"It follows that the subjects which the appellants have been required to value is not part of the sequestrated estate, but is still the property of the appellants themselves. The claim as stated by the appellants cannot be sustained, because it treats the obligation in the bond as a separate debt irrespective of the contract of sale, and on that footing the appellants claim a ranking for the price without undertaking to give delivery of the subjects sold. On the other hand, the interlocutor appears to me to be erroneous inasmuch as it assumes the contract to have been already rejected, and the sellers to have obtained a security for the unpaid price over property belonging to the purchasers. If this were so, the trustee could not enforce the contract, supposing that he desired to do so, or recover the property for the benefit of the creditors, except for payment of its present value with 20 per cent. in addition. It may or may not be for the interest of the creditors to execute the contract, but if it is for their interest they are entitled to obtain a conveyance for the balance of the contract price, and they cannot obtain it upon other terms. The rights of parties therefore cannot be explicated in the manner proposed. The appellants are undivested owners of the property, but subject to a contract of purchase and sale, which must be performed according to its terms, and not otherwise."

Counsel for the Appellants—Graham Murray. Agent—J. Smith Clark, S.S.C.

Counsel for the Respondent—G. W. Burnet. Agents—Cairns, M'Intosh, & Morton, W.S.

Friday, June 14.

FIRST DIVISION.

[Sheriff of Inverness, Elgin, and Nairn.

JENKINS (MACDOUGALL & COMPANY'S TRUSTEE) *v.* STEPHEN (STEPHEN'S TRUSTEE).

Partnership—Liability of New Firm for Debts of Old.

A firm and the two individual partners thereof, in security of a loan, granted a bond and disposition over heritable property belonging to the firm. Three years later they assumed another partner under a new contract of copartnery, under which the old firm was to be wound up, and the new firm did not take over the heritable property or any liabilities of the old, and only took over the stock at a valuation. Five years thereafter the estates of the firm and of the three individual partners were sequestrated, and the disponee under the bond and disposition in security lodged a claim for the sum therein contained, alleging that the new firm was a mere continuation of the old.

Held, on a proof, that the title and the right to the heritable property over which the bond had been granted remained with the old firm; that the stipulations of the contract had been observed in the actings of the parties; that the debt under the bond had not been adopted by the new firm; and that the claim accordingly fell to be *rejected.*

In 1879 the firm of Macdougall & Company, royal tartan warehouse, Inverness and London, consisted of two partners, Mr Robert Grant and Mr Alexander Maclennan.

In 1879 Macdougall & Company borrowed from Mrs Anne Mary Stephen, the trustee of the late Rev. Thomas Stephen of Kinloss, Morayshire, the sum of £3500, and in security thereof granted a bond and disposition of certain heritable property in Lombard Street, Inverness, the title to which stood in the names of Grant and Maclennan as sole partners of the firm. The bond was granted by Macdougall & Company and by "Robert Grant and Alexander Maclennan, the individual partners of the firm, both as partners thereof and as individuals."

In 1882 Donald Macbain, 42 Sackville Street, London, was assumed as a partner of the firm under a new contract of copartnery, whereby it was, *inter alia*, agreed that Grant and Maclennan should grant a lease to the new firm of the warehouse and premises in Inverness occupied by the old firm for ten years from June 1882 at the rent of £450. Grant and Maclennan assigned to the new firm the lease of the shop and premises in Sackville Street, London, occupied by the old firm. The new firm undertook to pay the future rents and assume the whole burden of the lease. The capital of the company was fixed at £10,000, of which Grant and Maclennan contributed £3750, and Macbain £2500. The new firm agreed to take over the whole stock and warehouse fittings and furniture in Inverness and London of the old firm, and pay for goodwill and the London lease. The value of the warehouse fittings and furniture was agreed to be £2000, of the London lease £2000, and of the goodwill of the business £2500. The sum of £6500 was therefore to be added to the value of the stock in ascertaining the sum payable by the new firm to the members of the old firm. Macbain was bound to pay to the new firm a sum of £1500 in addition to his share of the capital, on which sum he was to receive from the new firm interest at the rate of five per cent. The new firm should have no concern with the debts due to or by the old firm. No commission or charge should be made by the new firm for the collection and payment of the said debts, which would be done in the firm's premises.

