

ground, then I apprehend, that viewing the respondent in the situation of Feb. 28, 1826. a bankrupt who has properly surrendered up all his property to his creditors, who, it appears by the decision of the Court of Session, has, in the opinion of the majority of his creditors, acted honestly under the sequestration; and considering that this petition complained of the discharge of a bankrupt under such circumstances, your Lordships, if the appeal appear to be unfounded, will take care, that a bankrupt who has been thus dragged before your Lordships' house, shall be fully indemnified against the expenses which he has incurred in being brought here to support the decision of the Court of Session. My Lords, in this case, therefore, I shall submit to your Lordships, not only that these interlocutors be affirmed, but that your Lordships will take care, that that shall be accompanied with such an addition as shall indemnify the bankrupt against the costs he has incurred in supporting his discharge, which he properly obtained, and which has been sanctioned by the Court of Session, after a minute investigation of his case. In this case, therefore, I shall take the liberty of moving, that these interlocutors be affirmed, and that they shall be affirmed with such costs as shall indemnify the bankrupt in coming before your Lordships to support the decision of the Court of Session in his favour.

J. GREGGSON and J. RICHARDSON, Solicitors.

CAMPBELL, RIVERS, and COMPANY, and Others, Appellants.— No. 5.

Adam—Kaye.

DAVID BEATH, Respondent.—*Sol.-Gen. (Wetherell)—Keay.*

Recompense—Partnership—Mutual Contract.—Circumstances under which it was held (reversing the judgment of the Court of Session) that a partner in a joint adventure, the terms of which were arranged by a written contract, had no right to recompense for personal trouble connected with the adventure, for which no stipulation had been made, but which it was alleged was casus improvisus; nor to indemnity for the adventure having been put an end to as ruinous.

CAMPBELL, Rivers, and Company, Thomson, Wright, and Company, and David Beath, engaged in a joint mercantile adventure to India, in terms of the following contract:—

Mar. 3, 1826.
1ST DIVISION.
Lord Alloway.

‘ 1st, That the adventure by the ship Prince Regent, in addition to the vessel purchased for £5250, and the scheme of goods furnished by Mr Beath, shall consist of £10,000—£12,000 sterling in dollars to be purchased and shipped at Gibraltar.

‘ 2d, That of this adventure one half shall be assigned to Campbell Rivers and Company, one fourth to Thompson Wright and Company, one fourth to Mr Beath; in which pro-

Mar. 3, 1826. ' portion each party shall receive gain or suffer loss ; and what-
 ' ever part of the funds required for Mr Beath's interest, that
 ' may be deficient, shall be advanced equally by Campbell Ri-
 ' vers and Company, and Thompson Wright and Company.

' 3d, That, in the event of the prospects appearing to him
 ' favourable, Mr Beath is authorized to remain at Madras, after
 ' dispatching the Waterloo and Prince Regent, with the view of
 ' forming a mercantile establishment at that place ; the respec-
 ' tive parties in this country engaging to declare their intentions
 ' in this regard within one month after the arrival of the ship
 ' Prince Regent, or receipt of advices from Mr Beath, up to the
 ' period of the sailing of that vessel : And the following outline
 ' of an agreement for said establishment was agreed to, subject
 ' to such changes as may be mutually agreed on at a future
 ' period :—

' 1st, That a fixed capital of £60,000 sterling shall be ad-
 ' vanced, to continue during the term of the arrangement, which
 ' at present is not understood to extend beyond 31st December
 ' 1821, interest on the stock being drawn annually, but no part
 ' of the profits till the expiry of the agreement. That a separate
 ' firm, to be afterwards settled, (and to be placéd under the
 ' management in Liverpool of a partner from each of the com-
 ' panies of Campbell Rivers and Company, and Thompson
 ' Wright and Company,) shall be assumed, and the interest of
 ' the parties to be fixed as follows :—To Campbell Rivers and
 ' Company, three eighth parts ; Thompson Wright and Com-
 ' pany, three eighth parts ; David Beath, two eighth parts ditto ;
 ' in which proportion each party advance their share of the
 ' above-named capital ; it being understood that whatever amount
 ' Mr Beath may be deficient, is to be equally advanced by Camp-
 ' bell Rivers and Company, and Thompson Wright and Com-
 ' pany.

' 2d, That Mr Beath will have the management of the com-
 ' pany's affairs in India, with either his store rent, clerks' sala-
 ' ries, and household expenses, allowed him, or a fixed sum in
 ' lieu of the latter, as may be hereafter determined. That such
 ' household furniture as may be considered necessary shall be
 ' purchased and shipped by the Prince Regent, which furniture
 ' will remain the property of the company, should Mr Beath's
 ' permanent residence be determined on, or otherwise to be
 ' considered a part of the adventure by the ship, and sold ac-
 ' cordingly.

