

have conferred no such right upon the pursuers, and they have imposed no such obligation. It follows that the community of rights and obligations which the contract contemplated as possible has not been brought into existence, and the pursuers can have no title or interest to compel the construction of streets, which when they have been constructed they will not be entitled to use.

The pursuers' counsel relied upon a well-known series of cases with reference to building restrictions. These cases are not directly in point, because the pursuers are not claiming the benefit of a servitude or restriction, but seeking to enforce a personal obligation *ad factum prestandum*. But the result of the decisions, as the law is laid down by the House of Lords in *M'Ritchie v. Hislop*, is that to give neighbouring feuars the benefit of restrictions in feu-contracts to which they are strangers, there must be either (1) an express stipulation in their respective contracts with the superior, or (2) a reference in both contracts to a common plan or scheme of building, or (3) an agreement between the feuars themselves. The pursuers' title satisfies none of these conditions.

LORD ADAM concurred.

LORD M'LAREN—I also concur. I think that in order to give the pursuer a title to sue, he must either have assigned to him the creditor's right in the obligation, or he must show that by some antecedent contract the pursuer had undertaken to make a road for the alleged debtor's benefit. In such a case the principle of *M'Ritchie* applies. If the superior puts the adjacent feuar under such an obligation, the person with whom he has agreed to give a right to enforce that obligation will have the benefit of that obligation. The analysis which Lord Kinnear has made of the titles, shows to my mind completely that neither of these conditions applies, and therefore that the pursuer's case is not well founded.

LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—D.-F. Asher, Q.C.—Rankine—Guy. Agents Macandrew, Wright, & Murray, W.S.

Counsel for the Defenders and Respondents—W. Campbell—Fleming. Agents—Tods, Murray, & Jamieson, W.S.

Friday, July 17.

FIRST DIVISION.

[Lord Low, Ordinary.]

MESS (SANG & COMPANY'S TRUSTEE)
v. LOW.

Partnership—Constitution—Loan or Partnership—Share of Profits—Application of Profits to Extinction of Prior Debt.

J. advanced the sum of £1000 to L. & Co. on terms provided by a minute of agreement, which proceeded on the narrative that "the first parties have applied to the second party for an advance by way of a loan to enable them the better to carry on their business." The following conditions were contained in the deed:—(1) The second party was to receive 5 per cent. interest upon the loan; (2) The profits were to be retained in the business till the expiry of the agreement (which was to last for three years), when the loan was to be repaid and the profits divided equally between the parties; (3) the second party was primarily to apply his share of the profits in the extinction of a prior debt due to him by the partners of the firm; (4) the first parties were to have sole charge of the business of the firm, but were to supply half-yearly balance-sheets; (5) should the balance-sheet at any time show that the capital of the firm had fallen to £500, the agreement was to terminate, and the balance was to be paid to the second party, who was "in no circumstances to be liable beyond the amount of his loan;" (6) it was declared that the said second party should not be deemed or held to be in any respect a partner in the said firm.

Held that the contract was one of loan and not of partnership.

Title to Sue—Bankruptcy—Trustee in Sequestration—Partnership.

Opinion (by Lord M'Laren) that where the estates of a firm and certain of its partners have been sequestrated, the trustee in the sequestration has no title to call upon a person outside the trust, and who has not been made bankrupt, to contribute as a partner to the funds for distribution, unless such person is bound by the contract of co-partnery so to contribute.

The estates of Laing Brothers & Company, jute spinners, Dundee, as a company, and of the individual partners, were sequestrated on March 9th 1895, and Mr John Mess, accountant, Dundee, was appointed trustee in the sequestration. Previous to the sequestration he had been acting under a voluntary trust-deed granted in his favour by the partners on 25th July 1894.