In March 1887 Macdougall & Company presented a petition in the Sheriff Court of Inverness, under section 16 of the Bankruptcy Act 1856, for the sequestration of their estates and for the appointment of a judicial factor thereon.

On 25th March 1887 the Sheriff-Substitute (BLAIR) appointed Robert Palmer Jenkins, solicitor, Inverness, judicial factor on the sequestrated estate, and he was subsequently elected trustee.

On 16th November 1887 a claim was lodged by Mrs Anne Mary Stephen for the sum of £3500 in the bond and disposition of Macdougall & Company and Grant and Maclennan. The trustee rejected the claim, finding—"(3) That the heritable property in question over which the claimant holds security was never transferred by the said Mr Grant and Mr Maclennan and the old firm of

Macdougall & Company to the firm of Macdougall & Company as in existence at the date of the sequestration, and the three partners thereof, and that further no bond of corroboration was ever granted to the claimant by the firm of Macdougall & Company as existing at the date of the sequestration, or the partners thereof. (4) That in the books of Macdougall & Company, from the date of the formation of the new firm till the date of sequestration, the said Robert Grant and Alexander Maclennan, and the old firm of Macdougall & Company, as in existence prior to 1882, were treated as proprietors of the whole block of property, including the portion over which the claimant holds security, and that the firm of Macdougall & Company, as sequestrated, was charged annually by the old firm £450 as the rent of the premises occupied by them. (5) That in the claim lodged it is set forth that the property belongs to Mr Grant and Mr Maclennan. (6) That the claimant holds no personal obligation from and has therefore no claim against the firm of Macdougall & Company as sequestrated on 25th March 1887, but has a claim against the private estates of the said Robert Grant and Alexander Maclennan."

Mrs Stephen appealed against the deliverance, and a record by minutes was made up in the Sheriff Court.

Mrs Stephen averred—"The money lent by the appellant was paid to and received by the firm of Macdougall & Company, and was mixed up with their general funds, and used for the general purpose of their business. . . . The assumption of Mr Macbain as a partner was not notified to the public in any way, and in point of fact was practically kept a secret so far as Inverness was concerned. He appeared to be an assistant in the London business, but in truth the bondholders did not even know of his existence. It is said that he contributed towards the capital of the company, but the money which he is said to have contributed was advanced upon bills signed Macdougall & Company, and which have been ranked in the sequestration upon appeals to this Court, because they were in reality and truth loans to Macdougall & Company. The firm, it now appears, was hopelessly insolvent before 1882, and it is believed and averred that there never was any real alteration in the firm, and that the so-called assumption of Mr Macbain as a partner was simply a device for procuring money from persons outside the business. . . . Notwithstanding the alleged change of firm the debts owing by the firm at the date of the alleged change were paid by the alleged new firm out of the proceeds of their business, and the debts due to the old firm were collected and discharged by the alleged new firm. There was an absolute and entire continuity in the firm's affairs."

She pleaded—"(1) The bond and disposition in security founded on having been granted by Macdougall & Company as a firm the appeal ought to be sustained. (2) The firm having been carried on after the alleged assumption of Macbain as a partner without any winding-up, or any notification to the appellant or the public of a change, and with the same stock and generally the same assets and liabilities, the firm, even if altered, assumed or continued to be liable for the obligations of the old firm."

In the proof allowed by the Sheriff-Substitute the following additional facts were established:—

That the money lent by the appellant was expended by Macdougall & Company in buildings erected by them on their property in Inverness, and used by them for the purposes of their business. The total heritable debt on the property of the firm was £14,500, and the heritable property was sold on 1st May 1888 for £11,600, leaving a deficit of £2900, whereof the appellant's share was £700, to which amount she restricted her claim. The property over which the appellant held her security was never transferred by the old firm to the new, nor was any bond of corroboration granted by the new firm or its partners in the appellant's favour. It was intimated in the firm's trade advertisements that Macbain had been assumed as a partner, and a notice to this effect was advertised in the *Inverness Courier* and *Northern Chronicle*, and a copy of the advertisement was sent out to the customers. It further appeared that from the commencement of the new copartnery two sets of books were kept referring respectively to the old and new firms. A separate bank account was also kept for the old firm until October 1883, at which date that account ceased to be operated on, up till which time the debts of the old firm were paid out of both accounts. A number of the debts due to the old firm proved to be bad, and the new firm made advances beyond their receipts to the old firm.

