[*7th May* 1839.]

Appeal from the Court of Session, Scotland.)

RICHARD ALEXANDER and others, Appellants.[1]— (No. 10.)
Sir F. Pollock—Tinney.

Colonel C. S. MACALISTER and others (Caledonian Dairy Company Directors), Respondents.—*Knight Bruce—Pemberton.*

Partnership—Joint Stock Company—Contract.—In an action by directors of a joint stock company against the other solvent partners, for relief of advances and obligations by the directors personally in the management of the affairs of the copartnery, Held, upon construing the contract of copartnership, (affirming the interlocutors of the Court of Session,) that the following defences ought to be repelled; (1.) that the partners were only liable, inter se, to the amount of the sums severally subscribed by them for and as their shares in the said copartnership; (2.) that the directors had no right to begin business, and no power to bind the partners for any debts or obligations on behalf of the said company, till the whole stipulated capital had been subscribed for and secured; and (3.) that the powers of the directors to borrow money on the responsibility of the company and the partners were restrained.

Practice.—Held that the Court may, before exhausting the whole pleas of the parties, lay down certain principles, by declaratory findings, which shall regulate the future proceedings in a cause, and be the foundation of ulterior findings, the consideration of which may be reserved.

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[1] Reported 15 D., B., & M., 1061.

2d Division.

Lord Ordinary Jeffrey.

Statement.

IN the year 1824 the respondents were among the original projectors of a scheme, and issued a prospectus, for the establishment of a joint stock company for supplying the inhabitants of Edinburgh with milk and other dairy produce; the capital stock of the company was to be 50,000*l.*, to be raised by subscription, and divided into shares of 25*l.* each. The committee of management purchased the lands of Wheatfield near Edinburgh for 12,000*l.* "A meeting of subscribers" was held on the 2d February 1825, at which directors were named, and resolutions passed, so as to constitute the company, the capital of which it was resolved should be 50,000*l.*, divided into 2,000 shares of 25*l.* each. The directors were authorized to complete the purchase of the land requisite for the undertaking, and to erect suitable accommodations. A report read by the committee set forth, that the whole capital had been subscribed for; and the thanks of the meeting were voted to the committee for the purchase of Wheatfield. The secretary was directed to prepare a deed of copartnery. The lands of Meadowbank and an adjoining piece of land were soon afterwards purchased for 9,700*l.*

Thereafter a contract of copartnery was settled and approved of by the directors.

By the first article it was declared, that the copartnership should be held to have commenced from and after the 28th January 1825; and it was further declared, that the subscribers should "have right to the "profits, and be liable for the losses, arising from or "upon the said business, and should be bound to relieve "each other of all the debts and engagements of the "company, but that only to the extent of and in pro-"portion to their respective shares therein."

By the second article it was provided, that the subscribers should have "right to the profits and be liable "for the losses of said business, and should be bound "to relieve each other of all the debts and engagements "of the company, in the proportion of their respective "interests or shares in the capital stock."

By the fifth article it was declared, that nine ordinary directors should be chosen; and that as certain gentlemen named formed the interim committee of management, and as it would require some time to arrange completely the details of the management, and agreeably to the resolution and minute of the general meeting of shareholders, of date the second day of February last, it was thereby declared, that William Trotter, Esquire, &c. should be nominated and appointed directors of the concern, and should continue in that office from the date of the contract, and for two years from and after the last Monday of May thereafter.

It was provided by the eighth article, "that the "whole account books, papers, letters of correspon-"dence, and other writings relative to the business of "the company shall at all times be open to the "directors and superintending committee and mem-"bers thereof respectively, but to no other members of "the company, unless ordered by the annual general "meeting; and also that the directors shall have full "power to make the purchase of land, ground, or "other premises which they shall deem necessary for "the concern, and are hereby authorized to complete "and carry into effect the purchases made of the lands "of Wheatfield and Meadowbank, and to take all "requisite measures for the erection of suitable accom-

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" modations for the dairy establishment, and to enter " into all contracts or deeds necessary in the concerns " of the company, and otherwise to carry into effect " and execution the objects of the company, and to " take all such steps as to them may seem expedient " and beneficial in forwarding the prosperity of the " establishment; and according to their sound dis- " cretion, to dispose of the lands of Wheatfield, or feu " them; and also to feu such parts of Meadowbank, " from time to time, as they think proper;" and further, " that the power of the directors, in the above " mentioned and all other particulars, shall be subject " to such limitation, extension, or alteration as a " general meeting shall think fit; all which acts of " administration shall be effectually binding and " obligatory upon the company, and whole individual " partners thereof; that it shall be in the power of " the directors to borrow money, on the credit and " security of the company, to the extent of three thou- " sand pounds sterling, which they are hereby em- " powered to do, by way of cash account with some " bank or banking company, provided there is stock of " the company subscribed for and unpaid to that " amount."

It was provided by the ninth article, " that the sums " effeiring to the number of shares subscribed by the " members of the said company respectively shall be " advanced and paid in such instalments as the " directors shall see proper to call for, and that in such " mode, and at such times, and to such amount as they " shall think proper, upon premonition of one month " before the term of payment being given to the " subscribers respectively, by letter addressed to each

" of them, signed by the secretary and put into the " general post office of Edinburgh, with legal interest " of such part of said share so called for from the date " fixed for payment, and until payment thereof is " made; and in no event shall it be in the power " of the directors to call upon the partners for a sum " beyond that subscribed for by them respectively."

By the eighteenth article it was provided, " that a " stated account, made out from the books of the " company, and subscribed by the accountant and " secretary, shall in all cases be sufficient to ascertain " and constitute a balance and charge against a partner " of the company, and no suspension shall pass of a " charge so constituted, but upon consignation only."

The twentieth article declared, " that the directors " shall not be liable for omissions, nor for the suffi- " ciency or responsibility of securities or property on " which they may lend out or otherwise invest the " funds of the company, nor for the actions or intro- " missions of the manager, banker, clerks, or accoun- " tant, or any other officers or agents of the company, " or any other persons intrusted with the business of " the company, nor shall they be liable in solidum nor " pro rata for one another, but each only for his own " actual intromissions."

And the twenty-first article requires, " that each of " the partners shall assign to the company, and the " directors thereof for the time being, his own par- " ticular share and profits of the concern, in security of " the debts and engagements of the company."

