Saturday, July 10.

SECOND DIVISION.

PETITION—BROCKIE.

Petition to appoint Trustees—Jurisdiction.

An English deed appointed certain trustees, who predeceased the truster. The deed applied to the whole means of the truster, both in England and Scotland. *Held* that it was *ultra vires* of the Court to appoint new trustees in place of those deceased, the proper Court of resort being in England.

This case came up by reclaiming note against an interlocutor pronounced by the Lord Ordinary (Young), in a petition presented by Mrs Jane Lord or Brockie, and George William Brockie for the appointment of trustees. The circumstances were as follows—Thomas Brockie, on November 14 1850, by deed of settlement conveyed and assigned to Walter Anderson, general carrier, Edinburgh, and James Lord, cotton-spinner, Bacup, in the county of Lancaster, the hereditaments and premises situated in the barony of Portsburgh and sheriffdom of Edinburgh; also his share and interest in a certain annual rent-charge of £12, payable out of certain hereditaments, also situated in Portsburgh; and also two policies of insurance, amounting together to £999, 19s., but in trust always for the purposes therein mentioned, viz:—(1) That so long as the truster was not bankrupt or insolvent the trustees were to pay the rents and profits of the trust-estate to him. (2) That in the event of his becoming bankrupt or insolvent, the rents and profits should be paid to his wife on her own receipt. (2) That if the truster survived his wife, the rents and profits were to be paid and applied to his own benefit and that of his children. (4) That if his wife Jane Brockie survived him, the rents and profits were to be applied to her use during her life. (5) That after the death of both, the subjects were to be held for the children of the marriage, in such shares as the spouses jointly or the survivor might direct by any deed executed by them, and failing such directions in equal shares. (6) That in the event of there being no child or children of the marriage, or issue of such child or children surviving the term of payment, the estates were to be held for the next of kin of the truster.

Both Mr Lord and Mr Anderson accepted the trust, and the conveyance of the policies of assurance was duly intimated to the two assurance companies, but no title was made up in the persons of the trustees to the heritable estate. The trustees both predeceased the truster, who died at Southport on 14th October 1874. The petition set forth that it had therefore become necessary that new trustees should be appointed to carry out the purposes of the deed of settlement. The petitioner George William Brockie has attained majority.

The application was presented under section 12 of "The Trusts (Scotland) Act 1867," and section 3 of the "Titles to Land Consolidation (Scotland) Amendment Act, 1869."

The interlocutor of Lord Young was as follows—"3*d July* 1875—The Lord Ordinary having considered the petition, and heard counsel for the petitioners—Refuses the prayer of the petition, and decerns.

"*Note*—The indenture of 14th November 1850 is an English deed, the meaning and legal effect of which this Court is incompetent to determine without the aid of an English Court or of counsel learned in English law. Assuming that a trust is thereby well constituted, and that there are interests thereby created which require the protection of some judicial interposition to supply trust machinery in lieu of that which has failed according to the representation in the petition, I am of opinion that this is not the Court to resort to for that purpose. It is an English trust created by an English deed for behoof of English beneficiaries, and it is for the English Court having jurisdiction in the matter to afford any remedy which the circumstances may require. This Court may have to determine whether or not the indenture is efficacious to carry real property in Scotland, but under this petition the only question is about repairing the machinery of the trust which is said to have broken down, and it appears to me that this is a question for the determination of the proper Court in England. With respect to any property in Scotland which the deed may be held effectually to carry, we shall certainly recognise the validity of any appointment which the English Court having jurisdiction in the matter of the trust may be fit to make. In the case of a Scotch trust we should not hesitate to supply a failure of trustees in circumstances which seemed to us to require that this should be done, although part or all of the property affected by the trust happened to be in England, and I think it improbable that an English Court would interfere or hesitate about leaving the matter to our determination. By interfering in this case we might do great injustice, and an appointment by us might be disregarded by the Court in England which has jurisdiction in the trust, and is undoubtedly competent to make any appointment that may be required."

The petitioners reclaimed; and after hearing counsel the Court refused the reclaiming note, and adhered to the Lord Ordinary's interlocutor.

Counsel for the Petitioners—Burnet. Agents—Mason & Smith, S.S.C.

Tuesday, 13th July.

SECOND DIVISION.

[Lord Shand, Ordinary.

EAGLESHAM & CO. *v.* GRANT.

Principal and Agent—Partnership—Agreement for Commission on Profits—Cash Advances.

By minute of agreement A (a shopkeeper) in consideration of B's guaranteeing a composition to A's creditors, bound himself to transfer his whole business and estate to B with power to B to realize the estate and carry on the business in any way he might direct. A was likewise bound to devote his entire time and energies to the business, but was prohibited from ordering goods without B's express written authority. B was further to receive a commission of 7½ per cent. on all monies recovered by him, and was to account to A for the balance after fulfilment of the purposes of the agreement. A having ordered goods, but without B's authority as stipulated, *held* that the terms of the minute and the subsequent actings of the parties did not import that A and B stood to one another in the

position respectively of agent and principal, nor in that of partners, only in that of debtor and creditor—and that B. was therefore not liable in payment of the price of the goods.