' 3d, That should Mr Beath remain in India after the de-
 ' parture of the Waterloo and Prince Regent, and the other

‘ parties in this country not concur in the propriety of prose- Mar. 3, 1826.
 ‘ cutting the business in the manner provided for in the prece-
 ‘ ding resolutions, then a sum, to be mutually agreed on, shall
 ‘ be paid to Mr Beath, as a remuneration for his loss of time
 ‘ waiting such decision from this country, in addition to his
 ‘ necessary expenditure and passage home. The foregoing to
 ‘ be equally binding as if extended in regular contract. Copies
 ‘ of this agreement exchanged at Glasgow, 25th September
 ‘ 1818. (Signed) CAMPBELL RIVERS and Co. Pro Thompson,
 ‘ Wright and Co., A. GORDON. DAVID BEATH.’

In prosecution of this joint adventure, Mr Beath and family proceeded to Madras in the ship Prince Regent, containing part of the goods of the joint adventure. He found that place not so eligible for the establishment as had been anticipated; and therefore, leaving his family at Madras, he went on to Calcutta, from which, on 27th June 1819, he wrote to Campbell Rivers and Company.—‘ I have stated my opinion of my establishment
 ‘ being here rather than in Madras, and the more I see of this
 ‘ place (Calcutta), the more I am confirmed in my opinion. The
 ‘ resources of Madras are nothing in comparison to this, and but
 ‘ one or two ships loaded annually, and the only object in view
 ‘ was cotton, which had, before the bad accounts came out, been
 ‘ so much run upon by every merchant in the place, that it was
 ‘ run up to 45 pagodas per cundy, and even sending agents into
 ‘ the country where it was grown to engross all they could.
 ‘ And the consumpt for goods is equally comparatively small to
 ‘ this; and I never could expect to do much commission business.
 ‘ Ships only call there on their way to this, to try the market
 ‘ with their outward investments; and every object, I think,
 ‘ could be obtained by Mr Maitland remaining there, otherwise
 ‘ paying a commission to Binny and Co.; whereas my establish-
 ‘ ment here, with interest used on your parts at Clyde, London,
 ‘ and Liverpool, I might do something very handsome.’* And the letter concludes with a scheme of goods suited for Calcutta.

In the meantime, Mr Beath had not sailed many months, before Campbell Rivers and Company received information, which made them dread that the perseverance in the joint adventure would prove disastrous. They, therefore, on the 2d February 1819, and while he was on the outward voyage, wrote

* The respondent contended, that the letter proceeded to show that he was about to return to Madras, to remain for advices on the subject from Europe; but this evidence was objected to, and the objection sustained, as not having been read in the Court below.

Mar. 3, 1826. to Mr Beath as follows :—‘ Since you left us, the aspect of commercial affairs has become very gloomy. A general scarcity of money has prevailed, and is daily increasing; the effect has been a decline in almost every description of produce, but particularly cotton, which has fallen more in proportion; and as the stock remaining over from last year is unusually great, the crop in America better than an average, and the importation from India rapidly increasing, improvement in price cannot possibly be expected. On the contrary, we must look forward to cottons being lower than for many years back. Under these circumstances, we are most anxious for the result of the several adventures to India; and trust that advices from hence would reach Mr Maitland in time to prevent any considerable purchases of cotton for the Waterloo, inducing him to prefer investing in price goods at moderate prices, which, though considerably lower than when he left this, would still pay better than anything else from Madras. We also hope that you have succeeded in your views respecting coffee at Ceylon, which, and your purchasing piece goods and such other articles as were pointed out to you, is our only chance of getting off without loss. In this situation of affairs, we are decidedly of opinion that any permanent arrangement for an establishment in India would at present be imprudent; and we therefore wish you to arrange matters so as to return to this country in the ship Prince Regent, when, with your more mature opinion on affairs at Madras, and an improved state of matters here, we may be able to concert between us for prosecuting business in India. This measure we consider preferable to your remaining at Madras at a considerable expense, and much loss of time. Should this not reach you in sufficient time to enable you to return in the Prince Regent, (which in every view would be desirable,) it will remain with yourself to adopt the most prompt measures for bringing your concerns to a close, and come home by an early conveyance. We would, of course, prefer your having the whole of the adventures settled previous to your departure; but, in the event of that not being practicable, we recommend you placing whatever may be left behind in the hands of Messrs Binny and Company, with instructions to invest the proceeds in good bills, and remit the same in the proportions in which we are interested.’

Upon receipt of this letter, Mr Beath dissolved the mercantile connexions he had made in India, and returned to Great Britain. The adventure was ruinous, the loss amounting to above £20,000, and was not further prosecuted.

