of writing out in manuscript the notes of evidence, and lodging the manuscript copy in process, while the evidence is at the same time printed for the use of the Court and the parties. Their Lordships stated that there was no reason why the process copy should not be in print, or why the print should be copied over in manuscript for the sake of satisfying an imaginary rule that every step of process should be in manuscript. Such a practice increased expense, without any corresponding advantage.

Counsel for the Reclaimer—Mr Fraser and Mr Rhind. Agents—Messrs Jardine, Stodart, & Frasers. W.S.

Counsel for the Respondent — Mr Strachan, Agent—Mr Andrew Beveridge, S.S.C.

Tuesday, December 1.

FIRST DIVISION.

HUNTER AND OTHERS *v.* BURNLEY AND OTHERS (ECCLES' TRUSTEES).

Trust—Residue—Loss on Investments—Assignation of Bond—Pro indiviso *Creditor—Interest.* Generally, losses on investments of trust funds must be borne by the residue of the trust estate. Where, under a power of allocation in a trust-deed, trustees have allocated to a beneficiary a share in a heritable bond, that beneficiary cannot, if he becomes entitled to payment of his share of the trust estate while the bond is yet unrealized, demand an assignation to a proportion of the bond so as to become a *pro indiviso* creditor along with the trustees.

The pursuers sought in this action to recover payment of the balance of a legacy due to them from the trust-estate in the hands of the defenders. That balance was payable in October 1865, at which date it consisted of £350 in bank, and £100, being part of a heritable bond for £1500 held by the trustees. The pursuers contended that they were entitled to payment of the sum in bank as at October 1865, with interest at 5 per cent. from that date; and farther, that the trustees were bound either to pay the £100 along with the rest, or to assign the bond to the extent of the pursuers' interest therein. The trustees maintained that they were not bound to assign the bond to any extent, but were entitled to take their own time to realise it; and they claimed right to retain the money in bank in order to meet any loss which might arise on the bond. That bond, they alleged, had once been wholly allocated to the pursuers, and the allocation had been changed without any intention of relieving the pursuers from the loss which might arise therefrom. The Lord Ordinary (JERVISWOODE) sustained the defences and dismissed the action.

The pursuers reclaimed.

CLARK and MACKINTOSH for reclaimers.

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

The LORD PRESIDENT held that, on October 1865, the defenders were under an obligation to pay over the sum then due to the pursuers, whatever it was, unless any part of it was invested in such a way that it could not be immediately called up. Now the defender's own statement was that, to the extent of £100, the money was in that position, but the rest of it was in bank. The defenders had not alleged any sufficient reason for retaining the sum confessedly lying in bank. They spoke about retaining it in case there should be any loss on the bond, but they had not made it intelligible how the pursuers could be made liable for any loss arising in that way. Any such loss would fall on the residue of the estate. The residue appeared to be large. From the absence of any statements on record to the contrary, it must at least be assumed that the residue was quite capable of sustaining any such loss as was here apprehended, and such loss must then fall upon residue, unless it occurred through the malversation of the trustees. The notion, therefore, that the defenders were right to retain the money in bank was out of the question, and it followed necessarily that that money was payable as in October 1865; and if not paid, must bear interest at 5 per cent. That was the ordinary rule, and there was nothing in the circumstances of this case to prevent the application of the ordinary rule.

As to the £100, that was in a different position, and would be payable only now, when made available by the sale of the subjects over which it was secured.

The other Judges concurred, LORDS DEAS and KINLOCH holding that the pursuers were quite wrong in demanding a part assignation to the bond. That bond was a *unum quid*, which the trustees were entitled to hold and realise at their own discretion; and the introduction of a *pro indiviso* creditor into the bond might have greatly embarrassed the trustees in their management and realisation of the security.

In the circumstances, expenses to neither party.

Agents for Pursuers—W. F. Skene & Peacock, W.S.

Agents for Defenders—Murray, Beith & Murray, W.S.

Wednesday, December 2.

SECOND DIVISION.

WILSON *v.* DICK AND SON, AND OTHERS.

Agent and Client—Employment—Services—Remuneration. Circumstances in which *held* that an investigation into the affairs of a firm was made on the employment of the partners of the firm, as well as on behalf of other parties interested.