The summons in this case was at the instance of James Eaglesham & Co., warehousemen in Glasgow, pursuers, against John Grant, accountant in Inverness, defender, and concluded for payment of three sums of money, amounting respectively to £13, 10s. 1d., £26, 2s. 2d., and £52, 18s. 2d., with interest, the price of goods supplied at different dates by them to the order of James Munro, carrying on business as a draper in the "London House" Inverness. The circumstances of the case are set forth in detail in the interlocutor and note of the Lord Ordinary (SHAND), which were as follows:—

"*Edinburgh*, 12*th* April 1875.—Having considered the cause, with the proof adduced, Finds that the pursuers have failed to establish facts relevant to infer responsibility on the part of the defender for the sums sued for, repels the pursuers' pleas in law, sustains the pleas in defence, and assoilzies the defender from the conclusion of the action, and decerns: Finds him entitled to expenses; allows an account thereof to be given in; and remits the same, when lodged, to the Auditor to tax and to report."

"*Note.*—This action presents questions of importance and of difficulty—of importance, because, so far as I am aware, it is the first in which the Court has been called on to consider and apply certain principles in the Law of Partnership, introduced into the law of England by comparatively recent cases, now of leading authority; and of difficulty, because of the involved nature of the relations which existed between the defender Mr Grant and James Munro, in whose name the business referred to on record was carried on, and which have led to the charge of responsibility against the defender for the whole debts of the business.

"The sums sued for amount in all to £100; but the defender's responsibility in this case would infer liability to trade creditors of the business to the amount of upwards of £1000 in all; and if the defender should be held to be a partner of Munro, or to have acted as the principal in the business (Munro being merely his agent), must infer also the forfeiture of his claim as a creditor on Munro's sequestrated estate for upwards of £900.

"The goods, the price of which is sued for, were ordered from the pursuers by Munro, were invoiced to him and in his name, and were not furnished in reliance on the defender's credit to any extent. The business in Inverness was carried on exclusively in Munro's name; and Mr Eaglesham, when examined, stated that it was only after Munro's estates had been sequestrated, and after the existence of the agreement and other deeds now relied on had become known to the trustee in the sequestration, and through him to the trade creditors, that it occurred to the pursuers, or their advisers, that the defender was liable for the debt sued for. There is nothing in the case relied on as shewing that the defender had ever held himself out, or permitted himself to be held out and represented, as carrying on the business, either as a partner of Munro or otherwise. A person may incur responsibility for partnership debts where he has permitted himself to be represented as being interested in the business as a partner, even although he has not such an interest in reality. Liability in this present case is not maintained on this ground, but is rested entirely on the existence of the deeds, and the actings which followed, all of which came to the knowledge of the pursuers long after their debt was incurred.

"The ground of the pursuers' claim is alternative, as stated in Articles 12 and 16 of the Condescendence, the first being that, although the business was carried on in name of Munro, he was merely the agent or servant of the defender, acting for the defender's behoof and benefit as the sole principal; and the second that, at all events the defender was a partner in the business with Munro, and as such became liable for furnishings made to the business, including the pursuers' accounts. These alternative views are repeated in the 1st and 2d pleas for the pursuers.

"As the defender's liability is rested entirely on the deeds and actings referred to on record, it is necessary to ascertain what has been proved as to these, keeping in view the separate grounds of liability now stated. It is impossible to deal with the legal questions without a careful consideration and a somewhat detailed statement of the results of the proof.

"The defender was examined as the first witness for the pursuers, and gave a fair and frank account of the transaction which took place between him and Munro—an account which is substantially the same as that afterwards given by Munro himself in his examination. It appears that Munro had carried on business in Inverness as draper in the 'London House' for some years previous to March 1871, and having become embarrassed, he, at the request of his creditors, executed a trust-deed by which he conveyed his whole means and estate to trustees for the liquidation of his debts. A state of his affairs had been made up by Messrs Mitchell and Wink, accountants in Glasgow, from which it appeared that, if a settlement were made by a composition of 15s. per pound on his debts, there would be a probable reversion of £800 to £1000, and the creditors agreed that the trust-deed should be superseded if a composition of that amount were secured to them. In this position of affairs Munro was advised to apply to the defender, who carries on business as an accountant in Inverness, to assist him to carry out a composition-arrangement by becoming cautioner for the last two instalments of the composition; and the defender, after negotiation, and simply as a matter of business, agreed to give assistance. The terms on which the arrangement was concluded are contained in the minute of agreement between Munro and him, dated 4th April 1871, which is produced.

