express the view I entertain, and therefore I do not enter into any of the arguments submitted as to what the Sheriff of Chancery might or might not do in the way of deciding incidentally upon the question of right to the peerage. All I desire to say at present is that I do not think there has been sufficient cause made out for postponing the inquiry.

Lords Mure and Shand concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff of Chancery of 6th January last in the petition of Sir J. G. R. Maitland, and also recal the interlocutor of the Sheriff of Chancery of 6th January in the petition of Major F. H. Maitland: In the conjoined actions allow the petitioner Sir J. G. R. Maitland to lodge a condescendence of his averments within the next ten days, and the respondent Major F. H. Maitland answers thereto within ten days thereafter."

Counsel for Sir James Gibson Maitland—Mackintosh—Pearson. Agents—John Clerk Brodie & Sons, W.S.

Counsel for Major Maitland—J. P. B. Robertson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, February 19.

FIRST DIVISION.

[Lord Lee, Ordinary.

NEILSON *v.* NEILSON AND OTHERS.

(*Ante*, vol. xx. p. 816; vol. xxi. p. 94; and vol. xxii. p. 265.)

Trust—Assumption of New Trustees—Pendente lite nihil innovandum—*Interdict.*

While a dispute was pending among testamentary trustees relative to the subject-matter of a litigation in which the trust was interested, a proposal for the assumption of a new trustee was intimated by a quorum of the trustees. The remaining trustee raised a suspension and interdict to prevent the assumption, alleging that the person proposed was the nominee of certain of the trustees who had an interest in the dispute and were disqualified from voting, and was not neutral but prepared to give effect to their views. *Held* that interdict should be granted pending the litigation, but that on the litigation being decided, the respondents, being a quorum of the trustees, were entitled to assume the new trustee.

William Neilson, iron and coal-master, Mossend, died on 24th May 1882. He left a trust-disposition and settlement, dated 1st December 1880, by which he nominated as his trustees and executors his wife Mrs Ann Yule or Neilson; his brother Hugh Neilson, iron and coal-master, Summerlee, near Glasgow; his son James Neilson; James Thomson, engineer; and James M'Creath, mining engineer.

The trust-disposition contained certain special powers, and, *inter alia*, the following:—"*Third* I provide and declare that in all matters in regard to which the interest of any of my trustees as an individual is in conflict with the interest of any beneficiary under these presents, and in transactions with partnerships or companies in which they are partners or shareholders, the vote of such trustee shall not be counted in the determination of such matters, but the adverse interest of any trustee, or the fact of his being an interested party, shall not otherwise affect his power to act."

At the time of his death William Neilson was a partner of the Mossend Iron Company. After his death a question arose between his trustees and executors on the one hand, and the Mossend Iron Company on the other, as to the right of his trustees to avail themselves of an option given by the contract of copartnery to the executors of a deceasing partner to become partners of the company, on their intimating their intention to the surviving partners in writing within two months after the day of decease. By the terms of the trust-disposition and settlement this was a question on which two trustees (Hugh Neilson and James Neilson) were disqualified from voting through being partners of the Mossend Iron Company.

A meeting of trustees took place on 21st July 1882, at which Mrs Neilson and Mr M'Creath (being a majority of the trustees who were entitled to vote upon the question) determined to intimate to the Mossend Company that they elected to claim the right to become partners in William Neilson's stead. Mr Thomson did not vote. The Mossend Iron Company did not admit the alleged right of the trustees to become partners of the concern, and Mr M'Creath resigned while the dispute was pending, and before any proceedings were taken to enforce the claim, and thereafter an action of declarator to have the question determined was raised by Mrs Neilson, with her children's consent, as beneficiaries, which was, at the time when the present note was presented, depending before the Court. On 17th December 1883 Mrs Neilson, while this action was in court, received a letter from Messrs Mitchell, Cowan, & Johnston, writers, agents for the trustees, calling a meeting of William Neilson's trustees for the 21st of December, to consider "the proposed assumption of Mr James Bunten, Anderston Foundry Company, as a trustee in room of Mr M'Creath, resigned."

Mrs Neilson presented the present note of suspension and interdict against her co-trustees (Hugh Neilson senior, James Neilson, and James Thomson), to have them interdicted from assuming into the trust Bunten or any other person who was nominee of or identified in interest with Hugh Neilson senior and James Neilson, and to interdict Hugh Neilson senior and James Neilson from voting on the question of the proposed assumption of Bunten, or on any question of the assumption of a trustee entitled to vote on matters touching the Mossend Company or the share of the late William Neilson therein; further, to interdict Bunten, if assumed, from voting as trustee and executor in any matter touching the interest of William Neilson or of his trust-estate in the Mossend Iron Company, or in any other matter in which the interest of any trustee as an individual was in conflict with the interest of any of the beneficiaries under William

Neilson's settlement, or in any transaction with the Mossend Company, and meantime to grant interim interdict. She presented the application with concurrence of her children, as beneficiaries under the will.

