to making a testamentary writing. I am willing for the purposes of this case to hold all that in favour of those who wish this writing to be held to be a good exercise of the power. I think there is enough in the holograph portion of the writing to spell out of it a will, and that being so, the general doctrine comes in that it is quite possible to execute a power by will, and that where there is a general settlement it will be presumed if nothing points to the contrary that a power which the maker of the general settlement possessed has been thereby exercised. I am not inclined to draw the distinction which my learned brother has drawn between general powers and power to divide. Upon that matter I wish to reserve my opinion. I shall, however, for the moment assume that also in favour of the parties who contended that the power was well exercised. Where I think they fail is that, even assuming these things in their favour, they are asking the Court to do too much. We are asked, not to carry out the instructions which were left by the testatrix, but to make a will for her which, *tota re perspecta*, we may be fairly sure she would have made if the matter had been properly explained to her; and my difficulty arises from the fact, upon which Lord Johnston has chiefly based his judgment, that here there are three different trusts and none of them has anything to do with the others. The trustees in each trust are entitled to say, "Show us what we are to do; show us the authority of the deceased lady." Take the directions as they stand; they are misleading to the trustees of a single trust. If we were to hold the exercise of the power good a trustee of a single trust would then be told to pay away sums which are far in excess of what he can pay away, and he would be also told that there was a certain residue to be given equally to certain persons—a direction which would be really inappropriate. What one is really asked to do is to say to the body of trustees in Trust A, "You will allow me to introduce trusts B and C and add up all the figures together, and the result will show that it is more than likely that this lady meant you to divide the money which the three trusts together have in certain proportions which correspond to the figures which the deceased lady has put down, and then dispose of her private fortune by way of residue." In other words, you are asking the trustees to take these sums, not as direct directions at all, but as arithmetical factors in order to make a proportional sum, leaving out the residue. Now I think that is too great a feat for the Court to perform. I think probably the lady meant to do that, but I do not think she has done it. Accordingly I come to the same conclusion as Lord Johnston.

I am instructed to say that Lord Low concurs in the opinion which I have just delivered.

LORD KINNEAR and LORD SALVESEN gave no opinion, not having heard the case.

The Court answered the question of law in the case in the negative.

Counsel for First and Second Parties—Blackburn, K.C.—Lord Kinross. Agents—Gillespie & Paterson, W.S.

Counsel for Third Parties—Wilson, K.C.—Macmillan. Agents—Hope, Todd, & Kirk, W.S.

---

*Friday, July* 15.

## FIRST DIVISION.

(RAILWAY AND CANAL COMMISSION.)

## JOHN WATSON, LIMITED, AND OTHERS *v.* CALEDONIAN RAILWAY COMPANY AND OTHERS.

## POLQUHAIRN COAL COMPANY, LIMITED *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

*Appeal — Bar — Railway — Railway and Canal Commissioners — Railway and Canal Traffic Act* 1888 (51 *and* 52 *Vict. c.* 25), *sec.* 17—*Act of Sederunt,* 1*st June* 1889, *sec.* 2 — *Appeal against Order for Proof after Obtaining Diligence for Recovery of Documents—Competency.*

In an application by certain traders to the Railway and Canal Commissioners against several railway companies, the Commissioners intimated verbally that they would allow an inquiry into the facts. Shortly thereafter the respondents applied for and got a diligence in terms of a specification for the recovery of documents. The Railway and Canal Commissioners thereafter issued a written order allowing a proof before answer, and against that interlocutor the respondents appealed. The applicants having objected to the competency of the appeal on the ground that the respondents had barred themselves from insisting therein by taking the diligence for the recovery of documents, *held* that the appeal was competent.

*Railway — Railway and Canal Commissioners—Railway and Canal Traffic Act* 1854 (17 *and* 18 *Vict. cap.* 31), *sec.* 2—*Regulation of Railways Act* 1873 (36 *and* 37 *Vict. cap.* 48), *sec.* 6—*Railway and Canal Traffic Act* 1888 (51 *and* 52 *Vict. cap.* 25), *sec.* 8—*Jurisdiction—Reasonable Facilities.*

In an application to the Railway and Canal Commissioners at the instance of certain traders against certain railway companies for an order on the respondents to allow the applicants to tender their own waggons and to have their mineral conveyed over the railways in their own waggons, the Commissioners allowed a proof before answer. The respondents appealed and objected to proof being allowed, on the ground that what the applicants sought was a declarator of general legal right, which

was competent only in the ordinary Courts. *Held* that the question was one of reasonable facilities and therefore competently raised before the Commission.

