# SCOTLAND.

ON APPEAL FROM THE COURT OF SESSION,

(First Division.)

JOHN GEDDES - - - - *Appellant*;

ARCHIBALD WALLACE, for Himself and Partners - - - } *Respondents.*

The manager of a partnership concern, having a salary, with a share of the profits, according to a proportion of capital and stock not advanced by him, but assigned by way of nominal interest, (for the purpose of creating an addition to his salary, depending upon the contingency of the success which might be consequent upon his skill and industry,) is not a partner subject to loss in account with the other partners.

In such a case the manager is not liable for loss, although it is expressed in the articles of partnership that the partners (not excepting the manager,) are to be "sub-"ject to profit and loss," and although the manager signed the partnership books, joined in securities given by the partnership, and in most other partnership acts, including the advertisement for a dissolution; because it appeared, from the general structure, and all the provisions of the contract taken and construed together, as well as from the transactions between the parties and the conduct of the other partners, that the provision as to profit and loss was not intended to apply to the manager.

If it were so intended originally, it could not be enforced at the date the suit commenced, because the other partners, upon the dissolution of the partnership, and for many years afterwards, made no mention of the subject, and particularly as in a former suit between them and their manager respecting the amount of his salary, they omitted to make any claim against him as partner for a share of loss; and more especially as the Court below, and the House of Lords on appeal in that suit, estimated the salary on the supposition that

the manager was entitled to a share of profit as an addition to his salary, without being subject to loss, no mention or claim having been made on that subject, either in the original suit in the Court below, or upon appeal.

A partner may be liable for loss as to the creditors of the partnership, and not so as to his copartners.

The most positive expressions as to liability to loss, in articles of copartnership, may be controlled and superseded by transactions between the parties, the conduct of the copartners, and the special circumstances of the case, including non-claim, and inconsistent representations during a protracted litigation, which furnished occasion to make the claim if the right existed.

The transactions between partners may amount to a waiver of a written agreement, or evidence of a new agreement, different from written articles, provided those transactions show a probability, amounting almost to demonstration, that the articles were otherwise intended.

IN September 1785, the firm of "The Glasgow Bottlework Company," having lately purchased the concern in which the appellant was manager, retained the appellant in his situation, and agreed to allow him a fixed salary of 100*l.* per annum, with a thirteenth share of the free profits of the trade, not requiring him to advance any capital.

Soon after the establishment of the bottlework company, a proposal was made to them by "Hamilton, Brown, Wallace, and Company," manufacturers of flint glass at Verreville, Glasgow, to unite into one company; and in June 1786 a partnership was formed, which assumed the denomination of "The Glasgow Glasswork Company." The nature of the connection between the appellant and this company forms the subject of the present appeal.

The superintendence of the manufacturing department, both of the bottlework and of the flint

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glasswork, and the general management of the concern, were intrusted to the appellant. The mercantile and pecuniary transactions of the new company were directed chiefly by a committee, consisting of four of the partners.

The new company did not immediately upon their formation execute a written contract of co-partnership. In the mean time the committee held meetings for the purpose of conducting the business, and inserted their resolutions and orders in a sederunt book. The appellant attended them to receive instructions as manager, and subscribed some of the minutes in the book.

Articles of partnership, 1786.

The contract of co-partnery *, which was subscribed by the appellant, declares that the stock of the Glasgow glasswork company was to be 12,000*l.*; of which 8,000*l.* was to be advanced, and 4,000*l.* was to be borrowed. Eight shares were to belong to the partners of the bottlework company; eight shares were to belong to Hamilton, Brown, Wallace, and company; and the appellant was to have one seventeenth share, without advancing any capital.

The article, by which this arrangement is made, is expressed thus: "Third, In the said capital stock "of 12,000*l.* sterling, the *partners* shall be inte- "rested *in the profit or loss* in the following "proportions; viz. the partners under the firm of "Glasgow bottlework company eight seventeenths; "and the partners under the firm of Hamilton, "Brown, Wallace, and company, eight seventeenth

* To avoid repetition, some of the provisions of the articles of copartnership, which are stated by the *Lord Chancellor* in moving judgment, are omitted here.