Some time after, Mr Beath raised an action in the Court of Session against Campbell Rivers and Company, stating, that he is entitled to demand from the defenders a suitable recompense for his trouble and management in selecting, superintending, disposing of, and collecting the price of the foresaid cargo, which was sent from Britain to India on board the said vessel (the Prince Regent), and for his trouble and management in going to India, in order to ascertain and inform the defenders what would be the probable success of the proposed permanent mercantile establishment in India, and to form such an establishment in the event of its being ultimately agreed upon.' Also, that he is 'entitled to reparation of the loss and damage which he sustained in consequence of the defenders' having departed from the foresaid agreement, and thereby not only rendered useless the preparations he had made, at considerable expense, for the residence of himself and his family in India, but also deprived him of the opportunity, which he would otherwise have enjoyed, of employing his capital in the advantageous trade which could then have been carried on between this country and India.' And on these grounds the pursuer concluded for decree against the defenders for payment of '£1500, or of such other sum, more or less, as our said Lords shall be pleased to modify as a recompense to the pursuer for his foresaid trouble and management on behalf of the defenders in the premises; and also, of the sum of £2000, or such other sum, more or less, as our said Lords shall be pleased to modify, in name of damages, and reparation for the loss and injury which the pursuer has sustained in the premises.'

Campbell Rivers and Company maintained in defence, that none of the partners were entitled to any sum in name of recompense for trouble or management. Each looked exclusively to his interest in the joint adventure for the ultimate reward of his exertions. If the pursuer superintended the business abroad, the defenders had their share of management at home. Besides, it was distinctly stipulated that the pursuer was only to have his 'store rent, clerks' salaries, and household expenses allowed him,' unless he remained in India after the departure of the vessel, which he did not do. Neither had the pursuer any claim of damages, because no mercantile establishment was formed. The business was contemplated to be carried on at Madras, but the pursuer admits that business could not have been profitably prosecuted there, and, in point of fact, formed no establishment there; and even as to an establishment there, the defenders had reserved, by the agreement, a

Mar. 3, 1826. right to concur or dissent. The pursuer was only entitled to his necessary expenses there, and a passage home, which he has received.

The Lord Ordinary found, ' That, from the nature of the
' agreement betwixt the parties, the pursuer was induced to go
' to India, having a certain share in the concern with the defend-
' ers, with the view of establishing a mercantile concern in In-
' dia—that it was provided by the agreement betwixt them,
' that, should the pursuer remain in India after the departure
' of the Waterloo and Prince Regent, and the other parties
' should not concur in the propriety of prosecuting the busi-
' ness, then a sum, to be mutually agreed upon, should be
' paid to the pursuer as a remuneration for his loss of time
' waiting such decision from this country, in addition to his
' necessary expenditure and passage home—that, within three
' months after the pursuer's departure from this country by
' the ship Prince Regent, his partners, discovering that the
' trade would be most ruinous, and by which it is said that
' the company have lost to the amount of £20,700 upon the
' cargoes of two ships, the Waterloo and the Prince Regent,
' they immediately wrote him, that they had abandoned their
' intention of a mercantile settlement in India, as, from the state
' of the markets, it would be most ruinous, and desiring him to
' come home by the Prince Regent, which he accordingly did ;
' and therefore found, that by the clause in the agreement, as
' he did not remain in India after the departure of the Prince
' Regent, he could not have a claim under it for a remuneration
' for his loss of time. But found, that independent of that clause
' altogether, the pursuer has a claim for some indemnity for his
' having acted as supercargo on board these vessels, and for his
' loss of time for having embarked to India with the view of
' settling there, for the benefit of the common concern, which
' could never have been proposed to him without some in-
' demnification, if no ultimate settlement did take place in
' India, as, while the other parties were carrying on all the dif-
' ferent concerns in which they were engaged in this country,
' the pursuer, by his going out and coming home in the Prince
' Regent, was exclusively employed in that concern, and could
' be employed in no other ; and therefore he stood in this respect
' in a different situation from the other parties concerned ; and
' his return by the Prince Regent, by the orders of the defend-
' ers, without any settlement in India, for which purpose he had
' carried his wife and family there, being a case unforeseen and
' unprovided for in the contract, he is entitled to a fair indem-

‘ nification on that account from the concern in general : there- Mar. 3, 1826.
 ‘ fore, before farther answer, appointed the pursuer to give in a
 ‘ condescence, in terms of the act of sederunt, stating the
 ‘ precise time he was abroad upon this concern, and the sum he
 ‘ claims on that account.’—To this judgment his Lordship
 adhered,—and on the defenders having petitioned the Inner-
 House, the Court (2d December 1824) refused the petition,
 without answers, and adhered to the interlocutor reclaimed
 against.*

Lord Balgray.—I should like to have an answer to the petition. There was here a joint adventure, the fate of which had been adverse, and all concerned behoved to suffer. I look only to the agreement between the parties, of 3d September 1818. I do not think there was any occasion for Mr Beath to have taken out his family.

