

where the person sought to be made the *dominus litis* stood in the true relation of principal towards the party who was the nominal pursuer or the defender as the case may be. Now, if that is so, if the person who is behind, and who is sought to be made liable for expenses, is really in the position of principal—where that is the true relation between him and the party who is conducting the case in his interest, it may very well be that a question of election might arise affecting the disposal of the case and the expenses. I give no opinion upon that point, because I do not think it arises in this case; but it is at least maintainable that if the other contracting party has elected to treat the agent as the principal, in conformity with well-known principles of mercantile law, that he could no more recover costs from the principal than he could recover the principal sum in the action. I do not wish to give an opinion one way or the other on that point, but it plainly does not arise here, and for this reason, that the relation of the Employers Assurance Corporation and the Montrose Shipbuilding Company is not that of principal and agent at all. That appears very conclusively from this consideration, that the injured workman who brought the action against his employers had no election, and could not possibly have maintained an action against the Assurance Company as guarantors. There was no relation of contract whatever between him and them so as to give rise to election in regard to a suit for the principal sum; and that being so, I fail to see how any such questions can arise with regard to expenses. The other point to which I merely advert is, that it seems desirable in general that when it is sought to make someone responsible for expenses who is not a party to the suit, but who is known to be promoting the suit, the claim for expenses should be made in the action in which the expenses were incurred. And I should have thought with the Lord Ordinary that it was a maintainable point in this case that, as the Assurance Company were quite well known to be promoting the action, and no claim was made in the action to make them conjunctly and severally liable along with the liquidators or the representatives of the Shipbuilding Company, it is now too late to bring it forward. There are cases where an alleged *dominus litis* has been made responsible in a separate action, but in those cases which were cited to us it does not appear from the reports, so far as I have been able to gather, whether the party sued was known to be the *dominus litis* at the time when the original action was brought to a conclusion. I should like to reserve my opinion on this point also, because although the attention of counsel was called to the point, no argument was offered upon it, and I therefore assume that it does not arise in the present case.

LORD KINNEAR—I concur with your Lordship in the chair.

The Court pronounced this interlocutor—

“The Lords having considered the reclaiming-note for the defendant Corporation against the interlocutor of Lord Kyllachy, dated 24th December 1898, and heard counsel for the parties, Adhere to the said interlocutor: Refuse the reclaiming-note, and decern.” &c.

Counsel for the Pursuer—W. Campbell, Q.C.—Findlay. Agents—J. & J. Galletly, S.S.C.

Counsel for the Defenders—Vary Campbell—Moncrieff. Agents—Drummond & Reid, S.S.C.

Tuesday, October 24.

FIRST DIVISION.

GUNN, PETITIONER.

(Sequel of *Gunn v. Muirhead*, June 30, 1899, 36 S.L.R. 798.)

Company—Issue of Shares—Consideration other than Cash—Filing of Memorandum—Companies Act 1898 (61 and 62 Vict. cap. 26), sec. 1.

Form of memorandum authorised to be filed, under sec. 1 of the Companies Act 1898, in regard to shares in a company which had been issued as fully paid-up, and with respect to which no contract had been filed with the Registrar of Joint-Stock Companies, in compliance with sec. 25 of the Companies Act 1867.

The facts of this case, which were fully stated in the previous report, may be summarised as follows:—John Gunn, who was a shareholder in the West End Cafe Company, entered into an agreement with James Muirhead, whereby he agreed to accept certain shares in a company called Aitchison & Sons, which was being formed to take over the assets of the West End Cafe Company, in lieu of shares belonging to him in the West End Cafe Company, while Muirhead, on the other hand, undertook to relieve Gunn of the shares allotted to him in Aitchison & Sons.

No payment in cash was made by Gunn for the shares allotted to him in Aitchison & Company, and no contract was filed with the Registrar of Joint-Stock Companies, in terms of sec. 25 of the Companies Act 1867.

Gunn raised an action against Muirhead to have him ordained to take over the shares in implement of his agreement. Muirhead defended the action, on the ground that the shares allotted to Gunn were not free from liability, as no cash had been paid for them, and no contract under sec. 25 had been filed. In the action Muirhead was assoilzied (see 36 S.L.R. 798).

