Respondents' Authorities.—Shott's Iron Company, 19th Jan. 1828 (6 S. & D. p. 399); Culcreuch Cotton Company, 27th Nov. 1822 (2 S. & D. p. 47.); Adair v. New River Company, 2 Vesey, p. 429; Cockburn, Vesey, 16, p. 321; Cheyne, 2d Dec. 1828 (7 S. & D. p. 110.); Somervail, 22d Feb. 1830; Fife Bank, 7 Shaw and Dunlop, p. 60; 3 Ivory's Ersk. 2, 614.

Sept. 29, 1831.

SPOTTISWOODE and ROBERTSON—MONCRIEFF, WEBSTER, and THOMSON,—Solicitors.

GEORGE HUNTER, Appellant.—*Mr. Serjeant Spankie—Mr. Sandford.*

No. 49.

Honourable Mrs. C. COCHRANE and others, Respondents.—*Dr. Lushington—Mr. Rutherford.*

Partnership.—Usury.—Reparation.—Two individuals, having entered into a joint speculation in the purchase of an estate, held (affirming the judgment of the Court of Session),—(1.) That neither party was liable in damages for the manner in which this joint adventure was conducted. (2.) That, notwithstanding a change of circumstances, the eighth article of their contract of copartnery remained binding. (3.) That one of the parties was prevented from objecting to an accountant's report, and was not entitled to factor-fee. And (4.), That it was not usurious for the parties to stipulate that interest should be allowed by the one to the other out of the clear rents and profits of the estate, including the making a rest at the end of the year.

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2D DIVISION.
Ld. Mackenzie.

IN 1808 George Hunter and the late Honourable Basil Cochrane purchased jointly the estate of Auchterarder for 50,000*l.* on speculation. The purchase was made by them under a written contract of copartnery to endure for eight years. Cochrane was to advance the money, and have the titles in his own name, but Hunter was to act as manager and factor, and received a factory for that purpose. The estate was to be divided into lots and re-sold, and the parties were to share equally the profit and loss. The fourth article of the contract provided, "That the said Basil Cochrane and his foresaids shall, "on the 15th day of May in every year, state an account of the "said price of 50,000*l.* so advanced and paid by him as afore-"said, and of the interest thereof to that period, and of such sum "or sums of money as may have been laid out and expended "in improvements as aforesaid, and of the interest thereof to

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" that period; and such interest being added to the principal " sums, there shall then be deducted from the said aggregate " sums of principal and interest what shall have been actually " received for the time from the net rents and profits of the " said lands and barony of Auchterarder and others, or from " the proceeds of any sale or sales to be made thereof, or any " part thereof, (the expenses of management, and the expenses " of such sale or sales, being paid in the first place,) and the " balance shall be held to be a principal sum, bearing interest, and " be carried over to the next year's account; and both parties " agree that such rents and profits, and the produce of such sale " or sales as aforesaid, shall, after paying the expenses of " management out of such sale or sales, be applied in manner " herein-before directed in payment to the said Basil Cochrane " and his foresaids of the sums principal and interest before " specified." And the eighth article provided, "That the " whole matters aforesaid shall be transacted and completed in " the space of eight years, to be computed from and after the said " 15th day of May last (1808), and a final account shall then " be settled of the whole matters therewith connected in the " manner aforesaid; and if any part of the said estate shall then " remain unsold it shall be valued by two indifferent persons, " one chosen by the said Basil Cochrane and his foresaids, and " the other by the said George Hunter and his foresaids, with " power to the persons so chosen to name an oversman or " umpire in case of their difference in opinion," &c.

In 1812 Hunter became desirous to dispose of the estate. He was offered 60,000*l.* for it, but Cochrane objected to the sale, and recalled Hunter's factory; and it afterwards was disclosed that he had burdened it with an annuity of 1,500*l.* in favour of his wife. Hunter then raised an action, concluding that he should not be liable for any loss that might arise under the contract; that he should be found entitled to 5,000*l.* of damages in respect of Cochrane having objected to the sale, and that the estate should be sold. Cochrane raised a counter action, concluding, inter alia, that the whole fee and property of the estate should be found to be in him; that he had the sole right of management; that Hunter should deliver up the writs in his possession, and be found liable in damages for withholding them, and for breach of agreement.