Lord Hermand.—I see no occasion for an answer. It is clear that the interlocutor is right. There was obviously a *casus improvisus*, and the respondent is entitled to indemnity, of which neither the caprice of the petitioners, nor the adverse fate of the adventure, could deprive him. The respondent had given time and toil, while the other parties were managing their concerns snugly at home.

The Lord President.—I am equally clear that the interlocutor is well founded. A *casus improvisus* has occurred, and it is out of the question to say, that the petitioners could put an end to the adventure in the manner they have done, without a trial of the adventure ; and refuse the respondent the fair indemnity to which the interlocutor has found him entitled.

Lord Gillies.—I quite agree with Lord Hermand and the Lord President. The respondent’s right to an indemnity,—such indemnity as the interlocutor points at, is not excluded by the agreement. This was clearly a *casus improvisus*, and, moreover, the petitioners were bound to have given the adventure a fair trial. I differ from Lord Balgray, and see good reason for Mr Beath having taken out his family. Though other contingencies may have been unprovided for, that was contemplated by the agreement.

Campbell Rivers and Company appealed from these judgments.

* See 3 Shaw and Dunlop’s Cases, No. 254.

Mar. 3, 1826.

Appellants.—The rights and claims of the respondent must be regulated solely by his written contract with the appellants, and the judgment below is therefore erroneous, as awarding indemnification in respect of this ‘being a case unforeseen and ‘unprovided for in the contract.’—The plea of *casus improvisus* does not in any proper sense apply to the present case. The contract contains materials amply sufficient for determining the matter at issue; there being analogous contingencies thereby provided for, which, by necessary and unavoidable inference, lead to the decision of the point in dispute. He would have had no claim if the Indian establishment had been made, and had succeeded. He would have had no claim if the establishment had been made, and had instantly failed, and been obliged to be given up. He would have had no claim, at least, beyond a mere remuneration for ‘waiting, ‘after dispatching the vessels on their homeward voyage, for decision from this country.’ If a difference of opinion had arisen as to the expediency of forming the establishment at Madras, and the appellants had objected, the respondent was only entitled to a remuneration for loss of time, waiting a decision from Great Britain. But he had not to wait. The contingency of events not appearing favourable, was kept in view in the contract—so is not a *casus improvisus*. And, looking to the ruinous consequences of persevering, the respondent ought (whether he had got instructions or not from the appellants) to have given up all thoughts of the establishment; and, in point of fact, he had ceased to think of settling at Madras—and Calcutta was not the place selected by the agreement. It is therefore incorrect to say, that the appellants had put an end to the establishment. Although the judgment of the Court of Session only finds a sum due, without fixing the amount, the appellants ought not to be forced to go before a Jury, with a finding against them on the law. The time and trouble expended by the respondent, was just part of the stock; and the appellants also contributed time and trouble.

Respondent.—The Court of Session decerns for indemnity to the respondent, for his services as supercargo, and preparatory to establishing in India the business contemplated by the agreement. The precise amount is to be the subject of future consideration. That the plan should have been departed from, by the appellants writing from Great Britain, instead of abiding receipt of letters from the respondent, was a *casus improvisus*, which none of the parties had in view, and against which the respondent is entitled to be protected by a suitable indemnity, in the same way as if the plans had been relinquished in conse-

quence of advices from himself. The ulterior object, in considering the propriety of prosecuting which, much of the time, labour, and expense of the respondent were expended, was defeated by the appellants themselves, which they had no right to do, at least until they had heard from the respondent. They had nothing to manage in this country, he had there the labour of the shipments; and the commencement of the undertaking in India was to depend on his letters. The respondent had the right of judging whether an establishment should be made or not. The correspondence, before the agreement, shows that an indemnity was contemplated. If he had set up his judgment against that of the appellants, and they had recalled him, he would have been entitled to remuneration under the agreement; and he cannot be deprived of that, because the appellants did not allow him an opportunity of giving a definite opinion.

Lord Gifford.—You say it was the respondent's judgment that was to determine whether he was to form the establishment or not. But was it his judgment to form the establishment at Madras? In your summons you do not say that you had resolved to establish yourself there.

Solicitor-General.—The appellants put an end to the agreement; they did not give the respondent time to exercise his judgment. It is too monstrous to hold, that Mr Beath ever contemplated that these services were not to be remunerated.

Lord Gifford.—He had the chance of the contingent profits.

Solicitor-General.—Yes; but then it is clear, that he was also entitled to a consideration, ultra the profits of the partnership.

