to maintain the slaughter-house, and to prevent evasion of its use. It is said that to tax meat coming from a foreign country, though it is fresh when it comes into the city, is not needful for the use of the Act. That may be so, but certainly the Legislature has not excepted such meat, and we are not to speculate upon what the Legislature thought necessary and what it did not. It is a rule in the construction of remedial statutes to construe them liberally—that is, the cure of the mischief is to be construed so largely as to meet the mischief; but I do not know that there is any contrary rule of construction, viz., that the words are not to be read as broader than is necessary to meet it. On the contrary, the remedy of a statute often goes far beyond the mischief, for to make the one exactly equivalent to the other would be to run the risk of the remedy not always covering the evil. It is a safer rule to make a remedy certain to cover any mischief. Therefore, so far, I think, the second party cannot prevail.

But there is a second argument, namely, that this meat comes within the exception of "cured and preserved" meat. Now, it is contended for the magistrates that these words are synonymous, but I do not think it necessary to adopt that view. We all know what "cured" means—it has a fixed signification—and I am not surprised to find another word used to cover any case of a like kind, but which is not exactly covered by the word "cured"—for example, meat preserved in a semi-cooked state for ships going on long voyages, or preserved in air-tight tins. No one can doubt that such cases come fairly within the meaning of the word "preserved." But the second party contends that all meat preserved for a considerable time from decay or corruption by use of any artificial means is within the exception, although the meat may present the appearance of fresh meat, and be really fresh meat when it enters the city. It seems to me that a fair and reasonable construction of the exception is to apply it to something which shows itself in the face of the article when it is brought into the city. If it is brought into the city in a cured or preserved state, then it is within the exception, but it is out of the question to say that the exception refers not to the existing condition but to something in the previous history of the meat. Any other interpretation is forced, and would lead to a defeating of the intention of the clause, for if we applied the term to meat brought from America in ships specially adapted for the purpose, must you not apply it to all other cases in which meat is preserved from decay for any period of time? If that were so, to what an extent it could be carried! In hot weather every prudent housekeeper adopts artificial means for preserving meat. They place it in as cool and dark a place as they can find—some in a draught of cool air—and that is using artificial means to a certain extent. But above all, if anyone adopts the simple mode of packing in ice, then he is distinctly using artificial means; and so if every farmer in Midlothian were to send his meat into Edinburgh in ice he would be within the exception. Therefore I think the only safe construction has reference to the state of the meat at the time it passes into the city. When it enters the city Mr Watson's meat is sweet and fresh, or else I think he would not long retain the custom he receives. I think this question must be answered for the first parties.

Lord Deas and Lord Mure concurred.

Lord Shand—I concur. It is argued that if meat imported from America is not within the mischief of the statute, that is sufficient to decide the question in favour of the second party. But it is almost invariable that the narrative of a mischief struck at in a statute is followed by an enactment going beyond it. We have had lately before us such a case in Leeman's Act. In remedying the evil there the Act went very much beyond it in its enactment. So here, taking it that the purpose of this Act was to "prevent evasion of the use of the slaughter-houses," it is clear that the statute has gone beyond what was absolutely necessary. On the other question, as to whether this comes within the exception, I agree with your Lordships. The words are not absolutely synonymous, but they practically are, as they are intended to include every kind of preserved meat — salted or smoked, parboiled, preserved in air-tight tins, &c. In considering the meaning of the statute we must look at its date in the year 1850 Nothing of the kind was then in contemplation of the Legislature. Recent discovery shows that meat may be brought from foreign countries packed in ice or preserved by means bisulphate of lime. In both cases meat so treated is called "preserved," but the word is evidently used in quite a different sense. We say that the statutory word covers the meaning in which it is now used.

The Court therefore found and declared "that the corporation of Edinburgh is entitled to levy on the carcases or parts of the carcases of cattle slaughtered in America, preserved during its transit to this country by the application of ice, and brought within the police bounds of the city of Edinburgh in a fresh state, for the purpose of sale or consumption therein as fresh meat, the dues authorised to be levied by the 25th section of the Edinburgh Slaughter-houses Act 1850, and the 27th section of the Edinburgh Markets and Customs Act 1874;" and decerned.

Counsel for First Parties—Kinnear—Mackay. Agent—W. W. Millar, S.S.C.

Counsel for Second Parties—Asher—J. P. B. Robertson. Agents—Horne, Horne, & Lyell, W.S.

Friday, June 20.

FIRST DIVISION.

[Lord Young, Ordinary.

MANN (T. AIKENHEAD & CO.'S TRUSTEE) v. SINCLAIR.

