Saturday, November 4.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

MORRISON *v.* KIRK AND OTHERS.

Property — Pro indiviso Proprietors — Division and Sale—Right to Obtain Division where Arrangement for Bond for Five Years—Bar—Prejudice to Interests of Pro indiviso Proprietors.

The three *pro indiviso* proprietors of a heritable property entered into an arrangement under which a bond was obtained over the whole property on condition that so long as the interest and an annual instalment of £500 in reduction of the principal were punctually paid, the bond should neither be called up nor paid up for five years. In an action of division and sale of the property brought by one of the proprietors before the expiry of the five years, *held* (1) that the pursuer was not barred by the arrangement, and (2) that though the bondholders refused to allocate in the event of division, no such prejudice to the interests of the defenders would result from division as to entitle them to insist on sale.

Thom v. *Macbeth*, November 26, 1875, 3 R. 161, 13 S.L.R. 94, *distinguished.*

Mrs Margaret Hannah Kirk or Morrison, with the consent and concurrence of her husband Patrick Sandeman Beveridge Morrison, raised an action against Robert John Kirk and George Mackintosh Kirk, concluding for division and sale of certain heritable properties in Leith of which the pursuer and the defenders were *pro indiviso* proprietors.

The defenders averred that in the beginning of the year 1909 there were bonds over the property amounting to about £21,000, due to several creditors who desired repayment; that accordingly under arrangement between the pursuer and the defenders the sum of £22,000 was borrowed on the security of all the properties from the Edinburgh and Leith Gas Commissioners, the debtors in the personal obligation in the bond being the pursuer and the defenders.

The defenders further averred—"(Stat. 2) It was made a condition of this loan that the loan was not to be called up or repaid prior to Whitsunday 1914, and this condition was confirmed in writing by a back-letter dated 15th May 1909, granted by the clerk to the said Commissioners. It was a further condition of the loan, confirmed in the same way, that the sum in the bond should be reduced by the sum of £500 annually. The pursuer was a party to and cognisant of the imposition of the said conditions, and they are binding on her."

The defenders pleaded, *inter alia*—"(1) The pursuer is barred by personal exception, in respect of her actings set forth in the defences, from insisting in the present action *in hoc statu*. (2) In view of the bond over the subjects, and the agreement with regard thereto condescended on, division or sale of the subjects is presently impracticable. The action is premature and ought to be dismissed."

On 17th March 1910 the Lord Ordinary (GUTHRIE) remitted to Mr William Ormiston, land valuator, Edinburgh, "to consider the summons and whole procedure and also to examine the subjects libelled, and to report whether they are incapable of division among the *pro indiviso* proprietors thereof, and whether it is proper and necessary that they should be sold, with due regard to the interests of the parties."

Mr Ormiston reported, *inter alia*, as follows—"IV. That the subjects libelled are capable of division among the *pro indiviso* proprietors thereof. V. That they can be divided among three proprietors in three nearly equal divisions, either by choice or by ballot, the one receiving the properties with the slightly larger values paying over the difference in money to those receiving the lesser valued lot. VI. That to attempt to sell the properties now would be greatly to the disadvantage of the estate."

The bondholders, on being approached by the pursuer, intimated that they would not consent to allocate their bond in proportion to the division suggested by the reporter.

On 8th July 1910 the Lord Ordinary pronounced an interlocutor dismissing the action.

Opinion.—"In this case the pursuer proposes that certain properties in Leith, held *pro indiviso* by her and the defenders, should be divided. A remit was made to Mr Ormiston, ordained surveyor, to consider and report whether the properties are incapable of division among the *pro indiviso* proprietors thereof, and whether it is proper and necessary that they should be sold with due regard to the interests of the parties. Mr Ormiston reports in favour of division and against sale. Had I nothing to consider but his report I should find that the properties can be divided, and give effect to the division which he proposes. All parties agree in the fairness of the division proposed by him, and they also agree that to attempt to sell the properties at present would be to the serious disadvantage of the estate. Nobody proposes that I should order a sale; the question is whether I should order a division in view of the bond for £22,000 in favour of the Edinburgh and Leith Gas Commissioners which was borrowed on the security of the properties at Whitsunday 1909. The Commissioners not unnaturally have declined to allow an allocation, and insist on the obligations at present existing against the pursuer and defenders remaining down to the expiry of the loan at Whitsunday 1914. The pursuer says that notwithstanding she is entitled to have a division of the properties. The defenders reply that division in these circumstances would lead to an inequitable interference with their rights, and therefore should be refused.

