unnecessary to consider that question, as I am clearly of opinion that it is not competent to apply for such a remit with regard to the state of works not yet completed under a current contract. Apart from the question whether summary procedure is justified in this case, I think that in no form could interference of a Court, by calling for a report and then sanctioning the completion of the work by the pursuer himself, be allowed. I think therefore that the interlocutor of the Sheriff should in substance be affirmed.

LORD TRAYNER—I agree. The remedy which the pursuer seeks is not one which in my opinion the Court can be asked to give. He is asking that the Court should take, at his time and in a particular manner selected by him, a proof which cannot be conclusive on the matters involved. We were referred to cases in which remits have been made for the purpose of ascertaining the condition of fences and buildings at the close of a farm lease. In such cases the interests of both parties require that the state of the fences as left by the old tenant should be ascertained by some neutral person before the new tenant comes in and the circumstances have altered. I do not think these cases apply here.

The pursuer asks that a remit should be made to a man of skill to report upon the position in which the work now is. Now, either that report is to be conclusive or it is not. If it is not to be conclusive, then it is of no use. If it is to be conclusive, as I rather think the pursuer desires and intends, is that not an unjustifiable interference with the legal right of the defenders to have the dispute between them and the pursuer determined by proof in the usual way? I think it is.

If the pursuer desires only to preserve evidence of the present condition of the work, he can do so without the intervention of the Court by taking persons to examine the work. The defenders, however, will have any advantage to be derived from the cross-examination of such persons when they are adduced as witnesses.

LORD MONCREIFF—I agree with both your Lordships. This case can be disposed of on the terms of the petition. The pursuer asks for a remit to a man of skill to report upon the position in which the work is. I am of opinion that this demand is incompetent, or at least not applicable to the circumstances disclosed in the pursuer's condescendence. The pursuer intends that this report should be conclusive, that is to say, that the defenders should be bound by the result. In asking for a remit upon that footing the pursuer is not within his rights. I think that the contractors are entitled to have the dispute between them and the pursuer determined in the ordinary way by a proof at large. The prayer of the petition concludes with a craving for warrant authorising the pursuer to take the work out of the contractors' hands whether they are in fault or not. I think such procedure is not applicable to the circumstances of this case.

Applications for remits to men of skill have been sustained in certain cases, such as cases with regard to farm leases, in which remits have been made to ascertain the condition of the farm at the conclusion of the lease; but I think these authorities do not apply in such circumstances as we have here.

I am therefore of opinion that we should refuse the prayer of the petition and affirm the interlocutor of the Sheriff.

The LORD JUSTICE-CLERK was absent.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuer—Jameson, Q.C. — M'Lennan. Agent — William Gunn, S.S.C.

Counsel for the Defenders Squair, Leith, Campbell, and Wink — Sol.-Gen. Dickson, Q.C.—Salvesen. Agent — Alexander Morison, S.S.C.

Counsel for the Defender Lobban — Munro. Agents—W. & F. Haldane, W.S.

Friday, February 25.

FIRST DIVISION.

[Lord Low, Ordinary.

TEACHER *v.* CALDER.

Accounting — Contract — Agreement for Share of Profits — Whether Audit in Terms of Agreement.

An agreement was entered into between T and C, whereby, as interest for an advance made by T for the purpose of carrying on and extending the business of C's firm, he was to receive a certain percentage of the profits of the business. It was provided that the books of the firm should be audited annually by a particular firm of accountants, whose certificates "shall be binding on both parties as finally fixing the amount of the profits in each year." Notice of this agreement and of its terms was given by T to one of the partners of the firm of auditors, but they were not communicated by him to the partner who actually conducted the audit. While aware that T had an interest in the profits, the latter did not know the terms of the agreement, and in particular did not know that his audit was finally binding on the parties. T had access to the books of the firm, and had frequent meetings with the auditor.

In an action for a judicial accounting raised by T at the termination of the agreement, he maintained that the auditor's certificates were not binding on him, because the audits made were not such as were contemplated under the agreement.

Held, on a proof (*diss.* Lord Adam), that the certificates of the auditor were certificates under the agreement, and that accordingly the pursuer was not entitled to an accounting.

Opinion contra (*per* Lord Adam) that as the auditor admitted that had he known his audit to be final he might have conducted it somewhat differently, the audit was not one under the agreement, and the certificates did not bind the pursuer.

Contract—Breach of Contract—Diversion of Capital—Assessment of Damage on Basis of Breach of Trust or Breach of Contract.

An agreement was entered into by which the partner of a firm of wood merchants received a loan for the purpose of carrying on and extending his business. The terms of the loan did not make the lender a partner in the firm. It was agreed that the borrower should always keep £15,000 of capital of his own in the business. He did not do so, but withdrew different sums from time to time and placed them in a distilling business which belonged to him.

In an action of damages raised against him by the lender for breach of contract, the pursuer asked the Court to assess the damages at the amount of profit made by the diverted capital in the distillery, on the ground that the case must be treated on the same principle as if the debtor were a trustee for, or a partner of, the creditor. The Court *held* that this method of assessment was inapplicable, and assessed the damages on a computation of the extra profit which might have been made in the timber business with the aid of the diverted capital.

