an incorporated company) dying. But it appears to me that this is a false and misleading analogy. The effect of the death in such a case is to vest the whole joint property in the shares absolutely in the survivors, because such a joint trust-estate is either expressly or by implication given to the trustees jointly and the survivors and survivor. This was the ground of judgment in *Oswald's Trustees*, Jan. 15, 1879, 6 R. 461. No right or interest whatever can in such an event transmit or descend to the executors or representatives of the deceasing trustee, and therefore it becomes both impossible and unnecessary that any deed of transfer should be executed—impossible, because there is no one *in titulo* to make the transfer, and unnecessary because the shares are already by the operation of the original title of the trustees fully vested in the survivor.

But in the case of a trustee resigning, the shares cannot vest in his co-trustees by survivorship, and there is a living man to make the transfer. The form of the transfer would of course be by the ordinary method known in trust law. The whole trustees on the register, including the resigning trustee, will transfer the shares to the trustees other than the resigning trustee.

The reason why this course is not adopted in the present case is not far to seek. The whole circumstances suggest that the object is to deprive the company and its directors of the right to withhold their consent to the transfer, and to refuse to approve of the transferees—a right secured to them by the articles of association.

The Court granted the petition.

Counsel for Petitioner—R. V. Campbell—J. A. Reid. Agent—William Duncan, S.S.C.

Counsel for Respondents — Pearson — Low. Agents—Fraser, Stoddart, & Ballingal, W.S.

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*Friday, November* 20.*

## SECOND DIVISION.

[Sheriff of Aberdeen.

### NOBLE *v.* WATSON.

*Agreements and Contracts—Master and Servant—Dismissal for Fault—Forfeiture—Ship.*

The owner of a vessel entered into an agreement with a master whereby the master purchased and paid for a share in the vessel, and the owner agreed to hold the share in trust for the master's share of profits, without prejudice to his (the owner) selling or mortgaging the vessel, the master on his part agreeing to take the command under the stipulation that should he be guilty of drunkenness he should be liable to dismissal, and in that event to forfeit all claim to any share of the vessel or its profits. He was justifiably dismissed for drunkenness, and the owner, founding on the clause of forfeiture, refused to transfer the share or repay the price. *Held* that the share being the master's property, and it not being proved that his misconduct had caused loss to the owner, the owner was not entitled to hold the share as forfeited by the misconduct, and that as he had refused to transfer it he must refund the price.

* Decided November 13.

In August 1883 Crawford Noble junior, the owner of a steam-trawler called the "Lightning" of Aberdeen, entered into a verbal agreement with William Watson, a shipmaster, by which he agreed for the sum of £100 to sell him seven sixty-fourth shares of the vessel. Watson paid the money and obtained from Noble's agent a receipt therefor, which was as follows:—"Received of William Watson the sum of £100 on behalf of Crawford Noble junior, for a share in the steam-trawler 'Lightning.'" At the date of the sale the vessel was already mortgaged to a bank to her full value. On the 25th October 1883 they entered into a minute of agreement by which (1) Noble, in consideration of the sum of £100 paid to him by Watson, agreed, but so long only as Watson fulfilled the obligations undertaken by him in the second place, to "hold seven sixty-fourth shares of the vessel in trust for payment to the second party (Watson), during the continuation of the agreement, of one-ninth share of the net profits earned by the 'Lightning,' without prejudice to Noble's power to sell her or mortgage or dispose of her on repayment of the £100;" (2) Watson agreed to take entire command of the vessel, to conduct the trawling operations, &c., and to be sober and attentive to his duties as captain, "and in the event of his at any time becoming intoxicated or in any way failing to fulfil the obligations hereby undertaken by him, the first party (Noble), shall be entitled to dismiss him from his employment as captain, and in that event he shall forfeit all claim to repayment of the £100, and shall also forfeit his right to any share of the vessel or of the profits thereof."

Watson entered on his duties as captain on the 14th of August. In consequence, however, of his drunken behaviour Noble dismissed him from his employment.

