Accordingly I think that the Special Case cannot be further proceeded with, and that we ought simply to negative Mrs Bruce's claim to an immediate payment of any money at all.

LORD CULLEN—I concur.

The Court pronounced this interlocutor—

"Answer the first question of law in the case in the affirmative, and the first branch of the fourth question in the negative: Find it unnecessary to answer the third question; and refuse to answer the second question, and the other branches of the fourth question: Find all the parties to the case entitled to their expenses out of the testamentary estate."

Counsel for the First Parties—Johnston, K.C.—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Fourth and Fifth Parties—Fleming, K.C.—Malcolm. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Second Party—Murray, K.C.—Macmillan. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Third and Seventh Parties—Sandeman, K.C.—Inglis. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Sixth Parties—Constable, K.C.—Jameson. Agent—R. Simson, W.S.

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*Saturday, November* 18.

## EXTRA DIVISION.

[Lord Skerrington, Ordinary.

## NEW MINING AND EXPLORING SYNDICATE, LIMITED *v.* CHALMERS & HUNTER AND OTHERS.

*Partnership—Liability—Fraud of Partner—"Course of Business" of Firm—Partnership Act* 1890 (53 *and* 54 *Vict. cap.* 39), *sec.* 11 (*b*)—*Gratuitous Benefit from Partner's Fraud.*

A, a law agent, while acting as secretary of a limited company, assumed B as his partner, under a contract of copartnership which bore that the signatories had agreed to become partners "as law agents and conveyancers," that they should "devote their whole time and attention to the business," and that "all fees, including directors' fees, salaries, and other emoluments payable to either partner individually shall be credited to the firm unless by special agreement between the partners to the contrary." About five and a half months later A & B, as a firm, were appointed secretaries to the company, and A shortly afterwards absconded, having embezzled a considerable amount of the company's money. The company having sued B for, *inter alia*, the money which A had embezzled from the date of B's assumption as a partner to the date of the firm's appointment as secretaries, it was proved that the money embezzled, which consisted of sums paid for shares in the company by members of the public, had been entered in the firm's cash-book, that the office staff had been employed to do the secretarial work, and that one letter in connection with that work had been signed by B in the firm's name. It was proved, further, that A was debtor to the firm during the whole period, that he had withdrawn for his own purposes large sums from the firm's account at the bank, where they had a large overdraft, and that he had paid the money embezzled into that account without, however, reducing the overdraft below the figure at which it stood at the commencement of the period.

*Held* (1) that the money embezzled by A had not been received by the firm in the course of its business within the meaning of section 11 (*b*) of the Partnership Act 1890, and (2) that the firm had not been gratuitously benefited by the payment of the money into its bank account, and therefore that the firm and the remaining partner were not liable.

*Observations* (*per* Lord Skerrington, Ordinary) as to the position of a firm of law agents with regard to claims under contracts of employment with individual partners prior to the formation of the partnership.

The Partnership Act 1890 (53 and 54 Vict. cap. 39), section 11 (*b*), enacts—"Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss."

The New Mining and Exploring Syndicate, Limited, Edinburgh, brought an action against the dissolved firm of Chalmers & Hunter, W.S., Edinburgh; Hugh B. Hunter, W.S., as partner thereof and as an individual; and R. M. Maclay, C.A., Glasgow, trustee on the sequestrated estates of R. S. Chalmers, the only other partner of the firm, for a sum of £1400, which they alleged had been received by Chalmers and his firm while acting in succession as the pursuers' secretaries and law agents and embezzled by Chalmers. Chalmers was appointed secretary and law agent to the pursuers on 21st May 1907, and on 1st August 1907 he assumed the defender Hugh B. Hunter as a partner under the firm name of Chalmers & Hunter. On 17th December 1907 the firm were formally appointed secretaries to the pursuers, and they acted as such till 26th February 1908, when Chalmers absconded. Chalmers' trustee did not appear to defend, but Hugh B. Hunter, and the firm of Chalmers & Hunter, lodged defences, in which, while they admitted liability for any sums embezzled from 17th December 1907, when the firm were

appointed secretaries, denied liability for any moneys embezzled prior to that date.

The pursuers pleaded, *inter alia*—"(2) The sum sued for having been embezzled or misapplied by the said Robert Scott Chalmers while a partner of the defenders Chalmers & Hunter, and in the course of the said firm's business, as condescended on, decree should be pronounced in terms of the conclusions of the summons. (4) The sums sued for received since 1st August 1907 having been received by the firm of Chalmers & Hunter in the course of its business, and having been misapplied by the partners, or one of them, while in the custody of the firm, the pursuers are entitled to decree as craved. (6) The defenders having in their custody or possession the sums belonging to the pursuers sued for, or at any rate a portion thereof, as condescended on, decree should be granted therefor as craved. (7) The firm of Chalmers & Hunter by their course of dealing having made the whole transactions had with the pursuers part of the ordinary business of the firm, the pursuers are entitled to decree as craved."