Gunn now brought a petition for authority to file a contract with reference to these shares, under the provisions of the Companies Act 1898. By section 1 of said Act it is provided as follows—“(1) Whenever, before or after the commencement of this Act, any shares in the capital of any com-

pany under the Companies Acts 1862 and 1890, credited as fully or partly paid-up shall have been or may be issued for a consideration other than cash, and at or before the issue of such shares no contract or no sufficient contract is filed with the Registrar of Joint Stock Companies, in compliance with section 25 of the Companies Act 1867, the company or any person interested in such shares, or any of them, may apply to the Court for relief, and the Court, if satisfied that the omission to file a contract or sufficient contract was accidental or due to inadvertence, or that for any reason it is just and equitable to grant relief, may make an order for the filing with the Registrar of a sufficient contract in writing, and directing that, on such contract being filed within a specified period, it shall, in relation to such shares, operate as if it had been duly filed with the Registrar aforesaid before the issue of such shares; (2) Any such application may be made in the manner in which an application to rectify the register of members may be made under section 35 of the Companies Act 1862, and either before or after an order has been made or an effective resolution has been passed for the winding up of such company, and either before or after the commencement of any proceedings for enforcing the liability on such shares consequent on the omission aforesaid, and any such application shall, if not made by the company, be served on the company; (3) Any such order may be made on such terms and conditions as the Court may think fit, and the Court may make such order as to costs as it deems proper, and may direct that an office copy of the order shall be filed with the Registrar aforesaid, and the order shall in all respects have full effect; (4) Where the Court in any such case is satisfied that the filing of the requisite contract would cause delay or inconvenience, or is impracticable, it may, in lieu thereof, direct the filing of a memorandum in writing, in a form approved by the Court, specifying the consideration for which the shares were issued, and may direct that, on such memorandum being filed within a specified period, it shall, in relation to such shares, operate as if it were a sufficient contract in writing, within the meaning of section 25 of the Companies Act 1867, and had been duly filed with the Registrar aforesaid before the issue of such shares; the memorandum shall, before the filing thereof, be stamped with the same amount of *ad valorem* stamp duty as would be chargeable upon the requisite contract, unless the contract has been produced to the Registrar duly stamped, or unless the Registrar is otherwise satisfied that the contract was duly stamped."

The petitioner prayed, alternatively, the Court to ordain the said Aitchison & Sons, Limited, and the said James Muirhead and Henry Waters, to enter into a supplementary agreement with the petitioners in such other terms, to be adjusted at the sight of your Lordships, as your Lordships may approve of as a sufficient

contract in writing, within the sense and meaning of section 25 of the Companies Act 1867 (30 and 31 Vict. cap. 131), and of the Companies Act 1898 (61 and 62 Vict. cap. 26); or to direct the filing with said registrar, in lieu of a contract as aforesaid, of a memorandum in writing in a form to be approved by your Lordships, specifying the considerations for which the above-mentioned shares were issued.

The memorandum which it was proposed to file was set forth in an appendix to the petition in the following terms:—

"Pursuant to an order of their Lordships of the First Division of the Court of Session, dated 1899, in a petition at the instance of John Gunn, otherwise John Gordon Gunn, of the Queen Hotel, St Colme Street, Edinburgh, with consent and concurrence of Finlay Cook Auld, S.S.C., Edinburgh, and the said Finlay Cook Auld for his own interest, for authority to file a contract or memorandum with reference to fully paid-up shares in Aitchison & Sons, Limited—

"The after-mentioned 3164 shares of £1 each in the said company were issued to the several persons hereunder named and designed, in satisfaction of £3164, being part of the consideration of £22,000 agreed to be paid by the said Company to the West End Cafe Company, Limited, incorporated under the Companies Acts 1862 to 1867, and having its registered office at 129 Princes Street, Edinburgh, for the purchase of the heritable subjects, 129 Princes Street aforesaid, with the pertinents thereof and fittings and furniture therein, and the goodwill of the business carried on therein. At the date of the disposition carrying out the said purchase, the said several persons were shareholders of the West End Cafe Company, Limited, and held therein the same numbers of shares respectively as were issued to them in Aitchison & Sons, Limited, as hereunder stated. Said shares in the West End Cafe Company, Limited, were A shares of the value of £1 each fully paid up, and the said persons agreed to discharge, and did discharge, their claims for payment to them respectively of the share capital invested in the shares held by them in said West End Cafe Company, Limited, being £3164 in all, in consideration of the issue to them respectively, as fully paid-up shares of the shares in Aitchison & Sons, Limited, after mentioned—

Name and Address.	No. of Shares.	Progressive Numbers in Register.
John Gunn, hotel-keeper, Queen Hotel, St Colme Street, Edinburgh . . .	700	10,047 to 10,746
Finlay Cook Auld, S.S.C., Edinburgh . . .	464	10,747 to 11,210
James Muirhead, poultryer, 79 Queen Street, Edinburgh, and Henry Waters, butcher, 3 Queensferry Street, Edinburgh	2000	7,277 to 9,276

"By arrangement between the said James Muirhead and Henry Waters, assented to

by the directors of the company, the said allotment of 2000 shares to Messrs Muirhead and Waters was subsequently cancelled, and the same 2000 shares (register Nos. 7277 to 9276) were issued to the said James Muirhead alone as fully paid-up, and in satisfaction of the sum of £2000, being part of said price of £22,000 due by Aitchison & Sons, Limited, to the West End Cafe Company, Limited."

