sides the witnesses in the present action would be difficult to find unless it was proceeded with at once, and if there were delay until both proofs could be led simultaneously, they might be no longer in a position to adduce sufficient evidence.

Fraser, for defender, was not called on.

At advising—

Lord President—This is purely a question under the Statute 48 Geo. III., c. 151, sec. 9. No doubt the language of that section is such as occasionally to cause a good deal of difficulty as to the meaning of the words "relating to the same subject, matter, or thing, or having a connection or contingency therewith." In regard to this the Second Division had a good deal of difficulty in some recent cases, and especially in *The Western Bank of Scotland and Others* v. *Douglas and Others*, 21st January 1860, 22 D., 447, where the Second Division consulted this Division. These were difficult questions—this is not. I don't know what meaning we can put on the words "connection or contingency," unless they apply to actions of divorce by a wife against her husband, and by the husband against his wife for the purpose of dissolving *the same* marriage. The two processes will not necessarily be conjoined, though the Statute requires they shall be in one and the same Court, or before one and the same Lord Ordinary. I can imagine one of the parties saying, "I am ready now to prove my case, and should not have to wait till the other party seeks perhaps the whole world over for his witnesses." Therefore, though I am for adhering to the Lord Ordinary's interlocutor, I don't think the processes should be conjoined.

Lord Deas—I can't conceive a more clear instance of contingency than such a case as the present. As your Lordship says, conjunction does not necessarily follow. It is entirely in the power of the Lord Ordinary to conjoin or not, and I think that very likely in this case he will not. But that does not in the least touch the question of contingency.

Lord Ardmillan concurred.

Agents for Pursuer—Duncan, Dewar, & Black, W.S.

Agent for Defender—J. S. Darling, W.S.

Friday, July 10.

SECOND DIVISION.

WOTHERSPOON *v.* HENDERSON'S TRUSTEES.

Agent and Client—Accounts—Continuity of Employment — Triennial Prescription — Copartnery. (1) *Held* that the formation of a copartnery known and intimated to the parties is operative to destroy the continuity of employment prior to it of one of the partners as an individual. (2) Circumstances in which *held* that individual employment during the copartnery was available to preserve the continuity of individual employment, so as to elide the plea of prescription.

In this action Mr William Wotherspoon, S.S.C., Edinburgh, sued the trustees of the late William Henderson, writer, Hamilton, for payment of upwards of thirty accounts for professional service as an agent, done by the pursuer for or on account of Mr Henderson between the years 1829 and 1864. The pursuer formed a partnership on 1st November 1857 with Mr Alexander Morison, S.S.C., under the firm of Wotherspoon & Morison, which was dissolved on 1st November 1860. The greater portion of the accounts are sued for as having been incurred before the formation of the partnership, some of them during its continuance, and others after its dissolution. The defenders pleaded prescription against all the accounts prior to the dissolution of the partnership, and more than three years before raising the action.

The Lord Ordinary (Barcaple) pronounced the following interlocutor and note:—

"*Edinburgh, 30th May* 1867.—The Lord Ordinary having heard counsel for the parties, and considered the closed record and whole process, sustains the plea of prescription as to the accounts alleged by the pursuer to have been incurred to the firm of Wotherspoon & Morison, being Nos. 29 and 33, inclusive of the abstract of accounts No 6 of process, and also, *separatim*, as to the accounts alleged to have been incurred prior to 10th January 1852, being the first eighteen accounts in the said abstract, in so far as the same are now sued for: And before further answer on the said plea of prescription, as applicable to the other accounts, as to which it is proponed, allows the pursuer a proof *prout de jure* that he was employed by the deceased William Henderson to perform, and did perform, the work charged for in the account No. 28 of said abstract, as an individual for his own separate behoof and emolument, and to the defenders a conjunct probation: Appoints said proof to be led before the Lord Ordinary: Appoints the cause to be enrolled that a diet for the same may be fixed: and reserves all questions of expenses."