An agreement was entered into on 11th April 1889 between Mr Adam Teacher, wine merchant, Glasgow, of the first part, and Mr James Calder, timber merchant, Glasgow, of the second part, containing the following provisions:—"Considering that whereas the second party has applied to the first party for capital to be applied by him to extend and carry on his business as timber merchant, as at present carried on by him under the name or firm of Calder & Company, which the first party has agreed to give in consideration of receiving the interest and share of profits or additional interest as after mentioned in terms of the provisions of the said Act 28 and 29 Vict. cap. 86; therefore the said parties hereby reciprocally agree and bind themselves as follows:—(*First*) The first party agrees to advance in loan to the second party, to be put by him as capital into his said business of Calder & Company, timber merchants, Glasgow, the sum of £15,000 sterling. . . . (*Second*) The first party agrees to become security or cautioner to the Commercial Bank of Scotland, Limited, for £20,000 to be advanced to the second party for the purposes of said business. . . . (*Third*) The second party shall, in the first place, pay to the first party interest on the said loan of £15,000 from the date of advance at the rate of £5 per centum per annum during the non-payment, . . . and in the second place by way of additional interest, such further sum as shall be equal to 37½ per cent. of the net profits of the second party's said business of Calder & Company, after deduction of interest at the rate of £5 per centum per annum on the capital of the second party, or any partner he may hereafter assume into the business, and on the said loan of £15,000. . . . (*Fourth*) The books of the said firm of Calder & Company shall be balanced as on the 30th day of April 1889, and audited as after mentioned, and the second party's capital in the stock and plant of the firm valued and ascertained, and if the first party is dissatisfied with said valuation, the amount of said capital stock, &c., shall be valued by two arbiters, mutually chosen, with power to them to appoint an oversman in case of their differing in opinion, and the second party, in the event of his capital not amounting to at least £15,000, shall put into the business a sum sufficient to raise his capital to that amount. (*Fifth*) The books of the said firm shall thereafter be balanced annually on 30th April, and shall be audited by Messrs M'Clelland, Mackinnon, & Blyth, chartered accountants, Glasgow, or other auditors to be mutually agreed upon and appointed by both parties hereto, and the certificate of the auditors shall be binding on both parties as finally fixing the amount of the profits in each year, and the foresaid interest or percentage payable to the first party. (*Eighth*) The second party, and any other partner that may be assumed by him into the said firm, shall have power to draw interest on capital, as well as their share of the profits of said business as the same become due, or he or they may leave them in the business as capital, bearing interest at 5 per cent. per annum, but no capital shall be withdrawn from the business so long as the aforesaid loan is unpaid and the first party's liability for the bank credit is undischarged." It was further provided that Mr Teacher should have access to the books of the firm, with the option of getting repayment of his loan if it appeared that the business was not being successfully conducted and that 50 per cent. of the capital of the second party had been lost. It was stated that nothing contained in the agreement was to render the first party liable as a partner. It was to continue in force for five years, but either party had the right to terminate it on giving six months' notice prior to May 1st 1892. In event of disputes the parties agreed to refer them to Mr William Mackinnon, accountant, Glasgow.

In terms of the agreement Mr Teacher advanced the sum of £15,000 to Mr Calder, and entered into the cautionary obligation on his behalf for £20,000, and it was also arranged that the bank should allow to Mr Calder an overdraft or further credit of £20,000.

The agreement terminated on 30th April 1894, when the £15,000 loan was repaid with

interest at the rate of 5 per cent., and the cautionary obligation discharged. Payments had also been made in respect of the share of profits provided for by the agreement.

An action was raised by Mr Teacher against Mr Calder concluding for decree ordaining him to give an account of the business of the firm during the years of the agreement, and to make payment of the additional sum which might be found due to the pursuer, and further to pay £15,000, being damages for breach of contract. The pursuer averred that the defender represented to him that he had instructed Messrs M'Clelland, Mackinnon, & Blyth to audit the books and certify the profits in terms of the agreement, but that in point of fact he did not do so, but merely obtained from Mr Gairdner, C.A., a member of the firm, an audit of the books for his own satisfaction as he had done in previous years. He averred further that the defender manipulated the books and accounts so as to make the profits appear less than they actually were, and misled Mr Gairdner by statements which he made to him, and in particular that a bad debt due by Messrs John Rucker & Company had been carried to the debit of the profit and loss account for the year ending 30th April 1890, thereby diminishing the profits for that year, though it should have been deducted from the profits of the previous year, this being allowed by Mr Gairdner on the defender's false and fraudulent representation that the debt had been incurred during the year ending 30th April 1890. The pursuer further averred that the defender withdrew large sums from his capital in the business, and employed them in the business of James Calder & Company, distillers, Bo'ness, with the result that he never had £15,000 in the business of Calder & Company, and that it was carried on with a much smaller capital than ought to have been employed, and much smaller profits were earned than would have been had the defender implemented the agreement. He maintained that "the withdrawal of capital, *inter alia*, diminished the volume of profitable business which the defender would otherwise have transacted, prevented him from accepting profitable contracts, and from purchasing timber on favourable terms, and subjected the business to expense in the way of interest and discount," and that he had suffered damage to the amount sued for.

The pursuer pleaded—"(3) The certificates referred to are not binding upon the pursuer in respect that they were not granted by Mr Gairdner or his firm as arbiters or auditors under the agreement between the pursuer and the defender, and for the purpose of the said agreement."

The defender averred that the books had been audited by the auditors appointed under the agreement, and that the pursuer frequently called upon them during the currency of the agreement, and inspected the books and balance-sheets. He denied the allegations as to breach of contract; and pleaded—"(2) The profits of the firm payable to the pursuer having been fixed and ascertained by the certificates of the auditors in terms of the minute of agreement, the pursuer is not entitled to the accounting now sought for."

The Lord Ordinary (Low) on 15th October 1896 allowed a proof.

The defender reclaimed, and the First Division on 18th November adhered to the Lord Ordinary's interlocutor.

The result of the proof sufficiently appears in the opinions of the Court *infra*—The evidence of Mr Gairdner and of Mr Blyth, so far as material, will be found quoted in the opinion of Lord Adam.

The Lord Ordinary on 28th May 1897 pronounced an interlocutor by which he dismissed the action.

Opinion.—"The pursuer's case is laid upon fraud. He avers that the defender falsely represented to him that he had instructed Messrs M'Clelland, Mackinnon, & Blyth to audit the books and certify the profits in terms of the agreement, whereas in fact he gave no such instructions. The books, therefore, were audited by Mr Gairdner (a partner of M'Clelland, Mackinnon, & Blyth) in ignorance of the agreement, and in the belief that the audit was only for the satisfaction of the defender as sole partner in the business. The pursuer further avers that the defender in a variety of ways fraudulently manipulated the books and accounts so as to make it appear that the profits earned during the period covered by the agreement were much less than they actually were.

"These averments have been entirely disproved. There was no fraud on the defender's part; on the contrary, I am satisfied that he acted throughout in good faith.

"But the pursuer contends that upon the facts disclosed in evidence he is entitled to the general accounting which he asks in the summons.

