Thursday, December 23.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

STROYAN *v.* MILROY.

Partnership—Bill of Exchange—Proceeds of Bill, Accepted by Both Partners, Applied to Partnership Purposes—Bill Paid by One Partner—Relief—Contribution—Partnership Act 1890 (53 *and* 54 *Vict. cap.* 39), *sec.* 24 (2).

Certain bills were accepted by the two partners of a business, and the bills having been discounted the proceeds were applied to partnership purposes. After maturity the bills were paid by one partner alone, and he, after a judicial factor had been appointed to wind up the partnership, raised an action against his copartner for payment of half of the amount of the bills.

The Court *sisted* the action to await the result of the accounting in the partnership.

The Partnership Act 1890 (53 and 54 Vict. cap. 39), sec. 24, enacts—"The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined . . . by the following rules—. . . (2) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him (*a*) in the ordinary and proper conduct of the business of the firm, or (*b*) in or about anything necessarily done for the preservation of the business or property of the firm."

John Stroyan, solicitor, Newton-Stewart, raised on 21st June 1909 an action against James Milroy, manufacturer, Newton-Stewart, for payment of "(1) the sum of £259, 7s. 11d., being half of the sum contained in a bill for the sum of £500, dated 7th July 1907, drawn by William Milroy senior, Newton-Stewart, upon and accepted by the pursuer and the defender, payable twelve months after date, and half the interest thereon from 7th July 1908 to 15th June 1909, the whole amount of which bill and interest was paid by the pursuer to the said William Milroy senior; (2) the sum of £279, 16s. 5d., being half the sum contained in a bill for the sum of £550, dated 6th January 1908, drawn by the said William Milroy senior upon and accepted by the pursuer and the defender, payable twelve months after date, and half the interest thereon from 6th January 1909 to 15th June 1909, the whole amount of which bill and interest was paid by the pursuer to the said William Milroy senior; and (3) the sum of £254, 7s. 8d., being half of the sum contained in a bill for the sum of £500, dated 6th January 1908, drawn by John Milroy, residing in Newton-Stewart, upon and accepted by the pursuer and the defender, payable twelve months after date, and half the interest thereon from 6th January 1909 to 15th June 1909, the whole amount of which bill and interest was paid by the pursuer to the said John Milroy."

The pursuer and defender had carried on in partnership the Galloway Woollen Manufacturing Company, as sole partners thereof since the business was started in December 1897. On 12th June 1909 John M. Howden, C.A., was appointed judicial factor on the partnership, and was in course of winding up the business when the action was raised.

The defender, while admitting that the bills were accepted by the pursuer and himself, and were paid by the pursuer alone, averred—"It is the fact that said bills relate to the said mills, and were accepted by the pursuer and the defender as partners of the concern and to facilitate the financial arrangements connected with the provision of the capital requisite for working the same."

The defender pleaded, *inter alia*—"(2) The liability in respect of the bill transactions sued upon being an incident of the partnership between the pursuer and defender, falls to be cleared up in the general accounting now proceeding in connection with the dissolution of partnership, and the present action is incompetent and should be dismissed. (6) In any event, in the circumstances set forth the action ought to be sisted to await the result of the accounting in the judicial factory."

On 17th November 1909 the Lord Ordinary (SKERRINGTON) pronounced this interlocutor—"Allows the defender a proof of his averments on record, and to the pursuer a conjunct probation, but excluding from said proof all questions as to the state of the partnership account between the parties."

Opinion.—"The pursuer and the defender were acceptors of and co-obligants in three bills which were all paid by the pursuer alone at or after maturity. He now calls upon the defender to contribute one-half of the amount. *Prima facie* this claim is good. It is founded not upon the bills but upon the right of contribution which the law implies as between co-obligants in the absence of any agreement between them excluding or modifying it, and in the absence of any circumstances inconsistent with the right of equal contribution. But the defender alleges that he and the pursuer are partners, that the bills were granted for partnership purposes, and that the partnership is now being wound up by a judicial factor. He accordingly pleads that an action of relief based upon three isolated partnership transactions is incompetent. I am of opinion that this defence is relevant. Persons who are partners and who undertake joint and several liability for partnership purposes stand in a very different position towards each other as regards the right of contribution from that of persons who are strangers to each other. As already indicated, in the latter case the right is implied unless some fact is alleged and proved which excludes it. In the former case the natural inference is that the partners looked primarily at least to the partnership assets as the source out of

which the obligation should be satisfied. In the event of there being no partnership funds available, the law gives to any partner who advances his own money in order to pay a partnership debt a right to be indemnified by the firm—see Partnership Act 1890 (53 and 54 Vict. cap. 39), sec. 24 (2) and (3). There is, of course, no reason why a partner should not have both a right of indemnity as against the firm and also a claim for equal contribution as against his copartner, but if he desires to have the latter right it is, I think, not unreasonable to hold that he ought to stipulate for it expressly when undertaking the obligation. In the absence of any such agreement it is difficult to see how a partner sued for contribution by a copartner could be prevented from founding upon the terms of the contract of copartnery and the state of the partnership account as a defence to the action.