The result of the proof will be found summarised in the opinion of Lord Shand, who delivered the judgment of the Court.

In the affidavit and claim lodged in the sequestration of the new firm of Macdougall & Company by Stephen's trustees the alleged debtors in the foresaid sum of £3500 were Macdougall & Company, and Robert Grant and Alexander Maclennan, the individual partners thereof, the partners of the old firm. It was arranged, however, in order that the merits of the claim might be decided, that no objection of a technical kind should be taken to the affidavit.

The Sheriff-Substitute found that the new company "having taken over at 1st June 1882 the whole business and assets of the going business of the firm of Macdougall & Company, did thereby also assume the liabilities of the said firm, and among others the debt due to the appellant Mrs Anne Mary Stephen, as a creditor of the said firm. . . . Therefore sustains the appeal against the trustee's deliverance."

The trustee appealed to the Court of Session, and argued—The respondent was not entitled to claim on the sequestrated estate of the new firm for the balance due under her bond. There was no transference of the property of the old firm to the new, and the new firm in such circumstances could not be held responsible for the old firm's debts—*Heddle* v. *Marwick*, June 1, 1888, 15 R. 698. It was specially stipulated in the deed of copartnery that the new firm was not to be responsible for the old firm's debts, and this was a debt of the old firm; with the exception of the name there was no connection between the old firm and the new, and the new firm derived no benefit whatever from this money. This was not an ordinary trade debt of the new company, nor was it ever taken over by them from the old company—Lindley on Partnership, p. 208, and cases there cited. It

was a heritable debt of the old company neither adopted by the new firm nor by any of its partners—*Nelmes* v. *Montgomery*, June 15, 1883, 10 R. 974.

Argued for respondent—Though the terms of the deed of copartnery declared that the debts of the old firm were not to be taken over, the actings of parties showed that this arrangement had not been carried out. The old firm and the new were for all purposes one continuing copartnery; a London manager obtained a share of the business, but no notification of this was given to the public, nor was anything done to intimate the change which it was now said took place at that time. The new firm took over the old firm's debts just as it did its stock-in-trade and furnishings, and it was impossible now to repudiate this liability—*M'Keand* v. *Laird*, 30th March 1860, 23 D. 846. The actings of the new firm rendered them liable to the respondent. They continued to pay the interest on this bond from 1882, and by so doing adopted it. Had the new firm repudiated the bond and not so dealt with it the respondent would have been on her guard, and would have pressed for payment at the time when the old firm came to an end. At that time the old firm had assets, and the respondent by sequestrating it would have obtained payment of her bond, but as by the actings of the new firm these assets had disappeared the new firm ought to be held liable to the respondent —*Ridgeway* v. *Brock*, December 6, 1831, 10 Sh. 105; *Miller* v. *Thorburn*, January 22, 1861, 23 D. 359; *Heddle* v. *M'Laren*, June 1, 1888, 25 S.L.R. 553.

At advising—

Lord Shand—At the term of Whitsunday 1879 Mrs Mary Ann Stephen, the respondent in this appeal, who claims to be ranked in the sequestration, lent a sum of £3500 to Messrs Macdougall & Company and to Robert Grant and Alexander Maclennan, the individual partners of that firm, obtaining in return a bond and disposition in security in her favour, by which the firm and its two partners bound themselves for payment of the debt, and Grant and Maclennan being themselves infeft in certain heritable property belonging to them for behoof of their firm, of which they were the sole partners, conveyed the property in security in ordinary terms for payment of the debt. The sum advanced was to a large extent laid out in the erection of buildings on the ground embraced in the security, and according to the estimated value of the property at the time the heritable security was ample for the payment of the respondent's debt.

