already shown to belong to the defender, greatly transcend (I mean, of course, in kind and not merely in amount) the interests of a creditor, whether as regards his remuneration or his protection. It is, of course, true that the mere fact that the loan is on terms very favourable to the lender does not necessarily turn him into a partner. But when it appears, as in this case, that even if the loan were wiped out in the first year of trading, the so-called lender would continue to have the rights to one-half of the profits, and also (in several of the possible events leading to a winding-up) to one-half of the assets, then the just inference seems to be that the money has been advanced by one by whom and for whom the business is carried on. In truth, it can hardly be maintained that young Mr Brown, or he and his father together, could pretend that the business was theirs and not Mr M'Cosh's also. He had a right to insist that the business be carried on even if his advance were repaid. And the reason really was that he joined in starting the business, and carried it on in order that the three years' experiment might be made of Jardine's trading with Brown. The advance of £1250 was incidental to this design and for its furtherance. The main object was that this business should be under the control of the defender when the time came for his determining the future of Jardine. As I have said already, these were disinterested objects; but they were impossible of attainment, or at least they have not been attained, without making the defender liable for the engagements of the concern.

It is sometimes asked in those cases, did the defender intend to become a partner? and the suggestion is that the answer must be in the negative, This, however, is a very fallacious statement of the controversy. The proposed question really means, as the Master of the Rolls (Jessel) pointed out in *Pooley* v. *Driver*, nothing more than: Did he intend to assume the liabilities of a partner? and to this question, no doubt, a triumphant negative may always be returned. But I am anxious to add in the present case that I see no reason to ascribe to this deed the qualities of evasion or contrivance which have rendered some of these partnership cases so invidious. The personal relations to be dealt with in this case were delicate and complicated; and the provisions of the deed are therefore unusual. In supposing that those provisions did not involve the defender in the liabilities of a partner, the defender and his advisers have, I think, erred in law; but that is the only thing I have to say against them.

I am for recalling the Lord Ordinary's interlocutor and pronouncing decree in terms of the first conclusions of the summons, omitting the words "as such partner or otherwise" from the penultimate line in that conclusion. The cause can then be continued.

Lord Adam and Lord Kinnear concurred.

Lord M'Laren was absent.

The Court recalled the interlocutor of the Lord Ordinary, pronounced decree in the terms of the first conclusions of the summons, with the omission indicated by the Lord President, and continued the cause.

Counsel for Pursuers—W. Campbell, Q.C. —J. Wilson. Agents — Carmichael & Miller, W.S.

Counsel for Defenders — Sol.-Gen. Dickson, Q.C.—Clyde. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday November 1.

SECOND DIVISION.

[Sheriff-Substitute of Lothians and Peebles.

MACLEAN *v.* LOGANLEA COAL COMPANY, LIMITED.

Reparation—Master and Servant—Contributory Negligence—Mines and Minerals—Contravention of Special Rules of Pit—Coal Mines Regulation Act 1887 (50 *and* 51 *Vict. c.* 58), *sec.* 49, *General Rules*, 1, 21, *and* 22; 51 (1) (2), *and* (3).

The Coal Mines Regulation Act 1887 sec. 49, General Rule 22, enacts that "where the timbering of the working-places is done by the workmen employed therein, suitable timber shall be provided at the working-place, gate-end, pass-bye, siding, or other similar place in the mine convenient to the workmen."

Rule 75 of the special rules established for a coal-pit in terms of the Coal Mines Regulation Act 1887 provided—"If from accident or any other cause miners are at any time unable to find a sufficient supply of timber at the place appointed, they are expressly forbidden to remain in their working-places."

A miner employed in this pit brought an action of damages for personal injury against his employers, averring that on a certain day he had been ordered by a person entrusted with superintendence to leave his ordinary work of working out the coal in the pit, and to assist in enlarging an air-course, this work being specially urgent, as it was necessary to ensure the proper ventilation, and so the safety of the mine; that, in contravention of Rule 22, suitable timber was not supplied to him, the timber provided being either too long or too short for the place at which he was ordered to work; that he informed the person who had ordered him to do the work in question of this fact, but that he had been told by him that the supply was daily expected, and that he was to go on with the material provided; and that while he was endeavouring to put one of these pieces of un-

suitable timber into position he was injured by the fall of a stone from the roof, his injuries being due, as he averred, to the unsuitable nature of the timber supplied. The defenders, founding upon Special Rule 75, maintained that these averments were irrelevant. The Court *allowed* a proof before answer.

