

parties. It appears that the referee was of opinion, on a subsequent examination of all the waggons, that they were of less value than had been contracted for to the extent of £3, 15s. each, and the defender claimed this deduction, and was ready to settle on these terms. The pursuers refused to do so, and raised this action, to which several defences are stated. It is said the waggons have not been constructed according to agreement, and that the referee being of that opinion, the defender is not liable in the price. It is also said that the action should be dismissed, because it is a subject under the contract for reference. The first plea is met by the pursuers, who say that reference is out of the case—that the reference did not extend to anything but the condition of the materials and workmanship when delivered, and that at all events the defender's remedy was to return the waggons, which he did not do. I don't entirely adopt the construction of either party. I think the subject of the contract ought to be looked to. Although the clause of reference occurs in a sentence by itself, it is impossible to throw out of view the general character of the transaction which is embodied in the preceding paragraph, where the pursuers give their guarantee for a certain time. If, in the course of the twelve months, some or all of these waggons had broken down in consequence of deficiencies, and it had been discovered that the real cause was the original defective construction, I am not prepared to hold that under the contract the referee was not the proper person to determine that matter. I think, if the sellers had said, "We insist on having the opinion of the referee," the buyer could not have objected. But I don't think the case is in that position. It appears to me that the defender here has proceeded from the beginning on a mistaken notion of what were his duties under the contract, and I cannot discover that the defects observed by the referee afterwards were latent, and such as might not have been observed when the waggons were first delivered. The defender seems to have thought that he could go on using the waggons, and at any time take the opinion of the referee. He says himself on record—"The defender found, as the waggons were delivered, that they were defective in several respects, and he intimated these defects in writing to Mr Pickering from time to time as the waggons arrived. It was, however, not thought necessary to have them examined by Mr Thomson, the party named by Mr Pickering as the referee, until the whole of the waggons had been delivered, when it could be ascertained whether they were in every respect equal to Ashbury's waggons, as stipulated in the contract." That is his own statement. Now I think he was quite wrong in not returning the waggons if their disconformity to order could have been ascertained on delivery. But instead of that he went on using them, and has so mistaken his legal rights. I think, therefore, that the result the Lord Ordinary has arrived at is right. I also agree with him that the action is not excluded by the reference, and that the plea of homology on the part of the pursuers has not been made out. The other Judges concurred.

Agents for Pursuers—H. & A. Inglis, W.S.
Agent for Defender—James Finlay, S.S.C.

Wednesday, Dec. 5.

SECOND DIVISION.

GIBSONS v. MACQUEEN.

Process—Summons—Joint Pursuers—Competency.

A summons at the instance of four pursuers, whose interests were different, concluding that a slump sum of damages be paid to them all jointly, dismissed as incompetent.

This was an action of damages at the instance of four pursuers, who alleged that two of them had advanced £1200, and the other two £300, to James Scott, ironmonger in Edinburgh, for which sums separate bonds and dispositions in security were granted over certain subjects in Howe Street belonging to Scott. The summons concluded for a slump sum of £840. The defender in the action, Mr Macqueen, was agent for the debtor, and the nature of the allegations, which are the grounds of action, appear from the following issues proposed by the pursuers:—

"It being admitted that the pursuers, Jane Gibson and Agnes Gibson, agreed to advance to James Scott, then ironmonger, Howe Street, Edinburgh, the sum of £1200, on a bond and disposition in security over certain subjects in Howe Street, belonging to the said James Scott, to be subscribed by the said James Scott as principal obligant, and also to be subscribed by Alexander Scott, residing in Lauder, Berwickshire, and Alexander Reid, residing at Edmonston, in the county of Edinburgh, as cautioners for the regular payment of the interest on the foresaid sum: It being also admitted that the said Elizabeth Greenshields Gibson and Esther Gibson agreed to advance to the said James Scott the sum of £300, on a bond and disposition in security over certain subjects in Howe Street belonging to the said James Scott, to be subscribed by the said James Scott as principal obligant, and also to be subscribed by the said Alexander Scott and the said Alexander Reid as cautioners for the regular payment of the interest on the foresaid sum:—

"1. Whether, on or about 9th May 1854, the defender, John Moir Macqueen, acting as agent for the said James Scott, on payment to him of the foresaid sum of £1200, by John French, W.S., as agent for the said Jane Gibson and Agnes Gibson, delivered to the said John French, as agent aforesaid, the bond and disposition in security, No. 10 of Process, as a duly executed deed, in the knowledge that the subscriptions 'Alexander Scott,' 'James Browning,' and 'James Lockhart,' appended to said bond, or some one or more of said subscriptions, were forged, to the loss, injury, and damage of the said Jane Gibson and Agnes Gibson?

"2. Whether, on or about 9th May 1854, the defender John Moir Macqueen, acting as agent for the said James Scott, on payment to him of the foresaid sum of £300 by John French, W.S., as agent for the said Elizabeth Greenshields Gibson and Esther Gibson, delivered to the said John French, as agent aforesaid, the bond and disposition in security, No. 11 of Process, as a duly executed deed, in the knowledge that the subscriptions 'Alexander Scott,' 'James Browning,' and 'James Lockhart,' appended to said bond, or some one or more of said subscriptions, were forged, to the loss, injury, and damage of the pursuers, the said Elizabeth Greenshields Gibson and Esther Gibson?

