with the husband. Apart, however, from that, the circumstances are not such as to warrant a separation, and we know of no authority for a wife so deserting her husband applying to the Court for its authority to regulate her access to a child of the marriage. It will, I think, be in accordance with your Lordships' desire that I do not enter more into detail, and simply say that the petition is not legally maintainable, and should be refused. The affectionate terms of the husband's letters preclude the idea that he will in any spirit of vindictiveness deny or unduly limit the access of the mother to her child. The child may naturally be a bond of love to draw the spouses together.

We think the petition ought to be refused.

LORD CRAIGHILL and LORD LEE concurred.

LORD JUSTICE-CLERK was absent.

Counsel for Petitioner—J. P. B. Robertson. Agents—Mackenzie & Black, W.S.

Counsel for Respondent—Asher—Mackintosh. Agents—Adam & Sang, W.S.

Saturday, March 5.

FIRST DIVISION.

[Lord Adam, Ordinary.

EARL OF SOUTHESK AND OTHERS *v.* THE INCH BLEACHING COMPANY AND OTHERS.

Process—Issue—River—Nuisance.

In an action of declarator and interdict brought by riparian proprietors against the occupants of paper-mills and other works and the police commissioners of a burgh, to prevent them from polluting a river to the nuisance of the pursuers, the Lord Ordinary adjusted an issue, whether the defenders polluted the river "to the nuisance of the pursuers or their authors, or one or more and which of them?" The Court (*diss.* Lord Shand) *held* that the words "and which" should be deleted from the issue.

The Earl of Southesk and other riparian proprietors on the river South Esk raised an action of declarator and interdict against the Inch Bleaching Company, Messrs Guthrie, Gray, Peter, & Company, paper manufacturers, The East Mill Company, spinners and bleachers, Messrs Guthrie, Martin, & Company, distillers, and the Commissioners of Police of the Burgh of Brechin, to have them prevented from polluting the said river.

The Lord Ordinary (ADAM) adjusted this issue for the trial of the case—"Whether between the 11th day of June 1877 and the 11th day of June 1880 the Commissioners of Police of the burgh of Brechin did, by discharging sewage or other impure matters, or permitting sewage or other impure matters to be discharged, from the sewers or drains under their charge, at or near the burgh of Brechin, into the Skinners Burn, the Den Burn, and the Glencaldham Burn, or one or more of them, before their confluence with the river South Esk, and into the said river South Esk itself, pollute the water of the said river South Esk, to the nuisance of the pursuer or their authors, or one or more and which of them?"

The pursuer moved the Court to vary the issue by deleting therefrom the words "and which." They contended that the words were unnecessary, and contrary to the usual form of issue in such cases—*Duke of Buccleuch, &c.* v. *Cowan, &c.*, 23d Feb. 1866, 4 Macph. 475, and 21st Dec. 1866, 5 Macph. 214.

At advising—

LORD PRESIDENT—I think the issue should be "to the injury of the pursuers or their authors, or one or other of them."

LORD SHAND differed.

LORD DEAS concurred with the Lord President.

LORD MURE—My opinion has been distinct from the very first that the insertion of the words "and which" is a departure from the style of issue on which cases of this sort have been satisfactorily tried, and that the Lord Ordinary ought not to have put these words in the issue. I think they are more likely to confuse than to assist the jury, and that the issue without these words is well fitted to try the question. If the words are required here they might as well be required in every indictment where more than one person is brought up for trial in a criminal Court.

The Court remitted to the Lord Ordinary to adjust the issue in terms of the above opinion of the Court.

Counsel for Pursuer—D. F. Kinnear, Q.C.—H. Johnston. Agents—Mackenzie & Kermack, W.S.

Counsel for Defenders—J. P. B. Robertson—Jameson. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, March 8.

SECOND DIVISION.

[Lord Adam, Ordinary.

TRAILL *v.* DEWAR.

Agreement—Partnership—Obligation to Enter on New Partnership at Termination of Subsisting Contract—Reparation.

Two persons who were carrying on business in partnership with a third, entered into an agreement that at the termination of the existing contract neither should enter into any new arrangement for carrying on the business without concurrence and consent of the other, and that unless otherwise agreed each should at that date retain an equal interest of not less than one-third in the business. *Held*, at the termination of the existing contract, (1) that this agreement could not be enforced against one of the parties who was unwilling to enter into a new contract, in respect that it supplied no *data* for determining the duration of a new contract; (2) following *M'Arthur* v. *Lawson*, July 19, 1877, 4 R. 1134, that in respect that the Court could not

order specific implement of the alleged contract, no damages were recoverable against the party refusing to enter into a new partnership.