The defenders pleaded, *inter alia*—"(2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons so far as directed against these defenders, and the action as against them should be dismissed. (3) (*a*) These defenders not being responsible to the pursuers for any of the sums embezzled by R. S. Chalmers prior to 17th December 1907, as condescended on, and (*b*) these defenders having, prior to the raising of the action, admitted liability and offered to pay all sums embezzled by R. S. Chalmers during the firm's tenure of the secretaryship, these defenders are entitled to be assoilzied from the conclusions of the action. (4) In any event, these defenders, in so far as they are found personally liable, either on admission or in course of the present action, for the sum sued for, or any part thereof, are entitled to compensate such sum by the debts due by the pursuers in respect of the period subsequent to 17th December 1907, as condescended on."

The further *facts* of the case appear from the opinions of the Lord Ordinary (Skerrington) and Lord Mackenzie. On 23rd December 1910 the Lord Ordinary, after a proof, sustained the third and fourth pleas-in-law for the defenders, and assoilzied them from the conclusions of the summons.

*Opinion.*—"The pursuers are a mining company which was registered in Scotland on 17th May 1907. Three of the directors lived in Manchester, and the remaining director was a Scottish solicitor called Chalmers, who was also the solicitor and secretary of the company. He absconded about the end of February 1908, having embezzled a considerable amount of the pursuers' money. The object of the action is to make Mr Hunter, a Writer to the Signet in Edinburgh, liable for Chalmers' defalcations. Mr Hunter had the misfortune to enter into partnership with Chalmers as from 1st August 1907, while the defalcations were going on. It is common ground that Mr Hunter is a man of honour, and that he neither knew nor suspected that his partner was dishonest. The action is defended by Mr Hunter in his own name and in that of his dissolved firm of Chalmers & Hunter. The trustee on Chalmers' sequestrated estates is also cited, but does not appear as a defender.

"The moneys embezzled by Chalmers did not come into his possession in his capacity as the company's solicitor. They consisted of sums paid for shares by members of the public to whom Chalmers gave in return a receipt as secretary of the company. A secretary as such has no authority to receive money on behalf of his employer. His office has been described as a humble one—*George Whitechurch, Limited* v. *Cavanagh*, 1902, App. Cas. pp. 117 and 124; *Tendring Hundred Waterworks Company* v. *Jones*, 1903, 2 Ch. pp. 615 621. But the pursuers allowed Chalmers to handle their cash, believing no doubt, as did also Mr Hunter, that he was an honest man. The embezzlements began before the company was registered, and they amounted to more than £500 at 1st August 1907, when the partnership of Chalmers & Hunter came into existence. About £1200 more was embezzled between that date and 17th December, when, as the pursuers allege in condescendence 4, 'Messrs Chalmers & Hunter were formally appointed secretaries of the pursuers in place of the said Robert Scott Chalmers.' The minute of appointment in favour of the firm bore that it was made 'at the request of the secretary' (Chalmers). In asking for and accepting this appointment on behalf of his firm I hold that Chalmers exceeded his powers under the partnership agreement, which stated that the parties were to carry on business as law agents and conveyancers. It is no part of a solicitor's business to act as secretary or treasurer to a company. Although Chalmers acted without the authority of Mr Hunter, the latter, when he came in January 1908 to know of the appointment, ratified it and so made it binding upon the firm and himself as from its date but no earlier. It was not proved that Mr Hunter knew that the appointment was virtually as secretary and treasurer; but he has raised no question on this head, and has admitted liability for the sum of £200 which was embezzled by Chalmers in the two months during which the firm held the appointment. The only dispute is as to his liability for the money embezzled by Chalmers between 1st August and 17th December 1907.

"I hold it proved that between 21st May 1907, when Chalmers was appointed secretary, and 17th December, when the firm was appointed to that office, no agreement of any kind, either express or applied, was made between the pursuers or their directors on the one part, and either Chalmers or Mr Hunter on the other part, in regard to the secretaryship. It follows that the original appointment, which was by minute of the directors and for no defined period, remained in force until 17th

