the Sheriffs were accordingly recalled, and the advocator assoilzied.

Agents for Advocator—D. Crawford & J. Y. Guthrie, S.S.C.

Agent for Respondent—J. Barton, S.S.C.

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*Thursday, November 5.*

## FIRST DIVISION.

### GLADSTONE AND OTHERS *v.* LINDSAY.

*Foreign Decree — Decree-conform — Partnership—Accounting—Appeal*—Lis alibi pendens. Decree pronounced in terms of a foreign decree, —the defender not showing any such irregularities in the obtaining of the foreign decree as to lead the Court to examine it on its merits, or refuse to give it effect. General rule in partnership accounting.

This was an action at the instance of Robertson Gladstone, Archibald Kelso, and others, against David Baird Lindsay, concluding for payment to the pursuers of the principal sum contained in a decree of the High Court of Judicature at Fort-William, in Bengal, in favour of the pursuers against the defender, of date 7th September 1865, with interest and taxed expenses.

It appeared that the defender while resident in India was sued, along with other parties, by the present pursuers, for the debt which is the subject of the decree in question, along with another debt. Both debts were claimed as having been incurred to the firm of Gladstone, Wyllie & Company, of which the defender had been a partner along with the present pursuers. The defender, being desirous to leave India, executed, along with two sureties, a bond, styled a bail-bond, by which they bound themselves to pay to the plaintiffs in that suit, or in any other suit that might be brought against him by the same parties, relating to or arising out of the same matters, any sum which the Court might in such suit or suits adjudge to be payable by the defender, such payment to be made within one month after demand on his solicitors in these suits.

The alleged debt which is now in question related to advances from the funds of the firm to the Balgorah Coal Company. The defender having stated that he was the sole partner of that concern, the plaintiffs thought proper to withdraw that claim from the original suit, which was directed against other parties besides the defender, and to commence a new suit for it against him alone. He appeared in that suit, and filed an affidavit on 10th April 1865, in which he stated that three of the plaintiffs had commenced proceedings against him in the Court of Chancery in England for the taking of a partnership account. In respect of what was stated in that affidavit, he moved that the plaint in the cause should be taken off the file, on the ground that the Court had no jurisdiction, or on the ground of the dependence of the suit in Chancery; or, at all events, that proceedings should be stayed until the further orders of the Court. Counsel having been heard upon this motion, it was refused, the plaintiffs undertaking within two months to stay the proceedings in Chancery. In these proceedings at Calcutta Messrs Abbot and Lattey acted as attorneys for the defender. On 5th June 1865 Vice-Chancellor Wood pronounced an order staying further proceedings in the Chancery suit until 5th February 1866. But this was done at the instance of the defendant, on the ground tha an affidavit by the plaintiffs was insufficient, and in order that they might by that time lodge a sufficient affidavit. On 16th August 1865 the suit in Chancery was dismissed with costs, at the instance of the pursuers.

In these circumstances, the decree founded on was pronounced in the Court at Calcutta on 7th September 1865. The office copy, duly authenticated, bears that the cause came on on the day preceding and on that day for final disposal, in presence of counsel for the plaintiffs, and the defendant not appearing either in person or by counsel. It also bears the names of Messrs Abbot and Lattey as attorneys for the defendant.

This action was then raised.

The defender pleaded, *inter alia, lis alibi pendens*, in respect of a suit of accounting in Chancery instituted by him against the pursuers in January 1867; that the judgment could receive no effect, and the present action, so far as founded thereon, should be dismissed, in respect that it was irregularly and incompetently pronounced according to the law of England and of India—(1) Because the present pursuers failed to implement their judicial obligation to stay proceedings in the High Court of Chancery within the stipulated time; and (2) because, in any view, sufficient time had not elapsed since the dismissal of the pursuers' suit in Chancery; and that the defender, not being the pursuers' debtor on a fair settlement of the partnership accounts, but, on the contrary, being their creditor to a large amount, was not bound to make payment to the pursuers of the sum in the judgment.

The Lord Ordinary (BARCAPLE) repelled the defences and decerned against the defender.

