per cent., was in the adjusted balance-sheet deducted from the amount of his capital account, to which had been added his share of profits then calculated upon the year's business."

So far the averment takes objection to the mode in which the balance-sheets were prepared. But they go on to say—"This mode of disposing of the amount due by Provost Barr to the firm was adopted on an obligation being given by him that, should circumstances arise necessitating a new valuation of the buildings, machinery, and stock-in-trade belonging to the firm being made, which were entered in the balance-sheet at a valuation put on them by Provost Barr himself, and the new valuation be less in amount than his valuation, he would make up the difference to the extent of the sum then, or any sums which might thereafter be, deducted from his capital." And they go on to say that the effect of what was done was that while no alterations were made in the valuations, these valuations were utterly extravagant, and it is alleged that if these valuations had been accurate it would have been seen that the firm had made no profit at all, that the balance-sheets were erroneous, and that Provost Barr should not have made a penny. I do not, however, think that the averments are relevant. It is said no doubt that the valuation never alters, but that is not startling. It is not uncommon in stating valuation of buildings and machinery to take them at one fixed value, and if this is a matter of arrangement between the parties there is nothing improper in it. It may be, of course, only approximately correct, but if a business is to be carried on the buildings must be kept up to a standard of efficiency and therefore it is not unlikely that they are of much the same value throughout a period of years. It is quite true that the valuation put upon the stock-in-trade is also complained of, and we were referred to an obligation which I do not very well understand in this connection. The stock-in-trade is shown, *ex facie* of the balance-sheets, to have been valued every year. It could not have been otherwise. But if such a yearly valuation was made, the terms of the obligation are utterly inapplicable to the stock-in-trade. "These circumstances" and "this necessity" arise every year, and therefore the alleged agreement has so far no meaning at all, while with regard to the buildings and machinery it is irrelevant to aver that it was extravagant. It was the valuation agreed to by the parties.

I cannot, therefore, agree in the Lord Ordinary's course of allowing a proof of the averments in the answers to the 16th article of the condescendence.

Lord Mure concurred.

Lord Shand—I must own that I think this a very clear case. This copartnery was carried on for nine years. The contract provided that each year a balance should be struck of profit and loss as between the parties, so as to preclude the possibility of any subsequent dispute. This course was followed during a series of years, and what is proposed now is that this is to be gone back upon and opened up. I confess I do not, after listening with careful attention to all that has been said by Mr Salvesen and Mr Dickson, understand the case presented by the defenders. I do not understand whether they want a sum deducted from Provost Barr's profits, or a revaluation over all the nine years. Nor does this record help us. It speaks of an obligation. "This mode of disposing of the amount due by Provost Barr to the firm was adopted on an obligation being given by him that should circumstances arise necessitating a new valuation of the buildings, machinery, and stock-in-trade belonging to the firm being made, which were entered in the balance-sheet at a valuation put on them by Provost Barr himself, and the new valuation be less in amount than his valuation, he would make up the difference to the extent of the sum then, or any sums which might thereafter be deducted from his capital." But in the first place, we do not know what the circumstances provided against can possibly be, and in the second place, the thing mentioned, viz., a new valuation, is an impossibility so far as stock-in-trade is concerned. Except in the case of the last year it has been used up in the business. How could that possibly be used in an adjustment of the balance-sheets of previous years?

I think that the argument of the Solicitor-General that the whole actings of the parties are against such an idea is thoroughly borne out by by the facts; for the system contemplated by the contract was carried out for nine years. I think that there is no relevant case stated to entitle the defenders to parole proof of an obligation, by means of which to cut down this contract of copartnery.

Lord Adam concurred.

The Court pronounced this interlocutor:—

"Recal the interlocutor: Find that the averments made by the defenders in their answer to the 16th article of the condescendence are irrelevant in respect of the annual balance-sheets prepared in terms of the 5th article of the contract of copartnery, and remit to the Lord Ordinary to proceed with the accounting."

Counsel for Pursuers (Reclaimers)—Sol.-Gen. Asher, Q.C.—Lorimer Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Defenders (Respondents)—Dickson — Salvesen. Agent — J. Young Guthrie, S.S.C

Thursday, July 8.

FIRST DIVISION.

EVANS v. STOOL.

(See *ante*, vol. xxii., p. 872, 12 R. 1295.)

Process—Jury Trial—A. S. February 24, 1846.

Issues were adjusted on 15th June 1886 in an action raised in January 1885. On 18th June 1886 the pursuer gave notice for jury trial at the Summer Sittings. The pursuer then on 5th July, which was the last day on which notices for trial at the Summer Sittings could be given, countermanded this notice and gave notice for trial at the Christmas Sittings. Defenders moved the First Division, under the provisions of

A.S. 24th February 1846, "to fix the time and place of trial." The Court fixed the trial to take place on 27th July in the First Division.

In January 1885 Mrs Fanny Evans, wife of William Evans, pattern-maker, Liverpool, and her husband as her administrator-in-law and as an individual, raised an action against Mrs Amelia Stool, the widow of the deceased Alexander Stool, seaman, Dundee, and others, his representatives.

