son just as much as by Blaikie. This case does not depend for its solution on any question of negligence on the part of the trustees. The conduct to be inquired into is that of defenders to a suit. But if it had been necessary to inquire whether Anderson had been negligent in allowing the funds to remain in Blaikie's hands, I think there is overwhelming evidence to prove that he was. [His Lordship here adverted to the evidence, and then continued]—But it is not necessary for the determination of the case to make out gross negligence on Anderson's part. It is not proposed to make these defenders liable for improper management of a trust, and it is only to such things that the clause of immunity in the deed of 1847 applies. The case is that of persons who had been deprived of the office of trustees retaining trust-funds for their own indemnity and benefit.

Lord COWAN—Under the trust-deed of 1847 there does not appear to have been any formal appointment of factor — although that deed empowered the trustees to make such, and, if they pleased from their own number. The management of the estate seems, however, to have been devolved upon Blaikie. It then appears that the truster having become dissatisfied, resolved that it would be expedient to execute a new deed. This was in 1855, and although he had not reserved power to himself under the former deed to do so, there is no doubt whatever that he was quite entitled to recal the former trust and create a new one. Now it does not exactly appear that the deed of 1855 was intimated to the Blaikies and Anderson, but in 1857 this action was brought calling them to account for their management. That was a judicial intimation of the most pointed kind. At the time the action was brought it appears from their own statement that the defenders were owing £50 to the estate. The action called upon them to denude. They were entitled, they said, to be discharged before denuding, And so they were, but after the action was brought they were not entitled to intromit with the trust-funds. Their trust was recalled. They might have been entitled to retain any funds in their hands in liquidation of their claims against the estate; but where was their title to go on with the management of the trust and intromit with the rents? Perhaps it might have been that from 1855 to 1857, as there was a balance due to them, they were entitled to intromit with the rents; but whenever the balance turned they should have paid it into Court. The sum now claimed is a growing balance between 1857 and Blaikie's bankruptcy. The defenders, it appears to me, are to be dealt with as persons who jointly concurred in intromissions with an estate without a title. The very able argument addressed to us by Mr Mackenzie has not satisfied me that there is not evidence of gross negligence on the part of Anderson, had it been necessary for the determination of the case to consider that. He knew of Blaikie's embarrassments, and yet left all the management of the estate to him. He can't so rid himself from responsibility. But I agree with your Lordship that this is not necessary for the disposal of the case.

Lord BENHOLME—This case appears to me to be distinguished from every other case of the kind by the feature that whatever immunities these trustees may have had under the deed by which they were appointed, their position with regard to these was completely altered when the trust in favour of Edmond was created. From that time they were not entitled to plead immunities. Thereafter they drew the rents of the estate, not for the benefit nor on the mandate of their constituent, but for their own benefit and security. Now, when the mandate was recalled, exact diligence was required; and if a person intromits with funds, or allows a factor to do so in such circumstances, he is bound in exact diligence. He transacts at his peril. A right of retention exercised in such circumstances as we have disclosed in this case is to be used in the strictest and most careful way.

Lord NEAVES—I should be quite prepared to affirm the interlocutor under review *simpliciter*. I think the conclusions deduced by the Lord Ordinary from the proof are quite sound. I think, however, the proof might have been dispensed with altogether, because the case admits of being decided on a very simple view of it. The defenders no longer held the position of trustees after the judicial demand made upon them in this action. It cannot be pretended that they could thereafter have exercised any of the large discretionary powers conferred upon them by the deed under which they had formerly acted. All that had come to an end. There are cases where an absolute conveyance may be said to result in a trust where the purposes for which a conveyance was made are fulfilled. This is a case of another kind. The trust had been put an end to by the truster, and the defenders kept it up for their own protection and security. They could not pretend to any power to act as trustees, but they say they were entitled to retain the estate for their own indemnity. In this position of matters they came to be holders of the estate *in rem suam*. Now, it never was heard of that a creditor in possession could refuse to debit himself with the proceeds of the estate because his factor failed. The defenders had a balance in their hands, and they were bound to see to its careful preservation.

The Court therefore adhered with additional expenses.

Agents for Pursuer—Hill, Reid, & Drummond, W.S.

Agents for Defender—Hope & Mackay, W.S.

OUTER HOUSE.

(Before Lord Jerviswoode).

A. *v.* B.

Practice — Proof—Conjugal Rights Act. A defender and her alleged paramour having failed to appear at a diet of proof in a divorce case for identification, warrant granted to apprehend them.

In the interlocutor allowing a proof to the pursuer in this case, the Lord Ordinary, "on the motion of the pursuer ordains the defender, and C. D. referred to in the libel and relative condescendence, to appear personally at the said diet of proof for the purpose of identification, and grants warrant for citing them accordingly." At the diet of proof,

"FRASER, for the pursuer, put in executions of citation against the defender and against the said C. D. to appear at this diet of proof for the purpose of identification, and these parties having been called, and having failed to appear, counsel moved the Lord Ordinary for a warrant to apprehend them and detain them in safe custody till produced at an adjourned diet of proof before the Lord Ordinary at twelve o'clock to-morrow. The Lord Ordinary, having considered the said motion, and, in respect said parties have failed to appear, grants warant to messengers-at-arms to apprehend the persons of the said B. and C. D., and to

detain them in safe custody till produced to-morrow at twelve o'clock noon, for the purpose of identification at the adjourned diet of proof before the Lord Ordinary, and adjourns the diet for said proof till to-morrow at said hour of twelve o'clock."

