LORD KINNEAR and LORD PEARSON concurred.

The Court answered the first alternative of the first question in the affirmative and the second alternative in the negative, the second question in the negative, the second alternative of question three in the affirmative, question four in the negative, question five in the affirmative, and question six in the affirmative, "except as to the subjects described in the fifth question which at common law are exempt from taxation."

Counsel for the First Parties—The Dean of Faculty (Campbell K.C.)—W. J. Robertson. Agents—R. Addison Smith & Company, W.S.

Counsel for the Second Parties—Cooper, K.C.—Spens. Agent — Thomas Hunter, W.S., Town Clerk.

Tuesday, July 2.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

BRIMS & MACKAY AND OTHERS *v.* M'NEILL & SIME AND OTHERS.

Process—Summons—Competency—Several Pursuers—Community of Interest—Title to Sue—Dissolved Firm and its Successor Suing Together for One Sum Representing Debts Due to Old and New Firms.

The firm of B. & M. was dissolved in 1901 on the death of B., and a new firm of B. & M., constituted, of which M. a member of the original firm, was a partner. In 1907 an action was raised at the instance of (1) the new firm of B. & M. and its individual partners, (2) B.'s representatives, and (3) the dissolved firm of B. & M., against the firm of M'N. & S., and against P., one of the partners, as an individual, the conclusion being, *inter alia*, for payment of the sum of £200 "conjunctly and severally, or otherwise severally."

The pursuers averred that about 1894 the firm of B. & M. entered into an arrangement with P., then in business by himself, under which they from time to time sent him business on condition of his sharing agency fees with them; that subsequently, in 1898, P. joined the firm of M'N. & S., and that business was thereafter sent to him upon the same footing as before. It was not averred that any agreement had been made with M'N. & S.; nor was it averred that the new firm of B. & M. acquired, by assignation or otherwise, debts due to the old firm of B. & M.; but it was averred that an arrangement had been made for the new firm to collect accounts due to the old. The sum sued for was in respect of agency fees for business done both prior and subsequent to 1898.

The Lord Ordinary (Guthrie) dismissed the action so far as directed against the defenders M'N. & S., on the grounds (*a*) that the action was irrelevant, there being no averment of any agreement with M'N. & S., (*b*) that the action was incompetent, it being sought to make M'N. & S. liable for what in part represented debt due by P. before he joined the firm; but he held that as directed against P. the pursuers had a title to sue, and the action was relevant and he allowed a proof.

Held, on a reclaiming note at P.'s instance (the pursuers acquiescing in the Lord Ordinary's judgment as regarded M'N. & S.), that the action though relevant was incompetent, there being, so far as the right and title to debts due to them respectively was concerned, no connection between the old firm of B. & M. and the new, and it being settled law (following *Killin* v. *Weir*, February 22, 1905, 7 F. 526, 42 S.L.R. 393) that two or more unconnected persons cannot sue in one joint action unless they have been aggrieved by the same act of the defender or have a joint interest in the matter libelled.

Opinions as to the instance in an action to recover debts due to a firm with a personal name when dissolved, and existing only for the purposes of winding up.

(1) Brims & Mackay, Solicitors, Thurso, and Alexander Mackay, William Manson Brims, and James Young, all Solicitors, Thurso, the individuals of the firm, (2) the trustees of the deceased James Brims, Solicitor, Thurso, and (3) the now dissolved firm of Brims & Mackay, Solicitors, Thurso, brought an action against M'Neill & Sime, S.S.C., Edinburgh, and James Adam Pattullo and Henry Vetch, the individual partners of the firm, and also against James Adam Pattullo as an individual, the conclusion of which was that the defenders should be ordained "to exhibit and produce before our said Lords a full and particular account of the whole law agents' fees recovered by them in the matters condescended on, whereby the true amount or proportion thereof due by the defenders to the pursuers may appear and be ascertained; and the defenders ought and should be decerned and ordained, conjunctly and severally, or otherwise severally, by decree foresaid, to make payment to the first-mentioned pursuers of the sum of £200 sterling, or such other sum as shall appear and be ascertained by our said Lords to be due by the defenders to the pursuers as the pursuers' share of said fees."

