Lord Kinnear—I agree. I do not think it is necessary to lay down any general rule as to the conditions on which trustees who have made an unsuccessful defence of a will may be allowed their expenses out of the estate of the deceased testator whose act has put them into a position to consider whether they are to defend the will or not. The present is a very exceptional case, and for the reasons stated by your Lordship, I think that in this particular case the trustees should have their expenses. But upon the more general question I should desire to reserve my opinion.

Lord Adam was absent.

The Court found the pursuers entitled to their expenses out of the trust-estate, and also found the defenders entitled to their expenses out of the trust-estate.

Counsel for the Pursuers—Watt—A. S. D. Thomson. Agent—John Veitch, Solicitor.

Counsel for the Defenders—W. Campbell, Q.C.—Constable. Agent—Thomas Liddle, S.S.C.

Tuesday, November 1.

SECOND DIVISION.

[Sheriff of Lanarkshire.

DUNLOP *v.* MAXTON.

Reparation — Road — Defective Condition of Pavement — Liability of Proprietor where Defect Due to Operations of Railway Company under Statutory Powers.

The Glasgow Central Railway Act 1888 authorised the Caledonian Railway Company to construct an underground railway through Glasgow. Section 39 empowered the Railway Company to break or open any street or footpath in the streets under which the line was being constructed. Section 41 (*c*) provided that they should, to the satisfaction of the Corporation of Glasgow, restore the roads and pavements interfered with by them to the original level, and cause them to be maintained till properly consolidated.

A person was injured by stumbling and falling on account of the defective condition of a pavement which had been interfered with by the Railway Company in virtue of their powers under the Act, and which had been allowed to remain in a dangerous condition for two years. The Corporation had taken no steps to enforce the obligation of the Railway Company, but the proprietor of the adjoining property, and of the pavement and street *ad medium filum*, had frequently applied to the company to restore the pavement, and had obtained from them an undertaking to do so prior to the accident.

In an action brought by the person injured against the proprietor, *held* that the latter was not bound to restore the pavement in so far as injured by the operations of the Railway Company, and was not liable for the injuries sustained by the pursuer.

Baillie v. *Shearer's Judicial Factor*, Feb. 12, 1894, 21 R. 498, *distinguished.*

The Glasgow Central Railway Act 1888 (51 and 52 Vict. c. 194) authorised the Caledonian Railway Company to construct an underground railway through Glasgow. Section 39 of the Act provided that the Railway Company might, for the purposes of constructing the railway, temporarily cross, alter, break open, stop up, or divert any streets, roads, lanes, and footpaths shown on the deposited plans and described in the deposited book of reference, and "may also during such construction from time to time break or open any such streets, roads, lanes, or footpaths when necessary for the protection or repair of any sewers, drains, or pipes under the same." Section 40 provided that the company should restore the portions of the carriageway and footway of any street, road, lane, or footpath which might be from time to time stopped up by them for traffic for the purposes of the works within three months from the day upon which such portions should be stopped up, under a penalty not exceeding ten pounds for every day after the expiration of the said period. Section 41, sub-sec. (*c*), provided that "In every case in which the company interfere with any street, road, lane, pavement, footpath, or tramway, the company shall, to the satisfaction of the Corporation" of Glasgow, "(1) Restore the street, road, lane, pavement, footpath, or tramway so interfered with by the said works or by subsidence occasioned thereby to the original level; (2) cause the street, road, lane, pavement, or footpath to be maintained and properly consolidated; (3) make good the paving and metalling of the street, road, lane, pavement, or footpath to be repaved or remetalled over their entire width."

