such a wretched description to reach the bar of your Lordships' House.

LORD HERSCHELL—My Lords, I am of the same opinion. I desire to express my concurrence in the observations which my noble and learned friend on the woolsack has made as to the necessity of some course being taken which will put a stop to cases being brought *in forma pauperis* on appeal to your Lordships' House (thereby putting the other party necessarily to expense) for which there is not the slightest shadow of foundation. It appears to me that where the person appealing seeks for power to sue *in forma pauperis*, which he can only do by permission, and which confers upon him a very considerable right in respect of his freedom from obligation to pay the costs of the other party even if he is unsuccessful, it would be no interference with any reasonable right of appeal to require as a condition that he should show, in the first instance, some reasonable foundation for the appeal which he seeks to prosecute in that form.

LORD MACNAGHTEN—My Lords, I quite agree in all the observations which have been made by the noble and learned Lords who have preceded me.

LORD MORRIS concurred.

Their Lordships affirmed the judgment of the First Division and dismissed the appeal.

Counsel for the Appellants—Robertson—Bannerman.

Counsel for the Respondents—Lord Advocate, Q.C. — Maconochie. Agents — Grahames, Currey, & Spens, for J. & F. Anderson, W.S.

Thursday, August 7.

(Before Lord Herschell and Lords Watson, Macnaghten, and Morris.)

LAIDLAY AND OTHERS (LAIDLAY'S TRUSTEES) *v.* THE LORD ADVOCATE.

(*Ante*, July 12, 1889, 26 S.L.R. 738; and 16 R. 959.)

Revenue—Inventory Duty—Partnership—Share in Trading Company—Whether Indian or British Company—Death of Partner—Transfer of Shares.

A partnership of fourteen persons in Great Britain and two in India carried on a business "for the production . . . of indigo and silk and other produce, and for the sale in Calcutta, or shipment for realisation in Europe, of such produce."

The partnership deed provided that the business in India should be conducted by managing agents in Calcutta who could not be dismissed so long as they held certain shares in the partnership, and who alone had power to use the name of the firm; and further, that all the partnership books were to be kept in Calcutta. The annual balance-sheets were prepared and the profits appropriated to the partners by the managing agents, who annually sent to London certified reports and abstracts of accounts showing the business and profits, and the interest of each partner therein, and generally executed all acts in connection with the practical working of the business.

A financial firm in London were constituted agents for the partnership in Europe, and it was agreed that on the security of a mortgage over the assets they should make the necessary advances for carrying on the business, and that the produce of the business, or, if realised in India, the proceeds thereof, should be remitted to them. The profits were paid to the partners through the London agents, who were irrevocably appointed arbiters to determine any dispute between partners or their representatives.

The property of the partnership was vested in three trustees resident in this country in terms of the partnership deed.

Six of the parties resident in this country were constituted a committee to advise with the agents in London and Calcutta, and to decide, subject to the approval of a general meeting of the partners, on all matters affecting the partnership.

The deed also provided that on the death of a partner the partnership should not be dissolved, nor should his representatives become a partner, but the interest of such . . . partner . . . shall cease on the 30th September next after his decease, . . . and his share . . . shall be dealt with in manner following . . . if his representatives shall desire to sell such share to any of the partners or to any other person, to be approved by the committee, the same may be sold for such price as may be agreed on." If not sold within six months the fair value of the share was to be determined by the London agents, and upon the representatives executing a transfer or assignment of the entire share, the trustees of the partnership were to pay to the representatives the sum so ascertained.

A partner of the firm, domiciled in Scotland, died, and his executors sold his shares to his three sons. The executors failed to include the value of these shares in the inventory of personal estate belonging to the deceased in this country, and they were sued by the Inland Revenue for additional inventory duty. *Held* (*rev.* the judgment of the First Division) that the asset of the deceased's estate for which inventory duty was sought was not of the nature of a claim for a sum of money, but was a share of a business and assets

locally situated in India, and that that share was not liable for inventory duty in this country.

This case is reported *ante*, July 12, 1889, 26 S.L.R. 738, 16 R. 959.

