

agents must depend. This, the only authentic intimation, was given duly in the present case, and it must have been well known to all concerned that if they desire to ascertain when a case is to be heard they must look at the Act Book. Apparently the agent for the appellants did not consult that book, and he was not aware that the case was put out for hearing on the 20th May. The diet having been called, and no appearance made for the appellants, the Sheriff does not seem to have acted with undue haste, as he waited until 1st June, and there having been then still no appearance for the appellants, he, on the motion of the respondents, dismissed the appeal. This is the judgment appealed against, and it seems to me to have been perfectly correct.

Great weight is naturally attached to the opinion of an able and experienced Sheriff in regard to a matter of practice in his Court, and I see no reason for disturbing what he has done. I therefore think that this appeal should be dismissed.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court dismissed the appeal.

Counsel for the Defenders and Appellants—Campbell, K.C.—W. Thomson. Agents—Carmichael & Millar, W.S.

Counsel for the Pursuers and Respondents—Wilson, K.C.—C. D. Murray. Agents—Bruce, Kerr, & Burns, W.S.

Tuesday, November 19.

## SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

DOUGLAS v. HOGARTH.

*Reparation—Negligence—Two Defenders Sued Jointly and Severally or Severally—Effect of Discharge of Pursuer's Claim against One of Two Defenders—Right of Relief.*

A workman who was injured while employed in discharging the cargo of a vessel, brought an action against two defenders, craving decree against them jointly and severally, or severally, for £300 in name of damages. He made averments of fault against both defenders. Before issues were adjusted the pursuer discharged his claim against one defender for the sum of £15, and this defender was assoilzied. The remaining defender maintained that he was entitled to decree of absolvitor, in respect that the pursuer by discharging the other defender had deprived him of the right of relief which he would otherwise have had. The Court repelled this contention, and the pursuer having restricted his claim by the amount which he had received from the defender whom he had discharged, granted an issue against the remaining defender.

James Douglas, labourer, brought an action in the Sheriff Court at Glasgow against Hugh Hogarth, shipowner, and Robert Gillespie, stevedore, Glasgow, in which he craved decree against the defenders, jointly and severally or severally, for £300 in name of damages for personal injuries sustained by him. The pursuer averred that he was employed by the defender Gillespie to assist in discharging the cargo of a vessel belonging to the defender Hogarth, and that while so employed he received the injuries complained of. He made averments of negligence against both defenders.

The pursuer pleaded, *inter alia*—“(1) The pursuer having been injured through the negligence of both of the defenders, or either of them, or their servants, is entitled to compensation from them jointly and severally, or severally, with expenses.”

The Sheriff-Substitute (STRACHAN) on 28th May 1901, before answer, allowed a proof.

The pursuer appealed to the Court of Session for jury trial.

Before issues were adjusted the pursuer accepted from the defender Gillespie the sum of £15 in full satisfaction of his claim against him, and granted him a receipt, which bore that it was “granted in discharge of my claims against Robert Gillespie only, and is entirely without prejudice to any claims for damages I may have against the remaining defender Hugh Hogarth in respect of said injuries.”

In pursuance of this discharge and joint-minute following thereon the Court, by interlocutor dated 9th October 1901, assoilzied the defender Gillespie.

Thereafter the defender Hogarth obtained leave to amend his record by adding a statement setting forth the facts with regard to the settlement between the pursuer and the defender Gillespie, together with the following additional pleas-in-law:—“(5) In respect that he has accepted from the defender Robert Gillespie a sum in full of his claims of damages in the present action, the pursuer is barred from insisting in the action, and this defender is entitled to absolvitor. (6) The pursuer having discharged the person alleged to be jointly responsible for his accident, and having thereby deprived the present defender of his right of relief, is barred from further insisting in the action, and the present defender should accordingly be assoilzied.”

The pursuer in answer stated the following additional plea-in-law:—“The averments in the defender's amendment are irrelevant.”

An issue was lodged by the pursuer.

The defender Hogarth objected to an issue being allowed. He maintained that he was entitled to decree of absolvitor, and argued—in respect of the discharge granted to Gillespie, the pursuer had lost his right to proceed against the other defender, since if the action were allowed to proceed the latter might be held liable in a sum which, added to the amount already recovered by the pursuer, would exceed the total damage which he had suffered; and further that the

defender would be deprived of his right of relief against Gillespie as the person jointly responsible for the pursuer's injuries. He cited *Palmer v. Wick and Pulteneytown Steam Shipping Co.*, June 5, 1894, 21 R. (H.L.), 39, 31 S.L.R. 937.

