

able pictures at all. They believe and aver this portion of the claim to be grossly and fraudulently over-estimated to the extent of at least £300. The pursuer also claims for a considerable number of show-cards, of the value as estimated by him, of £8, 9s. 6d., which were gratuitously supplied to him by the respective traders for exhibition in his premises, and did not belong to him. The defenders herewith produce and refer to a copy of the said claim marked with respect to the foregoing classification, showing, as far as they are able to do so, the items before specified under the foregoing heads."

The Court allowed the amendment to be made, adhered to the interlocutor of the Lord Ordinary, and reserved the question of expenses in the Inner House.

Counsel for Pursuer—Shaw. Agent—J. Macpherson, W.S.

Counsel for Defender—G. Wardlaw Burnet. Agents—J. W. & J. Mackenzie, W.S.

Tuesday, June 2.

FIRST DIVISION.

[Lord Lee, Ordinary.

KENNEDY AND OTHERS *v.* INCORPORATION OF MALTMEN OF GLASGOW AND OTHERS.

Process—Division and Sale—Competency—Trust.

The title to certain subjects in Glasgow upon which a hall known as the Trades' House was erected, was taken to two individuals as office-bearers of the Trades' House, and their successors in office, in trust for the use of the Trades' House and the fourteen corporations composing the same, their several interests being in proportion to the sums which they had contributed towards the price of the site and the cost of erecting the hall. The two persons who were feudally vested in the property, and eight of the corporations, brought an action of division and sale of the subjects, calling as defenders the other six corporations interested, averring that the pursuers were desirous that the subjects should be sold, and that the price should be divided amongst them and the defenders according to the amounts they had respectively contributed. There was no appearance for the defenders, nor did they consent to decree. The Court *dismissed* the action as incompetent, on the ground that the property was not held *pro indiviso*, but upon trust for purposes which were capable of fulfilment, and in the fulfilment of which the defenders had an interest.

In 1792 certain subjects in Glasgow were acquired by James M'Lehose and John Gardner, the then deacon-convener and collector respectively of the Trades' House, Glasgow. The title thereto was taken in favour of these persons in their official capacities as deacon-convener and collector, and their successors in office, in trust for the use and behoof of the said Trades' House of

Glasgow, and of the said incorporations composing the same, in proportion to the several sums which each of these incorporations and communities had then advanced, or should thereafter advance to the said Trades' House, towards payment of the said price, and the expense of the building of the hall then proposed to be erected on the ground.

Shortly after the purchase had been effected a hall for the use and accommodation of the various incorporations composing the Trades' House was erected on the subjects, the *cumulo* cost of the site and of erecting the hall being £13,884, 4s. 11d. This sum was contributed in various proportions by the incorporations following, viz.—the hammermen, tailors, cordiners, maltmen, weavers, bakers, skimmers, wrights, coopers, fleshers, masons, gardeners, barbers, and bonnet makers and dyers, all of Glasgow.

This was an action of division and sale of the said subjects usually known as the Trades' House, at the instance of Hugh Kennedy as deacon-convener of the trades of Glasgow, and James Thomson Tullis, as collector of the Trades' House of Glasgow, who were in their official capacities feudally vested in the subjects for behoof of the Trades' House, and of the incorporations composing the same, and eight of the fourteen corporations interested in the Trades' House against the other six corporations, who were called as defenders. The pursuers set forth in the condensation the various sums which had been contributed by the incorporations towards the payment of the price of the site, and of the cost of erecting the hall, and stated that they were desirous that the subjects should be sold, and that the price should be divided among them and the defenders according to the proportions in which they had contributed.

The pursuers pleaded—“(1) The said Trades' House and incorporations specified in the summons being joint-proprietors *pro indiviso* of the subjects and others therein described in the summons, the pursuers are entitled to insist in the present action. (2) The said subjects being incapable of division, with due regard to the just rights and interests of parties, the pursuers are entitled to a decree of sale, as also decree relative to the disposal of the price as concluded for.”

The Lord Ordinary (LEE) remitted to Mr Smellie, surveyor and valuator, for a report, and on obtaining his report (which stated, *inter alia*, that the buildings did not properly utilise the ground, which was of great value as a site for business premises, that division would not be expedient or practical, and that the subjects should rather be exposed by public roup in one lot) pronounced this interlocutor—“Appoints the pursuers to print and box to the Court the said report and the summons with this interlocutor and note, and reports the cause to the First Division of the Court.

“*Note.*—The Lord Ordinary reports this cause to the Court because it appears to him to be attended with some difficulty as regards the competency.

The action is one of division and sale, and if the title of the pursuers was a simple title to a *pro indiviso* share of the subjects, the case would be one in which, the subjects being incapable of division, the principle of the case of *Brock v.*

Hamilton (19 D. 701) would be applicable.