The complainer averred that the proposal to appoint a new trustee originated with Hugh Neilson sen. and James Neilson, who were trustees under the trust-deed and also partners of the Mossend Iron Company, and that the object of the proposed assumption was to strengthen the defence of the company in the action then pending, and to hamper the complainer in pursuing it. She also alleged that Mr Bunten was not a neutral person, but as nominee of Hugh Neilson sen. and James Neilson, was friendly to them, and would give effect to their views in the trust matters affecting the copartnery; that the effect of Mr Bunten's election would be to throw the voting power of the trust entirely into his hands and those of Mr Thomson, and that there were no grounds, either of expediency or propriety, to justify the assumption of Mr Bunten into the trust.

The respondents averred that it was owing to the complainer's ceasing to attend the meetings of the trust, and to Mr M'Creath's resignation, that it was proposed to assume a new trustee. The business of the trust was at a standstill. Mr Bunten had a high social standing and great experience and ability, and had no interest or bias in the question of the partnership in the Mossend Company. They further averred that their power of voting upon matters connected with the trust was regulated by the provisions of the trust-disposition above quoted, and that they had had no communication with Mr Bunten, who had been asked by the agents of the trust whether he would be willing to act as a trustee.

The complainer pleaded:—"(1) *Pendente lite nihil innovandum.* (2) The intended assumption of Mr Bunten not being a fair or *bona fide* exercise of the powers of assumption vested in the trustees, but being proposed solely for the purpose of furthering interests adverse to the trust, the same should be interdicted."

The respondents pleaded:—"(2) The respondents, being a quorum of the trustees, are entitled, in the due exercise of their powers, to assume Mr Bunten, or other properly qualified person, as a trustee. (3) *Separatim.* In the circumstances, it is advisable that an additional trustee should be assumed into the trust, and Mr Bunten being well qualified for the office, and being completely neutral and unbiassed, the note should be refused."

The Lord Ordinary (Kinnear) granted interim interdict, and this interdict was on 10th June 1884 continued by Lord Lee, to whose interlocutor the First Division adhered on 1st July 1884. Thereafter (as reported *supra*, p. 265) on 19th December 1884 the action of declarator was decided by a decision of the First Division finding that Mrs Neilson had no title to sue. By interlocutor of 20th January 1885 the Lord Ordinary (Lee) recalled the interlocutor granting interim interdict, "in respect that the litigations referred to in the interlocutor of 10th June 1884 are now at an end, and that the averments of the complainer are not now relevant and sufficient to support the continuance of the interdict as formerly granted," and repelled the reasons of suspension.

The complainer reclaimed, and argued that the interdict should be continued.

The respondents replied that the circumstances had considerably changed since the pleadings in the interdict were prepared; that Hugh Neilson had died, and that the trust in its present condition was unworkable. The trustee proposed to be assumed was in every way suitable, while the allegations against him were of the vaguest kind and unsubstantiated. The respondents were willing that anyone whom Mrs Neilson wished should be assumed into the trust.

At advising—

Lord President—I think that so long as any litigation was going on between the parties it was quite proper that nothing of the nature of an assumption of new trustees ought to be allowed to take place, and accordingly on 1st July 1884 we adhered to an interlocutor of Lord Lee to that effect pronounced in December last, there being at that time no need for new trustees. The present condition of the trust shows, however, the necessity or expediency at least of some alteration in the body of trustees, because of the original trustees two only are alive and qualified to act, Mrs Neilson and Mr Thomson, and as these two do not agree it is necessary that one or more new trustees must be assumed. The very existence of these disputes necessitates the assumption of new trustees, and besides there are other matters in which James Neilson is not qualified to act, and which renders it essential that one or more neutral persons be assumed into the trust. Mr Bunten is in these circumstances proposed as a suitable person, and a meeting is called for the purpose of his election. To this Mrs Neilson objects, and suggests that she should be allowed to nominate a trustee, a proposal to which the respondents offer no objection so long as they are allowed to nominate Mr Bunten. It seems to me therefore that the parties are agreed upon this point at least, that there are to be two new trustees assumed, one nominated by Mrs Neilson, and Mr Bunten nominated by the Messrs Neilson. Mrs Neilson cannot, however, decide upon anyone to act as her nominee. Is that then to be taken as a reason why Mr Bunten should not be assumed? The objections to him are contained in Stat. 14 of the complainer's statement—"Mr James Bunten the proposed new trustee, is not a neutral person, but is the nominee of the said Hugh Neilson senior and James Neilson, and is friendly to them, and is closely connected in business with them and with the said Mossend Iron Company; and the said parties would not have proposed him as trustee unless they had satisfied themselves, as the complainer believes and avers they have done, that Mr Bunten is prepared to give effect to their views in the administration of the trust in matters touching the copartnery." Now, to say that Mr Bunten is not a neutral person because he is the nominee of these two trustees is to say nothing whatever. He cannot be assumed without nomination. But it is further said that Mr Bunten would give effect to the views of the Neilsons in the administration of the trust in matters touching the copartnery. Now, I think it would be somewhat difficult to sustain the relevancy of such an objection, for it comes to this, that Mr Bunten in Mossend affairs is to give effect only to Messrs Neilsons' views;