On 28th August 1891 Laing Brothers & Company and Mr John Low, nephew of the partners, entered into the following minute of agreement:—"Whereas the first parties have applied to the second party

for an advance by way of a loan to enable them the better to carry on their business: And whereas the second party has agreed to advance the sum of £1000 to be used by the first parties in their business upon the conditions hereinafter mentioned:—*First.* The second party hereby agrees to advance to the first parties the sum of £1000 in loan as above mentioned, and that for the period of three years from the 31st day of October 1891, upon which loan interest shall be paid by the first parties to the second party at the rate of £5 per centum per annum from the said 31st day of October 1891 to the term of payment, and that half yearly, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of said interest at the term of Whitsunday 1892, for the interest due preceding that date, and the next term's payment thereof at Martinmas following, and so forth half yearly during the continuance of the said loan. *Second.* The first parties agree that they shall retain in their business, and in order to secure the foresaid loan, the amount that may stand at their credit in the books of their firm as at 31st October 1891, at the expiry of a spinning account which will then come to an end, less the sum of £300 to be paid by them to Peter Matthew, merchant in Dundee. *Third.* The whole profits made in the business during the foresaid period of three years during which the foresaid loan is to continue, shall, under deduction of payments for management, wages, jute, and other ordinary and necessary outgoings requisite for carrying on the business, remain in the business, without any deduction other than that above specified until the expiry of this agreement, and on the expiry of the foresaid period the first parties shall repay in cash to the second party his said loan of £1000, and the whole of said profits shall be divided between the first parties and the second party equally. *Fourth.* In estimating the profits of the said business the said first parties shall be entitled to charge against the said business the sum of £2000 per annum in name of rent for Stobswell Works, and the sum of £50 per annum in name of office rent, and that by monthly instalments, and an allowance of £100 a-year for John Laing of Kellyfield, for assistance in the business, and all sums due to the said Peter Matthew for jute supplied by him or others to the said first parties, which outlay on jute at any one time shall not exceed £10,000: Declaring that the foresaid payments in name of rent shall be in full of all rents, taxes of every kind, and fire insurance, except fire insurance on the stock, which shall be charged separately and in addition against profits; and the first parties shall be bound to discharge all rents payable by them to their landlords, as well as all taxes and fire insurance, except as aforesaid. *Fifth.* The books of the said business shall be brought to a balance as on the 30th April and 31st October in each year, and should any of such balances show that the capital, including loan in this account, has

been reduced to £500, this agreement shall come to an end as at the date of said balance, and the amount then remaining shall be paid by the first parties to the second party, but under no circumstances shall the second party be liable for any sum beyond the £1000 he is to advance on loan. *Sixth.* The second party hereby agrees to apply the share of the profits falling to him, as above mentioned, at the expiry of this agreement, in reduction or extinction of the debt secured by bonds and dispositions in security for £5700 and £8000, granted by the said John Laing and his sons, the said William Robert Laing and David Colville Carruthers Laing, in favour of the late Andrew Beharie Low, Esquire of Butterstone, the father of said second party, over the said Stobswell Works and machinery, and Dens Road factory and machinery, and the lands of Kellyfield and others, the half of the said debt to which he is entitled in the apportionment of the estate of his said father being reduced or extinguished, *primo loco.* *Seventh.* The said first parties shall have the sole power of buying and selling, and generally of conducting the said business, but they shall supply a monthly statement showing the quantity of jute in stock and to arrive, and the extent of orders for yarns to execute to the said second party, and the said second party shall also be entitled to see the said half-yearly balance-sheets; declaring, however, that the first parties shall not be entitled to purchase or to have at any time in their possession a larger stock of jute than one or two months' supply in excess of yarns sold. . . . *Lastly.* It is hereby declared, that notwithstanding the loan made in terms of this agreement by the second party, the said second party shall not be deemed or held to be in any respect a partner in the said firm of Laing Brothers & Company, and shall not be liable for the debts and obligations of that firm." . . .

On 4th June 1895 Mr Mess raised an action against Mr Low, concluding for declarator that under the terms of the above agreement the defender had become a partner of the firm, and that the pursuer was entitled as trustee to recover from him such sums of money as might be necessary to pay the debts of the firm in full after exhausting the estate of the firm. The amount thus concluded for was £25,000.

The defender pleaded that not being and never having been a partner in the firm, and having never represented himself or suffered himself to be represented as a partner, he was entitled to absolvitor.

The Lord Ordinary (Low) on 14th December assolizied the defender.

Opinion.—"The pursuer is the trustee upon the sequestrated estate of Laing Brothers & Company, jute spinners, Dundee, and the object of the action is to have it declared that the defender was a partner, and is liable for the debts of the firm.

"The individual partners of the firm are the defender's uncles. He is a young man of apparently considerable means, and when the partnership is alleged to have

been entered into he was studying at Cambridge University with the view, he says, of taking orders in the Church of England.

