Tuesday, November 6.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MACKINTOSH *v.* GALBRAITH.

MACKINTOSH *v.* GALBRAITH AND ARTHUR.

Expenses - Several Defenders—Two Defenders Called and One Assoilzied—Liability of Pursuer for Expenses of Successful Defender—Liability of Defenders inter se.

The owner of a Ralli car deposited it with a firm of coachbuilders, whose estates were subsequently sequestrated. The trustee sold the bankrupt stock per inventory (which did not include the car) to an auctioneer. The latter sold the stock by public roup, the car being included by mistake among the articles sold. The owner of the car brought an action against the trustee and the auctioneer, in which he craved decree against them jointly and severally for delivery of the car, and alternatively for damages. Both defenders denied liability. The Sheriff-Substitute, whose judgment was affirmed by the Sheriff, assoilzied the trustee, and found the auctioneer liable in damages to the pursuer, and further found him liable in expenses to the successful defender. The Court on appeal having on the merits affirmed the interlocutors appealed against, *held quoad* expenses, (1)—*diss.* Lord Young—that the successful defender was not entitled to expenses against the unsuccessful defender; and (2) that the successful defender was entitled to expenses against the pursuer.

Observations as to the circumstances in which an unsuccessful defender ought and ought not to be found liable in expenses to a successful defender.

Major George Mackintosh, with consent and concurrence of Mrs Mackintosh of Balnespick, Inverness-shire, brought an action in the Sheriff Court at Glasgow against W. B. Galbraith, C.A., Glasgow—(1) for delivery of a Ralli car deposited by the pursuer with J. & W. Reid, coachbuilders, Inverness, and for payment of £20; and (2) failing delivery for payment of £50. The facts, so far as it is necessary to relate them for the purposes of this report, were as follows:—In 1895 the pursuer left the Ralli car with Messrs Reid to be overhauled and repaired. In 1897 Messrs Reid's estates were sequestrated, and the defender Galbraith was appointed trustee. He caused an inventory of the bankrupts' estate to be made up, in which the pursuer's car was not included, but was entered in a separate list as the property of the pursuer. Thereafter the trustee sold the bankrupts' stock as per inventory to David Arthur, auctioneer, Inverness. Arthur held a public auction of the stock on 14th December 1897, and among the articles sold by him was the pursuer's car. In 1899 the pursuer, who had meantime been serving abroad with his regiment, made inquiry about the car, and failing to get any information about it he raised the above-mentioned action against the trustee on Messrs Reid's sequestrated estate. The latter repudiated liability, and denied that he had sold the car to Arthur.

He pleaded, *inter alia* — "(3) All parties not called."

Thereafter the pursuer raised a second action, in which he called both Galbraith and Arthur, concluding against both defenders, jointly and severally, for delivery of the car, or on failure for payment of £50.

He pleaded, *inter alia*—"(5) The defender Galbraith having carelessly and negligently failed to protect the said car, and the defender Arthur having acted illegally and wrongfully in taking possession of and selling same, they are jointly and severally liable to the pursuers for the loss and damage thereby sustained."

The defender Arthur admitted that he had sold the car, but averred that it had been delivered to his representative by Galbraith's agent as part of the bankrupt stock which he had purchased.

The actions were conjoined, and proof was led.

The Sheriff-Substitute (SPENS), by interlocutor dated 22nd January 1900, found, *inter alia*, that sufficient care was not taken by the defender Arthur with regard to the exclusion from the bankrupts' property of the Ralli car in question, and that he was in *culpa*, and decerned against him for £20 as the value of the car, found that the defender Galbraith was not guilty of *culpa* in connection with the disposal of the car, and assoilzied him, and found the defender Arthur liable for the expenses of the pursuer, as also for the expenses of the defender Galbraith.

Arthur appealed to the Sheriff (BERRY), who on 25th May 1900 affirmed the interlocutor of the Sheriff-Substitute.

Arthur appealed to the Court of Session.

In addition to an argument on the merits, the appellant maintained that the interlocutors of the Sheriffs finding him liable in expenses to the other defender should be recalled, and argued—The appellant was no doubt liable for the expenses of the successful pursuer, but it was inequitable that he should be found liable also to the other defender. The pursuer had called a defender against whom it was decided he had no claim, and should pay the penalty of his non-success. He was not entitled to convene several defenders and ask them to fight the question of their mutual liability with each other at the expense of the one who should be unsuccessful. He must choose his debtor before coming into Court or abide the consequences. The analogy of the practice in cases of poor law settlement, relied on by the pursuer, was inapplicable. The practice in such cases was exceptional, and was based on the fact that one or other of the defending parishes was admittedly liable, and the pursuer had no interest in the result. It was otherwise in the present

case. The appellant had not sought to fix liability on Galbraith, but had merely denied his own liability.