"By the agreement it was provided that the books should be balanced yearly as at 30th April, and should be audited by Messrs M'Clelland, Mackinnon, & Blyth, 'or other auditors to be mutually agreed upon,' and that the certificate of the auditors should be binding on both parties as finally fixing the amount of the profits in each year and the interest or percentage payable to the pursuer. It was further provided that should any disputes or differences arise between the parties they should be submitted to William Mackinnon, accountant, Glasgow, whom failing to Andrew Mackinnon, bank agent there, as arbiters in succession.

"After the agreement was entered into the pursuer took it to Mr Blyth (a partner of the firm of M'Clelland, Mackinnon, & Blyth), with whom he discussed it, and Mr Blyth made and kept a careful abstract of the agreement. Mr Blyth admits that on behalf of his firm he accepted the employment to audit the books in terms of the agreement.

"The pursuer informed the defender that he had communicated the agreement to the auditors, and the defender naturally assumed, when the time for auditing the books arrived, that Mr Gairdner, the part-

ner of M'Clelland, Mackinnon & Blyth who came to make the audit, was aware of the agreement, and of the purpose for which the audit was to be made.

"Mr Gairdner audited the books for the years from 1890 to 1893 inclusive, and granted certificates of the amounts of the profits. *Prima facie*, therefore, the books were audited for these years in terms of the agreement.

"But Gairdner says that as a matter of fact he did not know of the agreement until after the audit of 1893. The explanation given is this — Messrs M'Clelland, Mackinnon, & Blyth acted as men of business for the pursuer, and Mr Mackinnon was the partner who was in the habit of attending to the pursuer's business. The pursuer took the agreement to Blyth because Mackinnon was at the time unwell. Mackinnon subsequently returned to business for a time, but again fell into bad health, and he is now dead. Upon Mackinnon's return to the office, Blyth says that he told him of his interview with the pursuer in regard to the agreement, and gave him the abstract of the agreement in order that he might attend to the matter. Apparently Mackinnon omitted to tell Gairdner, to whom it fell, in the ordinary course of the business of the firm, to make the audit about the agreement.

"There was nothing in the mere fact of Gairdner being called in to audit the defender's books to put him upon his inquiry as to the terms upon which he was to do so, as he had previously been in use to audit the defender's books year by year, but it is difficult to understand how he remained so long in ignorance of the agreement as he says he did. He saw from the books that the pursuer had lent £15,000 to the defender, and was receiving interest upon that sum, and 37 per cent. of the profits. The audit was conducted at the defender's place of business, and the latter gave any explanations which Gairdner required, and discussed various points with him. Further, the pursuer had, year by year, interviews with Gairdner, and ascertained what his share of the profits was. The pursuer says he was only shown abstracts of the balances, which were so condensed that he did not understand them. If the entries in Gairdner's books, however, of the duration of his meetings with the pursuer are correct, he and the pursuer must have gone pretty fully into the matter.

"In these circumstances it might very well have occurred to Gairdner to inquire whether there was any special agreement between the parties, the terms of which he ought to keep in view in making the audit. Perhaps he thought that if there had been anything special in the agreement the parties would have informed him of it. While, however, he did not know the precise terms of the agreement, he knew from the first year that the pursuer was getting a large share of the profits, and that he was settled with upon the audit which he (Gairdner) made. He therefore knew that he was not auditing the books merely for the satisfaction of the defender, but was dealing with a business in which there were different and, it might be, adverse interests.

"What actually occurred therefore was entirely different from the case averred by the pursuer, and the question is whether the latter is entitled to disregard the audit which was made and the agreement whereby it was stipulated that the profits should be ascertained by an audit, and to demand a general accounting both as regards the years covered by Gairdner's audits and the remaining year for which the agreement was in force and the balance for which is still open.

"If the defender had fraudulently concealed the agreement from Gairdner, and had fraudulently manipulated the books, it may be that the pursuers would have been entitled to call upon the defender to account, and perhaps the same result might have followed if Gairdner's ignorance of the agreement had been caused by the fault or negligence of the defender. But I do not think that it can be held that the defender was in fault. The pursuer told him that he had communicated the agreement to M'Clelland, Mackinnon, & Blyth, and I do not think that the defender can be blamed for assuming when Gairdner came to audit the books that he knew all about the agreement. That is just what the pursuer assumed when he went to ask Gairdner what the result of the audit was.

"In these circumstances it may be that this is one of those cases where (as between the parties) the loss, if any, must lie where it falls. If I am right in thinking that there was not fault on the defender's part, it cannot be said that he failed, as regards the audit, to implement the agreement. He balanced the books yearly in terms of the agreement, and he submitted them to the auditors, who, he was aware, had been instructed by the pursuer to audit the books in terms of the agreement.

"On the other hand, if the pursuer's claim had been that the accounts should now be re-audited under the agreement, on the ground that by reason of a mistake for which neither party was responsible, Gairdner's audit had not in fact been of the character contemplated by the agreement, an entirely different question would have arisen.

"Neither of these questions, however, is before me, the only question being whether the pursuer is entitled to have his share of the profits ascertained by the Court in a judicial accounting. Such a method of procedure is contrary to the terms of the agreement which the pursuer is seeking to enforce. Further, I think that it might be very prejudicial to the defender, who has not broken the contract in so far as the question with which I am now dealing is concerned, because it would, I suppose, open up such questions as the valuation of plant which has long ago ceased to exist.

"I am therefore of opinion that the pursuer is not entitled to a judicial accounting, although there may be some other remedy open to him.

"The pursuer, in the second place, concludes for damages for breach of contract.

"It was provided by the agreement that the defender should bring up the amount of his capital in the business to £15,000, and that he should not withdraw any capital from the business. The defender admits that he did not implement that part of the agreement. The amount of the capital which he had in the business was generally greatly below £15,000, and he constantly withdrew capital from the business in question and employed it in other businesses in which he was engaged.

"For that breach of contract the pursuer claims damages. He claims to be entitled either to an equivalent share of the profits earned by the defender in his other business to which he diverted capital, which under the agreement ought to have been employed in the wood business, or to such an amount as might have been earned in the wood business if the stipulated amount of capital had been employed in it.

