No. 39. them; and therefore found that Young and Govan should bear Harry Hope's part, who was *lapsus bonis*.

Fol. Dic. v. 2. p. 380. Newbyth MS. p. 47.

*** Dirleton reports this case:

1665. *December* 19.—WALTER YOUNG, Harry Hope, and John Govan, having written to the Lord Macdonald, that they had commissioned ——— Donaldson to buy cows for their use, and that for such as should be bought from him, they obliged themselves to pay all such bills as should be drawn upon them; and the said Donaldson having drawn a bill upon the said persons, and any of them;—found, that in respect they were partners, and *socii* as to the bargain, and the Lord Macdonald had upon their letter trusted and sold the cows to the said Donaldson, they ought to be liable *in solidum* conjunctly and severally.

Dirleton, No. 8. p. 5.

*** Stair's report of this case is No. 36. p. 2282.

1683. *March.*

JOHNSTON *against* SIR WILLIAM BINNING and BAILIE NIELSON.

No. 40. FOUND that the buying of bear by the clerk of a brewery, which came to be brewed there, made the masters of the brewery, who were *socii*, liable *in solidum* for the price of the bear, though the seller had no written receipt from the clerk or maltman; but that it was only proven by witnesses, and acknowleged by the clerk, that the same was delivered and brewed.

Fol. Dic. v. 2. p. 380. Harcarse, No. 854. p. 243.

*** The like was found February and March 1603, Dionysius Thomson *contra* Penman and others; and the like *contra* Sir James Stamfield, though here the clerk's commission in writ did not extend to the power of buying, which seems hard upon masters.

Harcarse. Ibidem.

1698. *January* 26.

BAILIE ALEXANDER BRAND *against* WARDEN and BUCHANAN.

No. 41. WARDEN and Buchanan having employed one to go to Orkney to buy some bear, and their factor having entered into a contract with Bailie Brand, then Steward of Orkney, and having bound his constituents; when they are charged, they suspend, that they can only be liable *pro rata*, because there is a clause of relief. Answered, Your *exercitor* or *institor* was fully by his commission empowered to

make bargains, and bind his constituents for the same; and *ex natura societatis* they are all liable *in solidum;* and the Lords now found them to be so, and not singly *pro parte virili.* No. 41.

Fol. Dic. v. 2. *p.* 380. *Fountainhall, v.* 1. *p.* 815.

1742. *June* 10.

DAVID RAMSAY, Shipmaster in Leith, *against* JOHN BALFOUR.

No. 42.
Insolvency of a partner, upon whom the loss lies?

DAVID RAMSAY having brought home some velvets, by commission, for Archibald Balfour and Samuel Welsh, merchants in Edinburgh, they paid him the prime cost of two thirds thereof, and agreed to give him a third share of the profits in disposing of the same, conform to an obligation, wherein they acknowledge the receipt of the velvets, and that he had paid one third of the price. "Therefore they oblige themselves to hold account to him for the third part of the neat proceeds of the sales of said goods, he always running all risks, according to his proportion, in all shapes with them." Part of the velvets were given to Patrick Manderston, merchant in Edinburgh, to be disposed of for their behoof, and he in his books gives them credit for the sum of £.117 Sterling, as the proceeds thereof; and marks the same on the back of a bill, which Balfour and Welsh had accepted, payable to Manderston. Shortly after, Samuel Welsh gave way; whereupon Ramsay brought a process against John Balfour, as representing Archibald his brother, to account to him for the third of the neat proceeds of the velvets. The defence was, That Archibald Balfour was not liable for Welsh's insolvency, and that he, the defender, was willing to implement Archibald's part, but was not bound to implement what was incumbent on Welsh.

Answered: That the co-obligants were liable conjunctly, though not conjunctly and severally; the effect of which behoved to be, that the one failing, the other was liable in the whole; for, without division or separation, they grant receipt for the cargo, and oblige themselves to hold account; which is just the same as if they had said, we bind ourselves conjunctly to account: And this being fixed, the consequence is, that Archibald was liable *in solidum*, both because the performance in this case is indivisible, and also because the other co-obligant is bankrupt. The trust reposed in Balfour and Welsh was plainly indivisible, and the consequential obligation, to account for the proceeds, must partake of the nature of the principal obligation. But even supposing the original obligation divisible, yet, even there, one of the obligants proving insolvent, the other is liable *in solidum*, because they are bound conjunctly. The goods were delivered to the obligants as partners, and they were to have the sole disposal; they could run no risk by the pursuer's bankruptcy, as little ought he by the failure of any of them. And as to the clause in the obligation, he running all risks, it means no more than such as the obligants should run in common, such as bad debtors, fire, &c. which it was most reasonable the pursuer should run as well as the others, since he was to have a