The defenders, Laidlay's Trustees, appealed.

At delivering judgment—

LORD HERSCHELL—My Lords, in the year 1877 a partnership was constituted for the purpose of carrying on a business which is thus described in the second article of the deed of partnership—"The business shall be the carrying on and working of indigo and silk concerns and zemindaries, for the production or manufacture or working of indigo and silk and other produce, and for the sale in Calcutta, or shipment for realisation in Europe, of such produce."

One of the partners in this firm, Mr Laidlay, has died, and the question has arisen whether his interest, whatever it may have been, derived from the deed of partnership to which I have called attention, is an asset situate in England and therefore made the subject of probate duty in respect of which probate must be taken out in this country. There can be no doubt that the question to be determined is, what is the local situation of the asset with which we have to deal, because that the interest, however it may be described, was an asset of the testator is beyond dispute.

My Lords, it has been said that the point to be determined is what is to be regarded as the locality in which the partnership is situate. I think it would be more accurate to state the question thus—What is to be regarded as the locality in which the business which is the property of the partnership is situate? Probate duty attaches to *bona notabilia* in the place where the goods are situate wholly irrespective of the question of the domicile of the testator; and in the case of *Ewing*, Sir James Hannen, in speaking of the share of a deceased partner as a partnership asset, stated that in his view it was situate where the business was carried on. Well, my Lords, in the present case we have to consider what is the locality in which the business which was the property of this partnership was situate. The choice has to be made between England and India. It has not been disputed by the learned counsel for the respondent that its locality cannot be both England and India—the choice has to be made between the two. Undoubtedly there are considerations arising from the terms of the partnership deed and the circumstances surrounding it, some of which point in the one direction and some in the other. Your Lordships have to consider which of these preponderate and what is the choice to be made.

Now, in support of the view that the business which is the property of the partnership is to be regarded as situate in India, there appear to be these very cogent considerations. The business carried on was the cultivation of estates all of which were situate in India, and the selling off the produce of these estates. The business properly so called was entirely carried on there. Nothing had to be done outside India except obtaining financial assistance from a firm in England and selling the produce which was not disposed of in India either in England or elsewhere. The business was conducted by managing agents who could not be dismissed so long as they held the requisite shares in the partnership, and these managing agents were an Indian firm residing and carrying on business in Calcutta. They alone used the name of the firm with which we are dealing. The partners in this firm, which traded under the style of Robert Watson & Company, were not at liberty to use that name, neither the individuals nor the whole of them. Messrs Jardine, Skinner, & Company, the managing agents to whom I have referred, were to transact and carry on the entire business, to make all the necessary contracts, to appoint and discharge the persons employed, to draw in their own names for the necessary funds, and to allocate the profits to the several partners in the partnership books; and the whole of these partnership books were to be kept in Calcutta.

My Lords, a stronger case—if the matter stood there, a more absolutely conclusive case—of a business locally situate in India, it is hardly possible to conceive, and if there were nothing else to be found in the deed, I do not see how even a doubt could have been entertained that India was to be regarded as the locality in which the business belonging to this partnership was situate.

I turn now to the points relied upon as showing that the locality ought to be regarded as England and not India, only saying at the outset, that having regard to the facts to which I have drawn attention, some very strong and overwhelming considerations would have to be suggested in order to get rid of such a case indicating India as the seat of the business.

Now, the circumstances relied on are these. In the first place the residence of the partners. There were sixteen partners who, according to their description in the deed which constituted the partnership, were at that time residing, seven of them in England, seven in Scotland, and two in India. I do not see how any inference is to be drawn from the place of residence. That would indicate, if numbers are to be relied upon, as much a Scotch business, a business to be regarded as situate in Scotland, as a business to be regarded as situate in England, and although the importance of that distinction is not now what it was, owing to comparatively recent legislation, yet of course the questions relating to probate in reference to Scotland and England respectively were as distinctly and as sharply severed as in respect of England or Scotland and India. It seems to me that from the fact that some of the partners resided in England and some in India, it is impossible to draw any inference which would at all diminish the weight of the circumstances upon which I have com-

mented as indicating India as the locality where this business is situate.

