precipitate, in his action. The negotiations between the executive of the company and the underwriters are not yet completed; but assuming that they were completed, it will be for the shareholders to consider whether they should proceed to a voluntary winding-up of the company. The question arising on section 129, sub-section (1), will naturally come on as soon as the chapter of winding-up is opened, and the shareholders will say whether or not the natural course, viz., for the company to be wound up by voluntary liquidation, shall not be followed. This petitioner, however, asks us to affirm that it is just and equitable now for the Court to pronounce a winding-up order, but we have no information whatever as to the wishes of the shareholders, and the time has scarcely come for their being convened and asked to come to a conclusion on the point. Accordingly I think that the grounds of the petition are entirely insufficient, and that the prayer should be refused.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court refused the petition.

Counsel for the Petitioner—Jameson—W. C. Smith—Macaulay Smith. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Respondents—Graham Murray, Q.C.—C. S. Dickson. Agents—Gill & Pringle, W.S.

Thursday, January 11.

SECOND DIVISION.

[Sheriff of Aberdeen.

COOKE'S CIRCUS BUILDINGS COMPANY, LIMITED *v.* WELDING.

Landlord and Tenant—Lease—Occupation—Partnership—Joint-Adventure—Liability of Joint-Adventurer for Rent.

Z. & W. agreed to carry on a music-hall business in the towns of A. and B. At A. they, along with G., their law agent, visited premises, to the proprietor of which they represented themselves as partners. Some days later Z. returned to A. accompanied by G, and negotiated a lease of the premises, G giving a written assurance that Z. had power to bind the firm. Z. signed with his own name and the name of the company. W. knew the lease had been taken. The lease was for three terms, from November 1891 to May 1892, from September 1892 to May 1893, and from September 1893 to May 1894. The advertisements contained the names of Z. & W., and W. made some payments in respect of the premises. The premises were occupied by the firm for their business for three months, when they were closed. The partnership was dissolved by mutual consent a short time before that event, and Z. disappeared.

In an action by the proprietor against W. it was proved that such premises are usually let for such terms as the lease specified. *Held* that the defender was liable for the rent for the first term, beyond the time during which the occupation actually existed.

Upon 12th September 1891 an agreement of copartnery was entered into between Burlington Brumell, professionally known as Baron Zeigler, theatrical, concert-hall, and general manager, and Edward Welding, Chester Lodge, 55 Haverstock Hill, London, in these terms—"First, That said parties in consideration of the second party (Welding) paying to the first party (Zeigler) the sum of five hundred pounds sterling on the signing of this agreement do hereby contract to be copartners in carrying on a business or joint-adventure as concert hall and circus proprietors and managers under the firm or style of Baron Zeigler & Welding, the business at present to include the Royal Circus in Canal Street, Bradford, and the Royal Circus in Aberdeen, and afterwards such other place or places as may hereafter be acquired and mutually agreed upon by both parties. Second, the partnership shall be held to have commenced at this date, and shall subsist till mutually dissolved, declaring that said partnership may be dissolved by either party giving to his copartner three months' notice in writing of his intention to terminate same. Third, The first party shall act as the managing partner of the firm, and their respective duties consistently therewith shall be mutually arranged as the requirements of the business may necessitate. . . . Fourth, Each partner shall draw ten pounds sterling weekly as salary, and the nett profits remaining shall be equally divided after the working expenses shall have been provided for, it being understood that each partner shall contribute equally towards these expenses, and that the first party shall relieve the second party of all loss and responsibility that may result from the management of the Royal Circus, Aberdeen."

The contract was drawn by Alex. W. Grant, a solicitor in Glasgow, who was employed by both parties to do so.

