No. 61. JOHN MACKENZIE'S TRUSTEES, Appellants.—*Knight.*

ALEXANDER MACKENZIE'S TRUSTEES, Respondents.— *Rutherfurd.*

Partnership—Interest.—Three separate contracts having been entered into by copartners in the course of five years: Held, 1. That the last contract was to be explained by the first; but observed, that a recital in a deed is not operative, unless for the purpose of explaining what is doubtful; that under the contracts one of the partners was entitled to a share of profits against his copartners personally, and not merely out of the reversion of the company estate, and that he was not liable in loss in a question with his copartners. 2. That accumulation of interest at the date of the action and of the decree not allowed, in respect of mora.

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ROBERT SHARP and John Mackenzie were extensive merchants in Glasgow, trading under the firm of Sharp and Mackenzie, and had different establishments abroad. The business at home was conducted principally by Alexander Mackenzie; and on 9th September 1794 a contract of copartnery was entered into, whereby it was declared, that Alexander Mackenzie was to receive one fourteenth share of the profits, besides a salary of 100*l.* yearly; and by another contract, dated 27th November 1798, his share was raised to one eighth. Balance sheets had been docqueted in 1795, 1796, 1797, 1798, and 1799. Sharp and Mackenzie's affairs became embarrassed, and their estates were sequestrated on the 8th November 1799. A great deal of their property was situated in America, and Alexander Mackenzie was prevailed upon to go out to take the management of the affairs there. As an inducement to undertake this duty, an agreement was entered into, 6th December 1799, by Sharp and Mackenzie, which bound themselves to make payment to Alexander Mackenzie and his heirs of his yearly salary of 100*l.*, together with a share of the free profits of the trade, as the same should appear from the yearly balances made out since 1st September 1794, with interest from the date of such balances, and that so soon as they were in possession of funds or property to enable them to do so in whole or in part. Before leaving this country, Alexander Mackenzie granted a factory and commission to William Leckie and others for the purpose of carrying into effect this obligation.

While Alexander Mackenzie was in America, several instalments were paid to the creditors, amounting in all to 14*s.* per pound on the amount of their debts. In the year 1801 John Mackenzie, in order to put an end to the sequestration, and to have the affairs of the company speedily wound up, proposed to the creditors to pay the remaining instalment of 6*s.* out of his own funds, in full of the principal of their debt, on condition of their relinquishing all claims for interest. This was agreed to; but before proceeding to carry this proposal into effect, John Mackenzie applied to the attornies of Alexander to restrict his claim to the reversion of the company estate, and to relinquish all claim for interest upon his share of the profits, in respect of the obligation which John Mackenzie had come under to the creditors. The attornies having considered the proposition reasonable, and the arrangement advantageous for their constituent, a deed of agreement was entered into on 25th September 1810, whereby it was agreed to restrict Alexander Mackenzie's claim in manner before mentioned—that the books should be balanced by John Mackenzie at 1st July 1804 — that Alexander's claim for interest should be relinquished—and that his share of the funds should be paid to him by bills at six, nine, and twelve months from the above period. On the same day, John Mackenzie wrote to Alexander, who was then in America, referring to the proposed arrangement for recal of the sequestration, but without mentioning any thing about the deed which had been executed, and adding:—

" I would stipulate for you if your claims are preferable, and " it would so turn out that, after winding up the business, no " more than your amount is saved, that the same be equally " divided betwixt you and I, unless it shall appear I have fully " as much as you; but this I will not ask if there be a sum left " for me equal to what you are entitled to. You may at first " view think this as encroaching on you; a moment's reflection " will point out how great a gainer you become by our snatching, " with much labour and difficulty, the effects from under a de- " structive sequestration, by which not only 15,000*l.* of interest " will be saved to the estate, but also a larger sum in commis- " sion, besides all the load of charges natural to a sequestration. " To wind up such an estate as ours, if continued under a " ruinous sequestration, your expectations and mine of a surplus