Bankrupt—Trustee in Sequestration—Title to Sue—Need of Notice to Creditors where Partnership Dissolved.

A and B were in business as partners, but B's name never appeared as a member of the firm, the firm being merely "A." After some time the partnership was dissolved by private deed of agreement. The dissolution was never advertised, but certain of the creditors and customers of the concern who had become aware that B had been in part-

nership with A, knew further that the partnership had been dissolved. A carried on the business by himself for six months, at the end of which time he assumed another partner, and thenceforward the name of the firm was "A & Co." This change was notified by circular to all the customers and creditors. On the insolvency of "A. & Co." the trustee upon their bankrupt estate sought to make B a partner of that firm and as such liable to its creditors. *Held* after a proof (1) that B was not a partner of the firm of "A. & Co." after the date of sequestration; and (2) that the private dissolution of partnership followed by the circular announcing the change in the firm-name was sufficient notice to the creditors to free B, the withdrawing partner, from all liability for debts contracted by the other partner under the new and different firm-name.

Observed that some of the creditors having been aware of the original partnership and retirement of B, there were classes amongst them, and that the trustee could have no title to sue for them as a whole, their interests being conflicting.

Observations on the case of *Hay* v. *Mair*, Jan. 27, 1809, F.C.

In 1871 a partnership was entered into between Mr Thomas Aikenhead and Mr Robert Taylor, but in the letter of agreement constituting it it was stated that the name of Mr Robert Taylor merely stood for that of a Mr Robert Sinclair, who was the true partner of the concern. The business of the copartnery was carried on from that date till 9th December 1874 by these two gentlemen under the firm-name of Thomas Aikenhead, when the partnership was dissolved by written agreement between the parties. This dissolution was not advertised. Mr Thomas Aikenhead from that date carried on the business on his own account and under his own name until 7th May 1875, when the following circular was issued to all his customers and creditors:—

"Sir,—I beg to inform you that I have taken into partnership my brother-in-law Mr Allan Watt, who has been some time with me, and that the business of manufacturer, at present carried on by me on my own account, will for the future be carried on by me and my partner under the firm of T. Aikenhead & Co.—I am, yours respectfully,

"Thomas Aikenhead.

"Mr Aikenhead will sign
"T. Aikenhead & Co.
"Mr Watt will sign
"T. Aikenhead & Co."

The firm name of T. Aikenhead & Co. having then been adopted, the business was carried on under it until April 1877, when the firm became bankrupt. Sequestration was awarded of the company's estate, and of that of Thomas Aikenhead as a partner and individual, on 20th April of the same year, and Mr Mann, the pursuer, was appointed trustee in the sequestration.

In these circumstances the pursuer raised an action against Robert Sinclair, to have it found that Robert Sinclair was at the date of the sequestration a partner of the firm of T. Aikenhead & Co., and of Thomas Aikenhead, in the business carried on by him under the name of the firm, and was liable to the creditors of the firm in the full amount of the debts due to them at the date of the sequestration. It was pleaded that the defender was really a partner of the firm of Aikenhead & Co.; or, secondly, that even were he not a partner, he was liable for the company's debts as if he were, because the dissolution of his partnership was never advertised or made known to the customers of the concern. A proof was led, and it was clearly shown in evidence by the minute of dissolution, &c., that the defender was not a partner, and never had been a partner of the firm of T. Aikenhead & Co. Further, all the creditors except one who were examined admitted to having received the above-quoted circular, although it also appeared that some of them were aware that Sinclair had been in partnership with Thomas Aikenhead.

The Lord Ordinary (Young), on 18th July 1878, pronounced an interlocutor assoilzieing the defenders, and added the following note:—

"*Note.*—The pursuer is trustee on the sequestrated estates of T. Aikenhead and Company, and of Thomas Aikenkead as a partner of that company and as an individual, and he sues in that capacity. He concludes for declarator that the defender Robert Sinclair 'was at and prior to the said sequestration a partner of the said firm of T. Aikenhead & Company, and of the said Thomas Aikenhead in the business carried on by the said Thomas Aikenhead under the name of the said firm, and is liable to the whole creditors of the said firm, and of the said Thomas Aikenhead as a partner thereof, in the full amount of the debts due to the said creditors respectively at the date of the said sequestration,' and for decree against him for the amount, viz., £6785, 15s.

