

Tuesday, February 19.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

MACBEAN v. WEST END CLOTHIERS COMPANY, LIMITED.

Process—Expenses—Caution for Expenses—Restriction of Amount—Defender in Liquidation—Extension of Time—Limitation of Caution.

A receiver and manager was appointed by the English Courts to a limited company registered in London and carrying on business in Scotland. A petitory action having been brought against the company the receiver and manager lodged answers. The pursuer pled that those answers were unauthorised, which plea was sustained by the Lord Ordinary. The defenders reclaimed and amended the record by adding averments to the effect that by the law of England the receiver's action in lodging answers had been validated, which averments rendered necessary a case to ascertain the English law. The Court, on the motion of the pursuer, *ordained* the defenders to find caution for the expenses of the cause by 15th February, and on 19th February, on the motion of the defenders, extended the time for finding caution to 5th March and limited the amount thereof to £300, reserving to the pursuer the right to apply to the Court at any future stage of the process for additional caution.

Duncan Alexander MacBean, *pursuer*, brought an action against the West End Clothiers Company, Limited, having their registered address in London and carrying on business at 3 North Bridge, Edinburgh, *defenders*, concluding for decree for £179, 8s. 4d., £20, 11s. 4d., and £353, 18s. 11d. with interest, which sums the pursuer alleged the defenders owed to Charles Cole Pitcher, formerly chairman and managing director of the defenders, who had assigned his rights against the defenders to the pursuer.

Defences were lodged for the defenders by a receiver and manager appointed by the English Courts, who averred that his powers superseded the powers of the directors.

The pursuer denied the receiver's authority to defend the action. He *pleaded, inter alia*—"2. There being no defences lodged by or on behalf of the company, decree should be granted as concluded for."

On 19th June 1917 the Lord Ordinary (ORMIDALE) sustained the second plea-in-law for the pursuer.

The defenders reclaimed and amended the record by adding averments to the effect that by English law the receiver's action in lodging defences had been validated. Those averments rendered necessary a case for the ascertainment of the English law under the British Law Ascertainment Act 1859 (22 and 23 Vict. cap. 63).

On 5th February 1918 the Court recalled the interlocutor of the Lord Ordinary, and, on the motion of the pursuer, *ordained* the

defenders to find caution for the expenses of the cause by the 15th February.

Thereafter the defenders moved that the time for finding caution should be extended and the amount limited. They referred to *Harvey v. Furquhar*, 1870, 8 Macph. 971.

On 19th February 1918 the Court extended the time for finding caution till 5th March 1918, and limited the amount thereof to £300, reserving to the pursuer the right to apply to the Court at any further stage of the process for additional caution, and to the defenders their answers thereto.

Counsel for the Pursuer—Constable, K.C.—Greenhill. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for the Defenders—Blackburn, K.C.—Leadbetter. Agent—Donald Mackenzie, S.S.C.

HOUSE OF LORDS.

Friday, May 3, 1918.

(Before the Lord Chancellor (Finlay), Viscount Haldane, and Lord Shaw.)

GORDON'S EXECUTORS v. GORDON.

Contract—Constitution of Contract—Writing.

Where there are communings with a view to an agreement, it is a question of the intention of parties whether a valid and effectual agreement has been made requiring no formal instrument though such formal instrument is being prepared, or whether there is to be no valid and effectual agreement until the formal instrument is completed. *Circumstances in which held a formal completed instrument was required.*

Samuel Hunter Gordon, and two others, a majority and quorum of the executors of the late John Gordon, farmer, Cullisse, Nigg, in the county of Ross and Cromarty, *complainers*, brought a note of suspension and interdict against Alexander Paterson Gordon, farmer, Arabella, Nigg, *respondent*.

The *prayer* was—"That the complainers are under the necessity of applying to your Lordships for suspension and interdict against the said respondent, as will appear to your Lordships from the annexed statement of facts and note of plea-in-law. That the complainers consider that in the whole circumstances of the case they are entitled to have this note passed and interdict granted without caution or consignment. May it therefore please your Lordships to suspend the proceedings complained of and to interdict, prohibit, and discharge the said respondent from selling, disposing of, or intruding with the stock, crop, implements of husbandry and plenishing on the said farm of Cullisse, and the furniture and plenishing in the dwelling-house thereon, and meantime to grant interim interdict or to do otherwise in the premises as to your Lordships shall seem proper."

The complainers pleaded, *inter alia*—"2. The compromise founded on by the respondent not having been agreed to by the complainers as deceased's executors or by all the beneficiaries, confers neither right nor title on the respondent to the stock, cropping, &c., of said farm. 3. In any event the alleged agreement not having been executed in writing by all interested parties is not binding, and decree should be pronounced as prayed for."

