COURT OF SESSION.

Saturday, May 26.

SECOND DIVISION.

[Sheriff Court at Glasgow.

M'CONNELL & REID *v.* W. & G. MUIR.

Compensation—Liquid and Illiquid Claims—Constitution—Sist.

In an action to recover the price of 400 bags of flour sold and delivered, the defenders sought to set off the price paid by them for 250 bags sold to them about the same time for which a delivery-order had been granted and acknowledged by the storekeeper, but of which they had not obtained delivery owing to a dispute as to the ownership of the flour. The question of the ownership was the subject of two multiplepoindings, one in the Sheriff Court which had been sisted to await a decision in the other, which was in the Court of Session but to which the defenders were not parties. The Lord Ordinary had pronounced judgment in the Court of Session multiplepoinding action, which the defenders maintained would rule the Sheriff Court action, with the effect that the pursuers never were owners of the 250 bags. *Held* that the counter claim was neither liquid nor *quod statim liquidari potest*, and so could not be set off against the liquid claim of the pursuers, and that there were no special circumstances averred to lead the Court to depart from the general rule and to grant a sist.

On 26th April 1906 M'Connell & Reid, flour importers, Glasgow, brought an action in the Sheriff Court there against W. & G. Muir, bakers, Calton, Glasgow, in which they sought to recover £262, 10s., the price of 400 bags of flour sold to the defenders and delivered on 8th March to them.

In defence the defenders pleaded—"(1) The defenders not being indebted to the pursuers in the sum sued for, and being willing to pay any balance that may be due by them to the pursuers, the present action should be dismissed with expenses," and sought to set off against the sum claimed, the sum of £172, 16s. 3d., the price paid by the defenders for 250 bags of flour which they averred had never been delivered. They made a statement of facts, which with the answers thereto for the pursuers was as follows:—"(Stat. 1) The defenders have often bought flour from the pursuers. Prior to 21st December 1904 they had purchased from the pursuers, but had not received delivery of the 400 bags of flour, and also 250 bags of flour, the price of which, less discount, was £172, 16s. 3d. Notwithstanding the delivery-order mentioned by the pursuers, the defenders have not yet received delivery of the said 250 bags of flour. (Ans. 1) Admitted that defenders have frequently purchased flour from pursuers, and that on 21st December 1904 defenders had not received delivery of the 400 bags of 'Unity' flour—same having been sold for forward delivery. Admitted that defenders had prior to 21st December 1904 also purchased from pursuers other 250 bags of flour, but denied that delivery had not been given. Explained that said 250 bags of flour were of 'Semper Idem' flour, which were held by Thomas Hayman & Son, carting contractors and storekeepers, 26 Robertson Street, Glasgow, as custodiers, in their Commerce Street Store on behalf of and subject to the order of pursuers, and were purchased by defenders from pursuers on 7th December 1904, 'ex store,' at the price of 28s. per bag, with 1¼ per cent. discount for cash in fourteen days, and delivery of same was given by pursuers to defenders on said 7th December by delivery-order addressed to the said Thomas Hayman & Son, granted by pursuers in favour of defenders for said 250 bags of 'Semper Idem.' The defenders paid the price of said 'Semper Idem' on 21st December 1904, and took the discount of 1¼ per cent. (Stat. 2) On said 21st December 1904 the defenders paid to the pursuers the said sum of £172, 16s. 3d., but they have not yet received delivery of the said 250 bags of flour—Thomson M'Lintock, chartered accountant, Glasgow, as trustee on the sequestrated estates of John M'Nairn & Company, produce merchants and importers, 104 Brunswick Street, Glasgow, having claimed that the same belonged to the said John M'Nairn & Company, and not to the pursuers, and that the pursuers had no title to sell the same to the defenders. (Ans. 2) Admitted that on said 21st December 1904 defenders paid to the pursuers the said sum of £172, 16s. 3d. *Quoad ultra* not known and not admitted. Explained that upon said 21st December 1904 defenders received from the said Thomas Hayman & Son, to whom the said delivery-order had been addressed, a warrant or certificate of transfer to the following effect:—'We have this day transferred to your account 250 bags of flour "Semper Idem" in Commerce Street Store, by order of Messrs M'Connell & Reid, which we now hold subject to your instructions only, you paying the store charges on same.' (Stat. 3) The question of the ownership of the said 250 bags of flour has been raised in an action of multiplepoinding which is at present pending in this Court, and to which the pursuers and defenders have been called as parties. The record in said action has not yet been closed. The defenders' claim in said action was lodged in order that their rights and the rights of the pursuers might not be prejudiced, and they intend either to withdraw or amend it. (Ans. 3) Admitted that the said action of multiplepoinding is presently pending in this Court, and reference is made to defenders' claim in said action, a copy of which is herewith produced. . . . . ."

