done.—The first consideration is, whether the circumstance of her having called for, and received, a part of her balance, makes any difference.—Whether it was called for before or after she knew of Mr. *Devaynes's* death is not, in my view of the case, at all material to the question. *Ex hypothesi*, the surviving partners are liable to the payment of this debt, and ought in the first instance to be called upon for the payment of it. How is it then, that a creditor, by acting upon that acknowledged liability, to the extent that his convenience and occasions may happen to require, is *quoad* the residue of his debt, to be placed in a worse situation than he would have been *quoad* the whole, if he had demanded no part of it? Miss *Sleech* by drawing a draft upon the surviving partners, recognizes them as her debtors. Such, undoubtedly, they were; but how does that affirmative act prove negatively that thenceforth no other persons were to be her debtors?

Another act, which is imputed to Miss *Sleech* as one which releases the Testator's estate, is, that she has signed the bankrupt's certificate. Now, I apprehend [571] that that can amount to no release of the demand upon Mr. *Devaynes's* estate. Supposing the 10th of *Anne* (stat. 10 *Ann.* c. 15, s. 3) had never passed, I do not conceive that the signing of a bankrupt's certificate could have operated as an ordinary release with regard to any third person; for it is the act of parliament that gives that release, in consequence of the certified conformity of the bankrupt to the requisitions of the bankrupt laws. A man, by signing a certificate, does not release his own debt, unless the requisite number of creditors afterwards sign; and, if they do sign, the debts of those who do not sign are as much released as the debts of these who do sign. If it were necessary to resort to the act, it appears to comprehend this case, as it extends to every case of joint-contract, or joint-obligation of any sort. Therefore, it appears to me, that Miss *Sleech* has not, in any way, released the demand which it is assumed by the decree, and clearly established by the authorities, that she had at the time of the death of Mr. *Devaynes*. I am consequently of opinion, that the report of the Master is right, and that the exception must be over-ruled

[572] CLAYTON'S Case.

Facts of the case.

The next class of creditors was represented by Mr. *Clayton*, and consisted of those who, after the death of *Devaynes*, continued to deal with the surviving partners both by drawing out and paying in money; payments being made by the surviving partners before they received any money of the creditors; and the balance, varying from time to time, sometimes increased, and sometimes diminished; but upon the whole considerably increased by the subsequent transactions.

In this case also, the creditor had deposited exchequer bills with the house, which exchequer bills were sold in *Devaynes's* lifetime without the knowledge of the creditor, and the produce applied to meet the exigencies of the house; and the particular facts of the case, as appeared upon the Master's Report, were the following:—

At the death of *Devaynes*, *Clayton* had a balance of £1713 on his cash account with the banking-house. Prior to the death of *Devaynes*, he had deposited with the partners two exchequer bills for £500 each, without giving them any power or authority to sell or dispose of the same, except as it was mutually agreed and understood between him and them, that, when the exchequer bills should be paid off, they, the partners, were to buy with the produce, or take in exchange, other exchequer bills, to be held by them in the same manner. Contrary to this agreement or undertaking, and without the consent or knowledge of *Clayton*, the partners did, in the lifetime of *Devaynes* (on the 19th of *June* 1809), sell these bills for £1035, which produce they applied to their own use. And of this transaction *Clayton* had no notice until after the bankruptcy of the surviving partners.

[573] Between the death of *Devaynes* and the bankruptcy, the payments made to *Clayton* by the surviving partners exceeded the amount of the balance (£1717) and the produce of the exchequer bills (£1035) together; and the payments so made amounted to the sum of £1260, within a few days after *Devaynes's* death, and before they had received any monies whatever. But their subsequent receipts largely exceeded the sums paid; and the balance due at the time of the bankruptcy (exclusive of the produce of the Exchequer bills) exceeded the amount of the balance

due at *Devaynes's* death. And *Clayton*, having, since the bankruptcy, discovered that the exchequer bills had been sold, and not replaced, proved the amount of the balance, together with the produce of the bills, as a debt under the commission; and received dividends upon the same, but did not sign the certificate.

The Report went on to state that *Clayton*, residing at *Newcastle*, kept his accounts with the partnership according to the custom already explained, of bankers with their country customers. On the 30th of *March* 1810, his account was made up and balanced by the surviving partners, and transmitted to him; and the balance was carried forward, and the account continued to the time of the bankruptcy. In the account so rendered, the proceeds of the exchequer bills were credited so as falsely to represent that they had been paid off by government on the 31st of *October* 1809, the day at which they were payable, and that a new exchequer bill for £1000 had on the same day been purchased, or taken in exchange from government, in their stead; and *Clayton*, being deceived by such statement, did not learn the truth of the case till after the bankruptcy, as already mentioned.

[574] Under these circumstances *Clayton* claimed against the estate of *Devaynes* the sum of £1171 (as the residue of the balance of £1713, after deducting the amount of the dividends received thereon), and the sum of £971 (as the value of the exchequer bills), with interest, after deducting the amount of the dividends received in respect of the said exchequer bills. The circumstance of the notice given by *Clayton* and *Scott*, as solicitors for the Executors of *Devaynes*, to the surviving partners, "that the use of *Devaynes's* name in the firm was without their consent" (which notice was so given without *Clayton's* personal knowledge), has been already detailed.

Master's Report. On the subject of these claims, the Master reported his opinion to be—*First*, that the subsequent payments made by the surviving partners ought to be applied to the account of the cash balance due at the death of *Devaynes*; and that *Clayton* had, by his subsequent dealings and transactions with the surviving partners, released the estate of *Devaynes* from the payment of the said cash balance, and every part thereof. *Secondly*, that, with respect to the value of the exchequer bills, *Clayton* had not, by his said dealings and transactions, released the estate of *Devaynes* from the payment of the value thereof, and such interest as after mentioned. *Thirdly*, as to the mode of estimating the value, and computing the interest, that the mode of computation adopted by the claimant (*viz.* by charging the actual amount of the proceeds on the 19th of *June* 1809, and calculating interest on that amount from that time), was erroneous, because, if the exchequer bills had not been sold, but kept and disposed of according to the agreement, the same, both principal and interest, would have been received on the 31st of *October* 1809, and [575] the principal only invested in new exchequer bills bearing the same rate of interest, which was accordingly represented (as aforesaid), to have been actually done; and the Master was consequently of opinion, that *Devaynes's* estate should be charged with interest, at the rate of £5 *per cent.*, only from the said 31st of *October* 1809, in addition to the principal sum; and, having computed the same accordingly, found the sum of £885 to be the amount of such principal and interest, for which the estate of *Devaynes* still remained liable in respect of the said exchequer bills.