On the previous day Zeigler & Welding had gone to Aberdeen accompanied by the solicitor, Grant, and examined Cooke's Circus Buildings along with William Sellar, the secretary of the Circus Company. Zeigler took the initiative in this proceeding, but Welding allowed himself to be introduced by Zeigler to Sellar as his partner, and told Sellar that he was the sleeping partner, and that Zeigler managed the business. Zeigler returned with Grant to Aberdeen on 21st September and adjusted the terms of an offer with Sellar, and a lease was subsequently effected between the Circus Company and Baron Zeigler & Company of the Circus premises, from the morning of the 23rd day of November 1891 to the second Saturday in May 1892; from the first Monday in September 1892 to the first Saturday of May 1893, and from the first Monday of September 1893 to the first Saturday of May 1894, declaring

that it shall be in the power of the said parties of the second part to bring this lease to an end on giving notice in writing to the party of the first part of their intention so to do at least two months prior to the first Saturday in May 1893." It was signed for the second parties as follows—"Baron Zeigler," "Baron Zeigler & Co." Welding declared that he was ignorant of the terms of this lease. During the negotiations Sellar, having failed to persuade Zeigler to obtain Welding's signature to the lease, obtained from Grant a letter in these terms—"With reference to the lease of Cooke's Circus executed to-day between the Cooke's Circus Buildings Co., Ltd., and Baron Zeigler & Co., it is within my knowledge that Baron Zeigler has power on behalf of his firm to enter into said lease and bind his firm."

Considerable alterations were made upon the building to suit it for the purpose of the entertainment, and Welding paid for these, and it was opened in November but was closed in January 1892. The advertisements contained the names of both Zeigler and Welding. The partnership between Welding and Zeigler was dissolved "by mutual consent as from 15th December 1891," and the notice described the firm as of Royal Circus, Bradford, and Royal Circus, Aberdeen. Welding paid the rent due at the date of the dissolution. Zeigler left the country.

Cooke's Company sued in the Sheriff Court at Aberdeen "Baron Zeigler & Company, theatrical entrepreneurs" and Zeigler and Welding as the individual parters of the firm, for "(First), £8, 1s. 4d. sterling, being the rent for said subjects for five days from 23rd to 27th, both days of December 1891, both inclusive, due and payable on the 22nd day of the said month of December; and (Second), the sum of £11, 5s. 10d. sterling, being the rent of said subjects for the week from the 28th day of December 1891, to the 3rd day of January 1892, both inclusive, due and payable on the 29th day of the said month of December, with interest thereon at the rate of £5 per centum per annum from the said several dates when the said sums respectively fell due till payment; and in security and for payment to the pursuers of the sum of £168, 19s. 6d. sterling, to become due and payable at the rate of £50 per calendar month, in equal proportions, on Tuesday in each week, commencing on Tuesday the 5th day of January 1892, and ending on Tuesday the 12th day of April 1892, both inclusive, with interest."

The pursuers averred—"The defender Welding's averments in answer, except in so far as coinciding herewith, are denied and irrelevant. Specially denied that the said defender was ignorant of the existence or terms of the said lease, and that the pursuers ever took possession of and let the premises in question. The defender Welding took part in the negotiations for the said lease, and along with his partner, the said Burlington Brumell, visited and inspected the premises in question prior to the conclusion of the said negotiations, and authorised and empowered the said Burlington Brumell to sign the said lease on behalf of their said firm of Zeigler & Company so as to bind the said firm and the partners thereof. Further explained and averred that the defender Welding has homologated the said lease as an obligation binding on his said firm and himself as a partner thereof, by paying certain rents due thereunder by drafts on his own bankers."

