relative to the pollution of the Pow Burn. The local authority have acquiesced in the decree, declaring that they are not entitled to pollute the water as it reaches the pursuers' land, and if they have polluted it, and there is reason to suppose that the pollution will be continued, it would seem to follow that the next step must be an interdict. The grounds on which the contrary is maintained are, first, that the defenders by their operations did not make things worse. But this is, I think, an erroneous contention. The fact appears to me to be that things have come to be worse since the works undertaken by the defenders were constructed, and in consequence of their construction the quantity of sewage has been increased, because preparations were made in the system adopted by the defenders for the reception of the sewage of new houses, and also because the effect of the cesspools has been to intensify the pollution of the burn. The solid matter is separated from the fluid. The solid matter stagnates and putrifies in the cesspools, and the fluid overflow which escapes not only flows further, but is more noxious than the discharge from the ditch which reached the cesspools. These things are proved by Wharrie as well as by Dr Stevenson Macadam and by other witnesses.

The second ground taken by the defenders is, that the owners and occupiers of the houses from which much of the sewage that is discharged first into and then out of the sewers and cesspools constructed by the defenders have not been called as defenders in this action. Certainly they might have been called, but the omission to call them does not lead to the conclusion that as regards the defenders interdict is an incompetent or an inappropriate remedy, for if the persons referred to had been called, and being called had been interdicted, that would not have affected the liability of the defenders to interdict, though the need of this remedy in their case would have been diminished or, it may be, obviated. Besides, it is not by any means clear that the owners and occupiers of the houses referred to could have been interdicted from discharging their sewage into the drain in question. They might have said that by paying their parts of the assessment, out of which the cost of the works executed by the defenders were defrayed, they had purchased a right to run their sewage into the drain which was constructed, and that the local authority from whom or through whose administration this right was acquired were the party to see that the outflow from the drains was not a nuisance to the lower heritors. This view of the matter might or might not have been sustained, assuming that it had been presented, and if there be uncertainty on the subject the pursuers' omission to call the owners and occupants of the houses referred to ought not in the circumstances to affect their right to a remedy against the local authority.

Last of all, the defenders say that to interdict them would be idle, if not worse, as they could not prevent the thing the occurrence of which is to be interdicted. There are two views which here occur for consideration. If the defenders communicated a right to others they must do what is necessary to obviate the consequences, and by the adoption of a general drainage scheme this would be effected. If, on the other hand, they have communicated no right, the defenders by a very obvious remedy may prevent all discharge of sewage into their drain, and as a consequence prevent the pollution complained of in their case by the pursuers. On this part of the case reference may be made to the case of *The Attorney-General* v. *The Acton Local Board*, decided by the Lords-Justices in England on 22d November last (Weekly Notes, December 3, 1882, and Weekly Reporter), and to the case of *The Metropolitan Board of Works*, 17 Chan. Div. 246, there cited.

In fine, the amenability of the defenders to interdict appears to me to rest upon the same ground as their amenability to the decree of declarator which has been pronounced against them. The latter has been acquiesced in; the former should not have been opposed, but opposed though it has been, it should, as I think, be granted. The recent case of *The Attorney-General* v. *The Union of Dorking*, L.R., 20 Chan. Div. 595, is not an adverse authority, for here there is present that which was not present in that case, viz., the construction of drainage works by the local authority, resulting, as I think, in an aggravated nuisance, and consequently in their responsibility for the discharge from those works by which in part the pollution complained of by the pursuers was produced.

For these reasons, and those set forth in the opinion of the Lord Justice-Clerk, I concur with him in thinking that the judgment of the Lord Ordinary ought to be affirmed.

Lord Rutherfurd Clark—I concur in the opinions of Lord Mure and Lord Young.

Lord President—I also concur in the opinions of Lord Mure and Lord Young.

This interlocutor was pronounced:—

"Having heard counsel . . . on the reclaiming note for the defenders the Parochial Board of the parish of Cadder, as the local authority of the said parish, against Lord Adam's interlocutor of 16th July 1881 . . . Recal the said interlocutor in so far as regards the interest of the said defenders; assoilzie the said defenders from the conclusions of the action for interdict . . . and decern."

Counsel for Pursuers (Respondents)— Lord Advocate (Balfour, Q.C.)— J. Burnet — Vary Campbell. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Defenders (Reclaimers)—Solicitor-General (Asher, Q.C.)—Lang. Agents—Dove & Lockhart, S.S.C.

