

sections 39-41, the obligations of the defender under the Glasgow Police Act or at common law as to the repair and maintenance of the pavement were undoubtedly suspended during the Railway Company's operations; he could not stop or interfere with these operations; and it lay with the Railway Company, if the effect of their operations was to dislocate the pavement, to take steps for the protection of the public at that place. Further, the Railway Company were bound, section 41 (c) (1) (2), to restore and maintain the pavement interfered with until it was properly consolidated, and that to the satisfaction of the Corporation. Thus the defender was completely ousted for the time—the Railway Company being substituted for him until the pavement should be restored to the satisfaction of the Corporation. Now, this was not done before the accident occurred; and the question is whether in these circumstances any duty lay on the defender to repair the pavement at his own hand.

Though not without some doubt, I think it is not established that he was under any such duty. His obligation to maintain the pavement was undoubtedly suspended at the outset; and it lay upon the pursuer to show that there was some intermediate point between the date of the original transference of the defender's obligation to the Railway Company and the complete restoration of the pavement, at which he again became responsible for its upkeep, with full title and power to interfere and restore it. This has not been clearly made out. The Railway Company's obligation was not merely collateral to that of the defender; it was substituted for it; and they, and not the defender, were the parties on whom the Corporation should have called to restore the pavement. This distinguishes the case from *Baillie v. Shearer's Judicial Factor*, 21 R. 498, in which, in the opinion of the majority of the Court, the proprietor of the *solum* was never relieved of his obligation to maintain the pavement.

On the evidence before us I think the blame for the accident lies between the Railway Company who failed to restore and maintain the pavement, and the Corporation whose duty it was to compel the Railway Company to do so. These parties are not here; but we can at least decide that the defender has not been proved to be liable. It has not been shown that he was himself bound to restore the pavement, and he did all that he could to get the parties who were responsible for its condition (if he was not) to repair it.

The Court pronounced the following interlocutor:—

“Recal the interlocutors of the Sheriff-Substitute of Lanark dated 15th July 1896 and 6th December 1897, and that of the Sheriff dated 28th February 1898: Find in fact (1) that the defender was on the 2nd August 1895 proprietor of the tenement in Great Western Road, Glasgow, occupied by Chrystal, Bell, & Co. and others, as also of the ground in front thereof to the centre of the

street; (2) that on said date the pursuer while walking on the pavement opposite said tenement stumbled and fell and was injured owing to irregularities in said pavement; (3) that said pavement had been taken possession of by the Caledonian Railway under the provisions of the Glasgow Central Railway Act 1888, by which they were empowered to execute works for the making of a railway under the street; (4) that said Caledonian Railway Company were bound in terms of said Act to restore said pavement so interfered with by them to the satisfaction of the Corporation of Glasgow; (5) that the said Corporation failed to enforce the obligation against the said Railway Company to restore said pavement; (6) that the defender used all diligence to obtain a fulfilment of the obligations on the said Railway Company and obtained an undertaking from them to fulfil it, and an order from an arbiter under agreement ordering them to do so; and (7) that the defender was not bound to restore said pavement in so far as injured by the operations of said Railway Company, and was not in fault in not restoring the same: Find in law that the defender is not liable for the defect in said pavement which caused injury to the pursuer: Therefore assoilzie him from the conclusions of the action, and decern.”

Counsel for Pursuer — Ure, Q.C. — Younger. Agents — Cairns, M'Intosh, & Morton, W.S.

Counsel for Defender — Guthrie, Q.C. — Graham Stewart. Agents — R. R. Simpson & Lawson, W.S.

Friday, November 4.

FIRST DIVISION.

MURRAY v. M'COSH.

Partnership—Loan or Partnership.

