

Wednesday, May 31.

SECOND DIVISION.

[Lord Low, Ordinary.]

ADAMSON'S TRUSTEES v.
MACTAGGART.

Foreign—Jurisdiction—Forum non conveniens.

In an action of general accounting brought against the surviving partner in an Indian business by the executors of the deceased partner the defender's plea of *forum non conveniens* sustained, because (1) the action was one for winding-up an Indian partnership; (2) the Indian Courts were a tribunal having competent jurisdiction; and (3) the accounting had already been proceeded with by the representative of the pursuers acting under their authority in India.

The executors-nominate of the deceased John Adamson, merchant in Negapatam, raised an action against Henry D. B. Mactaggart, Mr Adamson's partner in business in Negapatam, in which they sought that the defender should be ordained to produce (1) a full account as at 19th May 1890, the date of Mr Adamson's death, of the stock-in-trade, credits, property and effects, debts, and liabilities of the partnership, "whereby the amount of the estate of the said partnership as at said date, and the proportion thereof due and payable to the pursuers as executors foresaid, may appear and be ascertained," and (2) a full account of the business carried on by the defender in room and place of the partnership for six months from 19th May 1890, whereby the profits earned by him during said period, and the proportion thereof to which the pursuers were entitled for the benefit of the widow and child of the said John Adamson under and by virtue of said agreement of partnership, may appear and be ascertained," and to make payment of the sums found to be due to the pursuers under the accounts called for.

The pursuers averred—“(Cond. 1) The pursuers are the executors nominated and acting under the will of the late John Adamson of Negapatam. Mr Adamson was born in Scotland and retained his Scotch domicile until his death, and his executors, the pursuers, have been confirmed by the Scotch Courts. The defender for some time carried on business as a merchant and agent at Negapatam and Tuticorin, but had been for the three or four months prior to the raising of this action, and still continues to be, resident at Lephne-strath House, near Campbeltown, where he is tenant of a house and shooting. He was born in Scotland, and has always been and still is a domiciled Scotsman. (Cond. 2) By agreement of copartnership dated 1st January 1887 the late John Adamson and the defender mutually covenanted and agreed to become and be partners in the trade or business of merchants and agents

at Negapatam and Tuticorin, upon and subject to the terms, conditions, and stipulations expressed in said agreement. . . . (Cond. 3) By the 20th article of said agreement it was provided that within the space of six calendar months after the determination of the said partnership, during the joint lives of the said partners, a general account should be taken of all the stock-in-trade, credits, property and effects, debts and liabilities of the said partnership, and as soon as possibly can be thereafter the assets should be realised, the debts paid, and the balance divided between the partners. (Cond. 4) By the 21st article of said agreement it was provided that 'if either of the said partners shall die during the continuance of the said partnership, the like account and division shall be taken and made between the surviving partner and the executors or administrators of the deceased partner as are hereinbefore directed to be taken and made between the partners on the determination of the said partnership during their joint lives, provided, nevertheless, that the surviving partner shall be at liberty to take at a valuation the share of the deceased partner in the stock-in-trade, credits, property, and effects of the said partnership, upon giving to the executors or administrators of the deceased partner notice in writing of the intention in that behalf at any time within three calendar months from the decease of such partner, such valuation to be made by two indifferent persons or their umpire to be appointed respectively . . . and the amount of such valuation shall be paid by the surviving partner to the executors or administrators of the deceased partner by two equal instalments at the expiration of six and twelve calendar months respectively from the decease of such partner, with interest for the same or instalments thereof for the time being remaining unpaid after the rate of 8 per centum per annum.' (Cond. 5) By the 22nd article of said agreement it is provided that 'If either of the said partners shall die during the continuance of the said partnership, leaving a widow, child, or children him surviving, the surviving partner shall for a period of six months from the date of decease of said partner pay to the executors or administrators of said deceased partner for the benefit of the widow, child, or children, the share of profits to which the said deceased partner would have been entitled had he lived (in addition to the moneys to which they will be entitled under article 21st), such payment to be made as soon after the expiry of the six months from the date of decease of said partner as a proper account can be made up.' (Cond. 6) In virtue of said agreement the said John Adamson and the defender carried on said business as partners until the death of the former, which occurred on 19th May 1890. Mr Adamson left a widow, and on 15th August 1890 a posthumous son was born to him. A large part of the goods sold by the firm in India were purchased by them directly in this country. (Cond. 7) On 7th July 1890 the defender

