The defenders appealed to the Court of Session.

Argued for the appellants—The law put no restraint upon people using their own names to form a firm name, although there might be another firm of the same name in existence carrying on a similar business, provided there was no suspicion of fraud in the transaction. Everything here was done in *bona fide*. Besides, James Smith had renounced any right to the name of "Smith & M'Bride," which had become extinct. It could not be argued that this combination of names was never to be revived in Greenock without James Smith's consent.—*Burgess* v. *Burgess*, March 17, 1853, 3 De G. M. & G. 896.

Argued for the respondent—He had bought the goodwill of the business of Smith & M'Bride, and with it the sole right to use the firm's name. He had continued to use the articles which he had bought, and which were stamped with the name "Smith & M'Bride." He received letters so addressed. The name had not become extinct. M'Bride & William Smith had gone out of their way to put the junior partner's name first when M'Kelvie retired, in order to derive any benefit which might arise from the use of a name well known in the trade. His proposals had been most reasonable, and as they had not been acceded to he was forced to apply for the interdict to which he was entitled.—*Churton* v. *Douglas*, March 17, 1859, Johnson's Chan. Reps. 174; *Levy* v. *Walker*, February 5, 1879, 10 Ch. Div. 436.

At advising—

LORD YOUNG—This is an application by a party who purchased a going soda-water making business, with its goodwill and stock-in-trade, to have the party from whom he made the purchase and another, now associated with him in a similar business, from adopting the name of the business which with the goodwill was so purchased. The Sheriff-Substitute, after finding the facts, finds in law that "the defenders are not entitled to assume and use the name of the firm whose business and goodwill the pursuer purchased from the defender M'Bride," and grants interdict accordingly. I think that that judgment is right in fact—indeed the facts are not disputed—and in law. It would require a strong case to restrain any man from carrying on a business in his own name, but here a business, which had been carried on apparently successfully under the firm of Smith & M'Bride, was purchased by the senior partner Smith, with admittedly the exclusive right to use the firm's name, while M'Bride, from whom it was bought, associated two new partners with himself—one Smith, a brother of his late partner, to whom he had sold the business, and a new man called M'Kelvie—and then set up a similar business under the title of "M'Bride, Smith, & M'Kelvie." Whether this was a proper proceeding in the circumstances need not be inquired into, but he was clearly within his legal rights. This new firm does not seem to have answered, and M'Kelvie retired. M'Bride & Smith were thus left alone and they suddenly in September 1887 inverted their firm's names, putting the junior partner first and the senior partner second, which brought the firm exactly to what the old one had been, which had been sold just three years before. Both Sheriffs find that the object—and the only object—of thus inverting the names was to obtain any benefit which might be derived from the name of the old firm, and no other explanation has been offered to the repeated questions of this Court. It is the obvious reason which occurs to anyone, and which was prominently and almost unpleasantly assigned to it by both Sheriffs some months ago, and which has not yet found any other explanation.

I am therefore of opinion that the judgments of the Sheriffs are in the circumstances right, and that we ought to affirm them, and dismiss the appeal with expenses.

LORD RUTHERFURD CLARK—I agree.

LORD LEE—It is well settled in law that no man who sells a business and its goodwill is entitled to do anything to derogate from his own grant to the purchaser. There is no ground here for holding that the purchaser had renounced any right he had to the firm's name. I therefore concur.

Counsel for the Defenders (Appellants)—M'Lennan. Agents—Miller & Murray, S.S.C.

Counsel for the Pursuer (Respondent)—Shaw—Graham Stewart. Agents—Emslie & Guthrie, S.S.C.

Tuesday, October 30.

FIRST DIVISION.

MARSHALL AND OTHERS *v.* MELVILLE'S TRUSTEES.

Succession — Vesting — Interposed Liferent — Clause of Survivorship.

A testator directed his trustees to convey his heritage to his two daughters equally between them in liferent, and to certain grandchildren named, and to grandchildren *nascituri*, "equally among them, share and share alike, any of whom failing the share or shares of the deceaser or deceasers to the survivors equally among them, share and share alike, in fee."

