[12*th July* 1833.]

M. GILFILLAN, Appellant.—*Dr. Lushington—Busby.* No. 32.

A. P. HENDERSON, Respondent.—*Solicitor General (Campbell).*

Partnership—Pactum Illicitum.—A secret agreement was entered into between a law agent in the country and a person who was about to practise before the Supreme Court, by which the former, in consideration of his advancing money for the business, stipulated that he should receive one third of the profits.—Held (affirming the judgment of the Court of Session), that such an agreement was pactum illicitum.

2D DIVISION. Lord Fullerton.

ON 17th October 1818 a minute of agreement was entered into between the appellant, a writer in the country, and the respondent, then a clerk in Edinburgh, whereby the former engaged to make an instant advance of 100*l.* to enable the respondent to be admitted an agent before the Supreme Court, and to place at his disposal the sum of 400*l.*, and such farther sums of money as from time to time might be required for conducting the business, engaging at the same time to promote the respondent's interests "as much "as shall not interfere with the free exercise of his "own profession;" and in return stipulated for one third of the profits to be realised from the business, which he was to be entitled "to retain from his own "private and from his clients' accounts." It was

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provided that the agreement should be kept "private," and that it should subsist for five years from 11th November 1818. No formal contract was executed, and the respondent alleged that the only stipulation which had been fulfilled by the appellant was the advance of 100*l.*, (the greater part of which had been repaid shortly afterwards,) and some advances from time to time during the first ten months to the amount of 245*l.*, which were insufficient to discharge sums disbursed on the appellant's own private account and that of his clients. The parties continued to act under the agreement for the stipulated period, and to do business together till October 1826, when the respondent, declining to do farther business for the appellant, raised action against him for payment of sundry accounts. On the other hand the appellant raised a counter action, in June 1827, against the respondent, concluding that he should hold just count and reckoning with the appellant; that it should be declared that the agreement between the parties was valid and obligatory, and that the respondent was bound to produce states of the profits and losses arising in his business from November 1818 to November 1823, and to pay the appellant his proportion thereof in terms of the minute of agreement. In defence it was maintained, inter alia, that the agreement was illegal. The Lord Ordinary pronounced this interlocutor, 13th December 1831:—"The Lord Ordinary "having heard parties procurators and considered the "closed record, finds that by the agreement libelled the "pursuer, an agent in Glasgow, undertook to employ "the defender, an agent in Edinburgh, in the business "of his clients, and in return stipulated for a third part "of the profits derived by the defender from that

" business: Finds that it was also part of the agree-
" ment that it should be kept secret: Finds that such
" an agreement was illegal; and therefore sustains the
" plea of pactum illicitum, assoilzies the defender from
" the conclusions of the action, and decerns: Finds the
" defender entitled to expenses, and allows an account
" thereof to be given in, and to be taxed by the
" auditor."

Against this interlocutor a reclaiming note was presented by the appellant, and the Court having adhered (12th May 1832)* Gilfillan appealed.

Appellant.—The agreement of copartnery contains no stipulation to do any thing unlawful. The decision involves a principle that must strike at the root of many existing contracts of copartnerships between most respectable practitioners in both parts of the island, the lawfulness of which has never before been brought into doubt. The terms of the contract amount to nothing more than an ordinary contract of copartnery for five years between two professional men, and as far as concerns the relative interests of the parties is perfectly fair and legal. The appellant was not to conduct the business, but merely to advance the necessary capital, and use his influence in obtaining employment for the partnership. If there had been any thing in the contract by which it was stipulated that the appellant, without qualifying himself as an agent in the Court of Session, should have the power communicated to him of practising as an agent in that Court, the objection would have been obvious, as in that case the

* 10 S. & D., p. 523.

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contract would have involved a fraud upon the Court of Session and the practitioners in that Court, whose monopoly it infringed, and would have fallen within the rule of Brashe v. Mackinnon, the only case relied upon by the respondent.* But there was no such stipulation.

Respondent.—It was illegal for the appellant, who was not qualified or admitted to practise in the Court of Session, to stipulate for a share or proportion of the respondent's emoluments as a practitioner there in return merely for his assistance in obtaining business for him,—those emoluments, by law and by the regulation of Court, being appropriated exclusively to practitioners, and being calculated and fixed as suitable and necessary for maintaining their usefulness, independence, and respectability, and being thus ex suâ naturâ incommunicable to a stranger. It also was a fraud upon the public and his employers for the appellant, while he held himself out in the ordinary character of a writer in Glasgow, to attempt to form a secret compact for participating in the profits of the litigation that he might recommend or advise before the Supreme Court, thereby creating an influence and temptation inconsistent with his duty to his employers, and of which at least those employers were entitled to be publicly made aware, if it existed. The alleged arrangement would have been a violation of the revenue laws, by admitting the appellant to privileges which he was not with reference to those laws qualified to exercise. The secret agreement founded on is of a

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* Fac. Coll. 19th March 1820.

nature altogether so unjust and injurious, so derogatory to the legal profession, and so inconsistent with the interests of the Court, of clients, and of the public, that it ought not to be sanctioned or enforced.

