

the parties. It would not be expedient that these should be capable of being proved by parole.

**LORD DEAS**—I am of opinion that there is no rule which prevents an innominate contract from being proved otherwise than by the writ or oath of the adverse party. It would be better stated if it were said that there is no contract of an anomalous or unusual nature that can be dealt with otherwise. There are many contracts which have no name that are capable of being proved by parole just as much as those that have a name.

The pursuer cannot prove his case here without proving the facts and circumstances connected with it. It will naturally follow that the other party may do the same. The fact that the arrangement has gone on so long since the year 1867 without any change being made is very material of itself.

There are some contracts which have not been allowed to be proved by parole. In reference to the case of *Taylor v. Forbes*, 24 D. 19, it was a very unusual thing for a law agent not to ask for remuneration as averred by the defender there, and the proof was accordingly restricted. There is nothing here equivalent to the arrangements in that case between the law agent and his client.

**LORD MURE** concurred.

**LORD SHAND**—This is a question in which there have been fluctuations in the expression of opinion by different judges. I do not know where the question is more distinctly stated than by Lord Neaves in the case of *Thomson v. Fraser*, October 30, 1868, 7 Macph. 39. In the present case a parole proof would be of great benefit, and I think the leaning of the Court should be in favour of allowing proof at large rather than of restricting it in such cases.

The Court ordered a proof at large.

Counsel for Pursuer (Respondent)—Brand.  
Agent—Thomas Carmichael, S.S.C.

Counsel for Defender (Appellant)—Asher—  
Mackintosh. Agent—Alex. Morison, S.S.C.

Friday, July 20.

### FIRST DIVISION.

#### GRAHAM AND OTHERS v. THE OFFICIAL LIQUIDATOR OF THE EDINBURGH THEATRE COMPANY (LIMITED).

*Company—Companies Acts 1862 and 1867—Winding-up of Company—Expenses.*

As an ordinary rule, creditors of a company incorporated under the Companies Acts 1862 and 1867 will not be entitled to the expenses of bringing a second petition having the same purpose with one previously brought by other creditors.

Circumstances where creditors were held to be justified in presenting a second appli-

cation of the kind, and where they were allowed their expenses by the Court.

Two petitions were presented to the Court praying for the winding-up of the Edinburgh Theatre, Winter Garden, and Aquarium Company (Limited) on the ground of its insolvency. The first was at the instance of Moxon & Son, and Brown Brothers & Company, and was dated April 5th 1877; the second was at the instance of Robert Graham and others, constituting a majority in number and value of the creditors of the company, and was dated April 11th. The first petition asked that the secretary of the company should be appointed official liquidator; the second suggested that the wishes of the creditors should be ascertained on that matter.

After parties had been heard a liquidator, who was not the company's secretary, was appointed by the Court under Moxon & Son's petition. Graham and others then applied for the expenses of their petition and of their compareance to oppose the appointment of the company's secretary as liquidator. The latter part of the motion was not opposed, and in support of the former it was stated that the second petition had been brought as it was doubtful whether Moxon's would be withdrawn or not. There was nothing in the Act of 1862 permitting a sisting of other parties, to which the creditors in the second petition, who were the great body of creditors, had, after meeting, asked Moxon & Son to agree. They had further wished the name of the secretary of the company withdrawn from being suggested as official liquidator.

The liquidator did not dispute the competency of the petition, but said that the second petition was unnecessary.

At advising—

**LORD PRESIDENT**—I should very much regret if it were to be held that in the ordinary case creditors of a company like the present, when they bring a second petition having the same purpose with one previously brought, were entitled to expenses. But undoubtedly there may be circumstances which will justify a second body of creditors in presenting an application of this kind.

The only question is, whether the circumstances of the present case are of such a nature? It is no doubt true that Moxon & Son and others, who brought the first petition, represent a very small amount of debt, viz., about £300. But I do not know that that would be a sufficient reason for suspecting them of not being sincere in their desire to have the company wound up, and I can hardly say that that would justify a second petition at the expense of the estate. But I attach great importance to a meeting of creditors which afterwards took place, where a much larger amount of debt was represented. From that meeting a proposal came that other creditors should be sisted in the original petition, and that the name of the secretary as liquidator should be withdrawn. Moxon and others differed from the second petitioners in the person to be appointed as liquidator, though that of itself would not have justified another petition. It might only have justified an appearance. But the first petitioners ignored altogether the proposal to get some other liquidator than the secretary of the company, a proceeding for which I cannot conceive any good reason.

There was some reasonable apprehension that the first application might be withdrawn in the event the second petitioners were successful in securing the appointment of another liquidator.