The Railway and Canal Traffic Act 1854 (17 and 18 Vict. cap. 31) enacts:—Section 2—"Every railway company . . . shall . . . afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways . . . belonging to or worked by such compan[y ] . . . nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . ." Section 3—"It shall be lawful for any company or person complaining against any such companies or company of anything done, or of any omission made in violation or contravention of this Act, to apply in a summary way . . . in Scotland to the Court of Session in Scotland . . . or to any judge of . . . such Court . . . and it shall be lawful for such Court or judge to hear and determine the matter of such complaint."

The Regulation of Railways Act 1873 (36 and 37 Vict. cap. 48), section 6, enacts—"Any person complaining of anything done or of any omission made in violation or contravention of section 2 of the Railway and Canal Traffic Act 1854 . . . may apply to the Commissioners . . . and for the purpose of enabling the Commissioners to hear and determine the matter of any such complaint they shall have and may exercise all the jurisdiction conferred by section 3 of the Railway and Canal Traffic Act 1854 on the several courts and judges empowered to hear and determine complaints under that Act . . . and the said courts and judges shall, except for the purpose of enforcing any decision or order of the Commissioners, cease to exercise the jurisdiction conferred on them by that section."

The Railway and Canal Traffic Act 1888 (51 and 52 Vict. cap. 25) enacts—Section 8—"There shall be transferred to and vested in the Commissioners all the jurisdiction and powers which at the commencement of this Act were vested in or capable of being exercised by the Railway Commissioners whether under the Regulation of Railways Act 1873 or any other Act or otherwise. . . ." Section 17 (2)—"Save as otherwise provided by this Act, an appeal shall lie from the Commissioners to a superior court of appeal. (3) An appeal shall not be brought except in conformity with such rules of court as may from time to time be made in relation to such appeals by the authority having power to make rules of court for the superior court of appeal."

The Act of Sederunt of 1st June 1889, for regulating the procedure in appeals under the Railway and Canal Traffic Act 1888, provides:—Section 2—"It shall not be competent to appeal against any judgment, order, or finding of the said Commissioners unless the note of appeal is lodged with the Registrar . . . in the case of any interlocutory judgment, order, or finding within four days from the date of the judgment, order, or finding appealed against . . ."

The Railway and Canal Commission Rules 1889 provide:—Rule 30—"If it appear to the Commissioners at any time that the statements in the application or answer or reply do not sufficiently raise or disclose the issues of fact in dispute between the parties they may direct them to prepare issues, and such issues shall, if the parties differ, be settled by the Commissioners."

John Watson, Limited, coalmasters, Glasgow; William Baird & Company, Limited, coalmasters, Glasgow; William Barr & Sons (Coalmasters), Limited, Glasgow; The Lochgelly Iron & Coal Company, Limited, coalmasters, Lochgelly; The Alloa Coal Company, Limited, coalmasters, Alloa; and The Ormiston Coal Company, coalmasters, East Lothian—*applicants*—presented an application to the Court of the Railway and Canal Commission against The Caledonian Railway Company, The Glasgow and South-Western Railway Company, and The North British Railway Company—*respondents*—dealing with the running of traders' waggons on respondents' railways.

A similar application was presented at the instance of The Polquhairn Coal Company, Limited, coalmasters, Ayr, *applicants*, against The Glasgow and South-Western Railway Company, Limited, *respondents*.

The applicants John Watson, Limited, and others, in their initial application stated—"8. The said respondent railway companies carry coal traffic for coalmasters, mine owners, and their customers partly in waggons belonging to the railway companies, partly in waggons belonging to coalmasters or mine owners, or to merchants or manufacturers dealing with them as customers. The former class of waggons is generally known and spoken of as 'company waggons,' and the latter as 'traders' waggons.' This system of carrying coal has been in practice since the introduction of public railways into the mining districts of Scotland. . . . 13. On 1st August 1908 the three railway companies jointly issued a circular to all the mineral traders and colliery owners on the railways belonging to the Caledonian, Glasgow and South-Western, and North British Railway Companies, that as from 1st February 1909 they would claim and require payment of charges for their waggons if the same in the course of the conveyance were occupied longer than times capriciously fixed by the railway companies. . . . In order to compel the traders to use the waggons of the railway companies, and therefore to subject them to payment of the demurrage charges intimated, the Caledonian and Glasgow and South-Western Railway Companies refused to allow any more traders' waggons to be placed upon their respective railways for the conveyance of mineral traffic. In the case of the North British Railway Company, on whose system the

output of minerals is increasing, they received on their lines some new waggons, which it was at the time convenient for them to take, but they did so under intimation that they would at any time they chose refuse to carry traffic in them. . . . 26. . . . The refusal of the respondents to carry such traffic of the applicants or their customers in traders' waggons, and to admit new waggons for use on the said traffic, subjects the applicants and their customers to undue prejudice in favour of the traders whose traffic is so carried, and also subjects the applicants and their customers to undue prejudice in favour of the respondents themselves as owners of waggons. The said refusal is also in violation of the right of the applicants to put waggons on the respondents' lines for the conveyance of their own merchandise."