The defenders averred—"Denied that the said defender or his firm after mentioned were parties to any lease of the said premises. The lease produced does not bear to be signed by him or by his said firm nor was he ever communicated with regarding it, and did not know of its existence until he received the service copy summons herein. Explained that prior to 15th December 1891 the said defender was in partnership with the said Burlington Brumell *alias* Baron Zeigler, and that they carried on business at the said premises under the firm or style of Baron Zeigler & Welding, but on that date the said copartnership of Baron Zeigler & Welding was dissolved, and intimation of the dissolution was duly given in the *London Gazette* of 22nd December 1891 and the *Edinburgh Gazette* of 5th January 1892. The said dissolution was known in Aberdeen and was published in the local newspapers. Explained and averred that the defender Welding understood that the tenancy of the said premises by his said firm of Baron Zeigler & Welding was weekly and that the rent was payable, and was actually paid in advance, with the exception of one fortnight's rent which was paid on 21st November 1891 by the defender Welding by cheque sent by him to the said Burlington Brumell, who handed it to the pursuer's secretary."

It did not appear that Welding knew anything of the management in Aberdeen, but on 21st November 1891 he gave Zeigler a cheque in these terms:—"To The Bradford Old Bank, Limited, Bradford. Pay the Secretary of Cooke's Circus Coy. Ltd., or order the Sum of Twenty-five pounds—£25 0 0 EDWARD WELDING." Written upon paper printed on the back thus:—"*Memo from* Baron ZEIGLER and Major WELDING. Sole Proprietors:—Royal Jollity Vaudeville Theatres, Aberdeen and Bradford. Address all Communications:—Baron ZEIGLER, General Manager"—and the first fortnight's rent of the premises was paid with the money so obtained. It was also proved that it was the invariable custom to take premises for a variety entertainment such as that carried on by the company for a period of not less than a year, as the performers had often to be engaged a long time before their appearance was actually wanted. Welding declared that the intention and understanding of parties was that he should manage at Bradford and Zeigler at Aberdeen.

Upon 18th March 1893 the Sheriff-Substitute pronounced this interlocutor—"Finds in fact (2) that in the month of October 1891 the said Baron Zeigler concluded with

the pursuers a lease of their premises in Bridge Street, Aberdeen; (3) that the said Edward Welding was no party to the negotiations in regard to said lease and was not consulted with reference thereto, and *separatim*, that the said Edward Welding did not sign the said lease, the same having been subscribed on one side by Baron Zeigler on behalf of Baron Zeigler & Company; (4) that the said Edward Welding did not authorise the said Baron Zeigler to enter into said lease in pursuance of the undertaking to carry on the joint adventure referred to in the contract of copartnery, and did not concur with him in any steps having that object; (5) that the pursuers have failed to prove that the said Edward Welding was cognisant of the negotiations in regard to said lease, or that it had been concluded, until the business in Aberdeen was in operation under the management of the said Baron Zeigler; (6) that the said contract of copartnery was dissolved on 15th December 1891: Finds in law that Baron Zeigler had no implied authority, either at common law or under said contract, to enter into said lease on behalf of the said Edward Welding; and that he not having authorised the same, it is not binding on him: Finds, further, that the pursuers have failed to prove facts and circumstances shewing that the said Edward Welding adopted or homologated or acquiesced in said lease: Therefore assoilzies the said Edward Welding from the conclusions of the action."

Upon 12th July the Sheriff (GUTHRIE SMITH) recalled that interlocutor, and pronounced this judgment—"Finds it proved that the defender was in partnership with Burlington Brumell *alias* Baron Zeigler, as concert-hall and circus proprietors, under the firm or style of Baron Zeigler & Welding, and for some time carried on business as such at the Royal Circus, Aberdeen, until the 15th December 1891, when said firm was dissolved by mutual consent: Finds that by lease dated 13th October 1891 the pursuers let to the said firm the premises mentioned on record at the rents specified, and that the said lease was signed by the said Brumell as managing partner of the firm, but not by the defender: Finds that said lease was entered into by the pursuer in the belief, induced by the defender, that the said Brumell had authority to take the premises on behalf of the firm, and that the same is binding on the defender: Therefore repels the defences: Finds the defender liable in payment of the rents due and unpaid, namely, from 23rd December 1891 to 3rd January 1892, £19, 7s. 2d., from 5th January 1892 to 12th April 1892, £168, 19s. 6d., making in all £188, 6s. 8d., under deduction of the sums paid or recovered to account thereof."

