

Wednesday, November 22.

SECOND DIVISION.

(Sheriff of Ross and  
Cromarty.)

MORISON AND OTHERS v. ROSS.

*Process—Action of Declarator to Try Question  
already Pending in Another Action—Lis alibi  
pendens.*

Pursuers who had been unsuccessful in an action in a Sheriff Court appealed to the Court of Session, and while this appeal was pending, raised in that Court an action of declarator having the same object, and grounded upon the same *media concludendi* as the earlier action. The Court sustained a plea for the defender of *lis alibi pendens*.

On 18th April 1882 Mrs Margaret Morison or Murray, residing at Stornoway, and William Stewart, merchant there, presented a petition in the Sheriff Court of Ross, Cromarty, and Sutherland at Stornoway, craving the Sheriff to interdict the defender John Ross, Solicitor, Stornoway, as trustee on the sequestrated estates of Alexander Murray, "from entering upon the possession of the stock, estates, and effects, books, documents, deeds, or vouchers now belonging to the pursuers, in the shop, stores, houses, cellars, and other premises in Stornoway occupied and possessed by the pursuers, and in which they carry on business for behoof of the said Margaret Morison or Murray and William Stewart, under the name and firm of 'Alexander Murray, general merchant, Stornoway,' or from interfering in any way with the said premises or the pursuers' beneficial use, occupancy, and disposal of said estate, stock, effects, books, documents, deeds, vouchers, shop, stores, houses, cellars, and others."

The ground of this action was that the estate and effects in the shop and cellars in question belonged to the pursuers, and did not belong to Alexander Murray, on whose sequestrated estate the defender was trustee. Murray had entered into a contract of copartnery, dated 22d June 1881, with the pursuers, by which contract he had conveyed over his estate to the new firm composed of himself and the pursuers. The copartnery was to be held as commencing on 1st April 1881. Murray's estates were sequestrated on 7th March 1882. The copartnery was dissolved by minute of agreement on 15th March 1882, and Alexander Murray retired from the partnership, and ceased to have any interest in it or in the copartnership estate (according to that minute of agreement) as from 11th March 1882. The pursuers averred that in these circumstances they were the owners of the whole estate which had belonged to Murray, and craved interdict against Murray's trustee carrying it off.

The Sheriff-Substitute (BLACK) found that at the time when the copartnery was entered into by which Murray assigned his estate to the partnership, and also at the time of the minute of agreement dissolving the partnership, he was insolvent, and that the pursuers were conjunct and confident persons with him, the one being his mother and the other his shopman; that

the conveyance of the estate was made by Murray without true, just, or necessary cause, to the prejudice of the creditors, and that the contract of copartnery and minute of dissolution were therefore null and void.

On appeal this interlocutor was affirmed by the Sheriff-Principal (MACKINTOSH).

The pursuers then appealed to the Second Division of the Court of Session.

Before this appeal had been disposed of the pursuers raised an action of declarator against Ross as Murray's trustee, by which they sought to have it found and declared that from and after the 11th March 1882 the business carried on in Stornoway under the name and firm of Alexander Murray, together with the whole assets, business books, stock-in-trade, &c., were the property of the pursuers as sole partners of said firm of general merchants, trading and carrying on business in Stornoway under the name of "Alexander Murray," and that the defender, "as trustee on the sequestrated estate of the said Alexander Murray, the individual, or otherwise, had and has no right to take possession of the said business, assets, business books, stock-in-trade, or premises, or to interfere with the pursuers in the management of their said business, or in the realisation of the assets thereof, or the collection of the outstanding debts."

The defender pleaded, *inter alia*, *Lis alibi pendens*.

The Lord Ordinary (FRASER) sustained this plea and dismissed the action.

"*Opinion.*— . . . The same question is raised under this record which is raised in the action now depending before the Second Division of the Court, viz.: Whether the assignment made to the pursuers by Alexander Murray by the contract of copartnery validly conveyed to them the property of the stock-in-trade, &c., which had belonged to Murray. The object of the actions is the same; as are also the *media concludendi*, and therefore the plea of *lis alibi pendens* must be sustained."

The pursuers reclaimed.

The appeal and the reclaiming-note were put out on the roll of the Second Division for discussion together, and the Court, without calling on counsel for the defender, adhered to the interlocutor of the Lord Ordinary in the action in the Court of Session, and refused the appeal from the judgment of the Sheriff.

Counsel for Appellants and Reclaimers—A. J. Young. Agent—J. Smith Clark, S.S.C.

Counsel for Respondent—Trayner—Graham Murray. Agents—Tods, Murray & Jamieson, W.S.