APPENDIX.

PART I.

SOCIETY.

1776. *February* 15.

DAVID BLAIR of Dunskey, Esq. *against* MESSRS DOUGLAS, HERON and Company.

No. 1.
Import of a clause in a contract of copartnership, obliging the representatives of deceased, or the creditors of bankrupt partners, to draw their share of *stock and profit*, as the same shall stand at the last preceding settlement of the company's affairs; where there is no stock and profit to divide, and bankruptcy has taken place. See No. 22. p. 14577.

THE late Captain John Blair of Dunskey was an original partner in the banking company of Douglas, Heron and Company, and held two shares of £500 each in their capital stock, of which £775 had been paid up. In the seventeenth article of the partnership agreement, entered into at the time of establishing this banking company, the following provision is contained: 'That in 'the event of the death or insolvency of any of the partners, the heir, executor, 'or assigns of the deceased, and the creditors of the insolvent partner, shall be 'obliged to receive and draw their share in the stock and profits thereof, as 'the same shall stand at the last preceding settlement of the company's affairs, 'with interest thereof at 4 *per cent.* from that settlement until payment *is de-* '*manded*, and the legal interest thereof afterward till complete payment.' And by another article, it is provided, 'That the whole of the company's transac- 'tions shall be completely filled up, posted, and brought to a just balance once 'every year.'

The above mentioned John Blair, brother of the pursuer, died on the 17th October 1772; and the present pursuer having been decerned his executor, in hopes of avoiding the loss which every partner of that company would sustain from its total bankruptcy, brought an action in this Court for payment of the two shares of the stock, and profit due upon it, as the same stood settled and valued at the balancing of the company's affairs in November 1771, the date of the settlement last preceding his brother's death.

No. 1. The defenders opposed the pursuer's claim upon three different grounds. 1*st*, That article 17th of the partnership imported only a stipulation in favour of the company, which indeed made an obligation upon the heirs and creditors of the deceased, and insolvent partners, to *receive*; but it was optional to the company, either to *pay* them according to the last balance, or to account according to the real state of matters. There was an obligation upon the one party to *receive, but they had no title to demand.* And there was no obligation on the part of the company to *pay*.

2*d*, That supposing the clause imported an equal and specific obligation upon both parties, to assume the last balance as the rule, yet the same could only be made effectual out of their share 'of the *stock* and *profits* thereof.' It would both be improper and unjust, that the private estates of the partners should be subjected to one another. Only the common stock and profits of the company ought to be liable.

3*d*, That as Douglas, Heron and Company, would have been to all intents and purposes, both legally and actually bankrupt, by the general failure in June 1772, had not £450,000 been raised by the extraordinary remedy of the annuity scheme, which put off their dissolution for some time; yet it is beyond dispute, that in 1772, this company had received a mortal wound, and may be said to have been on death-bed from that time. And from that time too, their distressed situation put an end to the regulations calculated for the ordinary circumstances of a company carrying on business, which were all obliged to give way to the general necessity.

On the first of these points, it was contended by the pursuer, that by the common rules of law, an executor does not succeed as partner in place of the deceased, without a fresh agreement to that purpose; but that he is entitled to draw the share of the deceased *debitis deductis*, as it stood at the time of such partner's death, independent of all stipulation whatever. That the clause now founded on is generally inserted in every copartnership to avoid repeated settlements at the death or insolvency of individual partners, and to prevent a very frequent discovery of the affairs of the company to strangers, by fixing a period at which a value is to be ascribed to each share, and which the partners agree to be the fixed value until a new settlement is made, although the real value may be greater or less according to circumstances. That this stipulation was entirely in favour of the company; for it is clear, that a company progressively gaining, must profit by fixing the value of the share of the deceased partner according to the general state last preceding his death, as all the intermediate profit would belong to the company. Had the value of stock doubled in this intermediate time, still the pursuer, from the clause he now founds on, would have been obliged to receive that stock at one-half of its real value. If the terms of the contract would bind him in the one case, they will also bind the company in the other. Whatever may be the extent or nature of the pursuer's obligation with regard to the creditors of the company, yet the articles

of agreement, can alone be the rule of obligation among the partners themselves. No. 1.
It was further insisted, that the construction of this clause had received a solemn determination of the Court, in favour of the pursuer's argument, in the case of William Kirkpatrick, who claimed a share in the original stock, at the valuation of the last preceding balancing, as executor of John Kirkpatrick, an original partner, who died in January 1771.

To this, it was answered, That although such clauses as the one now founded on by the pursuer, are common in contracts of copartnership, yet there is nothing to prevent that clause being so framed, as to be obligatory upon the one party, and only optional to the other; and here there is no obligation whatever imposed upon the company. This clause was only framed in the view of success, and of the company's continuing the business. It would be extraordinary, indeed, that a clause framed for the reverse of bankruptcy and dissolution, should nevertheless regulate that event. By the pursuer's construction of this clause, had all the partners except two or three died in October 1772, the period of Captain Blair's death, the whole loss must have fallen upon the few survivors. It is impossible, that a consequence so absurd can be deduced as the meaning of this clause. Besides, such an extraordinary accident as the insolvency of the company, could not have been foreseen or guarded against by special clauses, and it is impossible to apply them to an event which was not in view. It was also said, that the case of Kirkpatrick does not apply, because that partner died in January 1771, when the company were in a flourishing condition, whereas, before Captain Blair's death, the company were in a state of virtual bankruptcy, had entered into the annuity transaction, and had actually stopped payment of their notes.

