LORD LOW, LORD ARDWALL, and LORD DUNDAS concurred.

The Court granted the prayer of the note.

Counsel for the Petitioner—J. H. Henderson. Agent—W. K. Lyon, W.S.

Counsel for the Respondent—F. C. Thomson. Agent—Peter Weir, S.S.C.

Tuesday, December 1.

SECOND DIVISION.

MENZIES' TRUSTEES *v.* BLACK'S TRUSTEES AND OTHERS.

Partnership — Deceasing Partner — Agreement to Pay Annuity to Widow of Deceasing Partner for a Period — Dissolution of Partnership before Expiration of Period.

A, B, & C, the partners of a law firm, executed a memorandum of agreement, which, *inter alia*, provided that in the event of the death of any of them leaving a widow, there should be paid to her a certain annual allowance for a period of five years. In the case of A's widow it provided that "if the party or parties carrying on the business retain" a certain agency she should receive an additional sum. A died leaving a widow and survived by B and C, who after A's death, and before the expiry of the five years dissolved partnership for reasons unconnected with the payment of the annuity.

Held, in a Special Case, that the right to the annual allowance terminated wholly on the dissolution of the partnership.

Question what the effect on the obligation to pay would have been if B and C had dissolved partnership in order to get rid of the annuity.

Alan Lockhart Menzies, W.S., Edinburgh, and others, trustees of the late Sir William John Menzies, W.S., Edinburgh (*first parties*); George Lewis Aitken, solicitor, Kirkcaldy, and others, trustees of the late A. W. Black, W.S., Edinburgh (*second parties*); the said A. L. Menzies as an individual (*third party*); and Dame Annie Percival Drought or Menzies, Canaan House, Edinburgh, widow of the said Sir W. J. Menzies (*fourth party*), brought a Special Case as to the fourth party's right to payment of an annuity under the memorandum of agreement after mentioned.

The memorandum of agreement, which was headed "Memorandum of Basis of Distribution of Profits of Menzies, Black, & Menzies, W.S., 25th January 1898," after providing for the division of profits of the business among the partners, continued as follows—"In the event of any of the partners dying or becoming incapacitated from active business, there shall be paid to such partner, or his widow if she survives him, the following allowances for a period of five years after such death or incapacity, but no longer—W. J. Menzies, or his widow, three hundred pounds annually, and if the party or parties carrying on the business retain the agency of the Church of Scotland, with the agency of the committees thereof, a further some of one hundred and fifty pounds annually. . . ."

The late Sir William John Menzies died at Edinburgh on 14th October 1905, and was at the time of his death senior partner of the firm of Messrs Menzies, Black, & Menzies, W.S., Edinburgh, the other partners then being the late Alexander William Black, W.S., and Alan Lockhart Menzies, W.S., Sir William John Menzies' eldest son. No formal deed of copartnery was executed by the partners. The partnership was terminable at will. Sir William John Menzies held the office of agent of the Church of Scotland, and of the committees thereof, the emoluments being credited to the partnership, and on his death his son, the said A. L. Menzies, was appointed agent. After the death of Sir William John Menzies the surviving partners, the said A. W. Black and A. L. Menzies, continued to carry on the business under the old firm name of Menzies, Black, & Menzies, and on the basis of an equal division of profits after debiting the allowance to Lady Menzies, but without executing any fresh memorandum as to division of profits or otherwise. This arrangement continued until 17th February 1906, when the firm was dissolved by mutual consent, but for reasons which the parties admitted had nothing to do with the allowance to Lady Menzies. From 17th February to 24th March 1906 the said A. W. Black and A. L. Menzies each conducted his own business in the old firm's office but kept separate books. They agreed that the profits earned by each during said period from 17th February to 24th March 1906 should be credited to a joint balance-sheet, and after debiting the allowance due to Lady Menzies down to 24th March 1906, be divided equally between them. This was accordingly done. On 24th March 1906 the said A. L. Menzies removed from the old firm's office, and from that date the business of each was distinct and separate. The said A. W. Black removed from the old firm's office on 26th May 1906. He died on 29th December 1906. In accordance with the arrangement in the memorandum the said A. W. Black and A. L. Menzies, the surviving partners, paid to Lady Menzies an allowance at the rate of £450 per annum from 14th October 1905 (the date of Sir W. J. Menzies' death) to 24th March 1906 (the date of the final dissolution of the copartnery), when they ceased to pay said allowance on the ground that the obligation to provide such an allowance was only binding upon them so long as they continued to carry on the firm of Menzies, Black, & Menzies. Parties to the case admitted that the said Alexander William Black and Alan Lockhart Menzies were entitled to dissolve their copartnery at any time, and that the dissolution of

the copartnery was not caused in any way with a view to extinguish Lady Menzies' claim to an allowance.

