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

company denominated Walter Wingate & Company. It describes each of these companies as having two partners—those of the former company being Austin & Company and Walter Wingate; those of the latter company being the same Walter Wingate and George Cadell Bruce. Mr Wingate is thus a partner of both companies.

The summons describes the pursuers as being the firm of "The Antermony Coal Company," and Austin & Company and Mr Wingate "being the individual partners of the said firm;" and the parties called as defenders are the firm of Walter Wingate & Company and Messrs Wingate & Bruce, the individual partners of that firm. Mr Wingate, who is at present in Australia, has not appeared in the action. Mr Bruce has appeared, and has stated several defences against the action; but under the present reclaiming-note we have at present only to dispose of the first of these defences, which is that the action cannot be proceeded with in respect that it has not been authorised by Mr Wingate. If that defence were well founded it would probably prevent the Antermony Coal Company from ever being able to enforce payment of the claim, even supposing it to be well founded, as Mr Wingate, who on that assumption would be one of the debtors, might never authorise an action to be insisted in against himself. But perhaps the company might have no remedy against such injustice if the defender could show that in strict law such trading companies are not entitled to sue their debtors to pay their debts in any case where one of the partners does not authorise the action. But is there any rule to that effect in the law of Scotland? In my opinion there is not, and I shall state the ground upon which my opinion rests.

The Scottish law of partnership is distinguished by this peculiarity, that even a private trading company, such as this Antermony Coal Company was, has one prerogative of a corporation, which is, that it is held to be a separate person in law; that as such it alone is the owner of the assets of the company; that it is the sole creditor in the debts owing to the company; and it is the proper and principal obligant in the debts owing by it, the individual partners being liable only *subsidiarie* for the company's debts. Thus the partners of the company individually and the obligants to the company are not immediately connected as creditors and debtors. For the same reason the connection of debtor and creditor may subsist between the company as a separate person in law and any one or more of its individual partners.

Another principle in our law of partnership is, that each individual partner of such a private trading company has a mandate or *prepositura* in the proper business of the company by which he has authority, in the name of the company, to enter into contracts, to subject it in liability for debts, to uplift and discharge debts owing to it, to institute actions against its debtors, and to carry on all other proper proceedings in the management of the proper business in which it is engaged—(Erskine, iii. 3, 20). This is one of the particulars in which a private trading company is distinguished from a joint-stock company.

Keeping these principles in view, I think the allegation of the defender Mr Bruce that the institution of this action has not been authorised by Mr Wingate is not relevant as a defence against the action. In the first place, Mr Wingate is not the creditor in the debt. Assuming, as we must do in considering this preliminary defence, that the sum sued for is owing by the defenders to the Antermony Coal Company, the creditor is that company itself as a separate person in law, and Mr Wingate individually is not in that position in reference to the debtors, and consequently no authority from him in that character is necessary to sustain the action.

Secondly, neither is his authority necessary in his character of mandatory, or *prepositus*, in the affairs of the company. The mandate, or *prepositura* of the firm of Austin & Co., which is the other partner of the Antermony Coal Company, is sufficient authority to it to institute this action at the instance of the company itself, the proper creditor for payment of a debt owing to that company as the price of goods sold and delivered by it to the defenders.

And accordingly it is a settled rule in our law of partnership that, in respect that such a private trading company is a separate person in law, it has a *persona standi in judicio*, and can itself sue and be sued by its social firm; and that (subject to an exception I am about to mention) it is not necessary that, whether it be pursuer or defender, all or any one of its individual partners should be a party to the action. This was long ago held in cases of the banking company of Douglas, Heron, & Co.; and the point, having been again raised, it was conclusively settled by the judgment of the whole Court in the case of Forsyth *v.* Hare & Co., 18th November 1834.

The exception to which I have just alluded is that of a company whose firm is what is called descriptive—that is, when it is denominated not by the names of persons, but only by some fancy description, such as that of the company in question, which is called the Antermony Coal Company. In such cases it has been deemed necessary that in judicial proceedings such a company should be identified by the names of some of its individual partners being added to its descriptive appellation. But why? Not, as already stated, because such partners are either the creditors of the debtors, or the mandatories or *prepositors* of the company's affairs, but because their names have been held to be requisite in cases of this kind, *to complete the description of the companies*, and to indicate that they are not mere myths, and also to indicate the names of some parties against whom personally execution may pass of any decree which may eventually be pronounced against the company, whether it be pursuer or defender. This was settled in a series of cases which occurred nearly forty years ago. A doubt as to the legality of parties suing or being sued by such descriptive firms occurred in the House of Lords in the case of the Commercial Bank of Scotland *v.* Pollock, and their Lordships allowed that case to lie over for a considerable time in order that the question might be fully considered. While that case was so standing over in that tribunal, the question occurred in two cases in this Court, and in both of them it was decided that companies having only such descriptive firms could sue and be sued by such firms, if the names of some of the partners were added. These cases were the Sea Insurance Company, 17th February 1827, and the Shotts Iron Company, 19th January 1828. And soon after these decisions were pronounced the House of Lords resumed consideration of the case of the Commercial Bank *v.* Pollock, and then gave judgment in it to the same effect on 28th July 1828. Although all these cases related to joint-stock companies whose affairs were carried on by official managers whose names were mentioned along with the descriptive names of the companies, the Judges expressly stated that the ground on which