The pursuers averred, *inter alia*—"(Cond. 1) The pursuers Brims & Mackay are solicitors and conveyancers, carrying on business in Thurso, and the other pursuers are the individual partners of said firm, and the representatives of a deceased partner of the now dissolved firm of Brims & Mackay, Solicitors, Thurso, which, however, subsists for the purpose of winding up. The deceased James Brims and the pursuer Alexander Mackay were the partners of the said dissolved firm of Brims & Mackay.

It was dissolved as at 1st August 1901. By arrangement between the parties it is provided that all accounts due to the late firm of Brims & Mackay are to be collected by and paid to the present firm of Brims & Mackay. The defenders are a firm of Solicitors before the Supreme Courts of Scotland, carrying on business in Edinburgh. Before joining the said firm the defender James Adam Pattullo carried on business in Edinburgh as a solicitor. . . . (Cond. 2) Before he started business on his own account the defender Pattullo was a clerk in the employment of Messrs John C. Brodie & Sons, W.S., Edinburgh, with whom Brims & Mackay had considerable business transactions. In that capacity said defender came to know the members of the firm of Brims & Mackay, who transacted business with him on behalf of said firm. In or about the year 1893 he informed Brims & Mackay, and particularly the pursuer Alexander Mackay, that he was about to start business, and requested that said pursuer and his firm of Brims & Mackay should send him a share of their Edinburgh work. . . . [*the pursuers here gave an account of an alleged arrangement as to agency fees being made with Pattullo*]. . . . The arrangement then made and subsequently acted upon was that of the sums received or recovered by the defender Pattullo in respect of the accounts incurred to him in connection with the various matters of business which Brims & Mackay might from time to time send him, the latter should receive from him the usual agency fees at the rate of one-third of the law-agents' fees paid to him. . . . After the defender Pattullo joined the firm of M'Neill & Sime, Brims & Mackay continued to send him work, which was done by his firm under their firm name. Said work was always sent to defender Pattullo by letter addressed to himself, and it was sent on the same footing and under the same arrangement as Brims & Mackay had had with Mr Pattullo before that time. Since then the defender Pattullo and his said firm have acted upon the agreement before mentioned, and both have from time to time, as they recovered accounts in connection with matters sent to him by the pursuers, remitted to the pursuers their share of fees as aforesaid. This has been the invariable practice between the parties, and it was solely in reliance upon the defenders carrying out honourably the agreement come to that Brims & Mackay from time to time sent them business to transact for them in Edinburgh. It is the custom in the profession for agents in the country to receive such agency fees from the agents whom they employ in Edinburgh, and the pursuers relied upon this well-recognised custom. . . ." In condescendences 3, 4, and 5 they gave instances where the defenders had given the agency fees as claimed, and the details of the various transactions, ranging from 1894 to 1905, in respect of which they sued.

The pursuers pleaded, *inter alia*—"(2) The defenders having obtained the business transacted by them through Brims & Mackay on condition that they would pay to the latter agency fees at the rate stipulated for, the pursuers are entitled to decree as concluded for. (3) The defenders are barred by their actings from maintaining that no contract for agency fees was made."

The defenders M'Neill & Sime pleaded, *inter alia*—"(1) No title to sue. (2) The action as laid is incompetent (3) The pursuers' averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (4) The arrangement or agreement condescended on with reference to the matter of agency fees is only provable by the writ or oath of these defenders. . . . (7) The pursuers' claims, if any, against the defenders in respect of items . . . condescended on being prescribed, the defenders are entitled to decree of absolvitor."

The defender Pattullo had, *inter alia*, similar pleas.