Lord Gifford.—If he had determined not to remain, and had returned by the vessel to this country, could he have claimed remuneration as supercargo?

Solicitor-General.—No; that would have been his own act. He himself would have been putting an end to the agreement. If there had been no agreement, we hold it clear, that, on the principles of copartnership, the respondent would have been entitled to remuneration, over and above his share of the profits for his extraordinary services.

Lord Gifford.—Whether he stipulated for it or not?

Keay.—We take the case of there having been no agreement at all; and we hold that he would. But he is also protected by the agreement, according to every fair interpretation. Is it possible that the profits on a one-fourth can be considered as an equivalent?

Mar. 3, 1826. *Lord Gifford.*—But can we make a new contract?

Keay.—Under the contract, the respondent went to India to establish a company there, if he approved. If he approves, then he is to get a remuneration on being summoned home. Could he have been compelled to go, had the present plea of the appellants been divulged? No doubt, he was subject to contról; but it is not to be presumed, that he would have been recalled in the face of a favourable report. Therefore, we maintain that the appellants should have waited until the dispatches arrived, and then have made up their minds to prosecute the adventure or not. The establishment was *Indian*, was not necessarily to be fixed at Madras only, and his accounts favourable.

The House of Lords ordered and adjudged that the interlocutors complained of be reversed, and the appellants assoilzied.

LORD GIFFORD.—My Lords, if in this case I had entertained any serious doubts, I should have requested your Lordships' indulgence for a short time before I stated my opinion; but after paying all due attention to the arguments urged at your Lordships' bar, and also to the arguments contained in these papers, I freely own to your Lordships, that I have come to the conclusion that these interlocutors pronounced by the Court of Session cannot be supported.

My Lords, this action arises out of a contract entered into with the respondent and the appellants, Messrs Campbell Rivers and Company, and Messrs Thompson Wright and Company, in the year 1818; and by that contract it appears, that these three parties, Campbell Rivers and Company, and Thompson Wright and Company, and Mr Beath, entered into a partnership transaction, with respect to an adventure in property then about to be sent out to India, in two vessels called the Prince Regent and Waterloo; and by that contract it was resolved, 'That the adventure
' by the ship the Prince Regent, in addition to the vessel purchased for
' £5250, and the scheme of goods furnished by Mr Beath, shall consist of
' £10,000 and £12,000 sterling in dollars, to be purchased and shipped
' at Gibraltar: That of this adventure one half shall be assigned to Camp-
' bell Rivers and Company, one fourth to Thompson Wright and Com-
' pany, one fourth to Mr D. Beath; in which proportion each party shall
' receive gain or suffer loss; and whatever part of the funds required for
' Mr Beath's interest that may be deficient, shall be advanced equally
' by Campbell Rivers and Company, and Thompson Wright and Com-
' pany.' Your Lordships perceive, in this adventure the parties were to be interested in different proportions, and the part of the fund which Mr Beath should not be able to contribute was to be made up by Campbell and Company, and Thompson and Company. My Lords, the agreement then goes on to provide for the establishment of a partnership concern in India, and by the third article it is provided, 'That in the event of the

‘prospects appearing to him favourable, Mr Beath is authorised to remain Mar. 3, 1826.
 ‘at Madras, after dispatching the Waterloo and Prince Regent, with the
 ‘view of forming a mercantile establishment at that place, the respective
 ‘parties in this country engaging to declare their intentions in this regard
 ‘within one month after the arrival of the Prince Regent, on receipt of
 ‘advices from Mr Beath up to the period of the sailing of that vessel ;
 ‘and the following outline of an agreement for said establishment was
 ‘agreed to.’ It then goes on to provide, that a fixed capital of
 £60,000 sterling shall be advanced, and that in this partnership Camp-
 bell Rivers and Company were to be interested in three eighths, and
 David Beath in two eighths : ‘ In which proportions each party advance
 ‘their share of the above-named capital, it being understood that what-
 ‘ever amount Mr Beath may be deficient is to be equally advanced
 ‘by Campbell Rivers and Company, and Thompson Wright and Com-
 ‘pany.’ It then provides, that Mr Beath was to have the management of
 the affairs in India, with either his store rent, clerks’ salaries, and house-
 hold expenses allowed him, or a fixed sum in lieu of the latter, as may
 hereafter be determined ; that whatever household furniture should be
 considered necessary was to be purchased and shipped by the Prince Re-
 gent, which furniture should remain the property of the Company, should
 Mr Beath’s permanent residence be determined, or otherwise to be con-
 sidered a part of the adventure by the ship, and sold accordingly. It then
 provides by the third article, ‘ That should Mr Beath remain in India
 ‘after the departure of the Waterloo and Prince Regent, and the other
 ‘parties in this country not concur in the propriety of prosecuting the
 ‘business in the manner provided for in the preceding resolutions,
 ‘then a sum, to be mutually agreed upon, shall be paid to Mr Beath, as
 ‘a remuneration for his loss of time awaiting such decision from this
 ‘country, in addition to his necessary expenditure and passage home.’