The following narrative of the *facts* is taken from the LORD CHANCELLOR'S opinion—"The action is one brought by the executors to restrain the present appellant from dealing with the farm of Cullisse (which is a farm which had been occupied by the deceased testator) or with the stock upon it, and the question whether there is a good answer to the claim of the executors depends upon whether a certain family arrangement was made between all the beneficiaries in the presence of the executors, that is, on the occasion on which the agreement is said to have been arrived at, which entitles the appellant to this farm as between himself and the other beneficiaries.

"The facts are of a somewhat complicated nature, and the House is very much indebted to the learned counsel for the appellant for the great fairness and clearness with which they indicated the essential points in this case.

"The action is brought by the executors, Samuel Hunter Gordon, John Scott Riddell, and James Hay, a majority and quorum of the executors of the deceased John Gordon, farmer, late of Cullisse, in the parish of Nigg and county of Ross and Cromarty. The action was brought against Alexander Paterson Gordon, farmer, of Arabella, in the parish of Nigg in the same county, and the prayer is this—'. . . [*quotes, v. sup.*] . . .'. The defence rested, as I have stated, upon the alleged fact that a family agreement conferring a right to this farm had been entered into by all parties concerned. The testator was Mr John Gordon, farmer, who died on the 29th August 1915. He left about £30,000 of moveable estate, and there were two farms which he had occupied, one of which was Cullisse. The family left were two sons, Mr Samuel Gordon and Mr Alexander Gordon, and three daughters, Mrs Riddell, Mrs Forbes, and Miss Catherine Gordon. The will of the testator was dated the 5th May 1914. It is not necessary to read the whole of it, but there will be found this passage—'(Fourth) I wish the residue of my estate to be divided into six portions, one share to be paid over to each of my children except my daughter Catherine, who shall have two shares, and if any of my said children predecease me then the issue of each predeceasing child or children shall take equally among them the share of their predeceasing parent; but declaring (First) that as I have already paid over to my son Alexander' (that is, the present appellant) 'Two thousand pounds in cash and the stocking of the farm of Balmackie, amounting altogether in value to about Five thousand pounds, the same shall be brought into account in

ascertaining the amount of the estate for division, and shall be deducted from the share falling to him or his issue.'

"Now disputes arose with reference to that provision about the £2000 which had been advanced to Mr Alexander Gordon. He considered it unfair that that should be deducted, as in his view it had been a matter of free gift to him by his father, and on the 1st September 1915 a compromise was entered into. It is an instrument signed by all the parties, sons and daughters, and the husbands of the daughters, and its effect is this. It states that the will had been left containing certain provisions as to the disposal of the estate, and the parties to the agreement were of opinion that certain of these provisions ought to be modified—'Therefore we are all agreed and hereby agree (First) That in ascertaining the amount of the estate for division Two thousand pounds of the money paid over to the said Alexander Paterson Gordon by his said father shall be held to have been a free gift to him and shall not be held to have been an advance to account of his share of the estate, but that Three thousand pounds of the money paid over to the said Alexander Paterson Gordon by his father shall be taken into account in estimating the residue of the estate for division and shall be held to be an advance to account of his share of the estate. (Second) That the sums of Five hundred pounds paid to each of the said Annie Hunter Gordon or Forbes and Jeannie Grindly Gordon or Riddell on the occasion of their respective marriages be held to be advances to account of their shares of the estate. (Third) That the said Catherine Elizabeth Gordon receive a legacy of the whole household furniture in the house at Cullisse and also One thousand pounds over and above her share of the residue of the estate. (Fourth) The residue then to be equally divided amongst the said Alexander Paterson Gordon, Samuel Hunter Gordon, Annie Hunter Gordon or Forbes, Jeannie Grindly Gordon or Riddell, and Catherine Elizabeth Gordon. It is hereby declared that these modifications of the said last will and testament are made because all parties are agreed that it is just to the said Alexander Paterson Gordon that they should be so made.'

"Now that compromise having been made it might have been supposed to have been an end of the matter, but on the 8th September Mr Alexander Gordon wrote a letter in which he stated his position, which was this—The letter is addressed to Mr Hay of the firm of Messrs Adam, Thomson, & Ross, advocates, Aberdeen—'I refer to what took place after my father's funeral regarding his will'—that was the agreement of the 1st September to which I have referred—'As mentioned, I decline to recognise the will read to the relatives as a proper expression of my father's testamentary wishes or to have anything to do with it. I understand that the document prepared by you after the funeral, and which I signed as you are aware most unwillingly, was to embody an arrangement independent of the will altogether. Although I feel very