Process — Appeal for Jury Trial — Jury Trial or Proof—Remit to Sheriff Court.

In an action of damages for personal injuries, raised by a miner against his employer, certain questions were raised as to the interpretation and application of the Coal Mines Regulation Act 1887, section 49, General Rule 22, and the special rules established for the pit under that Act. The Court, considering the case unsuitable for jury trial, allowed a proof before answer, and *remitted* the case to the Sheriff-Substitute to proceed.

This was an action brought in the Sheriff Court, Linlithgow, by John Maclean, miner, Airdrie, against the Loganlea Coal Company, Limited, in which the pursuer sought damages, alternatively at common law or under the Employers Liability Act 1880, for injuries sustained by him while working in the employment of the defenders at their coal-pit.

The pursuer averred — "(Cond. 2) The pursuer's ordinary duties were to assist in working out the coal in the said pit. The said pit is worked on the stoop-and-room system. (Cond. 3) On Thursday, 11th November 1897, the pursuer was ordered by the oversman (Alexander Hill) of the said pit to leave his ordinary work and to assist in enlarging an air-course in the pit. This work was specially urgent, as there was not a sufficient current of air for the ventilation of the mine passing through the then existing course. (Cond. 4) At the place where the pursuer was ordered to work, the seam of coal had been very much disturbed by a 'dyke' or 'fault.' The effect of this was to render the roof in proximity thereto to be specially dangerous and liable to come down. This is well known to every mine manager and oversman, and was well known to the manager and oversman of the pit, and they ought to have specially warned the pursuer and those working with him of the special danger, and he ought to have taken special precautions to see that the proper props for timbering were supplied to the miners, who were ignorant of the special danger. (Cond. 6) The seam of coal at which the pursuer was working was 4½ feet thick. In order efficiently to prop the roof of such a seam the props used should be 4½ feet long. For some days previous to the date in question the supply of these props to the said pit had been exhausted. This was known to the manager and roadsman, whose duty it was to have kept a supply of these props for the pit. The pursuer had informed the oversman of this fact, but he had told the pursuer that the supply was daily expected, and he was instructed by the oversman to go on with the material he had provided for him." He averred that the props supplied were either too long or too short; that when attempting to get one of these props, which was too long, into position, a mass of stone fell from the roof and injured him; that his injuries were caused by the unsuitability of the props available, and that if he had been supplied with props of the requisite length the accident would not have happened." He also averred—"(Cond. 10) The defenders, their manager, oversman, and roadsman, were in fault in not giving the pursuer special warning of the danger at the place in question, and in not making special provision for the safe propping of the roof at that point, and the defenders, their manager, and oversman, were in fault in not supplying suitable timber to make the roof of the workings secure. The injury to the pursuer was caused by said failure, which was a direct breach of the statutory obligation imposed on the defenders by the rule above quoted [Rule 22 set forth *infra*]. The manager and oversman are persons entrusted with supervision in the sense of section 1, sub-sec. 2, of the Employers Liability Act 1880. Special Rule 75 does not apply to the kind of work the pursuer was employed at. It was specially urgent work, as increased ventilation was required for the safety of the mine. The manager, oversman, and roadsman knew the pursuer was working with unsuitable props, and had their sanction in doing so. He was ignorant of the special danger he incurred in doing so, but the manager, roadsman, and oversman knew that there was special danger in so working, and they should have prevented the pursuer from so doing."

The Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58) enacts as follows:—Section 49—"The following General Rules shall be observed, so far as is reasonably practicable, in every mine:—Rule 1. An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless noxious gases to such an extent that the working-places of the shafts, levels, stables, and workings of the mine, and the travelling roads to and from those working-places, shall be in a fit state for working and passing therein. . . . Rule 21. The roof and sides of every travelling road and working-place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel or work in any such travelling road or working-place which is not so made secure. Rule 22. Where the timbering of the working-places is done by the workmen employed therein, suitable timber shall be provided at the working-place, gate-end, pass-bye, siding, or other similar place in the mine convenient to the workmen, and the distance between the sprags or holing-props where they are required shall not exceed six feet, or such less distance as may be ordered by the owner, agent, or manager." Section 51 enacts, sub-section 1, that there shall be established in every mine such special rules as may appear best calculated to

prevent dangerous accidents, and to provide for the safety, convenience, and proper discipline of the persons employed in the mine; sub-section 2, that such special rules when established shall be observed in every such mine in the same manner as if enacted in the Act; and sub-section 3, that any person bound to obey them who acts in contravention of any of them, shall be guilty of an offence against the Act."