The fourth party *maintained* that on the death of Sir W. J. Menzies, the surviving partners, the said A. W. Black and A. L. Menzies, became jointly bound to pay to her an allowance of £450 per annum, that allowance being a continuing burden on the surviving partners of the late firm of Menzies, Black, & Menzies, for five years from and after the date of the death of the said Sir W. J. Menzies, whether the surviving partners continued, or did not continue to carry on the business. In any case, the surviving partners having continued to carry on the business for some months after the death of Sir W. J. Menzies, and having admitted her claim to an allowance by paying it from the date of his death to the date of the final dissolution of the copartnery, could not extinguish her right thereto by dissolving the copartnery, and they, or their representatives, were therefore bound to pay the said allowance to her as aforesaid.

The second and third parties maintained, *inter alia*, that on a sound construction of the memorandum of 1898, the liability of the surviving partners for the allowances provided to the widow of a deceased partner was dependent on the continuation of the copartnership business, and that the liability of both surviving partners for the allowances to Lady Menzies accordingly terminated on 24th March 1906, when the copartnership was dissolved.

The *questions of law, inter alia*, were—"1. (1) Did the right of Lady Menzies to the annual allowance of £300 terminate wholly on the dissolution of the firm on 24th March 1906; or (2) Did it terminate wholly on the death of Mr Black on 29th December 1906; or (3) Does it remain in force (whether wholly or partially) for the full period up to 14th October 1910? . . . ."

Argued for the first and fourth parties—The parties to the agreement could not have intended that its provisions should be defeated by the dissolution of the firm. That being so, the agreement must be read as containing an implied condition that the widow's annuity was to be paid in any event—*Moorcock*, 1889, L.R., 14 P.D. 64, *per* Bowen, L.J. 68; *Ogdens Limited* v. *Nelson*, [1905] A.C. 109; *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488, *per* Lord Esher, p. 491.

Argued for the third party—The obligation to pay the annuity terminated when the business ceased to exist, *i.e.*, when the partnership came to an end, and there remained no personal obligation on the individual partners to pay. Impliedly, performance of this obligation was contingent on the business continuing to exist, and to be carried on by the same partners. There was no need here to imply any stipulation in order to give the contract a reasonable meaning. A widow took under it a valuable right in getting an annuity in the event, which was deemed probable, of the business being carried on by the surviving partners. Therefore *Moorcock* (*supra*) and *Hamlyn* v. *Wood* (*supra*) did not apply to this case, nor did *Ogdens, Limited* v. *Nelson* (*supra*). In these cases there was an implied contract to continue the business, whereas here the surviving partners were admittedly entitled to dissolve the firm. Reference was made to Lindley on Partnership (7th ed.), p. 742.

The second parties adopted the argument for the third party, and argued alternatively that in the case of Mr Black and his representatives the obligation to pay the annuity terminated, so far as they were concerned, at the latest with his death in December 1906.

LORD JUSTICE-CLERK—The form of this agreement leaves much to be desired, and it is unfortunate that three lawyers of such standing in their profession should have signed an agreement in a form which I am sure they would never have sanctioned if they had been asked to revise it on behalf of a client. The question is whether there is in this memorandum anything creating an obligation upon any of the partners after the partnership is dissolved. Of course if the partnership had been dissolved with the fraudulent purpose of defeating a third party's interest a serious question would arise, which, like every case of fraud, would require to be dealt with on its own merits. But no such question arises here, and indeed the possibility of such a question is directly negatived by the admissions in the case.

Sir William Menzies died in October 1905, and the partnership was dissolved in February 1906 for reasons which are stated by all the parties in the case to have had nothing to do with the allowance to Lady Menzies. A few months later Mr Black was unfortunately killed in the accident which happened near Arbroath. In his case it would be impossible to hold that any obligation subsisted against his estate after his death. But I go further than this, and hold that as the partnership was dissolved for good and onerous causes, there was no liability upon either of the individual partners to pay the annuity after the date of the dissolution.

LORD LOW—The principal question here is whether, after the dissolution of partnership between Mr Black and Mr Menzies, there was any obligation upon them, or either of them, to pay an annuity to Lady Menzies, and the answer to that question seems to me to depend entirely upon the construction of the memorandum which was signed in 1898 by the then three partners of the firm of Menzies, Black, & Menzies. That document is headed "Memorandum of Basis of Distribution of Profits of Menzies, Black, & Menzies, W.S." It provides, in the first place, for the division of the profits among the three partners in certain proportions. The memorandum then continues:—". . . . (*quotes paragraph from memorandum given supra*) . . . ."