Friday, January 26.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MACKENZIE'S TRUSTEES *v.* SMITH.

Heritable Security—Poinding of the Ground—Partnership—Competency.

It is not necessary that a party called as proprietor of subjects in a summons of poinding

of the ground should be feudally invested in the subjects, it being sufficient if he be the true owner.

A copartnery was dissolved in order that a new contract might be entered into between the members of it and a new partner whom they desired to assume into the business. The two partners of the company thus dissolved had, as trustees for their firm, granted a bond and disposition in security over the heritable property belonging to the firm in favour of the representatives of a person who had been partner with them in the business under a previous contract of copartnery, and whose interest they required to pay out. In order to adjust the new contract a balance-sheet was made up, in which the value of the buildings over which the security was constituted was placed on the credit, and the amount secured over them on the debit side, a balance of capital in favour of each of the two partners being brought out. It was stipulated in the new contract that this balance should be held to be the contribution of each partner to the new company, and also that the value of the ground and buildings should be taken into account in striking each annual balance of the affairs of the new company. *Held*, in a poinding of the ground at the instance of the creditors in the bond and disposition in security, that the ground and buildings, though feudally vested in the two partners, were the property of the new firm, and that the creditors were therefore entitled to poind the moveables belonging to the new firm thereon.

By contract of copartnery dated 1st February 1872, Alexander Mackenzie, upholsterer in Glasgow, George Smith, ironfounder there, and Gibson Craig Smith, ironfounder there, agreed to carry on the business of ironfounders in Glasgow under the firm of George Smith & Co. The copartnery was to exist for ten years, and was to be held as having commenced at Whitsunday 1871. On 22d December 1870 a feu-contract had been entered into between W. S. Stirling Crawfurd of Milton on the first part, and the three persons just named, as partners of the firm of George Smith & Co., on the second part, whereby Mr Crawfurd, on the conditions specified in the deed, disponed to the former, in trust for behoof of the firm of George Smith & Co., an area of ground situated in North Wallace Street and Kennedy Street, Glasgow, and part of the lands of Milton, as described in the feu-contract, the conveyance being taken in favour of the survivors and survivor of them, and the heirs of the survivor, in trust for behoof of the said copartnery. The buildings used by the firm in their business as ironfounders were subsequently erected upon this ground. By the contract of copartnery it was provided that in the event of the dissolution of the company by the death or bankruptcy of a partner, his share and interest was to be paid out by four equal instalments, of which the latest was to be at eighteen months from the dissolution so caused. The firm as thus constituted existed until 1875, at which time it was dissolved by the death of Alexander Mackenzie, whose share and interest in the concern was then found to amount to £47,358. The two remaining partners, as surviving trustees for the copartnery of George Smith & Co., and as individuals, and also as sole partners of the copartnery of George Smith & Co. then carried on by them, on the 31st January 1875 granted a bond and disposition in security over the said lands, with the buildings thereon, to the trustees of the deceased Alexander Mackenzie, in security of their obligation to pay out his share and interest in the firm of George Smith & Co. Thereafter they proceeded to carry on the business of the firm from 1875 down to 1880, during which time payments were made to the trustees of Mackenzie by which the debt due to his estate by George Smith & Co. was considerably reduced.

On 13th July 1880 George Smith and Gibson Craig Smith entered into a new contract of copartnery with Angus Macleod, their manager. A balance-sheet of the affairs of George Smith & Co. was made up as at 30th June 1880. This balance-sheet showed on the credit side a sum of £30,500 as the value of the buildings. On the debit side it showed a sum of £32,519, being the amount to which the heritable debt to Mackenzie's trustees had by that time been reduced. There remained a balance of capital due to George Smith of £24,969, and to Gibson Craig Smith of £11,101. By the new deed of copartnery it was contracted that the capital stock of the company was to be £32,000, which was to be contributed in the following way—£15,000 by George Smith, £11,000 by Gibson Craig Smith, and £5500 by Angus Macleod. The 4th article of the contract was—"In ascertaining the amount of capital contributed by the first (George Smith) and second (Gibson Craig Smith) parties, the whole parties hereto shall accept as correct and final the balance-sheet of the affairs of the said firm of George Smith & Co. made as at 30th June 1880, and the respective amounts of capital shewn by the said balance-sheet to be standing at the credit of the first and second parties shall be held to be their contributions of capital and surplus capital in terms of articles second and third hereof. In taking the said balance, the ground, buildings, and fixed machinery belonging to the said firm shall be valued at the agreed-on sum of £30,560 over and above the feu-duty, the policy of insurance for £2000 upon the life of the first party belonging to said firm shall be valued at the surrender value thereof on the 30th June 1880, and said policy shall be kept up by and be the property of the copartnery, and the stock and plant shall be valued in the manner customary at previous balances." The 7th article, which provided for an annual balance of the books, stipulated that "in taking stock for each balance, the ground, buildings, fixed machinery and plant, and the said policy, shall be valued at cost price to the new company, and the stock at 5 p. c. off current market prices."