December 1907, and that until that date there was no contract between the pursuers and the firm except as regards any legal business which the former employed the firm to execute. In point of fact, however, the firm did not perform any legal business for the pursuers prior to January 1908. The pursuers' counsel pointed out that partners are agents for each other and for the firm (53 and 54 Vict., cap. 39, sec. 5), and he referred to the law as to undisclosed principals and ratification with the object of showing that the pursuers were not entitled to treat the firm as if it had made a contract with them (the pursuers) through the agency of Chalmers. But these rules of law presuppose the existence of a contract upon which they can operate. The unauthorised contract of 17th December 1907, which Chalmers purported to make on behalf of his firm, and Mr Hunter's subsequent ratification, illustrate the law as to ratification which was fully considered and explained by the House of Lords in *Keighley, Maxsted, & Company* v. *Durant*, 1901, App. Cas. 240. If the pursuers could have proved a similar contract of an earlier date professing to bind the firm, and duly ratified subsequently, they would have made some advance towards gaining their case. Again, if on or after 1st August 1907 Chalmers had made a new contract with the pursuers for his appointment as secretary without mentioning the firm, it would have been possible to argue that such contract had been entered into by him as the authorised agent of the firm who were his undisclosed principals. Such an argument, though possible, would have been obviously bad, because a contract for the personal services of one man cannot be converted by any legal subtlety into a contract for the personal services of two men. See *Bell's Trustees* v. *Christie*, 6 D. 619.

"The pursuers' counsel founded specially on two clauses in the partnership agreement, viz.—(*Seven*), 'Both partners shall devote their whole time and attention to the business' . . . (*Eleven*), 'All fees, including directors' fees, salaries, and other emoluments payable to either partner individually, shall be credited to the firm unless by special agreement between the partners to the contrary.' These clauses show that in a certain sense it was part of the business of the firm of Chalmers & Hunter that its partners should hold individual appointments and so earn profits for the firm, and that a partner attended to the firm's business when he did his duty as a director or secretary under an appointment in favour of himself as an individual. In no proper sense, however, can it be said that a firm's business includes matters as to which the firm has no right and no duty to concern itself.

"The proof did not, in my opinion, add anything material so far as regards the question of Mr Hunter's liability. It was proved that the clerical work connected with Chalmers' individual appointments was done by the firm's staff, and that in his partner's absence Mr Hunter lent a hand to do what was necessary. It was also suggested, though not clearly proved, that a considerable proportion of the firm's income was derived from emoluments payable to Chalmers as an individual. The volume of this kind of business and the way in which the necessary clerical assistance was provided, are matters which do not affect the argument. One might figure an extreme case where two pluralists who had no professional practice agreed to divide as partners the emoluments of their several individual offices and to provide at joint expense suitable house-room and clerks to the satisfaction of the various employers. Seeing that such a firm could not sue any of the employers for salary, it is difficult to understand why it should be supposed to owe these employers any duty except the ordinary duty of honesty which it owed to the whole world. Another point much insisted on was the firm's mode of book-keeping. Their cash-book included payments and receipts on behalf of the pursuers, and their ledger included an account in name of the pursuers. Even if Mr Hunter had known and approved of this mode of book-keeping, the fact would not have affected the legal relation of the firm to the pursuers except if and in so far as Mr Hunter had notice from the entries in the firm's books of his partner's breach of trust. Technically it was incorrect that any of the pursuers' transactions should be recorded in the firm's books, but it was natural that Chalmers should borrow from his firm what he needed for petty cash advances on behalf of the pursuers. Of course it was inexcusable on his part to pay the pursuers' money into the firm's overdrawn bank account, and one wonders why he took the trouble to record such transactions. But it was not suggested that Mr Hunter saw these entries and so had notice of the breach of trust. It was said that he was negligent in not supervising his partner's book keeping. I do not agree. He was entitled to rely on Chalmers so long as he believed him to be honest and competent. In any case Mr Hunter and his firm owed no duty to the pursuers as to how they kept their books.

"For the foregoing reason I hold that the firm and Mr Hunter incurred no liability to the pursuers under any section of the Partnership Act. Chalmers' wrongful acts were not committed while he was 'acting in the ordinary course of the business of the firm or with the authority of his copartners,' section 10. Nor was the pursuers' money received by Chalmers when 'acting within the scope of his apparent authority,' section 11 (*a*). Nor did the firm itself receive the money 'in the course of its business,' section 11 (*b*). Lastly, Mr Hunter had no notice of the breach of trust, section 13 (1), and the money cannot now be followed and recovered as it is not in the possession and control of the firm, section 13 (2). Subject to the provisos (1) and (2), section 13 is clear to the effect that the employment by one partner of trust-property in the business of the firm does not create any liability against the other partners. 'If a partner,

