

except in so far as recalls the interlocutor of the Lord Ordinary dated 28th May 1897, and decerns against the defender for payment to the pursuer of £250 sterling of damages, be and the same is hereby reversed, and this House finds, and it is hereby declared, that the audits made by Mr Charles D. Gairdner for the years ending upon the 30th day of April in the years 1890, 1891, 1892, and 1893, and the relative certificates granted by his firm, were not made or granted in accordance with the terms of the minute of agreement dated 11th April 1889: And it is further ordered that subject to the said finding and declaration, the cause shall be and the same is hereby remitted back to the Court of Session in Scotland, with directions (1) to take an account in terms of the said minute of agreement of the nett profits of the firm of Calder & Company for the year ending 30th April 1890, and for the four following years; and (2) to assoilzie the respondent (defender) from the whole conclusions of the summons, in so far as the same are founded upon the alleged fraud or fraudulent misrepresentation of the respondent; and it is further declared that neither of the parties is entitled to decree for the expenses incurred in the Court of Session; and it is further ordered that the said respondent do pay or cause to be paid to the said appellants by revivor the costs incurred by them in respect of the said appeal to this House."

The pursuers applied to the First Division to apply the judgment of the House of Lords, and craved the Court to find them entitled to the expenses of the present application.

The respondents contended that as this was a case of divided success, no expenses should be allowed.

LORD M'LAREN—I think the key to the solution of this question of the expenses of the petition to apply the judgment, is to be found in the judgment itself. According to this test, the case is shown to be one of divided success, because the order is that "neither of the parties is entitled to decree for the expenses of process incurred in the Court of Session." Now, it is necessary that one of the parties should present a petition to apply the judgment of the House of Lords, and that the other should appear in order to see that everything is in order. No doubt the former will be subjected to the small extra expense of printing the petition, but I think that this is a proper case for allowing no expenses to either party.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Apply the said judgment of the House of Lords, and (1) remit the cause to the Lord Ordinary to take an account, in terms of the minute of agreement set forth in the petition, of the net profits of the firm of Calder & Company for the year ending 30th April 1890, and

for the four following years, and (2) assoilzie the defender from the whole conclusions of the summons in so far as the same are founded upon the alleged fraud or fraudulent misrepresentation of the defender, and decern: Find neither party entitled to the expenses of the petition."

Counsel for Petitioners—Cullen. Agents—Carmichael & Miller, W.S.

Counsel for Respondent—Salvesen, Q.C. Agents—Alexander Morison & Co., W.S.

Friday, January 12.

FIRST DIVISION.

[Sheriff of Ayr.

MORRISON v. MORRISON.

Sale—Sale of Business—Whether Business Books Carried to Purchaser.

In the sale of a retail business, in the absence of any express restriction or limitation, the business books and documents are carried to the purchaser.

A sold his business as tailor and clothier to B on terms embodied in a minute of agreement, which stipulated that A should retain right to all the book debts due to the business, and that B should collect these for him. The minute of agreement contained no reference to the business books. In an action by A for delivery of the business books and documents, held that the property in these was not reserved to A but passed to B.

Following on a minute of agreement of 30th January 1899, between James Morrison of the first part and Robert Orr Morrison of the second part, the first party sold the business of John Gloag & Company, tailors and clothiers in Largs, of which he was the sole proprietor, to the second party. The minute of agreement stipulated—"Second. The first party shall retain right to the whole book and other debts due to the said firm at the date hereof, and shall pay all obligations due by the said firm prior to the date of the said valuation. Third. The second party agrees to collect free of charge all book debts due to the first party, and to hand over the sums as and when collected to the first party or his agent." . . .

The business-books were not mentioned in the minute of agreement at all.

After the business had been taken over by Robert Orr Morrison, James Morrison raised an action in the Sheriff Court at Kilmarnock against him for delivery of—
"(1) The day books and ledgers of the business of John Gloag & Company between 1st January 1891 and 13th January 1899; (2) The whole time books and wages books of the said John Gloag & Company between said last-mentioned dates; (3) The whole invoices for goods supplied to said John Gloag & Company between said last-mentioned dates; (4) The whole receipts for

payments made by and on behalf of the said John Gloag & Company between said last-mentioned dates; (5) The cancelled cheques drawn by said John Gloag & Company upon the Royal Bank of Scotland, Largs, between said last-mentioned dates, together with the whole counterfoils of said cheques; (6) The bank book of the said John Gloag & Company with the British Linen Company Bank, Largs, between 1st January 1891 and 15th April 1898; (7) The cancelled cheques drawn upon said British Linen Company Bank between 1st January 1891 and the 13th January 1899, together with the whole counterfoils of said cheques." . . .