By an agreement entered into by four parties — A, B, C, and D—it was provided that A and B should advance respectively to C and D, in equal proportions, the capital required to start and carry on a business for a period of three years. C was declared to be the sole partner in the meantime of the business, but undertook no obligation to repay the sum advanced by B; and D was to act as manager. Beyond a right to inspect books, &c., A and B had no right to interfere in the management of the business. It was provided that the profits, after payment of salaries to C and D, and interest on the sums advanced by A and B, should be accumulated for three years, unless A and B should require them to be applied during that period towards the ex-

inction of their advances. One half, both of the accumulated profits and of the assets of the firm, was at the absolute disposal of B at the expiry of the contract, and he had similar rights both in profits and assets in the event of the business being wound up during the three years.

Held (rev. the judgment of the Lord Ordinary) that these provisions showed that the business was carried on by and for behoof of B, and that he was liable as a partner.

In March 1893 a minute of agreement was entered into between Mr William Stevenson Brown, iron tube maker, Glasgow, as the first party; Mr Andrew M'Cosh, iron-master, Glasgow, as the second party; Mr Donald Stevenson Brown, son of the first party, as the third party; and Mr Adam Jardine, iron manufacturer, Coatbridge, as the fourth party.

The minute contained the following provisions:—"Whereas the said Donald Stevenson Brown proposes to acquire the subjects at Coatbridge known as the Scotia Ironworks, with the stock, machinery, and plant connected with the business hitherto carried on there by the firm of Jardine Brothers, of which the said Adam Jardine is a partner, and to continue to carry on the said business under the firm of D. Stevenson Brown & Company; and whereas, in order to enable said business to be acquired and carried on, the said William Stevenson Brown has agreed to advance to the said Donald Stevenson Brown the sum of One thousand two hundred and fifty pounds as a loan to him, and the said Andrew Kirkwood M'Cosh has agreed to advance the like sum of One thousand two hundred and fifty pounds on behalf of the said Adam Jardine, said advances to be on the conditions hereinafter specified: Therefore the whole parties hereto, in order to express in writing the terms and conditions which have been arranged between and among them, have agreed and hereby agree and declare as follows, namely:—*First*—The said Donald Stevenson Brown shall purchase the foresaid subjects, including the said stock, machinery, and plant, and shall take the title thereto in his name in trust for the said firm of D. Stevenson Brown & Company and whole partners thereof, present and future, according to their respective rights and interests, and shall also continue the business as sole partner in the meantime of said firm. The said Adam Jardine shall enter the service of the said firm as superintendent and practical manager of the works, and his duties shall be to take charge of the practical working of the business at the works, and the duties of the said Donald Stevenson Brown shall be to take charge of the buying of all material and selling of goods, manufactured or otherwise, and of the financial department of the business, including the books and accounts: Both the said Donald Stevenson Brown and the said Adam Jardine shall devote their whole time and attention to the business, and the said Adam Jardine shall not be interested,

directly or indirectly, in any other trade or business whatever without the consent of the whole parties hereto; neither of the third or fourth parties shall bind himself by any cautionary or such like obligation involving personal liability, either by himself or along with others, without the express written consent of the whole of the parties hereto: There shall be kept regular books and accounts showing the whole transactions of the firm, and all writings relating to the business shall be taken and given under the said firm of D. Stevenson Brown & Company; the third party shall alone be entitled to sign the name of the said firm; the books of the firm shall be balanced as at the thirtieth day of June in each year, the first balance being made on thirtieth June next, and the said balances shall be checked and audited by John Maclay Murray, chartered accountant, Glasgow, whom failing to William Dunlop, chartered accountant there, and the balance-sheets, as certified by the said auditor, shall be signed by the third party and countersigned by the fourth party, and submitted for the inspection of the first and second parties within one month after the date of the said respective audits: The first and second parties shall have full and free right of access at all reasonable times to the business premises of the said firm, and also to their books and accounts, and they shall be entitled to all information regarding the business and the progress thereof from time to time in every respect. *Second*.—Each of the third and fourth parties shall, as remuneration for his services, draw a salary at the rate of One hundred and fifty pounds per annum, which shall be payable monthly: After payment of the said salaries and all working expenses (including interest at the rate of four per cent. per annum to the said first and second parties upon the foresaid sums advanced by them, or the balance thereof outstanding from time to time), and an allowance of not less than five per cent. on the purchase price of the foresaid heritable subjects as depreciation (which allowance for depreciation shall be dealt with as after written), any surplus which may be left as profit on the business shall be applied as follows, namely:—The sum of Five hundred pounds per annum shall be applied towards payment of the postponed debts in connection with the purchase price of the said subjects until the same are cleared off, and the balance of profit (if any) shall be disposed of as follows, namely:—One-half thereof shall be put to the credit of the third party in the books of the company, but the third party shall not be entitled, during the currency of this agreement, without the consent of all the parties hereto, to withdraw any portion of the sum or sums so passed to his credit in the books of the firm; and the other half shall be carried to the credit of a 'suspense account' to be opened in the books of the company for that purpose, and be dealt with as hereinafter provided; or, in the option of the first and second parties, the said balance of profit instead of being

