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spondent has been completely established, namely, although the British potash whitened the cloth at first in the process of bleaching, yet that afterwards, when exposed to the air, it acquired sometimes a reddish and sometimes a bluish colour. These potashes, therefore, did not answer the description given, and did not produce the effects ascribed to them by the appellants. Besides, they were blameable for selling these potashes, after they were apprized by Dr. Black that it contained noxious qualities, which made it totally unfit for the purpose of bleaching. The respondent is therefore entitled to indemnification for the damages she had sustained from the effects of the ashes in question. Whatever may have been the contents of the second card of directions issued by the appellants, it is clear that the respondent only received the first paper of directions; but the fact that the second directions varied essentially from the first, is conclusive against them, as showing that they were not fit for the purpose as at first advertised.

After hearing counsel, it was

Ordered and adjudged that the interlocutors therein complained of be affirmed, with £100 costs.

For Appellants, *Wm. Adam, Ad. Gillies.*

For Respondent, *R. Dundas, J. W. Murray, M. Nolan.*

NOTE.—Unreported in the Court of Session.

THOMAS WHYTLAW, Merchant in Glasgow,	<i>Appellant;</i>
MARGARET COATS, only child and Executrix of William Coats, late Merchant in Glas- gow, deceased,	} <i>Respondent.</i>

House of Lords, 19th May 1800.

COPARTNERY—RETENTION.—It was provided in a copartnery, that on the dissolution of the concern, no division of the stock or profits should take place, until the debts due by the company, or the debts due by any of the partners to the company, should be first *paid or secured*. Circumstances in which it was held that certain agreements subsequently gone into by the partners, did not alter or affect this provision of the contract; and that a partner, on the dissolution of the copartnery, was entitled to withhold and refuse payment of another partner's share in the concern, until a debt due by

another company, of which he was the sole surviving partner, was paid to the dissolved concern.

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In the year 1769 James Anderson, James Whytlaw, and William Coats, the respondent's father, entered into copartnership for the purpose of carrying on trade between Glasgow and Jamaica, under the firm of Anderson, Coats, and Whytlaw. In this copartnership the parties were equal shareholders; but it was dissolved by the bankruptcy of James Anderson in 1772.

The following year a new company was established, under the firm of Coats and Whytlaw, for the same purposes, by James Whytlaw, junior, and William Coats.

1773.

In 1775, the same parties, with the addition of the appellant Thomas Whytlaw, entered into a *third* copartnership, the nature and object of which were almost the same of the two preceding. In this copartnership, which was to endure for eight years from 15th September 1774, unless previously dissolved by the death or bankruptcy of any of the partners, Mr. Coats was concerned to the extent of one half, and the appellant and his brother to the extent of one fourth each.

1775.

By one article in this contract it was provided, " That
" before any division of the stock or profits of the said co-
" partnery be made, in any of the events foresaid, of death,
" bankruptcy, or withdrawing from the concern, or upon
" the final dissolution thereof, the whole debts due by the
" company, or the debts due by any of the partners to the
" company, shall be first paid or secured; and for that end
" each of the said parties hereby assign and convey to and
" in favour of one another their respective shares and pro-
" portions of the stock and profits of the said joint trade,
" and that aye and until the foresaid debts shall be fully
" paid or secured."

During the subsistence of this copartnership of Anderson, Coats and Whytlaw, the appellant and one John Thomson, carried on trade in Jamaica, under the firm of Thomson and Whytlaw.

These two companies were distinct, but disposed to befriend each other. Accordingly, it was agreed, in 1769, that the company of Anderson, Coats, and Whytlaw should give credit to their friends in Jamaica to the extent of £6000, in goods to be furnished from Glasgow, in security of which the late James Whytlaw, senior, saddler in Glasgow, became bound, of same date, to guarantee his son

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Thomas Whytlaw's half of such sums of money, as Thomson and Whytlaw, should be deficient in paying on account of the goods so sent and commissioned from the Glasgow house, and Mr. Coats and Mr. Anderson granted a similar obligation for John Thomson.

The credit thus given, along with a correspondent guarantee, was afterwards extended by minutes entered in the books of Anderson, Coats and Whytlaw, and of their successors, the two companies of Coats and Whytlaw (of 1773 and 1775).

1778.

