"In the present case, as I have said, no defences have been lodged stating the plea of bar.

"I had at first some doubt whether it might not be *pars judicis* to give effect to the provision of sec. 142, but I have come to the conclusion that Mr Little is right when he says that there is no obligation on the pursuer to incur the expenses of the procedure necessary to obtain the leave of the Court when the company and the liquidator have deliberately abstained from raising the objection.

"Accordingly, so far as the whole of the parties who have not lodged defences are concerned, I think the pursuer is entitled to a substantial part of the decree which he craves, although not to the whole. . . ."

The compearing defenders appealed to the Court of Session, and drew the attention of the Court to the point which, though not pleaded on record, was adverted to by the Sheriff-Substitute in his judgment, namely, that the leave of the Court had not been obtained to allow the action to proceed in terms of the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sec. 142, and they argued that on that ground the action was incompetent.

Argued for the respondent—The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sec. 142, was purely in the interest of the company or the liquidator, and if it was waived by them it was not *pars judicis* to give effect to it. In the case of *Sinclair* v. *Thurso Pavement Syndicate, Limited*, October 15, 1903, 11 S.L.T. 364, the Court had by implication given effect to this view. In any event, if the defender were allowed to take that plea now, it could only be allowed on the condition of amending the record and paying all expenses since it had been closed—*Clippens Oil Company, Limited* v. *Edinburgh and District Water Trustees*, July 6, 1905, 7 F. 914, 42 S.L.R. 698.

At advising—

LORD DUNDAS—The facts in this case are somewhat complicated in detail, but are sufficiently set forth by the Sheriff-Substitute, and I need not summarise them. The pursuer called as defenders to his action the company, the liquidator, the trustees for the first debenture holders, the trustees for the second debenture holders, and the postponed bondholders, but the only parties who have lodged defences are the trustees for the second debenture holders.

I shall notice at the outset a point which is not pleaded on the record, but which occurred to the Sheriff-Substitute himself and is considered by him in his note. He states that he had some doubt in his own mind whether it might not be *pars judicis* for him to give effect to the provision of section 142 of the Companies (Consolidation) Act 1908, which enacts that where a winding-up order has been made no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose. That is a section which may be pleaded by the company and its liquidator in any proceedings taken against them, and the decision of Lord Kyllachy in the case of *Sinclair* v. *Thurso Pavement Syndicate Company, Limited*, 11 S.L.T. 364, to which we were referred, seems to afford ground for the view that the plea if taken may be afterwards waived by the company or its liquidator. In the present case the company and the liquidator though called as defenders did not appear, and the Sheriff-Substitute came to the conclusion, as I think rightly, that it was no part of his duty in these circumstances to put the section into operation. Still less, I think, is it for us to take any notice of the section now that the case is in this Court. [*His Lordship then dealt with other points with which this report is not concerned.*] I think we should refuse the appeal and affirm the interlocutor of the Sheriff-Substitute.

LORD MACKENZIE and LORD CULLEN concurred in Lord Dundas's judgment.

The Court refused the appeal and affirmed the interlocutor of the Sheriff-Substitute.

Counsel for Appellants—Sandeman, K.C. —Lippe. Agents—Macpherson & Mackay, S.S.C.

Counsel for Respondent—Moncrieff, K.C. —D. P. Fleming. Agents—Simpson & Marwick, W.S.

Friday, July 10.

FIRST DIVISION.

[Sheriff Court at Dundee.

BRITISH MOTOR BODY COMPANY, LIMITED *v.* THOMAS SHAW (DUNDEE), LIMITED.

Process — Counter Claim — Contract — Damages for Late Delivery — Time of Delivery not Specified in Contract—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 11 (2), 29, 53 (1), 59, *and* 62.

A firm of motor body builders supplied a firm of motor engineers with a motor car body under a contract in which the time of delivery was not expressly specified. In an action for the price of the body the defenders stated a counter claim for damages in respect of the pursuers' failure to give delivery within a reasonable time.

Held that a claim for damages for late delivery was a relevant defence to an action for the price, notwithstanding that the contract did not expressly specify the time of delivery.