Oct. 15, 1831. "would certainly be blasted; for not only every shilling of in-
"terest would be charged us, but also a full commission to the
"last moiety paid, as well as other heavy charges incurred. It
"is certainly, then, your interest to go into my views to save
"your own property. Indeed, it is the opinion of Mr. A. Graham
"(the trustee), Messrs. Strang, Leckie, and Mathie (the attor-
"nies); but as I will on no account undertake such a burden,
"unless you are of my mind, I must have it immediately under
"your own hand; and unless you write several copies by dif-
"ferent conveyances, your letter may be too late, and the day
"appointed upon which I am to give in my determination past,
"and our affairs continue irrevocably under sequestration; but
"there is such a fairness in the proposition, that I think you
"will certainly agree. I wait, therefore, with impatience for
"your reply."

Alexander Mackenzie returned an answer to the letter on 4th December 1801, in which he observed:—

"As to the request you make of my agreeing to give up one
"half of my property in your favour, is what I cannot imagine
"you to be serious in. I suppose that you have not forgot, that,
"by our contract of copartnership, I had the full right to draw
"out of the company's funds my proportion of profits yearly,
"and, to have followed the example that was set before me, se-
"cured the same to my family; and if this had been done, would
"you ever have thought of asking me for any part thereof."—
"As to what you say of Mr. Graham and the other gentlemen
"being of the same opinion with yourself, however far this may
"be the case, or for as much as I would revere the counsel of
"these gentlemen, you must excuse me, in the present instance,
"for reserving to myself the power of thinking and acting as
"appears to me to be proper. I will come under no promise
"nor engagement in my present situation, but will most heartily
"join you in realising as much as possible of our late concerns,
"and as speedily, too, as the nature of the business will per-
"mit, and that upon the same terms which I agreed with you
"and the gentlemen in management of the business before I left
"home."

The same sentiments were communicated in a letter which Alexander Mackenzie wrote to Mr. Graham on 13th June 1802:—

"Mr. William Leckie has written to me, that, at the solicita-

" tion of Mr. John Mackenzie, he and the other attornies had
" signed a deed on my account to give up interest. I confess
" that I do not exactly know the meaning of this deed, but I
" know that these gentlemen had no power from me to restrict
" my claim upon my former partners, nor will I ever agree to
" any thing of the kind."

Notwithstanding of Alexander's refusal to accede to the terms proposed, John Mackenzie carried through the arrangement with the creditors, and on 11th March 1802 the sequestration was recalled. Shortly after this Alexander Mackenzie died on his way home from America, having previously executed a trust deed and settlement, whereby Mr. Leckie and his other attornies in this country were appointed his trustees, along with other persons therein named.

In 1810 the trustees raised an action before the magistrates of Glasgow against Sharp and Mackenzie, and the trustees of John Mackenzie, and the representatives of Robert Sharp, for payment of 10,000*l.*, or such other sum, as the amount due for Alexander Mackenzie's yearly salary and annual share of the profits of the business. The trustees of John Mackenzie raised a counter action before the Court of Session, for relief of Alexander Mackenzie's share of the loss sustained in the company's transactions, and for payment of 1,000*l.* uplifted by him in America. The original action was advocated to the Court of Session, and conjoined with the action of relief. After a variety of procedure, Lord Bannatyne, Ordinary, reported both actions to the Court, who, 2d February 1821, pronounced an interlocutor, finding,—

" That the claim made for the trustees of the late Alexander
" Mackenzie is well founded," and remitting " to the Lord
" Ordinary to ascertain the balance due to the said trustees, and
" to decern for payment of the same; also to hear counsel for
" the parties as to the demand for a decree for an interim-pay-
" ment to account of such balance; and in the ordinary action
" at the instance of John Mackenzie against Alexander Mac-
" kenzie's trustees, assoilzie the said trustees from the conclusions
" of the same, and decern: Find the trustees of the said Alexan-
" der Mackenzie entitled to their expenses hitherto incurred in
" the said conjoined processes."

On 11th July 1821 this judgment was adhered to. There-

Oct. 15, 1831. after a remit was made to Mr. Brown, accountant, to examine the books and accounts of the companies, and to report. A report was lodged, to which both parties objected.

