Friday, July 5, 1895.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

LOVIE *v.* BAIRD'S TRUSTEES.

Landlord and Tenant — Lease — Counter Claims — Mutual Obligations — Liquid and Illiquid.

An action was raised by an outgoing tenant against his landlord for the value of certain crops, dung, and labour taken over by the landlord at the expiry of the lease, the amount of which had been ascertained by arbitration under one of the provisions of the lease. The landlord pleaded in defence that he was entitled to set off against the sum sued for, which he admitted was due, counter claims for arrears of rent and for interest upon money expended in improvements, due to him by the tenant under other provisions of the lease. *Held* that the defence was relevant, in respect that the claim and alleged counter claim arose out of mutual and dependent obligations in the same contract, and that accordingly neither party was entitled to insist on fulfilment of the obligations in his favour without performing those exigible by the other party.

Alexander Lovie, farmer, Fraserburgh, was tenant of the farm of Towie, in Aberdeenshire, under a nineteen years' lease dated 18th September 1872. By the lease it was provided, *inter alia*, that the rent for the first five years should be £310, and for the remaining fourteen years £320; that the tenant should give over to the proprietor or incoming tenant at the expiry of the first ish of the lease (viz., at Whitsunday 1892) the houses, yards, grass, fallow land, and dung, and that he should then be paid "according to the valuation of men mutually chosen as aforesaid for the value of all sown grass, for the dung made upon the farm subsequent to the time of turnip sowing in the previous year, for the value of labour done to the break for green crop or fallow land in that year." Two arbiters were nominated previous to Whitsunday 1892, who fixed £670, 17s. as the sum due to the outgoing tenant for the grass, dung, &c., and to recover this sum Lovie brought an action against the trustees of the late G. A. Baird, the representatives of the landlord, who had died.

The defenders admitted that the sum sued for was due, but claimed a right to set off against it certain sums due by the tenant under the lease to them. In regard to these claims they stated—"(Ans. 9) Admitted that the defenders have made a counter claim against the pursuer, amounting to £1002, 1s. 3d., exclusive of interest and exclusive also of the expenses of the Sheriff Court action, which has not yet been determined, and the expense of repairing the farm buildings and fences at Towie, which were not left by the pursuer in the state of repair required by his lease. The said claim is in respect of arrears of rent, interest on improvement money, &c., due by the pursuer to the defenders under the lease in question. The defenders have prepared, and produce herewith, and found upon a statement shewing the rents, &c., due from 1884 to the termination of the lease and the payments made by the pursuer to account of same. In said statement the defenders, without admitting the pursuer's right to demand deduction thereof, and under reservation of and without prejudice to the defenders' right to recover the same, have given effect to the pursuer's contentions in the Sheriff Court action in regard to the interest claimed on the £160 of improvement expenditure and to the abatement of fire insurance premium, so far as relating to the period subsequent to the date of succession to the estate of the said George Alexander Baird as heir of entail foresaid. After making said deductions, and also after giving the pursuer credit for the sum sued for in the present action, the pursuer is still due to the defenders the sum of £134, 4s. 1d., besides interest and expenses foresaid, the defenders' claim to which is hereby reserved entire. The pursuer has never denied his liability for the rent, &c., of which the bulk of the defenders' counter claim is composed."

The pursuer pleaded—"(1) The defences being irrelevant should be repelled. (3) The counter claims made by the defenders not being liquid, and not being ascertainable in this process, the defences, in so far as founded thereon, should be repelled. (4) The sum sued for being the sum found due by arbiters appointed by the parties, decree as craved ought forthwith to be pronounced therefor."

The defenders pleaded—"(1) The pursuer being indebted to the defenders for rents and other sums due under the lease in a larger amount than the sum sued for, the defenders should be assoilzied with expenses. (2) The defenders are entitled to set off against the sum sued for the sums due by the pursuer in respect of his tenancy of the farm under the lease founded on. (3) The pursuer not having implemented his obligations under the lease founded on is barred from enforcing any counter obligations incumbent upon the defenders."

On 13th June 1895 the Lord Ordinary (KINCAIRNEY) allowed the parties a proof of their respective averments on record, and further appointed the defenders to lead in the proof.

The pursuer reclaimed, and argued—The defence was irrelevant, and was an attempt to set off illiquid and unascertained claims against a claim liquid and undisputed. Even the amount of rent due was not liquid, because the tenant disputed that he had had full enjoyment of the subjects leased to him—*Munro* v. *M'Geoghs*, November 15, 1888, 16 R. 93; *Stewart* v. *Campbell*, January 19, 1889, 16 R. 346; *Sivright* v. *Lightbourne*, June 11, 1890, 17 R. 917.

