[11*th August* 1832.]

No. 11. WILLIAM ALLEN FLOWERDEW, Appellant.—*Sir Charles Wetherell* — *Lushington.*

The DUNDEE, PERTH, and LONDON SHIPPING COMPANY, Respondents. — *Lord Advocate* (*Jeffrey*) — *Keay.*

Society — *Clause.* — By the contract of copartnery entered into on the formation of a shipping company, it is provided that "the free profits" of the company, as they shall appear at the time of each annual balance, shall be divided among the partners in proportion to their several shares in the concern, under a provision that in fixing the amount, 25 per cent. of the free profits, as appearing at the balance, shall be set apart as a sinking fund, for upholding the number of vessels necessary for carrying on the company's trade and meeting risks, with this qualification, that if the said sinking fund shall at any time exceed 5,000*l.* no part of the profits thereafter shall be set aside so long as it remains at that amount. The directors, on striking the annual balance, previously to setting apart the sinking fund and ascertaining the net profits, made a deduction from the gross receipts, and brought it to the credit of the different vessels, on account of their deterioration within the past year. One of the partners having challenged this mode of reaching the amount of the free profits, the House of Lords affirmed the judgment of the Court of Session assoilzieing the defenders.

1st DIVISION.
Ld. Newton.

THE Dundee, Perth, and London Shipping Company is employed in the conveyance of goods and passengers between the ports of Dundee and Perth, and London, Liverpool, and Glasgow. This company was formed by the union of the Dundee and Perth

No. 11.

11*th August* 1832.

FLOWERDEW *v.* The DUNDEE SHIPPING COMPANY.

July 3, 1826. Dec. 10, 1832.

Shipping Company and the Dundee and Perth Union Shipping Company, which then carried on business separately; and a contract of copartnery was executed in December 1826, and subsequent dates, but the business had commenced in July 1826. On the junction of the two companies, it was arranged that the new company should take the shipping, stores, and furniture belonging to both, along with certain heritable subjects belonging to one of them, at a valuation. The value of the shipping, stores, and furniture was accordingly ascertained to be 34,200*l.* sterling, and that of the heritable subjects 3,845*l.* sterling, making in all 38,045*l.*, which, in terms of the contract, was declared to be the capital stock of the new company. In the same article of the contract it was likewise provided that "no increase in the amount of the said capital stock shall "take place, unless the same shall be previously sanctioned and approved of by a general meeting of the "company called for the purpose, in manner hereinafter mentioned, and on not less than one calendar "month's notice."

William Allen Flowerdew was then a partner of the company, holding thirteen shares of the stock, and gave his consent to these arrangements, and subscribed the contract of copartnery. At this period, however, the actual or advanced capital of the company did not amount to the sum of 38,045*l.*, the amount of the declared capital. All that was actually advanced by the partners of the company was the value of the shipping, stores, and furniture, amounting to 34,200*l.* Certain heritable subjects had been likewise acquired; but they were not paid for out of contributions made by the individual members of the firm. While these

No. 11.
11th August 1832.
FLOWERDEW *v.* The DUNDEE SHIPPING COMPANY.

subjects appeared as a part of the property of the company, their price, on the other hand, appeared as a debt due by the company; so that at the commencement the real capital or input stock amounted to 34,200*l.*, being short of the maximum or declared capital by the sum of 3,845*l.* The contract provided that the free "profits" of the company, as they shall appear at the time of each balance, shall be divided among the partners in proportion to their several shares in the concern; and it is declared that, in fixing the amount, the committee of management shall have power, and they are authorized to set aside "twenty-five per cent. of the amount of the said free "annual profits, as a sinking fund for upholding the "number of vessels necessary for carrying on the com- "pany's trade, and meeting any risks which the com- "pany may have incurred, or to which they may be "liable." It is also declared, however, that if "the "sinking fund shall at any one time exceed 5,000*l.* "sterling, no part of the profits thereafter shall be set "aside so long as it remains at that amount."

On the 31st May 1827, the period appointed by the contract for the first balance of the books, the free profits of the preceding period amounted to 6,478*l.* 14*s.* 10*d.* During this time considerable improvements and repairs had been made upon the vessels; and on a valuation being taken preparatory to balancing, it was found that the estimated value exceeded the value which had been put upon them at the commencement of the period by 494*l.* 13*s.* 11*d.* Thus the expenditure of money on the vessels did more than counterbalance that deterioration which would have arisen from the use of the ships for the period of ten months; and the balance of

No. 11.

