sweeping or fishing averment which is not such as this Court can entertain. If they knew who were treated, they ought to have given their names and averred that they voted.

Lord Mure—I concur with your Lordship. The first objection must be dealt with on its merits. The returning officer has no power to deal with the qualification of the candidate. I have no doubt that it is bad, and on the other two objections I agree with the Lord Ordinary in thinking that they should be repelled.

The Court adhered.

Counsel for Pursuers—Scott—Strachan. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defenders—Balfour—R. V. Campbell. Agents—Maitland & Lyon. W.S.

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*Wednesday, May* 17.

## FIRST DIVISION.

[Lord Young, Ordinary.

### THE CLIPPENS SHALE OIL COMPANY AND OTHERS *v.* JAMES SCOTT AND THOMAS INGLIS SCOTT.

*Partnership—Declarator—Relevancy—Parole Proof.*

A entered into a contract of copartnery with two others. It was averred that his father B advanced the capital and managed the concern, and that A took no part in the business.—*Held* that in a question *inter socios* such averments were irrelevant to found an action of declarator of partnership against B.

*Opinions* that parole proof to set aside a contract of copartnery is only competent where there is an averment of a new agreement followed by actings that can be distinctly connected therewith.

This was action of declarator of partnership brought by the Clippens Shale Oil Company and two of the then partners in that company against James Scott and Thomas Inglis Scott. The company was formed by deed of copartnery dated 18th and 22d July 1871 between Robert Binning and John Binning, who were the pursuers in this action, and Thomas Inglis Scott, who was called as a defender for his interest. His father, James Scott, the defender in this action, was a party to this contract only as the legal guardian of his son.

The pursuers averred that James Scott, the father, entered on the management of the business of the Company, superintended their manufacturing operations, and entirely managed their financial transactions, supervising payment of accounts, arranging with bankers for payment of monies required, and prescribing the manner in which the books of the company were to be kept. It was also averred that he extended the works largely, and took a leading part in the selection of officials and servants. The leading averment was in the 2d article of the condescendence—that "Although Thomas Inglis Scott was the ostensible partner of the company, the defender James Scott was really the party who became partner, and implemented the obligations nominally undertaken by Thomas Inglis Scott." On the suggestion of the Lord Ordinary the following minute of amendment of this article was prepared:—"At the time when the contract was signed the pursuers believed that Thomas Inglis Scott was to be their partner, but immediately thereafter they discovered, that although Thomas Inglis Scott was the ostensible partner of the company, the defender James Scott was really the party who became the partner and implemented the obligations nominally undertaken by Thomas Inglis Scott. As soon as the contract was entered into Thomas Inglis Scott left for the Continent, and did not enter on the duties which devolved upon him under the contract, or proceed to qualify himself for assuming and taking charge of the works, as he was by the express terms of the contract bound to do. James Scott thereupon at once took up the position of being a partner in lieu of his son, and he was accepted as such by Robert Binning and John Binning, and they along with him, as copartners, have all along carried on the business of the Clippens Shale Oil Company upon the footing (as was the fact) that he was a partner of the company under the contract." For the reasons stated by the Lord Ordinary in his opinion he did not allow this amendment to be put in.

Both defenders pleaded that the averments of the pursuer were irrelevant, and the Lord Ordinary pronounced an interlocutor sustaining that plea and dismissing the action.

"*Opinion.*—The purpose of the action is to have it declared that the defender James Scott is, and since 22d July 1871 has been, a partner along with the pursuers under a contract of copartnery of that date. The contract, which is in the form of a probative deed, bears that the partners are the pursuers and Thomas Inglis Scott, and that the partnership shall endure, on the terms specified as agreed to, till 1st August 1885, being held to have commenced on 15th May 1871. As the effect of the decree of declarator concluded for would be to displace T. I. Scott from his position as a partner under the deed, and to put the defender in his place, he is called, and has appeared, as a party for his interest.

