

of the business which he sold to the pursuers, and endeavouring to get them to withhold their orders from the pursuer and to give them to him. This is against the good faith of his contract with the pursuers, and in violation of his duty and the pursuers' rights.

LORD MONCREIFF—I also agree that the Sheriff's judgment should be affirmed, because I hold it proved that the defender has canvassed or solicited orders from customers of the old firm of MacFarlane & Company, the goodwill of which he sold to the pursuers. The only point as to which I have any doubt is whether the pursuers are not entitled to a wider interdict than that which the Sheriff has granted, looking to the fact that in the memorandum and articles of association of their company the objects for which the company was established are declared to include the carrying on the business of carriers throughout the United Kingdom. This, taken in connection with the fact that the defender was in the service of the pursuers' company, and presumably was aware of the purposes of their association when he sold to them the business of MacFarlane, Lang, & Company, there is room for argument that when he undertook not to carry on "any separate business of a like or similar kind in the United Kingdom for the period of ten years," the undertaking was given with reference to the purposes for which the pursuers' company was formed.

But on the whole I am satisfied that the safer view is to hold that as the business which was sold by the defender to the pursuers was of a very limited character, the restriction which would prevent him from carrying on the business of carrier in any part of the United Kingdom, however remote from Dumbarton and unconnected with the Dumbarton trade, is excessive and should not receive effect.

I also agree that the Court has no power to remodel the restriction and confine it to a more limited area.

The Court pronounced this interlocutor:—

"Dismiss the appeal and affirm the interlocutor of the Sheriff of Stirlingshire dated 6th February 1899: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor appealed against: Of new assoilzie the defender from the first conclusion of the prayer of the petition, but interdict the said defender from applying by letter, circular, or other written communication, or personally, or by a traveller or agent or servant to any person who was a customer of the defender's firm of MacFarlane & Company prior to the sale of the business to the pursuers, asking such persons to deal with the defender in the business in and about Glasgow and Dumbarton and neighbourhood of steamship owner, general trader, or common carrier, or not to deal with the pursuers in such business, and discern."

Counsel for the Pursuers—Salvesen—M'Clure. Agents—Simpson & Marwick, W.S.

Counsel for the Defender—Clyde—Moncrieff. Agents—Webster, Will, & Co., S.S.C.

Tuesday, June 27.

FIRST DIVISION.

Lord Kyllachy Ordinary.

RENDALL v. STEWART & COMPANY,
et e contra.

Contract—Duration of Contract—Licence to Use Patent.

The owner of a patent entered into an agreement embodied in the following terms:—"I, W. F. R., do appoint Messrs S. sole makers of my patent freezer machine, and do hereby accept the royalty of 10 per cent of the money received on each of the machines they sell under this patent."

Held that the right conferred on Messrs S. was a licence which was terminable at pleasure by the owner of the patent.

Mr William Frederick Rendall was the joint owner along with Mr Richard Cracknell of the patent rights for the manufacture of refrigerating machines. On 20th April 1893 he entered into an agreement with Messrs D. Stewart & Company, Glasgow, in the following terms:—"I, W. F. Rendall, do appoint Messrs Stewart & Company, Limited, sole makers of my patent freezer machine, patent No. 4035, A.D. 1892 (patented in the name of Richard John Cracknell, 50 Finsbury Park Road, Middlesex), and do hereby accept the royalty of 10 per cent. of the money received on each of the machines they sell under this patent.—W. F. RENDALL. *Witness*, James Gourlay."

A number of machines were made and sold by Messrs Stewart & Company under the patent, and payments were made by them to Mr Rendall and the other joint-owner of the patent by way of royalties.

In 1896 negotiations were entered into between the parties with a view to the sale of the goodwill of the business, &c., by Messrs Stewart & Company to the owners of the patent, who were proposing to form a company for working it. The negotiations fell through, and on 9th December 1896 Mr Rendall intimated on behalf of himself and Mr Cracknell the termination of the agreement of 20th April 1893.

An action was raised by Mr Rendall against Messrs Stewart & Company, in which he claimed, *inter alia*, an account of the royalties due to him under the agreement.

A further action was raised by Messrs Stewart & Company, concluding for damages for breach of contract in respect of the termination of the agreement.

The pursuers pleaded—"The pursuers having incurred loss, injury, and dam-

age through the defender's breach of contract in terminating the pursuers' appointment as sole makers of the said machine, and communicating their specifications and other information, the pursuers are entitled to decree in terms of the petitory conclusion of the summons."

