

expedient rule or not is not *hujus loci*. It is certainly possible for the Legislature to alter it, or it may be possible for us to alter it by an Act of Sederunt, but we cannot by a judgment now go against the deliberate judgment of the Court in that case.

**LORD DEAS**—There is nothing against which the law and practice of the country have set their faces more strongly than an accumulation of actions. There certainly would be an accumulation of actions here if we were to hold Mr Maclaren's argument to be correct. The first action was not at an end. It might have been reclaimed against, or might even have been taken to the House of Lords; nothing is more clear than that it was a depending action. It would be a great hardship if a point of this kind was reviewed and revised at an interval of fourteen years. The case of *Aitken v. Dick* settles this, and I can see no principle or expediency in any other course.

**LORDS ARDMILLAN and MURE** concurred.

The Court adhered.

Counsel for Pursuers—Maclaren. Agents—Lindsay, Paterson, & Co., W.S.

Counsel for Defenders—Rhind. Agent—Robert Menzies, S.S.C.

Tuesday, June 13.

## FIRST DIVISION.

[Lord Shand, Ordinary.]

### SHAW v. YOUNG AND OTHERS (SHAW'S TRUSTEES).

*Process—Deed—Proving the Tenor—Title to Sue.*

Where a pursuer's title to sue is founded on a deed which cannot be recovered, he must bring an action of proving the tenor.

This was an action brought by the pursuer John Shaw against the defenders, who were trustees and executors acting under the trust-disposition and settlement of the pursuer's father, the late Thomas Shaw, concluding for a sum of £2000 alleged to be due to him as partner with his father in a confectionery business in Glasgow. This business, the pursuer alleged, had been originally established by James Scott, who died on 13th January 1837, and it was thereafter conducted by his widow, Mrs Susan Scott or Shaw, who was married on 26th June 1843 to the said Thomas Shaw, from which date last mentioned the said Thomas Shaw was conjoined with her in the management. The children of the said James Scott, viz., Margaret, Janet, Susan, and Hannah, had, under his will or otherwise, rights and interests in the said business, which were regulated and adjusted by mutual agreement and contract of copartnery, dated 25th June 1847, entered into between and among the parties following, viz.,—(I.) Mrs Susan Shaw, sometime widow of James Scott, confectioner in Glasgow, then wife of Thomas Shaw, confectioner in Glasgow, and the said Thomas Shaw, on the one part; and (II.)—(1) Margaret Scott or Morris, wife of David Morris, hatter in

Paisley, with consent of her husband; (2) Janet or Jessie Scott, residing in Glasgow; (3) Susan Scott, residing there; and (4) Hannah Scott, also residing there, on the other part. The pursuer on 24th June 1852 married the said Susan Scott. By assignation dated 19th, 22d, 23d, and 25th February 1856, the second and fourth daughters retired from the business, and assigned their shares to the pursuer and his father, and in 1858 the eldest daughter did so also. The pursuer's wife died in 1856, and Mrs Shaw, his stepmother, in 1867. In 1868 pursuer's father sold the business and stock-in-trade. In virtue of the assignations mentioned, and of the right acquired by him *jure mariti* to his wife's rights under the original contract of copartnery, the pursuer raised this action against his father's trustees, who averred in defence that the pursuer was not a partner, at all events ultimately, with the said deceased Thomas Shaw. If he ever was a partner, the partnership must have ceased many years ago.

The defenders further averred that even if the pursuer was at any time a partner, he duly received at least his share of the profits, and that upon an accounting they are not due him any sum whatever, and that his father for a great number of years, the precise time being to the defenders unknown, had to support the pursuer, and frequently to pay debts of his.

The assignations and contract of copartnery were not produced, and the pursuer failed to recover them under a diligence.

The Lord Ordinary pronounced the following interlocutor:—

“23d May 1876—Having heard counsel, remits to Mr William Brown, chartered accountant in Glasgow, to inquire into the facts set forth in the record, and to report, and in particular to report a state of the profits of the copartnery business for the period referred to in the record, in so far as he may obtain materials enabling him to do so, and also the particulars of any sums paid to the pursuer or his wife by his late father, with power to the accountant to recover all books and documents bearing on the subject of the remit, and for that purpose grants diligence at the instance of the parties against havers; said report to be made *quam primum*.

“*Note.*—The record in this case, particularly the defenders' record, is in a very unsatisfactory state, and the defenders say they cannot make their statements more precise. In the circumstances it appears to me that a remit to an accountant, with power to recover books and documents, is the course appropriate to actions of this class, is the best means that can be adopted for ascertainment of the facts, or for putting the case in shape for a proof to be taken on certain specified points, if that shall be found necessary.