In the special circumstances, I am disposed to think that that second petition was justifiable, particularly as the first petitioners were anxious, contrary to the wish of the general body of creditors, that the secretary of the company should be appointed liquidator. That appears to me a sufficient motive for the course taken by the other creditors.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

Counsel for Official Liquidator — Pearson. Agents—Dalmahoy & Cowan, W.S.

Counsel for Graham and Others—Mackintosh. Agents—Davidson & Syme, W.S.

Saturday, June 16.

## SECOND DIVISION.

[Lord Curriehill, Ordinary.]

AITCHISON v. AITCHISON.

*Partnership—Joint Adventure.*

Circumstances in which the members of a family residing together and all engaged in various branches of one business without any deed of copartnership, were held to have carried on the business for their joint behoof, and to be entitled to divide the profits.

This was an action of count, reckoning and payment at the instance of Charles Andrew Aitchison, confectioner in Edinburgh, against his brother John Aitchison, also a confectioner in Edinburgh, in the following circumstances.

The pursuer and defender were sons of John Aitchison, baker in Edinburgh, who died in 1823. Besides the pursuer and defender, John Aitchison the father was survived by four sons and three daughters, viz., Alexander, James, George, William, Isabel, Margaret and Catherine. The defender was the third of the family, and the pursuer was the youngest son.

John Aitchison the father was also survived by his widow Jean Inderwick or Aitchison. By trust-disposition and settlement, John Aitchison the father conveyed his whole estate to trustees, for payment to his wife in life and to his children in fee, "in such manner and proportion as my said spouse shall determine."

The trust-estate consisted of shop and dwelling-house in Little King Street and East Register Street, and two small shops in Catherine Street, and a personal estate of £1333.

The trustees did not intrude with the estate, but, with the consent of Alexander and James, who were of age, allowed Mrs Aitchison to take possession of the whole trust-estate, in order that she might carry on the business for the benefit of her family. Mrs Aitchison accordingly, with her two sons Alexander and James, continued the business in the shops in Little King Street and East Register Street under the firm of Mrs Aitchison & Sons or Aitchison & Sons. "No written con-

tract of copartnership was entered into, but the business was unquestionably at first carried on by these three persons for the benefit of the whole family. In 1828, as the business was increasing, and as several of their customers resided in the west end of the town, Mrs Aitchison resolved to extend the business by opening a confectionery shop in Queen Street; and accordingly she took a lease of the shop No. 77 Queen Street, and of the house above it, from her brother Mr Paterson, and there she and her son James commenced and carried on the confectionery business on a small but gradually increasing scale, until it became one of the largest and most successful businesses of the kind in Edinburgh. The other sons as they grew up all came, in one capacity or another, to take part in the business. When the Queen Street shop was opened in 1828 George was put in charge of the Register Street shop, and Alexander took charge of the Little King Street shop. The name of the firm in Queen Street was the same as before, viz., 'Aitchison & Sons', or 'Jean Aitchison & Sons'; and there is no doubt whatever that, from 1828 at all events until 1832, the whole three shops and businesses in Little King Street, East Register Street, and Queen Street were one concern. The bread which was baked at Little King Street was carried daily to East Register and Queen Street, to supply the customers of these establishments, and the drawings of all three places were paid or accounted for regularly to Mrs Aitchison at Queen Street. In consequence of the increase of the business, more assistance was required, and the defender John Aitchison, who had been a clerk in a wine merchant's office in Leith at a salary of £80 a year, gave up his situation, at his mother's desire, and went to Queen Street. He was entirely ignorant either of baking or of confectionery, and he never took any part in the practical department of the business, which was then under the charge of his brother James, and afterwards of James and of the pursuer; and his principal duties were to assist his mother in keeping the books, and attending in the shop or saleroom. The defender admits that he never put any capital into the concern, that no contract of copartnership was entered into, and that he just went to Queen Street because his mother required him. And the business went on as before in all the three shops as parts of one and the same concern, carried on for behoof of the whole family.

"In 1832 George Aitchison left the Register Street shop and went to the shop at the corner of Albyn Place and Wemyss Place, nearly opposite No. 77 Queen Street. He there began the business of baker, ostensibly in his own name; but from that time bread ceased to be sent from Little King Street to the Queen Street shop, and whatever bread was required for the customers of the Queen Street shop was supplied from Wemyss Place."

George gave up the business in Wemyss Place in 1865 on account of his health, and upon the death of his brother James in 1866 he took the place which James had occupied in the Queen Street business, where he remained until his death in 1874.

In 1835 Alexander, the eldest son, was married, and the baking business carried on in Little King Street and East Register Street was handed over entirely to him, he paying a rent to his mother