"The defender thereby agreed to become cautioner for the composition; and the general scope of the arrangement was, that in security of his obligation the sums to be realised from the stock and business should be applied in payment of the composition; in addition to which he stipulated for and obtained obligations of relief from two of Munro's friends or relatives, for two sums amounting together to £250. Taking the valuation of Munro's assets which had been made as a fair estimate of what might be realised, it appeared to Munro and the defender that by settling with the creditors for a composition of 15s. per pound on their debts Munro would ultimately have a reversion of about £800, and in addition to this

reversion, the defender had the security of the personal guarantee just mentioned. It was contemplated and intended that the business should continue to be carried on, and as a return for his interposition by becoming cautioner, and the trouble he might have, it was agreed that the defender should receive a commission of £7, 10s. per cent. 'on all monies which might be received or recovered by him in connection with the carrying on of the business, and realisation of the estate.' It is explained in the defender's evidence that the parties hoped that in the course of fifteen months Munro would be freed of his liabilities, and able to pay the defender the commission to which he was entitled under the agreement; and apparently the parties thought it would not be necessary that the defender should make advances out of his own funds. If these expectations had been realised, Munro at the end of fifteen months would have been in possession of his business free from his former debts, and unincumbered by any claim on it by the defender.

"As the pursuers' claim is rested much on the precise terms and effect of this agreement, it is necessary particularly to notice its provisions.

"The narrative contains a statement of the defender's undertaking to become security for payment of the two last instalments of the composition, and Munro therefore binds himself to assign, convey, and make over to the defender his whole stock in trade, shop fittings, and others, in the 'London House,' and his whole household furniture and furnishings of every description in his dwelling-house, with all outstanding book and other debts due to him, and generally his whole estate, real and personal, with power to the defender to realise the whole of his means and estate, to sell and dispose of his stock in trade and moveable effects, and to carry on the business in any manner of way he might choose or direct. The deed further contains an obligation on Munro to assign the lease of his shop and dwelling-house, and to insure his life for a sum of £500 in name of the defender, and an undertaking by him to devote his entire time and energies to the business of the 'London House,' and to assist by selling, and otherwise by carrying on and pushing the business, with a view to enabling the defender to realise the stock to the best advantage as speedily as possible. It was further provided that no goods of any description should be ordered by Munro for the purposes of the business or replenishing the stock without the express written authority of the defender, and under the declaration that for the payment of any goods ordered in contravention of this provision the defender should in no way be responsible. For these causes, and on the other part, the defender bound himself to pay out of the proceeds of Munro's stock and other effects the two last instalments of the composition, and also the value of such goods as might, upon his written authority, be ordered for the purposes of the business or replenishing the stock; and further, to pay out of these proceeds to Munro a weekly alimentary allowance of £1, 10s. sterling, and to allow Munro to retain his dwelling-house rent free, and to pay the rent, taxes, and public burdens for the shop and dwelling-house, and whole wages to servants, clerk, and assistants in the shop and house, and generally the whole working expenses of the establishment, as the same should be fixed and determined by him. The defender further bound himself to pay all the monies and proceeds which he might realise from the sale of the stock, from the recovery of the debts, and generally from the estate of Munro, into a separate account to be opened by him in his own name with the Caledonian Banking Company, and which might be operated on by him when necessary, and out of the proceeds of the stock and effects to pay the premiums on Munro's life, and on the insurance of the property, and the expenses which had been or might be incurred in carrying out the agreement of the parties.

"The deed thereupon provides that the defender should be entitled to charge in the account of his intromissions with the foresaid estate of the said James Munro the commission above mentioned, and the defender bound himself, after providing for all the payments undertaken by him, or for which he had rendered or might render himself responsible, as well as for his own commission and all expenses, to account to Munro for the balance which might remain in his hands thereafter, and after the fulfilment of the various purposes of the agreement. The deed further provided that in the event of Munro's bankruptcy, the defender should only be bound to account to him and the trustee of his creditors for the balance of the sums to be recovered and realised by him, which might remain in his hands after providing for the two foresaid instalments and for all the other payments for which he might be responsible, and the commission to which he might be entitled in terms of the agreement.

"In pursuance of this agreement the defender guaranteed to Munro's creditors the two last instalments of their composition; and on 17th April 1871 Munro executed two deeds in favour of the defender, (1) an assignation and conveyance of his whole stock-in-trade, conform to inventory (being the inventory for valuation which had been made up for the creditors to enable them to judge of the offer of composition), and also all his household furniture conform to inventory, and all outstanding book, trade, and other debts enumerated in a third inventory; and generally, his whole estate, real and personal, with full power to sell and dispose of the whole, "and to carry on the business in the 'London House' foresaid in any manner of way he may choose or direct;' and (2) an assignation of the lease of the house and shop which had a currency until Whitsunday 1874. The agreement was further followed by circulars issued to the debtors of the 'London House' in May and August 1871 by the defender, the terms of one of which is as follows:—'The outstanding accounts due to Mr James Munro of the 'London House' having, under new business arrangements, been transferred to me for recovery, I have to request payment of the sum of £ , outstanding against you in the books . . . your obedient servant, John Grant, Acct.,' and this resulted in the payment of certain accounts to the defender, although the larger portion of them appear to have been paid at the 'London House' to Munro himself.