In the autumn of 1891 the Railway Company, in virtue of the powers conferred on them by the Act, began to make alterations in the gas and water pipes in the roadway and under the pavement opposite No. 721 Great Western Road, occupied by Messrs Chrystal, Bell, & Company, and owned by John Maxton. The Great Western Road is a public street vested by the Glasgow Police Act in the Corporation of Glasgow in their capacity of Board of Police. As the result of the Railway Company's operations the pavement got into an unsafe condition, the level of the flags being altered, and other damage was done to the property adjoining. In letters to the Railway Company, commencing in 1892 and continuing after the operations of the Railway Company had been completed, and in personal interviews with the Railway Company officials, Mr Maxton, who owned the line of tenements of shops and dwelling-houses forming Nos. 711 to 729 Great Western Road, repeatedly called upon the Railway Company to remedy the damage caused by their operations, and, *inter alia*, to restore the pavement in question. The

Railway Company did not admit the alleged injury to Mr Maxton's property, and declined to come to any agreement as to the amount of compensation to be paid therefor. In consequence thereof a question of disputed compensation arose between Mr Maxton and the Railway Company, which was referred to Mr Copland, civil engineer, Glasgow, as sole arbiter, conform to minute of reference dated 28th and 31st January 1895. In this minute of reference Mr Maxton proposed to insert a clause giving the arbiter power to deal with the damage done to the pavement in front of his property, but the Railway Company refused to do so, and informed Mr Maxton that he was not liable to restore the pavement if it had been injured by their operations, because in terms of their Act the question as to the restoration of the pavements was one between them and the Corporation of Glasgow. On 8th July 1895, after proof had been led before the arbiter, an agreement was entered into between Mr Maxton and the Railway Company for the settlement of the reference. Under that agreement the Railway Company agreed to restore the whole pavements, kerbs, and channelway opposite 711 to 729 Great Western Road to the satisfaction of the Master of Works of Glasgow, and failing agreement with him to the satisfaction of Mr Copland.

On 28th November 1893 Mr John Whyte, the Glasgow Master of Works, served a notice on Mr Maxton requiring him to repair and level up the pavement in front of his property in Great Western Road. Correspondence on the subject passed between the parties, and on 16th January 1895 the Master of Works wrote Mr Maxton's agent that, after looking carefully into the clauses of the Act, he was of opinion that the Railway Company took the place of the proprietors, and were responsible to the Police Commissioners for any damage done by them so far as regards footpaths and roadways, and he therefore withdrew the notice. Mr Whyte thereafter called upon the Railway Company to put the pavement right, but the company refused to admit liability, and never restored it to the satisfaction of the Corporation.

On 2nd August 1895 Mrs Helen M'Intyre or Dunlop, while walking on the pavement opposite No. 721 Great Western Road, stumbled and fell in consequence of the irregularities in the surface of the pavement, and sprained her right ankle severely.

Thereafter she raised an action in the Sheriff Court at Glasgow against Mr Maxton for £250 damages, alleging that the accident was due to his fault in not fulfilling the obligations incumbent on him as proprietor of maintaining the pavement in a safe condition.

The defender pleaded, *inter alia*—"(1) The pavement in front of the tenement 721 Great Western Road, Glasgow, occupied by Chrystal, Bell, & Company, and others, having been interfered with by the Caledonian Railway Company in the construction of the railway from the Dalmarnock branch of the Caledonian Railway to Maryhill, under the provisions of the Glasgow Central Railway Act 1888, and that company having undertaken by the said Act an obligation to restore the said pavement so interfered with by their works, or by subsidences caused thereby, to its original level, and wherever necessary to cause the said pavement to be repaved, and any defects in the pavement in front of said tenement at the date of the accident to the pursuer having been occasioned by the operations of the said company, the defender has no responsibility for the said defects, and the said Caledonian Railway Company are solely responsible therefor."

A proof was heard which disclosed the facts above narrated.

On 6th December 1897 the Sheriff-Substitute (STRACHAN) pronounced the following interlocutor—"Finds that prior to Whitsunday 1896 the defender was proprietor of the tenements Nos. 711 to 729 Great Western Road, Glasgow, and the pavement in front thereof: Finds that the said pavement, and in particular the portion thereof in front of the premises occupied by Messrs Chrystal, Bell, & Company, was in the month of August 1895 in a dangerous and unsafe condition, the stones or flags thereof being of different levels, the discrepancies in some cases being from ½ to 1½ inches: Finds that on 2nd August 1895 the pursuer, while walking on the said pavement, tripped on an uneven part thereof, with the result that she stumbled and fell, spraining her right ankle severely: Finds that the said injury was sustained by the pursuer by and through the fault and negligence of the defender in failing to remove the present inequalities in the said pavement, and keep and maintain the same in a safe and proper condition: Therefore finds the defender liable in the loss and damage sustained by the pursuer in consequence of the said injury: Assesses the amount at £80, and decerns against the defender in favour of the pursuer for that amount."