The defender pleaded—" (3) The defender having been, on a sound construction of the agreement of 20th April 1893, entitled to bring the same to an end at any time, *et separatim*, having been entitled to bring it to an end in consequence of the fault and breach of said agreement on the part of the pursuers, ought to be assoilzied with expenses."

On 14th July 1898 the Lord Ordinary (KYLACHY) pronounced the following interlocutor in both the causes:—"Finds on the just construction of the agreement of 20th April 1893, mentioned on record, that the said agreement is not binding on the pursuer during the whole term of the patent, but that the same is terminable by him on reasonable notice: With this finding appoints the cause to be enrolled for further procedure, and grants leave to reclaim, reserving the question of expenses."

Opinion.—"In this action I have been pressed to decide in the first instance the question which is raised as to the construction of the agreement of 20th April 1893—I mean the agreement set out on record—by which Mr Rendall, the pursuer in the first action, appointed Messrs Stewart (the defenders in that action and the pursuers in the second) to be sole makers of his patent freezing machine, and accepted the royalty of 10 per cent. on the money received for the machines which Messrs Stewart might sell under the patent.

"The question of construction is this. Mr Rendall contends that the licence and monopoly granted by him (and the granting of which constitutes the agreement) was terminable on reasonable notice. Messrs Stewart contend that both the licence and monopoly were for the whole period of the patent, and were not therefore terminable until the patent expired. There is no question of perpetuity. The question is between a right terminable at will, and a right having the same duration as the patent.

"I do not know that any of the numerous authorities which were quoted at the discussion throw much light on the point thus raised. The cases which have occurred of agreements indefinite in point of time have all had peculiarities which made them more or less special. I am certainly not able to find established by these cases any legal presumption upon which I can decide the present action.

"There are, however, it appears to me, two considerations of a general character which carry one pretty far towards rejecting the idea of a licence and monopoly co-extensive with the duration of the patent. In the first place, if such duration had been intended it would have been easy to have expressed it. I should certainly have expected that if the agreement was

intended to be for a term so indefinite, that term would have been expressed. In the second place, the agreement so called is really a unilateral document. It bears to confer certain rights on Messrs Stewart, while at the same time they undertake no counter obligation. They are made sole makers of the patented machine, but they are not taken bound to make any machine, nor is there any definition of the rights of parties in the event of the patentee being dissatisfied with their action or inaction. It appears to me that this makes Messrs Stewart's contention somewhat difficult and not very probable.

"It is no doubt true that the agreement although unilateral is not altogether gratuitous. The patentee is to receive 10 per cent. of the gross receipts by way of royalty. But if this be regarded as a counter consideration, it amounts really in fact to a partnership or *quasi*-partnership, and if that be so, the contract is beyond doubt of a class where, unless the term of duration is specified, the currency is held to be at will.

"Altogether, I am of opinion that Mr Rendall is right in his construction of this so-called agreement, and I shall so find. But making that finding I shall continue the cause and grant leave to reclaim, reserving in the meantime the question of expenses."

Messrs Stewart & Company reclaimed against both these interlocutors.

Argued for reclaimers—This was not a unilateral agreement as was stated by the Lord Ordinary. Though the obligation on them to exert themselves in working the patent was not expressed in the agreement, that obligation was implied—*Galbraith & Moorhead v. Arethusa Ship Company*, July 9, 1896, 23 R. 1011. Accordingly the agreement was not a mere licence, and the class of cases such as *Patmore & Company v. Cannon & Company*, July 14, 1892, 19 R. 1004, did not apply. On the fair construction of the agreement it was permanent in its nature, enduring for the currency of the patent. On this understanding the reclaimers had incurred large outlays. It was competent to show that there was consideration for the agreement not actually expressed in it, and the reclaimers were entitled to a proof at large on this and on their other averments as to outlay, &c.—*Llannelly Railway Company v. London & North-Western Railway Company*, 1875, L.R., 7 E. & I. App. 550. Alternatively the reclaimers were entitled to reasonable notice.

Argued for respondent—The contract must be construed by the written agreement, and the actings which followed on it would not alter the conditions. The agreement constituted merely an exclusive licence which was terminable at will—*Frost's Patent Law and Practice*, p. 372; *Ward v. Livesey*, 1845, 13 M. & W. 838; *Guyot v. Thomson*, L.R. [1894], 3 Ch. 388; *Heap v. Hartley*, 1889, L.R., 42 Ch. D. 461; *Patmore & Company, ante*.

