Sept. 21, 1831.

of that averment; he says, that those pipes were of insufficient and bad materials; not only that the cock was insufficient, but that even the pipe was insufficient; and he shows how it was insufficient. Then can your Lordships say that there is no right of action because he has not done certain things which it is said he ought to have done? These are very fit matters to go before a jury, and they are very likely to help the pursuer and damage the defenders before a jury; but in this Court and in this form of pleading they have just as little to do with this case as they had with the case last before your Lordships, or with the case that is next to be heard. Therefore I should humbly move your Lordships that these interlocutors be reversed, and that the case be remitted, with instructions to the Jury Court to direct an issue to be prepared which will try the question in proper form by a jury; and I cannot but wish that the rule were adopted in the Court of Session which common sense dictates in every other Court, and which I take to be the true Scotch rule as well as the English, that the time is past for demurring, if a full and explicit answer has been put in, of facts amounting either to a plea of the general issue, or to some special pleas other than general issue, but covering the whole demand and raising a mere question of fact.

The House of Lords ordered and adjudged, That the interlocutor complained of be reversed.

ALEXANDER FRASER—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 38. WILLIAM DOWNE GILLON, Appellant.—*Mr. Serjeant Spankie—Dr. Lushington.*

ARCHIBALD MACKINLAY and others, for the Edinburgh and Leith Shipping Company, Respondents.—*Mr. J. Campbell—Mr. Tinney.*

Partnership.—Proof.—What facts and circumstances held (affirming judgment of the Court of Session) sufficient to establish that a party was a partner of a trading company.

Process.—Observations on the mode of pleading in the Scotch Courts.

Sept. 22, 1831.

2d DIVISION. Ld. M'Kenzie.

WILLIAM DOWNE, proprietor of Downe's Wharf, was one of the original partners of the company of Downe, Bell, and Mitchell, wharfingers, London, in which he held a one third

share, and to which he had granted a lease of the wharf at a rent of 900*l.* per annum. They were, in 1809, appointed agents in London for the Edinburgh and London Shipping Company. Downe had three daughters, married respectively to Charles Read, George Atkins, and Colonel Gillon of Wallhouse. He died in June 1810, leaving a will, whereby he bequeathed the wharf in three shares, one third to each of his daughters respectively in life-rent, and their children in remainder, and he further bequeathed his third of the profits of the business of the company in equal parts to his three sons-in-law. On the 7th of June 1811 a memorandum of agreement was entered into by Read, Atkins, and Forbes, (the last acting for Colonel Gillon,) as joint legatees of Downe on the one part, and Messrs. Bell and Mitchell, the surviving partners of the company, and as such lessees of the wharf, on the other part, whereby it was agreed that a new partnership should be formed, to be held as having commenced at the date of Downe's death, "the parties thereto being Messrs. Bell and Mitchell, each one "third, and the said three legatees the remaining third, in equal "shares." One of the articles of the agreement stipulated that the rent payable to the legatees for the wharf should be reduced from 900*l.* to 600*l.*, payable in three equal shares; and another provided that "a deed of lease and partnership shall be prepared "with all convenient speed, and a copy thereof sent to Scotland "for the approbation of Colonel Gillon and of Mr. Bell." On the 8th of June Forbes further made a verbal agreement with Read and Atkins, the co-obligants, which he announced to Colonel Gillon in these terms:—"By a separate unwritten but "solemn agreement with the two sons-in-law and executor, I "have obtained for you the choice of either continuing the "partnership, or accepting, in lieu of one third of rent "and one ninth of profits, the net sum of 500*l.* per annum "from 30th June last year." With reference to these arrangements, Colonel Gillon, of date the 13th of June, wrote Bell as follows:—"As a pledge has been given by all "present for the new agreement then entered into, the cove"nants of which, I presume, you are made acquainted with, "Mr. Forbes proposed for me, that, being at such a distance "from London, I should be left at liberty to receive a regular "payment annually of 500*l.* in lieu of every thing, or continue

Sept. 22, 1831.

