so far as it concludes against Finlay, Muir, & Company: Dismiss also the second and third conclusions of the summons, and decern," &c.

Counsel for Pursuers—H. Johnston, Q.C. —M'Leod. Agent—A. G. G. Asher, W.S.

Counsel for Defenders—Ure, Q.C.—Clyde. Agents—Forrester & Davidson, W.S.

Friday, December 16.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

MACLAINE *v.* STEWART, *et e contra.*

Lease—Missives of Lease—Whether Estate Regulations Incorporated by Implication in Missives.

Where parties had entered into missives of lease which contained the essential terms of a lease, but no reference to the estate regulations usually incorporated in leases granted by the proprietor, *held* that the tenant was not entitled to the benefit of provisions in the regulations as to the taking over of sheep stock by the landlord at the termination of the lease, where the tenant had in the negotiations subsequent to the missives repudiated the intention to be bound by them.

Custom—Proof of Custom—Whether Terms Added to Lease by Custom of District—Lease.

A tenant led evidence which proved that it was the invariable custom in a certain district to insert in leases of sheep farms one or other of several widely varying provisions for taking over sheep stock at valuation from an outgoing tenant. *Opinions* (*per* Lord Moncreiff and Lord Stormonth Darling, Ordinary) that this evidence was not relevant to establish any custom binding upon landlord who had let a sheep-farm to a tenant upon missives which made no reference to any such obligation.

Lease—Outgoing—Taking over Stock at Valuation—Regular Stock of Sheep—Excessive Stock.

Evidence upon which *held* (*diff.* from the Lord Ordinary) that a landlord had sufficiently established that the stock proposed to be handed over by an outgoing tenant was excessive.

In the first of these two conjoined actions Murdoch Gillian Maclaine of Lochbuie sued Peter Stewart, lately tenant of the farms of Rossal and Dernaculen on the estate of Lochbuie, in the island of Mull and county of Argyll, for £70, being the defender's half-year's rent from Martinmas 1896 to Whitsunday 1897, when his lease came to an end.

In the cross action Stewart called Lochbuie and the incoming tenants of Rossal and Dernaculen, and concluded, *inter alia*, (1) for declarator that the sheep-stock on Rossal and Dernaculen at Whitsunday 1897 was the regular stock of these farms in acordance with article 12 of the estate regulations on the estate of Lochbuie, which he maintained was incorporated in his lease, and did not exceed the average number kept during the five years of his lease; (2) for decree ordaining Lochbuie, in terms of the 12th article of the estate regulations, to take over the stock on these farms at valuation, under deduction of 800 and 400 sheep taken over or to be taken over at valuation by the incoming tenants, or otherwise under the same reduction to take over the stock at the prices fixed by valuation in the submissions between Stewart and the incoming tenants of Rossal and Dernaculen; and (3) for payment of the value of the sheep so fixed.

The conclusions of the summons were subsequently restricted to those against the defender Maclaine, the action as against the other defenders being withdrawn.

It was admitted that the half-year's rent sued for was due and unpaid.

The sheep upon the farms, over and above the 800 and 400 taken over by the incoming tenants, were sold by auction in terms of an agreement between the parties, and the question ultimately came to be, whether Stewart was entitled to payment of the difference between the price realised at the auction and the price which would have been obtained if these sheep had been taken over at valuation, less the amount of the half-year's rent. Lochbuie had bound the incoming tenants to take over only 800 and 400 sheep respectively.

Stewart averred—"(Cond. 4) . . . It is the universal custom on sheep farms in the district and an implied condition upon which all sheep farms are let, that the landlord or incoming tenant shall take over the usual and regular stock of sheep at the termination of an outgoing tenant's possession. This is a necessary custom in the interests of all parties alike."

Stewart pleaded—"(1) The defender Murdoch Gillian Maclaine being, as proprietor of the said farms, bound to take over the usual and regular sheep stock on the said farms from the pursuer at the termination of his lease, the pursuer is entitled to decree against him as concluded for with expenses. (2) In respect of his agreement with the incoming tenants limiting the number of the sheep stock that they were to be bound to take over, the said defender is bound to take over the balance between those numbers and the usual and regular stock on the farms."