the actions were sustained was, that these persons were also described as being *partners of the companies*. It thus came to be a settled rule, that in judicial proceedings in which a company having such a descriptive name is a party, it is requisite that, in order that it have a *persona standi*, it should be described by the names of some of its individual partners being added to its own descriptive denomination. But still the purpose of such addition is only to supplement its descriptive denomination by announcing that the company has as partners of it the persons whose names are so added. It is only to give effect to that rule that the names of Austin & Company and of Mr Wingate required to be added to the descriptive appellation of the Antermony Coal Company. And this being the case, it matters not whether or not *both* of them authorised the action. Either of them, in virtue of his legal *prepositura* in the company's affairs, had ample authority, without the consent or the knowledge of the other, to institute the action at the instance of the company, in order to recover a debt which is owing to it (as *in hoc statu*, must be assumed), and in the exercise of that authority that partner was entitled, and indeed bound, to describe the company by setting forth not only its descriptive appellation, but also the names of its partners.

It is only further necessary to state that it was necessary for Austin & Company, in so exercising its *prepositura*, to insert the name of the other partner as well as its own, because it has been further settled that the names of two partners at least must be so added to the description. This was found in the case of the London, Leith, Edinburgh, and Glasgow Shipping Company, 19th June 1841 (3 D. 1045). It was there suggested that although there might be propriety in requiring the names of three partners, as three persons make a *collegium*, yet that "*plurality is enough*." And in the present case the names of two partners are enough, because, besides being a plurality, they are all the partners of this company. I therefore think the allegation that Mr Wingate has not authorised the action is irrelevant as a defence against it.

Lord DEAS and Lord ARDMILLAN concurred.

The reclaiming note was therefore refused, with expenses.

Agent for Pursuers—William Burness, S.S.C.

Agents for Defender—Bruce, Lindsay & Paterson, W.S.

SECOND DIVISION.

WYLLIE AND OTHERS *v.* WYLLIE AND HILL AND JOHN HILL.

Title to Exclude—Arbitration. Terms of a clause of arbitration in a contract of copartnery, which held (alt. Lord Mure) not to exclude an action for exhibition of accounts against one of the partners.

The contract of copartnery of the firm of Wyllie & Hill, coalmasters at Govan and Glasgow, contained a clause to the effect that the representatives of a deceased partner are *ipso facto* by the death of their predecessors to be partners. Mr Wyllie, one of the partners, having died on 4th September 1861, this clause came into operation. Mr Hill, the surviving partner, raised an action of declarator in 1862, to have it declared that Mr Wyllie's representatives were not partners, but in this action he was unsuccessful. Mr Wyllie's representatives now raised this action of count, reckoning, and payment. Mr Hill, the defender, pleaded, *inter alia*, that the pursuers were not partners, and that he intended to appeal against the judgment of the Court of Session in the previous action. Alternatively, he pleaded that if the pursuers are partners, the present action is excluded by a clause of arbitration in the contract of copartnery in the following terms : — "The said parties agree, if any difference or dispute shall arise between them anent this copartnery, or the true meaning and intent of these presents, to submit and refer the same to the amicable decision, final sentence, and decreet-arbitral to be pronounced by John Geddes, Esq., mining engineer in Edinburgh; whom failing William M'Creath, Esq., mining engineer in Glasgow, as sole arbiter mutually chosen by the parties, with power to the arbiter to issue decreets-arbitral, partial or final, which decreets, when issued, shall be final and binding on the parties."

The Lord Ordinary (Mure) dismissed the action on the ground that the whole matter was reserved for the arbiters.

The pursuers reclaimed.

GIFFORD and R. V. CAMPBELL appeared for the pursuers and reclaimers.

GORDON and SCOTT for the defender.

The Court held that the question between the parties related at present solely to the first conclusion for exhibition of the firm's books, and for an account of intromissions. The objection which the defender made was simply that the pursuers were not his partners. Now, this was a matter which the Court had already decided in the pursuer's favour, and it could not be reasonably imagined that they were to allow the arbiters to become a court of appeal upon that point. As to the applicability of the submission clause to any other question between the parties no judgment was given. The Lord Ordinary's interlocutor was recalled, and the plea founded on the clause of arbitration was repelled in so far as it went to exclude the action. *Quoad ultra* a remit was made to the Lord Ordinary, and the defender was found liable in expenses.

Agent for Pursuers—Alex. Wylie, W.S.

Agent for Defender—John Walls, S.S.C.

COURT OF TEINDS.

Wednesday, July 4.

BUCHANAN *v.* MAGISTRATES OF DUNBAR.

Jurisdiction—Competency—Communion Elements. An application to the Court of Teinds for decree for communion elements, directed not against heritors, but persons said to be bound to furnish them under an obligation undertaken in 1618, held incompetent.

In the year 1860, the Rev. John Jaffray, then minister of the parish of Dunbar, raised a summons of augmentation, modification, and locality against the heritors of the parish, concluding for an augmentation of the stipend of the parish, with a competent yearly allowance for communion elements. On 16th January 1861 the Court of Teinds augmented the stipend to 21 chalders, "and that for stipend (the communion element money being paid by the burgh of Dunbar)."

It appeared that the Provost of the burgh had in the year 1618 consented on behalf of the com-