Exceptions. To different branches of this report each of the parties took exceptions; *Clayton* contending that, with respect to the cash balances, the estate ought merely to be discharged to the extent of any such balance as was paid to his use, after giving him credit for the sums paid in, and deducting the amount of the drafts drawn by him, after the Testator's death; and, as to the interest on the exchequer bills, that the same ought to be allowed from the time when they were sold, and not only from the time when they would have been paid off by government; while the representatives of *Devaynes* disputed the claim to the exchequer bills altogether.

In the argument, it was thought most convenient to proceed, in the first place, upon the last of these exceptions.

Third Exception. July 18–22, 23. *Hart*, *Wetherell*, and *Sidebottom*, *Martin* and *Hazlewood*, and *Abercromby*, for different parties in support of the exception. The deposit of exchequer bills with a banker stands on a totally different footing from the deposit of money; for the former is a mere naked bailment, unaccompanied [576] with any advantage arising from the use of the thing deposited. The selling

of these exchequer bills, before they became cash in the common course of payment, cannot in this Court be stated as any thing more than a breach of trust; for this Court is not competent to judge of questions of criminal jurisdiction. This constitutes the amount of the exchequer bills so sold a simple contract debt from the partnership to *Clayton*, and nothing further. This being the state of the transaction at the death of *Devaynes*, the first step taken by *Clayton*, he being at that time ignorant of the sale of the exchequer bills, is to give notice to the surviving partners, as solicitor for *Devaynes's* representatives, not to continue *Devaynes's* name in their firm; for this act, although really the act of his partner in the name of the partnership, is binding upon himself as a partner. *Alderson* v. *Pope* (1 Campb. 404). The inference to be drawn from it is, that they consider the estate of the deceased as not to be resorted to; but that the house ought to be continued as the sole debtors. After giving this notice, whereby he has evidenced his intention that the acts of the surviving partners shall not be construed to affect the estate of the deceased, he continues his dealings with those surviving partners. He then receives from them an account whereby it is represented to him that the bills have been disposed of in the regular course, and new bills taken in exchange or purchased with the proceeds; and he adopts this account, and the representation contained in it, without further inquiry; so far releasing *Devayne's* estate by such adoption; because it is owing to his own *laches* that that estate is now sought to be charged with the amount of the proceeds.

If it should be said that, when Mr. *Clayton* adopted [577] the surviving partners as debtors, he did not mean so to adopt them as to the exchequer bills, which he supposed to remain in specie; yet if, when he is subsequently told that they no longer remain in specie, having been sold in the regular course of business at a period later than the death of the deceased partner (even though that be a false representation as to the time and circumstances of the sale), and, if being so told, he acquiesces in the account rendered, and consents to the surviving partners continuing in possession of the proceeds of those exchequer bills, whether in the form of cash, or of new exchequer bills, how can it be pretended that, in so acquiescing, he retains any hold over the estate of *Devaynes*, which he has himself previously declared to be wholly unconnected with the partnership as to all subsequent dealings?

[It was also contended, that the sale of the exchequer bills appeared, upon the evidence, to be the act of the other partners without *Devaynes's* concurrence; and moreover, that it amounted to a criminal offence, for which none can be chargeable but the individuals by whom the offence has been actually committed.]

Bell and *Palmer*, for the Report. A breach of trust always constitutes a joint and several debt, for which each of the parties continues liable. *Devaynes* was, therefore, answerable for the conduct of his partners in respect of these exchequer bills, and his estate still remains answerable. It appears from entries in their books, that the partnership had the advantage of the proceeds arising from the sale; and, whether *Devaynes* had any specific [578] knowledge of the transaction or not, is perfectly immaterial.

No *laches* is imputable to Mr. *Clayton*; for he knew nothing of the sale of these exchequer bills till after the bankruptcy. In the month of *October*, when the pretended exchange of old for new exchequer bills was represented to have taken place; *Devaynes* was still living. Consequently, that which is called the adoption by Mr. *Clayton* of this representation is also quite immaterial.

The inference from the notice given by *Scott*, in the name of Messrs. *Clayton* and *Scott*, as solicitors for the Executors, can hardly be set up against the fact that one of those Executors, being also one of the surviving partners, subsequently sent to *Clayton*, as partner, an account in the name of the firm which, as Executor, he had served himself and his co-partners with the notice no longer to use. But, supposing he were privy to this notice being given, the notice itself only extends to the future acts of the partnership. How can it operate to rid any of the partners from a responsibility arising out of past transactions? Then, with respect to what is treated as an adoption on the part of Mr. *Clayton* of the account afterwards transmitted to him, it is difficult to understand how any liability can be got rid of by a false representation.

July 23. The *Master of the Rolls* [Sir Wm. Grant]. It appears to me that this transaction stands quite detached from any other, and may be decided by itself. [579] The exchequer bills having been sold in Mr. *Devaynes's* lifetime, contrary to the duty reposed in the partnership, and the money having been received by the partnership, the amount became a partnership debt, whether the individual partners were, or were not, privy to the sale. The debt accrued at the moment that the sale was made, and not at the time when the subsequent representation was given to Mr. *Clayton*, with respect to the re-investment of the money in other exchequer bills. How a falsehood told by the four could do away a previous breach of trust which had been committed by the five, I cannot comprehend. More than a breach of trust, I do not see how it can be reckoned. It was attempted to argue that it was a felony; but, in order to make the subsequent conversion of property, of which the possession has been delivered, amount to a criminal charge, it is necessary to shew that the *animus furandi* existed at the moment when the delivery was made. Taking this, therefore, to be a debt, as Mr. *Clayton* was altogether ignorant of its existence, he could not, by any subsequent dealings with the other partners, transfer it to their credit.

The notice, whatever operation it may have in any other question as between Mr. *Clayton* and the surviving partners, can have none in this case, in which he was ignorant that any such sum of money was in their hands. He was willing to trust them with the care of his exchequer bills; but, whether he would transfer to them exclusively the liability, which all had incurred, of answering for the produce of the sale, was a matter upon which he never had an opportunity of exercising any choice. For the same reason, none of the payments that were subsequently made, could [580] operate in extinction of this debt. Mr. *Clayton* could not draw upon the credit of a fund which he did not know to exist; and, whatever question may arise as to the manner in which the payments are to be imputed, to the old or to the new cash balances, they must be imputed to acknowledged cash balances, of the one or the other description, and not to the produce of securities which the one party represented, and the other believed, to be still remaining in specie.