Lochbuie denied that he was bound under the lease between him and Stewart to take over any sheep at all at valuation, or to take the incoming tenants bound to do so; and he also pleaded—"(4) The proper stock of the said farms having been duly taken over bythe incoming tenants, the said defender ought to be assoilzied from the whole conclusions of the summons so far as directed against him."

A proof before answer was allowed in

both actions, the actions] were conjoined, and Stewart was appointed to lead in the proofs.

The facts established by the proof may be summarised as follows:—Stewart had been in possession of the farm of Rossal from 1879 to 1892, and of Dernaculen from 1885 to 1892 as joint-tenant with his brother under formal leases which incorporated the printed articles and conditions applicable to the estate of Lochbuie.

One of these articles (the 12th) provided as follows:—"It shall be in the power of the proprietor, or those authorised by him, at all times during the lease offered for, to sowm or fix the number of sheep, cattle, and horses to be kept by each tenant and on each possession; and the tenants hereby bind and oblige themselves to give obedience to his or their orders in this respect, and they shall not keep a greater number of sheep, cattle, or horses than shall be fixed as above under a penalty of two pounds sterling yearly, to be paid to the proprietor as additional rent at Martinmas for each head of cattle or horse, and five shillings for each sheep kept by them over and above their fixed sowm respectively, and on no pretext whatever shall any tenant keep more cattle or sheep on his possession during the last than during the average of the preceding years of his lease under a penalty of five pounds sterling for each head of cattle or horse, and one pound sterling for each sheep above the average number; and where farms are let in common the tenants bind themselves to keep good neighbourhood among themselves; and in the case of all farms upon which a regular stock of sheep are kept, the incoming tenant shall be bound and obliged to take at entry the sheep stock on the farm at the valuation of neutral men in the usual manner, and he shall before delivery give satisfactory security for payment of the price at the term of Martinmas following, and at the expiry of the lease the proprietor or incoming tenant shall in like manner take the regular stock of sheep on the farm, provided they do not exceed the usual stock or sowming, and are in good condition, and free of disease, with reference to the preceding season. Further, the tenants shall not change the breed of sheep or system of breeding during the lease." . . . At his entry Stewart took over the sheep on the farms at valuation.

On 4th November 1891 Lochbuie and Stewart entered into the following missives of lease:—"Missives for new lease from Whitsunday 1892 to Whitsunday 1897. *Rossal, 4th Nov.* 1891.—To Maclaine of Lochbuie. Sir,—I hereby offer to take the farms of Rossal and Dernaculen as at present possessed by me on the following terms, viz.—Lease, 5 years. Rossal rent, £100 per annum. Dernaculen rent, £40 per annum. Right of fishing in the Coleader river for two rods. A porch to be erected at the kitchen door of Rossal house. Your acceptance of the above will oblige.—Your obedt. servant, PETER STEWART. I accept of the above offer.—M. G. MACLAINE of Lochbuie. Lochbuie, Isle of Mull, 4/12/91."

Originally it was contemplated that a formal lease should be drawn out. When it came to be drafted the landlord's agents proposed to incorporate the estate regulations so far as applicable. But the tenant's agent at once repudiated them. He maintained that they formed no part of the bargain. On 22nd February 1892 the tenant's agent wrote the landlord's agents as follows:— . . . "My client is willing to allow the tenancy to stand on the missive alone although it does not contain all that passed at the meeting between Lochbuie and him when it was signed. . . . I am quite willing to adjust with my client any draft of a lease based upon the missives, and these you will notice do not contain any reference to the printed articles of lease."