On 26th March 1907 the Lord Ordinary (Guthrie) sustained the second and third pleas-in-law for the defenders M'Neill and Sime, dismissed the action so far as directed against them, and decerned . . . Further, repelled the first, third, and fourth pleas-in-law for the defender James Adam Pattullo, and *quoad* the said defender and the pursuers, allowed them a proof *habili modo* of their respective averments.

Opinion—"The defenders M'Neill & Sime maintained their first, second, third and seventh pleas, namely, no title to sue, incompetency, irrelevancy, and prescription. The defender Mr Pattullo maintained similar pleas.

"So far as the defenders M'Neill & Sime are concerned, I sustain their pleas to competency and relevancy, and dismiss the action against them.

"The objection of these defenders to relevancy was founded on the absence of any relevant averment of an agreement between them and the pursuers to allow the pursuers a share of agency fees. The agreement founded on by the pursuers is alleged to have been made in 1893, when Mr Pattullo began business on his own account, and, as in a question with him, it is said to have continued after he became a partner of the firm of M'Neill & Sime in 1898. But I find no averment of any agreement between the pursuers and M'Neill & Sime, nor any sufficient averment of actings on the part of that firm which necessarily implied such an agreement apart from Mr Pattullo's alleged obligation.

"On the question of competency both sets of defenders object to the proposal of the pursuers to recover one sum of £200 from them 'conjunctly and severally, or otherwise severally.' They point out that while Mr Pattullo's alleged obligation applies to the whole period covered by the condescendence, namely, from 1894 to 1906, M'Neill & Sime had admittedly no relations with the pursuers till 1898, when Mr Pattullo joined the firm. The result is, they say, that the summons contains a

conclusion under which it would be possible to find M'Neill & Sime liable for the proportion of the £200 concluded for effeiring to the period between 1894 and 1898, for which, according to the pursuer's averments, Mr Pattullo is alone responsible. I think this objection is well founded, and that the case is indistinguishable from that of *Sinclair* v. *Caithness Flagstone Company*, 1898, 25 R. 703, per Lord Kinnear, page 707.

"Turning now to the case against Mr Pattullo, I take first his seventh plea, relating to prescription. That plea cannot be disposed of at this stage. The pursuers aver that the accounts in question were incurred on written instructions, and further, that they formed one continuous series. These questions of fact must first be determined before the plea of prescription can be dealt with.

"Mr Pattullo's plea on title to sue does not cover the whole accounts sued for. It relates to the period from 1894 to 1st August 1901, during which the firm of Brims & Mackay consisted of the late Mr James Brims and the pursuer Mr Alexander Mackay. Mr James Brims died on 1st August 1901, and thereafter the firm of Brims & Mackay, of which he had been a partner, subsisted only for the purpose of winding up by the surviving partner Mr Alexander Mackay. For the accounts alleged to be due in connection with work done during that period the only pursuers are the late Mr James Brims' trustees and 'the now dissolved firm of Brims & Mackay.' Mr Alexander Mackay is also a pursuer, but only as a partner of the existing firm of Brims & Mackay. It is said that in order to constitute a good instance for recovery of the accounts during the existence of the dissolved firm, Mr Alexander Mackay ought to have been a pursuer as the surviving partner of that firm.

"This objection is technical, and in the absence of express authority in its support I repel it. It is admitted that in the case of an existing firm like Brims & Mackay, with a personal firm name, it is not necessary to conjoin the names of any of the partners in order to make a good instance. If this be so, I do not see sufficient reason for holding that a debt due to a firm, which, although dissolved so as to be incapable of carrying on business still subsists for the purpose of winding up, cannot be recovered without conjoining in the instance the surviving partner or partners, or at least the surviving partner who is in charge of winding up—2 Bell's Coms. 527, 533. The cases quoted by the defenders in support of their view were cases where the firm name was descriptive and not personal, and where, therefore, whether dissolved or not, the names of the partners were necessary.

