peal be dismissed, and that the interlocutors therein complained of be affirmed, with £100 costs: but without prejudice to any such question when it may arise.

For Appellant, *Ed. Law, M. Nolan, David Monypenny.*
For Respondent, *R. Dundas, Wm. Adam, Mat. Ross.*

NOTE.—Unreported in the Court of Session.

THOMAS FORSTER, JAMES KIBBLE, JAMES BUCHANAN, and PATRICK KILGOUR, Surviving Partners of the Bonhill Printfield Company, - - - - - } *Appellants;*

MRS. MARY PATERSON, Relict of the Deceased ROBERT ORR, Manufacturer, also Partner of the said concern, and Others, his Trustees, ... } *Respondents.*

House of Lords, 26th Feb. 1802.

COPARTNERSHIP — DISSOLUTION — SETTLEMENT OF PARTNERS' SHARE.—By a clause in a contract of copartnership, it was provided that a balance should be annually struck, ascertaining each partner's share of stock, and his share of profit and loss, and that this was to be signed and engrossed in the sederunt book of the company. No exact date was fixed for this; but the balance continued to be struck annually in May. There was another clause of the contract, which provided, in the event of the death or insolvency of any of the partners, it was optional in the survivors to wind up the concern, or to pay the representatives of the deceased partner, or the creditors of an insolvent one, his share in the concern, as it was ascertained by the last balance. The last balance struck in the concern in question was on 10th May 1796, amounting to £8522 of clear profit. There ought to have been another balance struck in the following May 1797, but was not done. Mr. Orr, one of the partners, foreseeing his own death as probable, had repeatedly required the partner manager of the concern to strike the balance for that year, and took a notarial protest against his refusing to do so. He died in the end of July following; and the company having contended that they were liable only to account for his share, according to the last struck balance; Held them liable according to the balance that ought to have been struck in May 1797 before his death. Affirmed in the House of Lords.

The appellants, and the deceased Robert Orr, were partners in the Bonhill Printfield, carried on near Dumbar-

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Sep. 25, 1794.

ton. The contract was entered into of this date, and it expressly provided that the concern was to be divided into fourteen shares of £750 each, and each partner was to have so many fourteenths. The fourth article of the contract provided that the "books of the company, and stock in "trade, shall be regularly balanced once in the year, and a "minute thereof made out, and engrossed in the company's "sederunt book, ascertaining each partner's stock in trade, "and share of profit and loss; which minute being signed "by a majority of the partners, shall be equally valid and "binding upon the whole partners, as if they had been "present and signed the same."

By the sixth article, it was agreed, "That in case of the "death, or insolvency of any of the said partners, it shall be "in the power of the surviving and solvent partners, within "thirty days after such death, or notour bankruptcy, either "to dissolve the company, and to wind up the company's "concerns, or, in their option, to pay the creditors, or repre-"sentatives of such deceased or insolvent partner, his share "and stock in trade, as it stood ascertained by the last "signed balance in the company's books, after retaining as "much as will pay all debts due by him to the company, "payable the said free balance, at the expiry of six, twelve, "eighteen, and twenty-four months after such death or in-"solvency, in equal proportions, with the lawful interest "from and after the date of the signed balance, and until "payment; and, in that case, the heirs or creditors of such "deceased or insolvent partner, shall have no right to ex-"amine into the company's books, further than to see the "last signed balance."

The business was entered into, and Mr. Forster acted as manager of the concern. For the first year, a balance in favour of the company was adjusted on 25th May 1795, amounting to £2079. 19s. 10d.; and, in the following year, the balance struck in favour of the concern, on 10th May 1796, was £8522, making in all £10,601. 19s. 10d.

Mr. Robert Orr died 9th July 1797; no balance was made up for that year ending on 25th May. Mr. Orr, before his death, had frequently urged this, and had protested against any loss accruing to him or his representatives, in consequence of Mr. Forster's and the other shareholders' neglect to make out a balance sheet for the year ending 25th May. Action was then raised by Mr. Orr's representatives for payment of his share of stock as at 25th May 1797, including the profits preceding that period, and to

make payment to them of the amount thereof, at the periods specified in the sixth article of the contract.

The Lord Ordinary ordered the active manager to produce the certified copies of the signed balance of the company's transactions for the years 1796 and 1797, as the same were docqueted and signed in the company's books.