In a note, His Lordship, after a narrative of the facts as above, said:—"It does not appear to the Lord Ordinary that there is anything in the circumstances in which the decree was obtained that should lead this Court to refuse it effect, or to order proceedings with a view to its being further examined. It seems impossible to doubt that the defender had bound himself to submit to the jurisdiction of the Court at Calcutta in such a suit, if it should be brought. In point of fact he appeared in the suit, and submitted himself to the judgment of the Court, by lodging an affidavit, and moving that the plaint should be taken off the file, or proceedings in the suit stayed until further order of the Court. It is true that the motion was rested partly on the ground that the Court had no jurisdiction; but that contention, so far as appears from the affidavit in support of it, was based entirely on the fact that the plaintiffs had taken separate proceedings against him in the Court of Chancery in England, which involved the same matter. The other parts of the motion implied that, except on that ground, he did not dispute the jurisdiction.

"A separate objection taken to the decree is, that it was pronounced in absence of the defender, and when he had not the means of defending himself or being heard. Of course he could not take immediate direction of the proceedings in the suit which he had consented should go on against him in India, and in which he had actually appeared by counsel and taken part. But if the Lord Ordinary is right in the view which he has taken of the defender's position, he was bound to take measures for defending himself, so as to enable the plaintiffs to get an effectual judgment against him if they should succeed in the suit. He cannot avail himself of voluntary absence or ignorance of the pro-

ceedings. It is not disputed that Messrs Abbot and Lattey had acted for him in the suit at a previous stage. He had thus all the usual facilities which any litigant possesses for having his interests protected at every step in the suit. There is no allegation of any fraudulent or irregular proceeding, by which the coming on of the cause was kept from the knowledge of Messrs Abbot and Lattey. Their names appear in the office copy of the decree, on the assumption at least that they were attorneys for the defendant. If he purposely limited the instructions under which they had formerly acted for him, so as to prevent their attending to his interests at subsequent stages of the cause, that is a course for which he alone ought to be responsible. It must be assumed that if they had appeared, and stated any good ground for delay, or for further procedure before disposal of the cause, justice would have been done in that matter.

"But the defender further maintains that, apart from the preceding objections, the judgment is so entirely contrary to justice that it ought not to receive effect. This contention is rested upon the Chancery suit, which had been brought to an end on 16th August 1865, three weeks before the date of the decree, and on the effect which had been given to the dependence of that suit in the order of the Court at Calcutta of 5th June, refusing the defender's motion on the pursuers' undertaking to stay proceedings in the Chancery suit within two months. That was effectually done by getting the suit dismissed, though not within two months. Nothing had taken place in the interval in the Chancery suit to the disadvantage of the defender. In these circumstances the Lord Ordinary can see no reason to suppose that the Court was in any way misled as to the true position of the case, or that the judgment pronounced was contrary to justice.

"A separate ground of defence is rested on the dependence of a second suit in Chancery for taking a partnership account between the same parties. It is at the instance of the defender against the pursuers, and was commenced in January 1867; the present action being brought in March following against the defender, who resides in Scotland. The defender pleads *lis alibi pendens*. In his bill originating the suit the defender, as plaintiff, undertakes to pay any balance that may, on taking the account, be found due to the defendants. The Lord Ordinary assumes that the proceedings are of such a kind as to enable the pursuers, as defendants in that suit, to bring forward all their claims against the defender as plaintiff, and to enforce a full accounting to the effect of getting decree for any balance that may be due to them.