Dictum of Lord President Inglis in *MacBride* v. *Hamilton & Son*, June 11, 1875, 2 R. 775, 12 S.L.R. 550, to the contrary effect *overruled.*

Johnston v. *Robertson*, March 1, 1861, 23 D. 646, *commented on.*

The British Motor Body Company, Limited, motor body builders, Bannermill Works, Bannermill Road, Aberdeen, *pursuers*, raised an action in the Sheriff Court at Dundee against Thomas Shaw (Dundee),

Limited, *defenders*, for payment of £135, 11s. 6d. The sum sued for, with the exception of a small item of 1s. 6d., was the price of a motor body which the pursuers had built and fitted to a chassis belonging to the defenders, under a contract between the parties. The order for the body was given in February 1912 and delivery was made in October 1912. The defenders admitted that the price charged was correct, and they made no complaint as to the quality of the workmanship or material. They, however, stated in defence to the action a counter claim for damages in respect of the pursuers' failure to deliver the chassis with the body affixed thereto within a reasonable time. No time for delivery was expressly stipulated in the contract.

The pursuers pleaded, *inter alia*—"(1) The defenders being due and resting-owing to the pursuer the sum sued for, decree should be pronounced, with interest and expenses as concluded for. (2) The defenders' averments being irrelevant, and in any event being wanting in specification, *et separatim* being unfounded in fact, decree should be granted as craved, with expenses. (3) The claim of damages alleged by the defenders being illiquid, they are not entitled to set it off against the pursuers' claim for work done and goods supplied."

The defenders pleaded, *inter alia*—"(2) The defenders being entitled to set off the amount of their counter claim against the sum sued for, and having tendered payment of the balance due by them, should be assoilzied, with expenses."

On 12th June 1913 the Sheriff-Substitute (NEISH) dismissed the defenders' counter claim and decerned for the sum sued for.

Note.—[*After a narrative of the facts*]—"The pursuers maintain that where no specific time for delivery is stipulated the defenders are not entitled to set off a claim for damages for unreasonable delay against a claim for the agreed-on price.

"The opinion of Lord President Inglis in *M'Bride* v. *Hamilton & Son*, 2 R. 775, is in my opinion a direct authority for the pursuers' contention. In that case a definite time for delivery was stipulated in the contract, and it was held that the buyer was entitled, in an action against him for the price, to have his claim for damages for delay in delivery beyond the stipulated time liquidated in the action and set off against the price. It was, however, laid down by the Lord President that where no time is expressly stipulated within which work is to be completed a claim for damages on the ground that the work was not completed within a reasonable time cannot be pleaded *ope exceptionis*.

"The case of *Pegler* v. *Northern Agricultural Implement Company*, 4 R. 435, does not exactly, I think, touch the present controversy, although it has a very direct bearing upon the question whether an illiquid claim can be set off against a liquid claim. Pegler had raised an action for wages admittedly due to him, and it was held that the defenders could not prove and set off against his demand a claim against him for having failed to account for money received, men's time, and material. In that case Lord Shand dissented, with what appears to me, if I may say so without presumption, to be a very strong opinion.

"The opinion of Lord President Inglis in *M'Bride* has, however, so far as I can discover, been followed and accepted without deviation. The argument to the contrary which is maintained by the defenders in this case was put forward in *Dick & Stevenson* v. *Woodside Steel and Iron Company*, 1888, 16 R. 242, but was apparently given up before the advising, because Lord Rutherfurd Clark thus expresses himself in clear language—'The contract does not specify any time within which the engine and gearing were to be delivered. It therefore was conceded by the defenders that they could not retain the instalment of the price sued for in this action against any loss which has been caused by reason of the delivery having been unduly delayed. They took this point to be settled by authority, and we need not further consider it.'

"But then the present defenders maintain that the law, as laid down by Lord President Inglis, has been altered (1) by section 29 (2) of the Sale of Goods Act 1893, and (2) Schedule I, rule 55, of the Sheriff Courts (Scotland) Act 1907.