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These actions being conjoined, the Lord Ordinary (11th March 1814) found, "primo, that the fee and property of the lands and "barony of Auchterarder is vested in the said Basil Cochrane, "but that he holds the same in trust for behoof of himself and "the said George Hunter under the conditions specified in the "agreement executed between them on the 5th and 8th "October 1808; and finds that, in virtue of the agreement "above referred to, the said George Hunter is entitled to de-"mand from the said Basil Cochrane, in the event of the whole "estate remaining unsold when the demand is made, a disposition "or conveyance, with the usual clauses, to a moiety or half of "the estate, on his making payment to the said Basil Cochrane "of the half of the original price, together with the half of the "expenses of improvement and of management, deducting the "rents which have been received, or a disposition or convey-"ance, with the usual clauses, to the half of the remaining "property, if a part shall be sold, on his paying a half of the "balance of the price remaining unpaid to the said Basil "Cochrane, and a half of the expenses of improvement, as "provided for in the contract: Finds, secundo, that the fee and "property of the estate being vested in the said Basil Cochrane, "and he being empowered and taken bound by the fifth article "in the deed of agreement to re-sell the lands, he has it in his "power to grant effectual conveyances to third parties, or to "burden the estate with debt in favour of the heritable credi-"tors, and that the purchasers or creditors would be secure "whether Mr. Hunter had consented to the transaction or not; "but finds that, as the said Basil Cochrane holds the estate as a "copartnership concern between himself and Mr. Hunter, in the "profit or loss from the sale of which Mr. Hunter is to have "a joint and equal interest, so the said Basil Cochrane is "bound to consult with the said George Hunter, and to obtain "his consent before either selling the lands or burdening the "same with debt, or taking any such step which may affect the "said George Hunter's interest in the estate or value thereof; "and finds, that if Mr. Cochrane does otherwise, he will be "liable in reparation to Mr. Hunter of his share of any loss "that may accrue from the sale, or burdening with debt of the "lands; and finds, that, on the principles now stated, the said "Basil Cochrane is bound to obtain and record a discharge

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" and renunciation of the life-rent infeftment taken in favour of " his wife over the estate: Finds, tertio, that in respect the said " Basil Cochrane is feudally vested in the fee of the estate, and " in respect the factory granted by him to the said George " Hunter is expressly declared in gremio thereof to be re- " vocable, the said Basil Cochrane was entitled to recall " the factory, assoilzies him from the conclusion of the action " at the instance of the said George Hunter, founded on the " revocation of the factory, and on the appointment of a diffe- " rent factor; but finds that the said Basil Cochrane is liable to " the said George Hunter for any damage which the latter can " instruct to have been sustained by the copartnership concern " in consequence of mismanagement of the estate on the part of " the said Basil Cochrane; and that, on the other hand, the said " George Hunter is liable to Mr. Cochrane for any loss that " may be proved to have been suffered by the conduct of the " former while he had the charge of the estate: Finds, quarto, " that the said Basil Cochrane is liable to the said George " Hunter for his share of any loss which it may be proved by " the said George Hunter, after the estate shall have been sold, " has been sustained in consequence of the said Basil Cochrane " having refused to accept of offers for a sale of the lands and " barony; but finds that it cannot be ascertained whether such " damages are incurred, or, if incurred, what is the amount " thereof, until the estate shall have been sold, or the time shall " have arrived when the transaction between the parties is de- " clared by the deed of agreement to be brought to a conclusion. " In the action of declarator at the instance of the said Basil " Cochrane against the said George Hunter, finds, primo, that " the said Basil Cochrane has failed to show any sufficient reason " for insisting that the said George Hunter shall find security to " him for half or moiety of any loss or defalcation that may be sus- " tained at the winding up of the concern, or sale of the lands, " and therefore assoilzies the said George Hunter from the " conclusion to this effect of the action against him: Finds, " secundo, that the said George Hunter is bound to deliver to " the said Basil Cochrane or his commissioner the whole writs " and evidence, title deeds, leases or missives of lease, and " plans or maps of the lands, and that he is liable in damages " to the said Basil Cochrane for any loss or damage which may