"The first of these alternatives is founded upon a principle well known in trust law, but which I do not think has any application to such a case as the present. In regard to the second alternative, if it had been shown that larger profits would have been earned in the wood business if the defender had always had the stipulated amount of capital employed in it, I think that the pursuer would have been entitled to damages.

"The only evidence, however, led by the pursuer in support of his claim was that of certain wood merchants, who said that capital employed in a wood business such as that of the defender might be expected to yield some 8 per cent. I do not think that that evidence is of any value. I suppose that in no business can more than a certain amount of capital be profitably employed. How much can be employed depends upon the demand for the article dealt in, upon the amount of competition, and the extent of the business connection of the firm. The defender says—and his evidence is uncontradicted—that he supplied capital when it was required, and as much as was required, although he used his capital for other purposes when if it had been kept in the wood business it would have been lying idle. Further, I understand that the defender credited to the business 5 per cent upon capital which he withdrew for other purposes.

"While, therefore, there was a technical breach of the agreement, I am of opinion that it is not proved that the pursuer sustained any actual damage."

The pursuer reclaimed, and argued—1. No proper audit in terms of the agreement could be made by one who was ignorant of its terms, and of the purpose of the audit. It was the duty of the defender to see that the auditor was aware that his audit was to be final between the parties, and his failure to give him full and honest information upon the point constituted a gross breach of duty. The pursuer, on the other hand, had done all and even more than was required of him by communicating with Mr Blyth. The whole scope of the audit was altered by the auditor not being informed of its purpose. The fact that one of the partners in the firm was acquainted with the terms of the agreement did not affect the question. Such knowledge was only of importance *inter socios*. 2. He was entitled to damages in one of two ways: 1st, to the profits made out of the capital wrongly diverted—*Cochrane* v. *Black*, July 16, 1857, 19 D. 1019; *Dean* v. *MacDowell*, 1878, 8 Ch. Div. 345, *per* L.-J. Cotton. It made no difference that the parties here were not partners, the cases on trust and partnership merely expressing and not creating the rule—Lindley on Partnership, 588; *Yates* v. *Finn*, 13 Ch. Div. 839. 3. Alternatively, the pursuer was entitled to the loss of profits in the business caused by the diversion of the capital. There should be a remit to an accountant in terms making it clear that this was to be considered, or failing a remit damages should be estimated from the evidence. He was entitled to elect between these ways of computing the damage—*Nelson* v. *Betts*, 3 Ch. App. 429; *De Vitre* v. *Betts*, 6 E. and I. App. 319.

Argued for respondent—It was no more his duty to acquaint the auditor with the details of the agreement than it was that of the pursuer. When two parties were dealing with one another at arm's length in this way, each was equipped with the right and power to do all that was necessary to protect his own interests, and it was the pursuer's own fault if he had not made the matter perfectly plain to the auditor, with whom he was in frequent communication. But in point of fact the auditor knew all that was necessary for a proper audit under the agreement, since he was aware that there were two parties with conflicting interests. The attempts to reduce the reports on the ground of the defender's fraud had entirely failed. 2. As regards the damages, assuming that there had been a breach of contract, the pursuer had failed to establish that he had suffered any loss. In point of fact there had been no such breach, for the money was still an asset of the firm, having been lent on such terms that it could be withdrawn at a moment's notice. Moreover, the meaning of article 4 was that the stock, &c., was always to be worth £15,000, not that there was to be £15,000 in cash. But assuming the withdrawal, the result of the proof was to show that, owing to the depreciation in the trade, no greater profit would have been made even with the larger capital. This was not a case of dealing with another person's money, since it was his own that the defender had withdrawn. Accordingly it was in no way analogous to the case of trustees, or to partners as *quasi*-trustees dealing with the estate of others, and the pursuer was not entitled to the profits of the distillery business. There was no authority for the proposition that a man who borrowed money became trustee for the lender, or that if he had undertaken to devote his own money in a particular way

he must render an account of the profits made in using it in some other way — Lindley on Partnership (6th ed.), 587.

At advising—

LORD PRESIDENT—Although in the pursuer's argument before us the charges of fraud did not occupy the foremost place, it is yet right to note, as the Lord Ordinary has done, that on record the pursuer's case was primarily rested on those charges, and to express my concurrence with the Lord Ordinary's opinion that those charges have entirely failed.

A much more difficult question is raised by the pursuer's principal argument in support of his claim to a judicial accounting. There having existed between him and the defender for five years an agreement to share in the profits of a business conducted by the defender, the pursuer is *prima facie* entitled to call on the defender for an account of profits. His demand, however, is met by the plea that it was a condition of the agreement that there should be an annual audit of the books of the business by Messrs M'Clelland, Mackinnon, & Blyth, that the certificate of the auditors should be binding on both parties as finally fixing the amount of the profits in each year, and that for the first four of the five years in question the books have been so audited by these gentlemen and the amount of the profits certified by them. As regards the four years, therefore, the defender pleads that the amount of profits is finally fixed, and the first of the two questions in the case is, Whether this plea is good?

The answer of the pursuer raises, even on its statement, rather a fine point. He admits that the books were audited by the firm named in the agreement, and that they did certify the profits; but then he says that the audit was not an audit under the agreement. What this exactly means may more usefully be shewn by examining the evidence rather than the averment. I shall first, however, state a little more fully, but still very briefly, the relations between the two parties.

The pursuer is a spirit merchant in Glasgow, who has made a large fortune in that business. The defender is, in the first place, a timber merchant in Glasgow, but it is of material importance in the present question to remember that he is largely interested also in a distillery. It is narrated in the agreement now in controversy, and therefore it cannot be disputed, that the defender applied to the pursuer for capital to be applied by him to extend and carry on his business as timber merchant; and this was the occasion of the agreement being entered into. The agreement is by no means complicated, and its leading provisions are as follows: — The pursuer agreed to advance in loan for five years £15,000 to the defender, to be put by him into his business of Calder & Co., timber merchants; and also to become cautioner for a bank credit of £20,000 to be used for the purposes of the timber business. On the other hand, the defender was to keep in the business £15,000 of capital. The pursuer was to be paid interest on his loan of £15,000 at 5 per cent., and in the second place, by way of additional interest, 37½ per cent. of the net profits of the timber business. There was to be a balance of the books and an ascertainment of the value of the stock at the outset. There was also provision (by the clause on which the present question turns, and which I have already explained), for the annual balance and ascertainment of profits for each of the five years during which the agreement was to last. The pursuer was to have access, either by himself or by the auditors, to the books of the firm at all times.