"It is proved, and indeed admitted, that the defender and Thomas Aikenhead formed a partnership in 1871, the terms being regulated by a deed of agreement, in which the name of Robert Taylor stands for that of the defender. Taylor was (and I presume is) the defender's partner in his other business, and the reason for using his name in the contract with Aikenhead is stated in a letter quoted in the condescendence. The reason may be satisfactory or not, but the fact is not disputed, that the contract was truly with the defender. Under it the business was carried on in the name of Thomas Aikenhead till 9th December 1874, when the partnership was dissolved by written agreement between the parties of that date, the dissolution, however, having effect from 1st November preceding, being the day after the last balance was made. I avoid further details of the deed of partnership and agreement of dissolution, which I think are immaterial. It was admittedly intended that the partnership should be secret, and that Thomas Aikenhead should be the only ostensible trader. The minute of agreement provides that the dissolution shall be advertised, but it was not. Thomas Aikenhead thereafter carried on his business as a sole trader, and in his individual name (as before) till May 1875, when he assumed his brother-in-law Mr Watt as a partner. The firm of T. Aikenhead & Company was then adopted, and the business thereafter carried on by these two partners under it till April 1877, when the firm became bankrupt. Sequestration was awarded of the estate of the company, and of Thomas Aikenhead as a partner and individual, on 20th April, no account being taken of the individual estate of Mr Watt, probably because he had none.

"On these facts the pursuer contends that the defender was really a partner of the bankrupt company at the date of sequestration, and that although he was not, he is nevertheless liable for its debts as if he were, in respect of his partnership with Thomas Aikenhead, the dissolution of which was not advertised or notified to the customers who continued to deal with Thomas Aikenhead thereafter. The defender disputes the pursuer's title to sue, 'at least' on the latter ground, and also maintains that the action is untenable on its merits.

"Being of opinion on the evidence that the defender was not in fact a partner of the bankrupt firm, or of Thomas Aikenhead in the business carried on by him 'under the name of the said firm,' 'at and prior to the said sequestration' (I quote from the declaratory conclusions of the summons), it is unnecessary that I should decide upon the title of the pursuer to sue on an opposite assumption.

"The bankrupt company was formed in May 1875, and the formation of it notified by the circular quoted in the condescendence. Of this company the defender was certainly never a partner. He may be liable for all or some of its debts on another ground, but assuredly not on the ground that he was a partner. Partnership is constituted by contract, and cannot be otherwise constituted, and there is no evidence whatever that the defender ever agreed to be a partner of the bankrupt company. The evidence is distinctly to the contrary.

"It is, however, true that a man may be under the same liability to the trade creditors of another (whether an individual or a company) as if he were a partner, although in fact he is not. The common case of such liability, and the only one that need be noticed (if indeed there is any other), occurs where a man has so acted as to create the belief (contrary to the fact) that he is a partner, whereby people were induced to deal in reliance on his credit. When a man is in fact a partner, it is of course immaterial whether he is known or believed to be so or not, for he is liable on the fact itself. But when he is not a partner in fact, I really do not know any other ground on which liability on his part can rest, other than a belief that he is, attributable to himself, *i.e.*, his conduct, whether of commission or omission, calculated to produce it.

"The parties are in controversy on the question, whether the defender's secret partnership with Thomas Aikenhead from 1871 to 1874, and his omission to advertise or otherwise notify the dissolution of it, involves liability to all the creditors of the bankrupt company subsequently formed by Thomas Aikenhead, or to such of them as had discovered or truly suspected this partnership while it existed? There is, of course, no doubt of his liability for all debts incurred in the trade of which he was a partner; but there are, as I understand, none such, and certainly the pursuer has no concern with them if they exist. The defender is presumably, and no doubt really, solvent and able to meet his liabilities to those who have claims upon him. With respect to his alleged liability to all or any of the creditors of the sequestrated company, I desire to say no more than that, as at present advised, I see no sufficient ground for it. I abstain from entering further on the subject, because I think it unfitting to encourage or prejudice any claim against him which individual creditors may see fit to make on the ground that they in their dealings with the company were warranted in believing that he was a partner and relied on his credit accordingly. It is, I think, obvious that different creditors may stand differently in this matter. Liability of the kind I am dealing with is truly of an equitable and cautionary character, standing as it does on the consideration and principle that a man shall make good an obligation which, although not his own, he has induced another to accept in reliance on his credit.