Held that the right to their shares did not vest in the grandchildren till the period of distribution, which was the death of each liferenter as to the portion liferented by her.

David Melville, merchant in Greenock, died on 30th September 1845, leaving a trust-disposition and settlement and two codicils, dated respectively 8th December 1836, 30th November 1838, and 11th April 1843. By the said trust-disposition and settlement he disponed to certain trustees therein mentioned his whole estate, moveable and heritable, in trust for the ends, uses, and purposes therein mentioned. After providing for the disposal of his moveable estate he proceeded as follows:—"In the seventh place, that my said trustees, acceptors or acceptor, survivors or survivor of them, the major number accepting and surviving being a quorum, shall, so soon as they see fit, give, grant, and dispone to and in favour of the said Mrs Martha Melville or Simpson and Mrs Catherine Melville or King, equally between

them in liferent, for their liferent use respectively allenarly, and in the event of any one of them deceasing without leaving lawful issue of her body, the share of deceased to be given and disponed and to belong to the daughter surviving in liferent, for her liferent use allenarly, but excluding the *jus mariti* of her present husband, or any future husband she may marry; and to the said Catherine Melville Simpson and John King, my grandchildren lawfully born, and other grandchildren to be lawfully born, by my said two daughters, of their present or any future marriage, equally among them, share and share alike, any of whom failing the share or shares of the deceased or deceasers to the survivors equally among them, share and share alike, my whole heritable subjects and estates before described in fee." The heritable estate of the deceased was situated partly in Greenock and partly in Helensburgh. The above direction as to the disposal of his heritable estate was subsequently revoked as to his Helensburgh properties by the second codicil to his will, but remained in force as to the Greenock properties. The testator also by the same deed appointed a free yearly allowance to be made to his widow, which he subsequently increased by his first codicil. He was survived by his widow, who died in 1859, and by his daughters Mrs Simpson and Mrs King, who were his only children.

Mrs Simpson died on 1st December 1886, and Mrs King was living at the date when this case was presented to the Court.

Mrs Simpson's children were five in number. Two survived their mother, namely, Mrs Marshall and Mrs Fraser, two of the parties of the first part. The other three predeceased their mother, viz., (1) David Melville Simpson, who died 6th August 1882, intestate, leaving a widow and children. His eldest son was David Melville Simpson, one of the parties of the second part. (2) Alexander Simpson, who died in 1853, leaving no issue, and (3) John Simpson who died in April 1886, leaving a widow and two children. His only son was John Ewing Melville Simpson, born in July 1885, one of the parties of the first part. Under a general settlement executed by John Simpson his whole estate was conveyed to his widow Mrs M'Innes or Simpson, one of the parties of the first part.

Mrs King had two children. (1) David King, who died in 1863; and (2) John King, one of the parties of the second part.

A difference of opinion having arisen as to the disposal of these Greenock properties, a special case was presented to the Court to have the question determined. The point upon which doubt was entertained was as to what was to be done with the shares which Alexander Simpson, who died in 1853, and David King, who died in 1863, would have taken, had they survived the death of Mrs Simpson; and the decision of that question necessarily depended on whether at the time of their death they had a vested right in these shares or not.

The opinion of the Court was requested upon the following questions:—"(1) Did the fee of the said Greenock properties vest in the testator's grandchildren or their issue at the testator's death, or otherwise at a period prior to the deaths of the said Alexander Simpson in 1853, and David King in 1863? Or was vesting postponed till the death of his daughter Mrs Martha Melville or Simpson, or otherwise till a period subsequent to the deaths of Alexander Simpson in 1853, and David King in 1863? (2) Do the said Greenock properties fall to be divided into five equal shares, one of which is to be conveyed to each of Mrs Marshall, Mrs Fraser, John King, David Melville Simpson, and John Ewing Melville Simpson, or into seven equal shares, which fall to be conveyed as follows:—One share each to Mrs Marshall, Mrs Fraser, and John Ewing Melville Simpson, and two shares to be conveyed to each of John King and David Melville Simpson; or in what other proportions or shares do the same fall to be divided among the beneficiaries?"