The principal objection taken by the tenant, so far as the matters in dispute in this case were concerned, was to the first part of article 12 quoted above. A long correspondence followed, in the course of which the landlord's agents at first contended for the insertion of the whole of article 12, and the tenant's agent opposed this. Various clauses were subsequently proposed by both parties in lieu of the provisions in the first part of that article. The parties very nearly came to an agreement, but in the end they failed to do so. It was finally suggested that the landlord should have the right to count the tenant's sheep, and for that purpose to have notice of all sheep gatherings so as to be represented at them, and also that he should be entitled to direct the removal of the excess over the average number kept for the three years immediately preceding, the landlord or incoming tenant being bound to take over from the tenant at the end of the lease the usual and proper sheep stock, not exceeding in number the average of the immediately preceding years. But the tenant, although these provisions, with the exception of the clause as to notice being given of the sheep gatherings, had been suggested by his own agent, finally refused to allow Lochbuie to count his sheep till the end of the lease. When announcing this determination the tenant's agent concluded his letter as follows:—"The lease, of course, stands on the missives." This letter practically concluded the negotiations on the matter.

On 26th February 1895 Stewart gave notice that he would quit the farms on the termination of the lease at Whitsunday 1897. On 6th November 1896 he wrote to the landlord's agents asking for an assurance that his present sheep stock would be taken off his lands at his outgoing. In answer to this letter the landlord's agents intimated that the number of sheep to be taken over from him at valuation would not exceed 800 on Rossal and 400 on Dernaculen.

Stewart intimated that he had 1500 sheep to deliver, and that this was the usual and proper stock. It was ultimately arranged that the whole stock should be valued, but that only 1200 should be taken over by the incoming tenants under reservation of Stewart's right of action to compel the proprietor or incoming tenants to take

over the excess above that number at valuation prices.

With regard to the question whether the stock which the tenant had on the farm on the expiry of his lease was excessive the following facts appeared at the proof:—The numbers tendered on 3rd June 1897 were 931 on Rossal and 468 on Dernaculen, or in all 1399. The numbers taken over by Stewart at his respective entries were 838 on Rossal in 1879 and 382 on Dernaculen in 1885, or in all 1220. The incoming tenants deponed that anything over 800 on Rossal and 400 on Dernaculen would be excessive. By letter dated 16th October 1890 Stewart had informed the factor that the stock on the farms was 1100 sheep, 10 cows, 4 heifers, and 8 stirks. On the other hand there was evidence to show that Stewart, from his having kept fewer cattle and horses on the farms than his predecessors did, had pasture for a good many more sheep. The incoming tenants had not had much experience of sheep-farming in Mull. All the witnesses who were present at the valuation, except the incoming tenants, deponed that the condition of the sheep handed over was fairly good, and not such as to suggest over-stocking. There was nothing to show that the stock handed over contained an undue proportion of the younger class of sheep. The tenant produced books showing the number of sheep clipped and dipped on Rossal and Dernaculen from 1889 to 1897 inclusive. The average number clipped during that period was 907 on Rossal and 453 on Dernaculen, the lowest and highest numbers on each farm respectively being for Rossal 788 in 1891 and 995 in 1893, and for Dernaculen 417 in 1890 and 482 in 1896. The average numbers clipped were 1036 and 482, the lowest and highest numbers being for Rossal 956 in 1894 and 1105 in 1891, and for Dernaculen 413 in 1894 and 543 in 1896. No books or documents were produced showing what numbers of sheep were sold off or bought on to the farms in the various years, and Stewart deponed that he had no books which would give this information, and also that he had not kept any of the bought-and-sold notes. No evidence was led by the landlord to show excessive importation or undue reduction of sales during the last year or two of the lease.

The tenant deponed that he was able to keep more sheep on the farms because he held them together, and also because the heather was better burned than formerly.

Evidence was led by Stewart with the object of showing that it was the universal custom of the district for the landlord or incoming tenant to take over the sheep-stock at valuation, but no custom was proved, except a custom of inserting in leases of sheep-farms one or other of several widely varying provisions for taking over sheep at valuation."

