LORD LOW—I agree. I have no doubt that these articles are reasonably capable of bearing the innuendo put upon them by the pursuer, and that is quite enough to enable us to adhere to the interlocutor of the Lord Ordinary

The Court adhered.

Counsel for the Pursuer (Respondent)—G. Watt, K.C.—Constable. Agents—Constable & Sym, W.S.

Counsel for the Defenders (Reclaimers)—Hunter, K.C.—Horne. Agents—M. J. Brown, Son, & Company, S.S.C.

Tuesday, March 13.

FIRST DIVISION.

[Lord Johnston, Ordinary.

WALKER *v.* SMITH AND OTHERS.

Partnership — Mandate — Law-Agency — Implied Mandate—Power of Partner to Bind Firm—Partner of Law-Agent's Firm Borrowing Money on Security of Property Vested in Third Party—Obligation by Firm to Produce Deed Vesting Property in Partner Granted by the Partner.

It is not within the implied mandate of the partner of a firm of law-agents to grant a letter of obligation in the name of the firm undertaking to produce a deed vesting in him property on the security of which he is borrowing money, but which stands vested in a third party.

Agent and Client—Law-Agent Acting on Behalf of Lender—Scope of Authority—Borrower a Partner of a Firm of Law-Agents—Acceptance by Lender's Agent of Obligation Granted by Borrower in his Firm's Name to Produce Deed Vesting Security-Subjects in Borrower.

Held (*per* Lord Johnston, Ordinary) that a law-agent acting on behalf of a client, who was lending money to a member of a firm of law-agents, was not justified in accepting from the borrower, without ascertaining that he had his partners' authority, an obligation granted by him but in his firm's name undertaking to produce a deed vesting in the borrower the security-subjects which stood vested in a third party, and consequently that the lender could not on the obligation recover from the borrower's partners.

Bar — Mora — Contributory Negligence — Obligation by Partner in Name of Firm —Fraud of Partner—Delay in Enforcing Obligation.

A member of a firm of law-agents borrowing money for his own use granted an obligation in his firm's name undertaking to produce a deed vesting in himself the security-subjects which stood vested in a third party. The lender's agent accepted the obligation, but no steps were taken to enforce it. Nine years later the lender sought, on the obligation, to recover from the partners of the borrower's dissolved firm. *Held* (*per* Lord Johnston, Ordinary) that the lender could not recover from the partners other than the borrower inasmuch as her agent had contributed to the loss in not seeing that the obligation was fulfilled.

On 1st December 1904 Miss Annabella Walker raised an action for payment of the sum of £220, 13s. 4d. against William Kidd Smith, Robert Boyd, and William Cunningham Wilson, who had carried on business as law-agents in partnership under the firm name of Smith, Boyd, & Wilson, until the dissolution of the firm in 1896.

On 3rd July 1895 the defender Smith borrowed from the pursuer £200, and on the same date Smith granted to the pursuer a bond and disposition and assignation in security of certain ground-annuals, which was recorded on 4th July 1895. Along with the said bond and disposition and assignation the titles to the ground-annuals were delivered to the pursuer, and from these it appeared that the ground-annuals were vested in Dr William L. Muir, of Glasgow. In this transaction the pursuer's agent was W. P. M. Black, and at the settlement the defender Smith handed to him the following letter:— "11 West Regent Street,

"Glasgow, *3rd July* 1895.

"W. P. M. Black, Esq., Writer,

"Wellington Street.

"Dear Sir, *Loan of* £200.

"Referring to the settlement of this transaction to-day, we undertake to record and deliver to you (1) disposition and assignation in favour of Mr Smith, and (2) to bring down and exhibit to you clear search, and to purge the search of any incumbrances not at present disclosed in the search.—Yours faithfully,

"SMITH, BOYD, & WILSON."

The signature to this letter was written by the defender Smith. The pursuer also averred that at the settlement of the transaction Smith exhibited to Black a disposition and assignation of the ground-annuals purporting to be granted by Muir in favour of Smith, but the defenders Boyd & Wilson did not admit this, and averred that any such deed if produced must have been fabricated by Smith.

It was admitted by the pursuer that at the time the loan was made the pursuer's agent Black was aware that Smith was borrowing the money in connection with his own private business, and not on behalf of his firm.

The interest on the loan was paid by Smith until Martinmas 1900, but after that date, although making certain small payments, he failed to pay the interest with regularity. In 1901 he was sequestrated, and at the date of the action he was still undischarged.

In 1899 Smith, for the purpose of preparing a discharge and retrocession of the bond and disposition and assignation in security, had obtained from the pur-

suer the titles to the ground-annuals, and thereafter the ground-annuals were disponed by Dr Muir to other parties. The bond and disposition and assignation in security being accordingly valueless, and the pursuer not having received repayment of the loan made by her, she brought the present action for the principal sum lent, together with the interest remaining due thereon.