11th August 1832.

Flowerdew *v.* The Dundee Shipping Company.

494*l.* 13*s.* 11*d.* entered into, and formed part of, the divisible profit for the period. The valuation of the shipping was made by the committee of directors appointed for that purpose, and the same method was adopted in the succeeding years. From the sum of 6,478*l.* 14*s.* 10*d.*, which had been ascertained to be the free profits of the company, 25 per cent., or 1,600*l.*, was taken off and placed to the credit of the sinking fund; and the balance was divided among the partners, according to their respective interests. The sum of the stock and sinking fund was therefore at this period short of the maximum, according to the contract, by 7,245*l.* No insurance had at this time been effected by the company against the sea risks to which the vessels had been exposed.

At a meeting of the 12th July 1827, " it was recom-" mended to the committee to instruct the managers " to open an insurance account for the different vessels " in the books of the company, to make regular entries " of premiums of insurance to the debit of the vessels, " and to the credit of that account, and to charge it " with any losses that may occur to the shipping in the " course of the year; the residue, if any, to be divided " among the partners at the stated periods of balancing " the company's books;" and this recommendation was attended to in the balance of the 31st of May 1828. The free profits of the year preceding 31st May 1828 amounted to 6,412*l.* 15*s.* 6*d.*, a sum of 840*l.* having been previously set apart on account of the deterioration of the company's stock. The free annual profits of this year were subjected to a reservation of 25 per cent., being, in round numbers, 1,600*l.*, and the balance, 4,800*l.*, was divided among the partners according to

No. 11.

11*th August* 1832.

FLOWERDEW *v.* The DUNDEE SHIPPING COMPANY.

their respective interests; so that, there being 1,200 shares, the balance was distributed at the rate of 4*l.* per share. The stock of the company was, as before, 34,200*l.*, amounting, along with the sinking fund, now 3,200*l.*, to the sum of 37,400*l.*; short, however, of the admitted maximum by 5,645*l.* The profit arising from the voyages performed in the course of the year was on this occasion distinguished in the balance sheet from the amount which would have been adequate to cover the insurance of the vessels employed in the trade against sea risk. The latter sum amounted to 1,888*l.* 6*s.* 2*d.* In the course of the next year considerable additions were made to the shipping of the company, amounting in all to 5,910*l.* 11*s.* 5*d.* In addition to this, a contract was entered into for the building of a steam vessel. All this was done by the directors, under the sanction and with the full approbation of the company.

On the 31st May 1829 the annual balance was struck. The net profits of the company amounted to 6,429*l.* 4*s.* 11*d.*, the sum of 1,291*l.* 15*s.* 3*d.* having been previously brought to the credit of the different vessels on account of their deterioration within the year. The free annual profit was subjected to the reservation of 25 per cent., amounting to 1,600*l.*; and the balance of 4,800*l.* was divided among the partners, according to their respective interests, at the rate of 4*l.* per share; and Flowerdew received his respective proportion of the free balance. The real capital or input stock of the company, along with the sinking fund, now 4,800*l.*, amounted to 39,000*l.*, being less than the admitted maximum by 4,045*l.* With this mode of distributing the profits, however, Flowerdew was dissatisfied, on the ground in

No. 11.

11th August 1832.

FLOWERDEW v. The DUNDEE SHIPPING COMPANY.

substance that the managers of the company were not entitled to make allowance for the annual deterioration of the stock previous to the ascertainment of the annual free profits, and the retention of 25 per cent. thereof as a sinking fund; and he, therefore, brought an action, in the Borough Court of Dundee, against the directors, and praying for an increased per-centage in shape of interest, being 1*l*. 7*s*. 11*d*. on each of his thirteen shares of the company's stock, over and above the four per cent. declared by the directors and paid to him. To this summons defences were put in by the directors, that they were bound by the terms of the contract to set aside 25 per cent. of the free profits of the company as a sinking fund; and thereafter the Court found, "That by the "contract of copartnery on which this action is laid, "it is stipulated that the books of the copartnery shall "be balanced as on a stated day annually, and that "a statement or abstract of the affairs of the concern "shall be prepared and examined and docqueted, and "afterwards laid before the annual meeting of the "company: Finds it also stipulated that the free "profits of the company's trade, as they shall appear "at the time of each balance, shall be divided among "the partners, but under a provision that in fixing the "amount of the free profits for division 25 per cent. of "the amount of the free profits, as appearing at the "balance, shall be set apart as a sinking fund, for "upholding the number of vessels necessary for carry-"ing on the company's trade, and meeting any risks "which the company may have incurred, or to which "they may be liable, with this qualification, that if the "said sinking fund shall at any time exceed 5,000*l*. no "part of the profits thereafter shall be set aside, so

Dec. 10, 1829.