After the assumption of Angus Macleod into the firm of George Smith & Co., payments continued to be made to the trustees of the deceased Alexander Mackenzie of the sum due under the bond and disposition in security, and at 14th May 1882 the balance of principal, including the arrears of interest, amounted to £31,277. Since that date no part of the balance, or of the interest thereon, had been paid, and the present action of poinding of the ground was accordingly raised by Mackenzie's trustees against George Smith & Co. and the three partners thereof to have the move-

able goods of the defenders, as proprietors and occupiers of the ground and buildings over which the bond and disposition in security had been granted, poinded for payment of (1) the balance due by the firm of George Smith & Co. to the estate of the deceased Alexander Mackenzie, amounting to £31,277, 12s. 1d.; and (2) interest thereon at 6 p.c.

The pursuers averred that the payments made to them in reduction of the debt were made by George Smith & Co. The defenders denied that they were made by the firm, and averred that they were made by the Smiths as individuals, and charged against them in the firm's books. They denied that the firm had taken over the pursuers' debt, or adopted liability for it, and averred that it was due not by the firm but by the Smiths.

The pursuers pleaded, *inter alia*—"(1) The subjects described in the petition having been conveyed to the pursuers as aforesaid in security of the said debt, which is still due and resting-owing to the pursuers to the extent above set forth, the pursuers are entitled to warrant as craved. (3) The defenders having assumed and taken over the whole assets and estate of the firm of George Smith & Co., granters of the said bond, including the said subjects, and also its whole liabilities, including liability for the said bond, and having since by their actings confirmed their adoption of liability for the same, and been accepted by the pursuers as their true debtors, the pursuers are entitled to decree of poinding the ground as craved."

The defenders pleaded—"(1) The heritable subjects described in the petition not being the property of the present firm of George Smith & Co., who are the occupants thereof, the action is incompetent. (2) The present firm of George Smith & Co., as composed of the said George Smith, Gibson Craig Smith, and Angus Macleod, not being the debtors of the pursuers for the debt libelled, and *separatim* the said debt not having been constituted against them, they are entitled to absolvitor with expenses. (3) The moveables on the said heritable subjects being the property of the present firm of George Smith & Co., who are not debtors in the bond libelled, the defenders are entitled to absolvitor with expenses."

The following minute was lodged for the pursuers:—"The pursuers having offered to allow the defenders to dispose of the poinded effects on condition of their keeping a separate account of the proceeds in neutral names in a separate banking account, and holding the proceeds as a *surrogatum* for said effects, and the defenders having declined to accept said offer, the pursuers respectfully crave warrant to inventory the moveables upon the subjects described in the petition."

The Sheriff-Substitute refused the motion *hoc statu*. Thereafter he pronounced an interlocutor allowing a proof before answer.

"*Note.*—Unless it be clear that the defenders' contention that upon the assumption of Mr Macleod as a partner, and the constitution thereby of a new firm to which the moveables on the ground now belong, that firm is in the same position as a stranger purchasing these moveables, is on the face of it irrelevant, it appears to me that a proof is here required. After consideration I think the questions raised cannot be satisfactorily determined without a proof, which in the circumstances cannot be a voluminous one."

The defender appealed to the Court of Session for jury trial.

Before the appeal was heard in the Court of Session, the two Smiths having become bankrupt, Macleod, the assumed partner, acting under the powers contained in article 9 of the deed of copartnery relating to the third firm of George Smith & Co., dissolved the copartnery and became the sole partner of the firm.