Appearance was made for Aitchison & Sons, Limited, and for Muirhead. They objected to a contract or supplementary agreement being entered into, but offered no opposition to a memorandum. They moved, however, that the proposed memorandum be amended by adding the words, "without prejudice to any question of liability of the signatories of the memorandum of association of Aitchison & Sons, Limited, with regard to the shares severally subscribed for in the said memorandum."

To this the petitioner agreed.

The following authorities were referred to—*Hartley's case*, January 12, 1875, L.R., 10 Ch. 157; *in re Whitefriars Finance Company, Limited* [1899], 1 Ch. 193.

The Court, without giving opinions, pronounced the following interlocutor:—

"Approve of the appendix appended to the petition as amended in the terms proposed at the bar: Direct the filing of said memorandum with the Registrar of Joint Stock Companies within one month from the date hereof, and direct that the said memorandum being filed, it shall in relation to shares therein libelled operate as if it were a sufficient contract in writing within the meaning of section 25 of the Companies Act 1867, and had been filed with the Registrar aforesaid before the issue of said shares, reserving all questions as to the liability of the signatories of the memorandum of association of Aitchison & Sons, Limited: Find no expenses due."

Counsel for the Petitioner—M'Lennan—T. B. Morison. Agents—Auld, Stewart, & Anderson, W.S.

Counsel for the Respondents—Kennedy—Wilton. Agents—Wallace & Pennell, W.S., and W. Marshall Henderson, S.S.C.

Tuesday, October 24.

FIRST DIVISION.

[Sheriff of Dumfries.

IRVING v. GRAHAM

Property—March Fence—Act 1641, c. 41.

A proprietor of lands brought an action to have a neighbour ordained to concur in erecting a march fence in terms of the Act 1661, c. 41. The boundary between the estates was a stream about forty feet wide, which was of value for fishing. The pursuer proposed

either a fence partly on the one side of the stream and partly on the other, or alternatively that a fence should be erected entirely on his own side, and that the defender should be ordained to pay half the cost. *Held* that the Act applied solely to cases where the boundary was dry land or a stream of unimportant dimensions, and that the defender was not bound to assent to a fence partly on his own land, or (Lord M'Laren *dissenting* on this point) to pay half the cost of erecting a fence entirely on the pursuer's side.

Statute—Construction—Contemporaneous Decisions on Scots Acts.

Observations (per Lord M'Laren and Lord Kinnear) on the authority to be ascribed to contemporaneous decisions of the Court in the construction of the statutes passed by the Scots Parliament.

General Graham Wyseby brought an action in the Sheriff Court of Dumfries against Colonel Irving, proprietor of the adjoining estate of Bonshaw, to have it declared "that the defender, as proprietor of the said lands of Bonshaw, which march with and are bounded by the pursuer's said lands of Wyseby, is bound to concur with the pursuer in erecting a march fence where none at present exists, and in repairing or renewing the existing fences along the whole line of the said march, with suitable weirs or water-gates thereon, so as to secure and preserve the access by both parties to the Water of Kirtle, which is on the said line of march, and to pay one-half the expense thereof."

By the Act 1661, c. 41, it is provided as follows:—"That where enclosures fall to be upon the border of any person's inheritance, the next adjacent heritor shall be at equal pains and charges in building, ditching, and planting that dyke which parteth their inheritance."

Colonel Graham lodged defences in which he made the following averments:—" (Stat. 9) The pursuer's contention that defender must join in fencing the pursuer's land for its whole course opposite Bonshaw is illegal and unreasonable, and contrary to the custom along both banks of the Kirtle. That custom is, that where a proprietor has grass land along the river, he fences that land from the river at his own expense, or herds the cattle thereon, and when he has land in plantation it is left unfenced. That custom exists, *inter alia*, on Wyseby, Bonshaw, Robgill, and Woodhouse. It is convenient, and works no hardships to anyone."

The defender pleaded, *inter alia*—" (3) The fence sought by pursuer not being a march fence in the sense of the statute, the action ought to be dismissed with expenses. (5) The properties being separated by an important stream, and the *medium filium* being their boundary, the defender is not bound to join in fencing pursuer's land, and ought to be assoilzied. (8) A fence between the estates, such as prayed for, being impossible of erection without material change