

eighth, ninth, tenth, eleventh, and twelfth parties: In answer to the second question, find and declare that the *third parties* are in the same position as the *second parties*, and answer the second branch of the question in the negative: In answer to the third question, find and declare that the *fourth parties* rank on the rates and revenues of the trust *pari passu* with the *fifth parties*, and preferably to the *sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth parties*: In answer to the fourth question, find and declare that the *fifth parties* are in the same position as the *fourth parties*, and answer the second branch of the question in the negative: In answer to the fifth question, find and declare that the *sixth parties* rank on the rates and revenues of the trust *pari passu* with the *seventh, eighth, and ninth parties*, and preferably to the *tenth, eleventh, and twelfth parties*: In answer to the seventh question, find and declare that the *seventh party* ranks on the rates and revenues of the trust *pari passu* with the *sixth parties*: In answer to the ninth question, find and declare that the *eighth and ninth parties* rank on the rates and revenues of the trust *pari passu* with the *sixth and seventh parties*, and preferably to the *tenth, eleventh, and twelfth parties*: Answer the first branch of the eleventh question in the negative, and in answer to the second branch, find and declare that the *tenth party* ranks *pari passu* with the *eleventh parties*, and preferably to the *twelfth parties*: Answer the thirteenth question in the negative: Answer the sixth, eighth, tenth, twelfth, and fourteenth questions in the negative: Further answer the fifteenth question in the negative: Of consent find the whole parties entitled to expenses as between agent and client out of the revenues of the trust," &c.

Counsel for the Trustees—Balfour, Q.C.—M'Kechnie. Agent—R. Bruce Cowan, W.S.

Counsel for the Second, Third, Fourth, Fifth, and Sixth Parties—Asher, Q.C.—Dickson. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Seventh Party—Gillespie. Agents—Gillespie & Paterson, W.S.

Counsel for the Eighth and Ninth Parties—Sol-Gen. Robertson—Guthrie. Agents—Cowan & Dalmahoy, W.S.

Counsel for the Tenth Party—Darling—H. Johnston. Agents—Gillespie & Paterson, W.S.

Counsel for the Eleventh Parties—D. F. Mackintosh—Graham Murray. Agents—J. & J. Ross, W.S.

Counsel for the Twelfth Parties—Sir C. Pearson—Low. Agents—Gillespie & Paterson, W.S.

Wednesday, February 1.

FIRST DIVISION.

[Sheriff of Lanarkshire.

DAWSON & COMPANY v. GOLD.

Agent and Principal—Sale—Liability.

By an agreement between G, the proprietor of an hotel, and M, the occupant, it was acknowledged by M that the whole furniture and effects in the hotel belonged to G, and he agreed to transfer to G the licence for the hotel. M further agreed to manage the hotel for G, and to account to him for the drawings, for which he was to be paid a weekly wage. G then agreed not to charge rent for M's possession from the term immediately preceding the agreement, and M agreed to account to G for the stock in the hotel as at a certain date. The licence was thereafter transferred to G. Subsequently goods were supplied to M for the purposes of the hotel, on his order, and by a firm who were in ignorance of G's connection with the hotel. On learning of the agreement, however, they raised an action against G for the price of the goods. G's defence was that he had not ordered the goods, that the agreement had not been acted upon, and that M had not managed the business for him. *Held*, on the evidence, that G was liable.

This was an action in the Sheriff Court at Hamilton at the instance of M. D. Dawson & Company, brewers, Clydesdale Brewery, Glasgow, against John Gold, Hamilton, for £51, 10s., as the value of various quantities of stout and ale which the pursuers averred they had sold and delivered, between 4th January and 26th April 1886, to the defender, or on his behalf to his manager, W. H. M'Latchie, at the Royal Hotel, Calderbank, Lanarkshire, the defender being the proprietor thereof.

The pursuers averred that M'Latchie was the defender's manager, and had sole charge of the hotel, conform to an agreement between them, and that he received the goods, which were sold in the ordinary course of business in the hotel.