"The assignation of the lease was not intimated to the landlord. That deed and the conveyance of Munro's whole estate and effects remained in the hands, of the law-agent who acted for both parties, and whose account was paid out of the proceeds of the business from the bank account which was opened in terms of the agreement. Munro continued in possession of his house and business

premises as before, without any ostensible change. His name continued over the door, in all the advertisements regarding the business, and in the invoices of goods sent out and received. The correspondence in the course of the business was conducted entirely in his name, and the bills granted to creditors for goods supplied, of which there were a good many, were signed by him. In short, so far as third parties, including the pursuers, were concerned, the business continued to be conducted exactly in the same way as before, Munro being the only person appearing to the public to be interested in it; and even when the defender or his family purchased goods from the business, the account was charged and paid as in the case of any stranger.

"On the other hand, in pursuance of the agreement, the whole receipts for the business were paid by Munro into a bank account kept in name of the defender, and which was operated on by the defender's cheques alone. Monro was restricted to an allowance of thirty shillings, afterwards with the defender's consent enlarged to two pounds a week, for personal and family expenses, and this sum and the wages or salaries of shop assistants, and servants, and rates and taxes on the house and shop, were deducted from the drawings from time to time before the balance was paid into bank. A cash-book was also opened by Munro at the defender's desire, containing a record of the cash transactions in connection with the business; and this book and the bank book in the defender's name give the means of tracing all such cash transactions. When sums became payable either on account of composition on Munro's former debts, or on account of goods ordered, or for payment of rents, or the like, in carrying on the business after the agreement was entered into, the defender granted cheques on the bank-account in his name, into which the proceeds of the business were paid. These cheques were granted almost invariably not to the creditors directly, but were payable to bearer, and handed to Monro, who made the payment or remittance; but the cheques, generally speaking, specified the particular purpose for which they were granted. As to the system on which goods were ordered, the defender did not insist on Monro obtaining written authority from him granting orders. He was aware that goods were required, and were in course of being ordered from time to time; and the extent of his interference on this subject was to urge Monro to be careful to avoid ordering anything more than was absolutely required for the current wants of the business. The facts now stated seem to exhaust all that requires to be noticed as to the mode in which the business was carried on.

"Under this system matters proceeded from April or May 1871 until April 1873. In the meantime the creditors, including the pursuers, who had a debt due to them when the defender interposed as cautioner, received payment of the composition on their debts. The money was to a great extent obtained from the receipts of the business, but there was a considerable deficiency; and the defender, in order to meet this, and to supply Monro with the current expenses of the business, overdrew his account for a considerable sum, and one or two bills between him and Monro were discounted for this object. From July 1872 onwards, the defender was in this way under a considerable advance, and the amount increased as time went on. A state of Monro's affairs was made up in April 1873, from which it appeared that the business was not prospering—for the apparent surplus of about £800, which was one of the defender's inducements to enter into the arrangement, had fallen to below £500,—and it was resolved that Munro should look out for other occupation, and that the business should be wound up and the stock disposed of, if possible, to a purchaser. An opening shortly after occurred at Gairloch, in Ross-shire, to which Monro removed for the purpose of taking up the business of a hotel-keeper. From that time no further orders for goods for the business were given, but the premises were kept open for the purpose of realising the stock, Munro still continuing to take some charge, coming from time to time from Gairloch for the purpose, while in his absence the assistants at the shop disposed of what they could. The receipts continued as formerly to be paid into the account in the defender's name, and the defender continued to grant cheques for payment of the business accounts and expenses. When Munro left Inverness, he and the defender both anticipated that when the stock was sold and the business wound up there would be a reversion in Munro's favour of £200 or £300, after repayment to the defender of his advances, and payment of his commission under the agreement. The stock-in-trade was sold in July, after consultation with Munro, and with his sanction, at the price of £1021, and this sum was received by the defender Then, or immediately thereafter, it became evident that in place of a reversion, the business would show a considerable loss.

"Munro in the meantime had incurred a number of additional debts in connection with his business at Gairloch, and the result was that sequestration of his estates was taken out by one of his creditors in the beginning of October. In the meantime the defender had continued to collect debts due to the business, but at the date of the sequestration a number of these remained due, amounting, as estimated by the defender, to between £700 and £800, and this amount is claimed by the trustee as part of Munro's estate for division among his creditors. It may be presumed that a great part of these debts has become due by customers for goods sold to them during the two years for the period between April 1871 and the winding up of the business, and on account of stock purchased for the business during that time. The result, so far as the defender is concerned, apart from the question of liability raised in this action, appears to be that he has a claim for upwards of £700 for cash advances and interest, besides his claim for commission under the agreement, estimated at £225.