"*Note*—1. The first and most general question which arises under this plea is, Whether the accounts subsequently incurred to the pursuer as an individual, commencing soon after the date of the dissolution, and ending within three years of the action being raised, are to be held in this question of prescription as being continuous with those incurred to the firm, so as to prevent the triennial prescription operating against the latter?

"In *Barber* v. *Kippen*, 3 D. 965, Lord Cockburn held that, in the special circumstances of the case, an account incurred partly to a company and partly to one of the partners carrying on the business after the dissolution of the firm, was continuous. The judgment on this point is, however, of less weight, as he also held that letters written after the three years were out, amounted to an acknowledgment both of the constitution and subsistence of the debt. The Court expressly waived the determination of the general point, holding there was enough, in the special circumstances of the case, from which to infer that the account sued for was continuous, and that prescription was excluded. Unfortunately the opinions of the judges are not given. Upon the whole, the Lord Ordinary does not think that any aid is to be got from that case. The decision in the case of *Torrance* v. *Bryson*, 3 D. 186, and 13 Jurist 69, is still less in point. It was there merely held that an account incurred throughout to a law-agent as an individual, without any interval of three years, is not deprived of its continuity by the circumstance that, for a period of eighteen months occurring in the middle of the time over which it extended, a company of which the pursuer was a partner had acted as agents for the client. It was not proposed, as is done in this case, to connect the employment of the company with that of the individual, as giving rise to one continuous account liable to one course of prescription. The only question was, Whether the inter-

mediate employment of the firm constituted such an interruption of the continuity of the pursuer's individual account as to cause the earlier portion of it to run a separate course of prescription. The opinions of the judges are reported very shortly, and only in the *Jurist*, where Lord Mackenzie thus explains the judgment on this point of the case:—'I cannot see,' he says, 'how the employment of a firm of which the pursuer was a partner can destroy the continuity of the private account any more than the employment of a third party altogether unconnected with him would have done.' There is no such question in the present case.

"It would appear from the note of the Lord Ordinary in the case of *Torrance* that the action also embraced the accounts incurred to the company. The plea of prescription was expressly sustained in regard to them. But the Lord Ordinary says that he did so with some reluctance; and that, 'had the pursuer stated in the libel or the record that he had paid or accounted for these sums to the late company, the charge might have been sustained as proper articles of charge in the continuation of the pursuer's account.' This point was not before the Inner-House, as the pursuer did not reclaim. In the present case the pursuer does state on the record (cond. 24) that he paid up his interest in the company accounts to his partner, who endorsed them over to the pursuer before the expiry of three years from their last date. As the present Lord Ordinary understands Lord Cuninghame's note on this point, his Lordship would have been disposed to hold that the payment of the account incurred to the company might have been made part of the individual account of the pursuer, as a payment properly made by him as agent of the defender, like any other proper business disbursement on his account, if it had been so treated by the pursuer. In the circumstances, it was unnecessary to dispose of or seriously consider this point. Whatever may have been the merits of the view suggested by Lord Cuninghame, it does not seem to apply to the present case. The statement in support of the pursuer's title to sue for payment of the company accounts does not put it on the footing that they were paid by the pursuer as agent for his client, the late Mr Henderson, and on his behalf, and that they therefore constitute proper items of disbursement in the pursuer's subsequent individual accounts. It is merely the statement proper to be made by a partner of a dissolved firm who has taken over the debts, and would have been equally appropriate if the pursuer had not been employed as agent after the dissolution of the firm. It seems quite contrary to principle to hold that, if the company accounts were running a course of prescription as a separate debt, that could be interrupted by a party who was in the course of running up a new and separate set of accounts paying them, and taking an assignation to himself. The Lord Ordinary is therefore of opinion that the plea of prescription cannot be repelled upon this special ground.

