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

in their order, was held to be applicable not to bank accounts merely, but to all other accounts-current."

Ferrier reclaimed.

GIFFORD and J. C. SMITH for reclaimer.

CLARK and ADAM for respondent.

After various procedure in the case, including production of the agent's accounts, and a remit to the auditor for taxation:—

At advising—

LORD PRESIDENT—The judgment which we are to pronounce, is in point of form to dispose of the reclaiming note now before us; but the whole question between the parties is now a question of expenses, the controversy, when handled in a practical way, having been narrowed to a very small compass. This affair of Hamilton's debt to Mayer appears to have been a very troublesome matter from the beginning, but I cannot help saying that Hamilton's conduct throughout, and particularly looking to the way in which Ferrier had dealt for him, was not reasonable or satisfactory. Nothing could be more unreasonable than to leave Ferrier to pay Ross' account—Ross holding a decree in which he could have done diligence against Hamilton—and then not providing the funds to reimburse Ferrier. There can be no doubt that when this dispute arose, Ferrier was greatly out of pocket in paying the sum for which summary diligence might have been done against Hamilton.

The shape which the matter took before it was brought into Court was this. Hamilton was desirous of having the whole affair of his debt put into one account, so that it might be dealt with in a separate way from his ordinary account, and that was done in the account No. 7 of process. The amount was stated at £316, 0s. 8d., and on 13th October 1865, £200 was paid to account, leaving £116, 0s. 8d. Hamilton disputed this balance, but on what grounds we have never been able to see. We must suppose his grounds to be unreasonable, for he has not yet been able to justify them. The offer which he made to Ferrier was this—I will pay you £84, and not a farthing more. How he worked out that sum I do not know, but that he was wrong in that must now be held settled. Ferrier refused that offer, and said the amount is £116, 0s. 8d., and if you won't settle I must take proceedings against you. Ferrier had stipulated, I think very cautiously and properly, that Ross should on payment give him an assignation to his account, if required; and so, when he found his client in this unreasonable attitude, he got from Ross that assignation, and then he gave Hamilton a charge for £112, 14s. 1d., and 19s. as dues of extract. The question is—Was he justified in doing that? I do not say that it was not a strong step; but it must be kept in view that his client had put himself in a very false position by trying to disclaim what his client had done in paying Ross, and saying that he would not reimburse him. The client was in the wrong throughout the whole of this dispute, and therefore, the question comes to be—Whether in giving that charge, the agent was asking more than he was entitled to? It turns out, I think, that he was not. On the contrary, it is clear that if this account were made out in the way in which the agent was entitled to make it out, by charging interest and additional items, there is more due on the balance than the sum charged for. In these circumstances, I cannot help thinking that the charger was right throughout, and was entitled to take this mode of enforcing payment, and I am inclined to find the charger entitled to expenses. This I am all the more inclined to do when I look at the grounds on which the suspender resists payment. He does not say the charge was incompetent, but he says in his first plea—"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."

That certainly is not well founded. And his second plea is to the same effect. On what all this was based, we see from the Lord Ordinary's interlocutor, namely, that this jotting, No. 7 of process, was to be held as a proper account-current, and that the £200 was to be so imputed as to extinguish the charge. That plea has no foundation. In the first place, we were all satisfied on looking to this account that it was not an account-current; and secondly, that if it were and the cases cited were to be applied, the effect would be to extinguish other portions of the business account, and leave this most undoubtedly unextinguished. I think, therefore, that the charger is entitled to prevail.

LORD DEAS—The question between the parties is simply—Who was in the right? Now, I agree in holding that in the payment of that sum to Ross nothing was done but what was right. Hamilton no doubt says that he forbade Ferrier to pay that sum, but he has not suggested any ground on which Ross was not entitled to get payment of it, or to do diligence against him. It is clear, therefore, that Ferrier, in paying that sum, paid nothing but what Hamilton could be compelled to pay. He was entitled to an assignation, and to use the same remedies that Ross could use. I do not see that, having paid that money, he was not entitled to be reimbursed, leaving any question of the accounts open. There was no question of taxation raised at that time, for Hamilton says he objected to every item of the account. What is the result? There is no doubt that the account was subject to the well-known principle, that if a client does not choose to pay his account as rendered, but demands that it shall be taxed, his agent is entitled to alter and add to it. That is well settled. The client takes the risk if he insists on having the account audited. We must look therefore to the real sum due, and it turns out that there will be a sum of £9 more to pay than if Hamilton had paid when the account was rendered. There is no doubt, too, that an agent may, if he chooses, charge interest on his outlay, so it turns out that Hamilton will have to pay some £16 additional. Taking these two things together, the case is clear. It is hard no doubt that Hamilton should have to pay the money, but it would be still harder to make Ferrier pay it.

The other Judges concurred.

Agents for Complainer—A. & A. Campbell, W.S.
Agent for Respondent—J. H. Ferrier, W.S.

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*Friday, December 4.*

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## M'INTYRE AND HOGG V. ORR AND OTHERS.

*Property—Title—Lease—Water—Servitude—Acquiescence.* A proprietor granted to A in 1792 a tack of part of his lands, with the use and privilege of the water of Levern, belonging to the said lands, for the accommodation of mills, and with full power to the lessee to erect dams &c., on any part of the burn within the lands. In 1821 the proprietor disponed to B his said