The appellants represented against this order, contending that they were only liable, according to the sound construction of the contract, for Mr. Orr's "share and stock in "trade, as it stood ascertained by the last signed balance "in the company's books," and that, in terms of the said contract, Mr. Orr had no right to examine into the company's books further than to see the last balance, and therefore maintained that they had no right to enquire into the company's affairs after the balance of 1796; and craved the Lord Ordinary to alter accordingly. On this point the Lord Ordinary ordered memorials; but as the balance, as struck at 1796, was not disputed, and as interim decret was craved, this balance sheet was ordered to be produced. Upon production of which, he decerned for £2469. Against these interlocutors a representation was lodged, which was superseded until the memorials formerly ordered should come to be advised. The question was, Whether Mr. Orr's share ought to be calculated according to the last balance struck in 1796, or according to the balance that ought to have been struck in May 1797, but which had been erroneously neglected to be struck, recently before his death? and whether he was to be deprived of the benefit of the last year's profits, merely because the manager did not think proper to strike the balance? It was maintained by Mr. Orr's representatives, that as his death was foreseen, he had, under formal protest, required the manager of the company to make up the books and strike a balance, in terms of the contract, as neglect to do so might materially affect his interests; that this having been neglected, he was entitled to an accounting on the footing of a balance being struck at 25th May 1797. Nor was the sixth clause in the contract above quoted, any answer to this, because, in other clauses, it was expressly stipulated that the books and stock in trade should be regularly balanced once a-year; and this last clause must be read in connection with the first. On the other hand, the appellants maintained that the sixth article was express on the subject; and referred to the last struck balance in general terms, as the criterion and rule for regulating a deceasing partner's share. That this ne-

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cessarily foreclosed all further inquiry into the concerns; and that the respondents, Mr. Orr's representatives, could not complain, because, had there been a loss for the last year previous to 1797 instead of a gain, they acknowledge that they would have been exempt from all liability. Besides, the balance of 1796, and the company's affairs, were under judicial discussion, and the manager was not warranted to make out any new balance until this dispute was settled, and the parties satisfied with the former balance.

Feb. 24, 1800.

The Lord Ordinary pronounced this interlocutor :—" The " Lord Ordinary having advised the mutual memorials for " the parties, and having resumed consideration of the re- " presentation given in by the defenders against the inter- " locutor of the 2d of March 1799, with the answers there- " to, finds that the defenders do not allege that any thing " had occurred in the condition of the company's trade " which, in its own nature, made it improper that the books " should be brought to a balance as at the usual period in " May 1797, and the shares of the partners ascertained, in " terms of the contract of copartnery ; and finds, that al- " though they state it to have been incongruous on the part " of the deceased Mr. Robert Orr to insist on this being " done, while at the same time he, in conjunction with the " two defenders, Messrs. Buchanan and Kilgour, was chal- " lenging the former balances made up by Thomas Forster, " the managing partner, as erroneous, and was endeavour- " ing, by a course of proceedings at law, to have him re- " moved from the management, yet it is not stated, and " does not appear to be the fact, that those proceedings " would occasion any difficulty whatever to Mr. Forster in " stating the balance, and submitting it to the partners for " their approbation; and the Ordinary is of opinion that " Mr. Forster, having been continued in the management of " the company's affairs during the pendency of the proceed- " ings carried on by Mr. Orr, and those concurring with " him, it was his duty to proceed in every part thereof ac- " cording to the just interest of all concerned, notwith- " standing the disputes which subsisted among them : " Finds that he, Mr. Forster, did wrong in not bringing " the books to a balance as at the usual time in May 1797, " especially when required so to do by Mr. Orr under protest; " and finds that the explanations which he now gives of his " conduct in this respect, are in a great measure inconsistent " with what is set forth by him in his answer to the protest " above said; and, on the whole matter, the Ordinary repels

