

at the beginning of the 152nd section, to the effect that it shall not be lawful to form or lay out any new street in any burgh unless the same shall be at least 36 feet wide, is an imperative and inflexible enactment, and one which it is not within the power of the Commissioners or the Dean of Guild Court to relax. That would be a sound proposition if the enactment was not modified by a subsequent section. But I think it has been modified by the following words in the 153rd section—"Unless the same shall have been formally sanctioned by the Commissioners on a consideration of the special circumstances of the case." It is said that these words do not apply to the width of streets, but only to the building, raising, or adding to buildings contrary to the Act. I think the section will not bear that limited construction. If these words, "unless the same shall have been formally sanctioned," had come before the words "contrary to this Act," there might have been some ground for the argument; but they do not, and the fact that the words "contrary to the provisions of this Act" occur between the provisions about the width of streets and the building or raising of houses and the proviso "unless the same shall be sanctioned by the Commissioners," shows that the latter proviso overrides all that precedes it. I only further add, that it is quite plain that this 153rd section applies to the whole of the previous sections of this group of clauses from 142 down to 153. That is well illustrated by the words with which it concludes—"Provided always, that the provisions of this Act relating to the width and construction of streets or courts shall not extend or apply to any existing streets or courts which shall be proved to the satisfaction of the Commissioners to have been agreed to or to have been formed previous to the application of this Act." That is a proviso which qualifies all the preceding sections in the group. I am satisfied that the Commissioners' sanction to a departure from the statutory width of the street was lawfully given by them under the powers conferred upon them by the 153rd section.

LORD YOUNG was absent.

The Court recalled the interlocutor appealed against, repelled the pleas-in-law for the objector, and remitted to the Dean of Guild Court to proceed.

Counsel for the Petitioners and Appellants—Rankine, K.C.—Clyde. Agent—James Campbell Irons, S.S.C.

Counsel for the Respondent—Jameson, K.C.—Cook. Agent—F. J. Martin, W.S.

Thursday, February 14.

SECOND DIVISION.

[Sheriff Court at Forfar.]

CHRISTISON v. KNOWLES.

Prescription—Triennial Prescription—Trading Account—Continuous Account—Closing of Account—Change in Method of Paying Account.

A miller raised an action against an hotel-keeper for payment of the balance due on an account for corn and food stuffs supplied to the defender at various dates between 2nd May 1887 and 30th November 1899. The account sued on was stated as a continuous account between the dates mentioned, with payments to account on various dates. The pursuer averred that in December 1895, when a large balance was due on the account, the defender requested the pursuer thereafter to send a note of the items supplied each month, promising to pay these when rendered, and to pay up the old balance by instalments from time to time; that in accordance with this arrangement a note of the supplies was given to the defender each month, and the latter for some time paid instalments of what he was due the pursuer approximating to the amounts of these monthly notes; that latterly the defender became very irregular in paying the instalments, and that in December 1899 the defender's brother offered to pay the balance admittedly due on these monthly notes, but refused to pay the older items, which offer was accepted without prejudice to any claims which the pursuer might have for supplies given prior to December 1895.

The defender averred that no balance was due by him to the pursuer, and pleaded the triennial prescription. He produced a number of receipted accounts extending from April 1896 to August 1899, which showed that between these dates monthly accounts had been rendered to him by the pursuer, and that these accounts had from time to time been separately received when paid.

Held that the account sued upon was not truly continuous, the part of it relating to the supplies delivered before December 1895 having been closed under the arrangement made in that month, and that the triennial prescription applied to the part of the account which had been so closed.

Alexander Christison, miller, Guthrie, in March 1900, raised an action in the Sheriff Court at Forfar against Keith Knowles, horse-hirer, Panmure Arms Hotel, Edzell, for £754, 9s. 1d., being the balance of an account for corn and food stuffs supplied by the pursuer to the defender on various dates between 2nd May 1887 and 30th November 1899, with the legal interest thereon.

The account sued on was stated as a continuous account, extending between the

dates mentioned, showing payments to account upon various dates during that period, and bringing out the sum sued for as a balance due upon the whole account.