Argued for the pursuer and respondent—The Sheriffs had rightly found the appellant liable in expenses to the other defender Galbraith. The appellant's defence was, that the car had been delivered to him by Galbraith, and that made it necessary that the latter should be called as a defender. The appellant was therefore responsible for the expense thereby caused. The practice of the Court in regard to poor-law settlement cases was in point, and should be followed. Here it was clear that one or other of the defenders was in fault, and the determination of liability depended on questions which were personal to the two defenders. It could not be solved without convening both and leading evidence. Apart from poor law cases, there was precedent for the course taken by the Sheriffs—*Caledonian Railway Company* v. *Greenock Sacking Company*, May 13, 1875, 2 R. 671; *Cowan* v. *Dalziels*, November 23, 1877, 5 R. 241.

LORD JUSTICE-CLERK—In this case I have come to the conclusion that the decision at which the Sheriffs have arrived is the right conclusion. I think that no fault is attributable to Galbraith, the trustee, who in selling the bankrupt stock to Arthur did nothing which could lead Arthur to suppose that the pursuer's Ralli cart was included in the sale; on the contrary, it was by the inventory made plain that the Ralli cart was the property, not of the trustee but of a customer of the bankrupts. I think, therefore, that Galbraith is entitled to be assoilzied. Arthur, on the other hand, was plainly in fault, and I think that it is proved that he proceeded to sell the cart notwithstanding warning conveyed to him that it was private property, and therefore that he was rightly decerned against for the price.

Upon the question of the expenses in the Court below I do not agree with the view taken by the Sheriffs, who have found Arthur liable for the expenses both of the pursuer and of the defender Galbraith. I think that here the pursuer might, had he exercised due care in his inquiries, have ascertained that the case he truly had was not against Galbraith but solely against Arthur. I do not therefore think that the case is one in which the one defender who was in the wrong should be made to pay the expenses of a defender who should not have been convened in the case, and if convened should have been allowed to be set free of the case at once. I think, therefore, that the proper person to pay Galbraith's expenses is the pursuer, who brought and pressed the case against him.

LORD YOUNG—I have no hesitation in concurring with the judgment proposed in regard to the merits—that is that the pursuer is entitled to judgment against the defender Arthur, and that the defender Galbraith is entitled to decree of absolvitor.

With respect to the question of expenses, your Lordship has expressed the opinion that Arthur should not be found liable in Galbraith's expenses. I am of a different opinion, and think with the Sheriff and Sheriff-Substitute that he should. I agree with them that Galbraith is entitled to his expenses if he is assoilzied, and further, that he is entitled to a decree against the pursuer unless he is satisfied with a decree against his co-defender to pay them. If he is satisfied with such a decree, it would be ridiculous to go through the form of making the pursuer liable, by a decree against him, to pay the expenses, and then to ordain Arthur to relieve him. There is a practice, and occasionally there is an opportunity for acting upon it, of finding one of two defenders liable in expenses to the other. The question is whether this is or is not a case for the application of that rule. The pursuer here brought his action against both defenders; in his first petition he called Galbraith, and that was immediately followed by another against both Galbraith and Arthur, with a prayer to conjoin the actions. That was thought reasonable, and a record was made up between the pursuer and both defenders without objection. No additional expense was caused to Galbraith by this procedure, and I therefore deal with the question as if there had been only one action against both defenders. What was the question to be tried? It was admitted that one or other of the defenders should be found liable to the pursuer, and on what did the solution of that question depend? It depended on this, whether Arthur had taken away the car without authority, and disposed of it, as Galbraith said, or whether, as Arthur said, Galbraith had sold and delivered it to him. It occurs to me that that question could only be properly tried with both defenders, and could not be properly tried without both. No doubt the pursuer might, if ill advised, have tried it with one of them; but the result would not have been binding on the other And if he were unsuccessful, and then brought an action against the other, the decision would not have been *res judicata*, and he might have failed in his second action also. I therefore think that the only reasonable course was to try the question with both. A more typical case for the application of what is admittedly competent, viz., to make one defender pay the expenses of the other, I cannot conceive. I repeat the qualification that the successful defender may refuse to take a decree against his co-defender. But a sensible defender usually would give his consent, and such consent is constantly given. I am therefore of opinion that there is no ground for interfering with the judgment which has been pronounced by both Sheriffs.