No. 11.

11th August 1832.

FLOWERDEW v. The DUNDEE SHIPPING COMPANY.

"long as it remains at that amount: Finds that it is "reasonable, and in the spirit of the contract, and "according to the known usage and daily practice of "traders, manufacturers, and shipowners, to state "against their gross profits the deterioration which has "arisen during the year upon the instruments em-"ployed in their business; for example, in the case of "ships, to state against the gross freights the depre-"ciation of the vessel by tear and wear; for otherwise "the apparent profits would be fictitious, the dimi-"nution in value being in many cases more than equal "to the produce, and so there may be in truth a loss, "although the accounts (when the depreciation is not "deducted) shew in appearance a considerable gain: "Finds that it is only after such deduction from the "gross apparent profit that the true result or free "profit is ascertained: Finds that the sinking fund, "stipulated under the defender's contract of copartnery "to be maintained by retention of a portion of the free "profits, is not intended to be placed against the "natural depreciation of tear and wear; but, as the "contract itself bears, 'for upholding the number of "vessels necessary, and meeting any risks which the "company may have incurred, or to which they may "be liable;' that is to say, it is intended to meet any "extraordinary event, as, for example, the total loss of "any of their vessels, or the destruction of their ware-"houses: Finds, therefore, that the defenders were "entitled, in making their balance or abstract, to "set aside from the gross profits the sums necessary "for covering the natural deterioration during the "year, the balance so appearing being the free profits, "and they were entitled also to set apart 25 per cent.

No. 11.

11th August 1832.

FLOWERDEW v. The DUNDEE SHIPPING COMPANY.

" of the free profits towards the sinking fund: Finds it " admitted that the balance, being free profits, was " 6,429*l.* 4*s.* 11*d.*, of which they were entitled to set " apart 25 per cent., that is 1,607*l.* 6*s.* 3*d.*, leaving of " free profits for division 4,821*l.* 18*s.* 8*d.*: Finds it " admitted that they accordingly divided 4*l.* on each " share, that is in all 4,800*l.*, the balance, being " 21*l.* 18*s.* 8*d.*, being carried to the next year's ac- " count: Finds, therefore, that the acknowledged divi- " dend was all that the company were bound or entitled " to divide, with the exception of the fraction which " might have been paid on each share by the division " into 1,200 parts of 21*l.* 18*s.* 8*d.*; and the pursuer " has stated that it is not this fraction which he seeks " to recover. Therefore, on advising the whole case, " assoilzies the defenders, finds the pursuer liable in " expences, of which appoints an account to be lodged," &c.

Flowerdew advocated to the Court of Session, and his case came before Lord Newton, Ordinary.

On the 4th of February 1830, a special general meeting of the company was called in terms of the contract, for the purpose of considering the propriety of increasing the capital stock of the company, at which it was resolved by a large majority, that the declared capital of the company should be increased from 38,045*l.* to 50,000*l.* A resolution to the same effect was afterwards unanimously carried at a special general meeting held on the 11th of March 1830. On the 6th of February 1830, two days after the special general meeting, Flowerdew brought an action of declarator against the respondents in the Court of Session. The summons concluded, in the first place, that it should be found and

No. 11.

11th August 1832.

Flowerdew *v.* The Dundee Shipping Company.

declared, that the " company have not at any time since " the date of their said contract been, and are not now, " entitled to possess or hold a capital stock of greater " value than 38,045*l.* nor a sinking fund of larger " amount than 5,000*l.*, nor altogether to accumulate and " keep in their hands, for the purposes of their business " or otherwise, an amount of funds, effects, or property " of whatsoever description, of greater value, taken at " any one time, than 43,054*l.*" It then deduced, consequentially, that the company should be bound to divide any surplus which may exist among the partners, in proportion to their several shares. Secondly, it concludes, that in the distribution of the profits it shall not be competent for the company, first, to withdraw and set aside a part of the profits to meet an alleged or even a real deterioration or deficiency of the capital stock and sinking fund; and thereafter, and over and above, to set aside the stipulated proportion of 25 per cent. in name of sinking fund. Thirdly, it concludes that the profits of the trade of the company, as a shipping company, are distinct and separate from the profits arising in the insurance account opened in the books, and that the latter neither fall within the operation of the contract, nor are subject to the reservation of 25 per cent., but are distributable annually and without reserve among the partners. It then proceeds to call upon the company to make up accounts on these principles, and to account and pay over the balance to the pursuer accordingly.

