"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

that the claim on which the defender pleads compensation being illiquid cannot be set off against the pursuer's admitted claim; therefore repel the defences, and decern against the defender in terms of the conclusions of the summons; find the pursuer entitled to expenses both in the Sheriff Court and this Court; allow accounts thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for the Pursuer—W. A. Orr Paterson. Agents—J. & A. Peddie, W.S.

Counsel for the Defender—Mackintosh. Agents—Gifford & Simpson, W.S.

M., Clerk.

Saturday, November 21.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

MARY LAW *v.* ADAM HUMPHREY.

Bill—Onerosity.

A party granted to the mother of his housekeeper, who was illegitimate, a bill for a sum of money due to the latter as wages, in fulfilment of a promise made to her on her death-bed. His executor resisted payment on the ground of (1) facility of the granter, and fraud; (2) no consideration by the holder of the bill. He failed to prove the former, and *held* that the latter was not a good defence.

The pursuer in this case brought an action in the Sheriff-court against the defender to recover from him, as executor of the late David Humphrey, payment of a bill for £50, granted by the latter to her, in consideration, as was alleged, of the services of her illegitimate daughter, deceased, who had acted for some years as his housekeeper. The pursuer did not aver that she herself gave any consideration for the bill, which was a regular and valid document.

The defender pleaded *inter alia*—"(1) No value having been given by the pursuer for the bill libelled on, or for any part of the sum specified in it, she, as drawer and holder, is not entitled to recover payment thereof from the defender. (2) The deceased David Humphrey having been under no obligation to grant said bill, and his signature having been unduly impetrated from him to it while it was in an imperfect condition, by misrepresentations as to his liability, and under improper pretences, at a time when he was of weak and facile intellect, the pursuer is further debarred from insisting in the conclusions of the present action."

The Sheriff-Substitute (COMRIE THOMSON) pronounced the following interlocutor:—

"*Aberdeen, 15th May* 1874.—Having resumed consideration of the cause, Find it proved that the deceased Mary M'Donald, an illegitimate daughter of the pursuer, was for several years in the service of the late David Humphrey. That the defender is David Humphrey's executor-dative; that at the time of Mary M'Donald's death David Humphrey was due to her a considerable sum of arrears of wages; that on her death-bed she requested Humphrey to pay what was due to her to her mother, the pursuer; that David Humphrey undertook to do so; that after her death Humphrey granted to the pursuer the bill now sued for; that he did so in implement of his foresaid undertaking: Finds, in point of law, that the defence of 'no value' is unfounded: Finds that the defender has failed to prove that the deceased David Humphrey was facile, or that the bill in question was fraudulently impetrated from him: Therefore repels the defences: Decerns against the defender in terms of the conclusions of the summons: Finds the pursuer entitled to expenses of process, allows an account to be given in, and when lodged remits the same to the Auditor of Court to tax and report.

"*Note.*—It was maintained by the defender that his author, the deceased David Humphrey, was at the time the bill libelled was signed by him of weak and facile intellect, and that he would not have signed it had he known what he was about. The Sheriff-Substitute is of opinion that that defence has entirely broken down. The witnesses called to support it, and who knew the deceased intimately, concur in representing him as a strange sort of person, but they are equally unanimous in saying that he was obstinate and not easily led. The schoolmaster, who knew him well for fifteen years, depones as follows:—'He was not of weak or facile intellect, nor by any means easily imposed upon. He transacted business like other men. I don't think he would have signed a bill unless he had been due the money.'

"The genuineness of the bill, and the fact that it was truly the expression of the granter's mind, being thus established, the only other question falling to be disposed of is the defence of non-onerosity. It is true that no value was given to the acceptor of the bill by the drawer. That is to say, no services were rendered by the pursuer to the defender's author. But admittedly the pursuer's daughter was entitled to the sum in the bill, and on death-bed she desired Humphrey to pay that sum to her mother, the pursuer. He promised to do so. That promise could not be enforced in a Court of law, because the pursuer was not the representative of her deceased daughter, who was illegitimate, and died intestate. But Humphrey chose of his own free will to convert what was an imperfect obligation, binding upon him morally but not legally, into a perfect obligation, and this he did by granting the bill now in question. It seems to the Sheriff-Substitute that there is here a sufficient answer to the plea of want of consideration. It has been held that value is established, although the bill was granted in implement merely of an obligation in honour, or of a debt barred by prescription, or of a natural duty, such as providing more liberally than the law requires for a wife or a child. (See Chief-Justice Mansfield's observations in *Gibbs* v. *Merrhill*, 3 Taunt 307, and also the opinion of the Judges in *Seton* v. *Seton*, 2 Brown, Ch. Cas., 616).

"The present case seems to fall under the same category.

"The remaining defences may be disposed of in a sentence. The body of the bill was not filled up until after the acceptor's death, but his signature was on the stamp, and he was liable for whatever the stamp would carry. Besides, the sum was expressed in figures, though not in words, on the face of the bill when the deceased signed it."

The defender appealed to the Sheriff, who pronounced the following interlocutor:—

"*Edinburgh, 19th June* 1874.—The Sheriff having considered the reclaiming petition for the de-