LORD PRESIDENT—The Lord Ordinary seems to have acted in the interest of all parties by deciding on the effect of the agreement at this stage of the case, and it has not been shown that at any later stage he would have had more material for forming his judgment. The Messrs Stewart indeed virtually challenge judgment on the terms of the letter of 20th April 1893, for they say on record that their appointment “was embodied in” it.

I think that the conclusion which the Lord Ordinary has arrived at is substantially right. The right conferred is simply a licence to make patent machines on payment of a royalty on each machine, and the licence is not the less a licence because it confers a monopoly. Messrs Stewart were not bound to make any machines at all, and accordingly if their present contention is right, and is logically applied, Mr Rendall's patent might remain unused during the whole of its existence, and he not receive sixpence out of it. The natural safeguard against this is that he should be at liberty to make other arrangements as soon as he thought that the existing one did not answer. There is in the letter of appointment absolutely nothing pointing in the opposite direction — no lump sum paid down, nor any arrangements indicating a less elastic and more permanent relation.

Accordingly I hold that the agreement was terminable at pleasure, by which I mean that Mr Rendall might by notice terminate the agreement as from the date of the delivery of the notice. It is of course implied in this that Mr Rendall would be bound by all engagements entered into before the date of the delivered notice; but I hold that he would not be bound by anything done after notice — except the necessary working out of what had already been done. I rather think that this is really the view of the Lord Ordinary, but it is not quite accurately expressed by the words that the agreement is terminable “on reasonable notice.” I do not think that the Messrs Stewart were entitled to any interval between the notice and its coming into effect. Mr Rendall might terminate the relation between them to-day as from to-day, and Messrs Stewarts would from that date cease to be entitled to act under that letter. Only Mr Rendall would be bound to respect what they had done up to that time, and they would be entitled to complete what they had so done.

I am for adhering in each case to the Lord Ordinary's interlocutor, substituting, in each case, the words “at pleasure” for the words “on reasonable notice.”

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced the following interlocutor in both of the cases:—

“Refuse the reclaiming-note: Adhere to the said interlocutor with the variation that the words ‘at his pleasure’ are hereby substituted for the words

‘on reasonable notice’ therein, and decern.”

Counsel for Reclaimers—Guthrie, Q.C.—J. Wilson. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for Respondent—Sol.-Gen. Dickson, Q.C. — Aitken. Agents — Webster, Will, & Company, S.S.C.

Tuesday, June 27.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

GIBSON'S TRUSTEES v. GIBSON.

Expenses—Reclaiming-Note—Expenses of Unsuccessful Party—Construction of Deed.

An action of multiplepinding was raised for the purpose of construing a deed of which the Lord Ordinary in his judgment stated that “the deed is in my opinion exceedingly ill formed, and it is very difficult to arrive at its true construction.” The Lord Ordinary allowed all the parties in the case their expenses out of the fund *in medio*. An unsuccessful party reclaimed against the Lord Ordinary's interlocutor on the merits of the case, and the First Division adhered to the interlocutor reclaimed against. On a motion for expenses, the Court (while indicating that it must not be supposed that as a general rule an unsuccessful party who had been allowed his expenses in the Outer House would receive the same allowance in the Inner House), in view of the exceptional nature of the case (*diss.* Lord M'Laren) granted the unsuccessful claimer his expenses out of the fund *in medio*.

An action of multiplepinding was raised at the instance of the trustees of the late William Gibson for declarator that the pursuers were only liable in once and single payment of the means and estate belonging to William Gibson, which had been conveyed to the pursuers as trustees under his trust-disposition and settlement dated 11th October 1867; and for the exoneration and discharge of the pursuers.

The following account of the nature of the action and of the clauses of the trust-deed to be construed is taken from the opinion of the Lord Ordinary:—“This is a multiplepinding brought by the trustees of William Gibson, who died in 1868, survived by his widow, who died in 1897. She liferented the whole estate, and on her death it became necessary to divide the estate; and this multiplepinding has been brought for the determination of the questions which have arisen in regard to the construction of his disposition and settlement.

“The third purpose of the trust-deed relates to the widow's liferent, and is not material to the questions now to be decided. These depend upon the fourth and fifth