The pursuer pleaded—"(1) The defenders having failed to implement the obligation condescended on granted by them in the pursuer's favour are liable to the pursuer in damages for the loss sustained by her in consequence of said failure, being the sum sued for, and decree should be granted as concluded for. (2) The pursuer having suffered loss and damage to the amount of the sum sued for through the fraudulent actings of the said William Kidd Smith as aforesaid, decree should be granted as concluded for."

The defenders Boyd and Wilson pleaded—"(3) The letter of obligation founded upon by the pursuer not being granted by the said William Kidd Smith within the scope of the partnership business, or with the authority of these defenders, is not binding upon them. (4) The pursuer's loss having been caused by William Kidd Smith's fraud, which does not bind these defenders, they should be assoilzied, with expenses. *Separatim*—the pursuer's loss having been contributed to by the negligence of her agent in not seing that the letter of obligation was fulfilled, she is thereby barred from suing the present action."

The defender Smith lodged defences, but did not appear when the case was called in the procedure roll.

On 26th May 1905 the Lord Ordinary (JOHNSTON) sustained the part of the fourth plea-in-law for the defenders Boyd and Wilson stated *separatim*, and assoilzied them from the conclusions of the summons, and decerned against the defender Smith for payment of £223, 16s. with interest on £200 at 5 per cent. in respect of his failure to appear.

Opinion.—"In this action the pursuer seeks to recover from the three defenders who were formerly in partnership as law-agents the sum of £220, 13s. 4d., being the amount of a loan of £200 made by her to the defender Smith on 3rd July 1895, with arrears of interest. This sum Smith admits that he borrowed. The security was to be a bond and disposition and assignation in security of certain ground annuals which Smith represented himself as having acquired from Dr William Limond Muir of Glasgow. Whatever the truth of the situation, the title to the ground annuals was still in the person of Dr Muir. The pursuer alleges that Smith exhibited to her agent a disposition and assignation of these ground annuals purporting to be executed by Dr Muir in his favour. This is neither admitted nor denied by Smith, but it is suggested by his former partners, the other defenders, that such deed if it ever existed was fabricated by Smith. Be the truth as it may, Smith was admittedly not infeft, and therefore the security which he granted wanted something to make it effectual. Accordingly, at settlement of the transaction the pursuer's agent Mr Black, writer, Glasgow, accepted a letter of obligation purporting to be signed by the firm Smith, Boyd, & Wilson, in which they undertook (1) to record and deliver to him a disposition and assignation in favour of Smith; and (2) to bring down and exhibit a clear search, and to purge any incumbrances not already disclosed. Smith has failed to make payment, and though she has other grounds for suing him this letter is the pursuer's only ground for suing his partners, the other defenders.

"Now, it is common ground that this letter was signed in name of his firm by Smith himself. There is no averment that he had special authority from his partners to grant the obligation therein contained. But the pursuer relies on Smith's right to sign the firm name, and on the alleged facts that the conveyancing of this transaction was firm business, and that such obligations as the letter imports are commonly granted by law-agents in course of business in relation to the settlement of conveyancing transactions.

"The record is overlaid with irrelevant and impertinent matter, and it is very difficult to extract the real case, but I think the above is, shortly put, the kernel of it.

"I do not think that these allegations are relevant to support the pursuer's claim against Boyd and Wilson, who were Smith's partners at the date of the letter. Assuming that the conveyancing of this transaction was firm business, and that charges for it passed through their books; assuming further that such obligations as the letter imports are often given by agents, and when acting for a client are within the mandate of a partner to give, still the transaction was Smith's private and personal transaction in the knowledge of the pursuer and her agent Mr Black, and Mr Black was not justified in taking from Mr Smith, who he knew was personally concerned, an obligation purporting to bind the firm and which he knew to have been signed by Smith himself, without ascertaining that he had his partners' authority. And it is not alleged that he had such authority or that they even knew that he had given such undertaking in their name. In my opinion Mr Black had no right to rely on the letter founded on. It was of no more avail to him or his client than if it had been simply signed by Smith in his own name.

"But while the pursuer's averments are not sufficient to support the conclusion of her summons, which would lead to dismissal of the action, it may well be that the defenders have set forth a defence entitling them to be assoilzied from the conclusions.

"Now, having received it in July 1895 Mr Black (and it is addressed to him, not to the pursuer) made no use of the letter of obligation from that date till 1904, a period of nine years, and the pursuer must now maintain not only that she has a *jus quæsitum* in that letter but that the de-

fenders Boyd and Wilson are still under the obligation that it imputes. I could not in any view so hold. I think that the latter part of these defenders' fourth plea is well founded, viz.—'The pursuer's loss having been contributed to by the negligence of her agent in not seeing that the letter of obligation was fulfilled, she is thereby barred from suing the present action,' at least so far as they are concerned.