I am, therefore, of opinion that this exception must be over-ruled.

Second Exception. July 23–30. The next of the exceptions which was argued, was that to the allowance of interest on the exchequer bills sold, only from the time when they would, in the regular course, have become payable by government, not from the time of sale.

Bell and *Palmer*, in support of the Exception, contended that this was a question long settled by the practice of the Court. That, whenever a person has been guilty of a breach of trust, the Court has always said, the *Cestuy que trust* has a right to have the subject of that breach of trust in the manner most beneficial to himself; that he has a right to consider it either as a debt, from the time the breach of trust took place, or to be made good in *specie*; and that Mr. *Clayton* had elected in the former branch of the al-[581]-ternative. And they cited *Earl Powlett* v. *Herbert* (1 Ves. Jun. 297), *Pocock* v. *Reddington* (5 Ves. 794), *Long* v. *Stewart* (5 Ves. 800, note), and *Bate* v. *Scales* (12 Ves. 402. See also *Rocke* v. *Hart*, 11 Ves. 58. *Mosley* v. *Ward*, 11 Ves. 581).

Hart, *Wetherell*, and *Sidebottom*, and *Hazlewood*, for the Report. We do not deny the principle that a Trustee shall make no advantage of his breach of trust; that the *Cestuy que* trust is entitled to an inquiry how the money was disposed of; and, if he can find that by replacing the stock he shall be benefited, that the stock shall either be replaced, or he shall have the value in money. But the question is, whether the circumstances of this case do not take it out of the general principle.

This claimant seeks to effect an innocent person by a breach of trust of which his partners have alone been guilty. In point of fact, it must be admitted that the partners of *Devaynes* sold these exchequer bills in the month of *June* 1809. In *October* 1809, they would have become payable in the regular course, and then the capital alone (amounting to £1000), would have been to be laid out in the purchase of new exchequer bills, the interest upon the old bills, to the amount of £30 or £40, being, according to the agreement or understanding stated in the report, to be retained by the bankers, as part of the cash balance in their hands, to answer the drafts of their customer. In *March* 1810, they represented that they had in fact invested the [582] £1000 (which was false), and that they had (which was the truth), the amount of the

interest in their hands as part of the cash balance. *Clayton* adopts this representation; and, by accepting the supposed investment, recognizes the fact that the interest is to be considered as part of the floating cash he had in their hands, of which he might at any time avail himself by drawing at sight. In truth, from the month of *October* 1809, to the month of *March* 1810, he must be considered as having constantly acted upon the supposition that this £30 or £40 formed a part of that floating balance. He drew upon the fund of which this constituted a part; and his drafts, during this period, were to an amount by many thousands of pounds exceeding it. True, he paid in other sums to supply his credit; but still he drew, in part, upon the credit of this £30 or £40. Now, however, the Court will, by every possible means, repress fraud, and take care that those who have been guilty of fraud shall derive no benefit from it; yet, as against an innocent partner, the Court will deal with him as with an ordinary creditor, and charge him no further than a mere creditor might have been charged.

In a very recent case of *Underwood* v. *Stevens* and *Smith* (at the Rolls, *July* 1816), in which *Stevens* had sold out bank annuities which produced 5 *per cent.*, and *Smith*, his co-executor, had concurred in that act, your Honor charged *Stevens* with the 5 *per cent.*; but, in animadverting on the conduct of *Smith*, who, though he had concurred in the act, was guilty only of *laches*, thought that he was chargeable only at the rate of £4 *per cent.* (Vide *Tebbs* v. *Carpenter*, Madd. 305, and cases there cited.)

[583] In the present case, the Master has placed Mr. *Clayton* in the precise situation in which he would have been if the breach of trust had not been committed, and it is not a case which calls for more than that.

The cases cited are cases in which stock had been sold; and this differs from the case of exchequer bills, in that stock is capable of being replaced in specie; but you cannot re-purchase the same exchequer bills, nor others precisely of the same description, and bearing the same rate of interest with the former.

Bell, in reply. It is assumed that *Devaynes* was not privy to this transaction respecting the sale of the exchequer bills; but there is no evidence of this, and the contrary is most probable. However, he was a partner in the firm at the time when the Master finds, in general terms, that *the bankers* sold them out. It is entered in the books as the act of the partnership, and *Devaynes* continued a partner till his death, five months afterwards.

Suppose, in *Pocock* v. *Reddington* (5 Ves. 794), it had been asked, where is the breach of trust, if we have replaced the stock and paid the dividends? The *Lord Chancellor* answers that question; for he says, that is nothing to the purpose. You shall not be allowed to say, True, I have been guilty of a breach of trust; but I will replace the stock, and pay the dividends, and so all will be right. You have put yourself in a dif-[584]-ferent situation; and they have a right to consider you as their debtor from the time the stock was sold out, and to have interest from that period.

But it is said Mr. *Clayton* had the benefit of the nominal interest carried to his account. The amount of the interest was £49; and *Clayton's* account was never fully drawn within some hundreds, as will appear when we come to consider the next exception. Then have they a right to say he had the benefit of this sum which they carried to his account upon the footing of a pretended transaction? Have they a right to say, we have told you a falsehood, and therefore you shall not consider us as your debtors, as you otherwise might have done?

It is nothing that the bankers could not have purchased new exchequer bills to the precise amount of the old, together with the interest. They had funds in their hands to make up the amount required if necessary. The Master has not re-instated Mr. *Clayton*. He has only placed him in the situation in which he would have been if the exchequer bills had been sold in *October*. But this, as we contend, is precisely what the Master ought not to have done. *Clayton* had a right to say, I consider this as a debt, and that interest attaches to it, according to the principles of a Court of Equity, from the moment when it was incurred; that is, from the moment when the breach of trust was committed.

The *Master of the Rolls* [Sir Wm. Grant] reserved the consideration of this point until he should be enabled to decide upon the subject of the [585] next exception. But, after that was disposed of, he said (*July* 30) that, with regard to this

question of interest, he was of opinion, the interest should be computed upon the amount produced by the sale, from the period at which the money came into the hands of the partnership. He did not see how *Clayton's* acquiescence in the account rendered could affect this claim. He acquiesced on the supposition that the account was true. Therefore, when it afterwards turns out that the bankers, instead of keeping the exchequer bills, sold them and used the money produced by the sale, he has a right to treat that as a debt from the time when it came into their hands, and to charge them with interest for the use of it. And he said that he so decided, not on the ground that Mr. *Clayton* was bound to take it as a debt, but on the ground that he had elected to take it as such.

Exception allowed.