" shares; and the said John Geddes one seven-
" teenth share."

The ninth article provided, that " the company's
" books shall be balanced upon the 31st day of De-
" cember yearly, and docqueted in three months
" thereafter, beginning the first balance upon the
" 31st day of December 1787, when the company's
" free stock shall be ascertained, which shall then,
" and yearly thereafter, be subscribed by a majority
" of the partners in point of interest; and which
" docqueted balance shall be held good and proba-
" tive for and against all parties concerned."

The fifteenth article declared, that " although,
" by this contract, the said John Geddes is admitted
" a partner, and holds one seventeenth share in this
" company, yet it is expressly declared and under-
" stood to be under the conditions and restrictions
" more particularly specified in an agreement of this
" date, made and entered into between him and the
" company, and to which all the parties hereto bind
" and oblige themselves to conform."

The contract, towards the close, contains the following declaration: " That although, by the eigh-
" teenth and eleventh articles of the foregoing con-
" tract, certain rules and regulations are laid down
" for the payment of the shares of deceasing or
" bankrupt partners, yet, notwithstanding thereof,
" it is specially covenanted and agreed to by the
" whole parties hereto, that the stock or interest in
" this co-partnery of deceasing or bankrupt partners
" shall not be paid to their executors or creditors
" by this company, but that the same shall fall and
" devolve upon the remanent partners, of whichever

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" of the said Glasgow bottlework company, or " Hamilton, Brown, Wallace, and company, they " may respectively be partners; which respective " companies shall be entitled to hold and enjoy the " said shares, and settle with the executors or cre- " ditors of such deceasing or bankrupt partners, " according to the rules of their own co-partnery."

The agreement, stated in the fifteenth article of the contract, was drawn up, but not signed by the appellant or the other partners.

This agreement, among other things, provided, 1st, " That the said John Geddes shall take the " management and direction of the business of the " company, for which he shall be allowed the sum " of 100 *l.* sterling yearly out of the company's stock " during his management, *besides* his one seven- " teenth share *of the profits or loss* arising from " the business, if any be, as likewise the house " usually occupied by the company's manager, " and coals and candles for his family: 2d, In " consideration of which the said John Geddes " shall devote his whole time and attention to the " affairs and business of the company, and keep " such regular books and accounts as necessarily " belong to the business of his department, and " which shall be open to the inspection of the part- " ners at all times; that he shall likewise engage or " cause to be made all the pots necessary for the " business; and in short, he hereby engages to do " whatever else may be required of him for the " interest and advantage of the company: that he " shall at all times subject himself to such orders " and regulations as a majority of the partners in

" point of interest may think fit to give him; and " he hereby further promises and engages, that he " will not be concerned in any other trade during " the time of his acting as manager for this com- " pany. 3d, It is hereby specially provided and " declared, that it shall and may be competent at " all times, to and in favour of a majority of the " partners of the said company in point of interest, " in case of difference, at pleasure to supersede the " said John Geddes as manager, and to appoint " another in his stead, upon giving him six months " previous notice; or in the company's option, in- " stantly to supersede him upon paying him 200 *l.* " sterling; and likewise that the said John Geddes " shall at all times have it in his power to leave the " said company's service, on giving them six months " previous notice; and in either of these events, of " his being so superseded or leaving the company's " service, he shall from that time cease to be a part- " ner in the said company, and shall be obliged to " assign over his share to the other partners, upon " being paid the value thereof in manner after men- " tioned. 4th, In case the said John Geddes shall, " during the subsistence of the before mentioned " co-partnery, be superseded in the management " aforesaid, his share shall be withdrawn by him or " his assigns, agreeable to the balance struck imme- " diately preceding his dismission, which shall be " payable to him or them in two equal portions, at " the distance of three and six months from the " time of his leaving the work, and settling with the " company the accounts of his intromissions, with " the legal interest thereof from the date of such

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" balance till the same is paid; and in the event of " his death or bankruptcy during the currency of " this agreement, his share shall be paid to his exe- " cutors or creditors, at the times and by the propor- " tions, and bearing interest in the same manner " as is mentioned in the contract of co-partnery itself " of this date, in the article with regard to the " death of any partner."

