quite in conformity with the provisions of the act: (4) That if the case stood simply on the 2d section of the Prevention of Poaching Act, there might be some difficulty in saying that, on failure of payment of the penalty and expenses, an immediate award of imprisonment should follow; but that difficulty was removed by the 3d section, which said that penalties were to be recovered in the same way as in the Day Trespass Act, and that Act provided very particularly for recovery and enforcement of the penalties with costs.

LORD DEAS and LORD ARDMILLAN concurred.

Agent for Complainer—J. Somerville, S.S.C.

Agent for Respondent—D. Milne, S.S.C.

COURT OF SESSION.

Wednesday, January 27.

SECOND DIVISION.

FERRIER *v.* HANDYSIDE & HENDERSON.

Ship—Joint Partnership—Acceptance of Dividends—Agents—Reserve Fund—Disbursements—Accounting. A part-owner of a ship, which was under the general management of the owners, had joined in the management, and received half-yearly dividends under the system in operation. Sometime after having so acted he brought an action against the agents of the ship, who were also part-owners, in which he asked an accounting as to disbursements and profits of the ship since he acquired an interest in it. *Held* that the pursuer was barred by the acceptance of dividends from insisting in such an action; that the action was incompetent as direct against the agents; and that the proper contradictors were the owners.

This was an action at the instance of Mr Robert Ferrier, shipmaster, Glasgow, against Handyside & Henderson, steam agents in Glasgow. The action was brought by the pursuer, as part-owner of the steamship Caledonia, against the defenders as agents of the said steamship, without calling any of the other part-owners except the defenders, who besides being agents are part-owners also. The summons concludes for an account of the whole receipts and disbursements had by the defenders in connection with the Caledonia from the 10th December 1863, when the pursuer became registered owner of the sixty-fourth share of the vessel, and for payment of such sums as shall be ascertained to be due by the defenders to the pursuer. The Caledonia is employed by the part-owners in sailing regularly between the Clyde and New York. The defenders keep a book for the vessel, in which the earnings are entered on one side and the expenditure on the other, which is balanced half-yearly, and audited by one of the part-owners. After each half-yearly audit a dividend is declared among the part-owners, and any balance of profits is carried to a reserve fund. This mode of management has been in constant operation since before the pursuer became a part-owner, and the pursuer has never objected to it, but has regularly received his share of dividends.

The Lord Ordinary (BARCAPLE) held that in respect of the acceptance of dividends by the pursuer he was barred from maintaining his action of accounting at his individual instance against the defenders as agents of the Caledonia; reserving to the pursuer any right of action which he may have against the other part-owners of the vessel for an accounting in regard to the profits thereof or along with them, against the defenders as their agents.

His Lordship added the following note to his interlocutor:—

"*Note.*—Although this action is directed against the defenders as agents of the vessel, of which the pursuer is a part-owner to the extent of one sixty-fourth share, it is not founded upon any allegation of wrong done by the defenders to the pursuer. It is not suggested that they have dealt with him in any way differently from his co-owners, or that they have been guilty of embezzlement or fraudulent conduct towards the general body of owners. What the pursuer wants is, that an account shall be taken of the profits of the vessel during the time that he has been a part-owner, and that he shall have a rateable share paid over to him. His complaint truly is, that a portion of the profits which have been earned by the ship are retained as a reserve fund in the hands of the agents in place of being divided. The Lord Ordinary thinks that all that is a matter which the pursuer must discuss with his co-owners, and not with the agents of the general body.

"The pursuer founds upon the admitted doctrine that the mere fact of part-ownership does not make the part-owners of a ship partners; from which he deduces a right in each part-owner to raise a several action against the agents to account for his share of the ship's earnings. But where the owners themselves employ the vessel, disbursing the cost and receiving the earnings of each voyage, they are truly partners, or joint adventurers, in that matter; Abbott, 9th Ed. 91. Accordingly, in the cases cited for the pursuer, *Owston* v. *Ogle*, 13 East. 538, and *Servante* v. *James*, 10 B. and C., 410, where a right was sustained in the co-owners to sue severally the ship's husband or the master, the judgment proceeded on a special agreement, by which these parties were bound to each of the owners. In the present case the objection to the action is much stronger than if it merely rested upon the general principle of law. For a series of years the pursuer has been a party, along with his co-owners, to a systematic mode of managing the joint concern in which they are engaged, which was in existence before he became an owner, and is still adhered to by the general body. He never objected to that system, and he has regularly received half-yearly dividends under it. He may possibly be entitled to bring it to an end, or to have a further accounting and division of the profits. But that is plainly a question in which the other owners are the parties interested, and not the ship's agents, and it is to that end that this action for accounting, and a further payment of by-gone profits is directed. The Lord Ordinary does not think that in any case such an action would have properly laid against the agents; but he thinks it is clearly barred by the pursuer's participation in the system on which the co-owners have carried on their joint concern, as evidenced by his regularly receiving the dividends.

"The pursuer makes averments and has led proof to the effect that the defenders have improperly refused him information in regard to the ship. But whatever remedy he may be entitled to in that matter, it cannot be got by an action for accounting and payment, if, as the Lord Ordinary thinks, that is not a competent proceeding by a single part-owner against the agents."

The pursuer reclaimed.

A. MONCRIEFF and GLOAG for him.

SOLICITOR-GENERAL and WATSON for defenders.