The defender appealed, and argued—The defender was not liable under the lease, and if he was liable at all, which was not admitted, it could only be in respect of occupation; but then the occupation by Welding came to an end when the partnership was dissolved, and the rent of the premises was paid up to that time. The defender was not bound by the signature of Zeigler & Company to the lease, for (1) that was not his firm—he was a partner of Baron Zeigler & Welding; (2) he did not sign. Taking a lease of premises was not a transaction where the actings of one partner could bind the others without their special assent—Lindley on Partnership, 139; *Sharp* v. *Milligan*, June 28, 1856, 22 Beav. 606. Where there is a continuing liability, which may extend beyond the term of contract of copartnership, all partners must sign if they are to be bound. The circumstances proved in this case did not amount to homologation.

The pursuer argued—The defender was a partner of the firm. Leasing premises was an ordinary act of business for the firm, and the acting of one partner could bind the other. This action was only for the rent of the term which was begun by occupation of the premises by the firm, and it was proved that such buildings as this were never taken for less than a year. The defender had not shown that he had objected to his partner taking this lease—*Denniston, Macnayr, & Company* v. *Macfarlane*, February 16, 1808, M. Tack, App. No. 15; Hunter on Landlord and Tenant, i. 215; Lindley on Partnership, 135.

At advising—

LORD JUSTICE-CLERK—In 1891 the defender Welding and a person calling himself Baron Zeigler or Brumell entered into an engagement to carry on a theatrical business in certain places, one of which was Aberdeen—[*His Lordship read the first clause of the agreement of copartnery*].

It appears from the evidence that both Welding and Zeigler went to Aberdeen immediately after the signing of the contract to look at this circus which belonged to a limited company. They had a meeting with the secretary of the company, and then and there Welding was introduced as a partner, and he announced to the secretary Mr Sellar that he was the sleeping partner in the firm, and that Baron Zeigler was the managing partner. There is nothing more certain than this, that the contract provides that one of the places in which the business of the copartnery was to be carried on was a circus building in Aberdeen, and I think it proved that Welding knew that it was to be taken for the business in which he was a co-adventurer.

It is possible, as was suggested in the course of the discussion, that in such a contract as this it might be intended that one of the partners should have the lease of one of the places of amusement at one place and the other at the other, but there is nothing of that sort in this case, as I think it is clearly proved that Welding knew that the building was taken for the business of the copartnery.

The lease was made out in the name of Baron Zeigler & Company, and Zeigler signed it as Baron Zeigler & Company, and then added his own name, if it may be so called, "Baron Zeigler," and it was contended that Welding was not a member of

any such copartnery, and that he was not bound by the lease in any way.

I have come to the same conclusion as the Sheriff, although not upon quite the same grounds. I think that these premises were occupied by the parties to the copartnery for carrying on the business of the copartnery, that the business was carried on there on that footing as long as it lasted, and that when it became unsuccessful, although the copartnery was dissolved, I hold that the partners are liable for the rent of the term for which they had begun to use them. The occupation was the occupation of Welding as well as Zeigler. It is not contended that what is asked is an unreasonable sum to pay for the occupation. I therefore do not think it necessary to decide any question as to the written lease. In my opinion Welding is liable for the occupation, which was his as well as Zeigler's, and that the judgment of the Sheriff gives the right decision of the case, although I cannot agree with the grounds given in his note.

LORD YOUNG—The purpose of the agreement in this case, in the course of which various important questions of law arise, is to carry on a business as concert-hall and circus proprietors and managers at Bradford and Aberdeen.

It is not very surprising that the defender, after giving £500 to Zeigler, should come to grief, and he has come to grief because he has become involved in a question whether he is not liable for the rent under this lease for a circus at Aberdeen.