"I shall therefore repel Mr Pattullo's first plea of no title to sue, and also his third plea to relevancy. I think the pursuers have sufficiently averred a case of express contract between him and them of the nature alleged by them, and have also made a sufficient case, so far as averment goes, as a foundation for their third plea."

The defender Pattullo reclaimed, and argued—The action was incompetent on the ground that the two pursuers, the old firm and the new, were suing in one action for independent debts in which they had no common interest—*Killin* v. *Weir*, February 22, 1905, 7 F. 526, 42 S.L.R. 393; *Gibson* v. *Macqueen*, December 5, 1866, 5 Macph. 113, 3 S.L.R. 83. There was, besides, no separation of the amounts claimed by each. It was also incompetent on the further ground (recognised by the Lord Ordinary in the case of M'Neill & Sime, but equally applicable to Pattullo) that two defenders, viz., Pattullo and M'Neill & Sime were conjoined together, who had no common ground of liability, seeing that upon the pursuers' own showing the business was sent to Pattullo in the earlier, and to M'Neill & Sime in the later transactions—*Smyth* v. *Muir*, November 13, 1891, 19 R 81, 29 S.L.R. 94.

Argued for the respondents (who did not reclaim against the decision of the Lord Ordinary dismissing the action as against M'Neill & Sime)—The business had all along been sent to Pattullo, and the fact that he had joined the firm of M'Neill & Sime made no difference so far as his liability was concerned. Further, the mere fact that a pursuer brings an action against two defenders conjunctly and severally did not preclude him from proceeding against one of them—*Robinson* v. *Reid's Trustees*, May 31, 1900, 2 F. 928, 37 S.L.R. 718. This disposed of the reclaimer's last argument. As to his first argument (even assuming that the two firms of Brims & Mackay were unconnected persons, which was very far-fetched) there was no absolute rule against different pursuers conjoining in one action; it was a matter of convenience depending upon the circumstances of each particular case — *Cowan & Sons, &c.* v. *Duke of Buccleuch*, November 30, 1876, 4 R. (H.L.) 14, 14 S.L.R. 189. Here the most convenient course had been adopted of bringing everybody interested in the matter, either as pursuers or defenders, into the same action. The fact of there having been changes in the pursuers' firm was quite immaterial. In *Nicoll* v. *Reid*, November 15, 1877, 5 R. 137, 15 S.L.R. 89, an action at the instance of a sole surviving partner of a dissolved firm had been sustained as in substance at the firm's instance. A dissolved firm with a personal name could sue in its own name without the addition of the name of a surviving partner—Lindley on Partnership, p. 837.

LORD JUSTICE-CLERK—In this case a firm of Brims & Mackay are said to have sent business to Mr Pattullo, the defender, on special terms, and it is for a fulfilment of these terms that the action is brought.

In 1898 Pattullo joined in partnership with one Vetch, and they carried on business under the firm of M'Neill & Sime. The pursuers now ask an accounting for all business sent by them to Pattullo both before and after the institution of the copartnery.

They lay their action (1) against Pattullo,

(2) against M'Neill & Sime, and (3) against Pattullo and Vetch as the partners of that firm. They ask decree conjunctly and severally or otherwise severally.

The question now is, whether the Lord Ordinary was wrong in holding the pursuers to have a title to sue Pattullo. I agree with him in thinking that they have such a title. That he was employed by them is distinctly averred, and the terms of the employment are distinctly specified.

But that is not the only question with which the Lord Ordinary deals. Another important question is whether the action is competent, seeing that the firm of Brims & Mackay, which now exists and which sues the action, was not the firm with which the bargain with Pattullo took place. The original firm was broken up by the death of Mr Brims in 1901, and although there is now a firm of Brims & Mackay it is not the same firm as that which existed prior to 1901. The debts of Pattullo were due to the firm which came to an end in that year, and there is no connection of title or of right to the second firm for debts due to the first. It cannot be successfully maintained that the new firm has any joint interest to entitle them to sue for the debts incurred before they came into existence.