"The question at issue depends upon the construction of an agreement made between Laing Brothers & Company, and the individual partners thereof, on the one part, and the defender on the other part, in 1891.

"The pursuer contends that the agreement was one by which a partnership was constituted; the defender, on the other hand, maintaining that it was an agreement fixing the terms upon which he agreed to lend £1000 to the firm for the purposes of their business.

"The agreement proceeds upon the narrative that the first parties (that is, the firm and the individual partners thereof) have applied to the second party for a loan 'to enable them the better to carry on their business,' and that the second party (the defender) has agreed to advance to them the sum of £1000, to be used in their business upon the conditions thereafter mentioned.

"By the first article of the agreement the second party agreed to advance the sum of £1000 'in loan as above mentioned, and that for the period of three years from the 31st day of October 1891,' and the first parties bind themselves to pay interest 'upon the loan' at the rate of five per cent. per annum.

"By the second article the first parties agree to retain in their business, 'to secure the foresaid loan,' the amount that may stand at their credit in the books of the firm at a specified date, after deduction of a certain sum.

"So far the agreement is one in regard to a loan and nothing else, and the third article contains the first of the stipulations upon which the pursuer founds as showing that a partnership was truly constituted, although under cover of an agreement bearing to be for a loan.

"The third article is to the following effect:—'The whole profits made in the business during the foresaid period of three years, during which the foresaid loan is to continue, shall under deductions of payments for management, and other payments of a like nature, 'remain in the business without any deduction other than that above specified, until the expiry of this agreement, and on the expiry of the foresaid period the first party shall repay in cash to the second party his said loan of £1000, and the whole of said profits shall be divided between the first parties and the second party equally.'

"The pursuer, of course, founded upon the provision as to the division of profits, and argued that the fact that the defender was to be entitled to one-half of the profits was inconsistent with any other idea than that he was to be a partner, because it could not be said that he was to receive a share of the profits as interest upon the loan, interest having already been stipulated for by the first article. Now, no doubt the receipt by a person of a share of profits is *prima facie* evidence that he is a

partner, and if he was to receive a share of the profits in addition to interest at a full rate upon money lent by him to the firm, the presumption of partnership might be very difficult to rebut.

"In this case, however, when the third article of the agreement is read along with the sixth article, it becomes clear that the defender was not to be entitled to a share of the profits in the ordinary sense of putting it into his pocket, but that the one-half of the profits which was apportioned to him by the third article, was under the sixth article, to be applied in a particular way.

"It appears that the pursuer's father had lent a large sum of money to the firm, which was secured to the extent of £5700 over one property, and to the extent of £8000 over another property. The defender was under his father's settlement entitled to one-half of these debts.

"In these circumstances the defender agreed, in the sixth article of the agreement, to apply the share of the profits falling to him under the third article in extinction of the debts to which I have referred, 'the half of the said debt to which he is entitled in the apportionment of the estate of his said father being reduced or extinguished *primo loco*.'

"Apparently the parties did not contemplate that one-half of the profits for three years could possibly exceed the debts, because there is no provision for the disposal of any balance of profits remaining after payment of the debts.

"It seems to me that the arrangement set forth in article sixth entirely meets the argument which the pursuer founds upon article third. If in addition to interest at the rate of five per cent. upon the £1000, the defender had been entitled to put one-half of the profits into his pocket, the argument would have been very difficult to resist, because the inference would have been that the consideration which the defender was to give for the share of the profits was the obligation of a partner for the liabilities of the firm. It is different, however, when upon the face of the agreement the consideration is a prior debt of the firm. I see nothing inconsistent with an agreement for the loan of money, that the lender should stipulate that during the period for which the loan was given part of the profits should be used as a sinking fund for the payment of a prior debt. If the business had been successful, and there had been accumulated profits at the end of the three years, the defender would not have received payment of the amount, but would simply have written off an equivalent portion of the debt.

"Returning now to the intervening articles of the agreement, I do not think that the fourth is of any importance, as it only provides that in estimating the profits certain sums shall be deducted in name of rent for the business premises, and a salary of £100 a-year for an assistant. The fifth article, however, is the one upon which the pursuer's case chiefly depends. It provides that the books of the business

shall be brought to a balance twice in each year, 'and should any such balances show that the capital including loan in this account has been reduced to £500 this agreement shall come to an end as at the date of said balance, and the amount then remaining shall be paid by the first parties to the second party, but under no circumstances shall the second party be liable for any sum beyond the £1000 he is to advance on loan.'