being a trustee, improperly employs trust-property in the business or on account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein.' In the 7th edition of his book on Partnership (p. 192) Lord Lindley states that this section has not introduced any change in the previous law, and he quotes two cases where trust-money having been employed in paying partnership debts, or to other partnership purposes, the amount so applied was held to be not provable against the 'joint estate.' Though a firm in Scotland is a separate *persona*, I do not suppose that our law was different. I do not, however, interpret the statute as excluding liability on the part of the firm and its innocent partners in a case where it could be proved that the firm and partners had been actually enriched by the dishonesty of a partner who had misapplied trust money in paying off the firm's liabilities. Such a case is unlikely to occur in real life. The first victims of a dishonest partner are his firm and copartners, and Mr Hunter is no exception to the general rule. If, however, such an exceptional case should occur, a remedy would be found in what Stair (i, 6, 33) calls 'that common ground of equity, "*Nemo debet ex alieno damno lucrari.*"' The same rule of equity was stated in other words by Lord Chancellor Campbell in an English case cited by Lord Shand in his opinion in *Clydesdale Bank* v. *Paul*, 1877, 4 R. 626, 628—'I consider it to be an established principle that a person cannot avail himself of what has been obtained by the fraud of another unless he is not only innocent of the fraud, but has given some valuable consideration.' This equitable rule has no application to the facts of the present case. Although about £925 of the pursuers' money—which was trust money in the hands of their agent Chalmers—was paid by him into the firm's bank account between 1st August and 17th December 1907,* and was never repaid to the pursuers, the firm and Mr Hunter are not a whit the richer, but, on the contrary, are much the poorer for Chalmers' frauds. The pursuers' counsel founded on the case of *Clydesdale Bank* v. *Paul*, already cited, and in particular on Lord Shand's opinion. The opinions of the Lord Ordinary (Rutherfurd Clark) and of Lord President Inglis (in which Lord Deas and Lord Mure concurred) were based on a rule of the law of agency to the effect that if an agent commits a fraud 'while doing his business of agent,' the principal is liable at any rate to the extent to which he has benefited. In other words, assuming that the principal is entitled to

* *Note.*—The following excerpt from the bank pass-book shows the state of the firm's account during the period in question. The sums lodged printed in large figures, are moneys embezzled by Chalmers, mostly made up of pursuers' moneys :—

| 1907. | Brought forward, | £506 | 19 | 1 | 1907. | Brought forward, | £3086 | 18 | 4 | *Overdraft.* £2579 19 3 |
|---|---|---|---|---|---|---|---|---|---|---|
| Novr. 2. | To lodged, | 45 | 0 | 0 | Novr. 2. | By cheque, | 27 | 2 | 8 | |
| | | | | | | do. | 6 | 4 | 8 | |
| | | | | | 4. | do. | 2 | 9 | 4 | |
| | | | | | | do. | 4 | 3 | 4 | |
| | | | | | 5. | do. | 16 | 13 | 4 | |
| | | | | | | do. | 10 | 0 | 0 | 2601 12 7 |
| 7. | do. | 300 | 0 | 0 | 7. | do. | 502 | 6 | 0 | |
| | | | | | | do. | 4 | 4 | 0 | |
| | | | | | | do. | 3 | 3 | 0 | |
| | | | | | | do. | 9 | 19 | 6 | |
| | | | | | | do. | 33 | 9 | 9 | |
| | | | | | | do. | 80 | 0 | 0 | 2934 14 10 |
| 8. | do. | 350 | 0 | 0 | 8. | do. | 60 | 0 | 0 | |
| 9. | do. | 150 | 0 | 0 | | do. | 25 | 0 | 0 | |
| 11. | do. | 1 | 4 | 8 | | do. | 7 | 10 | 0 | |
| | | | | | | do. | 7 | 10 | 0 | |
| | | | | | | do. | 43 | 10 | 5 | |
| | | | | | | do. | 5 | 16 | 8 | 2734 1 11 |
| 13. | do. | 175 | 0 | 0 | 13. | do. | 150 | 0 | 0 | |
| | | | | | | do. | 80 | 0 | 0 | |
| 15. | do. | 16 | 11 | 3 | | do. | 8 | 10 | 0 | 2646 7 3 |
| 16. | do. | 7 | 3 | 6 | 16. | do. | 30 | 15 | 0 | |
| | | | | | | do. | 80 | 0 | 0 | |
| | | | | | 20. | do. | 5 | 0 | 0 | |
| 21. | do. | 12 | 10 | 0 | 22. | do. | 80 | 0 | 0 | |
| | | | | | 27. | do. | 12 | 10 | 0 | |
| | | | | | 28. | do. | 4 | 4 | 0 | |
| | | | | | 30. | do. | 10 | 0 | 0 | |
| Decr. 4. | do. | 30 | 0 | 0 | Decr. 4. | do. | 4 | 3 | 4 | |
| | | | | | | do. | 17 | 10 | 0 | |
| | | | | | 6. | do. | 2 | 2 | 0 | |
| | | | | | | do. | 3 | 0 | 0 | |
| | | | | | 7. | do. | 2 | 8 | 6 | 2831 15 4 |
| 9. | do. | 250 | 0 | 0 | 9. | do. | 30 | 0 | 0 | 2611 15 4 |

