Counsel for the Reclaimers—Solicitor-General (Watson), Q.C., and Trayner. Agents—Melville & Lindesay, W.S.

Counsel for the Respondents—Dean of Faculty (Clark), Q.C., and Kinnear. Agents—W. & J. Cook, W.S.

Friday, November 20.

FIRST DIVISION.

[Sheriff of Dumfriesshire.

GRAHAM *v.* BORTHWICK & CLAPPERTON.

Pauper—Settlement—Proof.

The Inspector of Poor in a parish brought an action against two other parishes for payment of the expense of maintaining a pauper, the grounds of action being that the pauper had a birth settlement in one or other of the said parishes. One of the defenders averred a residential settlement in the pursuer's parish, the other's averment was "not admitted." *Held* that the first defender should have been allowed a proof, and the pursuer a conjunct probation.

This was an appeal from the Sheriff Court of Dumfriesshire by the inspector of poor of the parish of Hoddam in an action at his instance against the inspectors of Middlebie and Annan, for recovery of £65, 17s. 8d., being the expense of maintaining a pauper from October 1868 to May 1873. The Sheriff-Substitute found for the defenders, and the Sheriff adhered.

The pursuer appealed.

At advising—

Lord President—The pursuer of this action is the inspector of poor of the parish of Hoddam, and he has called two defenders, the inspectors of poor of the parishes of Middlebie and Annan. The object of the action is to obtain relief for payments made for a pauper named Deans, and the ground of action was, as against Middlebie, that the pauper was born there; the same ground being stated alternatively against Annan. The pursuer did not aver that the pauper had a residential settlement in either of these parishes. The parish of Middlebie alleged that the pauper had a residential settlement in Hoddam, while the parish of Annan contents itself with a simple denial. The case came in that shape before the Sheriff-Substitute, and he pronounced the interlocutor to which the Sheriff adhered, and which is now before us. In this state of matters, the obvious course is to find out whether the pauper had or had not a residential settlement in Hoddam, and the way to do so was to allow Middlebie a proof and to Hoddam a conjunct probation. The Sheriff-Substitute, however, did not take that very obvious course. His interlocutor is as follows:—

"*Dumfries*, 14*th October* 1873.—Having considered the closed record, with the productions and whole process, Finds that the pursuer avers that the pauper was born in the parish of Middlebie, or, if not, in the parish of Annan; that the defender Middlebie avers that at the time when the pauper became chargeable he had a residential settlement in the parish of Hoddam; that the pursuer, although not admitting it, does not deny this statement; that by letter No. 10/2 of process, the pursuer, through his agent, admitted to the defender Middlebie that 'Deans, there is no doubt, had such a settlement, but he lost it by absence in Hoddam for more than four years:' Finds, in these circumstances, (1) that the pursuer having admitted that the pauper once had a residential settlement in his parish, the burden of proving that it was subsequently lost lies on him; and (2) that this matter falls to be decided before the question of the pauper's birth settlement requires to be entered upon: Therefore allows to the pursuer a proof as to the pauper having lost his residential settlement in the parish of Hoddam, and also of his averments as to the place of the pauper's birth, and to both defenders a conjunct probation; and appoints the pursuer to move for a diet of proof within seven days.

"*Note.*—The general rule is that the burden of proving a residential settlement elsewhere would lie on the birth parish, or the parish averred to be such, averring the acquisition of such a settlement, but the Sheriff-Substitute thinks that there are sufficient grounds in this case for shifting the burden of proof on to the pursuer.

"His letter clearly admits that the pauper once had a settlement in Hoddam, although a less certain sound is given out in the record. The truth of the admission is not repudiated distinctly in the record, and when the defender Middlebie (probably relying on the admission) avers the settlement in Hoddam, it is not denied that such was once acquired.

"To save the possible necessity for a second proof after a judgment on the question of residential settlement, the Sheriff-Substitute has allowed proof on both parts of the case together, but it will be in the pursuer's discretion whether or not he will require proof on the question of birth."

Now this seems to me a very strange course to follow. In the first place, as regards the averments on record, it is not at all improper on the part of Hoddam to meet the statement as to residence simply by non-admission. In a question not within the inspector's own personal knowledge he is quite entitled to say "not admitted." But the strangest part of all is the Sheriff-Substitute's importing into his interlocutor an admission said to be contained in a letter. An admission in a letter may be explained away, or this letter may not have been written by the instructions of the pursuer. In short, nothing can be more irregular than that a judge should take a letter in process as evidence before it is proved. I am not sure that Hoddam would have to prove the loss of a residential settlement by the pauper even if they admitted it originally, but anyhow, the first thing to be proved is that such a settlement was acquired. Nothing can put this case into shape but recalling the Sheriff-Substitute's interlocutor and all that followed on it. No doubt that may cause a good deal of difficulty, but the parties themselves may obviate that to a great extent by allowing the proof, so far as led, to form part of the proof in the action; it certainly is not a concluded proof. I hope that the counsel may be able to make some such arrangement.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff-substitute dated 14th October 1873, and the whole subsequent interlocutors in the cause, and appoint parties to be heard on the state of the process, reserving all questions of expenses.