" be proved, after full and due investigation, to have been sus-
" tained in consequence of his refusal to deliver up the papers
" referred to, or any of them, if it shall appear that any damage
" has been incurred through the refusal to deliver up these
" papers. Lastly, finds the said George Hunter bound to hold
" count and reckoning with the said Basil Cochrane for the
" rents received by him, and for the prices of the timber cut and
" sold, and ordains him to produce in process the roup-roll of the
" timber, and the bills which he states were taken by him for the
" price; finds it unnecessary to decide further with regard to
" the other conclusions of the action at the instance of the said
" Basil Cochrane, in respect these conclusions are already disposed
" of in determining with regard to the conclusions of the previous
" and counter action; and, on the whole matter in dispute,
" decerns and declares according to the above findings."

The Court adhered. A remit having been made to Brown, land surveyor, he reported as to the most expedient method of selling the estate; and the Lord Ordinary (11th March 1817) found, " That the eighth article of the agreement, in so far as it
" directs that if any part of the estate shall remain unsold on
" the 15th May 1816, a valuation shall be made by certain
" persons as therein mentioned, cannot furnish the rule of
" bringing the parties to issue in the circumstances which have
" taken place; and finds that the estate must be sold in whole
" or in lots by Mr. Cochrane, as a property held by him in
" trust for behoof of himself and Mr. Hunter, and in order to
" regulate the interests of these parties in the price, and their
" other rights and interests arising out of the contract, and
" which are sanctioned by the interlocutors of the Court."

The Court, however, (1st July 1819) altered this interlocutor, and found, " That the eighth article of the deed of agreement
" between the parties must take effect, and that the estate must
" now be valued in the manner therein pointed out; or in case
" of the parties failing to choose two indifferent persons for that
" purpose, then at the sight of the Lord Ordinary, in such
" manner as his Lordship shall direct, and remit to his Lordship
" to proceed accordingly."

Brown again reported, stating his opinion as to what was a fair price for the estate generally, without specifying any particular value on the wood and minerals, but specially excepting

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from the valuation a share of a common muir, in respect he did not consider himself a good judge of such property. The report was approved of, and a remit was afterwards made to Russel, an accountant, to state how the account stood between the parties. The Lord Ordinary thereafter (11th July 1820) found, "In "terms of the eighth article of the deed of agreement between "the parties, that Mr. Cochrane is now entitled to retain what "remains unsold of the estate at this time, and allows both "parties to see and object to Mr. Russel's report, if they, or "either of them, think fit so to do, and to be heard on the "points of the cause which are still undecided."

Condescendences were then ordered as to damages; but upon advising the statements of parties, the Court * (27th May 1824) dismissed all the claims of damages hinc inde, and remitted to the Lord Ordinary. Hunter then contended that, under the interlocutors of the Court, the value of the estate must, in a question of accounting between the parties, be taken, not as at Martinmas 1819, but Whitsunday 1816; but the Lord Ordinary repelled the objection, and the Court adhered. Thereafter, Cochrane having died, his Lordship (8th July 1828) found, "That the trustees of the late Honourable Basil Cochrane offer "either to take, or to allow Mr. Hunter to take, the moor of "Auchterarder at the price specified in their minute; and in "respect Mr. Hunter is not willing to take it, finds that the "trustees are entitled to retain the said moor at that valuation, "with interest thereof from the date at which this interlocutor "shall become final, and that this valuation falls to be sub-"stituted in place of the valuation of Mr. Brown in this "respect; and with this variation repels the objection to "Mr. Brown's report, and decerns accordingly."