It is provided by the twenty-third article, " that " previous to the last Monday of May eighteen hundred " and twenty-six, on which day the general annual

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"meeting of the stockholders is to be held, and in "every year thereafter, the books of the company shall "be balanced, and a statement or abstract of the "company's affairs shall, under the inspection of the "directors and auditors, be made up and signed by "the accountant of the company and secretary; and "no transfer of the stock shall be admitted or entered "in the books of the company for three weeks previous "to the said last Monday in May, nor till eight days "thereafter, yearly; and the directors, or their accoun- "tant or secretary, shall be obliged to lay upon the "table, at the said general meeting to be held upon "the said last Monday of May yearly, the said state- "ment or abstract, for the inspection of the partners "present, the substance whereof shall be stated at the "said court by the chairman or preses; and the said "statement or abstract shall lie at the office of the "secretary, open for the inspection of any of the "partners, for the space of one calendar month sub- "sequent to the said last Monday of May."

Thereafter the contract was subscribed by shareholders, to the extent of 20,000*l.* The directors. while it was in the course of subscription, took measures for the erection of the necessary buildings, the contract price being about 5,400*l.*, though they ultimately cost about 9,000*l.*

There having been a previous call of five per cent., a call of ten per cent. was made upon the shareholders in June 1825, and another call to the like extent in July following, but the calls were only partially paid; the sum thereby realized was inadequate to meet the engagements of the directors, and they borrowed money to pay the price of the lands purchased and for the

current expenses, partly on their own individual security and partly by heritable bond over Meadowbank, by some of their number as trustees for the company.

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The first general annual meeting of the proprietors of the company took place on the 29th of May 1826, and was attended by the principal shareholders, including the directors. A report was submitted by the directors, and approved of, containing a full statement of the affairs of the company up to that date, and of the various arrangements which had been made for the completion of the purchases of the several heritable properties, the nature and terms of the building contracts into which they had entered for the erection of the premises at Meadowbank, and the state of progress of these buildings, which were then almost completed. The directors also explained, that "although names were put down for 2,032 shares, "amounting in sterling money to 50,800*l.*, of which "the directors allocated 2,000 shares, yet the contract "was only signed by proprietors to the amount of 806 "shares, being 20,150*l.*" The report set forth the difficulties which the directors had experienced in carrying through the different pecuniary and other arrangements, from the delay on the part of many of the subscribers in paying up their instalments.

The meeting authorized these directors "to adopt "such farther measures, from time to time, as they "may consider necessary for promoting the prosperity "of the concern."

The affairs of the company became more involved, and the management more difficult, the subscribing partners declining to pay their different calls on the subscribed capital. The directors had to raise money

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and make advances on their personal security. Annual general meetings were held in 1827, 1828, and 1829, at which the partners present (consisting always of the quorum required by the deed of copartnery) approved of reports on the state of the affairs.

At a general meeting in 1830 it was resolved to wind up the affairs of the company. It appeared from the reports on the affairs of the company, prepared by a juridical accountant, that "a total loss has arisen on the "concern, as at 31st May 1834, of 36,685*l.* 19*s.* 2½*d.*, "and after deduction of the amount of calls on the "partners received and applied (extending to 15,068*l.* "2*s.* 10¾*d.*), there remains a deficiency beyond the "recovered capital, and the estimated property and "funds of the company, of 21,617*l.* 16*s.* 3¼*d.*;" that almost the whole of the above-mentioned loss had arisen from the fall in value of the heritable properties and buildings below their original cost, joined to the loss of interest on the prices, and the expense of titles and securities arising out of the purchase of those properties. The directors, or those in whose right they now stand, had made large advances from their own private funds, for the purpose of liquidating the debts and obligations of the company. The total amount of the outstanding debts of the company, in so far as the same had been ascertained, including the advances made by the directors, and advances by certain others of the partners, for the company's behoof, and in extinction of its obligations, was then 24,504*l.* 10*s.* 3¾*d.*

The defenders (appellants) who, besides the respondents, were the remaining solvent partners of the copartnery, having refused to contribute, with a view to make up this deficiency, an action was raised against

them in the Court of Session. It proceeded in the name of the pursuers (respondents), "all directors and "individual partners of the Caledonian Dairy Com- "pany," some of whom were also designed "as "trustees nominated by the directors of the said "company, and vested with the heritable property "thereof, with consent and concurrence of Carlyle "Bell and Alexander Cuninghame, Esquires, writers "to the signet, as vested, in manner after mentioned, "with the right to the debts and obligations after "referred to." The summons then recited the establishment of the company,—the provisions of the contract,—the nature and extent of the business carried on,—the mode of management,—the final winding up, and the ultimate loss and bankruptcy of the concern; and after setting forth that some of the bonds have been assigned to Messrs. Bell and Cuninghame; though paid from the funds belonging to the respondents, and that the greater portion of the remainder consists of advances made by them on behalf of the company, it concluded, that the appellants should be "decerned and ordained, by decree foresaid, to "make payment to the pursuers, conformable to the "amount of their advances respectively, of the rateable "proportions, corresponding to the respective shares of "stock held by the said defenders, of the sum of "15,000*l.*, or of such other sum as shall be ascertained; "in the course of the process to follow hereon, to "be the amount of the advances by the pursuers respec- "tively; on behalf of the said company, towards "extinction of its debts and obligations, according as "the rateable proportions thereof, falling on the "defenders, shall be ascertained in the course of

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" the said process, together with the legal interest of " said proportions from the respective dates of advance, " and in time coming, during the not-payment: " Further, the said defenders ought and should be " severally decerned and ordained, by decree foresaid, " to make payment to the pursuers of the rateable " proportions effeiring to the defenders, according to " their said respective shares of stock, of the sum " of 20,000*l.*, or of such other sum as shall be ascer- " tained, in the course of the process to follow hereon, " to be the amount of the outstanding debts and " obligations still due by the said company, as well as " of any further claims that may yet emerge, and of all " costs and expenses which may hereafter be incurred " in finally winding up the said concern, as the same " shall be severally ascertained in the course of the " said process, in order that the pursuers may operate " their relief from the said debts, obligations, and " expenses, by applying the said rateable proportions " thereof due by the defenders, along with their own " proportion, in extinction of the same."

There were also conclusions for having it found that the appellants, in the event of any of their number becoming insolvent, should be liable rateably for any deficiency thereby occasioned; and there were also additional subsidiary conclusions with reference to the ultimate winding up of the concern.

In defence it was pleaded, 1st, that the liability of each partner was limited to the amount of the shares subscribed for; 2d, that the debts concluded for were contracted by means of loans and obligations entered into in violation of the contract, particularly the eighth article, and on the personal responsibility of the respon-

dents individually; 3d, that the claim of the respondents was barred, in respect that they proceeded to carry on the business after they knew that the capital was not half filled up, without communicating that fact to the partners; and 4th, that it was barred, in respect that the whole losses had arisen from their own violation of the contract, their concealment and misrepresentation, and from their gross negligence and misconduct in the management of the company's affairs.