Agent for Pursuer—David Milne, S.S.C.

Saturday, June 30.

FIRST DIVISION.

ANTERMONY COAL CO. *v.* WINGATE & CO.

(*Ante* vol. i. p. 206).

Title to Sue—Descriptive Firm—Partners. A descriptive firm consisting of two partners, one of whom was abroad, sued an action for a debt due to the firm, in name of the firm and of its partners. Held that the partner left at home was entitled to raise and insist in the action without express authority from the absent partner, such authority being implied in the contract of partnership.

This is an action at the instance of the Antermony Coal Company, and Austin & Co., and Walter Wingate (who is in Australia), the individual partners thereof, against Walter Wingate & Company, and the said Walter Wingate and George Cadell Bruce, the partners thereof. It was defended only by Bruce, who pleaded that the pursuers had no title to sue. This plea was repelled by the Lord Ordinary (Barcaple), by interlocutor of date 23d December 1865, which became final. Bruce thereafter moved that the pursuer Walter Wingate should be ordained to sist a mandatory. This motion was refused, and the Court on 7th March 1866 adhered. Bruce thereupon stated the following plea in law:—"In the absence of any authority, sanction, or instructions by the pursuer Walter Wingate, and he not having authorised the institution or prosecution of the present action, it cannot be proceeded with."

The Lord Ordinary repelled this plea, observing in his

Note.—The Lord Ordinary does not think that the first plea can be sustained in the circumstances of this case. The action is at the instance of a company, though using a descriptive name—the Antermony Coal Company—not a proper partnership firm. The instance is properly stated, by giving the descriptive name, and also the names of the partners, Austin & Company and Walter Wingate. If Wingate were in this country, and did not appear to repudiate the action, no objection could be taken by the defender on the ground of want of authority. It has already been decided (Antermony Coal Company *v.* Bruce, 7th March 1866), that the fact of Wingate being abroad does not entitle the defender to require a mandatory to be sisted. He now maintains that, before it can be proceeded with, evidence must be produced that Wingate has authorised or sanctioned it. It appears on the face of the summons that Wingate is abroad, and the defender states that he has absconded for Australia. It is in that state of matters that the present action is brought for the price of articles alleged to have been sold and delivered by the Antermony Coal Company, of which Wingate is a partner, to a company of which Wingate and the defender Bruce are the partners. The defender denies all personal knowledge of the matter, and states that the business of his firm was managed wholly by Wingate. The Lord Ordinary is of opinion that in these circumstances the partner of the Antermony Coal Company who is in this country is entitled to sue the present action at the instance of the company and its individual partners, without producing authority to do so from Wingate, the absent partner. E. F. M.

The defender Bruce reclaimed.

ALEXANDER MONCRIEFF, for him, argued—A descriptive firm can only sue along with at least three partners, if there are so many; and if there are only two, as in this case, they must both sue along with the firm. One of the two is out of the country, and there is no presumption that he has authorised the action. We aver that he has not. The action, therefore, cannot proceed until authority from the absent partner is produced.

GORDON and LAMOND for the pursuers answered:—(1) This plea has been already disposed of when the plea of no title to sue was repelled. (2) When persons enter into partnership they authorise each other to act as representing the company, and the decision in this case will be *res judicata* against Wingate. There is no repudiation of the action by him.

At advising,

The LORD PRESIDENT—It appears that Walter Wingate is a partner of the Antermony Coal Company and also of Walter Wingate & Company. The meaning of the plea which the Lord Ordinary has repelled is that the Antermony Coal Company is a company carrying on business under a descriptive firm, and cannot sue without a certain number of the partners being named as pursuers. In this firm there are only two partners, and it is said that one of them has given no authority, and that it is not competent for the other to use his name without producing evidence of his authority. We had a question before us formerly as to Wingate's sisting a mandatory, and we found that he was not bound to do so. The question we have now to deal with is somewhat different. There was a great deal of difficulty at one time as to the proper mode of suing in the case of a descriptive firm. It was held that the proper way of libelling was to sue in name of the firm and a certain number of its partners. The rule was fixed that there should be at least three named, but according to what principle this number was fixed I do not know. If there are not three partners I presume it is enough that the whole partners are named. I think the interlocutor of the Lord Ordinary is right. I think that the name of the firm and a certain number of its partners being a proper mode of libelling a summons for the recovery of a debt due to the firm, those who have a legitimate interest as partners are entitled to use the name of another partner for the purpose of giving a good instance. If there are a great many partners, it may be easy to get the names of three, but if there are only two, and one is unwilling to sue, is the recovery of the debts due to the firm to be prevented? There could hardly be a stronger case than the present for illustrating the inconvenience of such a doctrine, for the partner who is said not to concur is also a defender, and he may not wish to give authority to prosecute himself. I think it is implied in the contract of partnership that partners are not entitled to obstruct, at least are not to be presumed to be desirous of obstructing, the business of the firm.

Lord CURRIEHILL—The solution of the question raised in this case depends upon certain peculiarities in the Scottish law of partnership. The summons concludes for payment of the price of goods sold and delivered by one company denominated the Antermony Coal Company to another