Act 1862, clause 251, enacts—"Every person who in any street or private street, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall on conviction, on the evidence of one or more credible witnesses, be liable to a penalty not exceeding forty shillings for each offence, or, in the discretion of the magistrate before whom he is convicted, may, without a penalty being inflicted, be committed to prison, there to remain for a period not exceeding fourteen days" . . . (that is to say) "*inter alia*, every person who shall use any threatening, abusive, or insulting words or behaviour with intent or calculated to provoke a breach of the peace, or whereby a breach of the peace may be occasioned."

Robert Stirling was on 26th February 1883 charged before one of the Police Magistrates of the burgh of Kirkintilloch, at the instance of David Murray, Procurator-Fiscal of the burgh, with having contravened the provisions of the above clause in so far as on the 9th February, in Eastside Street, Kirkintilloch, "he did use abusive or insulting words towards John Allan Forsyth, a cabinetmaker residing in Kirkintilloch—to wit, 'You are a damn beast,' whereby such words so used were calculated to provoke a breach of the peace." He pleaded not guilty, but on evidence he was found, under the said 251st clause, guilty "of contravening the 251st clause of the General Police and Improvement (Scotland) Act 1862," and sentenced to pay a fine of forty shillings or go to prison for fourteen days. The fine was paid, and he afterwards brought the present bill of suspension on the ground that the complaint was irrelevant in not setting forth that the alleged abusive words were used "to the obstruction, annoyance, or danger of the residents or passengers."

Argued for complainer—The sentence ought to be quashed because the charge is irrelevant; no offence had been shown to have been proved against the present complainer, "to the obstruction, annoyance, or danger of the residents or passengers," as insulting words did not constitute any breach of the peace—*M'Donald* v. *White*, June 9, 1882, 9 R. (J.C.) 43.

Argued for respondent—It was enough if the words used were said to be calculated to cause a breach of the peace. The words proved here were so, and are in themselves a cause of annoyance to those in whose hearing they were spoken.

This interlocutor was pronounced—

"Having considered this bill, and heard counsel for the parties, pass the bill, suspend the conviction and sentence complained of *simpliciter*, and decern: Find the complainer entitled to expenses, which modify to five guineas, for which, and one guinea as the dues of extract, decern against the respondent."

Counsel for Complainer—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondent—Shaw. Agent—Party.

COURT OF SESSION.

Thursday, June 14.

SECOND DIVISION.

[Sheriff of Lanarkshire.

NELMES & COMPANY *v.* MONTGOMERY & COMPANY.

Partnership — Assumed Partner — Liability — Trade Debts.

When a person is assumed as a partner in a going business, he does not necessarily become liable by reason of being so assumed for the debts connected with the business which were incurred before he became a partner.

A trader in the course of his business incurred a debt for furnishings. Thereafter he assumed a partner into the business, but without making the fact of the partnership known. The contract of copartnery did not contain any stipulation by which the partnership should undertake the liabilities of the trader or take over his assets. The creditor having become aware of the partnership sued the assumed partner for the debt. *Held* that he was not liable.

Observations on the liability of an assumed partner for the debts incurred prior to his entering the business.

On the 15th July 1881 Henry Nelmes & Co., billiard-table manufacturers, Wellington Street, Glasgow, brought an action in the Sheriff Court of Lanarkshire at Glasgow against James Montgomery, designed as billiard-saloon-keeper, London Street, Glasgow, for recovery of the balance of an account for two billiard-tables supplied to the defender in the end of the year 1879. The defence was that the defender never ordered or received the goods, but that he had been until September 1880 manager of billiard-rooms belonging to a person named Cockburn, from whom he had acquired the business, with the tables and furnishings, in that month. He pleaded that "Never having ordered or received from the pursuer the goods sued for," he was entitled to decree of absolvitor.

