have been ascertained. Whatever we may think about the *bona fides* of the waiter—and I do not think we need assume that he was in wilful breach of the statute—I cannot hold that the inquiries made by him, and the information he received, were a justification for him holding Nisbet to be a *bona fide* traveller.

Another question has been raised by Mr M'Lennan, which goes rather to the third question in the case, namely, whether Weber, the proprietor, is liable in a question of this kind for the fault of his servant? One or two cases have been quoted for the purpose of asking us to hold that although the waiter was wrong he must be held to be in breach of his master's instructions, and to have committed a fault for which his master is not liable. I cannot assent to any such doctrine. If the master gives his servant express instructions not to do a certain thing, and the servant knowingly in breach of these instructions does it, the master may not be liable, because the servant is not doing it in the employment of the master; but if a servant, as is alleged here, is *bona fide* considering for the master, and in the interest of the master, whether a certain person should be supplied with liquor, then the mistake which the servant makes in that matter is the mistake of the master. Having answered the first two questions in the negative, I have no difficulty in answering the third in the negative also.

Lord Adam—The first question is—"Was Thomas Nisbet a *bona fide* traveller within the meaning of the Acts when so supplied with liquor?"—so supplied meaning, supplied at the Grand Hotel, Lerwick, on Sunday the 9th September 1888. It appears from the facts stated that Nisbet had come to Lerwick, where his home was, about midnight on the night previous, had gone home, gone to bed, and been for nearly twelve hours in his own house. In these circumstances I think it is nothing short of ridiculous to say that this journey had not ceased. I think it is not arguable.

The next question is—"Was the said John Weber or his servant justified in supplying the said Thomas Nisbet with refreshments on the faith of the statement made by him?" I am of opinion with your Lordship that no innkeeper, or servant of an innkeeper, is justified in supplying liquor on Sunday unless he makes due and proper inquiry. The statement made here by Nisbet was that he had come by the steamer, and was a *bona fide* traveller. The statement that he was a *bona fide* traveller gives no information. The only statement there is that he had come by the steamer. Now, if every man who has landed from a steamer 12 hours before is to be presumed to be still *in itinere* that might be sufficient. But that is ridiculous. It was the clear duty of the servant to have gone on to ask some more questions. There was no proper or reasonable inquiry, and I must therefore come to the same conclusion as your Lordship. It follows that I necessarily come to the same conclusion upon the third question. I would rather not express any opinion as to what is reasonable inquiry, because that is a question of fact in every case.

Lord Trayner concurred.

The Court answered the first two questions of law in the negative, and the third in the affirmative.

Counsel for the Appellant—R. K. Galloway. Agent—Thos. Carmichael, S.S.C.

Counsel for the Respondent — M'Lennan. Agent—John M. Rusk, S.S.C.

COURT OF SESSION.

Tuesday, January 15.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

SCHAW *v.* BLACKS.

Right in Security—Pro indiviso *Property—Maills and Duties—Competency—Personal Bar.*

A *pro indiviso* proprietrix borrowed a sum of money, and in security thereof granted a bond and disposition over her *pro indiviso* share of the property. The bond was in ordinary form, and contained a clause of assignation of rents.

In an action of maills and duties by the creditor in the bond, the granter pleaded "no title to sue." The Court repelled this defence, holding that she could not object to the title of her own assignee, reserving the question which would have arisen if the defence had been stated by the tenants or by the other *pro indiviso* proprietors.

Mrs Margaret Kilgour or Black, wife of Roger Black, solicitor, Kirkcaldy, was proprietrix of two-fifths *pro indiviso* of the lands of Bruntshiels, in the county of Fife. In 1881 Mrs Black borrowed from Robert Schaw, Edinburgh, a sum of £1600, and in security of the loan she, with the consent of her husband, granted a bond and disposition in security over her share of the *pro indiviso* estate. The bond contained the usual clauses, including a clause of assignation of rents. The lands of Bruntshiels were divided into fourteen enclosures, which were let as grass parks. The said parks were rouped for the year 1888 in common form, and it was provided by the articles of roup that the rents were to be paid to Mr John Inglis of Colluthie, one of the *pro indiviso* proprietors, for behoof of himself and the other proprietors of Bruntshiels.

In July 1888 Schaw raised the present action of maills and duties against Mr and Mrs Black, calling also as defenders the other two *pro indiviso* proprietors of Bruntshiels, and also the tenants of the grass parks. He averred that the £1600 was due and resting-owing, and that the interest from the term of Martinmas was also unpaid. The only compearing defenders were Mr and Mrs Black, who admitted that the money, principal and interest, was due, but averred that the tenants of the parks were in no way bound to pay any portions of the grass rents to them, and that they were only payable to Mr Inglis of Colluthie for behoof of all the joint proprietors.

The pursuer pleaded that as he was a heritable

creditor infeft in the subjects he was entitled in default of payment to enter into possession of the lands, and to uplift the rents, and that he was entitled to decree of mails and duties.

The defenders pleaded, *inter alia*—"(1) No title to sue; and (2) that the action was incompetent."

