

Now, on the evidence it is clear, I think, that Morham intended to leave Leith and settle in Cupar, and that he began a period of industrial settlement in Cupar in April 1884.

With regard to the decisions to which we were referred, the only ones which have any application are those, the principles of which are in accordance with the views expressed by your Lordships, and in which I concur. As to the other class of cases connected with constructive residence, these have not to my mind any bearing on the present case. The only question which we have to consider is, whether the permanent residence of this man was, after 9th March 1884, Cupar? And I, for my part, think it was.

The LORD PRESIDENT was absent from illness.

LORD SHAND was absent on circuit.

The Court pronounced the following interlocutor:—

“Sustain the appeal, recal the interlocutor appealed against, and find as matter of fact (1) that John Wilson Morham, a tailor's cutter, died on 29th June 1886, survived by his wife Mrs Abigail Simpson or Morham, and several young children; (2) that on 10th September 1886 the said Mrs Abigail Simpson or Morham became chargeable to the City parish of Edinburgh, in which she was residing with her children, and that she was at that time and has ever since continued to be a proper object of parochial relief; (3) that between the 10th September 1886 and the 1st October 1887 the pursuer as Inspector of Poor of the said City parish advanced to Mrs Morham for behoof of herself and her children sums amounting in all to £20, 11s. 4d., conform to account No. 4 of process; (4) that the said John Wilson Morham had not continuously resided in the parish of South Leith for the period of five years immediately preceding the 26th May 1884: Find in these circumstances in point of law that the said John Wilson Morham had not acquired for himself and for his wife and children a residential settlement in that parish, which they retained at his death, and that the appellant, the Inspector of the parish of South Leith, is not liable for the sum sued for, or for the future alimont of the said Abigail Simpson or Morham and her children; therefore sustain the defences, assoilzie the defender from the conclusions of the action, and decern,” &c.

Counsel for Appellant (Defender)—Guthrie Smith—Salvesen. Agents—Snody & Asher, S.S.C.

Counsel for Respondent (Pursuer)—Balfour, Q.C.—J. A. Reid. Agents—Curror, Cowper, & Curror, W.S.

Friday, October 26.

SECOND DIVISION.

[Sheriff of Renfrew.]

SMITH & M'BRIDE v. SMITH.

Partnership—Goodwill—Right to Use Firm's Name.

James Smith and Joseph M'Bride carried on business under the firm name of “Smith & M'Bride.” The partnership was dissolved in 1884, James Smith buying the goodwill of the business, which he continued to carry on under his own name of James Smith, but without having renounced his sole right to the firm's name of “Smith & M'Bride.” In 1885 Joseph M'Bride, along with William Smith, brother of James Smith, and D. M'Kelvie, set up a similar business in the same town under the firm of “M'Bride, Smith, & M'Kelvie.” In 1887 M'Kelvie retired, and Joseph M'Bride and William Smith continued the business, but designated their firm as “Smith & M'Bride,” which was the name of the original partnership between Joseph M'Bride and James Smith. Held that the latter was entitled to interdict Joseph M'Bride and William Smith from using the firm name of “Smith & M'Bride.”

Previous to August 1884 James Smith and Joseph M'Bride carried on business in partnership as aerated water manufacturers at premises in Sugarhouse Lane and Waverley Lane, Greenock, under the firm name of “Smith & M'Bride.”

Upon 20th August 1884 the firm was dissolved by agreement between the partners, under which M'Bride sold to Smith for £300 his share and interest in the business, and Smith took over all the liabilities of the firm, and obtained right to collect all debts due to the firm, and to the goodwill of the business. The following notice of dissolution of partnership appeared in the *Edinburgh Gazette* of 22nd August 1884—“The co-partnership hitherto carried on by Smith & M'Bride, aerated water manufacturers in Greenock, by the subscribers, the sole partners thereof, has this day been dissolved by mutual consent. The subscriber James Smith has acquired the said business, with goodwill, and whole machinery and stock-in-trade. He will continue to carry on said business in his own name, and he is authorised to receive payment of all outstanding debts due to said firm, and he undertakes to pay all liabilities due by the firm.” Thereafter James Smith continued to carry on business in his own name at the same premises as formerly.