"The pursuer contended that that article showed that the parties recognised that the defender would be liable to creditors, and that the concluding words were an attempt to limit his liability to creditors by an agreement between the partners. Further, just as the first article provided for the case of the business being successful, so the fifth article provided for the case of the business being unsuccessful. In the former case the defender was to be paid the £1000 in cash; in the latter case he was only to be paid the balance of capital of £500 or under, which might remain. That stipulation, the pursuer contended, was entirely inconsistent with the idea that the defender was merely a lender to the firm, because no mere lender would agree, in the event of the firm to which he had lent money proving unsuccessful, to give up his debt and content himself with any balance of capital to the amount of one-half of the loan, or less, which might remain.

"I am unable to assent to the pursuer's construction of the fifth article. I think that it is designed as a protection to the pursuer as a lender to the firm. By the previous part of the agreement the £1000 which he lent was to become part of the capital of the firm and be used in the business, and there was to be no obligation to repay it until the lapse of three years. During that period the firm were entitled to trade with and risk the £1000, but if at any time it should appear that the firm had lost all their own capital, and one-half of the £1000 in addition, the defender was to be entitled at once to put an end to the agreement and demand that the balance of capital still remaining should be handed over to him. There is no stipulation that the defender is to accept the balance of capital as in full payment of his debt, and I do not think that the obligation undertaken by the firm and the individual partners in the third article to repay the loan in cash would in the event contemplated in the fifth article be discharged or extinguished.

"The stipulation or declaration that the defender should in no circumstances be liable beyond the £1000 which he was to advance, was, I think, unnecessary, and was, I imagine, inserted with the view of making it perfectly clear as between the parties of the contract, that although the defender took the risk of losing the £1000, or part of it, that was the limit of his risk and of his obligation. It is true that the article does not treat the defender simply as an ordinary creditor of the firm, because he is only to be entitled to claim the amount of capital brought out upon a

balance of the books, that is to say, after the trade creditors are provided for. But that is just the legal position of a lender to a firm who receives a share of the profits under the third section of the Partnership Act of 1890. I am therefore of opinion that if the agreement, apart from the declaration, does not make the defender a partner the declaration does not do so.

"The seventh article of the agreement was also founded on by the pursuer as pointing to partnership rather than to the loan. It provides that the first parties shall have the sole power of buying and selling, and generally of conducting the business; that they shall supply a monthly statement to the defender of the amount of jute in stock, and the extent of the orders for yarn, and that the defender shall be entitled to see the half-yearly balance sheets. It is then declared that the first parties shall not be entitled to have in stock a larger amount of jute than one or two months' supply in excess of yarns sold.

"No doubt these provisions might have been suitable enough for the case of a partner who was contributing capital, but who was taking no active part in the conduct of the business. They seem to me, however, to be equally suitable to the case of a lender who has advanced money necessary to enable the partners to carry on the business, and who as a condition of the loan has stipulated that the profits shall be accumulated for a certain period, and then applied in paying off a prior debt.

"The eighth and ninth articles do not touch the point at issue at all, but the last article declares that 'notwithstanding the loan made in terms of this agreement by the second party, the said second party shall not be deemed or held to be in any respect a partner in the said firm of Laing Brothers & Company, and shall not be liable for the debts and obligations of that firm.'

"I agree with the pursuer's counsel that that declaration would not prevent a partnership being constituted if the effect of a fair construction of the agreement otherwise was to show that there was a partnership. But the declaration shows what the intention of the parties was—that they did not intend to make a partnership—and of course in the question of the construction of the agreement the intention of the parties to it is a matter of importance.

"For the reasons which I have stated, I am of opinion that the agreement, upon a fair construction, is not one whereby a partnership was constituted, but one for fixing the conditions upon which the defender should lend £1000 to the firm. And that is sufficient for the decision of the case, because it is not said that the defender held himself out as a partner, or that anyone gave the firm credit upon the faith of his being a partner.

"I shall therefore pronounce decree of absolvitor."

The pursuers reclaimed.

In the course of the debate in the Inner House the defender was allowed to amend

his record, and to add the plea "No title to sue."

