[Heard 22*nd*. Judgment, 28*th April*, 1845.]

RICHARD GORDON, Trustee on the sequestrated estate of Mrs. Munro, executrix of Daniel Munro, *Appellant*.

MATHEW HOWDEN, residing in Edinburgh, *Respondent*.

Pawnbrokers.—Held that a contract between two parties to carry on the business of pawnbrokers in the name of one of them alone, followed by the single name appearing on the business premises, and in the documents issued to and taken from the customers, was a contract for a secret partnership, and illegal and void, as being contrary to the provisions and policy of the 39 and 40 Geo. III., cap. 99.

BY the 6th sect. of the Pawnbroker's Act, 39 and 40 Geo. III., cap. 99, it is enacted that every "pawnbroker shall insert in his "books the name of the thing pledged, the name of the pledger, "and of the owner of the goods," and by the 33rd sect., it is enacted "from and after the commencement of this Act, all and every "person or persons who shall follow, or carry on the trade or "business of a pawnbroker, shall cause to be painted or written, "in large legible characters, over the door of each shop or other "place by him, her, or them, respectively made use of for carrying on that trade or business, the christian and surname or "names of the person or persons so carrying on the said trade or "business, and the word 'Pawnbroker' or 'Pawnbrokers,' as the "case may be, following the same, upon pain of forfeiting the sum "of 10*l*. for every shop."

For many years prior to and until the year 1827, the respondent had carried on the busines of a pawnbroker in Dickson's Close, Edinburgh. From 1827 to 1833, the name of "John "Kidd" was substituted over the door of the premises for that of the respondent, which had previously been painted there.

In November, 1833, the respondent and Daniel Munro entered

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into a deed of partnership, whereby it was stipulated that "the "said parties having mutual trust and confidence in each other, "have agreed, and do by these presents agree, to be partners in "carrying on a joint trade and business as pawnbrokers in Edin- "burgh, under the firm of Daniel Munro, and that for the space "of five and a-half years, from and after the term of Martinmas "next, during which space it is stipulated that the said Mathew "Howden, who is well versed in the business, shall give such assist- "ance as he can with convenience to himself, in the management "and conducting of the business, he hereby reserving full power to "continue his business of appraiser and auctioneer, and to act "otherways on his own account, while the said Daniel Munro "binds and obliges himself, not to carry on any separate business, "but to devote his whole time and attention in conducting said "business, forming the subject of this copartnery. And for the "better regulating and carrying on of said business, the said par- "ties have resolved and agreed upon the following articles, *First*, "That the capital shall consist of the sum of 2000*l.* sterling, "and 1500*l.* sterling thereof is to be advanced by the said Mathew "Howden, and the remaining 500*l.* sterling, is to be advanced by "the said Daniel Munro, and that in such proportions, and at "such periods, as shall be required to carry on the business; and "for which sums so to be advanced the parties so making the "advance shall thereupon become creditors of the company for "the same, from the date of the advance by them respectively. "*Secondly*, That all bonds, bills, contracts, accounts, and other "writings relating to the said trade or business, shall be taken "and given under the foresaid firm of Daniel Munro; the said "parties shall keep, or cause to be kept, regular and distinct "books, containing all the affairs and transactions of the said joint "trade or business, and they shall post and bring forward, or cause "to be posted and brought forward, the books of the concern from "time to time, and the books shall be brought to a balance at "least every twelve months, and that upon the eleventh day of

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" November each year. *Thirdly*, That in respect the said " Mathew Howden is to advance the capital to the extent before " stated, he shall be entitled to the sum of 150*l.* sterling for the " first year, and 180*l.* sterling per annum for the remaining four " and a-half years, out of the first and readiest profits of the said " business, and that he shall be entitled to draw the same regu- " larly half-yearly, at the terms of Whitsunday and Martinmas, " the first term's payment at Whitsunday 1834, and the next " term's payment at Martinmas following, and so forth half-yearly " at these terms, during the period of this copartnery. But, on " the other hand, it is also stipulated that the said Daniel Munro " shall be entitled to the whole residue or remaining profits of the " business, whatever the same may amount to, to be uplifted by " him, either at said terms, or if he shall prefer it, to continue to " be employed in the business. *Fourthly*, That as it may be " some time after the copartnership shall have begun to be acted " upon before all the said stipulated capital sum shall be required " for the business, it is hereby agreed that for such part thereof as " may not be advanced by the said Mathew Howden, the foresaid " stipulated sum out of the profits payable to him, shall suffer a rate- " able deduction, in proportion as the amount thereof is to his pro- " portion or share of the capital sum to be advanced by him, and " which shall continue until the whole of his proportion of the " capital shall be invested in the business, and thereafter the said " Mathew Howden shall draw the full amount of his stipulated " share of the profits." The *fifth* article stipulated that the business should be carried on in the premises in Dickson's Close, and that the Company should pay Howden rent for them.—The *sixth* and *eighth* articles were in these terms. " *Sixthly*, In " case either of the said parties shall happen to die, the executors " of him who shall predecease the other shall be entitled to his " share of the profits, and be under the obligations incumbent upon " him during the remaining period of the contract. *Eighthly*, The " said parties agree that if any difference shall arise betwixt them