This declaratory action came likewise to depend before Lord Newton; and the two processes being conjoined, his Lordship " advocates the cause, conjoins the process of declarator with the process " of advocation, repels the reasons of advocation, sus-

Nov. 25, 1830.

No. 11.

11th August 1832.

FLOWERDEW v. The DUNDEE SHIPPING COMPANY.

" tains the defences, assoilzies the defenders from the
" conclusions of declarator, and haill conclusions of the
" respective libels in the inferior court and in this
" court: Finds the pursuer liable to the defenders for
" the expences incurred in these conjoined processes,
" both in the inferior court and in this court, and
" remits to the auditor to tax the account thereof, and
" to report." His Lordship added, in a note: " The
" Lord Ordinary sees no objection to the first decla-
" ratory conclusion, which indeed is not disputed by
" the defenders, but a finding to that effect would serve
" no purpose, as it is only introduced as a foundation
" for the next conclusion, which does not seem admis-
" sible, and besides could have no application to the
" present situation of the company, whose capital has
" been increased. It appears to him that the principle
" on which the balance sheets of the company in pro-
" cess has been made up is quite correct. There is
" brought to account on the one side the whole existing
" funds of the company, consisting of their shipping
" and stores, heritable property, cash, bills, and debts
" due to them, the shipping being taken at the present
" estimated value, while on the other side is placed the
" original input stock of 34,200*l.*, the sinking fund in
" so far as realized, and the debts owing by the com-
" pany, and the difference or excess of the funds is
" added under the head of profits, to balance the ac-
" count. Now, as in the balance sheet of May 1829
" the sinking fund is only 3,200*l.*, the company was
" entitled, in terms of the contract, to retain 25 per
" cent. of the profits towards increasing it, seeing that
" after such addition it would not exceed the maximum
" of 5,000*l.* It is obvious also, that on these principles

No. 11.

11th *August* 1832.

FLOWERDEW *v.* The DUNDEE SHIPPING COMPANY.

" the company's stock could never be increased beyond
" the amount of the original input stock and the full
" sinking fund, because, in so far as the existing funds
" came to exceed this amount, they must fall as free
" profits to be wholly divisible among the partners.
" The result might no doubt be unfair, were the ship-
" ping or other property estimated below its true
" value, but there is no averment to this effect in the
" record, the pursuer's objections being directed solely
" to the principle of accounting. As to the insurance
" account, the Lord Ordinary cannot see how the
" saving the company may have made by not insuring
" at all can be said to be a profit arising from a sepa-
" rate trade. The keeping of an account on the hypo-
" thetical footing that insurances had been effected at
" the ordinary premiums was just a mode of shewing
" whether or to what extent the system of not insuring
" was a profitable one. The Lord Ordinary has been
" the more disposed to give expences, that almost the
" whole incurred in this court have arisen since the
" resolutions of the meeting of 11th March 1830, in-
" creasing the capital to 50,000*l.* By this resolution it
" appears to him that the object of the present litiga-
" tion, and particularly of the action of declarator, was
" done away, and that the pursuer had, with the excep-
" tion of the expences, for which he was found liable in
" his action in the inferior court, no longer any sub-
" stantial interest in continuing the proceedings."

Flowerdew reclaimed, but the Court, without hearing the counsel for the defendants, adhered with expences.*

Feb. 2, 1831.

Flowerdew appealed.

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* 9 Shaw and Dun. 373.

No. 11.

11th August 1832.

FLOWERDEW v. The DUNDEE SHIPPING COMPANY.

Appellant.—With reference to the contract of copartnery, the conclusions of the action are plainly well founded. The directors could not by the terms of the contract make the capital larger, nor increase the sinking fund, by creating a new and unauthorized deduction from the free profits, the subject of the annual division. No doubt, since these actions were brought into court, it has been resolved to increase the capital of the company to the amount of 50,000*l.* This subsequent resolution, however, does not affect the present question, which must be decided by the terms of the contract as it originally existed.