"Accordingly it is not enough to dismiss the action *quoad* the defenders Boyd and Wilson. They are, in my opinion, entitled to be assoilzied.

"I have every sympathy for the pursuer, but that sympathy will not justify me in imposing the loss which she has incurred in the manner above described upon the shoulders of innocent third parties.

"So far as the action is directed against Smith it is impossible to understand his defence, and as he has not appeared to explain or support it I shall give decree against him by default."

The pursuer reclaimed, and argued—(1) The defender Smith obtained the loan by fraud while acting in the ordinary course of the firm's business and within the scope of his apparent authority, and therefore the defenders Boyd and Wilson being the other members of the partnership were liable to make good the sum—*Beveridge* v. *Forbes, Bryson, & Carrick*, July 16, 1897, 5 S.L.T. 115; *Sadler* v. *Lee*, 1843, 6 Beav. 324; *Sawyer* v. *Goodwin*, 1866, 36 L.J. (Ch.) 578. Sections 10 and 11 of the Partnership Act 1890 (53 and 54 Vict. cap. 39) covered this case. (2) The defenders were liable in respect of the obligation undertaken by Smith in the firm's name. Although the letter containing the obligation was addressed to the pursuer's agent, yet the pursuer being a disclosed principal was entitled to sue on it—Evans on Principal and Agent (2nd ed.), p. 468; Bell's Principles, p. 224a. This was not the case of an obligation granted by a partner in connection with his own private and personal business, as in *Paterson Brothers* v. *Gladstone*, January 15, 1891, 18 R. 403, 28 S.L.R. 268. The obligation in question was in the course of what was ostensibly the firm's business, and, in its nature such as was frequently and according to general practice undertaken by law-agents in carrying through conveyancing transactions, and therefore section 5 of the Partnership Act 1890 applied. The circumstance that the money was received by Smith alone did not relieve the partnership of the obligation undertaken in its name—*Bryant, Powis, & Bryant, Limited* v. *La Banque du Peuple* [1893], A.C. 170; *Union Bank* v. *Makin*, March 7, 1873, 11 Macph. 499, 10 S.L.R. 301; *Dryburgh* v. *Gordon*, October 15, 1896, 24 R. 1, 34 S.L.R. 19. (3) The Lord Ordinary was in error in founding upon the interval which occurred between the granting of the obligation and the application for its enforcement by Black in 1904 as prejudicing the pursuer in this action. This was equivalent to holding that the pursuer was barred because of contributory negligence, but contributory negligence could not be pleaded as against a claim in respect either of a fraud on the part of the defender or of a written obligation granted by him. Further, it was not averred, as was necessary, that the defenders had suffered through this delay—Bell's Principles, 27a; and in point of fact the pursuer had applied for payment prior to 1904.

Argued for the defenders Boyd and Wilson—The Lord Ordinary's interlocutor was right. Black took the obligation from Smith merely in order to relieve himself from the trouble of making a search, and the obligation being one between the agents the pursuer was not entitled to sue on it. Further, the summons was irrelevant because the pursuer had no dealings or communication with the defenders' firm, nor did she in any way employ them, and it was not averred, nor was it the case, the firm or these defenders received or benefited by the money. The whole transaction was so clearly outside the scope of the partnership business that the pursuer could succeed only by showing that Smith was specially authorised by the other partners to grant the obligation—section 7 of the Partnership Act; and no special authority being averred the action ought to be dismissed. As no application was made to the firm for nine years the pursuer was in any case barred from suing.

At advising—

LORD PRESIDENT—The defenders in this case are the partners of a now dissolved firm of writers in Glasgow. While that firm was in existence one of the partners, the defender Smith, wished to borrow money and entered into negotiations with another writer named Black with a view to obtaining a loan from one of his clients, namely Miss Walker, the pursuer in this case. It is admitted that Black was aware that the loan was for Smith's personal use and not for the benefit of his firm. The security for this loan, it was agreed, was to be a bond and disposition and assignation in security of certain ground annuals in Glasgow. The defender Smith granted a bond and disposition and assignation in terms of this agreement and at the same time delivered to Black the titles to the ground annuals. These titles showed that the ground annuals were vested in a person of the name of Muir, which of course was a fatal defect because it was clear that the granter of the security was not possessed of that which he purported to assign. At the date for settlement Smith handed to Black a letter in these terms—[*his Lordship read the letter of 3rd July* 1895]—In this letter the signature of the firm was adhibited by Smith.