"The question remains unsettled by authority, so far as the Lord Ordinary can discover—unless the judgment of Lord Cuninghame sustaining the plea of prescription in the case of *Torrance* is to be so considered,—Whether accounts incurred to a company, and those incurred to a partner carrying on the business after a dissolution, are to be considered as continuous, so as to prevent prescription running against the former? The Lord Ordinary thinks that the company accounts, and those incurred to the partner as an individual, must be looked upon as originally separate debts, and each, therefore, liable to a separate course of prescription under the Statute. It is evident that they were separate debts to many effects. They might never have become vested in the same person. It happens in the present case that the pursuer, who was subsequently, as an individual, the agent of Mr Henderson, has taken over the debts due to the company, but this might not have been so. They might have been taken over by the other partner, or they might have been realised for behoof of both partners. The Lord Ordinary does not think that, by any transaction between the partners to which the client was not a party, the position of the latter could be made worse in the question of prescription. If the debts due to the company, or these particular accounts, had been left to be realised as company assets for behoof of the partners, or of the creditors of the company, or had been assigned to the other partner, or to some third party, it could hardly have been maintained that the currency of prescription was prevented by the fact that the pursuer was subsequently employed by the same client, and had accounts against him. In that case the two sets of accounts would have continued to be, as they originally were, separate debts, due to separate creditors. Could this state of matters be prevented by any arrangement between the partners, even if entered into before or at the time of the dissolution? The Lord Ordinary thinks that to hold so would be to extend the construction which has been given to the Statute in favour of a continuous account much beyond what has yet been done. He is not aware of any case in which that has been held to be a continuous account, in this question of prescription, which was not one debt incurred to the same creditor. When both debts come to be vested in the same person, as in this case, the action is still for the two debts, the one as originally due to the pursuer, and the other as assigned to him. The accumulation of claims in his person may produce important legal consequences; but it cannot of itself have the effect of stopping the currency of prescription upon one of them. The same party may undoubtedly be creditor in debts some of which are prescribed and some not. If the several debts consist of accounts, the question must always be, whether they are truly continuous. And continuity is not constituted by the mere fact that they were originally incurred to the same party, much less that they have subsequently become vested in one person.

"What appears to the Lord Ordinary to be the most plausible view against the operation of prescription is, that the client may be held to have tacitly consented to the continuousness of the account by continuing the employment to one of the partners. But the continued employment constituted two debts, due to separate creditors, though, like any other separate debts, they might become vested in the same person. The question must always remain, whether there is anything to exempt the original creditor in the first debt, or his assignee, from the inoperative provision of the Statute, that he must raise action for it within three years from the time when it became due.

"The Lord Ordinary feels strongly the extreme delicacy of this question; and he is not without an apprehension that the conclusion to which he has come may operate hardly in this and other cases. But he does not think he would be warranted in ex-

tending the principle of continuity of accounts, as excluding the triennial prescription, beyond what has been already done. The obvious policy and intention of the Statute was to compel creditors to raise action for their debts within a reasonable time after they become fully due, and it is expressed in terms ample for that purpose. By the complete dissolution of a company to which an account has been incurred, the debt for which action is to be raised is complete, and there is nothing to prevent the application of the Statute, as in the case of an account still current.

"In disposing of the question, the Lord Ordinary does not mean to decide any point which is not expressly included in the case. In particular, the judgment which he now pronounces does not imply any opinion as to the effect, in this question of prescription, of mere changes upon a firm by the retirement or assumption of partners. Such a case may present consideration with which at present he has no occasion to deal.

"2. The pursuer maintains that, even if the accounts of the firm, and those subsequently due to him as an individual, cannot be held to be continuous, his subsequent and prior accounts are connected by his having been separately employed as an individual, during the existence of the company, to do the work charged for in the account No. 28 of the Abstract. The position of the pursuer in this case will be afterwards adverted to. But in the meantime, supposing it to be well-founded, a separate question as to prescription arises at an earlier stage in the series of accounts. As the account No. 18 ends on 14th April 1848, and the next account, No. 19, begins on 10th January 1852, there is an interval of more than three years between them, on which is founded a plea of prescription as to the former account, and all the accounts preceding it. The only answer to this plea is, that certain accounts, not libelled on, were actually incurred to the pursuer in the interval. They are neither produced, nor founded upon, or mentioned in the record. But the pursuer refers to a general reservation in the conclusion of the summons, and in the last article of the condescendence, of all other claims competent to him, or to his original or late firms, for various other business accounts, including disbursements incurred by the late Mr Henderson, and the firm or firms of which he was the principal partner.