"If in these circumstances the pursuers had, for the first time, commenced an action in this Court for a debt arising out of the transactions of the firm, there might have been much force in the plea of *lis alibi*. In that state of matters it would have been proper to ascertain the precise nature and effect of the Chancery proceedings. But the question arises very differently where the debt sued for in this Court has already been the subject of a suit and a judgment, though in a foreign Court. The Lord Ordinary must at present hold it to be a good judgment, to which this Court would give immediate effect except for the dependence of the suit in Chancery. It is only for the purpose of preventing injustice being done that the Court can refuse in the meantime to interfere. This is not a case in which there will be double proceedings for trying the same question here and in England; and the judgment of this Court will not, as regards the Court of Chancery, put the matter in any different position from that in which it already is in consequence of the Indian decree. The one judgment will be no more *res judicata* than the other. If there is any real ground of hardship it is, that by judgment here the defender may be forced now to pay the debt decerned for in India, while he is maintaining in the Court of Chancery that, in a full accounting, the pursuers are indebted to him. It is to be kept in view that he only took steps to bring on an accounting after the pursuers had obtained judgment against him for this particular debt. But the Lord Ordinary thinks it a more important consideration that the defender has a remedy in his power peculiarly suited to secure justice in the matter to both parties. If this action should be sisted to abide the result of the Chancery suit, and it should then appear that the whole debt decerned for is due, the consequences might be very injurious to the pursuers. But it is open to the defender to apply in the Court of Chancery, where he is prosecuting his suit, for an injunction against the pursuers putting the Calcutta decree in force, or prosecuting any action for that purpose. The Court of Chancery would be in a position to dispose of such an application with reference to the nature and effect of the proceedings depending there and their apparent merits, and also to consider whether, if granted, it should be in any way qualified for the security of the pursuers. The defender has not hitherto made any such application. But the pursuers have applied in the Court of Chancery for an order to stay proceedings until the sum decerned for by the Calcutta Court has been paid to them, or into Court. From the report of the judgment of the Lord Chancellor on that point, 11th March 1868, it appears that in refusing the order he specially founded upon the circumstance that the plaintiff, the present defender, has not asked to restrain proceedings against him in Scotland or elsewhere for recovering the money due under the decree; and his Lordship added, that if the plaintiff came asking indulgence of that kind, the Court would put him upon terms. Upon the whole matter, the Lord Ordinary thinks that to sist this action during the dependence of the Chancery suit would not be to aid, but to interfere, with the ordinary and proper course of justice.

"The defender's sixth and seventh pleas in law are to the effect that, on a fair settlement of the partnership accounts, he is not debtor to the pursuers, and that he is entitled to set off against the sums claimed by the pursuers such sums as may be due to him in connection with the partnership business. The pursuers have in the decree founded on a liquid ground of debt against the defender; and if any effect could be given to these pleas it would be by sisting the action until the result of the accounting in Chancery, which, for the reasons already stated, the Lord Ordinary is of opinion ought not to be done."

The defender reclaimed.

MONCREIFF, D.-F., and H. J. MONCREIFF, for reclaimer.

YOUNG and MACKAY for respondents.

The following authorities were cited:—*Southgate* v. *Montgomery*, 9 Feb. 1857, 15 S. 507; *Don*, (*per* Lord Brougham) 5 Cl. and Finn. 20; Kent Com. 11,292: Kames Prin. of Equity, 2365; Story Confl. of Laws, 606–8 (6th Ed.) *Bank of Australasia*, 16 Queen's Bench, 717; Shand's Pr. 200.

At advising—

LORD PRESIDENT—after narrating the facts of the case, said—The objection to the decree of the Calcutta Courts comes to this, that that decree was irregularly and improperly obtained by the pursuers while the defender was not represented in Court. Now, if that could be made out to the effect of showing that an irregularity was committed, not in point of form, but one which inflicted substantial injustice on the defender, I think that, on that ground, the decree would be examinable. But has that been shown? The only obstacle in the Calcutta Court to the suit going on was the Chancery suit. It was said that this must, in the first place, be finally closed, and apparently till that was done the Courts in Calcutta were not disposed to proceed. Now, what happened? The proceedings in Chancery were in point of fact brought to a close, and the suit dismissed, on 16th August 1865. The decree now sought to be enforced was pronounced by the Calcutta Court on 7th September following. Therefore the Chancery suit was no longer in existence when the decree was pronounced in the Calcutta Court. But it is said that the abandonment of this Chancery suit could not have been known in Calcutta when the decree was pronounced. Supposing that were true—if it had been known, would not that have been a sufficient ground for pronouncing the decree? and as to that, it is beyond doubt that the defender in that suit had no answer on the merits. His only answer was these proceedings in England. He objected to proceed until the issue of the partnership accounting. It appears to be suggested that there was some unfair dealing on the part of the pursuers' attorneys, particularly as to the affidavit of 17th August 1865, in which they state that these proceedings in Chancery are absolutely at an end. I see nothing like misrepresentation there. It appears to me to be a fair representation of what the Calcutta attorneys then knew of the matter, and in what they say they anticipate will be done they are perfectly right. They say that no proceedings have been taken, that they believe no further proceedings will be taken, and that the suit in Chancery will be dismissed, either of consent or on the application of the plaintiffs. In point of fact, no proceedings had been taken, or were taken. But before the decree was pronounced in Calcutta the anticipation of the attorneys was verified by an end being made to the proceedings in Chancery. The decree did not proceed on that affidavit. It was sworn on a motion for dismissal of the action. The only effect of that affidavit was the refusal of the motion on 17th August, and then on 7th September this decree was pronounced. I must say that, even if there were here any irregularity in form, it does not seem possible to maintain that any substantial or tangible injustice was inflicted on the defender, for if he had been in the Calcutta Court represented by his counsel and solicitor, what could he have said? Only this, that the claim against him for this £11,000 ought not to be allowed to be made effectual against him until the issue of the partnership accounting. That plea is as much open to him still as it was in the Calcutta Court. I don't say that we can entertain it; certainly not. We have no means of knowing anything of the matter. There is a well-known general rule that when a partnership accounting is going on one partner is not entitled to proceed against another, and do diligence on one particular item; but that rule is not of universal application. Its applicability depends on circumstances; and, the partnership accounting being conducted in the Court of Chancery, it is plain that the question whether this decree ought to be enforced is a question for the Court of Chancery, and not for us. It will be open to the defender to go to the Court of Chancery and ask to have his co-partners restrained from enforcing this decree until the issue of the suit in Chancery. Still more was it open to him, while this action was proceeding, to go to Chancery and ask to have these proceedings restrained altogether.