My Lords, in consequence of this agreement, Mr Beath sailed in one
 of those vessels with this joint adventure. After he had sailed, and in the
 month of February 1819, three months after he had sailed, the appellants,
 Campbell Rivers and Company, and Thompson Wright and Company,
 wrote him a letter, intimating their opinion, that in consequence of the then
 state of the market, it would not be expedient that this establishment in
 India should take place; and therefore recommended him to arrange matters
 so as to return by the ship Prince Regent, when, upon his mature opinion
 upon the state of matters at Madras, they might be enabled to concert
 measures for a future establishment if necessary. It appears that Mr
 Beath had touched at Madras in his way out, and went on to Calcutta,
 where I apprehend this letter was received by him ; and this letter was re-
 ceived by him previous to the return of the Prince Regent. In consequence
 of this letter, and as it will also be seen from his own views with respect to
 the establishment at Madras, (as to which I shall advert presently,) he re-
 turned in the Prince Regent to England. He then made a demand upon
 the appellants of two kinds ; first, he demanded a remuneration for the
 trouble to which he had been put in this outward expedition, and in pro-

Mar. 3, 1826. viding the adventure to India, which he considered he was entitled to, he having acted as supercargo ; and he claimed remuneration in that character. I should have stated to your Lordships, also, that this adventure to India turned out a most unfortunate one. The appellants allege that the loss sustained amounted to upwards of L.20,000. My Lords, the respondent also made a demand against these gentlemen for damages, in consequence, as he alleges in his summons, of this letter, written by them to him, recommending and desiring him to return to this country, which he contended was a violation of the contract he had entered into with them, one object being not only the prospect of profit upon the outward adventure, but the contingent prospect of advantage upon that establishment contemplated to be formed at Madras. He therefore in his summons, as I have stated, applied for remuneration for his trouble in superintending and collecting this outward cargo, and superintending the dispatching it to India, and for his trouble in going to India, and also for remuneration for damages in consequence of the defenders having departed from their agreement, and recalled him from India before he had any opportunity of exercising his judgment, whether it would be proper to form an establishment there or not.

My Lords, the defences put in by the appellants were, first,—as to the joint adventure,—that Mr Beath could claim no remuneration, because he was in the situation of a partner ; and where a person engages in the character of a partner, he must be contented with his share of the profits stipulated for in the original formation of that partnership, and bear his share of the loss ; but that he is not entitled to any additional remuneration for any trouble he may have taken in the business, unless in the articles there has been a stipulation to that effect ; therefore, as to his first claim, the defence was, that he was a partner in that adventure, and that in his character of partner he could not claim any particular remuneration for the trouble he had employed in that adventure. As to the second part of his demand, they contended there was no ground for his being entitled to damages in that respect, as the establishment in India depended entirely upon a future contingency, namely, the probability of its being advantageous to form this establishment at Madras ; and that before the return of the Prince Regent, it had been intimated to Mr Beath that the partners here considered it would not be advantageous, and that he, acting upon that, returned in the Prince Regent ; and by the articles he was only to receive compensation for his loss of time while he might be detained after the departure of the Prince Regent, for the purpose of his forming his opinion whether that establishment ought to be formed there or not.

My Lords, upon the matter coming on before the Lord Ordinary, the Lord Ordinary pronounced an interlocutor, which it is very important to call your Lordships' attention to. He finds, ' That from the nature of the agreement betwixt the parties, the pursuer was induced to go to India, having a certain share in the concern with the defenders, with the view of establishing a mercantile concern in India. That it was provided by the agreement betwixt them, that should the pur-