Moreover, there is no distinction drawn in the summons between debts said to have been incurred by Pattullo while the old firm subsisted, and debts which may have been incurred after it had ceased to exist. The pursuers have failed by any specification by separate conclusions to distinguish between what is alleged to be due to the old firm and what to the new.

It appears to me in these circumstances that Mr Pattullo's plea must be sustained, with the result that the Lord Ordinary's interlocutor should be recalled and the action dismissed.

LORD LOW—The circumstances in which this action has been brought may be stated very shortly.

It appears that in 1893 the defender Pattullo commenced business on his own account as a law agent in Edinburgh, and the pursuers aver that the then firm of Brims & Mackay, law agents in Thurso, from time to time sent business to him upon the condition, to which he agreed, that they should receive one-third of the fees which he earned. In 1898 Pattullo went into partnership with the defender Henry Vetch, and the two of them carried on business as law agents under the name of M'Neill & Sime. The pursuers aver that thereafter they continued to send business to Pattullo on the same footing as before. In these circumstances they call for an account of the fees recovered upon all the business sent by them to Pattullo, both before and after he became a member of the firm of M'Neill & Sime.

The action is brought not only against Pattullo as an individual but against the firm of M'Neill & Sime, and Pattullo and Vetch as the partners thereof, and decree for the full sum of £200 claimed by the pursuers is asked against the defenders "conjunctly and severally or otherwise severally."

The Lord Ordinary has dismissed the action in so far as it is directed against M'Neill & Sime, on the grounds (1) that the pursuers have no title to sue, because they have made no relevant averment of an agreement to share fees with M'Neill & Sime; and (2) that the action as laid is incompetent in respect that it is sought to make M'Neill & Sime liable for that part of the £200 which represents the alleged debt due by Pattullo alone before he joined that firm. So far the interlocutor has not been challenged. The Lord Ordinary has, however, further held that the pursuers have a title to sue Pattullo, and the first question is whether he was right in doing so.

That is a question which is not free from difficulty, but I agree with the views expressed by the Lord Ordinary, and if it had been the only question which we had to determine I should have been prepared to adhere.

There is, however, another question which was very fully argued before us, but with which the Lord Ordinary has not dealt. That question is whether the action as laid against Pattullo is competent. Pattullo's second plea-in-law is that the action as laid is incompetent. The Lord Ordinary, however, has not dealt in any way with that plea, although he has repelled the first plea (of no title to sue), the third plea (that the pursuers' averments are irrelevant), and the fourth plea (that the agreement averred can only be proved by writ or oath). Probably the question was not argued to the Lord Ordinary, at all events so fully as it was in this Court, and his Lordship may have thought that he would be better able to deal with the competency of the action after the facts had been ascertained.

The conclusion to which I have come, after careful consideration, is that the second plea for Pattullo should be sustained.

It is well settled that two or more unconnected persons cannot sue in one joint action unless they have been aggrieved by the same act of the defender, or have a joint interest in the matter libelled—*Killin* v. *Weir*, 7 F. 526.

Now it was argued that the two firms of Brims & Mackay—that is to say, the firm which was dissolved in 1901 and the existing firm—cannot be regarded as unconnected persons, because the same business has been carried on by them in succession without any break in its continuity. That is quite true, but as regards debts due to the old firm and the new firm respectively there is no connection between them. It is not said that the new firm acquired by assignation or otherwise debts due to the old firm. All that is said is that an arrangement has been made for the new firm to collect accounts due to the old firm, but that only means that for the purpose of collecting accounts the new firm is authorised to act as the agents of the old firm. The fact remains that so far

as the right and title to debts due to them respectively are concerned, there is no connection between the two firms.

Again, I do not think that even if the two firms could be regarded as being only technically and not in any practical sense unconnected persons, they have a joint interest in the matter libelled. No doubt they both claim debts incurred in respect that both firms in succession employed Pattullo to do business for them, and in some cases employment which was commenced by the old firm was continued by the new firm. But in whatever amount Pattullo may be indebted to the two firms, it must be divisible into two portions, the one due to the old firm alone and the other due to the new firm alone.