The trustees of John Mackenzie pleaded, that under the contracts of 1794 and 1798, there was no exemption of Alexander Mackenzie from liability for loss; that, at all events, he was to be relieved only from loss of capital; that, by the deed of 1799, he had no claim against the parties personally; that there being no reversion of the company's estate, his representatives could draw nothing.

Alexander Mackenzie's trustees pleaded, 1. That the report was erroneous, because it bore that the docqueted balance sheets for the years 1795, 1796, 1797, and 1798, were not intended or fitted to ascertain the precise sums due to Alexander Mackenzie, whereas it was clear that those balance sheets were so fitted and intended, and were docqueted for no other purpose than to fix the precise sums. 2. That it was reported that the estimated amount of a share of certain alleged losses appearing as funds for 1798 ought to be deducted, whereas there ought to be no such deduction, because there had previously been made specially all deductions applicable. 3. That, while the report bore that it would be equitable to allow an accumulation of interests as at 8th October 1810, the date of the action, to 2d February 1821, the date of the decree, there ought to be no such allowance by reason of alleged mora on the part of the objectors, whereas it was established that there had been no mora. 4. And that it was reported, without evidence, that there ought to be deducted certain payments alleged to have been made to Alexander Mackenzie in 1799.

Cases were ordered, and after some other proceedings the Lord Ordinary, on 25th May 1830, pronounced this interlocutor:—

" Having heard parties' procurators, approves of the account-
" ant's reports, and decerns and ordains the defenders, con-
" junctly and severally, viz. John Mackenzie's trustees, quà
" trustees, and the trustees or representatives of Robert Sharp,
" to make payment to the pursuers, Mrs. Marion Kelly or
" Mackenzie, relict of the deceased Alexander Mackenzie, mer-
" chant in Glasgow, William Leckie, merchant in Glasgow,
" and Benjamin Mathie, writer there, as surviving trust dis-

" ponees of the said Alexander Mackenzie, of the sum of 4,685*l.* Oct. 15, 1831.
" 2*s.* 2½*d.* sterling, and the legal interest of 1,957*l.* 12*s.* 9½*d.*
" thereof, from Martinmas 1828 till payment, and allows this
" decreet to go out and be extracted ad interim: Finds expenses
" due to neither party since February 1821; and, quoad ultra,
" remits to Mr. James Brown, accountant, to examine the books
" and accounts of Andrew Duncan and Company, with power
" to call therefor, and for all documents and explanations which
" he may deem necessary, and to report a state of the accounting
" with reference thereto."

John Mackenzie's trustees reclaimed, praying for absolvitor, or at least that it should be found premature to pronounce decree for any sum until the investigation of the affairs of Andrew Duncan and Co. should be brought to a conclusion.

The Court pronounced this interlocutor:—" On security being
" found by the pursuers, as trustees, to answer to the defenders
" for the consequences that may arise against the pursuers in
" the accounting with Andrew Duncan and Company, adhere
" to the interlocutor reclaimed against, and allow the decree ad
" interim to be extracted, on security being found as aforesaid,
" and lodged in the clerk's hands; and further, find the de-
" fenders liable in the expenses incurred by the pursuers since
" the date of the Lord Ordinary's interlocutor reclaimed against;
" appoint an account thereof to be put in, and remit to the
" auditor to tax and report on."*

Both parties appealed.

John Mackenzie's trustees. — Alexander Mackenzie had no exemption from liability for loss; and, at all events, could have no claim for profits against the other partners individually, if these profits, before they were drawn by Alexander, or while they remained mixed up with the company's funds, were absorbed by subsequent losses, and the ultimate bankruptcy of the concern. There is no evidence that under the original contract of 1794 Alexander Mackenzie was relieved as in a question with his copartners from all liability for loss. The contract of 1798, by

* 8 S. D. B., pp. 781—1009.

