

1765.

CUNNINGHAM
 v.
 KINNEAR, &c.
ALEXANDER CUNNINGHAM, W.S. - - -
Appellant;
THOMAS KINNEAR, Insurance Broker in Edin-
burgh, ALEXANDER BROWN and SON, Mer-
chants, and WILLIAM HUME, Merchant Up-
holsterer in Edinburgh, - - -
}
Respondents.

House of Lords, 27th March 1765.

PARTNERSHIP—JOINT ADVENTURE—PRÆPOSITUS NEGOTIIS.—Where goods were purchased on individual account; and thereafter an interest purchased therein by another, as part of a cargo shipped for foreign trade; where also there was no contract, and no previous reputed partnership, anterior to the purchase of the goods shipped: Circumstances in which held, there was an existing copartnery, and that the deceased partner, in purchasing the goods, in ordering the insurances, and in receiving the returns, acted as *præpositus negotiis* of the company, and bound the other partners.

Michael Ancrum, merchant in Edinburgh, engaged in a foreign trade from Leith to Madeira and Jamaica, which was entirely distinct, and no way connected with another partnership, in which he was chiefly concerned. Residing in Edinburgh, he there purchased the commodities and goods suitable for the Madeira markets, and shipped them off in one vessel.

The appellant Cunningham, Andrew Ronaldson, Thomas Murray, and others, joined him in this private trade, and agreed to take from him particular shares of the goods thus shipped to Madeira and Jamaica.

The appellant took one-third of one cargo, and a fourth of another cargo, shipped to these places in 1760; and one half of two cargoes, shipped for the same place, in 1762.

The goods shipped in 1760 were under the following invoices: (1.) “ Invoice of goods shipt by Michael Ancrum for “ Madeira and Jamaica on board the ship Edinburgh, Tho- “ mas Murray, master, on the joint account and risque of “ Alexander Cunningham, Esq., and Michael Ancrum and “ Thomas Murray, consigned to the latter.” (2.) “ Invoice “ of goods shipped by Michael Ancrum for Kingston in “ Jamaica, on board the Edinburgh, Thomas Murray, mas- “ ter, on the joint account and risque of Alexander Cun- “ ningham and Andrew Ronaldson, Esquires, and Michael “ Ancrum, and Mr. John M’Lean of Kingston, and to him “ consigned.”

For the goods shipped in 1762, the invoice sets forth: “ Invoice of goods shipped by Michael Ancrum for Madeira, “ on board the ship Edinburgh, James Hamilton, master, on

“ the joint account and risque of Alexander Cunningham, Esq., and the said Michael Ancrum, and to the said James Hamilton consigned.” The other, which had reference to goods sent to Jamaica, was in precisely the same terms, only that the goods were consigned to a different party—John and Archibald M’Leans of Kingston.

1765.

 CUNNINGHAM
 v.
 KINNEAR, &c.

These last invoices were made out on 27th Feb. 1762, after the goods were shipped, but the vessel waited 14 days longer, to receive some guns from Newcastle. Ancrum delayed signing the invoices: In the meantime, he had fallen ill, and by the time the vessel was ready to sale (13th March) he was unable to sign them, whereupon the appellant signed these “ for Michael Ancrum and self.” Ancrum died on the 17th of March, having first conveyed his whole estate to the appellant and other trustees, for the payment of his debts, &c.

The appellant was appointed by his co-trustees to manage Ancrum’s affairs; and, in order to do this prudently, he ordered on the 25th March such an additional insurance on the ship and cargo as, with £3000 already insured, should entitle the insured to recover £2360 on the goods, and £1400 on the ship, free of all deduction.

The goods shipped had been bought on credit by Ancrum, and, unwilling to abide the result of the adventure, or recovery of Ancrum’s estate, Kinnear, for himself, and as trustee for the vendors of these goods, raised an action against the appellant and his co-trustees, and also against Daniel M’Lean of Jamaica, and Andrew Ronaldson, Esq., as partners, joint traders, or adventurers, with the said Michael Ancrum, for payment of £1200. Another action was brought for goods bought upon the same grounds by John Weir, merchant in Edinburgh, for payment of £667. 18s. 7d. It was agreed that one action should settle the question as to both, and that a decision against the appellant would be conclusive as to all the defenders. They were both laid on the basis that the appellant was a partner in trade with Ancrum, and that Ancrum merely purchased on credit for the company. The pursuers therefore insisted, that there was a proper partnership between Ancrum and the appellant for carrying on a joint trade, and consequently each partner was liable *in solidum*. That though there were no formal articles of agreement entered into for a certain term, as is usual in partnership, yet the legal consequences and liability were the same, where the goods were furnished to a joint

1765.

CUNNINGHAM
v.
KINNEAR, &c.

concern, and the appellant a member of, and a party taking benefit from that joint trade. Yet the partnership was proved: 1st, By the invoices above referred to; 2d, Letters written by Ancrum and the appellant to their correspondents in Jamaica, in which the appellant appeared to identify himself as a party interested; and in particular, a letter addressed to "Messrs. Cunningham and Ancrum," from Jamaica, advising them of certain goods to be sent out next voyage, as most suitable for the Jamaica market, which agreed with the invoice of goods sent to Jamaica in 1762; 3d, An order by Ancrum to Weir, which, it was alleged, desired him to furnish the goods for behoof of Cunningham and Ancrum; 4th, Two letters written by Ancrum to the appellant, when in London, stating that he was about being laid in prison for Kinnear's insurances, and that the appellant's share thereof was £380. In addition to these articles of evidence, it was pleaded that Ancrum was *præpositus negotiis*. In answer, it was contended as Ancrum alone made the purchases, and effected the insurances, and as the respondents dealt with him, and upon his own credit, they had no claim against the appellant. That his interest was purchased from Ancrum after the latter had bought the goods from the vendors on his own account; that anterior to this there was no partnership or joint adventure; that he contracted with him merely for a share of the cargo, without any previous partnership with him, or any dealing with the respondents whatever.