passed to the credit of said accounts, or after having been so passed, shall be paid to the first and second parties towards reduction of the advances made by them as before mentioned: And should in any year the profit not be sufficient to pay said sum of Five hundred pounds towards reduction of said postponed debts, then the deficiency shall be taken in equal sums from the account of the third party in the company's books and from said suspense account: But in case of any sums being so taken from said accounts to make up said sums of Five hundred pounds, such sums shall be replaced from profits in the subsequent year or years, and form a first charge against said profits till repaid. *Third.*—Should any balance-sheet show a loss instead of a profit, one-half thereof shall be carried to the debit of the said Donald Stevenson Brown and the other half to the debit of the foresaid suspense account: And in the event of its being found necessary that the business should be discontinued and wound up, then it is conditioned and agreed that neither the first nor second parties shall be entitled to rank for the said sums of One thousand two hundred and fifty pounds advanced by each of them until the claims of third parties have been met in full. And in a question between the parties themselves, the said first party shall have a claim for the amount owing to him only against the third party, and the second party shall have a claim for the amount owing to him only against the fourth party: Should either the first or second party make any further advances to the firm, they shall be entitled to receive therefor interest at the rate of five per cent. per annum, and in respect of such supplementary advances they shall have all the rights of ordinary creditors. *Fourth.*—This agreement shall subsist until the thirtieth day of June Eighteen hundred and ninety-six; at said date the second party, and failing him his executors, shall, on giving three months' previous notice to the third party, be entitled to call upon the said Donald Stevenson Brown to admit the said Adam Jardine as a full partner having equal rights with him in the said business, and to enter into a contract of copartnership for a period of not less than five years from the said date, which contract shall contain all usual and necessary clauses: And in the event of there being any differences of opinion in the adjustment of such clauses (including the fixing of the name and style of the new firm), such differences shall be settled and such adjustment shall be made by the arbiter hereinafter named: And should the said Adam Jardine become a partner with the said Donald Stevenson Brown, any sum which may stand at the credit of the said suspense account in the books of the said D. Stevenson Brown & Company shall be transferred to the credit of the said Adam Jardine in the books of the new firm, and shall belong to him, and the second party shall have no claim thereto. *Fifth.*—At the thirtieth day of June Eighteen hundred and ninety-six, should the second party or his foresaids decline to appoint the said