It appears to me, therefore, that no relevant ground has been alleged for interfering with this foreign judgment, or refusing to pronounce judgment in accordance with that of the Lord Ordinary.

LORD DEAS said that he adopted the ground of judgment stated by his Lordship in the chair, and by the Lord Ordinary. If these reasons had been less conclusive than they were, then some weight must be given to this, that the judgment of the Calcutta Court was open to appeal to the Privy Council, where the defender would have obtained any redress to which he was entitled, but no such appeal had been taken by the defender.

LORD KINLOCH—I have arrived at the same result with your Lordships. The question before us is, whether we are to pronounce a decree-conform, where there is presented to us the judgment of a competent Court *ex facie* regular and sufficient. Admittedly, we cannot enter on the merits of the judgment. The party objecting to our pronouncing a decree-conform must make out to our satisfaction that the judgment was obtained irregularly and improperly, and in such circumstances as would make it against justice to give it effect. I am of opinion that the defender has not sufficiently established this.

The question substantially turns on the effect to be given to the order of the Calcutta Court, of date 10th April 1865. The Court had then before them a motion to have the cause taken off the file, on the ground, *inter alia*, of certain proceedings in the Court of Chancery in England at the instance of the plaintiffs. The Court refused this motion, "the plaintiffs, by their attorneys, undertaking within two months from this date to stay the proceedings" in the Chancery suit.

On the 5th of June thereafter, on the motion of the defendant, the Court of Chancery stayed the proceedings in that suit to the 5th of February 1866, and, at the same time, enlarged until that date a current order against the plaintiffs to file a certain affidavit. This might not be, in strict form, the staying of proceedings contemplated in the Calcutta order of 10th April, but I think that in substance it comes to the same result—the proceedings having been stayed for a period of eight months, which was presumptively a sufficient time to terminate the suit in Calcutta.

The next step that we find taken is an application in the Calcutta Court, made by the defendant on 14th August of the same year, 1865, to have the suit dismissed for want of prosecution. In opposition to this motion an affidavit was filed by the attorney of the plaintiff, communicating the information received by telegram from England in these words:—"Lindsay's suit stayed tlll February next; is anything more necessary?" He further said—"I say that I verily believe no proceedings whatever have been taken by the said plaintiffs in the said suit since the 5th day of June last; and I

believe no further proceedings will be taken therein; but that, if the same has not been already, it will be stayed by consent, or on the application of the said plaintiffs." That he rightly interpreted the intentions of his clients is made manifest by the fact stated by the defender on the record (stat. 9), that on 18th August 1865 the bill in Chancery had been dismissed, with costs.

The Court in Calcutta refused the defendant's motion; set down the case for judgment; and, on 7th September, pronounced the decree to which we are now asked to attach our decree-conform. I see no reason for our refusing to do so. The Court in Calcutta considered that the condition expressed in their order of 10th April had been sufficiently fulfilled; and that the defendant was rightly called on to plead to the merits of the suit. I see no sufficient ground for holding any different opinion. I perceive no reason why the defendant should not have stated his defence, if defence he had, and it was his own fault if he was not prepared to do so. The Calcutta Court thought that they were entitled to give the decree in question; and I cannot say that I perceive any such irregularity or impropriety of procedure as would warrant us in refusing a decree-conform.