On 16th November 1888 the Lord Ordinary (KINNEAR) sustained the defenders' second plea-in-law and dismissed the action.

The pursuer reclaimed, and argued that the Lord Ordinary's judgment had proceeded upon a mistaken view of the nature of Mrs Black's right; hers was not a joint right, but a right in common, which was practically the same as the right of tenants-in-common in the law of England — Williams on Real Property, p. 162. The distinction in the law of Scotland between joint property and property in common was not clearly laid down either in the text-books or in the decisions. As an instance of joint property, the right possessed by one of a body of trustees was the simplest example; while, on the other hand, the case of heirs-portioners best illustrated the position of the holders of a right in common. Mrs Black's right here, though not strictly speaking an heir-portioner right, was analogous to it, as she could sell, alienate, or burden her *pro indiviso* share. On the distinction between joint and common rights—2 Bell's Com. p. 544; Ersk. Inst. ii. 6, 53; Bell's Prin., sec. 1072; Rankine on Land Ownership, 485. As to the powers of *pro indiviso* proprietors, the result of the decisions was that in all questions between the said proprietors and third parties in matters relating to the common property the consent of all the *pro indiviso* proprietors was necessary, as, for example, in the case of suing a removing from the common property—*Grozier* v. *Downie*, June 13, 1871, 9 Macph. 826; on suing a declaration of marches—*Young* v. *Tennant & Company*, June 11, 1860, 22 D. 1415. When as in the case of questions in which the rights of the *pro indiviso* proprietors only were at issue, greater laxity in the matter of consents prevailed—*Stewart* v. *Wand*, February 5, 1842, 4 D. 622; *Johnstone* v. *Crawfurd*, July 3, 1855, 17 D. 1023; *Monson*, December 11, 1857, 20 D. 276; *Lawson* v. *Leith and Newcastle Steam Packet Company*, November 26, 1850, 13 D. 175. II. Personal bar—The present defence, while it might have been formidable in the mouths of the tenants or of the other *pro indiviso* proprietors, could not be listened to from the present defenders, who being the pursuer's authors and the debtors in the bond, were barred from calling in question the pursuer's title. They had by the bond assigned the rents, and could not now be heard to plead that that assignation was invalid. Neither the tenants nor the other *pro indiviso* proprietors were in any way opposing what the pursuer here sought to obtain.

Argued for the defenders Mr and Mrs Black—The title of the pursuers was to a *pro indiviso* property, and an action of mails and duties was not competent to parties holding, like the defenders, a joint right. If so, it was not competent to the pursuer, who was merely their assignee, and whose right could not be higher than that of the cedent. The case was ruled by *Cargill* v. *Muir*, January 21, 1837, 15 S. 408, and the opinion of the Lord Ordinary in that case exactly defined the nature both of the defenders' and of the pursuer's rights in the present case. Here it was not only the property which was held *pro indiviso*, but also the right—*M'Neight* v. *Lockhart*, November 30, 1843, 6 D. 128. The defence here stated was competent either to the tenants or to any of the *pro indiviso* proprietors, and it was not to be assumed that because no defences were put in by any of the other defenders that they on that account were to be held as consenters to the present action.

At advising—

LORD PRESIDENT—I think this is a very special case, and that the decision in it will not establish any general rule of law, nor will it interfere with any of the decisions which have already been pronounced in this class of cases.

Here the defender granted a bond and disposition in security over her two-fifths of the *pro indiviso* estate. The bond contained the usual clauses, and among them was the clause of assignation of rents, and this clause of assignation of rents implied a power to enter into possession of the lands by an action of mails and duties. But the granter of the bond now says to his creditor, the present pursuer, "You are not to enter to these lands to the effect of drawing the rents, even though you restrict your claim to two-fifths of the rents of the subjects; and you shall not in any way make use of the clause of assignation of rents contained in the bond."

If this defence had been stated either by the tenants or by either of the other *pro indiviso* proprietors a very different question from that now before us would require to have been determined; but the sole defenders here are the debtors in the bond, Mrs Black and her husband. All the other parties called as defenders are quite willing that the pursuer should be paid out of these rents the proportion effeiring to Mrs Black. The arrangement by which the rents of these parks were to be paid to Mr Inglis of Colluthie, one of the other *pro indiviso* proprietors, though a convenient enough plan for the management of this estate, is not one which can in any way interfere with or control the rights of a heritable creditor. There is no other objector to what the pursuer proposed should be done except the granter of this assignation, and it is very clear, I think, that the compearing defenders cannot take this objection to the pursuer's title.

LORD MURE—I agree with your Lordship that the circumstances of this case are very special, and being so, we have sufficient in them for the determination of this question without going into the difficult and somewhat involved matters which were raised in the course of the discussion. In the present case all the *pro indiviso* proprietors have been called, and also the tenants, as defenders.

The tenants do not defend the action, nor do the other two *pro indiviso* proprietors, but a special defence has been put in by the third *pro indiviso* proprietor, who is also the debtor in the bond, and who pleads that the pursuer has no title to sue, that the action is incompetent, and that there is no relevant case.