Again, even if it could be said that both firms founded on the same act of the defender, namely, his refusal to carry out the agreement alleged to have been made with the old firm and continued with the new firm when it came into existence, the action as laid would still be incompetent, because it would have been necessary to have separate conclusions, the one specifying the sum alleged to be due to the old firm, and the other the sum alleged to be due to the new firm—*Harkes* v. *Mowat*, 24 D. 701.

There are other grave objections to the form of the action, which, however, it is unnecessary to consider, because if the view which I take be sound it is sufficient for the disposal of the case.

I am therefore of opinion that the second plea-in-law for Pattullo should be sustained and the action dismissed.

Lord Ardwall—I agree with the opinion just delivered by my brother Lord Low, but I would like to say in regard to what his Lordship seems to have had in view in the last sentence or two of his opinion, that I desire to reserve my judgment on the question of title to sue as viewed from the standpoint of form. I am of opinion that if the pursuers Brims & Mackay sue as agents for or in any other capacity representing the old firm of the same name—and they do apparently sue as such agents—that capacity or character should have been set forth in the instance of the summons.

It may be quite true, as stated in the record, that an arrangement was made with the old firm that "all accounts due to the late firm of Brims & Mackay are to be collected by and paid to the present firm of Brims & Mackay;" and we all know that it is a very common arrangement that all assets of a firm should be handed over to and collected by a succeeding firm, but if that is so in this case it should have appeared in some way in the instance of the summons, and the mandate, assignation, agreement, or other document conferring on them a title to sue for sums due to the old firm and to recover payment thereof ought also to have been mentioned in the instance of the summons. With this reservation I agree entirely with what has been said by Lord Low, and think that the action should be dismissed.

Lord Stormonth Darling was absent.

The Court pronounced this interlocutor—

"Recal the said interlocutor reclaimed against, except in so far as it dismisses the action against the defenders M'Neill & Sime: . . . Sustain the second plea-in-law for the defender Pattullo: Dismiss the action, and decern."

Counsel for the Reclaimer (Defender)—Morison, K.C.—W. L. Mackenzie. Agents—M'Neill & Sime, S.S.C.

Counsel for the Respondents (Pursuers)—Hunter, K.C. — D. Anderson. Agents — Purves & Simpson, W.S.

Tuesday, July 2.

SECOND DIVISION.

[Sheriff Court at Ayr.

ARTHUR AND OTHERS *v.* AIRD AND OTHERS.

Process—Interdict—Competency—Plurality of Pursuers—Community of Interest—Plurality of Estates—Trespass—Fishing.

The proprietors of the estates of A and B, on the river Ayr, brought a joint action of interdict against certain persons, praying the Court to interdict them "from unlawfully entering and trespassing upon the lands and estate of A, . . . or upon any part thereof, or from unlawfully entering and trespassing upon the lands and estate of B, . . . and, in particular, from fishing for, or trying to catch or kill in any way, yellow trout or greyling in the portion of the river Ayr so far as it flows *ex adverso* of the said estates of A and B."

Held (1) that the action was incompetent in so far as it concluded for an interdict against trespassing on the estates of A and B, neither pursuer having any title to or interest in the estate of the other, (2) that in so far as it concluded for an interdict against fishing, it was competent only as regarded a portion of the river which flowed between the two estates, because there, and there only, the two pursuers had a common interest in the stream, but was incompetent, for lack of that common interest, as regarded other portions, viz., a portion flowing wholly within the estate of B, and a portion flowing between the estate of B and the estate of C, the proprietor of which was not a pursuer in the action.

Property — Fishing — Trout — Rights of Members of Public.

Observed (*per* Lord Justice-Clerk)—"1. No one has any right to trespass on the lands of another for the purpose of fishing. 2. No one, even if he is law-