Argued for reclaimers — 1. On the construction of the agreement, the parties intended to make a contract establishing all the rights *inter se* of partners, but attempted to relieve the defender of his obligations to third parties and make it a loan. That, however, it was not possible for them to do—Lindley on Partnership (6th ed.), pp. 45-47. The definition of partnership in the 1890 Act was fully satisfied by the conditions here. The sharing of profits stipulated for in article 3 was *prima facie* evidence of partnership, especially when taken along with the fact that by article 1 five per cent. interest was already allowed on the sum advanced. This was still further strengthened by the restrictions upon the method of conducting business, and by the provisions for periodic balancing and accounting. But the stipulation in article 6 as to what was to happen when the capital of the firm fell to £500 was absolutely inconsistent with any relation but that of partnership. If the defender were merely a creditor of the firm, he surely would not wait to demand repayment till the capital fell to £500, but would call for it when there was £1000 left. But the stipulation was quite reasonable if he were a partner. He would have no further rights after getting this £500, as he wrongly maintained that he would under sec. 3 of the Act, and accordingly would lose half, so this was nothing more or less than a gamble in the capacity of a partner. The fact that the profits were to be primarily applied in payment of the debts due by the former firm was merely an arrangement between the parties to apply profits in the first place in this way, but there was no limitation if there were more profits than would meet these debts, and the surplus would go to the defender. Accordingly there was here a contract of partnership, and the declaration in the 10th article did not prevent it being so. 2. The pursuer had a title to sue. No change had taken place in the creditors between the date of the trust-deed and of the sequestration. There was no authority for the view that a trustee was not entitled to sue a partner for debts of the firm—*Hay v. Mair and Others*, January 27, 1809, F.C; *Speirs v. Dunlop*, May 9, 1777, 2 Paton 437. The defenders misapplied the doctrine in *Mann v. Sinclair*, June 20, 1879, 6 R. 1078, at 1082, for the trustee's title to sue was only rejected on the ground that the party sued was not in fact a partner. And there was no countenance for applying that doctrine where the party sued was—as might here be assumed—to be a partner. The only alternative view would be for all the creditors to go against him individually, which would be, of course, out of the question.

Argued for respondent—The question was whether the parties were partners *inter se*, there being no suggestion that the defender had held himself out as a partner so as to deceive third persons—*Eaglesham & Company v. Grant*, July 15, 1875, 2 R.

960, at 964. The question was the same as if it had been raised by the parties *inter se* in the course of conducting the business. The two real partners could not have claimed in the face of the agreement that the defender was a partner as regards themselves, and accordingly the pursuer was not entitled to do so now. The Lord Ordinary's treatment of the various articles of the minute of agreement completely refuted the arguments of the pursuer based upon them. There were two analogous cases in which it was held that partnership was not constituted—*Mollwo, March, & Company v. Court of Wards*, July 1872, L.R., 4 P.C. App. 419, and *Badely v. Consolidated Bank*, 1888, 38 Chan. Div. 238. In the former case two of the elements relied upon by the pursuers existed, viz., sharing in the profits, and complete control of the business by the lender. Assuming the defender to be a partner, he could not be sued till the company's estate was exhausted. Accordingly the liability of the partners of the company to pay a debt after the estate was exhausted was not an asset of the company, and the trustee on the sequestrated estate, who under sec. 102 of the Bankruptcy Act 1856 (19 and 20 Vict. cap. 79) was vested in "the whole property" of the debtor, did not acquire a claim such as this. There was no case where the trustee on a sequestrated estate had been allowed to sue an alleged partner. The defender was not sequestrated, and accordingly he could not be discharged by the majority of the creditors, and would continue liable after being sued by the trustee. It was held in *Dunbar v. Remington, Wilson, & Company*, March 10, 1810, F.C., that an individual creditor might sue an alleged partner even though there was sequestration of the partnership estate, so if the trustee were right there would be two sets of creditors with rights to sue. The only legal way for the trustee to sue was by receiving an assignation of their rights from the creditors—*Speirs v. Dunlop*, *supra*.

At advising—

LORD KINNEAR—After the Lord Ordinary's decision in this case had been given, the defender added a plea that the pursuer had no title to sue, but it does not appear to me that his position is materially altered by the new plea. If we were to consider the plea on the assumption that the defender was in fact a partner so as to render him liable jointly with the other partners as well as severally to the entire body of creditors of the bankrupt firm, I should not, as at present advised, be disposed to sustain it, but I am of opinion with the Lord Ordinary, and for the reasons he has given, that the defender was not a partner of the bankrupt firm, and has incurred no liability to its creditors.