wrote Mr Ramsay, one of the pursuers, and as acting for them, formally intimating to him, 'under paragraph 21st of the said agreement, as therein required, that I intend to take over the stock-in-trade, credits, property, and effects of the partnership.' But in the letter making said intimation he said, 'With reference to the assets of the firm I would propose that I take them over at the figure at which they stand in the books, in the same way as was done when Mr Adamson joined Mr Anderson, and when I joined Mr Adamson. If, however, you prefer to have them valued, I have no objection, only I look upon the latter as a useless expense.' (Cond. 8) After making some inquiries, the pursuers acquiesced in and agreed to this proposal, and requested the defender to render them an account, so that the amount of the firm's assets might be ascertained, and the proportion thereof falling to them duly paid over. The defender accordingly, during the spring of 1891, rendered them several accounts, when the pursuers for the first time learned that instead of giving credit for the various assets of the firm at the figures at which they stood in the firm's books, the defender had, without giving any notice thereof to them, obtained *ex parte* valuations of certain of these assets, and had inserted said valuations in the accounts as the sums for which he was liable, and that he had also proceeded at his own hand to write off certain book debts due to the firm and standing in their books at the date of Mr Adamson's death as of full value, and to debit them with half of the sums thus written off. The defender had farther debited the pursuers with various sums which are not good charges against Mr Adamson's estate. The pursuers have remonstrated against this conduct and have intimated to the defender various objections to his accounts, and called on him to render them a proper account, but he refuses to do so. He has meantime on his own account, and for his own behoof, taken possession of, and realised or disposed of the whole or the greater part of the firm's assets, and has treated them in every way as if they were his own absolute property. He has made the pursuers various payments to account, but they believe and aver that on a proper accounting there is still a large sum belonging to them in his hands, amounting to at least the sum first sued for. With reference to the statement in answer, it is admitted that the Administrator-General (to whom, by the advice of Messrs Branson & Branson, the pursuers handed the papers in connection with Mr Adamson's Indian estate, which included shares in various public companies and large deposits in Indian banks), in order to facilitate the realisation by the pursuers of that estate, and to avoid the necessity of one of the pursuers going out to India personally, obtained, on the authority of the pursuers, from the High Court of Judicature at Madras, letters of administration under Mr Adamson's will. Admitted that the Adminis-

trator-General from time to time received, on behalf of the pursuers, various payments from the defender on account of his indebtedness to Mr Adamson's estate, and granted him receipts therefor, but denied that he ever granted or had power to grant him a final discharge in respect of said indebtedness. He was expressly instructed by the pursuers not to do so, and explained that on 24th August 1892 he stated in a letter to Mr Ramsay, 'I have not given Mr Mactaggart—meaning the defender—any release.' Explained further that the Administrator-General wrote to Mr Ramsay in the following terms, in answer to a letter which he had written stating various objections to the defender's accounts:—'Mr Mactaggart is in possession of all the evidence, and it would be very difficult for me to obtain any proof except from him. Litigation must necessarily be very expensive, and is sure to be unsatisfactory. I do not think it would be of any advantage to file a suit, as we could not recover costs, and the cost of sending down a competent English solicitor would exceed by far any sum the Court would decree, so far as I can judge; only 5 per cent. on the claim decreed is allowed as costs. . . . If, however, the executors are still disposed to question the propriety of these accounts, and are desirous of putting the matter into Court, I would suggest their empowering some person here to apply for and obtain letters of administration to the deceased's estate, and relieve me of the present administration, as I hesitate to put the estate to the expense of a suit.' In order to carry out the suggestion of the Administrator-General as to taking out letters of administration in favour of some other person in India, it would have been necessary that such person should find caution to the amount of double Mr Adamson's Indian estate, which could only be done by paying a large commission to induce some bank or guarantee company to become security. In consequence of this difficulty and expense, and of the statement by the Administrator-General as to the expense of litigation in India, the pursuers were satisfied that the inconvenience and expense of suing the defender in the Indian Courts were such as to render an action against him there utterly impracticable. Having, therefore, learned some time thereafter that he had returned to this country, they considered it their duty, in execution of the trust committed to them by Mr Adamson, to raise an action against him here. Explained that for the purposes of the present action it is unnecessary that the books of the late firm of Adamson, Mactaggart & Company should be sent home to this country, as full material for the accounting can be obtained from the firm's balance-sheets, copies of which, so far as not already in the pursuer's possession, can be easily obtained from India. Explained that Negapatam and Tuticorin are both situated at a distance of several hundred miles from Madras, which is the seat of the nearest Court in India in which the question be-