"(1) Section 29 (2) of the Sale of Goods Act 1893 provides that 'Where, under the contract of sale, the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.' But then, so far as I am aware, this section adds no new provision to the conditions of the contract of sale, but only lays down what was always the law of Scotland, and in *M'Bride*, which was decided in 1875, long before the date of the Sale of Goods Act, Lord President Inglis points out that it is a condition of all contracts that the work must be completed in reasonable time (2 R., at p. 781). Accordingly, I do not think the defenders can take any support for their argument from the Sale of Goods Act.

"(2) Rule 55 of the Sheriff Courts Act 1897 was considered in the case of *Christie* v. *Birrells*, 1910 S.C. 986, and it was held that the rule had not made any alteration on the settled law that an illiquid claim for damages cannot be set off against a claim for rent. In that case Lord Mackenzie says at p. 991—'The rule was intended to avoid a multiplicity of actions and to enable the Court to grant decree in favour of a defender. It was not intended to take away the right of the creditor in a liquid debt to get decree, or to impose upon him the obligation of waiting until the decision is given as regards disputed claims of damages such as those raised by the defenders here.'

"Again, Lord Dundas in that case says, at p. 992—'It is to my mind a strong thing to say that rule 55 goes, by implication, much further and really abrogates the previously existing law—as apart from mere

procedure—as to the incompetency of setting off illiquid claims of damages against a liquid demand for rent or the like.'

"If I am right in my reading of the law as laid down in the case of *M'Bride*, then I am further of opinion, upon the authorities referred to, that law has not been altered by subsequent legislation. Accordingly it appears to me that the defenders are not entitled in this action to set off their counter claim for damages against the pursuers' demand for payment of the price. I therefore dismiss the counter claim and grant decree as craved."

The defenders appealed to the Sheriff-Principal (FERGUSON), who on 4th July 1913 adhered.

Note.—"At the argument on the appeal defenders' agent gave up the contention based upon the Sheriff Courts Act 1907, and relied wholly on the effect of the Sale of Goods Act 1893, the sections on which he founded being section 11 (2), section 53, section 59, and section 62. In the cases that were quoted there is an absence of authority as to the effect of the Act of 1893, though I observe that in *Paton* v. *Payne* (35 S.L.R. 112), s.s. 11 (2), 53 and 62 were cited in the House of Lords. But as in both *Taylor* v. *MacLellan* (29 S.L.R. 23) and *Paton* v. *Payne* there were cross actions, neither of these cases bears directly on the point at issue, which is, whether, *obstanti* the original pursuers in an action for the stipulated price of an article furnished and retained, the defender can in that action set off by way of counter claim a claim of damages for delay in delivery, no fixed time of delivery being stipulated. Prior to 1893 the law of Scotland was perfectly clear, as thus laid down by the Lord President in *MacBride* v. *Hamilton* (2 R. 780)—'If the contractor was tied down to a particular time by the words of the contract the case comes within the rule of *Johnston* v. *Robertson*, but if he was only bound to finish the work in reasonable time the damages for delay must be liquidated in a separate action.' The reason is found in the fact that if there is an express provision in the contract as to time there is a specific breach of the particular contract sued on, and the plea is at once available that the party suing has not performed his part of the contract. It was as much a condition in all contracts, implied as matter of law and common sense—that the work should be completed in reasonable time, before 1893 as after it. The rule laid down by the Lord President is really a rule of Scottish practice, and it is not to be expected that it would be altered by an imperial statute of which the main purpose is the codification of existing law. To justify the conclusion that it was abrogated a clear and unambiguous statutory enactment, or a subsequent decision of the Court of Session inconsistent with its maintenance, would be necessary.

"Section 11 (2) of the Act of 1893 says nothing as to the method in which the buyer is to make his alternative remedy effectual, and 'a breach which may give rise to a claim for compensation or damages' seems to suggest just the sort of indeterminate illiquid claim which Scottish practice has refused to allow to be set off against a liquid claim instantly verified.

"Section 53 is English in its terminology, and it is upon a breach of warranty that the right to set up against the seller in diminution or extinction of the price arises.

