*Thursday, June* 13.

## FIRST DIVISION.

[Lord Kincairney, Ordinary.

## CONWAY *v.* DALZIEL AND OTHERS.

*Process — Competency — Accumulation of Defenders against whom Different Grounds of Action — Amendment of Record — Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29.

The widow and children of a workman brought an action against his employers, their law-agent, and two doctors, concluding for decree against them, jointly and severally, or severally, for £500 as damages. The pursuers averred that the two doctors had, on the instructions of the law-agent and the employers, made an unauthorised *post-mortem* examination on the deceased. They further averred that the doctors had cut out and taken away and had retained possession of certain parts of the body, but there was no averment that in so doing the doctors acted on the instructions of the law-agent or the employers.

*Held* that the action was incompetent as laid, in respect that the damages were claimed for two separate wrongs, with one of which, *i.e.*, the cutting out and taking away and retaining parts of the body, the defenders, other than the doctors, were not alleged to be implicated.

*Opinions* that the pursuers would not be entitled to amend their action by deleting from the condescendence the averments relating to the removal of parts of the body.

Stephen Conway, a labourer in the employment of Messrs J. & A. Mitchell, builders, Glasgow, was injured by a stone falling on his head while engaged in his work. He brought an action of damages against his employers, but died during the course of it. The action was continued by his widow as his executrix, and the defenders were ultimately assoilzied.

Subsequently the present action was raised by the widow Mrs Conway, and by Conway's children. It was directed against Doctors Dalziel and Buchanan, both of Glasgow, Messrs J. & A. Mitchell, and Thomas M'Lelland, writer in Glasgow, and concluded that the defenders should be ordained "to make payment, jointly and severally, or severally, to the pursuers of the sum of £500 sterling."

In this action the pursuers, after narrating the facts above mentioned, made the following averments:—"(Cond. 4) By instructions of the said J. & A. Mitchell and of their agent the said Thomas M'Lelland, or one or other of them, the said Doctors Dalziel and Buchanan, on the day after the death of the said Stephen Conway, went to the said Mrs Conway's house and made a *post-mortem* examination of the said Stephen Conway's body. No intimation of any kind was given to pursuers, or any of them, or to any one on their behalf, of the intention of the said doctors to call and make a *post-mortem* examination of the deceased, nor did the said doctors when they called to make said examination, or at any other time, ask or receive the consent or authority of the pursuers, or of anyone else on their behalf, to make such an examination. The said two doctors made no explanation whatever to the pursuers, nor to anyone on their behalf, of their intention, but simply took possession of the body, and ordered Mrs Conway and those of her family who were present to leave the room. Mrs Conway not knowing the purpose of the doctors, made no opposition. The said *post-mortem* examination was made by the said two doctors wrongfully, no legal authority to make the same having been received by them or by those who instructed them. . . . Explained that Dr Connor (a medical man who had attended the deceased up to the time of his death, and who was present at the *post-mortem* examination), called on the said Mrs Conway with reference to a *post-mortem* examination of the deceased. Mrs Conway told Dr Connor that she objected to any *post-mortem* examination of the deceased. . . . In any event she never consented to the removal of portions of her husband's body. . . . (Cond. 5) A considerable time after said examination was made the pursuers learned that the said two doctors, when they made the said *post-mortem* examination, cut out and abstracted from the body several internal organs, namely, the liver, the gall bladder, and parts adjacent. These organs were taken away by them, and are still in their possession. The said organs were cut out and taken away without the consent of the pursuers. The said Dr Connor had no mandate from the pursuers to acquiesce on their behalf in the abstraction and removal of said organs. In point of fact he did not so acquiesce. (Cond. 6) The action of the defenders in causing a *post-mortem* examination of the said Stephen Conway's body to be made hurt the feelings of the pursuers. Had the pursuers been aware of what was proposed to be done they would have taken steps to prevent the said examination from taking place. The pursuers would never have consented to the said examination, the idea of the body of the deceased being subjected to a *post-mortem* examination being repellant to them. Since they learned of the internal organs having been abstracted, their feelings have been much more hurt and wounded. The pursuers are all the persons who are entitled to sue for reparation in respect of said unauthorised *post-mortem* examination."

The defenders pleaded, *inter alia*, (1) "The action is incompetent as laid."

On 15th November 1900 the Lord Ordinary (KINCAIRNEY) pronounced an interlocutor by which he sustained the first plea-in-law for the defenders, and dismissed the action as incompetent.