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" anent the true meaning of any part of this contract, or other-
" ways in relation to the copartnery, they hereby agree to submit
" and refer the same to Andrew Rutherford, Esq., advocate,
" whom failing, to Thomas Walker Baird, Esq., advocate, either
" of whose decreet arbitral to be pronounced shall be final and
" binding upon parties."

In pursuance of this contract, Munro entered upon the active management of the business—his name alone was painted over the door of the business premises—the licences were taken out in his name alone—and the tickets and notes were issued in the same manner.

In June, 1836, Munro died, leaving a will, whereby he appointed his widow to be his executrix. Mrs. Munro confirmed the will, and continued the pawnbroking business, until the month of April, 1837, when her estates were sequestrated.

On the 29th of April, the respondent presented an application to the sheriff, setting forth the contract of copartnery between him and Munro, and praying possession of the partnership effects against the trustee on Mrs. Munro's estate, with the view of winding up the affairs of the company. Under this application, the respondent obtained possession of the funds and effects of the partnership by a decree of the sheriff finding that he was entitled to it, as the only solvent partner, for the purpose of winding up the affairs of the partnership. While so in possession, the trustee on Munro's estate adjusted accounts with the respondent to a certain extent, on the footing of his being a partner.

Thereafter, in the year 1841, the appellant brought an action against the respondent, for an account of his intromissions with the partnership effects, and for reduction of the deed of partnership, as void under the Pawnbrokers' Act; and also for reduction of the sheriff's decree.

The respondent pleaded in defence, that the deed of partnership was not struck at by the statute—that, if it were, the action

in order to lie, should have been brought before the justices of the peace, and within twelve months of the offence, and that the interlocutors of the sheriff had been acquiesced in and homologated.

On the 28th of May, 1842, the Lord Ordinary, (*Cockburn*,) pronounced the following interlocutor, adding the subjoined note:—

"The Lord Ordinary having considered the process, and "heard parties, sustains the Reasons of reduction of the contract, "the additional contract, and the interlocutors libelled; decerns, "in terms of the reductive conclusion; and appoints the cause "to be called, in order that it may be settled how it is to be "proceeded with."

NOTE.—The Lord Ordinary put it "to the parties, whether "either of them wished to adduce any further evidence of the "fact that there was, or that there was not, a secret co-partnery, "but neither did.

"In this situation, and looking at the circumstances as they "are admitted or established already, the Lord Ordinary has no "doubt that such a concealed co-partnery did exist. The busi- "ness was not merely *carried on, de facto*, without the defender's "name being disclosed, but it *was a part of the original scheme* "that this should be done. Except in the private understand- "ing of the parties, as in their contract, or in the other pro- "ceedings known only to themselves, there is no trace of the "defender being a partner to be found. It was unknown to "the public and to the law.

"The Lord Ordinary holds the English case of Warner *v.* "Armstrong (3 Mylne and Keene, p. 45,) to fix that the "illegality of the co-partnery must be taken to be the legal "consequence of this secrecy. Even though there had been a "difference of opinion on that case between some of the "common law Judges and the Judges in equity, (which, how- "ever, does not clearly appear,) the Lord Ordinary would

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" prefer the opinion of the Lord Chancellor, not only because " it decided the case, and is the latest authority, but because he " agrees with it. He concurs in its view of the meaning and " *policy* of the statute.