A record having been prepared, parties were heard before Lord Jeffrey, as Ordinary, who (6th December 1836) pronounced the following interlocutor:—"The "Lord Ordinary having heard the counsel for the parties "very fully, on the closed record and whole process, "and made avizandum, repels the defence founded on "the clause (or clauses) in the contract of copartnership, alleged by the defenders to import an absolute "limitation of the liabilities of the partners inter se to "the amount of the sums severally subscribed by them "for and as their shares in the said copartnership; "repels also the defence founded on the allegation "that the pursuers or directors of the said company "had no right to begin business, and no power to bind "the partners for any debts or obligations on behalf of "the said company, till the whole capital of 50,000*l.* "had been subscribed for and secured; and farther, "repels the defence founded on the clause or provisions of the contract by which the defenders allege "that the powers of the directors to borrow money on "the responsibility of the company and the partners "thereof were restrained; and, before farther answer, "appoints the cause to be enrolled, that parties may

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"explain in what way the cases of the several de-
"fenders are or may be affected by this deliverance,
"what findings or decernitures may be required to
"apply it to their several cases, and what farther
"determinations may be necessary to exhaust the
"cause as to the said several defenders, or any of
"them."

To this interlocutor his Lordship added the subjoined note, explanatory of the grounds of his opinion.[1]

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[1] "The first of the above-mentioned defences appeared to be that chiefly "relied on. It was rested mainly on the provision in the close of the "first article of the contract, 'that the partners should be bound to "relieve each other of the debts and engagements of the company only "to the extent of and in proportion to their respective shares therein,' "and partly upon passages in the 8th, 9th, and 13th articles, which were "said to confirm the construction put by the defenders on this first pro-"vision. According to that construction, this provision was specially "intended to protect the body of partners from the consequences of "overtrading, or rash and imprudent dealings, on the part of the "directors, and was equivalent to an injunction that they should at no "time put more than the subscribed capital at hazard, under pain of "being made personally answerable, and without relief, for the conse-"quences of any more extensive speculations. Now, if any thing be "clear in this case, the Lord Ordinary takes it to be, that this limitation "of the provision to the case of directors having occasion for relief is "totally inadmissible. It is in express terms a provision limiting the "right of relief of all the partners, as against each other. The case of "directors is not once named or alluded to in any part of the article; "and it is not less, but more, extravagant to say that it applies exclu-"sively to them, than it would be to say that they alone were exempted "from its operations. If it had really been intended to impose such a "restriction upon the powers of the directors to bind the company, it is "inconceivable that the parties should have introduced it into this first "article, which merely sets forth the universal and common-law rights "and liabilities of the partners, instead of bringing it in as a limitation "of the great general powers given to those directors by article 8, which "does contain a special limitation as to borrowing, or as a qualification "of the great immunities conferred on them by article 21.

"If the true meaning and effect of the restraining words now cited be "therefore as the defenders contend, it necessarily follows that no one "partner of the company who has been obliged by a creditor to pay any "of its debts or engagements, or who is distressed by such a creditor,

Against this interlocutor a reclaiming note was presented to the Second Division of the Court, and on

" will be entitled to any relief from the other partners, beyond the " amount which may remain unpaid upon the subscribed capital of each, " and if all have paid up their whole subscriptions he will be entitled to " no relief at all. Now the first question is, whether it is conceivable " that so monstrous and unjust a provision could be intended, or could by " possibility be admitted to have effect? The Lord Ordinary has never been " able to get over this, and thinks that any construction of which the " words are at all susceptible must be preferred to one which would lead " to such a consequence.

" The defenders, indeed, endeavour to show that the consequences " would all fall back upon the directors; and that if it was right that " they should not trade beyond their capital, except at their own peril, " there would be no harm in denying, even to an innocent partner, who " might be subjected in the consequences of their so overtrading, all " relief as against the other innocent partners, seeing, they said, that he " might still have relief against the rash directors themselves; but this is " evidently altogether fallacious. Take, first, the most favourable case for " the defenders; assume, contrary to the fact, that the directors would do " wrong in trading beyond the capital, and suppose that a private partner, " having no concern with the management, is obliged to pay a debt so " contracted, is there any justice or common sense in saying that he shall " not be relieved by the other partners, who were equally liable to such " distress? or, under the words relied on, would be enabled to claim " relief from the directors who overtraded? Those directors are not liable " for each other. The individuals who subjected the concern to the debt " may be all insolvent, and the whole subscribed capital may have been long " ago paid up. Then the directors are all necessarily partners; and it is " not easy to see how they should not have the benefit of the provision " in question as well as the others. There is confessedly no provision, " nor any thing like a provision, in the contract, that the individual " directors who overtrade shall be bound to relieve the partners who may " be consequently distressed by the company creditors; and what the " defenders seem to go on, in this attempt to escape from the result of " their construction, is really nothing more than some vague notion of " equity, and an assumed common-law liability of the directors, to an " award of damages and reparation as the penalty of their so overtrading. " In any ordinary case, however, there would plainly be no such liability; " and in the cases most likely to occur there would be no shadow even of " equity in seeking to subject them to such a penalty. There is, in point " of fact, it must always be remembered, no declaration in the contract " that no engagement shall ever be entered into beyond the subscribed " capital. Now, suppose the whole of that capital paid up, and yielding " great profits, under an admirable system of management, and that the " directors, in order to increase those profits, contract for 100 more cows.

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advising it the following interlocutor was (2d June 1837) pronounced :—" The Lords having considered this

" and a corresponding range of new cow-houses, could it ever be said that " this was a malversation, for which, in the event of any ultimate miscar- " riage, they could be made liable at common law in their own persons, " and without relief from their partners? And if there would plainly be " no such liability at common law, how is it possible to construe or spell " it out of a provision in the contract which makes no distinction between " directors and other partners; and instead of imposing any extraordinary " liability on its members, consists wholly in a declaration (as the de- " fenders at least allege) that they shall all be freed from the common " and natural liability of partners.