The first question which suggests itself upon that clause arises upon the words

"there shall be paid," and the question is, "paid by whom?" The only answer which I can find to that question is in the words two lines further on, "the parties carrying on the business." I therefore think it is plain that no personal obligation was undertaken by the partners to pay an annuity to the widow of any one of them who should predecease; but that what they contemplated was the case of the death of one of the partners and the carrying on of the business by the surviving partners, in which case they provided that the widow of the predeceasing partner should be paid an annuity out of the profits of the business. That that was what the partners contemplated is made plain by the clause in regard to the agency of the Church of Scotland, because that clause would have no meaning and no possible application except in the case of the surviving partners continuing to carry on the business. So it appears to me clear that in making this agreement the parties contemplated one situation and one only, and provided for one situation and one only, namely, that after the death of one of the partners the remaining two should continue to carry on in partnership the business of Menzies, Black, & Menzies.

The first partner who died—Sir William Menzies—died in October 1905, and the remaining two partners—Mr Black and Mr Menzies—continued to carry on the business in partnership till February 1906, when they dissolved partnership by mutual consent. The dissolution seems to have taken effect on 24th March 1906; and down to that date the annuity to Lady Menzies appears to have been settled, and no question arises as to that period. It might be suggested that Mr Black and Mr Menzies ought to have carried on the business for the purpose of paying this annuity. But no such obligation was put upon them, and there is nothing in the memorandum to deprive the partners of their right either to carry on the business or to dissolve it, so long as they did nothing in fraud of Lady Menzies' right to the annuity. If it had appeared that they had dissolved the firm simply to get rid of the annuity, that would have raised a different question, but it is admitted for the purposes of this case that the annuity had nothing to do with the dissolution, and that the partnership was dissolved for ordinary business reasons.

Another point was maintained which I confess at first sight seemed to me to have considerable substance in it, namely, that the position of matters contemplated in the contract had in effect come into existence, because when Mr Black and Mr Menzies separated, they practically divided the business between them, so that between them they were ingathering the whole profits of the firm which had previously been carried on as Menzies, Black, & Menzies. I think the answer is that that was not the event contemplated by the parties, and we cannot speculate what the partners would have agreed should be done, if they had taken such an event into consideration. To do so would be to make a contract for the parties which they did not make for themselves, and that they had not any such case in contemplation is plain from the clause referring to the agency of the Church of Scotland. The case which has arisen therefore is a case not contemplated in the agreement between the parties, and the Court cannot interfere to make a new agreement for the parties which they did not make for themselves.

Accordingly, I think that the right of Lady Menzies to her annuity under the agreement terminated at the date when Mr Menzies and Mr Black separated.

LORD ARDWALL—I agree with the views expressed by both your Lordships. This agreement does not import an absolute personal obligation on all or any of the partners of the firm of Menzies, Black, & Menzies; the obligation such as it is is conditional on the business being carried on after the death of one of the partners. But I understand both your Lordships are of opinion that if this firm had been dissolved by the partners after the death of Sir William Menzies for no good reason whatever except to extinguish Lady Menzies' claim for an allowance, the Court would have given, or at all events might have given, a remedy in that case, and the only difficulty I had was whether the fact of the two surviving partners dissolving the firm and ceasing to carry on business together, for apparently the benefit of one of the partners or the convenience of both (it does not very clearly appear which) did not place them in a similar position, they having dissolved the partnership with the result, though not with the intention, of extinguishing this claim for an allowance. On considering the contract, however, I am unable to find in it anything which obliged them to carry on the business together in partnership after the death of Sir William Menzies, and that being so, I arrive at the same conclusion as your Lordships.

LORD DUNDAS—I agree in the conclusion at which your Lordships have arrived, and I desire to express my entire concurrence in the opinion delivered by Lord Low.

The Court answered the first branch of the first question of law by declaring that the right of Lady Menzies to the annual allowance of £300 terminated wholly on the dissolution of the firm of Messrs Menzies, Black, & Menzies, W.S., on 24th March 1906, and found it unnecessary to answer any of the remaining questions, and decerned.

Counsel for the First and Fourth Parties—Cullen, K.C.—J. H. Millar. Agents—W. & J. Cook, W.S.

Counsel for the Second Parties—Constable, K.C.—Macmillan. Agents—A. W. Black & Co., W.S.

Counsel for the Third Party—Johnston, K.C.—Hon. W. Watson. Agent—Alan L. Menzies, W.S.