"3. Whether, on or about the 9th May 1854, and at the delivery of the said bonds, the said John Moir Macqueen falsely and fraudulently represented to the said John French, as agent for the pursuers, for the purpose of enabling the said John French to complete the testing clauses of the said bonds, that the said bonds were signed by the said Alexander Reid before these wit-

nesses, James Browning, joiner, Edmonston, and James Lockhart, gardener, Edmonston, while the said John Moir Macqueen well knew that the said Alexander Reid had not signed said bonds, or either of them, before the said witnesses, to the loss, injury, and damage of the said pursuers ?

- "4. Whether, on or about 9th May 1854, and at the delivery of the said bonds, the said John Moir Macqueen falsely and fraudulently represented to the said John French, as agent foresaid, for the purpose of enabling the said John French to complete the testing clauses of said bonds, that the said bonds were signed by James Kay, smith at Lauder, and William Glass, residenter there, as witnesses, while he well knew that the said James Kay and William Glass, who subscribed said bonds, did not reside at Lauder, but in Edinburgh, to the loss, injury, and damage of the said pursuers ?
- "5. Whether the defender, as agent foresaid, induced the pursuers respectively to advance the foresaid sums of £1200 and £300 on said bonds and dispositions in security over said subjects, by falsely and fraudulently overstating the rental of said subjects, to the loss, injury, and damage of the said pursuers ?
- "6. Whether the defender, as agent foresaid, undertook the duty of getting the said bonds duly executed by the obligants therein ; and whether he failed to perform said duty, to the loss, injury and damage of the pursuers ?
- "7. Whether, on or about 9th May 1854, and at the delivery of the said bonds, the said John Moir Macqueen fraudulently represented to the said John French, as agent foresaid, that the said bonds had been duly executed by the obligants therein, while the said bonds had not been duly executed by said obligants, to the loss, injury, and damage of the pursuers ?"

Damages laid at £840.

The parties, having failed to adjust issues before the Lord Ordinary (Barcaple) his Lordship reported the case.

FRASER and SCOTT, for the pursuers, argued—It is quite competent, in an action at the instance of two or more persons, even when they are unconnected, to conclude for a sum in name of damages to be paid to them all jointly. In the present case the several persons were not unconnected, as the two bonds on which they had advanced their money were secured *pari passu* over the same subjects. The two bonds were contemporaneous in date, and were carried through by the same agent. There was a general agreement to lend £1500, and it was for the mere matter of convenience that the securities were taken in the shape of the two bonds, one for £1200, and the other for £300, instead of one bond for £1500.

LORD ADVOCATE and W. N. MACLAREN, for the defender, answered—This action is at the instance of two different sets of pursuers. The first of these sets consists of the two parties first named in the summons, who aver that they lent £1200 to Scott on a bond and disposition in security. The other set consists of the two last-named pursuers, who aver that they advanced £300 to Scott on a separate bond and disposition in security. The two bonds were two totally separate and distinct transactions. The first two pursuers accordingly are averred to have suffered damage out of a transaction totally separate and distinct from that out of which the last two are averred to have suffered.

The summons, notwithstanding, concludes that the defender should be decreed to pay to the whole four pursuers jointly the sum of £840. It was quite incompetent for two or more sets of unconnected pursuers, suing together in one summons of damages, to conclude for one sum of damage to be paid to them all jointly. In order that the summons should be sustained at the instance of two or more sets of unconnected pursuers, it must conclude for a separate sum in name of damage to be paid to each set. *Harkes v. Mowat*, 4th March 1862, 24 D. 701 ; *Fleshers of Dumfries v. Rankine*, 10th December 1816, F.C.

The Court sustained the second plea in law for the defender, to the effect that the conclusions of the summons were not framed in such terms as to authorise the Court to pronounce decree for reparation and damages in the present action. There were here two sets of pursuers with no community of interest—nay, whose interest might at any time become adverse. Their respective claims might come to depend upon quite different grounds ; the one might succeed and the other fail, and yet they had no mode, nor any clue to a mode, of ascertaining what amount of interest each set of pursuers had in the sum of £840 concluded for.

Action dismissed with expenses.

Agents for Pursuers—Murray, Beith, & Murray, W.S.

Agent for Defender—John Moir Macqueen, S.S.C.

PETITION—MORRIS (*ante*, vol. ii., p. 222.)

Appeal to House of Lords—Interim Execution. A petition to apply a judgment of the House of Lords affirming one of this Court is incompetent ; and one for delivery of a bond of caution to repeat expenses, ordered to be paid under an application for interim execution, is unnecessary, where the judgment is affirmed, because the bond is conditional on reversal only.

In this case the Court of Session had decreed in the petitioner's favour, with expenses, and an appeal having been taken to the House of Lords, had granted *interim* execution for expenses on the usual bond of caution for repetition being lodged. The House of Lords having simply affirmed the judgment, the petitioner in this petition asked the Court to apply the judgment of the House of Lords, and to grant warrant to the clerk for delivery of the bond of caution.

ORR PATERSON appeared for the petitioner.

ALEX. BLAIR for the respondent.

The Court, *ex proprio motu*, dismissed the petition as unnecessary, holding that where the House of Lords' judgment was a simple affirmation, it was neither necessary nor competent to apply the judgment, and there was no occasion for delivery of the bond of caution, because its coming into operation was conditional on reversal only.

Agents for Petitioner—Duncan & Dewar, W.S.

Agents for Respondent—Hunter, Blair, & Cowan, W.S.

Wednesday, Dec. 5.

FIRST DIVISION.

CLEPHANE AND OTHERS *v.* MAGISTRATES OF EDINBURGH AND OTHERS

(*ante*, 22 D. 1222, and 2 Macp. H.L. 7).

Property—Mortification. Held that the University of Edinburgh had no right, under the