mend him for doing so; but here we are only to look to the legality of his conduct.

He appears to me to have brought his action on legal grounds, but to have failed in proving any damage, you should therefore find for him; but if you agree with me in thinking that he has failed in proving damage, you should find nominal damages, and may find one farthing or a shilling. This does not decide the expense, as that is a matter for the Court; but you ought to do your duty, and to presume that the Court will do what is right as to expenses.

Verdict—For the pursuer, damages 1s.

Donald, for the Pursuer.
Cowan, for the Defender.
(Agents, *James Gemmel*, W. S., and *Thomas Gairdner*, W. S.)

PRESENT,

LORD CHIEF COMMISSIONER.

TAYLOR & Co. *v.* SIR WILLIAM FORBES & Co.

1827. Nov. 21.

THIS was an action of damages for breach of contract.

Finding for the defenders on an issue whether the trustee and

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creditors of a bankrupt undertook a contract, and failed in executing it.

DEFENCE.—The whole creditors ought to have been called. The sequestration was closed without any claim being made by the pursuers. The trustee did not violate any contract with the pursuers. He was not authorized by the creditors to enter into new contracts.

ISSUE.

"It being admitted that the estate of Anthony Henry Gutzmer, iron-founder, Leith Walk, near Edinburgh, was, on the 15th day of June 1824, sequestrated by the Court of Session, in terms of the statute, and that the defenders claimed as creditors on the said sequestrated estate:

"1. Whether, after the said sequestration, the iron-foundry and other business, previously carried on by the said Anthony Henry Gutzmer, were continued by the trustee and creditors on the said sequestrated estate; and whether, on or about the beginning of September 1824, the said trustee and creditors undertook and agreed to finish to the pursuers three vats of good and sufficient workmanship, and to deliver the same early in the month of October 1824, or within a reasonable time; and whether the said defenders failed to perform their said agree-

"ment, to the loss and damage of the pur-
"suers?

2. Whether the defenders, &c. agreed to furnish three soap-pan bottoms?

Moncreiff, D. F. for the pursuers, said, The creditors authorized the trustee to carry on the work; and he engaged to execute the order given by the pursuers, who have suffered great damage from the delay; and when the pans were put up they were insufficient.

When a witness was called,

Skene, for the defenders.—He is, and at the time of the order was, a partner of the pursuers. He does not receive a salary, but a share of profits; and to free himself from the character of partner, he must advertise out and send special notice to the customers.

A clerk who receives a share of profit of his master's business an inadmissible witness.

Moncreiff, D. F.—The argument proceeds on a wrong assumption both of law and fact. The company was originally John Taylor and Company; and after the sequestration of John, William advertises that he is to carry on the trade, and the change of firm is a sufficient notice. The witness may be liable to the public as a partner; but he swears that he is not a partner. He is a clerk paid by a per centage.

2 Bell's Com. 533.

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Jeffrey.—He is a partner; and if not, he has still a direct interest in the result of the cause. No authority has been given for the doctrine, that a clerk with a per centage is not a partner; but in this case the entry in the books shows that what he draws is a share of profit and loss; he has therefore a direct interest to increase the profit.

LORD CHIEF COMMISSIONER.—In almost all points of view this is a delicate question; and it is a most anxious situation in which a judge is placed when called on to reject evidence.

I do not wish to go minutely into the question, whether this person is a partner, as there is sufficient evidence on the other view to decide the case? The witness has stated himself to be a clerk, not a partner; but his admissibility does not depend on his opinion of his situation. That must be guided by what in law is his situation. His opinion of his interest only goes to affect his credit. In what situation, then, does he stand as to his interest, to make a gain or avoid a loss? Suppose he establishes a gain, then he is entitled to a share; and though the balance has been struck, and he has a discharge to save him from loss, still would not he be liable for the expenses to the pursuers? Is not this an interest which

law has created, and of which he cannot divest himself?—We reject the witness.

Jeffrey, for the defenders.—The pursuers have completely failed. The only authority given by the creditors was to finish going contracts. The bankrupt, as an individual, entered into this agreement. The pursuers failed to prove that the defenders contracted with them,—that a contract in the terms specified was entered into and broken,—or that they suffered any loss; besides, he ought to have called all the creditors, though even, if they had been called, it is too late after the composition with the bankrupt.

LORD CHIEF COMMISSIONER.—This is an action brought against a few of the creditors of a bankrupt, and not against the bankrupt himself; and though I at first thought it might have been decided by the learned Judge who sent it, I am now satisfied that there might have been facts fixing this contract on the defenders, and binding them individually.

If the contract is fixed against them, then the questions are, whether the work was insufficient; whether the damage is proved; whether there was an undertaking, and a breach of

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that undertaking? It is admitted that the defenders were creditors; and the first question is, whether the work was continued by the creditors? and it is clear on the evidence, that the authority given by the creditors to carry on the work was only to complete the contracts already entered into; and the question in the issue is, whether the trustee *and* creditors undertook? The trustee and creditors must concur, in order to bind the creditors in any new contract; and the purpose of sending this case to trial was to ascertain whether there was any thing binding the creditors. I cannot state to you that a trustee on a sequestrated estate is agent for the creditors, unless he has special authority from them; and it appears that even he at first disapproved of this transaction, but afterwards did acts confirming it. These might possibly be binding on him; but in this he was not acting as trustee; nor is there any act by the creditors undertaking the obligation; and unless both they and the trustee undertook and agreed, the rest is immaterial.

The bankrupt swore that there was no contract as to time; you must therefore consider the state of the trade, and of the workmen, who were then in a state of insubordination, in estimating what is a reasonable time. You will

also consider the complaint made, that no written answers were sent to the pursuers' letters. You must hold that the verbal answers sworn to were those given; and you must consider, whether, in the circumstances, the letters were written with a view to an action.

If you differ from me in the view I take of the case, you must then consider the damages; and in such a case you were entitled to proof of specific damage, but here there is none such. There is no doubt, however, that a trader who is kept out of the means of carrying on his trade must suffer damage.

Verdict—For the defenders on both issues.

Moncrieff, D. F. and *More,* for the Pursuers.
Jeffrey and *Skene,* for the Defenders.
(Agents, *G. M'Callum,* W. S. *Gibson* and *Hector,* W. S.)

Dec. 13, 1827. Circumstances in which the expense of discussing a preliminary defence was not given.

When expenses were given, an application was made by the pursuer for the expense of discussing the preliminary defence.

LORD CHIEF COMMISSIONER.—In this case a debate was necessary, independent of the preliminary defence; and as the defenders have been successful on the merits, we dismiss the motion.