Oct. 15, 1831. which his share, subsequent to its date, was enlarged from one fourteenth to one eighth of the profits, contains no provision or declaration that he was absolutely to be relieved from loss, nor is there any thing to establish his exemption from liability for loss, as under that contract. At all events, under these contracts, and according to their just and true construction, Alexander Mackenzie, at the utmost, was only exempt from liability for actual loss, but had no right to profits, either, in the first place, where no free profits were made in any one year, after deducting the whole losses by bad debts or otherwise during that year; or, in the second place, where the free profits made during any one year had been absorbed by subsequent losses, and in this case, by the ultimate bankruptcy of the copartnery, before such profits were drawn out and appropriated by the copartners, and while they remained undistinguished from and mixed up with the general funds.

Independently of this, and according to the true construction of the contract of 1799, by which the interests of the parties were ultimately arranged, and having regard to the circumstances in which it was executed, and to the prior contracts, Alexander Mackenzie had no right to profits, except from the reversion of the copartnery estate, after satisfaction of all the company's debts and obligations,—the object of the contract 1799 being to confer upon him a preferable right over the company funds only, as in competition with the copartners, but not to create any claim against their separate or individual estates; and, therefore, as there is no reversion of the copartnery estate, the whole being swept away by the bankruptcy, there is no fund against which Alexander Mackenzie's representatives can have any claim under the contract 1799.

But although these deeds are conclusive against the claim, the agreement executed between Alexander Mackenzie's attornies and Messrs. Sharp and Mackenzie superseded all the previous arrangements, and under it the accounts between the parties must be adjusted, unless it can be shown that it is not binding or effectual as against Alexander Mackenzie.

But upon the supposition that the interlocutors of the Lord Ordinary and of the Court, together with the report of the accountant on which they are founded, should be supported, it is

plain, with reference to the cross appeal, that the objections of the respondents to the accountant's report, as not being sufficiently in their favour, are altogether groundless.

Alexander Mackenzie's trustees.—Under the contracts of 1794 and 1798 Alexander Mackenzie was exempted from liability from loss either of capital or profit, and his claim did not depend upon the existence or non-existence of company funds. By the obligation of 6th December 1799, which is a valid and subsisting deed, because the agreement of the attornies, by which it was restricted, was ultra vires and repudiated, Alexander Mackenzie had a claim for profits against his copartners personally, and such claim was not dependent on there being or not being a reversion of the company estate. The docqueted balance sheets for the years 1795-96-97 and 1798, were fitted and intended to ascertain, and did ascertain, the precise sums due to Alexander Mackenzie. Interim-decree in favour of the respondents ought to have been awarded upon these docqueted balance sheets. But assuming that the docqueted balance sheet for 1798 was not to be held as conclusive, there ought not to have been deducted the estimated amount of a share of losses on American adventures, appearing as funds in the docqueted balance of 1798, because these had been previously made specific deductions.

Accumulation of interest on the debt, as at 30th October 1810, (the date of the action,) and 2d February 1821, (the date of the decree,) has not been allowed by reason of alleged mora, whereas there was no mora.

LORD CHANCELLOR.—My Lords, this question when first brought before your Lordships appeared to be involved in much greater obscurity than, upon a more attentive consideration of the arguments, and the perusal of these very voluminous papers, it proves to be. There can be no doubt, that if in any instrument, whether a bond or agreement, or any other instrument, the parties by way of recital state, that in another instrument certain things were stipulated for on the one hand, or bound to be performed on the other hand; and reference being had to that other instrument, thus imported, as it were, by way of recital, into the one in question, it is found that the other instrument does not contain this matter, the recital, however plain, does go absolutely for nothing, because a man shall not be bound by a mere matter of recital. You are to look upon the operative part of the deed. The recital is of importance, and may be resorted to in explain-

