no partnership with the creditors, and the creditors understood with whom they were dealing, for, if I mistake not, the whole of the money that was accepted was spent, not even in suing the seven signatories to the memorandum of association, but in endeavouring to recover from the vendors and their agents in London the amounts that had been expended, and it was only when they found those parties were not good for those expenses, and failed to recover them in that way, that they turned round and insisted on what they had not insisted on before, that the respondents here were members of the association. That is the opinion I have formed, and therefore on that point I hold the liquidator has failed to make out that those persons should be placed on the list of contributories.

There is a question about persons who appear in the list of directors, and persons who acted as directors, that may give rise to a separate question, and in that we are ready to hear any observations that may be made.

The following interlocutor was pronounced:—

"The Lords having resumed consideration of the cause, with the record made up in terms of the interlocutor of 20th July last, and heard counsel, Find that the respondents who are proceeded against solely in respect of the letter of allotment of 22d July 1872, and the consequent payment of the allotment money, are not contributories, and ought not to be put upon such list, in respect they never were partners of the Consolidated Copper Company of Canada (Limited); and decern: And before further answer appoint the said respondents to lodge their account of expenses in process, reserving consideration of the same: *Quoad ultra* continue the cause."

Counsel for Petitioner — Balfour — Alison. Agent—T. F. Weir, S.S.C.

Counsel for Respondents John D. Peddie and Others — Asher — Mackintosh. Agents — Drummond & Reid, W.S., and J. & A. Peddie & Ivory, W.S.

Counsel for Respondents John Allan jun. and Others—R. V. Campbell—Pearson. Agents—Mitchell & Baxter, W.S.

Wednesday, November 14.

SECOND DIVISION.

SPECIAL CASE—PRINGLE AND OTHERS.

Succession—Mortis causa *Conveyance—Conveyance of House under Bequest of "Moveable and Personal Estate."*

A bequest of "all the moveable and personal estate which shall belong to me at the time of my death," taken in conjunction with the terms of a holograph letter of instructions by the testatrix, in which the amount of the estate as detailed included the value put upon certain house property belonging to her—*held* (upon the principle of *Hardy's Trustees*, May 13, 1871, 9 Macph. 736; and *M'Leod's Trustees* v. *M'Leod*, Feb. 28, 1875, 2 R. 481) to be sufficient to carry that heritage.

Counsel for First Party—Jameson. Agents—Scott-Moncrieff & Wood, W.S.

Counsel for Second Party—Fraser—Darling. Agents—Mylne & Campbell, W.S.

Thursday, November 15.

SECOND DIVISION.

[Lord Young, Ordinary.

SCHOOL BOARD OF THE BURGH *v.* SCHOOL BOARD OF THE PARISH OF RENFREW.

School—Education Act 1872, *sec.* 9—*Disputed Areas of Parish or Burgh.*

A question having arisen between the School Boards of the burgh and of the parish of Renfrew as to the respective areas of the two — *held* (following the case of *Lochgilphead School Board* v. *Knapdale School Board*, January 30, 1877, 4 R. 389) that under section 9 of the Education (Scotland) Act 1872, such a dispute was matter for the Board of Education or the Sheriff, whose decision was final, and action brought to have the matter determined in the Court of Session dismissed accordingly.

Counsel for Pursuers (Reclaimers)—Asher—R. V. Campbell. Agent—A. Kirk Mackie, S.S.C.

Counsel for Defenders (Respondents)—Balfour. Agents—Frasers, Stodart & Mackenzie, W.S.

Thursday, November 15.

FIRST DIVISION.

[Sheriff of Forfarshire.

NICOLL *v.* REID.

Title to Sue—Use of Firm Name—Where a sole Surviving Partner sued in his own Name for Debts due to Firm.

A firm of two partners was dissolved by mutual agreement, which provided for winding up the concern, and for the payment to and discharge by either party of debts due to or by the firm. One of the partners died shortly afterwards and before the winding-up was completed. *Held* that the surviving partner was then in the same position as if the death had operated the dissolution, and that in suing for a debt due to the firm neither law nor usage obliged him to do so in the company name.

The firm of Nicoll & Reid carried on business at Kirremuir as cabinetmakers and joiners. It was mutually agreed between the partners that the firm should be dissolved on December 31, 1875, and a minute of agreement was drawn up to that effect. The third article of the agreement was as follows:—"*Thirdly*, The books of the concern

shall be brought to a balance as on the 31st day of December current, and a list of the outstanding debts then due to the firm shall be made out in duplicate, and a copy given to each of the partners, either of whom shall be entitled to take payment of and to discharge such outstanding debts, and to pay debts due by the firm, they both being bound, however, to account to each other for the debts so collected and paid by them respectively; and that on a date to be fixed as soon as may be found convenient after the dissolution." The firm was dissolved at the date agreed upon. Mr Alexander Reid, one of the partners, died in the following July. In December 1876 Mr Nicoll presented a petition in the Sheriff Court at Forfar, as an individual, and now sole surviving partner of the dissolved firm of Nicoll & Reid, . . . "and as authorised under and in virtue of the minute of agreement," praying for decree against William Reid, debtor to the firm, to ordain him to pay a sum of £66, 8s. 10d. due by him to the firm for joiner work done.