First exception. July 23, 24–26. On the subject of the first Exception (which came on to be argued last in order), it is only necessary to recapitulate the following facts:—

At the death of *Devaynes*, *Clayton's* cash balance in the hands of the partnership amounted to £1713, and a fraction.

After the death of *Devaynes*, and before *Clayton* paid in any further sums to his account with the bankers, he drew out of the house sums to the amount [586] of £1260, thereby reducing his cash balance to £453 and a fraction.

From this time to the bankruptcy, *Clayton* both paid in and drew out considerable sums; but his payments were so much larger than his receipts, that at the time of the bankruptcy, his cash balance, in the hands of the surviving partners, exceeded £1713, the amount of the cash balance at *Devaynes's* death. (And this, exclusively of the exchequer bills and their produce, which were put out of the question in the consideration of this exception.)

By the amount of the dividends received since the bankruptcy (those dividends being apportioned to the whole debt proved under the commission), the balance of £1713 would be reduced to £1171 and a fraction; and it was this last sum which *Clayton* claimed against *Devaynes's* estate, and as to which the Master had reported that *Clayton* had, by his subsequent dealings with the surviving partners, released the said estate.

But now, upon the argument of the exception, and in consequence of the decision in Miss *Sleech's* case, that claim was abandoned, to the whole extent of the cash balance at *Devaynes's* death above £453, the sum to which it had been reduced by drafts upon the house previous to any fresh payments made to it; and that which was now claimed is the last mentioned sum of £453, *minus* its proportion of the dividends.

Bell and *Palmer*, *Fonblanque* and *Clayton*, in support of the exception. [587] This is a case, the decision of which will be of the greater importance, as it has lately been one of frequent occurrence, and has never been decided, either at law or in equity. Suppose that, in this case, *Devaynes*, instead of dying, had merely quitted the partnership; and that public notice had been given of that event, tantamount to the notice afforded by the advertisement of his death in the newspapers; and that the same transactions had taken place with the continuing partners which have now taken place with the surviving partners. In such case, the question would have been a mere legal question; and what we submit is, that in such a case, the retiring partner would clearly be liable to the extent of the £453; and, if so, then that, in the present case, the rule of equity is strictly analogous to the rule of law.

If this view be correct, then all that remains to be considered is, whether there are here any special circumstances which would, in the case we are supposing, have discharged the legal liability.

The legal principle is that which is laid down in *Bois* v. *Cranfield* (Styles, 239; Vin. Ab. title Payment, M. pl. 1), and appears to be this; *viz.* that, if a man owes another two debts, upon two distinct causes, and pays him a sum of money, he (the payor) has a right to say to which account the money so paid is to be appropriated.

Then follows *Heyward* v. *Lomax* (1 Vern. 24), deciding that, if a man, owing another money on a security carrying interest, and also on simple contract, pays money generally, without specifying on what specific account, it [588] shall be taken to the advantage of the payor, in discharge of the debt carrying interest. This, however, has been over-ruled by subsequent cases.

The next is *Perris* v. *Roberts* (1 Vern. 34), where, there being a mortgage debt,

and also a debt by simple contract, and both being cast into one stated account, and a bill of sale made for securing the balance, which proved deficient, the payment was decreed to be apportioned. In this case there were strong circumstances to have exonerated the debtor altogether.

In *Manning* v. *Weston* (2 Vern. 606), however, the rule is strictly brought back within its former limits. There, a man indebted both by specialty and by simple contract, having made payments and entered them in his book as made on account of what was due by specialty, this was held not a sufficient appropriation; and the *Lord Chancellor* said, that the rule of law, "Quicquid solvitur solvitur secundum modum solventis," is to be understood only when, at the time of payment, the payor declares the purpose. If he does not, the payee may direct how it shall be applied. See to the same purpose, an anonymous case in second Modern Reports (2 Mod. 236), and *Bowes* v. *Lucas* (Andrews, 55).

Meggott v. *Mills* (Ld. Raym. 287) must also be mentioned, because that is a case on which some stress will probably be laid. Lord C. J. *Holt* there expressed it to be his opinion that, where two sums were due, one of which might make the debtor a bankrupt, and the other (being a debt incurred after he ceased to trade), could [589] not produce that consequence, the payment should be taken without more, as meant to be applied to the former debt. But this opinion of Lord *Holt's* has since been called in question.

Goddard v. *Cox* (2 Stra. 1194) is next in order of time, and has been considered as a ruling case ever since its decision. There, a widow, being indebted as Executrix to her deceased husband, became also indebted on her own account, and afterwards married again, and her second husband became also indebted on his own account, and made payments without declaring the purpose. It was agreed that he had the first right to appropriate his payments; but, having neglected it, that it devolved on the payee, who might apply them as he pleased either to the debt incurred by the wife *dum sola*, for which the husband was answerable, or to the husband's own debt, but not to the debt of the wife as Executrix. And a case of *Bloss* and *Cutting* was there cited, to the same effect as *Manning* v. *Weston*, and the rest.

The next case is *Hammersly* v. *Knowlys* (2 Esp. 665), which would have been against us if we had contended for the whole amount of *Clayton's* claim; but, taking it at the lesser sum only, is in our favour. In that case, Lord *Kenyon* held that, the note of *A.* being deposited by *B.* at his banker's, as a security for money, the bankers knowing that it was an accommodation note, and *B.* afterwards paying money to his bankers without any specific appropriation, the money must be placed as far as it would go in discharge of the then existing debt, and the banker could not make the maker of the note responsible for more than the [590] balance remaining due at the time of such payment, although he afterwards trusted his debtor with a further sum of money.

Then comes *Dawe* v. *Holdsworth* (Peake, N. P. 64), which was an action of trover. The defence was bankruptcy; and the question arose, as it did in the case in Lord *Raymond*, whether the petitioning creditor's debt could be established by reason of the bankruptcy? To establish the bankruptcy, the Defendant proved that *Pittard* was a trader, and so continued till 1785, when he became indebted to one creditor in £200, upon whose petition the commission issued. This debt was originally a simple contract debt, but a bond was given after he had ceased to be a trader; and Lord *Kenyon* held that the question was, not when the bond was given, but when the debt was contracted. There had been dealings between the bankrupt and the petitioning creditor since he ceased to be a trader, and it proved that, though at the time the commission issued, there was a larger balance than £200 due to the creditor, yet more than £200 had also been paid on account between the time when the trading ceased and the issuing of the commission. Lord *Kenyon* further held that, as no particular directions had been given for the application of the money paid on account, it must be placed to pay off the old debt first. Consequently, no part of the debt contracted while *Pittard* was a trader remained due when the commission issued; and the commission itself was therefore unsupported.