*Opinion.*—"This is an action of damages brought by the widow and children of Stephen Conway, who suffered an injury while in the employment of the defenders

J. & A. Mitchell, builders, Glasgow. He raised an action of damages against his employers, and in the course of the action he died. His widow and executrix was sisted in his stead as pursuer. She appealed for jury trial, which took place and resulted in a verdict for the defenders J. & A. Mitchell, who were found entitled to expenses, which have not been paid.

"The damages concluded for in this action are for injury to the feelings of the pursuers caused by the unauthorised *post-mortem* examination of the body of Stephen Conway and the abstraction of certain internal organs. The action is directed against (1) Drs Dalziel and Buchanan, who made the *post-mortem* examination; (2) Messrs J. & A. Mitchell; and (3) Thomas M'Lelland, writer, the agent employed by them. It is averred that Drs Dalziel and Buchanan in making the *post-mortem* examination acted on the instructions of J. & A. Mitchell and of their agent Thomas M'Lelland, 'or one or other of them.' The conclusion is for decree for £500 against these defenders, 'jointly and severally, or severally.' . . .

"But the defenders have objected to the competency of the action on the ground that it concludes for one sum of damages against three separate sets of defenders for different wrongs, which was held to be incompetent in *Barr* v. *Neilsons*, March 20, 1868, 6 Macph. 651; *Taylor* v. *M'Dougal*, July 12, 1885, 12 R. 1304; and *Sinclair* v. *Caithness Flagstone Company*, March 4, 1898, 25 R. 703. That objection was open in the case of *Pollok* v. *Workman*, (January 9, 1900, 2 F. 354), and was, I suppose, taken, and if taken was repelled, on the ground, I presume, that only one wrong was alleged, namely, the *post-mortem* examination, in which wrong all the parties were participant; and I consider that that answer would be sufficient in this case also but for one singular but important specialty, which did not, so far as appears, occur in the case of *Pollock*. It is this, that in condescendence 5 the pursuers aver that a considerable time after the examination was made the pursuers learned that the doctors had cut out and abstracted from the body certain internal organs mentioned, and that these organs were taken away by the doctors and were still in their possession. In condescendence 4 the pursuers say that 'in any event she never consented to the removal of portions of her husband's body.' These words signify, I think, that although Mrs Conway might be held to have consented to the *post-mortem* examination, yet that the pursuers' action would remain good because of the abstraction of the organs of the body; and further, in condescendence 6, they say, that 'since they learned of the internal organs having been abstracted, their feelings have been much more hurt and wounded,' meaning thereby that the amount sued for would have been less had the internal organs not been abstracted. The pursuers have thus stated this abstraction and retention of the internal organs as a distinct and separate wrong. But who are charged with that wrong? No one, as I read the record, except the doctors. The pursuers have not said that they were instructed by the other defenders to remove these organs or to retain them. The averment is made against the doctors alone, and it is unconnected with the jury trial. As made, the pursuers would be entitled to prove that the doctors had committed this wrong for their own private purposes. Suppose they did so, could the other defenders be made liable for that wrong? I do not think they could on this record. If that be so, then the cases of *Barr*, *Taylor*, and *Sinclair* apply, and on the principle of these cases the action must be dismissed as incompetent."

The pursuers reclaimed, and argued that the case was distinguished from the authorities on which the Lord Ordinary had proceeded, in respect that the removal of parts of the body was impliedly authorised by the order to make a *post-mortem* examination. They suggested that, if the Court was against them on this point, they should be allowed to amend their record by deleting the averments relative to the removal of parts of the body, but they did not table any definite amendment.

Counsel for the respondent were not called upon.

LORD PRESIDENT—This action is directed against three different sets of defenders—the first, a firm of builders; the second, their law-agents; and the third, two medical men. The pursuers' claim is against all these defenders jointly and severally. But when we come to the pursuers' condescendence we find two separate and distinct wrongs alleged, viz., the *post-mortem* examination of the deceased, and the abstraction and retention of certain organs of his body. All the defenders are alleged to have been concerned in the commission of the first wrong, the first set of defenders as having instructed the law-agents, the law-agents as having instructed the doctors, and the doctors as having actually made the examination. So far the case is consistent. But the pursuers aver another and independent wrong, viz., the removal and permanent retention of certain organs of the body. This is a wrong in which the first and second sets of defenders are not alleged to have been concerned. It is not averred that the organs were removed and retained at their request or on their instructions, and it could not be said that the removal and retention were ordinary incidents of a *post-mortem* examination. It might perhaps have been possible to regard the temporary removal of the organs for the purpose of laboratory examination as an incident of a *post-mortem* examination, but this cannot be suggested with regard to their permanent retention.

