

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 multiplepounding 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 multiplepounding 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 assolizied 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," assolizieing the defenders, and "in respect it was stated at the bar that pursuer does not desire to proceed in terms of

the Workmen's Compensation Act 1897" finding it unnecessary to pronounce further.

The pursuer appealed to the Court of Session.

On 16th May 1906 the Court was proceeding to dismiss the action on new findings in fact other than that no fault had been proved against the defenders or anyone in the position of superintendent, when the pursuer moved the Court to determine the amount of compensation due under the Workmen's Compensation Act, and referred to section 1, sub-section 4, of that Act. The defenders asked that the case should be continued, and the Court granted a continuation of a week.

At the continued hearing on 2nd June it was argued for the defenders—The Court which was to assess the compensation payable under the Workmen's Compensation Act was the Court in which the action was tried, *i.e.*, in which proof is taken. The case should be remitted to the Sheriff to assess the compensation—*Little v. P. & W. MacLellan, Limited*, January 16, 1900, 2 F. 387, 37 S.L.R. 287.

Argued for the pursuer—In *Little (supra)* there were no materials upon which the Court could have proceeded to assess compensation, there having been no proof on the merits. Here there were the necessary materials, and this was the Court which tried the case because it finally ascertained the facts on which the judgment was to proceed.

The Court pronounced this interlocutor—

"Sustain the appeal and recal the said interlocutor appealed against: Find in fact . . . (5) 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: Therefore dismiss the action, remit to the Sheriff to determine the amount due to the pursuer under the Workmen's Compensation Act 1897, and decern . . ."

Counsel for Pursuer (Appellant)—R. L. Orr, K.C.—J. H. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defenders (Respondents)—George Watt, K.C.—Macmillan. Agents—Cuthbert & Marchbank, S.S.C.

Tuesday, June 5.

## SECOND DIVISION.

[Lord Salvesen, Ordinary.]

### WATSON v. WORDIE & COMPANY.

*Reparation—Damages—Accident—Street—Horse—Vice—"Reesting"—Stopping Suddenly when in Front of Another Vehicle—Relevancy.*

The pursuer in an action for damages averred that when driving a lorry along a street, seated with his legs over the

near side, and when about to overtake a two-horse lorry of the defenders proceeding in the same direction at a walking pace, he looked back over his shoulder on hearing the bell of a tram-car; that while in the act of doing so he was injured by his legs coming against the defenders' lorry, which had suddenly stopped owing to one of its horses having come to a standstill in accordance with a vicious habit of "reesting" known to the defenders. He further averred that the defenders were in fault in using such a horse in their business.

*Held* that the pursuer had not stated a relevant case of fault against the defenders.

Thomas Watson, lorryman, in the employment of Messrs J. & A. Hutton, Edinburgh, brought an action against Wordie & Company, general carriers, in which he sued them for £500 damages for injuries.

He averred, *inter alia*—" (Cond. 2) On or about 23rd March 1905, between 8 a.m. and 9 a.m., the pursuer was driving a lorry containing a load of timber from Leith Docks to the timber yards of his employers at Newington. He was, as is customary when driving a lorry, seated on the left-hand corner thereof, with his right leg hanging over the end nearest the horse, and his left leg over the side. While proceeding up the North Bridge the pursuer overtook a two-horsed lorry (afterwards ascertained to belong to defenders) proceeding slowly in the same direction. The North Bridge is very wide, and between the eastmost car line and the footway there is ample room for two lorries to pass each other. (Cond. 3) As the pursuer was anxious to reach East Newington Place as soon as possible, and defenders' lorry was proceeding slowly, it was necessary for pursuer to pass defenders' lorry on the right-hand side. To accomplish this pursuer pulled his horse to the right. As he was doing so he heard a car bell ring, and in order to satisfy himself that he was not the cause of any obstruction he turned his head for a moment in the direction of the car. At that moment one of the horses in the defenders' lorry 'reested,' or suddenly halted, with the result that defenders' lorry suddenly and unexpectedly stood still, and before pursuer was able to pull up, the defenders' lorry came into contact with pursuer's left leg and crushed it between the two lorries. Had said horse not 'reested' pursuer could easily have passed the defenders' lorry. (Cond. 5) The said accident was due to the fault and negligence of defenders. They were well aware that one of the horses yoked in said lorry was a 'reester,' or one which has the vicious habit of suddenly halting in the street, without any cause or without any previous warning, and obstinately refusing to proceed. This kind of horse is well known to all horse-dealers and users of horses, who in consequence do not use them in the public streets, as their employment there is attended with danger to the public using said streets. The defenders well knew that