" The defender's chief pleas against this result are :—

" 1st. That the statute only imposes *penalties* and that even " these cannot be sued for after a year for a breach of the act. " The Lord Ordinary thinks that these are penalties for irre- " gularities committed *in the course of conducting a trade not* " *otherwise struck at by the act*, and that a statute condemning " secret partnership, *on grounds of public policy*, cannot be " defeated, and the secret partnership enforced merely by paying " these penalties, or by a failure to exact them timeously.

" 2nd. That *in turpi causa melior est conditio possidentis*.. " But whatever effect this maxim might have had, *as between the* " *original parties*, the Lord Ordinary does not think it applies " to the circumstances of the present case, in which all that has " taken place is, that *a trustee acting for creditors*, and misled " by the erroneous interlocutors now brought under reduction, " has hitherto dealt and accounted with the defender as if the " co-partnery was lawful. Besides, the defender was not con- " tent originally with his mere possession, but *expressly founded* " *on the contract*, as the ground for his obtaining the interlocu- " tors which he got from the sheriff, and which are now under " reduction.

" What effect this reduction may have on the new accounting, " the Lord Ordinary does not now say, because the only con- " clusions debated are the reductive ones."

The respondent reclaimed to the Inner House, which ordered Cases by the parties, and upon advising these, pronounced the following interlocutor, " alter the interlocutor of " the Lord Ordinary reclaimed against, and repel the reasons " of reduction, in so far as they proceed upon an alleged viola- " tion of, or agreement to, violate the Pawnbrokers' Act; *Quoad*

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" *ultra* remit to the Lord Ordinary to proceed farther as to his " Lordship shall seem just."

The appeal was with leave of the Court below, against this interlocutor.

The *Lord Advocate* and *Mr. Shand* for the Appellant.—The contract is express that the business was to be in the name of Munro alone, and the documents issued and received were likewise to be in his name alone. The policy of the statute is to make as public as possible the names of " all and every person or persons" carrying on the business, and for this purpose it requires that the names of the persons carrying it on shall be painted on the door of the business premises and appear in the documents issued. The stipulations of the contract, therefore, were in direct contravention of the terms of the statute, and in defeat of its policy; the wealthy partner was to keep in the back ground, and the one of moderate means to be held forth as the only person with whom the public was dealing, and to whom they could look in any case of liability or attempt to enforce the penalties of the statute for infringement of its provisions, although the express object of the statute was, that both should be known, in order that for the protection of the public, the statute might be enforced against both.

A contract of the nature in question being prohibited by the statute under a penalty, the statute is not satisfied by mere enforcement of the penalty. The contract itself is null and void. Forster *v.* Taylor, 5 *Bar.* & *Ad.* 887; Fergusson *v.* Norman, 6 *Scott*, 791; Armstrong *v.* Warner, 3 *My.* & *K.* 45.

Mr. Turner and *Mr. Peacock* for the Respondent.—The ground upon which the decision in Warner *v.* Armstrong went was, that although the agreement *ex facie* was legal, by evidence *dehors* the agreement it was shown to be illegal. The effect of the evidence there was to show a collateral illegal contract; but

in the present case no collateral agreement is either alleged or proved. The case therefore must depend on the terms of the written contract.

In Warner's case the party had not been a pawnbroker before, and the whole was a contrivance for a loan at high interest, under the cover of a partnership. Here Howden was himself a pawnbroker, and the contract was not one framed for evasion, but was *bonâ fide* for the purpose of partnership, and *ex facie* performance of it was perfectly compatible with observance of the statute. If the contract be lawful, the subsequent acts of the parties will not affect its legality; the fact of not painting the names of all the partners upon the premises may be punishable under the statute, but there is no covenant to that effect in the contract.

It seems questionable indeed whether the object of the statute was intended to go beyond this, that the name of those actually carrying on the business should appear, in order that action might be brought against them. Here Munro was the party actually carrying on the business. If this be so, no infraction of the statute has occurred, and even were it otherwise, if there be reasonable ground for inferring intention of compliance with the act, illegal intention will not be presumed. The omission to paint the respondent's name may have arisen from ignorance of the law, not from intention to violate it; but before the contract can be held to be illegal, it must be shown from the terms of the deed and from the acts of the parties taken together, that illegality was intended. A mere stipulation to carry on the business in the name of one out of two persons is not illegal, unless it can be shown that there was an intention to conceal the name of the other. The business might have been carried on in the name of one, and the names of both have been painted.