" But the radical fallacy of the defenders attempt to palliate the revolt- " ing consequences of their doctrine is that it is not true, in point of fact, " that engagements which cannot be answered by the subscribed capital " of the company must necessarily have been contracted by overtrading " on the part of the directors; and that it is, on the contrary, undeniable, " that cases must continually occur in which the natural right of " partners to be rateably relieved of company debts by each other would " be most unjustly cut off by that interpretation, while there was not the " least pretext for recurring on the directors, or any one else, for repara- " tion. Suppose the whole capital paid up and yielding a large profit, " and the directors resolved, notwithstanding, to incur no new expense " beyond the amount of the said capital actually in their hands. Suppose " that the final call on the partners had recently yielded 10,000*l.*, and " that this sum was deposited in a bank, and that on the faith of this " they had contracted for 2,000*l.* worth of cows, and 5,000*l.* worth of " new buildings, these undoubtedly would be engagements within their " powers, and the line of their duty, even according to the rigid and " imaginary restriction of the defenders. But suppose the bank to fail, " the cows to die of distemper, the houses to be destroyed by fire, and " the whole concern to be broken up before the prices of these articles " were paid, and then suppose that the sellers and contractors should sue " an individual partner for those company debts, and obtain decreet " against him, could it be seriously maintained that he should have no " relief whatever against his partners, but be obliged to pay 7,000*l.* of " company debts out of his own pocket, from the mere accident of his " having been selected by a company creditor in preference to all or any " of those who were equally liable to their diligence? Yet, if the de- " fenders' reading of the provision in question is the right one, this would " be the inevitable consequence. The partners are only to relieve each " other to the extent of their subscribed capital still unpaid; but in the " supposed case it is all paid, and the debts having been contracted when " there was abundant capital in the hands of the directors to answer them, " even the shallow pretext of handing him over to them for indemnity " would be excluded. It is needless, indeed, to go to such an extreme

" note with the other proceedings, and heard counsel " thereon, adhere to the interlocutor complained of, " case as has now been supposed, for the purpose of testing the doctrine " of the defenders, since, unless it be held that no company is to contract " any debts or engagements after its subscribed capital is paid up, how- " ever ample the stock in which that capital has been invested may be to " answer them at the time, it is obvious that unavoidable misfortunes " may reduce the creditors to the necessity of coming on individual " partners for satisfaction, and that the most unheard-of injustice must " be done, if they were to be excluded from all claim of relief on their " associates.

" The Lord Ordinary is satisfied, therefore, that this cannot be the " meaning and effect of the provision relied on by the defenders; and the " next question therefore is, what then is its meaning, and how are the " words of it to be satisfied? These words, no doubt are awkward and " ill assorted, but to him he will confess that they seem of very little " importance; the whole passage from the word 'declaring,' in the first " line of the page, to the end of the article, being, in his opinion, little " more than an idle amplification of the elementary principle of all co- " partnerships, and which would be implied, though not once mentioned " in the contract, viz., that the partners should share profit and loss " according to their interest in the concern, the words, 'but only to the " 'extent of and in proportion to their shares therein,' being merely a " clumsy and tautological way of expressing a proportional liability, and " which, with a slight variance, might have been more clearly worded " as follows:—'but each only to an extent proportional to his share in " the stock of the said company.'

" But though the Lord Ordinary inclines strongly to think this, and " no more, the true meaning of the words in question, he conceives that " the peculiar form of expression may be explained by one or two suppo- " sitions equally inconsistent with the views of the defenders, and either " of them far preferable to their interpretation. The clause, it will be " observed, sets out with declaring generally, and without qualification, " that the partners 'shall have right to the profits, and be liable to the " 'losses, arising upon the said business;' and it is only after having " made this separate and absolute provision that it proceeds to say, " 'and shall be bound to relieve each other of the debts and engagements " 'of the company, but only to the extent of and in proportion to their " 'shares.' Now, the Lord Ordinary would suggest, that the debts and " engagements of the company, thus contradistinguished from its losses, " may have been meant of such debts and engagements only as might " be satisfied without loss to the company, as being within the amount " of the unpaid-up shares of the several partners; and that the limitation " meant no more than this, that when any individual partner was " distressed for debts of this description, he was to be entitled to pro- " portional and total relief from the rest, but to the extent only of those

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" refuse the desire of the note, and reserve all questions " of expenses."

Alexander and others appealed.

" unpaid shares, by means of which the matter might, in such a case, be " settled without any sacrifice of the funds actually in the hands of the " company, and vested in its business, and consequently without giving " occasion to any thing that could be entered as loss in the books of the " concern. When the debts and engagements, however, exceeded the " amount of unpaid shares, they necessarily fell upon the input or vested " stock (or its profits), and thus passed into the separate head of losses, " for which, by the preceding part of the clause, the whole partners are " made liable absolutely, and without any limitation.

" If this, however, be the just view of the provision, it is certain that " the pursuers are entitled to judgment, the whole sums for which they " now call on the defenders being either truly and literally losses, or " debts and engagements, which remain after all the subscribed stock " has been applied towards their liquidation.

" The second supposition (which is not inconsistent with the pre- " ceding), by which a just and reasonable meaning may be given to the " words in dispute, is, that they were intended not to cut off the " inherent right of a distressed partner to equal relief from the others, " but only to oblige him to seek it simultaneously and proportionally " from them all; to deprive him, in short, of the power competent to " an extraneous creditor of the company, of selecting one or a few " to bear the common burden, and to make it necessary at once to " convene the whole, and to come against each only to the extent of the " proportion indicated by the amount of his share in the concern. This, " it is conceived, was a proper and laudable object, and will fully explain " and satisfy the words of the provision in question.

" Understood in this sense, too, it has been carefully attended to by " the pursuers in framing their summons, the conclusions being directed " against the whole solvent partners of the company, and only for " their rateable and proportional shares of the sums demanded.

" If the case had admitted of no other solution the Lord Ordinary " would have adopted either of these constructions in preference to that " of the defenders, and indeed he is strongly inclined to the views " on which the last of them is founded; but he has already stated " that he considers both as unnecessary, and is satisfied on the whole " that the words so much relied on are mere surplusage, and mean " nothing more than what was already expressed, and would indeed have " been implied if the whole clause had been omitted. One main " reason for this opinion is derived from the tenor of that part of the " second head or article of the contract, in which the whole of the " passage already referred to in the first article is carefully repeated, with

Appellants.—1. The action was ill-founded, because in a question inter socios the appellants could only be

