

the prints had been lodged. If matters had been allowed to run on in this way until the twenty-first day without the defender having any reason to believe that the prints were lodged, then clearly the defender would have had no case, but the appearance of the cause in the Lord Ordinary's Procedure Roll gave him good reason to believe that the prints had been timeously boxed. Upon that ground I agree with your Lordships that the Lord Ordinary's interlocutor should be recalled.

LORD DEAS was absent.

The Court recalled the interlocutor and remitted the case to the Lord Ordinary.

Counsel for Defender (Reclaimer)—Gillespie.  
Agent—W. B. Rainnie, S.S.C.

Counsel for Pursuer (Respondent)—Watt.  
Agent—P. H. Cameron, S.S.C.

Tuesday, December 9.

## FIRST DIVISION.

[Lord Adam, Ordinary.]

WILLIAM LAIRD & COMPANY v. LAIRD AND RUTHERFURD.

*Trust—Declarator of Trust—Proof—Partnership—Act 1696, cap. 25.*

A firm and two of its partners brought an action against the remaining partner and another person to have it declared that a patent which had been taken in the defenders' names truly belonged to the firm. The pursuers averred that it had been taken in defenders' names merely to satisfy the patent laws. *Held* that the action was a declarator of trust, which could be proved only by writ or oath of the defenders.

John Laird senior, George Milne Laird, and John Laird junior were at the date of this action partners of the firm of William Laird & Company, manufacturers in Forfar. They had been in business together for a number of years. William Rutherford had been in their employment as manager prior to June 1882.

The action was raised by William Laird & Company and John Laird and G. M. Laird, as two of the partners of the firm, against the other partner John Laird junior, and also against Rutherford, for declarator "that a patent for an invention of improvements in weaving bags, sacks, and other tubular and double fabrics, also single fabrics, and in the means employed therefor, under letters-patent to said defenders John Laird junior and William Rutherford, numbered No. 671, in the year 1884, and which letters are dated 23d February 1874, the final specification being filed in the Great Seal Patent Office, in pursuance of the conditions of the said letters-patent, on 20th August 1874, is the property of the said firm of William Laird & Company, and that the said John Laird junior and William Rutherford hold the same for behoof of the said firm."

They stated—" (Cond. 2) Part of the pursuers' business consists in the weaving and manufacturing of sacks and other like fabrics. In the year 1873 the defender William Rutherford, in course

of his duties in the pursuers' works, suggested an improvement in the method of weaving bags, sacks, and other like fabrics. The pursuers accordingly adopted the said suggestion, and the same was wrought out and perfected by them in their works, at their sole expense, under the supervision of the defender William Rutherford as their manager. Various alterations and improvements were effected upon the said principle in the course of its being thus perfected. The pursuers, in order to secure a monopoly of the said invention for their business, in or about the month of September 1873 resolved to patent the said invention, and they accordingly put themselves in communication with patent agents for this purpose. Through said agents a patent was taken out and letters-patent obtained, which bear date 29th October 1873, and are numbered No. 3508 of that year. The defender John Laird junior, as a partner of said firm, took the principal management in negotiating the said patent. He, in name of the firm and for its behoof, communicated with the patent agents and gave them instructions. He also paid the expenses connected with the said patent out of the funds of the said firm, and charged the same to the firm in the books. The name of the defenders was put in said patents by the pursuers on the suggestion of the patent agents, and merely to comply with the requirements of the patent laws."

They further stated, that to follow out and perfect the first patent they took out a new one in 1874, No. 671, in the same way and under the same conditions as the former, and that the firm and the defenders used and regarded both as the property of the firm; that the patent No. 671—being that referred to in the summons—being found to serve the purpose, the other was allowed to drop; that claims to the patent as individual property had now been set up for the first time by defenders, which rendered the action necessary.

The defenders stated that they were the sole inventors, and that the patents were taken by them in their own name and for their own behoof.

The pursuer pleaded, that as the patents were their property, they were entitled to decree of declarator as concluded for.

The defenders pleaded, *inter alia*—" (3) The pursuers' averments as to the said patent being held in trust for the firm of William Laird & Company can be established only by the writ or oath of the defenders."

By interlocutor of 30th October 1884 the Lord Ordinary sustained the defenders' third plea-in-law.

*Opinion.*—Letters-patent, dated 23d February 1874, were granted to the defenders John Laird junior and William Rutherford for 'improvements in weaving bags, sacks, and other tubular and double fabrics, also single fabrics, and the means employed therefor.'

"The object of the action is to have it found and declared that the said John Laird junior and William Rutherford hold this patent for behoof of the pursuers William Laird & Company, and that it belongs to and is the sole property of the pursuers.

"It appears to me that this is clearly a declarator of trust, and therefore can only be proved by the writ or oath of the defenders, unless there be facts and circumstances averred which take the case out of the ordinary rule.