"In support of the action the pursuers aver (cond. 2) that 'although T. I. Scott was the ostensible partner of the company, the defender James Scott was really the party who became the partner and implemented the obligations nominally undertaken by T. I. Scott.' This, which is the leading averment, is followed by detailed averments regarding the defender's conduct in relation to the business of the company, from which it appears that he took an active charge of the business, so active indeed that, being also injudicious, the concern has in consequence been involved in great pecuniary difficulties.

"The pursuers asked a proof of their averments, which the defender opposed on the plea of irrelevancy. The question for decision accordingly is, whether or not the pursuers' averments are such as ought to be admitted to proof.

"The pursuers argued that a contract of copartnership was proveable by parole, and might even be inferred from the conduct of parties. The defenders, conceding this as a true general proposition, contended that it was here inapplicable because of the deed of partnership, which

the pursuers were not at liberty to discredit and contradict by parole evidence, to the effect of shewing that while in terms contracting with T. I. Scott, and he with them, the reality was otherwise, the contract being in truth between them and the defender, and that the name of T. I. Scott was inserted in the deed as a deception for some purpose unexplained. The counsel for the pursuers contended that the deed might be so contradicted, and I do not see how the conclusion whereby it is asked that the defender shall be declared a partner under it, and to have been so from its date, could with reference to the averments, which are to the effect that the parties had so intended and agreed from the first, be otherwise maintained.

"I am clearly of opinion that the deed of partnership cannot be so contradicted. It may be, and probably is, true that the defender meant to secure to himself or his son (it don't signify which) such benefits as the partnership might yield, without exposing himself to the corresponding risk, and that with this view he induced the pursuers to take his son, who was a minor, and probably dependent on him, as their partner under the deed, and at the same time to allow him (the father) to take a part in the management of the business. The device would, of course, be unavailing to save the defender from liability to third parties dealing with the company in the belief, justified by his conduct, that he was a partner; but the question is very different when it occurs with the pursuers, who agreed to take the son as their partner, and that for whatever reason, good or bad, but agreed to by them as satisfactory, the defender should not be their partner. This is the effect of the deed which they executed, and it is plain that the meaning and intention of taking the minor son, and not his father, as the partner in the concern, was to save the father from liability as in a question with themselves, for it could not affect strangers. It was for them to consider whether they would agree to this or not, but having agreed to it they cannot now repudiate it or prove by parole an agreement that the father was to be bound to them just as if his name, and not his son's, had been inserted in the deed.

"I have said that the defender would be liable to third parties on proof that he so acted in the business as to warrant the belief that he was a partner. Such liability does not, like liability *inter socios*, rest on the fact of partnership, but on conduct which induces reasonable belief, although it may be contrary to the fact. *Inter socios* partnership is always a pure question of contract, while liability as a partner to strangers may be, and frequently is, irrespective of any contract constituting partnership, and may exist notwithstanding of the clearest evidence that the party liable never was, or had long ceased to be, a partner.

"I suggested in the course of the discussion that the case might stand very differently on an averment that, subsequent to the execution of a deed of partnership, a verbal agreement had been made whereby T. I. Scott had retired from the company and the defender had agreed to become, and had been accepted as, a partner in his room and place, and that this subsequent agreement had been acted upon. The pursuer's counsel asked time to inquire and consider whether he could propose an amendment of the record to this effect. The result is the minute No. 9 of process. I cannot, however, regard it as an amendment to the effect suggested, or other than a statement in somewhat different, but not more distinct, language of the case presented by the record, viz., that while the pursuers by deed contracted with the defender's son they verbally contracted with the defender himself, who, on parole proof to that effect, should be held liable just as if the written contract had been with him. I do not therefore see fit to allow the amendment, and on the whole matter must feel constrained to sustain the plea of irrelevancy, and dismiss the action."

The pursuers reclaimed, and were allowed by the Court to put in the foregoing minute of amendment on payment of £5, 5s. of expenses.

