

Thursday, July 9.

SECOND DIVISION.

[Lord Kinnear, Ordinary.]

ALEXANDER'S TRUSTEES v. THOMSON.

Partnership—Contract of Copartnership—Representatives of Deceased Partner—Management.

Two parties to a contract of copartnership agreed to carry on a business in partnership, terminable in certain events. It was stipulated in the contract that one of them should take the active management of the business of the copartnership, and should be the manager thereof at a salary. The contract also contained a clause to the effect that the death of either of the partners should not dissolve the copartnership, but that the representatives of the predeceasing partner should "be entitled to take his room and place in the copartnership, with this exception, that such representatives shall not be entitled to take the active management or carrying on of the business of the copartnership." After the business had been carried on under the contract for a number of years, the partner who had been manager died. The surviving partner thereupon assumed the management. The representatives of the deceased partner raised an action against the surviving partner to have it declared that, on a sound construction of the contract of copartnership, they collectively formed one partner along with the defender, that he had no right by himself to assume the management, and to exclude them therefrom, and to have him interdicted from so doing. *Held* that the pursuers were entitled to declarator that they collectively formed one partner with the surviving partner in the copartnership, but that they were not entitled to take any part in the active management thereof.

By agreement of copartnership dated 6th August 1870, William Thomson, clothier, Dundee, and Charles Alexander, printer, Dundee, on the narrative that they had for some time been carrying on business without any distinct arrangement as to terms and conditions, agreed "to carry on business in copartnership as printers and newspaper proprietors in Dundee, under the firm of Charles Alexander & Company, and that for the period of ten years from and after the 9th day of April 1870, and thereafter until either partner shall give the other twelve months' previous written notice of his intention to dissolve the copartnership, when upon the expiry of such twelve months the copartnership shall come to an end; but the partner giving said notice shall be bound at any time during the running of the said twelve months to sell his whole right and interest in the copartnership, and its assets, under burden of his share of its debts, to the other partner, for such a price as shall be put thereon by two valuers, one of whom shall be named by each partner, or by an oversman to be named by such valuers, to act in the event of their disagreeing."

The assets of the copartnership were to consist of certain heritable property, and the copyright of the *Dundee Courier and Argus*, the *Northern*

Warder, and the *Weekly News* newspapers, and were to belong to the partners in the proportion of two-thirds to Thomson and one-third to Alexander. The parties further agreed that Alexander should take the active management of the business of the copartnership, and should be the manager thereof, at such salary as should be from time to time agreed upon between the partners, and that the profits of the business should belong in the proportion of two-thirds to Thomson and one-third to Alexander, and that the losses should be borne in the like proportions. The concluding clause was as follows—"And it is hereby further agreed that the death of either partner shall not dissolve the copartnership, but, on the contrary, the representatives of the partner deceasing shall be entitled to take his room and place in the copartnership, with this exception, that such representatives shall not be entitled to take the active management or carrying on of the business of the copartnership."

The parties carried on business as partners in terms of this agreement till the death of Alexander on 5th September 1884. He left a trust-disposition and settlement, by which he nominated and appointed Mrs Helen Anderson or Alexander, his widow, and Charles Alexander junior, his son, to be his trustees. This settlement contained the following clause—"I direct my trustees, as soon after my decease as possible, to convey and give over to my son Charles my whole right and interest in the business in which I am engaged at the time of my decease."

In October following Alexander's testamentary trustees raised an action in the Court of Session against Thomson to have it found and declared "that on a sound construction of the agreement of copartnership between the said deceased Charles Alexander and the defender, dated the 6th day of August 1870, the pursuers, as trustees foresaid, collectively form one partner along with the defender in the copartnership formerly carried on by the said deceased Charles Alexander and the defender, and that the defender, in the events which have happened, has no right to assume or exercise by himself the active management of the business of the said copartnership, or to exclude the pursuers, as trustees foresaid, from an equal share in the regulation of the affairs thereof," and to have him interdicted from "assuming or exercising by himself the active management of the business of the said copartnership, and from excluding the pursuers, as trustees foresaid, from an equal share in the regulation of the affairs thereof, and from giving orders or directions, or incurring obligations in connection with the said business, without the consent of the pursuers, and from appointing or dismissing servants of the said copartnership without the said consent."

