Saturday, June 28.

SECOND DIVISION.

M'ELROY & SONS *v.* THARSIS SULPHUR AND COPPER COMPANY.

(*Ante*, vol. xv. pp. 115 and 727.)

Expenses—Modification.

Where the Court had given the pursuers in an action decree for expenses subject to modification, and remitted to the Auditor to tax and report, the Auditor disallowed all expenses incurred by the pursuers in branches of the case in which they were unsuccessful. The pursuers objected, urging that the modification to be made by the Court referred to the part of the case in which they had been unsuccessful; the Court affirmed the Auditor's report.

The facts in this case have been already reported, *ante*, vol. xv. pp. 115 and 727, 5 R. 161, and in terms of the interlocutor of the Second Division of 17th November 1877 the Auditor reported. The pursuers lodged objections to the report, and the Court on 18th March 1879 pronounced the following interlocutor—"The Lords having heard counsel on the objections to the Auditor's report, before further answer remit to the Auditor to report generally on the principle on which his taxation has proceeded, how far it is affected by the fact that the pursuer has partially failed in the litigation, and the effect, if any, attributed by him to the finding of the Court in regard to modification."

The Auditor in consequence lodged the following special report:—"Having considered the note of objections for the pursuers to his report of 8th March 1879 on the account of expenses to which they are entitled under the interlocutor of the Lord Ordinary (CURRIEHILL), of 29th May 1877, and the interlocutors of the Court of 17th November 1877 and 28th February 1879, with the account itself, the proceedings in the case, and the interlocutor of the Court of 18th March 1879 (under which this report is made), the Auditor now reports,—

"*First*, That in taxing the account in question he has proceeded in the same manner as if the finding of expenses had been in general terms without mention of modification;

"*Second*, That the taxation has been affected by the fact that the pursuers have partially failed in the litigation only in this respect, that he has disallowed all expenses clearly distinguishable as connected with the portions of the case in which the pursuers have not been successful; and

"*Third*, That in the audit he has not attributed any effect to the finding of the Court in regard to modification.

"The grounds on which the Auditor has proceeded in thus dealing with the account may be briefly stated. Under a general finding of expenses, without any qualification whatever, it is the duty of the Auditor to disallow all expenses of unsuccessful litigation. The Act of Sederunt of 15th July 1876 (repeating a provision of the previous Acts) provides (General Regulation 5) 'that notwithstanding that a party shall be found entitled to expenses generally, yet if on the taxation of the account it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings.' The Auditor cannot see any reason for disregarding the instruction where expenses are found due subject to modification. It cannot be doubted that where this qualification is attached to the finding it is intended by the Court to give the party entitled to expenses less than under a general finding. The duty of the Auditor (subject to the correction of the Court) is to ascertain and report the amount of expenses properly incurred, exclusive of those connected with unsuccessful litigation. It is for the Court alone to deal with the question of modification, and it is evident that they cannot satisfactorily modify without previous knowledge of the amount of the expenses properly incurred. If such amount be not ascertained in the ordinary way by the Auditor's report, it is difficult to see how it can be arrived at by the Court so as to form a proper basis for modification. It has always been held by the Auditor (and he believes by his predecessors also) that modification is intended, not to interfere with the ordinary rules of taxation, but in some measure to compensate the party found liable in expenses for the costs incurred in resisting the claims in regard to which his opponent has failed. Modification, in a word, as understood by the Auditor, is to some extent a substitute for a cross finding of expenses. This view as to modification is not understood by some agents, and whether for confirmation or correction, an authoritative disposal of it by the Court is not unnecessary."

The pursuers objected to this report that the modification allowed by the Court referred to the part of the case on which they had been unsuccessful, and that the Auditor was wrong in disallowing the expenses connected with this part of the case, which fell to be dealt with by the Court in allowing a modification.

At advising—

LORD JUSTICE-CLERK—We will modify to £300. The Auditor says it is important that there should be some recognition of the principle which he lays down that modification was not intended to interfere with the ordinary rules of taxation, but in some measure to compensate the party found liable in expenses for the costs incurred in resisting the claims in regard to which his opponent has failed. We may take the result of this case as a recognition of this principle in so far as it affirms entirely the Auditor's report.

LORD ORMIDALE and LORD GIFFORD concurred.

Counsel for Pursuers—Dean of Faculty (Fraser) —Rhind. Agent—R. P. Stevenson, S.S.C.

Counsel for Defenders—Trayner—Darling. Agents—Webster, Will, & Ritchie, S.S.C.

CASSELS *v.* STEWART.*

(*Ante*, p. 562.)

OPINION OF LORD JUSTICE-CLERK—In this case we have from the Lord Ordinary a very long and elaborate note expressive of his opinion, and the result at which I have arrived is that he has come to a just conclusion, and indeed to the only possible conclusion upon the demand contained in the summons.