Then it is said that the partners, residing as they did, many of them in England and in Scotland, had vested in them a control of this business although Jardine, Skinner, & Company were the persons who were to carry it on. That depends upon the construction especially of the 9th, 11th, and 21st articles of the partnership deed. A committee was created who were to advise with the agents of the partnership "on all matters affecting the interest of the partnership," and who were also, subject to the approval of a general meeting of the partners, to decide on all matters affecting the interests of the partnership. The 11th clause empowered Jardine, Skinner, & Company to decide whether all the branches of the business should be carried on, or which of them and to what extent, but this was made in terms subject to the opinion of the committee. The managing agents were also empowered to determine what branches of business should be undertaken, but there again no new branch was to be undertaken without the consent of the committee. The 11th clause then proceeds to give the fullest powers to Messrs Jardine, Skinner, & Company with regard to the conduct of the business and in the terms in which those powers are conferred there is no such proviso as is inserted in the earlier part of the clause relating to the consent of the committee being requisite.

The necessity for that consent or approval is limited to two things only as it seems to me—the discontinuance or diminution of the business theretofore carried on or the addition to or increase of it by opening up new branches.

Then, turning to the 21st clause, no partner or partners were to contract any debt or draw or accept or indorse any bill in the name of the partnership, nor were any of the partners, not being a majority, to interfere in any way with the conduct of the business by Jardine, Skinner, & Company, or Matheson & Company (whose connection with the business I will come to in a moment) but all powers for controlling, regulating, ordering, and managing the affairs of the partnership which consistently with the provisions of these presents might be exercised by all the partners for the time being, might be exercised by a majority of them. Now, that clearly indicates that there was intended by the deed to be a limitation of the extent to which the partners, even the whole of them, could conduct, regulate, order, or manage the affairs of the partnership, because it is only so far as consistent with the provisions of the deed that those powers possessed by the whole might be exercised by the majority. And, my Lords, when the whole of this deed is looked at I cannot doubt, that although it was intended that Messrs Jardine, Skinner, & Company should defer to the wishes of the partners, and that the partners should decide upon matters which should be suggested affecting the interests of the partnership, yet that the management of the business proper should be vested in Jardine, Skinner, & Company and not in the partners generally.

But, my Lords, even if it were the case that these partners, residing some in England, some in Scotland, and some in India, could have controlled as they pleased the action of Jardine, Skinner, & Company, to my mind that would not in the slightest degree diminish the importance of the facts to which I have called attention as showing that the seat of the business was in India. I cannot recognise the view as sound that the fact that a single person (to put a simple case for the moment) who owns a business carried on in, India resides out of India, resides it may be from time to time in different countries, and can from any of those countries control the action of the agents who are carrying on his business for him, transfers the locality of that business from time to time to the particular country in which he happens to reside, and from which his orders to his agents would come; and therefore for my part I do not consider it necessary to enter into any minute criticism as to the relations of these partners to Jardine, Skinner, & Company, that is to say, to what extent they could control or regulate their action, because it seems to me that whatever that extent was, having regard to the terms of the deed, the fact that that power of control existed did not in any way prevent this business, carried on as it was, and intended to be carried on as it was, from being a business situate in India.

Then the respondent relies upon the fact that Messrs Matheson & Company were the London agents of the partnership; therefore he says that they had London agents just as they had Calcutta agents, and that the Calcutta agency no more points to its being an Indian business than the London agency points to its being an English business. But, my Lords, the functions of the London agents were of a totally different character from those of Messrs Jardine, Skinner, & Company, to which I have already alluded. The London agents were a financial house who afforded the necessary financial assistance to the business in India. Having advanced the funds required for the cultivation, they stipulated that the proceeds of the produce when realised should be remitted to them in London, or that if it was determined to realise the produce by sale in England or Europe rather than in India, they (Matheson & Company) should be the agents to whom the produce should be so consigned for sale. Now, except that the produce was thus remitted, and that Matheson & Company were thus constituted agents, they had no connection with the business and no right to interfere in its management.