The Court adhered.

Hunter then lodged a minute, craving that, in addition to the value put upon the estate by the surveyor, additional sums ought to be allowed for the church seats attached to the estate, for the wood and for the minerals; he also claimed a commission for trouble in managing the estate while it remained in the

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* 3 Shaw and Dunlop, p. 79.

joint possession of the parties; but the Lord Ordinary (30th November 1830) found, "That after the approval of "Mr. Brown's report, which is final, it is not competent for "the pursuer to bring forward the present objections, and "therefore repels the same, and repels also the pursuer's claim "on account of his own trouble;" and the Court (18th February 1831) adhered.* Sept. 30, 1831.

Hunter appealed.

Appellant.—(1.) The whole loss which has arisen in consequence of the joint speculation having been occasioned by the improper conduct of Cochrane, no part of the loss can justly be thrown on the appellant, but, on the contrary, the respondents have rendered themselves liable to the appellant in damages. Accordingly, he ought to be assoilzied from the conclusions of the action raised against him by Cochrane; and, on the other hand, in the action raised at the instance of the appellant, he ought to be relieved from all the loss which has arisen from the said speculation, and found entitled to damages. (2.) It has been found by a final judgment of the Court of Session, not appealed from by the respondents, that if loss has been sustained in consequence of Cochrane having refused any offer of purchase for the lands and barony of Auchterarder, the appellant is entitled to the damage which has arisen in consequence. (3.) At all events, the eighth article of the agreement concluded between the parties became inapplicable to the circumstances in which they were placed, and ought not therefore to have been enforced in the manner now complained of. (4.) Even if the eighth article of the deed of agreement had been binding upon the parties, it was plainly the valuation of the estate as at May 1816, and not at any subsequent period, which must form the rule of settlement between the parties.

Respondents.—(1.) It is clear, that in terms of the eighth article of the deed of agreement between Cochrane and the appellant, what remains unsold of the estate of Auchterarder is the exclusive property of the respondents as his representatives,

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* 9 Shaw and Dunlop, p. 477.

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and that the appellant is bound to relieve them of one half of the loss incurred by the joint adventure. (2.) The appellant's own acts and deeds, judicial and extra-judicial, make it impossible for him, consistently with law or justice, to challenge the Lord Ordinary's interlocutor of 11th July 1820, by which Cochrane was found entitled to retain what was then unsold of the estate. (3.) The claims of damage by which the appellant has attempted to compensate the legal claim against him for payment of his half share of loss are frivolous and unfounded. In the whole transaction Cochrane was the party misled, and he violated no legal right competent to the appellant; and, (4.) The value of what remains unsold of the estate having been fixed by reference to Brown in 1819, and his report having been approved of by the Court below without objection, it ceased to be competent for the appellant to insist some years afterwards that the estate should be valued speculatively, with a view to its supposed marketable price in May 1816. Any complaint about the value of the muir must now be frivolous. The value of it was correctly ascertained by a report of the referee Mr. Brown, who, from being originally chosen by both parties to affix a definitive value to the whole estate, had a right to determine the value of this appendage; but, the respondents closed with the appellant's own proposal to give him credit for more than double the ascertained value of it. The pretext, that growing trees, minerals, market-customs, church-sittings, &c. had been overlooked in the valuation, being totally unfounded in fact, and irrelevant in law, no attention is due to them. The appellant's claim for factor-fee is unsupported by the terms of the commission under which he acted, is opposed to his own declarations subsequent to the period for which it is claimed, and is out of time, being brought forward upwards of fifteen years after the rendering of his factory accounts, which contain no charge of the kind, or reservation of it.

The point was also raised, but which had not been argued in the Court below, that the contract was colourable, illegal, and usurious.