The pursuer advanced his £15,000 and guaranteed the credit; and the loan and the guarantee subsisted during the stipulated five years. At the end of each of the four first years, the books were audited by Messrs M'Clelland, Mackinnon, & Blyth, but before the time for the last audit arrived the present dispute had broken out.

Now, the facts about the audits are not complex, although they give rise to a rather subtle argument. The pursuer himself may be said to have set Messrs M'Clelland & Company in motion, for he took the agreement to those gentlemen and handed it to one of the partners, Mr Blyth, in order to their proceeding to act as auditors. The firm had in fact been in the habit of auditing Calder & Company's books, but they had also enjoyed the confidence of the pursuer, having audited the books of his own business. Mr Blyth, then, examined the agreement and made a very distinct précis of it, and if he had been the partner who conducted the audit, its finality could not have been questioned. It happened, however, that the books were audited in each year, not by Mr Blyth but by his partner Mr Gairdner, and the pursuer's point is that Mr Gairdner says (and I hold this to be proved) that he never saw the agreement, nor Mr Blyth's précis of it. This being so, the pursuer maintains that Mr Gairdner's audits were not such audits as the agreement contemplates, and are therefore not final under the agreement.

Before considering this argument it is well to see what knowledge Mr Gairdner had of the pursuer's relation to the timber business. Now, from Mr Gairdner's own evidence it is clear that while he never knew the details of the agreement, he did know, when he audited the books in 1890 (and he carried the knowledge with him in each subsequent audit), that the pursuer had lent the defender £15,000, and that he was getting in return not merely 5 per cent. interest, but also 37½ per cent. of the profits of the business. Mr Gairdner knew, he says, that to this extent he was auditing in the interest of the pursuer as well as the defender, and his audit, he says expressly, was made in the knowledge that the pursuer had an adverse interest to the defender, an interest to see the profits made as big as possible. Not only so, but the pursuer's interest was brought home to Mr Gairdner by the pursuer having two long

meetings with him during the first audit, the subject of those meetings being Calder & Company's balance and the pursuer's interest in it. It is not unimportant to notice that not only were the firm of M'Clelland & Company the auditors of the pursuer for his own business, but Mr Gairdner was the partner of the firm who audited his books, and accordingly in meeting Mr Gairdner about Calder & Company's balance the pursuer was not among strangers but was meeting a business man with whose methods he was familiar. Let it be remembered also, as we noticed in examining the provisions of the agreement, that the pursuer had a perfect right to see the books of Calder & Company himself, or, if he preferred, through the auditors. It appears that, in fact, the pursuer exercised his option by seeing the books through Mr Gairdner.

The facts so standing, the question is in what sense are Mr Gairdner's audits and certificates not audits and certificates in terms of the agreement? If the fact that Mr Gairdner never saw the agreement is enough, the matter is quite simple, but I cannot think that this is tenable. The fact which in the view of the pursuer's skilled witnesses it was necessary for the auditor to know, was known to Mr Gairdner; and that was that he was auditing for two men, one of whom was interested to make the profits large and the other more or less interested to make them small. Given a knowledge that the pursuer was a creditor getting a share of the profits, and the auditor knew all. In truth, there does not appear to be any generic difference between the two modes of auditing spoken to by the accountants; the one is only stricter and more accurate. But for the purposes of the present case it is not necessary to inquire whether Mr Gairdner's audit would not have been final under the agreement if the pursuer had chosen to leave him alone and let him audit as if the defender alone was interested. The fact is that the auditor had the knowledge of adverse interest being involved.

In the course of the debate the pursuer's counsel were asked what clause or provision in the agreement which Mr Gairdner did not know of could have affected his audit, and none was mentioned except the provision that the certificates were final. Now, I cannot think that this had anything to do with the audit. If two parties having a difference agree to be bound by the opinion of a certain counsel whom they jointly consult, shall they not be bound if the counsel is not told that his opinion is to bind the disputants? Possibly some counsel would give a better opinion knowing this responsibility, possibly others would give a worse; the knowledge might steady some and flurry others.

It seems to me that in the present case the parties agreed to be bound by the audit of Messrs M'Clelland, because they knew them to have always audited the books of Calder & Company and therefore knew its affairs, and because both gentlemen had experience of, and confidence in, the auditors selected. There is nothing in the agreement to require that the auditors should see it; both parties had access to the auditors and could show them the agreement or not show it, just as they pleased, and could tell them as much or as little as they liked about their relations to the business. The presence of the pursuer of itself attested his interest in profits, and in fact it is proved to the hilt that the audits were throughout conducted with a knowledge, not merely that he had an interest, but of the amount of it. These things being so, I am of opinion that the certificates are certificates under the agreement. They cannot be invalidated by the fact that the pursuer did not take enough pains in examining the books and in canvassing questionable entries, nor even by the fact, if that had been suggested, that the auditor was not sufficiently vigilant. As an illustration I take the case which was most seriously discussed, the case of Rucker's debt. On the best opinion I can form I think that Rucker's debt ought to have been written off in the balance of the year before the pursuer's interest began, and ought not to have been allowed to reduce the profits of the first year in which the pursuer was a sharer of profits. That the contrary opinion is tenable is shown by the evidence of witnesses of credit. But supposing there were not two sides to the question, and that Mr Gairdner missed the error, or, examining the question, came to an erroneous decision, this could not of itself upset his certificate or open it to review, unless the decision were the result of the defender's fraud. Now, it is a most remarkable fact that, although the pursuer has made more of this affair of Rucker than of anything else in the case, Mr Gairdner, who had certified the balance sheet in which Rucker's debt was treated as a loss affecting the pursuer's share of profits, was never so much as asked a question on the subject. For aught that appears, Mr Gairdner is a convinced supporter of the accuracy of the entry, and may have reached his conclusion after the most complete examination of the subject.