" one or two slight verbal changes, and the remarkable omission of the " words 'but only to the extent of,' on which the whole case of " the defenders depends. From the words 'bind and oblige,' in the " fourth line of this second article, to 'shares of the capital stock,' in " the ninth line, the whole is a literal transcript of the passage in the " first article, including the obligation of relief, of which so much has " been said, and the material thing is, that this obligation of relief is " expressed in the second edition, without any limitation, except that " of being proportional to the interest in the stock. It now runs " thus,—'and shall be bound to relieve each other of all the debts and " 'engagements of the company in the proportion of their respective " 'interests or shares in the capital stock.' What was the object of " this anxious iteration of a very unnecessary clause the parties have " been unable to explain, and the Lord Ordinary does not pretend to " understand. But as it is undeniable, that all the other slight vari- " ances of expression in the six lines so repeated do not make the " least change in the sense or substance of the provision, so the utter " omission of the words on which the defenders exclusively rely, affords " a strong and almost conclusive reason for holding that this also was a " variance by which the sense was not thought to be affected, and that " the clear and indisputable meaning of the last edition of the words " must also have been that of the first. If it was not, there is a " palpable contradiction in these two consecutive clauses; and a contra- " diction which cannot be extricated or reconciled. By the one clause, " the partners are bound to relieve each other only to the extent of and " in proportion to their subscribed capital unpaid, and by the other they " are bound to relieve each other in proportion to their interests in that " subscribed capital. As to the meaning of the last there can be no " doubt, and that meaning is entirely conformable to justice and com- " mon law. The former is in some measure ambiguous, and admits, as " has been seen, of various interpretations; and, according to the de- " fenders construction, it is utterly repugnant to justice, and without " example in practice. If it admitted of no other construction but this, " one of the contradictory provisions must give way, and the Lord " Ordinary conceives that it cannot be that which stands last in the " deed, and is alone conformable to equity and general law. If it does " admit of construction, however, there can be no better guide to the " true meaning than the immediate subsequent clause, in which the " whole matter is resumed, with direct reference to the specific capital, " which had not been previously defined.

" If this leading defence is not maintainable on the first article of the " contract taken by itself, it is plainly in vain to hope that it may be " aided by any of the rest. The special restriction upon borrowing in " the close of the eighth article will be noticed in reference to the

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made liable to the extent of the shares for which they originally subscribed, in respect of the express stipulations to that effect in the written contract.

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" last defence. But as to any bearing it may be supposed to have on " the first, it is enough to observe,—1st, that it relates expressly to the " directors, and not to partners generally; and 2d, that it would obvi- " ously have been unnecessary if the first article had imported what the " defenders now allege.

" The ninth article again plainly relates exclusively to calls on the " partners for the instalments of their subscribed capital, and to nothing " else. It regulates in great detail the forms of such calls, and the sub- " sequent proviso that the directors shall have no power thus to call for " any sum beyond that subscribed, manifestly relates to such calls only, " and not to actions of relief by partners distressed for company debts, or " seeking to equalize the burden of its losses, after its business is at an " end. The proviso was probably unnecessary; but it was apparently " suggested by the loose wording of an earlier part of the same article, in " which the directors are empowered to make their calls ' at such times " ' and to such amount as they shall think proper.' In fact, it is pre- " cisely equivalent to a parenthesis like this after the word amount, ' (but " ' never exceeding the sum subscribed by each such partner,)' which " would have been a better way of expressing what might very well have " been left to implication, and would obviously have afforded no room " for the strained inference of the defenders.

" The only other article referred to in relation to this first defence was " the 13th, and when fully considered, it appears to make strongly against " the views of the defenders. It relates to the right of a partner allowed " to retire, or to sell his shares, to be relieved of all antecedent debts, &c., " of the company. It first provides, that ' he shall be entitled to relief " ' of the whole of such debts,' and then the other partners ' bind and " ' oblige themselves severally to relieve him in proportion to their shares, " ' and to the extent of their liability herein-before expressed.' Now, at " the very most, this merely falls back on the original definition or mea- " sure of liability, and tends in no way to limit or define it. But look- " ing to the clear and unqualified right of the retiring partner to be at " all events relieved of the whole debts and obligations, and considering " that on the defender's view of this original liability, he could have no " relief at all, in the very probable case of the whole subscribed capital " being paid up, when the creditors came to him for payment, it seems " obvious that this liability could not be so limited as they allege, with- " out imputing to this provision the most manifest inconsistency, as well " as the grossest injustice.

" With regard to the defence rested on the allegation that the directors " had no right to begin business, or undertake engagements for the com- " pany, till the whole capital of 50,000*l.* was subscribed, it is not

The contract was framed on the basis that the partners were not to be liable under any circumstances

" necessary to consider, whether there might not be cases where such a " ground of pleading might be admitted. It is enough, that it is clearly " excluded by the circumstances of the present. In the first place, the " contract, though only begun to be signed in April 1825, expressly pro- " vides, that the copartnership shall be held to have commenced in " January preceding, and refers to and recognizes in various places (and " particularly in articles 5 and 8), the proceedings of various meetings of " directors in February and March preceding. In particular it declares " (article 5), that the directors appointed by a meeting of the 2d February " shall be continued in office for two full years, so as that no interruption " should be given to the operations in which they were engaged. To " the Lord Ordinary it appears that no party signing this contract can be " allowed to pretend ignorance of what had been done or sanctioned at " these previous meetings. But the matter is not left to implication, for, " in the 8th article of the contract, deliberately subscribed by the defen- " ders, the directors are in express terms empowered ' to complete and " ' carry into effect the purchases made of the lands of Wheatfield and " ' Meadowbank, and to take measures for the erection of suitable " ' accommodation for the establishment, and to enter into all contracts " ' and deeds necessary,' &c. Now, the lands of Wheatfield had been " already bought for a price of 12,000*l.*, and the lands of Meadowbank " for 9,750*l.*; and yet the defenders, who all sign before any thing like " the amount of these sums was subscribed, do instruct the directors, " on their responsibility, to carry into effect those purchases, and " to grant all necessary deeds for that purpose. It is quite in vain to " say that partners who thus expressly recognized and adopted as acts " of the company purchases made four months before, and when there " was not one farthing of actual subscription, must be held (upon " mere implication) to have meant that nothing further should be done " till 50,000*l.* had been actually collected; and that when they directed " buildings to be erected on the lands so purchased they had no notion " of authorizing any contract being entered into for that purpose till " this whole capital was secured. If they declared it right and laudable " to lay out 20,000*l.* when they had no capital at all, it is extravagant " to say that they would have reprobated the idea of contracting for " necessary buildings to the extent of 9,000*l.*, when they had a sub- " scribed capital of only 20,150*l.* The directors accordingly entered " immediately into such a contract, and the buildings were actually in " progress before most of the defenders subscribed. The Lord Ordi- " nary cannot think it doubtful that they were fully warranted in so " doing, by the express terms of the contract already in part recited. " But in this way the company was bound, by the express authority of " the defenders and the other subscribers, and before a single subscrip- " tion was realized, to the extent of more than 30,000*l.*, which was

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beyond the amount of the capital stock subscribed for by them respectively. Whether reference be had to

" the true origin of the debts still owing, and in fact, with the other " unavoidable expenses of the experiment thus authorized, the source of " the whole losses which have been sustained.