My Lords, I cannot bring myself to think that the fact that a financial firm in this country were constituted agents for these purposes, and to this extent if a firm whose business was carried on substantially in India at all alters the character of that firm or its business and makes it in any respect other than an Indian business.

In connection with the deed of partnership, one other circumstance I think only was relied upon, and that is that by that deed Messrs Matheson & Company were constituted, in case any difference arose, the arbitrators to determine it between the partners. But it is hardly seriously contended that this fact of itself was of any weight, or that the deed relating to what was undoubtedly an undertaking carried on out of this country thus made it an undertaking carried on in this country by reason only that those who carried it on had agreed upon an arbitrator locally situate here to determine any difference that might arise between them.

My Lords, giving the fullest weight to all the considerations arising upon this deed with reference to the transactions which were to take place in this country and the residence in this country, it appears to me impossible to hold that they in any way countervail or get rid of the considerations with which I started, and which point to this being an Indian business, and therefore a business the partnership property of which is locally situate in India. In saying this I am differing from the view taken by the Lord Ordinary, but on the other hand I am agreeing with the view which was taken by Lord Shand in the Court of Session, and which was not dissented from by the majority of the Court, who based their judgment upon an entirely different ground, to which I now pass.

The point which now arises of course starts with the hypothesis that this is a business locally situate in India, and that the asset consisted of a share in a business which was locally situate there. My Lords, reliance is placed upon the 25th clause of the partnership deed as showing that even if, apart from that provision, this is to be regarded as a business the property of these partners situate in India, nevertheless there was an asset locally situate in this country which was properly the subject of probate here. My Lords the provision relied on provides that on the death of any partner his representative should not become a partner in respect of any share of his, but that the interest of the deceased partner should cease from the 30th day of September next after his decease. Therefore the interest of Mr Laidlay in this firm unquestionably vested in his executors, and remained in them, except so far as it was disposed of by a subsequent transaction, from the time of his decease down to the subsequent 30th of September.

The clause then goes on to provide that if the trustees desire to sell the share and can find a purchaser whom the committee approve of, then they may complete that sale, and pass to the purchaser from them the share and interest in the partnership and all its assets which was possessed by the deceased partner. If they are unable to find any purchaser of whom the committee approve within six months, or if they do not desire to sell in the manner provided for, then at the end of the six months the fair value of the share of the deceased partner, as on the 30th of September on which his interest is to cease, falls to be determined by Messrs Matheson & Company, and upon the executors executing a transfer or assignment of the share, the trustees of the partnership are to pay to the representatives of the deceased partner the sum so fixed by Messrs Matheson & Company, or there is a provision for charging it and paying it by instalments upon which I need not dwell. And the 26th clause provides that "every purchaser becoming entitled by purchase, or obtaining such transfer of the share of a deceased partner, and executing such mortgage or indemnity shall, upon entering into a covenant with the trustees of the partnership to perform and abide by all the provisions herein contained, become a partner in the place of the deceased partner."

Now, my Lords, I think that when that provision is considered, it, to my mind at least, renders it clear that this asset, which by the hypothesis was a share in a partnership business situate in India, did not, by the exercise by the representatives of the deceased partner of this option, however they exercised it, convert that which otherwise would have been an Indian asset into an English asset. It is said that the representatives of the deceased partner sold to persons in this country, but that transaction of sale was a transaction altogether subsequent to the death, and the character of the asset and its local situation cannot be affected by considerations or circumstances arising out of a transaction subsequent to the death. The question is, where at the time of the death was the asset situated? That it was sold to a person residing in this country, and that therefore the payment in respect of it became a debt from a person residing in this country, and that the situation of the debtor is to be regarded as the situation of the asset in the case of the debt can matter nothing, because this was a debt not existing at the time of the death of the testator, but arising subsequently to the death of the testator by a sale of a part of his assets, and of course the local situation of his assets cannot be in the slightest degree affected by what arises out of a sale of those assets.