"Here the bankrupt company is the primary and proper debtor for all the debts incurred in the course of its trade. The defender may, for aught I can decide in this case, be liable on the doctrine in question to all the creditors if there is no distinction among them (of which I am necessarily ignorant), or to some of them and not to others if there be room for distinction, as there well may be. To such extent as he might be called on to satisfy these creditors he would, I think, clearly be entitled to such relief as a cautioner may have from the proper debtor, that is, the bankrupt company, for any liability of his is for debts not his own but the company's. Now, I can see no title or duty which the pursuer has to intermeddle in this matter. His right and duty is to ingather and distribute the estate of the bankrupts, of which the liability of the defender to all or any of the creditors to make good their debts (assuming it to exist) forms no part. The creditors will, of course, take what they can get in the distribution of the bankrupt estate of their primary and proper debtors, and if they are so fortunate as to have claims beyond against the defender or any other to make good deficiencies, so much the better for them; but I fail to see what concern the trustee in the bankruptcy has with such claims.

"I should have thought all this quite clear, and decided accordingly, without any doubt or hesitation, had it not been for the case of *Hay* v. *Mair* in 1809, in which other views seem to have been assumed without question or discussion, for in that case no question seems to have been raised or mooted regarding the title of the trustee in bankruptcy. Considering the date of the case—for it occurred at a period (seventy years ago) when mercantile cases were rare in Scotland—that the question of title was not argued but simply assumed, and that no case to the same effect has since occurred, I am not disposed to regard it as an authority which I ought to follow against the opinion which I have formed. The principles of mercantile law have been greatly developed and matured since 1809, and I am not prepared in deference to a solitary case of that date to hold that a man may be liable for the debts of another on the footing that he was a partner of his, although he was neither so in fact nor gave any reasons to the creditors in these debts to believe that he was. The pursuer's counsel pressed it as authority even to the extent of sanctioning the proposition that this sort of liability may exist (like that of a real partner) in favour of creditors who did not believe the party to be a partner, or who positively knew that he was not. If this were allowable, it would, I think, be a severe condemnation of the

authority. Nor can I in deference to this case hold that when a man induces the erroneous belief that he has become the partner of a trader, or continues his partner after he has truly ceased to be so, the liability thence attaching to him is a liability to such trader, and so part of his assets to be recovered by himself if solvent, and by his trustee in bankruptcy if sequestrated. I have already observed that a party against whom such liability is enforced pays not his own debt but that of the trader who incurred it, and has relief against him or his estate in bankruptcy accordingly, for the ground of his liability to the creditor is not necessarily or generally inconsistent with a right of relief against the proper debtor. I must regard this as a very clear proposition indeed, and it is obviously inconsistent with the contention of the pursuer here, and the assumption (for it was no more) in the case of *Hay* v. *Mair*. A trustee in bankruptcy represents the creditors—that is, is charged with their interests only with respect to the bankrupt estate. The creditors, all or any of them, may have, and very frequently have other estates, and parties liable to them, and with respect to these liabilities they are certainly not represented by the trustee in bankruptcy, who accordingly has no title or duty to enforce their claim, the success of which, while it would benefit them, would not enlarge or relieve the bankrupt estate under his charge.

"With this full explanation of the grounds of my judgment, I think I may properly give effect to it by sustaining the defences generally and assoilzieing the defender, and of course with expenses."

The pursuer reclaimed, and argued that no notice of the dissolution of partnership, which took place in December 1874, was given to the customers unless the circular of May 1875 could be said to do so, but that was not sufficient to advertise a dormant partner out of a concern. On this ground Sinclair's estate was liable to the creditors. If that were so, the trustee had a good title to sue in this action, as the duty of a trustee in a sequestration was to gather in the bankrupt's estate, and that was equivalent to saying that he was to gather in all the estate available to give to the creditors. Further, when a firm was made bankrupt, though the individuals were solvent at the time, the trustee had a good title to go against the solvent partners to the amount of the liability for the good of the creditors, all of whom he represented. It had also to be presumed in this case that the trustee was acting with concurrence of all the creditors.

Authorities—Bell's Comm. ii. 640-643, 5th ed. —530-533, 7th ed.; Lindley on Partnership, 405-407, Cases; *Dalgleish* v. *Fleming*, M. 14,595; Mercantile Law Amendment Act 1856, 2d Rep. of Commission; *Hay* v. *Mair*, Jan. 27, 1809, F.C.

Argued for respondent—None of the creditors here were in the position of knowing that Sinclair had even been a partner—they might have heard a rumour, but that was all. Besides, even if they had heard, Sinclair had ceased to be a partner, and never had traded under the new firm-name T. Aikenhead & Co. Besides, sufficient notice was given to the creditors by the circular of May 1875; it plainly showed that the old firm, whatever it had been, had ceased to exist, and a new one, whose members were specified, had been begun. But further, the trustee had no title to sue this action, for he could not represent all the creditors in this case, as their interests were conflicting. Some also knew that Sinclair had left the firm and some did not. If the trustee could sue at all, he sued for all the creditors equally, and therefore these two classes of creditors would be put on an equality, which was manifestly unjust. The question as to the title to sue of a trustee in a sequestration was not decided in *Hay* v. *Mair;* it never was submitted to the Court. There all the creditors were in the same position, as the partner proceeded against was an active member of the concern.