The directors were therefore not entitled, upon any real or supposed ground of tear and wear or deterioration of their vessels, and over and above the expenses of full and complete repair, to retain from the fund of annual division more than twenty-five per cent. on the free profits set apart for the creation and maintenance of a sinking fund. It is a colour and evasion to pretend that they are entitled every year, before striking the free proceeds, to set aside a certain sum as the estimated amount of the deterioration of their whole stock during the year preceding. That is a mere attempt to conceal their intention of increasing the capital beyond the terms in the contract, by which the directors were not entitled to retain, either as capital stock or as a sinking fund, more than the sum of 43,045*l.*; and under any circumstances they were bound to divide the surplus.

Separatim, the amount of the insurance account should be divided annually among the partners, without being subject to any deduction on the score of a sinking fund.

No. 11.
11*th August* 1832.
FLOWERDEW *v.* The DUNDEE SHIPPING COMPANY.

Respondents. — The capital stock of the company, together with the sinking fund, has not at any time exceeded the limits pointed out in the contract. According to the sound and proper construction of that contract, the free annual profits of the company are to be ascertained by deducting from the gross annual profits the annual expence, a fair estimate of value having been previously put upon the stock, and allowance having been previously made by corresponding entries in the books of the company, for the improvement or deterioration which the stock may have undergone in the course of the year. The free annual profits must be so ascertained, although the managers or the company may have chosen, subsequently to the date of the contract, after the division of a year's profits, and without any change on the actual business of the company, to exhibit in their system of book-keeping the amount of premiums which it would have been requisite to pay for the insurance of the company's vessels, had insurance been actually effected.

Besides, the appellant has truly no interest to follow forth the declaratory and cannot succeed in the petitory conclusions of his action. All along the capital of the company has been less than the declared capital, and of this difference the appellant could have been called on to pay his share. His present opposition is the less tenable, that he acquiesced in the principles on which the profits had been struck, and took payment of his dividend. But all doubt is removed by the company having increased their declared capital, which, by the terms of the contract, they were entitled to do.

No. 11.

11*th August* 1832.

Flowerdew *v.* The Dundee Shipping Company.

Lord Chancellor:—My Lords, the circumstances of this case are somewhat complex in their statement; I therefore should wish to have an opportunity of looking into the printed cases before I move your Lordships to pronounce judgment.

Consideration adjourned.

Lord Chancellor:—My Lords, I have, since this cause was argued at your Lordships' bar, taken considerable pains in examining the cases, and I now state to your Lordships, that I agree in opinion with the Court of Session, affirming an interlocutor of the magistrates of Dundee, which declared the rule by which the accounts of this company were to be adjusted. The rule so laid down not being satisfactory to the appellant, he instituted a suit in the Court of Session, calling in question the judgment which had been pronounced by the magistrates; that judgment was thereby brought distinctly under the notice of the Court. It came on before Lord Newton as Lord Ordinary, and his Lordship, in refusing the application, found the pursuer liable for the expences incurred in the conjoined processes, both in the inferior court and the Court of Session; and his Lordship states, as a ground why he allows the expences to the defender, that almost all the expences incurred in the Court of Session had been incurred since the resolution of the 11th of March 1830, increasing the capital; and that the persisting in the litigation after that resolution, the effect of which was to do away with the previous litigation, and particularly the action in the Court of Session, was a line of conduct which certainly rendered the pursuer subject to the payment of the expences, which ought not to fall upon the other party.

No. 11.

11th August 1832.

FLOWERDEW v. The DUNDEE SHIPPING COMPANY.

On a consideration of the whole of the circumstances, my Lords, I must say that I certainly take the same view of this case, that there was an obstinate persisting in litigation by the appellant, notwithstanding the clear decision against him; and, in that view of it, I think the appellant must pay the costs. I move your Lordships, therefore, that these interlocutors be affirmed with full costs, which the usual means must be taken to ascertain.

The House of Lords ordered and adjudged, " That the " said petition and appeal be, and the same are hereby dis- " missed this House, and that the said interlocutors therein " complained of, be, and the same are hereby affirmed: " And it is further ordered, That the said appellant do " pay or cause to be paid to the said respondents the sum " of 225*l.* for their costs in respect of the said appeal."

BUTT — MONCRIEFF and WEBSTER, — Solicitors.