Dr John Traill, the pursuer of the present action, had for many years been in practice as a physician in Arbroath. In 1860 he entered into a contract of partnership with J. A. Dewar, M.D., the defender, which was to last for ten years. In 1869, however, this partnership was brought to an end by mutual consent, and it was arranged that a new partnership should be entered into in conjunction with a third party, Dr Anderson, this new arrangement to subsist for ten years from 1st May 1869, "hereby declaring, that notwithstanding the death of any of the said partners during the continuance of the said period, the said copartnership shall not come to an end, but shall be carried on by the surviving partners to the effect and subject to the provisions hereinafter written, until the same be dissolved in manner after mentioned: But it shall be in the power of any of the partners to put an end to the copartnership at the said 30th day of April 1879, or at the 30th day of April in any year thereafter, provided such partner shall give notice in writing to his copartners of his intention to do so six months previous to the date at which he wishes to withdraw from or to terminate the copartnership." This contract provided for payment out of the profits of the business of an annuity to Dr Traill's brother, to whom the practice had at one time belonged, a fixed allowance to Dr Anderson, and "in payment to the said John Traill of an allowance at the rate of £500 per annum, and to the said James Alexander Dewar of an allowance commencing at the rate of £360 per annum for the first year of the copartnership, and increasing by £20 yearly thereafter until it reach the like sum of £500 per annum." Very shortly after the execution of this contract it was found that sufficient profits were not likely to be drawn from the practice to pay the £500 to Dr Traill and £340 to Dr Dewar, and on the 14th October of the same year (1869) these two gentlemen, on the narrative of the contract, and without prejudice to it, but in supplement thereof, executed a memorandum of agreement whereby Dr Traill, in the event of the expected deficiency in the profits, guaranteed to Dr Dewar his allowance of £340, increasing by £20 per annum, notwithstanding that his own allowance of £500 should not be paid in full, provided that the obligation should extend no further than to give himself and Dr Dewar equal shares in the profits. Dr Dewar admitted in this process that the result of this agreement was that he received £200 more than he would have done under the contract of copartnery. The second head of this agreement was as follows:—"The said parties hereto agree and bind themselves respectively that on the termination of the fixed period of copartnership provided by the said contract, being ten years from 1st May Eighteen hundred and sixty-nine, neither of them shall enter into any new arrangements connected with the carrying on of their profession and business in Arbroath without the concurrence and consent of the other, and, unless otherwise agreed, each of the said parties hereto shall then be entitled to retain an equal interest of not less than one-third in the present business, subject to the deduction of two pounds per week, or one hundred and four pounds per annum, for the services of an assistant, in terms of article sixth of the said contract, in case of absence or inability to attend to duty."

On 1st May 1879, in terms of written notice provided for in the contract, the partnership was brought to an end. No arrangement for a new partnership had been entered into, and a question arose between Drs Traill and Dewar as to the effect of article 2 of the supplementary agreement just quoted, as the result of which Dr Traill raised this action against Dr Dewar for declarator that upon a sound construction of the memorandum of agreement "the defender is bound to enter into a partnership with the pursuer . . . the said partnership to continue during the lifetime of the parties, and to be terminable by the death of either; and the terms and conditions of the said partnership being as specified in the said memorandum of agreement, and so far as not specified being to be found by our said Lords," or otherwise for declarator that the defender was bound to enter into a partnership in such "usual and reasonable period" as the Court should determine. In the event of the defender not entering into any contract he concluded for £3000 in name of damages. At the time of raising the summons the pursuer was in his seventy-second year.

The defender stated that before the action was raised he offered to enter into a partnership for one year from May 1879, but that the offer was refused. He pleaded—"(2) The agreement does not constitute any obligation upon the defender to enter into a copartnership with the pursuer, and no *termini habiles* of a contract of copartnership are therein contained."

The Lord Ordinary (Adam) assoilzied the defender, adding this note to his interlocutor:—". . . It is sufficiently clear that the parties intended, on the expiry of the existing contract, to carry on business in partnership. It will be observed, however, that nothing is provided as to the disposal of one-third share of the business in the event which has occurred of neither party desiring to have a third partner. But what is more material in the present question is, that there is no provision as to the duration of the partnership. In particular, it is not provided that it shall endure during the lifetime of the parties, and the Lord Ordinary can discover no *data* from which it is to be inferred that such was the agreement of parties. If the partnership is not to be for the lifetime of the parties the Lord Ordinary does not know what would be a 'usual and reasonable period' for the duration of such a partnership. It was suggested that as the two previous partnerships in connection with this business had each been for a period of ten years, it ought to be inferred that this one was intended to be for a like period. But the Lord Ordinary cannot think that that would be a legitimate inference to draw. The Lord Ordinary is therefore of opinion that the supplementary agreement cannot be enforced against the defender to the effect of compelling him to enter into a new partnership with the pursuer, seeing that one of the essential terms of the partnership has not been fixed.