"The Lord Ordinary does not think the pursuer can found upon these alleged accounts in the present action for the purpose of avoiding the plea of prescription. He is not here seeking to establish them as articles of debt against the defenders, or raising any issue as to their constitution. It could only be by proving that he performed the work charged for in them on the employment of Henderson that he could make them avail for the purpose of excluding prescription. But the Lord Ordinary does not think he could be allowed to prove accounts as claims of debt against the defenders in an action in which he has purposely abstained from concluding for payment or constitution of them, or even setting them forth, or in any way founding upon them. The case would have been different if the accounts in question had been paid after the death of Henderson. The decision in *Fisher* v. *Ure*, 14 S. 660, would then have applied. The Lord Ordinary thinks that the only course for a pursuer to adopt in such a case is to exercise his privilege of abandoning his action, and to raise a new action, including the accounts in question. *Ex facie* of the case as it stands, the previous accounts are prescribed. The pursuer's only answer is, that they constitute part of one general account for debt incurred to him by Henderson, for which he was not bound to raise action until it was completed and brought to a close at Henderson's death. In order to maintain this effectually, he must, it is thought, raise action for the whole debt or series of accounts, at least to the extent of excluding any interval of three years.

"An additional objection to the course proposed by the pursuer is, that, according to the case of *Beck* v. *Learmonth*, 10 S. 81, the accounts now referred to would not avail to exclude prescription if they were paid in the lifetime of Henderson. It would therefore be necessary for the pursuer to prove both their constitution and resting-owing at Henderson's death, in this action, in which they are not sued for or put in issue in any way.

"3. The latest of the accounts incurred to the pursuer before the partnership ends on 30th October 1857, and the first account subsequent to the dissolution, begins more than three years after, on 21st November 1861. But the pursuer maintains that the account No. 28 of the Abstract, beginning 16th July and ending 10th September 1860, though incurred during the partnership, was incurred to him as an individual, and connects the prior and subsequent individual accounts by interrupting the interval of three years between Nos. 27 and 34 of the Abstract.

"The account is for the preparation and completion of a security for an advance made by the pursuer to Mr Henderson. It is not disputed that it entered the books of the company, just as any other account for business transacted by them would have done. The work charged for is just of the kind which was proper to be transacted by the firm, in the ordinary course of the business which the pursuer avers (cond. 18) he then carried on with his partner under the firm. He nowhere alleges that he at the same time carried on business separately on his own account. But he avers, in regard to this particular account (cond. 23), that Mr Henderson instructed him individually to prepare the bond and complete his title—that he did so—and that the account in question was thereby incurred to him individually. No written evidence is produced in support of this averment. The account, from its date, is prescribed, unless it can be shewn that, being incurred to the pursuer as an individual, it is part of a continuous set of accounts with those which are subsequent to the dissolution of the firm.

"The Lord Ordinary feels it to be an exceedingly delicate matter, in these circumstances, to allow the pursuer a proof *prout de jure* of his averment, that he was employed as an individual, and on his own behalf, to do the work charged for in this account. It is not without difficulty, and some hesitation, that he has come to the conclusion that such a proof is competent in the circumstances. He is sensible that it is allowing the pursuer to prove, in part at least, the constitution of a debt which may prove to be prescribed. But it is not for the purpose of establishing the debt that the proof is at present allowed. According to the view which the Lord Ordinary takes of the first point in the case, the question, whether this particular account is prescribed, depends entirely upon whether it is an account to the pursuer or to his firm. If there had been no accounts incurred by Henderson to the firm, there would have been nothing to in-

dicate *prima facie* that the account was prescribed. The existence of the firm, and its employment by Henderson, do not exclude the possibility of the pursuer being employed as an individual to transact a piece of business. He distinctly avers that he was so; and, upon the whole, the Lord Ordinary does not think that he can exclude the proof."