Adam Jardine as a partner with the said Donald Stevenson Brown, then, in the option of the said Andrew Kirkwood M'Cosh, or of the said Donald Stevenson Brown, the said business shall be wound up in the manner provided in article seventh hereof. *Sixth.*—In the event of the death of the third party before the thirtieth day of June Eighteen hundred and ninety-six, the second party or his foresaids shall have power to wind up the business in manner hereinafter provided in article seventh, or to pay out the interest of the third party to his representatives as the same shall be disclosed by a balance and new valuations then to be made at the sight of the arbiter hereinafter named: And should the fourth party die before the said thirtieth day of June Eighteen hundred and ninety-six, then the first party shall in like manner have power to wind up the business in manner hereinafter provided by article seventh, or to pay off to the second party the advance made by him or the balance thereof which may be found due, with the addition of any sum which may then, after the said balance and valuations have been made, be found to stand at the credit of the said suspense account, or under deduction of any sum which may be at the debit of the said account: And in case of either the first or second parties in said event electing to pay out the interest of the deceiver, the business shall in such case belong to the party so paying out said interest. *Seventh.*—In the event of the business being wound up in terms of any of the provisions hereinbefore contained, such winding-up shall take place at the sight of the arbiter hereinafter named. He shall cause a fresh balance to be made as at the date of such winding-up and shall cause new valuations of the assets to be made at said date, and if necessary he shall realise the whole assets of the firm by public roup or private bargain, and pay off the liabilities thereof, but declaring that neither the first nor the second party shall be entitled to claim against the assets of the firm in respect of the said advances of one thousand two hundred and fifty pounds each made by them until the whole of the other creditors are paid in full: And if any surplus shall be left from the assets of the firm after payment of the liabilities and after repayment of the said advances, or the balance thereof that may be due at the time, such surplus shall be divided, in proportion to their respective interests, between the said Donald Stevenson Brown or his representatives, and the said Andrew Kirkwood M'Cosh or his representatives, for the benefit of the said Adam Jardine or any of his relatives, as the said Andrew Kirkwood M'Cosh or his representatives shall see fit. *Eighth.*—Nothing herein contained shall be held as in any way conferring upon the said Adam Jardine or his representatives any right or claim against the said Andrew Kirkwood M'Cosh, any benefit which the said Andrew Kirkwood M'Cosh may hereafter give to the said Adam Jardine or any of his relatives being entirely gratuitous and at the sole option and

discretion of the said Andrew Kirkwood M'Cosh. *Lastly*.—In the event of any differences or disputes arising between or among the parties hereto, or any of them, regarding the meaning of these presents, or as to the implement thereof in any way, or the rights or obligations of the parties *inter se*, or in the adjustment of the clauses of the contract of copartnership before mentioned, all such differences and disputes are hereby referred to the final sentence of John Turnbull, writer in Glasgow, whom failing, by non-acceptance or otherwise, of John J Coatts, writer in Glasgow, as sole arbiter." . . .

The agreement was acted upon and the business was conducted up till 3rd November 1896, when the firm's estate and that of Donald Stevenson Brown were sequestrated. Mr John Mackay Murray, C.A., Glasgow, was appointed trustee on the sequestrated estate.

The estates of the firm having proved insufficient to pay the creditors in full, the creditors claimed that Mr M'Cosh was an obligant for their debts as a partner of the firm of D. Stevenson Brown & Company.

An action was raised against Mr M'Cosh by the trustee on the sequestrated estates, and by Messrs David Greig & Company, creditors to the extent of £326, of which a balance of £217 remained unpaid. The summons concluded for declarator that under the minute of agreement the defender "incurred the whole liabilities of a partner in the business . . . and that at and prior to the date of the sequestration . . . the defender was and still is a partner of the said firm, and liable as such partner or otherwise for the debts and obligations of the firm."

There were further conclusions for payment to the trustee of the whole balance of the debts of the firm remaining unpaid after its estate was exhausted, and *separatim* for payment to the other pursuers of the balance left due to them.

The defender pleaded—" (5) On a sound construction of the agreement sued on, the defender never became a partner or assumed the liabilities of a partner, and should be assoilzied from the conclusions of the summons."

The Lord Ordinary (STORMONTH DARLING) on 4th March 1898 pronounced an interlocutor whereby he sustained the defenders' fifth plea and assoilzied him from the conclusions of the summons.

Opinion.—"The question here is, whether the defender was a partner in the business carried on by Mr Donald Stevenson Brown under the firm of D. Stevenson Brown & Company, down to the sequestration of the firm and of Mr Brown on 3rd November 1896. That is a question depending entirely on the terms of the minute of agreement, dated 23rd and 31st March 1893, because it is no part of the pursuers' case that the defender held himself out as a partner. If he is liable at all, it is because the agreement made him an actual partner.