Argued for appellant—The present action was incompetent, because the heritable subjects described in the petition were not the property of the present firm of George Smith & Co., who were merely occupants of the premises. It was essential that the goods poinded should belong to the debtor, or to the debtor's tenant. But this was not a case against tenants, so no analogy could be drawn between this case and one of landlord and tenant. In inquiring who were the true debtors you could not go beyond the parties mentioned in the document of debt — See case of *Scottish Heritable Company* v. *Allan and Campbell*, January 14, 1876, 3 R. 333. The Smiths were the only proprietors of the ground. Any moveables of theirs might be poinded, but the moveables sought to be attached by the present diligence did not belong to the Smiths at all—*Mugavin* v. *Ogilvie*, February 11, 1854, 16 D. 540; *Miller* v. *Thorburn*, January 22, 1861, 23 D. 359; *Collet* v. *Master of Balmerino*, 1679, M. 10,550; *Thomson* v. *Scoular*, January 18, 1882, 9 R. 430; Erskine, iv. 1, 13.

Argued for respondent—The parties called here were the true owners of the ground, for a party need not be feudally invested in order to be called as proprietor of the subjects in a summons of poinding of the ground—*Brown* v. *Scott*, December 21, 1859, 22 D. 273; *M'Keand* v. *Reid*, March 30, 1861, 23 D. 846; *Bell* v. *Cadell*, December 3, 1831, 10 S. 100; Erskine, iv. 1, 11; More's Notes to Stair, p. 211. It was not necessary to show that the moveables poinded belonged to the debtor — *Campbell's Trustees* v. *Paul*, January 13, 1835, 13 S. 237; *Lyons* v. *Anderson*, October 21, 1880, 8 R. 24. But the new contract of copartnery showed that the property was taken over by the members of the third firm, who had therefore a personal title to these moveables, which thus fell under the present diligence.

At advising—

Lord President—The defenders of this action of poinding the ground are George Smith & Co., ironfounders in Glasgow, and the existing partners of that firm—the two Smiths and Angus Macleod.

The allegation of the pursuers is, that these defenders are proprietors and occupiers of the ground upon which the moveables are, and their title is a bond and disposition in security over that ground.

The firm of George Smith & Co. originally consisted of three partners—the two Smiths and Alexander Mackenzie — and they apparently commenced this business, for with a view to carrying it on they obtained a feu of the ground on which the works stand in the year 1870 from Mr Stirling Crawfurd. The conveyance in that feu-contract is to Alexander Mac-

kenzie, George Smith, and Gibson Craig, and the survivors and survivor of them, and the heirs of the survivor, in trust for behoof of their said copartnery of George Smith & Co. Now, that first copartnery subsisted till the year 1875, when it was dissolved by the death of Mackenzie. The effect of that of course under the terms of this feu-contract was to leave the two Smiths as the owners of the ground in trust for the company which had thus come to be dissolved by Mackenzie's death. The two Smiths then carried on the business alone, without any third partner, from 1875 to 1880, and seem to have carried it on very much under the same provisions as in the original contract with Alexander Mackenzie, but in 1880 Mr Macleod became a partner of the firm. He was (as it is expressed in the new contract) assumed into the firm, but in truth, as the contract very plainly shows, there was an entirely new copartnery, and in that contract of copartnery we find, I think, plainly enough the terms and conditions upon which the business was to be carried on, and the manner in which the assets and debts of the second company, in which the two Smiths were partners, were to be dealt with by the third company, of which Macleod was a partner.

Now, the question—the main question—which has been discussed before us is this, whether the new firm of the two Smiths and Macleod became the proprietors of the subjects over which the bond and disposition in security extends, and as such are subject to a poinding of the ground for attaching the moveables belonging to them upon that ground?

It is necessary, however, to go back a little in order to explain what was the origin of this bond and disposition in security. When Mackenzie died he was entitled, under the original contract of the firm in which he was a partner, to be paid out—that is to say, his executry were to be paid out, and the balance found due to them amounted to somewhere about £47,000. It was for that £47,000 that this bond and disposition in security was granted by the two Smiths in May 1875, and registered in the month of June thereafter. That debt of £47,000 was, in the course of the conduct of the business by the second copartnery, reduced to somewhere about £32,000, and that was the condition of the debt and of the property at the time that the third copartnery was formed, of which the defenders are the partners.

The affairs of the second company, of which the two Smiths were partners, of course required to be wound up upon the formation of the third firm, and upon that occasion a balance-sheet was made out, as of course was absolutely necessary, in order to wind up the affairs of the second firm, which had then come to an end, but that balance-sheet having been so made up for the purpose of showing what balances there were in favour of or against the partners, came to be the basis to a great extent of the new contract of copartnery, and therefore I think it desirable to consider that balance-sheet in the first place, and see what is there shown before reading the clauses of the contract which are founded upon by the pursuers for the purpose of showing that the new firm, represented by the present defenders, became the proprietors of the heritable subjects in question.