" This alone might dispose of the defence, that the directors had no " right to expose the partners to hazard, or to bind them in any obligation " till the whole capital was subscribed. But there is another provision in " the contract which is separately conclusive upon this head. This is the " latter part of the second article, which expressly declares, that it ' shall " ' be in the power of the directors to retain, for behoof of the company, " ' such number of shares as they may think proper of the said capital " ' stock, to be disposed of by them in such way as they may think best " ' for the company.' Now, under this provision, it is plain that the " directors might have retained, and for as long as they thought fit, any " proportion of the 2,000 shares into which the 50,000*l.* of proposed " capital was to be divided; and it would be palpably absurd to say, that " they were not to begin business so long as any part of these was so " retained. How, then, can it be pretended that, under this contract, " they were not entitled to begin business till the whole 2,000 shares were " appropriated? And what practical difference would it have made, if " they had, by an express minute, declared the 1,300 shares which were " actually undisposed of, had been retained in terms of this provision, for " behoof of the concern? In point of substance and effect they were so " retained, and as completely at the disposal of the company and its " managers as if a minute to this effect had been formally engrossed in " the books. That it was not so engrossed may be an impeachment of " their book-keeping or accuracy in entering their transactions, but can " never deprive them of the substantial power, under which they have " really acted, or subject them to forfeitures as for breach of an imaginary " interdict against entering on business till all the shares are actually " taken by individual partners, in the very face of this express licence and " permission to the contrary.

" The last defence disposed of by the preceding interlocutor, is that " founded on the concluding part of the 8th article of the contract, by " which the directors are empowered to borrow ' on the credit and secu- " ' rity of the company,' to the extent of 3,000*l.*, provided there is sub- " scribed capital unpaid up to that amount at the time. This, though " properly an empowering clause, is contended to import a prohibition to " borrow, except on those conditions, and this prohibition, the defenders " say, the directors have violated, by borrowing to a much larger extent, " and when there was no such unpaid capital; and they maintain they " cannot be called on to relieve them of the consequence of such borrow- " ings.

" Now, the short answer to this is, that there have been no borrowings " ' on the credit and security of the company,' to a greater extent than is " permitted by the contract; that the greater part of the transactions

the provision which expressly declares, that their liability shall be limited "to the extent of and in pro-

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"complained of under that name consisted merely in granting new "securities for debts previously existing, and recognized in the contract "itself, and the remainder in raising money on the personal credit of "individual partners or directors, and afterwards advancing it to pay off "the most pressing of the existing debts of the company. According to "the Lord Ordinary's impression, there is no one case in which money "has been raised, directly or indirectly, on the company's account, in "order to extend its business (the case evidently contemplated in the pro-"vision referred to), or for any other purpose than to satisfy the claims "to which the company was liable from the very beginning, or which "ought to have been defrayed by the withheld instalments on the sub-"scribed capital. It is needless to go here into the details of those pro-"ceedings; but with the exception of the sums actually advanced for "those purposes out of the private funds of individual directors, the Lord "Ordinary is not of opinion that any farther investigation is necessary. "With regard to these, a question may no doubt be raised, whether the "condition of the company was not such as to have made it the duty of "the directors rather to have allowed the creditors, whom they thus "pacified with their own money, to have proceeded with diligence against "its property, than to have delayed an inevitable catastrophe by such "interference. If the defenders can make out any case of gross and "pernicious imprudence of this kind, it will be open to them to do so "under the preceding interlocutor, which merely finds that these were "not acts of borrowing on the credit and security of the company, in "contravention of the contract. To him it certainly occurs, that it would "be next to impossible to make out such a case. By paying the most "urgent debts of the company with their own money, they may have "done no real service to the concern. But they would seem entitled, at "all events, to come in the place of the stranger creditors, whose pro-"ceedings they thus arrested, and against whose claims it is admitted that "the defenders would have had no protection.

"In these circumstances, it is needless to inquire into the justness of "the legal assumption, that the grant of a limited power in a contract of "this description implies such a penal prohibition against exceeding the "limit, as in every case to infer the forfeiture of equitable rights, other-"wise competent at common law, to persons in the situation of the "pursuers; and it is equally unnecessary to consider the effect of the "declaration, which immediately precedes this implied prohibition, viz. "'that the powers of the directors shall, in all particulars, be subject to "'such limitations, extensions, and alterations as a general meeting shall "'think fit,' taken in connexion with the fact, that the whole proceedings "of the directors, with their books and documents, were submitted to "several general meetings, subsequent to the public conclusion of all the "transactions now complained of, and deliberately sanctioned by a general "vote of approbation."

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" portion to" the shares subscribed for, or to those other clauses which no less unequivocally declare, that " in no event" shall calls be made upon the partners for sums beyond their subscribed capital, or which expressly debar the directors from borrowing money beyond the amount of subscribed capital, it appears very plain that it was the meaning of all the subscribers to the contract, that their liability should be of this limited description. It might be very true, indeed, that a restricted liability of this nature could not be secured to the partners by means of the contract in any question with the public. A total immunity from loss could only be obtained by charter or act of parliament. But it may be observed in passing, that the directors were authorized by the 37th section of the contract, " to apply for a royal " charter of incorporation or for an act of parliament " in favour of the company at any period they shall " think proper." Hence, it appears that it had been contemplated by all parties that application should be made for a charter of incorporation, by which the plan of a limited responsibility might have been carried more fully into effect.

The first clause contained the important qualification as to this limitation of liability. It expresssly declares, that the partners " shall have right to the profits and " be liable for the losses arising from or upon the said " business, and shall be bound to relieve each other " of all the debts and engagements of the company, " but that only to the extent of and in proportion to " their respective shares therein." This qualification is set forth as a substantive provision in the very outset of the contract. It occurs in the very first clause. And it is quite clear that this is the operating clause.

It provides for the constitution of the partnership; the partners "bind and oblige themselves, their heirs, "executors, and representatives whomsoever," to contribute and pay the full amount of the shares respectively subscribed for; and the right to the profits, and the liability for loss is regulated by it.

The ninth clause also expressly bears, "and in no "event shall it be in the power of the directors to call "upon the partners for a sum beyond that subscribed "for by them respectively." These words not only proceed on the notion of, but expressly provide for a restricted liability. The directors were empowered to direct the shares subscribed for to be paid by instalments. So long as any portion of these instalments was not paid they had a certain security for any engagements which they might undertake. But in so far as related to indemnification from the partners their claim ceased with the amount of the shares. Whatever engagements they might enter into beyond this sum they could not look to the partners for indemnity. The partners were entitled to stand on the stipulation, "that "in no event shall it be in the power of the directors "to call upon them for any sum beyond that subscribed "for by them respectively." If it had been the intention of the partners to undertake a general liability for each other, for all the obligations of the company, whether they exceeded the amount of the subscribed capital or otherwise, this clause would never have been introduced into the contract. It indicated, as plainly as words could do, that if the directors, by overtrading or mismanagement, exceeded the amount of capital, all obligations beyond it must be

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held to have been undertaken on their own personal responsibility, and not on the responsibility of the partners.

