

Now, when you get the length of saying that this is a document the benefit of which goes to the owner of the subject, be he heir or singular successor, you cannot stop there, for if the lands are divided it follows that each owner of the divided portion must be entitled to go on and ascertain the value of this portion. How that is to be done is a subordinate question. I do not see any difficulty, if the case is proved, in approving of the decree as a whole, and following it up to a conclusion by limiting it to the interest of each particular pursuer. That would in no way prejudice the rights of persons interested in other lands. But it is a condition of the pursuer obtaining approbation that he should show that the land he is now possessed of was included in the subjects named in the report, and that it has come to him by a title subsequent to the date of the report. Of course if his title originated at a date prior to the report, then his lands would not be included at all, because they could not be held to be included in a valuation to which the only parties were the Bishop of Moray and the community of Elgin. I therefore think that proof should be allowed.

LORD KINNEAR—I am entirely of the same opinion, and have nothing to add to what your Lordship has said.

LORD PEARSON—I am of the same opinion.

LORD SALVESEN—I also concur.

The Court pronounced an interlocutor repelling the first, second, and fifth pleas for the defenders, and allowing, before further answer, a proof as to the pursuers' land being included in the subjects named in the Sub-Commissioners' report, and remitting to the Lord Ordinary on Teinds to take the proof and to report, with expenses.

Counsel for the Pursuers—M'Lennan, K.C.—Brodie Innes. Agents—Mustard & Jack, S.S.C.

Counsel for the Compearing Defenders—Johnston, K.C.—Constable. Agent—J. B. M'Intosh, S.S.C.

## COURT OF SESSION.

Wednesday, February 21.

### FIRST DIVISION.

[Lord Mackenzie, Ordinary.

WALLACE v. WALLACE'S TRUSTEES.

*Partnership—Copartnership for a Fixed Term—Death of Partner Immediately on Expiry of Fixed Period without New Agreement—Question of Continuance of Partnership—Partnership Act 1890 (53 and 54 Vict. cap. 39), secs. 27 and 32.*

A partnership agreement was entered into for five years "from and after the first day of January" 1895. One of the partners died on the morning of the

2nd January 1900. No new express agreement had been entered into.

Held that the partnership was dissolved and that there had not been in fact a "continuance of the business by the partners" in the sense of section 27 of the Partnership Act 1890 so as to infer a continuance of the partnership.

*Partnership—Copartnership for Fixed Term—Continuance of Partnership after Expiry of Term—Rights and Duties of the Partners—As they were at the Expiration of the Term—Partnership Act 1890 (53 and 54 Vict. cap. 39), sec. 27 (1).*

Opinion (per Lord Mackenzie, Ordinary) that the words "at the expiration of the term" in section 27 (1) of the Partnership Act 1890, where that section says that in a partnership for a fixed term continued beyond the term "the rights and duties of the partners remain the same as they were at the expiration of the term," are equivalent to "during the partnership term."

The Partnership Act 1890 (53 and 54 Vict. cap. 39) enacts, sec. 27—"Where partnership for term is continued over, continuance on old terms presumed"—(1) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will; (2) a continuance of the business by the partners, or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership." Sec. 32—"Dissolution by expiration or notice—Subject to any agreement between the partners, a partnership is dissolved (a) if entered into for a fixed term, by the expiration of that term. . . ."

On 29th April 1905 Forbes Thomson Wallace, solicitor, 40 Marchmont Crescent, Edinburgh, raised an action of accounting against William Shepherd, solicitor, Royal Bank House, Leven, Fife, and others, the testamentary trustees of his father the late Forbes Thomson Wallace, bank agent, Leven.

The pursuer, who had an interest in the residue of his father's estate, made averments to the effect that the assets of the trust estate had not been properly realised. "(Cond. 6) In particular, the defenders have failed to realise and give credit in their accounts for certain payments which fall to be made to the estate of the deceased by his partner the defender William Shepherd. Mr Shepherd had been in partnership with the deceased since 1890, and from the period from 1st January 1895 under a copartnership agreement dated 28th February 1895.

(Cond. 7) The said copartnership agreement was in force at the date of Mr Forbes Thomson Wallace's death and . . . Mr Shepherd was bound to pay to the defenders one-half of the profits of the business for the five following years in so far as they

exceeded the sum of £500 per annum. . . .”

