execute a poinding and sale of the whole of the defender's effects, amounting in value to £130; that he did so by the fraudulent device of slumping the various articles in the defender's house into a few lots, to conceal the false and fictitious nature of his valuation; and that he sold the said valuable articles thus fraudulently slumped and under estimated to Mr Douglas himself on said 23d May." The pursuer stated that he had only acted in the execution of his duty as sheriff-officer.

The defender pleaded, *inter alia*, that the statements being substantially true, and *separatim*, not being malicious or without probable cause, he should be assoilzied.

The following issues were proposed by the pursuer and defender respectively:—"Whether in a summons raised and executed at the instance of the defender against Mr W. Scott Douglas on or about 20th June 1879, there were inserted statements in terms of the schedule hereunto annexed? Whether the said statements are of and concerning the pursuer, and falsely and calumniously represent him to be a dishonest person and unfit to hold the office of a sheriff-officer, and were maliciously inserted or caused to be inserted in said summons by the defender, to the loss, injury, and damage of the pursuer.—Damages laid at £500.

"SCHEDULE.

"Said scheme was carried out in the following manner, viz.—On or about 20th May 1879 the said Robert Richardson went to the pursuer's residence, and on the instructions of the defender executed a pretended poinding and valuation of certain effects therein, including said works of art and the pursuer's household furniture, of the value of £130. But instead of making a proper inventory and valuation, as the said sheriff-officer was bound to do, he wilfully put a false and absurdly low value upon said valuable property, and in order to conceal the false and fictitious nature of said valuation he illegally and wrongfully slumped a vast number of articles into a very few lots" [amounting in all to the sum of £12, 4s. 1d.] "whereas the true value of said articles exceeded the sum of £130 and thereafter on or about the 23d May the said Robert Richardson and two assistants came to the pursuer's house and made a pretended sale of said articles to the defender, in slump, at the sum of £12, 4s. 1d., or at all events declared them to belong to him as at that value, in payment and satisfaction of his alleged debt of £12 of principal with 4s. 1d. of expenses.

"AMENDED ISSUE PROPOSED BY THE DEFENDER.

"Whether the statements in the said schedule are true?"

The Lord Ordinary (CRAIGHILL) approved of the issue for the pursuer as finally adjusted, disallowing the amended issue for the defender. There was the following note to the interlocutor:—

"*Note.*—The issue proposed by the pursuer and adjusted by the Lord Ordinary was accepted by the defender as suitable for the trial of the cause. And with reference to the counter-issue, the question which was raised by the defender was not whether an issue in justification should be allowed, but assuming that he was to have an issue, whether he was not entitled to have an issue in the terms which had been disallowed. The Lord Ordinary decided, that as it did not cover all which was in the pursuer's issue, the counter-issue as asked could not be granted."

The defender reclaimed, and argued—That it was sufficient in a counter-issue of *veritas* to prove the truth of the facts as stated in the pursuer's issue without meeting them on the breadth of the innuendo in that issue.

Authorities—*Torrance* v. *Weddel*, Dec. 12, 1868, 7 Macph. 243; *Ogilvy* v. *Paul and Others*, June 28, 1873, 11 Macph. 776; *M'Iver* v. *M'Neill*, June 28, 1873, 11 Macph. 777.

At the instigation of the Court the innuendo was withdrawn, and the following issues as finally adjusted were approved of:—"Whether in a summons raised and executed at the instance of the defender against Mr W. Scott Douglas on or about the 20th June 1879, there were inserted statements in terms of the schedule hereunto annexed? Whether the said statements are of and concerning the pursuer false and calumnious, and were maliciously inserted or caused to be inserted in said summons by the defender, to the loss, injury, and damage of the pursuer?"

Counsel for Pursuer (Respondent)—Dundas Grant. Agent—D. Turner, S.L.

Counsel for Defender (Reclaimer) — Shaw. Agent—P. Morison, S.S.C.

Tuesday, December 16.

FIRST DIVISION.

[Lord Young, Ordinary.

HANNAN & HAIR *v.* HENDERSON.