"Section 62 construes breach of warranty as equivalent in Scotland to 'a failure to perform a material part of the contract.' It appears to me only reasonable that 'a material part of the contract' should be something embodied in an express provision of the contract, and not something which can only be determined after inquiry into collateral circumstances. Nor do I think that the provision of section 59, by which the buyer, who keeps goods which he might have rejected and claims damages, may be required to consign the price, was intended by implication to alter the principles of Scottish practice, or deprive the seller of any existing right he might possess."

The defenders appealed, and argued—A claim for damages in respect of late delivery, even where the time of delivery was not fixed by an express term of the contract, could be stated by way of counter claim in an action for the price. A rule that it must be liquidated in a separate action was not laid down in *MacBride* v. *Hamilton & Son*, June 11, 1875, 2 R. 775, 12 S.L.R. 550, the opinion of Lord President Inglis to that effect being *obiter*. The point was given up in *Dick & Stevenson* v. *Woodside Steel and Iron Company*, December 18, 1888, 16 R. 242, 26 S.L.R. 165, which was not therefore an authority against the appellant. *Pegler* v. *Northern Agricultural Implement Company*, February 2, 1877, 4 R. 435, 14 S.L.R. 302, was distinguishable. If a rule as stated by Lord President Inglis in *MacBride* (*cit. sup.*) was laid down in that case, it was altered by the Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), secs. 11 (2) and 53 (*a*). The counter claim was competent under the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap, 57), First Schedule, rule 55. All that was decided in *Christie* v. *Birrells*, 1910 S.C. 986, 47 S.L.R. 853, was that rule 55 did not make it competent to set off an illiquid claim against a liquid one. If the possibility of having a cross action stating the counter claim conjoined with the action for the price were the test—*per* Lord Dundas in *Christie* (*cit. sup.*)—the counter claim was relevant. Reference was also made to *Johnston* v. *Robertson*, March 1, 1861, 23 D. 646.

Argued for the pursuers (respondents)—The rule laid down by Lord President Inglis in *MacBride* (*cit. sup.*) was a settled rule of procedure, and had been accepted and acted on ever since. It really meant that the defenders' counter claim must be as liquid and readily verifiable as the pursuers' claim. Hence the absence of a specified time of delivery made all the difference. The rule had not been altered by the decisions in the rent cases. That was not a development since *MacBride*, as the doctrine first appeared in *Graham* v. *Gordon*, June 16, 1843,

5 D. 1207. Nor had the rule been altered by statute. Warranty in section 53 of the Sale of Goods Act meant a proper warranty in the English sense, and section 11 (2) did not imply that every failure to perform a material part of a contract was a breach of warranty. Rule 55 of the Sheriff Courts (Scotland) Act was merely a procedure section. Its subsumption was that the counter claim was of such a nature that it could be set off against the sum sued for. Reference was also made to *Fraser* v. *Lang*, February 10, 1831, 9 S. 418; *Cooper* v. *Green & Chatto*, M. 10,100; *Pegler* (*cit. sup.*), and *Christie* (*cit. sup.*).

At advising—

LORD PRESIDENT—This is, in substance, an action of damages for breach of a mercantile contract. In form it is not, and the question we have to consider is whether or no, because of the form in which the case is presented to the Court, we are compelled to refuse to entertain it. I should regret if we were so constrained, but I am of opinion that we are not.

The pursuers sue for payment of £135, being the price of a landaulette body which they made for a Wolseley car, and supplied to the defenders in terms of a contract dated in February 1912. There was no time for delivery stipulated in the contract. Delivery was made in October 1912, and the defenders met the claim for payment of the contract price by a claim for damages for late delivery in respect that the sellers had not delivered within a reasonable time.