"In the leading case of *Brock* v. *Hamilton* (19 D. 704) Lord Rutherford observed—'He

does not, however, think the pursuer bound to show equity for division, or where division is impossible for sale. He considers the pursuer's right in that respect to be clear. But circumstances may easily exist in which the defender may show in equity a good defence against the demand for division and sale.' His Lordship does not give any indication of what kind of circumstances would raise this equitable defence. But in the case of *Thom* v. *Macbeth* (3 R. 164), where it was found that division, although physically possible, would be inequitable—the estate was a feuing estate, and its full value could only be realised if it were feued as a whole—the three Judges referred to the kind of case in which this equitable consideration would arise. Lord Justice-Clerk Moncreiff said—'The deduction which I draw from the judgment of Lord Rutherford in the case of *Brock* is, that when division is not reasonably practicable without sacrificing to an appreciable extent the interests of some or of all the parties, the only resort is a sale and division of the price.' Lord Ormidale referred to the case of *Brock* and the other cases of *Anderson* and *Craig*, and said—'The expression "impossible" or "impracticable," as used in these cases, clearly means impossible or impracticable, having a due regard to the just rights of all the coproprietors.' And lastly, Lord Clifford said on page 165—'Considerations of expediency, of expense, and of deterioration cannot be left out of view, and in most cases it is just upon these considerations that the question depends whether a subject shall be specifically divided, or whether it shall be sold and the price distributed.'

"In this case Mr Wilson maintains that, looking to the interests of his clients, the defenders, the division proposed is not reasonably practicable, because it would prejudicially affect their legal rights. He pointed out that at the present moment, although each of them is liable for the whole debt, nothing can be done without joint consent; each of them has full control of the whole properties subject to the debt. If the proposal is carried out, and the property is divided, and the debt is left unallocated, then each of them will have full control over his own portion, but no control over the other two-thirds. In the parts of the properties not under their control dilapidation might take place; the subjects might be applied to speculative and unremunerative purposes, and even such a matter as keeping up the fire insurance might from inattention not be looked after. In short, the defenders say that they would lose all control of the other parts of the property, a control which is in the market recognised as representing a valuable asset.

"It seems to me that, following the views which were given effect to in the case of *Thom* v. *Macbeth*, I am bound to hold that the division here, although physically practicable is not reasonably practicable, with due regard to the interests of the parties, and in particular the interests of the defenders. I must therefore dismiss the summons."

The pursuer reclaimed, and argued—A *pro indiviso* proprietor was always entitled to have the property divided if that was practicable, and if not to have it sold—*Anderson* v. *Anderson*, March 11, 1857, 19 D. 700, at p. 704; *Brock* v. *Hamilton*, January 27, 1852, 19 D. 701. It could not be said that division was impracticable here. Neither the bond itself nor the arrangement under which that bond was granted was any obstacle to division. If after division the bondholders were to enforce their rights against any one of the three proprietors, he could get an assignation from the bondholder—*Nicol's Trustee* v. *Hill*, February 8, 1889, 16 R. 416, 26 S.L.R. 327. The case of *Thom* v. *Macbeth*, November 26, 1875, 3 R. 161, 13 S.L.R. 94, was distinguishable, for there division would have affected the market value of the property.

Argued for the defenders (respondents)—Though the existence of a bond over a *pro indiviso* property did not necessarily exclude division and sale, the pursuers' demand was excluded here, because the arrangement under which the bond was obtained impliedly bound all the proprietors to remain in communion for the five years. At all events division would so prejudice the defenders' interests that the Court would not order it. If the property were divided, then each part would remain burdened with the whole debt, since the bondholders refused to allocate, and would thus become unmarketable. That entitled the defenders to resist division—*Thom* v. *Macbeth*, *cit.*

At advising—

LORD SALVESEN—The pursuers and defenders in this case are *pro indiviso* proprietors of certain properties in Leith, and the pursuer has brought this action for division of the properties, or if it should turn out that division is not practicable, to have the properties sold and the price divided. The Lord Ordinary remitted to Mr Ormiston to examine the subjects libelled, and to report whether "they are incapable of division among the *pro indiviso* proprietors thereof, and whether it is proper and necessary that they should be sold, with due regard to the interests of the parties." Mr Ormiston accordingly presented a report, the substance of which is that the properties "can be divided among three proprietors in nearly three equal divisions either by choice or by ballot, the one receiving the properties with the slightly larger values paying over the difference in money to those receiving the lesser valued lot." He further reported that "to attempt to sell the properties now would be greatly to the disadvantage of the estate." The parties were heard upon this report, and the Lord Ordinary thereafter dismissed the action, thus in effect holding that the pursuers must remain for the present *in communione* with the defenders as proprietors of the common property.