It is unnecessary to say, in passing, that the fee of the subjects, speaking in the feudal sense, could not possibly be transferred from the two Smiths to the new partnership by the contract of copartnery; but it is not necessary that a party called as proprietor of subjects in a summons of poinding of the ground should be feudally invested in the subjects. It is quite conceded that if he is the true owner, in the proper sense of the term, that is sufficient to make him liable to the defenders in a summons of poinding of the ground. Now, the balance-sheet shows that business had been carried on to a very considerable extent by the second firm, and we gather that even the first firm carried on a very large business from the balance of profit belonging to Mackenzie, at the time it was dissolved by his death, and accordingly the first set of items in this balance-sheet is the amount of book debts, amounting to no less than £16,336. There are a great many other items on the credit side of the balance-sheet which it is not necessary to go over particularly, but they consist of the goods in process of manufacture—of stock of various kinds. Patterns and designs is one very large item—£22,300. Of course, it is quite to be expected in a foundry business of this kind. Among other items there appears on the credit side of the account the value of the building, under the head of new work, £30,500. On the debit side of the account there are not many items, and most of them are trifling until we come to the overdraft upon the bank account, which is £6000, and the debt due to Mackenzie's representatives, which is £32,519, being the reduced amount of the debt which was secured over the heritable subjects with which we have to deal. There is in addition to that a Dublin bill, which is apparently current at the time, and then there remains £24,969 as the balance of capital due to George Smith, the senior of the firm, and £11,101 as due to Gibson Craig Smith, the other partner.

Now, if this is a correct balance-sheet—and we must take it to be so because as I said it is referred to in the contract of copartnery — then these two things are very clearly made out.

In the first place, it is proved that supposing this second copartnery to be wound up and sold off, each of the brothers, the Smiths, would have a very handsome balance to be paid to him, that is to say, if the property of the company realised the value which is put upon it in this balance-sheet.

But it is also very clear, in the second place, that that company could not be wound up in that way without providing for the debt that was due to Mackenzie's representatives of £32,519. In short, the balances which are brought out in favour of the two Smiths proceed not only upon the valuation of the existing property and assets of the company, but also upon the amount of debt on the other side for which provision must be made before these balances can be brought out. Now, what does the contract of copartnery of the new firm do in this state of the matters? It provides that the capital stock of the company is to be £32,000, and it is to be contributed thus —£15,500 by George Smith, and £11,000 by Gibson Craig Smith, and £5500 by Mr Macleod. If the matter stopped there each of the partners would be bound to contribute his share of the capital in hard cash, and I suppose Mr Macleod probably did so, but in regard to the share to be contributed by the two Smiths a difference is

made. That is not to be put in in cash, but it is to be done in this way :—In ascertaining the amount of capital contributed by the first and second partners, "the whole parties hereto shall accept as correct and final the balance-sheet of the affairs of the said firm of George Smith & Company, made out at 30th June 1880"—that is, the balance-sheet that I have already referred to—"and the respective amounts of capital shown by the said balance-sheet to be standing at the credit of the first and second parties shall be held to be their contribution of capital and surplus capital in terms of articles 2 and 3 hereof." Now what does that mean? It certainly does not mean that capital in the shape of money is to be put into this new concern by the two Smiths, and just as little does it mean that Mr Macleod, the other partner, is to be satisfied with knowing that the two Smiths possess that amount of capital. That capital must be put into the business and used for the purposes of trade, and its standing in the balance-sheet will not enable it to be put into the trade and used for the purposes of trade. It must be brought into this new concern, and how can a balance such as I am now speaking of be made available for trading purposes of the new concern? only in one of two ways—either it must be uplifted from the old concern by the partners to whom it belongs, and put into the new concern, or the property and debt upon which that balance rested must be made over to the new concern. There is no other way of doing it; it must be in one way or other. It must be done either by uplifting the cash from the old concern and paying cash to the new one, or there must be a transfer of the property it is secured on, and of course with the property the debts burdening that property, so that I think the part of the fourth clause which I have just read is sufficient of itself to show that the meaning of the parties was that the new firm was to take over the assets and debts of the old firm. But the clause goes on as follows—"In taking the said balance the ground, buildings, and fixed machinery belonging to the said firm shall be valued at the agreed-on sum of £30,560 over and above the feu-duty, the policy of insurance for £2000 upon the life of the first party belonging to said firm shall be valued at the surrender value thereof on the 30th June 1880, and said policy shall be kept up by and be the property of the copartnery, and the stock and plant shall be valued in the manner customary at previous balances."