tween the pursuers and defender could be tried. Explained further that Mr Gordon, who was for several years prior to Mr Adamson's death the principal assistant and head book-keeper of the firm of Adamson, Mactaggart, & Co., and who is the person most familiar with that firm's system of book-keeping and mode of conducting business, left India permanently in the end of 1890 and returned to this country, in which he is still resident. (Cond. 9) The defender has further refused to give the pursuers a proper account of the business for the six months succeeding Mr Adamson's death, so as to ascertain the proportion of the profits earned during that period, to which they are entitled on behalf of Mr Adamson's widow and child. He has made the pursuers payments to account of said profits, but they believe and aver that on a proper accounting it will be found that he still retains in his hands at least £500, to which they are entitled under this head. The present action has thus become necessary."

The defenders lodged defences and pleaded, *inter alia*—" (2) *Forum non competens*. The agreement of copartnership libelled having been executed in India, and the business carried on there, and the whole assets, books, and papers of and relating to the said business being in that country, the Court of Session in Scotland is not a proper or competent *forum* in which to determine the rights of the partners. (3) The domicile of the said copartnership and partners thereof being in India, the appropriate tribunals of that country are the proper and competent *forum* for determining the rights of the partners, and this Court ought to decline to exercise jurisdiction in this action, and to dismiss the same."

On 24th January 1893 the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds that in the circumstances set forth on record this Court is not a *forum conveniens* for the trial of the present action: To that extent and effect sustains the second and third pleas for the defender, dismisses the action, and decerns, &c.

"*Opinion*.—I am of opinion that this is a case in which the plea *forum non conveniens* falls to be sustained. . . .

"The action is one of general accounting against the surviving partner by the representatives of the deceased partner, and *prima facie* the appropriate *forum* to try such a case is the Court of the country where the partnership had its domicile, where the business was carried on, and where the books and papers of the business are situated.

"The pursuers have taken advantage of the fact that the defender had taken a house and shooting in Argyllshire to raise the present action. But it is not said that defender has left India and intends to reside in this country permanently. On the contrary, it is not disputed that he still carries on the business in India, of which he is now sole partner, and that his visit to this country was only of a temporary character.

"I do not proceed merely upon the fact that this is a general accounting brought against an Indian merchant, in regard to an Indian business, but also upon the course of action which has been followed by the pursuers themselves. Under their instructions and authority, an Indian official, the Administrator-General at Madras, obtained letters of administration of Mr Adamson's estate, and among other things, proceeded to realise the interest of the executy estate in the partnership. The Administrator-General appears to have obtained accounts from the defender, and also to have obtained payment from the defender of, at all events, the whole amount which the latter brought out as due to the executy estate. I think that it is plain from the letter quoted in article 8 of the condescendence that if the matter had been left to the Administrator-General, he would have regarded the accounting with the defender as completed. It appears that one of the pursuers, Mr Ramsay, took various objections to the defender's accounts, and apparently instructed the Administrator-General to sue the defender for an additional sum of £500. The Administrator-General, in the letter to Mr Ramsay to which I have referred, advises against litigation, and concludes as follows:—'If, however, the executors are still disposed to question the propriety of these accounts, and are desirous of putting the matter into Court, I would suggest their empowering some person here to apply for and obtain letters of administration to the deceased's estate, and relieve me of the present administration, as I hesitate to put the estate to the expense of a suit.' The Administrator-General's letter is very like an intimation to the pursuers that in his opinion they have no case against the defender, and that, at all events, he will be no party to a litigation.

"The pursuers say that it would be very expensive to obtain a new administrator appointed in India; that from what the Administrator-General writes, it appears that even if they succeeded in a suit in India they would only recover a small part of their expenses; that the books of the firm are not required, but only copies of the balance-sheet; that a former book-keeper of the firm, who would be an important witness, is now in this country; and that Madras, where the action would fall to be tried, is several hundred miles from Negapatam.

"These are the grounds upon which the pursuers claim right to have the action tried in this country, and in my opinion they are insufficient. No doubt what evidence is likely to be required, and where the documents or witnesses are, are matters to be considered in cases of this description, but I cannot assume that the books of the business would not be required in this case, and the fact that one person, who may or may not be a witness, is in this country, I think, of no importance.