The law as now established may be stated in the words of Lord Justice Lindley:—"No person who does not hold himself out as a partner is liable to third persons for the acts of those whose profits he shares, unless he and they are really partners *inter*

se. At the same time, persons may find that they are partners for all purposes, although they only intended to be so for purposes beneficial to themselves."

The question therefore is, whether the defender and the bankrupts, Laing Brothers & Company, did or did not become partners *inter se* by virtue of the agreement on which the pursuer relies. The agreement is in form an agreement for a loan, but it is said that it is in substance a contract of copartnership. In 1891, when the agreement was made, the bankrupts, William Laing and David Laing, were carrying on business under the name of Laing Brothers & Company, and the defender, who is their nephew, advanced to them a sum of £1000 for three years, on which they undertook to pay interest at the rate of five per cent. By the third article of the agreement it was stipulated that the whole profits made in the business during the foresaid period of three years should, under deduction of payments for management and so on, remain in the business until the expiry of the agreement, and on the termination of the foresaid period, the first parties, the borrowers, should repay to the lender his loan of £1000, and the whole of the profits should be equally divided between the parties. I agree with the Lord Ordinary that if this stipulation had stood alone it would have afforded a very formidable argument against the defender, but then it is qualified in a very material manner by the sixth article of the agreement, which restricts what had appeared under the third article to be an absolute right to share in the profits. For by the sixth article the lender agrees to apply the share of the profits falling to him at the expiry of the agreement in reduction or extinction of a certain debt secured by bonds and dispositions in security for £5700 and £8000, which were granted by the father of the borrowers, who was at one time in partnership with them, and by the borrowers themselves, in favour of the father of the lender over the Stobswell works and machinery and certain other subjects belonging to them, the half of the said debt to which the lender was entitled being reduced or extinguished *primo loco*.

The effect of these two articles taken together seems to me to be that the defender is not to receive a share of the profits as a partner, but that the share, which by the third article is nominally appropriated to him, is in reality to be applied towards payment of a prior debt of the true partners in which he was himself a creditor to the extent of one-half. It is not a part only as I read the contract, but the whole of the profits acquired by the defender, that are to be applied in this manner; and the agreement is in substance that the defender undertakes to lend £1000 at interest on condition that the borrower shall give further security for payment of debt already due to his father's representatives of whom he was one, by retaining the profits of the business for three years, and at the end of that time applying or enabling him to apply one-

half of these profits in reduction or extinction of the debt. One-half of the profits therefore is to go into the pockets of the borrowers—the true partners; and the other half in payment of their debt.

I do not think it necessary in considering the law applicable to such a contract as this to examine the number of previous cases in which the liability of a person lending money to a trading firm has been discussed, because the whole law on the subject has now been embodied in the Partnership Act. According to the provisions of that statute, the receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner, but it does not of itself make him a partner, and in particular it does not make him a partner that he receives payment of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business, or that he lends money to a person engaged in business on a contract that he should receive a share of the profits. Therefore in order to establish a partnership between the lender in this case and the borrowers, it is necessary that we should look for something more than that *prima facie* evidence of partnership which the statute says is not enough of itself to constitute that relation, something which indicates more clearly than participation in the profits, or which, in conjunction with participation in profits, clearly indicates that the relation between the parties *inter se* was that of partnership, so that each was agent for the other in the conduct of a business for their joint benefit. Now, I am unable to find anything further in the contract than the clauses which I have already considered to indicate a relation of partnership. The pursuer urged very strongly upon our consideration the effect of the fifth clause, by which it is provided—
[quotes it].

It is said that that shows that the lender was to share the losses as well as the profits of the copartnership, and that there could be no stronger indication that the relation of partnership existed. Now, undoubtedly, it is a note of partnership that a person who advances money to the firm is to risk his money in the business. But then the effect of this particular clause does not appear to me to put the lender in the position of sharing losses as a partner, but, on the contrary, to indicate a relation towards the borrowers entirely different from that of partnership. He had undertaken to advance money to remain in the hands of the firm for three years; but then he stipulates for a right to call it up if at any time it shall appear that the capital has been reduced to £500. It is said, I think quite correctly, that the stipulation that, in that event, the amount of the capital then remaining shall be paid by the borrowers to the lender, and that the lender shall be satisfied with such payment, because the agreement has then come to an end, is not in accordance with the ordinary rights of a lender in a simple contract of loan, because the lender is to be entitled only to