My Lords, with the utmost respect for the learned Judges in the Court below who took this view, I am unable really to entertain any doubt whatever upon this point. It appears to me clear that there has been some confusion between the rights which have arisen out of the sale of an asset of the testator and the question what was the character of that asset, and where was it situate before it was sold, which is really the question falling to be determined?

My Lords, for these reasons I think that this asset was a share in partnership property consisting of a business and assets locally situate in India, and that the share therefore must equally be regarded as an asset situated in India, and that no subsequent dealing with that share under the powers conferred upon the representatives of the deceased partner by the deed of partnership can alter that local situation,

or make that which was an Indian asset other than an Indian asset.

For these reasons I move your Lordships that the interlocutor appealed from be reversed, and that the cause be remitted to the Court of Session with directions to assoilzie the defenders, and declare them entitled to expenses in the Court below, and that the respondent do pay to the appellants the costs of this appeal.

LORD WATSON—My Lords, I am altogether of the same opinion with that which has been expressed already by the noble and learned Lord on the woolsack. In conquence of the different grounds of judgment selected by the Lord Ordinary, and by the First Division of the Court, both of whom gave judgment for the claim of the Crown, it is necessary in this case to consider two questions, viz.—First, What is the nature of the asset in respect of which probate duty is sought; is it of the nature of a claim for a sum of money, or is it a share in the business of Robert Watson & Company? And secondly, if the latter, what was the *locus* of the business of which it is a share?

My Lords, to deal in the first place with the ground of judgment of the Inner House, with which I am altogether unable to agree, it appears to me to rest upon a confusion between two things essentially distinct, that is to say, the intrinsic nature of the asset which fell *in bonis* of the late Mr Laidlay upon his decease, and the powers that are given to his executors to deal with that asset. Their Lordships have assumed that immediately upon the death of Mr Laidlay that which formed part of his succession before the trustees applied for confirmation was nothing more than a right to a sum of money payable in England. Now upon construing the contract I think it is quite impossible to arrive at that conclusion. No doubt the right of the executors to uplift the profits after a certain date came to an end—it might come to an end on the very day of Mr Laidlay's death and might so never come into existence. But the share did not cease to bear profits, and when sold or taken over carried these profits intermediately accruing and earned to the purchaser from the executors. That which the executors had *in bonis* was a share to sell, and the executors had the right to sell and in point of fact they did sell and transfer. The consequence has been that their transferees are now in as full right of the deceased's share as he was himself during his lifetime, not against the contract or inconsistently with the contract, but in entire accordance with its terms and provisions.

My Lords, I do not think the result would have been different if those executors whose field of purchasers was very circumscribed, because they could sell to no one without the approval of the committee of partners, had failed to find a purchaser to the satisfaction of the committee. In that case the contract provides that the share shall be valued by the London agents, Matheson & Company, and upon payment of the valuation the share is to pass to the partners or to any transferee from them, any third person whom they may choose to appoint or select to take the share. But even in that event the contract recognises that the asset which the partners acquire by that transaction from the estate of the deceased is a share, and accordingly provision is made in the 25th article of the contract for the executors granting a transfer of the share as a condition of their right to receive the amount fixed as the value by Messrs Matheson & Company.

Now, my Lords, with respect to the second question as to what is the *locus* of that business in which the share is held, I have listened with much pleasure to the very plausible arguments which have been addressed to the House on behalf of the Crown by the Solicitor General for Scotland —I say "plausible" because it appeared to me that there never was a plainer case brought before a court of justice for fixing the *locus* of a business abroad. I am not going to follow the noble and learned Lord who preceded me into all the details, but there are one or two matters which appear to me to be absolutely conclusive upon the point. The whole of the assets are in India; so is the whole staff of the officials and servants of the firm. The managing agents in India, who must include in their firm at least one partner in the partnership holding a certain amount of its shares, have the absolute right of management, absolute as to finance, absolute as to the mode of cultivation, absolute as to the mode of realising assets, and they are charged moreover (and that appears to me to be a very important feature in the case) with keeping the books, with making up the balance-sheets, with everything in short that is necessary to the conduct of the business of a company down to the ascertainment of profits and the apportionment of those profits amongst the partners. It is a very singular contract, singular in this sense only, that contracts in these terms are not frequently met with before courts of justice. These partners seem to have renounced the power to do almost every act which usually distinguishes a partner. They cannot sign their own firm's name; they cannot effectively interfere in the conduct of the busines. Their function seems to be limited principally, if not wholly, to two matters—the first is to determine whether the limits of the business shall be expanded or contracted, because upon that point they are to judge, whereas the moment the limits are fixed, then so far as regards conduct and management the managing agents in India have the power. The second matter is the important privilege of taking their profits when they have been apportioned and handed over to their agents in London. Now, my Lords, even if you are to regard the place where the partners were to be found, in this case it can hardly be said that they had any office or place of business at all, but even if they had an office or place of business, it appears to me that that would not be sufficient to qualify the cir-