Watson raised this action against Noble for repetition of the £100, and averred that he had frequently applied to the latter for a bill of sale of the shares of the vessel for which the sum was paid, but the defender had refused to give it to him. He reserved all claims competent to him for damages in respect of the defender's failure to implement his engagement.

The defender averred that through the pursuer's drunkenness and neglect of duty he caused him serious loss and damage, and in particular on 6th December damage was done to the extent of £57 to the nets of a fishing-boat, for which the defender was held responsible, and a trawl-net and gear were lost on the 15th December. He also stated that the pursuer, besides having forfeited the sum of £100 in terms of the agreement, was liable to him in damages for loss and injury caused by culpable neglect of duty, and he reserved right to raise action therefor.

The pursuer pleaded—"The pursuer having paid to the defender the sum sued for, for a specific purpose, and the defender having refused to implement his part, is liable in repetition, and decree should pass against him for the principal sum, interest, and expenses as prayed for."

The Sheriff-Substitute (Brown) found, after a proof, that the pursuer was entitled to damages

for breach of contract, and assessed the amount at £40.

"*Note.*— . . . As I look upon the case, the receipt, the verbal and the subsequent written agreement, all form part of one transaction, and are to be taken in synthesis in considering on what terms the pursuer became captain of the 'Lightning;' and I think upon the evidence it is not doubtful that the agreement was, that on an instant payment of £100 the pursuer was to receive the command and acquire a share in the vessel, but was to forfeit both on certain conditions, which are set forth in the minute of agreement. My view upon the evidence further is that these conditions are not qualified, for notwithstanding the stringency of the contract I am unable to hold that for a single act of violation of its spirit, not shown to be followed by actual loss, the defender was entitled to get rid of the pursuer, and put the £100 he had deposited in part for a share of the ship into his own pocket. The case of the pursuer, therefore, really comes to be one of damages for a breach of contract, and not, as he has put it, a claim for repetition under the receipt, for, as I have already pointed out, he cannot so lay his action without ignoring the agreement, which he certainly cannot do. It then comes to be a difficult question, What is the damage which the pursuer has proved? I am quite clear that the £100 is not the measure of the damage, for what has to be assessed is the value of his interest in the vessel and of his command at the time he was dismissed. The pursuer himself has succeeded in excluding evidence as to the subsequent history of the vessel, and according to the view I have ultimately come to take of the case that presents an element of some embarrassment. But although the details of the loss are not in evidence, it is quite clear that the 'Lightning' since the pursuer's dismissal has been a losing concern, and that both the value of the master's position and his interest have been considerably depreciated. The materials are not abundant for forming a judgment, but dealing in a somewhat rough way with such evidence as there is, and particularly having reference to the uncontradicted evidence of the defender as to the deterioration in the vessel, I think justice between the parties will be done by awarding damages to the pursuer to the extent of £40," &c.

On appeal the Sheriff (GUTHRIE SMITH) found that under the agreement between the parties the pursuer was liable to dismissal, and agreed to forfeit £100 "which he had paid as the consideration for his receiving the command of the trawler and a certain share of the profit in the event of his at any time becoming intoxicated or failing to fulfil the obligations undertaken by him; (2) that this condition was not observed by him on more than one occasion; that thereby his dismissal was justified and the forfeiture incurred: Therefore assoilzies the defender from the conclusion of the action, &c.