The above facts were set forth on record, and the pursuer pleaded—" (1) The whole books and documents sued for being the property of the pursuer he is entitled to delivery of the same."

The defender pleaded—" (3) The defender having entered into an obligation to collect debts of the said business under said agreement, and intimation thereof having been given to the customers of said firm he is entitled to retain the said books till said obligation is implemented. (4) *Separatim*, the defender having purchased the said business under said agreement, he is entitled to retain possession of the said books and invoices as his property."

On 14th June 1899 the Sheriff-Substitute (HALL) pronounced the following interlocutor:—" Finds that by minute of agreement dated 30th January 1899 the pursuer agreed to sell, and the defender agreed to purchase, the business of tailors and clothiers carried on by the pursuer, under the name of John Gloag & Company: Finds that by the said minute of agreement the pursuer retained right to the whole book and other debts due to the said firm at the date thereof, and that the defender agreed to collect the said book debts free of charge to the pursuer: Finds that the said minute of agreement including the said stipulation as to the collection of the book debts, was advertised in the *Edinburgh Gazette* of 17th February 1899, and duly intimated to the customers of the said firm: Finds that the pursuer now seeks to recover from the defender the books, invoices, and other documents which had prior to the said minute of agreement belonged to the said firm: Finds that he has set forth no relevant ground to support such a claim: Therefore sustains the defences and dismisses the action."

Note.—" While I have been unable to discover any direct authority on the point, I rather think it must be held as a general rule, and as matter of legal presumption, that the books of a mercantile business in which its transactions are recorded form an accessory or pertinent of the business, and that when the latter has been transferred the books go along with it to the transferee. When a man in selling his business reserves right to the book debts, this will certainly entitle him to the use of the books in so far as necessary for the purpose of collection, though I doubt if such a reservation, unless expressed in

very special terms, would extend so far as to continue in him a right of property in the books themselves. In the present case, where the pursuer has stipulated that the defender shall collect the book debts free of charge to him, it is absolutely necessary to enable the defender to fulfil his obligation that the possession of the books should remain in his hands. Nor is it to be assumed that the stipulation referred to is conceived exclusively in the interest of the seller of the business, it being perfectly well understood that a stipulation of that nature has a material efficacy in maintaining the connection of the purchaser with the former customers, and generally in holding the business together. The pursuer's reason for demanding delivery of the books and other documents appears to be that he does not desire the stipulation as to the collection of the book debts by the defender to be carried out, but it is an essential article of an agreement into which he has voluntarily entered, imposing an obligation upon the defender of which the pursuer does not propose to relieve him, and also constituting a right in the defender's favour of which he cannot arbitrarily be deprived, and the pursuer has stated no shadow of ground on which the stipulation should be set aside. I have therefore dismissed the action."

On 22nd August 1899 the Sheriff (BRAND) adhered.

Note.—" According to the second article of the minute of agreement the defender Robert Orr Morrison 'agrees to collect free of charge all book-debts due to the first party,' that is, to the pursuer James Morrison. To enable the defender to do this, it was indispensable for him to have the firm's books, invoices, and other business accounts in his possession, and when the agreement was framed and executed it is difficult to believe that this was not fully intended by both parties. The pursuer having duly entered into the agreement is bound to adhere to it. Nor has any tenable reason been suggested for his not doing so. In the course of the discussion reference was made to the copy correspondence produced, and it was suggested to me on behalf of the appellant that on perusal of the letters I would find adequate grounds for arriving at a different conclusion from that reached in the interlocutor under review. So far from this being the case the perusal of the said letters which I have made confirms me in the opinion that the interlocutor under review is well founded. These letters show that repeated demands were made by the pursuer's agent for delivery of the said books, &c., but no good reason for such a demand is disclosed or has since been advanced. There is also much force in the consideration stated by the Sheriff-Substitute that possession of the books and documents in question by the purchaser is necessary, or at least extremely desirable, in order to his keeping due hold of the business he had acquired. Moreover, it would be impracticable for the defender to fulfil the undertaking he has given to collect all 'book debts' unless he had in

his possession the 'books' in which the 'book debts' are recorded.