The pursuer reclaimed.

YOUNG, GIFFORD, and SCOTT for him.

MACKENZIE and WATSON in answer.

At advising—

LORD JUSTICE-CLERK—In this case we have to deal with the application of the law of the triennial prescription to the demand of the pursuer. The accounts before us commence so far back as 1829; the latest ends in December 1864. The action was brought in April 1866.

The pursuer sues partly in his own right and partly as in right of the firm of Wotherspoon & Morison. Part of the accounts were incurred while the pursuer, Mr Wotherspoon, was carrying on business under an assumed firm of Wotherspoon & Mack, of which Mr Wotherspoon was the sole partner; but these accounts have been, on both sides, dealt with as being accounts of Mr Wotherspoon individually.

The accounts sued for are, generally speaking, accounts in the Court of Session, incurred in various processes of advocation and suspension. The deceased Mr Henderson was a practitioner before the Sheriff Court of Lanarkshire, and was resident at Hamilton, and employed Mr Wotherspoon—and thereafter the firm of Wotherspoon & Morison—and thereafter Mr Wotherspoon again as an individual—to conduct numerous litigations in which his country clients were involved. The accounts embrace also business done for himself personally. It has been held, and is now settled, that employment by a country agent to conduct different processes constitutes continuous employment, so as to prevent the operation of prescription running from the close of each separate account.

Mr Henderson died on 7th January 1865. The first question raised by Mr Henderson's representatives relates to alleged breaks in the continuity of the accounts claimed by Mr Wotherspoon, contracted with him as an individual; it being pleaded that prescription applies by reason of two periods of discontinued employment for the period of three years on each of these breaks. The next relates to the company accounts; and it is pleaded that there is an absence of action or proceeding for more than three years after these company accounts were closed.

Taking, first, the private accounts. The two periods stated as breaks in the continuity of employment for the prescriptive period of three years are—1, From the 4th April 1848 to 10th January 1852; and 2, From the 30th October 1857 to the 21st November 1860. Prescription would be applicable to fourteen accounts, amounting to £400 or thereby, should it be held that there was an interval of three years from 4th April 1848; the sustaining of the second would affect the accounts sued for and ten additional accounts.

As the plea of the defenders, founded on the latter break, would extend to all the accounts up to 21st November 1860, that question may be conveniently considered first.

The pursuer meets the plea of prescription by maintaining, first, that there was no break in the continuity of the accounts, because, although a copartnery was formed by Mr Wotherspoon's adoption of his son-in-law as his partner in November 1857. and continued for three years, the same accounts run on, and the employment was continued during the copartnery; and second, that there was *de facto* individual employment as to an account for £10 11s. 6d., commencing on the 16th July and ending on the 10th September 1860, which would break effectually the supposed interval of the three years from October 1857 to November 1860, if that fact is held to be proved.

The former of these two views raises a point of difficulty in the law of prescription, and not yet decided, so far as I can find, by any express decision of the Court. The view which I take of it is, that, in the circumstances under which the present case is presented for judgment, we cannot hold that there has been a continuity of the private employment of Mr Wotherspoon by the employment of the firm of Wotherspoon & Morison. There was a new contract, and different parties to the contract, so soon as the firm was formed and employed. I can figure cases of such employment as that the continuity of an account should not be held to be affected by a change of the copartnery. A case of employment of a firm, of changes in a firm not known to the client, the introduction or withdrawal of parties having a mere interest in the firm, would present a case for decision different in its nature, and which might probably be viewed differently. In this case there is a palpable change in the firm, a substantial alteration in the contracting parties, an avowed, known, and recognised introduction of new and altered responsibility. A copartnery constitutes a new person; and though there may be special cases where, from the nature of the contract or the dealings of parties, the effect of a change may not be held to operate so as to rear up prescription, I do not think that is so here. There was a change in the creditor, and that a known change. There is a strong confirmation in the fact of the mode of dealing with the accounts by the parties—the separation of the individual and company accounts, and the separate right of recovery provided for. So far, I go with the defenders, and adopt the reasoning in the Lord Ordinary's note.