"Now, the principles on which such a question must be determined are well settled by the Partnership Act of 1890, sec-

tion 2, and by a series of cases, of which in England, *Cox v. Hickman*, 8 H.L.C. 268; *Mollwo, March, & Co. v. The Court of Wards*, L.R., 4 P.C. Ca. 419; and *Badeley v. The Consolidated Bank*, L.R., 38 Ch. Div. 238; and in Scotland, *Eaglesham v. Grant*, 2 R. 960; *Stott v. Fender*, 5 R. 1104; and *Mess v. Low*, 23 R. 1105, are the leading examples. Some of these supplied materials for the Act, and all are useful in explaining it, the result being that participation in the profits of a business is no more than *prima facie* evidence of partnership, and that it does not even raise a presumption requiring to be displaced, but that the question whether there is a partnership or not is one of intention to be ascertained from the agreement of parties taken as a whole.

"The agreement in this case is of an unusual nature, and I have not found its construction easy. But its leading purpose is clear enough. There were four parties to it, two with capital and two without. Each of the capitalists, Mr William Brown and the defender, was willing to advance £1250 in order to set agoing a business, of which Mr Brown's son Donald was to be the immediate owner, but into which the defender's protégé Mr Jardine was to be assumed as a partner, if the defender desired it, at the end of three years. Meanwhile Jardine was to act as practical manager of the works, while Donald Brown was to take charge of the financial department of the business, and he only was to sign the firm name. But each of the young men was to draw the same salary of £150, and, after payment of working expenses, including interest at 4 per cent. on the two advances of £1250 each, any balance of profit was to be divided into two equal parts, one-half being put to the credit of young Mr Brown in the books of the firm, and the other half being carried to the credit of a 'suspense account.' As it is this suspense account which affords the pursuer his chief argument, I shall follow its destination in a moment, but in the meantime it is proper to note that Mr Brown senior and the defender had the option of requiring the profits, instead of being passed to the credit of these accounts, to be paid to themselves towards reduction of their advances. It is also to be noted that, in the event of the business resulting in loss and requiring to be wound up, it was agreed that neither of these gentlemen should be entitled to rank for his advance until the claims of third parties had been met in full, and that, as between the parties themselves, Mr Brown senior should have a claim for the amount owing to him only against his son, and that the defender should have a claim only against Jardine. The two capitalists were to have a right of access at all reasonable times to the business premises, and to the books and accounts of the firm, and were also to be entitled to all information regarding the progress of the business from time to time.

"So far I do not think it can be said that there was anything inconsistent with the idea of a loan of money on the part of these

gentlemen to set the business agoing. No doubt, so far as the defender was concerned, it was not a loan made on the personal responsibility of the actual trader, for the general estate of the latter was not to be liable in repayment. I see from the report of the argument in *Stott v. Fender* that the same circumstance was pleaded unsuccessfully as tending to the inference of partnership. But the profits of the business in this case were to be liable for the interest, and might be made liable even for the principal, and the provision that the lenders were to rank for the principal only after the claims of third parties had been met in full was no more than an expression of what the Partnership Act provides by section 3, in the case of a lender who receives a share of profits. On the other hand, Jardine's personal responsibility for the repayment of the defender's advance was much more consistent with loan than partnership.

"I now come to the portion of the agreement which deals with the 'suspense account.' At the termination of the agreement, viz., on 30th June 1896, the defender was to have the right of calling upon Donald Brown to admit Jardine as a full partner having equal rights with himself, and to enter into a contract of copartnership with him for not less than five years, in which case any sum standing at the credit of the suspense account in the books of the business was to be transferred to the credit of Jardine in the books of the said firm, and the defender was to have no claim thereto. Plainly, I think, in the contemplation of the parties that was to be the normal result if all went well. But there were two other possible events which were also provided for—(1) that of the defender declining to nominate Jardine as a partner, and (2) that of Donald Brown dying before June 1896. In either case the defender was to have power to wind up the business, or pay out Donald Brown's interest to his representatives and acquire the business for himself. In the case of the business being wound up, and a surplus being left after meeting all liabilities and repaying the advances, such surplus was to be divided between Donald Brown or his representatives and the defender or his representatives for the benefit of Jardine or any of his relatives as the defender or his representatives should see fit. Again, I say all this is consistent with the leading idea that the defender's contribution of £1250 was to be for the benefit of Jardine, whether the latter was assumed as a partner or not.