As indicated at the outset of this opinion, the pursuer has on record a case of fraud, and he insisted in those charges down to the end of the debate. By them he seeks to invalidate the certificates, even assuming these to have been otherwise final. I do not intend to say more about those charges than what I have already said; they have in my judgment entirely failed. All the matters out of which they arise are matters of opinion on which honest men may differ; on several of them I incline to think not only that the defender was honest, but that his opinion was right.

As regards the conclusions for accounting, my opinion is that the defender must prevail; and as he did not indicate dissatisfaction with the dismissal which the Lord Ordinary has applied to the four first years to which the certificates relate, as well as to the last, the dismissal of the conclusions for accounting, I suppose, will stand.

The pursuer did not ask a judicial accounting for the last year (the books of which have not been audited) unless the previous years were to be re-opened.

I turn now to the conclusion for damages. It was allowed by both parties that the defender was under obligation to keep the £15,000 of capital of his own in the business, and it was admitted by the defender that he did not do so. The extents to which the defender's capital was short at each balance during the four first years is shown in a state in the print, which is admitted by Mr Muir, his accountant, to be correct, with the exception of an entirely unimportant note at the end. The deficiency at the first balance was over £9700, at the second over £9200, at the third over £8300, at the fourth over £13,800. For the fifth balance the proper amount was paid in on the balance day, but the day before he had no capital at all in the business. The state of the capital account at the annual balances however does not adequately represent the normal amount of the deficiency throughout the year. It was much greater, and it appears that it was not by accident that this occurred.

That this withdrawal of capital was a breach of contract the defender admits, and the Lord Ordinary pronounces—and there can be no doubt about it. It was argued before us that the claim of damages could not be maintained, because the pursuer had opportunities of knowing of the deficiency of capital. But there is no plea of acquiescence or discharge on record, and this is the less surprising as the evidence of Mr Muir shows that the true state of the capital was not palpable on the face of the books.

The claim of damages is therefore not met by any defence. Yet the Lord Ordinary has dismissed the conclusion for damages on the ground that while there was a technical breach of the agreement, it is not proved that the pursuer has sustained any actual damage.

This judgment cannot stand, because even if no substantial damage had been proved, the mere fact of the breach of contract entitles the pursuer to damages, even were they merely nominal — *Webster* v. *Cramond Iron Company*, 2 R. 752. But further, I do not agree with the Lord Ordinary in considering the breach to have been merely technical. His Lordship has accepted the defender's general statements that the money was not required for the business, that no contract was refused, and that the money was employed quite beneficially for the pursuer, as it, or the greater part of it, was lent to another firm in which the defender was interested and yielded 5 per cent. These vague and plausible statements ought not to mislead anyone who bears in mind the duty of the defender under the agreement. When the pursuer lent the defender his £15,000, it was on the representation expressed in the contract that it was to work an extended timber business which should have a constant capital of £30,000 backed by a bank credit of £20,000. Having got the money for an extended timber business, the defender made, so far as appears, no attempt whatever to extend the business, having promptly and gladly withdrawn the bulk of his own capital into the more lucrative business of distilling, the profits of which he was not obliged to share with the pursuer. With the money of the timber business much more lucratively employed in distilling, it is not difficult for the defender to say, with a tolerably good conscience, that the timber business, which he himself managed, really did not need the money. But I decline to content myself with such excuses for what I think was a material and not a technical breach of contract.

The question as to the remedy has been left by the pursuer in a somewhat unsatisfactory position. The pursuer has been attracted by the large gains of the distilling business; he has sought to capture these by the misapplication of rules of trust law and of partnership law; and less attention has, in consequence, been bestowed on his true claim of damages.

In my opinion, it is impossible for the pursuer to claim the profits made in the distillery with the defender's capital, which ought to have been in the timber business. The money traded with in the distillery was not the pursuer's but the defender's; and the defender was neither a trustee nor (in relation to the pursuer) a partner. The fact that the pursuer was entitled to a share of profits did not under this agreement make him a partner; and his relation to the defender was simply that of creditor in a contract obligation.

The question then is, what damage has the pursuer sustained? or, to put it otherwise, what would he have gained, more than he has done through the 5 per cent. return, had the defender kept the stipulated capital in the timber business? As I have indicated, the pursuer has not developed his case on this question as perhaps might have been done; and although I have very carefully examined the evidence I do not find myself in a position to assess large damages. There is adequate evidence that the timber market admitted of the remunerative employment of capital during the period of the agreement, and that 8 per cent. was being earned. That the business of Calder & Company, as reconstituted by the agreement, had no use for the capital, or for two-thirds of the capital, the loan of which was the occasion of the agreement, I flatly decline to accept on the mere assurance of the person who diverted it; and there is no independent evidence to support the proposition. A comparison of the profits actually earned by the unduly limited capital with the 8 per cent. spoken to by the witnesses may usefully be referred to, not as forming a measure of damages, but as furnishing checks for testing the fairness of a rougher award founded on a review of the whole facts. As already indicated, the pursuer has left this part of his case in a very rough state, and in my consideration of the amount of damages I have taken the

figures at the worst for him. We sit as a jury; and the sum which I propose is, in my judgment, a very moderate estimate of the damage caused by the defender's breach of contract during the five years. I am for giving the pursuer decree for £250 in name of damages.

LORD ADAM—by the agreement entered into between the pursuer and the defender with reference to the loan of £15,000 by the former to the latter, it was stipulated that the pursuer should be entitled to 5 per cent. interest on the loan of £15,000, and also 37½ per cent. of the net profits of the defender's business of Calder & Co. after certain deductions therein specified.

In order to the ascertainment of the sum to which the pursuer was entitled as his share of the net profits, it was by the 4th article of the agreement provided that the books of Calder & Co. should be balanced on the 30th day of April 1889, and audited as thereinafter mentioned, and that the defender's capital in the stock and plant of the firm should be valued and ascertained, and if the pursuer should be dissatisfied with the valuation, the amount was to be fixed by arbitration.

By the 5th article of the agreement it was provided that the books of the firm should thereafter be balanced annually on 30th April, and should be audited by Messrs M'Clelland, Mackinnon, & Blyth, chartered accountants, or other auditors to be mutually agreed upon, and that the certificates of the auditors should be binding on both parties, as finally fixing the amount of the profits in each year, and the interest and percentage payable to the pursuer.