Now, the explanation I understand the defenders to give of this part of the clause is that the ground and building was to be valued at £30,560, not as the value at which it was to be transferred from the old concern to the new, but as the value which it was to represent when taken out of the assets of the old firm, and that the corresponding debt, as they call it, the balance of the debt due to Mackenzie's executors, is also to be taken out on the other side, and, in short,'that the balance-sheet is to be adopted with the exception of the £30,000 value of buildings on the one side, and of the account of £32,000 of debts secured over the buildings on the other side. But is there the smallest appearance in this fourth article or any where else of so anomalous and peculiar a transaction. It would be very odd, indeed, if the balances in favour of the two Smiths are to be taken as £24,000 and £11,000 respectively, when these two items, one on each side of the account, are to be taken out, which would certainly have had the effect of altering these balances. The balances would by no means have been the same; the variation might not have been great, but still there would have been some variation; and if that had been, of course the balance-sheet of the old firm should have been remodelled so as to give effect to that supposed stipulation. I can find no evidence whatever on the face of this contract, or of the balance-sheet to which it refers, and which is part of the contract, to countenance such a supposition.

Still further, the seventh article provides for the keeping of a regular and distinct set of books—"A regular and distinct set of books shall be kept by the copartnery, in which their whole transactions shall be duly entered, and stock shall be taken and the books balanced yearly in the month of July, and the profit or loss on the year shall be carried to the credit or debit of the respective partners' accounts, in the proportions provided by article fifth hereof. The said books shall be annually audited by an independent accountant; and in taking stock for each balance, the ground, buildings, fixed machinery, and plant, and the said policy, shall be valued at cost price to the new company, and the stock at 5 per cent. off the current market prices. These provisions may, however, be amended at any time by the mutual consent of all the partners in writing."

Now what is the meaning of this? The ground, buildings, and fixed machinery are to be valued in every year's balance-sheet. Valued as what? Is it not "valued as part of the assets of the company?" I do not understand for what purpose they could be valued except as assets of the company, or in what other character they could possibly enter a balance-sheet of the company. In short, this seventh section is totally inconsistent with the idea maintained by the defenders, and consistent only with the view that the property had been transferred to the company by the previous part of the contract, and was therefore during the currency of the contract at every annual balance to be put at a certain valuation on the credit side of the balance-sheet. There is a provision also in this contract for a premature dissolution of the contract, if one may so express it, by which one man may be entitled to take over the whole business to himself, or two men to the exclusion of the third, and that the partner or partners who so assume the whole business to themselves are to buy out the other partners or partner; and I am led to ask whether if balance-sheets were made out in terms of the 7th article of this contract, and they proposed to buy out a partner according to the last balance-sheet previous to the occurrence of the event which entitled them to do so, they were to find that balance-sheet to include as part of the assets of the company the ground, buildings, and fixed machinery according to the 7th section of the contract. Most assuredly they would, and therefore the outgoing partner would be entitled to credit for his share of the value of that ground, buildings and fixed machinery as part of the assets of the company. All this I think renders it perfectly clear that it was the intention of the parties, and that they had perfectly well carried out that intention, to take over the whole firm's busi-

ness with its assets and liabilities, and I do not see how without a different kind of winding-up of the old company altogether it was possible to do anything else.

That conducts me very clearly to the conclusion that the present firm is the owner of these heritable subjects, but it also leads me to the conclusion that they have also become debtors in the debt to Mackenzie's representatives of £32,500. Whether that is absolutely necessary to the decision of this case is perhaps not of much consequence, but the grounds upon which I arrive at the conclusion that they are substantially the owners of this heritable property compel me necessarily to come to the conclusion also that they have become liable for the debt which is secured over it, and therefore I do not think there is any relevant defence here, but, on the contrary, that the pursuers of this action are entitled to decree of poinding.

Lord Deas—Really the question seems to turn very much upon the first plea-in-law for the defenders. Now, I am of opinion, and such I understand to be the opinion of your Lordships, that these heritable subjects are the property of the present firm of George Smith & Co., and that being so virtually settled the whole matter. Then, taking the contract along with the balance-sheet, which I think we are quite entitled to do, I really do not think it would be of any use for me to attempt to go over them in detail. I accordingly think the Sheriff's judgment is well-founded, and that we are entitled to go a little further than that, and grant decree of poinding now. I remarked during the argument that the defenders would not gain anything by the appeal, and I still am of that opinion.