Now according to the law of Scotland, if no time is fixed for delivery in a contract of sale, a reasonable time is implied. And accordingly the pursuers here must be held to have contracted that they would deliver the landaulette body within a reasonable time, and if they have failed to do so then they have committed a breach of contract, and it is trite law that a party who is in breach cannot demand implement of a contract. Accordingly the defence here would appear to be sound and based on well-established principles. The pursuers, however, plead that the claim of damages by the defenders being illiquid they are not entitled to set it off against the pursuers' claim for work done and goods supplied. That is obviously a bad plea, because if a time for delivery had been specified in the contract the claim for damages for delay would equally have been an illiquid claim, and yet it is conceded that it would have formed a good defence to an action for payment of the price. The plea which the pursuers intended to state, but did not state, was—that inasmuch as the delay in delivery was, as alleged, beyond a reasonable time, and not beyond a specified time, a claim of damages in respect of that late delivery was a bad defence to the action. That is the plea which, no doubt, they intended to state, and that was the plea which the learned Sheriffs sustained. And certainly the Sheriffs were bound in the existing state of the law to sustain the plea, because the rule rests upon an *obiter dictum* of the late Lord President Inglis to be found in the case of *MacBride* v. *Hamilton* (1875) 2 R. 775.

An *obiter dictum* coming from so eminent an authority is entitled to the very highest respect, especially as, seemingly, it has been accepted as sound law ever since.

Stated in very simple language the rule is this—that if a reasonable time for delivery has been exceeded then a claim of damages for late delivery is not a good answer to a claim for payment of the contract price; but if a specified time for delivery has been exceeded then a claim of damages for delay is a good answer to a claim for the contract price. Both pleas arise out of the same contract — whether he has exceeded a reasonable time or has exceeded a specified time, equally the pursuer is in breach of his contract, but apparently it was thought that, because in the one case the defender had to prove one fact only, to wit, the amount of his damages, and in the other case he had to prove two facts—(first) what was a reasonable time for delivery, and (second) the amount of damages which he had suffered in consequence of the failure to deliver within a reasonable time, it was a bad defence. But that is the only difference between the two—that in the one case the defender has to prove two facts, and in the other one. I cannot think that such a distinction can be supported having regard to the sound principles of the law of contract, for both pleas arise out of exactly the same contract, and a failure to deliver within a reasonable time is just as much a breach of the particular contract as a failure to deliver within a specified time.

When the dictum of Lord President Inglis in the case of *MacBride* v. *Hamilton* is examined it will be found to rest upon the supposed authority of the case of *Johnston* v. *Robertson* (1861) 23 D. 646, for here are the Lord President's words—2 R. at p. 781—"In *Johnston* v. *Robertson* the employers were found entitled to set off a claim of damages sustained by reason of delay in the execution against the contract price sued for by the contracter. One distinguishing feature of that case was that the damages were liquidated by the contract; for the Court held that the £5 to be paid by the contractor for every week during which the works should remain unfinished was not meant as a penalty but a liquidation of the actual loss contemplated as likely to be suffered by the employers in consequence of the delay. But that was only one point in the case, and although it occupies a conspicuous place in the opinions of the Judges, the judgment of the Court, as I understood it, was that the damages, whether liquidated or illiquid, might be set off against the contract price sued for provided there was breach of an express condition of the contract in point of time. In that case there was a careful and precise stipulation that the building was to be completed and the keys delivered over by a specified day. There could be no doubt that there was a breach of contract in point of time. I think it was the opinion of all the Judges that if there had been no express provision in the contract as to time, and the only complaint of the employers had been that the work was not completed in reasonable time—which is an implied con-

dition in all contracts—that would not have led to the same result, since there would not have been a breach of the particular contract sued on, and the plea would not have been available in the same way against the contractor that he had not performed his part of the contract and therefore could not recover."

