

1777.

MITCHELL  
v.  
GOVERNOR AND  
COMPANY FOR  
RAISING  
WATER, &c.

Haining belonging to him, fell to the Crown. It was sold to the respondents, the York Buildings Company, "with the " town and lands of Madiston, with coals and coal heughs " of the same," &c.

A suspension and interdict was brought by the appellant against the respondents and their tenants of the coal, in which he made claim to the full right in the coal of these lands, under the circumstances above stated.

Jan. 31, 1776.

The Lord Ordinary pronounced this interlocutor: "Having considered this representation and answers thereto, and " state of the process, Find that the York Buildings' Com-  
" pany has right to the coal in the lands in question, and  
" that Mr Livingstone Mitchell has no right thereto; finds  
" that the York Buildings Company's tacksmen have right  
" to continue their possession of the said coal; assoilzies the  
" defenders from the process of declarator; finds the letters  
" orderly proceeded with, and discharges the caution for  
" damages found by the Earl of Errol, and James King (the  
" tenants), and decerns."

July 10, 1776.

On reclaiming petition, the Court adhered, and on a second reclaiming petition the Court again adhered.

Nov. 29, 1776.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Henry Dundas, Al. Wedderburn, J. Dunning.*

For the Respondents, *E. Thurlow, Alex. Wight.*

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BLAIR  
v.  
DOUGLAS, &c.

[Fac. Coll., Vol. vii., p. 194; et Mor. 14,577.]

DAVID BLAIR, Esq. of Dunskey, . . . *Appellant;*

Messrs DOUGLAS, HERON, and Co., . . . *Respondents.*

House of Lords, 30th April 1777.

PARTNERSHIP—ARTICLES.—In the articles of copartnery of the Douglas, Heron, and Co.'s Banking Company, it was provided that the heirs and executors of a deceasing partner should be obliged

to receive and draw his share in the stock and profits thereof, as the same should be ascertained by the last balance struck immediately preceding his death. The last balance was struck in November 1771. The appellant's brother died in October 1772; but in June 1772, the Company had become insolvent. In an action raised by the appellant, held that the clause of the contract could not apply to the circumstances of this case, in respect the Company had become bankrupt several months before Mr Blair's death.

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 BLAIR  
 v.  
 DOUGLAS, &C.

The late John Blair of Dunskey was an original partner of the Banking Company of Douglas, Heron and Co., holding two shares of £500 each, in their capital stock, of which £775 had been paid up, as appeared from the receipts and the books of the Company.

In the seventeenth article of the partnership agreement, the following provision was contained, "That in the event of  
 " the death or insolvency of any of the partners, the heirs,  
 " executors, or assignees of the deceased, or creditors of the  
 " insolvent partner, shall be obliged to receive and draw their  
 " share in the stock and profits thereof, as the same shall  
 " stand at the last preceding settlement of the Company  
 " affairs, with interest thereof at 4 per cent. from that settle-  
 " ment, till payment is demanded, and the legal interest  
 " thereafter, till complete payment." And, by another article, the Company's affairs were to be balanced once a year. John Blair, above mentioned, was the brother of the appellant, and died on 17th October 1772; and the appellant having been decerned his executor, he became entitled to the deceased brother's share in the said Banking Company, and the profits due upon it as the same stood settled and valued at the balancing of the Company's affairs last preceding his brother's death.

Upon the ground of the clause of co-partnery above quoted, the appellant transmitted to Mr Christian, the Company's cashier, a note signed by himself, declaring his intention of not continuing a partner in his brother's place, but, on the contrary, demanding payment of his brother's two shares, as valued at the settlement immediately preceding his brother's death; but the Company alleged that they held the appellant to be a partner, as succeeding in the room and place of his brother. The Banking Company, it appeared, had become insolvent in the month of June 1772, before the appellant's brother's death.

The appellant brought an action against the Company, for

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an account of the two shares in question, according to the settlement immediately preceding John Blair's death.

The Lord Ordinary pronounced this interlocutor:—"In respect that the Banking Company of Douglas, Heron, and Company, stopped payment on the 25th of June 1772, several months prior to the death of the pursuer's brother, in whose right he claims: Finds that the seventeenth article of the contract of the co-partnery does not apply to this case, therefore, assoilzies the defenders from this action and decerns, superseding extract till the second sederunt day of June next."

July 21, 1775.

On a reclaiming petition, the Court were first of opinion that the respondents were "accountable for the value of his brother's shares, as ascertained by the balancing of the Company's books in November 1771; and remitted to the Ordinary to proceed accordingly." But, on a reclaiming petition for the respondents, the Court pronounced this interlocutor:—"The Lords having advised the said petition, with

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the answers, and heard parties' procurators on the cause, in presence, with what is above set forth, and that it is asserted by the procurators for the defenders, and not denied by the procurator for the pursuer, that between the balancing of the Company's books in November 1771, and Mr Blair's death in November 1772, the said Company became totally insolvent, in manner above set forth; therefore find that the petitioners are not accountable to the respondent for the value of his brother's share, as ascertained by the balancing of their books in November 1771; and remit to the Lord Ordinary to proceed accordingly."

Against this interlocutor the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutor complained of be, and the same is hereby affirmed.

For the Appellants, *Ja. Wallace, Ar. MacDonald.*

For the Respondents, *E. Thurlow, Al. Wedderburn, Alex. Murray, Alex. Wight.*