The first parties maintained that the vesting of these properties did not take place until the death of the testator's daughter Mrs Simpson, or otherwise until a period subsequent to the deaths of Alexander Simpson in 1853 and David King in 1863, and that the properties should be divided into five equal shares, one of which should be conveyed to each of Mrs Marshall, Mrs Fraser, John King, David Melville Simpson, and John Ewing Melville Simpson. The necessary result of a survivorship clause where there was an interposed liferent was to postpone vesting till the period of distribution — *Young* v. *Robertson*, February 11, 1862, 4 Macq. 314 (*per* Lord Westbury, p. 319); *Snell* v. *White*, May 24, 1872, 10 Macph. 745; *M'Alpine* v. *Studholme, &c.*, May 20, 1883, 10 R. 837.

The parties of the second part maintained that vesting took place *a morte testatoris*, or otherwise at a period prior to the deaths of Alexander Simpson and David King, and that the properties should be divided into seven shares, one of which should be conveyed to each of the five persons named by the first parties, leaving two shares to be dealt with as follow — One to be conveyed to John King as heir of his deceased brother David King, and the other share to be conveyed to David Melville Simpson as heir of his father, who was heir of conquest to Alexander Simpson. "Any of whom failing" meant any of whom failing prior to the death of the testator. There were specialties in the case of *Young* v. *Robertson* distinguishing it from the present case, and consequently it was not decisive on the question of construction to be decided here. *Snell's* case, again, differed from the present as there was no interposition of a trust there. An interposed liferent did not necessarily defer vesting till the period of distribution. In many cases where there was a destination-over it had been held that vesting took place *a morte testatoris*.

At advising—

Lord President—The clause requiring construction in this settlement is that which occurs in the seventh head of the deed. In construing this clause I do not think we get much light from other portions of the deed, or even from the codicils. The testator contemplated generally that his two children should have the liferent of the properties mentioned, and that the fee should be equally divided among the children of his two daughters. There were two grandchildren alive at the time of the making of the testament—one daughter of Mrs Simpson and one son of Mrs

King—and they are mentioned in the deed as the parties to whom the fee of the properties was to be conveyed, but provision is also made for grandchildren *nascituri*, and grandchildren *nascituri* are obviously to be placed in the same position as those named in the deed. Now, the clause of the deed is expressed in this way—"My trustees shall, so soon as they see fit, give, grant, and dispone to and in favour of the said Mrs Martha Melville or Simpson and Mrs Catherine Melville or King, equally between them in liferent, for their liferent use respectively allenarly, and in the event of any one of them deceasing without leaving lawful issue of her body, the share of deceased to be given or disponed and to belong to the daughter surviving in liferent for her liferent use allenarly." Now, it may be as well to stop there for the purpose of disposing of this part of the clause. Mrs Simpson died in 1886, but she left issue, and therefore this part of the clause did not take effect—her liferent expired, and did not transmit to her sister—so that part of the clause is out of the case altogether. The clause then proceeds to exclude expressly the *jus mariti* of her husband, present or future, and thereafter goes on thus—"And to the said Catherine Melville Simpson and John King, my grandchildren lawfully born, and other grandchildren to be lawfully born, by my said two daughters of their present or any future marriage, equally among them, share and share alike, any of whom failing the share or shares of the deceaser or deceasers to the survivors equally among them, share and share alike, my whole heritable subjects and estates before described, in fee." Now, the one party contends that the fee vested *a morte testatoris*, and it is maintained that the effect of this is that all the grandchildren who were in existence at the testator's death, or who came into existence afterwards, are entitled equally to share in the fee of these properties. That, it appears to me, is to ignore altogether the most important part of the destination—the clause of survivorship—which is expressed in terms which I should have thought it was only possible to construe in one way. "Any of whom" necessarily means any one of the grandchildren, whether named in the deed or afterwards born. If any one fails, then his share goes to the survivors. It is needless to say that the grandchildren to be born could not very well fail by predeceasing the testator, therefore the clause of survivorship never applied to them, and it must be construed to apply to those parties who may fail at some other period than the death of the testator. And when vesting did not take place at the death of the testator, the next inquiry is what is the period of distribution? For the death of the testator not being the period of vesting it is very difficult to find any other period of vesting except the period of distribution, if we except some special cases where the testator has either expressly or by implication assigned a term of vesting other than the period of distribution. Such cases have occurred, but where no other period is suggested the term of vesting is either (1) the death of the testator, or (2) the period of distribution. There is no choice except between these two; it is a mere alternative which it is. Now, I consider that to take the death of the testator as the term of vesting is impossible and inconsistent with the undoubted nature and scope of the provision in the deed, and against the plain words of the clause.

