show that the defender acted illegally in working his coal, and generally conducting his operations as he did. The narrower view is that the pursuers have failed to trace the damage they have suffered to the defenders' action. This last is the view of Lord Ormidale, in whose opinion in that respect I concur entirely, as I also do in the last ground adopted by Lord Gifford. My own view is that the working of the minerals towards the surface was not a regular thing, but that question appears to me to be quite overridden by the fact that the pursuers have failed to trace the damage to the defender's fault.

Lord Neaves was absent.

The Court adhered.

Counsel for Pursuers—Dean of Faculty (Watson) —Lee—Harper. Agent—Henry Buchan, S.S.C.

Counsel for Defender — Balfour — Alison. Agent—J. Gill, L.-A.

Thursday, January 13.

FIRST DIVISION.

[Sheriff of Lanarkshire.

GIBSON & STEWART *v.* BROWN & CO.

Compensation—Contract—Damage—Defence.

Storekeepers received a quantity of grain from the owners for storage without express contract. In a petition at their instance for warrant to sell a portion of the grain which remained in their hands undelivered, in payment of their storage account, — *held* that an illiquid claim of damages for injury received by the grain when in the petitioners' hands, restricted to the amount of the account sued for, was a competent defence.

This was an appeal from the Sheriff-court of Lanarkshire in a petition at the instance of Gibson & Stewart, general storekeepers, Glasgow, against Brown & Co., starch manufacturers there. The petition set forth that the petitioners had received into their stores in Ann Street, Glasgow, from 29th June to 8th July 1872, 2000 bolls of Indian corn or maize belonging to the respondents; that this corn had been re-delivered to the respondents to the extent of 1792 bolls, 208 bolls still remaining in the stores; that the respondents were owing the petitioners sums for storage of the grain, &c., to the amount of £111, 4s. 10d.; that the respondents had declined to pay their charges, and that further charges for storing were still being incurred; that these charges would exceed the value of the grain still in store, unless it were forthwith removed. The petitioners therefore prayed, *inter alia*, for warrant to sell the grain, and after deducting the expenses of process and sale, to apply the free proceeds *pro tanto* in the liquidation of the charges, amounting to £111, 4s. 10d., due by the respondents to the petitioners, reserving to the petitioners their claim for any balance which might remain due to them for storage or otherwise, after deducting the free proceeds of sale.

In their answers to the condescendence the respondents admitted the correctness of the charges of £5 for receiving, of £3 for hoisting, and of £11, 4s. for weighing, but they resisted the other charges, viz., £21, 17s. 6d., being charges for turning the corn, and £70, 13s. 4d., being the rent for storage from 29th June 1872 to 14th April 1875, and stated that when the grain was redelivered to them as above it was found to have got damaged "by heating or other causes unknown to them while in the petitioners' possession." They further averred that the damage was caused by the manner in which the petitioners had piled the grain, and by their failure to turn it and use sufficient care in storing it. Their loss was stated at £125.

The petitioners denied that the damage, if there were such, was caused by their fault, and explained that the grain was in a heated state when they received it. They further pleaded, *inter alia*, "(2) The claim of damage stated in the defences is illiquid, and cannot be set off against the petitioners' claim for rent and charges."

On 30th June 1873 a joint minute by the parties was put in process, in which they consented to the sale of the grain and the consignation of the free proceeds of the sale, reserving the rights of the parties.

After proof had been led, the Sheriff-Substitute (Guthrie) found upon the facts for the petitioners apart from the question of the competency of the defence.

On appeal to the Sheriff (Dickson) the judgment of the Sheriff-Substitute was recalled by the following interlocutor:—"Having heard parties' procurators on the defenders' appeal, and considered the record and proof, for the reasons stated in the note hereto, recals the interlocutor appealed against: Finds that the grain in question was stored in the pursuers' stores for the time specified in the petition, and that their proper charges therefor are £111, 4s. 10d.: Finds that it was the pursuers' duty to have said grain properly stored and turned while in their hands, but that they failed in that duty, in consequence of which the grain deteriorated in quality and value, and the defenders suffered loss to an extent equal to, if not greater than, the pursuers' said claim: Therefore sustains the defences to that extent and effect: Finds that the pursuers were not justified in refusing to deliver the portion of the said grain which they retained under their lien for store charges, and that the price thereof falls to be paid to the defenders: Accordingly appoints the Clerk of the Court to pay to them the sum consigned: Finds the pursuers liable in expenses: Allows an account thereof to be given in: Remits the same when lodged to the Auditor of Court to tax and report; and remits to the Sheriff-Substitute to decern for the amount of said expenses when taxed, and decerns."

In a note the Sheriff stated that he "had great difficulty upon the only question debated before him, viz., whether the pursuers neglected to take proper care of the grain when in their store, their procurator having admitted that any claim by the defenders to damages on that account was a good defence to the claim for storage, rent, &c."