In this case Mr Richard Wilson, chartered accountant in Edinburgh, sued Mrs Janet Birrell or Dick, widow of the late Charles Dick, brewer in Edinburgh, and Brydon Monteith, farmer, Tower Mains, near Edinburgh, as individuals; the firm of Charles Dick & Son, now or lately brewers in Edinburgh, and William Dick, lately residing in Edinburgh, presently in South America; the said Mrs Janet Birrell or Dick, and Charles Thomson, brewer in Edinburgh, the individual partners of said Company, as such and as individuals, for the sum of £419, 9s. 6d. The pursuer makes the following statement:—The pursuer, Richard Wilson, is a chartered accountant in Edinburgh, and on or about April 14, 1865, was instructed and employed by the defenders, Mrs Janet Birrell or Dick and Mr Bryden Monteith, at a meeting of parties interested in the business of the defenders, Charles Dick & Son, brewers in Edinburgh, held on said date, to examine a balance-sheet that had been lately made up of the said defenders', Charles Dick & Son's

business, as well as the whole books of the said Company, so far as the same might be necessary for ascertaining the condition and accuracy of the said balance-sheet and books, and the state of the capital and business of the concern, and the proportions of capital at the debit or credit of each partner in the business. The defender, Mr Monteith, stated that this step was expedient for the satisfaction of the partners themselves, and also in order to give confidence to Messrs M'Lean & Hope, and other customers of the business. The defender, the said Bryden Monteith, also stated that the pursuer's proposed employment was concurred in and approved of by the partners (other than the said Mrs Dick) Mr William Dick and Mr Charles Thomson. The defender, the said Bryden Monteith, was appointed preses of the said meeting, with power to sign the minutes for himself, Mrs Dick, and the absent partners of the said firm of Charles Dick & Son."

The pursuer then goes on to state that this employment was ratified by the defender's agent by letter; that he performed the work, and that it was afterwards approved of by some of the defenders—viz., William Dick and Charles Thomson, partners of the firm.

The defenders maintained the following pleas:—"1. None of the defenders other than Mrs Dick having employed the pursuer to do the work, for the alleged performance of which the sum sued for is charged, the said defenders should be assoilzied. 2. *Separatim*, as regards the defender Bryden Monteith, any part which he took in the matter having been taken wholly as the representative of Mrs Dick, under the said minute of agreement, the terms of which were well known to the pursuer when he undertook the employment, the defender incurred no responsibility or liability to the pursuer. 3. The action cannot be maintained, in respect that the pursuer did not perform the work which he was employed to do. 4. At all events the pursuer cannot recover, in respect that he failed properly and timeously to perform the said work, and that his said failure has been a cause of loss, injury, and damage to his employer. 5. In no view can the pursuer recover the sum sued for, in respect that the said sum is greatly in excess of a fair and reasonable charge for the work in question, even assuming it to have been properly performed."

The Lord Ordinary (JERVISWOODE) pronounced the following interlocutor and note:—"*Edinburgh, 17th March* 1868.—The Lord Ordinary having heard counsel, and made avizandum, and considered the record, with the proof adduced, productions, and whole process, including the joint-minute for the parties, No. 92 of process: Finds, 1st, That the employment of the pursuer, in the matters to which his claim in the present action relates, commenced by a communication by Mr Cotton, S.S.C., to him, in terms of the letter dated 18th April 1865, which forms No. 8 of process, and with which was inclosed, as the authority of the pursuer proceeding to inquire into the affairs of the firm of Charles Dick & Son, an extract from minute of meeting of parties interested in the business of that firm, held on the 14th April 1865 (Appendix A, p. 20), so far as the said minute related to the proposed employment of the pursuer: 2d, That the pursuer, in the course of acting under the employment foresaid, was engaged for a considerable period of time in an extensive investigation of the books and affairs of the said firm, of which the defenders, William Dick, Mrs Dick, and Charles Thomson, were then partners: 3d, That the said employment of the pursuer was recognised by the said firm, and by the defender Bryden Monteith, who acted in the management of the affairs of the said Company as the representative of the said Mrs Dick, who was a partner therein as aforesaid: 4th, That the defender Bryden Monteith was not a partner of the said firm of Charles Dick & Sons; and finds that the pursuer has failed to prove, as matter of fact, that he was employed in the matters to which this action relates by the said defenders as an individual, or otherwise than as the representative and as acting on the part of Mrs Dick; and, with reference to the terms of the questions stated in the said joint minute, No. 92 of process, Finds, 1st, That the pursuer was employed in the matters to which his claim relates by Mrs Dick, by the firm of Charles Dick & Sons, and by Charles Thomson and William Dick, as partners thereof: 2d, That the employment of the pursuer in the investigation of the affairs of the said firm was not confined to ascertainment of the interest of Mrs Dick therein only, but was extended to the whole affairs of the firm, with a view to the interests of the firm, and of the partners thereof; and that the pursuer did, in fact, perform the work to which his present claim relates; and, with relation to the terms of the said joint minute (92 of process), appoints the cause to be enrolled for such order as may be necessary, with a view to further procedure in the cause.