Authorities—*Cox* v. *Hickman*, Aug. 3, 1860, 8 Clark's H. of L. Cases, 268; *Eaglesham* v. *Grant*, July 15, 1875, 2 R. 960; *Stott* v. *Fender*, July 20, 1878, 5 R. 1104; Story on Partnership, par. 159; *Carter* v. *Whalley*, 1 Barn. and Ad. 11; *Heath* v. *Sansom*, 4 Barn. and Ad. 172; Smith's Mercantile Law, 47, 9th ed.; *Western Bank* v. *Needell*, 1 Fos. and Fin. 461; *Gardner* v. *Anderson*, Jan. 21, 1862, 24 D. 315; *ex parte Good*, 5 L.R. (C.D.) 146; *ex parte Sheen*, 6 L.R. (C.D.) 235; *Remmington Wilson* v. *Dunbar*, March 10, 1810, F.C.; *Hunt* v. *Alexander*, 7 Carr and Payne, 746.

At advising—

LORD PRESIDENT—The pursuer in this case is trustee upon the sequestrated estates of T. Aikenhead & Co., and of Thomas Aikenhead as a partner thereof. These estates were sequestrated on April 20th 1877. The object of the action is to make the defender Sinclair answerable for the debts of the sequestrated company. The summons concludes for declarator that the defender "was at and prior to the said sequestration a partner of the said firm of T. Aikenhead & Company, and of the said Thomas Aikenhead in the business carried on by the said Thomas Aikenhead under the name of the said firm, and is liable to the whole creditors of the said firm, and of the said Thomas Aikenhead as a partner thereof, in the full amount of the debts due to the said creditors respectively, at the date of the said sequestration, and for decree against him for the amount, viz., £6785, 15s." The pursuer claims, first, that the defender was really a partner of the bankrupt company at the date of sequestration; and second, that even if he were not a partner he is liable as if he were, in respect that the dissolution of partnership was never notified or published to the customers and creditors of the business. Now, if this first ground had been established as matter of fact, no doubt the defender would have been answerable for the debts. But it has not been so established. On the contrary, it is proved in evidence that Sinclair never was a partner of the firm trading under the name T. Aikenhead & Co. The plea therefore with which we have to deal is the second only.

The liability which is sought to be established is based on an allegation that the defender had been a partner of Thomas Aikenhead in business, and that no notice had been given to the public of dissolution of that partnership. The history of the case is somewhat peculiar. In 1871 articles of partnership were entered into by Mr Aikenhead and a Mr Robert Taylor. Mr Sinclair's name did not appear in the agreement, but Mr Taylor really had no interest in the business, and his name was

inserted only as representing the interest of Mr Sinclair. In fact, there is no doubt that as regards the partnership entered into in 1871 the real partners were Thomas Aikenhead and Sinclair, and also clearly at that time Sinclair was intended to be and was a secret partner. But in the course of three years that partnership closed. It is not even alleged that any public notice of the dissolution was given, but there is no doubt as matter of fact that by private arrangement there was a dissolution effected by the minute dated 9th November 1874, the effect of which was to put an end to the partnership made in 1871. That dissolution was never advertised or made known to the customers or creditors of the concern. About half-a-year afterwards, however, new arrangements were made, and these were made public. This arrangement was that Thomas Aikenhead should for the future carry on the business of the firm on his own account, but taking into it his brother-in-law A. Watt. Now, keeping in view the fact that the arrangement between Aikenhead and Sinclair came to an end in 1874, it is important to notice that the business was carried on from December of that year to May 1875 under Thomas Aikenhead's name alone. In May a circular was addressed to all the customers of the firm, and I do not think it is alleged that any one was ignorant of what then was announced, or that any creditor can say that he was not made personally aware of the change in the firm. Now, the circular is in these terms—[*reads ut supra*]. This is signed Thomas Aikenhead, and added to it is a *facsimile* of the handwriting of both Aikenhead and Watt, showing how they were to sign the firm-name. Now, it appears to me that the circular announces three things—first, that up to the date of the circular the business was being carried on by Aikenhead on his own account; second, that in future the business would be carried on by him and his brother-in-law as the two partners; and third, that for the future the firm would be T. Aikenhead & Co. instead of Thomas Aikenhead. Now, if it were alleged that after the date of the circular Sinclair continued to be a partner of the new firm, I could quite understand the pursuer's case, but it is not so; on the contrary, it is proved that his connection ended six months before the date of the circular. The question then is, whether that circular did or did not sufficiently announce to the world such a change in the business as to put all who saw it on their inquiry as to the facts? I can only say that unless you had had an express statement that Sinclair was no longer a partner no notice could, to my mind, be more explicit. I think clearly that from and after May 1875 Sinclair cannot be held liable for any debts of the firm, and yet it is for these debts he is sought to be made liable.