After proof the Sheriff-Substitute (SPENS) found that the defender had ordered the billiard-tables, and that he was liable for the unpaid balance of the price, a part of which had been paid by Cockburn. In a note to this judgment the Sheriff-Substitute explained that although Cockburn was connected with the purchase of the tables, it was only as security for Montgomery, and that £70 he had paid to Nelmes & Co. was really on behalf of Montgomery. Montgomery appealed to the Sheriff, who on 27th January 1882 dismissed the appeal. Upon the extracted decree pronounced in this action Montgomery was charged to make payment of the sums for which he had been found liable, but he failed to do so. On expiry of the days of charge Nelmes & Co. presented a petition for *cessio* against him under the Debtors (Scotland) Act 1880, and the Bankruptcy and Cessio (Scotland) Act 1881, stating that he was due to them the sum of £80, 18s., the balance of the price of the billiard-tables and certain

work that had been done upon them. At an adjourned examination of Montgomery in this process of *cessio* he stated that on 24th November 1881, after the Sheriff-Substitute had decided against him, and he had appealed to the Sheriff, he had sold his stock, including the billiard-tables and fittings of the saloon in London Street, to John Coltart for the sum of £145, that with this money he paid off all his debts except that owing to the pursuers, and also paid £15 to a person named Gavin Loudon, whom he alleged to have become his partner in 1880, and to have so continued till he sold the shop and business to Coltart. Nelmes & Co., on these facts being disclosed, were allowed further proof in the *cessio* to the effect that the alleged sale to Coltart was not *bona fide*, but was a fraudulent device to defeat their claim. In the course of this proof Gavin Loudon, who was a teller in the Bank of Scotland Office, Canning Street, deponed that he had advanced £90 to Montgomery at the end of September 1880 for the purpose of buying the table from Cockburn (whom he deponed to be the real proprietor), and that that money had been paid to Cockburn. This money was used to meet a bill which Cockburn had had discounted at the bank in which Loudon was teller. It also transpired from Loudon's evidence that he had entered into a contract of copartnery with Montgomery, which was dated 13th December 1880. This contract set forth that "the copartnery is hereby declared to have begun on the day of last, and shall subsist for five years from that date." The books were to be balanced monthly, the first balance being at 31st October last (1880). The capital was to be £158, of which Loudon was to contribute £90, and Montgomery £68. There was no express provision as to taking over the assets and liabilities of the business which Montgomery had carried on. Loudon also deponed that he had seen the £145 paid by Coltart to Montgomery.

In consequence of what had thus been disclosed, Nelmes & Co. now raised this action against James Montgomery & Co., and James Montgomery and Gavin Loudon, partners thereof, and against Loudon as an individual, for £80 18s., being the sum sued for in the previous action, and for £24, 13s., the expense of the previous action. No decree was asked against Montgomery as an individual, except for expenses in the event of his opposing the action, since the pursuers had already obtained such a decree in the previous action.

The pursuers, after detailing the purchase of the billiard-tables in December 1879, and the payment of a sum to account of the price by Cockburn on behalf of Montgomery, averred—"The pursuers believe and aver that the partnership was entered into by the defenders on or prior to 29th December 1879, and that the purchases from the pursuers by Montgomery on that date were made by the authority and for behoof of James Montgomery & Co. for the purpose of beginning said business." . . . Their averment then proceeded—"At entering into partnership with Montgomery, the defender Loudon was aware that the purchases from the pursuers, which formed the principal partnership stock-in-trade, had not been paid for, and that Montgomery was unable to pay for the same, and the pursuers believe and aver that the cash with which Cockburn made the partial payments condescended on was provided and handed to him by the defender Loudon, or otherwise from the joint copartnership funds." They set forth the transaction with Coltart already referred to, averring that it was simulate and collusive, and that the pretended price had really been supplied by Loudon. "At all events, and whether the price was thus supplied or not, the sum received for the said goods was applied *in rem versum* of James Montgomery & Co., and the pursuers believe and aver that the same was used for the purpose of paying off the debts then due by the firm with the exception of that due to the pursuers."

They pleaded—"That having sold the goods and performed the work condescended on," they were entitled to decree as craved; or otherwise "(2) The defenders having taken over the liabilities incurred by the defender Montgomery in instituting the business transferred to the copartnery, the pursuers are entitled to decree as craved." "(5) In any case, the defenders having received the said furnishings supplied by the pursuers, used them in their business, and afterwards disposed of them for their own behoof, the pursuers are entitled to decree in terms of the prayer of the petition."