repudiate the transaction (which may not always be the case) he must repudiate it as a whole, and he cannot at the same time refuse to return the consideration received by his agent from the third party. In the present case Chalmers' fraudulent acts were not done by him in his capacity as agent for the firm, and accordingly the firm is not called upon to elect whether it shall repudiate or ratify his actings. The ground of judgment in *Clydesdale Bank* v. *Paul* is really covered in the case of a firm by sections 10 and 11 of the Act. A difficulty arises from Lord Shand's reference to the general rule of equity. With the greatest possible respect I doubt whether the judgment can be supported on that ground. Further, it humbly appears to me that the rule of agency law founded on by the majority of the Judges is different, both in principle and in practical working, from the general rule of equity invoked by Lord Shand.

"I have already said that Chalmers' frauds did not arise out of his or the firm's employment as solicitor. I assume that the firm did execute various pieces of legal business for the pursuers, and that if the whole facts were examined the inference would be that the pursuers employed the firm and not Chalmers as an individual. In the course of the argument a good deal was said as to the effect of the agreement of copartnership upon Chalmers' former clients. For the sake of clearness I may state my views, though the question does not really arise. (1) As regards legal work which Chalmers was employed to do before the partnership began, and as to which there was no new contract, express or implied, either with the firm or any partner, I should have thought it clear that the firm could neither sue nor be sued, even though the work was in fact done by them. My only difficulty arises from the contrary opinion of Lord Kyllachy in *Tully* v. *Ingram*, 1891, 19 R. 65, 70, 29 S. L. R. 78. In the Inner House the Lord President pointedly reserved his opinion on this question (pp. 73, 74). (2) As regards clients of Chalmers who knew that he had assumed a partner, and who employed him without mention of the firm, it would be a jury question whether the contract was with him as an individual or as agent for the firm. Generally, I think the inference would be that he acted for his firm, but if the circumstances pointed to an individual employment, say, as permanent solicitor to a corporation, the inference might be the other way. *The British Homes Assurance Corporation, Limited*, v. *Paterson*, 1902, 2 Ch. 404, is an example of a case where a client was held to have employed a solicitor individually, and not his firm. (3) As regards clients who employed Chalmers without knowing of the partnership, the firm might sue or be sued as Chalmers' undisclosed principal, if that exceptional rule of law is applicable to so personal a contract as the employment of a solicitor. I express no opinion as to this."

[*His Lordship then dealt with a point which is not reported.*]

The pursuers reclaimed, and argued—(1) The defenders were liable under section 11 (*b*) of the Partnership Act 1890 (53 and 54 Vict. cap. 39). The money embezzled by Chalmers had been received by him in the course of the firm's business. The partnership agreement provided that each partner should devote his whole time to the firm's business and that emoluments payable to the partners individually should be credited to the firm unless by special agreement to the contrary. It was clear, therefore, that the secretaryship was part of the firm's business, otherwise Chalmers would not have been devoting his whole time to the business. This was shown by the course of dealings of the partners. (1) All moneys received by Chalmers were entered in the firm's cash book; (2) certain of them were put into the bank account of the firm; (3) the office staff were servants of both partners; (4) on one occasion Hunter had signed the firm's name as secretaries of the company. When a firm had conducted its business in this way an outsider had at least an option of making the other partner liable for what he must or ought to have been cognisant of—*Willet* v. *Chambers*, 1778, 2 Cowp. 814, at p. 816, *per* Lord Mansfield; *Rhodes* v. *Moules*, [1895] 1 Ch. 236, at p. 242, *per* Lord Herschell; *Cleather* v. *Twisden*, 1885, 28 Ch. D. 340, at p. 349, *per* Bowen, L.J.; Bell's Commentaries (7th ed.) vol. ii, 506; *Sandilands* v. *Marsh*, 1819, 2 Barn. & Ald. 673, at p. 678, *per* Abbot, C.J.; Lindley on Partnership (7th ed.) 185. A law agency or secretaryship was not so personal a service as to make it impossible that it should be performed by a firm. The case of *Keighley, Maxsted, & Company* v. *Durant*, [1901] A.C. 240, cited by defenders, was not in point, because it referred to a particular contract—a sale made without the authority and not in the name of the principal, and which could not be subsequently ratified, while in the present case there was a continuing transaction which was capable of ratification, and it was competent for the company when it found the duties of the secretary performed by the firm to turn round and accept the firm. (2) The defenders were liable in any event under the common law principle that one person shall not be benefited gratuitously by the fraud of another. The firm had benefited by Chalmers' misappropriation, because the money had been paid into the firm's bank account. There was an overdraft on this account, and that was conclusive, because the moment money was paid into the account the indebtedness was *pro tanto* diminished. It was no answer that money had at the same time been paid out by the fraudulent partner for his own use—*Barwick* v. *English Joint Stock Bank*, 1867, L.R., 2 Ex. 259; *Clydesdale Bank* v. *Paul*, March 8, 1877, 4 R. 626, 14 S.L.R. 403; *Reid* v. *Rigby*, [1894] 2 Q.B. 40; *Jacobs* v. *Morris*, [1901] 1 Ch. 261. In the last case the test was whether the money had been in the

bank sufficiently long to give the other partner an opportunity of knowing that it was there. Where there was a constant practice of the kind, it must be presumed to be in the knowledge of the other partner.