"The only additional facts to be mentioned before dealing with the legal questions in the case are, that when Munro removed to Gairloch he took with him his whole household furniture, and certain articles of napery and the like, from the stock in the business. It appears that he mentioned to the defender his intention to remove the furniture, and the defender did not object, and that something was said as to its being taken at the valuation which had been put upon it at the time of Munro's stoppage. In October following, on the eve of the sequestration, Munro granted a bill to the defender for the value of the furniture as thus estimated and the invoiced value of the goods he had taken from the shop. The bill was dated in May

because the parties considered that as the proper date for the transaction, and at the same time Munro granted a bill for the estimated amount of the defender's advances. The claim originally lodged by the defender on Munro's estate was based upon these two bills, but that claim was afterwards withdrawn and another given in for the defender's actual advances and interest and the commission claimed under the agreement, and disregarding these bills.

"Such being the state of the facts as to the origin and history of the defender's connection with the business, the questions of law which arise are,—Whether the defender has become responsible for the business debts, (1) because the business carried on ostensibly in Munro's name was truly carried on for his behoof, Munro being agent and the defender the principal? or (2) because the defender was truly a partner with Munro in the business? and it will, I think, be convenient to take the last of these questions first.

"I am of opinion that in a question between Munro and the defender no partnership existed, and that the substance and effect of the agreement into which they entered was, that the defender undertook to guarantee the payment of debts due by Munro, which might involve an advance on his part, on condition that Munro should conduct his business under stringent supervision, regulations, and restrictions, and should pay the defender a commission on the gross amount to be received in connection with the carrying on of the business and realisation of his estate, until the defender should be relieved of his guarantee. That this was the substance of the arrangement between these parties is I think apparent, if it be considered what would have been the position of matters if the parties had realised their expectations, and the business had prospered instead of going back. In that case, from the receipts of the business, the composition on the debts, the payment of which the defender had guaranteed, would have been paid without any advance on the defender's part being necessary, and as soon as his guarantee had in this way been superseded, and assuming that he was not under an advance, Munro would have settled with him by simply paying the stipulated commission under the agreement. On payment of that commission it is clear the defender was bound to discharge all the deeds that had been granted in his favour. This shews that the true nature of the arrangement between him and Munro was that commission should be paid by Munro for services rendered,—the service being the interposition of the guarantee, and the amount of commission being dependent on the sums received from the business, and in the realisation of any part of Munro's estate which might be sold. The defender was not even to receive a share of the profits of the business. His commission had no relation to profits, but was fixed with reference to the gross receipts from Munro's whole estate; and as between him and Munro there was no stipulation that he should bear any share of the losses which might be sustained. Both parties transacted on the footing that the business should continue to be Munro's. If it succeeded and he paid the defender's commission, the business belonging to him was freed from any burden or obligation in favour of the defender. If it failed, on the other hand, I see no reason for holding that the defender in that case became a partner with Munro. He did not undertake in that case to bear a share of the losses, any more than he became entitled in the case of success to a share of the profits. The losses of the business fall on Munro because the business belonged to him. The defender's loss is the amount of his commission and any sum he advanced under his guarantee, excepting any composition he may recover on these accounts; for his interest, as between him and Munro, was by their agreement limited to his commission and the repayment of any advances he might be obliged to make.

"Previous to the now leading case of *Cox* v. *Hickman*, House of Lords (Appeal from Exchequer Chamber), August 1860, 8 House of Lords Cases, 268, and 30 Law Journal (Common Pleas), 125, participation in the profits of a business was sufficient to infer responsibility as a partner as explained, with the only limitation of the rule, and a full reference to the authorities in the last edition (3d edition) of Mr Lindley's work on Partnership, p. 36. In that case it was decided that the right to a share of the profits of a business does not necessarily infer the liability of partnership, and that the relation of partnership depends on the question whether the business is in substance and reality carried on by the alleged partner himself, or by others authorised to act as his agent or agents for that purpose, the destination or division of profits being a material or pregnant circumstance, but a circumstance only, in determining that question. The case of *Cox* v. *Hickman* has been followed by several others, referred to by Lindley on pp. 40 to 45 of his work, the leading cases being those of *Bullen* v. *Sharpe*, 1865, Law Reports, 1 Common Pleas, p. 86, and *Mullwo, March, and Company* v. *Court of Wards*, in the Privy Council, July 1872, 4 Privy Council Appeals, 419. These two cases have perhaps a most direct bearing on the second ground of responsibility maintained here against the defender; and the latter of them indeed in some material respects in its circumstances closely resembles the present case. Without entering into any analysis of these cases, which would involve much detail, I have only to say that I concur in the view expressed by Mr Lindley, that the judgments in these two cases merely carried out to their legitimate results the principles which were announced, and which received effect in the decision of *Cox* v. *Hickman;* and I think they bear out the statement made by Mr Lindley, obviously after very careful consideration and examination of the judgments, and with a special knowledge of the case of *Mullwo*, with which he was very familiar, that they 'establish the doctrine that no person *who does not hold himself out as a partner* is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se*.'