"But then follows article 8, on which the pursuer strongly founds, to the effect that nothing contained in the agreement should be held as conferring upon Jardine or his representatives any right or claim against the defender, any benefit which the defender might hereafter give to Jardine or his relations being entirely gratuitous, and at the sole option and discretion of the defender. From this it is argued that the defender might, if he pleased, have declined to nominate Jardine as a partner, and might either have acquired the business for him-

self or have insisted on its being wound up, and in addition to obtaining repayment of his advance, might, if the funds allowed it, have walked off with half the surplus assets.

"So far as the right to acquire the business is concerned, I do not see that the defender's position differed in any way from that of Mr Brown senior, who had a corresponding right under article 6, in the event of Jardine's death, to pay off the defender's advance, plus any sum at the credit of the suspense account, and thereby to acquire the business for himself, and it is not maintained that this made Mr Brown senior a partner. There was a similar right in *Badeley's* case to enter and complete the works for which the money was advanced. In short, a stipulation by which in certain events an interest in a business may be acquired *de futuro* does not make present partnership.

"I admit that the other alternative of winding-up the business and taking for his own benefit one-half of the accumulated profits, in addition to repayment of his advance, was within the defender's power, although I see no reason to doubt his statement on record that he never intended to obtain any personal advantage from the agreement. Possibly there is no difference in law between stipulating for a share of profits to be given to another and making the same stipulation for oneself. But participation in profits, whether immediate or deferred, may be part of the consideration for a loan, and does not by itself make the lender a partner. Here, as it seems to me, there is nothing else to infer partnership. The express words of the agreement are against it, for article 1 declares that Donald Brown is to be 'sole partner in the meantime of said firm.' I think the whole tenor of the agreement is against it just as much. Unless, therefore, I were to hold that the agreement was a mere cover or blind to give the defender the benefits of partnership without incurring its liabilities, I could not find for the pursuer, and I am not prepared to say that."

The pursuers reclaimed, and argued—None of the ordinary provisions of articles of copartnership were omitted in this minute of agreement. In the first place there was the fact of the advance having been made and the money used as trading capital. This was not obtained by the firm by way of loan, but held as partnership capital. The preamble discriminated between the money advanced by Mr Brown, which was described as a loan, and that by the defender which was not so described, and the whole terms of the minute were in harmony with the preamble and not consistent with the idea of a loan. The Lord Ordinary had not sufficiently appreciated the fact that there was to be community of both losses and profits. The sharing of profits was *prima facie* evidence of partnership, and there was nothing in the rest of the deed to rebut that evidence.—See cases cited by Lord Ordinary, and *Pooley v. Driver* (1876), L.R., 5 Ch. Div. 458; *Ex parte Delhasse* (1877), L.R., 7 Ch. Div. 511; *Adam*

v. *Newbigging* (1888), L.R., 13 App. Ca. 308; *Davis v. Davis* (1894), L.R., 1 Ch. 393; Lindley on Partnership, 6th ed., pp. 45-7; Partnership Act 1890 (53 and 54 Vict. cap. 39), sec. 2, sub-sec. 3.

Argued for respondent—The leading idea in partnership was that the partners were conjoined in carrying on a business. There was nothing of that kind here. The preamble clearly showed that partnership was not intended, the advance of a loan being of no weight in constituting a partnership. Nor was the sharing in the profits an absolute indication of partnership; it was no more than *prima facie* evidence—not even raising a presumption to be rebutted.—See cases cited by Lord Ordinary, and in particular *Mess v. Low*, at p. 1116. The distinction drawn by the claimer as to the use of the words “loan” and “advance” in the preamble was not well founded, for they were used throughout the minute interchangeably. It was quite a common stipulation that there should be no power in the debtor to repay the loan before a fixed period. In short, the reclaimers’ case began and ended with the fact that the respondent was to share in the profits, a fact which did not constitute partnership in view of the other terms of the agreement.