claim the amount of capital brought out by the balance of the books, that is to say, after the creditors have been provided for. But then I think the Lord Ordinary's observation on that point is equally just, that under the third section of the Partnership Act that is the legal position of a lender to a trading firm who receives a share of profits, and therefore in so far as the stipulation in question gives the lender his money or so much of it as may be extant only after the trade creditors have been satisfied, it is not a necessary inference that the relation between the parties was any other than that of lender and borrower. But then it is said he not only allows his right to be postponed to that of trade creditors, but that in the event provided for he consents to lose one-half of his advance and possibly more, because he is to be satisfied with what is left of the capital when the agreement comes to an end. Now, I agree that that is not generally the position of a creditor. The distinction between creditor in an ordinary loan and a partner is undoubtedly that the creditor is indemnified against loss. But then neither is it the position of a partner. The stipulation is that the capital being to a large extent gone the lender shall have paid over to himself in his own absolute right all that is left of it, and that he shall not be liable under any circumstances to pay anything more than the sum he had already advanced, with the right to what shall be left in the hands of the borrowers when the capital has been reduced. That is not the position of a partner, nor is it a liability for the losses of the firm. A partner's liability for losses arises from this, that he is answerable jointly with all the other partners, and also severally for all the debts of the firm, and therefore he must contribute his own proportion of the losses after the capital has been exhausted. The stipulation that the lender shall be under no liability to make such contributions is the negation of a elementary condition of partnership, and therefore I do not find in this stipulation, any more than in that for the application of profits, any indication that the parties were partners *inter se*.

I do not quite agree with the Lord Ordinary in an observation which he makes that the condition that the second party should in no circumstances be liable for anything more than the sum advanced is superfluous. It may be that it might have been inferred even if it had not been expressed in words. But I think the expression is material as showing the true intention of the contract, for since participation in profits is *prima facie* evidence to instruct partnership, every term of the contract must be of importance which goes to confirm or to displace that conclusion. From this point of view the remaining clauses, except the last, do not appear to me to be of much importance. But the last is very material, because it negatives the relation of partnership in express terms. It declares that the second party shall not be deemed or held to be in any respect a partner in the

said firm, and shall not be liable for the debts and obligations of that firm. Now, if the law is, as I apprehend it to be, that the liability which the pursuer seeks to enforce against the defender depends upon his establishing that there was a contract of copartnership between him and the borrowers making them partners *inter se*, this stipulation appears to me conclusive.

If sharing of profits is not enough, then what is further required in order to constitute partnership must be something which shows that the parties were agents for each other in carrying on business, and were entitled to bind each other by contracts for the common benefit, and that cannot, in my opinion, be maintained on a fair construction of this contract.

On the whole matter, therefore, I agree with the Lord Ordinary.

LORD M'LAREN—It is important in a case of this description to distinguish clearly between the question of partnership and the somewhat allied question of representation. While it is true that a man may be subject to the liabilities of a partner without actually being one, if he holds himself out, or suffers himself to be held out as a partner, the benefit resulting from that liability is always confined to the persons who have been deceived by the representation. The principle is very clearly recognised in the 14th section of the Partnership Act of 1890.

Now, this is not an action for the purpose of rendering Mr Low liable as a partner on the ground that he held himself out, or allowed himself to be held out, as a partner of the bankrupt firm. The ground of liability alleged is that by contract he is a partner with other two gentlemen whose estates as well as those of the firm have been sequestrated.

The question whether the defender has entered into the contract of partnership must be determined on similar principles to those which govern the construction of other contracts—that is to say, we must endeavour to find out what is the true meaning of the agreement upon which the trustee founds his action. Now, within a period which some of us remember, some of the conditions of this agreement would most probably have been held to amount to a partnership, but since the passing of Lord Justice Bovill's Act (1865 Act), the provisions of which are in substance included in the Partnership Act 1890, it has been established law that the receipt of a share of profits as remuneration for services, or in place of interest on a loan, does not of itself constitute the relation of partnership. That is now provided in the 3rd sub-sec. of sec. 2 of the Partnership Act, and amongst other examples which are given of the cases in which the receipt of profits will not make a man a partner, the first is, "the receipt by a person of a debt or other liquid amount by instalments or otherwise out of the accruing profits of a business."