The Court unanimously agreed with the Lord Ordinary. The reserved fund had been withdrawn and separated. The agents were in no way responsible for any portion of the reserve fund; and, looking to the objects of this action, it could not proceed against them. The proper contradictors were the owners. The agents had accounted for everything for which they were responsible to the pursuer. If the Court were to sustain this action, the result would be that the agents would be liable in an action at the instance of every one of the sixty-four part-owners. As long as the accounts required adjustment, the whole owners must concur. There might be a stage in the accounting when the question of individual payment might arise, but that question was not here.

Agents for Pursuer—Burn, Wilson & Gloag, W.S.
Agents for Defenders—Hamilton & Kinnear, W.S.

Thursday, January 28.

FOWLER *v.* FOWLER AND OTHERS.

Entail—Reserved Power to Nominate Heirs—Reserved Power to Alter and Revoke—Supplementary Deed—Dispositive Clause. A party executed a deed of entail, in which he reserved both a right to revoke and alter the destination *in toto*, and a right to nominate heirs at a particular point in the series of succession. He afterwards executed a second deed, by which he revoked and altered the course and order of succession contained in the first deed of entail, and provided a new destination essentially different from that of the first deed. The second destination was not expressed in new disponing words. *Held* (affirming judgment of Lord Kinloch) (1) that the supplementary deed was an effectual alteration and revocation of the destination in the entail; (2) that the supplementary deed was not a mere nomination of heirs, but a deed altering and revoking; (3) that the supplementary deed being inhabile as a conveyance in favour of those called to the succession, the estates were held in fee-simple.

This was an action of declarator by Mr Fowler of Raddery, in the county of Ross, against the succeeding heirs of entail, to have it declared that the lands of Raddery are not entailed.

By deed, dated 29th October 1821, the deceased, James Fowler of Raddery, "gave, granted and disponed" the lands of Raddery "to and in favour of myself during all the days of my life, and, after my death, to" a specified series of heirs; . . . . "whom failing, to such other person or persons as I shall, at any time during my life, or even on deathbed, name and appoint to succeed to me in my said lands and estates, by any writing to be executed by me for that purpose; whom all failing, and that I shall not execute any other nomination of heirs, or, that these heirs fail, to my nearest lawful heirs or assignees whatsoever; . . . . reserving always full power and liberty to me, at any time of my life, not only to revoke and alter the foresaid course and order of succession as to all, or any, of the heirs of tailzie and provision before specified, and also to revoke and alter any of the conditions, provisions," &c.

By deed, dated 27th November 1840, Mr Fowler declared, "in virtue of the reserved power to revoke and alter the same, I do hereby revoke and alter the course and order of succession contained in the said disposition and deed of entail, and declare the destination to my said lands and estate to be as follows—viz., "in the first instance, to and in favour of myself during all the days of my life, and after my death to the said Henry Mackenzie Fowler," &c. The destination in this new deed was radically different from that contained in the former.

The pursuer pleaded—(1) By the supplementary deed the entailer revoked *in toto* the destination in the first deed: (2) the second deed containing no dispositive clause, cannot operate as a conveyance to the institute and series of heirs mentioned in it; and (3) the nomination of heirs in the second deed was not in conformity with the power reserved in the first.

The defenders replied, the two deeds together form a valid entail.

The Lord Ordinary (KINLOCH) pronounced the following interlocutor:—

"*Edinburgh, 18th July* 1868.—The Lord Ordinary, having heard parties' procurators, and made avizandum, and considered the process—Finds that the deed entitled Supplementary Deed of Entail, executed by the deceased James Fowler on 27th November 1840, is not a deed executed by virtue of the reserved power of nomination of heirs contained in his prior deed of 29th October 1821, but is a deed of revocation and alteration of the said previous deed: Finds that the destination to the parties appointed by the said previous deed to succeed to the lands after the death of the said James Fowler is effectually revoked by the said deed of 27th November 1840; but finds that the said last-mentioned deed is not framed in a mode habile or sufficient to constitute a valid conveyance in favour of those whom it purports to call to the said succession: Finds that, in consequence, the pursuer, as the heir-at-law of the said James Fowler, is entitled to hold the lands of Raddery and others libelled under his character as such, and as unlimited fiar of the same. To the effect foresaid, finds and declares in terms of the conclusions of the libel, and decerns; and appoints the cause to be enrolled, in order that any other necessary judgment may be pronounced therein.

"*Note.*—By his deed of 29th October 1821 the deceased James Fowler, on the narrative that he intended to execute an entail of his lands of Raddery and others, 'gave, granted and disponed' these lands 'to and in favour of myself, during all the days of my life, and after my death to John Fowler, now residing in London, my eldest son, and the heirs-male of his body, whom failing, to the heirs-female of his body,' whom failing, to a specified series of heirs-substitute.

"One of the branches of this destination, being that succeeding to the Rev. Alexander Wood, minister at Rosemarkie, and the heirs-male of his body, is thus expressed:—'Whom failing, to the heirs-male procreated or to be procreated of the body of James Grant, house-carpenter at Fortrose, my cousin, in the order of their seniority.' And the deed thereafter proceeds, 'Whom failing, to such other person or persons as I shall at any time during my life, or even on deathbed, name and appoint to succeed to me in my said lands and estates by any writing to be executed by me for that purpose; whom all failing, and that I shall not execute any other nomination of heirs, or that these heirs