Partnership—Conventional Irritancy of "Declared Insolvency"—Where Held to be Applicable.

A contract of copartnery between A, B, and C, distillers, contained a stipulation that on the "death, mental incapacity, bankruptcy, or declared insolvency" of any of them, he should cease to be a partner, and be paid out of the concern in a specified manner. C was also sole partner in a coppersmith's firm of C and D, and this firm having become insolvent, a circular letter was sent round to their creditors, who finally accepted a composition of 10s. per £. A and B then brought an action asking for declarator against C that their partnership had come to an end, and that he had ceased to have any interest in the concern. *Held* (1) that the facts as proved constituted "declared insolvency," and that C had therefore ceased to be a partner in the distillery as from the date of the circular letter; and (2) that the irritancy could not be purged at the bar, the stipulation being a reasonable one, and not of a penal nature.

James Hannan, John Hair, and Alexander Gibb Henderson entered into a contract of copartnery, which was executed in December 1877, for the purpose of carrying on a distillery business under the name of the "Glen Kinchie Distillery Company," at Kinchie in East Lothian. The copartnery was to subsist, unless dissolved in manner

therein mentioned, for 10 years as from 1st July 1877; and each partner was to contribute £1500 to the capital stock. Henderson, however, finding himself unable to contribute his £1500 when called upon, a minute of alteration was executed by the partners in June 1878, under which the capital sum of £4500 was to be made up in the following proportions :— Hannan £2250, Hair £1500, and Henderson £750; and it was stipulated that Henderson's payment should be allowed to stand over until he could conveniently pay it, or until it should be paid out of his share of the profits, the amount being placed meanwhile to his debit in the firm's books. The contract of copartnery provided that Hannan should be managing partner, and should have sole conduct of the business. It was further provided that he was to be entitled to carry on his ordinary business in addition to that of the distillery. The said contract also provided—"*Eighth*, In the event of the death, mental incapacity, bankruptcy, or declared insolvency of any of the partners during the existence of the copartnership, he and his representatives and his creditors shall then and thenceforth cease to be partners and to have any share and interest in the copartnership property and assets, and his share and interest therein shall *ipso facto* vest in his copartners, to the exclusion of the representatives and creditors of the deceasing, incapacitated, bankrupt, or insolvent partner, and they shall only be entitled to be settled with in manner following. *Ninth*, In case such death, mental incapacity, bankruptcy, or insolvency shall occur before any balance-sheet shall be docqueted, the sum to which the deceaser's representatives, or guardians of an incapacitated partner, or creditors of a bankrupt or insolvent partner, shall be entitled shall be the sum or sums actually paid in by him, with interest thereon at the rate of five per cent per annum from the time the same was paid in, under deduction of any sums drawn out by him."

Henderson was in December 1877 carrying on business as a coppersmith in Edinburgh under the firm of Henderson & Dickson, of which firm he shortly afterwards became sole partner. The affairs of this business became embarrassed in the course of the year 1878, and Henderson was unable to pay his debts, and suspended payment. A circular letter of intimation, of date 25th September 1878, was sent by his agent with his authority to the creditors in the following terms :—"Gentlemen, I regret to announce that owing to certain heavy losses Messrs Henderson & Dickson, coppersmiths, Jane Street, Leith Walk, Edinburgh, are obliged to suspend payment. A state of affairs is being prepared by Mr Francis Dickson, C.A., and I have to request your attendance at a meeting of the creditors to be held in Lyon & Turnbull's Rooms, 51 George Street, Edinburgh, on Monday next, 30th inst., at 3 o'clock afternoon, when the state of affairs will be laid before the meeting and the instructions of the creditors taken. Meantime I have to ask indulgence with regard to any acceptances becoming due." The creditors held a meeting, and it being represented that Henderson's assets amounted to £4971, 10s., and his liabilities to £9444, 11s. 3½d., they agreed to accept a composition of 10s. per £.