At advising—

LORD PRESIDENT—The Lord Ordinary has given a clear and succinct account of the provisions of this contract of copartnership, and I do not intend to state them over again. What I am going to say assumes a full knowledge of the contract and sets out my conclusions on its legal effect regarding the defender.

Now, to begin with, I have no doubt at all that in intervening as he did Mr M'Cosh had no intention of making gain for himself. To me it is clear that he interposed in the interests of Mr Jardine and of that gentleman's relations, and that, if he stipulated that he himself should have very high and arbitrary powers, this was done in the interest of those whom he desired to advance and benefit. But, on the other hand, it seems to me that, for the purposes of the present question, it is immaterial whether his motives in obtaining that control over the profits and assets of the concern were selfish or unselfish, and that the true question is as to the aggregate effect of the rights which (for whatever reason) are conferred on him in this contract. To put this in another way, suppose that Mr M'Cosh had called himself a trustee and had put himself formally in a fiduciary relation to Mr Jardine and his relations, this would not affect the question whether the rights he acquired under the contract did not make him a partner. Whether, then, the defender interposed for his friends or himself, what we have to find out is whether, to the extent of a share which may be accurately stated as a half, this Scotia Ironworks business was not his business.

Now, it is quite true that the contract says that “in the meantime” young Mr

Brown was to be sole partner, and the words “in the meantime” point to the expected contingency of Mr Jardine being made a partner at the end of three years, which was the term of the contract. But it is unnecessary to say that a declaration of this kind will not avail to prevent other persons than the so-called sole partner being found to have rights assigned to them by the contract which makes them partners. I have come to the conclusion that this has been done in the case of Mr M'Cosh.

First of all about profits. While there was to be an annual striking of profits, no profits were to be paid out till the expiry of the contract; and in the case of the one-half with which we are directly concerned, it was to be paid into an account to be entitled a “suspense account.” Now, when the term of the copartnership expired the amount in this suspense account was at the absolute disposition of the defender. I put it thus broadly because that is the legal result. In this unfettered arbitrament he might either hand it over to Jardine on starting him in a fresh contract or give it to Jardine's relatives, or do neither of these things, just as he pleased.

So far as regards the profits. Now as to the capital. If the defender chose, he had right, at the expiry of the contract, to call on young Mr Brown, whom we have seen described as sole partner, to assume Jardine as a partner—and assume him he must—with the effect of giving Jardine one-half of the whole assets of the firm. It thus appears that in this event the three years' trading has been, as regards one-half of both profits and capital, for Mr M'Cosh's nominee.

Again, should the defender, dissatisfied as he might be with the three years' experiment, think it better not to put Jardine into the business as a partner, then the concern, if the defender so chose, is to be wound up, and in this event one-half of the surplus of the assets is to go to the defender, with unlimited power of disposing of it. The same was to occur if Brown senior chose to call for a winding-up in the same event. In the event of the death of young Brown during the contract, the defender was entitled to pay out his interest and take the business himself. In the event of Jardine's death during the contract, the defender would seem to take the suspense account (that is, one-half of the accumulated profits) only, and would leave the assets behind.