The agreement in question was entered into in October 1885 between John Gold of the first part, and W. H. M'Latchie and his wife, Rosina Gold or Armstrong or M'Latchie, of the second part. It provided as follows—"The first party having raised an action against the second party for delivery of the furniture, &c., within the Royal Hotel, Calderbank, and failing delivery, for payment of £100, both parties have agreed in manner following, that is to say—1st, The second party hereby acknowledge that the whole furniture and effects within the said hotel belong to the first party by right of purchase from John M'Queen Barr, trustee in the *cessio* of the said Rosina Armstrong or Gold, and that he is entitled to take delivery thereof at pleasure. 2nd, The second party agree, whenever they are asked to do so by the first party, to transfer to him the licence certificate and excise licences now held by Mrs M'Latchie in name of Armstrong or Gold. 3rd, The second party William M'Latchie agrees to manage the said hotel at Calderbank for the first party, to render due account of his management,

and pay over the nett drawings to the first party. The said William M'Latchie further agrees to manage the said business in a strict and proper manner, so as not to contravene the Public-Houses Act, or to incur a forfeiture of the licence, and also obey the instructions and orders of the first party. 4th, The first party agrees to pay the said William M'Latchie a wage of 35s. per week. 5th, The first party agrees not to exact or charge rent for the second party's possession of the said hotel from Whitsunday last to the date of this agreement. 6th, The second party agree to account to the first party for the stock in the said hotel as at 16th February 1885, conform to inventory and appraisal by Mr William Burn, auctioneer, Glasgow. In like manner, the first party agrees to pay the second party for whatever surplus of stock there is over and above what is stated in the inventory and appraisalment."

The defender's answer was that M'Latchie had not implemented this agreement, and that he did not manage the hotel business for the defender.

He pleaded—"The goods, payment of which is sued for, not having been ordered by the defender, or by anyone for whom he is liable, and not having been delivered to the defender, the defender should be assoilzied, with expenses."

The facts appear from the opinions *infra*.

The Sheriff-Substitute (MAIR) on 7th January 1887 assoilzied the defender with expenses.

"*Note*.—There can be no doubt from the evidence that the goods furnished by the pursuers to the Royal Hotel at Calderbank, between January and April 1886, were supplied on the credit and responsibility of Mr W. H. M'Latchie, who then occupied the hotel. The goods were ordered by him in his own name, and so delivered to him. They were charged for in the pursuers' books against M'Latchie, and the pursuers knew of no one else in connection with these goods except M'Latchie, who alone was regarded by them as their debtor. They never heard of the defender in connection with the hotel until shortly before the raising of the present action. The pursuers however aver that Mr M'Latchie was the defender's manager, and had the sole charge of the conducting of the business in the Royal Hotel at Calderbank, conform to an agreement between them, and that the manager received the goods, 'which in the ordinary course of business were sold in the defender's said hotel.' The agreement is in process, and the question now to be determined is, whether at the time the goods were ordered and furnished by the pursuers, M'Latchie acted as the defender's manager, under the agreement or whether he was acting for himself. Before, however, advertng to the terms of this agreement, it is important to see the position of matters before it was executed. The defender is the proprietor of the Royal Hotel at Calderbank, and for some years before his brother Andrew's death, three or four years ago, Andrew was his tenant in the hotel, and as such held the hotel licence. The furniture in the hotel, however, belonged to the defender. After the brother's death his widow carried on the business in the hotel, and the licence was taken out in her name. The business apparently did not prosper, and *cessio* was taken out against Mrs Gold in the