The action of multiplepoinding in the Sheriff Court referred to had been sisted pending a decision in a multiplepoinding raised in the Court of Session before Lord Ardwall dealing with the same matter—

Hayman & Son v. *M'Lintock*, 1906, 13 S.L.T. 863. Both multiplepoindings were raised by Hayman & Son as nominal raisers, Thomson M'Lintock being real raiser. W. & G. Muir were not parties to the Court of Session action. M'Connell & Reid had lodged claims in it, but not in the Sheriff Court action though called as defenders.

On 13th December the Sheriff-Substitute (BALFOUR) repelled the defences and decerned against the defenders in terms of the petition, holding that they could not set off the price of the 250 bags of which the ownership was in dispute against the price of the 400 bags.

On appeal the Sheriff (GUTHRIE) on 16th February 1906 recalled his Substitute's interlocutor, decerned *ad interim* for £89, 13s. 9d., and *quoad ultra* sisted the action.

Note.—"There is a sum of money belonging to the defenders in the pursuers' hands, for which it may turn out that the pursuers have not given value. It is not a liquid debt by the pursuers to the defenders, but it is in course of being made liquid or the reverse. This is, I think, an exceptional case in which the principle of retention may be extended on grounds of equity apart from usage or mutual contract, for the pursuers, founding on a liquid debt, are shown on probable grounds to be under an obligation to account to their debtor for a large sum arising out of a similar and almost simultaneous transaction. The cases of *Munro* v. *Macdonald's Executors*, 4 Macph. 687, and *Ross* v. *Ross*, 22 R. 461, cited to me appear to warrant the sist which I have granted in order that the true position of the parties *inter se* may be fixed."

The pursuers appealed to the Court of Session, and argued—The Sheriff-Substitute was right. It was owing to defenders' own fault and delay that they did not obtain actual delivery. If the defenders had any claim, it was for damages for failure to implement a contract of sale. The claim was neither liquid nor, as the Sheriff stated, "in course of being made liquid or the reverse." For the multiplepoinding in the Sheriff Court had been sisted, and, moreover, the defenders now stated regarding their claim therein that they intended "either to withdraw or amend it," while to the Court of Session multiplepoinding the defenders were not parties. The pursuers' claim on the other hand was admitted, and the ordinary rule that an illiquid claim cannot be set off against a liquid claim applied—*Mackie* v. *Riddell*, November 20, 1874, 2 R. 115, 12 S.L.R. 115; *Scottish North-Eastern Railway Company* v. *Napier*, March 10, 1859, 21 D. 700; *Mackie* v. *Mackie*, June 15, 1897, 5 S.L.T. 42. The cases of *Munro* v. *Macdonald's Executors*, March 30, 1866, 4 Macph. 687, and *Ross* v. *Ross*, March 9, 1895, 22 R. 461, 32 S.L.R. 337, referred to by the Sheriff, were exceptional and special cases. The defenders' present position was inconsistent with their claim in the Sheriff Court multiplepoinding, where they stated that 250 bags of the flour "belonged to the said M'Connell & Reid."

Argued for the defenders (respondents)—1. The defenders' claim was really liquid; it was for repetition of the price paid. They could not have got delivery, for according to Lord Ardwall's judgment in *Hayman & Son* v. *M'Lintock*, February 22, 1906, 13 S.L.T. 863 (the judgment in which would necessarily rule the Sheriff Court multiplepoinding) the property had never passed from M'Nairn & Company, and therefore, *prima facie* at any rate, the pursuers had no title to sell. In any case a delay from 21st December (the acknowledgment of intimation of the delivery-order) till after 9th February was not unreasonable. 2. But even assuming the claim was illiquid, it was in process of being made liquid by the multiplepoindings in the Court of Session and in the Sheriff Court, and the action should be sisted to await the result—*Munro* v. *Macdonald's Executors*; *Ross* v. *Ross* (*cit. supra*). In *Mackie* v. *Mackie* decree had been given before the counter claim was raised. *Mackie* v. *Riddell* was quite different from the present case; it would have been similar if the horse there in question had never been delivered.

LORD JUSTICE-CLERK—I have no doubt that if this case is to be disposed of in the way the Sheriff has done, it can only be on the ground of very special circumstances to take it out of the ordinary rule that an illiquid claim cannot be set off against one that is liquid. The Sheriff has treated it as an exceptional case. After giving it full consideration I cannot see any such special circumstances as would entitle us to treat it otherwise than according to the usual rule. The purpose of the defenders' plea is to save themselves the risk of loss in respect of another transaction. I cannot see why that should affect the matter. We are told that there is an action of multiplepoinding pending in the Court of Session, that it will shortly be decided, and that the decision in that case will set up the defenders' claim. We do not know as to that. We do not know what the decision will be, and we do not know, whatever the decision is, that it will necessarily decide the question between the parties in this case. I am sorry to differ from the Sheriff, who has had a large experience in this class of cases, but I must say that I think the Sheriff-Substitute is right, and that there are not sufficient grounds of an exceptional nature for sisting the case as the Sheriff has done.