Sept. 22, 1831. "a partner in the contract, by which I would be entitled to re-
"ceive one third of the rent of 600*l.* and one ninth of the
"profits of trade. In this situation of matters I have taken
"the liberty to request that you will have the goodness to give
"me your advice upon this subject:—1. Whether to remain
"as a partner; 2. Or to receive the 500*l.* annually." Thereafter Colonel Gillon intimated that he would avail himself of the option allowed him by the subordinate verbal agreement entered into with Read and Atkins, and accept the annual payment of 500*l.* These persons, however, refused to abide by this agreement, and after some correspondence an arrangement was effected. Another agreement was entered into (13th May 1813) by Colonel Gillon on the one part, and Read, Atkins, Bell, and Mitchell on the other, whereby it was "covenanted, stipu-
"lated, declared, and agreed, that neither the said Andrew Gil-
"lon, or his heirs, executors, administrators, and successors,
"shall be concerned in, or have any management or control of,
"the business carried on at Downe's Wharf under the firm
"above mentioned. 2. That during the period stipulated as
"the endurance of said partnership, either in virtue of a minute
"drawn up and signed at London in the month of June 1811,
"to which the said Andrew Gillon was (proposed to be) a party,
"or by any subsequent contract to be subscribed by the said
"Charles Read, George Atkins, William Bell, and Alexander
"Mitchell, as the sole partners now composing the firm of
"Downe, Bell, and Mitchell, they or their successors shall, in
"consideration of the sum of annuity after mentioned, be en-
"titled to occupy and possess the wharf called Downe's Wharf,
"situate in East Smithfield aforesaid, and the buildings thereon,
"&c., and that without any let, stop, hinderance, or impedi-
"ment from the said Andrew Gillon or his foresaids. 3. That
"the aforesaid Downe, Bell, and Mitchell, their executors, ad-
"ministrators, and successors, on the other hand, are and shall
"be bound and obliged, as they do hereby bind and oblige them-
"selves and their aforesaids, to pay unto the said Andrew
"Gillon or his aforesaids the sum of 400*l.* sterling per annum,
"during the space or period above referred to, in full of all that
"he or they can ask, claim, or demand as heritable proprietor
"or proprietors of the aforesaid wharf and buildings, or any
"parts thereof, as particularly described in the second clause of

" this agreement. 7. That the aforesaid minute of agreement, Sept. 22, 1831.
" which was entered into in the month of June 1811, shall cease
" and be void in so far as regards the share of the business thereby
" (proposed to be) allotted to the said Andrew Gillon, and he
" shall not have any interest in or concern with the business of
" the said Messrs. Downe, Bell, and Mitchell, or the profits or
" losses arising therefrom."

On this footing matters remained, without, however, any notification to the public; only it did not in fact appear whether the contract above quoted had been acted on, for although Colonel Gillon never in all obtained more than 406*l.* from the company, he was in their books credited with one ninth of the profits.

In 1814 the shipping company withdrew their vessels from the wharf. Downe, Bell, and Mitchell then owed them 843*l.* 8*s.* 3*d.* In June thereafter the shipping company brought an action of count and reckoning against the London company and its individual partners, not including Colonel Gillon, and in this action they obtained decree for the above sum, with expenses; but on becoming acquainted with the above circumstances, they brought, in August 1822, a supplementary action for the amount against him as a partner. On his death this action was transferred against his son, William Downe Gillon, who, in defence, denied that either he or his father was ever a partner of Downe, Bell, and Mitchell. The facts or allegations in the case were fully detailed in revised and re-revised condescendences and answers.

The Lord Ordinary (12th November 1829,) found " it
" proved that the defender's father, Lieutenant Colonel Andrew
" Gillon of Wallhouse, was a partner of the company of Downe,
" Bell, and Mitchell, wharfingers in London, and that the
" defender represents his father; and, before further procedure,
" appoints the cause to be enrolled."

The Court, 30 Nov. 1830, adhered.*

William Downe Gillon appealed.

Lord Chancellor.—My Lords, after fully attending to the facts of this case, as opened for the appellant, if I had felt that there was any

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* 9 Shaw and Dunlop, p. 90.