Argued for the defenders—(1) Defenders as innocent parties could not be made liable under the statute for the defalcations of the defaulting partner unless pursuers proved that the money came into the hands of the partner as such and in the course of the firm's business. In point of fact no law business was done by defenders' firm for pursuers, and the secretaryship of the defaulting partner did not make the firm liable even under the partnership agreement—*Mabon* v. *Christie*, Feb. 8, 1844, 6 D. 619; Lindley on Partnership (7th ed.), pp. 187 and 188, and cases there cited; *Keighley, Maxsted, & Company* v. *Durant* (*cit. sup.*); *Lloyd* v. *Grace, Smith, & Company*, [1911] 2 K.B. 489. Chalmers was not entitled to receive money for pursuers, and if he embezzled it he embezzled it as secretary and not as partner. Defenders were law agents and not bankers, and it was no part of a solicitor's business to act as bankers—*George Whitechurch, Limited*, v. *Cavanagh*, [1902] A.C. 117; *Tendring Hundred Waterworks Company* v. *Jones*, [1903] 2 Ch. 615; Lindley on Partnership (7th ed.), 190 and 191, and cases there cited; *Harman* v. *Johnson*, 1853, 2 El. and Bl. 61; *Sims* v. *Brutton*, 1850, 5 Ex. 802; *Cleather* v. *Twisden*, *cit. sup.* *Jacobs* v. *Morris*, *cit. sup.*, and [1902] 1 Ch. 816, was really in defenders' favour, and *Clydesdale Bank* v. *Paul*, *cit. sup.*, was different, because the stockbroker's clerk in that case had implied power which bound his principal. (2) The Partnership Act 1890 was really a complete code, but if pursuers had a case at common law it was no better. The *onus* here was on the pursuers, and they must prove gratuitous benefit. The mere fact that the money had been paid into the firm's bank account was not enough, unless it was proved that the money remained there. Pursuers' argument would apply equally to cases where money was put in the firm's safe for the night. It was necessary to look at the transaction as a whole, and so viewed it would be seen that the firm had derived no benefit from the transaction—*Sinclair, Moorhead, & Company* v. *Wallace & Company*, June 4, 1880, 7 R. 874, 17 S.L.R. 604. Pursuers' own remissness was responsible for the defalcations, and further, it was not proved that pursuers knew anything about the fraud.

At advising—

LORD MACKENZIE—The purpose of this action is to make the defender liable for the defalcations of his late partner Robert Scott Chalmers, S.S.C., who acted as secretary of the pursuers—The New Mining and Exploring Syndicate, Limited. It is common ground that the defender was entirely ignorant of his partner's dishonesty. The question to be decided in this case is which of two innocent parties is to suffer for Chalmers' fraud.

The pursuers seek to recover from the defender certain payments which are traced into the firm's bank account, and this they do upon two grounds, (1) under section 11 (*b*) of the Partnership Act 1890, . . . [*quotes, v. sup.*] . . .; and (2) at common law, on the ground that no one can retain a gratuitous benefit which he has obtained through the fraud of another.

Three periods were dealt with in argument, the first being from 17th May to 1st August 1907. It was stated that during these months £525 of the company's money was misappropriated by Chalmers whilst secretary of the company. Mr Hunter did not, however, enter into partnership with Chalmers until the 1st of August 1907, and pursuers' counsel admitted that no claim could be made against the defender prior to that date. The real question in the case relates to the second period, from 1st August to 17th December 1907. Hunter and Chalmers entered into partnership as law agents and conveyancers on 1st August 1907. During the period from that date to 17th December 1907 Chalmers was secretary of the company. It is alleged that £925 of the pursuers' money was during this period paid by Chalmers into the firm's bank account, that he paid out for behoof of the pursuers' company only £175, and that he embezzled the balance of £750. The defender is sought to be made liable for this sum. The third period was from 17th December 1907 to the end of February 1908, when Chalmers absconded. During this time the firm acted as secretaries to the company. The defender admits his liability for a sum of £200, but counterclaims for sums which *in cumulo* amount to more than this. These counterclaims have been given effect to by the Lord Ordinary.