"The grounds upon which I proceed in sustaining the defender's plea are (1) that this is an action for winding up an Indian

partnership; (2) that the Indian Courts are a tribunal having competent jurisdiction; and (3) that the accounting has already been proceeded with, perhaps concluded, by the representative of the pursuers acting under their authority in India. In these circumstances it appears to me that the Indian Court is the suitable tribunal for the trial of the case. It is certainly best for the interest of the defender that it should be tried there, and I do not think that that course would be contrary to any legitimate interest of the pursuers. Further, looking to the nature of the case, and the proceedings which have already been taken in India, I think that the ends of justice are more likely to be attained by holding that further proceedings must be taken in the Courts of that country."

The pursuers reclaimed, and argued—The cases where this plea had been sustained were chiefly those in which foreign executors had been called to account for estate situated in a foreign country, or where a person was sued as a partner in a foreign firm, the books of which were abroad—*Clements v. Macaulay*, March 16, 1866, 4 Macph. 583. The reason of this was that executors were officers of the Court and responsible to the Court which appointed them, and therefore should not be sued elsewhere. Neither of these considerations applied here. The executors of the deceased partner resided in this country, and were confirmed by the Scots Court. The production of the books was unnecessary, and did not affect the question—*Sim v. Robinow*, March 17, 1892, 19 R. 665. The party taking objection to the Courts of this country must show that he would be put to an unfair advantage by the case being tried here. It was not enough to show that the defence had a better chance of succeeding if the case was tried abroad—*Longworth v. Hope*, July 1, 1865, 3 Macph. 1049 (opinion of Lord Deas, 1057). No unfairness would result to the defender if the case was tried in this country, and his plea of *forum non conveniens* should be repelled.

Counsel for the defender was not called on.

At advising—

LORD JUSTICE-CLERK—I see no good ground for interfering with the decision at which the Lord Ordinary has arrived.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—I also agree. I think that this is one of the cases specially pointed at in the case of *Clements* as those in which action ought to be taken abroad. It is a case in which a person has been sued as a partner in a foreign company, the books and funds of which are in another country.

The Court adhered.

Counsel for the Pursuers—Chree. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defender—Burnet. Agents—Murray, Beith, & Murray, W.S.

Wednesday, May 31.

FIRST DIVISION.

[Lord Low, Ordinary.]

THE ROYAL BANK OF SCOTLAND AND OTHERS, PETITIONERS.

Trust—Trust for Creditors—Appointment of New Trustee—Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97)—Trusts (Scotland) Amendment Act 1884 (47 and 48 Vict. cap. 63), secs. 1 and 2.

Held that the operation of the Trusts Act of 1867 is extended by the Trusts Act 1884 to trusts in which the trustees do not act gratuitously, and that it is competent for the Court under section 12 of the Act of 1867 to appoint a trustee in a trust for creditors.

On November 18th 1890 Francis Robertson Reid granted a trust-deed for behoof of his creditors in favour of Lawrence Hill Watson, C.A., Glasgow. The deed provided that a suitable remuneration should be paid to the trustee.

The trustee died on 27th January 1893, and thereafter the Royal Bank of Scotland and the British Linen Company Bank, the principal creditors of the said Francis Robertson Reid, with his consent and concurrence presented a petition wherein they craved the Court to appoint a trustee under the trust-deed in place of the deceased Lawrence Hill Watson, or otherwise to appoint a judicial factor on the trust estate.

Section 12 of the Trusts (Scotland) Act 1867 provides—"When trustees cannot be assumed under any trust-deed, or when any person who is the sole trustee acting under any such trust-deed has become insane or incapable of acting by reason of physical or mental disability, the Court may, on the application of any party having interest in the trust-estate, after such intimation and inquiry as may be thought necessary, appoint a trustee or trustees under such trust-deed, with all the powers incident to that office." . . .

The question arose whether the Trusts Amendment Act 1884 had extended the operation of the Trusts Act 1867 to trusts in which the trustees did not act gratuitously, and the Lord Ordinary (Low), in respect of the importance of this question, reported the petition to the First Division. The provisions of the Trusts Amendment Act 1884, on which the petitioners founded, are set forth in his Lordship's note.

"*Opinion.*—The petition is presented by two of the principal creditors of Mr Reid with his concurrence, and no opposition to the appointment has been offered by any of the parties interested. The prayer asks alternatively for the appointment of a judicial factor, but the parties desire that a trustee should be appointed, if that course is competent.

"The application is made under the Trusts Acts, although they are not cited in the petition, and it appears to me to be