LORD KYLLACHY—I regret to be obliged to agree. I think the Sheriff-Substitute's judgment must be returned to. If on the record in the present case facts were averred and admitted which even *prima facie* instructed a good claim on the part of the defenders against the pursuers arising out of the previous transaction mentioned, I should have been quite disposed to stretch a point so as to try in the present action the merits of the defenders' claim, and if it turned out to be just, to give the defenders the benefit of a set off. But on examining this record I find that there is not only no admission of such facts but no averment of them. There is nothing to show and

nothing averred relevant to infer that even *prima facie* the defenders have a good claim for failure to deliver under the previous contract. In these circumstances I am constrained to agree with your Lordship that the Sheriff's interlocutor must be recalled and the interlocutor of the Sheriff-Substitute restored.

LORD STORMONTH DARLING — I agree. The argument for the defenders is that they have paid away money to the pursuers which they are entitled to get back in an action of repetition or of damages. It is said that we should sist the present action until that question is decided. It is not said that there is any case in Court which will necessarily settle it. No doubt it is said (Stat. 5) that the issue in this action "depends in great measure on the judgment to be pronounced in the action of multiplepoinding referred to in art. 3 hereof." But when we turn to article 3 we find that the record in that action is not closed and that the defenders intend either to withdraw or amend their claim. Then as to the multiplepoinding in this Court, Lord Ardwall's judgment, although it might be valuable as a precedent, would not settle the question as between these particular parties. The Sheriff is therefore hardly accurate in saying that the defenders' counter claim "is in course of being made liquid or the reverse." It is not in the position of being "*quod statim liquidari potest.*" Accordingly the ordinary rule that an illiquid claim cannot be set off against a liquid claim applies and I agree that the interlocutor of the Sheriff should be recalled and that of the Sheriff-Substitute restored.

LORD LOW—I am of the same opinion. It is plain that there are no special circumstances here which would justify the Court in treating this case as an exception to the well-established general rule that an illiquid claim cannot be set off against a liquid claim.

The Court pronounced this interlocutor—

"Sustain the appeal, recal the said interlocutor, and affirm the interlocutor of the Sheriff-Substitute dated 13th December 1905: Repel the defences and decern against the defenders in terms of the prayer of the petition: Find the defenders liable in expenses in this and in the Inferior Court since the said 13th December 1905," &c.

Counsel for the Pursuers (Appellants)—Crabb Watt, K.C.—MacRobert. Agents—Cadell, Wilson, & Morton, W.S.

Counsel for the Defenders (Respondents)—Horne. Agent—W. B. Rankin, W.S.

Saturday, June 2.

SECOND DIVISION.

[Sheriff Court at Glasgow.

QUINN *v.* JOHN BROWN & COMPANY, LIMITED.

Process—Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *sub-sec.* 4—*Assessment of Compensation in Action Brought Independently of the Act—"Court in which the Action is Tried."*

In an action of damages for personal injuries at common law and alternatively under the Employers' Liability Act 1880, a Sheriff after a proof assoilzied the defenders, and inasmuch as the pursuer intimated he did not wish to proceed under the Workmen's Compensation Act 1897, found it unnecessary to pronounce further. The pursuer appealed, and, on the Court proceeding on new findings in fact to dismiss the action, moved for compensation to be assessed under the Workmen's Compensation Act. The defenders argued that that should be done in the Sheriff Court. The Court *remitted* to the Sheriff.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1 (4), enacts—"If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. . . ."

In October 1903 John Quinn, rigger, Glasgow, raised an action in the Sheriff Court at Glasgow against John Brown & Company, Limited, Clydebank Engineering and Shipbuilding Works, Dumbartonshire, for the sum of £500, or otherwise for the sum of £218, 8s. as damages at common law and under the Employers' Liability Act 1880 respectively, on account of personal injuries sustained by him on 31st March 1903 when working in the defenders' employment.

On 31st July 1905 the Sheriff-Substitute (DAVIDSON), after a proof, pronounced an interlocutor finding in fact, *inter alia*, "that no fault has been proved against the defenders or anyone in the position of superintendent in their employment within the meaning of the Employers' Liability Act 1880," assoilzieing the defenders, and "in respect it was stated at the bar that pursuer does not desire to proceed in terms of