Now I pause here to observe that if delivery is late because a reasonable time was exceeded, that is just as much a breach of the particular contract as if a specified time had been exceeded; and when the case of *Johnston* v. *Robertson* is carefully examined it will be found that it does not decide that any such distinction exists. No doubt in *Johnston* v. *Robertson* a specified time was fixed for the completion of the contract work, and a claim for damages was held to be a good answer to the claim for the contract price, but that was upon the ground that a party seeking implement of a contract was bound to fulfil his part of the contract. And nothing was said by the learned Judges who decided that case, with the exception of one passage to which I shall later refer, to support the view that if a reasonable time had been exceeded and not a specified time the claim of damages could not be set up against a claim for the contract price. Thus in the opinion of Lord Benholme it appears that the plea which the Court there sustained as a good answer to the claim for the contract price was based mainly on the rule of the law of Scotland that one party to a mutual contract in which there are mutual stipulations cannot have his claim under the contract satisfied unless he is prepared to satisfy the corresponding contemporaneous claims of the other party to the contract. "I think," says Lord Benholme, "the rule of law, that an illiquid claim cannot be set off against a liquid claim, does not apply to such a case"—that is to say, that the plea as we have it before us is a bad plea—"and that, at all events, if the one claim be liquid and the other partly illiquid yet contemporaneous, the rule should suffer some qualification or relaxation if the claims arose under one contract. The counter claims must be contemporaneous, for, if not, the rule would apply. Here it appears to me that the pursuer cannot prove his case without letting in the defence. The question raised by the pursuer is, Has the work been performed within the stipulated time? That requires probation, and the circumstance that the defenders' claim on the ground of delay in completing the work arises out of the same contract, appears to me to be a satisfactory answer to the objection that the damages claimed under the defenders' issue have not been constituted by a substantive action." Now nothing could be clearer than that statement of the ground of judgment by Lord Benholme. It simply lays down and applies the familiar doctrine that a man in breach of a contract is not entitled to demand implement from the opposite party. And in the same way, when we turn to Lord Cowan's opinion we find on this part of the case he says, at p. 654,—"I concur generally with Lord Benholme as to the competency of pleading this counter claim *ope exceptionis*, and am clear that an action of reduction is not necessary to enable the defender in this way to meet the demand of the pursuer. I also concur in thinking that the Statute of 1592, which I hold not to apply to this case, does not raise any difficulty." "I cannot doubt," says Lord Cowan further on, "that opposing claims arising out of one mutual contract may be dealt with in this way. The case of *Dickson* v. *Porteous*, (1852), 15 D. 1, is a peculiar case and does not interfere with the general principle that claims out of mutual contracts may be pleaded against one another. That defence is not properly the defence of compensation, but is rather a defence to the effect that the pursuer is not entitled to what he demands under the contract until he fulfil his own obligations under it." There is nothing in the opinions of either of these learned Judges to support the view that the defence held good would have been considered bad if the contractor had there exceeded a reasonable time instead of, as he did, exceeding a specified time, in the completion of his work. And in the same way, when we turn to the opinion of the Lord Justice-Clerk (Inglis) we find him saying, at p. 656—"As to this second question"—the one we are now concerned with—"I think the statute does not apply; it applies only to compensation *de liquido in liquidum*, instantly verified by the writ or oath of party. The claim by the defender here is not a liquid debt, and it takes no benefit from the statute, and therefore we may discharge from further consideration the question as to whether the decree in absence is any impediment to this defence. . . . The defence arises out of an obligation in a mutual contract, which is to be enforced at the same time as the stipulations in favour of the pursuer. Even that consideration might not be conclusive against the objection that a separate action should be raised to enforce this claim under the contract. . . . Every action on a mutual contract implies that the pursuer either has performed or is willing to perform his part of the contract, and it is therefore always open to the defender to say that under the contract a right arises also to him to demand performance of the contract before the pursuer can insist in his action."

Once more I think there can be nothing plainer than the ground of judgment as thus stated by the Lord Justice-Clerk Inglis. But towards the close of his opinion there is to be found one short paragraph in which, unquestionably I think, his Lordship must have had in his mind the distinction which he announced in such explicit terms in the subsequent case of *MacBride* v. *Hamilton*, 23 D. at p. 656. In one sentence he says—"If the defence had been founded on an allegation of unreasonable delay the case would, at all events, have been a very different one from this, and must have been dealt with on different principles." Now his Lordship does not say in what respect it would have been a different case from the one then before the Court, and he

does not say upon what different principle the Court would have treated it. We can only judge what he meant by the dictum subsequently announced in the case of *MacBride* v. *Hamilton*, 2 R. at p. 781. All I say in regard to this short paragraph is that it was purely *obiter*, that it was not concurred in by the other two members of the Court, and, for the reasons I have given, it appears to me to be antagonistic to the principle upon which, confessedly, the judgment in *Johnston* v. *Robertson*, 23 D. 646, depends, to wit, that claims arising out of a mutual contract may be pled the one against the other, and that the pursuer is as much in breach of his contract if he exceeds a reasonable time for delivery as if he exceeds a specified time for delivery.