LORD CHANCELLOR.—We are of opinion, in this case, that

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the judgment of the Court below cannot be sustained. With reference to the main point that has been under consideration, the policy of the law requires that all persons who carry on the business of pawnbroking shall publish their names to the world. There are many reasons which have been assigned for this, into which it is not necessary for me now to enter, after the decisions that have taken place upon the subject, because in the Court of Exchequer, when this question came before that Court, in the case that has been alluded to, (Warner *v.* Armstrong,) the Court decided that a secret partnership in the pawnbroking business was illegal (2 *Cro.* & *Mee.* 284). The question afterwards came before Sir John Leach, Master of the Rolls, and he also in express terms decided (3 *My.* & *K.* 61) that a secret partnership in the pawnbroking business was contrary to law. That case afterwards went before my Lord Brougham, when he held the situation of Lord Chancellor, and he affirmed that decision (3 *My.* & *K.* 64), and stated also his opinion, that it was a violation of the law to enter into a secret contract of co-partnership in the business of pawnbroking.

The question therefore, and the sole question is, whether this is a contract of that nature; whether it is a secret contract for the purpose of carrying on the business of a pawnbroker. Now this gentleman, Mr. Howden, had himself been a pawnbroker, and carried on business for a considerable time, and it is very difficult to suppose that he was not acquainted with the law connected with this subject. He afterwards, carrying on another business, wished to take a partner into this business of pawnbroking, and for that purpose he took in Daniel Munro, and a partnership was formed between them. But the first stipulation of that partnership contract was, that the business should be carried on in the name of Daniel Munro, which imports that it was to be carried on in that name alone, and that Howden's name was not to be mentioned in the firm.

Now the Act of Parliament requires that persons carrying

on the business of a pawnbroker shall put their names over the door; the names of all the persons carrying on the business. If then the partnership-contract stipulated that the business should be carried on in the name of Daniel Munro, and Daniel Munro alone, that was implicitly a stipulation that Daniel Munro's name alone should be placed over the door, and even in that view of the case the transaction would have been illegal.

It was further stipulated that all bills and other instruments should be drawn solely in the name of Daniel Munro; all these circumstances appear to me to lead to the conclusion, (and it requires some evidence on the other side to prove that that was not the intention of the parties,) that Daniel Munro's name alone should be known in the business, and that it should not be known to the world that he had any partner. It was to be a secret partnership from the very terms of the contract. It is quite consistent with this case that the parties might have reserved to themselves the right of communicating to the world that Mr. Howden was also a partner, but it requires some proof on the other side, I think, to show that that was the intention of the parties. From the terms of the contract I think I am justified in inferring—and I can come to no other inference—that it was the intention of the parties that Daniel Munro alone should be known in the business, and that it should not be known that Mr. Howden had anything to do with the concern.

I think the points alluded to in respect to the arbitration, and also the registration, have been satisfactorily answered by the Lord Advocate. If any contests arose, those contests should have been rather presented to a Court of Justice than to private arbitration. And as to the registration, I apprehend that that was a mere matter of form, which was never acted upon, and which probably never was intended to be acted upon.

For these reasons, I am of opinion that the judgment of the

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Court below should be reversed. If the opinion which I have expressed is correct, the interlocutor of the Sheriff was incorrect, and ought to have been reversed by the Lord Ordinary, and in that case it is proper that it should be reversed here.

It does not appear to me that any other question arises.

LORD BROUGHAM.—My Lords, I so entirely agree in the argument so forcibly stated, and so correctly stated, by my noble and learned friend, that I shall not trouble your Lordships with more than a word or two upon the subject.

I hold it to be perfectly clear that this was an illegal contract, for the express purpose of doing an illegal act—that this stipulation was entered into that Howden's name should be concealed, and that Daniel Munro's name alone should appear. It appears to me to be quite inconsistent with the whole frame of this instrument that anything else should have been in the contemplation of the parties.

My Lords, I consider that this Pawnbroking Act, (as I stated in the Court of Chancery, in the case of Lewis *v.* Armstrong, and in another case before me,) was a very politic and wise act. A great clamour was made before me in argument on the part of the pawnbrokers, that they were exposed to suspicion, and held to be a suspected class of individuals, and that it was treating them with indelicacy so to consider the act and to construe it. I remember my answer to that was a very obvious one, and which occurred to every one upon looking to the policy of that very beneficial act—that no honest, respectable pawnbroker would feel that there was an impropriety, or any indelicacy in being called upon to disclose his name, and the name of his partner with whom his business of pawnbroking was carried on; that it tended to prevent dishonest and fraudulent proceedings, oppressive to the poor as well as fraudulent in themselves, and tended to the encouragement and protection of fair traders, and to separate them from unfair traders. That no person, there-

fore, had any right to complain of the Act of Parliament, or of the mode of enforcing it.