The books of Calder & Co. were in fact audited by Mr Gairdner, a partner of the firm of M'Clelland, Mackinnon, & Blyth, for the years ending 30th April 1890, 1891, 1892, and 1893, and he granted certificates of the amount of the profits, and the pursuer was settled with for the share to which he was entitled on the amounts thus appearing.

The question is, whether these certificates are binding on the pursuer under the 5th article of the agreement as finally fixing the amount of the profits in each year.

It is clear from Mr Gairdner's evidence that when he audited the books and granted the relative certificates during these years he did not know of the agreement in question. I think that neither the pursuer or the defender is to blame for this. The pursuer communicated the agreement to Mr Blyth, one of the partners of Mr Gairdner's firm, and the defender knew that Mr Mackinnon, another partner of the firm, was aware of it, as was in fact the case, and I think that both the pursuer and defender were entitled to assume that Mr Gairdner had been put in possession of the agreement by one or other of the partners before proceeding to audit the books.

The fact, however, is that Mr Gairdner did not know of the agreement, and I have difficulty in understanding how his audit of the books can be held to be an audit under an agreement of which he was ignorant, and in particular when he was ignorant of the character of the audit in which he was engaged, and that it was to be conclusive between the parties. But if his audit was not, as I think it was not, an audit under the agreement, then it cannot have the protection of the finality provided by the 5th article of the agreement. But it is said that Mr Gairdner knew all that it was essential for him to know in order to make a binding audit under the agreement when he knew that the pursuer was entitled to a share of the profits, as in that case he knew that the pursuer and defender had conflicting interests in the matter. That he knew this fact and that he audited the books throughout in that knowledge is certain. He himself says—"Each certificate I gave as to the amount of the profits earned was correct in view of a single partner. (Q) But you knew there was somebody getting three-eighths of the profits?—(A) Yes. (Q) In view of that knowledge you knew he had an interest to the extent of three-eighths of the profits?—(A) Yes. (Q) So your certificate was in that knowledge?—(A) Yes. (Q) Then it was not one interest, but two interests?—(A) Yes. (Q) But whether there were one or two interests, it correctly certified the profits of the business?—(A) Yes. The only operation to be done afterwards was to allocate three-eighths to the one and five-eighths to the other. (Q) Of course you must have seen that Mr Teacher had an adverse interest in this matter to Mr Calder if he had a right to three-eighths of the profits—he had an interest to see the profits made as big as possible?—(A) Yes, my audit was made in that knowledge."

It is right also to point out what Mr Blyth, who was thoroughly aware of the terms of the agreement, says on the subject. He says—"I did not look upon it (the agreement) as in any way altering our position as auditors. We had been auditors for several years, and I did not look upon this new agreement as in any way affecting our position. That was because I considered our audit would quite serve the purposes of the agreement. In short, the audit by my firm was an audit to which nothing required to be added in the performance of our duties under the agreement. (Q) Referring to the fifth head of the agreement, did it appear to you that the kind of audit which you had been in use to make would be quite satisfactory under that clause?—(A) It did not occur to me to make any change on the audit. I say yes to that question." The material point, however, is that Mr Gairdner, whose audit and certificates are in question, is not of that opinion, and would not have audited the books in the same way or treated the audit actually made as a sufficient basis for granting the certificates which he did if he had known of the agreement.

Speaking of the last audit he says—"I began the audit on the 9th July. Having become aware of the terms of the agreement, I examined the books differently on that occasion from what I had done

formerly, because the charge against profits might require to be differently treated. On examining the books at that time I found certain items which appeared to me not to be satisfactory. I communicated in consequence with Mr Teacher's agents—Messrs Anderson & Mackinnon. After that discussion arose between the parties, and the result has been that the 1894 audit has never been completed."

Again in cross-examination he says—"I never knew the details of the agreement;" and being asked, "How could you perform your duty without knowing something about it?" his answer is—"I could not perform it in accordance with the agreement, because I did not know the details." Again in answer to the question, "You used the expression that you did not suppose you were making a final audit. What did you suppose you were making if the balance-sheet were adopted and signed?—(A) I understood that to mean that I was not aware I was holding the balance as I would have done if I had had the terms of the agreement before me." And again on re-examination he says—"(Q) Did you do in this case just what you generally do when employed by a trader to audit in his interest?—(A) Yes. (Q) Supposing you made an audit in the capacity of arbiter between parties, would you audit differently?—(A) I would analyse the allocation between capital and revenue somewhat differently. (Q) You mean in the case of a partnership limited to a few years?—(A) Yes, and acting as arbiter. (Q) Why would you do that?—(A) A man trading on his own account might charge up a number of entries to revenue which should be debited to capital account if there were other interests. (Q) Then had you at any time in signing these docquets the impression that you were giving an arbiter's award?—(A) No,"—by which he afterwards explains he means arbiter to the extent of adjusting the profits.

I think it sufficiently appears from Mr Gairdner's evidence that, in his opinion, in order to a proper audit under the agreement it was necessary that he should know the terms of the agreement, and in particular that, under article 5, his audit was to be conclusive between the parties, or, as he puts it, that he was arbiter to the extent of adjusting the profits. In that case, he says, his mode of conducting the audit would have been different, and if so, the results would have been different. It appears to me to be no answer to this that Mr Blyth and others think that the manner in which Mr Gairdner audited the books was a sufficient audit under the agreement. Their opinion as to the sufficiency of the audit can never make it a final audit under article 5.

My own opinion is that it was essential to a proper audit under the agreement that the auditor should know that his audit was to be final between the parties as to the amount of profits. He was, as he says, arbiter to the extent of adjusting the profits, and the certificates issued by him were equivalent to so many decrees-arbitral so to speak. I do not see how decrees-arbitral, binding between the parties, can be issued by a person who does not know that he is an arbiter.

I am, accordingly, of opinion that the books of Calder & Company have never been audited under article 5 of the agreement, and that therefore the audits and certificates issued by Mr Gairdner are not final. The result is that I think that the pursuer is entitled to have the books of Calder & Company re-audited. If, as the pursuer says, the auditors named in that article decline to re-audit the books, and the parties cannot agree to another auditor, then I think the matter must be remitted to an auditor to be named by the Court.