Hannan and Hair having thereafter required Henderson to sign a minute acknowledging that he was no longer a partner in the distillery company, he refused to do so, and they accordingly raised this action of declarator against him to have it found that from and after the 25th of September 1879 he had "ceased to be a partner with the pursuers in the copartnership . . . ." and that "any share and interest in the copartnership property and assets, and his share and interest therein, if he any had, by the fact of his declared insolvency on or about the aforesaid date of 25th September 1878, vested in his copartners, the pursuers, to the exclusion of him the said defender and his creditors."

The defender stated in answer that he had never been divested of his estate, and had never been declared insolvent within the meaning of the contract of copartnery.

The pursuers pleaded, *inter alia*—"(1) By the terms of the contract of copartnery between the parties the declared insolvency of any one of them terminated his connection with the partnership; and the defender having declared his insolvency, he from the date of declaration ceased to be a partner. (3) The defender having ceased to be a partner, is entitled to be settled with in terms of the contract of copartnery, and he having paid no money towards the capital of the concern, has nothing to receive, and has no claim on the remaining partners or on the partnership property. (5) The pursuers being now the sole partners of the Glen Kinchie Distillery Company, they alone are entitled to sign documents relating to the company's affairs, or to transact its business, and the signature and concurrence of the defender is not necessary."

The defender pleaded, *inter alia*—"(1) The pursuer's statements are not relevant or sufficient to warrant the conclusions of the action. (3) The defender never having been bankrupt or declared insolvent, and never having been divested of his estates, the pursuers are not entitled to decree."

On 21st July 1879 the Lord Ordinary (Young), after proof led, repelled the defences, and decerned in terms of the conclusions of the summons. His Lordship added this note :—

"*Note.*—The question in the case is, whether or not the defender became insolvent and insolvency was declared within the meaning of the words 'declared insolvency' in the clause in the contract of partnership cited? On the evidence I must answer this question in the affirmative, and have, I think, no alternative but to enforce the agreement of the parties accordingly. It is not doubtful, in point of fact, that in September 1878 the defender's liabilities exceeded his assets, and that in consequence he called his creditors together and arranged with them for a discharge on a composition of 10s. in the pound. This is 'declared insolvency' in the ordinary meaning of the words, and I find nothing in the contract to enable me to hold that they were used in any extraordinary sense.

"The case is a hard one for the defender, and for this reason I allowed it to stand over, in case the pursuers might be induced, if the composition was paid—so that the partnership would really be exposed to no detriment from the insolvency of the defender, which would then have passed away—to forego their strict right, at least to the extent of making some reasonable allowance to the defender on his retirement. The case has now been enrolled to ask judgment

on the footing that both parties stand on their pleas and legal rights; and I decide the case on that footing accordingly, though with some regret that I cannot to any extent relieve the defender of the consequences of his contract, which I think operates severely in the circumstances."

The defender reclaimed, and argued—There was here no "declared insolvency" in the sense of the contract of copartnery. Such words must be presumed to have been used deliberately, and to infer notour bankruptcy, shutting of doors, or the use of diligence or a decree against the defender. In any view, the insolvency was not that of the defender as an individual, but of the firm of Henderson & Dickson. The irritancy could at all events be purged at the bar.

Authorities—*Munro* v. *Cowan*, June 8, 1813, F.C., 2 Bell's Comm. (M'L.) 152-3; 1 Lindley, 230; Bell's Prin. sec. 701.

Replied for the pursuers—The defender had *de facto* become insolvent, and this was sufficiently "declared" by the circular letter of 25th September. The words "declared insolvency" had no special or technical interpretation. In *Munro's* case the words used were much stronger, viz., "bankruptcy or arrestment equivalent to notour bankruptcy." The Court would not readily interfere with conventional irritancies where the stipulation was not oppressive; and once fairly incurred, such an irritancy could not be purged —*Stewart*. It was too late to purge the irritancy here, if such it could properly be called.