"*Note.*—In this case the agreement between the parties is in writing, and no evidence of the terms of their arrangement is in my opinion admissible except the document itself. In effect it provides that, in consideration of his paying to the defender £100, the pursuer was to be appointed captain of the trawler 'Lightning,' and be treated as owner of a ninth share in the division of the profits, without, however, acquiring any property right in the vessel. On the other hand, the pursuer bound himself to keep sober, and to submit to dismissal as well as the forfeiture of his £100 'in the event of his at any time becoming intoxicated, or in any way failing to fulfil the obligations hereby undertaken by him.' This was a very stringent clause, but I assume there were good reasons for it, as the defender says there were, and it is a perfectly lawful stipulation. The defender might well desire both to protect himself and to provide a stimulus to the pursuer to abstain from drinking. On the other hand, it furnishes the other party to the contract with a potent lever which might easily be used by an unscrupulous person in an unfair manner. Lord Stowell once observed 'that in a mode of life particularly exposed to severe peril and exertion, and therefore admitting in seasons of repose something of indulgence and refreshment, proof of a single act of intemperance committed in port is no conclusive proof of disability for general maritime employment.' (*The Exeter*, 2 Rob. 261.) And although since the time of that eminent judge the standard of sobriety has been greatly raised among all classes of society—especially amongst seafaring men, to whom the care of valuable lives and property is entrusted—I have no doubt whatever that the clause in question ought to be construed in the spirit of the sentiment here expressed. The intoxication meant is a recurrence to his former habits, which but for his promises of amendment, would have prevented him from even obtaining the employment. The defender could not be permitted to take advantage of some isolated act of forgetfulness on the part of the pursuer from which no evil resulted. He must act on reasonable grounds and produce sufficient evidence that the pursuer, on whom the whole success of the adventure depended, was really no longer to be depended on, and so had incurred the forfeiture. But even reading the clause in this sense, and as favourably as I can for the pursuer, I think the evidence adduced for the defender is sufficient to justify his action. I do not attach importance to the loss of the trawling gear off the Isle of May, although that was a serious matter, and I am not satisfied that it was not preventible. But, in my opinion, if the agreement is to receive effect at all, there is no getting over the fact sworn to by some of the crew—namely, that the pursuer, in his own words, 'got on the spree at Leith,' with the result that the trawler was lying idle in port while she might have been fishing. The manager of the trawler states that when he went up to Leith in November 1883 he found the craft in port, the captain drunk, dismissed him, and took him back at the solicitation of his wife. It is also proved that owing to the incapacity of the pursuer the trawler on one occasion put to sea under charge of the engineer and fouled some fishermen's nets, for which £35 of damages had afterwards to be paid. If these failures in duty entitled the defender to interfere for his own protection, as I think they did, by revoking the pursuer's appointment, I cannot see how under the agreement the dismissal did not carry the loss of the £100 with it."

The pursuer appealed, and argued—This was not an action of damages at all, but one for repetition of a sum of money paid for the purchase of shares of a vessel which the seller had

refused to transfer to the purchaser. To give effect to what was a penal clause in the agreement would be to deprive the purchaser of what he had admittedly paid for.

The defender replied—The forfeiting clause in the agreement fell to be given effect to. It was expressly inserted in the agreement to meet the possibility of the pursuer's returning to habits which were well known. The Court could not reduce the sum unless it was shown to be an exorbitant one.—*Forrest & Barr* v. *Henderson, &c.*, Nov. 26th 1869, 8 Macph. 187; *Craig* v. *M'Beath*, July 3, 1863, 1 Macph. 1020.