Argued for the defenders—This was an action based on a single deed—a lease constituting a mutual contract, under which one party could not sue the other if he had

not himself observed its stipulations — *Johnston* v. *Robertson*, March 1, 1861, 23 D. 646; *Turnbull* v. *Maclean & Company*, March 5, 1874, 1 R. 730; *Macbride* v. *Hamilton & Company*, June 11, 1875, 2 R. 775. Even a landlord could not recover his rent as a liquid debt unless he had observed his duties under the lease—*Graham* v. *Gordon*, June 16, 1843, 5 D. 1207. The doctrine of liquid and illiquid did not arise here. It applied where the attempt was made to set off against a debt due under a contract something outside the contract. But the claims and counter claims were all under the same contract and must be disposed of together. The defenders' claim, moreover, if not liquid, was at least capable of instant verification.

At advising—

LORD ADAM—My opinion is that the Lord Ordinary's interlocutor ought to be adhered to. This is an action brought by a tenant of the defender in Aberdeenshire, holding under a nineteen years' lease, which came to an end, I think, in 1892. It is one of the numerous conditions of that lease that at its expiry the outgoing tenant should be paid, according to valuation by arbiters mutually chosen, for the value of all sown grass; for the dung made upon the farm subsequent to the time of the turnip sowing in the previous year; for the value of labour done to the break for green crop or fallow land in that year. The lease having come to an end, the valuation of these matters took place in terms of the lease, with the result that the valuation brought out £670, 17s. as being due by the landlord to the tenant under that clause of the lease. That amount is not disputed, nor is liability for it disputed on the part of the defender; but then he pleads in defence to the claim certain other claims for certain sums from 1884—sums for rent alleged to be unpaid, interest on improvement expenditure on buildings, and on the fencing and draining of the land, bringing out a balance of £1002 due to him after allowing deductions for all the rent paid to account, and thus leaving a larger sum than that alleged to be due by him. The question is, whether in this action the landlord is entitled to go into this proof, and to say that these sums are due to him. My opinion is that he is so entitled as the Lord Ordinary has found. The claims here on the one side and the other are mutual claims arising under the obligations of the lease. The landlord is bound to pay this sum which is sued for in this action, and so equally is the tenant bound to pay his rent and implement the other prestations according to the averments on record. I think the question is just whether, as the Solicitor-General puts it, one party to the contract is to be entitled to instant payment, while at the same time he is refusing to implement his own part of the contract. I think he is not.

LORD M'LAREN—The claims regarding which the Lord Ordinary has allowed a proof appear to be entirely claims which arise within the lease between the late Mr Baird and his tenant—that is to say, they are all provided for in the lease. The lease as usual stipulates for rent payable at two half-yearly terms, and then the tenant is under obligation to repay to the landlord the sum expended by him for insurance and public assessments, and to pay him interest on certain expenditure which the landlord undertakes to make for the benefit of the farm. That is classed under the head of draining, building, fencing, and land improvements. Then again, the landlord under one of the usual clauses binds himself to give certain compensation to the tenant for available improvements at the end of the lease. What has taken place is that each half-year the tenant appears to have punctually paid his rent, but apparently there had been no payments made under the other conditions of the lease, probably because the rent was the thing the amount of which the tenant knew in advance, but he could not pay the other claims under the lease although the account was rendered to him.

Now, supposing that the tenant's claims had not been constituted by arbitration, it seems plain enough that the one party could not have sued for fulfilment of the pecuniary obligations without exposing himself to be met by the counter claims, not upon the ground of compensation, but on the ground that all stipulations under the same contract resolved into an account in which naturally a balance is due by the one party or the other.

The question then is, does it make any difference that the tenant has obtained an award from valuators as prescribed by the lease. I think not, and for this reason, that the arbiter who was valuing the tenant's claims had no power to deal with the matter of the landlord's claims for these annual charges that he was to receive along with his rent. The landlord had no defence to the award, and he very properly allowed it to go on, and allowed the claims to be valued, and I think that that ought not to prejudice his right to set off his claims, which are just as clearly due, and which need no constitution except the production of the vouchers, against the sums due to the tenant, which require to be ascertained by the opinion of a skilled person.