The other clauses in the contract aided the same construction, in which there is nothing unreasonable, as it only imports a salutary limitation of the common law liabilities, which it was expedient in this instance to restrain.

2. As the greater portion of the debt concluded for in the present summons was contracted by means of advances made by the individual directors, or of obligations entered into by them on their personal responsibility, and ultimately paid by them out of their own funds, the appellants were not bound to relieve the respondents of any such advances or obligations.

This proposition had been met in the note of the Lord Ordinary by the inconclusive remarks, that there had been truly no borrowings, "that the greater part "of the transactions complained of under that name "consisted merely in granting new securities for debts "previously existing, and recognized in the contract "itself, and the remainder in raising money on the "personal credit of individual partners or directors, "and afterwards advancing it to pay off the most "pressing of the existing debts of the company." All this, however, proceeds on a very obvious fallacy, in point of argument, and on a mistake in regard to the fact. The Lord Ordinary manifestly assumes, that the raising of money fell within the ordinary powers of administration of the directors, and that, provided they could raise it, without borrowing it, in the strict sense

of that word, their actings would be binding on the whole partners. It has been already shown, however, that this is a very erroneous view of the matter. According to the whole conception of the contract it was the manifest understanding of all parties that the administration of the directors was not to extend beyond the capital subscribed for, and that no debt was to be contracted beyond that capital. The raising of money beyond that sum implied an excess of power, whatever might be the form in which the transaction was carried through. The point to be looked to is not whether actual loans were made beyond the sum of 3,000*l.*, but whether the credit and security of the company could be pledged to a greater extent. It was not the form of the transaction but the substance of it which must be regarded. Hence it followed, that in so far as the respondents have endeavoured to pledge the credit and security of the company beyond the capital actually subscribed for, the appellants are freed from all liability. Generally, if one partner draws a bill for a partnership debt, it becomes a debt by the copartnery, but not so in a company like this.

3. The appellants were not liable for the sums concluded for in this action, in respect that the respondents, contrary to the fair meaning of the contract, proceeded in the business of the partnership before the contract was subscribed for the whole stipulated capital, and that they afterwards persevered, when, in the knowledge that it was not then subscribed to the extent of one half of this capital, concealing from their copartners the important alteration which had occurred in the defalcation of the capital.

The appellants knew nothing of the relative number

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of subscribers who had subscribed, and refused to subscribe the contract. It was the province of the directors exclusively to look to this; but when a change of so vital a character had occurred they were not entitled to proceed in the business without obtaining fresh instructions from the whole partners referably to the altered situation of the affairs of the company. That it was the deficiency of the capital which led to the action could not be disputed. Had the whole capital of 50,000*l.* been subscribed the present question could not have been raised. The loss would have been distributed over an increased number of partners, and would have been less than the number of shares for which they had respectively subscribed. But further, it was the commencement of the business with an inadequate capital which has caused much of the loss. It was this which led to the whole system of borrowing, and caused to be included, as constituting part of the loss of the company, a sum of no less than 8,107*l.* 16*s.* 6*d.* for interest on loans and debts; and by deranging the whole system of management from the beginning, diminished even the chance of success which the concern might have had under more favourable circumstances. It was impossible to doubt that the alteration that had taken place between February, when the respondents reported that the whole capital had been subscribed, and April thereafter, when they knew that not more than about 20,000*l.* was to be looked to, was material; and could it be disputed that the managing partners of a concern are bound to communicate all material facts to their copartners? The meeting of February authorized purchases to the amount of upwards of 20,000*l.*, believing that the capital was 50,000*l.*; but, if they had been

told that it was not to be the half of that sum they most assuredly would have altered their course. They would either have closed the concern, which might have been done at a small loss, or have reduced the scale of the establishment.

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The Lord Ordinary notices the appellants "pretend-" ing ignorance" of what had been done. His Lordship says, that if they thought it right to lay out 20,000*l.* "when they had no capital at all," it is extravagant to say that they would have reprobated buildings at a cost of 9,000*l.*, "when they had a sub-" scribed capital of only 20,150*l.*" But this is absolute perversion of the fact. In place of having no capital at all, when they authorized an outlay of 20,000*l.*, they believed, upon the written report of the respondents, that they had a capital of 50,000*l.*

Independently of the interlocutors being erroneous on their merits there would be manifest injustice in repelling these defences, which extend so deeply into the merits of the action, before the appellants have had an opportunity of bringing forward their whole case upon the alleged acts of mismanagement, which they were confident would work their exemption from the present claim. No judgment ought therefore to be pronounced which would conclude them, by a decision in one branch of the cause.

Respondents Argument.

Respondents.—1. The respondents, as directors and partners, or in right of directors and partners, of the Caledonian Dairy Company, were by law liable only rateably, according to the respective shares held by them of its stock, for the losses sustained and debts and obligations incurred by that company; and they were

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entitled to be relieved of all farther proportions of said losses, debts, and obligations by the remaining solvent partners rateably, according to the interest which such partners respectively had in the concern.

In the first place, what each of the appellants was called upon to contribute towards the relief of the respondents was a sum proportioned to his own share of the stock. Had these claims been made by creditors who were not partners of the company the solvent partners would have been liable, conjunctly and severally, and each partner might have been sued in solidum. But as this is an accounting inter socios, the claim is framed upon a different footing, each of the appellants being sued only for his rateable proportion of the sums of which the respondents are entitled to be relieved.

In the next place, this was not an action for payment of calls to contribute to the stock of the company. The company has been dissolved, and the object of the action is merely to adjust and allocate among the different partners, according to their respective interests in the concern, the losses which have been incurred, and the debts which remain unpaid.

The appellants, accordingly, had not disputed that the respondents have a legal right to such relief as is thus claimed by them, unless that right is excluded by the conditions of the contract of copartnery; but they said that that contract contains stipulations which exempts them from their legal obligation so to contribute towards the relief of their copartners. The Court of Session had found that pretence to be altogether untenable, on the grounds so unanswerably stated in the note of the Lord Ordinary.

2. The contract of copartnery contained no condition importing a limitation of the liabilities of the partners, inter se, to the amount of the sums severally subscribed by them for and as their shares in the copartnership; but, on the contrary, it imposed upon them an express obligation to relieve each other rateably, according to their respective interests in the concern.