"Upon the whole matter I am clearly of opinion that the Sheriff-Substitute is right."

The pursuer appealed, and argued—The principal value of the business books was to instruct debts due to the pursuer; therefore his was the primary interest in them. The defender's interest in them for the purposes of the business would be served by his having access to them. The Sheriff and Sheriff-Substitute had considered the case from the view that the pursuer wanted the books to collect the debts, but the true view was that the books remained the property of the pursuer, there being nothing in the agreement to deprive him of it. The meaning of the agreement was that it reserved to the pursuer everything that was not expressly carried.

The defender was not called upon.

LORD PRESIDENT—Mr Morison has stated everything which could be urged against the judgments of the Sheriff-Substitute and Sheriff, but it appears to me that these judgments are entirely correct. The question to whom the business books and documents sued for belong depends on the terms of the agreement between the parties, and on that agreement the first question is, whether these books and documents are included in the sale of a "business of tailors and clothiers" such as was sold by the pursuer to the defender. In the absence of some express restriction or limitation it seems to me that things so essential to the successful prosecution of the business as the business books and documents would be included. One of the most important things in a business is its trade connection—not merely the connection with persons to whom the owner of the business sold, but with the wholesale houses and merchants from whom he bought. It would be very material to the buyer of a business to know not only the persons with whom but also the terms on which it had been conducted. That knowledge might greatly affect the value and success of the business; the buyer would see from the books not only the names of the customers, but also whom he could trust and whom he could not trust, as well as the terms on which wholesale houses dealt.

Mr Morison relied chiefly on the pursuer's wish to have the means of getting in his outstanding accounts; but looking to the enumeration of books and documents sued for, that consideration would apply only to a comparatively small part of them. On the other hand, all the books and documents sued for might be required by the person carrying on the business, because without them he would be very much in the position of a person starting a new business without any trade connection. Accordingly, I think that if there had been no stipulation relative to the books and business documents in the agreement, the Sheriffs would have been right in thinking that the sale carried them to the purchaser. But, further, it is stipulated in the agreement that the defender shall act in effect

as the pursuer's agent to collect the book debts due to him, and that implies that he should have the books necessary to enable him to do so. Mr Morison would say, however, that although the defender was to act as agent for the pursuer in that matter, the pursuer could intervene at any time and say he no longer wished the defender to collect the debts, and demand the books to enable him to collect them himself. That would raise a wholly different question from that which is presented in this action.

It is needless to say what might have been the rights of the pursuer if he had alleged that the debts due to him were not being collected by the defender, and that he desired the books or access to them to enable him to collect them himself, as he makes no such allegations. His claim is based exclusively upon the contention that he has right to the property of the books, and it appears to me that so far from the right of property in the books under such a contract being reserved to the seller it must pass to the buyer. I therefore think that the judgments of the Sheriff-Substitute and Sheriff should be affirmed.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court refused the appeal and affirmed the interlocutors of the Sheriff-Substitute and the Sheriff.

Counsel for the Pursuer—Campbell, Q.C.
—T. B. Morison. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defender—Salvesen, Q.C.
—Hunter. Agent—James Ayton, S.S.C.

Friday, January 12.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

CHRISTIE v. CRAIK.

Issue—Counter-Issue—Whether Counter-Issue Meets Issue.

In an action of damages for slander the question raised in the pursuer's issue was whether the defender stated that the pursuer had supplied hay and straw above the market price to the police commissioners of a burgh, of which body he was a member, "and had intimidated a public servant of the commissioners in order to induce him to purchase." The issue also contained an innuendo to the effect that the words used imputed corrupt dealing by the pursuer in his capacity as police commissioner. The innuendo contained no reference to the charge of intimidation. The counter-issue proposed by the defender was, "Whether the pursuer, while holding office as a police commissioner, did supply hay or