In the view your Lordship has taken of the case, I agree in the amount of damages proposed to be awarded.

LORD M'LAREN—The object of the action is to have the account between the pursuer and the defender referred to an accountant for revision, in order that the true amount of the profits due by the defender to the pursuer under the agreement of 11th April 1889 may be ascertained.

According to the fifth article of the agreement the books of the firm were to be balanced annually on 30th April, and were to be audited by Messrs M'Clelland, Mackinnon, & Blyth, or other auditors to be mutually agreed upon, and it is declared that the certificate of the auditors shall be binding on both parties as finally fixing the amount of the profits in each year, and the interest or percentage (37½ per cent.) payable to the pursuer in respect of his loan and financial assistance to the firm.

In order to overcome the effect of this declaration of finality the pursuer relied on two specialties. First, he based an argument on the fact that the accountant who conducted the annual audit was not made acquainted with the terms of the agreement; and secondly, he argued that the fifth article presupposes that a true balance had been struck as at 30th April 1889, the date of the commencement of the joint trade in terms of the fourth article of the agreement. It was argued that the balance struck on 30th April 1889 was not a true balance, and that the error alleged would vitiate all the subsequent balances struck in terms of the fifth article, and would render the declaration of finality nugatory or ineffectual.

As to the first point, it is true that although a copy of the agreement was sent to the firm of M'Clelland & Co., it was not given to Mr Gairdner, the partner who conducted the audits and certified all the balances, including the preliminary balance-sheet of 30th April 1889, from which the others were reckoned. Now, if the agreement had been withheld from Mr Gairdner by the defender, one might be led to suspect some indirect motive on his part, which would have given a different aspect to the case. But Mr Gairdner's firm had got the agreement, and if the agreement did not reach the partner who was to do the work of the audit, this was a mistake for which

the defender was in no way responsible. We have, then, only to consider whether Mr Gairdner's ignorance of the terms of the agreement did in fact disable him from making an effective annual audit of the books of Calder & Company. It is not a condition of the agreement that its terms should be communicated to the auditor, and therefore it is for the pursuer to show that his position under the agreement was altered to his disadvantage by the non-communication of the terms of the agreement to Mr Gairdner.

In the absence of special circumstances establishing such disadvantage I am unable to see how the pursuer could suffer prejudice. The audits prescribed by the fourth and fifth articles were not subjected to any conditions or restrictions, and I think it must be taken that the parties contemplated an ordinary mercantile audit once a year, and that they were willing to be bound for the purposes of their contract by the balance-sheets prepared or certified by the auditor. The first balance might have been made the subject of arbitration, but as arbitration was not claimed it seems to me that it is just as final as those of subsequent years.

But the defender has a better answer. Although Mr Gairdner knew nothing of the agreement when he adjusted the preliminary balance of April 1889, he became aware in the course of the next audit that the pursuer had an interest in the business, and therefore in the audit, because he found in the private ledgers an entry crediting Mr Teacher with his share of the profits of the first year. Now, if Mr Gairdner, when he came to know that Mr Teacher was getting a share of the profits, had found it necessary for the purposes of the audit that he should see the agreement, he would have asked for it. But it was not necessary that he should see the agreement, because he has only to make an honest audit of the business transactions of the year, and as there can only be one way of making an honest audit, it was of no consequence for the purposes of that audit what were the terms of the arrangement between the parties, or the precise interest of the pursuer in the profits of the business.

Passing to the second point, the only error which counsel succeeded in establishing in the balance-sheet of 1889 was the mode of treating Rucker's bad debt. Rucker's intimation that he was unable to meet his engagements was posted before 30th April 1889, but it only reached Glasgow after that date. The debt was then written off in the account 1889-90, and the effect of this was that Mr Teacher's share of profits has diminished by a proportional part of this bad debt. Now, I think that Rucker's debt ought to have been written off in the balance of the previous year's transactions; but this is a question of book-keeping, and Mr Gairdner approved of writing it off as a loss accruing in the year in which the intimation was received. There is no reason to suppose that Mr Gairdner would have treated the debt differently if the agreement for sharing profits had been brought to his notice, and I am unable to admit that an error of judgment (if such it is) on the part of the auditor chosen by the parties to regulate the statement of their transactions is a valid reason for reopening accounts which have been settled and acted on for a series of years. As to the claim of damages for breach of contract I shall say very little. The accounts prove that the defender did not fulfil his undertaking to keep a sum of £15,000 of capital in the business, and there are indications that his shortcoming in the matter of providing capital was even greater than is disclosed by the balance-sheets.

The only defence is that sufficient capital for the actual transactions of Calder & Company was provided by means of the cash-credit of the firm with the Commercial Bank. Now, as the defender would have been entitled under the agreement to credit himself with interest at the rate of 5 per cent. on his unpaid capital, and as the money was got from the bank at rates seldom exceeding 5 per cent., it was said that the loss to the pursuer was merely nominal.

I think this answer insufficient, because the agreement contemplated an extension of the business of Calder & Company, and the defender was bound to use his best exertions to extend the transactions of that firm in such a degree that the whole prescribed capital, plus the £20,000 borrowed from the Commercial Bank, should be the sufficient and necessary capital for the conduct of the business. Of course we do not know that it was possible to increase the transactions of the firm to such an extent, and we can only award an arbitrary sum of damages, which I agree may be estimated at £250. If I were able to proceed on my individual judgment I should be prepared to award £500, but the only question before the Court is, whether the damage shall be assessed at the minimum sum of £250 proposed by the Lord President, and my answer is in the affirmative.

LORD KINNEAR was absent.

The Court pronounced the following interlocutor:—

"Recal the said interlocutor [of 28th May 1897]: Decern against the defender for payment to the pursuer of £250 sterling, of damages: *Quoad ultra* dismiss the action: Find the defender entitled to two-thirds of the taxed amount of expenses," &c.

Counsel for the Pursuer—Asher, Q.C.—Johnston, Q.C.—W. Campbell. Agents—Carmichael & Miller, W.S.

Counsel for the Defender—Balfour, Q.C.—Salvesen. Agent—Alex. Morison, S.S.C.