*Saturday, May 20.*

## SECOND DIVISION.

[Lord Kincairney, Ordinary.

## SHAW *v.* GIBB'S TRUSTEES.

*Process — Title to Sue—One Pursuer Entitled to Proceed with Action Raised at Instance of Himself and Another.*

A guaranteed that the profit to be made on certain building operations should be equally divided between B and C. After the operations were completed and A had died, an action was raised against A's trustees, the summons of which bore to be at the instance of B and C, and concluded for an accounting in regard to the building operations, and for payment of £1000 "to the pursuers." The summons was called in the name of C only, and he was the only pursuer named in the *partibus*. It was stated in the condescendence that B had become bankrupt, and that the action was insisted in by C "to the effect of enabling him to obtain one-half of the profit due to him under said letter, and to this effect the conclusions of the action are accordingly restricted." It was not said why B's trustee had not proceeded with the action.

*Held* that C had a good title to sue.

*Process—Partibus—A.S., 11th July* 1828.

The Act of Sederunt 11th July 1828 provides that the *partibus* written on the summons shall contain the name and designation of each pursuer if there be two pursuers.

Where a summons bore to be at the instance of two pursuers, and one alone desired to proceed with the action—*held* that the provisions of the Act were substantially complied with by inserting in the *partibus* his name and designation.

In connection with the completion of a tenement of shops and dwelling-houses at Haymarket Terrace, and two tenements at Dalkeith Road, Edinburgh, Thomas Gibb, quarrymaster, Motherwell, sent the following letter to William Macleod, builder, Edinburgh—"Dear Sir,—I hereby guarantee that whatever profit is made on the job at Haymarket Terrace and Dalkeith Road be equally divided betwixt you and Wm. Shaw, unless one-third of the joiner work profit goes to me. Of course no profit is to be paid until I get the money from Campbell, and out of the Haymarket job."

Thomas Gibb died on 27th May 1892, and in September Macleod and Shaw raised an action against his trustees to have the defenders ordained "to exhibit and produce a full and particular account of the intromissions of the said deceased Thomas Gibb, with the funds paid and received by him in connection with the erection and sale of a tenement of shops and dwelling-houses at Haymarket Terrace, Edinburgh, and of the funds paid and received by him in connection with the contract for the mason work of two tenements of shops and dwelling-houses at Dalkeith Road, Edinburgh, executed by the said Thomas Gibb for and on behalf of James Campbell, joiner, Edinburgh, and for which mason work the pursuers were sub-contractors, whereby the true balance due by the said Thomas Gibb to the pursuers at the date of his death may appear and be ascertained," and to ordain the defenders, as trustees foresaid, "to make payment to the pursuers of the sum of £1000 sterling, or of such other sum as shall appear and be ascertained to be due by the defenders, as trustees foresaid, as the balance of the said intromissions of the said Thomas Gibb with the foresaid funds, with the legal interest thereof at the rate of 5 per centum per annum from the 15th day of May 1889 until payment;" or in the event of the defenders failing to produce an account, to ordain the defenders to pay the pursuers £1000.

The summons was called in name of Shaw only, and he was the only pursuer named in the *partibus*. It was stated in the condescendence that Macleod had become bankrupt, and that the action was insisted in by Shaw "to the effect of enabling him to obtain one-half of the profit due to him under said letter, and to this effect the conclusions of the action are accordingly restricted." It was not said why Macleod's trustee had not proceeded with the action.

The defenders lodged defences, and pleaded, *inter alia*—"(2) No title to sue; in any event, the pursuer William Shaw is not entitled by himself alone to proceed with this action as presently laid."

On 25th January 1893 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Repels the second plea-in-law for the defenders; and before further answer, appoints the defenders to lodge an account of the intromissions of the late Thomas Gibb in connection with the building operations referred to in the letter, &c.

"*Opinion.*— . . . The second plea is that Shaw has no title to sue, and is not entitled alone to proceed with the action as laid.

"This plea involves, or at least suggests, first of all a novel point of process. The summons which has been called is a summons at the instance of both Shaw and Macleod. There does not exist any summons at the instance of Shaw alone, and the question is, whether Shaw alone is entitled to call a summons at the instance of himself and another? The defenders argued that the *partibus* was not in compliance with the 27th section of the Act of Sederunt, 11th July 1828, which requires that the *partibus* shall contain the name and designation of each pursuer when there are two, and it was maintained that the Act required that the name and designation of Macleod should have been in the *partibus* as well as the name and designation of Shaw. The case of *Craven* v. *Elibank's Trustees*, March 9, 1854, 16 D. 811, in which a decree against a pupil was reduced because there was no mention of

tutors and curators in the *partibus*, was referred to. It illustrates the necessity of compliance with the Act of Sederunt in the preparation of the *partibus*, but otherwise has no distinct bearing on the present question.

