

## COURT OF SESSION.

Tuesday, May 24.

## FIRST DIVISION.

[Sheriff Court of Forfarshire  
at Dundee.]

REILLY v. SMITH.

*Process—Action against Two Defenders—  
Averments Directed against One Defen-  
der Only—Competency.*

A pursuer brought an action in the Sheriff Court against A, and also against B "for any interest he may have," as defenders, and prayed the Court to grant a decree against "the above-named defenders, ordaining them" to pay to the pursuer the sum of £150. The pursuer's averments and pleas-in-law set forth grounds of liability only against A. The Sheriff pronounced an interlocutor dismissing the action in so far as directed against B, and allowing it to proceed against A.

*Held* that the interlocutor of the Sheriff was right in the circumstances.

William Reilly, calender worker, 9 Tait's Lane, Dundee, as tutor and administrator-in-law of his pupil son William Reilly junior, brought this action in the Sheriff Court of Forfarshire against "William Smith, 226 Strathmartine Road, Dundee, and John Simson Buchan, house agent, Barrack Street, for any interest he may have in the premises," praying the Court "to grant a decree against the above-named defenders, ordaining them to pay to the pursuer the sum of £150." . . .

The pursuer averred that the defender Smith was the proprietor of a wall; that part of the wall was in a ruinous condition; and that the pursuer's son the said William Reilly junior was severely injured by the fall of a stone from the ruinous part of the wall.

The pursuer pleaded in law as follows:—"The pursuer's child having been seriously injured by the fall of part of the defender's wall, through the negligence of the defender Smith, or his servants, the pursuer is entitled to reparation as craved from the defender Smith."

A joint-minute for the pursuer and the defender Buchan was lodged, stating "that the accident complained of was in no way caused through the fault of the defender Buchan, and that the onus of keeping said wall in repair belongs wholly to the first defender. Therefore crave the Sheriff to sist the action so far as it concludes against the said defender Buchan."

On 27th November 1903 the Sheriff-Substitute (CAMPBELL SMITH) allowed the joint minute for the pursuer and the defender Buchan to be received, interposed authority thereto, and in terms thereof sisted the action so far as it concluded against the defender Buchan.

Subsequently the defender Smith moved for absolvitor from the action against him,

in respect of the joint-minute before mentioned and the interlocutor of 27th November.

On 8th January 1904 the Sheriff-Substitute refused this motion and allowed the parties a proof of their respective averments.

The defender Smith appealed to the Sheriff.

On 5th February 1904 the Sheriff (JOHN-STON) issued the following interlocutor:—"Recals the interlocutor of the Sheriff-Substitute of 27th November 1903, except so far as it allows the minute for the pursuer and the defender Buchan to be received, and to that extent sustains the appeal; *quoad ultra* refuses the appeal and affirms the interlocutors appealed against: Finds that there is no relevant case against the defender Buchan, and therefore dismisses the action as against him; and remits to the Sheriff-Substitute of new to assign a diet of proof, and to proceed in the cause."

*Note.*—"The pursuer sues his own landlord and an adjoining proprietor for injury to his child from the fall of a wall dividing their properties, though he does not aver, and apparently does not know, whether the wall is mutual or wholly on one of their properties, and which. He calls them both promiscuously, and so concludes against them without adding either 'jointly' or 'jointly and severally,' or 'jointly and severally or severally.' The nature of the liability alleged precludes the liability being joint merely. It is on negligence, and therefore *quasi delict*, and without solving the difficult question whether there could be contribution if both defenders had been guilty of the negligence, it is clear that both would be liable *in solidum*, and that if one only was so guilty he alone would be liable. What, then, is the meaning of calling two defenders and concluding against them both generally? It is necessary to ask the question, because while there is a relevant case to go to trial against Smith, the pursuer's landlord, there is absolutely none against the other defender Buchan, against whom the action falls to be dismissed, as the pursuer now admits, the sist granted by the Sheriff-Substitute being inappropriate. Upon the answer to that question it depends whether the action can proceed against the defender Smith alone. I think that such a conclusion must be jointly or jointly and severally, according to the nature of the liability pleaded, and therefore in this case jointly and severally, but I cannot read into it 'jointly and severally or severally,' which to my mind is necessary to admit of decree against one defender while departing from the action against the other. Accordingly, did I act on my own judgment, I should dismiss the action against both defenders, holding that unless it was good against both it was good against neither, and in this following the opinions of Lord M'Laren in *Mackersy*, 22 R. 368, 32 S.L.R. 277, and of Lord Trayner in *Douglas*, 4 F. 148, 39 S.L.R. 118. These opinions were *obiter*, however. But I find