In no part of the first clause is the amount of the sums subscribed by the partners said to be the measure of their liability. From beginning to end of that clause the amount of the sums subscribed by them not only is not referred to for that purpose, but is never once mentioned for any purpose whatever. What the contract refers to as the measure of the liability of partners inter se, is just the equitable one established by the law of Scotland itself, viz. "proportions "corresponding to their respective shares" in the company; and, in the next place, even had there been any doubt otherwise as to the meaning of the rule thus stated for regulating the liability of partners inter se, certain it is, that at all events it could not mean that the sums subscribed by the respective partners should be the limit of their liability. That meaning at all events must be excluded; for, it will be observed, that the right of the partners to profits, as well as their liability for losses, and for relief of debts, was to be measured by the same rule. The words "only to the extent of, and in proportion to, their "respective shares therein," apply to the one as well as to the other. The amount of the subscribed capital of each partner, therefore, cannot be the rule which is here prescribed for measuring the extent of his right

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to the profits; and neither can it be the rule which is here prescribed for measuring the extent of his liability for losses and debts, because that liability is to be regulated by precisely the same rule as the right of profits. Whatever therefore may be the meaning of the rule thus prescribed for regulating the liability of partners in relief to each other, it cannot have that meaning which the appellants wish to engraft upon the words.

The appellants were not entitled to resist the claim of the respondents on the pretence that the directors of the company had not power to bind the partners for debts and obligations on its behalf till the whole capital of 50,000*l.* has been subscribed for and secured; and they were not freed from their legal obligation of rateable relief to the respondents by the clause in the contract relating to the borrowing of money.

These positions were amply supported by the reasoning of the Lord Ordinary, and the opinion of the Court as expressed by Lord Medwyn.[1] And there could be no danger to the ultimate and satisfactory adjustment of the rights of the parties in the further progress of the action by affirming these interlocutors, as every thing else was clearly reserved by the Lord Ordinary in disposing of three of the defences founded on.

The LORD CHANCELLOR, throughout the hearing of the cause, intimated his concurrence in the views of the Lord Ordinary upon the merits of the defences, and moved that the consideration of the cause be adjourned, that their lordships might consider of the propriety in point of practice of affirming these declaratory findings at that stage of the proceedings.

[1] Report in Fac. Coll.

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Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, in the appeal which was before your lordships yesterday, in consequence of what was pressed by the learned counsel for the appellants in his reply, I was desirous to take an opportunity of examining the proceedings, in order to satisfy myself, and to be able to state to your lordships, whether there really was any danger, such as seemed to be anticipated by the learned counsel, namely, that by affirming the interlocutor of the Court of Session your lordships might be giving more effect to that decision than appears to have been intended by the learned judges who pronounced it. I find that the appellant himself, in stating his case, on the fourth page, states the grounds of his defence in these terms:—"The action was re-
" sisted on the ground, 1, that the liability of each
" partner was limited to the amount of the shares
" subscribed for; 2, that the debts concluded for
" were contracted by means of loans and obligations
" entered into in violation of the contract, and on
" the personal responsibility of the respondents indi-
" vidually; 3, that the claim of the respondents was
" barred in respect that they proceeded to carry on
" the business after they knew that the capital was not
" half filled up, without communicating that fact to
" the partners; and, 4, that it was barred in respect
" that the whole of the losses had arisen from their
" own violation of the contract, their concealment and
" misrepresentation, and from their gross negligence
" and misconduct in the management of the company's
" affairs." Now, the interlocutor of the Lord Ordinary, affirmed by the Inner House, disposes of three of these grounds in the very same terms in which they are put forward by the defenders themselves. It repels

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" the defence founded on the clause or clauses in the " contract of copartnership, alleged by the defenders " to import an absolute limitation of the liabilities of " the partners inter se, to the amount of the sums " severally subscribed by them for and as their shares " in the said copartnership." It repels also "the " defence founded on the allegation, that the pursuers " or directors of the said company had no right to " begin business, and no power to bind the partners " for any debts or obligations on behalf of the said " company, till the whole capital of 50,000*l.* had been " subscribed for and secured;" and further repels "the " defence founded on the clause or provisions of the " contract, by which the defenders allege that the " powers of the directors to borrow money on the " responsibility of the company and the partners " thereof were restrained; and before further answer " appoints the clause to be enrolled, that parties may " explain in what way the cases of the several defen- " ders are or may be affected by this deliverance, " what findings or decernitures may be required to " apply to their several cases, and what further deter- " minations may be necessary to exhaust the cause as " to the said several defenders, or any of them." Therefore, my Lords, according to a very usual course of proceeding in the Court of Session, it disposes of parts of the case, lays down the general principles by which the future proceedings are to be regulated, but it does not exhaust the case, but reserves the consideration of other matters, merely declaring certain points to be adjudged as the foundation of what the Court may hereafter think it right to do.

My Lords, it is consistent with the practice of the

Court of Session, much more than it is consistent with the practice of any court in this country, so to deal with the case. In a late case of great importance[1] your Lordships had an instance, where the summons containing declaratory and petitory conclusions, the court confined itself to the declaratory conclusions, leaving the petitory conclusions for further consideration. It declared the right, but it did not administer the relief, but left the question of what relief was to be administered for the further consideration of the court. So in this case the court says that the points set up in behalf of the defenders are not capable of being maintained, and it is not inconsistent with the practice of the Court of Session to repel those defences, but if the court think that there are other points which require further inquiry and further consideration, it does not exhaust the subject, but merely declares that in so far as the defence rests upon certain points the court is of opinion that the defence cannot be maintained. My Lords, the court has in this instance done no more than that. It has taken up the defences brought forward by the parties themselves, and it has adjudged that those defences do not meet the case made by the pursuers. It leaves the rest of the subject entirely untouched; and therefore I do not see the least danger to be apprehended from its being supposed that the interlocutor which has been pronouced can have any more effect than that which your Lordships yesterday were of opinion ought in substance to be pronounced, namely, that the defence relied on in these three grounds which constitute the substance of the interlocutor, are not defences which can protect the case of the defenders. Any other defence is open to them; it only declares

[1] Auchterarder Case, see antea, p. 220.

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7th Mar. 1839.

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that these three grounds are not positions upon which the defence can stand.

Now, my Lords, that being very plain upon the interlocutor,—such being the understanding of the Lord Ordinary, and the clear opinion of the judges of the Second Division of the Court, and I may say the clear opinion of your Lordships upon the discussion of the merits of the case, in the way almost conceded by the learned counsel for the appellants, for no resistance could be made to the conclusion to which the Court of Session had come, the difficulty, if any, was supposed to arise upon this point of form. If your Lordships are of opinion, as I certainly am, that the point of form is not open to the observations which have been made upon it, your Lordships cannot hesitate, upon a matter which appears upon investigation to be extremely plain, to affirm the interlocutor of the Court below, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

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