The said copartnership agreement dated 28th February 1895 contained the following clauses—“*First*.—The parties hereto agree to continue to carry on the said business under the same firm name for a period of five years as from and after the 1st day of January 1895.

*Fifth*.—In the event of a dissolution of the copartnership by the death of either partner during the subsistence of this agreement, it is agreed as follows:—(*First*) In the event of the death of Wallace the books of the firm shall be brought to a balance by Shepherd as at the date of Wallace's death, and the proportion of profits due to him ascertained. Shepherd shall carry on the business, and for a period of five years subsequent to Wallace's death the profits of said business, as shewn by the balance sheet to be made up annually by him, which shall be final, shall, in so far as they exceed five hundred pounds per annum, be paid, one half to the representatives of Wallace, and the other half together with the said sum of five hundred pounds per annum shall belong to Shepherd. (*Second*) In the event of the death of Shepherd the books shall be brought to a balance by Wallace as at the date of Shepherd's death, and the proportion of profits due to him ascertained. Wallace shall carry on the business and shall pay to the representatives of Shepherd for a period of five years subsequent to the date of his death the sum of one hundred pounds per annum.”

The late Forbes Thomson Wallace, the partner and truster, had died on 2nd January 1900.

The defenders, *inter alia*, pleaded—“(4) The said partnership not having been continued after the term fixed by the said agreement for its expiry, the defenders should be assoilzied. (6) In any event the provisions of the said contract for the interest of the representatives of the deceased were not of such a nature as to be held continued.”

On 23rd December 1905 the Lord Ordinary (MACKENZIE) allowed a proof.

*Opinion*.—“The pursuer brings this action of accounting against the defenders, as trustees under his late father's testamentary settlement, and also as individuals. The action proceeds on the footing that the defenders have failed to ingather the assets of the late estate.

“The late Forbes Thomson Wallace, the truster, had been in partnership with William Shepherd, one of the defenders. They had carried on a banking, law, and insurance business in Leven under a partnership agreement dated 28th February 1895, for five years from 1st January 1895. This term expired on 31st December 1899. Mr Wallace died on 2nd January 1900. Two questions arise at this stage of the case—(first) whether the partnership was continued after the term had expired on 31st December 1899, and (second) whether, if so continued, the provisions of a certain article in the partnership agreement (to be afterwards referred to) were carried forward into the partnership at will.

“The first question depends upon fact,

because section 27 of the Partnership Act 1890 provides as follows—[*his Lordship quoted the section supra*].

“Accordingly the only point argued under this head was whether there was a sufficient averment of a continuance by the partners, or either of them, of the business after the expiration of the term specified in the partnership agreement. I am of opinion that the pursuer's averments in regard to this are quite sufficient to entitle him to inquiry.

“Inasmuch, however, as success on the first question would not avail the pursuer, unless the second question (which does not depend on disputed fact) is to be decided in his favour, it is necessary that it should be disposed of now. It is whether the provisions of article fifth of the partnership agreement are to be held as carried forward if subsequent to 31st December 1899 there was a partnership at will.

“Article fifth provides—[*his Lordship quoted article 5 of copartnership agreement supra*].

“The defenders did not contend that the provisions of article fifth are inconsistent with a partnership at will. Their argument was that this article provides only for the dissolution of the copartnership by the death of either partner during the subsistence of this agreement, and that this agreement terminated on 31st December 1899. I am of opinion that this is much too narrow a construction. I think that when partners continue business after the expiry of their original contract, without making any new agreement, the original contract is held to be renewed by tacit relocation, and all the articles of the original contract, so far as they are applicable to a partnership at will, are carried forward to regulate the rights and obligations of the partners *inter se*.

“It was also contended, on a construction of section 27 (1) of the Partnership Act (quoted *supra*), that ‘the rights and duties remain the same as they were at the expiration of the term’ in the case of a partnership continued after the term has expired; that if the late Mr Wallace had died prior to 31st December 1899 the rights conferred by article fifth would have vested in his executors, but that as he survived that date no right had as at the expiration of the term vested in him, and therefore nothing was transmitted to his executors. I am of opinion that the expression ‘at the expiration of the term’ is equivalent to ‘during the partnership term,’ and that therefore the argument upon the terms of the section is met by the same consideration which (as already explained) seem to me sufficient to negative the argument for the defenders, founded on the opening words of article fifth.