The next thing accordingly to consider is what is the period of distribution, and there is no doubt that there might be more than one, as part of the estate may be distributed at one period and part at another. In the result there is one portion of the estate set free on the death of the first liferentrix. Mrs Simpson died in 1886, and that was the end of her liferent, as she left children, and therefore the right of her sister to her liferent by survivorship did not come into existence. Accordingly the liferent of Mrs King remained where it was, and the liferent of Mrs Simpson became extinct. There is nothing in the deed to prevent immediate distribution of the half of the estate liferented by Mrs Simpson, and accordingly by the necessary operation of the deed the period of distribution of that half of the estate is her death, and the period of the distribution of the other half is postponed because of Mrs King's liferent. So long as Mrs King is alive no distribution of the half liferented by her can take place, but the parties claiming are entitled to have a distribution in equal shares among them—that is, *per capita*—of one-half of the estate set free by the expiry of Mrs Simpson's liferent.

Lord Mure—I agree with what your Lordship has pointed out, that at the death of Mrs Simpson one half of the estate was set free for distribution in terms of the seventh purpose of the settlement, and that that is to go in equal shares to the grandchildren of the testator, being the families of his two daughters, and I think that our answer to the first question should show that the child of Mrs King takes a share of that half.

The question we have to deal with is a question of vesting, and such are always a little puzzling. I am inclined to think that there was a kind of vesting *a morte testatoris;* that the fee vested in the families of the two daughters on the grandchildren being born. The fee was destined to a class, though no division could take place till after the death of the liferentrix. There was no vesting in individuals, but in a class. That view, however, makes no difference on the result at which your Lordship has arrived, and in which I agree.

Lord Shand—The trustees are directed by the testament to dispone the testator's heritable estate to his two daughters equally in liferent, and I think it is clear from the terms in which the direction to dispone is made that on the death of one liferentrix there is no accession of liferent to the other, but that half of the fee becomes liable to distribution. The question is how that half is to be distributed. On that matter we have the concluding part of the clause dealing with the fee, and the words of the clause are that the conveyance is to be "to the said Catherine Melville Simpson and John King, my grandchildren lawfully born, and other grandchildren to be lawfully born by my said two daughters of their present or any future marriage, equally among them, share and share alike." If the clause stopped there, plainly there would have been vesting *a morte testatoris*, subject only to this, that any child coming into

existence after the death of the testator would have had a right to share with those born before that event. In that case I would have come to the conclusion that the property vested in each child, although his share might have been diminished by others being subsequently born, It is contended, still, that that is the result of the deed, but that view is, I think, unsound, because we have here a survivorship clause of the ordinary kind in these terms:—"Any of whom failing the share or shares of the deceaser or deceasers to the survivors, equally among them, share and share alike." There is to be an equal division of the estate, the share or shares of any one who has deceased—that is, without issue as the deed was granted by the grandfather—are to go to the survivors, share and share alike. There is nothing, so far as I see, to suggest a difficulty in giving to that clause its usual interpretation, which it received in the case of *Young* v. *Robertson*. Accordingly I am of opinion that as there were two children who did not survive the first liferentrix, and who left no children, their shares accresced to the others, and that therefore there are only five parties to take. Whether there could be any sort of vesting *a morte testatoris* perhaps is more a question of words than of any practical importance. What occurs to me is that there was no vesting in the children or the families properly speaking. Till the liferentrix died the fee was in the trustees, and there was suspension of vesting. If the trustees had conveyed to the daughters of the testator in liferent, I should say that there was no vesting in a class properly speaking, because there would then have been a fiduciary fee in the mothers for the children surviving the liferentrices. It is pretty obvious that if the liferentrices died without issue there was no vesting of the fee, because there was no issue to take, and any vesting which could be stated as a vesting *a morte testatoris* must have been a vesting of a fiduciary fee either in the trustees or in the daughters to hold for the grandchildren.