There is thus a single conclusion for £500, while there are two separate and distinct claims made against different persons—the first against all the defenders, while the second is only against two of them, and accordingly the summons as it stands is incompetent both on principle and on the

authority of the cases relied on by the defenders.

There is no offer on the part of the pursuers to amend the summons, and therefore it is not necessary to consider whether amendment would be permissible, but I may say that it would be difficult to grant a motion for an amendment which would have the effect of permitting the pursuers to sue exclusively upon the first of their two grounds of claim for a sum which they have named as reparation not for that wrong but for both the wrongs which form the grounds of the action as it stands. For these reasons I am of opinion that the Lord Ordinary is right, and that his interlocutor should be adhered to.

LORD ADAM—I agree with the Lord Ordinary and with your Lordship. The two wrongs alleged as grounds of action are distinct and separate wrongs, although it may be said that the first gave occasion for the commission of the second. But this is not sufficient to justify the pursuers in treating them as if they constituted one and the same wrong for which each and all of the defenders were liable.

It is not an ordinary incident of a *post mortem* examination that separate organs of the body should be removed and never replaced. This is a much more serious wrong than the *post mortem* itself. All the defenders are relevantly charged with the commission of the lesser wrong, but it is equally clear that as regards the more serious wrong, the removal of parts of the body, the first defenders and their law-agents are not relevantly charged. From the averments and from the nature of the case the doctors alone could be made responsible for such a step as removing parts of the body. There is no averment and there is no justifiable inference that they were instructed or authorised to do this.

The action has not been properly framed and is incompetent as it stands, but it is suggested that the difficulty might be met by deleting the part of it relating exclusively to the two doctors. It would then be open to the objection that the sum concluded for as recompense for two wrongs remained the same although the chief cause of injury or damage was left out of consideration. There is in my opinion no authority for such an amendment under the Court of Session Act 1868, and it would therefore not be competent to allow it.

LORD M'LAREN—I agree in all respects with the judgment of the Lord Ordinary, which brings out very clearly all the points in the case. On the merits I have nothing to add. As to the question of amendment, I think it right to notice that the pursuer had the opportunity of amending his record in the Outer House. After the Lord Ordinary's judgment she might have considered whether she could maintain the action in its present form, and counsel might have come here with a definite amendment. I do not remember any case in which a party has asked the Court for a judgment, leaving it to the Court to amend his record for him; it is for the party whose pleading is defective to table his amendment. But even supposing that there was an amendment in proper form, I should have the greatest difficulty in allowing any amendment which would make this action competent. The powers of amendment conferred by the Court of Session Act 1868 are, speaking generally, conferred for the purpose of enabling the parties to raise the true question in issue; but here there are two questions in issue, and according to the form in which the case is put we are unable to deal with either of them. It appears to me that the pursuer can only raise the question she desires to raise by separate actions against the separate wrongdoers, and no amount of amendment would convert this action into two separate actions. I do not know what aspect the case might bear if the pursuer had offered to withdraw her action as against Messrs Mitchell and the law-agents. It might be that counsel would then be able to make out a relevant and competent action against the doctors. But no such proposal is made, and I agree with your Lordships that the judgment of the Lord Ordinary should be affirmed.

LORD KINNEAR — I concur, and have nothing to add on the main question, except that I entirely agree with the Lord Ordinary on the question of competency, and therefore I say nothing about the other points discussed in his Lordship's opinion, since we cannot consider them in an incompetent action. As regards the question of amendment, no formal proposal to amend the record has been made; but there has been such an expression of a wish to amend as would, according to our ordinary practice, have induced us to allow the pursuer's counsel an opportunity of considering whether he intended to propose an amendment. It is therefore proper to consider, as your Lordships have done, whether any amendment which the pursuer could propose should be allowed. Now, the only amendment suggested is to strike out of the record all those averments which are directed against the doctors specially, as distinguished from those averments which are directed against them in common with the other defenders. But the object of striking out these averments is not to amend the record in order to bring out the true point at issue between the parties, but for the purpose of turning an incompetent action into a competent one by striking out a ground of action set forth in the condescendence, and so enabling the conclusions of the summons to be read in a totally different sense from that which they bear as originally framed. I think that is not within the powers conferred by statute or by practice. I do not know, however, that the question of amendment is very material, because, if it were allowed, it could only be on conditions, and one of these conditions must be the payment of all expenses incurred in discussing an incompetent action, which means all the expenses incurred before the action was made competent by the amendment.