"The pursuer has an alternative conclusion for damages; but the Lord Ordinary thinks, in accordance with the principles laid down in the case of *M'Arthur* v. *Lawson*, 19th July 1877,

4 R. 1134, that the pursuer cannot recover damages."

The pursuer reclaimed, and argued—The supplementary agreement was to bind the defender to enter into a new partnership for life or for a reasonable term. In any event, if he did not, the pursuer was entitled to damages—*M'Arthur* v. *Lawson*, July 19, 1877, 4 R. 1134; *Walker* v. *Milne*, June 10, 1823, 2 S. (n.e.) 338; and Jan. 29, 1825, 3 S. (n.e.) 333.

The Court continued the case for a week with a view to a settlement, when the defender repeated the offer made by him before the case came into Court, to hold that the partnership was renewed for one year, and that the pursuer was entitled to one-third of the net profits of that year.

At advising—

LORD JUSTICE-CLERK—It is no doubt a hard case when a man in his later years finds himself without appliances to carry on his profession; but I concur entirely in the opinion of the Lord Ordinary in this case. I think there are no materials out of which the result aimed at in this summons can be arrived at. The whole case depends on the second article of the contract or memorandum of agreement, which was intended to supply a defect in the original contract. That contract was to continue for ten years, and the memorandum of agreement, entered into on the narrative of that fact, provided under its second head—in the first place, that at the end of the ten years neither of the parties "shall enter into any new arrangements connected with the carrying on of their profession and business in Arbroath without the concurrence and consent of the other," which was not done in this case. I think that unless some term is adjected to such a provision it is inextricable, and cannot receive effect. That a man should bind himself for life not to carry on business in Arbroath is a contract which cannot receive effect at all. A contract of this kind is capable of receiving effect, but only where it is so limited that it has a definite and certain end. The reason is obvious. In the present case there is unfortunately no such limitation.

The second part of this second provision of the agreement is as follows:—"And, unless otherwise agreed, each party shall then, at the end of the ten years, be entitled to retain an equal interest of not less than one-third in the present business, subject to the deduction of £2 per week or £104 per annum for the services of an assistant, in terms of article 6 of the said contract, in case of absence or inability to attend to duty."

It is not very clearly expressed, but I read it as applying solely to the case of a retirement from business of either of the partners after the expiry of the original contract. It could only apply to that. I do not think it necessary to say anything more. This is an imperfect and unfinished agreement, and it is impossible to give specific effect to it. I am for adhering to the interlocutor of the Lord Ordinary. The tender previously made, however, has been repeated today at the bar, and is a very proper one in the circumstances.

LORD YOUNG—I am of the same opinion. I only wish to explain that we continued the case, not because of any serious doubt that we entertained upon it, but because we thought it not unreasonable, and certainly desirable, that the defender should renew the offer which he made before the action was raised. I was myself of opinion—and I think your Lordships concurred with me—that at best, under article 2 of the memorandum of agreement, the defender would not be bound to give the pursuer more than one year's income—that is to say, in the most favourable view of the case for the pursuer (while I am far from saying that it is a sound view), the renewed contract, after the expiry of eighteen years, would comprehend the final clause of the original contract (which I assume is renewed by it), "that it shall be in the power of any of the partners to put an end to the copartnership at the said 30th day of April 1879, or at the 30th day of April in any year thereafter, provided such partner shall give notice in writing to his copartners of his intention to do so in six months previous to the date at which he wishes to withdraw from or terminate the copartnership." Therefore if this partnership did continue after the lapse of the ten years it was an indefinite continuance, with power to either party to give the other notice to quit. Indeed it would be almost extravagant to make the parties bind themselves for life. In that view the defender has satisfied the pursuer's claim completely by offering to account for the profits of the year succeeding the ten years' partnership. We thought it right to continue the case that that offer might be renewed. That has been done, and by it the defender has completely satisfied the pursuer's claim in point of law. I think the Lord Ordinary's interlocutor should be affirmed, but in respect of the offer that has been made no decerniture will probably be required.

LORD CRAIGHILL—I am of the same opinion. On an anxious consideration of the supplementary contract of 14th October 1869 I think it not possible to give it a construction which would warrant any of the conclusions of the summons. I think that the pursuer had himself no clear idea of what is involved in his case, and has therefore put into his summons certain alternative conclusions in order that the Court may supply what the parties themselves have omitted from their agreement. It is not the duty of the Court to make a new bargain for the parties which they have not made for themselves, but to give effect to the bargain they have made. I cannot adopt any of the conclusions of the summons, and therefore agree with your Lordships in adhering to the interlocutor of the Lord Ordinary.

The Court adhered.

Counsel for Pursuer—Guthrie Smith—Jameson. Agents—Leburn & Henderson, S.S.C.

Counsel for Defender—D.F. Kinnear, Q.C.—Hon. H. J. Moncreiff — Dickson. Agents — Webster, Will, & Ritchie, S.S.C.