"No other case was quoted, and in the absence of authority I am not prepared to throw out the action on this purely technical objection, although I think it raises a certain difficulty. I think that when an action at the instance of two or more pursuers is raised or served, and one or more of these pursuers does not desire to proceed, it must be competent to the other pursuers to proceed, and for that purpose to call the summons. I doubt whether it would be competent to insert in the *partibus* and calling lists the names of the pursuers who are not insisting, and I think that the provisions of the Act of Sederunt are substantially complied with by inserting the names and designations of those pursuers only who desire to proceed; and even if that were not so, I am inclined to hold, in the absence of authority, that a failure in exact compliance with the precise provisions of the Act would not of necessity make the process incompetent. I am therefore not prepared to hold that there is no process. Indeed, there is no plea which expressly puts that point, which rather arose in the course of the argument.

"It was further argued, that seeing that the summons concludes for decree for one undivided sum, it was not competent to grant a decree for one-half in favour of the pursuer Shaw, and that a restriction of the conclusions to that effect involved an incompetent alteration of the summons.

"I think that the pursuer's claim as now pressed is within the conclusions of the summons. I do not see any technical difficulty in giving decree for half of the sum ascertained to be due, and this plea seems sufficiently met by the case of *Pyper* v. *Christie*, November 6, 1878, 6 R. 143, to which I have been referred, in which, as appears from the session-papers, the conclusions were for payment of one sum in favour of three pursuers, but the action was allowed to proceed at the instance of two of them, who restricted their claim to two-thirds of the sum sued for. In that case there was a minute of restriction. The case had been called (as I ascertained by examining the calling list) in name of all the three pursuers, and decree of absolvitor was pronounced against the pursuer not proceeding, in respect of his non-appearance. But these particulars do not affect the point under consideration.

"Although the letter founded on is addressed to Macleod only, and not to Shaw, Shaw's interest in it is expressly mentioned, and I am of opinion that Shaw has the same right to sue on it as he would have had, had it been addressed expressly to himself as well as to Macleod.

"It was further maintained, that as the obligation was in favour of two parties, it was necessary that both should sue an action to enforce it, and that this action being at the instance of one of them only, could not be insisted in. I have felt, and still feel, some doubt on this point. The defenders referred to *Detrich & Webster* v. *Laing & Company*, January 8, 1885, 12 R. 416, the rubric of which case bears that one of several parties having a joint right under an agreement is not entitled to sue for implement without the concurrence of the others. That, however, was not an action for money, but for declarator that a certain agreement was valid and effectual, and for a decree to enforce it. It was not disputed by the pursuer that an action to enforce a joint agreement could not be sued by persons who had only a joint right along with other persons not parties to the action, but it was contended that in this case the interest of the pursuer Shaw and of Macleod in the results of the undertakings mentioned in the letter were not joint but several, and that therefore one of them had an independent title to recover his share.

"In *Scotland* v. *Walkinshaw*, November 18, 1830, 9 S. and D. 25, an action by one part-owner of a ship for recovery of his proportion of freight or demurrage was held incompetent where there was nothing to prevent the other part-owners from joining in the action. That case comes near the present case, because, as here, there was an action for money, which was divisible in definite shares among the part-owners. But in that case the action was against a third party. In the present case the action is by one party to a joint adventure against another party to the adventure. It is of the nature of an action *inter socios*.

"It may be that the case of *Scotland* v. *Walkinshaw* is not of the highest authority, and it was criticised in the case of *Lawson* v. *Leith and Newcastle Steam Packet Company*, November 25, 1850, 13 D. 175, in which a part-owner of a ship was held entitled to sue an action of damages for injury done to the ship. But that case was distinguished from *Scotland* v. *Walkinshaw*, because the one was an action on contract and the other on delict, and the decision in *Scotland* v. *Walkinshaw* was not expressly disapproved of.

"I refer also to the recent case of *Shaw* v. *Black*, January 15, 1889, 16 R. 336, as bearing on this question.

"Now, this action is laid on a single contract. I have considerable doubt whether the interests of Macleod and Shaw in that contract were not joint interests, and but for the case of *Pyper* v. *Christie* already referred to, should have had difficulty in repelling the defenders' plea, which is not a technical plea, but one which they have a substantial interest to maintain; for they reasonably object to try this question with Shaw, with the possibility of trying it again with Macleod, unless indeed they can get a decree against Macleod, either as in absence or for non-appearance or by protestation.