Now, in the face of all this, which *prima facie* I should say is overwhelming proof of partnership, we are told that the defender's position is merely that of a creditor who has advanced money on loan to the sole partner, and it is true that he did advance £1250 for the purposes of the business. Deciding this case, as I desire to do, on the substance and not on the mere expressions of the deed, I do not dwell on the omission in the narrative to describe this advance as a loan, or to say to whom it is advanced. But it seems to me that the interests in both profits and assets, which I have

already shown to belong to the defender, greatly transcend (I mean, of course, in kind and not merely in amount) the interests of a creditor, whether as regards his remuneration or his protection. It is, of course, true that the mere fact that the loan is on terms very favourable to the lender does not necessarily turn him into a partner. But when it appears, as in this case, that even if the loan were wiped out in the first year of trading, the so-called lender would continue to have the rights to one-half of the profits, and also (in several of the possible events leading to a winding-up) to one-half of the assets, then the just inference seems to be that the money has been advanced by one by whom and for whom the business is carried on. In truth, it can hardly be maintained that young Mr Brown, or he and his father together, could pretend that the business was theirs and not Mr M'Cosh's also. He had a right to insist that the business be carried on even if his advance were repaid. And the reason really was that he joined in starting the business, and carried it on in order that the three years' experiment might be made of Jardine's trading with Brown. The advance of £1250 was incidental to this design and for its furtherance. The main object was that this business should be under the control of the defender when the time came for his determining the future of Jardine. As I have said already, these were disinterested objects; but they were impossible of attainment, or at least they have not been attained, without making the defender liable for the engagements of the concern.

It is sometimes asked in those cases, did the defender intend to become a partner? and the suggestion is that the answer must be in the negative. This, however, is a very fallacious statement of the controversy. The proposed question really means, as the Master of the Rolls (Jessel) pointed out in *Pooley v. Driver*, nothing more than: Did he intend to assume the liabilities of a partner? and to this question, no doubt, a triumphant negative may always be returned. But I am anxious to add in the present case that I see no reason to ascribe to this deed the qualities of evasion or contrivance which have rendered some of these partnership cases so invidious. The personal relations to be dealt with in this case were delicate and complicated; and the provisions of the deed are therefore unusual. In supposing that those provisions did not involve the defender in the liabilities of a partner, the defender and his advisers have, I think, erred in law; but that is the only thing I have to say against them.

I am for recalling the Lord Ordinary's interlocutor and pronouncing decree in terms of the first conclusions of the summons, omitting the words "as such partner or otherwise" from the penultimate line in that conclusion. The cause can then be continued.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court recalled the interlocutor of the Lord Ordinary, pronounced decree in the terms of the first conclusions of the summons, with the omission indicated by the Lord President, and continued the cause.

Counsel for Pursuers—W. Campbell, Q.C.—J. Wilson. Agents—Carmichael & Miller, W.S.

Counsel for Defenders—Sol.-Gen. Dickson, Q.C.—Clyde. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday November 1.

SECOND DIVISION.

[Sheriff-Substitute of Lothians and Peebles.]

MACLEAN v. LOGANLEA COAL COMPANY, LIMITED.

Reparation—Master and Servant—Contributory Negligence—Mines and Minerals—Contravention of Special Rules of Pit—Coal Mines Regulation Act 1887 (50 and 51 Vict. c. 58), sec. 49, General Rules, 1, 21, and 22; 51 (1) (2), and (3).

The Coal Mines Regulation Act 1887 sec. 49, General Rule 22, enacts that "where the timbering of the working-places is done by the workmen employed therein, suitable timber shall be provided at the working-place, gate-end, pass-bye, siding, or other similar place in the mine convenient to the workmen."

Rule 75 of the special rules established for a coal-pit in terms of the Coal Mines Regulation Act 1887 provided—"If from accident or any other cause miners are at any time unable to find a sufficient supply of timber at the place appointed, they are expressly forbidden to remain in their working-places."

A miner employed in this pit brought an action of damages for personal injury against his employers, averring that on a certain day he had been ordered by a person entrusted with superintendence to leave his ordinary work of working out the coal in the pit, and to assist in enlarging an air-course, this work being specially urgent, as it was necessary to ensure the proper ventilation, and so the safety of the mine; that, in contravention of Rule 22, suitable timber was not supplied to him, the timber provided being either too long or too short for the place at which he was ordered to work; that he informed the person who had ordered him to do the work in question of this fact, but that he had been told by him that the supply was daily expected, and that he was to go on with the material provided; and that while he was endeavouring to put one of these pieces of un-