"The defender's counsel referred to certain authorities, all English, viz., *Sadler* v. *Nixon* (1834), 5 B. & Ad. 936; *Sedgwick* v. *Daniell* (1857), 2 H. & N. 319, and Lindley on Partnership (7th edn.), pp. 297, 497, 592, and 597. These authorities show that prior to the Judicature Acts of 1873 and 1875 very technical rules obtained in England as to the right of one partner to sue another. These rules seem to have primarily depended upon specialities of English law, such as the distinction between law and equity, and the non-recognition of a separate *persona* in a mercantile company. In *Sadler's* case one of three copartners having paid a copartnery debt compulsorily and in order to regain his liberty, it was held that he could not maintain an action at law against his copartners for contribution, but that his only remedy was to file a bill in equity for a partnership account. In *Sedgwick's* case, on the other hand, two out of three copartners had obtained an advance from a bank for partnership purposes on the security of a joint promissory-note. One of the co-obligants having been compelled to pay the whole amount he was held entitled to contribution from the other co-obligant upon the ground that the transaction was not a partnership one in respect that the whole three partners had not signed the promissory-note. Apparently the result would have been different if all the partners had signed. Since the Judicature Acts the rules of procedure in England have been altered, and I do not know whether an action like the present would or would not be maintainable. I am of opinion that these authorities are of little use in Scotland, and that the competency of the action must depend upon the agreement, express or implied, between the parties at the time when they granted the bills. If, as is alleged, the bills were granted by partners for partnership purposes, I do not think that the right of relief arises in the absence of express agreement or special circumstances. Accordingly I allow the defender a proof of his averments, and to the pursuer a conjunct probation, but excluding all questions as to the state of the partnership account. The present action is not suited for taking a partnership account."

The pursuer reclaimed.

In the course of the argument the pursuer admitted, and subsequently lodged a minute stating this admission—"That the moneys received in respect of the three bills mentioned in the summons were applied for the purposes of the Galloway Woollen Manufacturing Company, of which the pursuer and defender were the sole partners."

Argued for the pursuer (reclaimer)—The pursuer was entitled to decree. To state merely that the money was used for partnership purposes was irrelevant. There was no mention of the partnership in the bill, nor was it averred that the pursuer had the whole capital in the business. In the absence of any particular bargain the pursuer was entitled to the ordinary right of relief against a co-acceptor. This right of relief was created by the bill and was not derived from the relationship of partnership.

Argued for the defender—Signatures of acceptance on a bill were not intended to create any contract between the signatories *inter se*, but only between them on the one hand, and the other parties to the bill on the other hand. Before any claim could arise between the co-acceptors of the bills, the bills were dead—Bills of Exchange Act 1882 (45 and 46 Vict. c. 61), secs. 59 (1) and 61; Chalmers on Bills of Exchange, p. 219, *et seq.*—and any right of relief must arise on the contract of partnership not on the bill—*Harmer* v. *Steele*, 1849, 4 W. H. & G. 1, Wilde, C.J., at p. 12. The pursuer was not entitled to isolate the transaction of the bills, which was an incident of the partnership, and the liability thereunder must be considered in the general partnership accounting—*Macdonald* v. *Whitfield*, 1883, 8 App. Cas. 733; *Sedgwick* v. *Daniell*, 1857, 2 H. & N. 319; *Sadler* v. *Nixon*, 1834, 5 B. & A. 936; Lindley on Partnership (7th ed.) p. 597.