It would be difficult to say whether under the terms of the contract with Zeigler the defender Welding authorised him to enter into a lease for the use of the circus building. The case presented, however, is limited to this—the pursuer asks that the liability of the defender should not be that of a tenant under the lease, but only as an occupier of the premises for the period of occupation during the subsistence of the joint-adventure, and for such a reasonable period beyond as may be shown that it is customary and reasonable to let such premises as these for the use to which the joint-adventurers intended to put them. The action is therefore limited to asking decree for the rent for the first year. The pursuer's position is that the premises having been occupied by the defender for three months he must pay the rent of them for that time, and for a period of six months beyond that, because I think it is according to the evidence that the pursuer would not have given permission for anyone to occupy the premises for a less period than that.

I think that is a sufficient ground for our judgment. No doubt it avoids the question which otherwise would rise in the case, whether one of a party of joint-adventurers has the power to bind his co-adventurers to a lease for a year or for any period. I am inclined to negative that view. I rather incline to the view that persons who let heritable subjects to joint-adventurers, if they wish to be secure, should get all the persons to whom the subjects are let, securely bound, by obtaining their signatures to the lease, if it is for a period to which by our law writing is necessary, or by getting their verbal consent if a verbal consent is all that is necessary. In this case there was no communication whatever between the pursuer and defender prior to granting the lease, and apart from the question of right altogether, I think the proper course for a proprietor to take in letting a heritable subject is to communicate with the person he desires to take as tenant.

I confess, however, that when the pursuer is suing the defender, not under the lease, but on the ground of occupation, there is a good deal to be said for him, and I do not quite see the answer to his demand. That state of facts reduces the question to this, whether the defender is liable for the two or three months' rent beyond the time during which the occupation actually lasted, and which months, according to the evidence, would complete the shortest term for which such buildings as these would have been let? If that is the question, I think we may take all the circumstances of the case into consideration, and looking to the fact that Welding went to Aberdeen with Zeigler; that he told Sellar, the secretary of the Circus Company, that he was the sleeping partner in the firm; that he allowed his name to be used in advertisements of the business, and so on, I think the agent for the Circus Company was entitled to rely upon his liability for the rent for this short period.

LORD RUTHERFURD CLARK—I do not think that this case raises any general question at all. For my part I decide it entirely upon the special circumstances of the case. It is proved satisfactorily to my mind that the parties to the contract of copartnery intended that a lease of these premises should be taken, and that the appellant Welding knew that the lease was taken for the use of the company and for carrying on the business. I think that the rent of the premises for the term in question in which the company took possession must be paid by Welding as occupier.

LORD TRAYNER—The defender Welding entered into a contract with a person calling himself Zeigler to carry on a business or joint-adventure as concert hall and circus proprietors and managers in Aberdeen. It was necessary that premises should be taken in which to carry on the joint-adventure, and either of the joint-adventurers taking a lease of such premises, in prosecution and in the interests of the joint-adventure, would, in my opinion (in the general case), be acting within his implied mandate, and would bind the whole of the joint-adventurers for the tenant's obligation. I have said in the general case, because a question might be raised whether what had been done by the one joint-adventurer was a thing which was in the prosecution of the co-adventure or appropriate to it.

It is not necessary, however, for the deci-

sion of this case to determine any general question as to the power of one joint-adventurer to bind his co-adventurers, because I am of opinion, with Lord Rutherfurd Clark, that the case may be decided on its special circumstances. In my opinion Welding knew and approved of the premises in question being taken for the purposes of the joint-adventure, and entered into possession of the premises. He must therefore pay the rent which is now demanded.

The Court adhered.

Counsel for the Appellant—H. Johnston—G. Watt. Agent—Andrew Urquhart, S.S.C.

Counsel for the Respondent—Shaw—Abel. Agent—R. C. Gray, S.S.C.