They further stated in their reply to the answers for the respondents—"2. . . . Whether the mineral traffic is carried by the respondents as common carriers or under statutory obligations or otherwise, the applicants are entitled when they so wish to have their coal and mineral traffic carried in traders' waggons. . . ."

The applicants applied to the Court for an order enjoining the respondents and each of them "1. To give the same facilities for use of traders' waggons as of company's waggons. 2. To desist from refusing or threatening to refuse to carry traffic in traders' waggons. 3. To desist from issuing circulars or letters refusing to carry traffic in traders' waggons. 4. To carry the coal and other minerals of the respective applicants in waggons provided by the applicants respectively, or by their customers respectively, from and to places to which the railways of the said railway companies form a route or part of a route. 5. To desist from giving any undue preference to themselves or other persons in the carrying or in the collecting, carrying, and delivery of coal or other mineral traffic in waggons belonging to the said railway companies or any of them, or in waggons belonging to any other trader. 6. To enjoin the respondents and each of them not to subject the applicants or any of them to any undue prejudice in respect of traffic carried or proposed to be carried in waggons not belonging to the respondents or to any of them. 7. To carry from any station at which the respondents receive traffic over their railways to places on their railways respectively, or to junctions with other lines where the railway of the receiving company forms part only of the route, all waggons destined for the applicants, or any of them, or for their customers, to the station or junction to which the same is consigned, and that whether these waggons are or are not intended for traffic on the railways of one or more of the respondents."

On 18th May 1910 the Commissioners intimated verbally that they were prepared to allow an inquiry into the facts upon which the application was based. About a week later the applicants and the respondents both lodged specifications of documents for which they asked a diligence, and on 31st and 25th May respectively the *ex officio* Commissioner (LORD MACKENZIE) issued interlocutors granting the diligences. Against the interlocutor of 31st May granting the traders' diligence the respondents (the Railway Companies) appealed (Note of Appeal No. 1). The interlocutor allowing the respondents' diligence was not appealed against and accordingly became final. On 29th June 1910 a signed order allowing a proof before answer was issued, and against this interlocutor the respondents on 2nd July appealed (Note of Appeal No. 2). The two notes of appeal were heard together.

In the course of the debate the Court suggested that with a view to the avoidance of unnecessary proof the respondents in the application should put in a minute stating what they were prepared to admit. They (the Railways) accordingly lodged a minute in which they admitted, *inter alia*, "(1) That since the introduction of public railways into the mining districts of Scotland they have been in the habit of carrying coal traffic over their respective systems in large quantities, partly in waggons belonging to the railway companies, and partly in waggons belonging to the traders. (2) That on the respective systems of the two companies there has never been available for coal and other mineral traffic a stock of waggons sufficient in number to carry the whole coal and mineral traffic passing over said systems without including the traders' own waggons." They admitted further that prior to the Railway Rates and Charges Order Confirmation Acts 1892 (55 and 56 Vict. cap. lvii-lxiii), which fixed the waggon allowances to be made to traders who supplied their own waggons, they had made waggon allowances to such traders, and that they did not object to traders using their own waggons till February 1909, when they ascertained that the number of company and traders' waggons on their respective systems exceeded the number reasonably required for the traffic.

The respondents the Glasgow and South-Western Railway Company dissociated themselves from these admissions, and admitted separately (1) that in only a few cases where they had special agreements had they allowed coal traffic to be carried in traders' waggons, and (2) that in such cases they had made waggon allowances.

The applicants (the Traders) in reply lodged a minute stating what facts in face of the minute of admissions they proposed to ask proof of. These facts were divided into five heads and embraced generally averments (as stated at length in their application) as to (1) the general practice of carrying in traders' waggons, (2) the effect which the abandonment of the practice would have on the traders' businesses, (3) the supply of railway waggons available to meet the traders' demands, (4) the attitudes of the railway companies with regard to the

charge, and more particularly with regard to the enforcement of demurrage charges, and (5) the effect of the charge as the withdrawal of a reasonable facility. The admissions made by the Glasgow and South-Western Railway Company were denied.