Now, looking to the facts of this case, it does not appear to me that the defender has any

possible answer on the merits. In the absence of the other *pro indiviso* proprietors they must be held, if not concurring in what the pursuer is doing, at least as not objecting to it; and as neither they nor the tenants offer any opposition to what the pursuer is asking, the other *pro indiviso* proprietor, who is also the debtor in the bond, cannot be heard to state the objection which she here takes to the pursuer's title.

Lord Shand—The principal defender in this case is proprietor *pro indiviso* of two-fifths of the estate of Bruntshiels, which is let in grass parks to tenants whose rents form the subject of the present litigation. Her right being one *pro indiviso* is a right over the whole estate, but it only extends to so much of the rents as corresponds to her two-fifths share of the property. She has conveyed away her rights in the property to the pursuer. She granted a bond and disposition in security for money lent to her by the pursuer, conveying to him, as the condition of the loan, her two-fifths share of the estate, and assigning the rents effeiring to that share.

Now, if the objection which she has stated here had been taken by the tenants on the estate I do not see reason to doubt that it would have been well founded. They contracted for payment of their rents as a whole, and they would, I think, be able to maintain successfully that they were not bound to apportion the rents and pay them among the different *pro indiviso* proprietors and their assignees according to their several rights. In like manner, the other *pro indiviso* proprietors might succeed in maintaining that one of their number was not entitled to have the rents split up—directly drawing his or her share from the tenants—but that the rents should be paid over in one *cumulo* sum to the person having the authority of all the proprietors to grant a discharge. The Lord Ordinary has so held, and I see no reason to doubt that he is right.

A good deal has been said in the course of the argument as to the views expressed by the Judges in the cases of *Cargills* v. *Muir*, 15 S. 408, and *Lawson* v. *Leith and Newcastle Steam Packet Company*, 13 D. 175, with reference to what are called joint rights as contrasted with the rights of tenants-in-common, as they are called in the law of England.

I do not think that it is necessary to give any opinion on the matters discussed. I rather take it to be clear that neither a joint owner nor a tenant in common could in his own name sue for the whole rent nor for his own share of the rent. An instance in our law of joint proprietorship, in the sense of the joint ownership in the law of England is that of trustees holding a conveyance in ordinary terms for trust purposes. In joint ownership the property is vested in A and B and the survivor. On the death of one of them his right goes necessarily to the survivor. A tenancy-in-common, on the other hand (as it is called in England), seems to arise where each of the *pro indiviso* proprietors has a certain share or right in the property, which he may himself dispose of as he thinks fit by a deed granted by himself. It appears to me that the right here held by the creditor in the bond and also by each of the *pro indiviso* proprietors is a right of this latter kind, because each of the proprietors may dispose of his own share of the estate, and upon his death there is no vesting of his share in the surviving *pro indiviso* proprietors. The law seems to be the same in England as in this country, that in actions on the contract of lease—as distinguished from actions to protect the property from injury or to vindicate claims of damage because of its wrongful destruction—one *pro indiviso* proprietor has not a title to sue—Woodfall on Landlord and Tenant, p. 12; *Descharme* v. *Horsgood*, 10 Bing. 526. I assume the Lord Ordinary is right in his general view of the case, but I think the fact that the defender Mrs Black, in the position in which she stands, has no case on the merits. She conveyed away to the pursuer all her rights. The specialties of this case are that neither the tenants nor the other *pro indiviso* proprietors object to the action, and I think Mrs Black has averred no right or legitimate interest to do so. Had she raised an action for the rents, or rather her share of them, she would have been successful unless the tenants stated a defence, which they have not done here, and her creditor is not to be put in a worse position than she herself was in.

On the whole matter, I am of opinion that Mrs Black has no legitimate interest or right to maintain her defence, which is simply an attempt to prevent effect being given to her own assignation without any legal ground for so doing, and that we ought to recal the Lord Ordinary's interlocutor and grant decree to the pursuer in terms of the conclusions of the summons.

Lord Adam—I concur; but I reserve my opinion as to the main question here till the point is raised in a question with a tenant or a joint proprietor.

The Court recalled the Lord Ordinary's interlocutor, repelled the defences, and granted decree in terms of the conclusions of the summons.

Counsel for the Pursuer — Gloag — Martin. Agents—Henderson & Clark, W.S.

Counsel for the Compearing Defenders (Mr and Mrs Black)—Sir C. Pearson—Shaw. Agent—John Rhind, S.S.C.

Friday, January 18.

FIRST DIVISION.

[Sheriff of Forfarshire.

HENDERSON *v.* ROBB AND OTHERS.

Bankruptcy—Cessio—*Creditor*—*Title to Sue.*

When decree of *cessio* has been granted, a creditor can only sue an alleged debtor of the estate by obtaining the use of the trustee's name (which he can compel by finding security for expenses), or an assignation to the claim.

On the 25th of March 1886 decree of *cessio* was granted in the Sheriff Court at Forfar against Joseph Robb, farmer, Glenquiech, and William Carnegie was appointed trustee on his estate. William Henderson, crofter, lodged in the process of *cessio* an affidavit and claim for £100.

William Henderson thereafter raised an action against David Robb and David Howe, farmers,