and not to act properly in the administration of the trust. In answer to this statement it is denied that there have been any communications between Messrs Neilson and Mr Bunten, or that any understanding whatever has been arrived at between the parties as to how Mr Bunten will act if he is assumed into the trust, and it is denied that he has any connection with the Mossend Iron Co. Now, the complainer could have met this answer if she had liked, and might have made some more specific averment about the alleged understanding existing between the Messrs Neilson and Mr Bunten. She has not done so, and we are therefore thrown back upon the bare averment by the complainer that Mr Bunten is to give effect to the Messrs Neilsons' views in Mossend matters, and such a statement is in my opinion irrelevant. If we were dealing here with the appointment of a trustee, or of a factor, by the Court, that would be a different matter, and we should then appoint some neutral party, but we are dealing with a case of assumption of new trustees, the power to do which is conferred by statute, and the Court has no right to interfere with this statutory power unless something of the nature of corruption is made out. It is to be hoped that matters will be satisfactorily arranged by Mrs Neilson consenting to act along with Mr Bunten, but if not, I think the trust is very fortunate in securing the services of a gentleman like Mr Bunten, who unless he was actuated by a spirit of friendly interest towards the parties would not accept an office which no stranger would covet.

LORDS MURE and SHAND concurred.

The Court adhered.

Counsel for Complainer—Pearson—Guthrie. Agents—J. & J. Ross, W.S.

Counsel for Respondents—Low. Agents—Morton, Neilson, & Smart, W.S.

Thursday, February 19.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

EADIE AND OTHERS *v.* MACBEAN.

Partnership—Insanity of Partner—Dissolution of Partnership.

When by the terms of a contract of copartnery the whole partners are bound to take an active management of the business, the permanent insanity or incapacity of one of them operates a dissolution of the partnership, because such partner cannot perform his part of the contract.

Partnership — Duties of Partners — Permanent Incapacity of Partner.

A contract of copartnery provided that all the partners with one exception should give their whole time to the affairs of the business. The remaining partner providing the capital and plant of the business, and it was agreed that he alone should sign bills and cheques, but in the event of his indisposition or his being unable to attend to business from other causes any of the other partners might do so. He was struck with paralysis and rendered unable for business. *Held* that the other partners were not entitled to have the partnership dissolved and the business wound up, the event which had happened being provided for by the contract, and the partnership not being one to which he was bound to devote his time and attention.

For many years prior to 1880 Mr Hugh MacBean had been in business as an oil and colour manufacturer in Glasgow. In the beginning of 1880 he was sole partner of his firm of MacBean & Co., and proprietor of the works in which it was carried on, as well as of the plant. He was then about 60 years of age. In that year he assumed into partnership Archibald Eadie, John Cassells, and John Shankland, of whom Eadie and Shankland had been in the employment of Hugh MacBean & Co.

The contract was for ten years from 1st January 1880, it being competent to MacBean (the first party) to retire at the end of any year on giving six months' written notice. The name of the firm was to continue to be H. MacBean & Co. Eadie and Shankland were not possessed of much capital. The contract provided (article 2) that the capital should be £20,000, £5000 being contributed by each partner. The firm was to pay a rent to the first party for the heritable property and plant. MacBean's interest in the firm was (article 5) to be four-twelfths, Eadie's three-twelfths, Cassells' three-twelfths, and Shankland's two-twelfths. Each partner was (article 6) to receive from the copartnership a salary of £350 a-year. Eadie, Cassells, and Shankland (2nd, 3rd, and 4th parties) were to "devote their whole time and attention to the copartnership business, and shall not be concerned, directly or indirectly, in any other trade or business whatever or in any speculation or adventure, and none of them shall become surety, cautioner, or guarantee for any person or company." MacBean was connected with another business and was not taken so bound. MacBean (article 7) was alone to be entitled to sign cheques and endorse bills and promissory-notes, but all the partners might subscribe the copartnership name in other cases, but that only for the purposes of the business. "In the event of the indisposition of the first party, or of his being unable to attend to business from other causes, any of the other partners shall, in such a case, be likewise entitled to sign cheques and to endorse bills and promissory-notes for the purposes foresaid. (8) In the event of any of the partners contravening the provisions of article 7th, or in the event of either of the second, third, or fourth parties contravening the provisions of article 6th, the observing partners shall be entitled to extrude the non-observing partner from the copartnership, and to advertise the same in the *Gazette* and otherways to the public: And in the case of such extrusion, the extruded partner shall cease, from and after the date of any such act or contravention, to be a partner in like manner in all respects as if he had become bankrupt on the date of contravention, and shall be paid out or settled with by his copartners in the same manner and to the same effect in all respects as his creditors would have been entitled to be paid out as hereinafter mentioned." A partner who became notour bankrupt was *eo ipso* to cease to be a partner (article 10). Books were to be regularly kept, and to be balanced once a-year.