The applicants (the Traders) objected to the competency of Note of Appeal No. 2, and argued that the respondents had barred themselves from prosecuting this appeal by their own actings in getting a diligence for the recovery of documents —*Craig* v. *Jex-Blake*, March 16, 1871, 9 Macph. 715, 8 S.L.R. 428.

Argued for the respondents—The respondents were not barred. They had all along endeavoured to get a written order for proof, and it was not their fault if the order allowing proof was not issued till 29th June. There was no case in the books parallel to this, and it would be unfair to sustain the applicants' contention.

On the merits the respondents (the Railways) argued—There was no jurisdiction. There were no relevant averments on record, and therefore the Commissioners were in error in allowing a proof. The application was an application in general terms, *in vacuo*, viz., that traders were entitled as a matter of right to have their trucks received by the railway companies. That, however, was a matter which was independent of the question of reasonable facilities. The orders asked for could not be pronounced and were not competently raised on the allegations in the pleadings. The Commissioners sat to deal with particular grievances, and that was the antithesis of abstract legal right. "Reasonable facilities" suggested an inquiry into particular circumstances. The Railway and Canal Commission was a statutory body with specific duties, and a person who came before it must show that the jurisdiction of the ordinary courts was excluded and given to the Commissioners. The question therefore was—Was it within the jurisdiction of the Railway and Canal Commission to determine questions of abstract declarator? The traders' proposition was that it was in the option of the traders of Scotland to insist that their waggons should be received by the railway companies. This was insisted on as a matter of abstract right and not of reasonable facility. The crave in the present case was for an order, not merely for the applicant traders, but for all the traders of Scotland. This was properly a matter for declarator in the Court of Session, and not a question of "reasonable facilities" before the Railway and Canal Commission. The case here, as disclosed by the applicants' averments, was not that the applicants found their trade hampered by the refusal of the railway companies to carry their coal in their own waggons, but that the traders were entitled to insist that their coal should be so carried. There were no specific allegations of refusal to accept loaded trucks. The only specific allegation was of refusal to accept new empty trucks. It was impossible to say that a general declinature was a denial of reasonable facilities. The Railway and Canal Commission might in dealing with the application of a particular trader, deal incidentally with a question of law, but it could not decide a general question of law by itself—*Spillers & Bakers, Limited* v. *Great Western Railway* [1910], 1 K.B. 778, at p. 788. The Polquhairn case dealt with a particular grievance, but they followed it up by asking a general decerniture in much the same terms as the main case. The same argument therefore applied. If there was to be an inquiry it should be limited, and the issue should be defined under rule 30 of the Railway and Canal Commission Rules 1889.

Argued for the applicants (the Traders) —The case was really one of reasonable facilities within the meaning of the Railway and Canal Traffic Act 1854 (17 and 18 Vict. cap. 31), secs. 2 and 3. The applicants asked an order from the Commissioners to affirm their right to a certain thing as a reasonable facility. The traders were entitled therefore to a proof. The Commissioners had understood that this was the real issue between the parties, and if this had not been so they would have exercised their power under rule 30. In any event the Court could only do one of two things. If the case was quite irrelevant, then the Court would remit the case to the Commissioners with a direction to them to dismiss it. But if it was relevant the applicants were entitled to full proof. There was no legal principle on which they could be compelled to accept certain limited admissions which were always construed strictly and against the party accepting them.

Lord President — This case comes before us as an appeal from an order of the Railway Commissioners allowing a proof before answer of the averments in a certain application made to them. The first point that was taken upon the appeal was the special point that in the circumstances of the case the appeal was not competent. That was put upon this specialty, that the Commissioners having intimated verbally that they were prepared to allow an inquiry into the facts upon which the application was based, the railway companies thereafter prepared and tabled a specification of documents to be recovered, which, of course, could only be of use if there was going to be an inquiry. I do not think that it would be at all safe to hold the appeal incompetent upon any such specialty, because I think that the railway companies were really forced to that action in self-defence, and that it was not in any way upon their part a waiving or abrogation of their admitted right to appeal. They could not appeal sooner, because the Commissioners had not written an order. I wish to say distinctly, that as it has been held and is the case that the proceedings of the Railway Commission, when in Scot-

land, are the proceedings of a Scottish Court, it is certainly not only advisable but necessary that in any future case where the Railway Commissioners allow an inquiry they should, as we phrase it, "write upon it," in order that appeal may at once be taken if either of the parties think such an appeal is necessary. That disposes of the first matter.