Oct. 15, 1831. ing what is obscure in the operative part, or in extension of what is limited in amount in the operative part. For these purposes the recital is material, and is evidence of the intention of the parties; but it shall not control the intention, plainly and unequivocally expressed by the parties in the operative part of the deed, that being the part by which they are to be bound. Now, I take it to be clear, that it being found in one part of the deed of 1799 (the last of all) that there is a statement referring to what had passed before, (and that is the important point at issue between the parties,) that Alexander Mackenzie was to receive a certain share of the free profits, after deducting the expenses and bad debts; the dispute being, whether he was entitled to receive his share of free profits, an eighth and 100*l.* a year, at all events; and if there were no free profits, he was to be subject to no loss—that he was to be a partner to receive profit, if profit was made, in a certain proportion, but no partner to share in any loss? The first question is, whether this is to be taken as the operative part of that deed in 1799, and to have relation back to the period that had passed before, or only as a reference in the recital to the former deed? Now, in looking into that, I have no doubt whatever—and here I agree with the counsel for the appellants, and differ widely from the counsel for the respondents—that this is to be taken as a recital. I have stated that a recital is not operative, unless for the purpose of explaining what is doubtful; but it is not operative to explain the meaning of the parties in a former instrument, if that former instrument is clear in itself. It may operate to explain, and, which is very material in this case, to prove the substance of a lost deed, and to prove important matters, of which other and more precise evidence is not forthcoming. But where there is another instrument executed by the same parties, referred to in the recital, by which they affix a meaning to it, it cannot be said to give a meaning to the former deed which that former deed does not, upon the production itself, appear to have; and your Lordships know, so far have the courts of law gone with respect to disallowing any alteration of the meaning being drawn from a matter of recital, that they have not even allowed, which has been thought to be going far, the legislature in the preamble of one act to affix a meaning to another; holding, that if the legislature intended to affix a meaning to what it had passed, this ought to be done by a declaratory act. Now, according to these principles, I cannot regard this recital, as either evidencing the intention of the parties in the deed of 1799, if that intention is clear without it, or as giving a meaning to the deed of 1798, or the one immediately preceding, which deed enlarged, as it were, the terms of the last preceding deed of 1794. When you look into the deed of 1798, which is forthcoming, you do not find any thing in it to warrant the recital in the deed of 1799,

namely, that those were the precise terms upon which Alexander Mackenzie was to receive his share. On the other hand, it must be admitted you do not find any thing that is inconsistent with or repugnant to the notion that those were the terms—the deed is consistent with those being the terms. So that, though a recital would carry the meaning of the parties further than they had expressed it, yet it would not control or set aside any thing they had purported to have done; but I cannot go so far as to say that the mere recital of their intention referring to the deed of 1798, or being in the deed of 1798, or being in the deed of 1799, is sufficient of itself to import into that prior deed of 1798 a condition which the parties seemed to have assumed, or, as it is argued, that it is to be assumed to have existed in 1798. I cannot go quite so far with the counsel for the respondents. I think it would be dangerous, and tend to confusion in the construction of written instruments. The safe rule is, to hold the parties only bound by what they have, in the operative part of the instrument, bound themselves to perform. But then there is another view material in the present case, and it is upon this view that the Court below must have decided. I am furnished with a most imperfect note, professing to contain the grounds of the decision; but the Court appear to consider, that besides the deed of 1799, dealing with the other deed of 1798, there was an original bargain in 1794 not forthcoming, and that that original bargain is apparently, by the deed of 1798, only continued and extended; and that, taking (and I am prepared to advise your Lordships to sanction this ground) the deed of 1799 as evidence that the parties contracted in 1794, you have a right to take it as evidence of the nature of that contract—that you have a right to take that deed as evidence, and that the acting under it is evidence of the original bargain between the parties, that Mr. Mackenzie was to be paid 100*l.* a year and a fourteenth of the free profits, (afterwards extended to an eighth,) and that he was not to be subject to any loss. It is true that the deed of 1798 does not expressly exempt him from any loss; but if in 1794, in the original concoction of the bargain—in the inception of their relation—there is reason to believe he was to be exempted from loss, there is nothing in the deed of 1798 that is not perfectly compatible and consistent with it. On the contrary, the more your Lordships look at the whole of the relation that appears to have subsisted between these parties, the more you will be disposed to think that he was to be protected against loss. He was not in the nature of a partner, properly speaking, not one of the firm itself; and though he was to be paid partly in profits and partly in salary, it was only to give him an interest in the success of the concern. He was rather bringing in work and labour as an agent than science and capital as a partner. He is to be paid 100*l.* a year salary, a