LORD TRAYNER—In so far as concerns the merits of this case I concur in the judgments pronounced by the Sheriffs. I think it is established by the evidence in the case, (1) that the car in question was not sold by Galbraith to Arthur, and (2) that Arthur sold the car after he had been duly warned that it was not part of the stock which he had bought. In these cir-

cumstances there can be no doubt that Arthur is bound to pay the value of the car to the pursuer. But I am unable to concur with the Sheriffs in regard to their disposal of the question of expenses. The matter stands thus. When the pursuer discovered that his car had been sold, he claimed its value from Arthur, who had sold it. Arthur repudiated liability on the ground that the car had been sold to him by Galbraith, whereupon the pursuer claimed from Galbraith, who in turn repudiated liability on the ground that he had not sold the car to Arthur. The pursuer then raised his action against Galbraith, who stated in defence judicially, what he had already explained extrajudicially to the pursuer, but pleaded that all parties had not been called, on the ground that Arthur was the proper debtor in the claim, if there was any claim at all. On this the pursuer raised an action against Galbraith and Arthur, and the two cases were conjoined. Now, in my opinion, the pursuer having before him the conflicting views of the two defenders, should have informed himself of where the truth lay, and directed his claim, and insisted in his claim, against the person (and him only), who according to his information was responsible. I do not think a pursuer is entitled to convene two or more defenders who each and all deny liability, and say that liability lies on one or other of them. He must select his debtor and proceed against him. If he takes the other course—the course adopted here—he does so at the risk of being found liable in expenses to those defenders who were not his debtors, and against whom, consequently, no action should have been brought. But I see no reason why an unsuccessful defender should be held liable in expenses to a successful defender, who, as the result shewed, should never have been called. I am therefore of opinion that the Sheriffs were wrong in finding the defender Arthur liable in expenses to the defender Galbraith. As between the pursuer and Galbraith the question presents more difficulty. I think the plea of all parties not called should not, certainly need not, have been put forward. If Galbraith was not liable to the pursuer, it was no concern of his who was, and calling Arthur into the field did nothing to strengthen Galbraith's defence. On the other hand, the pursuer might have disregarded that plea and insisted on his right to a decree against Galbraith if he could establish Galbraith's liability. On the broad ground that the pursuer's action against Galbraith was unfounded, and unsuccessful, I think the pursuer must be found liable in expenses to Galbraith. What I have now said refers only to the expenses incurred in the Court below.

I should perhaps add, that the cases arising under the Poor Law Act, referred to in the debate, do not, in my opinion, form any precedent for what the Sheriffs have done. In these cases, where two defenders are summoned, the one representing the birth parish, and the other the parish of alleged residential settlement, the pursuer having called the defenders, practically retires from the case. The defenders there admit that one or other is liable, and the question which is liable is a question between themselves. But if a relieving parish raised an action against two parishes on the ground that the pauper had a residential settlement in one or other of these parishes, and both denied liability, then the pursuer would get his expenses against the parish found liable, and be liable in expenses to the parish assoilzied. That is the kind of case we are dealing with here.

LORD MONCREIFF—On the merits I agree with the Sheriffs.

On the question of expenses, however, I am of opinion that while the defender Arthur is liable in expenses in the Sheriff Court to the pursuer, he is not liable to his co-defender Galbraith.

Where a pursuer convenes two defenders I do not doubt that in certain circumstances it is in the discretion of the Court, in the event of one defender being found liable and the other not, to find the unsuccessful defender liable in expenses, not only to the pursuer, but to the successful defender. We are familiar in practice with this being done in poor-law cases; but the reason for that is obvious, as the form of the summons in such cases shows. Where, as usually happens, the relieving parish obtains an admission that the pauper was born in the parish of A, and A avers that a residential settlement has been acquired in the parish of B, the relieving parish brings a summons against A and B concluding against them alternatively, and having nothing to prove simply watches the case while it is determined between A and B whether the pauper has or has not acquired a residential settlement. Whichever of the parishes A or B is unsuccessful pays the expenses of the successful parish as well as those of the pursuer.

But except in poor-law cases such practice as to expenses is exceptional, though not incompetent, the general rule being that if a pursuer convenes two defenders and one is assoilzied, the pursuer and not the unsuccessful defender pays the expenses of the successful defender.

