18th Feb. 1800 generally; and to find from which of the defenders, and in respect of what particular sums, as to each of them, the pursuers, and which of them, are entitled to a proportional relief, and by reason of what acts each such defender became personally liable and in what sums the defenders are respectively personally liable to contribute to such relief; and it is further ordered and adjudged, that the interlocutor of the Lord Ordinary, of the 14th May 1800 be, and the same is hereby reversed.

For Appellants, *Wm. Adam, Wm. Alexander, Matthew Ross, Jas. Abercromby.*

For Respondents, *T. Erskine, Henry Erskine, John Clerk.*

NOTE.—Unreported in the Court of Session. Under the remit, *vide* Dow, vol. iv. p. 341, for what appears to have been done. The Road Act is the 32 Geo. III. c. 120, extended by 35 Geo. III. c. 150, (Bathgate and Airdrie Line.) The English case referred to by the Lord Chancellor was Horsely *v.* Bell, Ambler's Reports, p. 770, not "Forster *v.* Dell," as mistaken by the short-hand writer.

THOMAS GRAHAM of Calcutta, . . *Appellant;*

ISABEL and ANN HENDERSON, Sisters and Executrixes of the late COLONEL JOHN HENDERSON of the East India Company's Service, } *Respondents.*

House of Lords, 20th December 1802.

COPARTNERSHIP—LIABILITY—POWER OF ATTORNEY—RIGHT OF DELEGATION—JURISDICTION—FOREIGN.—A copartnership was empowered, as attorneys, to invest their constituent's funds in certain securities, and remit the interest. They did so, but, several years afterwards, the company underwent a change, by some of the old partners retiring, which changes were intimated to the constituent. The appellant was one of those who retired from the old company. The new company continued to correspond with and act for the party; but there was no renewal of the power or approval of their actings. They became bankrupt, with his securities and funds in their hands. In an action against the appellant to make good the loss; held, in the special circumstances, that he was liable, and that the Court had jurisdiction in the question.

Lieutenant Colonel Henderson, on retiring from India, committed the charge and management of his affairs in that country, to the house of Graham, Crommelin, and Moubray, of which the appellant was a partner; and, for that purpose, left with them, of this date, a power of attorney; and also, Jan. 22, 1787.

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of even date, a letter of instructions in regard to the business committed to them, which generally was to recover debts and funds belonging to the Colonel in India, to invest the money, when received, in securities of a certain species, and to make him remittances from the interest of all his stock and funds.

In 1787 Mr. Crommelin gave up his share in this concern in favour of Robert Graham, which change in the firm was specially notified by them: and that the new firm was to be conducted under the firm of Grahams and Moubray. This new company continued to manage and transact Colonel Henderson's business. They made up his accounts at the end of the year, transmitted them to him, and also transmitted the £500 of aggregate interest contained in his original letter of instructions. Afterwards William Skirrow was assumed as a partner, which was also intimated to Colonel Henderson; and that the firm would continue under the name of Grahams, Moubray, and Company, to carry on the business.

Thereafter another change took place in the copartnership, by the appellant Thomas Graham being obliged, from his duty as a revenue comptroller, to leave the concern. On this occasion due notice was inserted to all and sundry, in
Nov. 1, 1790. the Calcutta Gazette; and they also, of same date, wrote a letter to Colonel Henderson, with a copy of this advertisement, as well as a circular, to all those who did business with the company. The firm was thereafter carried on by Graham, Moubray and Co.

Colonel Henderson, it was proved, received the letters intimating the changes of the concern. On the last occasion, he wrote Graham, Moubray and Co. respecting a purchase of a pipe of Madeira, and in March 1791 they wrote him with the usual remittance of £500; and with this account, a list of his India Company's securities, in which the whole of the Colonel's funds were invested, except the balance of 413 rupees, was sent and annexed to this letter.

The Colonel did not order any thing in regard to the management of his affairs, further than he had done by his original power of attorney and letter of instructions. He did not homologate or concur in the handing over the management of his affairs, or his property and funds, to the new company, although he corresponded with them in regard to them.