Down to 1st June 1882 Grant and Maclennan continued to carry on their business of Macdougall & Company, which had existed for a number of years both in Inverness and London, and they paid half-yearly the interest on the respondent's security, as well as the interest on other similar securities which they had granted in return for loans on adjoining properties held by them in the same way, and some of which were occupied by them for the purposes of their business down to that time. At that date they agreed to take into partnership Mr Macbain, who had been for about twenty years an assistant in the London business. A regular contract of copartnership was entered into, and from that date the business of Macdougall & Company, carried on under the same name or firm, belonged to the three partners, Grant, Maclennan, and Macbain. This new company continued to carry on business for five years, but in March of 1887 the estates of the company and of the three individual partners were sequestrated.

The respondent claims to be ranked as a creditor of this later company for the debt constituted by the bond and disposition in security of 1879 in her favour, and the Sheriff-Substitute, reversing the deliverance of the trustee in the sequestration, has sustained the claim to be ranked. After consideration of a full argument, I have come to the conclusion without difficulty that the judgment complained of should be reversed, and that the respondent's claim to be ranked should be refused.

The bond and disposition in security founded on was not granted by the company which came into existence in 1882, or by the partners of that firm, and of course it is incumbent on the respondent to aver and prove either an express undertaking by the later firm and its partners of liability for the debt, or facts and circumstances in the course of dealing of the parties which show that this firm and its partners undertook such liability. The respondent's affidavit and claim sets forth no ground of liability, for it merely proceeds on the bond and disposition in security, which of course could contain no obligation by a company which only came into existence three years after that deed was granted. The claim as stated was one which the trustee in the sequestration would have been quite warranted in rejecting *simpliciter*, because it disclosed no ground of liability of the bankrupt company. But an appeal having been taken against the trustee's deliverance, a record by minutes was made up in the Sheriff Court, from which it appears that the claimant maintained that the bankrupt company "assumed or continued to be liable for the obligations of the old firm," and were therefore liable in payment of her debt. The facts mainly relied on, as averred by the respondent, were that the money lent by her was received by the firm in 1879 and mixed up with their general funds, and used for the general purpose of their business; that the assumption of Mr Macbain as a partner was not published to the world; that the money which he was said to have put into the business was really got by loans obtained by the firm from third parties; that "there never was any real alteration in the firm, and that there was a mere continuity of the old firm's business," the new firm taking over the assets of the old firm on the one hand, and assuming liability for debts and obligations on the other. And the authorities on which the claim was maintained were cases of which the most recent and important were the cases of *Heddle*, 15 R. 698, and *M'Keand*, 23 D. 845, in both of which the judgments proceeded on the view that there had been no real change in the copartnery beyond the assumption of a partner who obtained a small share of a going business without putting in new capital; and where the new firm went on to trade with the stock and assets of the old firm, taking these over without any arrangement for the winding-up of the old company's affairs, or for an accounting with the old firm or

its partners, but undertaking liability for all the old company's debts and obligations.

It appears to me to be clear, on a consideration of the proof adduced by both parties, that the respondent has entirely failed to prove her material averments, and that the facts proved are in striking contrast with the facts held to be established in the class of cases to which I have alluded, and which in these cases were the ground of judgment.

1. In the first place the nature of the debt and obligation are of considerable importance. There was no doubt an obligation for repayment of the loan granted by the old firm and by Grant and Maclennan. But the transaction was substantially the taking of a heritable security on a permanent loan, and the lender looked mainly to the value of the property conveyed as the means of payment. As to the proceeds of the loan, Mr Grant, the claimant's witness, says—"The bulk of it was paid to the contractors for the buildings as they proceeded." The debt cannot be regarded as in any sense a proper trade debt like debts due to merchants supplying stock, or to bankers on a firm's banking transactions, and so is not one of a class which it is at all probable that a new firm or company would undertake liability for.