Now, *prima facie*, this seems to be an authority unfavourable to us. But in *Peters* v. *Anderson* (5 Taunt. 596), [591] after all the cases on the subject had been fully gone through, it was laid down that, although the payor may apply his payment to which of two or more accounts he pleases, and although his election may be either

expressed or inferred from the circumstances of the transaction; yet, if not paid specifically, the receiver might afterwards appropriate the payment to the discharge of either account as he pleases. And Lord C. J. *Gibbs*, referring to the cases of *Meggott* v. *Mills*, and *Dawe* v. *Holdsworth*, observes that, in both, the debts arose on the same account, and it was totally immaterial to which end of the account the payment should be applied; but that Lord C. J. *Holt*, and after him Lord *Kenyon*, went upon this ground, that it would be too hard if a man, having made a payment sufficient to exempt him from the operation of the bankrupt laws, should not have the benefit of paying off that part of his debt which subjected him to their operation. "It is an exception," he said, "and founded on the circumstance of bankruptcy."

There is one more case of *Newmarch* v. *Clay* (14 East, 239), where Lord *Ellenborough* said, there might be a special application of a payment made, arising out of the nature of the transaction, though not expressed at the time in terms by the party making it. And he said, the payment in that case was evidenced by the conduct of the parties to have been made for the purpose of taking up the bills which had been antecedently dishonoured; for that, upon receiving that payment, the dishonoured bills were delivered up. And, upon that ground, the Court of K. B. were of opinion there ought to be a new trial, the present Lord Chief Baron having previously decided it upon the general [592] principle that, where there is no express appropriation, the payee has a right to apply the payment at his own option; which general principle is also admitted by the very ground on which the Court of K. B. granted the new trial. Upon this, therefore, the doctrine of Courts of common law rests at the present day.

Now, to apply this doctrine to the circumstances of the present case. In none of those cited does it appear that the payee had actually appropriated the payments made until the matter came into question; and the last case of *Newmarch* v. *Clay* (as well as the principle of *Goddard* v. *Cox*) shew that the doctrine applies equally in the case of a partnership. Then it is shewn that the Court may, from circumstances, infer the intention to apply a payment in discharge of the old debt;—but what were the circumstances from which that inference was drawn in the case referred to? They were of such a nature that no doubt could arise respecting their tendency. Accordingly, the counsel acquiesced immediately, and did not even urge an inquiry. The case of *Dawe* v. *Holdsworth* proves, what we do not mean to dispute, that, when the old debt is completely discharged, the payments subsequently made must be applied in discharge of the new debt. This is the only case in which we hear of applying the payments to a first debt in priority to a subsequent debt; and this is the case which, Lord C. J. *Gibbs* afterwards says, was rightly decided, upon the principle that one debt would have exposed the party to a commission of bankruptcy, stating that "it is an exception founded on the circumstance of bankruptcy."

Now, still considering the present case as involving the legal question, let us suppose that *Devaynes* retired from the partnership in *November* 1809, from [593] that time till the commission issued in *July* 1810, Mr. *Clayton* continued to deal with the house both by paying in and drawing out; and, in making his payments, he had a right to apply them to whatever demand he thought proper. But it is said there are special circumstances. What are they?—First, That Mr. *Clayton's* partner gave notice to the house that *Devaynes* would have nothing more to do with the house. What would be the effect at law, of such a notice? Does it discharge the debt? A release cannot be by parol. How then could the debt be discharged? Not by the subsequent payments; for, those payments being made generally, the payee had a right to attribute them to whatever account he pleased. In fact, there was no payment made to the account of the old debt, except as it was actually reduced on the entire balance. Then was it in any manner altered in consequence of *Clayton's* accepting the new house as his debtors? He never did accept them as his debtors, any otherwise than as they were, and continued to be his debtors in law. But he never, by any acts of his, specifically accepted them as such. This might have been more strongly urged in *Newmarch* v. *Clay*. *Devaynes's* Executors could not, by giving notice, withdraw themselves from their responsibility. Then what does the notice amount to? Besides, notice to a partner does not bind, except in the case of a co-partnership transaction; and, therefore, even if this notice could operate

as a discharge (but which it cannot), if both had been privy to it, it could not at all events have any effect whatever on Mr. *Clayton*.

Then there is the circumstance of the account delivered in *March* 1814. What conclusion can be drawn from that circumstance? *Clayton* had con-[594]-tinued to deal with the house; so had the parties in *Newmarch* v. *Clay*. So they had in *Meggott* v. *Mills*, and in *Peters* v. *Anderson*. There can be no distinction between a banking co-partnership and any other co-partnership. The question is, was the sending this account any admission by *Clayton* that, so far as his debt had not been paid, he considered this account as a payment? The proper way to try this would be by supposing that the account consisted only of sums drawn out. And this, as your Honour has already decided in Miss *Sleech's* case, would not have operated in discharge. Does the circumstance of the creditor having paid in, as well as drawn out, make any distinction? It proves that he credited the house for the terms so paid in, not that he credited it for an already existing debt of *Devaynes*: that remains just as it did before. Upon that security he rested, and had a right to rest.

So it would be at law, if *Devaynes* had only *retired* from the partnership. What then discharges his estate in equity? We have already your Honour's opinion that, although in this case it is a mere equitable demand, yet it is an equity founded upon the principles of law; and, if so, it is impossible to conceive of any defence in equity that would not have been an available defence at law, supposing the circumstances of the case were such as to constitute it a legal demand instead of an equitable.

(The following cases were also cited in support of this exception. *Wilkinson* v. *Sterne* (9 Mod. 427), *Hall* v. *Wood* (14 East, 243, n.), *Kerby* v. *Duke of Marlborough* (2 Maule & S. 18)).

[595] *Hart*, *Wetherell* and *Sidebottom*, and *Hazlewood*, for different parties against the exception.

The four surviving partners, having possessed themselves of all the funds of the five, were bound first to discharge the obligations of the five; and, in taking the accounts between the parties, the Court must consider every subsequent payment as to be carried to the account of that debt which, in a fair and equitable understanding between the parties, was first to be discharged, in exoneration of *Devaynes's* estate.

The rule of law to which it has been attempted to adapt this case, stands on a principle quite foreign to that with which the Court has now to deal. It is that where there are debtor and creditor, and the debtor owes more than one debt, and pays a sum of money, he has a right to direct to which of the debts that payment shall be applied; and, if he omits to do so, then the law implies that it is immaterial to him to which the payment is applied, and, by his omission, he has left the application to the option of the creditor; and again, that, if the creditor neglects to exercise that option, still the application may be regulated by circumstances.