At advising—

LORD YOUNG—This is a confusing case looking to the contract between the parties and the agreement between them, which is oddly worded. It appears that the defender was owner of a screw trawler called the "Lightning." Although it was mortgaged to its full value in August 1883, in that month it was admitted he made an agreement with the pursuer of the action to sell him seven sixty-fourth shares of the vessel, and the pursuer duly paid the money and obtained receipt therefor. We are relieved from difficulty as to the extent of the shares, because the parties are agreed that it was seven sixty-fourths. Whether the contract could have been implemented or not is doubtful, for the ship was then mortgaged to the bank for its full value. The defender says in his evidence that if the pursuer had asked for it he would have given him a transfer of the shares next day, and that there was no doubt the mortgage would have enabled him to do it by discharging the mortgage to that extent. The original contract then is not doubtful. But then there is a subsequent agreement between the parties which I should have had difficulty in reading as a confirmation of the original contract had it not been stated to us that both parties were agreed that the original contract of purchase and sale of the seven sixty-four shares was never changed, the defender remaining the seller and the pursuer the purchaser of the shares. The agreement of October was represented to us as signifying that the pursuer was to be put in the position of master of the trawler, and so long as he remained in the defender's service as such the shares which he had bought were not to be transferred to him but to be held by the defender in trust for him, he while the agreement lasted receiving for his services and in respect of his shares one-ninth of the net profits; and the agreement is quite capable of being so read. He agrees to remain sober, and if he gets drunk he may be dismissed. That was hardly a necessary stipulation to make, because without any stipulation at all the owner of a ship may dismiss the captain if he gets drunk. Well, he entered on his duties in October, the date of the agreement, but afterwards he did get drunk and was dismissed, and I assume quite properly dismissed, so that this agreement is no longer to stand. But then the agreement stipulates that if he forfeits his place as captain he is to forfeit his shares too, and the case comes to turn on the validity of that forfeiture. The case was argued on several footings. It was argued that the sum of £100 was to be security to make good any damage which might be caused by drunkenness I cannot so read it. In fact the case first turns on the legality of the agreement. There is no question of damages before us. The action is for repetition of the price of shares purchased because the seller refuses to transfer them to the purchaser. Dismissal is indicated on record, and also a claim of damages in respect of that. Again, the defender says that by the pursuer's getting drunk, and therefore failing in his duties as skipper, he has suffered damage for which he reserves his right of action. Therefore, first, as the claim to any damage done to the pursuer under the head of wrongful dismissal is reserved to him, so the claim for any damage done to the defender by the pursuer forfeiting the condition of the agreement is reserved by the defender. The main question in the case then, and on which the decision must turn, is as to the forfeiting clause, that if he gets drunk, though he has done no damage at all, he shall forfeit the shares which he bought from the defender. I am not prepared to enforce that. It is a penalty and cannot be enforced at least in this action. Assuming the pursuer to have been properly dismissed, or even let us say improperly dismissed, he was entitled to go to the defender and say, "This agreement of October is at an end, transfer to me the shares which I bought and which you hold in trust for me." The defender declined to comply with the request, and he was not entitled to do so. That is sufficient for the decision of the case. I therefore propose that with appropriate findings as to the purchase and sale of the ship and the defender's refusal to transfer the shares bought and paid for, we should find that the pursuer ought to get decree for the £100.

LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK—I agree. We have been relieved by the parties from all difficulty in construing what might be a difficult agreement to construe. It is admitted on both sides that the pursuer bought and the defender sold seven sixty-fourth shares of the trawler in question, and that being so, the price was paid and these shares although they were not registered in the pursuer's name became his property. Now, did they ever cease to be his property? I do not think so. It is said he forfeited the property in consequence of the condition contained in the agreement as regards his sobriety. We cannot enforce the condition to the effect of transferring the pursuer's property to the defender. It seems to me when we are left in ignorance whether the pursuer caused loss to the defender, it would be contrary to the rules of law to order forfeiture of the property, and so transfer that property to the defender. Therefore the only question is, whether the pursuer is entitled to get £100? At first I felt considerable difficulty, but of that I have been relieved, because the pursuer was willing to take his shares of the ship, and indeed asked for them. The defender might have transferred them, but he refused to do so, and that being so, as he got the price and refused to transfer the subject of the price, the pursuer has right to demand the restoration of the price. Whether he is bound to take the seven sixty-fourth shares even if they had been offered to him we are again relieved from inquiring, because the defender has not offered them yet.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the appeal, Find in point of fact—First, that the respondent Crawford Noble junior is the registered owner of the steam-trawler 'Lightning,' of Aberdeen, and that, being such owner, he, on 18th August 1883, sold to William Watson, the appellant, seven sixty-fourth shares of the said steam-trawler, at the price of One hundred pounds, which was paid to him at the time of the sale by the said appellant; second, that on 25th October 1883 the said appellant and respondent entered into the minute of agreement of that date, and in the record referred to; third, that it was admitted at the bar by the counsel for the said respondent that it was not the purpose of the said agreement, or the meaning or intention of the parties thereto, that the said appellant should cease to be the proprietor, as purchaser, by the aforesaid sale of seven sixty-fourth shares of the said steam-trawler, but only that the said respondent should hold the same in trust for him during the subsistence of the said agreement, and while the said appellant continued in the command and charge of the said trawler as thereby agreed, but subject to the forfeiture thereby provided if legally valid; fourth, that on 20th December 1883 the respondent dismissed the appellant from his employment as captain of said trawler, of which he then ceased to have the command or charge, under the aforesaid agreement, and that the said dismissal was warranted by the appellant's misconduct and drunken habits; fifth, that the appellant thereupon demanded from the respondent a transfer of the shares of the said trawler which he had purchased and paid for, and which the respondent held in trust for him as aforesaid, and that the respondent refused the said demands, on the ground that the said shares had by the said agreement been forfeited to him by the misconduct for which he had been dismissed from the command: Find in law that the said shares are the property of the appellant, who bought and paid for them, and that the same were not forfeited to the respondent by the misconduct for which he was dismissed, and that the respondent having refused to transfer when demanded, and persisted in the refusal, is bound to repay the prices which he received therefor: Therefore sustains the appeal, recal the interlocutor of the Sheriff appealed against, and the interlocutor of the Sheriff-Substitute of 9th June 1885: Repel the defences, and decern against the respondent in terms of the conclusions of the action: Find the appellant entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for Pursuer — M'Kechnie — Glegg. Agent—John Macpherson, W.S.