Sept. 22, 1831.

thing doubtful upon the evidence whether Colonel Gillon was a partner or not, I should then have been disposed to hear the counsel on the other side, for the purpose of removing that doubt, or of seeing whether they could support, upon other grounds, the decree now under appeal before your Lordships. But as, of course, what may fall from the respondents' counsel can only have the effect of confirming the opinion, which, upon the whole, I am disposed to entertain with very little hesitation, namely, that there was a partnership, and that opinion going along with the decision of the Court below, I think it would be an unnecessary consumption of your Lordships' time if I were to call upon the other learned counsel to address your Lordships. My Lords, it is a very painful circumstance to observe the mass of pleadings with which this case has been encumbered by the unskilful inartificial manner in which this condescendence has been drawn,—the mass of averments on the one side and the general denial upon the other, whereupon, and upon three or four documents, letters, and agreements, the Court have come to a decision upon the question before it. But even of that I would not have so much complained if the Court, seeing that there was any neat issue of fact raised, had, after all, thought proper to cast aside the husk in which it was, enveloped, and to say, "Let the whole of this condescendence, now "re-revised, (and which is made worse by that re-revision—made more "prolix, more inartificial, and less like what a pleading of this nature "ought to be than it was at first,) undergo to a fourth stage of pre-"paration—let it be reformed, and by the application of the scissors "let the great bulk of it, all but about two or three lines, be cut off, "and let that remain which is the averment that there was a partner-"ship, and let that fact, if disputed, be tried by a jury." In all probability, among other effects, this good would have resulted from such a course, that we should not have had the question brought here. My Lords, it really ought to be recollected that the arrears of appeals with which your Lordships were overwhelmed was one of the moving considerations which induced parliament to consent to the great innovation, so much complained of at the time, of introducing jury trial into Scotland, in the hopes that by trying issues of fact the amount of appellate business would be diminished; and not only that your Lordships would have less business to do as a Court of Appeal, and less arrear, therefore, of that business, and less expense and delay to suitors, but, what was perhaps more material still, that a better mode would be established of deciding questions of fact; and that then this house would no longer be placed in the situation of having a mass of evidence brought up before it in the form of what is called in Scotland a proof, and being called upon, without having seen the

witnesses any more than the Court below had seen them, to sit in judgment as a Court of Review upon questions of fact, wrapt up in almost impenetrable confusion. But here we have a case without any proof at all by either party. There is nothing but a mass of averments on the one side, and a denial, more or less general, on the other, and some half-dozen or dozen of documents in the shape of letters ; and then, upon this imperfect probation, you are called upon to sit in judgment still upon the question of fact, for it is merely the question of fact of the partnership which the Court below, in the first instance, have chosen to decide without the intervention of a jury. Now this appeal would have been saved if a jury had tried the cause, and they would have been a much better tribunal for trying this question than either the Court below in the first instance, or your Lordships in the last. Nevertheless, this is not the course taken below. They thought that the evidence was strong enough to supersede the necessity of sending it to a jury, and they have saved nothing to the parties ; on the contrary, they would have saved them a good deal of money and a good deal of time if they had let a jury decide. Sept. 22, 1831.

Nevertheless, we are now to deal with the appeal ; and the question is, whether, if they had sent the case to a jury, the jury, upon the facts before you, could have drawn any but one conclusion, namely, that there was a partnership ? But I must say a word more on these pleadings, than which I cannot conceive any thing more vexatious, any thing that tends less to the elucidation of truth, or that tends more to involve the question at issue, and to prevent the parties from distinctly seeing what the question between them really is. You see the way a pleader proceeds in Scotland, when he draws a condescendence, is, first of all, to make averments of facts ; but he does not confine himself to make the averment material to the question between the parties, but he instantly tacks to it a statement, by way of averment also, of all the details of the evidence which go to prove that fact which he has first averred. The pursuer here does not say, " I aver that Colonel " Gillon was a partner, and I am ready to prove it. You may deny it " if you please, and then we shall go to issue. I will establish it in " evidence, and you may disprove it if you can." But he says, " I will " show that he wrote a letter on such a day, I will show that " Forbes did so and so, and I will show that he gave authority to " Forbes." That is bad enough, for that is the evidence to prove the averment. But he does not confine himself to that, for he goes into minute particulars, stating how he shall show that Forbes is the agent, and how he is to prove that he did such and such things. Then, among the notable things averred here on the one hand and denied on the other, is, that three actions were tried in the Court of King's Bench, that there was an affidavit in support of the plea of abatement

Sept. 22, 1831.