Messrs. Graham, Moubray and Co. became insolvent, with Colonel Henderson's funds in their hands, and the individual

partners retired from Calcutta to the Danish settlement in Serampore, to avoid diligence.

During Colonel Henderson's life, he contemplated making Graham, the appellant, and Crommelin (who had been of the original and intermediate copartnerships, but who had retired in manner above represented) liable for the debt, as if they had been partners of the last mentioned company; but he afterwards desisted from so doing. The claim was, after his death, insisted in by his executors, the respondents, who brought the present action before the Court of Session against Graham, who then resided in Calcutta, but who had an heritable estate in Scotland—the summons being executed against him as furth of Scotland, and also against George Graham, his attorney in Scotland, concluding for payment of £4005, being the value of 35,486 rupees, or delivery of the securities above specified.

Defences were lodged by the appellant's attorney, stating preliminary defences: 1. That *ex facie* the summons itself, the action ought to have been brought in India. 2. That all parties having interest were not called.

The Lord Ordinary repelled the preliminary defences, and June 10, 1797.
ordained the defender to lodge peremptory defences. On Nov. 2, 1797.
representation he adhered. And, on further representation,
it was again adhered to. June 23, 1798.

Defences on the merits were then given in, setting forth, that the appellant was no partner of the company by whom the debt was due. That the original partnership was dissolved by his retirement from the concern—That this was specially notified to Colonel Henderson, and to the other dealers in business with the concern, by circular; and to the public generally, by the advertisement in the Calcutta Gazette; and, finally, that Colonel Henderson had allowed the new company, after this notification, to transact and manage his affairs for him; had corresponded with the new firms—had received accounts and remittances from them, and had not only ratified the transference of his funds to the new company, but had adopted them as his doers and negotiators, by which he tacitly released the appellant from his engagements. It was answered, that the appellant had no right or authority to transfer or entrust to another party, or to the new firm, the effects committed to his care. The notification, therefore, of his retiring from the concern could not alter this liability. That letter, accompanied with the Mar. 10, 1791.
account current, might import that the new company were willing to answer all liabilities of the old concern; but it

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did not import an entire devolution of the powers and trust of the old company, far less a transfer of the effects themselves. Nor could the receipt of the £500, and the pipe of wine, be considered as a renunciation of, or passing from the security of Grahams, Moubray, and Co.

Nov. 12, 1799. The Lord Ordinary pronounced this interlocutor:—

"Finds it admitted upon the part of the defenders, that the "business entrusted to the house of Grahams, Moubray, and "Co., in the present instance, was that of holding Colonel Hen-"derson's money and securities, and making remittances for "his behoof, agreeably to instructions; and that when the "defender, Mr. Thomas Graham, left the company, he took "care that the funds and securities should be transferred to "the new company for the Colonel's behoof; and finds, "that it behoves Mr. Thomas Graham either to account to "the customers of the house, for what funds belonging to "them the company stood possessed of, or to transfer those "funds to others, duly authorized to act for the customers' "behoof; and it is alleged that this was accordingly done "by the transference that was made to Grahams, Moubray, "and Co.: Finds that no sufficient notification of such trans-"ference was made to Colonel Henderson, by letter from "the new company, dated the first day of November 1790, "signifying that Mr. Thomas Graham's interest in the house "ceased that day, and that it is not alleged that any direct "and positive notification of such transference was given to "Colonel Henderson, either previous or subsequent to that "letter, and there is not any document produced, instruct-"ing the fact of such a transference having been made, or "any arrangement of affairs between the former company "and the new company, whereby the former company "devolved upon the new the trust and agency Colonel Hen-"derson had committed to them: Finds that such trans-"ference and devolution is very imperfectly indicated by "the account rendered to Colonel Henderson by the new "company, bearing date 10th March 1791; for that account "does not state the receipt of the Colonel's funds from the "former company, at the period of its dissolution, or at any "other period, but continues to account to Colonel Hen-"derson as if it were the old company, taking credit for "payments made for his behoof during the admitted sub-"sistence of the old company. Finds, that by the Power of "attorney from Colonel Henderson, the old company were "enabled to substitute attornies; but no Power of devolu-"tion, or delegation, was thereby conferred: Finds that