Lord Adam—I am of the same opinion. There are two possible terms at which vesting might have taken place. It might either have been *a morte testatoris*, or at the period of distribution, and by the terms of the clause of survivorship I think there was no term but the period of distribution at which it could have taken place. One half of the estate has by the death of Mrs Simpson been set free for distribution. That has now vested in the children surviving as a class, and there has been no vesting of the other half. That conclusion causes no difficulty about legal considerations, because the trustees hold the fee for the grandchildren who may survive the period of distribution. It is possible that none of the grandchildren may survive that period, in which case that purpose of the deed will lapse. If we were dealing with such a case as *Snell* v. *White*, where there was a direct conveyance by the testator, the presumption of a fiduciary fee might be necessary, just because there had been no trustees mentioned by the testator. If, however, the conveyance is made in the terms of the seventh head of this deed, I do not think it is necessary to presume a fiduciary fee in the daughters. The trustees have been appointed to carry out the purposes of the trust-disposition—to hold the fee for the purposes of the trust-deed—and one purpose is that of making payment among the surviving grandchildren of the testator when the period of distribution comes. I do not think there is any difficulty in coming to that conclusion.

The following interlocutor was pronounced:—

"The Lords having considered the special case and heard counsel for the parties—(1) Find and declare that the fee of the Greenock properties did not vest in the testator's grandchildren or their issue at the testator's death, but that on the death in 1886 of his daughter Mrs Martha Melville or Simpson one-half of the said properties fell to be distributed among the whole grandchildren of the testator or their issue then existing, and that the other half of the said properties has not vested in the grandchildren or their issue now in existence, but will fall to be distributed on the death of Mrs King among the whole grandchildren or their issue then in existence: (2) Find and declare that the said Greenock properties fall to be divided into five equal shares, one of which is to be conveyed to each of Mrs Marshall, Mrs Fraser, John King, David Melville Simpson, and John Ewing Melville Simpson, and decern."

Counsel for the First Parties—Guthrie. Agents—Smith & Mason, S.S.C.

Counsel for the Second Parties—C. S. Dickson. Agents—Cumming & Duff, S.S.C.

Counsel for the Third Parties—M'Clure. Agents—Smith & Mason, S.S.C.

Wednesday, October 31.

FIRST DIVISION.

M'PHEDRON AND ANOTHER *v.* M'CALLUM AND OTHERS.

Arrestment—Ship—Recal of Arrestment—Consignation—Caution.

An action having been raised against the owners of a ship, on the dependence of which arrestments had been laid on the ship, on the petition of the defenders the Court (following *Stewart* v. *Macbeth*, December 19, 1882, 10 R. 382) *recalled* the arrestments on consignation of the amount sued for and a sum to meet the expenses of the action.

John M'Phedron and John Currie presented this petition for recal of arrestments laid on their steamship the "Easdale," on the dependence of an action against them for £176, 11s. 8d. at the instance of John M'Callum and others, the owners of the steamship "Hebridean."

The petitioners averred that the action was called in Court on 25th October, and defences did not fall to be lodged till ten days thereafter. They were prepared to lodge defences when due, and to dispute the conclusions of the summons. They had offered to consign the sum sued for in the hands of the Clerk of Court, but the pursuers refused to withdraw their arrestments. Further, that they were under engagement to carry cargo,