At advising—

LORD PRESIDENT — In this case the pursuer and defender, who are partners, became acceptors and co-obligants in three bills which were discounted and paid by the pursuer alone at or after maturity, and this action is raised by the pursuer in order to recover from the defender one half of the sum which he was compelled to pay. The Lord Ordinary considered that inasmuch as it was alleged that these bills were granted for partnership purposes he could not grant decree *de plano*. If they were for partnership purposes he considered that decree could not be so granted, but that the right to it must depend on an accounting in the partnership affairs, which, I should mention, is going on. Against that interlocutor this reclaiming note has been presented. I entirely agree with the Lord Ordinary in his reasoning; but while the case was before your Lordships it appeared from a statement made by counsel that it would be useless to go to the expense of a proof when parties were

truly agreed on the facts necessary and relevant to raise the questions of law, and accordingly counsel for the pursuer very properly, on the suggestion of the Court, put in a minute in which he admitted that the moneys received in respect of the three bills mentioned in the summons were applied for the purposes of the Galloway Woollen Manufacturing Company, of which the pursuer and defender were the sole partners. That makes the proof allowed by the Lord Ordinary unnecessary, but, of course, leaves the Lord Ordinary's reasoning. With that reasoning I concur, and have very little to add. It is conceded that if a partner pays a partnership debt, though he may have recourse against the other partner if the funds of the partnership are not sufficient to meet that debt, yet that recourse will necessarily depend on the state of the partnership account for its measure, and you cannot find that out till there is an accounting between the partners. If that be so, the fact that these partners sign a bill makes no difference, because such persons know that in a question with the holder of the bill they may be called on to pay the whole, leaving recourse to depend on the true state of the bargain between them. I assume the true state of the bargain to be that each one of the partners should pay one half if the partnership could not pay or did not pay. The position then comes to be just the same as payment of a debt by one partner, and therefore the Lord Ordinary on the merits is right. I propose that we recal the interlocutor of the Lord Ordinary, but sustain the sixth plea-in-law for the defender, which is to the effect that the action ought to be sisted to await the result of the accounting in the judicial factory, and that we remit to the Lord Ordinary with instructions to him to sist the action.

LORD KINNEAR and LORD DUNDAS concurred.

LORD M'LAREN and LORD JOHNSTON were absent.

The Court recalled the interlocutor of the Lord Ordinary and sustained the sixth plea-in-law for the defender.

Counsel for the Pursuer (Reclaimer)—Munro—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defender (Respondent)—J. R. Christie. Agents—Simpson & Marwick, W.S.

Thursday, January 20, 1910.

SECOND DIVISION.

[Lord Johnston, Ordinary.

HEDDERWICK AND OTHERS (HEDDERWICK'S TRUSTEES) *v.* HEDDERWICK'S EXECUTOR AND OTHERS.

Trust—Failure of Objects—Trust for Behoof of Firm—Transfer of Business to Limited Company.

A partner addressed a letter to his firm in which he directed them to hold two-fifteenths of his interest in the firm in trust, and to apply the annual proceeds "for the purpose of rewarding meritorious or long-service employees of our said firm, or for any other purposes of the business, as the managers may in their discretion deem expedient, and they shall be sole judges." Subsequent to the truster's death the business was transferred to a private limited company.

Held (*rev.* judgment of Lord Johnston) that the trust purposes failed when the business was transferred to the limited company, and that the fund fell into intestacy.

On 14th April 1908 Edwin Charles Hedderwick, Glasgow, and two others, as the registered holders of certain shares under a letter dated 10th November 1895, written by the deceased James Hedderwick, LL.D., brought an action of multiplepoinding. Claims were lodged by (1) the said Edwin Charles Hedderwick as executor-dative of Dr James Hedderwick; (2) Maxwell Hedderwick as trustee acting under the said letter of 10th November 1895; and (3) James Hedderwick & Sons, Limited.

The following *narrative* is taken from the judgment of Lord Johnston (Ordinary)—"The object of this multipleponding is to determine the effect, under changed circumstances, of a direction given by James Hedderwick, LL.D., in an *inter vivos* deed which he executed some years before his death, by which he endeavoured to make a provision for the rewarding of employees of his firm. Dr Hedderwick was the founder or one of the founders of the *Glasgow Citizen* newspapers, and had in the course of a long business life established or at least extended a lucrative business as a newspaper proprietor and general printer and publisher. The business began more than a century ago. . . .

"Dr Hedderwick had four sons, Percy David Hedderwick, Edwin Charles Hedderwick, Maxwell Hedderwick, and Francis Hedderwick. . . . In 1892 a contract was entered into, the object of which was to give continuity to the business so far as that was possible under a private deed of copartnery. *Inter alia* by article 8 the capital stock of the firm was to be treated as divided into thirty equal shares, whereof fifteen were to be held as contributed by and belonging to Dr Hedderwick himself, and three, six, and six respectively to be