I should have thought this sufficient for the disposal of the case, but there is one other question of importance raised, and I do not think it right, particularly as the Lord Ordinary has adverted to it, to leave it unnoticed. I refer to the objection as to the trustee's title to sue. The pursuer is trustee in a sequestration, and as such represents all the creditors. He cannot represent a class of creditors only, and he does not profess to do so; he appears in his proper character of representative of the whole. Now, presuming that there is no doubt, and I think there is not any, that it was known to some of the creditors that Sinclair had retired from the business, it is quite impossible to say that those creditors who knew and those who did not know shall be in the same position when they desire to make Sinclair liable for these debts. The creditors who knew of the fact of the retirement, although it was as regards others private, never could recover from Sinclair, while another who acted thinking that Sinclair still was a partner might be entitled to recover. But both are here represented by the trustee, and if he were to recover this money in terms of the summons the creditor who knew of the retirement would be put upon precisely the same footing as the one who did not. Now, that consideration satisfies me that it is quite impossible to combine all the creditors as a class and to find that the trustee is entitled to go against the latent partner because he has not advertised out, without considering the case of each creditor. If I had supposed that the case of *Hay* v. *Mair* could be relied on to support such a doctrine I should have little doubt in saying it was a bad decision. But the question of title to sue was never there raised; it could not be raised; the partner who was sought to be made liable was proved to be an active and public member of the firm, and there had been no retirement, and therefore there was no difficulty in allowing the trustee to sue for all the creditors, who were all equally entitled to go against him, and therefore I say this question could not be raised. But I am not prepared to say that *Hay* v. *Mair* is in other respects to be set aside as a single authority for the law there laid down. It is not necessary here to define what is a latent partner, or to go into the law of advertising out, but on that question I say that the case is not only not a single case on the point, but it is by no means the leading authority. It is one of a series of which *Dalgleish* is the first and *Hay* next, and after them *Dunbar* v. *Remmington Wilson*. It is, however, unnecessary to pursue the question further, and I have only said this much lest I should be thought to agree with the Lord Ordinary in his view of the law as applied here. I may add that the case of *Dunbar* in 1810 is almost exactly in point on the merits in the present case. I am for adhering to the Lord Ordinary's interlocutor.

Lord Deas—The question raised here is, Whether the defender is liable for the debts of the firm T. Aikenhead & Co.? That comprehends the question, Is he to be held to have been a partner of that firm in respect that he had been a partner in business at one time with Thomas Aikenhead and did not advertise out of the firm? I agree with your Lordship that the circular which your Lordship read was a sufficient and distinct notice that the former firm, whatever it was, had been dissolved, and that a new one had been commenced. Nobody, I think, could read that circular without seeing that such was the case, and if that be so, that affords an effectual answer to the conclusion of the summons that he was an active partner at the time of the sequestration, or in such a position that he must be held to have been so. There is thus no necessity for deciding any other question, even that regarding the title to sue of the trustee in the sequestration. However, in that point also I agree with your Lordship that he has no proper title to sue such an action as this, and

therefore this other defence would be sufficient also to enable us to dismiss the action. It is not necessary to go so far as to say that there never could be a case of the same nature as this in which a trustee in a sequestration would have a title to sue for all the creditors. In this case the creditors obviously stood in different relations, and had conflicting interests. Some knew how the matter stood as regards the partnership, and some did not. There might be cases where the confliction of interests might be even greater than here. Altogether, it seems difficult to imagine a case in which the trustee could sue for the whole as he tries to do here.

Further, if the case was not disposed of on these grounds, a question might have arisen on the authorities which have been quoted by the Lord Ordinary, but I do not intend to discuss them here, but so much, however, I will say, that I agree with your Lordship that *Hay* v. *Mair* is not unsupported by important decisions, both before and after it in point of time. I do not think it can be said that at the date of that case we had no mercantile law in Scotland, though commercial transactions have greatly increased since then; the principles of the law referring to them had received much alteration prior to that case. The doctrine in Scotland, so far as I can understand, does not agree with that of England in this case. If it came to be a question as to which were the best, I can see that much might be said on both sides.