Part of the appellant's duty originally as manager, was to keep the books personally; but in September 1787, the minutes of the committee of management state, that as the appellant had too much to do, it would be expedient to get a man " who would take " charge of the mercantile part of the business, such " as the writing of letters, making out invoices, taking " care that orders were properly and expeditiously " executed," &c. so as to leave the appellant full leisure to attend to the manufacturing part of the business. In pursuance of this resolution, a clerk was employed to keep the books and attend to the mercantile part of the business, as an assistant to the appellant.

In the balance book of the company, where the balance sheets of each year were entered and docqueted, were docquets dated 15th April 1789, 12th March 1790, 17th March 1791, and 3d April 1792; the three last were signed by the appellant, and express that the partners then " examined the " books of the Glasgow glasswork company, kept by " John Geddes," &c.

The capital consisted of buildings, tools, and stocks of manufactured glass, belonging to the two former companies, which were purchased or taken by the united company, according to inventories and

upon a valuation. To carry on the trade, money was borrowed on their joint bonds.

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When the stock of the company was fixed, and the inventories and valuations made, accounts were opened in the ledger for the shares of stock belonging to the different parties interested. The plan being that the bottlework company and the flint glass company should rank as creditors on the funds and profits or losses; eight seventeenths of the stock were entered in a stock account to the Glasgow bottlework company; eight seventeenths to the flint glass company, Hamilton, Brown, Wallace, and Co.; and the remaining one seventeenth to the appellant.

A stock account was opened for him at the first valuation, crediting him with one seventeenth share of the stock, which then was 625*l.* This sum was not advanced by Mr. Geddes, though credited to him in the stock account; there was therefore a second account opened, viz. a common stock account current, in which the preceding share of stock was stated to his *debit.*

In December 1788, upon a balance of the books, there was an apparent profit of 1,475*l.* 10*s.*; but the balance book states, that as no allowance had been made for bad debts, and as the buildings were stated rather high, the company ordered a deduction to be made from the valuations of the whole, to the amount of 2,626*l.* This made a loss on the balance of 1788, of 1,151*l.* 5*s.* 10*d.*; and Mr. Geddes' one seventeenth of that loss, 67*l.* 14*s.* 5*d.* is charged to his *debit*, but he did not sign the docquet, although he acquiesced in the arrangement.

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On the 28th of September 1790, a minute was entered in the sederunt book, dividing the shares into eighty-five parts, and mentioning the number of shares opposite to the names of each of the partners. Mr. Geddes' share is entered thus: "To "John Geddes 5–85ths." His name is entered on the list like those of the other partners, after which the minute proceeds as follows: "In which propor- "tions we declare ourselves to be interested, and to "*draw profit or suffer loss* accordingly; and in case "of the death or bankruptcy of any of the partners, "the share of such deceased or insolvent partner shall "fall in and belong to the company in general, "agreeable to the manner as specified in the contract "of co-partnery, in every respect, except in belonging "to the particular company to which said partner "originally belonged, which is hereby in so far altered. "In witness whereof, &c."

28th Sept. 1790. Minutes in company's sederunt book as to shares, and profit and loss.

This minute was signed by the appellant.

1790. March 12, Minute as profit then made.

In 1790 the books were balanced. They showed a supposed profit of 1,055*l.* 4*s.* 4$\frac{3}{4}$*d.*; and the doc- quet at this balance, which was also signed by the appellant, is in the following terms. "At Glasgow, "the 12th day of March 1790: We subscribers, all "partners in trade, buildings, and other effects con- "tained in this and the other books belonging to the "concern carried on under the firm of The Glasgow "Glasswork Company, as kept by our partner, Mr. "John Geddes, and the clerks under him; having "examined the said account books and inventories, "as made up to the 1st day of January last, find the "same to be fairly stated, and brought to a balance, "and that the profit for last year amounts to 1,055*l.*

"4*s.* 4¾. sterling, and the stock of said company "to 9,473 *l.* 14*s.* 2*d.* sterling. We hereby order, "that the 1,055*l.* 4*s.* 4¾*d.* sterling, profit for last "year, be added to the amount of the stock, which "makes it now amount to 10,528*l.* 18*s.* 6¾*d.* "sterling; and declare for ourselves, our heirs, exe- "cutors, and successors, that in case of the death or "bankruptcy of any of us before next balance, we are "to draw our proportion of the foresaid funds accord- "ing to the above balance, at the terms and in the "manner specified in the contract of co-partnery."