On 6th July 1898 the Lord Ordinary pronounced the following interlocutor:—"In the action at the instance of Peter Stewart against Murdoch Gillian Maclaine, assoilzies the defender from the conclusions of the summons, and decerns; in the action at the instance of the said Murdoch Gillian Maclaine against the said Peter Stewart, decerns against the defender for the sum, with interest thereon, first concluded for in the summons; *quoad ultra* assoilzies the defender, and decerns: Finds the said Murdoch Gillian Maclaine entitled to expenses in both actions," &c.

Opinion.—"In the view which I take of this case the main question agitated in the proof does not arise for decision. That question was whether the sheep-stock presented by the tenant for valuation at his outgoing did or did not exceed the usual and regular sheep-stock on the two farms of Rossal and Dernaculen.

"If it had been necessary to decide it, I confess I should have had some difficulty in doing so.

[*His Lordship then stated the general facts of the case as narrated* supra.] "The *onus* of proving excess being on the landlord, and the contending views representing merely the difference between 1200 and 1399, I think it would have been difficult to hold that the landlord had proved his case.

"But the true question seems to me to be rather one of law. The tenant, as I have explained, had been in possession of Rossal from 1879 to 1892, and of Dernaculen from 1885 to 1892, as joint-tenant with his brother, under formal leases which incorporated the printed articles and conditions applicable to the estate of Lochbuie.

[*His Lordship then quoted the material words in the first part of article* 12 *above set forth.*] "On 4th November 1891 the landlord and tenant entered into missives, which are set out on the record. These missives contained all the essentials of a lease—subject, endurance, rent—and some minor particulars. I do not myself doubt that in so bargaining both parties had in view the printed conditions which had hitherto been matter of agreement between them, although the missives contained no express reference to these conditions."

[*His Lordship then stated the facts above set forth with regard to the negotiations between the parties for the adjustment of a lease and the ultimate position taken up by the tenant.*]

"This attitude on the part of the tenant was, I think, within his legal rights, because the missives were silent as to the conditions. But it was an unfortunate attitude for his own interest, and it was the more remarkable that his only objection to the printed conditions was directed against the first part of article 12, which, so far as I can see, had no application to farms such as those in question. A power given to a proprietor at any time during a lease 'to 'sowm or fix the number of sheep, cattle, and horses to be kept by each tenant and on each possession,' is plainly, I think, referable only to cases of pasturage held in common. The very word 'sowming' presupposes several small tenants on one farm, and has no application to a farm held by a single tenant. A very similar clause was so interpreted by the Court in *Duke of Argyll v. M'Arthur's Trustees*, 17 R. 135. When so restricted the clause is of some utility as

enabling the landlord to settle disputes among his small tenants holding in common; but if it were to be held applicable to the case of a single tenancy, I should agree with the tenant's agent that it might be very arbitrary and unjust in its operation. Certainly article 12 is by no means a model of clearness, and this perhaps accounts for the fact that in opposition to the view which I have expressed, both parties seem to have assumed that the whole article applied to single farms and what are called 'club farms' alike. But all that is rather by the way; the salient fact is that the tenant repudiated the printed articles in their entirety, and that during the whole five years of the lease his possession stood on the missives alone.

"Now, what was the effect of that in law? Clearly, I think that neither party was entitled to demand that a single head of stock should be handed over at the termination of the lease. Of course it was open to the parties to make a special bargain with regard to that matter, but no such bargain was made. What the landlord did was to bind his new tenants to take no more than 800 sheep from Rossal and 400 from Dernaculen, and this was intimated to Stewart by Messrs Tods, Murray & Jamieson's letter of 30th November 1896, in answer to a letter from him asking for an assurance that his present stock would be taken off his hands at his outgoing. What the result would have been if he had then insisted that he would hand over either the whole or none it is of course impossible to say. All that he did was to enter into an agreement with the new tenants, under which his whole stock was to be valued, but only 1200 were to be held as delivered, under reservation of his right of action to compel the proprietor or incoming tenants to take over the excess above that number at valuation prices. That, of course, simply relegated the question to the position in which it stood under the missives.