Upon receiving this letter Black paid his client's money to Smith, As a matter of fact no disposition in favour of Smith was ever recorded or given. Smith fell into pecuniary difficulties, and the ground annuals were transferred by Muir to other parties and the bond given by Smith became ineffectual. After the lapse of nine years this action has been brought against Smith and the other partners of

his firm. There is, of course, no doubt that the pursuer is entitled to decree against Smith, although this is probably of no value, but the other partners are solvent and are liable in the obligations of the firm. Now, your Lordships will perceive that there is no averment, and it is not the case that the firm ever received the money paid by the pursuer. Had that been so the pursuer's case would have been very different, for in that case, however Smith might have abused his position, it would have been in the mouth of the pursuer to say as against the other defenders "The money passed into your coffers and you must account for it." In the present case the pursuer cannot urge this, and her right of action is based on the letter and the letter alone. It is true that the letter is addressed to Black, but this circumstance is immaterial because Black was the agent for and was acting on behalf of the pursuer.

Now, the Lord Ordinary has assoilzied the defenders Boyd and Wilson on the ground that Black, knowing that the loan was Smith's private and personal transaction, was not justified in taking from him an obligation purporting to bind the firm without ascertaining that he had his partners' authority or without obtaining their signatures, and on the further ground that the pursuer is barred owing to her negligence in allowing nine years to elapse without seeing that the letter of obligation was fulfilled. Now, I agree in the conclusion at which the Lord Ordinary arrives, but I prefer to rest the decision on another ground. I do not think that it makes it any better for the pursuer's case that she knew that the loan was obtained for Smith's private purposes, but then I hesitate to say that that knowledge so changed the situation as to render it necessary for the pursuer or her agent to see that the other partners of Smith's firm signed or authorised the signature.

There is, however, a fatal defect in the pursuer's case at the outset. The signature to the letter admittedly was adhibited by Smith and Smith alone, and therefore as no special authority to attach the signature has been proved, it is incumbent on the pursuer to show that this act was within Smith's implied mandate as a member of his firm. Now, it is true that the second obligation undertaken in the letter—the obligation to exhibit a clear search and to purge it of incumbrances—is one which is frequently given by law-agents, and the practice is so well established that I am prepared to hold that by the custom of the profession it has come to be within the mandate of the partner of a legal firm to undertake such obligations on behalf of the firm. But this is so, not because the undertaking of an obligation of this nature is such as would naturally fall within the mandate of a partner, but for an entirely different reason. It is common knowledge that for many years there was great difficulty in getting searches at short notice, and even now at certain times this is still the case, and it is out of the necessities of the situation that the practice has arisen. And there is further a slight extension of that practice, which also rests on grounds of common sense. I have no doubt that it is within a writer's mandate to bind his firm with reference to some deed which their client is under an obligation to grant. Suppose, for instance, that a bond is to be granted by the client of a firm and that the lender is satisfied as to the borrower's title, but that the actual deed in security, either because the borrower is abroad or for some other reason, is not executed. In such a case I quite understand that the borrower's agent might undertake to deliver the deed executed by his client, and I have no doubt that this obligation undertaken on behalf of the firm by one of the partners would bind the firm.

But while this is so I do not think it is possible to extend the rule so as to cover such an obligation as was undertaken by Smith in the present case. When Black received the titles he saw that Smith had no right whatsoever to assign the ground annuals, and to say that in these circumstances he bound his firm to produce a title which was the foundation of the borrower's right is to go entirely outside the ordinary mandate of the partner of a firm of law-agents. It is said by the pursuer that at the settlement a title was in fact produced though not delivered, but this is not admitted, and the matter is left in obscurity. In any case Black was put on his guard when he received the original titles, and he should never have trusted to Smith's undertaking that his firm would produce what it was not its business to supply. Accordingly I think that the action entirely fails with respect to the defenders Boyd and Wilson.

In coming to this conclusion I am fortified by the knowledge that the same result would ensue from the application of certain familiar general rules of law. It is an elementary rule that if money is lost by the fault or negligence of A, the Court, as between two innocent parties, will fix the loss on the party who made it possible for A to deal with the money in the manner which has led to the loss. If that rule be applied in this case there can be no doubt as to the result. Smith was, of course, directly in fault, but as between Black and Smith's partners, who made it possible for Smith to act as he did? It was the conduct of Black, for he acted quite wrongly as a law-agent in paying his client's money on such security as Smith offered. Accordingly, on the whole matter, I am for sustaining the Lord Ordinary's interlocutor, but on grounds other than those adopted by his Lordship.

LORD M'LAREN and LORD PEARSON concurred.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Maclennan, K.C. — Hamilton. Agent — Andrew H. Hogg, S.S.C.

Counsel for the Defenders, Boyd and Wilson (Respondents)—Hunter, K.C.—Wilton. Agents—Sturrock & Sturrock, S.S.C.