The only other observation I wish to make is, that while perhaps in point of form this is a case where a proof should be allowed, I think if I had been dealing with it I should not have fixed a diet in the meantime, but should have called upon the defenders to put in process their vouchers, because if it appears that the proper receipts are produced for the sums charged, and these sums have never been paid by the tenant, there cannot be anything left that would be a proper subject of parole evidence. It may be, of course, that if certain items were objected to, parole evidence might be necessary in regard to these. But I have always rather demurred to the idea of sending what is properly a case of accounting to proof without in some way ascer-

taining what are the points upon which the parties are at issue. However, the interlocutor has not been objected to on that ground, and I suppose if we adhere to it there is every probability that so far as these claims can be instructed by the production of vouchers parties will dispense with other evidence.

LORD KINNEAR — I am of the same opinion. It appears to me that the tenant's claim for the sum fixed by valuation under this contract of lease is very much in the same position as the landlord's claim for the fixed rent under a contract of lease, and therefore that the question now in dispute between the parties must be determined by the principle laid down by Lord Fullarton in the case of *Graham* v. *Gordon*, June 16, 1843, 5 D. 1207, which has been followed over and over again since, where his Lordship said that a claim for rent is not liquid in the same sense as a sum in a bond, because it is a payment in consideration of something to be done under a contract, and therefore if the obligations in respect of which the payment is to be made have not been performed, the demand for payment cannot be said to constitute a liquid claim. I think the tenant's position in this case is exactly the same as the position of the landlord in the case figured. He is entitled to have payment of the value of the stock in question, but that is a payment in consideration of the performance of his own obligations under the contract. If either party to a contract of this kind, having against the other a claim for a definite sum of money fixed by the contract, has not performed the obligations incumbent upon him in consideration of which that payment is made, that is a very good answer to an action such as we are now considering.

I agree with your Lordships that there is a case here which must be made the subject of inquiry, and that no decree can be given against the landlord until the pecuniary claims against the defender *hinc inde* have been finally adjusted. I also agree with the hope expressed by Lord M'Laren, that parties may see their way to avoid unnecessary expense in a case of this kind. But that is not a question for us, and as there is no sufficient ground to entitle us to interfere with the discretion of the Lord Ordinary, his judgment must stand.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuer—Dundas—Glegg. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders — Sol.-Gen. Shaw, Q.C. — Salvesen — Lyon Mackenzie. Agents—W. & F. Haldane, W.S.

Friday, December 13.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

SUTHERLAND *v.* URQUHART.

Landlord and Tenant — Lease — Counter Claims—Separable Obligations—Liquid and Illiquid.

An outgoing tenant raised an action against his landlord for the value of crops taken over by the landlord at the expiry of the lease, the amount of which had been ascertained by arbitration under a minute of agreement entered into by the parties at the termination of the lease. The landlord pleaded in defence that he was entitled to set off against the sum sued for, which he admitted was due, counter claims for damages which he alleged were due to him by the tenant for failure to implement the conditions of the lease as to the upkeep of buildings and the cropping of the land.

Held that the defence was irrelevant, on the ground that the claim and alleged counter claim arose upon separate and independent obligations, and that the latter being illiquid, could not be set off against the tenant's liquid claim for the sum fixed by arbitration.

Lovie v. *Baird's Trustees* (*ante*, p. 208) *distinguished.*

Mr John Sutherland, farmer, late tenant of the farm of Upper Tillymauld, on the estate of Byth, Aberdeenshire, raised an action against Mr Beauchamp Urquhart, proprietor of the estate, for payment of the balance of a sum due to him as the price of the grain crop which the landlord took over on the tenant giving up the farm. The value of the crop had been ascertained in a reference to arbitration by the parties under a minute of agreement entered into at the termination of the lease, and in the action this minute of agreement was alone founded on. It appeared, however, that the General Articles, Conditions, and Regulations established by the defender for the tenancy of all farms on his estates of Meldrum and Byth, which were incorporated in the lease, contained provisions for the valuation by arbitration of the crops and other farm produce left by the tenants at the expiry of their leases. The sum fixed by the arbiters appointed to conduct the valuation was £136, but the pursuer admitted that he was due to the defender, for rent and other claims, the sum of £68, and he accordingly restricted his claim to £68.

The defender averred that he had claims against the pursuer to the amount of £205 "for failure to implement the terms of the lease as to the up-keep of buildings and the cropping of the land," together with the liquidate penalty of £72 as stipulated in the lease, and that he had raised an action against him for the former amount. He