"So much did the tenant, when he came into Court, feel the necessity of founding on the printed articles which he had hitherto repudiated, that the declaratory conclusions of his summons are expressly laid upon these. It is true that he has a further conclusion, asking that the landlord should be decerned to take over the excess stock at valuation prices. If the printed conditions are out of the case, this conclusion can only be supported on what is said to be the custom of the district.

[*His Lordship then stated the nature of the proof led with regard to custom.*]

"Custom is never imported into contract except for the purpose of supplying a term on which both parties are presumed to have agreed; and even if the alleged custom in this case were more uniform than it is, I think it would be a strange perversion of the doctrine to presume agreement on a matter about which the parties negotiated for six months, and then differed so absolutely that the negotiations had to be abandoned.

"In these circumstances I find it impossible to read into this lease any implied condition founded on custom. I find it equally impossible to hold that the printed conditions applied, in face of the tenant's distinct repudiation of them during the whole period of his possession and of the landlord's acquiescence in that repudiation. The result is that I must assoilzie the landlord from the conclusions of the action at the tenant's instance, and I must give decree for the rent in the landlord's action, assoilzieing the tenant *quoad ultra*."

Stewart reclaimed, and argued—(1) The custom alleged was proved. The tenant was entitled to the benefit of a custom if not repugnant to his lease, although his lease did not refer to it. The terms of a lease could not be contradicted or altered by proof of custom, but an additional condition might be added:—*Wigglesworth v. Dallison*, Smith's Leading Cases (10th ed.) vol. i. 528, and *Hutton* v. *Warren*, 1 M. & W., there referred to at page 535. It was plain here that the missives were not intended to be a complete statement of the bargain between the parties, and they must be assumed to have had in view the custom of the district. (2) The presumption was that a renewal of an old lease, apart from special stipulation to the contrary, was upon the same terms as the former lease. Rankine on Leases (2nd ed.) 534. Consequently in this case the whole of article 12 of the estate regulations was binding upon the parties. (3) Where a formal lease was stipulated for in the missives, or was clearly contemplated by both parties, usual and customary conditions, although not mentioned in the missives, might be introduced into the lease if not contradictory to the terms of the missives, and either party might insist upon this being done, the exact terms being determined by a reporter on remit from the Court in the event of difference between the parties:—*Erskine* v. *Glendinning*, March 7, 1871, 9 Macph. 656; see also *Whyte* v. *Lee*, February 22, 1879, 6 R. 699, *per* Lord Young (Ordinary) at page 701 (note). Here the word "lease" in the missives did not mean "endurance," but meant that the parties agreed to enter into a formal lease upon the usual terms. One of the usual and customary provisions which the parties would have been bound to accept would have been a clause as to the taking over of sheep stock at a valuation by the landlord or incoming tenant, for whatever might be the effect of the proof as to custom, it was proved beyond doubt that such a clause was one of the usual and customary provisions of leases relating to sheep farms in this district. (4) A tenant was entitled and bound to go out of a farm upon the same conditions as he had come into it. Such a provision was invariably inserted in leases, and if a formal lease had been insisted upon here the tenant would have been entitled to have a clause to that effect put into it. Even upon the missives alone the parties must be held to have contracted upon the tacit assumption that the tenant was to have the advantage of this rule. When

the tenant's agent wrote that the lease would "stand on the missives" he did not mean that no conditions were to be binding upon the parties except those expressly mentioned in the missives, and this was not a fair interpretation to put upon the words used by him. (5) The tenant was not now barred by the position which he took up during the negotiations, any more than the landlord was by the contentions maintained on his behalf. The landlord had never taken up the position that he was not bound to take over any sheep at all until after this action began. The landlord was just as much barred from maintaining his present position as the tenant was. (6) There was no excess of stock. The *onus* was upon the landlord to prove that there was, and he had not discharged it. The proper proof of overstocking was to show that an unusual number of sheep had been bought, and that an unusual number of ewes which should have been cast had been kept on. Nothing of that sort was established here. On the contrary, it was proved that the stock on the farm was the usual stock, and that there was no sign of overstocking in the condition of the sheep. More sheep could be kept now than was the case at one time, when a considerable number of cattle had been pastured, for which sheep had now been substituted. As to this question see *Duke of Argyll v. MacArthur's Trustees*, November 28, 1889, 17 R. 135.