The petitioners appealed to the Court of Session, and argued—The claim for damages was illiquid, and was incompetent as an answer to a petition like the present. It was no argument to say the rent claimed by the petitioners

was illiquid also, for the rent became due at a fixed term.

The respondents argued — In a petitory action the claim of damages would have been a good defence. This contained the ingredients of a petitory action, and besides asked for power to implement the decree. There was no writing in this contract, and the stipulations were as express on the one side as on the other. Both claims were equally illiquid, and in such a case a claim of damages arising out of the same transaction was a good defence.

Authorities—*The Scottish North Eastern Railway Company* v. *Napier*, March 10, 1859, 21 D. 700; *Riddell* v. *Mackie*, Nov. 20, 1874, 2 R. 115, 12 Scot. Law Rep. 115; *Macbride* v. *Hamilton & Son*, June 11, 1875, 2 R. 775, 12 Scot. Law Rep. 550; *Taylor* v. *Forbes*, Dec. 2, 1830, 9 S. 113; *Johnston* v. *Robertson*, March 1, 1861, 23 D. 646; *Stewart* v. *Campbell*, Nov. 12, 1834, 13 S. 7.

During the discussion the respondents put in a minute agreeing to restrict their claim for damages to the amount of the accounts set forth by the petitioners.

At advising—

Lord President—I cannot think that there is any real difficulty in this case when it is thoroughly examined, although it belongs to a class which often raise points of delicacy, and it was necessary to have it fully argued that we might see our way clearly before giving judgment.

The pursuers are storekeepers, and the defenders, who import grain, delivered during parts of June and the first week of July 1872 into their stores 2000 bolls of Indian corn, for the purpose of having them kept there. There was no written contract between the parties, and nothing to explain the verbal contract; but the act of delivering the grain to the premises in which it was received created an implied contract, and for the terms and conditions of that we are obliged to have regard to usage and the custom of trade, and the rate of charges made must also be so tested. The account, to a certain extent, is not disputed. It is conceded that the storekeeper is entitled to charge 5s. per 100 bolls for storing, 3s. per 100 bolls for hoisting, 1s. 6d. per 100 bolls each time the grain is turned, 12s. 6d. for weighing when the grain is delivered out, and over and above these to charge warehouse rent. As a counterpart to this claim, it is admitted that the petitioner was bound to take due and proper custody of the grain. Under the head of proper treatment there is included the duty of turning, so as to prevent heating or such like injury to the goods.

As I have said, this is a mutual contract, so constituted that its terms require to be settled by use. It follows therefore that a claim arising upon the one side or the other requires to be proved unless it is admitted, and so when the storekeeper brings an action for the recovery of his storage dues, it would be open to the merchant to dispute the accuracy of the rates, and so the pursuer would be put to prove his account. In such a case, if the merchant were to allege damage to himself by the non-performance by the storekeeper of his part of the contract, it appears that that claim, arising out of the same transaction, would constitute a good ground for a counter action.

The peculiarity of this action is that the petitioners are exercising a lien or right of retention over the grain in their stores. They have retained a part of the grain, and have asked for a warrant to have it sold, and to retain the proceeds *pro tanto* of their charges. At first sight this creates considerable embarrassment, and that was aggravated at the time the Sheriff pronounced his judgment by the fact that the claim of the respondents for damages was greater than the amount asked by the pursuers for storage dues. Further, the Sheriff's interlocutor affirms the loss of the defenders to have been "equal to, if not greater than," the pursuers' claim. But any embarrassment thus produced has been removed by the minute which the defenders have lodged, restricting their claim to the amount of the accounts put in by the petitioners. Now, that being so, and having regard to the fact that the prayer of this petition, although it takes the form of a warrant to sell, operates a payment in money of claims made against the respondents, I do not see any distinction to be drawn between this form and a proper petitory action. If that be so, and if it be clear that the two claims arise out of the stipulations of the same mutual contract, the only point which remains is, whether the law applicable to express contracts also applies to those which are constituted by implication only. I do not find any sufficient reason for distinguishing the two. If the contract was express on the one side, and on the other not, I do not say what would be the effect; but in the present case, on both sides the terms of the contract are left to be interpreted by usage. It being so, I think, in the present case, the rule which applies where there is an express contract on both sides must be followed.

Further, if the claim of the defenders be competent, I do not think there is much difficulty about the merits of the case, and upon these I agree with the result at which the Sheriff has arrived.