‘suer remain in India after the departure of the Waterloo and Prince Mar. 3, 1826.
 ‘Regent, and the other parties should not concur in the propriety of
 ‘prosecuting the business, then a sum, to be mutually agreed upon, should
 ‘be paid to the pursuer as a remuneration for his loss of time waiting
 ‘such decision from this country, in addition to his necessary expenditure,
 ‘and passage home. Finds, that within three months after the pursuer’s
 ‘departure from this country, by the ship Prince Regent, his part-
 ‘ners discovering that the trade would be most ruinous, and by
 ‘which it is said the Company have lost to the amount of £20,700 upon
 ‘the cargoes of two ships, the Waterloo and Prince Regent, they imme-
 ‘diately wrote him they had abandoned their intention of a mercantile
 ‘settlement in India, as from the state of the markets it would be most
 ‘ruinous, and desiring him to come home by the Prince Regent, which
 ‘he accordingly did.’ Then the Lord Ordinary finds, ‘Therefore, that
 ‘by the clause in the agreement, as he did not remain in India after
 ‘the departure of the Prince Regent, he could not have a claim under it
 ‘for a remuneration for his loss of time.’ I beg your Lordships to ob-
 ‘serve, that the Lord Ordinary expressly finds, there had been no viola-
 ‘tion of the agreement—the counsel for the respondent do not, in argu-
 ‘ment, acquiesce in this finding of the Lord Ordinary; but they have not
 ‘found any fault with this interlocutor, that is, there is no appeal on the
 ‘part of the respondent. It must therefore be taken, that there is no
 ‘breach of the agreement, whereas the summons is founded upon an al-
 ‘leged breach of the agreement, which the Lord Ordinary finds has not
 ‘taken place. Then he goes on and finds, ‘That independent of that
 ‘clause altogether, the pursuer has a claim for some indemnity for his
 ‘having acted as supercargo on board those vessels, and for his loss of
 ‘time, by having embarked for India, with the view of settling there
 ‘for the benefit of the common concern, which could never have been
 ‘proposed to him without some indemnification, if no ultimate settlement
 ‘did take place in India; as while the other partners were carrying on all
 ‘the different concerns in which they were engaged in this country, the
 ‘pursuer, by his going out and coming home in the Prince Regent, was
 ‘exclusively employed in that concern, and could be employed in no
 ‘other; and therefore he stood in this respect in a different situation from
 ‘the other parties concerned; and his return by the Prince Regent, by
 ‘the orders of the defenders, without any settlement in India, for which
 ‘purpose he had carried his wife and family there, being a case unforeseen
 ‘and unprovided for in the contract, he is entitled to a fair indemnifica-
 ‘tion on that account from the concerns in general.’

Now, first, with regard to this claim for indemnification, I must say,
 with great submission to the Lord Ordinary, that he has been making a
 new contract for the parties, instead of looking at the contract itself. I
 say, if a person enter into a partnership concern, in which he contributes
 a certain portion of capital and labour, unless he stipulate that he shall re-
 ceive a greater remuneration for his labours than the other partners, he
 cannot claim it. The Lord Ordinary has found, that although this was

Mar. 3, 1826. a joint adventure to India, yet he is entitled to specific remuneration as the supercargo. It appears to me that that cannot be supported in point of law, these persons being partners in this adventure. If Mr Beath had chosen to have said, and it then would have been competent for the other parties to have considered whether they would acquiesce in it or not;—if he had said, Although you have advanced capital, I am expending all my time, and in addition to that share of the profit, I ought to be entitled to further remuneration for my trouble in procuring the cargo, and superintending its disposal in India, and providing for the return cargo—I say that would have been subject to their approbation; but he has done no such thing by these articles. It therefore appears to me, with great submission to the Lord Ordinary, that instead of construing this contract, he has been making a new contract; and therefore I cannot agree in that part of the finding of the Lord Ordinary, or the interlocutor of the Court of Session affirming that judgment, and finding that under this agreement Mr Beath can institute a claim for remuneration in respect of the adventure out in the character of supercargo, or that in that character he is entitled to remuneration. On the contrary, the defence is a valid defence in point of law, that he was a partner, and must be content with the profit, if any accrued from the partnership, and if any loss, he must sustain his share of the loss, and be content without any remuneration at all.

As to the other part of the case, it is said he is entitled to compensation in damages, in consequence of returning in the Prince Regent, the parties here, by their letter (which I shall call your Lordships' attention to presently), having intimated their opinion that it would not be proper to form an establishment in India. That letter was written three months after the departure of the Prince Regent. (His Lordship here read the letter by the appellants to the respondent.)

My Lords, before the receipt of this letter, it should seem a letter had been written from India by Mr Beath to these gentlemen, upon which considerable comments have been made at your Lordships' bar, in which he strongly expresses his opinion, that in his judgment it would not be desirable to form an establishment at Madras, but that if it was to be formed anywhere, it should be at Calcutta. As far, therefore, as the formation of the establishment at Madras is concerned, it appears that Mr Beath's opinion was in unison with the opinion of the parties at home; but looking at the agreement, it was the intention of the parties, that the establishment, if any, was to be formed at Madras. Your Lordships will perceive, that this agreement looks at the formation of this establishment as a contingent event. It provides for the event of Mr Beath's remaining in India after the departure of the Waterloo and the Prince Regent. If he remained in India for the purpose of seeing whether the establishment should be formed at Madras, without having received any intimation from the parties at home, who were to have the option of determining, the articles provide he shall have a remuneration for his loss of time while so waiting for that determination, in addition to his necessary expenditure and passage home. I should observe here, in passing, that as

to the expenditure and passage home, that is not denied—that has been Mar. 3, 1826. paid—he has received a very considerable sum for that, and there is no question upon it; therefore I say, when Mr Beath went out, it depended upon a contingency whether this establishment was to be formed or not; and if the determination that it should not be formed was come to in time for his return by the Prince Regent or the Waterloo, or if he had come to that determination, I apprehend it is quite clear that the parties never meant to give him any remuneration for his remaining in India. It is expressed, that if he remained in India after the return of the Prince Regent and the Waterloo, waiting the decision from this country, then he is to receive compensation; but providing for that event shows, that, in the other event, if he returned in the Prince Regent, (it having been his own determination that no establishment could be formed there,) in that case he was to be entitled to no remuneration.