" there is no evidence in process that the account of the " 10th March 1791 reached Colonel Henderson, previous to " the bankruptcy of the new company, which seems to have " happened about October 1791: Finds that there is no " evidence that the letter, of which there is a copy inserted " in Colonel Henderson's letter book, and those dated 10th " March 1791, with a notandum, indicating that it had been " despatched by *Dutton* and *Kent*, ever reached the new " company, or *a fortiori*, that it reached it before its failure, " or was ever relied and acted on by that company, or by " the defender. And finds, that though this letter should " have reached the new company in August or September " 1791, it would, neither in form nor in substance, have in- " ferred an approbation of an entire devolution of powers " and trust to the new company by the old, especially when " no such absolute devolution had as yet been notified to " Colonel Henderson: Finds that the letters of the 12th " April 1792 from Colonel Henderson to the new house, and " to Mr. Robert Graham and to Mr. Moubray, were written " many months after the bankruptcy of the new house, of " which event it does not appear that any measures were " taken by the house itself, or by the defender, to have " given him intimation, whilst such measures, if duly taken, " might naturally have prevented the writing or despatch " of those letters: Finds that it does not appear whether " these letters were not accompanied with one also for the " defender, which, if produced, might throw material light " on the point, how far the Colonel did not still place re- " liance on Mr. Thomas Graham in the management of his " affairs: Finds it is to be presumed, from the defender's let- " ter of 16th February 1793 to Colonel Henderson, that " such a letter had actually been received by him, though " not now produced: Finds it also to be presumed from " said letter of 16th February 1793, where the defender " mentions having recently seen Mr. Robert Graham at " Chinsura,* and urged him to make out a statement of his " affairs, that the defender had access to show at what pe- " riod Colonel Henderson's securities (called dependencies " in the accounts rendered) were converted into cash, and " employed by either the former company or the new com- " pany, for their own purposes: Finds that though it is " admitted that both Mr. Robert Graham and Mr. Moubray " are dead, the defender has given no explanation of his " arrangements with the new company at the period when,

* In the respondent's case " Chimma."

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"as he alleges, the old was dissolved, nor has any informa-
"tion been given to the Lord Ordinary how the affairs of
"the new company have been winded up, nor whether any
"care of Colonel Henderson's interest on that occasion was
"taken by the defender, who states himself as having been
"the principal creditor of the new company: Finds that,
"under all these circumstances, no effectual *delegatio officii*
"has been established, whereby the former company, that
"are said to have ceased to exist on the 31st of October or
"1st November 1790, are exonered of their obligation to
"account to Colonel Henderson and his representatives:
"Finds that the defender, as a surviving and solvent part-
"ner of that company, is liable to account accordingly; and
"ordains the defenders to lodge their accounts for that
"purpose in process, and that in ten days. Refuses the
"representation for the defenders, adheres to the interlo-
"cutor repelling the preliminary defences, and dispenses
Jan. 16, 1801. "with further representation." On two reclaiming peti-
Feb. 5, —— tions against this interlocutor, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords, including the preliminary objections to the action.

Pleaded for the Appellant.—1. The Court of Session was incompetent to the decision of this question, because the subject matter having regard to transactions with a company and individuals in India, it ought to have been brought before the courts of Bengal. Not only has the appellant been domiciled in Calcutta for thirty years, but the whole transactions alluded to took place in that country. The power of attorney was executed there, and there also were the securities and funds of Colonel Henderson, together with the copartnerships which successively existed. The hardship, therefore, to which the appellant is exposed, by the present suit being brought to this country, is apparent, and ought therefore to be dismissed. But, 2d. Colonel Henderson having had complete notice sent him of the appellant's withdrawal from the firm of Grahams, Moubray, & Co. upon the 31st October 1790, and that a new copartnership was to be established, under a different firm, who was to succeed to the business of the agency, and, among the rest, to be entrusted with his affairs, he must be held to have approved of this transference of his affairs to them, and to have adopted the new firm, by allowing his securities to remain in their hands, corresponding with them, and receiving remittances from them as his doers or agents, which are circum-