"*Note.*—The points of chief importance here have relation to the matter of employment of the pursuer. That he was engaged in, and did perform in as satisfactory a manner as the circumstances would permit, the duties undertaken by him, the Lord Ordinary does not hesitate to affirm. But the questions in relation to the parties by whom he was so employed, raise some points of difficulty.

"First, as regards the defender Monteith, it admits of no doubt that the employment of the pursuer commenced through his recommendation. But that circumstance does not go far in fixing liability on that defender, when it is seen that he was then acting as the representative of a partner of the firm, Mrs Dick, as to whose liability no doubt has been raised, and it cannot be said that the pursuer was in any doubt, in point of fact, as to the true position of Mr Monteith, who was not a member of the firm of C. Dick & Son.

"Second, As respects the liability of that firm, a more difficult question—as it presents itself to the Lord Ordinary—arises. Because the Lord Ordinary feels bound to say that the pursuer, on receiving the instructions from Mr Cotton, under the letter of 18th April 1865, with the extract of the minute of meeting of the 14th, had no sufficient warrant to conclude that his employment was thereby authorized by the firm. But, on the other hand, it appears clear that, after the employment of the pursuer had been so resolved upon, and when it was found that it would be for the advantage of the copartnery, if not absolutely necessary, that its affairs should undergo an investigation, the firm did recognise and approve of the employment of the pursuer in that matter, and took benefit therefrom.

"On the whole, therefore, the Lord Ordinary must hold that the firm is to be regarded as having employed the pursuer in the matter of the investigation made by him into its affairs."

The defenders reclaimed.

BALFOUR for them.

MACDONALD in answer.

At advising—

LORD COWAN—The only question is, Whether the professional work performed by the pursuer was on the employment of the firm of Dick & Son, and for their benefit, as well as on the employment and for the benefit of the estate of Mr Dick sen., and his widow and representative Mrs Dick? I am of opinion that the Lord Ordinary has taken a correct view of the liabilities of the parties, and that his interlocutor should be affirmed.

No doubt the letter sent to the pursuer, with the relative documents, on which his employment originated, was from Mr Cotton. But this letter is sent, along with other documents, for the pursuer's consideration—copy minute of 14th April 1865, which, although subscribed by Bryden Monteith as preses, purported to be that of a meeting of "parties interested in the business of Charles Dick & Son,"—and set forth that the pursuer's employment was concurred in and approved, not by Mrs Dick only, but by the other partners, the defenders Charles Dick and William Thomson. The pursuer was therefore entitled to hold his employment to have been for all the parties interested in the business, assuming the statements in the minute to be correct as matter of fact. Did it appear, indeed, that Mr Monteith had misrepresented the facts, and that he had no authority for stating that the other partners of the Company concurred in his employment of the pursuer, liability could only have attached to Mrs Dick and to himself as having unauthorisedly acted in name of the others. But if, on investigation, the truth of the matter is that he was justified in alleging that he had the concurrence and authority of all the partners of the Company to the investigation by the pursuer of the affairs of the Company, and of which they were to reap the benefit, there can be no doubt that the parties, by whom he was authorised to act as he did, became liable for the work done on his employment, and that Mr Monteith, having merely acted as agent in the matter, was entitled to be absolved from all liability. Where a factor or agent acts unauthorisedly in name of his principal he will be liable personally, but where he has authority to bind his principal and transacts in his name, no personal liability attaches to the factor or agent. There may be circumstances in which joint responsibility may be incurred, but this must appear very clearly on the face of the transaction. In the present case, having regard to the evidence, documentary and parole, I am of opinion that no real ground exists for inferring such joint liability.