On other grounds, then, I agree in the conclusion arrived at by your Lordship.

Lord Mure—I concur with your Lordships. It is decided in the case of *Hay* v. *Mair*, with reference to dormant partners, that where a partner leaves a business he must either give public notice or some equivalent act must be done at the time of the dissolution in order to render him free. That case and other cases laid down that rule, and it is not necessary in deciding this case to settle the question whether that rule or another is the better one to act upon. I think that in this case the circular was equivalent to a distinct notice of dissolution. That circular was sent to all the customers, and I do not think that when it was read and understood there could be any other idea but that. From that time the partnership was to consist of Messrs Aikenhead and Watt. That is sufficient for the case. It is a peculiar circumstance that every witness except one admits that he got this circular, and these are the very parties for whom the trustee wishes to gather in the estate of Sinclair, and to make it responsible for the debts among others to these gentlemen who got the circular. The only explanation they give is, that they did not trouble themselves to think about the circular. But creditors were bound to read the document and to get at its meaning. They ought to have been put on their guard by it, and if they had read it over twice they could not have arrived at any other conclusion but that which I have stated. On that ground I adhere to the Lord Ordinary's interlocutor. On the question of the trustee's title I concur with your Lordship.

Lord Shand—I concur. With the averments which appeared on the record it became necessary to allow a proof, and if the proof had shown that notwithstanding the minute of dissolution, even in a question between the fellow partners, Sinclair continued interested as a partner under the new firm, I should have had little doubt as to the trustee's title to sue his action, and no doubt at all as to the liability of Mr Sinclair's estate. But the proof is clear, and shows that that part of the action which is grounded on the averment that Sinclair was a partner at the date of the sequestration is out of the case. From the date of the dissolution of partnership—Nov. 1, 1874—till he ceased to have any interest whatever in the concern, Sinclair, far from being a partner, was a creditor of Aikenhead for sums he owed him to pay him out of the business. The evidence is perfectly clear on that point. If Sinclair could be held liable in these sums claimed for, it would be with a right of relief against the persons really carrying on the business, namely, Thomas Aikenhead and Allan Watt.

That ground of liability being out of the case, the first question that arises is, Is the trustee's title to sue against a person not a partner, in a question between that person and Aikenhead, a good one? The pursuer has maintained that though no partnership continued in a question between Sinclair and Aikenhead, yet he remained a partner in a question with the creditors of the firm because of his failure to advertise out of the concern. I am clearly of opinion that that argument is unsound. That he was not a continuing partner is clear from the right that he had of relief against Aikenhead. But the ground of liability which is contended for is not that he was a partner in any question that might arise, but that not having advertised out he continued to represent himself as a partner, and that being the case, people traded on his credit. In short, the ground of liability comes to be, not partnership itself but representation of partnership. Keeping that in view, there can be no doubt that the trustee has no title to sue an action based on this ground of liability, for it necessarily follows, if the ground of action be that, although Sinclair was not a partner, third parties, not knowing of the dissolution of partnership, traded on his credit, there must be a distinction between persons who knew that he was no longer a partner and those who did not. For example, Sinclair may have informed some creditors that he was no longer a partner, but they being still creditors might have gone on trading with the concern. It would be entirely against principle and justice to hold that creditors who admit that they knew he had ceased to be a partner, and who would have to admit further that they were not trading on his credit, yet should be held to be entitled to recover from Sinclair on the legal fiction that he was still a partner simply because he had not advertised out. Accordingly, the moment it reaches that the trustee has evidently no title to sue. The pursuers felt that they must maintain that whether a creditor knew of the retirement or not he was entitled to claim against Sinclair's estate. In this case, then, I think the claim of each creditor must be tried on its own merits. The case on other points has been fully canvassed by your Lordships, and upon them I shall say no more. I express no opinion on the authorities, such as *Hay* v. *Mair;* that question may return in some other case at a future date.

I further wish to say, as the point has been raised, that I entirely agree that the notice of

dissolution was sufficient in the circumstances. The notice here put the creditors in exactly the same position as in the case of *Dunbar*, and there it was held to be sufficient.

The Court adhered.

Counsel for Pursuer (Reclaimer) — Asher—Mackintosh. Agents — Hamilton, Kinnear, & Beatson, W.S.

Counsel for Defender (Respondent)—Balfour—Rhind. Agent—R. P. Stevenson, S.S.C.

Friday, June 20.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—(*M'DOUGALLS' CASE*)—M'DOUGALL AND ANOTHER (PETITIONERS) *v.* LIQUIDATORS.