Upon 24th December 1885 M'Bride formed a partnership with William Smith, brother of the said James Smith, and David M'Kelvie, and under the firm of “M'Bride, Smith, & M'Kelvie” they carried on business as aerated water manufacturers at 61 Nicolson Street, Greenock, until 27th August 1887, when M'Kelvie retired from the partnership. Thereupon M'Bride and William Smith continued to carry on the business, but changed the name of the firm to “Smith & M'Bride.”

In September 1887 James Smith brought a petition in the Sheriff Court at Greenock against

M'Bride and William Smith to have them interdicted from trading under the firm name or style of "Smith & M'Bride."

The pursuer averred that, although he commonly used his own name in the conduct of his business, he had not by agreement or otherwise parted with his right to use the style or firm of "Smith & M'Bride," which he acquired when he purchased the goodwill of that business in 1884; that he was still known as "Smith & M'Bride;" that he was entitled to the sole use of that firm's name; and that he had suffered loss and injury in his business through the defenders' unwarrantable assumption of that name. He had intimated to the defenders that he would be satisfied if they made the name "M'Bride & Smith," which it should have remained when M'Kelvie retired, or even if they made it "William Smith & M'Bride," but they had refused to accede to either of these proposals.

The defenders averred that by the terms of the *Gazette* notice (*supra*) the pursuer had renounced any right he might have had to the firm's name; that the old firm's name was extinct, and that upon M'Kelvie's retirement, "because of certain re-arrangement of their business and otherwise the defenders resolved thereafter to change their firm's name into that of Smith & M'Bride," the actual names of the only remaining partners.

The Sheriff-Substitute (NICOLSON) pronounced this interlocutor:—[After findings in fact in terms of the above narrative]—"Finds in law that the defenders are not entitled to assume and use the name of the firm whose business and goodwill the pursuer purchased from the defender M'Bride: Grants interdict in terms of the prayer of the petition, &c.

"*Note.*—'It seems settled law,' says Clark on Partnership, p. 1431, 'that when the goodwill of a business has been sold, the seller may recommence a similar business in the neighbourhood of the old premises, the only restrictions on this right being that in the case of a firm the seller shall not assume the old name, or represent himself as the successor of the former concern.' I presume that if the pursuer had continued to use the firm name of 'Smith & M'Bride' the defenders would not have ventured to assume it. Their defence is that he abandoned his right to the name, and agreed to do so. His intimating in the advertisement of the dissolution of partnership that he will continue to carry on the business in his own name cannot be so interpreted. His choosing to carry on the business in his own name, and announcing it publicly, did not imply that he gave up the right to the firm name, which he acquired along with M'Bride's share of the business and the goodwill, and had thenceforth the exclusive right to use. He says he still carries on the business in the old premises, under the old name and his own, but there is no proof of this, and in the Directory he appears only as 'James Smith, Aerated Water Manufacturer.' Be that as it may, he acquired the right, and he has not lost it, to the firm name of 'Smith & M'Bride,' by which he says he is still known in the conduct of his business. When the defenders parted with M'Kelvie the name of the firm had to be changed, and the omission of M'Kelvie was all that was necessary. Instead of 'M'Bride, Smith & M'Kelvie,' it should thenceforth have been

'M'Bride & Smith.' But instead of that, the name of the junior partner has been put first, and that of the senior second. Why so? 'Because of certain re-arrangement of their business and otherwise,' say the defenders (art. 4). 'Otherwise' is a very vague and comprehensive word, and if here I take it to mean 'because the name of Smith & M'Bride was already well known in the trade, while that of M'Bride & Smith was new,' I believe I rightly interpret the words and the conduct of the defenders. Their further explanation that the new name 'was simply adopted because of the individual partners composing said firm having said names,' I must regard as scarcely tolerable, if not simply incredible.