As to the second question, that of interruption of the period by alleged individual employment, we have had a proof, and we have had to determine its effects. The question is one of fact. Is it, or is it not true, that Mr Wotherspoon was employed by Mr Henderson as an individual to do the business charged for in the account of £10, 11s. 6d. in July 1860? Presumptions against the notion of individual employment arise, first, from the fact that the company was still subsisting when the account was incurred and the work done, so far as not personally done by the pursuer through the company clerks; secondly, that the account was actually rendered to the deceased as a company account by the party engaged in collecting the company accounts; and thirdly, that nothing is heard of the peculiarity until its importance became obvious in this subsequently raised question of prescription. An examination into the facts removes, in my mind, much of the weight of these presumptions; and if credit is given to the positive testimony addduced, the case is clearly proved.

The transaction was in itself peculiar. Mr Wotherspoon was induced to give a loan from his personal funds at a time when there was the utmost exigency on the part of the late Mr Henderson to obtain it. Very severe consequences to Mr Henderson would have followed had he not been able to command a

sum of money. Every effort had been exhausted in an attempt to obtain accommodation when Mr Wotherspoon was induced, out of his private funds, to give him the sum in loan necessary to relieve him. The employment related to a private matter, in which the personal element—the individual relation between Mr Henderson and Mr Wotherspoon—entered into and pervaded the transaction. Mr Henderson was at the time aware that there was to be a dissolution of the company in November. It was natural that the conversation should turn, as Mr Wotherspoon says it did, upon the subject of the contemplated dissolution, and Mr Henderson's prospective employment of Mr Wotherspoon after November. We know from the testimony of Mr Morison, he had notified his intention to dissolve before that; and, as we may infer from what is proved, the dissolution of the company was one in which there entered some feelings of an unpleasant kind, and that Mr Wotherspoon's desire may be safely assumed to be that his partner should not carry off a client. The absence of any allusion to the subject of professional employment, during a conversation protracted by the sending and returning of a messenger to the agents in the cause in which the payment by Mr Henderson was to be made, would have been singular—almost incredible. That Mr Wotherspoon should state, as he says he did, to Mr Henderson that this was to be a private individual matter, and that Mr Henderson, who really did thereafter adhere in his employment to Mr Wotherspoon, should assent to the proposal in a matter wholly indifferent to him, was really no more than was to have been looked for. Mr Wotherspoon stipulated for heritable security, which was to extend to another personal advance which he had previously made, and introduced a stipulation as to expenses, which confirms his statement.

It is proved, both by the absence of positive stipulation in the contract and by the evidence of Mr Morison, that the carrying on of such a piece of professional business as a private and confidential matter was not opposed to his understanding of the footing on which the copartnery was entered on. And Mr Wood, the accountant, was actually employed on the footing of such accounts being likely to be found, and which, if found, were to be dealt with as individual ones.

The rendering of the account as a company account is stated to have arisen from the employment of an accountant. The entry of this account in the ledger was put before the accountant without any marks to distinguish it from other accounts, Mr Wotherspoon himself not having seen the account. The employment of an accountant is clear, and the absence of the entry in the ledger is clear also. The question as to the cause I shall afterwards examine. That it was not brought forward sooner, and particularly in a conversation between Mr Wotherspoon and the agents of the trustees, is one of the features of the case which seems to me most adverse to Mr Wotherspoon. Mr Wotherspoon did, in that conversation, refer to a plea which he no doubt thought sufficient; but that he should have omitted the stronger and conclusive one is certainly remarkable in a gentleman of his intelligence and experience. Had the case been at all doubtful on the proof, it might have merited grave consideration. As it is not in my mind at all doubtful on the proof, it cannot of course be regarded otherwise than as a mere omission, at a very convenient opportunity, to state a good plea. The omission of the statement of a fact or plea in conversation, before an action is brought, cannot forfeit a right.

