the machine was not in fact according to contract, and that such trials as there had been afforded ample evidence of this. If this be so, it is submitted that the Appellant would not be liable to pay for the machine, and it is contended that the evidence establishes these facts, or, at all events, that the machine did not comply with the contract."

In the view which I have taken of the judgment under appeal, any general allegation by the Appellant, to the effect that the machine was not conform to contract, is irrelevant, because, according to that view, the machine must be held to have satisfied the contract test, which was not applied, owing to the default of the Appellant.

As to his other allegation, that "such trials as there had been" made it clear that the machine was disconform to contract, I doubt whether it is to be found on the record, and, even if it be, I have

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no doubt of its irrelevancy. No such statement would, in my opinion, afford a relevant answer to the case disclosed by the interlocutor under appeal, unless it amounted to this, that the machine was so disconform to the specification, or so palpably deficient in working power, that the Respondents were not in *bonâ fide* to tender it to the Appellant as in implement of the contract. I need only add that I have not heard it suggested in argument that any such case has been made by the Appellant, on record or elsewhere.

In appeals falling within the scope of the 40th section of the *Judicature Act*, 1825, I humbly conceive that this House has no concern with the proof which has been led in the Sheriff's Court. When it can be shewn that the Court of Session has not exhausted the issue before it, and that there are material questions of fact left undetermined, a remit will be made to the Court below to pronounce findings upon these questions, but that can only be shewn by a reference to the record, and not to the proof. It would, in my opinion, be productive of great inconvenience if the House were to make remits upon matters of fact which are not very plainly set forth upon record, as substantive grounds either of pursuit or of defence.

I am accordingly of opinion that the application for a remit which has been made by the Appellant's counsel, ought not to be entertained, and that the judgment under appeal must be affirmed, with costs, and the appeal dismissed.

LORD SELBORNE, L.C.:—

My Lords, having had an opportunity of reading in print the judgments which have now been delivered by my two noble and learned friends, and agreeing with them, I think it unnecessary to add anything further.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, March 7th, 1881.

Agent for Appellant: *William Robertson.*
Agents for Respondents: *Simson & Wakeford.*