I do not think, therefore, that the refusal to allow amendment entails any hardship upon the pursuer. In whatever way they set about it, they cannot convert a bad action into a good one at the expense of their adversary, but only at their own.

The Court adhered.

Counsel for the Pursuers and Reclaimers—G. Watt, K.C.—A. M. Anderson. Agent—Henry Robertson, S.S.C.

Counsel for the Defenders—Guthrie, K.C.—M'Lennan. Agents—Auld, Stewart, & Anderson, W.S.

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*Friday, June* 14.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

MAXWELL *v.* M'FARLANE.

*Superior and Vassal — Feu - Contract — Construction—Additional Feu-duty for "Ground on which Buildings shall be Erected"—Ground Accessory to Buildings.*

A feu-contract provided that the vassal should pay, in addition to the feu-duty stipulated, "the sum of two shillings sterling of additional feu-duty for every square pole of the said piece of ground on which buildings shall be erected, excepting an addition to the mansion-house, and a porter's lodge." A singular successor of the vassal erected a public laundry on part of the feu. *Held* (*rev.* judgment of Lord Stormonth Darling, Ordinary) that the additional feu-duty was exigible not only for the ground actually covered by the laundry buildings, but also for the ground utilised for approaches to the laundry, and certain grass slopes forming the bank of the laundry reservoir.

By feu-contract, dated 21st and 29th April 1852, the late Sir John Maxwell of Pollok feued to William Young, manufacturer, a portion of the lands of Redds, near Pollokshaws, extending in all to 12 acres, 9·98 poles. The *tenendas* and *reddendo* clauses of the said contract were in the following terms:—"To be holden of and under the said Sir John Maxwell, and his heirs and successors, in feu-farm, fee, and heritage for ever, for the yearly payment to him and them of the sum of £60, 4s. 10d. sterling of feu-duty at two terms in the year, Whitsunday and Martinmas; . . . And also the said William Young and his foresaids, paying yearly to the said Sir John Maxwell and his foresaids, besides the feu-duty above stipulated, the sum of two shillings sterling of additional feu-duty for every square pole of the said piece of ground on which buildings shall be erected, excepting an addition to the mansion-house of Auldhousefield and a porter's lodge which the said William Young and his foresaids may erect without being liable for any of the said additional feu-duty."

In 1890 Donald M'Farlane acquired from Young a portion of the said feu, and erected thereon a public laundry, with a reservoir and bleaching-green annexed. On this being erected Sir John Maxwell Stirling Maxwell, the successor of the late Sir John Maxwell in the superiority of the lands in question, claimed the additional feu-duty, as provided by the feu-contract above quoted, not only for the ground actually covered by the laundry buildings, but also for ground utilised in the approaches to the laundry, and certain grass slopes which formed the banks of the reservoir. M'Farlane, while admitting that the additional feu-duty was exigible in respect of the ground actually covered by buildings, disputed the further claim, and accordingly Sir John Maxwell brought the present action, concluding for payment of £87, 15s. A plan was produced, on which the ground in respect of which additional feu-duty was claimed was enclosed within red lines. No claim for additional feu-duty was made for the ground used as a reservoir or as a bleaching-green.

On 11th January 1901 the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor, whereby he dismissed the action.

*Opinion.*—"In 1852 the late Sir John Maxwell of Pollok feued about 12 acres of his estate to one Young, at a feu-duty of £5 per acre. At that time the ground consisted of a dwelling-house and park, but evidently the parties contemplated that in course of time it might come to be used for building, and so the feu-contract contained a provision for an additional feu-duty in that event. The words which give rise to the present question are, 'And also the said William Young and his foresaids paying yearly to the said Sir John Maxwell and his foresaids, besides the feu-duty above stipulated, the sum of two shillings sterling of additional feu-duty for every square pole of the said piece of ground on which buildings shall be erected, excepting an addition to the mansion-house of Auldhousefield and a porter's lodge, which the said William Young and his foresaids may erect without being liable for any of the said additional feu-duty, which feu-duty shall begin to run from the first term of Whitsunday or Martinmas after the erection of the buildings in respect of which the same is exigible shall have been commenced, and shall be payable along with the feu-duty above stipulated, half-yearly at Whitsunday and Martinmas by equal portions, and with penalty and interest as above specified.'

"About ten years ago the defender acquired from the trustees of the original vassal a portion of these subjects, extending to about 7¾ acres. On part of the ground so acquired he has established a public laundry. The actual space covered by the buildings and outbuildings of the laundry is about 2 roods 9 poles, but the space enclosed within red lines on the plan produced is a little over an acre, the difference being accounted for by roads and grass