that the First Division of the Court in *Milne*, 20 R. 95, 30 S.L.R. 105, where husband and wife were called as here, assoilzied the husband and allowed the action to proceed against the wife, and that the Second Division in *Caughie*, 25 R. 1, 35 S.L.R. 3, granted an issue in terms which might have resulted in the same result, while in *Robinson*, 2 F. 928, 37 S.L.R. 718, Lord Moncreiff stated an opinion *obiter* in opposition to those of Lord M'Laren and Lord Trayner referred to above. In these circumstances I am bound to follow the judgment in *Milne's* case, and I have accordingly dismissed the action against Buchan and allowed it to proceed against Smith."

The pursuer appealed for jury trial.

The defender objected to the competency of the action, and argued—In the petition what was asked was simply a joint-decree against Smith and Buchan, who were the "defenders." The terms of the conclusion overruled the character in which Buchan was called. If, for example, decree were to pass on this summons in the undefended roll, the decree would clearly be one importing joint-liability—*Mackersy v. Davis & Sons*, February 16, 1895, 22 R. 368, 32 S.L.R. 277; *Milne v. Smiths*, November 23, 1892, 20 R. 95, 30 S.L.R. 105.

Argued for the pursuer and appellant—It was clear from the condescendence and pleas-in-law that the pursuer sought decree only against Smith. In the petition Buchan was called only "for any interest he may have" and the word "defenders" in the prayer must be read in connection with these words. The action being really an action against Smith should be allowed to proceed against him and should not be thrown out on the very technical ground stated by the defender.

LORD PRESIDENT—This action is certainly not very artistically framed. The position in which it now stands is that the Sheriff has found that there is no relevant case against the defender Mr Buchan, and has dismissed the action in so far as directed against him. I think that in doing so he was right. There is no allegation in the condescendence against Mr Buchan, and the petition bears that he was called merely "for any interest he may have." This leaves the defender Smith still in the action, and the Sheriff has allowed a proof so far as he is concerned. This is, I think, the proper course to take in the circumstances.

LORD ADAM—It is quite clear from the record in this case that the pursuer sought decree against nobody but Smith. There are no averments against the other defender Buchan, but for some obscure reason known only to himself he calls Buchan for his interest. The difficulty is to see what the pursuer means by asking decree against "the defenders." Now, looking to the averments and the pleas-in-law, it is clear, as I have said, that the action is really only against Smith. Accordingly it seems to me that the Sheriff was right in allowing the action to go back to the Sheriff-Substitute to take a proof before answer.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court remitted the case to the Sheriff-Substitute for proof.

Counsel for the Pursuer and Appellant—G. Watt, K.C.—D. Anderson. Agent—John N. Rae, S.S.C.

Counsel for the Defender and Respondent—Deas—Morton. Agents—Macpherson & Mackay, S.S.C.

Saturday, May 28.

## SECOND DIVISION.

(With Three Consulted Judges.)

[Lord Kyllachy, Ordinary.]

ASSETS COMPANY, LIMITED v.

BAIN'S TRUSTEES.

*Trust—Process—Action against Trustees after Estate Distributed and Trustees Discharged—Competency.*

Held, in a Court of Seven Judges (rev. judgment of Lord Kyllachy), per the Lord President, Lord Justice-Clerk, Lords Adam and Trayner, following *Assets Company, Limited v. Falla's Trustee*, December 11, 1894, 22 R. 178, 32 S.L.R. 143—that an action is competent against trustees, for the purpose of constituting a claim against the trust estate, after the trust estate has been distributed and the trustees have been discharged by the beneficiaries—*diss.* Lords Young, Kinnear, and Moncreiff.

*Company—Contract—Discharge—Reduction of Discharge on Ground of False Statements—Representation or Warranty—Fraud—Mora.*

In 1879 the liquidators of the City of Glasgow Bank entered into a compromise with B, a contributory of the bank who was unable to meet calls, "on the basis and on condition of the truth, accuracy, and completeness" of a written "statement of his affairs, means, and property," appended to his answers to certain questions put by the liquidators to contributories with whom they effected compromises. One of these questions was—"What property do you possess, and what is its nature and value to the best of your knowledge and belief?" B, as required, made a solemn declaration that the answers he had given to the questions put to him were true and correct answers "to the best of my knowledge and belief." The compromise was approved by the Court, under whose supervision the liquidation proceeded, and B was discharged. In 1882 a limited company known as the Assets Company was formed, which took over the assets of the bank. B died in 1882. In 1901 the Assets Company raised an action against B's trustees concluding