In my opinion this judgment cannot stand. Unless a *pro indiviso* proprietor has barred himself by contract from resorting

to an action of division or sale he has an absolute right at common law to insist in such an action. If it should turn out that division is impracticable or would operate unfairly, then his remedy is to have the properties sold and the price divided. The defenders pleaded a family arrangement under which they say it was implied that none of the co-proprietors should resort to an action of this kind until at least the year 1914. Under this arrangement a loan of £22,000 was obtained in 1909 for five years over the whole properties, on the footing that so long as the interest was punctually paid and also an annual instalment of £500 in deduction of the principal, the loan should neither be called up nor paid up during that period. Under this arrangement one of the defenders factored the properties; but after a year's trial the pursuer complained of his failure to keep proper accounts, and he was superseded by a judicial factor appointed in the Bill Chamber. This gentleman is now managing the properties, and of course charging for his services in doing so.

In my opinion there is no relevant averment of any agreement by the pursuer that she should not resort to her common law rights as a *pro indiviso* proprietor. A division of the properties now cannot affect in any way the rights of the bondholders. All the properties will continue to be the subject of their security, whether they form a common property or are divided among the owners. The personal obligation of the three borrowers will also be available to the bondholders. The Lord Ordinary seems to have taken the same view, because it is not on this ground that he has dismissed the action. He seems, however, to be apprehensive that if the subjects were divided one or other of the owners might allow dilapidation to take place or apply the subjects to speculative and unremunerative purposes. That is a risk, however, which the pursuer runs just as much as the defenders; and it might be said in every case where there was a bond over undivided properties which could not be called up or paid up for a period of years. The risk, besides, does not appear to be a very real one, as it is of course in the interest of each proprietor to make the most out of his or her property. The matter of the fire insurance, I think, need scarcely be considered, because the bondholders will of course see to it that the premiums are duly paid. Considerations of this kind have never been regarded as sufficient to exclude the common law right to have the property divided, and the case of *Thom* v. *Macbeth*, to which the Lord Ordinary refers, is no authority for such a view. There the estate was a feuing estate, the full value of which could only be realised if it were feued as a whole; and while division was refused as inequitable to some or all of the parties, the Court directed the property to be sold and the price divided. In the face of Mr Ormiston's report it would never do to resort to a sale of the properties with which we are here dealing in the present state of the property market, and the only alternative seems to be to grant the pursuer's demand for division.

The only point which at one time gave me a little concern has reference to the stipulation that a sum of £500 is to be repaid annually to the bondholders towards reduction of the principal sum half-yearly. These instalments have hitherto been paid out of the surplus rents belonging to the whole proprietors *pro indiviso;* and it is conceivable that the pursuer might not contribute her proportion out of the property which was handed over to her on a division with the result of endangering the continuance of the loan. I cannot think that there is very much substance in this objection. In the first place the pursuer runs exactly the same risk as the defenders in this matter. Either or both of them might equally fail to contribute his proportion of each instalment. If so, however, any of the proprietors might pay up the balance or leave the bondholders to take action against the proprietor who had failed to pay his or her proportion of the instalment due. It is scarcely to be assumed that the bondholders would act capriciously or inequitably in such a matter, or that if one proprietor paid up more than his share of an instalment, he would not be entitled to a remedy against the defaulting proprietor *quoad* that proportion. At all events I think it cannot be affirmed that division will sacrifice the interests of some or all of the parties, which was the ground on which it was refused in *Thom's* case. I am therefore of opinion that we must recall the Lord Ordinary's interlocutor and remit to him to give effect to the division which Mr Ormiston proposes.

LORD DUNDAS—I am of the same opinion. The pursuer here—I quote Lord Deas' language in the case of *Anderson* (1857, 19 D. at p. 704)—"seeks to enforce his common law rights, which entitle the *pro indiviso* proprietor to have the subject divided, and if not divisible to have it sold. The ordinary rule is that no man is bound to remain longer in communion than he pleases." The Lord Ordinary was of opinion that though the subjects are physically divisible "the division proposed is not reasonably practicable," but owing, as I gather, to some misapprehension, instead of pursuing this view to its logical conclusion by ordering sale, he dismissed the action. It appears to me that neither the considerations which the Lord Ordinary deals with nor the further objections stated by the defenders' counsel at our bar form any sufficient answer to the pursuer's demand for division. The grounds of my opinion are substantially these which have been so fully explained by my brother Lord Salvesen. I agree, therefore, that the interlocutor reclaimed against ought to be recalled and the case sent back to the Outer House in order that the subjects may be divided at the sight of the Lord Ordinary.