Note.—"It is clearly proved, and does not seem indeed to be disputed, that the pavement in question was in a dangerous and defective condition in the month of August 1895, and that this was the cause of the injury sustained by the pursuer.

"The only question is, whether any fault or negligence has been established on the part of the defender in not having the defects repaired and the pavement put in a proper and safe condition. There can be no doubt that the alteration of the level of the stones or flags forming the pavement was caused by the operations of the Caledonian Railway Company in connection with the construction of the railway from their Dalmarnock Road Branch to Maryhill in the years 1892, 1893, and 1894, under the provisions of the Glasgow Central Railway Act 1888. By the 39th section of that Act the Railway Company were empowered to break open, stop, or divert any road, street, or any path shown on the deposited plans, to appropriate these during the construc-

tion of their works, and, if necessary, to break open the same for the protection or repair of sewers, drains, or pipes, and by the 40th section they were taken bound to restore any street or footpath interfered with to the satisfaction of the Corporation of Glasgow.

"It must be conceded that from the time the pavement in question was injuriously affected by the operations of the company the defender did everything he could, short of adopting legal proceedings, to get the company to repair the defects and put the pavement in a safe condition, and also to induce the Corporation to compel them to do so. After a great deal of labour he succeeded in getting an obligation from the Railway Company to restore the pavement to its original condition, and induced the company and the Corporation to enter into a reference on the subject, which resulted in the necessary work being ultimately done. If the defender's duty was simply to endeavour to get the Railway Company and the Corporation to fulfil the obligations imposed on them by the Act of Parliament there can be no doubt that that duty was discharged by him.

"But was this the only duty or obligation incumbent on the defender in connection with the matter? It was very strongly maintained by him that it was. The position taken up by him was and is that the injuries to the pavement having been caused not by him but in connection with the operations of the Railway Company, and they being under a statutory obligation to repair and restore the same, they are alone responsible for the defects which led to or caused the pursuer's injuries. The defender appears throughout to have been under a misapprehension in regard to this matter. He has entirely overlooked the duty and obligation imposed on himself by the common law.

"There can be no doubt, I think, that as the proprietor of the pavement, it was the defender's duty to keep and maintain it in such a condition that it could be used in safety by the public. It is true that he did not himself cause the defects which rendered it dangerous, but that did not relieve him of the obligation to repair it and put it in a safe condition. Nor does it in any way affect his responsibility in this respect that the Railway Company were under a statutory obligation to restore the pavement to the condition in which it was prior to the operations. The case of *Baillie* v. *Shearer's Factor*, 23 R. 498,, is a clear authority on the point. In a question with the public, the defender, as the proprietor, was the person on whom the obligation primarily lay, and not with the Railway Company, as he seems to suppose. He was the only one known to the public as being under any duty or responsibility in the matter. It must be kept in view, also, that the work requiring to be done in connection with the repair of the pavement was one which did not involve much time or expense. None of the stones or flags appear to have been broken or injured. All that required to be done was to restore the levels in such a way as to remove the inequalities, and that is a work which could have been done by the defender as well as by the Railway Company. Why, then, did he not do so, in place of wasting so much time in futile negotiations with the Railway Company? His duty was clearly to have called on the Railway Company to restore the pavement, and if they failed to do so within a reasonable time, to have the necessary work done at their expense. In place, however, of following this course, he allowed the pavement to remain for at least two years in what he knew was a dangerous condition, and I cannot but hold that this was such fault or negligence on his part as renders him liable for the injuries sustained.