Argued for the respondent.—The custom alleged was not proved. All that was proved was that some provision as to taking over sheep at valuation was generally introduced into leases in Argyllshire. Proof of what generally happens was not proof of custom—*Brown v. M'Connell*, June 7, 1876, 3 R. 788. As regards the estate regulations, the tenant could not now ask that a condition which he had repudiated should be held as incorporated with his lease. It was too late for the tenant to come forward and make his present claim when the part of the clause which safeguarded the landlord's interests could not be made operative, and only the part which was favourable to himself could receive effect. To allow him to do so would be inequitable. The first part of article 12 applied to all farms, not merely to club farms. Even if the article were held as incorporated, and the landlord were bound to take over the usual stock at valuation, he had implemented that obligation. Any stock over 1200 was excessive. The landlord had sufficiently proved this. It was unjust that he should suffer because the tenant had kept imperfect books. Moreover, the tenant was bound by his statement that there were only 1100 sheep on the farm, which was the representation upon which he got his lease.

At advising—

Lord Trayner—I come to the same result as the Lord Ordinary, and very much for the reasons expressed by his Lordship in his opinion.

It may be true that in entering into the contract or missives of lease dated 4th November 1891, the parties intended that the formal lease which was contemplated should contain an embodiment, or a reference amounting to an embodiment, of the printed conditions relative to the granting of leases on the defender's estate. But it is equally true that when the draft lease, prepared in that view, was presented to the pursuer, he declined to execute it, and refused to have the printed conditions made part thereof. He was willing enough to have these conditions included in the lease in so far as they conferred rights or privileges upon himself, but not to any other extent. This attitude he maintained (apparently under legal advice) throughout a long correspondence which took place between the law-agent of the parties, and finally intimated in a letter dated 20th October 1892—"The lease of course stands on the missives." He now says that his contention, so pertinaciously urged on his behalf, was wrong, and that he is not bound by it. But he has only discovered this, or at all events, has only admitted it, when the insertion of the printed condition would be of no avail to the defender and would benefit himself. I think he cannot be allowed now, with such an effect, to change his ground. As he insisted on the lease standing "on the missives" he must abide by the missives, and the claim which he now makes is one which the missives do not warrant or support.

I think it right to add that, even if the printed conditions had been added to the missives, I should not, as at present advised, be prepared to concur in the view indicated by the Lord Ordinary, that the defender had not proved that the number of sheep tendered by the pursuer was in excess of the ordinary and usual stock on the farms. But on this question it is not necessary to pronounce any decision.

Lord Moncreiff—The tenant's defence to the landlord's claim for rent is that it was an implied condition of his lease that at the termination the landlord should take the stock of sheep at a valuation, and that the value of the sheep on the farm exceeded the landlord's claims. The tenant possessed from 1892 to 1897 on missives of lease which contained no reference to any such condition. But he now seeks to import it on the ground that parties contracted with reference to the estate regulations, and in particular to the twelfth article of the regulations.

There is no doubt that it is competent to read into a written lease conditions which are in accordance with a distinct local custom or estate regulations, provided that the circumstances are such as to lead to the conclusion that parties had such custom or regulations in view when they entered into the contract.

In the present case, as regards custom, apart from estate regulations, I think the proof does not establish any custom beyond this, that there is in Argyllshire a general custom of introducing stipulations into written leases as to the incoming tenant or

the landlord taking over the sheep stock of his predecessor at a valuation.

The evidence shows that the stipulations as to the mode in which this is to be done vary considerably, and thus it is essential that they should be reduced to writing.