"Of course a business carried on in the name of one person may be entirely the business of another whose name may be unknown to third parties, and in that case the unknown principal is responsible for all contracts made by his agent carrying on the business within its ordinary line, while the agent, even if paid by a salary only, will himself be responsible for the business debts, not because he is truly a partner, but because he holds himself out as such. The case of *Edmunds* v. *Bushell and Jones*, Law Reports, 1 Queen's Bench, 97, cited by the pursuers, is an illustration

of this rule; where, however, the question is, Whether a person who receives with others a share of the profits of a business, of which they are unquestionably partners, he is also a partner? I think it is the result of the decisions above referred to that (in the absence of acts showing that with his knowledge or authority he was held out as a partner) the receipt of profits will not infer responsibility as a partner unless the parties, having regard to the subsistence of their arrangements, are really partners *inter se;* and referring in particular to the opinion of Baron Bramwell in the case of *Bullen* v. *Sharpe*, and to the judgment in the case of *Mollwo, March, & Company*, I think there is no more reason for inferring agency, with resulting liability for the debts of the business, from an agreement to share profits, than for inferring partnership as between the parties receiving profits.

"Reverting to the question whether the defender was a partner with Munro in the business in question, I think the pursuer has failed to instruct such partnership—(1) because what the defender received, or was to receive, was really not a share of profits, but a commission on the gross receipts from the business and the realisation of Munro's estate; and (2) because, even if these could be represented as a share of profits, the true nature of the arrangement between Munro and the defender was that a guarantee was interposed for a certain return, and not that the defender should have any share in the business to be carried on as belonging to him as well as Munro.

"The remaining question is, Whether the business belonged entirely to the defender, Munro being merely his agent or servant in conducting it? I am of opinion that the facts proved do not warrant this inference. The defender never took possession, as he no doubt might have done, of the stock and other personal property which belonged to Munro; but, on the contrary, allowed Munro to continue in open possession as formerly. The conveyance was not acted on in any way. It is true the business was conducted under the stringent conditions and restrictions for which the defender stipulated when he agreed to interpose his guarantee, and in particular the whole monies drawn were paid into an account in the defender's name, and could only be drawn out again on his cheques. Certain other conditions were relaxed, as for example the provision that goods should not be ordered without written authority; but, notwithstanding, Munro alone carried on the business, subject no doubt to strict control, and to an obligation to limit himself to a small sum for maintenance. Munro's own name appeared in every way, so far as regards the public, as if he were under no control. The sole change under the agreement was, that as the price for the defender's interposition by his guarantee, Munro submitted to the defender's control so far as he chose to exercise it, which appears to have been very little, in carrying on the business.

"For the reasons already stated, I hold it to be clear there was no partnership between the parties *inter se*, and the same considerations appear to me to shew that Munro was acting for himself as the proprietor of the business, and not for the defender, in carrying it on. The defender no doubt had an interest, viz., to receive his commission and be relieved of his guarantee, and for that purpose had stipulated for such control as he took over the management. But the management was not for his behoof as in right of the business, but for Munro, to whom the profit or loss belonged.

"The points chiefly relied on as fixing liability on the defender in the character of a principal, Munro being his servant or agent merely, are the existence of the bank-account and the operations on it, the fact that the defender made large advances from his own funds to enable the business to be carried on, and the granting of the bills above mentioned by Munro to the defender on the eve of bankruptcy. As to the first of these, if it be assumed that the bank-account had been in the name of a third party for the defender's protection, and to secure him against the application of the receipts of the business to any other purpose than payment of its debts, and that the cheques of this third party had alone been effectual, the result, so far as the business is concerned, would have been the same, viz., that it would have been carried on subject to the control stipulated for. In that case I do not think there would have been room for the argument founded on the existence of the bank-account, and it seems to make no real difference that the defender himself had this check on the application of all money received in the business, by having the bank-account in his own name. The fact that the defender paid considerable sums out of his own pocket in carrying on the business is, I think, of no importance, for substantially they were loans by the defender, or payments which he could not avoid making under his guarantee. They cannot, I think, be truly represented as money advanced by the defender as principal to Munro as his agent in carrying on his business. As to the bills granted on the eve of bankruptcy, they appear to me to have been taken at a time when the parties were in some confusion as to the precise effect of their agreement and what had followed, which is not to be wondered at, having regard to the rather unusual and somewhat complicated nature of the arrangements which they had entered into. The defender was entitled to commission on any part of Munro's estate which was realised, and as the furniture was, as it were, taken away from his power of control and of taking possession of it, he may have regarded it as realised, in the sense of giving him a claim for commission on its value. But, whatever be the explanation, the parties were evidently under a misapprehension as to the nature of the defender's rights. The bills were subsequently abandoned, and I do not attach any real importance to the fact of their having been taken.

"In the view now stated, the agreement between the parties not having been followed by the defender himself taking possession of Munro's business or effects.—a fact which is illustrated by the circumstance that the trustee has now right to the debts, and would also have had right to the stoc if it had not been sold and realised before the sequestration,—it follows that Munro was acting for himself and not as the defender's agent in carrying on the business, and if so, responsibility against the defender cannot be maintained.