Accordingly the result I come to is that the Lord Justice-Clerk Inglis must have been under some misapprehension when he said in *MacBride* v. *Hamilton* that the question had been virtually decided in *Johnston* v. *Robertson*. *Johnston* v. *Robertson*, and indeed *MacBride* v. *Hamilton*, are simply other illustrations of the application of the familiar rule, which will be found admirably stated in the judgment of Lord Shand, which was affirmed in *MacBride* v. *Hamilton*, 2 R. at p. 779, footnote, where his Lordship says—"I think the sound general rule, which may be the subject of exceptions arising from special circumstances or the special terms of a particular contract, is that in cases of mutual contract a party in defence is entitled to plead and maintain claims in reduction or extinction of a sum due under his obligation where such claims arise from the failure of the pursuer to fulfil his part of the contract." And it was in applying that principle that Lord Shand came to the conclusion that the defence in *MacBride* v. *Hamilton* against a claim for payment of the contract price was well founded. The Lord President himself says (2 R. at p. 780)—"The question whether a claim of this kind can be maintained *ope exceptionis* is always one of nicety. The general proposition is clear, that where a party seeks to enforce a contract he must show that he has performed, or been ready to perform, his part of the contract."

Accordingly I think it can be shown quite conclusively that there was no support in the law of Scotland prior to the case of *MacBride* v. *Hamilton* for the distinction which was drawn between two illiquid claims of damage—one illiquid claim depending upon exceeding reasonable time for delivery, the other equally illiquid claim depending upon the contractor having exceeded a specified time for delivery. The Sheriffs, proceeding upon the rule laid down in *MacBride* v. *Hamilton*, sustained the third plea-in-law for the pursuers and have thrown out this action. I am of opinion that although they were certainly bound to take that course in the existing state of the law, it is now our duty to put the law upon a proper and true foundation and to announce that no such distinction exists, and that no such rule is now to be found in the law of Scotland.

It must, however, not be forgotten that all the law to which the defender in this case appealed is now to be found codified and defined in the recent Sale of Goods Act of 1893 (56 and 57 Vict. cap. 71), as thus—By the 29th section, sub-section (2), of the statute, it is provided that "where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time." To that provision the defender here appeals. By section 56 it is provided that what is a reasonable time is a question of fact, and that the defender here desires to prove. By section 11 (2) it is provided that "in Scotland failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages." That is exactly what the buyer has done here. By section 53 (1), where there is a failure to perform a material part of the contract, he may set up against the seller such failure in diminution of the price—exactly what the buyer desires to do here. And lastly, by section 59, when the buyer elects to claim damages for breach of contract instead of rejecting, "he may, in an action by the seller for the price, be required, in the discretion of the Court before which the action depends, to consign or pay into Court the price of the goods"—which may be done here if the Sheriff-Substitute in his discretion thinks proper to order consignation.

The code applies therefore to every stage of this case, and if I am right in the conclusion I have reached with regard to the law subsequent to and anterior to the date of the Sale of Goods Act, then it is apparent that we do not need here to invoke the 55th rule appended to the Sheriff Courts Act of 1907 (7 Edw. VII, cap. 51, Sched. I), because it always was the law of Scotland that no counter action was needed in order to sustain a defence such as is tendered here, but that it was sufficient to state it in the defence to an action for implement of the contract.

I am therefore for recalling the interlocutors of the Sheriffs and remitting to the Sheriff-Substitute to proceed with the case.