Counsel for Hoddam—Lancaster. Agents—Mackenzie & Kermack, W.S.

Counsel for Middlebie—Fraser and Johnstone. Agent—John Galletly, S.S.C.

Counsel for Annan—Crichton. Agent—Wm. Steele, S.S.C.

Friday, November 20.

FIRST DIVISION.

[Sheriff of Stirling.

RIDDELL *v.* MACKIE.

Compensation.

Held that a defender was not entitled to set off an illiquid claim for damages against a debt which he admitted on record.

The object of this action was to recover the price of three stots sold by the pursuer to the defender. The latter did not deny his liability, but stated as his defence that he had bought a horse warranted sound from the pursuer, which was in fact unsound, and that he had sold her at a loss, which loss he wished to set off against the pursuer's claim. The Sheriff-Substitute found for the defender. The Sheriff recalled his interlocutor. The defender appealed.

At advising—

Lord President—This action is brought for £30, 15s. The pursuer avers—"On or about the 1st day of February 1873 the pursuer sold to the defender three stots, at the price of £30, 15s., and the same were taken delivery of by the defender on or about the 11th day of same month," and that is *simpliciter* admitted. He then avers—"The defender refuses or delays to make payment of the said price, and the pursuer has in consequence been compelled to raise the present proceedings," and that too is admitted.

In that state of the record the pursuer is apparently entitled to decree, but the defender pleads compensation as damages to the amount of £12, 10s. The pursuer has added an additional plea in law—"In the circumstances above set forth, the defender is not entitled to plead compensation; and his statement of facts and pleas in law being irrelevant, unfounded in fact, and untenable in law, ought to be repelled."

In my opinion the first of these should have been sustained at once, and decree given in favour of the pursuer. His claim being admitted, and the defender's counter claim being illiquid, the rule of law is quite settled that there can be no compensation. It is quite needless to go into the case. The case of the *North-Eastern Railway Co.* v. *Napier*, 21 D. 700, is on all fours with the present, and I am quite clear that all that has been done in the Sheriff-Court must be swept away. As the parties are here, however, it may be a kindness to them to express an opinion as to the counter claim. I am quite clear that warranty has not been proved, and that it cannot be proved. There is one observation which the Sheriff makes which I think a very good one; he says—"A purchaser intending to rely on an express warranty must either have it in writing or take care to have evidence sufficient to prove the fact and terms of the warranty."

I quite concur in that. The Mercantile Law Amendment Act requires in such a case express warranty; here there is a total absence of anything of the kind.

Lord Deas—It is quite true that this action is brought for a claim which is not liquid, and, that being the case, Mr Mackie has been a little misled. If another claim of the same kind had been specifically made by him, a question might have arisen, but it is quite plain that the admissions on record by the defender exclude his claim of damages. Here there can be no doubt that the transaction between the parties is admitted, and the defender says in statement 7, "that the defender is willing, and has always been so, to pay the sum of £18, 5s., being the balance due by him for the said stots." The only thing he calls a plea in law is a repetition of this statement. Going no farther than this, there could not be a more express admission of debt subject to a counter claim of damages, and, the debt being admitted, the pursuer is entitled to decree. The only plausible thing said for the defender is at the top of page 5:—"The defender received from the pursuer authority to dispose of the said filly to the best advantage, and he, the pursuer, would 'stand' the greater part of the loss sustained; and at the time the stots were purchased by the defender from the pursuer he was to be allowed to retain the said loss sustained by him at the payment of the price of the same." But what is the result of that? The Sheriff might have allowed a proof of that, and, if proved, there would have been an end of the matter; but, if unproved or disproved, it cannot alter the facts of the case. Correctly stated, the pursuer's claim is an admitted claim, and that is a great deal stronger than one merely liquid.

Lord Ardmillan—I agree entirely with your Lordship's opinion in the case of the *Scottish North-Eastern Railway Company.* The same plea here is equally well founded, and the only plea for the defender is his statement on page 5, which Lord Deas read; but it is not the statement of that qualification which is important, but the proof of it, and that proof does not exist. On the other part of the case I should have had some difficulty if the defender's materials had been better dealt with, but I think the warranty has not been proved, nor even the unsoundness. The animal was young and untried, and warranty is not usual in such cases.

Lord Mure concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff of date 21st August 1873, and all the subsequent interlocutors in the cause; find that on the 1st February 1873 the pursuer (respondent) sold to the defender (appellant) three stots, at the price of £30, 15s.; find that the defender received delivery of the said stots on the 11th of the same month; find that the defender has failed to pay the price of the said stots find