The statement of Mr Wotherspoon as to the fact of individual employment is quite clear, and it is corroborated in every essential point by his clerk. If credit be given to the statement, it is clear that the arrangement that it should be an individual account was actually proposed and assented to. The testimony of Laurie, the clerk, is shaken by the obtaining of a receipt from Mr Morison with an untrue date; but that the statement is true is made as clear to my mind as any fact can be by real evidence. It appears Mr Wotherspoon directed the clerk to enter the account as a private one, and entries were made at the time in the day-book, which did distinguish it from the other accounts, and marked the items as those of Mr Wotherspoon. There are several entries; one of them under circumstances which go absolutely to exclude the possibility of an *ex post facto* entry, viz., the blurring of the initials W. W. at the time, which were begun to be written in the wrong place, and were superinduced by W. Henderson. This affords demonstration to my mind that the entry was truly made in the day-book at the time, and, if so, the entry was made in consequence of the directions given by Mr Wotherspoon at the time. The letters W. W. are quite legible.

So supported by real evidence, I cannot resist the conclusion that the statement sworn to is true. That the initials distinguishing the entry were not copied into the ledger may be in part accounted for by the hurry with which it was prepared. Therefore, there being no break between 1857 and 1860, the first ground for the plea of prescription is obviated. The individual accounts up to the eighteenth of the abstract are not open to the exception.

As to the accounts prior to 1852, the case stands thus. There is a blank, as before mentioned, in the accounts sued for, being April 1848 to January 1852. Mr Wotherspoon proposes to prove that there were certain accounts incurred upon the employment of the deceased in that interval. The proposal of the pursuer is met by two pleas, one that there is no averment in record as to any such employment; and the second is that, according to the assumed state of the law, any such accounts could only be looked to as libelled on.

An averment of employment is made in general terms in the first article, and a reservation implying an averment of the fact is introduced into the last. These are vague, but the plea of prescription in defence is not so raised either in the defender's statement or in his pleas, so as to point to this period at all. The averment and plea are directed against the second interval, and I am, on that ground, prepared to disallow the objection. Had the objection been clearly taken, the statement would have required to have been more explicit.

The proof to be allowed is not a proof of these accounts so as to lead to a decree for payment in the pursuer's favour, but proof of employment professionally—continuously—in the discharge of the same duties as in reference to the account sued for, so as to show that there was truly no break in the course of employment. When this distinction is understood, the groundwork of the defender's plea is shown to fail. The case of *Fisher v. Ure* proves that regard may be had to other accounts than the individual accounts sued for. Here employment may be made out to the effect of showing that there was not an interruption in the course of dealing for a

period sufficient to rear up the plea of prescription. I do not in this view consider the supplementary action as necessary or as available to the pursuer in this question. I think that the institution of such an action could scarcely remove the objection to the libelling of the accounts if that objection were well founded.

I would propose, therefore, in reference to this objection, that we should allow the pursuer a proof so as to show continuity in the employment of the deceased—a previous specification being given in of the special acts of employment. The individual accounts from 1852 should be found not to be prescribed, and the company accounts to have fallen under the operation of the triennial prescription.

The other judges concurred.

Agents for Pursuer—Wotherspoon & Mack, S.S.C.

Agents for Respondents—Morton, Whitehead, & Greig, W.S.

Saturday, July 18.

CONNAL & CO. *v.* DAUNT & CO. AND OTHERS.

Foreign—Iron Warrant—Indorsation—Bankruptcy—Intimation. (1) Circumstances in which *held* that the law of Scotland was to be applied that certain warrants were transferable documents, but that their indorsation required to be followed by intimation to the warehouse keepers to perfect the right of an indorsee as in a question with competing rights constituted by arrestment or otherwise. (2) *Held*, in accordance with the opinion of English Counsel, that the inspectors on Daunt's estate had not by the deeds in their favour any right which could compete with that of Loder; but, as Loder's averments as to the way in which he had become possessed of the warrants as to intimation were not admitted, proof allowed.