"There were two reasons given by the defender for not having himself repaired the pavement. In the first place, he says that the interference with the pavements in connection with the Railway Company's operations were so frequent that if he once restored it there was always a risk of his having to do so several times over, and in the second place, in the event of his interfering to put it right, and any subsidence or irregularity afterwards appearing, the Railway Company might attribute this to his operations. These reasons do not appear to me to be of such a character as would in any circumstances justify continued inaction on the part of the defender, but a conclusive answer to them is, that the operations of the Railway Company were all concluded, and the ground had finally settled down for at least a year before the accident was sustained by the pursuer."

The defender appealed to the Sheriff (BERRY), who on 28th February 1898 adhered.

The defender appealed, and argued—It was admitted that the defect in the pavement had been caused by the Railway Company's operations. There was no fault alleged against the defender for allowing the pavement to be lifted, and there could be no fault in his not restoring it, because under the Act of Parliament the Railway Company were taken bound to restore it to the satisfaction of the Corporation. This they had never done. By statute he had been divested of the power of controlling the condition of the pavement, and the duty of controlling it had been imposed on the Railway Company until they restored it to the satisfaction of the Corporation. He was the legal owner of the pavement, but his rights and duties were in abeyance at the date of the accident. There had been a statutory interference with his proprietary rights and a corresponding statutory limitation of his proprietary liabilities—*M'Fee* v. *Police Commissioners of Broughty Ferry*, May 16, 1890, 17 R. 764. The liability for the condition of the pavement continued on the Railway Company until they restored the pavement and maintained it till it had properly consolidated. The authorities showed that it is because the duty of maintenance is on the proprietor that he is liable for its condition. In *Baillie* v. *Shearer's Judicial Factor*, February 1, 1894, 21 R. 498, it was held that the street had not been taken

over by the Board of Police, and there was thus a duty on the part of the proprietor. The Corporation by withdrawing their notice had acknowledged that the Railway Company and not the defender were responsible for the condition of the pavement, and this was the proper view.

Argued for pursuer—The defender as proprietor of the pavement was liable in a question with a member of the public for its getting into an unsafe condition. The case of *Baillie's Trustees*, *supra*, showed that this was the law even if the street is under the control of a public body. That case was in all material respects similar to this. The liability of the defender was not affected in any way by the statute. It did not relieve him of his duties and responsibilities under the common law.

At advising—

LORD JUSTICE-CLERK — The following facts are distinctly established :—

(1) That the Caledonian Railway took possession of the whole of the street in question by authority of an Act of Parliament obtained by them for the purpose of executing railway works under the surface.

(2) That they were taken bound to restore the street and footpaths which they had received in good order, in so far as their operations might interfere with them.

(3) That they did so take possession, and that one result of their operations was that the footpath was injured so as not to be safe for foot-passengers. The defender had nothing to do with these operations, and could not have interfered with them or controlled them in any way.

(4) That the defender, out of whose control the pavement opposite his property had been taken by the company, adopted every effort to get them to fulfil their obligation to restore the footpath, using every means, as the Sheriff-Substitute says, short of an action at law, to obtain restoration.

(5) That the Corporation of Glasgow, after calling upon the defender to restore the footpath, withdrew their notice, intimating that they were satisfied that the proprietor's obligation had been taken over under statute by the Railway Company.

(6) That the Railway Company informed the defender that he was not liable to restore the footpath if it had been injured by their operations.

(7) That the Railway Company admitted that the question was between them and the Corporation.

(8) That the defender pressed his desire for restoration upon the Company persistently, and ultimately induced the Railway Company to sign an undertaking to restore all the foot-pavements opposite his property.

(9) That he obtained a judgment from the arbiter under the agreement with the Company ordaining them to restore.

