Lord Craighill—I am quite content with the interlocutor your Lordship has proposed. It seems to me to be consistent with the opinion I have already delivered, and to be entirely consistent with the circumstances of the case, and not to be to any extent inconsistent with the provisions of the Judicature Act. I looked into that matter with reference to the judgment that might come to be proposed. That was the conclusion to which I came, and which I still entertain.

Lord Justice-Clerk—Of course we have had this question fully before us. It was raised necessarily by the very great division of opinion among the Judges on the bench, and the very close division that took place. The result is, that while there is a great difference of opinion on both points—first, as to the right of property, and secondly, as to the infringement—a majority are of opinion that the interdict ought to be recalled. That interdict was the object of the action, and the sole view that the pursuer maintained. It seems to me that we have no alternative but to give effect to those opinions. In regard to those findings in fact, I agree with Lord Young's views substantially, that infringement is not a question of fact. It is necessarily a question that proceeds upon comparison—not a question of fact, but a question of inference from the two things to be compared, and therefore a question of legal right.

On the whole matter I think the judgment I have proposed is the only one we can with propriety pronounce.

The Court pronounced judgment in the form suggested by the Lord Justice-Clerk.

Counsel for Pursuer — R. V. Campbell — Darling. Agents—W. & J. Burness, W.S.

Counsel for Defender—Lorimer. Agent—John Latta, S.S.C.

Wednesday, October 21.

SECOND DIVISION.

[Sheriff of the Lothians.

WILSON *v.* THE NEWHAVEN CO-OPERATIVE STORE COMPANY.

Sheriff—Process—Summons—Declarator—Competency—Sheriff Courts (Scotland) Act 1877 (40 *and* 41 *Vict. c.* 50), *sec.* 8, *sub-sec.* 2.

A person alleging himself to be a partner in a company brought an action against it in a Sheriff Court to have it declared that he was, and had been since a certain date, owner of two shares in it; and (2) for payment of certain sums as profits on these shares. *Held* that the declaratory conclusion was unnecessary, and that it being withdrawn, the action was competent before the Sheriff.

Thomas Wilson, fisherman, Newhaven, presented a petition in the Sheriff Court of the Lothians against the Co-operative Store Company, Newhaven, and certain individuals, partners or members of the company, and also against John Linton (Combe), salesman of the company, praying for a decree "finding and declaring that the pursuer was on or about 1st December 1883, has since been, and is still a partner or member of the said company, and that the property and assets thereof at and since said date belonged and belong to the pursuer to the extent of two shares." There were also petitory conclusions for payment to the pursuer by the defenders of two sums of £6 and £8, and for expenses.

The pursuer averred that he was an original member of the company (which was established in 1857 but was not registered or incorporated under any Act of Parliament) and was the owner of two shares on which five shillings a share was paid up, that in the beginning of 1883 he was induced by the defender John Linton, who made repeated representations to him that the company was not then in a prosperous condition financially, to transfer his shares to the said John Linton for the sum of 10s., which he (Linton) represented to be the value of them. He further averred that the representations of Linton with regard to the financial condition of the company were false and fraudulent, and made for the purpose of inducing the pursuer to sell his shares at a nominal value in pursuance of a scheme of Linton for acquiring the shares of the company for himself and his relatives at a nominal value; that subsequent to the transfer the company had paid two dividends or bonuses of £3 and £4 respectively; that having been thus induced to part with his shares by fraud and circumvention, he claimed to be still a shareholder of the company, and entitled to participate in these dividends, payment of which was refused to him by the committee of management.

The defence was a denial of the pursuer's averments of the reasons for selling his shares, and a plea that having by the transfer of his shares discharged all his claims against the company he was not entitled to decree under the declaratory conclusion of the petition.

The Sheriff-Substitute (Rutherfurd) found that the action was incompetent in the Sheriff Court, and therefore dismissed it.

"*Note.*—Actions of declarator are competent in the Sheriff Court only in so far as they are expressly authorised by statute. It is true that actions containing declaratory and rescissory conclusions are frequently sustained in this Court, where these conclusions are merely introductory or ancillary to the leading conclusions of the libel, but in the present instance the leading conclusion is to have it found and declared that the pursuer was on 1st December 1883, has since been, and is still a partner of the defenders' company. The other conclusions are merely subordinate to this, and are consequent upon the pursuer's succeeding in vindicating the right which he seeks to have declared. The action is not brought in terms of the Sheriff Courts Act of 1877, section 8, sub-section (2), for the purpose of determining a question relating to property in moveables. It is a declarator of partnership, and therefore appears to the Sheriff-Substitute to be incompetent in this Court."

The pursuer appealed to the Sheriff (Davidson), who dismissed the appeal.

"*Note.*—The main declarator asked is, that the pursuer should be declared to be a partner and member of the company. It is necessary that the Court should declare that before anything else

required by the pursuer could be done. It seems to the Sheriff this is not, properly speaking, such a declarator as is covered by the 8th section of the Act 1877."