Douglas, Heron and Company, supported their second proposition, by contending, that the partners of a company were only bound to communicate profit and loss while the company is subsisting, and to divide the stock, or what remains of it, when dissolved; and that it never was the intention of this or any other clause in a contract of copartnership, to subject the individual partners to one another out of their private estates. Now, it is not disputed, that both stock and profit had been swallowed up in the general convulsion of June 1772, previous to Captain Blair's death. Even admitting, then, that the last balance of the company's books must be the rule of *valuation*, still the Company's *stock* is the fund from which that value must be paid. Mr. Blair only claims as the representative of a partner, and even by the very words of the clause founded on, he is 'obliged to receive his share in the stock and profit.' His claim therefore can extend no further. And it was added by the Company, in the *third* place, That when the Company itself becomes bankrupt, *deest res*, there can be no society without a subject capable of yielding profit. If the company had been declared bankrupt before Captain Blair's death, there could have been no room for the pursuer's claim. But it must be admitted, that the Company were at that time in a state of *virtual bankruptcy*, as the

No. 1. annuity loan had been transacted, and they had stopped payment of their notes. Although business had afterwards been commenced, and the partnership not actually dissolved till August 1773; yet, whatever business was done after June 1772, was merely *ad hunc effectum*, to do those things which were necessary for putting an end to the business. Captain Blair survived every transaction of the Company by which loss had been sustained; and as his executor had received the advantage of the annuity loan, by the estate being thereby saved from diligence, so it is but fair that he should submit to the loss.

On both of these points, the pursuer answered, That with regard to the stock and profit, the company had the same funds after the 1772, as previously to that period; for although before Captain Blair's death, their offices had been shut, and they had agreed to allow interest on their notes, yet that is no proof of bankruptcy; as the two public banks in Scotland had done the same some years before, without that event being expected to ensue. That as the company did subsist without dissolution till August 1773, they must be bound by their subsisting articles. That these articles led the pursuer back to November 1771, after which time it is declared, that he has no interest whatever in the Company. That at this time, there was not even a bankruptcy expected, and there was a sufficient *stock* and *profit* to divide according to the balance that the pursuer now claims. The intermediate transactions between the last balancing and the death of Captain Blair, the pursuer had no concern with, and as he would not have been benefited by any fortunate circumstance that might have occurred, so it is impossible to subject him to the loss that has happened within that time. The copartnership was not dissolved till August 1773, and supposing that the annuitants had died within that period, the company would have been in a much better situation than ever, but the pursuer could not have participated in that advantage. Therefore, the pursuer cannot be affected with the Company's acts after the last balancing of their books in November 1771. What is meant by the *virtual bankruptcy* of the Company, if any thing at all can be understood by it, is, that a bankruptcy was apprehended; but that the rules of accounting agreed upon by a subsisting company, should be at once cancelled by acts done to prevent an impending dissolution, appears to be contrary to all mercantile principles and the reason of the thing itself. Nor can the merely having recourse to extraordinary expedients, work that effect in any company great or small. But besides, these extraordinary expedients were all subsequent to November 1771, after which period, the pursuer, by the seventeenth article of agreement, had no interest or concern in the Company.

The Lord Ordinary, 10th March 1775, found, that as the Company had stopped payment on the 25th of June 1772, several months prior to the death of the pursuer's brother, in whose right he claims, that the 17th article did not apply, and therefore assoilzed the defenders. The Court, however, 21st July 1775, at first altered this interlocutor, and found 'the defenders account-

'able to the pursuer for the value of his brother's shares, as ascertained by the 'balancing of the company's books in November 1771.' But upon advising a reclaiming petition with answers, and after a hearing in presence, the following interlocutor was pronounced: No. 1.

'The Lords, (13th February 1776,) having advised said petition, with the 'answers, and heard parties' procurators in the cause, in presence, with what 'is above set forth, and that it is asserted by the procurators for the defenders, 'and not denied by the procurators for the pursuer, that betwixt the balancing 'of the Company's books in November 1771, and Mr. Blair's death in October '1772, the said Company became totally insolvent in manner above set forth; 'therefore find, That the petitioners are not accountable to the respondent 'for the value of his brother's share, as ascertained by the balancing of their 'books in November 1771.'

And this interlocutor was, (30th April 1777,) affirmed upon appeal by the House of Lords.

Lord Ordinary, *Stonefield.* Act. *M'Queen, Blair.* Alt. *Ilay Campbell* et *Alex. Wright, Alex. Murray.*

D. C. *Fac. Coll. No. 223. p. 194.*

1776. *August* 8.

THOMAS and WILLIAM DUNLOPS, and Others, Trustees for the Creditor of JOHN CARLYLE and Co. *against* ALEXANDER SPIERS, and Others, Trustees of JAMES DUNLOP, junior.

No. 2.
Particulars of the case, No. 42. p. 14610.

JAMES DUNLOP, younger of Garnkirk, James Douglas of Mains, afterward known by the name of James Campbell of Blythswood, and James White merchant in Glasgow, entered into a copartnership, under the firm of James White and Company.

Upon the death of James White, who had been acting partner, a new copartnership was formed betwixt James Dunlop and James Douglas, and two other persons then assumed, viz. John Carlyle and Gavin White; which copartnership was carried on under the firm of John Carlyle and Company.

This copartnership failed in November 1763, and the creditors of the Company having entered into a concert, in which they became bound to follow joint measures, Thomas and William Dunlops, Robert Bogle, Thomas Scott, and the now deceased James Montgomery, merchant in Glasgow, were nominated by them as their trustees. These gentleman at the same time were also appointed trustees by Carlyle and Company for gathering in their effects, and dividing them among the creditors agreeably to the concert thus entered into.