LORD SKERRINGTON—The question which we have to decide is whether it is a relevant defence to an action for the price of goods sold and delivered to allege that the pursuer failed in his implied obligation to deliver the goods within a reasonable time, and that the defender thereby incurred damage which he claims to set off *pro tanto* against the contract price. Both the learned Sheriffs have answered this question in the negative, and have decided that such a claim of damages cannot be successfully pleaded *ope exceptionis*, but must be liquidated in a separate action. Their decision is in conformity with the opinion of

the Lord President (Inglis) in *MacBride* v. *Hamilton & Son*, (1875) 2 R. 775. That opinion, however, was purely *obiter*, and I am unable to reconcile it with the general principles of contract law. Accordingly I am prepared to hold that the defender in an action like the present one is entitled to establish and set off a claim of damages based upon the ground of the pursuer's failure to deliver within a reasonable time. While such, however, is my opinion upon the general legal question, I am equally clear that the Court, as the master of its own procedure, has an equitable power to prevent a defender from taking advantage of the rule of law as to mutual contracts merely for the purpose of delay and in order to try to set up a counter claim which could not in all probability be successfully established in a cross action. This power is expressly conferred or recognised by section 59 of the Sale of Goods Act 1893. Both the Sheriffs refer to the provisions of this statute, but they do not, in my opinion, give to them their due effect. I shall assume that in the present case the time of delivery was not of the essence of the contract within the meaning of section 10. In any case the defenders waived this point by taking delivery — See *Paton & Sons* v. *Payne & Company*, (1897) 35 S.L.R. 112. It follows from section 11 (2), section 53, and section 62, that the defenders were entitled to claim "compensation," or in other words to set up against the seller the breach of contract alleged to have been committed by the latter "in diminution or extinction of the price."

The Sheriffs refer to rule 55 of the Sheriff Courts Act 1897. Seeing that the counter claim in the present case was smaller than the principal claim, the defenders did not need to found upon this rule, and their position would have been just as strong if the rule had never been enacted. The effect of the rule, as I read it, is to empower the Sheriff to grant a decree in favour of a defender as if the latter had brought a cross action. In every case, however, the Sheriff will require to consider whether the counter claim is of a kind which entitles the defender to have a judgment upon it before a decree is issued on the principal claim.

LORD ORMIDALE — I concur with your Lordship and have nothing to add.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute and remitted the cause to the Sheriff-Substitute to proceed.

Counsel for Pursuers (Respondents)—A. M. Mackay. Agents—R. C. Gray & Paton, S.S.C.

Counsel for Defenders (Appellants) — Lippe. Agents — Alex. Morison & Co., W.S.

Thursday, July 16.

EXTRA DIVISION.

[Lord Anderson, Ordinary.

STEVENS *v.* MOTHERWELL ENTERTAINMENTS, LIMITED AND ANOTHER.

Process — Record — Amendment — Court of Session (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29.

The defenders in an action reclaimed. They did not print and box the notes of evidence. Subsequently they craved leave to amend the record by adding certain averments and pleas-in-law in the light of facts divulged at the proof. The respondent asked that the reclaiming note be dismissed in respect of the omission to print the notes of evidence which were necessary to make the amendment intelligible, but which would also show that he was entitled to hold the decree. *Held* that the amendment should be allowed on condition of the reclaimers paying within one month to the respondent the taxed amount of his expenses since the closing of the record.

The Court of Session (Scotland) Act 1868 (31 and 32 Vict. cap. 100), section 29, enacts— "The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session, upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper; and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made. . . ."

James Cousin Stevens, Edinburgh, *pursuer*, brought an action against Motherwell Entertainments Limited, incorporated under the Companies (Consolidation) Act 1908, and having its registered office at 47 Frederick Street, Edinburgh, and Robert Colburn Buchanan, theatrical director, Ulverston, Oswald Road, Edinburgh, *defenders*, for payment of certain sums amounting in all to £885, 5s. 10d., as provided for, *inter alia*, in and by (1) an agreement "between the pursuer and the defenders, Motherwell Entertainments Limited, dated 8th July 1913, and relative missives therein referred to, and (2) deed of guarantee granted by the defender Robert Colburn Buchanan to the pursuer, dated 31st July 1913."

The Lord Ordinary (ANDERSON), after a proof, awarded the pursuer the sum of £213, 12s. 10d. with expenses.

The defenders reclaimed, and boxed with the reclaiming note a copy of the closed record and of the interlocutors in the cause, but not the notes of evidence. Subsequently they craved the Court in view of facts which the proof had disclosed to allow a minute of amendment to be lodged adding certain averments and pleas-in-law to the record. The respondent admitted the relevancy of