Lord Deas—There is at first sight, no doubt, a little embarrassment in this case, in consequence of the peculiar form in which the action is brought, but it only requires a little attention to enable us to see that that embarrassment is more apparent than real. The pursuers had a right of lien over the grain which still remained at that time in their premises, and in order that effect might be given to that right they crave in this petition a warrant to sell the grain. That was quite right. They also crave leave "to apply the free proceeds *pro tanto* in the liquidation of the charges, &c., due by the respondents to the petitioners." There cannot be a doubt that that is not only an application to sell the grain, but also to put the proceeds into their pockets when sold. It is therefore just a petitory action, coupled with an assertion of a right of lien, and of their proposed liquidation of their debt by disposing by sale of the grain in their stores. This is made still clearer if we have regard to the procedure in the case. Though it was pleaded *in limine* by the respondents that the action was incompetent, that plea was at the outset repelled of consent, and a minute was then put in by the

parties consenting to the sale of the grain and to the consignation of the free proceeds, pending the determination of the rights of parties. So that, in these circumstances, nothing remained to prevent the pursuers, if they prevailed, putting that fund at once into their pockets. It is difficult then to see the difference between this and a petitory action.

If that be so, the question comes to be, whether in this mutual contract the fact that on both sides the contract arises on implication in place of being express excludes the counter claim in defence of damages. It is very true that the defenders admit, to a certain extent, the charges against them, and it is quite right to say that that account comes near to a liquidation of the sum demanded, even without the admission of its correctness. But there are the items of £21, 7s. 6d. for turning the grain, and of £70, 13s. 4d., neither of which are admitted. These are left to implication, and we are not dealing with a case where there is an admission of the whole accounts sued for. Besides, admissions of such a nature must be taken with their qualifications. I think the counter claim of damages is legitimate.

As to the difference from the excess of the damage over the sum concluded for, I confess I should be slow to say that it would have made any difference to my mind though the restriction agreed to by the minute had not been made. We are familiar with the practice of allowing damage to be pleaded as a defence where the amount of the damage exceeds the pursuers' claim. But we have not to deal with that now, and it is not before us.

Upon the merits of the case I agree with your Lordship.

Lord Ardmillan—There is some nicety in the preliminary question raised in this case. My humble opinion is that if the claim of the petitioners, who are substantially the pursuers, had rested on a written contract, then, unless the defenders could bring their claim within the same contract, that claim must be excluded. In the present case the parties must go to proof. The defenders, who say that out of the same contract so proved there arose an obligation on the part of the pursuers that the grain should be so stored as not to suffer damage, are quite entitled to plead this defence, and to have it held good.

Whether the respondents could have pleaded damage beyond the limited amount to which they have restricted their claim by minute, it is not necessary to decide. I merely mention this to guard against the inference that but for the reservation it could or could not have been pleaded.

After the best consideration of the case, both on this point and upon the merits, I have come to be of the opinion of your Lordships.

Lord Mure—I have no difficulty on either point in this case. The authorities before us of mutual contracts were all under the express written agreement of parties. But the present circumstances, when the verbal contract has to be set forth in proof, make no difference in the application of the rule. This case is identical with that of *Taylor* v. *Forbes*, and the pursuers here, as owner of the storing lofts, are, to my mind, in no different position from the owner of the ship there. It was in that instance laid down that the plea of set-off was competent, and the present case is, I think, in a more favourable position, because neither claim was here liquid at the time of the closing of the record. There the amount of the freight was liquid. That is my view on the competency of the plea, and on the merits I also agree.

The Court adhered.

Counsel for Petitioners (Appellants)—Asher —Brand. Agent—Duncan & Black, W.S.

Counsel for Respondents—Balfour—Jameson. Agents—J. & R. D. Ross, W.S.

Friday, January 14.

FIRST DIVISION.

[Lord Craighill.

THE SCOTTISH HERITABLE SECURITY COY. (LIMITED) *v.* ALLAN, CAMPBELL, & COY., AND THE SCOTTISH HERITABLE SECURITY COY. (LIMITED) *v.* JOHN WATSON & SONS.

Poinding the Ground—Heritable Creditor—Proprietor —Right in Security.

A debtor in security of a sum advanced granted a personal bond in favour of the creditor, in which it was provided that he (the creditor) should have "all the rights and power of absolute proprietors" in and over certain lands also conveyed to him in security of the advance by the creditor. The disposition by which these lands were conveyed was *ex facie* absolute, and the deed was duly recorded, but a back-letter which was granted by the creditor was not recorded. Upon the debtor's failure to pay under the stipulations of the bond, the creditor, having first prepared and recorded a duplicate back-letter, raised an action of poinding of the ground in satisfaction of his claim.—*Held* (1) that the title of the creditor being the said *ex facie* absolute disposition, was that of a proprietor, not of a creditor, and (2) that the sum claimed was therefore not a *debitum fundi*, and was no foundation for an action of poinding of the ground.

Observed (*per* Lord President) that the back-letter must be held as not recorded, notwithstanding the duplicate, but that, had it been recorded, it would not have been material to the case.

In the first of these two actions the Scottish Heritable Security Co. (Limited) were pursuers, and Allan, Campbell, & Coy., manufacturers, Newburgh, Fifeshire, and John Carmichael Allan, the only individual partner of that firm, were defenders.

The facts of the case, so far as material, were as follows:—By a bond dated the 13th Apri