My Lords, what are the facts? Before the return of the Prince Regent, he does receive from England a notification of the opinion of the parties here, that no such establishment should be formed. He does not himself allege that at Madras he had taken any means to form such establishment, but at Calcutta he had, and said, that if it was to be formed anywhere, it should be there. He returns in the Prince Regent—he is not detained in India after the return of the Waterloo—he has taken no measures for forming an establishment at Madras—he intimates in this letter, that if any establishment is formed, it should be at Calcutta; and it is quite clear that he conceived that he could form no establishment at Calcutta without the concurrence of his partners at home. He had returned from India in the Prince Regent, not having been detained beyond the return of that vessel, having received that notification from the parties at home, that their clear opinion was that no establishment should be formed there. He then institutes an action for damages upon this contract, which the Lord Ordinary finds has not been broken at all, for his having been put to expenses in taking his family out to form that establishment at Madras, which he took no steps to form, but if he looked to any establishment at all, it was at Calcutta.

My Lords, the Lord Ordinary has said that this was a *casus improvisus*—that the parties never looked at the event that has happened, of his returning in the Prince Regent. My Lords, whatever may be our conjectures as to what parties might have contracted for, or whether they contemplated certain events or not, I apprehend we are to consider the contract according to the language of it. The parties have contemplated that Mr Beath might return in the Prince Regent, and do not stipulate in that case to make him any additional remuneration for any loss of time in India, or any other expenditure; but the only event in which they contemplate remuneration to him, is in case he should be detained there to form his judgment; and if, in the interval between the return of the Prince Regent and receiving communication from home, he has been put to any expense and loss of time, he is to receive remuneration. My Lords, I must confess, however one might be influenced by the supposed hard-

Mar. 3, 1826. ship of this case upon this gentleman, your Lordships cannot proceed upon it: it would be the most dangerous doctrine in the world, if your Lordships, or the Court below, were to proceed upon the supposed hardship of the case, if this hardship should induce you to decide against the stipulations. Whatever may be the opinion as to the hardship of the case, it does not appear to me that the party has sustained any damage in consequence of any violation of this agreement; he has not brought himself within that provision that entitles him to damages,—the Lord Ordinary having found that no breach of the agreement had taken place,—but, as it appears to me, making a new contract on his part, and finding that, in consequence of what has happened, this gentleman is to receive remuneration; there being nothing pointing to remuneration under such circumstances, but, on the contrary, the articles provide he is to receive no remuneration. They contemplate his return in the Prince Regent, in which case it does not provide that he is to receive any additional remuneration, but he is to be content with his share of the profits.

On the whole, therefore, I must say, notwithstanding the great reluctance and great diffidence which I feel upon all occasions whenever I differ from the decision of the Court below; yet when I entertain a very clear opinion that the decision of the Court below cannot be supported, it is my duty to express that opinion to your Lordships; and if your Lordships do not give any intimation of an opinion different from what I have expressed, it is my duty to move your Lordships that these interlocutors be reversed.

JAMES CAMPBELL—MONCRIEFF and WEBSTER, Solicitors.

No. 6.

CLAYTON and Others, (LOWTHIAN'S Heirs-Portioners,)

Appellants.—*Shadwell—Abercromby.*

R. LOWTHIAN, ROSS, and Others, (Executors of LOWTHIAN,)

Respondents.—*Adam—Keay.*

Heir and Executor.—A purchaser of an estate over which there was an heritable debt, having bound himself to pay it as part of the price, and received a discharge of the price on that footing; and having granted a personal bond of corroboration to the creditor,—Held (affirming the judgment of the Court of Session) in a question between the heir and executor of the purchaser, that the debt was heritable, and formed a burden on the heir.

Mar. 3, 1826.

2d DIVISION.
Lord Cringle-
tic.

IN 1777, Mr Mackenzie purchased the estate of Netherwood, consisting of the lands of Conheathrig and others, and Mr Lowthian was cautioner for payment of the price. In order to pay a part of it, Mr Mackenzie borrowed £10,000 from Glover; to whom he granted an heritable bond and disposition in