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LORD CHANCELLOR.—My Lords, as I entertain no doubt whatever of the propriety of the decision which the learned Judges in the Court below have come to, I shall not delay your Lordships longer to consider this case, but shall move your Lordships now to affirm the interlocutors appealed from. My Lords, as to that part of the case which relates to the conduct of the party, Mr. Henderson, at whose instigation it is alleged that the arrangement was made, and who was undoubtedly as much a party to that illegal arrangement as was the other gentleman, Mr. Gilfillan, and with respect to that part of the case which relates to his conduct in availing himself of the objection,—your Lordships have nothing whatever to do with it. He may have reasons which would extenuate, or, it may be, would furnish a justification of his conduct; but, even if it were without extenuation or without justification, it must be remembered that those observations are applicable to all cases in which two parties enter into a contract in which one of them sets up that it is invalid in law as a defence against the other. The Court before whom the question is carried have nothing whatever to do with that; there is no reason whatever why the Court should express any opinion upon the conduct of parties. If they have by law a right to avail themselves of an objection, from that moment the Court before whom the question is brought has no choice, but it must of necessity relieve against a fulfilment of the unlawful contract.

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My Lords, as regards the next point—the merits of the case: whatever might be the law with respect to a contract of partnership entered into between two persons, both of whom were qualified to perform the business in the Courts in question, and which contract of partnership, openly and before all the world, held both the partners out as such,—whatever, I say, might be the law with respect to such a partnership as that,—your Lordships have nothing to do with it in this case, nor had the learned Judges in the Court below; that is not this case. This case differs from the one just put in these material facts: first, that both of the parties in question were not qualified to practise in the Courts; and next, that it was a part of the articles of the partnership, or the agreement which constitutes here a partnership, that it should be kept secret from all the world. Either of those grounds, it appears to me, would be sufficient to dispose of this question. The Court below have preserved the law, and, as far as I am able to judge, have most justly decided the question. It is impossible for any one to say that the principle on which they have decided is new. At all events, it is not the only case of the kind, because Brashe v. Mackinnon is clearly a case upon the point. The Court there held unanimously, although it is by inadvertence stated to be by a majority, that the contract was improper on the part of each party; by which, I take it, we are to understand that it was in its nature pactum illicitum in both parties. One does not exactly understand the word "improper," in a judicial sense, to mean any thing more than something which the Court cannot sanction; what must have been meant was, that it was improper to make profits

of the proceedings before any other Court than the Court in which the party was allowed to practise; and therefore the Court, first of all, declared that it was illegal in an agent,—that it was contrary to the practice of the Court, and against the law of the Court, for a solicitor or procurator or agent in a superior Court to make profit of the proceedings before an inferior Court. This was the impropriety in that person, namely, the agent in the superior Court; and their Lordships also held, that there was a similar impropriety in a solicitor before an inferior Court entering into an arrangement by which papers to be given into Court by him were to be drawn by other persons, while he was bound to certify that they were drawn by himself. That does not apply to the present case. But the illegality imputed by this judgment to one of those parties exists in some degree here; for if it is improper that the agent in a superior Court should make a profit of the proceedings before an inferior Court, this can of course only be because the agent in the superior Court is not a practitioner before the inferior Court. The circumstances of that case then apply to the present as well as the judgment; for there the Court discountenanced a party, even if qualified to practise in his own name before an inferior Court, practising in another man's name before such inferior Court. Now, here Mr. Henderson practises in the superior Court in his own name, the other party, Mr. Gilfillan, not being enabled to have his name appear as a practitioner in that Court; and this was of course kept secret. Therefore, in every point of view in which the finding in Brashe v. Mackinnon can be taken, I can see no dis-

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tinction whatever. My Lords, this is a matter of practice (as was justly stated by the Solicitor General,) with which your Lordships would be slow indeed to interfere, if the question had now for the first time come before the Court; and I make this observation the rather because this case of Brashe v. Mackinnon is said to have been decided after the contract in question had been entered into. The contract, as I understand it, was entered into in the year 1818, and Brashe v. Mackinnon was not decided until the year 1820. Even if the decision here had not proceeded upon that case, I should still have been very slow to differ from the Court below in a matter of practice.

My Lords, with respect to the second ground; that seems to me to be quite sufficient to decide the case, even if the first were not enough. I entirely agree with the learned Judges in the Court below, that a contract is illegal between two parties which keeps their clients in ignorance of its purport. This being a contract of partnership under which the country solicitor acquired an interest in the profits of the town solicitor's practice, that, I should conceive, upon public principle would be sufficient to invalidate the contract. Therefore, my Lords, I entirely agree with the learned Judges of the Court below, that this is illegal in both respects: in respect of its being a contract in which one of the parties could not practise in the superior Court, and in respect of its being a contract in which there was an obligation of secrecy as against all the world, including the client. I humbly move your Lordships, therefore, that these interlocutors of the Court below be affirmed, with such costs as will cover the expenses.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the sum of 201*l.* 14*s.* 6*d.* for his costs in respect of the said appeal.

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A. DOBIE—H. HYNDMAN, Solicitors.