We now have the merits of the appeal. The appeal, as it stands, is an appeal against—again using Scottish phraseology —a proof being allowed before answer. That is, to a great extent, a matter of discretion, and as we are not in use lightly to interfere with the discretion of a Lord Ordinary, so in the same way we should, I think, never be willing lightly to interfere with the discretion of the Railway Commissioners. It is their case and they have to manage it, and unless we thought they were clearly wrong we should not interfere with them.

That, I think, would have been sufficient, and I do not think the argument on the case would have gone any further if it had not been for what I do not hesitate to say is the perfectly deplorable nature of the pleadings of the applicants. I have never seen pleadings in which the real point at issue was so disguised, concealed, and overlarded with irrelevant statements and statements difficult to understand; and I think that the whole of the expense of what has happened and of this discussion has been brought upon the heads of the applicants by the state of their own pleadings. The pleadings make no specific averments which can be specifically met, and make no clear and concise statement of the real point that is before the Court. If there had been more time I confess I would very much have liked to have taken advantage of the particular procedure laid down in rule 30, and have forced the parties here to disclose the issue of fact in dispute between them, and direct them to prepare proper issues; and if they had not agreed, then we, as in place of the Commissioners, would have settled the matter. However, seeing that we have had so much discussion, I do not think it is necessary to do that, because I think, with difficulty, and after much travail, the real question has at last slowly made its way from this mass of superincumbent irrelevancy. The real question is whether the railway companies are or are not bound to give reasonable facilities to these traders, and the reasonable facility which they ask is that they are to be allowed, under the circumstances of their trade, to tender their own waggons and to have their mineral conveyed over the railway system in their own waggons, and that they are not to be at the mercy of the railway companies, who may say to them, according to the other contention, "No, we are in a position to give you waggons of our own," or, "We think the total amount of waggons on the line is enough for the traffic, and therefore we will not have your stock which is to run over our line increased." It seems to me that that is a perfectly intelligible bone of contention. It is one upon which it seems to me there is very ample ground for argument on both sides.

Now that is the only question, and it was admitted categorically by Mr Murray, with the frankness we generally expect from him, that that question could only be determined as a question of reasonable facility, because it is certain that it can only be upon the question of reasonable facilities in this matter that the tribunal of the Railway Commission can be invoked. There are in the mass I have already alluded to various phrases which would seem to suggest that a case was going to be made on what I may call common law, carriers' law, or it might be statutory law. If there is such a case, that is a case for the law courts and not for the Railway Commissioners. If a trader is entitled to have a waggon of his own put on the line as a matter of right, whether that matter of right depends upon a statutory provision or upon the common law applicable to common carriers and the like, that is a thing he can have declared in the courts of the country, and that is a thing he is entitled to have quite irrespective of whether his demand is for a reasonable facility or is not. In one sense the right to reasonable facilities is a statutory right, because it is only statute that gives the person the right to have a reasonable facility; but the moment that the person confesses that he has no other right, the precise determination of what, in the concrete, is or is not a reasonable facility is a matter that has been committed by Legislature to the jurisdiction, not of the courts, but of the Railway Commissioners. I think it necessary to say that while I think that is perfectly certain, that is not to say I have any fault to find with the investigation that was made into the matter of right by Mr Justice Lawrence sitting as a Railway Commissioner in the case of *Spillers & Baker, Limited* v. *The Great Western Railway Company*, because there the application was upon a dispute as to a certain rebate which was to be given under a certain schedule, section 2 of the Great Western Railway Rates and Charges Act. Now a dispute upon charges under a Railway Charges Act goes to arbitration to the Board of Trade and by them is referred to the Railway Commissioners, and it was only one of the many familiar instances where a tribunal, in order to expiscate its own jurisdiction, may have to decide incidentally a matter which as a pure abstract point is not subject to its jurisdiction. The old and familiar instance is the Court of Session deciding somebody's right to a peerage. It was necessary for them to go into that to settle the matter of rebate, but that is not to be taken as authority for the proposition, for which I think there was no authority, that the Railway Commissioners could be asked to give a general declarator of legal right not based upon reasonable facilities.