beginning of the year 1885. It would appear that the defender for the purpose apparently of saving his property in the hotel and preventing the hotel as such being ruined, and with a view to the business being still carried on by his sister-in-law, purchased back from the trustee in the *cessio* the whole of the furniture and effects therein, which the trustee had taken possession of as part of the assets under the *cessio*. The business was thereafter still carried on by Mrs Gold until she got married to M'Latchie in June or July 1885, after which, although the licence was still in Mrs Gold's name (the year for which it was granted being at the date of the marriage current), the business was carried on by M'Latchie. According to the evidence of the defender he seems after the marriage to have got concerned about the furniture, as there was no written evidence that it was his property, and the agreement before referred to was entered into. It is dated October 1885, and proceeds on the preamble or narrative that the defender had raised an action against M'Latchie and his wife for delivery of the furniture in the hotel, or for payment of £100. The first article of the agreement contains an acknowledgment by M'Latchie and his wife that the furniture and effects belonged to the defender by right of purchase from the trustee in Mrs Gold's *cessio*, and that he was 'entitled to take delivery thereof at pleasure'; the second, that M'Latchie and his wife agreed, 'whenever they are asked to do so' by the defender, 'to transfer the licence certificate and excise licence now held by Mrs M'Latchie in name of Armstrong or Gold.' The third, that M'Latchie agreed to manage the hotel for the defender, to render due account of his management, and pay over the net drawings to the defender, and to manage the business in a strict and proper manner, so as not to contravene the Public Houses Acts, or incur a forfeiture, and obey the orders of the defender. The fourth, that the defender agreed to pay M'Latchie a wage of 35s. per week. The fifth, that the defender agreed not to exact or charge rent for M'Latchie's and his wife's possession of the hotel from Whitsunday 1885 to the date of the agreement; and the sixth, that M'Latchie and his wife agreed to account to the defender for the stock in the hotel as at 16th February 1885, conform to inventory and appraisalment by Mr Wm. Burn, auctioneer, Glasgow, and in like manner the defender agreed to pay M'Latchie and his wife for whatever surplus of stock there was over and above what was stated in the inventory and appraisalment. Such are the terms of agreement between the defender and M'Latchie, and if it had been established that it was acted on, the pursuers—notwithstanding that the goods supplied by them were ordered by, and delivered to, M'Latchie—would have been entitled to prevail in the present action. The burden of proof, however, lay upon the pursuers, and in my opinion they have failed to discharge that burden. The agreement itself does not constitute the relationship of principal and agent as one which was to come into existence immediately upon the execution of the agreement. I cannot help thinking that the primary object of the agreement was to preserve evidence that the furniture and effects in the hotel were the property of the defender, and that the secondary object was to put

it in the power of the defender, if he found that the hotel was not being properly managed, to take possession himself, and to pay to M'Latchie a certain sum per week as manager. If the agreement was intended to have immediate effect, and to transfer the business from the M'Latches to the defender, what was the use of inserting in it that the defender was entitled to take delivery of the furniture at pleasure? If the business was to be the defender's there was no necessity for this. Again, the licence was only to be transferred to the defender whenever the M'Latches were asked to transfer it, and the defender only agreed to pay the M'Latches for whatever surplus of stock there was over and above what was in the inventory and valuation. It is manifest from all this that something required to be done before the agreement came into operation. Accordingly the defender has sworn, and his evidence is uncontradicted, that the agreement was not acted on in the sense of making the business his. He says it was necessary before this could take place that the stock should be valued and taken over, but this was not done, that no money was ever paid to M'Latchie in name of wages, and that no account was ever rendered by him of the management of the business. In short, notwithstanding the agreement, the business still continued to be that of M'Latchie and his wife, and to be entirely managed by them. The defender never profited a sixpence by it. It is true the defender did all he could to get the agreement implemented, but until it was implemented in the way and manner pointed out by him in his evidence he could not be regarded as the responsible party in the business of the hotel. In such a case as this the substance of the transaction between the parties and not the mere form is what is to be looked to. The real nature of the transaction was that the M'Latches were to continue to carry on the business for their own behoof, with power at the same time to the defender, when he thought it necessary for the sake of preserving his property in the hotel as a hotel, to take the business over, and to pay M'Latchie a wage of so much per week as manager. This, however, did not make the defender the real trader in the business. It is not without significance in the present case that the defender is himself an agent for a beer firm in Dundee, and that his commission as agent is $37\frac{1}{2}$ per cent. If the business of the Royal Hotel at Calderbank had been his in reality it is highly probable that he would have supplied the beer to it himself. But this was not so, simply because it was not his business. He says he supplied public-houses in Calderbank with beer 'on both sides of M'Latchie's, both Mr Wallace and Mr Hay, one on one side and the other on the other side of the hotel. I never asked M'Latchie for an order, because I did not consider he was good enough for an order.' But it appears that the defender obtained a transfer of the licence to the hotel in the month of January 1886, and that most of the goods supplied to the hotel were supplied after that date. If I had thought this circumstance made any change in the management of the hotel, I would have felt myself bound to give the pursuers the benefit of it. In point of fact, however, this step was taken by the defender to put him in a position to obtain

implement of the agreement and get possession of the business. There was no change in the management of the hotel or in the name above the door. It was still carried on by the M'Latches, and the goods supplied to it were supplied on their credit and responsibility, and not on that of the defender. In the whole circumstances therefore, and having regard to opinions of the Judges in the cases of *Eaglesham v. Grant*, 17th July 1875, 2 R. 960, and *Stott v. Fender & Crombie*, 20th July 1878, 5 R. 1104, I have felt myself constrained to assolvie the defender from the action."