Now, the two chief notes of partnership under this agreement are (1) that part of

the consideration for the sum of £1000 lent by Mr Low is given in the shape of a share of profits; and (2) that the surplus profits are divided between the first parties and the second party, it being explained that the share coming to Mr Low is to be applied in repayment of an old debt. These two conditions are therefore such as are declared by Act of Parliament not in themselves to constitute partnership, and when we come to inquire what other conditions there are which, taken along with these, will amount to partnership, I can find none. One of the points insisted on by counsel is that the parties had been at pains to state in very clear terms, and in more than one of the articles of the agreement, that Mr Low was not to be responsible for losses or to incur any other liability than the loss of his £1000. I think the argument to which I have referred rests upon what seems to me to be a confusion of ideas in applying to the construction of a contract a principle which is often applied quite legitimately to the consideration of evidence. If a witness is continually protesting that he has not committed himself to something, that is an element which may lead to the suspicion that he has done it and is anxious to get out of it. But where the question is not one of evidence, but of the construction of a written document, why should the statement of the parties that they do not intend to subject one of their number to the liabilities of a partner not have the same effect accorded to it as any other statement in the deed, the question always being, what is the meaning of the words used to express their intention? The pursuer's counsel also made a point on the 5th article which they say involves the unnecessary surrender of a contract right if Mr Low is not a partner. I agree with Lord Kinneir in his observations on this article as well as in all the rest of his Lordship's judgment, and I shall say nothing more on this head except this, that I think nothing could be more reasonable on the part of a person lending his money as a friendly loan, seeing that he is debarred from all control of the business than that he should stipulate that after a suitable interval the books should be examined and he should be allowed to do what he can to get something out of the assets of the estate. I fail to see that there is in this article the slightest indication of intention to constitute partnership, though there are expressions which are perhaps open to criticism.

Being clearly of opinion that Mr Low is not a partner under the agreement, it is not necessary for me to enter into the question of the trustee's title. But I may say that if that point were gone into, I think the trustee would find difficulty in establishing a title to call on anyone outside the trust to contribute towards the fund for distribution. While a deed of partnership provides for further contributions, the trustee, no doubt, has the right to enforce the obligation. But there is no obligation under this agreement to contribute anything beyond the original sum of £1000. Mr Low's estates have not been sequestrated; he is assumed

to be solvent, and so there is neither a relation of contract nor a proprietary interest, so far as I can see, on which the trustee can base his title.

In the clause of the Partnership Act constituting the special law of Scotland on this subject, all that is said is that the firm is a separate person in law, but that a partner is liable to be charged to meet the obligations of the firm. Now, sequestration is not a process for rendering a party liable to meet the obligations of a firm; it is a process for attaching the assets of those who are members of the firm, and who have been made bankrupt, and I am unable to see how this sequestration is to be converted into an active title for the purpose of putting persons under the trust who are not named in the trustee's appointment.

The LORD PRESIDENT and LORD ADAM concurred.

The Court adhered.

Counsel for the Pursuers—Asher, Q.C.—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Defenders—C. S. Dickson—Macfarlane. Agents—Henderson & Clark, W.S.

HOUSE OF LORDS.

Monday, July 13.

(Before Lords Herschell, Watson, Macnaghten, Morris, Shand, and Davey.)

CARRUTHERS v. CARRUTHERS' TRUSTEES.

(*Ante*, vol. xxxii. p. 587, and 22 R. p. 775).

Trust—Trustee—Personal Liability—Scope of Immunity Clause—Culpa lata—Neglect to Audit Factor's Accounts in Accordance with Trustee's Directions—Proof of Loss—Onus.

Where there has been *culpa lata* on the part of trustees and loss to the trust-estate which it might reasonably be concluded would not have been incurred apart from the trustees' failure in duty, the *onus* lies upon them to show that the loss would equally have been incurred if they had performed their duty.

A trustee conveyed his whole estate to trustees, who entered on office in 1879. They were empowered to appoint one of their own number or other person as factor for the trust-estate, and were directed to require the factor to lay before them within one month after 31st December in each year an account of his intromissions, "with the whole vouchers thereof, to be by them examined, audited, and (if found to be correct) approved of." In virtue of this provision the trustees allowed one of their number to act as factor with remuneration. For two years the ac-