Lord Mure—By the terms of this feu-contract, dated in 1870, entered into by Stirling Crawfurd and the Smiths, the title to the property is taken to and in favour of Mackenzie, George Smith, and Gibson Craig Smith, and the survivors and survivor and the heirs of the survivor, in trust for behoof of their copartnery of George Smith & Company; therefore the feudal title to the property is taken to the Smiths as trustees for their company. So standing the title in 1875, a bond and disposition in security had been granted over that property by the Smiths in favour of the pursuer, who, as I understand, were creditors to the extent of whatever share the deceased partner Mr Mackenzie had in that original partnership. That is represented by the money under the bond which the pursuers are unable to recover, and in these circumstances they bring this action of poinding the ground with a view to the recovery of their debt, and they are met by the defence that the defenders are not proprietors of the ground—the ground upon which the moveable property is sought to be poinded.

Now, the defenders, while they maintain that they are not proprietors of the subject, admit that they are occupiers as a firm, but they do not allege on this record under what title they occupy the ground and have possession of it, and they do not allege that they are tenants of the proprietors under the feudal title. In these circumstances the question is raised, How do they happen to be possessed of that property? and now that the matter has been explained to us, I think it is clearly made out that under the contract of copartnery by which the new firm was constituted it is provided that the beneficial interest as proprietors of the heritable subjects was handed over by the old firm to the new firm, and that under these articles which were referred to—articles 4 and 7 of the contract of copartnery—it is made clear that the heritable subjects are part of the copartnery property. On that ground I agree with your Lordships that this poinding is competent.

Lord Shand—Since this action was raised in the Sheriff Court Mr Macleod has become the sole partner of George Smith & Company, and in a question between Mr Macleod and his other partners it may be that he is now the sole owner of the moveable property on this ground; but this case having been raised before any such arrangement was made has to be taken upon the footing in which matters stood at the date when the petition was presented, and at that time both parties are agreed that the moveable property on the ground in question was the property of the firm as consisting of the three partners—the two Messrs Smith and Mr Macleod.

The pursuer alleges further that that firm was not only owner of the moveable property—which is admitted—but that that firm and its partners were also the owners of the heritable property, and liable to diligence against the heritable property. If the effects on it belong to the proprietors of the heritable property, they were liable to the diligence of the poinding of the ground. The defenders however deny that the new firm were the owners of the heritable property. They allege that it belonged to the old firm and to its two partners the Messrs Smith alone, while they say that the moveable property belonged to the new firm and its three partners. And so it has been maintained that as the moveable effects belonged to different persons from those to whom the heritable property belonged, and as the owners of the moveable property were not even tenants of the heritable proprietors, it has been maintained that the moveable effects are not liable to this poinding of the ground at all.

In that state of matters, the question—and I may say the only question—which has been presented for the decision of the Court at the close the argument is this—"Whether the heritable property did or did not belong to the new firm?" I am clearly of opinion that it does belong to the new firm, and I may say that I have never doubted that it did so from the time that the articles of that contract of copartnery were read in the opening speech for the appellants. I think that that matter is made perhaps not so clear as it might have been by a direct statement in the contract of copartnery to the effect that the heritable property would henceforth become the property of the new firm, but short of that I think the language of the contract is as clear as possible to that effect. I think that in these articles—articles 4 and 7—to which your Lordship has specially referred, the matter is put beyond all possible doubt. The substance of the arrangement was this, that the Messrs Smith were to put in a certain amount of capital, and might put in a certain amount of surplus capital. In respect of the stipulated capital they put in they were to get certain shares

of profit; in respect of surplus capital, any partner putting surplus capital in was to receive 6 per cent. of interest out of the first readiest funds of the profits of the company. So far as surplus capital was concerned, the partner became as it were creditor of his fellow partners for that amount, and was to get interest upon it.