Confining attention to the second period from 1st August to 17th December, the claim by the pursuers under the Partnership Act 1890, section 11 (*b*), depends upon whether the firm received the money "in the course of its business." Now during this period it was Mr Chalmers who was secretary of the company, not the firm. The pursuers' counsel laid great stress upon the terms of the agreement of copartnership between the defender and Chalmers, particularly the provisions (7) "both parties shall devote their whole time and attention to the business . . ." and (11) "all fees, including directors' fees, salaries, and other emoluments payable to either partner individually, shall be credited to the firm unless by special agreement between the partners to the contrary . . ." It was argued that a large part of the firm's business consisted of work in connection with companies; that the directors of the pursuers' company were aware of the assumption of the defender as a partner by Chalmers; that the partners treated the pursuers' business as part of that conducted by the firm; that this was evidenced by the way the books were kept; and that consequently the company could elect even after the event to hold the firm liable for what their secretary had done.

I am unable to assent to this view. Hunter and Chalmers agreed to become partners "as law agents and conveyancers" according to the terms of the copartnership agreement. The firm were not secretaries of the company, nor indeed were they its law agents. Chalmers was the secretary giving his personal service. There is only one item of evidence put forward against this, and that is a letter dated 27th August 1907, signed "Chalmers & Hunter, secretaries." The signature of the firm is in the handwriting of the defender Mr Hunter, but the letter is a typewritten one, and the signature "Chalmers & Hunter," might well have been appended *per incuriam*.

So far as the £925 is stated to have consisted of cheques, these were made payable to Chalmers as an individual. As the Lord Ordinary points out in his reference to the case of *Bell's Trustees* v. *Christie*, 6 D. 619, it is impossible in the circumstances to hold that the contract by which Chalmers gave his personal service to the company became a contract under which the firm was bound. I am accordingly of opinion that the case sought to be made against the defender under the Partnership Act 1890 fails. It was admitted in argument that if liability could not be established against the firm under section 11 (*b*), no case could be made under any of the other sections.

The case against the defender at common law creates more difficulty. An argument was submitted by the Dean of Faculty, on behalf of the defender, that sections 10 and 11 of the Partnership Act 1890 contained all the grounds upon which one partner could be made liable for the default of another. According to this contention the defaulter must have received the money in his capacity as agent. It was argued that the case of the *Clydesdale Bank* v. *Paul*, 4 R. 626, did not go further than this. It is no doubt quite true that, if it is sought to make a principal liable as such, agency must be established. The common law ground of liability, however, rests upon a much wider basis. The Lord Ordinary quotes the passage from Stair (i, 6, 33), in which it is described as "that common ground of equity—"*Nemo debet ex alieno damno lucrari.*" This principle is independent of the question of agency. The Lord Ordinary refers to Lord Shand's dicta in *Paul's* case, and expresses a doubt whether the judgment there could be supported on the general rule of equity. It is not necessary to discuss that question here. No doubt is expressed in the Lord Ordinary's opinion as to the existence of such a general rule of equity, his opinion being that the equitable rule has no application to the facts of the present case. It is here that, in my opinion, the difficulty of the case lies, although in the conclusion I arrive at the same result as the Lord Ordinary. The question is whether the firm took a gratuitous benefit. It was argued for the defender that consideration was given by the firm because at the time the payments in were made by Chalmers he was the firm's debtor, and that accordingly it must be regarded that he was merely paying his debt. The answer to this, in my opinion, is that in point of fact he never did pay his debt. It is no doubt of importance (as will be adverted to later on) that he was debtor to the firm during the period in question, but I cannot see evidence in the case to entitle me to take the view that he paid his debt to the firm and obtained a discharge for the amount.

The question, in my opinion, really depends on the view taken of the firm's bank account. I should say first of all that I think it sufficiently established that there are five credit entries in that account which represent money of the pursuers' company. This is instructed by the evidence and minute of admissions, which I need not go into in detail. The sums are £300 paid in in notes on 7th November 1907 in respect of the allotments of shares in the pursuers' company to the brothers Reid; £200, part of a cheque of £350 in favour of Chalmers paid in on 8th November in respect of an allotment of shares to Dr Cramer; £150 by cheque to Chalmers paid in on 9th November in respect of an allotment of shares to Mr Barbour; £25, part of a cheque for £175 to Chalmers, paid in on 13th November in respect of shares allotted to Mr George Campbell; and £250 paid by cheque to Chalmers on 9th December 1907 in respect of shares allotted to Mr James Donaldson.