The docquet entered immediately before the dissolution of the company, which is also signed by Mr. Geddes, was to the following effect: "At Glasgow "the 3d day of April 1792: We, James Dunlop, "&c. and John Geddes, all merchants in Glasgow, "and partners in the business carried on here under "the firm of the Glasgow Glasswork Company hav- "ing examined the books of the said company (kept "by John Geddes) from the 1st day of January 1791, "to the 1st of January last, find the same to be fairly "entered and stated, and brought to a balance as "above, and on the thirteen preceding pages: that "the capital of the company amounts to 11,166*l.* "10*s.* 5*d.* sterling, which belongs to the partners "according to their respective shares, narrated in "sederunt dated the 28th day of September 1790. "That the property and debts belonging to the com- "pany amount to 23,387*l.* 1*s.* 8*d.* sterling, the debts "due by the company amount to 11,778*l.* 1*s.* 6*d.* "and the neat profit for said year to 442*l.* 9*s.* 9*d.* "sterling. We hereby order that 53*l.* 9*s.* 7*d.* "of the sum gained be applied to the credit of

1792, April 3d. Docquet immediately prior to the dissolution of the company.

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" the different partners, according to their respective " interests, and the remaining sum of 389*l.* 0 *s.* 2 *d.* " towards the credit of a sinking fund, to answer for " bad debts and discounts: And we also agree, that " in case of the death of any of us before the end " of the contract, or winding up of this concern, that " our heirs, executors, or assignees shall be liable " to sustain any loss and entitled to any profit that " may be applicable to the share of such deceased " partner during that time. In witness whereof, &c."

In the year 1792, the Dumbarton Glasswork Company having made an offer to purchase the whole buildings and property of the company, it was resolved to accept of the offer, and to dissolve the company as at December 1792.

The minute agreeing to dissolve the company, is signed by Mr. Geddes as well as the rest of the partners. The advertisement published in the Gazette and other newspapers, with the subscription of the partners, intimating the dissolution of the company, had the appellant's name subscribed to it as a partner, and the minute of sale by the Glasgow to the Dumbarton Company was signed by Messrs. Wallace, Warrock and Geddes.

14 Feb. 1793. Minute after the dissolution of the company.

Immediately after the dissolution of the company the books were balanced on their prior transactions, when it appeared that there were nearly 19,000*l.* of debts owing to, and upwards of 11,000*l.* owing by, the company. Supposing the debts good, the loss upon the balance for that year would have been 2,766*l.* 7*s.* 3*d.* which the partners by their docquet ordered " to be applied to the debit of the different partners " stock accounts, according to their respective inte-

" rests at the first of January last: But (they observe)
" as debts to a considerable amount are still outstand-
" ing, and as the sum set aside as a sinking fund to
" answer for bad debts and discounts may not be
" sufficient, we cannot at present ascertain the exact
" loss upon this concern, and therefore we hereby
" agree, as mentioned in last docquet, that in case
" of the death of any of the partners before the end
" of the contract or winding up of this concern, that
" our heirs, executors, or assignees shall be liable to
" sustain what ever loss may be applicable to the
" share of such deceased partner at that time."

10 July, 1798.
His answer.

This minute was not signed by the appellant. Some time elapsed after the dissolution of the partnership, while the partners were employed in winding up their affairs. After the debts due to and from the company had been settled, it ultimately turned out that there was such a defalcation of funds, from the failures of persons indebted to the company, and other causes, that the partners, when interest was calculated on their respective balances, were subject to a loss.

In 1798, Mr. Archibald Wallace, one of the respondents, transmitted to the appellant a statement of accounts between him and the company, in which the appellant's share of loss is placed to his debit.