This is a competition as to a quantity of pig-iron situated in the stores of Connal & Co., warehouse-keepers in Glasgow. In December 1865 Connal & Co. received into their stores in Glasgow 45,000 tons of pig-iron, for which they granted to W. H. Daunt & Co. of Liverpool a variety of acknowledgments or warrants in the annexed form:—

"Connal & Co., warehouse-keepers, Iron Yards, General Terminus and Green Bank, south side of Broomielaw; Hyde Park, north side of Broomielaw, and Port Dundas.

Stamp 3d.

"Warrant No. $\frac{106}{73}$ for $\left\{\begin{array}{l}300 \text{ tons No. } 1 \\ 200 \text{ " No. } 3 \\ \hline 500\end{array}\right\}$ Clyde $\left\{\begin{array}{l}500 \\ \text{tons} \\ \text{pig-} \\ \text{iron.}\end{array}\right.$

"Glasgow, 19th December 1865.

"We have received into our stores and entered in our warehouse books in the name of *Messrs W. H. Daunt & Co.*; and we now hold to their order *five hundred tons pig-iron* of numbers one and three, and we will deliver to their order by endorsement hereon, 'free on board' here, from our stores, that quantity of pig-iron—same number and brand, on payment of the charges noted at foot and return of this warrant. (Signed)—Connal & Co.,

Warehouse-keepers.

"Charges,

Rent at ¾d. per ton per month.

Agency 1s. per hundred tons if transferred.

Exd. and entd. by A. Young."

Daunt & Co. are alleged to have obtained from Mr Giles Loder, merchant in London, an advance of £150,000 on the security of this iron; and in order to constitute that security, they are said to have delivered to Mr Loder, along with their promissory notes for the amount, the acknowledgments or warrants which had been granted to them by Connal & Co., and which W. H. Daunt & Co. blank indorsed. These acknowledgments or warrants, when thus endorsed, were delivered to Loder on and prior to 27th February 1866. The indorsation or delivery was not intimated by Loder to Connal & Co. prior to 9th July 1866, but they are said to have been intimated to them on that day. In the meantime, on 5th May 1866, Daunt & Co., having become insolvent, executed for behoof of their creditors a deed of arrangement for winding up their affairs, under inspectorship, in virtue of the English Bankruptcy Acts. The iron is now claimed by Mr Loder, on the one hand, under the indorsed acknowledgments or warrants delivered to him, and by the inspectors of Daunt & Co.'s affairs, on the other hand, under the registered deed of arrangement which had been executed. There are also creditors of Daunt & Co. claiming under arrestments used in the hands of Connal & Co. subsequent to July 1866.

The Lord Ordinary had allowed parties generally a proof of their averments. Among others, a great variety of statements were made by Loder as to English law and usage, which he maintained fell to be applied in the determination of the rights of parties. On the other hand, Daunt & Co's inspectors and the arresting creditors contended that the effect of the indorsation and the necessity of intimation to complete Loder's rights, were to be fixed by Scotch law.

Parties reclaimed.

Young and J. Mair for Loder.

Gifford and Maclean for Daunt & Co.'s Inspectors.

D.-F. Moncreiff and Watson for arresting creditors.

The Court, after argument, took the opinion of English counsel on the title of Daunt & Co.'s inspectors under the foresaid deed of arrangement. The following were the queries put:—

"I. Supposing the warehouse-keepers' warrants import an obligation to deliver the specific iron received—

"1. What is the effect of the deed of arrangement, according to the law of England, as to vesting in the inspectors whatever movable subjects may then have been the property of the bankrupts, or as to entitling them to recover and take possession of such property from the custodiers of the same; and if it would be thus vested, or might be thus recovered, for whose benefit and behoof would it be so?

"2. What is its effect as to giving any preference in regard to moveable subjects in competition with other parties holding prior completed rights of pledge over the same, or parties holding prior rights in reference thereto depending entirely on personal contract?

"II. Supposing the warehouse warrants to import merely an obligation to deliver the like quantity of similar iron—

"1. What is the effect of the deed of arrange-