They averred that Charles Alexander the younger had been employed, with an interval of five months, in the office of the business from 1870 till the date of the action, and that for the last nine months he had by his father's desire, and with the knowledge and consent of the defender, taken the actual management of the entire business, and that shortly after Alexander the elder's death the defender had himself assumed the entire management of the business, and had intimated to the staff, and to the clerks and servants of the copartnership, that they were in future

to take their instructions from him and not from Charles Alexander junior or the pursuers, and that he had threatened to dismiss Charles Alexander, and had stopped payment of his salary. They further stated—"The pursuers do not themselves claim the active management, but they claim an equal voice with the defender in determining how the active management is to be carried on, and they have all along been and still are ready and willing to concert measures with the defender for that purpose, and generally to consult with him upon all matters connected with the copartnery. The position taken up by the defender renders this impossible, and the present action has therefore become necessary."

The defender denied that Charles Alexander junior had been since 1870 continuously in the office of the firm; that his father had given him occasional employment there, but that from the irregularity of his attendance, and from his incapacity, his position was that of a mere supernumerary without any recognised position in the office, and that he was not fitted for any but the most subordinate position in any department of the business. He admitted having intimated to the staff that they should take their instructions from him, and that he had instructed the cashier not to pay any moneys in name of wages or profits to Charles Alexander.

The pursuers pleaded—" (1) On a sound construction of the said agreement the pursuers as trustees foresaid collectively form one partner along with the defender in the copartnery of Charles Alexander & Company, and are entitled to all the rights and privileges of partners. (2) The defender is not entitled, in the events which have happened, to assume or exercise by himself the active management of the business of the said copartnery, or to exclude the pursuers as trustees foresaid from an equal voice in the regulation of its affairs, and the pursuers are entitled to decree of declarator and interdict as concluded for."

The defender pleaded—" (1) The action having been raised without any joint deliberation on the part of the trustees at whose instance it is brought, and one of these trustees having disclaimed the same, the pursuers have no title to sue. (3) On a sound construction of the agreement of copartnery, and in the events which have happened, the defender is entitled, to the exclusion of the pursuers, to take the active management and carrying on of the business. (7) The pursuers are not entitled to take the room and place of the late Charles Alexander in the copartnery before confirming to his estate."

The Lord Ordinary (KINNEAR) pronounced this interlocutor—" Finds that the pursuers as trustees of the deceased Charles Alexander are entitled to take the place of the said deceased in the copartnery between him and the defender, and collectively form one partner with the defender in the said copartnery, and to this extent and effect finds and declares in terms of the conclusions of the summons: *Quoad ultra* finds that the pursuers are not entitled to take the active management of the business of the copartnery, and assoilzies the defender from the conclusions of the summons: Finds the defender entitled to expenses, &c.

"*Opinion.*—The pursuers are a majority of the trustees, and as such are entitled to main-

tain this action on behalf of the trust-estate notwithstanding the dissent of one of their number. It is settled law that a general disposition unconfirmed, although it may not be a complete title to discharge, is a licence to sue. The first and seventh pleas for the defender are therefore repelled. But the latter plea is only repelled because on the merits I am prepared to give effect to the defender's contention. I am not prepared to hold that the pursuers could without confirmation insist upon taking an active part in the management of the business, but I think they are entitled to have their interest in the copartnery declared.

"It is not doubtful that under the contract the copartnery was not dissolved by the death of Mr Alexander, or that his representatives are entitled to take up his interest in the concern. But it is stipulated that the representatives of a deceased partner 'shall not be entitled to take the active management or carrying on of the business.' It is said that this refers to a previous clause under which, while both partners were alive, the active management was committed to Mr Alexander, and that it means merely that his representatives are not to have the entire management to the exclusion of Mr Thomson. But it is equally applicable to the representatives of either partner, and a stipulation that the representatives of a deceased partner shall not exclude the surviving partner from all share in the management would be quite superfluous. On the other hand, it is perfectly intelligible that while partners may be ready to agree that their respective interests in their common business should transmit to representatives on death, they should nevertheless think it necessary to stipulate that persons of whom they know nothing should not be entitled to take an active part in the management of the business. This appears to me to be the meaning of the stipulation in question, and I think it excludes the pursuers' claim to have an equal voice with the defender in the regulation of their affairs."

The pursuer reclaimed, and argued—The clause providing that the representatives of a predeceasing partner were to take "his place and room" in the copartnery, evidently intended, when applied to the representatives of Alexander, that they were to take the management, which was part of the deceased's "place and room" therein.

Counsel for the defender were not called on.