The pursuer averred that he was tenant of the meal mill at Arnhall, Kincardineshire, for twenty-seven years prior to Martinmas 1895, and since that date had carried on business as a corn-miller at the meal mill at Woodtown, between Fettercairn and Edzell; that the defender had occupied the Panmure Arms Hotel and Stables at Edzell as proprietor from 1884 till Martinmas 1895, and since then as tenant; and that the defender had also occupied a small farm near Edzell since 1884. The pursuer further averred as follows—“(Cond. 2) Ever since defender came to the said Panmure Arms Hotel stables in 1884 he ordered and obtained supplies of corn, meal, and food stuffs from pursuer from the meal mill at Arnhall, and latterly from the mill of Woodtown, for the said hotel stables and farm, and up till the commencement of the account sued for these were more or less regularly paid for. Since the beginning of this account, however, defender became very irregular in paying, and although he made payments from time to time as indicated in the account, there is a balance still due of £754, 9s. 1d., the amount sued for. A detailed account of the items supplied and payments made is produced herewith. Pursuer is still supplying the defender with food stuffs. (Cond. 3) In December 1895 defender, who was then making arrangements to have his hotel taken over by a limited liability company, although there was then a large balance due, requested pursuer thereafter to send a note of the items supplied each month, promising to pay these when rendered, and to pay up the old balance by instalments from time to time as he was able. In accordance with this arrangement a note of these supplies was given to defender each month, or at short intervals, and he paid instalments of what he was due pursuer for some time approximating the amounts of these monthly notes, and he also made payments to account of the balances then due on 6th January 1896 and 16th September 1897, and on the latter date promised to pay a further sum of £30, which, however, he did not do. Latterly defender became very irregular in paying instalments also, and on 25th September 1899 this action was threatened. After sundry correspondence defender's brother David Christie Knowles, offered to pay the balance admittedly due on these monthly notes, but refused to pay the older items. The payment offered was accepted on 5th December 1899, but only ‘without prejudice to any rights or claims the said Mr Christison may have for supplies given prior to December 1895.’”

The defender admitted that from 1884 onwards the pursuer had from time to time supplied the defender with corn, meal, and food stuffs, and that the pursuer was still supplying him with the same; that he had from time to time made payments to the

pursuer for the supplies, and that from the month of December 1895 he had made monthly payments in satisfaction of the supplies of food received during the particular month. He also admitted that on 5th December 1899 his brother David Christie Knowles had paid £72, 14s. in discharge of the balance due by the defender to the pursuer as at 30th November of that year. The defender further averred that on a just account no balance was due by him to the defender.

The defender pleaded, *inter alia*—“(2) The action, in so far as concluding for food supplies prior to December 1895, is barred by the triennial prescription.”

The defender produced an account between the defender and pursuer rendered on 13th October 1899 by the pursuer's agent to the defender's brother D. C. Knowles. This account extended from 2nd May 1887 to 5th December 1895, and amounted (after deduction of a sum of £200 paid by the defender to the pursuer on 6th January 1896, and another sum of £20 paid on 16th September 1897) to £740, 15s. 10d. The defender also produced a number of receipted accounts applicable to dates between April 1896 and August 1899, which showed that during that period monthly accounts had been rendered by the pursuer to the defender for the corn and food stuffs supplied during each month, and that these accounts were from time to time separately receipted when paid. The defender also produced a receipt dated 5th December 1899 granted in favour of D. C. Knowles for £69, 11s. 6d., being the sum of £72, 14s. mentioned above as paid by him less a contra account of £3, 2s. 6d. This receipt bore to be for “balance of monthly accounts due by his brother” the defender to the pursuer “for oats, &c., supplied up to 30th November last (and which monthly accounts are hereby discharged, but without prejudice to any rights or claims the said Mr Christison may have for supplies given prior to December 1895).”

On 7th June 1900 the Sheriff-Substitute (LEE) pronounced the following interlocutor:—“Finds in fact that for many years the pursuer has supplied the defender with corn and other food stuffs; that from 1884 to December 1895 said goods were supplied on current account, and the defender from time to time made payments to the pursuer in deduction of the amount due by him; that in December 1895 the account then current between the parties was closed by mutual arrangement, and that thereafter monthly accounts were handed to the defender, who has produced valid receipts in discharge of most thereof: Finds in law that in the circumstances stated the account which was closed in December 1895, and the subsequent monthly accounts, fall to be dealt with as separate debts, and that the term of prescription in the case of each runs from the last item in each account: Therefore sustains the second plea-in-law of the defender to the extent of limiting the pursuer's proof of the prescribed account to the writ or oath of the defender,” &c.

The pursuer appealed to the Sheriff (JOHNSTON), who on 20th July 1900 adhered to the interlocutor appealed against.