In striking the balance it appears to be perfectly clear that this property was put in, and put in at a valuation, because having been so put in each of the Messrs Smith's capital is fixed at a certain sum, and that sum was not only equal to what they would require to give—their stipulated capital—but it was a sum which left a surplus capital. The only way in which you can reach a surplus capital—that is to say, money or shares in that business which was to bear 6 per cent.—was, as the Solicitor-General pointed out, by putting in the property which was to be taken at that valuation, and which being taken at that value made them creditors for so much money—having right to so much money which should bear interest at that rate; and accordingly I think that that being the true nature of the arrangement, puts it beyond question that the company took the property at the valuation at which it stood in their balance. I think that is made even clearer, if it were necessary to say so, by article 7, and upon pressing the language of that article upon the Lord Advocate in his argument, the only way in which he could escape from its direct effects was by adding words which made it conditional in its operation, there being nothing in the article to suggest a condition from beginning to end. That being so, I think there is an end of the question between the parties. The heritable property is the property of this firm, though vested, no doubt, by the title in the two Messrs Smith of this firm. The moveable property is admitted to be the property of the firm, and therefore this diligence is a competent diligence in such circumstances. If it were necessary to go into the question as to whether the new firm, of which Mr Macleod is a partner, became liable for the debt due to these petitioners, I have no doubt whatever they became liable for that debt but that is not necessary in order to entitle the pursuers to use this diligence.

There is no necessity for sending this case back for proof—it being in this Court we are in a position to dispose of it. As Lord Deas has remarked, the appellants have gained no advantage, but on the contrary have apparently been subjected to a disadvantage, by appealing; but I dare say it is satisfactory to all the parties that they have the question between them shortly and quickly settled, and at the least expense, in this way, instead of having been sent back to have a proof, and after the expense of a proof finding that this is the result after all. I have no doubt as a result of the case that we ought to repel the defences and grant the prayer of the petition.

The Court repelled the defences and granted warrant to poind in terms of the prayer of the petition.

Counsel for Appellants — Lord Advocate (Balfour, Q.C.)—Trayner—Strachan. Agents—Mack & Grant, S.S.C.

Counsel for Respondents — Solicitor-General (Asher, Q.C.)—Jameson. Agents—J. & J. Ross, W.S.

Saturday, January 27.

FIRST DIVISION.

[Lord Lee, Ordinary.

MACKAY *v.* M'CANKIE.

Process — Jury Trial — Reparation — Slander — Verbal Slander.

Held that as an action of damages for slander may be raised to recover *solatium* for wounded feelings, (1) averments of alleged slanderous statements contained in a letter addressed to the pursuer himself, and (2) averments of slanderous expressions said to have been used to the pursuer, but not said to have been uttered in the presence of third parties, will entitle the pursuer to an issue.

Relevancy—Innuendo.

A creditor on a promissory-note given as security for a debt payable by instalments, wrote to the debtor, after payment of one instalment was due and unpaid, stating that another person whose name was on the note along with that of the debtor had repudiated it, and that unless the full amount was paid next day he should think it necessary to hand the case to the procurator-fiscal. *Held*, in an action of damages for slander raised by the debtor, that this letter was reasonably capable of the innuendo that it charged the pursuer with forging and utteringthe note, or with some other crime which should be brought under the notice of the criminal authorities, and issue *granted* for the trial of the question.

John Mackay, writer, Edinburgh, raised this action of damages against James M'Cankie, accountant, Edinburgh, concluding for £200 as damages and *solatium* said to have been caused by slanderous statements made by the defender verbally and in writing. It appeared from the averments of the pursuer and the defender's admissions that the pursuer had upon different occasions borrowed money from the defender, and that upon the 12th July 1882 he obtained a loan of £12. The pursuer averred that he gave as security a promissory-note subscribed by himself and by a firm of Low & Company and Mr Francis Low, sole partner thereof, the loan being repayable in three instalments of one, two, and three months from date, and £2 being deducted as discount or interest; that on 14th August following, the first instalment having become due, and application having been made by the defender for payment, he intimated that payment would be made in the course of a day or two; that on the 18th August the defender wrote to him this letter, which contained the written slander complained of:—"The promissory-note handed by you to me, signed by yourself, Low & Co., and Francis Low, was presented to-day to Mr Low for payment of the instalment now past due. He repudiates all knowledge of the said note, and I have therefore to inform you that unless the full amount of the promissory-note is now paid to me before 11 o'clock to-morrow (Saturday), I shall consider it necessary to hand the case in to the Procurator-Fiscal.—Your obedient servant, JAS. M'CANKIE."

The innuendo placed by the pursuer upon this letter was as follows:—"(Cond. 3) The statements in the said letter are of and concerning the pursuer, and falsely and calumniously, maliciously, and