Lord Chancellor.—My Lords, in consequence of some observations that have been thrown out here, for the first time, respecting the usurious or illegal nature, in the respects specified, of the agree-

ment made between Cochrane and Hunter, I thought it right to turn the attention of the counsel to that matter, because it had not been argued in the Court below. It is inconvenient though not incompetent to have objections sprung upon us for the first time here, and this not unfrequently occurs, not only in Scotch, but in English and Irish appeals. I am, upon the whole, disposed to recommend to your Lordships to affirm the interlocutors of the Court below. The only part to which I shall call your Lordships' attention is that which has not attracted the attention of the Court below. Upon the best consideration of this contract, I do not think, in the circumstances of this case, that it can be taken to be illegal as between the two parties. It is perfectly clear, and cannot be doubted with respect to the English law, after the decisions of the courts of Westminster Hall, that in a court of law in this country an agreement to make a rest at the end of the year—a general agreement for compound interest—for interest upon interest, is bad (for that is a cover for gross and rank usury); but an agreement which beforehand shall stipulate that the interest at the end of the year shall accumulate without a new transaction—without a new loan or agreement of that description—that it shall then become principal, and bear interest, has been, in a case which ran the gauntlet of all the lawyers in Westminster Hall, declared in most explicit terms not to be invalid. At the same time it is perfectly certain, that the Court of Session is a court of equity as well as a court of law, and may admit of those considerations on which, in respect of such agreement, the courts of equity in this country are thought to discountenance such proceedings; and it is said that in a very well known case—I think of a West India mortgage—in which there was an agreement to accumulate interest, and make it become part of the principal, Lord Eldon within a year or two after he came to the Great Seal, though he distinctly admitted there was nothing illegal, yet said, that a court of equity would discountenance such a transaction; he even went so far as to say that it would not permit it, because it had a tendency towards usury, but still (having regard to the decisions in the courts of Westminster Hall) he said that it certainly was not illegal. There might be some doubt, therefore, taking the Court of Session to have an equitable as well as a legal duty to perform, whether, in such a case, they would not have been bound to sustain this objection, had their attention been called to it; and if they would have been bound, had their attention been called to it, we are bound to put ourselves in their place, and to do for them what they ought to have done, or, at all events, we should have been bound to remit to the Court below for further consideration; but when your Lordships come to look at the present case, you must see that it is not a transaction of the kind alluded to, and cannot, in its

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circumstances, be void, as a transaction for the loan of money, either by way of loan upon a bond or upon mortgage, which was the nature of the case of Chalmers v. Golding, decided by Lord Eldon. It is an arrangement with respect to a partnership in a land speculation. £50,000 was to be advanced to purchase the land by one of the two copartners, and the skill and work and labour to be bestowed upon the investment were to be contributed by the other copartner; and in making their arrangement beforehand they had agreed between themselves, that interest should be allowed by one of the partners to the other out of the clear rents and profits of the estate, in a certain proportion, and including the making a rest at the end of the year. Now, it is quite clear that no jury of the country would find that to be usury since the case of Carstairs v. Stein, which was tried at Guildhall, and underwent great discussion, on the motion for a new trial. The question of usury is precisely a question of fact for the jury. That was the case of a supposed undue commission; and the question here to go to a jury, under the direction of the learned judge, would be, whether this whole transaction was or was not a shift for receiving more than five per cent. Now, no jury could look at this transaction, and doubt about it. I think it cannot be construed into a cover for obtaining more than five per cent., therefore I have no doubt whatever, had this matter been brought before the Court below, as it has been before your Lordships, even if their opinion had been that, exercising a sort of equitable jurisdiction, as well as legal, they ought not to countenance transactions of the nature I have described; nevertheless, they would not have considered this as one of that class of cases which they were bound to discountenance, much less disallow, on the ground of the contract being colourable and a cloak for usury. I am therefore of opinion that your Lordships ought to affirm the judgment of the Court below.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

MACDOUGALL and BAINBRIDGE—SPOTTISWOODE and ROBERTSON,—Solicitors.