Special rules were established for the mine in question here.

Special Rule No. 73 provided as follows:—"Whether the operations shall be conducted by the 'long wall' or 'stoop-and-room' system, suitable timber being provided at the working-place, gate-end, pass-bye, siding, or other similar place in the mine convenient for the miners, the same shall be set up by the miners in the working-places where the roof and sides require to be secured by them. The timber and any necessary sprags or gibs shall be set up at such times, in such number, and at such points within the working limits as shall from time to time be necessary." . . . Special Rule 75 provided as follows:—"If from accident or any other cause miners are at any time unable to find a sufficient supply of timber at the place appointed, they are expressly forbidden to remain in their working-places."

The pursuer founded on General Rule 22.

The defender referred to General Rule 21 and Special Rules 73 and 75, and maintained that on his own showing the pursuer had contravened one or more of these enactments, and more particularly Special Rule No. 75.

The defenders pleaded—(1) The pursuer's statements are irrelevant. (3) The pursuer's alleged injuries having been caused, or at all events materially contributed to, by his own fault, the defenders should be assoilzied. (4) In any view, *volenti non fit injuria*.

By interlocutor dated 27th May 1898 the Sheriff-Substitute (MACLEOD), before answer, allowed a proof.

Note.—"The averments of the pursuer are somewhat confusing, but I gather he traces his injuries to an accident due (article IV.) to a specially dangerous condition of the roof of the seam of coal at which he was at the time of the accident ordered to work (article III.) by the defenders' oversman, which specially dangerous condition was known (article IV.) to the defender's manager or oversman, and (article X.) was not known to the pursuer. This specially dangerous condition of the roof became the cause of the accident because (articles V., VI., and X.) the defenders, their manager and oversman, in contravention of Rule 22 of the Coal Mines Regulation Act, failed to supply suitable timber to make the roof secure, and when the pursuer informed the oversman that the supply of proper timber was exhausted, he was ordered by the oversman to go on with the unsuitable timber provided, and the pursuer was in consequence injured by an accident which would not have happened had timber of a suitable length been provided. A number of cases were cited for the defenders, such as *M'Neil* v. *Wallace & Co.*, 7th July 1853, 15 D. 818, and *M'Gie* v. *Eglinton Iron Co.*, 9th June 1883, 10 R. 955; but in all these cases the danger that caused the accident was one equally known to the injured man and to those in authority over him. The distinction of this case is an averment that the accident was due to the action of unsuitable timber upon a danger known to his superiors and unknown to the pursuer, at a place and in circumstances to which it is averred Rule 75 has no application. On these averments (though they might be much more clearly and distinctly stated) I am not inclined to refuse inquiry."

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

The defenders objected to the relevancy of the pursuer's averments, and argued—The fault alleged was that sufficient timber was not provided by the defenders. Under Special Rule 75, which was admittedly in force at this mine, it was, in terms of the Coal Mines Regulation Act 1887, section 51 (3), a penal offence for the pursuer to go on working if he could not find sufficient timber. If he went on working without having sufficient timber, that amounted to contributory negligence on his part, and he was not entitled to recover damages from his employers—*Heaney* v. *Glasgow Iron and Steel Company*, May 27, 1898, 25 R. 903. That case ruled the present. The case of *Campbell* v. *Calderbank Steel and Coal Company, Limited*, March 11, 1898, 25 R. 753, was distinguished, in respect that there the person who really broke the rule was the oversman and not the workman, whereas here it was the pursuer who was guilty of the contravention of the statutory enactment. The pursuer said that Special Rule No. 75 did not apply, but he could not maintain that and at the same time found on General Rule 22, which was the basis of his action. If General Rule 22 applied, then so also did Special Rule No. 75. "Working-place" must be read in its plain natural meaning as the place where the miner happened to be working. At any rate it was for the Court to say what the words meant, and any dubiety as to their signification was not a ground for allowing a proof. "Sufficient timber" was the same as "suitable timber," and it was a mere evasion of the rule to maintain that a miner was entitled to go on working if unsuitable timber was provided. Counsel for the defenders also referred to *Smith* v. *Merryton Coal Company, Limited*, July 19, 1898 (not reported).