These being the circumstances under which this case came into Court, the question is whether the defender is liable in damages for injuries caused to the pursuer because the pavement was not in order at the time when the accident happened to the pursuer. Both Sheriffs have held that he is so liable. Now, he can only be so liable if he can be held to have been negligent. It must be through his fault that the pursuer received her injury. It is not enough that he is the proprietor of the property and primarily responsible for the pavement. It must be possible to affirm as fact that he committed fault and thereby caused the injury. I am unable to hold that it is made out that he was in fault. His property was temporarily and compulsorily taken out of his hands. Others were by statutory authority placed in possession of it, with power to interfere with it, and the duty was imposed on them to restore it, they having done what was necessary to make it safe and sound as it was before. They were not entitled to hand it over without doing so, and he was not bound to accept it until they did so. I am satisfied that he was not in neglect of his duty, that he actually and diligently did all he could to get those who had under statutory rights taken over his property and been placed under obligation to restore his property after they had interfered with it, and that if there was fault, it was the fault of those who delayed to fulfil their statutory obligation.

Taking this view of the case, I do not think that the Sheriffs are right in holding the defender liable, or in holding that the authority they quote is conclusive against the defender. The case is one really of issue, although taken on proof before the Sheriff, and the true issue is one of fault. The pursuer has failed to prove fault, and in my opinion the defender is entitled to absolvitor.

LORD YOUNG—Dealing with the case on the footing that the injury to the pavement was done by the Railway Company in the execution of their statutory powers, I am of opinion that if anybody is responsible it must be the Railway Company. But to find that what they did in the exercise of their statutory powers was done by the defender is to my mind absolutely extravagant, and to find that he is responsible for what, plainly, on the statement of the case, the Railway Company were responsible for, is equally so. The view of the Sheriff seems to be that it was the duty of each of the proprietors in this street (there may be two or three hundred of them) to immediately set about restoring the street, both the foot-pavement and the driving road up to the centre of the street, or to bring an action against the Railway Company to compel them to set about restoring it. That is a ludicrous idea, impracticable upon the face of it. It is an extravagant proposition that an action was open to each proprietor to compel the Railway Company to restore the street, which under an Act of Parliament they were bound to restore, not to the satisfaction of each individual proprietor regarding the bit opposite to his own door, but to the satisfaction of the city authorities, who are charged with the interest and safety not of the proprietors but of the

whole citizens of Glasgow, and not the whole citizens of Glasgow only, but the whole public who were entitled to resort to the street. The statute which places on the Railway Company the duty of restoring the street, of putting it into good order, provides that they must do it to the satisfaction of the Corporation, who are those in charge of the whole streets which they have interfered with and disordered. The statute deals with the matter in the mode which in my opinion is according to law and reason, that the duty of seeing that the street is put in proper order is in those who have charge of the street, namely, the Corporation. That is sufficient for the protection of the public, and a finding to the effect that the blame upon the defender here was that he did not bring an action against the Railway Company is what I can give no countenance to.

The Sheriff-Substitute in his opinion says —"It must be conceded that from the time the pavement in question was injuriously affected by the operations of the company, the defender did everything he could short of adopting legal proceedings to get the company to repair the defects and put the pavement in a safe condition, and also to induce the Corporation to compel them to do so." Now, does anyone doubt that if the defender or any other single proprietor had raised an action against the Company, it would have been thrown out on the ground that the Railway Company's duty was to do the thing, not to the satisfaction of any individual proprietor, but to the satisfaction of the public authority charged with the public interest. But after the Sheriff-Substitute had stated and given his judgment on the footing that the defender had done everything he possibly could do short of bringing an action, he says—"Whether he could by means of legal proceedings have enforced the restoration of the pavement by the Company need not be considered. It is enough that he refrained from doing so and remained content with correspondence." Well, then, you have these two view—first, that the defender did everything in his power short of bringing an action, and second, whether he could have brought an action with any success need not be considered; it was sufficient that he did not bring it, and that is the fault upon which the Sheriff-Substitute proceeds to find the defender responsible. I need say no more to show the ground on which I have formed a very clear opinion that the judgment of the Sheriff-Substitute and that of the Sheriff confirming it are bad, and ought to be reversed.