July 27, 1763. The Lord Ordinary pronounced this interlocutor: "Having considered the several proceedings in this cause, and the mutual memorials and writings produced, finds it fully instructed, that the defender, Alexander Cunningham, was concerned as a partner in the different adventures which gave rise to the question in debate: Finds it also instructed, that the furnishings of the goods, and the different insurances libelled upon by the pursuer, were made and brought to the account or use of the company, wherein Mr. Cunningham was a partner: Finds it also instructed, that Michael Ancrum, now deceased, in purchasing the goods, in ordering the insurances, and in receiving the returns of the goods sent abroad, and recovering the insurances, acted as *præpositus negotiis* of the said companies, and not in his own name only; and that the engagements he came under, for behoof of the said companies, affect the companies as a copartnery debt, and Mr. Cunningham

“ as a partner.” On representations and answers, his Lordship adhered; and upon reclaiming petition to the whole Court and answers, the Court pronounced this interlocutor: “ The Lords having advised this petition, with the answers thereto; they refuse the desire of the petition, and adhere to the Lord Ordinary’s interlocutors; find the petitioner liable in expenses of process, of which ordain an account to be given in,” &c.

1765.

CUNNINGHAM
v.
KINNEAR, &c.
Nov. 16, and
Dec. 1, 1763.
Jan. 21, 1764,
and
Feb. 16, 1764.

An appeal was taken of these interlocutors to the House of Lords.

Pleaded for the Appellant:—There is no averment by the respondent that Ancrum and the appellant ever entered into articles of partnership, or were joint partners in trade, anterior to the purchase by Ancrum of these goods from the respondents, nor has he proved that they were known and reputed as such, at any time, or concerned as partners in the trading cargoes in question; and all that is set forth is, a partnership inferred by presumption with regard to the two cargoes, and hence it is contended, that those who furnished the goods did so, on the credit of Cunningham, as well as Ancrum, who bought them; but this is contrary to fact, because all the evidence established is, that the respondents dealt with Ancrum alone, in the sale of these goods, which is confirmed by the state of Ancrum’s own books, where they are set forth as a purchase on his own individual account: That the appellant only dealt with Ancrum himself, as owner of the whole, without regard to those with whom Ancrum had contracted: That these were mere joint adventures, which are distinct from partnership. In partnership each is liable for the whole; but in these temporary adventures, it is established by the best authorities, that he who purchases the goods, is he who stands liable for the whole to the third party, the associates being bound only to each other. Further, that the plea of *præpositus negotiis* is inapplicable to adventure, and even in a case of proper partnership, no one can act as such, without a special commission or procuration existing at the time of the purchase; but that no such commission existed is evident, by the fact, that the respondents never knew, till after Ancrum’s death, that the appellant was in any way connected with the joint trade, and as, at the time of the purchase, they did not know of such connection, so they cannot be presumed to have relied on his credit, or given the goods to Ancrum as *præpositus negotiis* for others.

1766. *Pleaded for the Respondents.*—By the law of Scotland, all partners in a private trading society, are liable conjunctly and severally for furnishings made to the trade of that society. It is not essential to the constitution of such a society, that a contract in form should be executed between the partners, or a firm, or social name assumed by them; but the society may be established to the above effect, *rebus ipsis et factis* by the consent of the parties, proved by their accounts and transactions. A society may also be established *de certa re aut negotio* concerning a particular voyage, or adventure, as well as for a greater length of time, or more extensive trade. Society is defined, a contract for the communication of profit and loss. Persons may in some cases be called not improperly joint traders, without being *socii* or copartners. But where there is a communication of profit and loss, and of the property of the goods *pro indiviso*, a proper society is created. In the present case, there was clear evidence that it was a society, and not joint adventure, which connected the appellant with Ancrum in the two cargoes in question, and the latter having dealt with the respondent as *præpositus negotiis* of the concern, was liable for the furnishings ordered by him.

After hearing counsel, it was

Ordered and adjudged that the appeals be dismissed this House, and the interlocutors therein complained of be hereby affirmed; and that the appellant do pay to the respondents £80 costs on these two appeals.

For Appellant, *Fl. Newton, Al. Forrester.*

For Respondents, *Tho. Miller, C. Yorke.*

Note.—This case is not reported in Court of Session.

GEORGE WISHART, D.D., and all the other	}	<i>Appellants;</i>
Ministers of the Gospel in Edinburgh,		
THE MAGISTRATES of Edinburgh,	- -	<i>Respondents.</i>

House of Lords, 17th February 1766.

JURISDICTION OF COURT OF TEINDS—STIPEND.—Held the Court of Teinds has no jurisdiction to augment the stipend of ministers out of any other funds than the tithes of the parish, where the minister serves the cure, and, therefore, that they had no jurisdiction to augment the stipends of the ministers within the city of Edin-