That the employment of the pursuer was for behoof of the Company, and was truly concurred in by all the partners, I think is clearly established by the proof. It must, first of all, be kept in view, as shedding light on the whole matter, that the death of Mr Dick sen. made it indispensable that the state of the affairs of the Company, and the respective interests of the several partners, should be satisfactorily ascertained, and that the amount of capital to be embarked in the new concern of Dick & Son by the several partners of the new company, and especially by Mrs Dick and her family, should be settled to their mutual satisfaction. A mere balance-sheet prepared by a junior partner of the old concern, it cannot be assumed, would be accepted as affording that satisfactory view of the affairs of the Company which those interested in the estate of old Mr Dick were more especially entitled to require. And it farther appears to have been very expedient, if not necessary, for the new concern to satisfy those with whom they dealt, and in particular Messrs M'Lean & Hope of Leith, that the affairs of the Company were in a safe and sound state. I apprehend this to be the balance-sheet referred to in the fourth article of the contract of August 1864.

By the contract subsisting at the death of Mr Dick sen., entered into in May 1862, it was agreed that the capital of the Company was to be £19,000, the whole of which was to be contributed by Mr Dick sen., and on which he was to receive interest at four per cent. until the two junior partners should pay up their shares of the capital; and it was declared that the share and interest of Mr Dick sen. was to be 8-10ths, and that of each of the two junior partners 1-10th. A balance-sheet prepared after Mr Dick's death by one of these junior partners might very justly be objected to as not affording satisfactory evidence of the state of the concern by his widow and representatives. do not think it therefore unreasonable, or anything more than was to be expected, that a thorough investigation into the Company's affairs should be made by a properly qualified person at the expense of the Company. And this is precisely what I hold on the evidence to have been done. For, although Mr Monteith, as acting for Mrs Dick, did apply to the pursuer in the first instance, and subscribed the minute of April 1865, it appears to me that he did so for behoof of all the partners in the concern, and that he had full authority to do so, and to bind the Company.

The fifth article of the contract of August 1864 has been alleged to indicate that Mr Monteith was to act in the affairs of the Company solely as representing Mrs Dick and the other representatives of Mr Dick senior, and to be remunerated solely by her and them. But this is not the true reading of that article of the copartnership. Its object is to provide for Mrs Dick's interest in the new concern being properly attended to and represented by a nominee to be approved of by the other partners, and who was from time to time to have power to inspect and examine into the affairs, books, and vouchers of the Company—a most just precaution, when it is considered that the estate of the deceased Mr Dick was so deeply interested in the capital of the Company. I cannot view this provision of the contract to have had reference to that balance-sheet between the old concern and the new concern, and the ascertainment of Mr Dick senior's interest in the capital at the date of his decease, for which the fourth article of the copartnery provides. Had the evidence shown that the junior partners, Charles Dick and William Thomson, had wished some other party than the pursuer to be employed, and had repudiated his employment, the case would have assumed a different aspect; but in place of this, the statement of Mr Monteith in the minute of April 1865 is amply supported by the evidence. The minutes of the meeting in the pursuer's chambers on 9th July 1866 and 4th September 1866, with the intermediate letter from the defender Thomson dated on the previous day, are conclusive as regards the effect of the documentary evidence. And as regards the parole evidence, there is nothing in it calculated, in my apprehension, to disturb, and everything that might be expected to support, the conclusion at which I have arrived, that the pursuer's employment was con-

curred in and approved of by the whole parties interested.

The other Judges concurred.

Agents for Pursuer—Stewart & Wilson, W.S.

Agent for Defenders—George Cotton, S.S.C.

Wednesday, December 2.

M'NIVEN ETC., *v.* PEFFERS.

Partnership—Lease—Obligation to Communicate. Circumstances in which *held* that a partner who had obtained a renewal of a lease was bound to communicate to his copartner his share of the profits of the business, notwithstanding that the lease by which the rights of parties were originally determined had come to an end.