“The facts which were relied on were, that when the letters-patent were issued, the defender John Laird junior was a partner of the firm of William Laird & Company as it then existed, and is now a partner of the pursuers’ firm, which has come in place of the original firm; and that the defender Rutherford was, at the date of the letters-patent and for many years after, in the employment of the firm as manager. I was referred to the cases of the *General Assembly of the Baptist Church*, 3 D. 1030; *Kilpatrick*, 4 D. 109; and *Forrester*, 2 R. 755, for the purpose of shewing that where property is held in the name of a partner of a firm as an individual, it is nevertheless competent to prove *pro ut de jure* that such property is the property of the firm of which he is a partner, or, in other words, that the transaction is a company transaction. It appears to me to be needless to inquire how far these cases would have ruled the present one if the letters-patent had stood in the name of John Laird junior alone, because William Rutherford, who appears *ex facie* of the letters-patent to be joint proprietor with John Laird junior, is not and never was a partner of the pursuers’ firm. It appears to me, therefore, that the principle of the cases referred to does not apply to the present one, and that the defenders’ third plea-in-law ought to be sustained.”

The pursuers reclaimed, and argued, that as against John Laird junior they were entitled to a proof *pro ut de jure*, he being a partner. The case did not therefore fall under the Act of 1696 as to proof of trust. Rutherford was no doubt in a different position; the conclusions of the summons could hardly be maintained against him. They were willing to abandon the action against Rutherford and proceed against the other defender.

Authorities—*Horne v. Robertson*, 4 R. 977, and cases cited by the Lord Ordinary.

Argued for respondent—There was nothing in the circumstances of this case to take it outwith the Act 1696, c. 25, and the proof should be limited to the writ or oath of the defenders.

At advising—

LORD PRESIDENT—The case of the pursuers is to be found in the statements contained in article 2 of the condescendence, and the whole ground of action is set out in it. It is of importance, therefore, to see what the various averments are which this article contains—[*His Lordship here read the second article of the condescendence above quoted*]. Now, it appears to me that this is a most distinct statement that the improved mode of manufacturing these articles was the invention of Rutherford, who experimented upon and perfected his discovery in the pursuers’ works in company with John Laird junior.

It is not alleged that the pursuers acquired their rights from the inventors either by purchase or in any other legal manner, but they acted as if they had so acquired their rights, and proceeded to get them patented in the name of Rutherford and John Laird junior, and there can be no doubt that the parties in right of this patent are Rutherford and John Laird junior. They have the sole title *ex facie* of the letters-patent.

The object of the present action is to have it found and declared that this patent is the pro-

perty of William Laird & Company, and that John Laird junior and William Rutherford hold the same for behoof of the firm. There are other conclusions in the summons, but these are all ancillary and subordinate to the one which I have just read. Such, then, being the nature of the action, I agree with the Lord Ordinary in thinking that it is nothing more than a declarator of trust. The words cannot, I think, have any other meaning, and so upon the very face of the summons the Act 1696 is undoubtedly applicable. It has been said that the Act is inapplicable because the names of the defenders were inserted in the letters-patent only in compliance with the requirements of the patent laws. That, however, cannot prevent its application to a case like the present, because the Act of 1696 is not concerned with the object for which the trust may be constituted; it deals only with the subject-matter of the document, and limits the mode in which the trust may be proved.

It has also been said that because one of the parties in whose name the letters-patent were granted was a partner of the pursuers’ firm, that upon that account the case does not fall under the statute, and various cases were cited in support of the contention that a proof *pro ut de jure* should be allowed. Now, what the pursuer here asks is to be allowed to prove by parole that the patent which the defenders took out in 1873 in their own names was truly the property of the pursuers’ firm. For the reasons which I have stated, I consider that the statute of 1696 is applicable, and that this averment can only be proved by the writ or oath of the defenders.

What may occur in the course of a proof by writ it is hardly necessary now to conjecture. The pursuers may possibly succeed in showing that as regards John Laird junior, he, being a partner both of the late and of the existing firm, is to be held as a trustee, and that as one of the patentees he represents the firm in the patent, and is bound to communicate one-half of the benefits derived from it to the firm. I prefer, however, to consider the question which is now before us, and I propose to deal with it in the same way in which the Lord Ordinary has done, as I do not see how we can possibly resist arriving at the conclusion that it falls within the statute.

I am therefore for adhering to the Lord Ordinary’s interlocutor.

LORD MURE—I am quite of the same opinion. I do not see how this action can be viewed in any other light than as one of declarator of trust. The word “trust,” no doubt, is not made use of, but what the pursuers seek is to have the right presently standing in the name of the defenders declared to be held by them in trust for the pursuers’ firm. This is just a declarator of trust. I can see nothing in the circumstances which have been stated to us to bring it under the rules laid down in the cases where the statute was held not to apply, and where a proof *pro ut de jure* was allowed.