On 6th December the Sheriff-Substitute pronounced the following interlocutor:—“Finds in fact that it is admitted by the pursuer that the whole items in the account dated subsequent to December 1895 have been paid by the defender; . . . that the defender does not deny the constitution of the debt alleged by the pursuer from May 1887 to December 1895, and that the pursuer has failed to produce any writ of the defender showing the subsistence of the debt after three years from the close of the account in December 1895: Finds in law that the pursuer has not proved his debt by the writ of the defender as required by the Act 1579, c. 83: Before final judgment allows the pursuer, if so advised, to lodge a minute referring his debt in so far as prescribed to the oath of the defender, and for this purpose appoints the case to be put to the roll on Thursday 20th December 1900,” &c.

On 20th December the Sheriff-Substitute, in respect that the pursuer had failed to refer the debt sued for to the oath of the defender, assolized the defender from the conclusions of the summons.

The pursuer appealed, and argued—The account, payment of which was sued for, was a continuous account. All through the years the same course of dealing had gone on between the parties, and the defender had made no averment of any new or independent course of dealing. The change in 1895 was merely a change in the method of payment. The Sheriff-Substitute should therefore have repelled the second plea-in-law for the defender, and held that the whole account was to be considered as one—*Ross v. Cowie's Executrix*, Dec. 4, 1888, 16 R. 224. In any event, the pursuer was entitled to a proof to show that the account was continuous—*Wotherspoon v. Henderson's Trustees*, July 10, 1868, 6 Macph. 1052.

Argued for the defender—The account was not continuous. The old account was closed in December 1895. The subsequent accounts were settled monthly and fell to be dealt with as separate debts. The pursuer having produced no writ showing the subsistence of the debt due under the old account, it must be held to have prescribed—*Beck v. Learmonth*, Nov. 30, 1831, 10 S. 18.

LORD YOUNG—The triennial prescription deals with trading accounts, and requires those who supply goods to see that their accounts are regularly settled, or to take a document from the debtor acknowledging subsistence of the debt, the alternative being that they have no right to have an action established except by reference to their debtor's conscience. In the present case in December 1895 there was a sum approaching £1000 due to this miller upon the supplies which he had made to the defender, and he and his customer arranged to change their system of dealing. It is impossible to deny upon the record and the documents before us that there was a

change made then; indeed, it is not disputed, but is a matter of averment by the pursuer himself. After December 1895 this change was made and acted upon for about five years, and instead of a continuous account monthly accounts were rendered, and, generally speaking, were settled. Sometimes there was a small balance at the settlement at the end of the month which was not paid but was carried on to the following month, and so on. Now, at the end of five years after the closing of the old account in December 1895 this action is brought for the recovery of the balance then undischarged. The question we have to consider is, whether the triennial prescription applies to this balance. In my opinion it does. If this creditor, who has not been attending to his own interests by either insisting on payment or taking a document, suffers upon a reference to the conscience of his debtor he has himself to blame for the consequences. I therefore am of opinion that the judgment of the Sheriffs should be upheld.

LORD TRAYNER—I concur. The triennial prescription begins to run from the last date of the account. If the account is a continuous account, no matter how long the period over which it extends, it is the last date in that account from which the triennial period must be reckoned, but if the account is stopped at a certain date (although the trading between the parties may continue) from that date the triennial prescription of the account begins to run. The question therefore here is, whether the account sued for is a continuous account, and I think it is not. In order to show this it is sufficient to refer to the averment of the pursuer in condescence 3, where he distinctly states that prior to 1895 there was a continuous account between him and the defender, which was then closed, and that thereafter a different arrangement was made to the effect that instead of adding what was afterwards supplied to the account which had been running, these future supplies should be charged in separate accounts, and separately settled. It is also recognised that the account was closed at December 1895 by the statement that while the defender was thereafter to pay for monthly supplies each month, he was to pay off the amount of the old account by instalments as he could. That this arrangement was made and acted on is abundantly clear from the receipted monthly accounts and other documents produced.

LORD LOW—I am of the same opinion. I agree with what your Lordships have said. I think it is impossible to get over the receipts which have been produced, and I have no doubt that the Sheriffs have taken a proper view of this case.

The LORD JUSTICE-CLERK and LORD MONCREIFF were absent.