Defences were lodged for "Montgomery & Co. and Gavin Loudon," and also for "Montgomery & Co. and James Montgomery." Both defenders pleaded that not having ordered or received the tables they were not liable in the cost thereof. At a proof led in the action the pursuer Nelmes deponed that he had regarded Montgomery as purchaser, and that Cockburn, who had said that he would pay him or see him paid, was only guaranteeing the payment. Montgomery and Cockburn (who had become bankrupt) both deponed that Cockburn was the person who ordered the tables from Nelmes, and was the real purchaser from him. Loudon deponed that he had advanced £90 to Montgomery to buy the tables from Cockburn, and had become a partner with him in 1880 in order to get some security for that money.

The Sheriff-Substitute (SPENS) pronounced this interlocutor—"Finds that the billiard tables in question were supplied in December 1879: Finds at that date the defender Loudon was not a partner or joint adventurer with the defender Montgomery, but only entered into the contract of copartnery conform to copy contract produced on 13th December 1880: Finds it did not emerge to the pursuers that the defender Loudon was a copartner or joint adventurer until April 1882, in proceedings in the petition for *cessio* at the instance of the pursuers against the defender Montgomery: Finds, in these circumstances, as matter of law, that the defender Loudon is not liable for the price of the billiard tables in question: Finds, as regards the defenders other than Loudon, that as the only alleged partner of the said James Montgomery is the defender Loudon, no decree can be pronounced against the said alleged firm; and as regards the defender James Montgomery, decree has already been pronounced against him in this Court: Therefore sustains the defences and assoilzies the defenders from the prayer of the petition: Finds pursuers liable in expenses.

"*Note.*— . . . The only question, however, really in this case is as to Loudon's liability. The tables were supplied in December 1879 on the order

of Montgomery, and without any disclosure with reference to Loudon being in any way connected with Montgomery. The contract of copartnership is dated 13th December 1880, but *in gremio* of it it contemplates partnership dating from an earlier date. The first clause begins thus:—'The copartnery is hereby declared to have begun on the day of last, and shall subsist for 5 years from that date;' then in the 9th article there is a provision as to books being kept and brought to a balance on the 31st of each month. The deed then goes on, 'The first balance shall take place as on 31st October last for the period preceding, and the next balance as on the 30th day of November last, and so forth monthly thereafter during the currency of this contract.' This seems to furnish room for argument that the partnership dated as from 30th September; but, at all events, I think it is not open to argument that at the date when the billiard tables were sold and delivered to Montgomery the defender Loudon was a partner of Montgomery. In these circumstances I am of opinion that Loudon cannot be held liable. Reference may be made to Lindley on Partnership, 4th ed., pp. 388 to 390 inclusive, and cases there referred to. Thus he says, p. 389, 'As the firm is not liable for what is done by its members before the partnership between them commences, so, upon the very same principle, a person who is admitted as a partner into an existing firm does not by his entry become liable to the creditors of the firm for anything done before he became a partner.' That I take to be the law of Scotland as well as that of England. Reference may also be made to the case of *Lockharts* v. *Moodie & Coy.*, June 8, 1877, 4 Ret. 859. This was a different case altogether from the present, but the opinions of the Judges go clearly to show that in the present case Loudon could not be held liable for the order of Montgomery, who was not at its date, and when the goods were supplied, a partner of Montgomery's.

"As Loudon is or was the only partner of Montgomery, no decree can be granted against Montgomery & Co., and as there is a subsisting decree against James Montgomery, no second decree can be pronounced against him: Therefore I think that all the defenders must be assoilzied from the cravings of this petition. It is with some reluctance, looking to the way pursuers have been treated, that I give expenses against them, but there is no logical reason for deviating from the ordinary rule that expenses fall to be awarded to the successful party."

On appeal the Sheriff (CLARK) adhered for the reasons assigned by the Sheriff-Substitute.