“I am therefore of opinion that if it is proved the partnership continued after 31st December 1899 the provisions of article fifth were carried forward. . . .”

The defenders reclaimed, and argued—The averments for the pursuer were vague and not such as to infer a continuance of the partnership. The facts which the Act required to establish a presumption of continuance were absent, and there was

no averment of agreement to continue, therefore the partnership must be held to have expired.

Argued for the pursuer and respondent—The averments were such as to instruct an agreement between the partners that the firm should continue after the expiry of the period fixed for its duration. The business had been continued after that date in the sense of sec. 27 (2) of the Partnership Act 1890. The fact of 1st January being a holiday was immaterial, and the partnership had continued in the sense of the agreement thereanent.

LORD PRESIDENT—This is a case in which a beneficiary brings an action because he conceives that the trustees of his father's settlement, under which he is a beneficiary, have not made good a claim against a person who was a partner with the deceased truster. The claim is thus one for certain profits in respect of a partnership.

The deceased truster and the person in question were partners in a law business, and had a partnership agreement, dated 28th February 1895, the currency of which was for "five years as from and after" 1st January 1895. The partnership accordingly expired either upon the midnight of 31st December 1900 or on the midnight of 1st January 1901. I do not think it necessary to decide the question as to the precise meaning of the term "from and after"—in other words, as to the exact terminus of the partnership. The partnership agreement had a clause in it that in the event of the death of the senior partner, who was the truster, during the subsistence of the partnership agreement, the business should thereafter be carried on for a period of five years subsequent to his death by the surviving partner, and that the surviving partner should give a certain portion of the profits to the representatives of the predeceasing partner.

Now, what happened was this. No arrangement was made as to making any new partnership agreement, and the senior partner died at 7 o'clock on the morning of 2nd January 1901. The pursuer alleges that the partnership was continued, and that the clause as to carrying on the business for five years must be read into the new partnership. The matter seems absolutely determined by the sections of the Partnership Act which have been referred to. Sec. 32 of that Act says—"Subject to any agreement between the partners, a partnership is dissolved, (a) if entered into for a fixed term, by the expiration of that term." Well, that was the case here, and therefore, *prima facie*, the partnership was dissolved at the latest at midnight of 1st January. Then sec. 27 deals with the case of a partnership being continued after the term has expired as follows:—"(1) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were

at the expiration of the term, so far as is consistent with the incidents of a partnership at will; (2) a continuance of the business by the partners, or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership."

Now, these words seem to me to be perfectly clear. How can you have a continuance of the partnership without partners? The thing is impossible. And, accordingly, the continuance of the business—which is presumed to be a continuance of the partnership—must be a continuance "by the partners or such of them as habitually acted therein;" so that still, in order to a continuance of the partnership, there must be partners. Here it was impossible, after the death of the truster, that there could be a continuance of the partnership, because there were no partners, and it is impossible—supposing one takes the earlier date—that there could be a continuance of the business after 1st January without this continuance of partnership, because there was no time to infer that such continuance was consented to by the partners. The 1st of January was a holiday, and it seems improbable that any business was done in the office on that day. The continuance of the business is matter of fact, and the fact could never be gathered from a mere casual performance of some ordinary duty by one of the partners on a single day. Accordingly, it seems to me that the pursuer's case entirely fails.

I cannot help thinking that the Lord Ordinary had not noticed this matter where he says—"The only point argued under this head was whether there was a sufficient averment of a continuance by the partners, or either of them, of the business after the expiration"—that is not the phrase of the statute—"of the term specified in the partnership agreement." You cannot have a continuance of the partnership by one of the partners.

Accordingly, I cannot think there is really any room at all here for proof, and that the defender ought to be assoilzied.