The defender raised a preliminary objection to the action, "that the pursuer is not entitled to sue in his individual capacity, or otherwise than in the name of the firm (which still subsists for the purpose of winding-up), for a debt alleged to be due to the firm; and the action as at present laid is therefore irrelevant, and ought to be dismissed, with expenses." The pursuer averred that he had a right under the minute of agreement to take payment of and to discharge debts due to the firm.

The Sheriff-Substitute (GILLESPIE) found that there was not on the record any relevant and sufficient statement of the pursuer's right to sue, and on that ground dismissed the action. The Sheriff, (HERIOT) on appeal, adhered, adding the following note to his interlocutor:—

"*Note.*—Had this firm of Nicoll & Reid been dissolved by Reid's death, then Nicoll, the surviving partner, would have been entitled to collect the debts due to the late firm, and to sue for them.

"But that is not the state of matters. The firm was dissolved, not by death, but by mutual agreement, signed by both parties. That Reid died afterwards seems to the Sheriff to be of no consequence.

"It is necessary, therefore, to examine this agreement to ascertain what the partners arranged as to the collection of the debts due to the late firm.

"It is there agreed that a list of the outstanding debts then (31st December 1875) due to the firm shall be made out, and that either of the partners should be entitled to recover the debts contained in that list.

"It was stated at the hearing that no such list of debts had ever been made out, and certainly none has been produced. In such circumstances it seems to the Sheriff that parties interested in the affairs of the firm are just in the position of those where a firm has been dissolved by mutual contract, and where no provision has been made as to the collection of the debts due to the company."

The pursuer appealed.

Authorities — *Barclay* v. *Lawrie*, February 19, 1857, 19 D. 488; *Forsyth* v. *Hare*, November 18, 1834, 13 S. 42; *Antermony Coal Company* v. *Wingate*, June 30, 1866, 4 Macph. 1017; *Muir* v. *Collett*, June 17, 1862, 24 D. 1119; *Edinburgh and Glasgow Bank* v. *Ewan*, February 28, 1852, 14 D. 547.

At advising—

LORD PRESIDENT—This is a very peculiar case. Although the plea is a technicality, and perhaps has not much in it, I am not surprised that the Sheriff-Substitute and the Sheriff found much difficulty in coming to a decision. I am, however, on the whole inclined to differ.

The firm of Nicoll & Reid was dissolved on 31st December 1875, and Mr Reid, one of the two partners, died in July of the following year. At the time of the dissolution an agreement was drawn up between the parties, and among other things it was stipulated under the third head that the books should be balanced, and that each partner should be entitled to take payment of and to discharge outstanding debts, and to pay debts due by the firm. In point of fact, the pursuer Mr Nicoll is survivor of a dissolved firm, but it is true he is not surviving partner in the sense that a dissolution was brought about by the death of Mr Reid. The important question is this—Does the circumstance of the death occurring after the dissolution, and while the business is still being wound up, make the survivor stand in a different position from that in which he would have stood had death been the cause of the dissolution? I know no case in which a surviving partner in Mr Nicoll's position has been held to have all rights as he would have had had death been the cause of dissolution, but although no such case has occurred, I am unable to distinguish in principle between this and ordinary cases. The reason why the law gives the whole control of the affairs of a firm to the surviving partner is that he is the man who has the greatest interest, and is the person best qualified to proceed; and so strong is his right that he cannot be superseded by a factor unless under an allegation of some personal disqualification from acting. The same reason applies to the surviving partner in this case. He has the strongest interest in the debts, and he has the best qualifications to enable him to proceed to collect them. Just as in the ordinary case the surviving partner is the best man to commence proceedings, so in this case Mr Nicoll is the person best qualified to continue the winding-up. I am unable therefore to draw any distinction between the two cases.

Whether the agreement has been superseded by the death of Mr Reid it is not perhaps very material for us to consider, for Mr Nicoll occupies the position of surviving partner independently of the agreement. If there had been anything in the agreement contrary to his right, a different question would have arisen, but if the agreement is of any effect at all it is rather a fortification of his title.

I cannot agree with the defender's counsel that the mandate contained in the agreement falls by the death of the mandant. That applies only to gratuitous mandates, whereas this is part of an onerous contract. But I do not attach much importance to the agreement; the pursuer as surviving partner has the sole power of winding-up, and within that power the power of suing for the company debts.