Argued for the pursuer and appellant—If the present defender had a good claim of relief against Gillespie, that could not be affected by any transaction between Gillespie and the pursuer. The pursuer was therefore entitled to an issue. He was willing to restrict his claim by deducting the amount which he had received from Gillespie.

LORD JUSTICE-CLERK—The facts here are that one of the defenders having made a settlement has been assoilized; and the remaining defender maintains that the action cannot now be allowed to proceed as against him, on the ground that in the event of a verdict against him he will be deprived by the settlement which has been come to of his right of relief against the other defender. I do not think that any such question arises at this stage. The question whether or not this defender is responsible does not depend upon whether or not someone else is responsible. If a relevant case has been stated against this defender—and I think it has—the case must go to trial as against him. The only difficulty which might have arisen is occasioned by the pursuer having already got some of the compensation which he sues for: but that difficulty is removed by the pursuer having agreed to restrict the sum sued for by the amount which he has received.

LORD YOUNG—I am of the same opinion. There is no objection to the relevancy of the pursuer's case against Hogarth, and therefore it must go to trial. We are not concerned with the pursuer's case against Gillespie, whether he has a relevant and true case against him, because the claim which he makes against him has been settled and discharged. But that settlement can in no way prejudice the defender Hogarth.

LORD TRAYNER—I agree with your Lordship that the pursuer has stated a relevant case against the defender Hogarth, and I therefore think that his first plea-in-law should be repelled. The other question raised by the defender Hogarth is of some importance, viz., whether the pursuer having discharged his claim against one defender that necessarily discharges the other. The main argument offered in support of that view is, that by this settlement the pursuer has deprived Hogarth of the legal right of relief which he would otherwise have had against the other defender. I desired some authority for that proposition, for I am unable to see how the pursuer's discharge to Gillespie could affect any right of relief that Hogarth might have against him. Any rights that Hogarth has are rights vested in himself, and he alone can discharge them; and I therefore can see no reason for holding that the

pursuer has deprived him by compromising his claim against Gillespie of any right of relief that he may have against the latter. The case would have been different if this had been an action against two defenders jointly and severally alone, because then both must be held liable or neither. But this petition is framed so as to entitle the pursuer to take action against one of the defenders, and therefore there is no principle for holding that he is excluded from going against either. It is said that if the pursuer obtains a verdict against Hogarth for the full amount which he claims he will be getting more than he sues for, having already had his claim satisfied to the extent of £15 by Gillespie. But that difficulty is avoided by the pursuer having consented to restrict his claim to the sum sued for less what he had already received.

I therefore think that we should repel the first, fifth, and sixth pleas stated by Hogarth and approve of the issue proposed.

LORD MONCREIFF—The pursuer proceeded originally against two defenders, but has now thought fit not to proceed against one of them. It is immaterial that a sum of money has been paid by that defender. The case is the same as if the pursuer had brought his action against Hogarth alone. If Hogarth is found liable in damages, and has a good claim of relief against his alleged fellow wrongdoer (as to which I express no opinion), I am satisfied that no transaction between the pursuer and Gillespie will prevent the defender Hogarth making good that claim of relief. I therefore think that the case must go to trial. No doubt the jury, if they award damages to the pursuer, will take into account the amount that he has already received from Gillespie.

The pursuer having amended his issue by altering the damages claimed from £300 to £285 the Court repelled the first, fifth and sixth pleas-in-law for the defender Hogarth, and approved of the issue as amended.

Counsel for the Pursuer and Appellant—  
Younger. Agents—Oliphant & Murray,  
W.S.

Counsel for the Defender and Respondent—  
Salvesen, K.C.—Constable. Agents  
—J. B. Douglas & Mitchell, W.S.

Thursday, November 21.

## SECOND DIVISION.

[Lord Stormonth Darling,  
Ordinary.

ANGUS' TRUSTEE v. ANGUS.

*Bankruptcy—Illegal Preference—Cash Payment in Ordinary Course of Business—Fraudulent Preference—Fraud—Husband and Wife—Marriage-Contract.*

By antenuptial contract of marriage a husband bound himself within five years to pay £5000 to the trustees for behoof of his wife and himself and the