LORD JUSTICE-CLERK—I entirely concur. I do not think any grounds have been

stated why this *pro indiviso* proprietor who wishes the subjects divided should not have them divided.

LORD ARDWALL was absent.

The Court recalled the Lord Ordinary's interlocutor and remitted to him to give effect to Mr Ormiston's report with due regard to the interests of the parties, and to proceed.

Counsel for the Pursuer (Reclaimer)—Graham Stewart, K.C.—Armit. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders (Respondents)—Wilson, K.C.—Jameson. Agents—Garden & Robertson, S.S.C.

Saturday, November 4.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

FOOTE *v.* SHAW STEWART AND OTHERS (DIRECTORS OF GREENOCK HOSPITAL AND INFIRMARY).

Reparation—Negligence—Public Hospital—Liability of Directors for Unskilful Treatment of Patient by Staff—Paying Patient—Special Contract—Relevancy.

The pursuer of an action of damages against the directors of a public hospital averred that having met with an accident by which the lower part of her thigh bone was fractured she called in a doctor, who advised her to go at once to the hospital in order to have the advantage of the medical appliances there, and in order to have the injury examined and treated; that she accordingly applied to the hospital, and was received as a paying patient therein at "the rate of £2, 2s. per week for board and medical treatment, by arrangement made on the defenders' behalf with Dr G., the defenders' house surgeon, to whom the pursuer explained the circumstances above narrated"; that the treatment of her case by the defenders' surgeons was negligent and unskilful, and resulted in injury and damage to her.

Held (1) that the obligation undertaken by the directors of a public hospital towards the public is only to furnish the services of competent medical and surgical practitioners, and (2) that the pursuer had not relevantly averred any contract whereby the defenders undertook any other obligation toward the pursuer, and action therefore dismissed as *irrelevant*.

Hillyer v. *Governors of St Bartholomew's Hospital*, [1909] 2 K.B. 820, *approved*.

Mrs Joicey Marion Brown or Foote raised an action of damages against Sir Hugh Shaw Stewart and others, the office-bearers and directors of the Greenock Hospital and Infirmary, as representing the Hospital and Infirmary.

The pursuer averred—("Cond. 2) On or about 19th February 1910, the pursuer, who was residing at an hotel in Gourock, had a very severe fall there, by which her leg was broken above the knee, the lower part of her thigh bone being fractured. (Cond. 3) After the accident the pursuer, finding she was severely hurt, sent for a doctor in Gourock. The said doctor found the pursuer suffering from a serious injury to her leg in the region of the knee, and advised her to go at once to the Greenock Infirmary in order to have the advantage of the medical appliances there, and in order to have the injury examined and treated, and if necessary to have the Röntgen rays applied. She accordingly applied to the defenders' infirmary, and on or about 20th February was received as a paying patient therein at the rate of £2, 2s. per week for board and medical treatment, *by arrangement made (on the defender's behalf) with Dr Greaves, the defenders' house surgeon, to whom the pursuer explained the circumstances above narrated.*" [The passage in italics was added at amendment in the Inner House]. The pursuer further averred that the defenders' surgeons treated her for a sprain of the knee, that their diagnosis and treatment of her case was negligent and unskilful, and resulted in loss, injury, and damage to her.

The pursuer pleaded—"(1) The pursuer having suffered loss, injury, and damage through the fault of the defenders, or of those for whom they are responsible, is entitled to reparation therefor in terms of the conclusions of the summons, with expenses. (2) The defenders having undertaken to treat the pursuer for her said injuries, and having failed to do so with proper care and skilfulness, and the pursuer having suffered loss in consequence, they are bound to make reparation therefor to the pursuer."

The defenders, who denied the pursuer's averments of negligence or unskilfulness, pleaded, *inter alia*—"(3) The averments of the pursuer being irrelevant, the action should be dismissed."

On 4th November 1910 the Lord Ordinary (SKERRINGTON) sustained the third plea-in-law for the defender and dismissed the action.

Opinion.—"The pursuer alleges that she entered the Greenock Infirmary as a paying patient in consequence of having met with an accident to her leg, and she further alleges that the doctors in the infirmary failed to diagnose her injuries correctly, and treated her for a sprained knee, whereas in point of fact she was suffering from a broken thigh. She accordingly claims damages from the directors of the infirmary upon the footing that the defenders are responsible for the doctors whom they employed. It is not alleged that the defenders failed to employ competent doctors, nor is it alleged that the pursuer received any treatment in the infirmary except what was in conformity with the directions of the infirmary doctors. In