In making out accounts in 1778, it was found that a considerable sum was due by the company of Thomson and Whytlaw to Anderson, Coats and Whytlaw, and a still greater sum to their successors Coats and Whytlaw; and on the 9th of March of that year an agreement was entered into, reciting the various connections that subsisted between the said partnerships in this country and Jamaica; and declared that the credit granted by Anderson, Coats and Whytlaw, and continued by their successors, was allowed to "the said John Thomson and Thomas Whytlaw, who were a company under the firm of Thomson and Whytlaw;" and it then proceeded to lay down a plan for the adjustment of the claims which the said two Glasgow companies had against Thomson and Whytlaw.

The provision in the agreement applicable to the old concern of Anderson, Coats and Whytlaw, declared, That Mr. Coats, as being bound for John Thomson, and James Whytlaw, junior, the representative of his father (James Whytlaw, senior), who was bound for Thomas Whytlaw, had resolved to advance to themselves, as partners of Anderson, Coats and Whytlaw, or which is the same thing, to place to their debit, in the books of the company, the sum of £250, on account of the Glasgow house; Mr. Thomson being liable to James for the sum thus advanced. The deed then went on, "Therefore, and in prosecution of the said agreement, they, the said William Coats and James Whytlaw, as standing partners of the said former concern of Anderson, Coats and Whytlaw, and the said William Coats, James Whytlaw, and Thomas Whytlaw, as constituent partners of their said present concern of Coats and Whytlaw, do hereby exoner and declare the said William Coats, and his heirs, executors, and successors, and the said James Whytlaw, and all others the representatives of the said James Whytlaw, senior, his father, respectively,

“ of the foresaid obligation granted by the said James
 “ Whytlaw, senior, as security for the said Thomas Whyt-
 “ law; and of all the continuations and extensions of these
 “ obligations by the minutes of sederunt before mention-
 “ ed.”

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In regard to the debt or sums due by the Jamaica house to the company of Coats and Whytlaw, the deed provided that “ the said William Coats, as security for the said John Thomson, and the said James Whytlaw, as come in place of his father, and security for the said Thomas Whytlaw, do hereby bind and oblige themselves severally, and their respective heirs, executors whomsoever, to advance and pay to themselves, and the said Thomas Whytlaw, as constituent partners of the company of Coats and Whytlaw, or their heirs or assignees, all such sum and sums of money as the said John Thomson and Thomas Whytlaw, in company, shall be resting or owing to the said concern of Coats and Whytlaw, as the same is or shall be ascertained by their books for goods furnished or to be furnished by them as on their credit, to the said Thomson and Whytlaw; and that at any time the same shall be demanded by any of the partners of Coats and Whytlaw, after the expiration of three months from the date hereof, provided always that the obligation before written shall extend against the said William Coats, as security for the said John Thomson, only to the extent of £2000 sterling, and consequents, and no further; and in like manner the same shall extend against the said James Whytlaw only to the like sum of £2000, and consequents thereof, and no further.”

1782.

In the year 1782 the company of Thomson and Whytlaw was dissolved, and, in the course of the same year, John Thomson died, leaving that house very considerably indebted to both the companies at Glasgow of which Mr. Coats was a partner. The appellant accordingly, as the sole surviving partner of the Jamaica house, went out to Jamaica to wind up the affairs, but, in place of this, he seems to have confined himself to settling with the executor of Thomson in Jamaica, as to his share of the concern, by which he agreed to accept of £4000 -as his interest in the concern, on condition of being relieved of the company debts. He also had conveyed over to him certain securities and debts in security and relief, and for payment of the debts due to the Glasgow companies.

The appellant alleged, that by mistake these appeared in

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his name alone, while, in point of fact, they were assigned direct to these companies themselves.

In 1785 an agreement was entered into, which sets forth, “ considering that I (Thomas Whytlaw) am personally bound “ for payment of the debts due by Thomson and Whytlaw, “ and having agreed that the other debts due to the Glasgow “ houses, and the sum of £4000 due to myself, should draw “ and be paid proportionally from the subjects or sums for “ which I obtained the aforesaid assignation (to the securi- “ ties), and from any remittance that has or may be made to “ us in consequence thereof. Therefore I hereby bind and “ oblige myself, my heirs and executors, to communicate “ and make just count and reckoning and payment to the “ said companies, &c., as remittances come to my hands.” The respondent’s father thereby accepted of this mode of payment, but did not agree to discharge his other rights or securities for payment of these debts.