The only question that remains is—What are the relevant averments of fact which will help the Railway Commissioners to decide this question of reasonable facili-

ties? We thought the best we could do would be to bring the matter as far as we could to a point by asking the railway companies to put in specific form what they were prepared to admit. They have done so. We asked the applicants, in view of that minute of admissions, to say what they still proposed to prove, what facts they asked a proof of. The railway companies, through their counsel, have pressed upon us the position that they have admitted everything necessary and that no proof should be allowed. I do not think we can go that length, for the reason which Lord Kinnear stated that you cannot force people to agree to a so-called Special Case, and I think still less can we go that length when the question is not entirely before us, but is a question in which the Railway Commissioners have said they want a certain inquiry.

I propose that we should send the case back to the Railway Commissioners, and with these remarks tell them to allow a proof, in face of the minute of admissions, of the facts averred by the applicants and minuters in their minute, but with these alterations—". . . [*His Lordship here dealt with various articles of the minute*] . . ." and I think it would be for the Railway Commissioners, in the conduct of the proof, and with that due regard which I have no doubt they will have to avoid waste of time and pleonastic repetition, to consider each article of evidence as it is proffered, first of all in the light of what is already admitted by the minute of admissions, and second, in the light of the averment that is made over and above this minute of admissions.

LORD KINNEAR—I agree with your Lordship on all points.

LORD JOHNSTON—I also agree.

LORD SALVESEN—I also agree. I desire to add one observation, and that is as regards the form of the order of the Railway and Canal Commissioners allowing proof. Your Lordship has pointed out that the Railway and Canal Commission sitting in Scotland is a Scottish Court, and I see no reason why that Scottish Court should not adopt the simple and well-settled forms of interlocutors in use in Scotland, in place of the long and cumbrous equivalent used in this case, which is obviously borrowed from English practice.

The Court pronounced these interlocutors—

"Repel objections to the competency of said appeal: Remit the cause to the Railway and Canal Commissioners to proceed with the proof allowed to the parties, but that always holding in view the said minute of admissions No. 17 of process, and restricting the proof allowed to the applicants to the matters whereof proof is asked in the specification of facts contained in said minute No. 18 of process as adjusted by this Court: *Quoad ultra* refuse the appeal, and decern."

"Recal the interlocutor of the *ex officio* Commissioner appealed against, dated 31st May 1910, and in lieu thereof grant diligence for citing havers at the instance of the respondent and applicant traders respectively, as craved, for the recovery of the documents and others in terms of the specification of documents No. 2 of process as now adjusted between the parties, and commission to James Adam, Esq., Advocate, to take the oaths and examination of havers and to receive their exhibits, to be reported *quam primum* to the Railway and Canal Commission."

Counsel for Respondents (Appellants)—Clyde, K.C.—Cooper, K.C.—Macmillan—Hon. W. Watson. Agent—James Watson, S.S.C.

Counsel for Applicants—D.-F. Scott Dickson, K.C.—Murray, K.C.—Horne, K.C.—Strain. Agents—Drummond & Reid, W.S.

---

*Tuesday, July* 19.

## SECOND DIVISION.

[Sheriff Court at Cupar.

## CHRISTIE *v.* BIRRELLS.

*Sheriff—Process—Counter Claim—Liquid and Illiquid—Landlord and Tenant—Action for Rent—Illiquid Claim of Damages—Sheriff Courts (Scotland) Act* 1907 (7 *Edw. VII*, c. 51), *Sched. 1, Rule* 55.

The Sheriff Courts (Scotland) Act 1907, First Schedule, Rule 55, enacts—"Where a defender pleads a counter claim, it shall suffice that he state the same in his defences, and the Sheriff may thereafter deal with it as if it had been stated in a substantive action, and may grant decree for it in whole or in part, or for the difference between it and the claim sued on."

*Held* that this provision did not make it competent to set off illiquid claims of damages in an action for a liquid debt, and that therefore a tenant, sued for payment of rent, was not entitled to set off claims of damages in respect of (1) the landlord's delay in fulfilling an obligation under the lease, (2) operations on the part of the landlord causing damage to the subjects let, and (3) breaches of collateral obligations alleged to have been undertaken by the landlord.

*Macnab* v. *Nelsons*, 1909 S.C. 1102, 46 S.L.R, 817, *considered* and *distinguished.*

In July 1909 Robert Maitland Christie of Durie, Fifeshire, raised an action in the Sheriff Court at Cupar against Alexander Birrell and William Birrell, farmers, Banbeath, Fifeshire, concluding for, *inter alia*, (1) the half-year's rent due at Whitsunday 1909 of the farm of Banbeath and Cottown of Durie; (2) additional payment in respect of new cottages there for the period from