Shortly after the death (in 1859) of the late Mr W. Rutherford, wine and spirit merchant in Edinburgh and Glasgow, the shop and business carried on by him in Gallowgate, Glasgow, was taken over by his sister-in-law, Mrs M'Niven, who entered into partnership with the defender Peffers, who had been for many years the shopman there. The partnership was to last till Whitsunday 1866; and in the event of Mrs M'Niven's death before that time, her daughter was to become partner in her stead, but as trustee for Mrs M'Niven's grandchildren. The lease of the premises, which had not expired at Mr Rutherford's death, was renewed in Mr Peffer's name, so as to expire at the same term—Whitsunday 1866. Mrs M'Niven died in 1861, and her daughter took her place under the contract of partnership. The property having changed hands in 1863, and the new landlords desiring to make some alterations on the premises, they, in February 1864, obtained Mr Peffers' consent to this being done, in consideration of a reduction of £12 in the rent, and an undertaking to give him a new lease for five years from Whitsunday 1866, "at a fair and reasonable rent." Miss M'Niven was not informed of this arrangement. She resided in Edinburgh, and quarterly statements of the profits were rendered to her. In December 1865, her agent, Mr Finlay, S.S.C., in prospect of the expiry of the lease and partnership, wrote to a Mr Brown, who acted on behalf of Mr Peffers, suggesting some arrangements that might be made at Whitsunday, by which Mr Peffers, after paying for the goodwill, might thereafter carry on the business for himself. No answer was made to this letter, and another was written in March 1866, renewing the proposal. In the end of that month, a new lease of the premises was concluded between Mr Peffers and the landlords at a considerable advance of rent. In April, the parties met, when this was intimated by Mr Peffers, and he stated that he intended to carry on business after Whitsunday on his own account. Mr Finlay intimated that, in these circumstances, he considered the partnership would continue after Whitsunday, and that his clients would be entitled to their share of the profits. In May, a valuation of the stock and fittings of the shop was made by mutual consent, and Mr Peffers tendered to the M'Nivens half thereof, together with half of the profits till Whitsunday. This was refused, and an action brought, in which the M'Nivens contended that the partnership subsisted after Whitsunday 1866 as before, that the renewed lease was partnership property, and that they were entitled to half of the profits. The Lord Ordinary (Ormidale) assoilzied Mr Peffers from the first conclusion that there was a subsisting partnership. A new summons, to bring out more clearly the second conclusion, having been brought, and a proof taken, the Lord Ordinary found that the renewed lease was and could only legally have been obtained by the defender for behoof of the copartnery, and that the same is now held by him for their behoof accordingly, and that the pursuers were entitled to their share of profits since Whitsunday 1866, and until the stock, goodwill, &c., of the company should be realised for mutual benefit.

The defenders reclaimed.

GIFFORD and LORIMER for them.

SHAND and WEBSTER in answer.

The Court adhered to the Lord Ordinary's interlocutor, and remitted to him to settle the questions of accounting between the parties.

Agent for Pursuers—J. Finlay, S.S.C.

Agent for Defender—D. J. Macbrair, S.S.C.

Thursday, December 3.

FIRST DIVISION.

HAMILTON *v.* FERRIER.

Agent and Client—Charge on Bill—Disputed Balance—Taxation—Interest—Account Current—Assignation—Payment to Account. Circumstances in which a client *held* liable in payment of the expenses caused by his resisting a charge given him by his agent for payment of a business account. If a client insists on having his agent's account taxed before he pays it, the agent is not bound by the account already submitted, but may remodel and add to it before sending it to the auditor.

For many years Ferrier acted as the agent of Hamilton. In 1863 Hamilton was sued in the Court of Session by Mayer for a debt of £29, 14s. Hamilton defended, and Ferrier conducted his defence. In July 1865 decree was pronounced against Hamilton for the debt, and £112, 14s. 1d of expenses. Sometime thereafter, his agent Ferrier paid these sums to Ross, Mayer's agent, stipulating for an assignation to the debt. Disputes arose between Hamilton and Ferrier as to the latter's accounts, Hamilton alleging that his agent had made the payments to Ross without authority; paying a sum of £200 to account, but refusing to pay the full amount of the business account sent in by his agent. Ferrier having obtained from Ross an assignation to the decree for expenses, charged Hamilton thereon. Hamilton suspended, pleading; "1. The advances made by the charger in payment to Mr Ross of the sums now charged for, having been repaid to him by the complainer, the charge ought to be suspended as craved. (2) The complainer is entitled to have the sum of £200, paid by him as aforesaid, applied in extinction or payment of the earliest items charged against him on the debit side of the charger's account-current in Mayer's case; and the said sum being so applied, it discharges the sums for payment of which the complainer is now charged."

The Lord Ordinary (MURE) sustained the reasons of suspension upon "the authority of *Laing* v. *Brown*, 2d December 1859, and the decisions there referred to, in which the rule that a payment on the credit side to an account-current must be applied in liquidation of the sums on the debit side