On 28th May 1885 the Lord Ordinary (Lee) appointed the pursuers to lodge issues.

On 15th July 1885 the First Division adhered to this interlocutor.

On 15th June 1886 issues were adjusted.

On 18th June 1886 the pursuers gave notice for jury trial at the Summer Sittings.

On 5th July 1886 the pursuers countermanded this notice and gave notice for jury trial at the Christmas Sittings. The 5th of July was the last day on which notices could be given for trial at the Summer Sittings.

The defenders then presented a note to the Lord President, in which they sought that the countermand should be discharged, and that the trial should proceed at the Summer Sittings.

By A. S. 24 February 1846 it is provided that "in case either party countermands the notice of trial given by him, it shall be competent for the Court, if then sitting, or to the Judge at the Sittings, or on the Circuit for which such notice of trial had been given, to fix the time and place of trial, on cause shown by the opposite party." The defenders argued that they would suffer hardship if the case were delayed until the Christmas Sittings. The Act of Sederunt gave the Court power to fix the time and place of trial, which might be at the Summer Sittings, in spite of the countermand—*Campbell* v. *Caledonian Railway Company*, Dec. 6, 1881, 9 R. 251.

The Court, in respect that the pursuers had stated no good reason for their countermand and the postponement of the trial till winter, fixed it to take place on 27th July at the Summer Sittings of the First Division for jury trials.

Counsel for Pursuer—A. S. D. Thomson. Agent—William Officer, S.S.C.

Counsel for Defenders—G. W. Burnet. Agent—George Andrew, S.S.C.

Thursday, July 8.

SECOND DIVISION.

[Lord Fraser, Ordinary.

TAIT'S TRUSTEES *v.* TAIT AND OTHERS.

*Husband and Wife—*Jus relictæ*—Effect on Settlement of Wife's Election of Legal Rights—Legacy—Special and General Legatees—Residue.*

A truster conveyed his estate to trustees, directing them to convey his interest in certain leases of farms, and the farm stocking on the farms, to two of his nephews respectively, to pay certain pecuniary legacies, and to give his widow the liferent of the residue, and after his death to divide it among certain residuary legatees. The widow took her *jus relictæ*. *Held* that the residue must first be exhausted in payment of *jus relictæ* before the special legacies to the nephews could be infringed upon (*alt.* judgment of Lord Fraser, who held that the *jus relictæ* should in the circumstances of the case be paid from the whole moveable estate *en masse*, each legatee contributing in proportion to the amount of his legacy).

William Tait died on 9th December 1884. He was survived by his wife but had no children. He was tenant of the farms of Venchen, near Kelso, Wideopen, Open Haughs and Town Yetholm Mains in Yetholm, Roxburgh, and of Linden, near Galashiels. He was also joint-tenant along with his nephew Andrew Lees of Buckholm, Williamlaw, and Ladhope Muir in the parish of Melrose. He left a trust-disposition and settlement by which he conveyed to trustees, of whom Andrew Lees and another nephew, George Tait, accepted and acted as his trustees, his whole estate and the leases of the farms, and in the *second* and *third* purposes directed them to convey to his wife the whole household furniture in the farm-house at Venchen along with £200 for mournings and interim aliment. He further directed them, *fourthly*, to pay £250 to Jane Tait, his housekeeper at one of his farms, and £50 to George Maillen, his shepherd at Venchen; *fifthly*, to convey to his nephew Andrew Lees (1) his whole interest in the lease of the farms of Buckholm, Williamlaw, and Ladhope Muir, (2) his right to the lease of Lindean, (3) the farm stocking, cattle, and household furniture, &c., on these farms, declaring that Lees should by acceptance thereof be bound to free and relieve the trustees of rents, wages, &c., in respect of these farms; *sixthly*, to convey to his nephew George Tait (1) the truster's right to the lease of the farms of Venchen and Wideopen, (2) the farm stocking, &c., on the farm, under the same declaration as applied to his other nephew. Each of these two nephews was also to pay the trustees £350 at the end of five years from the truster's death, and £350 at the end of ten years from the same period. He directed the trustees, *seventh*, to pay to his wife a liferent of the residue of his trust-estate, the sums of money to be paid by Lees and Tait to be included in residue; *eighth*, on her death to realise his estate and divide the free proceeds amongst his sister Mrs Agnes Tait or Davidson and his nephews and nieces in equal shares, these shares of residue not to vest till the time of payment arrived. By a codicil to the settlement, on the narrative of the provisions to the nephews of the truster's right to the leases of his farms, and whereas it was his wish that the assignations to them should be made as soon as possible after his death, and should take effect as at that date, he declared that each should be entitled to any profits the trustees might make out of the leases which were to go to him while they might hold them, and on the other hand should be bound to pay losses incurred by the trustees with reference thereto. This provision in the wife's favour was to be declared in full of her terce and *jus relictæ*. The trustees entered on their office and found that the free moveable estate after payment of debts amounted to £17,348, 3s. 6d. Mrs Tait, the widow, intimated that she repudiated her conventional provisions under the