But how is it in the absence of all circumstances except that of the order of time? Suppose *A.* owes *B.* a debt of £100 contracted five years ago, and another debt of £100 contracted half a year ago, and pays money equal to the discharge of either of the two debts, without directing to which it is to be applied, and without the creditor's doing any act to appropriate it to either. What then? shall it not, in common sense, be taken as applied to the payment of that [596] debt for which there has been the longest forbearance, and against which, if remaining unsatisfied, the statute of Limitations will soonest operate? *Wentworth* v. *Manning* (2 Eq. Ab. 261).

This, however, is not a case between the same debtor and creditor. The relations of the parties are altered. What are the terms to be implied in the very first draft drawn by *Clayton* after *Devaynes's* death? He must be considered as saying to the surviving partners, You are my debtors, in respect of a debt contracted by you and your deceased partner; and I now call upon you to pay me a certain sum in discharge of *that debt*. He draws a second and a third draft on the same terms. He then pays in an additional sum, not expressing that he pays it into any new account, and afterwards draws a fourth draft. What is there to shew that this fourth draft was drawn upon any other terms than the three preceding? He knows that it is the duty of the four to pay the debts due from the five. He knows equally well that it is not competent to him, by giving credit to the four, to charge the estate of the deceased partner with any sums to which it was not previously liable.

If Mr. *Clayton* had been asked, when he began to draw upon and pay money

to the surviving partners, knowng that *Devaynes's* representatives had nothing to do with the firm, whether he did so, considering *Devaynes's* estate as responsible to him, or whether he did not deal upon the sole responsibility of the surviving partners, would he not, as a man of honour and integrity, have answered, Certainly, I never had any conception that any other but the surviving partners [597] were responsible? If he had been asked, whether he did not consider that as in the ordinary course of his former dealings with the partnership, the first draft he drew on the new partnership was in like manner applicable to the old balance, would he have hesitated for a moment to say, I drew this draft considering that, whenever there is an item on one side of an account, it is supposed to be in satisfaction of the old standing items on the other side, and that, whenever a balance is struck, there is an extinction *pro tanto* of the existing debt? If, on the other hand, Mr. *Clayton* had done these acts in contemplation of reserving to himself the double responsibility of the surviving partners, and of the estate of the deceased partner; would not a Court of Equity have said, this is a fraud in him to endeavour so to deal with the surviving partners as to be guaranteed by the estate of the deceased partner, without communicating to the representatives of the deceased partner that he is dealing with that intention?

When Lord *Eldon* said, in *Ex parte Kendal* (17 Ves. 514), that there may be dealings between the surviving partners and the creditors of the old partnership which would discharge the estate of the deceased partner, could he by possibility have contemplated a stronger case, in respect of such dealings, than the present? If it were competent to the creditor thus to deal with the surviving partners, keeping to himself in reserve the responsibility of the deceased partner's estate, for nine months after his death, why not for nine years? Why not for thirty years, during which he might have paid in hundreds of thousands; and, if at the end of the thirty years, one of the survivors were to become in-[598]-solvent, he might even then, upon this principle, resort to the account *ab initio*, and, fixing upon the sum to which the balance was at one time reduced, call upon the Court to give him out of the estate of the deceased partner the amount of that balance.(4)

[599] Now, if Mr. *Clayton* could shew that, at any period, he attributed his payments into the banking-house to any particular account distinct from the other account, and that he attributed his drafts correspondingly to those payments, that might have considerable weight; for he might say, having no doubt his old balance [600] would ultimately be paid, but, doubting whether the new house would be able to pay back the sums he paid in, he had taken care to draw upon the recent payments, reserving to himself the liability of *Devaynes's* estate. Even then, it would be said, what-[601]-ever was your intention, it was one upon which, if you acted, you were bound to disclose it to *Devaynes's* representatives. Otherwise, you have acted fraudulently towards them, and a Court of Equity will give you no assistance. But that is not the present case. There was no such intention on the part of Mr. *Clayton*; and it comes simply to this, whether his dealings with the surviving partners are not such as come within the meaning of Lord *Eldon*, when he says there may be dealings which would discharge the estate.

(In addition to the cases already cited, the following were mentioned. *Simpson* v. *Vaughan* (2 Atk. 31). *Strange* v. *Lee* (3 East, 484)).

Bell, in reply. If a man is bound in any one bond jointly with another, as principal and surety, and in another bond by himself alone, and pays money on account, nobody can doubt he means to pay off the bond in which he is solely bound, in preference to that in which another is bound with him. If it is asked on one side, how did Mr. *Clayton* mean to apply this payment?—I would ask on the other, how did Mr. *Devaynes's* partners mean that it should be applied?—Certainly, in payment of their own debts, not of the debts of the five.

Where is the authority for the alleged rule as to the priority of the debts? In *Newmarch* v. *Clay*, the Lord Chief Baron was of opinion, the payment was not applicable to the first debt, notwithstanding there [602] was a partner concerned in the first who was not concerned in the second; and the Court of K. B. afterwards varied the decision, not on that ground, but on a ground which was perfectly distinct. If that ground existed, why did Lord C. J. *Gibbs* say, that *Dawe* v. *Holdsworth* was distinguishable on account of its being a case of bankruptcy? Every argument applicable to this case might have been applied to *Kirby* v. *The Duke of Marlborough*; for *Devaynes's* estate cannot be placed in a higher degree of responsibility than that of a surety.

In *Ex parte Kendal*, Lord *Eldon* expressly declared he would not decide the question. Then why refer to that case as containing his lordship's decision of this?

Whether the continuation of payments and receipts alone amounts to a discharge is a mere legal question in the case of a withdrawing partner, and must be decided on the same principles in the case of a partner who dies. Does a single payment, or a single receipt, alter the case? They say, yes; but where is the authority? *Newmarch* v. *Clay* is an authority against them. So are all the cases. They are all cases which decide that it may be inferred from circumstances. But the question remains, What is a sufficient foundation for the inference? The continuance of the transactions, it has been held over and over again, is not enough. It must be a continuance attended with other circumstances.

Then they say, the new firm ought first to pay off the old debts. That depends upon whether they have assets of *Devaynes* in their hands. If he was a debtor [603] to them, where was the obligation between them? The obligation, if there was any, must depend on their having assets of his in their hands. But, if there had been such an obligation, how would that affect Mr. *Clayton* as a creditor? *Crawshaw* v. *Holmes*, *Featherstonhaugh* v. *Fenwick*.