Now as to what has been said with respect to the clause which requires an arbitration to settle disputes, such disputes must be settled, as my noble and learned friend stated, somehow. Now how that was to conduce to publicity, I am labouring under the same difficulty as my Lord Advocate in apprehending. But I conceive the most effectual publicity would have been to leave the law to take its course, and let the disputes that might arise under the partnership, be brought into public Court. Says Mr. Howden, "Let it be done by Mr. Rutherford, and if Mr. Rutherford cannot take it, take A. B." I forget who. Very well. The publicity was so great that they confided their secret to one individual instead of confiding it to the whole Court, and to all mankind! How that was to operate publicly I cannot tell.

As to registration, it is obvious that they need not register at all. If there had been a stipulation requiring, under a penalty, that it should within six months, or within any reasonable time be recorded in some public register, a very different aspect would have been given to the instrument. But that is not so. What the effect of that would be it is needless to stop to inquire. There is nothing of the kind at all.

I am, therefore, clearly of opinion that the sheriff's interlocutor was wrong, and that my Lord Cockburn was perfectly right in rescinding it; and I am of opinion that the Inner House, in altering the interlocutor of Lord Cockburn, were entirely wrong, and we must now reverse that decision.

LORD CAMPBELL.—My Lords, I have very little to add to what has been stated by the two noble and learned Lords who have preceded me. I was counsel at the bar in the case of Warner *v.* Armstrong, and I had the misfortune of being on the weak side, instead of the right side; but I do not doubt that

the proper construction was put upon the Act of Parliament by the then Lord Chief Baron, the Lord Chancellor, and the Master of the Rolls; and there can be no doubt that the partnership being in violation of the Act of Parliament, is illegal, and cannot receive any other solution, because to say that it is merely subject to a penalty, would be entirely to defeat the intention of the Legislature. Then, what we have to consider is whether, if this agreement were carried into effect, the Act of Parliament was violated or not. And it seems to me that this is a much stronger case than the case of Warner *v.* Armstrong, because here there can be no doubt the Act of Parliament would be violated, for the agreement expressly stipulates that the business shall be carried on under the firm of Daniel Munro. Then, if it were to be carried on under the firm of Daniel Munro, it would be wholly inconsistent with that to put over the door the name of Howden, because the business then no longer would be carried on under the firm of Daniel Munro, but under the firm of Munro and Howden.

There is an express clause in the Act of Parliament, which declares that "From and after the commencement of this "Act, all and every person or persons who shall follow or carry "on the trade or business of a pawnbroker, shall cause to be "painted or written, in large legible characters, over the door "of each shop or other place, by him, her, or them respectively "made use of for carrying on that trade or business, the chris-"tian and surname or names of the person or persons so car-"rying on the said trade or business."

Then, my Lords, if the Act of Parliament is carried into effect, the agreement is violated; if the agreement is carried into effect, the Act of Parliament is violated. They cannot stand together. Mr. Peacock, in a very ingenious way in the stress of his argument, says there was a stipulation that the partner whose name was not to appear was to assist. That

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makes the thing worse, because he carries on the business; and if so, then his name should have appeared over the door. But it is expressly stipulated that his name should not appear over the door. That construction of this clause of the agreement, and that section of the Act of Parliament, are quite sufficient to dispose of the case, and to show that this agreement is contrary to the Act of Parliament.

Ordered and adjudged, That the interlocutor complained of in the said appeal be reversed, and that the cause be remitted back to the Court of Session in Scotland, with directions to that Court to adhere to the interlocutor of the Lord Ordinary in the said cause, dated the 28th of May, 1842, recited in the appeal, and to decern in terms thereof. And it is further ordered, That the said respondent do pay to the said appellant the costs to which the respondent was found entitled by the said interlocutor of the 22nd of February, 1843, appealed from, if paid by the said appellant, and do pay to the said appellant the costs incurred by him in the Court of Session in the said cause.

SPOTTISWOODE and ROBERTSON—DEANS, DUNLOP, and HOPE—Agents.