cumstance, which I have already referred to, as leading to the inference that the position, the place where this business was carried on, and the only place which can be predicated as the *locus* of the asset, is India.

For these reasons I concur in the judgment which has been proposed.

LORD MACNAGHTEN—My Lords, I must say that I think this is a very plain case. It cannot be disputed that the business which Messrs Jardine, Skinner, & Company of Calcutta carried on under the style or firm of Robert Watson & Company, for and on behalf of the persons named in the deed of 1877 as partners in that firm, was an Indian and not an English business. India was the field of its operations. The whole of its capital, consisting both of moveable and immoveable property, was in India, and the books of the business which recorded all the transactions done in the name of the firm, and the particulars of the interests of the individual partners were kept in Calcutta. The business was, I think, as purely an Indian business as any business can be which is carried on in India on behalf of persons some or all of whom may be resident outside the territorial limits of India.

Now, it cannot I think be disputed that if the whole business had belonged to one person, and that person had resided in England, and had died here, an Indian and not an English probate would hav ebeen required in order to enable his legal personal representatives to collect the assets of the business.

It was contended, however, that the fact that the business was carried on for and on behalf of a body of persons, all but two resident in the United Kingdom, associated together in partnership, and not on behalf of an individual, makes a difference. I am at a loss to see what difference that fact of itself, and apart from any special contract to be found in the deed of copartnership, can make. If the business in its entirety is situated in India, I cannot understand how it can be that the several shares which make up the whole are situated somewhere else.

Then comes the question, Is there anything in the deed of partnership tending to show that the share of a partner dying during the copartnership is to be considered as situated in any other place than that in which the business is carried on? Quite the contrary. The death of a partner does not cause a dissolution of the partnership as between the other partners or any change of any sort or kind in the business. The business goes on as it did before. The whole capital vested in the trustees still remains in India. The share of the deceased partner does not cease to exist on his death. Up to the end of the current financial year the deceased partner has an interest in the profits and losses of the partnership. After that date the interest of the deceased partner in the share which belonged to him is in abeyance, but it belongs to his legal personal representatives, and to no one else. They and no one else can sell and transfer it, and when they sell it they sell it with all the profits belonging to it which have accrued in the meantime. Now, that share is a share in an Indian business, and the locality of that asset in my opinion is India and not England.

In my opinion an Indian and not an English probate was required to enable Mr Laidlay's legal personal representatives to recover Mr Laidlay's share of current profits, and to transfer his share in the partnership business to a purchaser.

I think therefore that the interlocutor appealed against must be reversed.

LORD MORRIS concurred.

Ordered that the judgment appealed from be reversed, and cause remitted to the Court of Session with directions to assoilzie the defenders and declare them entitled to expenses, and that the respondent pay the costs of this appeal.

Counsel for the Appellants—D.-F. Balfour, Q.C.—Sir H. Davey, Q.C. Agent—A. Beveridge, for W. M. Morris, S.S.C.

Counsel for the Respondent—The Lord Advocate, Q.C.—Sol.-Gen. Darling, Q.C.—W. J. Mure. Agent—Sir W. H. Melville, Solicitor for England for the Board of Inland Revenue, for David Crole, Solicitor for Scotland for the Board of Inland Revenue.

END OF VOLUME XXVII.