Argued for the pursuers and appellants—(1) Special Rule No. 75 did not apply. That rule forbade the miner to remain in his working-place if he was unable to find a sufficient supply of timber at the place appointed. The pursuer was not in his "working-place" when he met with the injuries founded on. The work in which he was engaged was work of special urgency, necessary for the ventilation and so for the safety of the pit, which he was specially ordered by the oversman to perform, and it was ordered to be per-

formed, not at the pursuer's working-place, but at an "air-course." Special Rule No. 75 only applied where the workman was working at his ordinary working-place and at his ordinary work—that was, at the "working face" engaged in getting coal. "Working-place" was used in mining and also in the Coal Mines Regulation Act 1887 with this special restricted meaning, and not in the general sense of any place where the miner happened to be working. See section 49, General Rules 1 and 21. There was at least a dubiety as to the meaning of these words as used by miners which made it undesirable to decide the case without inquiry. Further, Special Rule No. 75 did not apply, because it only forbade working when no timber at all was supplied. Here timber was supplied, although it was unsuitable for this particular purpose in respect of length. General Rule 22 enacted that "suitable timber" should be provided, whereas the expression used in Special Rule 75 was "a sufficient supply of timber." (2) Whether Special Rule No. 75 applied or not it did not afford a good defence to this action, in respect that, if the pursuer acted in contravention of its provisions, he did so in obedience to the orders of the oversman, and the employer was not entitled, for the purpose of barring an action against him at the instance of his workman, to found upon the workman's contravention of a rule which the employer's superintendent had ordered the workman to disregard—*Campbell* v. *Calderbank Steel and Coal Company, Limited, cit.*, see especially *per* Lord Trayner at page 759; *Marley* v. *Osborn* (1894), 10 T.L.R. 388. [Lord Trayner—In that case the rule contravened was merely a rule promulgated by the employer, which he could alter or dispense with. It is different when the rule contravened is statutory, and can only be altered by the Legislature.] The special rules can be altered without the intervention of the Legislature. The case of *Heaney* v. *Glasgow Iron and Steel Company, cit.*, was distinguished from the present in respect (*a*) that there it was not disputed that Special Rule No. 75 applied, and (*b*) that no special order to go on working was averred.

At advising—

Lord Trayner—The decision in the case of *Heaney* to which we were referred by the defenders does not appear to me necessarily to govern the present case. The pursuer's averments in that case are not identical with the averments made by the pursuer here; and it may turn out that the difference between them is sufficient to lead to a different result as to their relevancy. On the relevancy of the averments before us I think it is not desirable at the present stage to pronounce any judgment. It seems to me that the better course is to adhere to the course adopted by the Sheriff-Substitute, and before answer to allow a proof. The questions of law which have been raised on the construction and application of the general and special rules appear to me to make the case unsuited for jury trial. The case should be remitted to the Sheriff to proceed, with power to him to dispose of the expenses of this appeal as part of the expenses in the cause.

Lord Young and Lord Moncreiff concurred.

The Lord Justice-Clerk was absent.

The Court pronounced the following interlocutor:—

"Dismiss the appeal: Before answer, allow the parties a proof of their averments and remit the cause back to the Sheriff-Substitute to proceed therein: Find the expenses of this appeal to be expenses in the cause."

Counsel for the Pursuer—W. Thomson. Agent—Richard Johnstone, S.S.C.

Counsel for the Defenders—Salvesen—C. K. Mackenzie. Agent—W. G. L. Winchester, W.S.

Wednesday, November 2.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

KESSON *v.* ABERDEEN WRIGHTS AND COOPERS' INCORPORATION.

Corporation—Ultra Vires—Management of Funds—Effect (1) *of Usage and* (2) *of Contract in Limiting Power of Dealing with Corporate Funds.*

A trade incorporation, whose exclusive trading privileges were abolished in 1846, in order to induce persons to become members, issued a scale of allowances and annuities to which members would be entitled out of the corporate funds in return for payment of certain fees on entry.

A member who had entered on this footing brought an action against the incorporation to have certain annual expenditure out of the corporate funds on social entertainments declared illegal and interdicted.

Held (1) that there was nothing in the contract between the pursuer and the incorporation to limit the previously existing right of the latter to administer its funds in accordance with the practice of the incorporation at the time the contract was entered into; and (2) that the pursuer had failed to prove that the expenditure in question was inconsistent with the constitution or the established usage of the incorporation.

Expenses—Trade Incorporation.

A trade incorporation *held* entitled to charge upon the corporate funds the expenses of unsuccessfully defending an action against it by one of its members.

This was an action at the instance of Mr John Kesson, carver and gilder, Aberdeen, against the Aberdeen Wrights and Coopers'