

Wednesday, February 22.

FIRST DIVISION.

[Sheriff of Stirling, Dumbarton, and Clackmannan at Dumbarton.

KILLIN AND OTHERS v. WEIR.

*Process—Summons—Competency—Several Pursuers Claiming Separate Damages in One Action—Community of Interest—Reparation.*

An action by several pursuers for separate sums in name of damages was based upon an averment that in the month of January the defender made to one of the pursuers a statement which was false and fraudulent, and in the month of February made similar statements to the others, and that the pursuers had thereby suffered loss by being induced to purchase certain shares. *Held* that the action was incompetent as the pursuers had no real and true community of interest.

Thomas Killin, clerk, 108 West George Street, Glasgow, Finlay M'Fadyen, of Rennie & M'Fadyen, 79 Robertson Street, Glasgow, Thomas Torrance Crossgrove, 32 Midlothian Drive, Shawlands, Glasgow, and Colin Campbell, 1313 Pollokshaws Road, Glasgow, raised an action in the Sheriff Court at Dumbarton against Alexander Clark Weir, residing at Woodburn, Helensburgh, Dumbartonshire, in which they sued for the following sums respectively, viz.—£100, £175, £150, and £50. They stated that in November 1903 the defender, being then resident in Johannesburg, South Africa, wrote to the pursuer Killin bringing under his notice and recommending as certain of success a gold-prospecting company known as the Hex River Main Reef Syndicate, Limited, and they made the following averments:—“(Cond. 4) In or about January 1904 the defender came to this country and called on the pursuer Thomas Killin. He then informed him that he had purchased £10,000 of the shares himself, and that the shares were lying in his name with the secretary. He further stated that there was £5000 of the capital of the Syndicate lying in the bank at Johannesburg to meet the cost of boring and testing the ground, and that a bore was in course of being put down which was expected to reach the reef in three or four months. As a further inducement to take shares the defender expressed his willingness to pay the expense of an engineer selected by the Glasgow shareholders going from this country to be present when the bore reached the reef and give his report. The defender was introduced to the other pursuers by Thomas Killin in or about said month of February, and made similar statements to them and others, including John Leiper Gemmill, Parklea, Dumbuck, Glasgow, as to his holding in the company being £10,000; that he purchased said shares; that £5000 of the capital of the Syndicate was actually in the bank for the purpose before mentioned; that a bore was being

put down, and was expected to reach the reef in three or four months. All these statements were false and fraudulent, and were known to be so by the defender, and made by him to the pursuers and others with the express intention of inducing the pursuers and others to purchase shares in the concern. (Cond. 5) The pursuers, believing in the sincerity and truth of the defender's statements and assurances as aforesaid, were induced to purchase from the defender shares in the said syndicate as follows;—The said Thomas Killin, 100 shares at the price of £100; the said Finlay M'Fadyen 150 shares at the price of £175; the said T. T. Crossgrove 150 shares at the price of £150; and the said Colin Campbell 50 shares at the price of £50, for which they received certificates which will be produced. Several other friends of pursuers also took up a number of the shares, relying on the defender's statements to them as above.”

The pursuers pleaded—“(1) The pursuers having been induced by the false and fraudulent representations of the defender to purchase shares in the said company, they are entitled to repayment from him of the amounts respectively advanced to him, with expenses.”

On the 25th October 1904 the Sheriff-Substitute (P. J. BLAIR) issued an interlocutor allowing the pursuers a proof of their averments, and on the 9th December 1904 the Sheriff (LEES) adhered to this interlocutor.

The defender appealed, and argued—The action was incompetent, for there were four independent pursuers suing for separate amounts of damages upon separate grounds of action. Killin sued on a statement alleged to have been made in January, and the other pursuers upon other statements alleged to be similar, but made in the month of February. The wrong alleged was not the same but different—Mackay's Manual of Practice, p. 135; *Harkes v. Mowat*, March 4, 1862, 24 D. 701; *Gibson v. Macqueen*, December 5, 1866, 5 Macph. 113, 3 S.L.R. 83; *Mitchell v. Grierson*, January 13, 1894, 21 R. 367, 31 S.L.R. 301; *Fischer & Co. v. Andersen*, January 15, 1896, 23 R. 395, at p. 400, 33 S.L.R. 306.