"That the assumption of this name by the defenders, and the consequent confusion of a new firm with an older firm represented by the pursuer is injurious to him, and that he is entitled to be protected from such injury, I cannot doubt."

The defenders appealed to the Sheriff (MONCREIFF), who dismissed the appeal, and added the following note:—"The Sheriff-Substitute's judgment is clearly right. Whatever may be the defenders' legal rights, there can be little doubt as to their *animus* or intention in adopting the firm of 'Smith & M'Bride,' viz., to obtain any benefit that was to be derived from the name of the old firm. The Sheriff-Substitute has explained this so fully that I need add nothing. As to the law of the case, I think that in a question with a partner who has sold his interest in the 'goodwill' of a business it must be held that he loses the right to use the old firm. This is correctly laid down by Lindley on Partnership (4th edition) p. 861—"The purchaser of a goodwill of a business acquires the right not only to represent himself as the successor of those who formerly carried it on, but also to prevent other persons from doing the like.' In the case to which he refers (which closely resembles the present), viz., *Churton v. Douglas*, 1859, Johnson's Chan. Reps. p. 174, there will be found a valuable exposition of the law by Vice-Chancellor Page Wood, which fully supports the statement in the text.

"It is said that the pursuer bound himself not to assume the name of the old firm. I do not so read the notice in the *Gazette*. That notice means no more than this, that it was the intention of the pursuer to carry on the business in his own name; and I think it is clear that he would have been at least entitled to have added, 'Successor of Smith & M'Bride,' if he had thought fit. Even if the pursuer were not entitled to use the old name of 'Smith & M'Bride' (which I do not affirm), it by no means would follow that M'Bride, who was bought out, and had assigned his whole interest in the concern to Smith, was entitled to do so, and represent himself as carrying on the business of the old firm. As to the time which had elapsed without the pursuer using the old firm's name (if this is the case) I think a sufficient explanation is, that until the assumption of the name by the defenders it was quite understood by the public that the pursuer was carrying on the business of the old firm. I therefore think that he is entitled to the protection sought, and that interdict has been rightly granted."

The defenders appealed to the Court of Session.

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

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

At advising—

LORD YOUNG—This is an application by a party who purchased a going soda-water making business, with its goodwill and stock-in-trade, to have the party from whom he made the purchase and another, now associated with him in a similar business, from adopting the name of the business which with the goodwill was so purchased. The Sheriff-Substitute, after finding the facts, finds in law that "the defenders are not entitled to assume and use the name of the firm whose business and goodwill the pursuer purchased from the defender M'Bride," and grants interdict accordingly. I think that that judgment is right in fact—indeed the facts are not disputed—and in law. It would require a strong case to restrain any man from carrying on a business in his own name, but here a business, which had been carried on apparently successfully under the firm of Smith & M'Bride, was purchased by the senior partner Smith, with admittedly the exclusive right to use the firm's name, while M'Bride, from whom it was bought, associated two new partners with himself—one Smith, a brother of his late partner, to whom he had sold the business, and a new man called M'Kelvie—and then set up a similar business under the title of "M'Bride, Smith, & M'Kelvie." Whether this was a proper proceeding in the circumstances need not be inquired into, but he was clearly within his legal rights. This new firm does not seem to have answered, and M'Kelvie retired. M'Bride & Smith were thus left alone and they suddenly in September 1887 inverted their firm's names, putting the junior partner first and the senior partner second, which brought the firm exactly to what the old one had been, which had been sold just three years before. Both Sheriffs find that the

object—and the only object—of thus inverting the names was to obtain any benefit which might be derived from the name of the old firm, and no other explanation has been offered to the repeated questions of this Court. It is the obvious reason which occurs to anyone, and which was prominently and almost unpleasantly assigned to it by both Sheriffs some months ago, and which has not yet found any other explanation.

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

LORD RUTHERFURD CLARK—I agree.

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

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

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

Tuesday, October 30.

FIRST DIVISION.

MARSHALL AND OTHERS v. MELVILLE'S TRUSTEES.

Succession—Vesting—Interposed Liferent—Clause of Survivorship.

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

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

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