From one point of view it may no doubt be represented that the firm took a gratuitous benefit from these payments to credit of its bank account. At the date of the first of the payments the account was overdrawn to the extent of £2601, 12s. 7d., and the argument is that the amount of the overdraft was extinguished *pro tanto* by the payment in of the £300. If, however, the debit side of the account is examined it is found that at the close of the banking operations on the 7th of November, the day when the £300 was paid in, so far from the overdraft being diminished, it was increased to the figure of £2934, 14s. 10d. The pursuers, however, say, We have charged you, the firm, with receipt of £300 of the company's money. You do not discharge yourselves of the receipt of that money by merely pointing to the fact that cheques were drawn the same day which *in cumulo* are much more than sufficient to draw out the amount paid in. This in the ordinary case would appear to me to be a formidable argument. I have come, however, to be of opinion that it is sufficiently met by the evidence led for the defender. It is conclusively proved that Chalmers drew out of the firm's bank account for other than firm purposes sums amounting to £1840. It is also proved that throughout the whole of the period in question he was in debt to the firm for upwards of £1000. There is a want of specification about both these items of evidence. When, however, it is said that Chalmers was throughout a debtor to the firm for the amount stated, I think it may fairly be held to mean that he had drawn

out by upwards of £1000 more than he had put in, including in his payments to credit the amount of the pursuers' money. This being the case, it is impossible, in my opinion, to say that the firm took a gratuitous benefit to the extent of the £300. If the succeeding payments are scrutinised in the same way the same considerations I think apply to them. As already stated, the £300 was paid on the 7th of November, and the last of the payments—the sum of £250—on the 9th of December. The amounts of the overdraft are during the whole of this time always in excess of the sum of £2601, 12s. 7d. with which the period commences. The amount of the overdraft on the 9th of December is £2611, 16s. 4d.

An *onus* is put on the defender by the pursuers when they prove that money belonging to them was paid into the bank account, the *onus* being to show that the firm was not enriched thereby. On an examination of the bank account taken with the whole evidence in the case I have come to be of opinion, though not without difficulty, that this *onus* has been discharged by the defender. The facts of the case make it like one in which a partner of a firm puts cash into the firm's safe for a limited period which he takes out again. The fact that the money has been deposited in the safe does not *per se* benefit the firm.

I should notice another way of putting the case against the defender, which is this. At the close of the day on 15th July 1908 he squared off the bank account by paying in the sum of £224, 5s. 7d. It was argued that but for the five credit entries I have above referred to the amount he would have had to pay would have been swelled by the sum of £925. I am not satisfied of this. It is not established that the bank would have allowed the overdraft to mount up, and it may fairly be said that the sums which were allowed to be drawn out were to a certain extent in respect of the sums which were paid in. The defenders' answer was that the amount of the overdraft was limited by the value of the securities deposited. Here the proof is deficient, as I regret to say it is on other points in the case. It is not proved what the value of the securities deposited was, nor what limit the bank put upon the amount of the overdraft. For the reasons, however, previously stated, I think there is sufficient in the case to entitle the defender to escape liability.

It was argued for the defender that but for the remissness of the directors of the pursuers' company in discharging their duties there would have been no loss, but for this there is no record.

[*His Lordship here dealt with a point not reported.*]

I am of opinion that the interlocutor reclaimed against should be adhered to.

LORD DUNDAS and LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuers and Reclaimers—Constable, K.C.—D. Anderson. Agents—Cowan & Stewart, W.S.

Counsel for Defenders and Respondents—D.-F. Dickson, K.C.—Wilson. Agents—Davidson & Syme, W.S.

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*Friday, November 24.*

## FIRST DIVISION.

[Lord President and a Jury.

## SLAVIN *v.* TRAIN & TAYLOR.

*Master and Servant—Workmen's Compensation Act* 1906 (6 *Edw. VII, c.* 58), *sec.* 1 (4)—*Unsuccessful Action against Employer—Bill of Exceptions—Motion for Assessment of Compensation—Whether Motion Timeously Made—Process.*

Where a workman who has unsuccessfully sued his employers for damages desires to have compensation for his injury assessed under the Workmen's Compensation Act 1906, the motion for assessment must be made before the verdict is applied, and if not so made it will be too late

A workman brought an action in the Court of Session for damages on account of injuries sustained by him while in the defender's employment. The jury having found for the defenders, a bill of exceptions was taken, which, however, was eventually refused. The defenders having moved the Court to apply the verdict, the pursuers craved their Lordships to assess the compensation to which the pursuer was entitled under the Workmen's Compensation Act 1906.

*Held* (after consultation with the Second Division) that the motion for assessment was timeously made.

*Observation* (*per* the Lord President) as to the subsequent procedure in cases where such a motion is made.

The Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), sec. 1, sub-sec. (4), enacts—"If, within the time hereinafter in the Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. . ."

Peter Slavin, labourer, Trongate, Glasgow, brought an action against Train & Taylor contractors, Rutherglen, for payment of £500 as damages for personal injury sustained by him while in the