" the plea stated by the defenders, that they are bound to " account only for Mr. Orr's share, as ascertained by the " balance of 10th May 1796; and finds that they must ac- " count for his share as it stood at the usual period of stat- " ing the balance in May 1797; and in respect it is admit- " ted that the books have been brought to a balance as at " the period above said, although this is alleged not to have " been done till after Mr. Orr's death, ordains the defenders " to produce a certified copy of the balance sheet, in order " that the share to which the pursuers, as in right of Mr. " Orr, are entitled, may be ascertained; and further, finds " that it is admitted by the defenders, that they are at all " events liable to the pursuers to the extent of Mr. Orr's " share, as ascertained by the balance sheet of May 1796; " and that they do not pretend that there is any debt owing " to them by Mr. Orr, which they are entitled to retain out " of it; and the Ordinary is of opinion that the defenders " are not well founded in maintaining that they are not " bound to pay the sum confessedly due, unless the pur- " suers shall abandon the larger claims in which they are " insisting; and, therefore, of new finds the defenders liable " in the interim, in the payment to the pursuers of Mr. " Orr's share, according to said balance, and decerns against " them, conjunctly and severally, for payment of the sum of " £3292. 7s. 5d., being the amount thereof, and that at and " against the term of Whitsunday next, and allows an inte- " rim decreet to that effect to go out and be extracted; but " reserves consideration of the pursuers' claim for bygone " interest, and also of their claim for the expense of ex- " tracting an interim decreet, until the final issue of matters " in dispute; and, with these variations, refuses the said re- " presentation against the interlocutor of 5th March 1799; " and prohibits any more representations to be received; " and likewise, in respect it appears to the Ordinary inex- " pedient that the question should go before the Court in a " divided state, dispenses with any representation against " any part of this interlocutor." On two consecutive re- claiming petitions the Court adhered.

May 13, 1800.
May 30, ——

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

Pleaded for the Appellants.—The sixth clause in the articles of copartnership, upon which the appellants founded their defence, is positive and express, " that in case ot " the death or insolvency of any of the said partners, it shall

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"be in the power of the surviving and solvent partners, "within thirty days after such death or notour bankruptcy, "either to dissolve the company, and to wind up the com- "pany's concerns, or, in their option, to pay the creditors "or representatives of such deceased or insolvent partner, "his share and stock in trade, as it stood ascertained by the "last signed balance in the company's books, after retain- "ing as much as will pay all debts due by him to the com- "pany," &c.; "and, in that case, the heirs or creditors of "such deceased or insolvent partner, shall have no right to "examine into the company's books, further than to see the "last signed balance." And, therefore, by the express terms of this clause, the appellants were entitled to avail themselves of their option, and therefore to settle with the respondents agreeably to the balance of 10th May 1796. And there is no foundation for the respondents' plea, that the clause of the copartnership founded on by the appellants, must be read under the condition "that a balance "should actually have taken place at the usual period of "balancing." If the surviving partners had been to blame, or in *mala fide* in not making up the balance sheet, there might have been a case, but no such blame attaches. Mr. Orr's representatives must submit to the conditions prescribed by the contract in settling with them.

Pleaded for the Respondents.—The contract of copartnership stipulates "that the books and stock in trade shall "be regularly balanced once in the year, and a minute "thereof made out and engrossed in the company's sede- "runt book, ascertaining each partner's stock in trade, and "share of profit and loss;" and it is only proceeding on the supposition that this article was to be punctually complied with, that it is further provided by the sixth article, "that the creditors or representatives of a deceasing or in- "solvent partner, are only to be entitled to his share, and "stock in trade, *as it stood ascertained by the last signed "balance in the company's books.* If the latter words were to be taken by themselves, and a judaical construction to be put thereon, it might be alleged that the heirs or creditors of a deceasing or insolvent partner, would be entitled to nothing more than his share of the stock, as it stood at the last balance, though none such had taken place for several years preceding the death or bankruptcy, while, in the meantime, great profits might have been realized, from all participation in which they would be totally debarred.

But this construction is at one glance manifestly unjust and preposterous; and the sound view, is that which makes the clause founded on by the appellants, subject to, and qualified by the condition contained in the clause as to balancing the books and stock regularly every year. Were a contrary rule to hold, it would lead to the most dangerous consequences. They might retain from the deceasing partner the whole profits for the years during which no balance was struck. On this view the Court of Session decided the case of the Dumbarton Glass Works. In the contract, there were clauses precisely similar to those which occur in the present case, declaring that a balance should be annually struck, and that it should be in the option of the company to hold the shares of deceasing and insolvent partners, at the value put upon them in this balance. Mr. Dunlop of Garnkirk purchased a considerable share in these works, after which no balance was struck for two or three years, and, in the meantime, he became bankrupt. The other partners then declared their option to hold the share, as it stood at the preceding balance; that is, the balance which had been actually struck and signed at the distance of two or three years preceding. On the other hand, his creditors contended that his share must be taken and paid for as it stood at the period immediately preceding the bankruptcy. The Court decided on the latter footing. Even if the failure to strike a balance had arisen from accident, or some unavoidable cause, still Mr. Orr's share ought to be calculated and paid as from the date when the balance ought to have been struck. This is the more imperatively the result, where negligence and blame are apparent in the circumstances of the case. Here the company and its manager were specially required to strike a balance, and a protest taken on refusal.