The pursuer brings this action for the purpose of asking the judgment of the Court to the effect that an agreement, dated the 19th of May 1863, which we have heard fully discussed, was made and entered into by the defender for and on behalf of the Glasgow Iron Company and the pursuer and defender as the whole remaining partners thereof, or must be held to have been so made and entered into. And then it has a further conclusion, which I suppose is dependent, although it may not necessarily be dependent, on our affirming the first of these propositions, that the partnership "accounts of the said company, from 31st May 1859 to 31st May 1870 inclusive, should be made up and settled on the footing that the said purchase was made for behoof of the said company and the pursuer and defender equally, and as the whole remanent partners thereof."

Now, the first of these propositions, that the agreement which was made on the 19th of May 1863 was made on the part of the copartnery, and that the copartnery was entitled to the benefit, depends upon the proof, and I think the evidence which has been led proves beyond all question not merely that the agreement was not made on behalf of the company, but that the only thing which, upon the allegation of the pursuer, the defender was instructed or requested to do on behalf of the company never was done, for whatever may be the terms of this agreement, it proves beyond all question that James Reid remained a partner—and in point of fact he did remain a partner—of this company down to the day of his death, and never ceased to be so. And it seems equally clear that Stewart, who was the other partner, never did ask him to cease to be a partner, or that if he did ask him, Reid did not consent to it. What Stewart did was something entirely different, and something which the company never could by possibility have had the benefit of. In the first place, Stewart agreed with Reid, not that he should retire from the company, but that he should remain in the company until he (Stewart) wished him to retire, which he never did; and in the second place, they made a bargain to the effect that in respect of his payment some twenty years afterwards, or within twenty years, of the sum of £60,000 which stood at the credit of his copartner and uncle, Mr Reid, in the books of the firm, he should obtain a conveyance of the whole of Reid's interest in the firm as at that date. Now, as regards the first of these conclusions, I think it came out quite clearly in the debate that there never was a bargain under which Reid was to retire as at 19th May. Now, it appears from the evidence of Cassels that that is what he says Stewart undertook to do. Whether Stewart undertook to do that or not, it was not done. The agreement is of a totally different description, and therefore the case is dependent upon the first of these conclusions, that this was a bargain for behoof of the company, and I am quite clear that there are no materials in the facts of this case on which that could possibly be sustained.

The second ground is more difficult, and it raises some questions in regard to the law of partnership, the importance of which I entirely appreciate. It cannot be disputed upon the decided cases that although there is a *delectus personæ* in the contract of copartnery, any partner may, if he chooses, assign his own share to a third party, as long as that does not interfere with the conduct of the company or the respective rights and interests of the partners *inter se*. There is nothing to prevent that in the law of partnership or the *delectus personæ*. Neither is there anything under this contract of copartnery. All that is provided there about the assignment of shares in the copartnery is this, that the company shall not be bound to take any notice whatever of transactions of that kind. And so long as the company are not called upon to take any notice of them, there is no violation of that provision of the contract. Now, in the present case, what has actually happened is, that Mr Stewart holds an unintimated assignation to the whole of Reid's share. There is a clause unquestionably in the original contract of the 19th of May to the effect that "the right and interest or stock hereby sold (that is, the whole interest which Reid had) may remain in the first party's name, or it may be transferred over to the second party at any time he may require it." That clause was never acted on in the second branch of it—that is to say, Reid's name continued as a partner to the end; and therefore no question arose as to that clause or as to the powers which Stewart might have had if he had chosen to act upon it. But I have a very strong opinion that in the circumstances that actually occurred the construction of that 7th clause, which would lead to the right of Stewart to turn Reid out, cannot be maintained, because on 19th March 1864 Mr Reid entered into a new bargain not only with Mr Cassels, the other partner, but with Mr Stewart himself. It was agreed on the 31st May 1860—the deed was signed on the 19th of March 1864, after the date of the other agreement—that James H. Robertson having sold his shares, there should be a statement of the position of the accounts; and it is said, "When it was arranged to buy J. H. Robertson's shares in the business, it was further agreed by the remaining partners that they should each have an equal interest in the company's business from the date of J. H. Robertson's retiring from the concern;" and therefore from the date of the signing of that minute, viz., the 19th of March 1864, there was substantially a new contract of copartnery, and a contract of copartnery under which Reid had a third share of the interest in the concern. It is not necessary to decide that matter, but I take it that Stewart was as much bound to it as Cassels was, and that that being posterior to the agreement, you cannot read the agreement in any way but conform to the stipulations of the contract which was made in 1864. And therefore Mr Reid did remain not only ostensibly but actually a partner of this company down to the day of his death. But then it is said—and

* The manuscript of this opinion was not received in time for publication with the report of the case.