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Oct. 15, 1831. moderate salary, he is expressly stated to be a person to render the benefit of his work, labour, and science, and he is to be paid a very small share of the profits. He is, by an explicit agreement, excluded from all property in the capital. What he did in going to America, and the labouring oar he took upon himself, is consistent with the rest of the case: for, taking the whole of the transaction, the probabilities are all one way, and it is likely, even if you saw no evidence of it, that such an arrangement should be made as to secure him from loss; because, if a person has a salary and a small proportion of the profit, and is not secured from loss, he fills a very inferior situation to those enjoying a good salary, and not paid by a proportion of the profits. That being the probability of the case, and it being plain that such was their intention at the time they so expressed themselves—that such was their knowledge—and that such was their belief at the time —what other conclusion follows from these facts than that the inference which I have stated cannot be wholly rejected from the cause? The recital is not to control the deed of 1794, but to show that the parties knew and believed that these were the terms and such the conditions upon which Alexander Mackenzie had acceded to, and continued in, and become a member of, and employed under the partnership; and such being the case, I am inclined to agree in the opinion of the Court below, that this must be taken to be the basis of the transaction between the parties. But then it is said afterwards there was a transaction in 1801, which, though ultra vires, yet must be held to be homologated, and set up by the party himself; because he did, at all events, acquiesce in it, and under it this attorney obtained a recall of the sequestration, of which Alexander Mackenzie did not object to taking the benefit. It is unnecessary for me to observe, that this was behind his back—the sequestration being recalled—he being in America at the time, and dead before any steps were taken to get rid of that recall or supersedeas, and to set up the sequestration again. The Court, after his death, had, or not, a right to recall the recall of the sequestration, and to set up the sequestration after his death. It is unnecessary for me to deal with that question; I can conceive a case in which the Court may be called upon to exercise that right, and I do not dispute that the Court may do so. But we are here upon a question as to the conduct of the trustees after the death of the bankrupt. His remaining in America, and his death there, accounts for his not taking any step; and his not having recalled the recall of the sequestration amounts to nothing. But it is said, the trustees were in his shoes, and representing him, and why did not they take steps? I will not say that they might not have done it—they had a right to set up the sequestration—any more than I will say that the Court might not, after his death, have set it up. But the

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question being as to the homologation of the trustees, and not as to so acting, it is sufficient to say that the very circumstance of the bankrupt being dead at the time takes away from the conduct of the trustees, in not so applying for the recall of the supersedeas, any thing amounting to confirmation or homologation of what had been done in Mr. Mackenzie's absence, ultra vires. As to the other part of the case, it amounts to little or nothing. The only point upon which I entertain any doubt is upon the subject of the cross appeal; and without looking into the case a little farther, I am not prepared to advise your Lordships to affirm that judgment. As to the original appeal, I humbly move your Lordships that the judgment of the Court below be affirmed; but in a case of this kind I shall not advise your Lordships to affirm it with costs.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

JOHN MACQUEEN—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 62.

JAMES M'GAVIN, (Trustee for the Creditors of John Stewart and Co.) Appellant.

JAMES STEWART, Respondent.

Appeal.—An order for the examination of three parties before a jury discharged, in respect of two of them being dead.

Oct. 18, 1831.

IN July 1830, (Vol. II. p. 536,) the House of Lords remitted this case (which related to an accounting between partners) to the Court of Session, with a direction to submit it to a special jury, and a recommendation that the three partners should be examined on oath before the jury.*

The agents for the parties now attended by order of the House, and being called to the bar, and questioned by their Lordships, stated, that two of the partners on one side, directed to be examined upon oath, were dead.

* See 9 S. D. B. 17, ante procedure on a motion to apply the judgment in the Court of Session.