Authorities—*Hogg* v. *Morton*, March 4, 1825, 3 S. 617; *Parker* v. *Gossage*, 1835, 2 C.,M., & R. 617; *Biddlecombe* v. *Bond*, 1835, 4 Adolph. and Ellis, 332; *Stewart* v. *Watson*, July 20, 1864, 2 Macph. 1414; *Lyon* v. *Irvine*, February 13, 1873, 1 R. 512; *Glass* v. *Haig*, June 12, 1877, 4 R. 875, 14 Scot. Law Rep. 561.

At advising—

Lord President—In this case the contract of copartnery was executed in December 1877; the business (a distillery one) was to be carried on by the firm at Kinchie, in the county of Haddington, and it was provided that the contract should endure for ten years. Each partner was taken bound to contribute £1500 to the business, and Mr James Hannan was appointed managing partner, with sole power to enter into contracts, to accept estimates, to purchase materials necessary for the business, and sell the proceeds—in short, with sole power to conduct the business. He was not, however, bound to devote his whole time and attention to the firm's affairs, but only to take a general superintendence, "so far as he can do so without interfering with his ordinary business," and in like manner Mr Henderson and Mr Hair were bound "to give their assistance and advice in the conduct of the business when called on to do so, and in so far as it shall not interfere with their own business." It is therefore plain on the face of the contract that the partners had each a separate business of his own to conduct independently of the distillery, That being so, it was in my opinion a most reasonable provision to insert in this contract of copartnery that the ascertained and "declared insolvency" of any one of the partners should end the contract so far as he was concerned; the very circumstance that each one had a separate business of his own made it a reasonable provision; I do not say it would not otherwise have been so, but this was an additional and special reason to justify its insertion. The provisions of this clause, and the manner in which it was to be worked out, do not seem to me harsh or unnecessarily hard; it is only provided that in the event of such "declared insolvency" such partner is to be paid out on a particular footing. He does not forfeit rights already acquired. He is to be paid out on the footing of receiving a proportional part of the profit. In short, he is to be paid out very much on the same footing as his representatives would have been had he died instead of being declared insolvent. Now, there is nothing unnecessary or harsh about having some such arrangement as this. Then it is not said that the proceedings here were carried out against the defender in any harsh or oppressive way. All that is sought is to give effect to that clause in the contract by declaring that his connection with the firm came to an end from the time of his insolvency. The result of this is that the defender gets nothing of the effects of the firm, there having been apparently no profits for the year, and he never having paid up any of the capital sum which he was taken bound to pay when he became a partner. The Lord Ordinary seems to think the defender was hardly dealt with in being put out of the partnership on such terms, but I confess I am not able to sympathise with that view. He entered the partnership at a time when he ought not to have done so—when he might have known that he had no funds or capital to enable him to undertake such an enterprise. The result is that having become insolvent in his own particular business, he gets out of the partnership without losing, if without gaining, anything. He should never, in my opinion, have been in the concern, for he was not in a position at the time of his entering it to advance the £1500.

The only questions which remain are—(1) Whether the defender was in a position of what the contract calls "declared insolvency?" and there is also a question of law behind, viz., Is it possible in an action of this kind to allow the defender to purge the irritancy at the bar? As to the phrase "declared insolvency," I think the words are not used in any technical sense, nor have they any in the law of Scotland (though I have an impression that there is such in the law of England), but they simply mean that a person who is insolvent has been declared to be so—that is, it has been made known to the public and to his creditors that he has stopped payment. Now, is there any doubt that this was the case here? The circular letter was sent round by the defender's own instructions; his creditors met together, and going on the footing that he could not pay his debts, agreed to take a composition of ten shillings in the pound. If he did not thus declare himself insolvent, I do not know what the meaning of the words can be. I have therefore no doubt that the case is within the meaning of the 8th article of the contract.