2. It is quite clear that not only the title to the heritable property, which is the subject of the security, but the right to the property itself all along remained with Grant and Maclennan and the old company of which they were the sole partners. Although immediately after the sequestration there seems to have been some confusion in the minds of certain of the bankrupts, and even of the trustee, or rather, perhaps, I should say in the minds of their advisers, as to the rights of proprietorship of the heritable properties which truly belonged to the old firm and its partners, and part of which was occupied by the new firm, there can be no doubt that the right to these properties never was transferred to the new firm or its partners. It would be remarkable in these circumstances if the new firm were found to have accepted or adopted liability for a number of bonds over subjects in which they had no right of property or other interest. In any view, the case is not one in which, as in the other leading cases which have occurred, the new firm took over the whole property of the old firm and its partners for these heritable properties, valued at upwards of £20,000, were not so taken over.

3. But perhaps of more importance still are the provisions of the contract of copartnery of 1882, which distinctly show that the old company was to be wound up, and was to subsist for the purpose of being wound up, and that the new company was to be started on an entirely new basis, and was not to undertake any liability for the debts of the old company. Mr Macbain, the new partner, undertook to put £2500 into the business, as against £3750, the estimated capital of each of the other partners, and was to have a corresponding share of the profits. It is true that in order to enable him to raise the money his partners assisted him with their credit, but he became the principal obligant for the repayment of the loans, for which they were cautioners only. Then, the new company took a lease of their premises from the old firm for the endurance of the partnership, being ten years at a rent of £450, an arrangement which in the most distinct manner showed how complete was the separation between the interests of the two firms, and that this separation was to be continuing and permanent. Finally and conclusively, the stock of the old firm was only taken over at a valuation made at the time, for the amount of which the new firm became liable to pay to the partners of the old firm interest on the amount to be charged against the new firm until it could conveniently repay the capital, and the contract expressly bore that "the new firm shall have no concern with the debts due to or by the old firm," a stipulation which is of course in its very terms and substance directly opposed to the whole idea on which the present action is based. It is unnecessary to notice the other provisions of the contract of copartnery further than to say that there are subsidiary clauses provided for the keeping of books to be regularly balanced, that the new firm should make no charge of commission for the collection and payment of the old firm's debts, and that as to the London business that the new firm should take over the lease of the London premises, and in that instance undertake the responsibility of the future rents. Taking the contract as a whole, I have only to observe that I could scarcely conceive of a deed being more carefully framed for the purposes of distinguishing between the business and interests of an old company and a new one formed to take up the old business, or in which it was made more clear that the new company did not take over the whole assets of the old, and only took over the stock at a price agreed on, and that the new company did not adopt or undertake liability for the debts of the old company.

4. All this, however, might have been stipulated in writing only. The parties might in carrying on their business have disregarded their arrangement so carefully recorded, and have so acted in some way dealing with all the creditors so as to accept universal liability for the old company's debts. But I find nothing in the proof to countenance such a suggestion. The contract was carried out, so far as I can see, in all its stipulations. From the formation of the new company in 1882 down to the sequestration there were two sets of books kept, one for the old firm and another for the new firm. Of course it was in the books of the latter that the cash transactions, receipts, and payments were all in the first instance made, but in every case where money was received or paid on account of debts due to or by the old firm the amount was transferred to the books of the old firm, to the credit or debit of that firm as the case might be. In short, the old firm was treated as in liquidation of its trade debts and obligations, as a company being wound up, and which when the debts due to and by the firm were paid would remain possessed only of their heritable property subject to the bond over it, the new firm acting as their agents in the winding-up. Mr Grant, the claimant's leading witness, says on this point—"Messrs Stewart, Rule, & Burns were also my own agents, and they prepared the contract between Mr Macbain, Mr Maclennan, and myself. That contract provides that a new firm should be constituted, and it also expressly provides that the firm should have no concern with the debts due to or by the