After hearing counsel,

LORD THURLOW said,—

" My Lords,

" The matters in dispute between the present parties consist of two points; 1st. At what period the settlement of accounts shall be held to have taken place, so as to regulate their several interests? The appellants insist that the balance of 1796 shall be the rule, while the respondents contend for that of 1797. The 2d point is, if an interim decree given for a partner's share, as by the balance of 1796, be well founded?

" The first point lies in small compass. Five gentlemen enter

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into a partnership to carry on business together for twenty years, and Forster, one of the partners, is appointed to be manager, and to keep the company's accounts. By the articles executed, he bound himself to act in that capacity. (Here his Lordship read the articles of copartnership, particularly the fourth and sixth, founded on by the parties.)

"It is admitted on both sides, that, in point of fact, the balance of 1796 was the last signed balance. The pursuers in this action proceeded against the appellants, on the ground of the balance which ought to have been made in May 1797, but which had been fraudulently, as they contended, withheld. The Court of Session, your Lordships know, is a court of equity, as well as of law, and might give relief in a case of fraud, or even in a case of accident. But I think here the putting off the balance was premeditated, and I must express my great disapprobation of the conduct of the parties.

"Mr. Orr, one of the partners, became infirm in health early in the year 1797, and he, looking to the clause in the articles which directed the balancing once in the year, after the usual period was past, became very anxious for a settlement up to the 10th May 1797. It was the duty of Forster to have done so; he was liberally paid for his trouble in managing the company affairs; but I fear much he held out, in consideration of Mr. Orr's declining health.

"What is the answer made to the respondent's demand? It is, that the balance was not signed at Mr. Orr's death, no matter for what reason, and therefore the respondents must be contented with the balance of 1796.

"It was said that it was not in Forster's power to make a balance, because Orr and two other partners had brought an action against him to get up the books, and remove him from the management; that in this action his accounts had been said to be erroneous, and that, as the settlement of 1796 was to be the foundation of that of 1797, there could be no balance while the matter was *sub judice*.

"But why was the matter *sub judice?* The majority of the partners had, by the articles, a clear right to displace Forster, if they chose to do so; and it was not necessary for them to say more than that such was their pleasure. I see a good deal of impertinent matter stated on this subject; but why it was stated, except for the purpose of swelling the record, I do not perceive.

"It was said that the surviving partners had an option, either to dissolve the copartnership, or settle accounts by the last signed balance. They had such option, and they have gone on with the adventure. That the accounting was delayed on account of Mr. Orr's bad health seems so clear, that one would wonder what could be said to the contrary.

"The interim decree proceeds on different grounds. It was agreed on both sides, that the respondents were, at all events, entitled to their share as by the settled balance of 1796; and the Court,

therefore, most justly, according to their practice, when there is no officer appointed to receive monies paid into Court, ordered the ascertained sum to be paid in the meantime. Something has been said here with regard to interest, which I did not understand. The matter of interest is clearly reserved by the interlocutor for further consideration.

"This appears so plain a case, tainted by the conduct of the appellants, and where they have been the cause of so much unnecessary delay, that though I am seldom inclined to give costs on appeals, I conceive this case fit to be so marked by your Lordships."

On his Lordship's motion, the case was then affirmed, with costs.

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £100 of costs.

For Appellants, *Wm. Alexander*, *John Clerk*, *M. Nolan.*

For Respondents, *Edw. Law*, *Wm. Adam*, *Chas. Hay.*

NOTE.—Unreported in the Court of Session.

(M. App. I. Usury, No. 1.)

WILLIAM WALKER, Merchant in Berwick; Messrs. SURTEES, BURDON and EMBLETON, Bankers in Berwick; Messrs. CLUNIE and HOME, Merchants in Berwick; JAMES SHERIFF, Merchant in Edinburgh; JOHN JAMIESON and SON, Merchants in Leith, and Others, Creditors on the Estate of Messrs. SINCLAIR and WILLIAMSON, Merchants in Leith, . . *Appellants;*

ROBERT ALLAN, Banker in Edinburgh, *Respondent.*

House of Lords, 2d March 1802.

USURY — ACT OF 12 QUEEN ANNE, c. 16. — ACT 31 ELIZABETH, c. 5.—(1.) A firm in Leith were in the habit of raising money by means of discounting bills with Mr. Allan, a banker. Mr. Allan charged a deduction for discount on these, ranging from ten to six per cent. And, in the several settled accounts for a period of several years, the balance, including commission, was always carried to a new account, and made to bear interest. On their bankruptcy, the creditors objected to Mr.