The pursuers appealed.

Argued for them—When a man becomes a partner with a trader in a going concern, without information being given to the creditors, it necessarily follows that in taking over the stock-in-trade and business of the firm the incoming partner becomes liable for the trade debts then due.—*Ridgeway* v. *Brock*, 6th Dec. 1831, 10 S. 105; *M'Keand* v. *Reid*, 30th March 1860, 23 D. 846. No doubt that Montgomery purchased these tables, but the contract here disclosed an existing business to be conducted by the defenders for their behoof. It was clear from the *dicta* in *Miller* v. *Thorburn* that Loudon having entered into partnership with Montgomery, was bound, in questions both with his partner and the public, to accept liability for trade debts.—*Miller* v. *Thorburn*, 22d Jan. 1861, 23 D. 359; *Whyte* v. *M'Intyre*, 12th Jan. 1841, 3 D. 334; *The British Linen Co.* v. *Alexander*, 14th Jan. 1853, 15 D. 277.

Argued for the respondents—This copartnership between Montgomery and Loudon was not entered into until September 1880 at the earliest, and the tables had been bought in December 1879. Loudon had no liability for them when they were purchased, and the mere fact that he had entered into a partnership with Montgomery did not make him liable for that person's previous debts. It had been held that if a person is not a partner at the time of ordering the goods, the only way by which he can become responsible is by his assuming liability, and the acquiescence of the creditor. That was not the case here, and therefore Loudon was not liable.—*British Linen Co. Bank* v. *Alexander*, 14th Jan. 1853, 15 D. 277; *Lockharts* v. *Moodie & Co.*, 8th June 1877, 4 R. 859.

At advising—

LORD JUSTICE-CLERK—On the general question of law difficult issues may arise. If two men enter into a partnership I do not understand it to be disputed that neither becomes liable for the individual debts of the other. It has been said that if a trader in a going concern takes to himself a partner, who also takes over the stock of the concern, the new partner also takes over the liabilities of the firm. That might be equity if it were the case of two young assistants being taken into partnership by a trader in an old established business, and that is the explanation of the cases of *M'Keand* and *Miller*. I cannot separate the *dicta* in those cases from the facts to which they were applied, and in both cases it was shown that the defenders did assume the debts and liabilities of the firm. Reading these *dicta* in that light, I am not disposed to quarrel with them. But I cannot sanction the principle that the creditors of any man who forms a partnership with another even in a going concern have any *nexus* on or claim over the stock-in-trade with which that other had been trading before. I concede that the circumstances under which and the mode in which a new partner enters a going business may create a presumption that he has become liable for the former debts of the concern. But we have no such case here. In the first place no trade was carried on which could be the subject of a stipulation in a deed of copartnery as to making over the stock-in-trade. This tobacconist had a shop in which he put a billiard table as an additional attraction to his customers, and finding it a successful speculation he hired a larger room, and placed in it the two billiard tables, the price of which is the subject of dispute in this case. He afterwards assumed this man Loudon as a partner to share in the future profit or loss of the speculation, but that did not make Loudon liable for debts contracted before he came into the business at all. In the second place, there is not a word in the partnership deed as to the transference of any stock-in-trade.

LORD YOUNG—I am of the same opinion, and the case appeared to me to be quite clear from the first. The pursuer sets out one ground of