“The defenders maintain that the case should be sisted till the pursuer, in a formal action of proving the tenor, shall set up the deeds founded on; but in the circumstances I think this is unnecessary, and would impose a hardship and injustice on the pursuer. In a former litigation in this Court the contract of copartnery was produced and printed for the use of the Court, and admitted by the late Mr Shaw. Mr Shaw's receipt for the two assignations founded on by the pursuer is produced, and no account is given as to what has become of those deeds; and in

the circumstances, and having regard to the terms of the defenders' record, which does not deny either the existence or the alleged terms of the deeds, I think the action should be allowed to proceed, at least to the extent of obtaining the accountant's report. The deeds may yet be recovered in the procedure before him, and, failing production of the originals, his report will state the grounds on which the copies produced are presented as authentic."

The defenders reclaimed, and argued that there was no other way of ascertaining what the provisions of these deeds were but by an action of proving the tenor.

The pursuers argued—There was no necessity for such an action here. The contract of copartnership was produced in an action reported in 8 Macph. 419, and was there admitted by Thomas Shaw, and the assignations must be held to be confessed by the defenders, since the pursuer has produced receipts for them by Thomas Shaw to his agent, and the trustees are now in the place of Thomas Shaw. This was decided in the case of *Strachan v. Stewart*, 9 Macph. 116.

Authorities quoted—*Stair*, iv. 32, 2; *Clark v. Clark's Trs.* (Lord Cowan's remarks) 23 Dunlop, 80.

At advising—

LORD PRESIDENT—I agree with the Lord Ordinary in saying that the record in this case is very unsatisfactory; but there is one thing that appears to be very clear, and that is, that the contract of copartnership dated 25th June 1847 is a necessary and fundamental part of the pursuer's title to sue. It is not his whole title; there are two assignations which are also part of his title as much as the contract of copartnership.

That being so, and these documents not having been produced, the question is—whether this action can be allowed to proceed till a proving of this tenor has been brought. I am of opinion that such a proving of the tenor is indispensable here. As to the cases quoted by Mr Campbell, they are not in point. There are many documents that in the course of an action may, as a mere incidental part of the probation in the case, be admitted to proof, but when the writing referred to constitutes the title of a party to sue, I never heard it contended that he could proceed without proving the tenor of it. The interlocutor must therefore be recalled, and the case sisted for the pursuer to bring an action for that object.

LORD DEAS—I agree with the Lord Ordinary and your Lordship that this record is most unsatisfactory.

The title of the pursuer consists of a contract of copartnership and two assignations. There is no want of evidence that these existed, and there are ample means of proving their tenor. The natural course is to do so. If there had been no means for doing it, and that had been shewn to be the fault of the other party, there might have been reason for proceeding to a proof at large; but that is not so. Without these materials for proving the tenor, I do not know to what course we might have been driven. We might have been forced to this conclusion—that we knew the pursuer was a partner, but knew nothing of the conditions of the partnership, but as we have them

I quite agree with your Lordship that this interlocutor must be recalled.

LORD ARDMILLAN—I am of the same opinion. It will not do to remit to an accountant merely because this is a case of accounting. It is based on a contract of copartnership, and there are no means by which the Court can know the contents of that contract without proving its tenor.

LORD MURE—I have no difficulty in concurring. The action is brought upon an alleged contract of copartnership. The moment that is disputed we must inquire into its terms, and unless it is produced that can only be done by an action of proving the tenor.

Interlocutor recalled and case sisted.

Counsel for Pursuers—R. V. Campbell. Agents—Hill & Fergusson, W.S.

Counsel for Defenders—Asher—M'Kechnie. Agent—John Carment, S.S.C.

Wednesday, June 14.

## SECOND DIVISION.

[Lord Shand, Ordinary.]

CALEDONIAN RAILWAY COMPANY v.

WILLIAM BAIRD & COMPANY.

*Nuisance—Pollution—Drainage—Property—Landlord and Tenant—Interdict.*

Owners of property erected a mining village on the banks of a stream. Into this stream went drains intended for the conveyance of ordinary surface drainage; other arrangements being made for the sewage pollution of the village.

In a process of suspension and interdict at the instance of an inferior heritor complaining of pollution—*held* that the pollution being established, it was not a good defence to aver (1) that the drains were only surface drains, and were misused by the fault of the miners against the orders of the proprietor; or (2) that the proprietor could not be interdicted for the act of the tenant.

*Observed* (per Lord Justice-Clerk) that there is a distinction between the case where tenants are on lease, and where they are removeable at will.

*Opinion* (per Lord Gifford) that a proprietor in erecting a village is bound absolutely to prevent pollution.

This was a note of suspension and interdict presented by the Caledonian Railway Company against William Baird & Company, iron and coal masters, Glasgow, for the purpose of putting a stop to a system of drainage by which the sewage from the village of Auchinsterry, belonging to the respondents, was conveyed into a burn which flows into the Forth and Clyde Canal. The complainers prayed the Court to "suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondents from carrying or conveying the drainage or sewage of the dwelling-houses and outbuildings connected therewith, recently erected by them at Auchin-