“But the peculiarity is that the subjects appear to consist of a tenement acquired and held by the pursuers as trustees for the use and behoof of the Trades’ House of Glasgow and other incorporations as a Trades Hall. The terms of the trust (which is constituted by the title-deeds) are recited in the condescence as follows—‘The title thereto was taken in favour of the said James M’Lehose and John Gardner, in their official capacities as deacon-convener and collector foresaid, and to their successors in office, in trust for the use and behoof of the said Trades’ House of Glasgow, and of the said incorporations composing the same, in proportion to the several sums which each of these incorporations and communities had then advanced, or should thereafter advance, to the said Trades’ House, towards payment of the said price, and the expense of the building of the hall then proposed to be erected on the ground.’ There is no allegation that the purposes of the trust have come to an end, or have become incapable of fulfilment. But it is said that the pursuers (the trustees) are now desirous ‘that the subjects should be sold, and that they and the defenders should receive payment of the shares of the price to which they are respectively entitled.’ It does not appear how or on what footing the moneys required for the purchase and construction of the premises were raised by the various incorporations, and no explanation is given of any necessity, either for selling the subjects, or for putting an end to the trust.

The Lord Ordinary is not aware of any case in which an action of sale and division has been held to be an appropriate remedy in such circumstances. The parties to the cause are not *pro indiviso* proprietors in the ordinary sense. They rather appear to be beneficiaries, entitled to the use of the subjects as a Trades’ Hall, under a trust constituted for their benefit by the action of those who raised the funds, and who took the title in the shape in which it stands.

“There are many cases in which subjects may be acquired by subscription or otherwise, and vested in trustees for purposes of a similar kind—a university hall, a chapel, or reading room, or the like, and it is new to the Lord Ordinary that any of the beneficiaries interested in such subscriptions may appeal to the Court for sale and division of the proceeds on the allegation that they are unwilling to continue *in communione* with the other beneficiaries.

“It rather appears to him that the principle of the action of division and sale is inapplicable to such a case, unless the parties can shew that they are absolutely entitled to be free of the trust, and to have the price divided for their own behoof. This does not appear from the summons and report, and the Lord Ordinary thinks the more appropriate remedy, if a sale is to be authorised, would have been an application under the Trusts (Scotland) Act 1867. There are cases in which property held in trust for a particular use may be sold by the authority of the Court, such as *Johnstone v. Magistrates of Canongate* (M. 15,112), and cases in which a sale has been held illegal (*Magistrates of Airdrie v. Smith*, 12 D. 1222). But the Lord Ordinary is aware of no case in which an action of division and sale has been sustained as competent in such

circumstances as those here described, at the instance of one of the trustees or beneficiaries. He is not satisfied that the pursuers can be regarded as *pro indiviso* proprietors of the subjects in fee-simple, and he thinks it right to explain that when the interlocutor sustaining the title was pronounced, his attention was not called to the peculiarities of the case or to the form of the title. [*His Lordship had previously in the interlocutor remitting to the valuator sustained the pursuers’ title to raise and insist in the action.*]

“In the absence of any contradictor representing the interests of all parties, who as members of the corporation may be affected by a sale and division of the proceeds as proposed, the Lord Ordinary thinks it right to report the matter to the Court in order that his difficulties, if unsubstantial, may be disposed of in a manner which will leave the title clear of all doubt.”

The pursuers argued in the Inner House that the action was competent.

At advising—

LORD PRESIDENT—The property which is sought to be divided in this action was acquired in 1792, the title being taken in name of James M’Lehose and John Gardner, the then deacon-convener and collector of the Trades’ House of Glasgow, and the title was taken to these persons in their official capacities, and to their successors in office, in trust for the use and behoof of the Trades’ House of Glasgow. The disposition narrates the bargain that was made between the disponent and disponees, and then the property purchased is disposed “to and in favour of the said James M’Lehose and John Gardner, deacon-convener and collector of the said Trades’ House, and to their successors in office, in trust for the use and behoof of the said Trades’ House of Glasgow, and of the incorporations composing the same,”—then follow the various incorporations—masons, gardeners, barbers, bonnet-makers and dyers, &c., “in proportion to the several sums which each of these corporations and communities have advanced, or shall in future advance, to the said Trades’ House towards payment of the above price, and the expense of the building of the hall proposed to be erected upon the plot of ground disposed.”

At present two individuals of the names of Kennedy and Tullis are the representatives in title of the two gentlemen who acquired the property in 1792, upon which a hall has been erected for the use and accommodation of these corporations, and they hold the property for precisely the same purpose as the original disponees. The cost of building the hall was provided in very unequal proportions. The *cumulo* cost of erecting the hall, and paying the price of the subjects amounted to £13,884, 4s. 11d., and that was provided by fourteen corporations. Therefore the trust upon which this property, which is feudally vested in the pursuers, is held, is for the maintenance and administration of the hall; and all the corporations and their members are interested in the maintenance and use of the hall.