The pursuer appealed to the Court of Session, and argued—This was a declarator for the purpose of determining a question relating to property in moveables, and was therefore within section 8 of the Act. But even if the declaratory conclusion were incompetent, the Sheriff had done wrong in dismissing the whole action, for it was competent *quoad* the other conclusions—*Moroney* v. *Muir*, November 5, 1867, 6 Macph. 7.

The defenders replied—Unless the pursuer could establish his declaratory conclusion he had no title to sue, and the whole action fell to the ground. The pursuer was a mere member of the public. Before he could sue the company as a partner he must establish the fact of his partnership, and this could only be done by declarator—*Fraser* v. *Hair*, June 23, 1848, 10 D. 1402; Clark on Partnership, i. 396.

The Court being of opinion that the declaratory conclusion of the petition was not necessary, allowed the pursuer to put in a minute withdrawing that conclusion, and without delivering opinions remitted the case back to the Sheriff to proceed.

Counsel for Pursuer (Appellant) — Thorburn. Agents—Miller & Murray, S.S.C.

Counsel for Defenders (Respondents)—D.-F. Balfour, Q.C. — M'Kechnie. Agents — Irons, Roberts, & Lewis, S.S.C.

Saturday, October 24.

FIRST DIVISION.

[Lord Trayner, Ordinary.

BARONESS WILLOUGHBY DE ERESBY *v.* CALLANDER AND OBAN RAILWAY COMPANY.

Entail—Railway—Expenses of Application to Uplift and Apply Consigned Money—Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 9), *secs.* 67, 79.

In a petition under the Entail Acts it was found that an heiress of entail had expended certain sums on permanent improvements on the entailed estates. In a subsequent petition she prayed the Court for leave to uplift and apply money consigned in terms of sec. 67 of the Lands Clauses Consolidation Act 1845, by a railway company, all in terms of sec. 26 of the Entail Amendment Act 1848. She further prayed the Court to find the railway company liable in the expenses of the application, all in terms of sec. 79 of the Lands Clauses Consolidation Act. The Junior Lord Ordinary ordered intimation, advertisement, and service on the three next heirs of entail in terms of the prayer of the petition, and subsequently found the railway company liable in the whole expenses of the application. In a reclaiming-note, *held* (1) that the petitioner was entitled to the expenses of presenting the application, and of obtaining warrant for uplifting the money; but (2) (*rev.* judgment of Lord Trayner) that no advertisement of the petition or service thereof on the next heirs of entail being required by the Lands Clauses Consolidation Act, the expenses in connection therewith fell to be borne by the petitioner and not by the promoters of the undertaking.

The Callander and Oban Railway Company having taken a portion of the entailed estate of Drummond and others in the county of Perth, belonging to the Baroness Willoughby de Eresby, and held by her under a deed of entail dated and recorded in November 1874 for the purposes of their undertaking, the purchase money therefor was fixed by arbitration, under the provisions of the Lands Clauses Consolidation (Scotland) Act 1845, on 14th November 1883, at the sum of £77, 6s. 7d., which sum was consigned in bank in terms of that Act.

Subsequently the railway company took another portion of the estate for the same purposes, and the purchase money therefor was in like manner fixed by arbitration at £207, and that sum was also consigned in bank.

On 28th March 1876 Lady Willoughby de Eresby presented a petition to the Court for authority to uplift a sum amounting to £2182, 19s. 7d. which had been consigned by the Callander and Oban Railway Company, and on 14th July 1876 the Junior Lord Ordinary found that the petitioner had expended the sum of £2835, 13s. 11d. on permanent improvements on the entailed estates, and granted warrant to the petitioner to uplift the said sum of £2182, 19s. 7d. in repayment *pro tanto* of the improvement expenditure, leaving a balance expended on improvements of £652, 14s. 4d.

On 19th March 1879 Lady Willoughby de Eresby presented another application to uplift a sum of £406, 7s. 7d. consigned by the City of Glasgow Water Commissioners, and on 19th July 1879 the Junior Lord Ordinary granted warrant to uplift the said sum and apply it in repayment *pro tanto* of the said balance of £652, 14s. 4d., leaving a balance expended on improvements on the estates of £246, 6s. 9d.

On 27th February 1885 Lady Willoughby de Eresby presented this petition to the Court setting forth the above facts.

The petition further stated that in these circumstances she was desirous of obtaining the authority of the Court to uplift and apply the foresaid consigned sums of £77, 6s. 7d. and £207 in repayment of the balance of £246, 6s. 9d., that she was also desirous of uplifting the balance of the consigned sums, amounting to £37, 19s. 10d., which remained after repayment of the sum so found to have been expended, such balance being less than £200, and of acquiring the same for her own use and behoof; and that the petition was presented in terms of the Lands Clauses Consolidation (Scotland) Act 1845, and the Statutes 11 and 12 Vict. cap. 36, 16 and 17 Vict. cap. 94, 31 and 32 Vict. cap. 84, 38 and 39 Vict. cap. 61, and 45 and 46 Vict. cap. 53, and relative Acts of Sederunt. The names and designations of the three next heirs entitled to succeed after her to the estates were set forth in the petition. The petition set forth sec. 26 of the Entail Amendment Act 1848, and sec. 79 of the Lands Clauses Consolidation (Scotland) Act 1845.