The appellant on the 10th July 1798, returned an answer, in which he said, that the company were considerably in debt to him; and in a subsequent part of his letter he adds, " I have nothing to do with
" the losses of the late Glasgow glasswork company.
" If they think otherwise, they must take what mea-
" sures they can for making their claim effectual."

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During the period of his connexion with the Glasgow glasswork company, the appellant had occasionally drawn from the company's funds small sums for his subsistence. After he had quitted the service of the company, some further payments were made to him in liquidation of his allowances; but no conclusive settlement was made. The company insisted, that he had overdrawn the sum to which he was entitled; and that upon making up the books, it appeared that he was debtor to the company to the amount of 650*l.* 11*s.* 2*d.* being for payments made to him, after he quitted their service.

The claim which the company thus made against the appellant, to refund the money so paid to him, rested upon an assertion, that the appellant was entitled to no higher salary than 100*l.* per annum. The appellant offered to consent to an adjustment of the amount of his salary by reference to arbitrators, which was accepted by the respondents, and two persons with an umpire were named.

The bond of arbitration submits all pleas, claims, and debates, "and debateable matter whatever, pre-
"sently subsisting between the said Glasgow glass-
"work company and the said John Geddes, for
"whatever cause or occasion, previous to the date
"hereof; and particularly, without prejudice to the
"said generality, a claim made by the said John
"Geddes upon the said parties or partners of the
"said Glasgow glasswork company, for a certain sum
"of money to be allowed him for his management
"of the company's affairs, and extra trouble while
"he superintended their works, to the decree
"arbitral of," &c.

In the pleadings under the submission, the claims of the parties were confined to two points; first, a claim for adequate salary on the part of the appellant; and secondly, a counter claim for advances made in cash and goods by the company to the appellant, after he quitted their service. These advances, after extinguishing a salary of 100 *l.* per annum, left a surplus of 602 *l.* 9 *s.* 8 *d.* In a letter to their law-agent at Edinburgh, the company say, "the difference "between the company and Mr. Geddes is chiefly, "if not solely, a claim of salary for additional "trouble." 15 June, 1795.

The submission having expired without a decree, the parties had recourse to a court of law. The company raised against the appellant an action in the Court of Session in Scotland, in the name of Mr. Hamilton, one of the partners, as attorney for the rest, concluding for payment of 650 *l.* 11 *s.* 2 *d.* with interest from 31st December 1792, the date at which the books were balanced. The above sum was the alleged surplus received by the appellant over and above the salary for six years and a half. The appellant raised a counter action against the company, concluding for payment of 911 *l.* 3 *s.* This action was founded on the claim of the appellant to be entitled to salary at the rate of 275 *l.* per annum.

After the cause had been brought into court, the appellant, in a letter to one of the partners, proposed a new reference, which was at last agreed to, and the arbitrators named and appointed.

In this second submission, the claims of parties stood as before. Archibald Wallace, acting for the

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company, addressed to the arbiters two letters; in one of which he says, "The sum of 650 *l.* 18 *s.* 2 ½ *d.* "is the amount which the Glasgow glasswork com- "pany claim as due to them by Mr. Geddes, agree- "able to account rendered;" in the other letter dated the 15th October 1796, he thus expresses the sentiments of the respondents, as to their rights: "We would wish to remind the arbiters, that the "Glasgow glasswork company's claim against Mr. "Geddes, began with the sum of 175 *l.* 10 *s.* 7 ½ *d.* "balance due by him on 1st Jan. 1792, agreeable "to a state of the company's affairs at that time, "signed by him and the partners." No claim for loss of capital was brought before the arbitrators, but in this, as in the former reference, the sole question was the rate of salary payable to the appellant. This submission also having expired without a decree, the cause was resumed in court. In the course of the pleadings, the company produced the copy before stated, of a contract between the company and the appellant, written on stamped paper, but not signed by any party. They alleged, that this was the contract which was meant to have been executed, to regulate the rights of the appellant, and that it was alluded to in the 15th article of the principal contract, already recited. According to this unsigned contract, the appellant was to have a salary of 100 *l.* per annum. The appellant denied all knowledge of the contract, and contended that he was not privy to it, and that it was not binding upon him.