On appeal, the Sheriff (BERRY) on 25th May 1887 pronounced this interlocutor:—"Finds, in fact, that the quantities of stout and ale, the price of which is sued for, were sold and delivered to Mr William M'Latchie at or about the dates libelled, for the purposes of the Royal Hotel, Calderbank: Finds that at the time of such sale and delivery M'Latchie was acting as manager of the hotel, on behalf of the defender, his principal: Finds that in purchasing and accepting delivery of the said goods, M'Latchie was acting within the scope of his authority as such manager: Finds that the price thereof has not been paid: Finds in law, in these circumstances, that the defender is liable therefor; therefore recalls the interlocutor appealed against, and decerns as libelled, &c.

"*Note.*—I think the defender is in the circumstances of this case liable for the goods supplied to M'Latchie at the Royal Hotel, Calderbank. The case turns mainly on the effect of the agreement of October 1885 between Mr and Mrs M'Latchie and the defender. It has been contended, and apparently is the view taken by the Sheriff-Substitute, that that agreement was not intended to be immediately operative; that certain steps required to be taken before it was so; that these steps were not taken before the goods in question were ordered; and that therefore the defender, whose position as principal depends on that agreement being operative, is not liable for the goods supplied to M'Latchie. It is true that the first two articles of the agreement admit of an interpretation consistent with its being merely prospective so as to come into operation at some future date; but it seems to me that the other articles are not consistent with any other view than that they were to be immediately operative. The third provides for M'Latchie managing the hotel for the defender, and the fourth for the payment of a weekly wage by the defender to M'Latchie, and to neither of these conditions is any time adjoined at which they were to come into operation. The natural interpretation is, that they were to come into operation at once. Again, by the fifth head, the defender agrees not to charge rent for M'Latchie's possession from the previous Whitsunday to the date of the agreement. That stipulation seems to imply that after the date of the agreement it was unnecessary to make any stipulation as to rent, for rent would then cease to be payable under the agreement, the relation of the parties being no longer that of landlord and tenant, but that of master and servant. Further, the actings of parties are consistent with the view that the relation of master and servant between them under the agreement was not postponed to any indefinite

date after its execution. We find in the course of 1886 actions brought on the one hand by the defender against M'Latchie for the ejection of him from the hotel as the defender's manager, and for an account of his intrusions as manager for the period from 12th October 1885 to the date of the action, and, on the other hand, by M'Latchie against the defender for his wages or salary under the agreement. I am not much moved by the fact that the defender abandoned his action against M'Latchie. The abandonment may probably have proceeded from an apprehension of a claim like the present being put forward should the relation of the parties come to be known. The second head of the agreement was not conceived so as to be immediately operative, providing as it did for transference of the licence to the defender when asked by him. Under this provision, however, a transference was obtained about the beginning of January 1886. It seems to me that in these circumstances it must be taken that the defender was the person to whom the real interest in the hotel and its profits belonged at the time when the goods in question were supplied to M'Latchie, and that he is therefore liable for the price as an undisclosed principal. There can be no doubt that the ordering of such goods was within the implied authority of M'Latchie as manager. The two cases referred to by the Sheriff-Substitute seem to me to be distinguished from the present. They proceed on the ground that the persons sought to be made liable were not the real principals or partners of those by whom the debts sued for were incurred, whereas here I think the defender became the real principal, and to him any benefit or profit from the management of the hotel would have belonged. Such cases are to a large extent cases of circumstances. In the present case I think the circumstances are against the defender."