No doubt in consequence of this difficulty the tenant's declarator is founded on a presumed adoption of the estate regulations which in article twelve make certain provisions on that subject. But he is at once met with the rejoinder that when the landlord was willing to grant him a formal lease embodying those regulations, he deliberately refused to accept it on the ground that he had not agreed to those conditions, and announced his intention of possessing, and did possess, under the missives of lease apart from the regulations. I think it is quite sufficient for the landlord's case to hold that the tenant is now barred from going back on the construction of the contract. He has from the first repudiated the conditions, and in particular the first half of article twelve. It is out of the question that he should now be allowed to maintain that he is entitled to the benefit of the latter half of that article when, the lease being at an end, the landlord no longer has it in his power to enforce the earlier portion of it.

Even if I held the landlord bound to take over the stock, I think there are solid grounds for holding that he has sufficiently implemented any obligations which lay upon him by taking over twelve hundred sheep, that being within a score of the numbers which were on the farm when the tenant took it over from his predecessor.

The Lord Justice-Clerk concurred.

Lord Young was absent.

The Court adhered with additional expenses.

Counsel for the Reclaimer—Salvesen—A. S. D. Thomson. Agents—Gill & Pringle, W.S.

Counsel for the Respondent—Johnston, Q.C.—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, December 17.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

CURRAN *v.* ROBERT M'ALPINE & SONS.

Process—Appeal—Appeal for Jury Trial—Competency—Court of Session Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40.

In an action of damages for personal injuries laid alternatively at common law and under the Employers Liability Act 1880, the defenders averred that the pursuer had discharged any claims otherwise competent to him by accepting payments under an insurance scheme organised by them for the benefit of their employees, under which it was a condition of receiving such payments that the receipt of them should bar all legal claims. The Sheriff-Substitute, *ante omnia*, allowed a proof of these averments, and thereupon the pursuer appealed for jury trial. *Held*, in accordance with the views expressed in *M'Coll* v. *J. & A. Gardner*, January 12, 1898, 25 R. 395, that the appeal was incompetent, in respect that it had not been taken upon an interlocutor allowing proof on the merits of the cause.

This was an action brought in the Sheriff Court at Glasgow by Bat Curran, labourer, against Robert M'Alpine & Sons, railway contractors there, in which the pursuer craved decree for £500 at common law, or alternatively for £170 under the Employers Liability Act 1880, as damages for personal injuries sustained by him through the fault of the defenders while he was working in their employment.

The defenders denied liability, but in addition put in a separate statement of facts in which they averred that the defenders had a scheme of insurance whereby, in consideration of a payment by themselves and a contribution by their servants, certain benefits were assured to their employees in the event of their sustaining injuries, that the pursuer was aware of this scheme, and that deductions under it had been made from his wages, that in terms of a notice setting forth the terms of the scheme, which was posted up at the defenders' offices and at their store, it was provided that any workman of defenders by accepting the payments therein provided, discharged his claims at common law and under the Employers Liability Act 1880, that the pursuer had received sundry payments from the defenders under the scheme, and that he had thereby discharged his claims, if any.

The defenders pleaded—"(3) The pursuer having accepted payments from defenders under their scheme as condescended on, has discharged any claims otherwise competent to him under common law or statute, and the defenders should be assoilzied."

The Sheriff-Substitute (Balfour) on 26th July 1898 issued the following interlocutor:—"Having considered the case, *ante omnia*, allows the defenders a proof of the averments in their statement of facts annexed to the defences, and to the pursuer a conjunct probation, and appoints the case to be put to the diet roll of 31st August.

The pursuer appealed to the Court of Session for jury trial.

The defenders objected to the competency of the appeal, and argued—This appeal was incompetent—*M'Coll* v. *Gardner & Company*, January 12, 1898, 25 R. 395.

Argued for the pursuer and appellant—This appeal was competent—*Conroy* v. *A. & J. Inglis*, June 4, 1895, 22 R. 620; *Robertson* v. *Earl of Dudley*, July 13, 1875, 2 R. 935. The Court of Session Act 1825 (6 Geo. 4, cap. 120) (Judicature Act), section 40,