Argued for them—It was perfectly competent to prove verbal alterations on a written contract if followed by *rei interventus*, *prout de jure*. That was the principle of the *Bargaddie* case (*Wark* v. *Bargaddie Coal Company*, 6th March 1856, 18 D. 772; reversed in H. of L. 15th March 1859, 21 D. p. 1.) and of *Sutherland* v. *The Montrose Shipping Company*, 22 D. 665. Now, the actings here averred were of such a nature that they could only be explained by referring them to some verbal agreement. Besides, it was sufficiently averred in the statement that James Scott was accepted as a partner by the pursuers. The judgment of the Lord Ordinary proceeded on the assumption that the pursuers wished to lead proof to contradict the written contract. That was not so. James Scott was not individually interested in the contract, and was no party to it. Such facts and circumstances as were here averred would certainly be sufficient in the ordinary case to establish a partnership, and it was only on the assumption that the pursuers wished to destroy the written contract that the Lord Ordinary's judgment was founded; but no alteration of the contract was proposed, and therefore this was a stronger case than either of those quoted; proof therefore *prout de jure* was competent.

The defenders were not called upon.

At advising—

Lord President—The summons in this case concludes that it should be found and declared that the defender James Scott is at present, and has been since 22d July 1871, a partner along with the pursuers—that is, Robert Binning and John Binning—in the business carried on at Clippens, in Renfrewshire, under the name of the Clippens Shale Oil Company, under contract of copartnery dated 18th and 22d July 1871, and bearing to be between the pursuers and the said Thomas Inglis Scott. There is no doubt about the meaning of that conclusion—it is that the defender James Scott is a partner with the Messrs Binning in the Clippens Shale Company, that these three are the sole partners, and that Thomas is not a partner. Now, I do not say that, notwithstanding the fact that Thomas Inglis Scott is a partner and James is not, it may not be competent to prove by transactions between the parties that the one has been substituted for the other, which is the statement of fact averred here, and sought to be proved as matter of fact; but the question is, how this has

been brought about as averred on the record. We must look at the written contract of copartnery, which is the foundation of the pursuers' case, and see precisely what is the relation of parties as there defined.

It is a contract between Robert Binning and John Binning as first and second parties, and Thomas Inglis Scott, with the special advice and consent of James Scott, as his curator and administrator-in-law, as third party. The capital is to consist of £30,000, to be made up and subscribed thus—The first and second parties are to make over to the copartnery the retorts, plant, and buildings belonging to them, valued at the sum of £3487, 1s. 10d., and in respect thereof there is to be carried to the credit of the second party, at the first party's request, the sum of £2000, which shall be held to be the said second party's contribution at the outset to the capital of the company, and the balance of the said sum of £3487, 1s. 10d., viz., £1487, 1s. 10d., shall be carried to the credit of the first party, not as a contribution to capital, but as a debt due to him by the copartnery, to be liquidated as the partners may hereafter arrange. The third party shall contribute as his share of the capital the sum of £10,000, which shall be contributed from time to time according to the requirements of the business. The balance of capital is to be made up by the accumulation of profits to the credit of each partner in a certain stipulated manner.

The result is that the Binnings are to contribute the plant, while Thomas Inglis Scott contributes £10,000 in cash. Then the profits are to be divided in the following proportion:—7s. 6d. per pound to the first party, 2s. 6d. to the second, and 10s. to the third, and the parties are bound to bear losses in the same proportion. Then the duties of parties are assigned to them, and the various provisions usual in a contract of this kind are inserted.

It appears that Thomas was a minor, and his father became a party to this contract as his legal guardian, but he stipulates for certain rights, and undertakes certain obligations in events specified in the 9th article of this contract of copartnery, and it is very important to notice what these are.