Husband and Wife—Exclusion of Jus mariti *from Wife's* Acquirenda *in Antenuptial Marriage Contract.*

Held that the *jus mariti* and right of administration of a husband over the *acquirenda* of his wife may be competently excluded *per aversionem* in an antenuptial marriage contract.

The petitioners Mr and Mrs M'Dougall were married in 1845. An antenuptial contract was entered into between them. In this contract it was provided, *inter alia*—"Whereas the said Margaret Wright has several sums of money due and belonging to her, and also several sums and legacies in expectancy, particularly the sum of Two thousand pounds provided to her, or to be provided and left to her, by her said father on his decease, of which sum a part thereof amounting to the sum of Two hundred pounds is to be paid to her on her present marriage by her said father, and a legacy left and bequeathed, or provision made, to her by William Thorburn, Esq., residing in Stirling, the amount of which is as yet unascertained: It is hereby provided, declared, and agreed to by both parties, that not only shall the foresaid sum or sums above specified, due and belonging, and to fall due and belong, to the said Margaret Wright, but also any other provisions, legacies, or bequests that may be made by any other relation of the said Margaret Wright, or other party or parties, to her in time coming, and which shall or may fall due during the subsistence of the marriage, shall still, and notwithstanding of the said marriage, remain the absolute property of the said Margaret Wright and be at her sole and unrestricted disposal, and full power and liberty is hereby reserved to her to assign and dispone the same, or any part thereof, without the consent of the said John M'Dougall, her intended husband, and the said sum or sums, legacies, and bequests, shall in no ways be subject to nor affected by the debts or deeds of the said John M'Dougall, his *jus mariti* and power of administration therein being hereby expressly excluded, and the said John M'Dougall does hereby renounce his said *jus mariti* and right of administration, and all right or interest in him inconsistent with this reserved power in the said Margaret Wright: And in case it shall be necessary to uplift any part of the said sums, legacies, and bequests during the subsistence of the said marriage, or upon their falling due and payable to her, it is hereby expressly agreed that the same shall not fall under the *jus mariti* of the said John M'Dougall, but the said sum or sums so uplifted or falling due and payable shall be lent out, and the bonds and securities therefor shall be taken payable to the said Margaret Wright, her heirs, executors, and assignees, excluding the said John M'Dougall's *jus mariti* as aforesaid, and the receipts or obligations of the said Margaret Wright shall be a sufficient discharge of the same, without the consent and advice of the said John M'Dougall."

In 1867 Miss Grace Wright, a sister of the petitioner Mrs M'Dougall, died leaving a *mortis casua* settlement by which she disponed her whole estate to her sister, nominating her at the same time her sole executor and universal legatory. There was no exclusion of the *jus mariti* or right of administration of Mr M'Dougall. The estate to which Mrs M'Dougall thus succeeded consisted of £460 of City of Glasgow Bank stock, besides other property, and in September 1867 she was confirmed executrix-nominate of Miss Wright, and the confirmation was forwarded to the bank officials who issued a stock certificate in the following terms:—

"CERTIFICATE, CITY OF GLASGOW BANK.

"No. 29/67. Entd. R. R.

"*Glasgow, 24th September* 1867.

"These certify that the executrix of the late Miss Grace Wright, Comrie Road, Crieff, has been entered in the books of this Company as the holder of four hundred and sixty pounds consolidated stock.

"Robert Kidd, *p. Accountant.*

"John Turnbull, *p. Manager.*"

"*Note.*—This certificate must be deposited with the bank before a transfer for the whole or any portion of the stock can be issued, or a new certificate granted."

On the back of the certificate there was a jotting in the following words:—"Mrs Margaret Wright or M'Dougall, spouse of the Reverend John M'Dougall, residing at Canaan Park, near Edinburgh, executrix nominated by the deceased Miss Grace Wright, Crieff, conform to *testament testamentar* in her favour by the Commissary of the county of Perth, dated 13th September 1867."

"R. R."

The dividend warrants in respect of the stock were sometimes signed by Mr M'Dougall and sometimes by Mrs M'Dougall, but always cashed by the former.

When the bank failed, the names of both Mr and Mrs M'Dougall were placed upon the list of contributories, and calls were made upon them in respect of the stock, and they then presented this petition praying for the removal of Mrs M'Dougall's name.

It was argued for the petitioners that there was not by the marriage contract a valid exclusion of Mr M'Dougall's *jus mariti* and right of administration from the succession of the deceased Miss Wright, and as it was not competent by antenuptial contract to exclude *per aversionem* those rights with reference to *acquirenda*, the