LORD M'LAREN—I agree with your Lordship that it is not necessary for the purposes of this case to determine whether the partnership in question expired on the last day of December or on the first day of January. There is a rule—a well-known rule—for computation of time which is applied to cases where the law itself introduces a time limit, the most familiar examples being the law of deathbed and the sixty days for cutting down preferences under the Act of 1696. Under that law the rule is to exclude the first day and to include the whole of the last day of the term, but it is not to be assumed that this applies to the interpretation of words fixing the time in a written contract or agreement. In the interpretation of a contract the question always is, what was the intention? It is very unlikely that parties entering into a contract for years would intend to make it begin on the second instead of the first of January, and end on

the first of January instead of 31st of December. It is, however, unnecessary to decide the point in this case, for we are all satisfied that it would be impossible—whether or not the first day of the year is to be included in the partnership—to draw any inference from the carrying on of business for a single day, and especially where that day is a public holiday. Now, it is not averred that the partners had entered into any new agreement before the expiry of the duration of the copartnership. I have no doubt that such an agreement is capable of parole proof, because partnership is a consensual contract. It may be continued by verbal agreement on the terms of the old written agreement. The evidence would, of course, have to be clear. The Court would not readily hold that two experienced men of business left a matter of that kind to a verbal understanding, knowing very well how to put down their agreement on paper. But no such agreement is averred.

I am of opinion that the 27th section of the Act has no application to this case, because, as I read the section, it is a condition of the two propositions there formulated that there is a partnership in existence—that is, a plurality of persons interested in the business. It is quite enough under the second branch of the section that one of the two should continue to do the work if that has been the practice of the firm—*e.g.*, where there is an active partner and a sleeping partner, but before the 27th section can take effect you must have two persons in the partnership from whose actings, or the actings of one of them, you are to infer a resolution to continue the old business. Now we have not got that, because by a strange coincidence the death of one of the partners occurred within a day after the expiry of the partnership.

I am therefore of opinion that there is no averment here of the continuance of the partnership, and accordingly there can be no proof.

LORD KINNEAR—I quite agree with your Lordships. The statute provides that where there has been a contract of copartnership for a fixed term, and that term has expired, the partnership may be continued without an express agreement, provided it is continued in fact by the partners, or by such of them as habitually acted during the term, without any settlement or liquidation of the partnership affairs. That last condition seems to me to imply that, before it can be presumed against a former partner that he is continuing the business, he should have some opportunity of showing that he does not intend to do so by taking some steps, at all events, towards the settlement or liquidation of the partnership affairs. But without laying weight on that consideration it is, at all events, clear enough that what the statute imperatively requires is continuance of the business by the partners, or, at all events, by those partners who have during the fixed term habitually acted therein. Now, in the present case, the deceased man, who is said to have continued the partnership,

died on the morning of 2nd January before the business hours began. The fixed term of partnership admittedly came to an end on either the 1st or 2nd of January. Assuming it came to an end on 1st January, the question is whether the dead man did anything to show that he and his partner were continuing the business as before, or allowed his partner to do anything to show that they were continuing the business as before, and to show a continuance of the business. Now, I agree with your Lordships that there is nothing averred on record from which it is possible to infer—even if some business had been done by the surviving partner just as it would have been done at any time before the arrival of the fixed time—a continuance of the business in the circumstances set out. In the ordinary course of affairs, if one partner of a firm is actually lying on his deathbed, it may be absolutely indispensable, and, at all events, perfectly reasonable, that the surviving partner should see that the business does not come to an end. The question is not whether the business, but whether the partnership, continued when the surviving partner like a reasonable man attended to the business though the other partner was no longer in life. But it is not averred that the surviving partner did anything whatever. Lord M'Laren pointed out at an early stage of the discussion that the day was a public holiday—New Year's Day—and therefore there is no room to presume that the surviving partner did anything in the business at all. At all events there is no averment.

It appears to me, therefore, that the conclusion your Lordships have reached is perfectly sound. There is nothing averred to show that the business was continued at all during the time that may have elapsed between the expiration of the fixed term and the death of the deceased man—at all events nothing to show that it was continued as a partnership. I therefore agree that the interlocutor under review should be recalled.

LORD PEARSON concurred.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for the Defenders and Reclaimers—The Dean of Faculty (Campbell, K.C.)—Sandeman. Agents—Thomas White & Park, S.S.C.

Counsel for the Pursuer and Respondent—Macfarlane, K.C.—Dunbar. Agent—Thomas Henderson, W.S.