The defender appealed, and argued—M'Latchie carried on this business for himself. The only ground on which the defender was sought to be made liable was the existence of the agreement. But M'Latchie had never observed it, and the appellant had always been thwarted in his attempts to enforce it. The defender had never got any benefit from the business while M'Latchie had it. He carried on the business for himself.

Argued for the respondents—The appellant was the true principal. Even if true that he never got the profits of the business, it made no difference to the legal aspect of the case. The appellant's whole actings showed that he recognised the agreement as subsisting.

At advising—

LORD PRESIDENT—This is an action for goods sold and delivered, and the ground appears from the first article of the condescence—"The pursuers sold and delivered to the defender, or on his behalf to his manager, W. H. M'Latchie, at the Royal Hotel, Calderbank, Lanarkshire, the defender being the proprietor thereof, between the 4th day of January 1886 and the 26th day of April 1886 various quantities of stout and ale amounting in value to the sum of £51, 10s." The defence is—"The goods, payment of which is sued for, not having been ordered by the defender, or by anyone for whom he is liable, and not having been delivered to the defender, the

defender should be assoilized with expenses." Now, the question here is, whether at the time of delivery of the goods the defender was keeper of the hotel, and the person to whom the hotel belonged at the time? The evidence for the pursuer includes a minute of agreement which is complete in form, and tested, between the defender of the first part, and Rosina Armstrong or M'Latchie and the said William M'Latchie of the second part. The agreement is in the following terms—[reads agreement]. There is no misunderstanding the nature of this agreement. M'Latchie and his wife were to remain in possession of the hotel, but as the furniture belonged to Gold it is plain that he had command of the whole thing. If he had chosen to take away the furniture the business could not have gone on. It thus appears that the agreement contemplated that M'Latchie should remain as manager, and Gold as the proper keeper of the hotel. For that purpose it became immediately necessary that the licence should be transferred. This was done, and the effect was that no one could lawfully carry on the business except the defender. If anyone but the defender or his manager had carried on the business, he would have been liable to prosecution for violation of the Public-House Statutes. Again, it quite appears that M'Latchie was transformed by the agreement from an hotel-keeper into a servant, because the sole interest he had in the business was the payment of his wage of 35s. per week. M'Latchie undertook to manage the hotel and account for the drawings, but he had no longer any further interest in the profits than what I have mentioned. As regards the rent it is not unimportant to observe that M'Latchie is to be absolved from all claim for rent for the half-year of his possession as keeper of the hotel. Nothing is said regarding the rent for the future, because Gold was the proprietor of the hotel and responsible himself therefor. Now, it is said that the agreement was never carried into effect, and that M'Latchie did not account as he promised to do, or perform the obligations undertaken. But we find that that state of things did not end the agreement, and only gave rise to an action upon it. The agreement was valid, and fixed the relations of parties as respectively manager and keeper of the hotel. And so, however little M'Latchie may have done his duty, the character of the agreement is not altered. It is clear under it that the profit of the business was to be Gold's exclusively, and that is the proper test of who was in reality the keeper of the hotel. The question is, for whom was the business carried on? The answer is, for Gold and none other.

But the case does not rest here, for M'Latchie having failed in performing his part, Gold thought it necessary to have him removed, and so he raised an action before the Sheriff for this purpose. The date as usual is not given, but the first deliverance is 17th August 1886, and in that action, besides concluding for removing, he asks a decree against M'Latchie "ordaining him to produce before the Court a full account of his intrusions as manager to the pursuer, with the drawings and other moneys belonging to the pursuer coming into the hands of the said William M'Latchie, defender, as manager foresaid, for the period from 12th October 1885 to the date hereof, that a true balance due to the pursuer