old firm. It was also provided by the contract that the new firm should collect the debts of the old firm without commission. Those provisions in the contract, so far as keeping our books are concerned, were carried out by us. We kept correct books from the date of the contract until the sequestration, and whatever the books show is, so far as I know, and to the best of my knowledge and belief, correct, and they exhibit a true state of the affairs of both firms from time to time. Although the new firm was started in 1882 the old firm still existed so far as the collecting of the debts and so far also as the paying of the debts was concerned. (Q) Is it the case that the heritable subjects in High Street and Lombard Street continue to be the property of the old firm?—(A) I believe so." The rents of the heritable properties collected by the new firm or due by them to the old firm were credited to the old firm, and the interests paid and outgoings for the properties were put to the old firm's debit, and these books were balanced annually by Mr Meston, an accountant from Aberdeen, who went periodically to Inverness for the purpose. It is needless to pursue this subject further than to say that the evidence of Mr Cameron, accountant, including his report on the books, shows that the provisions of the contract were carried out in every particular. It is true that in the end a very large amount of the debts due to the old firm proved bad and were not paid, and so the new firm made large advances beyond their receipts for the old firm, but this result, as far as I can see, was not anticipated, and in any case does not detract from the fact that the contract was acted on.

All this being so, I have really great difficulty in seeing on what grounds the claimant can say that the debt due to her was adopted by the new company, *i.e.*, that the new company in the face of the agreement to the contrary between the firms undertook liability for that debt. The claimant and the new company had no dealings or communication relating to any such liability. It is said the firm undertook responsibility for other debts, for the balance due to the bank, and for the ordinary trade debts, which were indeed paid off by the new firm. As to the debt to the bank, the mode in which that was dealt with is a very good illustration of what alone will generally give a creditor a legal right or obligation against a new firm. The bank's agent having learned that a new partner had been assumed and a new company started, became alive to the necessity of having an obligation granted by the new firm for the bank's debt, and having pressed for this—intimating no doubt that a refusal would result in a stoppage of the bank account—he obtained the obligation he desired. The claimant has nothing of the kind in any transactions with her. Then, as to the ordinary trade creditors, most of them had furnished goods to the old firm, and the new firm continued to deal with them. In the course of such dealing the old and new accounts as in a question with the creditors were treated as one continuous series of accounts (though the payments made in so far as made for the old firm were placed to their debit), and in this way, as also in the case of bills current when the new firm began and afterwards renewed by them, the new firm by their mode of dealing in each case undertook liability for the old debt. In the result, the new firm not only expressly undertook liability for these debts, but generally speaking paid them off, incurring new debts which have been ranked on the sequestration, and in the end none of the old firm's trade debts were outstanding unpaid. But in the claimant's case no such dealings occurred.

The only remaining point to which the claimant's counsel attached importance in the argument was that the new firm after 1882 regularly paid the interest on the claimant's bond, generally by the firm's cheques or bills, and the claimant had no notice of the change of partnership, and no knowledge of any change. But as regards the interest so paid—the amount was in fact at once carried to the debit of the old firm by the new firm, who merely acted as their agents in making the payments. It is said that nevertheless the claimant is entitled to hold that the new firm became their obligants in the capital sum. I know of no legal principle which can support that view. The failure to intimate to a creditor of the old firm that a new company had been formed cannot infer an undertaking of liability by the new company for the old firm's debts, and the creditor who knew nothing of the change of partnership cannot on any principle of law which admits of being stated say that she acquired as a new debtor a partnership of which she knew nothing, because that new partnership paid the interest falling due on her bond under the arrangement between the two firms already fully stated. With such a contract of copartnery acted on, as I have stated, nothing short of a direct undertaking by deed or by dealing unequivocal in its character with the individual creditor, could infer an undertaking of liability for a debt of the old firm. There was no such undertaking or dealing here, and therefore no such liability undertaken; and so I am clearly of opinion that the judgment of the Sheriff-Substitute must be recalled, and her claim to rank must be rejected.

The LORD PRESIDENT, LORD MURE, and LORD ADAM concurred.

The Court recalled the interlocutor appealed against, and reaffirmed the deliverance of the trustee.

Counsel for the Appellant—Gloag—Low. Agents—J. & A. F. Adam, W.S.

Counsel for the Respondent—Murray—Dickson. Agents—John C. Brodie & Sons, W.S.