Counsel for Defender—Younger. Agent—

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*Friday, November 20.*

## FIRST DIVISION.

[Sheriff of Perth.

## STUART & COMPANY *v.* KENNEDY.

*Sale — Price* — Consensus in idem placitum — *Mutual Error.*

A quarrymaster sold to a mason a certain number of feet of stone at a certain price. After the stone had been in part delivered and used it appeared that the seller believed that the stone was sold by the *superficial*, the buyer by the *lineal* foot. *Held* that in consequence of this misunderstanding there had been no *consensus in idem placitum* as to the price, and that as the stone could not be restored to the seller, the fair market value of the stone used ought to be taken as the price payable.

*Wilson*, 21 D. 967, followed.

James Stuart & Company, coal and lime merchants, Denny (afterwards represented in this action by J. F. M'Queen, trustee for their creditors), sued James Kennedy, Killiechassie, Tullypowrie, under the Debts Recovery (Scotland) Act 1867, in the Sheriff Court at Perth, for the sum of £34, 16s. 9d., being the balance of an account for £74 for coping-stone.

The pursuer undertook to supply the defender, a mason and builder, with 750 feet of garden wall coping at the price of 1s. 9d. per foot. The question in the case was, Whether the superficial or the lineal foot was intended?

The pursuer averred it was 1s. 9d. per superficial foot. The defender averred it was 1s. 9d. per lineal foot. 750 feet of the specified dimensions at 1s. 9d. per lineal foot amounted to £65, 12s. 6d., while at 1s. 9d. per superficial foot it amounted to £142, 3s. 9d.

The pursuer had on 30th June 1883 written the following letter to the defender—"Dear Sir—Further to my letter of 23d inst. I shall be glad to supply you with 750 lineal feet garden coping, 26″ broad, 3″ thick at sides, and 3½″ in centre, mill-faced, sawn on sides, and half-checked ½″ on the joints, put on trucks at quarries, at 1s. 9d. per superficial foot, and trusting this low figure will secure the order, I am, yours truly," &c.

The defender denied that he ever received such a letter, and there was no proof that he ever accepted the offer it contained.

The contract actually entered into was a verbal one, and was entered into between the pursuers' traveller and the defender, between whose evidence at the proof there was a direct contradiction; the traveller saying that the superficial foot, the defender that the lineal foot, was the measure agreed on.

After the question arose, the defender, under reservation of his position, had paid £40 on account. That sum being rather more than the stone then delivered would cost, according to his view of the bargain, he maintained in this process that no more was due. On the pursuers' view the total amount delivered would amount to £74, 16s. 9d., so that £34, 16s. 9d. was the sum sued for.

The Sheriff-Substitute (Graham) found for the pursuers, and decerned for the sum sued for.

On appeal the Sheriff (Gloag) on Sept. 26, 1885,