action which if well founded on fact would be good in law. Thus in cond. 6 he says, after having averred that the sale took place in December 1879—"The pursuers believe and aver that the partnership was entered into by the defenders on or prior to the 29th December 1879, and that the purchases made from the pursuers by Montgomery on that date were made by the authority and for behoof of James Montgomery & Company, for the purpose of beginning said business." Now, had that averment been true, the legal import is that Loudon & Montgomery carrying on business together were the purchasers of the billiard tables, and so were liable for the price; but it is not true. The billiard tables were sold in December 1879, before Loudon became a partner, which he did on 30th September 1880. How did Loudon become liable for the price of the billiard tables? He was not liable for anything done in the business in 1879, nor in 1880 till September. The billiard tables were sold and delivered to Montgomery alone on his sole credit, and so matters stood during that year. When did delivery to him become delivery except on his sole liability? When was any other security than his own given for the price? The only averment on this point I can find is in cond. 8—"At entering into partnership with Montgomery, the defender Loudon was aware that the purchases from the pursuers which formed the principal partnership stock-in-trade had not been paid for." In these circumstances it is said Loudon became further security for these billiard tables. Now this must depend upon some general proposition of law applicable to the fact that he became Montgomery's partner a year after the sale. The proposition can be none other than this—if a man join the keeper of a billiard saloon he becomes liable for all the debts he owes connected with the business previously carried on. I should say there was no authority for that proposition, and that it was an irrational statement. Liability would go back as far as debts could be proved. It is sought to limit this contention by saying that in order to the assumed partner being held liable he must take over the assets—but what assets did Loudon take over? And does it mean any asset, or is it material that the asset includes the goods the price of which is in question. Then, suppose the debt is the price of goods, and that the goods have been taken over, does the taking of these goods over import liability. If so, I put the question to counsel—Is any possessor of these liable? The answer was, No, but only if he is a partner; but what is the difference? I think you have brought it to this, that the possession of goods renders the possessor liable—the fact that he is a partner does not seem material. Taking all the facts—and they seem to be in two lines—I am of opinion there is no ground of liability. I cannot hear disputed, without entering my protest against the dispute, what I consider trite law, that a partner has any liability for any profit or loss incurred before he entered the concern. I think these are rules which we have always considered to be settled, and known to be acted upon in the business world; but we are not concerned with any more general views than are sufficient to dispose of the present case.

Lord Rutherfurd Clark—I am also of the same opinion, and am glad I can hold that opinion without entering upon the question of law which this case raises before us. The ground of the action is that the defender Loudon had entered into a partnership with Montgomery, the object of which was to carry on an existing business, and further, that the whole assets of the business should be taken over, and were taken over, by the copartnery. I am not going to consider if these considerations import or do not import liability; all I am going to say is that the facts are not proved. I doubt if Montgomery had any other asset than the billiard tables, but even if he had not there is no evidence sufficient to instruct the facts from which it is attempted to force liability on Loudon.

Lord Craighill—I also think that the interlocutor of the Sheriff should be affirmed and the appeal be dismissed. I am glad I can do so without deciding all the questions which have been presented in the course of the argument, or saying anything as to the *dicta* of Lord President M'Neill and Lord President Inglis, of Lord Ivory and Lord Cowan, which were cited by counsel for the appellant, except that on the present occasion it appears to me to be unnecessary to come to a conclusion on that subject. My grounds simply are—(1) that all are agreed that liability for the debts of a pre-existing business does not arise merely from joining a new partnership by which the same business is to be continued; (2) that there is no express obligation undertaken by the new company to pay the debts of Montgomery, the person who succeeded in the business, nor was there in their conduct of the business any recognition of such liability; that there is no evidence here that all the assets of the business carried on by Montgomery prior to the partnership were made over to the new company; and (3) that, moreover, it is not proved even that the billiard tables, part of the price of which is sued for, were transferred by Montgomery, the original debtor of the pursuers, to the partnership. Indeed, so far as the weight of the evidence is concerned, the property of these tables remained with Montgomery. These being, as I think, the facts, I am free to hold, without running counter to any of the *dicta* referred to, that liability against the defender Loudon has not been established.

The Court pronounced this interlocutor—

"Find that the billiard tables in question were supplied by the pursuers in December 1879: Find that the defender Loudon was not then or before the 30th September 1881 a partner or joint-adventurer with the defender Montgomery, and that the contract of copartnery entered into by them does not bear, and that it is not proved, that the copartners undertook the obligations of Montgomery, or that any part of his assets was made over to them: Therefore dismiss the appeal, affirm the judgment," &c.

Counsel for Appellant—J. P. B. Robertson—M'Lennan. Agent—James Skinner, Solicitor.

Counsel for Respondent—Guthrie Smith—Brand. Agent—John Gill, S.S.C.