Lord Trayner—The Sheriff and Sheriff-Substitute regard this case as ruled by the decision of the Court in the case of *Baillie*, to which they refer. I cannot agree with them. In *Baillie's* case the defender was found liable in damages, because (1) the pavement belonging to him (or with regard to which he was held as undertaking the proprietor's responsibilities) had fallen into disrepair so as to be dangerous through his fault; and (2) because he had failed in his duty to have the pavement repaired. Now, it cannot be said that the pavement in question here fell into disrepair or became dangerous through any fault on the part of the defender. The pavement was in a good and safe condition until it was interfered with by the Railway Company in the exercise of powers conferred on them by Act of Parliament. Now, it cannot be said, in my opinion, that the pavement, when thrown into a state of disrepair so as to be dangerous for passengers, remained so through the fault or neglect of the defender. The Railway Company were under obligation (imposed by Act of Parliament) to restore the pavement interfered with by them to the satisfaction of the Corporation of Glasgow. This obligation, however, they had not discharged when the pursuer was injured, as set forth in her condescendence. I cannot hold the defender liable for the consequences of the failure of the Railway Company. It is said that the defender should have enforced fulfilment by the Railway Company of their obligation. I doubt very much whether he had any title to do so, but even if he had, I see no reason for holding that he was bound to enter into a litigation with the Railway Company in reference to that matter, seeing that the restoration of the pavement was to be to the satisfaction of the Corporation, who could certainly have enforced the obligation to restore.

I think the defender was practically dispossessed of the pavement when the Railway Company began their operations upon it, and that he did not come into possession again until the pavement was put back into a condition as good and safe as that in which it was before being interfered with. I am unable to affirm that the pursuer's injuries were caused through the fault of the defender, and therefore agree with your Lordship that the appeal should be sustained.

Lord Moncreiff — I have felt some doubt on one aspect of this case. A long interval (about two years) elapsed between the ostensible completion of the Railway Company's operations and the accident to the pursuer; and I think there is room for serious argument whether the defender's obligation to maintain the pavement — which was, I assume, suspended during the Railway Company's operations — did not revive (at least in a question with the public) on the operations being completed and the pavement professedly restored, whatever right of relief the defender might have had against the Railway Company. In other words, even assuming that the Railway Company were originally and remained responsible, was the defender entitled to leave the pavement in a state dangerous to the public for two years? Did not his long-continued failure to repair it of itself constitute fault?

I appreciate the difficulty which the Sheriffs have felt on this point; but I am not prepared to differ from your Lordships. By the Railway Company's statute of 1888,

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

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

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

The Court pronounced the following interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute of Lanark dated 15th July 1896 and 6th December 1897, and that of the Sheriff dated 28th February 1898: Find in fact (1) that the defender was on the 2nd August 1895 proprietor of the tenement in Great Western Road, Glasgow, occupied by Chrystal, Bell, & Co. and others, as also of the ground in front thereof to the centre of the street; (2) that on said date the pursuer while walking on the pavement opposite said tenement stumbled and fell and was injured owing to irregularities in said pavement; (3) that said pavement had been taken possession of by the Caledonian Railway under the provisions of the Glasgow Central Railway Act 1888, by which they were empowered to execute works for the making of a railway under the street; (4) that said Caledonian Railway Company were bound in terms of said Act to restore said pavement so interfered with by them to the satisfaction of the Corporation of Glasgow; (5) that the said Corporation failed to enforce the obligation against the said Railway Company to restore said pavement; (6) that the defender used all diligence to obtain a fulfilment of the obligations on the said Railway Company and obtained an undertaking from them to fulfil it, and an order from an arbiter under agreement ordering them to do so; and (7) that the defender was not bound to restore said pavement in so far as injured by the operations of said Railway Company, and was not in fault in not restoring the same: Find in law that the defender is not liable for the defect in said pavement which caused injury to the pursuer: Therefore assoilzie him from the conclusions of the action, and decern."

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

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

Friday, November 4.

FIRST DIVISION.

MURRAY *v.* M'COSH.

Partnership—Loan or Partnership.

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