At advising—

LORD YOUNG—The question in this case deals with the effect of a clause in a contract of copartnery which is dated in 1870, between the deceased Charles Alexander and the defender, by which they agreed to enter into partnership as newspaper proprietors. The contract of copartnery provides that they were to carry on the business for ten years and as long thereafter as they pleased, the partnership being terminable on a year's notice by either party. Business was carried on by them under the contract till 5th September 1884, when Charles Alexander died. A dispute has now occurred between his representatives and the surviving partner as to the meaning and effect of a clause in the contract. Alexander's representatives claim a share not only

in the property of the concern, but also in the management, while the surviving partner concedes them a right to an interest in the business but denies that they have any right to interfere in the management.

Now, the contract contains a clause stipulating that on the death of either party the copartnership should not be dissolved, but, on the contrary, that the representatives of the partner deceased shall be entitled to take his room and place in the copartnership, with this exception that such representatives shall not be entitled to take the active management or carrying on of the business of the copartnership. Now, the survivor contends quite reasonably that this clause, while it gives to the representatives of the predeceasing partner an interest in the profit or loss of the concern, excludes them from any share in the management. But it is contended on the other side that this is not the true meaning of the clause, or, at least, that though it may be the *prima facie* meaning, the words are capable of another meaning which is really impressed on them by reference to the contract as a whole, particularly by reference to a prior clause giving the whole active management to Alexander, which is to this effect, "and he shall be the manager thereof, and for his services as such he shall receive a salary of such amount as may from time to time be agreed on between the partners." The contention of the defender is that the clause first referred to must be taken in its *prima facie* meaning, and that though Alexander had the active management during his life, his representatives, if he predeceased, were to take his right in the business with the exception that they were not to have the active management of it which belonged to him.

The Lord Ordinary is of opinion—and I agree with him—that the words of the clause are applicable to the representatives of either party, and thus the true meaning of it is that contended for by the defender, and that the pursuers have shown no reason for impressing on it a more limited construction. I think the Lord Ordinary is right in this, and I see nothing in his judgment requiring any alteration or modification. The pursuers, as representatives of the predeceasing partner, will therefore take his share in the business, with the exception that they will have no part in the management, and the Lord Ordinary has rightly assoziated the defenders from the remaining conclusions of the summons.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD JUSTICE-CLERK—I entirely concur.

LORD CRAIGHILL was absent.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Darling. Agent—David Milne, S.S.C.

Counsel for Defender (Respondent)—Pearson—Law. Agents—Rhind, Lindsay, & Wallace, W.S.

Thursday, July 9.

SECOND DIVISION.

[Lord Trayner, Ordinary.]

WALLACE & BROWN v. ROBINSON, FLEMING, & COMPANY.

Sale—Disconformity to Contract—Timeous Rejection—Breaking Bulk.

A cargo of 615 logs of wood arrived in port on 14th June, and its discharge was finished on 26th June. The purchaser sold eleven logs from the ship's side without examination, and cut up in his yard thirteen other logs to fulfil an order. The latter were not delivered as they were found unsuitable. He subsequently had a great number of the other logs chipped in order to ascertain their condition, and on 3d July wrote to the seller's agents rejecting the cargo as disconform to contract. *Held* that the rejection was timeous, and that there had been no breaking of bulk nor act of ownership sufficient to bar rejection.

Opinion per Lord Trayner (Ordinary), that the purchaser must pay the seller the full amount received by him for the eleven logs sold, and not merely the amount of the invoice price relative to them.

Agreements and Contracts—Sale—Bill, Payment of Price of Goods by Acceptance of—Agent and Principal.

An agent for a disclosed foreign principal sold to a merchant in this country a cargo of timber, payment to be made "by approved acceptance to the seller's or agent's drafts payable in exchange for shipping documents." The purchaser, after accepting the seller's draft for an amount corresponding to the invoice price of the goods, rejected the goods on delivery as disconform to contract, and refused to honour the acceptance. In a suspension by him of a threatened charge on the bill by the agent, the latter pleaded that he acted only as agent, and that he held the bill for value, having given value to the principal for the amount of it by accepting the latter's draft, and was thus entitled to maintain the diligence upon the purchaser's acceptance independently of the contract of sale. The amount of the agent's acceptance to the principal did not correspond with that of the purchaser to the former. *Held* that the bill accepted by the purchaser related to the contract of sale, and that the agent could not maintain the diligence upon it while the contract remained unfulfilled by the principal.

In February 1884 Robinson, Fleming, & Co. of London, acting as agents for Anton Tuchhändler of Dantzig, agreed to sell to Wallace & Brown, of Arbroath, a cargo of wood. The sale-note contained these clauses—"All warranted to be of good, fresh, and merchantable quality, according to the usual mode of sorting at place of shipment; deliverable free on board a vessel according to the custom in the port of Dantzig. Payment by approved acceptance to the sellers' or agents' drafts at four months from date of bill