Friday, January 12.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

GRANT *v.* HENRY.

River—Navigable but Non-tidal River—Trout Fishing.

Held in the case of a navigable but non-tidal river that a right of access to and along the bank did not confer on the public a right of angling for trout therein; that a riparian proprietor had the exclusive right to trout fishing *ex adverso* of his lands; and that the right could not be acquired by the public by use for the prescriptive period.

Mrs Kinloch Grant was proprietrix of the lands of Arndilly and Aikenway, in the counties of Elgin and Banff. These lands were bounded on the west by the river Spey. *Ex adverso* of the lands the Spey was not a tidal river. Mrs Grant's title to Arndilly included the salmon-fishings thereof in the Spey, but in her title to Aikenway the salmon-fishings were reserved to the heirs and assignees of James, Earl of Findlater and Seafield.

In October 1892 she brought an action against John Henry, who had claimed a right to fish for trout in the Spey *ex adverso* of her lands, in which she sought to have it declared (1) that she was entitled to prevent the defender from entering on or passing along that part of the *alveus* of the Spey lying between the bank in the pursuer's lands and the *medium filum* of the river, and from entering and passing along the banks of the river so far as within her lands; (2) that the pursuer had the exclusive right to fish for trout and other fish from the *alveus* of the river between the bank in her land and the *medium filum*, and from the bank *ex adverso* of her lands (excepting the right of salmon-fishing reserved under her title to Aikenway); (3) that the defender had no right to fish for trout or other fish from her side of the river, or the foresaid part of the *alveus*, or in the water flowing over the same. The summons also contained conclusions for interdict corresponding to the first and third declaratory conclusions.

The defender in answer averred, *inter alia*, "that the Spey is a public navigable river, and that any part of its *alveus* is inalienable by or from the Crown as trustee for the public. The members of the public have enjoyed its use as a public navigable river since beyond the memory of man.... The public have exercised and enjoyed the right of fishing for trout and other fish not of the salmon kind in and use otherwise of the *alveus* of the said river *ex adverso* of the pursuer's said lands from time immemorial. They have also exercised and enjoyed the right of walking on its bed and along its banks. They have in particular enjoyed and exercised from time immemorial a right of way on the south bank of the river *ex adverso* of the pursuer's lands."

The defender pleaded, *inter alia*—"(4) The public have from time immemorial enjoyed the right of fishing for trout and other fish not of the salmon kind in the *alveus* of the said river *ex adverso* of the said lands; the defender as a member of the public is entitled to exercise said right. (5) The Spey being a public navigable river, the pursuer has no exclusive rights therein, except the right of fishing for fish of the salmon kind. (6) Alternatively, prescriptive use."

On 16th February 1893 the Lord Ordinary (KYLLACHY) repelled the defences, and found, decerned, and declared, and interdicted, prohibited, and discharged in terms of the conclusions of the summons, and found the pursuer entitled to expenses.

"*Opinion.*—The defender in this case claims right, as one of the public, to fish for trout in the river Spey *ex adverso* of the pursuer's lands of Arndilly; and the present action has been brought to have it declared that he has no such right, and to have the defender interdicted from continuing to fish on the pursuer's water.

"The defender's claim is rested upon two grounds:—(1) That the river Spey is at the place in question navigable—that is to say, navigable for boats and rafts; and that being navigable, although not tidal, it is a public river, in which the public have the same rights as they have at sea; (2) that assuming the river to be private in point of property, the right of trout fishing may yet be acquired by the public by prescriptive use, in the same manner as a right of way.

"I have had a very full and careful argument on the important questions thus raised, and have been very willing to consider how far the law of Scotland leaves these questions open. In result, however, I cannot say that I have found room for any serious doubt on that subject.

"As to the first ground, it is probably true—at all events (what is enough at present) it is averred—that the river Spey, from about Kingussie downwards, is navigable, and has been long navigated by boats, currachs, rafts, and other native