The only remaining question is whether in

exercising that power he must, as a matter of form, use the firm name? I know no authority for that proposition. If the point had been settled, even by inveterate usage, I should not have gone against such usage. The whole title and interest are vested in the pursuer in the character in which he sues.

LORDS DEAS and MURE concurred.

LORD SHAND—I have come to be of the same opinion. The defence which has been substantially sustained is the preliminary plea. I gather from the note by the Sheriff-Substitute, in which the Sheriff concurs, that if the name of the firm had been used he would have held the instance good. The objection therefore comes to be that the company firm is not made the pursuer.

The first ground on which it is said that the action cannot be maintained in its present form is in respect of the terms of the minute of agreement. I do not think the minute raises any difficulty; it is merely an agreement which stipulated that the dissolution should take place at a certain date, and went little further. The third article embodies merely a convenient arrangement for the collection of the firm's debts. One of the parties died, and the arrangement was at an end. The consequence was that Mr Nicoll became the sole surviving partner, just as he would have been had the company been a going concern when Mr Reid died. In these circumstances is it necessary to have the company firm in the instance? I am not surprised at the Sheriff's decision, as even in ordinary cases of dissolved partnerships I think the action has usually been in the firm's name. Had the pursuer been able to point out any case in which an individual partner was found entitled to sue in his own name for a company debt, it would have been cited, and the preliminary plea would at once have been repelled. The question really is, "Have we not substantially the company here as pursuers?" The pursuer sues, moreover, not only as an individual, but as "now sole surviving partner of the dissolved firm of Nicoll & Reid," and I think that this is in substance an action raised at the instance of the company, and therefore I am for sustaining the instance as sufficient.

The following interlocutor was pronounced:—

"Recall the Sheriff-Substitute's interlocutor of 20th January 1877, and all the subsequent interlocutors; Repel the preliminary plea stated for William Reid, defender (respondent): Sustain the pursuer's (appellants) title to sue; and remit to the Sheriff to proceed further as shall be just; Reserve to the Sheriff all questions of expenses in the Sheriff Court: Find the appellants entitled to expenses in this Court; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer (Appellant)—M'Laren—J. A. Reid. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defender (Respondent)—Balfour—J. P. B. Robertson. Agents—Macbean & Malloch, W.S.

Thursday, November 15.

FIRST DIVISION.

KEY *v.* M'INTOSH.

Poor's Roll—Act of Sederunt 21st December 1842.

Where a party belonging to a parish in the country applied to be admitted to the poor's roll, and for that purpose produced a certificate from the kirk-session of an Edinburgh parish, which bore the qualification that they were ignorant of the truth of the applicant's statements, the Court *remitted* to the parish of domicile for further information, but dispensed with the personal attendance of the applicant there, which is required by the 3d section of the Act of Sederunt of 21st December 1842.

In an application by a party named Key for admission to the poor's roll, the necessary certificate, under the Act of Sederunt of 21st December 1842, was produced from the kirk-session of the parish of St Andrew's, Edinburgh, in which the applicant had resided for about five weeks previously. It bore that the kirk-session were not personally aware of the truth of the facts stated, as they rested entirely on the applicant's own credit.

The petitioner's story was that he had been a veterinary surgeon in Nairn, but falling into a state of destitution he had come into Edinburgh, partly to try to obtain work, but also with a view of making arrangements for carrying on an action which he had depending in the Court of Session against a party named M'Intosh.

The application was opposed by M'Intosh, on two grounds—1st, That the certificate should have been from the kirk-session of Nairn, where the applicant's real domicile was; and 2d, that as the certificate depended entirely on the applicant's own statement, it was not sufficient.

Objector's authorities — Duncan's Parochial Law, 720; *Paton*, Nov. 30, 1832, 11 S. 146; *Paterson* v. *Mackenzie*, June 15, 1830, 8 S. 920.

Counsel for the applicant stated that he was willing to apply to the kirk-session at Nairn, but that by the 3d section of the Act of Sederunt of 21st December 1842 he would be obliged to attend personally before the kirk-session, and asked the Court to allow communication to be carried on by letter, as the expense of going to Nairn was more than the applicant could afford.

Petitioner's authorities — *Cumming*, Jan. 27, 1831, 9 S. 342; *A. B.*, June 21, 1832, 10 S. 673; *Dickson*, Jan. 15, 1852, 24 Jur. 154.

The Court made a remit to the kirk-session of Nairn for information as to the applicant, and dispensed with personal attendance by the applicant.

Counsel for Applicant—Goudie. Agent—F. J. Martin, W.S.

Counsel for Objector—Mair. Agent—Wm. Officer, S.S.C.