In the present case, while I sympathise with the pursuer, I do not see sufficient grounds for subjecting the defender Arthur in the expenses of the successful defender Galbraith. The pursuer did not, as it were, put this question of liability *in medio* and leave the two defenders to fight it out. Whether this would have been competent is very doubtful, but he did not do it. His object was to obtain a decree against both defenders jointly and severally. The fifth plea-in-law for the pursuer is—"The defender Galbraith having carelessly and negligently failed to protect the said car, and the defender Arthur having acted illegally and wrongfully in taking possession of and selling same, they are jointly and severally liable to the pursuer for the loss and

damage thereby sustained;" and the defenders' witnesses were all cross-examined on behalf of the pursuer as well as on behalf of the other defender. No alternative case is made on record or in the course of the proof.

Besides, a very little inquiry should have satisfied the pursuer that he had not sufficient grounds for proceeding against Galbraith. It was certainly not a sufficient reason for his doing so that Arthur alleged that Galbraith sold the Ralli car to him. Galbraith's assurance, supported by the bankrupt Morris Reid and others, should have satisfied him that there was no sale of that car.

The result is that I am of opinion that the pursuer is entitled to expenses against Arthur in the Court below; that as Galbraith has been assoilzied and is not entitled to expenses against Arthur he must get his expenses in the Court below from the pursuer.

As to the expenses in the appeal, I think there should be no expenses as between the pursuer and Arthur. Galbraith must get his expenses as against the pursuer.

The Court dismissed the appeal, and found in fact and in law in terms of the interlocutor of 22nd January 1900. *Quoad* expenses, the interlocutor proceeded—"Recal the said interlocutors in so far as they find the defender Arthur liable in the expenses of the defender Galbraith: Find the pursuer entitled to expenses against the defender Arthur in the Inferior Court only: Also find the defender Galbraith entitled to expenses against the pursuer both in the Inferior Court and in this Court; and *quoad ultra* find no further expenses due as between the pursuer and the said defender Arthur."

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Counsel for the Pursuer and Respondent—W. Campbell, Q.C.—Hunter. Agent—Alexander Ross, S.S.C.

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Wednesday, November 7.

SECOND DIVISION.

GRAY'S TRUSTEES *v.* WILSON.

Writ—Addition—Testament—Subscription—Holograph Addition Inserted between End of Tested Deed and Testator's Signature—Holograph Writing—Succession—Testamentary Writing—Authentication of Holograph Addition.

A testator who died domiciled in Scotland caused a will to be framed in English style, which he signed before witnesses. On his death an addition in red ink, holograph of the testator, and headed "Codicil," was found inserted in a blank space between the end of the deed and his signature. The "codicil" made certain additional provisions in favour of a beneficiary under the will.

Held that the holograph addition was authenticated by the testator's signature as part of his will, and must therefore receive effect.

This was a special case presented for the determination of questions as to the validity and effect of the testamentary writings of Robert Gray, who resided in Dundee, and died there on 19th December 1899.

By his will, which was dated 7th July 1893, the testator appointed certain persons to be his trustees and executors. He, *inter alia*, bequeathed to Agnes Wilson, his housekeeper, an annuity of £30, to Mrs Barbara Wilson an annuity of £10, and to Mrs Robert Dow an annuity of £5. He further directed his trustees to pay over the residue of his estate, after the death of the last annuitant, to the Association for the Education of the Deaf and Dumb in Dundee, to be applied in establishing bursaries or scholarships. The will, which was written on a printed form of a will in the English style, was framed by Mr Miln, actuary in the Dundee Savings Bank, at the testator's request, and according to his instructions. It was duly signed by him in Mr Miln's office in presence of two witnesses, who subscribed it as such.

After the testator's death the will was found in his repositories. On the margin of the first page was written a note in red ink, in the testator's handwriting, in these terms—"Mrs Barbara Wilson died on the 22nd of Decr., year 1894. Her annuity falls to Agnes Wilson afore mentioned." This note was neither signed nor initialled. In a space which had been left between the end of the will and the testator's signature, there was written also in red ink and in his handwriting the following addition:—"*Codicil.*—The will above was written by John Miln, formerly clerk to John Sturrock, writer, Dundee. I hereby enjoin that the annuity of ten pounds designed for Mrs Barbara Wilson, who died in Glasgow last year, shall be added to the annuity of Mrs Agnes Wilson forementioned, together with free use of my house furniture for her life, including my library, and my trustees foresaid may choose anything if they like for themselves."

The admitted facts with regard to these additions in red ink were as follows:—"Mrs Barbara Wilson, the mother-in-law of Agnes Wilson, died on 22nd December 1894. About a week after her death the deceased had a conversation with his housekeeper in his house. He asked her whether she wished to remain in his house after his death, seeing that she would have no home in Glasgow in consequence of the death of her mother-in-law who lived there. Mrs Agnes Wilson said she would like to remain, and the deceased then told her that the £10 annuity which he had left to her mother-in-law would be added to her