LORD SHAND—In the course of the discussion the pursuers abandoned the conclusions of the summons against the defender Rutherford, but they pressed them against John Laird junior, and they asked that as against him a proof at large

should be allowed them of their averments on record.

If the pursuers could have satisfied us that the case of Rutherford was distinguishable from that of John Laird junior we might have consented to the mode of inquiry proposed, but I cannot see that the pursuers have succeeded in making any such distinction.

These letters-patent themselves do not form a deed of trust, nor are they embodied in any deed of trust, but the grant was taken in the name of the defenders by the pursuers themselves, and that proves the peculiar feature of this case and makes these letters-patent equivalent to a deed of trust by the pursuers in favour of Rutherford and John Laird junior; nor can I see that the circumstance of John Laird junior being a partner of the late firm at the time when these letters-patent were granted makes any difference in the question now before us. I therefore agree with your Lordships in thinking that we should adhere to the interlocutor of the Lord Ordinary.

LORD DEAS WAS ABSENT.

The Court adhered, and remitted to the Lord Ordinary to proceed with the cause.

Counsel for Pursuers (Reclaimers)—Comrie Thomson—Guthrie. Agents—Henry & Scott, S.S.C.

Counsel for Defenders (Respondents)—J. P. B. Robertson—Fleming. Agents—Morton, Neilson, & Smart, W.S.

Wednesday, December 10.

## SECOND DIVISION.

[Lord M'Laren, Ordinary.]

JAMESON AND OTHERS v. THE POLICE COMMISSIONERS OF DUNDEE.

*Property—Boundary—River—Police—Right to Alveus of Burn which has been from Time immemorial a Common Sewer—General Police Act 1850 (13 and 14 Vict. cap. 33), sec. 228.*

In the course of the construction of docks in a burgh certain land was recovered from the sea and came to be possessed by the adjacent proprietors whose lands were bounded by the sea flood. A burn which from time immemorial had been used as a public drain, and which was finally covered in and conducted through pipes, flowed southward through certain of these lands, and as the land was recovered from the sea the course of the burn or drain was extended till it came to form the sewer passing under the street adjoining the docks, which formed the seaward boundary of the adjacent lands. Over the channel of the burn immediately to the north of this street the police commissioners of the burgh had erected and maintained for more than twenty years a public urinal and privy. The *alveus* of the burn above the pipes was otherwise an open space. The proprietor of a warehouse on one side of this open space, and the proprietor of a shop on the other side, raised an action against the police commissioners for declarator that no part of the ground on which the urinal and privy were erected be-

longed to the commissioners, but that the whole of it belonged to them (pursuers) for their respective interests, and to have the commissioners ordained to remove the erections. The pursuers produced title-deeds of their authors in the lands to which the land gained from the sea had accresced, the earlier of which described the lands of each of them as bounded by those of the other, while the later titles of one of them described his lands as bounded not by those of the other but by the burn, and contained a measurement. *Held* that as the burn had been from time immemorial a public drain, and as such belonged to the police commissioners for behoof of the community, and as the pursuers had established no title to the *alveus* of the burn by grant from the magistrates, and no prescriptive title by use, the defenders should be assoldied.

When the docks of Dundee were constructed under the Dundee Harbour Act of 1815, Dock Street, which runs east and west, was laid out on ground recovered from the sea or Firth of Tay, and formerly within high-water mark. By the construction of Dock Street some ground immediately to the north of it—that is, between it and the place still called the “Seagate” of Dundee—which had formerly been likewise within high-water mark, came into possession of the owners of property at and near the Seagate whose lands were bounded on the south by the sea-flood. A burn called (towards its eastern extremity) the “Mause Burn” or the “Mause Hole,” formerly flowed into the sea at Burnhead at the west end of the Seagate. As the bed of the Tay was filled up down to Dock Street the burn made a new development of its channel seawards, and when Dock Street was completed it was carried into a sewer which was constructed under that street.

The General Police Act of 1850 was adopted by the town of Dundee in 1851. Section 228 of that Act (13 and 14 Vict. cap. 33) provides—“That all sewers and drains within the burgh, whether existing at the time when this Act is applied, or made at any time thereafter (except sewers and drains the private property of any person or persons, or made and used as of private right by any person or persons for his or their own profit, or for the profit of proprietors or shareholders, and except sewers and drains made and used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament, or for the purpose of irrigating land), shall vest in and belong to and be entirely under the management and control of the commissioners.”

The Mause Burn was originally a burn of pure water flowing through what was formerly known as the Meadows of Dundee, but had been since the beginning of this century or earlier used as a public sewer of the town, and had become foul. At the time of the adoption of the Police Act 1850 it was still open, but as building in the neighbourhood increased it was in 1864 covered over, and at the time the present action was raised it flowed entirely in pipes underground till it joined the sewer in Dock Street. There was then (with the exception of the buildings after mentioned) no building upon the bed of the burn above the pipes, and it thus remained (above