Argued for the respondents—The action was competent, for the ground of action was the one misrepresentation. It had been repeated, but it was the same misrepresentation—*Smyth v. Muir*, November, 13, 1891, 19 R. 81, at p. 88, 29 S.L.R. 94. The community of interest was clear on the pursuers' statement, where it must be tested, and though one of the pursuers might have a separate fact to prove, that made no difference—*Cowan & Sons, &c. v. Buccleuch, &c.*, November 30, 1876, 4 R. (H.L.) 14, 14 S.L.R. 189.

LORD PRESIDENT—This is an appeal from interlocutors of the Sheriffs of Dumbarton in an action at the instance of Thomas Killin, Finlay M'Fadyen, Thomas Torrance Crossgrove, and Colin Campbell against Alexander C. Weir, in which each of the pursuers sues for separate sums of money, which they say is due to them in name of

damages in respect of loss which they have incurred owing to having taken shares in a certain syndicate induced by the false and fraudulent representations, as they allege, of the defender. The learned Sheriffs have allowed proof of pursuers' averments, but on appeal a point has been argued to your Lordships which does not seem to have been mooted in the Sheriff Court, viz., as to the competency of the action in respect that the four pursuers are allied together in suing for separate sums of money in respect of misrepresentation to them by the defender. I find that in an old but respected treatise on forms of process by Mr Ivory (Forms of Process, i, 161) the rule is stated that when several unconnected persons have been aggrieved by the same act of the defender, or have a joint interest in the matter libelled, one action in their joint names is perfectly competent, but that cases in which joint action is competent are limited to those of these two descriptions. I do not think the Court has ever departed from that rule. Indeed, so long ago as 1741 an attempt very much like the present seems to have been made in the case of *Gray and Others, His Majesty's Feuars in Orkney v. Sir James Stewart of Barray*, June 5, 1741, M. 11,981, where the Lords found "that different parties could not accumulate their actions in one libel unless they had connection with one another in the matter pursued for or had been aggrieved by the same act." I think all the cases that were quoted to your Lordships fell quite distinctly under one or other of these two categories. "Had connection with one another in the matter pursued for" means a case of which a very apt illustration can be found in the case of riparian proprietors. They represent property having a joint interest, and it has been held that they may quite appropriately combine themselves in one action to protect their common interest. "Being aggrieved by the same act" finds its illustration in the various cases quoted of actions of slander, where the ground of action is contained in one statement made once and for all implicating several persons and aggrieving them. I cannot find any amplification of these two principles, and I think it is very obvious that on considerations of expediency it would be regrettable if any amplification had to be allowed. I ventured to put the case in the course of the argument that if the misrepresentation complained of had been contained in a prospectus published in a newspaper we might have had hundreds of persons coming together and all joining in one action for damages which they had sustained by this misrepresentation. The truth is that when the pursuers' averments are looked at there is no real and true community of interest. It is said that it was one and the same false representation. But then it was made to different persons at different times and to a certain extent at different places, and it is impossible to doubt that the words of the communication used to different persons differed at least a little in particulars, which may or may not have great importance when you come to

determining whether these representations were false or not. In these circumstances I am of opinion that we have no course but to dismiss the action as incompetent.

LORDS ADAM and M'LAREN concurred.

The Court recalled the interlocutors appealed against and dismissed the action as incompetent.

Counsel for the Pursuers and Respondents—Younger—D. Anderson. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender and Appellant—Munro—J. A. Christie. Agents St Clair Swanson & Manson, W.S.

Saturday, February 25.

## FIRST DIVISION.

[Sheriff Court at Airdrie.]

M'DONALD v. JAMES DUNLOP & COMPANY (1900) LIMITED.

*Reparation—Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 1 (2) (b)—Action for Reparation by Person Found not Entitled to Claim Compensation under Compensation Act—Competency.*

An action for reparation at common law and under the Employers' Liability Act is not excluded by the fact that the pursuer in such action has already sought, but has been found to have no title, to recover compensation under the Workmen's Compensation Act 1897.

*Blain v. Greenock Foundry Company*, June 5, 1903, 5 F. 893, 40 S.L.R. 639, and *Rouse v. Dixon*, L.R. [1904] 2 K.B. 628, referred to.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37) section 1 (2) (b) enacts:—"When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act, but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act except in case of such personal negligence or wilful act as aforesaid." Section 1 (4)—"If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable