

Ardwall that I deem it unnecessary to add anything.

The LORD JUSTICE-CLERK and LORD DUNDAS concurred.

The Court pronounced this interlocutor—

“... Find in law (1) that under the Road Statutes, and particularly 11 Geo. III, cap. 53, the defenders were bound to maintain a clear passable road at said place of not less than 20 feet in width; (2) that the defenders were in breach of said duty in laying down and allowing to remain on said road obstructions which reduced the width of clear passable road to 11 feet 6 inches; and (3) that the defenders were under the Road Acts and the Local Government Act each liable to maintain one-half of the said road at said place of a clear passable width of not less than 20 feet, and that it was reduced to the width of 11 feet 6 inches by and through their joint fault, and that therefore they are liable to the pursuer jointly and severally for the loss and damage sustained by him,” &c.

Counsel for Pursuer—M'Lennan, K.C.—A. M. Stuart. Agent—J. Pearson Walker, S.S.C.

Counsel for Defenders St Andrews District Committee—Constable, K.C.—C. H. Brown. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defenders Cupar District Committee—A. M. Anderson, K.C.—J. B. Young. Agent—William Black, S.S.C.

Tuesday, January 31.

FIRST DIVISION.

[Sheriff Court at Dumbarton.

ANDERSON v. M'GOWN.

Sheriff—Process—Jurisdiction—Remit to Court of Session—Competency—“Actions Relating to Questions of Heritable Right or Title”—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, c. 51), sec. 5.

A builder raised an action in a Sheriff Court against one whom he averred to be under contract a joint-adventurer with himself and another in a speculation involving the acquisition of lands and building of tenements. The action concluded for payment of £2365 odds, which pursuer averred to be one-third portion of the disbursements made and charges incurred by him on account of the joint-adventure. The defence was that the pursuer had not acted in accordance with the agreement, in respect, *inter alia*, that he had erected buildings which he was not entitled to erect. At the closing of the record the defender required the cause to be remitted, under the Sheriff Courts (Scotland) Act 1907, sec. 7, to the Court of Session, as being an action relating to a question of heritable right and title.

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The Court held that the action did not relate to a question of heritable right or title within the meaning of sec. 5, and remitted it back to the Sheriff Court in terms of section 4, sub-section 5, of the Act of Sederunt of 5th January 1909.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) enacts—Section 5—“Nothing herein contained shall derogate from any jurisdiction, powers, or authority presently possessed or in use to be exercised by the sheriffs of Scotland, and such jurisdiction shall extend to and include—... (4) Actions relating to questions of heritable right or title, including all actions of declarator of irritancy and removing, . . . : Provided that actions relating to questions of heritable right or title, including irritancy and removing, . . . shall, if raised in the Sheriff Court, be raised in the Sheriff Court of the jurisdiction and district where the property forming the subject in dispute is situated, and all parties against whom any such action may be brought shall in such action be subject to that jurisdiction: Provided also that it shall be competent for either party at the closing of the record or within six days thereafter to require the cause to be remitted to the Court of Session in the case of actions (a) relating to questions of heritable right and title where the value of the subject in dispute exceeds fifty pounds by the year or one thousand pounds in value.”

The Act of Sederunt of 5th January 1909 provides—Section 4, sub-section 5—“Upon the appearance of the cause in the Single Bills of the Division to which it has been remitted, parties will be heard upon any motion made to retransmit the cause to the Sheriff Court or directed against the competency of the remission. . . .”

On 17th November 1910 William Anderson junior, builder, 49 Bellfield Street, Glasgow, pursuer, raised an action in the Sheriff Court at Dumbarton against Andrew M'Gown, residing at Mansefield, Drumchapel, defender, and Charles A. Cameron, residing at Torloisique, Drumchapel, for any interest he might have. In the petition the pursuer made a claim “for payment of the sum of £2369, 15s. 7½d. sterling (two thousand three hundred and sixty-nine pounds, fifteen shillings and sevenpence halfpenny) conform to account hereto annexed, being the defender Andrew M'Gown's one-third share of the cost of nine tenements on a plot of ground at Dumbarton Road, Stewart Street, and Swindon Street, Dalmuir, erected by pursuer on behalf of himself, the defender Andrew M'Gown, and the said Charles A. Cameron, as joint-adventurers or joint-owners, and interest accrued to 10th November 1910, in terms of agreement or joint-adventure amongst the parties.”

The following narrative is taken from the opinion of Lord Kinnear, *infra*:—“The pursuer brings his action upon the allegation of a contract which he describes as a joint-adventure for carrying out a certain building speculation; and he says that certain parties have made an agreement to

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acquire land and build tenements upon it in the execution of their contract. Then with reference to his own share in that agreement, he alleges that the parties agreed that the pursuer, who is a contractor and builder, should 'cover the whole ground as reasonably as possible, and finance the whole job until the bonds were got, but that the defender and Cameron would help him with money if required. It was also then arranged that the defender's and Cameron's names be kept in the background, and the pursuer was to appear to third parties as the owner of the buildings. The title to the ground was to be put into the pursuer's name to secure the cost of the contract, and after the job was finished a settlement was to be effected.' Then, upon that statement of the agreement which he alleges, he sets out that he has erected certain buildings, and he finally avers that the sum sued for is the amount due by the defender to the pursuer as joint adventurer with him and Cameron for one-third share or portion of the disbursements made and charges incurred by the pursuer on behalf of the joint-adventure in connection with the erection of the said nine tenements. The answer made by the defender is that the pursuer has not acted in accordance with the agreement, because he has erected buildings which he was not entitled to erect, the parties (according to the defender) having stipulated that only a certain number of buildings should be erected, and that of these he should be liable to contribute the cost only of a more limited number."

The pursuer pleaded, *inter alia*—" (2) The defender being a joint-adventurer with the pursuer and Cameron in the said building speculation, and as such being liable to the extent of one-third for the disbursements made by the pursuer on behalf of the joint-adventure as condescended on, decree should be granted as craved, with expenses."

The defender pleaded—" (1) The pursuer's statements being irrelevant and insufficient to support the crave of the petition, the action should be dismissed, with expenses. (2) The pursuer's averments in so far as relevant and material, relative to the alleged agreement between parties, are only proveable by the defender's writ or oath. (3) The defender not being due and resting-owing to the pursuer in the sum sued for, he is entitled to be assolizied with expenses. (4) The pursuer's statements, so far as material, being unfounded in fact, the defender should be assolizied. (5) The pursuer being in breach of the contract between parties in a material respect as condescended upon, and the defender being therefore entitled to rescind, and having rescinded the contract, the defender should be assolizied. (6) The pursuer being in breach of the contract between the parties in a material respect as condescended upon, the pursuer is barred from insisting in the present action. (7) The pursuer is barred by his actings as condescended upon from maintaining the present action. (8) The pursuer being due and resting-owing to

the defender in the amount of his counter claim as condescended upon, the defender is entitled to decree therefor with interest and expenses as craved. (9) In any event the sum sued for is excessive."

On 6th January 1911 the Sheriff-Substitute (BLAIR) closed the record, and on the same day the defender required the cause to be remitted to the First Division of the Court of Session.

When the case appeared in the Single Bills the pursuer objected to the competency of the remit to the Court of Session, and moved that the case should be retransmitted back to the Sheriff in terms of section 4, sub-section 5, of the Act of Sederunt of 5th January 1909.

Argued for pursuer—It was incompetent to remit this case to the Court of Session because it did not belong to the class of cases referred to in section 5 of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, c. 51). If this case raised any question of heritable right it did so merely by way of defence to the real question between the parties, namely, what was the extent of the joint-adventure between them. It was true that the joint-adventure happened to deal in land, but this action was one of accounting and nothing else, and if it were held that this case related to a question of heritable right or title, then all actions of accounting where heritage was involved would come under the same category. The defender was liable not as a co-owner but as a joint-adventurer, and if this action had been brought in the form of a declarator the conclusion would have been, not for declarator that the parties were co-owners, but for declarator that a joint-adventure had been entered into between them to the extent of one share each. The cases cited by the defender were all cases where the Court could not proceed a single step until it had first decided the question of ownership, but in this case the question of ownership was a mere sequel to the real question.

Argued for the defender—The pursuer averred a joint-adventure, which had resulted in joint-ownership, and the real question between the parties was one of proprietorship. The defender could not be liable except in the capacity of a co-proprietor, and if the action had been brought in the form of a declarator the conclusion of the summons would have shown this. In an action of accounting when one of the co-owners denied that he was a co-owner, that at once raised a question relating to heritable right or title, and in order to determine whether an action relates to a question of heritable right or title the true basis of the action must be looked to—*Duke of Argyll v. Muir*, 1910 S.C. 96, 47 S.L.R. 67, especially opinion of Lord Kinnear, at p. 104, 71. Counsel also cited *Earl of Moray v. Pearson*, June 11, 1842, 4 D. 1411, at p. 1413; *Lowson's Trustees v. Crammond*, November 16, 1864, 8 Macph. 53 (*per* Lord Justice-Clerk Inglis); and *Stark's Trustees v. Cooper's Trustees*, July 20, 1900, 2 F. 1257, 37 S.L.R. 944.

[The Court asked Counsel for the defender

whether he could point to any of the defender's pleas as supporting his argument that the action related to a question of heritable right or title. Counsel in reply pointed to plea 4, quoted *supra*.]

At advising—

LORD KINNEAR—This is an action instituted in the Sheriff Court at Dumbarton which the defender desires to have removed to this Court under the provision of the fifth section of the Sheriff Courts (Scotland) Act 1907, which allows either party in certain cases to require a cause to be remitted. The pursuer disputes the competency of the motion, on the ground that the proviso of the statute relied upon is inapplicable to the case, and I am of opinion that he is right.

The statute provides, in the first place, that the jurisdiction of the sheriffs in Scotland shall extend, among other things, to actions "relating to questions of heritable right or title," but subject to this proviso—"That it shall be competent for either party, at the closing of the record or within six days thereafter, to require the cause to be remitted to the Court of Session in the case of actions (a) relating to questions of heritable right and title where the value of the subject in dispute exceeds £50 by the year or £1000 in value." Now if we had to read this clause with reference to its own terms alone and without any external aid, I may say for myself that I should have no difficulty in reading it as meaning that the actions which might be removed as relating to questions of heritable right must relate to disputed questions of right submitted to the adjudication of the Sheriff Court; and if that were so, it is, to my mind, plain enough that the clause would apply to these cases only where the point of right in the subjects was directly concerned.

But then we are not dealing with language which is employed for the first time in a novel connection. The statute extends the jurisdiction of the sheriffs, and it provides that if they desire it the parties may withdraw from this newly enlarged jurisdiction certain cases which under the old law were exempt from the jurisdiction of the sheriffs altogether, and were competent only to the Court of Session; and for that purpose it necessarily uses language which was very familiar to the former law and which has been judicially construed over and over again. There are a great number of cases in which the Court has had to define the limits of the Sheriff Court, on the one hand, and this Court, on the other, with reference to questions of heritable right. I do not think it necessary to examine any of them, and I shall simply cite the definition given by the late Lord President Inglis in *Pitman v. Burnett's Trustees* (1882, 9 R. 444, 19 S. L. R. 411), which I think is most apposite to the present purpose, because it is put in the form of an interpretation of the very words which are used in this section of the Act of Parliament. What his Lordship says (at p. 448, 413) is this—"A question of heritable right

arising in an inferior court which stops the exercise of the jurisdiction of that inferior court means a competition of heritable right—in other words, a competition of title." Now, if that was the meaning of these words under the old law, which is altered by this statute extending the jurisdiction, I apprehend it cannot be questioned that it is also the meaning of the words employed in the statute itself. The question is, therefore, whether in that sense the present action raises any competition of heritable right or title. [*His Lordship here narrated the facts, supra*.]

It appears to me that this is a case upon personal contract and nothing else—personal contract to pay a share of the moneys expended in the erection of the buildings.

The question between the parties which is raised by this record therefore relates to the contract for the payment of money upon the execution of certain work, and nothing more. The defender has stated nine pleas in defence, but certainly none of them raises any question of heritable right or title; they are pleas to contract. And it appears to me to be of no consequence at all that the contract in which the parties are equally interested is intended to enable buildings to be erected which may become the property of the parties, or that there may be some implication of an obligation to take over the subjects when the houses are built, and that under it there was a necessity or condition to acquire an interest in the real property on which the buildings were to be erected. The question of right to that real property is not put in issue, and therefore, according to the law as laid down by Lord President Inglis, this is not a question of heritable right in the sense of the statute.

I only add that all the cases founded upon by the defender are entirely in accordance with the Lord President's doctrine. The two cases on which he relied were *Earl of Moray v. Pearson* (1842, 4 D. 1411), and *Lowson's Trustees v. Crammond* (1864, 3 Macph. 53). Now, in the former case an action was brought in the Sheriff Court at the instance of a pursuer, alleging that he was the superior of certain land, concluding to have the defender, who he averred was bound to take a certain area in feu, ordained to erect houses of a certain kind. But the defender alleged that the area upon which he was so asked to build houses was not truly the area which he had agreed to take by certain missives of feu between him and the pursuer, and it was with reference to that plea that the Court said that it raised a question totally incompetent in the Sheriff Court. Lord Cunninghame says—"There can be no doubt that the Court of the Judge Ordinary is competent to entertain all cases of personal obligation, though constituted by contracts or agreements respecting heritable estates, on which ground actions are daily brought before the Sheriff for payment of feu-duties and annual rents, and fulfilment of other obligations constituted

by contracts peculiar to heritage. But even in cases of that description the Sheriff could not proceed to try or to enforce a personal obligation if any fair doubt were raised as to the completion and validity and subsistence of the contract itself, of which the personal obligation was only an accessory." Accordingly his Lordship goes on to say that "the Judge Ordinary cannot declare, and, still less, he cannot adjust, a disputed contract relative to a real estate, incidentally, to enable him to give effect to the subordinate and personal obligations in the contract." But that does not prevent his adjudicating on the personal contract itself if there is no question of real right in dispute between the parties.

Then, again, in *Lowson's Trustees v. Crammond*, which was a similar case, the ground of judgment was put very clearly by the Lord Justice-Clerk. In that case there was a petition for the removal of certain buildings which it might have been quite competent for the Sheriff to entertain, but the Lord Justice-Clerk says—"In defence, the defender states that the building is entirely on his own ground, that it does not rest on the ground of anyone else, and particularly that it is not erected on the servient tenement. The pursuer undertakes to prove that it is, or, in other words, he seeks to have it declared by the Sheriff that part of the ground on which the house is built is not the defender's property. In whatever way the Sheriff determined the matter he determined a right of property, and that, too, regarding a piece of ground the owner of which, according to the pursuer's allegations, was not a party to the action. This was not an incidental matter. The whole substance of the application—and there is nothing else in the application—is to fix whether the strip of ground is or is not the property of the defender."

Now I cannot see that the result of this action is to touch any question of the right of property whatever, and I am therefore of opinion that the motion to remit is incompetent, and that the case must go back to the Sheriff.

LORD JOHNSTON—At common law the Sheriff cannot entertain any question regarding the right to heritable property.

By the Sheriff Courts Act 1877 his jurisdiction is extended to all actions (except adjudications and reductions) "relating to a question of heritable right or title, where the value of the subject in dispute" is under £50 by the year or £1000 in value.

By the Sheriff Courts Act 1907 such actions remain within the competency of the Sheriff—the expression is repeated, "actions relating to questions of heritable right or title"—but the privilege is conferred on either party to require the cause to be remitted to the Court of Session "where the value of the subject in dispute exceeds £50 by the year or £1000 in value."

It is sought to have the present case, which was raised in the Sheriff Court at Dumbarton, remitted to this Court. And the question is, does it fall under the

category of an action "relating to" a question "of heritable right or title"? I do not think that it does, and that it must be retransmitted.

The action arises out of a transaction in heritage, to the effect only that but for the existence of certain heritable subjects it could never have arisen. But it in no sense relates to the right or title to these subjects. The title stands in the pursuer. There is no question as to its validity, or as to what falls under it or as to its being a title in trust, three parties, viz., the pursuer, the defender, and a second defender called merely for his interest, being interested in the property, the title, to which stands in the pursuer's name.

The action relates to a joint adventure in the erection of buildings upon these heritable subjects. And the real question, stripped of unnecessary statement, relates to the extent of the joint adventure, the pursuer maintaining that it extended to the building of nine tenements to cover the whole ground, and the defender maintaining that it was restricted to the building of three only on a particular part of the subjects. The pursuer sues the defender for payment of his share of the disbursements in the joint adventure, which have all been made by the pursuer. The subject in dispute is therefore not the heritage, either as regards right or title. It relates to a personal contract in which the heritage is involved as a mere incident.

Before concluding, I would draw attention to a verbal mistake which the sheriff-clerk has made in treating the defender's requisition for remit, as an appeal, as this proceeds on an erroneous conception of the statutory provision.

LORD MACKENZIE—I think that the question in the present case relates to a personal contract, not to a competition of heritable right and title, and therefore am of opinion that the process should be retransmitted.

The LORD PRESIDENT was absent.

The Court sustained the objection to the competency of the remission, remitted the cause back to the Sheriff, and found the defender entitled to modified expenses of £7, 7s.

Counsel for the Pursuer—Macmillan. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defender—Horne, K.C.—MacRobert. Agent—James Gibson, S.S.C.