Of course this sum of £10,000 was advanced by Thomas Scott's father, and there is nothing suspicious about that. He desires accordingly to look after it in the event of any mishap overtaking his son. He is therefore, in the event of the decease or insolvency of his son, to be entitled to come into the copartnery himself, or to put in any other of his sons, and he obliges himself in either of these events to come in himself or to put in another son. All this is most rational and natural, and nothing could be more definite and distinct than what was here contracted.

But it is said that under this contract Thomas Inglis Scott never was a partner. What is stated is—"At the time when the contract was signed the pursuers believed that Thomas Inglis Scott was to be their partner; but immediately thereafter they discovered that, although Thomas Inglis Scott was the ostensible partner of the company, the defender James Scott was really the party who became the partner and implemented the obligations nominally undertaken by Thomas Inglis Scott." Now, if this means anything, it means that by the written agreement his father became the partner, and that this discovery was made when the contract was signed. As a matter of fact it is nonsense; it is a contradiction in terms to say so. Thomas, not James, is the partner. But it is further said, that "as soon as the contract was entered into, Thomas Inglis Scott left for the Continent, and did not enter on the duties which devolved upon him under the contract, or proceed to qualify himself for assuming and taking charge of the works, as he was by the express terms of the contract bound to do." As I read the contract, his duty was to attend to the counting-house, and nothing more. But let that pass. Here is an allegation of failure in duty; but it has not been maintained that by his absence he forfeited his position. But further, the pursuers say—"James Scott thereupon at once took up the position of being a partner in lieu of his son, and he was accepted as such by Robert Binning and John Binning, and they along with him have all along carried on the business of the Clippens Shale Oil Company." Here it is averred that James acted as a partner, that the Binnings accepted him as such, and that these three acted on the footing that he had become a partner under the contract, and that he had taken his son's place because his son had gone abroad. But the fact that he acted as a partner does not make him so in a question *inter socios*. And that is all that is averred, except what we find within brackets (as was the fact), but that is only averred as a fact discovered on signing the contract.

I never read anything so irrelevant to make out a ground for the declarator concluded for. If it had been averred that in consequence of his son's absence, or any other like cause, it was arranged that James should take his place, as he would have been entitled and bound to do in the event of his son's decease or insolvency, and that he did take his place, that might be competently proved by parole evidence. But that is not averred. There is no agreement averred to deprive Thomas of his rights, and to give all these rights to his father. Of such an agreement there is not even a hint, and in the absence of such an agreement all that is here averred goes for nothing. The facts seem to come to this—that Thomas, a young man, left the country, for what reason does not appear. His father, who was, we may fairly presume, a man of experience in such matters, looked after the business, in which he had a substantial interest, for he had advanced £10,000 for his son. That was not singular, nor was it strange that the other partners permitted him to do so. That explanation accounts for everything without the figment of a parole agreement.

On the whole, then, I think that the Lord Ordinary's judgment is sound, and ought to be affirmed.

LORD DEAS—The agreement here bears to be between the two Binnings and Thomas Inglis Scott, and nobody else. There has been a great deal of argument to the effect that proof might overcome the terms of this agreement; but that argument lacks a foundation. In the first place, there is no averment of a written agreement to

any other effect, nor, in the second place, of any parole agreement, nor, in the third place, of any facts and circumstances sufficient to set it aside. In the absence of these it is useless to discuss questions that might arise from them. When the case was before the Lord Ordinary this was quite clear, for he refused to admit the amendment No. 9 of process. We have admitted it. But that is a mere question of procedure, and does not mean that its averments are relevant; and I agree with the Lord Ordinary that its averments are irrelevant. I express no opinion as to the relevancy of proof of certain averments that might have been made, as the Lord Ordinary has done, but I find no such averments here.