The company of Coats and Whytlaw in Glasgow, having also been brought to an end, by the death of James Whytlaw, the present action was brought by the appellant against Mr. Coats, for payment of £2874. 9s. with interest, as his half share of the effects of the house of Coats and Whytlaw, (he being entitled to one fourth in his own right, and to one fourth as in right of his deceased brother.) 2. Of £1603. 7s. 9d., as the one half of the debt due by Thomson and Whytlaw of Jamaica.

The defence stated to this action was, that as the company of Coats and Whytlaw were creditors of Thomson and Whytlaw, he, as such, was entitled to retain the sum claimed in the present action, till the just demand against the Jamaica company was satisfied and paid. This defence being coupled with the statement that the appellant owed,

1st. As an individual, to the concern of Coats and Whytlaw,	£246 13 6
2d. As the surviving partner of Thomson and Whytlaw, he owes the same concern	3206 15 6
3d. Thomson and Whytlaw owed the company of Anderson, Coats and Whytlaw, of which the respondent’s father, Mr. Coats, was the representative,	539 17 6

The Lord Ordinary (Glenlee) pronounced this interlocu-
May 15, 1798. tor : “ Finds that the said Thomas Whytlaw, the only sur-

“ living partner of the company of Thomson and Whytlaw
 “ of Jamaica, and who, by certain transactions between
 “ him and the executors of his deceased partner John
 “ Thomson, has *inter alia* obtained securities to be made
 “ over to him for the relief of the whole debts due by the
 “ said company, which securities were stated by him to be
 “ fully and undoubtedly adequate for that purpose, must,
 “ in the present question between him and William Coats,
 “ be held primarily and principally liable for, and as bound
 “ to relieve the said William Coats of the debt remaining
 “ due, by the company of Thomson and Whytlaw of Jamaica,
 “ to the companies of Anderson, Coats, and Whytlaw, of
 “ Glasgow, and Coats and Whytlaw also of Glasgow.
 “ Finds that any division of the funds of the two com-
 “ panies last mentioned, which at present can take place
 “ between the said Mr. Whytlaw and the said Mr. Coats,
 “ must proceed on the footing above mentioned; and that
 “ nothing in the transactions founded on by Mr. Whyt-
 “ law, entitles him to demand that the division above said
 “ should take place, in the same manner as if the debts re-
 “ maining due by the said company of Thomson and Whyt-
 “ law of Jamaica, to the said Glasgow companies, were due
 “ severally to the extent of one half by himself and Mr.
 “ Coats, without Mr. Coats having relief against him; or to
 “ insist that Mr. Coats in the meantime should advance his
 “ share of such debt to be made part of the present fund of
 “ division, and wait for his reimbursement from the securi-
 “ ties already in the hands of him (Mr. Whytlaw,) or from
 “ what he Mr. Coats himself may otherwise recover from
 “ the estate of John Thomson.”

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On reclaiming petition to the Court, this judgment was May 25, 1799. adhered to. And, on a second reclaiming petition, the June 5, — Court again adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—Upon the deed 23d Sept. 1785. 1st. Under this agreement, the respondent’s father, as the cashier of Coats and Whytlaw, received from the securities thereby agreed to be communicated, nearly one half of the debt due by Thomson and Whytlaw to Coats and Whytlaw, and of that due to Anderson, Coats, and Whytlaw. He, in like manner, received nearly one half of the debt due by John Thomson, as an individual, to Coats and Whytlaw, as well as of that due to himself, and of that

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due by the old Jamaica company, of Millar, Thomson, & Co., dissolved in 1769, with which the appellant had no concern. By accepting this deed, and participating under it for a period of eleven years, the respondent's father, Mr. Coats, thereby acknowledged that Coats and Whytlaw should relinquish, or at least postpone their personal claim against the appellant, for the debt due by Thomson and Whytlaw, and take their payment out of the securities obtained from Thomson and Whytlaw's estate. By their acceptance of the securities, it follows that they could not resort to their personal claim against the appellant. They could not avail themselves of the one, and also resort to the other.