But then it is said this is an irritancy and may be purged at the bar. I doubt whether it can be called an irritancy. No doubt it is so in this sense, that the occurrence of the event brings to an end certain rights as well as certain obligations. But assuming it to be an irritancy, it is clearly a conventional one, as arising out of a contract

between the parties. The ordinary rule is that conventional irritancies are to be enforced according to their terms, and once incurred cannot be got the better of. But this was, besides, a most reasonable stipulation, for the meaning of it was that the partnership was to cease, not because the defender had not paid his debts, but because he was publicly known to have become an insolvent trader. This has a prejudicial effect on the business in which the insolvent trader is a partner, and therefore it is that it is so often stipulated that bankruptcy or insolvency shall terminate the contract. The irritancy therefore, if properly so called, can never be purged; the mischief has been done and can never be undone. The partners say, we will not have a partner who has been declared to be insolvent. Were it otherwise this man would come back into the partnership without capital and with a damaged commercial reputation, which is the very thing which the provision was intended to prevent. I think the interlocutor reclaimed against should be affirmed.

Lord Deas—There is no doubt a distinction between legal and conventional irritancies, and that distinction has been frequently recognised in late years in the decisions of the Court. In order to entitle a conventional irritancy to have effect, it is necessary it should be a fair and reasonable stipulation. But applying that doctrine to this case, I cannot say that this clause, looking at the whole terms of the contract and the position of the parties, is unfair or unreasonable. I am therefore disposed to concur with your Lordship.

Lord Mure concurred.

Lord Shand—I am of the same opinion. If the stipulation had been of a penal nature, and had involved not only the forfeiture of the defender's position, but the loss of large vested rights of property in the partnership funds, I am by no means sure that another principle might not have come in, and that the Court might have allowed the irritancy to be purged, or at least might have annexed conditions to the granting of a decree such as that now proposed. But in the circumstances I think the interlocutor should be adhered to.

The Court adhered.

Counsel for Pursuer (Respondent)—Dean of Faculty (Fraser)—Mure. Agent—G. M. Wood, S.S.C.

Counsel for Defender (Reclaimer)—M'Kechnie—Millie. Agent—W. Spink, S.S.C.

Friday, December 19.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

* EASSON AND ANOTHER *v.* BROWN OR THOMSON AND OTHERS (THOMSON'S TRUSTEES).

Succession — Testament — Construction of Term "Money."

In a holograph trust-disposition and settlement framed in popular language by the granter (who was not a conveyancer) the expressions "all money that I should leave, wherever deposited," and "the interest of all moneys left by me," occurred. *Held* that these expressions as used were capable of including, and in the circumstances were terms apt to include, the testator's whole moveable estate.

Various questions were raised in this case, which turned upon the construction of the trust-disposition and settlement and relative codicils of the late David Thomson, machine-maker, Leith. It is not thought necessary to report more than one of these.

The pursuer Mrs Mary Thomson or Easson was one of Mr Thomson's children by a first marriage, and she and her husband raised this action against Mrs Ann Forman Brown or Thomson, Mr Thomson's wife by his second marriage, and the other children of the testator, who were his trustees and executors. Mr Thomson's trust-disposition and settlement, which was dated February 8, 1878, was holograph, and was not prepared by a practised conveyancer, being informal and framed in popular language. After disposing of the heritable property, feu-duties, and household furniture, which he bequeathed to his wife, the deed proceeded—"All money that I should leave, wherever deposited, shall be divided amongst my wife and children, share and share alike; such division to take place when my youngest daughter arrives at the age of twenty-one years, but in the event of any of my daughters being married before that time, I leave it to my trustees to allow them such sums as to give them a suitable providing." Mr Thomson subsequently executed a codicil to the following effect:—"It is my express wish to my trustees that my daughter Mary's [the pursuer] share of everything I leave be given to her at the rate of thirty pounds per year, payable half-yearly, as long as there is funds to pay that amount." And on 20th June 1878 the testator executed a further codicil, which after disposing of his weighing-machine business, stock-in-trade, &c., concluded with a *P.S.* to the following effect:—"It is also my wish that my wife Ann Forman Brown shall receive the interest of all the moneys left by me up to the time of division of the same, as arranged for in my settlement dated the eighth day of February One thousand eight hundred and seventy-eight years." In consequence of these deeds, and doubts regarding their construction, the present

* See Special Case *Dunsmure and Others (Dunsmure's Trustees)* v. *Elliot*, Nov. 22, 1879, *ante*, p. 134.