Lord Ardmillan—The pursuers in this case are Messrs Robert and John Binning; the defenders are Messrs James Scott and Thomas Inglis Scott. The contract of copartnery is dated 18th and 22d July 1871, and on the face of it there are three partners, Robert Binning, John Binning, and Thomas Inglis Scott. James Scott appears in it as the legal guardian of his son Thomas Inglis Scott, taking certain responsibilities and reserving certain rights. The object of this action is to substitute James for Thomas Scott, for there is no ground for making four partners in the business. I cannot get over the position of Thomas Scott. What has he done to destroy his right to the partnership? I do not doubt that it might be proved that his father had come in his place if there had been an averment of an agreement to that effect with Thomas as a party to it, and that followed by definite actings referable to it; but such an agreement must have been clearly connected with the actings, and all the parties must have taken part in such an agreement. Now, it is not alleged that Thomas was a party to anything. What he did, according to the most favourable reading of the facts for the pursuers, was to dispossess himself of his partnership by his absence. But this amounts to nothing relevant to infer that he had been turned out in favour of his father. He could not have been turned out except on the footing that his father took his place, and that is not alleged. It must be remembered that the conclusion of the summons is to turn Thomas out of the partnership and put in James. I concur with your Lordship in thinking that the Lord Ordinary's judgment should be affirmed.

Lord Mure concurred.

The Court adhered.

Counsel for Pursuers—Asher—Young. Agents—Campbell & Smith, S.S.C.

Counsel for Defender (James Scott)—Watson—Mackintosh. Agents—Webster & Will, S.S.C.

Counsel for Defender (Thomas Inglis Scott)—Balfour—Lorimer. Agents—Hamilton, Kinnear, & Beatson, W.S.

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*Thursday, May* 18.

## SECOND DIVISION.

[Lord Shand, Ordinary.

### THE EDINBURGH STREET TRAMWAYS CO. *v.* TORBAIN.

*Company—Edinburgh Street Tramways Acts*, 1871, 1873, 1874—*Statutory Agreement—Fares.*

The Edinburgh Tramways Company were bound by their original Act of 1871 to carry passengers at one penny per mile. A statute in 1874 permitted them to establish omnibuses on certain sections in place of laying down lines, and to charge "twopence per mile for first-class passengers on those routes and any tramway routes worked in connection therewith."—*Held* that this provision did not apply to journeys performed in cars only.

*Observed* (*per* Lord Ormidale) that where where there was ambiguity such statutes must be construed for the public and against those who enjoyed the concession.

This was an action at the instance of the Edinburgh Street Tramways Company against Alexander Torbain, Leith. The summons concluded for declarator that under the Act 37 and 38 Vict. cap. 68, § 4, the pursuers were entitled to demand and take in respect of passengers carried in or by their cars between Leith and the General Post Office, Edinburgh, and *vice versa*, a sum not exceeding twopence per mile for first-class passengers; and also for payment of one penny by the defender, as the difference between his payment and the threepence demanded by the Tramways Company as the fare from Leith to the General Post Office.

The pursuers were incorporated by an Act in 1871, and obtained an Act in 1873 giving them a year more to complete some of their lines. In 1874 they obtained another Act (37 and 38 Vict. cap. 68) entituled "An Act to extend the time for the widening and improvement of the North Bridge by the Corporation of Edinburgh, under an agreement confirmed by the Edinburgh Tramways Act 1871, and to authorise the Edinburgh Street Tramways Company to relinquish the construction of certain of their authorised tramways, and for other purposes." The 4th section of this Act, on which the present action depended, was as follows:—"The Company shall (by themselves or others) if and when required by the Local Authority of Edinburgh, by one month's notice in writing to that effect, provide good and sufficient conveyance by means of omnibuses between such point in Princes Street or Waterloo Place as the Local Authority may from time to time determine, and the bridge across the Water of Leith at Stockbridge, which omnibuses shall not be run less frequently than four times each way every hour, between the hours of nine in the forenoon and nine in the afternoon of each lawful day; and shall also run omnibuses as aforesaid between the Royal Institution in Princes Street, Edinburgh, or such other place as the Local Authority of Edinburgh may from time to time determine, and such point in the place known as or called