may be ascertained, and to discern the defender the said William M'Latchie to pay to the pursuer such sum as may be found to be the true balance on said account, with the interest which may be due thereon." In the condescendence he alleges—" (Cond. 5) The defender the said William M'Latchie has failed to obtemper the provisions of the said agreement, in particular he has failed to render an account of his management and pay over the drawings, and he has refused to render such account, although he has been frequently asked by the pursuer to do so. (Cond. 6) During the interval from 1st July to 10th August 1886 the pursuer on four separate occasions waited at the said premises with the view of obtaining from the defender the said William M'Latchie an account of his management, but on each occasion was informed that the defenders had gone from home." That petition was met by a counter petition dated 21st September, brought by M'Latchie for his wages of 35s. per week stipulated for by the agreement, and M'Latchie states in it that Gold was the keeper of the hotel. These actions were conjoined, and after that rather a singular proceeding took place of which no explanation is forthcoming. When actions are conjoined of course they cannot be taken out of Court except by the joint action of both parties. But a minute was lodged by Gold alone, in which he stated—" In respect of the failure of the said William M'Latchie to lodge an account of his intrusions, in pursuance of interlocutor pronounced of this date, the said John Gold respectfully moves the Court to dismiss the above mentioned conjoined actions, and to find neither party entitled to or liable for expenses." That minute was, oddly enough, given effect to by the Sheriff-Substitute. My object is to show what the nature of the agreement was. We find in the averments of both parties a concurrence in the statement that Gold was keeper, and M'Latchie was manager of this hotel. Now, surely it is too late for Gold to come forward in an action for goods delivered at the hotel and say that he was not the hotel-keeper to whom the goods were delivered. I am disposed to agree with the Sheriff, and propose that we adhere to his interlocutor.

LORD MURE—The Sheriffs held opposite views here, and I am not surprised at it, because at the first blush of the case it is clear that the pursuers looked to M'Latchie as the person to whom the goods were furnished. From the circumstances of the case the Sheriff-Substitute thought he could not look at the agreement because it had not been acted on by the parties. I regard his position as unsound in law. I think it is quite clear from the agreement that M'Latchie was the manager of this hotel. The agreement is dated in October 1886. It provides that the licence shall be transferred to Gold. That was done in the January following, and the greater part of the goods were furnished after the date of this agreement, and of the transfer of the licence. Now, in this the agreement was acted on, and therefore I cannot hold it to be the case that the parties have shaken themselves free from the terms of the agreement, simply because there have been disputes between them as to how this business was to be managed. Besides, in the counter actions in the Sheriff

Court the agreement was founded on as subsisting. I see no reason to reject the view taken by the Sheriff. The position of the parties is clearly demonstrated by their own showing.

LORD ADAM—I had a doubt as to whether we should not return to the interlocutor of the Sheriff-Substitute. That doubt was founded on the consideration whether the hotel business had been *de facto* carried on by Gold or not, and that again was founded on the question whether M'Latchie had not held Gold at arm's length and carried on the business as his own, meaning to do nothing else than use it for himself. But on further consideration I agree in your Lordships' views.

LORD SHAND was absent from illness.

The Court refused the appeal with expenses.

Counsel for the Appellant—G. W. Burnet.
Agent—Thomas Carmichael, S.S.C.

Counsel for the Respondents—Guthrie—Wilson.
Agents—Fodd, Simpson, & Marwick, W.S.

Wednesday, February 1.

FIRST DIVISION.

EARL OF STRATHMORE *v.* HERITORS
OF RESCOBIE.

Church—Patronage Act 1874 (37 and 38 Vict. cap. 82), secs. 4 and 5—Compensation—Delay of Patron to Claim—Bona fide Payment by Heritors—Personal Bar.

A petition presented under the 4th section of the Church Patronage Act of 1874, the Sheriff, in 1875, found that the patron would be entitled to receive from the heritors of the parish, on the occurrence of a vacancy, payment of a sum of money as compensation in respect of the operation of the Act, by four yearly instalments out of the first four years' stipend, which, but for the passing of the Act, would have been wholly payable by them to the minister appointed on the occurrence of the vacancy. Intimation of the petition was made, as provided by the Act, to the minister of the parish and the clerk of the presbytery of the bounds. There was no service of the petition upon the heritors. In 1880 a vacancy occurred. The heritors paid the first four years' stipends to the minister then appointed, and the patron made no application for payment of the compensation till 1887. *Held* that the patron was, in the circumstances, barred from claiming compensation, as he had made no intimation of his claim to the heritors, who had made the payments to the minister in good faith.

This was a special case to which the Earl of Strathmore was the party of the first part, and the heritors of the parish of Rescobie, in the county of Forfar, were the parties of the second part.

The case contained the following statement—
Prior to the passing of the Act 37 and 38