"But the case of *Pyper* v. *Christie* seems in point, and I am bound to follow it. It was an action where two out of five co-

adventurers were held entitled to sue one of the co-adventurers who had acted as treasurer. The case is not satisfactorily reported, and it does not show that any of the previous cases were quoted. But their Lordships in the Inner House recalled the judgment of the Lord Ordinary, and repelled the plea of no title to sue, stated in circumstances not distinguishable in principle from those in the present case.

"Their Lordships do not allude to any previous decisions, but must have been satisfied either that the case of *Scotland* v. *Walkinshaw* did not apply, or that it was wrongly decided, and it is not very easy to reconcile some of the dicta with the previous decisions.

"The case is, however, certainly distinguishable from *Scotland* v. *Walkinshaw*, and is, I think, substantially decisive in this case. . . .

"I shall therefore repel the second plea-in-law for the defenders, and appoint them to lodge accounts of the intromissions of the late Thomas Gibb in reference to the building operations referred to in the letter quoted on record."

The defenders reclaimed, and argued—Shaw had no title to sue alone. Raising an action in the name of two persons and calling it in the name of one was changing the instance of the action. If the pursuers had sued for £500 each, something might have been said for the argument that one of the pursuers was entitled to proceed with the action for his own £500, or if there had been separate conclusions for each of the two pursuers the same argument might have applied—*Harkes* v. *Mowat*, March 4, 1862, 24 D. 701. But here the action was raised by two persons for payment of a single sum "to the pursuers," and the instance would be changed altogether if only one-half of the sum was sued for by one of the pursuers—*Gibson* v. *Fraser*, July 10, 1877, 4 R. 100.

Counsel for the pursuer William Shaw were not called on.

At advising—

LORD JUSTICE-CLERK—The position of matters in this case is that Macleod and Shaw were the original pursuers in this action, but that Macleod is no longer one, as he is a bankrupt and his trustee will not proceed with the case. Shaw is therefore now suing alone, but limits his demands to one-half of the sum stated in the summons. I think the Lord Ordinary is right in repelling the plea of no title to sue, and in holding that Shaw is entitled to proceed with the case.

LORD RUTHERFURD CLARK—I am satisfied with the judgment of the Lord Ordinary.

LORD TRAYNER—I agree with the Lord Ordinary.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuer William Shaw—Strachan—Craigie. Agents—A. & A. S. Gordon, W.S.

Counsel for the Defenders—H. Johnston—Deas. Agent—D. Hill Murray, S.S.C.

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*Saturday, May 20.*

## FIRST DIVISION.

[Lord Kyllachy, Ordinary.

## ANSTRUTHER *v.* BURNS AND OTHERS.

*Process—Competency of Reclaiming-Note—Imported Refusal or Postponement of Proof—Interlocutor merely Step in Procedure previously Fixed—Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 27 *and* 28—*A.S., 10th March* 1870.

Upon 4th February the Lord Ordinary found in an action of declarator that a certain agreement did not supersede the obligation of the defenders to execute a lease, and appointed them to lodge objections to the draft produced, and upon 13th May he remitted to a man of skill to adjust the draft lease and to report. The former interlocutor was not reclaimed against within six days, and leave to reclaim was refused. Against the latter interlocutor the defenders reclaimed within six days.

*Held* that the reclaiming-note was incompetent, as the interlocutor reclaimed against was merely a step in the procedure previously determined upon.

In July 1892 Sir Windham C. J. C. Anstruther, Bart., brought an action against Straton B. Burns and others to have it found and declared that the defenders were bound by virtue of an agreement dated 15th August 1862 to enter into and execute a lease of certain coalfields in terms of a draft produced.

Upon 4th February 1893 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Finds that the obligation of the defenders' author contained in the agreement of 1862 to execute a formal and regular lease of the mineral field in question was not superseded by the subsequent and supplementary agreement of 1871; and before further answer appoints the defenders within ten days to state their objections, if any, to the draft lease produced with the summons, and forming No. 7 of process, and the pursuer to answer said objections within ten days thereafter."

Upon 16th February leave to reclaim against this interlocutor was refused *in hoc statu*.

Upon 24th March the Lord Ordinary heard counsel on the objections and answers, and appointed the cause to be enrolled on the second sederunt day for further procedure, and meantime refused leave to reclaim.

Upon 13th May the Lord Ordinary pro-