"It is perhaps unnecessary to consider what would have been the result if the defender had taken possession in a way which seems never to have been contemplated— viz.. by removing Munro from the occupation of the premises. Even in that case, however, it is by no means clear that if the

defender carried on the business under the agreement in Munro's name, and without holding himself out in any way as a partner, or as carrying on the business to any extent for his own behoof, that the result would have been different. In that case it is clear that the return to be received by the defender would still have been a commission on the receipts of the business and nothing more, and he would have carried on the business for Munro's behoof ultimately—the profit or loss being Munro's under the agreement. He would truly have been, I think, the agent for Munro, the principal; and if his acts in carrying on the business were all consistent with the character of agent for Munro, in whose name and by whose mandate the business was conducted under the agreement, and the defender had not held himself out as a partner to the public, I am disposed to think he would not have been responsible for the trade debts. With reference to this question, however, much might depend on the special circumstances proved as to the mode of taking possession and the particular acts of the defender; and without actual facts, such as do not here occur, the question does not admit of being made the subject of a definite opinion."

The pursuers reclaimed, and argued — The minute of agreement and disposition and assignation following absolutely divested Munro in favour of Grant. The conveyance was tantamount to a *dispositio omnium bonorum.* It was not necessary that the transference should be overt. There was here the element of control had and exercised by the defender, which was absent from the English authorities relied on by the Lord Ordinary.

The defenders argued—The transaction was not in *rem versum* of the defender otherwise than on the footing of agency. The minute of the agreement contemplated only the winding up of the business. Grant gave no express written authority to purchase the goods as provided and enjoined there, and if a latent authority is founded on, it must be taken as a whole, and the authority and its qualification are to be regarded together.

The following cases in addition to those mentioned in the Lord Ordinary's note were cited—*Murray & M'Gregor* v. *Campbell & Co.*, 6 S. 147 *Gibson* v. *Forbes*, 11 S. 916; *Mathieson* v. *Alison*, 17 D. 274; *Anderson* v. *M'Call*, 4 Macph. 765.

At advising—

Lord Justice-Clerk—This case, which involves important questions, has been treated by the Lord Ordinary at great length, and we have had a very able argument from the bar on the points which it raises. To my mind the ground lies within narrow compass, and may be shortly stated. The action is at the instance of a Glasgow firm who supplied goods to a draper in Inverness of the name of Munro, trusting simply and entirely to the credit of that individual. The pursuers say they have discovered that Munro was not the real party who carried on the drapery business, and that the party who did so was the defender, whom accordingly they in this action sue for payment of the price of the goods supplied. This they do on a plea which has the effect of making the defender the real trader and Munro his factor or agent. Had the minute of agreement, on which the pursuer's claim is rested, been for the benefit of the defender, and not for that of Munro, and had Munro been put forward while the defender remained the true principal in the background, the pursuer might have prevailed in his contention. When the real contractor is at last disclosed, it makes no difference in law that the other contracting party was ignorant of his existence at the date of the transaction. But in this case the provisions embodied in the minute of agreement were clearly only a piece of mechanism to enable Munro to get his creditors to accept a composition and to secure the defender, who had consented to become guarantee for the instalments. The whole transaction must be taken together, and the primary object of it undoubtedly was to provide a guarantee for the payment of the instalments of the composition. When we reach this there is an end to the legal discussion of the case, for the principle of partnership has no place whatever here. There is no allocation of a share of the profits to Grant; these go to Munro, who remained the trader, and no one else had a right to participate. I do not therefore see how this contention of a partnership can be substantiated, and the relations of Grant and Munro were not those of principal and agent. Grant was a medium and intervener for the purpose of paying Munro's debts. The case of *Mollwo, March, & Coy.* v. *Court of Wards*, July 1872, 4 P.C. Ap. 419, has some valuable dicta; amongst others, that in such transactions as the present the substance and not the form must be regarded; and if the intention was that the parties should stand to one another in the light of debtor and creditor, that intention must be given effect to. I think such was the relation of parties here, and that this action cannot be sustained. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Neaves—I hold the same views with your Lordship in this case. There are two strong facts which we must note here at the outset. The public were never misled or deceived by Munro's actings and dealings; had such been the case I should have been glad to give them redress. Neither did the defender enter into the agreement with Munro, on which the pursuer relies, for his own enrichment. He came under his engagement as a friend; the proceeds of the drapery business were to go to pay off Munro's debt, and that wiped off, matters were to revert to their old position. The defender's rights only arose as a creditor coming forward on the specified footing of the agreement, and no equity demands that he should be made accountable to parties who never knew anything of him till after the date of Munro's sequestration. There never was a delivery to the defender under this agreement, so far as the public were concerned. Partnership between the defender and Munro is therefore out of the question. Nor can it be maintained that they stood to one another in the position of principal and agent. If the principal allows the agent to be held out as a general agent, no private or latent stipulations between them can in law be pleaded in bar of liability. The case of *Edmunds* v. *Bushell & Jones*, 1 Q.B. 97, illustrates this doctrine. But I cannot assimilate that case to the present. Munro was never divested to the eye of the public of his former position and responsibility for his undertaking, and no claim either in equity or in law can lie against any other but him.

