of the Magistrates. The Magistrates are the managers of the town's estate, but the right of property is in the community. The complainer therefore is not seeking to protect a subordinate right of use in the property of another, but he claims on behalf of the community to prevent their own property from being disturbed, and that is what every burgess is entitled to do independently of the Magistrates or against their opposition. This was the ground of judgment in *Sanderson* v. *Lees*, and in the subsequent case of *Grahame* v. *Swan*. It is said, however, that it is unjust to the respondent to compel him to try a question of property in a process the judgment in which may not be *res judicata* if the same question should be raised hereafter by the Magistrates. I agree with the Lord Ordinary that it would be premature to consider how far the judgment in this case will constitute *res judicata*, since we do not know what the judgment may be. But the same question arose in *Sanderson* v. *Lees*, and Lord Deas makes an observation upon it which I think very useful. His Lordship says—"I am quite aware that this question arises in the form of a suspension and interdict. But I give no opinion whether this decision will or will not be *res judicata* in an action of declarator should such a proceeding be resorted to. A question of right may be raised and decided even in a process of suspension and interdict; and it will be for consideration if a declarator shall be raised whether this is not a case in which that has been done." And then his Lordship points out that all the pleas of the respondent were upon matter of right. The material point is that a burgess may raise a process of this kind even although it may involve matter of right, and that whether it will result in a final judgment on a question of property will depend on the subsequent course of the proceeding and on the ground of the ultimate decision. I agree that there is force in the observation which was made by the respondent's counsel that it may be very hard for him to be compelled to litigate a question of this kind with one unreasonable inhabitant of the town where the Magistrates who are the responsible administrators of the burgh property are clearly of opinion that it is not expedient or not worth while to litigate. But we cannot take for granted at present that the complaint is unreasonable. That is the question to be tried; and if the law is, as I think it clearly is, that the complainer is not bound by the decision of the Magistrates, he has a good title and interest to try it.

The only other point which the Lord Ordinary decides is that raised by the fifth plea-in-law, which is that a note of suspension and interdict is an inappropriate form of action in trying the questions raised by the complainer. In so far as that plea is meant to be founded on the suggestion that rights of heritable property are necessarily concerned I think that it is untenable, but it was also supported by the argument that the suspension and interdict were too late since the wrong complained of is already completed. I think that it also is quite untenable. The encroachment complained of is a continuous enroachment, and the inhabitants, if their case is otherwise well founded in fact, are entitled to a decree which will prevent the respondents from continuing to interfere with the subjects and will enable the proper administration to restore the subjects to their true purposes, or to compel the respondents to restore the ground to the condition in which it was before the operations complained of.

LORD ADAM and LORD M'LAREN concurred.

The LORD PRESIDENT, who was present at the hearing, having in the interval been appointed a Lord of Appeal in Ordinary, gave no opinion.

The Court adhered.

Counsel for the Reclaimers — Balfour, Q.C. — Dundas, Q.C. — Kennedy — W. F. Trotter. Agent—T. S. Paterson, W.S.

Counsel for the Respondent—Sol.-Gen. Dickson, Q.C.—Wilson—Guy. Agents—Patrick & James, S.S.C.

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*Tuesday, November* 21.

## SECOND DIVISION.

[Sheriff of Lanarkshire.

## M'ALPINE & SONS *v.* DOCHERTY.

*Proof — Separate Proof of Preliminary Defence—Discharge—Reparation.*

A workman bringing an action for damages against his employers was met by the defence that the claim had been discharged. *Held* (reversing judgment of Sheriff, and reverting to that of the Sheriff-Substitute) that proof of the averments relating to the discharge should be taken before the main question was remitted to proof.

James Docherty, labourer in the employment of Robert M'Alpine & Sons, railway contractors, raised an action in the Sheriff Court at Glasgow, concluding for damages against his employers, both at common law and under The Employers Liability Act 1880. The defenders, besides lodging defences to the pursuer's condescendence, put in a separate statement of facts, in which they averred—"(Stat. 1) After the accident in question, communications were entered into between the pursuer and the defenders, with a view of settling any possible claim for damages that pursuer might allege to be due to him in respect of the injuries said to have been suffered by him by said accident. (Stat. 2) The pursuer asked for and agreed to accept the sum of £3 in full satisfaction of his claim. That sum was accordingly paid to him by the defenders, and accepted by him in full of all his claims, and on receipt thereof he granted the following discharge to the defenders." . . .