below, and that Forbes, the agent, was sworn as a witness in the King's Bench, and gave his evidence in a certain way before that tribunal. Now, parties ought to be told, that if they will aver evidence instead of averring the propositions of fact which they are to prove by evidence, they ought at least to have the decorum in their pleadings of not averring what every boy who has been a year in an attorney's office, or a month in a special pleader's office, knows cannot be given in evidence. If you had five thousand witnesses who had heard Mr. Forbes examined—if this had been as true an averment as any thing could possibly be, it is utterly immaterial; for if you had five thousand witnesses who were ready to swear it, not one tittle of it could, by the law of the land, have been listened to by any Judge sitting in England or sitting in Scotland. The law of the land is, that this is not evidence, and one is really mortified at seeing the records of a Court polluted by such averments. How can any young man coming to the Scotch Bar, when he sees the Court allow all this without saying a word against it, (for I do not see any application to strike it out of the record,) how can any writer or agent or young conveyancer, copying over these things in the course of learning Scotch law, do otherwise than believe that that is evidence; and I should not be astonished to hear counsel at your Lordships' bar get up a year or two hence and say, "We know that is evidence by the law of Scotland, for did not your "Lordships allow it in the case of Gillon?" Therefore, even admitting that it was right, which it was not, to plead matter of evidence, (instead of referring to the evidence, and only pleading your general averment of fact,) if it was right make your whole condescendence a mass of insinuation, implication, and inference, (for this condescendence is argumentative from beginning to end,) yet still you ought only to aver that which is legal evidence—you are not to aver hearsay, which cannot be evidence in any court. Really, my Lords, this tends to unsettle men's notions as to what the law is; and unless some means are taken of checking this endless and boundless laxity of pleading, I can, for my own part, see no end to vexation and litigation, leading not only to great delay and expense, but also to misdecision; because, unless men's minds are applied to a correct and distinct view of the case, they are sure to be led into error. As I had occasion to observe yesterday in the case of M'Donald*, it is in vain you give jury trial to the people of Scotland, as a blessing when it is made the instrument of getting at the truth in an accurate and correct and technical manner, for it will be the instrument of confusion, worse confounded than ever, if this course of pleading (if

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* M'Donald v. Mackie and Co., ante, p. 465.

such it can be called) is allowed. My Lords, if this goes on much longer, it will be my bounden duty, occupying the situation I fill, to bring before your Lordships some legislative measure for the purpose of remedying it; for if the Courts below will not themselves, the wisdom of the legislature must be invoked to devise and advise, if not to compel, a proper system of pleading. In the case of M'Donald, the Court below, at a certain stage of the cause, took up a demurrer to the relevancy of the averment, and said, "These facts are totally irrelevant." Why? Because some of them are not true. Really that was the argument. A person was averred to have contracted to supply leaden pipes of proper materials, and in spite of that contract to have furnished pipes that were honey-combed, and of which the lead was bad; and the learned Judges said the averment was quite irrelevant, and there was nothing to send to the jury. They said that one part was irrelevant because there was not a breach of the contract, and that another part was irrelevant because it was clear that it was not true. My Lords, in this case, however much I may regret, for the reasons I have given, that this case did not go before a jury, upon the whole, I think their Lordships have come to a right conclusion in finding that there is a partnership; and as, upon the facts of the case, I see no prospect whatever of a further investigation before a jury displacing the conclusion which these facts have led the Court to, however much I may regret that the other course was not taken, I shall advise your Lordships to affirm the judgment, and with costs.

Sept. 22, 1831.

The House of Lords ordered and adjudged, That the interlocutors be affirmed.

Respondents' Authorities.—Livingston, 17th Jan. 1755 (Mor. 1455); 2 Bell's Com. 506; 1 Montague on Part. p. 4; Grace, 1755 (——); 2 Black. 998 (App. 39); De Grey, c. i.; Hoare v. Dawes, 1780; Dow, 371 (App. 65); Lord Mansfield; Lord Loughborough in Coope v. Eyre, 1 H. Black. 37, 1789 (App. 53); D. Argh.; Waugh, 1793 (——); 2 H. Black.; Bloxham, 7th March 1775; Mont. ii. p. 40, vol. i. pp. 4, 5, and 17.

SPOTTISWOODE and ROBERTSON — MUNDELL, — Solicitors.