Lord Ormidale—We have in this case the benefit of a long and able note from the Lord Ordi-

nary, and I quite agree with your Lordships that there is one branch of the action with which the Lord Ordinary has dealt largely which can give no trouble. No case of partnership has been made out here. The defender was not known to the pursuers till long after the transactions between them and Munro were completed. Still it does not follow that if Munro was only ostensibly put forward and the defender was the real principal, having the sole interest, that the defender is not liable. He no doubt had an interest of a certain kind in the proceeds of the business of the "London House;" he was to be remunerated for his services in interposing himself as a check on behalf of Munro's creditors, and further stipulations were made in the agreement to secure him in the risk he was running. Beyond that extent the defender had nothing to do with the conduct of the drapery shop. It was conceded that Munro could have discharged the defender at any moment, on relieving him from his obligations and paying him the commission stipulated for. No partner could be so discharged, and this is perhaps a sufficient test on the question of partnership. But we have further to consider whether, failing a partnership, a case of agent and principal has been here instructed. This is the second alternative proposition which the pursuer asks us to affirm. His argument amounts to this, that Munro was a mere man of straw, who was put forward only to deceive the public. I cannot think that this was the case; on the other hand Grant was really no more than an agent. He was employed to liquidate and discharge Munro's liabilities, and in return it was arranged he was to receive a commission of 7½ per cent. upon the proceeds of the business from Munro. Grant was a mere medium between Munro and his creditors; he acted in the capacity of agent, and the present case therefore differs from that of *Edmonds* v. *Bushell and Jones*, which has been quoted as an authority for the pursuer.

Lord Gifford—Without any difficulty I have arrived at the same conclusion with your Lordships. The pursuers in entering into the transactions for which they are now claiming against the defender knew nobody but Munro, and they took Munro's bills, three in number, in payment of the goods. Further, on Munro's sequestration they ranked upon his estate for their claim. They now maintain that it was Grant who was the draper, and that it was to him that the goods were really furnished. This argument is founded upon two grounds. In the first place, it is said that Grant was in law a partner of Munro's and therefore liable, and this plea is a good one if made out in point of fact. In this the pursuers have quite failed, and without a shadow of doubt there was no partnership. Whatever the nature of the minute of agreement is, it is not a contract of copartnery. The defender is not under it to receive any share of profits, nor is one of the elements which belong to a partnership present here. The second alternative on which the pursuers rest their case is only a little more difficult. The question whether Grant was the real person with whom the pursuers dealt is one of fact; if the fact was so, the legal result is undoubted. In my opinion, the pursuers have failed to prove this branch of their case also. The substance of the dealings and negotiations which took place between Munro and the defender must be looked at as a whole. It is a fundamental principle of law of large application that when we get to the reality we must then disregard the form. This minute of agreement must be looked at in the light of this maxim, and if so, it is apparent that Grant was not here the real contractor.

Their Lordships therefore adhered to the Lord Ordinary's interlocutor, with additional expenses.

Counsel for Pursuer—Balfour and Alison. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Defender—Dean of Faculty (Clark) Q.C. and Mackintosh. Agents—Murray, Beith & Murray, W.S.

Wednesday, July 14.

SECOND DIVISION.

AULD *v.* SHAIRP.

(*Ante*, p. 177.)

Title to sue—Loss, Injury and Damage.

The patron of a professorial chair in a university intimated to a certain person his intention of presenting him to the vacant chair. No appointment, however, was made. The present holder of the chair had been appointed Principal and had resigned the chair, but on learning the patron's intentions he withdrew his resignation and retained both offices, representing at the same time to the patron how injurious the appointment he proposed to make would be for the interests of the university. The patron not having appointed the person whom he had intended, but having left the Principal also in occupation of the chair, *held* (1) that there having only been an expectation of an appointment, there could be no title to sue in the person who was to have received the chair, or in his representatives. (2) That in law there was no absolute illegality in the retention by the Principal of the chair also.

Slander — Privileged Communication — Malice — Damages.

The Principal of a university having written a letter to the patron of a professorial chair to the effect that the appointment of a certain gentleman to the Chair would be injurious to the interests of the university; *held* that the communication must be deemed to have been a privileged one, and that malice had not been proved against the writer of it.

The circumstances of this case will be found fully detailed *ante*, p. 177.

At advising—

Lord Justice-Clerk—When this very interesting and very important case was before us on the question of title, we repelled the plea of want of title, in so far as it was pleaded as a bar to the action, and to no other effect; and before further answer we of consent allowed both parties a proof of their respective averments. The question which had mainly been argued in that former discussion was, how far the pursuer, as executrix and representative of her deceased husband Dr