Upon the deed 1788. By this deed, to which the appellant was a party, the claims of Anderson, Coats, and Whytlaw, and of Coats and Whytlaw, by reason of the obligations granted by the appellant's father and Wm. Coats, are discharged, and those claims are thereby regulated in this manner. "That each of the said William Coats and James
 " Whytlaw was to put to his debit £250 on account of the
 " concern of Thomson and Whytlaw in Jamaica, that is, to
 " give the latter concern credit for £500, holding the said
 " John Thomson liable to the said William Coats for the
 " one half thereof: and the said Thomas Whytlaw for the
 " other half of the same." The manner in which this credit is given is demonstrative also of the manner in which all the other credits were given, which creates the debt for which retention is now claimed. This is further proved by another clause in this agreement, whereby the respondent's father, and the appellant's brother, "bind and oblige themselves severally, and their respective heirs and executors,
 " to advance and pay to themselves and the said Thomas
 " Whytlaw, as constituent partners of the company of Coats
 " and Whytlaw, or their heirs or assignees, all such sum
 " or sums of money as the said John Thomson and Thomas
 " Whytlaw in company, shall be resting owing to the said
 " concern of Coats and Whytlaw, as the same is or shall be
 " ascertained by their books, for goods furnished, or to be
 " furnished by them, or on their credit, to the said Thomson
 " and Whytlaw, and that at any time the same shall be de-
 " manded by one of the partners of Coats and Whytlaw,
 " after the expiration of three months from the date of this
 " agreement." Although therefore the appellant admits that, by the deed 1785, he is personally liable for the debts of Thomson and Whytlaw, yet he contends that by the agree-

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ment of 1778 above quoted, such personal liability was discharged, at least was limited to one half of its legal extent, so that instead of being liable for the *whole* of the debt due by Thomson and Whytlaw, he is only taken bound for the one half of that debt. When, therefore, this is the result of the deed 1778, and when by the deed of agreement 1785, the company of Coats and Whytlaw became bound to take payment out of the securities, there remains no good ground in law for withholding payment of the appellant's share in the concern of Coats and Whytlaw.

Pleaded for the Respondent.—1. It is an undisputed principle of law, that every partner of a company is liable to the utmost extent of the whole debts owing by that company; and as it is acknowledged that Thomson and Whytlaw, of which the appellant is the surviving partner, are indebted to the concern of Coats and Whytlaw to a large amount, the appellant cannot be suffered to appropriate the funds of the latter to himself till that debt is paid. The effect of the plea maintained by the appellant is the reverse of the just and natural order of accounting; for his purpose is to take possession of part of the funds of Coats and Whytlaw, while his own debts, or what in law and common sense is the same thing, the debts of the company, of which he is the sole surviving partner, are still unpaid. 2. Besides, the appellant's demand is in direct repugnance to the articles of partnership, by which it was agreed that there should be no division of the stock or profits of the copartnery till the debts due by the partners to the company should be paid or secured. And by the same article Mr. Coats, under the circumstances, became vested in the appellant's share, and entitled to hold it till his debt to the partnership is fully paid and secured. 3. Further, the legal rights and obligations of the parties have not in any respect been varied by the *guarantees* originally granted, or by the *deeds* 1778 and 1785. These latter deeds applied only to the obligations of the guarantees for the house of Thomson and Whytlaw. It applied to them in a cautionary or fidejussory character merely; but did not relate, and so could not affect or destroy the obligation of the appellant, as the surviving partner of Thomson and Whytlaw, to pay the debt due by that house. But it is needless now to argue the question upon the deed 1778, because by the subsequent deeds of agreement it is that the present question comes to be decided.

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The appellant's transactions alone in Jamaica with the executors of Thomson, by which he accepted and secured for himself £4000 as the amount of his own interest in that concern. And for the relief of the debts due to the Glasgow companies only obtained assignments to certain bonds and judgments held by Thomson and Whytlaw, and with a general deed of security over John Thomson's other property, does not exempt from his personal liability, but rather strengthens and confirms it. These assignments were not made over in the name of Coats and Whytlaw. They were made out in the name of Thomson, and confessedly by the deed 1785, were as much for behoof of the whole creditors of Thomson and Whytlaw, as for any one individual creditor of that concern. He went out to Jamaica to adjust and settle the company affairs. He held a power of attorney from the company of Coats and Whytlaw to obtain a settlement of their debt, and he therefore acted *pessima fide* in taking a better security for himself than he thought requisite for the large claims which Mr. Coats had against Thomson and Whytlaw. But, separately, the interlocutors appealed from go no farther than to find that any division of the funds which can at present take place must proceed on the footing of the appellant's being liable for the debts of the Jamaica house. And if the securities alluded to be as good as he represents them, then he shall, when paid, reap the benefit thereof.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be, and the same are hereby affirmed.

For the Appellant, *W. Grant, M. Nolan.*

For the Respondent, *Ar. Campbell, Wm. Alexander, Wm. Erskine.*

NOTE.—Unreported in the Court of Session.