On the other point argued—that we ought at least to delay pronouncing this decree in respect of the proceedings at present going on in the Court of Chancery in the suit at the defender's own instance—I have no doubt whatever; if we hold the judgment unobjectionable, we are bound, I think, at once to give decree-conform. Whether the judgment should be enforced, or proceedings in execution restrained in respect of the pending suit, is a question which is not at all for us, but exclusively for the Court of Chancery.

Agent for Pursuers—A. Howe, W.S.

Agents for Defender—Morton, Whitehead, & Greig, W.S.

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*Friday, November* 6.

## GORDON *v.* GORDON'S TRUSTEES.

*Trust—Provision to Children—Investments—Fluctuation in Value—Guarantee.* Terms of trust-deed on which *held* that the trustees were not entitled to retain in their hands the residue of the trust-estate as a guarantee fund for the purpose of meeting any deficiency that might arise in the value of securities set apart by them, as directed, for behoof of the children.

The late Mr Harry Gordon conveyed by his last will and testament his whole estate, real and personal, to trustees, who were directed, *inter alia*, on each of the truster's daughters arriving at twenty-five years of age, and being unmarried, to set apart any of the securities held by them, or to invest in securities in their own names as trustees, or in the purchase of lands in Scotland, the sum of £10,000 for the behoof of each daughter so arriving at twenty-five years of age, being unmarried; and were also directed to pay to each daughter the proceeds of the said securities yearly or half-yearly, as the same might be received by the trustees. Mr Gordon farther appointed his trustees, in the event of any of his daughters being married (if under the age of twenty-one years), either to set apart any of the securities held by them to the extent of £5000, or to invest that sum in securities, taken payable to themselves as his trustees, for the behoof of his said daughter so marrying, in liferent for her liferent use allenarly, whom failing, for behoof of her husband for his liferent use allenarly, and for the behoof of the issue of the marriage, equally between them in fee, upon the said issue attaining the age of twenty-one years, when the same was declared to be payable to them respectively, or upon the death of their father, should he be then alive and entitled to the liferent; and upon the truster's daughters so marrying attaining the age of twenty-five years, or upon any of the daughters who had attained the age of twenty-five marrying, the trustees were appointed to set apart any of the said securities held by them to the extent of £5000 additional, or £10,000 in the whole, or to invest the sum of £10,000 upon securities taken in their own favour as trustees for behoof of the truster's daughters respectively in liferent for their liferent use allenarly, whom failing, for the use of their husbands respectively in liferent for their liferent use allenarly, and of the issue of the marriage in fee, upon the said issue respectively attaining twenty-one years of age, when the same was to be respectively payable to them, or upon the death of their father, should he be then alive, and entitled to the liferent. It was further provided that, in the event of any of the truster's daughters dying without leaving issue, the provision in any such daughter's favour should immediately become part of the residue of the truster's estate, and should be accumulated by the said trustees in Scotland, and be applied to the purposes directed by said last will and testament.

An annuity was appointed to be paid to the truster's son; and it was farther provided by the will that the trustees, as soon as the legacies and other provisions were satisfied, and they should have secured and set apart the sum of £10,000 for each of the truster's surviving daughters, and as soon as there should remain in their hands, or under their control, such an amount as they should deem sufficient for the purpose of purchasing an estate or estates in Scotland, should invest the same accordingly, taking the titles thereto in their own favour as trustees, and that they should execute a deed or deeds of strict entail of the said estates, according to the rules of the law of Scotland, and that the said estate or estates should be disponed by the said entail or entails to John Gordon, the truster's only son, and the heirs of his body, whom failing, his daughters in the order of their seniority, and the heirs of their bodies respectively.

The truster died in 1843, leaving a widow, a son, and several daughters. The trustees paid annuities to the widow and son as directed, and they also set apart sums invested in heritable securities sufficient to meet the provisions to the truster's daughters, paying the interest to them so far as these daughters were entitled to receive it, and as regards these daughters not entitled to do so, in consequence of being under twenty-one or twenty-five years of age, paying out of the interest the allowance provided for them. The surplus interest on the provision, so far as not appropriated to payment of the expense of management, was accumulated with the capital. Farther, the trustees purchased certain lands to be entailed, which lands were possessed by the truster's son until his death in 1862. His sister, Mrs More Gordon, who was the eldest daughter of the truster, became the party who under the provisions of the said last will and testament was entitled to be institute under the deed of entail directed to be executed by the said