The pursuer having asked the Court to allow him to lodge a minute referring the existence of the debt to the defenders' oath,

the Court pronounced the following interlocutor:—

“Recal *in hoc statu* the interlocutor of 20th December last in so far as it assolvies the defender from the conclusions of the action: Allow the pursuer to lodge a minute referring the debt sued for to the defender's oath, reserving meantime all objections to said minute: *Quoad ultra* affirm the interlocutors of 7th June and 20th July 1900, and find in fact and in law in terms of the interlocutor of 6th December 1900.

Counsel for the Pursuer and Appellant—Wilson, K.C.—Lamb. Agent—R. S. Sharpe, Solicitor.

Counsel for the Defender and Respondent—Salvesen, K.C.—Adamson. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, February 27.

SECOND DIVISION.

STEWART v. LAMONT.

Company—Winding-up—Voluntarily—Contributory—Rights of Contributors inter se—Fully Paid-up Shares—Companies Act 1862 (25 and 26 Vict. c. 89), secs. 85 and 133 (9) and (10).

Held, in the voluntary winding-up of a limited company, that after all debts and expenses had been paid, a shareholder who had been allotted fully paid up shares in consideration of his services as promoter of the company was entitled to have the liquidator ordained to make a call upon the holders of shares not fully paid up, so as to equalise the actual payments made on these shares with the amount credited as paid up on the paid-up shares, and thereafter to proceed in terms of the statute with the adjustment of the rights of the contributors among themselves.

Paterson v. M'Farlane, March 2, 1875, 2 R. 490, followed.

In re Holyford Mining Company (1869), 1r. Law Rep. 3 Eq. 208, distinguished.

An agreement, dated 24th, 25th, and 26th January 1898, was entered into between Thomas Law Patterson, late manager to John Walker & Company, sugar refiners in Greenock, William James Stewart, produce broker, Glasgow, John Millar, drysalter in Glasgow, George Coats of Staneley, Paisley, and James Boyd, drysalter in Glasgow, therein termed the First Syndicate, of the first part, the said Thomas Law Patterson of the second part, the said William James Stewart of the third part, the said John Millar of the fourth part, the said George Coats of the fifth part, the said James Boyd of the sixth part, Quinton Hogg, West India merchant in London, of the seventh part, and Andrew Lawrie Macfie of Fairrie & Company, Limited, sugar

refiners in Liverpool, of the eighth part, and James Mackenzie, solicitor in Glasgow, as trustee and on behalf of the Syndicate therein termed the Limited Syndicate, of the ninth part. The agreement was filed with the Registrar of Joint-Stock Companies on 28th January 1898.

In the agreement it was narrated that the First Syndicate had incurred an expense amounting to £700 in promoting and developing a scheme for establishing a joint-stock company to be called the Washington State Sugar Company, Limited, for the purpose of acquiring leases of certain areas of land extending in all to 3000 acres or thereby at Waverley, Washington, U.S.A., which the said William James Stewart on behalf of the First Syndicate had obtained the offer of securing at nominal rents upon a sugar factory being established there by the influence of the First Syndicate, and that the said William James Stewart had also obtained promises of subscriptions for capital in the proposed company in Washington State to the amount of £30,000 or thereby, and in the United Kingdom to the amount of £25,000 or thereby, and in order to further develop the said scheme and promote the said company it had been found expedient that a new syndicate with limited liability should be formed on the terms therein specified. The agreement then provided (1) that the parties thereto should take the necessary steps for registering the limited syndicate, under the name of the *Scoto-American Sugar Syndicate, Limited*, with a capital of £3000 divided into 3000 shares of £1 each; that each of the six parties to the agreement, other than William James Stewart, should subscribe for 400 shares of £1 each, and William James Stewart for one share, and the remaining 599 shares should be issued as fully paid-up to William James Stewart in consideration of his services in maturing and developing the scheme. The sum of 5s. per share was to be payable on each of the said shares on application and 5s. per share on allotment, and the balance was to be subject to such calls as might be resolved upon at general meetings of the syndicate from time to time.

The agreement further provided (3) that the articles of association of the Limited Syndicate should provide (a) that the shares held by each member of the syndicate should not be transferable; and (b) that all questions at meetings of the Limited Syndicate were to be decided by the votes of the majority of the members present, or represented by proxy at such meetings, each member having one vote whatever number of shares he might hold; (4) that William James Stewart was to be appointed manager and secretary to the Limited Syndicate upon certain terms of remuneration; (5) that when the arrangements were fully matured the Limited Syndicate should take the necessary steps to form a company for the purpose of taking over the concessions and establishing a sugar factory on the basis of the Limited Syndicate receiving a certain number of fully-paid shares in