stances so strong as to amount to a discharge and release of the appellant from all responsibility. If Colonel Henderson understood otherwise, then it was his duty to say so by return of post. If he did not adopt the new firm as his agents, and approve of the transference of his affairs and means to their management, he ought to have written to this effect, or employed other agents, in either of which case, the appellant would have been put on his guard, and, to save all responsibility, the funds of the Colonel would then have been placed beyond all risk; but not having done so, his silence must be held as a tacit approbation of the transference of the arrangement of his affairs with the new company.

Pleaded for the Respondents.—1st. The appellant has again, after stating his peremptory defences, revived his objections to the summons, and to the jurisdiction of the Court in this question: but in neither can he be serious, because in themselves they are extremely ill founded. Every Scotsman, though abroad, is subject to the Courts of this country *ratione originis.* But if he has an heritable estate in this country, which is the fact in the present case, the question then admits of no doubt whatever. It is further placed beyond all doubt, by his having an attorney in this country, who actually appears and states defences, although these defences be to object to the jurisdiction. It is of no consequence that the other partners have not been called; because, as the company no longer subsists and carries on business, and is now dissolved and bankrupt, the same necessity of calling the whole partners to an action raised for a partnery debt does not hold. The pursuers are entitled to have their remedy against any one partner, where that remedy can best be found. They could not cite the other partners, residing in a Danish settlement, to appear before this Court; and so the objections on both grounds are untenable. 2d. But, upon the merits of the case, it is clear that an agent, or a party acting under a power of attorney, cannot shake himself free of the responsibilities it imposes, without he can show an express liberation from his constituent. It is equally clear that the company, to whom the power of attorney was originally taken, could not delegate their office to another, or transfer Colonel Henderson's affairs and funds to another, without express authority from him. It was a trust of the most onerous kind, entailing responsibilities such as could not be so lightly dealt with. Colonel Henderson may have relied upon the joint exertions, prudence, fitness, and responsibility of the whole, in

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imposing this trust; and, in employing a company for the management of such affairs, this is generally to be presumed. It was therefore beyond the power of the old company to hand over the management to the new company, without express authority and consent. Nor do the letters of notification of the change in the firm, alter or affect this conclusion. The Colonel, by his silence, and by his correspondence with the new company, never for a single instant gave them to understand that he had liberated the old firm, or any individual member of it; and, therefore, there is no ground whatever on which to rear the superstructure of an implied discharge.

After hearing counsel,

LORD CHANCELLOR ELDON said,

"My Lords,

"The present appeal brought into discussion before your Lordships a great variety of matter. I therefore deemed it not unfit that you should pause a while before coming to a decision upon it.

"It is not according to the usage of this House that the grounds of your judgment should be stated, when the affirmance of a decree under appeal is moved for. I have often, in my own particular case, lamented that such was the usage, but it has been sanctioned by universal practice, and the wisdom of this House, for a long period of time.

"I shall therefore only say a few words on the second question made in this case, that which respects the merits of the matter at issue. After looking through the whole case again and again, I do not see grounds for a reversal of the interlocutors appealed from. I think it proper to state, that the judgment seems to me to stand altogether upon the circumstances of the present case, and that, so far from affording any general rule in other cases and other partnerships, it may not, perhaps, form a rule in other cases arising out of other circumstances relating to the same partnerships.

"The specialities and particular circumstances of this case are the grounds upon which, in my opinion, the interlocutors should be affirmed."

It was therefore,

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellant, *Wm. Adam, Samuel Romilly, Matt. Ross, Tho. W. Baird.*

For Respondents, *S. Percival, Wm. Alexander.*

NOTE.—Unreported in the Court of Session.