In that state of the title, and having regard to the object with which the subjects were acquired, I think it is too clear for argument that the pursuers have no title to insist in this action. An action of division and sale has special application

to the case of property held *pro indiviso*, but the parties before us are not at all in that position. The feudal fee is vested in two individuals, but all these various corporations are beneficially interested in the trust, and are all more or less interested in its maintenance. There is no allegation here that the trust has failed, but just that there is a desire on the part of some of the corporations, or the individual members, to have the subjects sold and the proceeds divided. On the whole matter I quite agree with the Lord Ordinary. I do not think it necessary to say what might be done in an action brought in a different form, and with different consents. I agree with the Lord Ordinary that the action ought to be dismissed.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

The Court dismissed the action.

Counsel for Pursuers—Graham Murray.
Agents—J. & A. Hastie, S.S.C.

Wednesday, June 3.

FIRST DIVISION.

[Sheriff of Lanarkshire.

CRAWFORD & COMPANY v. THE SCOTTISH SAVINGS INVESTMENT AND BUILDING SOCIETY.

Process—Competency—Sheriff—Poinding of the Ground—Competent and Omitted.

In an action of poinding of the ground, brought in the Sheriff Court by a person holding a bond and disposition in security over certain subjects, decree was pronounced on 15th August 1883 against the tenant of the subjects to the extent of one year's rent. In December 1884 the defenders in that action brought an action in the Sheriff Court to have the creditor interdicted from selling the articles poinded. They founded upon receipts for the said year's rent, dated, two on 11th November 1882, one on 15th May 1883, and one on 12th June 1883. These receipts were not founded on or produced in the action of poinding of the ground. Action *dismissed* as incompetent on the grounds—(1) that it was an attempt to review the decree in one action in a Sheriff Court by means of another; and (2) that the payment of rent was a competent defence to the original action which had been omitted.

Crawford & Company were the proprietors of certain heritable subjects in Glasgow over which they had granted two bonds and dispositions in security.

In May 1882, Wallace, the first bondholder, raised an action of poinding of the ground, and subsequently entered into possession under a decree of maills and duties.

Crawford & Company thereafter became tenants of the subjects under an arrangement with Wallace.

In August 1882 the Scottish Savings Investment and Building Society, the postponed bondholders, raised a poinding of the ground in the

Sheriff Court at Glasgow, in which Crawford & Company, as tenants of the subjects, appeared as defenders.

After a considerable amount of litigation decree was pronounced on 15th August 1883, but was limited to £40, being the amount of rent due by Crawford & Company for the year from Whitsunday 1882 to Whitsunday 1883.

In August 1884 this decree was extracted, and on 25th December 1884 the Savings Investment Society obtained a warrant of sale.

This action was thereupon raised in the Sheriff Court at Glasgow by Crawford & Company to have the Savings Investment Society interdicted from carrying away, selling, disposing of, or interfering with the articles poinded. The pursuers averred that before the decree of poinding was pronounced on 15th August 1883 they had paid to Wallace, the prior bondholder, the rent due by them for the year from Whitsunday 1882 to Whitsunday 1883. They produced receipts for the rent, dated two on 11th November 1882, one on 15th May 1883, and one on 12th June 1883. These receipts had not been founded on or produced in the original action.

The defenders pleaded—(1) That the action was incompetent in the Sheriff Court, being an action to review a Sheriff Court decree, and (3) Competent and omitted.

The Sheriff-Substitute (ERSKINE MURRAY) on 7th February 1885 sustained the defenders' first plea-in-law and dismissed the action.

Note.—This action is one of interdict, and is to interdict the sale, under a poinding of the ground obtained by defenders in an action against the pursuers and others, of a number of specified articles. In that case the pursuer appeared, stated, and fought several defences, and an expensive proof ensued, and the proceedings lasted for a considerable time. Finally, on 16th June 1884 decree was given against the present pursuers, but in so far as concerned the liability of the articles poinded, to the extent of £40 only, being the rent due by pursuers for the year from Whitsunday 1882 to Whitsunday 1883. No plea of payment had ever been taken by them. But they now plead that they paid the rent to a prior bondholder, who had also poinded the ground, and produce receipts, dated, two on 11th November 1882, one on 15th May 1883, one on 12th June 1883, all long before the date of decree in question. If the Sheriff-Substitute had not sustained the first plea, he would have been inclined to sustain the defence of competent and omitted, as this point ought certainly to have been raised if they were going to defend the other case at all. But it seems clear that this action is simply equivalent to a suspension, and as such is incompetent in the Sheriff Court." . . .

On appeal the Sheriff (CLARK) affirmed the foregoing interlocutor.

Note.—I have had very much difficulty in deciding this case, but have ultimately come to the conclusion that the Sheriff-Substitute is right. It would not be possible to entertain the action of interdict while the decree in the poinding of the ground stands unreduced, and it is not possible to reduce in this Court a decree which, in so far as this Court is concerned, has become final, without reviewing the same, which is *ultra vires* of the Sheriff. It is also observable that the pursuers, who made themselves parties