The pursuer stated that when the discharge referred to was obtained from him he was blind and suffering great bodily pain, that he was weak and facile in mind and easily imposed on, all owing to the injuries he had received, and that the discharge was obtained from him by fraud and circumvention and concealment of material facts. The pursuer also tendered restitution of the sum paid.

The pursuer pleaded—"(1) The pursuer having sustained the injuries libelled through the negligence of the defenders, or of those for whom they are responsible, at common law or under the statute foresaid, are liable in compensation and damages to the pursuer. *Additional pleas.*—(1) The pursuer being weak and facile in mind and easily imposed on, or at least not being of sound and disposing mind at the date of the pretended settlement, and the said David Robertson having at the time concealed material facts from the pursuer, and, taking advantage of the pursuer's weakness and facility and the said concealment as aforesaid, having impetrated from the pursuer by fraud and circumvention the said settlement and the said pretended receipt, the same should be set aside in terms of the Sheriff Court (Scotland) Act 1877. (2) The pursuer being blind at the time the pretended receipt was granted, the same was not executed according to law, and the same should be set aside. (3) The said receipt having been obtained from the pursuer by fraud and circumvention on the part of the defenders or their law-agent, and the pursuer having offered to make *restitutio ad integrum*, the same should be set aside."

The defenders pleaded—"(4) The pursuer having accepted a sum in full settlement of his claim, is debarred from insisting in the present action, and the action should therefore be dismissed, with expenses.

The Sheriff-Substitute (SPENS) pronounced the following interlocutor:—"Allows pursuer a proof of the averments contained in answers 1 and 2 of the answers to defenders' separate statement of facts, and to the defenders a conjunct probation, and sends the case to the diet roll of 12th July, pursuer on or before said diet to consign the sum of £3 admittedly paid to him."

The pursuer appealed to the Sheriff (BERRY), who pronounced the following interlocutor:—"Recals the interlocutor appealed against: Allows a proof, subject to the condition that before the proof the pursuer shall consign the sum of £3 admittedly paid to him."

*Note.*—"This case has been appealed on the ground that the whole case should be sent to proof. The Courts, as the decisions show, do not favour the proof in a case being split up. I do not think that there is sufficient ground in the present case for departing from the general rule on that point. The proof allowed is subject to the condition of the sum of £3 being consigned in Court."

The defenders appealed to the Court of Session.

At the hearing no appearance was made for the pursuer. Counsel for the defenders was stopped in his argument.

LORD JUSTICE-CLERK—I am of opinion that the Sheriff-Substitute was right in allowing the limited proof which he did, and that we should revert to his interlocutor. If the matter is decided in one way on that proof there would be no need for any inquiry of a more extended character, and therefore I think that the proof allowed by the Sheriff-Substitute is all that should be allowed at this stage.

LORD TRAYNER—The defence to this action is that the pursuer's claim has been settled. The Sheriff-Substitute allowed a proof of the averments relating to the alleged settlement. The Sheriff has recalled the Sheriff-Substitute's interlocutor, and remitted the case to proof on the whole matter—that is, both merits and alleged settlement, at the same time saying that the decisions do not favour "the proof in a case being split up." If that means that the Court does not favour taking proof on parts of the merits of a cause I agree. But where something is alleged which is a bar to the action on the merits proceeding, there is no disfavour shown to the proof being "split up" so as to decide the question of bar before the merits are included. The merits may never require to be considered. I think that we have previously approved the course taken here by the Sheriff-Substitute, and my view is that that course is the proper one to take. It would be altogether idle to inquire into the merits of the case if the case has been settled.

LORD MONCREIFF—I am of opinion that in cases where a discharge is pleaded in defence, and the pursuer does not deny that he signed the discharge, it is incumbent on the pursuer to show that the discharge was obtained in circumstances which do not not make it binding upon him. I do not understand the Sheriff's view. If the discharge is binding, there is an end of the case, and therefore *in limine* the proof should be limited to that question. This in practice is the course usually followed.

LORD YOUNG was absent.

The Court sustained the appeal, recalled the interlocutor appealed against, and remitted to the Sheriff to proceed in terms of the interlocutor of the Sheriff-Substitute.

Counsel for the Defenders — Mitchell. Agents—Clark & Macdonald, S.S.C.