The house was not trading on *Devaynes's* assets. In fact, the assets of the house, at the period when Mr. *Devaynes* quitted it, were not got in; and that creates the insolvency of the house. The house had been paying off the debts contracted in *Devaynes's* lifetime by their new credit; and, in this very case of Mr. *Clayton's*, where we claim only £453, the difference between that sum and the £1171 has been paid by money lodged with these gentlemen, and obtained on their own credit; for the assets of the house are still outstanding.

Then, what is the equity of this case? What circumstances are there which apply to the case of a dying partner, and do not apply to the case of a retiring partner? It is said, the debt is extinguished at law; and that equity will not revive it, where there is a superior equity. But this is a fallacy. The debt was not extinguished; for, though the remedy was gone at law, it continued in equity; as in *Lane* v. *Williams*, *Bishop* v. *Church*, &c., as soon as the securities were found to be given for a partnership debt, they were considered as joint and several. The single questions, therefore, are whether the continuing to deal, by drawing out and paying in, has operated to extinguish the debt, or whether it has been so extinguished by the circumstance of the account delivered? And these questions must be taken as the facts stand upon [604] the report; that is, without any inquiry how the affairs of the house stood as between *Devaynes* and his partners.

The case of *Wentworth* v. *Manning* was one of a specific payment, and therefore does not apply. But, if it were applicable, it would be contradictory to the cases of *Goddard* v. *Cox*, and the others which have been cited, and therefore of no authority, considering the book in which it is printed (2 Eq. Ab. 261).

July 26. The *Master of the Rolls* [Sir Wm. Grant]. Though the Report, following (I presume) the words of the inquiry directed by the Decree, states the Master's opinion to be that Mr. *Clayton* has, by his dealings and transactions with the surviving partners, subsequent to the death of Mr. *Devaynes*, released his estate from the payment of the cash balance of £1713, yet the ground of that opinion is, not that the acts done amount constructively to an exoneration of Mr. *Devaynes's* estate, but that the balance due at his death has been actually paid off,—and, consequently, that the claim now made is an attempt to revive a debt that has once been completely extinguished.

To a certain extent, it has been admitted at the bar, that such would be the effect of the claim made before the Master, and insisted upon by the exception. To that extent it is, therefore, very properly abandoned; [605] and all that is claimed is the sum to which the debt had at one time been reduced.

It would, indeed, be impossible to contend that, after the balance, for which alone Mr. *Devaynes* was liable, had once been diminished to any given amount, it could, as against his estate, be again augmented, by subsequent payments made, or subsequent credit given, to the surviving partners. On the part of Mr. *Devaynes's* representatives, however, it is denied that any portion of the debt due at his death now remains unsatisfied. That depends on the manner in which the payments made by the house are to be considered as having been applied. In all, they have paid much more than would be sufficient to discharge the balance due at *Devaynes's*

death;—and it is only by applying the payments to subsequent debts, that any part of that balance will remain unpaid.

This state of the case has given rise to much discussion, as to the rules by which the application of indefinite payments is to be governed. Those rules we, probably, borrowed in the first instance, from the civil law. The leading rule, with regard to the option given, in the first place to the debtor, and to the creditor in the second, we have taken literally from thence. But, according to that law, the election was to be made at the time of payment, as well in the case of the creditor, as in that of the debtor, "in re præsenti; hoc est statim atque solutum est:—cæterum, postea non permittitur." (Dig. Lib. 46, tit. 3, Qu. 1, 3.) If neither applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the priority in which they were incurred. And, as it was the actual inten-[606]-tion of the debtor that would, in the first instance, have governed; so it was his presumable intention that was first resorted to as the rule by which the application was to be determined. In the absence, therefore, of any express declaration by either, the inquiry was, what application would be most beneficial to the debtor. The payment was, consequently, applied to the most burthensome debt,—to one that carried interest, rather than to that which carried none,—to one secured by a penalty, rather than to that which rested on a simple stipulation;—and, if the debts were equal, then to that which had been first contracted. "In his quæ præsenti die debentur, constat, quotiens indistincte quid solvitur, in graviorem causam videri solutum. Si autem nulla prægravet,—id est, si omnia nomina similia fuerint,—in antiquiorem." (Dig. L. 46, t. 3, Qu. 5.)

But it has been contended that, in this respect, our Courts have entirely reversed the principle of decision, and that, in the absence of express appropriation by either party, it is the presumed intention of the creditor that is to govern; or, at least, that the creditor may, at any time, elect how the payments made to him shall retrospectively receive their application. There is, certainly, a great deal of authority for this doctrine. With some shades of distinction, it is sanctioned by the case of *Goddard* v. *Cox* (2 Stra. 1194); by *Wilkinson* v. *Sterne* (9 Mod. 427); by the ruling of the Lord Chief Baron in *Newmarch* v. *Clay* (14 East, 239); and by *Peters* v. *Anderson* (5 Taunt. 596), in the Common Pleas. From these cases, I should collect, that a proposition which, in one sense of it, is indisputably true,—namely, that, if the debtor does [607] not apply the payment, the creditor may make the application to what debt he pleases,—has been extended much beyond its original meaning, so as, in general, to authorise the creditor to make his election when he thinks fit, instead of confining it to the period of payment, and allowing the rules of law to operate where no express declaration is then made.

There are, however, other cases which are irreconcileable with this indefinite right of election in the creditor, and which seem, on the contrary, to imply a recognition of the civil law principle of decision. Such are, in particular, the cases of *Meggott* v. *Mills* (Ld. Raym. 287), and *Dowe* v. *Holdsworth* (Peake, N. P. 64). The creditor, in each of these cases, elected, *ex post facto*, to apply the payment to the last debt. It was, in each case, held incompetent for him so to do. There are but two grounds on which these decisions could proceed;—either that the application was to be made to the oldest debt, or that it was to be made to the debt which it was most for the interest of the debtor to discharge. Either way, the decision would agree with the rule of the civil law, which is, that if the debts are equal, the payment is to be applied to the first in point of time—if one be more burthensome, or more penal, than another, it is to it that the payment shall be first imputed. A debt on which a man could be made a bankrupt, would undoubtedly fall within this rule.

The Lord Chief Justice of the Common Pleas explains the ground and reason of the case of *Dowe* v. *Holdsworth* in precise comformity to the principle of the civil law.

[608] The cases then set up two conflicting rules;—the presumed intention of the debtor, which, in some instances at least, is to govern,—and the *ex post facto* election of the creditor, which, in other instances, is to prevail. I should, therefore, feel myself a good deal embarrassed, if the general question, of the creditor's right to make the application of indefinite payments, were now necessarily to be determined. But I think the present case is distinguishable from any of those in which

that point has been decided in the creditor's favour. They were all cases of distinct insulated debts, between which a plain line of separation could be drawn. But this is the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying, this draft is to be placed to the account of the £500 paid in on *Monday*, and this other to the account of the £500 paid in on *Tuesday*. There is a fund of £1000 to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in, that is first drawn out. It is the first item on the debit side of the account, that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has, or has not, been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made? [609] You are not to take the account backwards, and strike the balance at the head, instead of the foot, of it. A man's banker breaks, owing him, on the whole account, a balance of £1000. It would surprise one to hear the customer say, "I have been fortunate enough to draw out all that I paid in during the last four years; but there is £1000, which I paid in five years ago, that I hold myself never to have drawn out; and, therefore, if I can find any body who was answerable for the debts of the banking-house, such as they stood five years ago, I have a right to say that it is that specific sum which is still due to me, and not the £1000 that I paid in last week." This is exactly the nature of the present claim. Mr. *Clayton* travels back into the account, till he finds a balance, for which Mr. *Devaynes* was responsible; and then he says,—"That is a sum which I have never drawn for. Though standing in the centre of the account, it is to be considered as set apart, and left untouched. Sums above it, and below it, have been drawn out; but none of my drafts ever reached or affected this remnant of the balance due to me at Mr. *Devaynes's* death." What boundary would there be to this method of re-moulding an account? If the interest of the creditor required it, he might just as well go still further back, and arbitrarily single out any balance, as it stood at any time, and say, it is the identical balance of that day which still remains due to him. Suppose there had been a former partner, who had died three years before Mr. *Devaynes*—What would hinder Mr. *Clayton* from saying, "Let us see what the balance was at his death?—I have a right to say, it still remains due to me, and his representatives are answerable for it; for, if you examine the accounts, you will find I have always had cash enough lying in the house to answer my subsequent drafts; and, therefore, all the payments [610] made to me in *Devaynes's* lifetime, and since his death, I will now impute to the sums I paid in during that period,—the effect of which will be, to leave the balance due at the death of the former partners still undischarged."—I cannot think, that any of the cases sanction such an extravagant claim on the part of a creditor.

If appropriation be required, here is appropriation in the only way that the nature of the thing admits. Here are payments, so placed in opposition to debts, that, on the ordinary principles on which accounts are settled, this debt is extinguished.

If the usual course of dealing was, for any reason, to be inverted, it was surely incumbent on the creditor to signify that such was his intention. He should either have said to the bankers,—"Leave this balance altogether out of the running account between us,"—or,—"Always enter your payments as made on the credit of your latest receipts, so as that the oldest balance may be the last paid." Instead of this, he receives the account drawn out, as one unbroken running account. He makes no objection to it,—and the report states that the silence of the customer after the receipt of his banking account is regarded as an admission of its being correct. Both debtor and creditor must, therefore, be considered as having concurred in the appropriation.

But there is this peculiarity in the case,—that it is, not only by inference from the nature of the dealings and the mode of keeping the account, that we are entitled to ascribe the drafts or payments to this balance, but there is distinct and positive

evidence that Mr. *Clayton* considered, and treated, the balance as a [611] fund, out of which, notwithstanding *Devaynes's* death, his drafts were to continue to be paid. For he drew, and that to a considerable extent, when there was no fund, except this balance, out of which his drafts could be answered. What was there, in the next draft he drew, which could indicate that it was not to be paid out of the residue of the same fund, but was to be considered as drawn exclusively on the credit of money more recently paid in? No such distinction was made; nor was there any thing from which it could be inferred. I should, therefore say, that, on Mr. *Clayton's* express authority, the fund was applied in payment of his drafts in the order in which they were presented.

But, even independently of this circumstance, I am of opinion, on the grounds I have before stated, that the Master has rightly found that the payments were to be imputed to the balance due at Mr. *Devaynes's* death, and that such balance has, by those payments, been fully discharged.

The Exception must, therefore, be over-ruled.

BARING'S Case. *July* 24.

Creditors, in respect of stock standing in the name of the partners, which was sold in breach of trust, and the proceeds applied to the use of the partnership, entitled as against the estate of the deceased partner, either to consider it as a debt, or to have the stock specifically replaced, at their option. It makes no difference that the stock stood in the name of, and was sold by, one of the partners only, the proceeds having been applied to the partnership use.

Sir *Thomas Baring* (as Executor of *Wigglesworth*) represented the claims of those creditors who had stock standing in the names of the partners, or of one of them, which was sold in the lifetime of *Devaynes*, without the knowledge of the creditors, and the proceeds applied to the use of the partnership.

The Master reported his opinion to be, that the estate of *Devaynes* was liable to pay to the creditors the value of the stock at the date of his Report.

[612] The particular circumstances under which this claim was made, were the following:—

Wigglesworth, at the time of his death, was possessed of a large sum in the 3 *per cent.* consols standing in the name of *Noble*; the partnership also were indebted to him on the banking account. After his death, his Executors, continuing to employ the house as bankers in respect of his estate, directed the dividends when received by them to be laid out in accumulation of the stock so standing in the name of *Noble*, which was done from time to time accordingly. The Master reported that the reason why the original and after-purchased stock stood in the name of *Noble* alone, was because, as one of the partners, by the request, or with the concurrence of the rest, he took into his own hands the general management both of the stock belonging to the house, and of that entrusted to the house by their customers, for the convenience of receiving dividends, and selling such stock, when requested so to do, without the expence of powers of attorney for those purposes; but that the so placing the stock in the name of *Noble* alone, was the act of the house, for its own convenience, and not by the direction or appointment of the customers, who gave their directions and authority to the partners jointly; although, in this case, they knew that the stock had been placed in the name of *Noble* alone, and believed that it so continued until after *Devaynes's* death. The Master further reported that the stock belonging to the house in its own right was no way distinguished in the bank books from the same species of stock belonging to the customers, and by them entrusted to the partnership; so that it was impossible to ascertain whether any part of the stock sold out was the specific property of *Wigglesworth*, [613] or his Executors, except by a deficiency in the amount of stock remaining in the name of *Noble*.

The Report proceeded to state, that the amount of stock belonging to *Wigglesworth's* estate, including the accumulations at *Devaynes's* death, was £26,200, according to the entries in the passage-book from time to time delivered to the Executors, and as was accordingly supposed by the Executors to be the fact; that it appeared by the accounts rendered since the bankruptcy, that £24,600 (part