The company in their pleadings further insisted, that in their books they had given credit to the appellant at the rate of 100 *l.* per annum, and that the

books must be considered as under his care, because he was the manager of the company. The appellant alleged that he kept none of the books; that they were kept by Stewart Telfer; that the hand writing of the appellant, except as a subscriber to some docquets, would not be found in the books; and offered to prove, that the books were kept by a clerk not under the superintendence of the appellant, but under the committee of management; that the appellant had never consented to the entries in question, which had been inserted by the direction of the managing committee, with a view to the final balancing of the books. Finally, the company contended, that the sum of 100*l.* per annum was, in itself, a reasonable allowance as a salary to the manager of such glassworks, considering that the appellant was to obtain a *share of the profits* of the business in addition to his fixed salary. On that question of fact concerning the reasonableness of the rate of salary, the appellant joined issue with the company, and called for a remit to persons of skill and experience in the business.

By an interlocutor, dated November 13th 1798, Lord Craig, (Ordinary) found the appellant entitled to salary, at the rate of 120*l.*

Interlocutor of LordOrdinary, 13 Nov. 1798.

Both parties lodged representations to the Lord Ordinary against that judgment.

The Lord Ordinary having adhered to his judgment, both parties presented petitions to the whole court, and the case was remitted to persons acquainted with this branch of business, to report their opinion upon the merits of the appellant's claim for salary. The following judgment was afterwards pronounced:

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" The lords having resumed consideration of the said " petition for Gilbert Hamilton and others, with " the counter petition of John Geddes of the " 1st March last, with the remit therein of the " 4th of that month, and reports made in conse- " quence thereof by Messrs. William Tennant, " John Niven, and James Smith, now lodged in " process—Finds the said John Geddes entitled to " an allowance, including all his claims for salary, " extraordinary trouble, or for the expenses of en- " tertainments in his house, at the rate of 226 *l.* " 18 *s.* 5½ *d.* sterling per annum, during six years " and a half that he acted as manager for the peti- " tioners Gilbert Hamilton and others; and remit " to the Lord Ordinary to proceed accordingly, to " hear parties *on any claims of compensation*, and " all other points of the cause, and to do therein as " he shall see just."

The appellant acquiesced in this judgment; but the company presented a reclaiming petition, which was refused; whereupon the company appealed to Parliament.

In the printed cases of the company presented to the House of Lords, as appellants, in that case, the second reason of appeal is in these words: " The " manager, as a partner, has a share of the profits; " and, when the two glasswork companies were " united in 1786, there was conferred on him a " greater proportion of those profits than upon the " other partners." It was added, they, " made " Mr. Geddes's emoluments to a certain extent to " depend upon their trade being profitable or not; " for they made him a partner entitled to a share of

" the profits, and they increased his share in 1786, " *instead of conferring on him a large salary.*"

The fifth reason of appeal declares, that Mr. Geddes (then manager) had a share of profits as a partner without capital, " which he accordingly " received as the salary due to him."

The judgment of the Court of Session was affirmed in the House of Lords, and the cause returned to Lord Craig, Ordinary, to adjust the accounting between the parties. The appellant put into process a state, showing, that in terms of the final interlocutors of the Court of Session, affirmed in the House of Lords, he was creditor of the company to the amount of 401 *l.* 3 *s.* of principal, and he claimed interest on the arrears of his salary.

26 March 1805.

A new litigation now commenced in the form of objections, answers, replies, and duplies. Disputes were raised about the mode of charging interest, &c. and the company now brought forward a claim which had formed no part of their former pleadings, that Mr. Geddes must be liable for a share of losses sustained by the company many years before, to an extent sufficient to extinguish his claim of salary, and to turn the balance against him.

On the 13th of May 1806, Lord Craig, Ordinary, pronounced the following interlocutor: " Having " considered the foregoing objections for Gilbert " Hamilton, and the other partners of the late " Glasgow glasswork company, defenders, with the " answers thereto for John Geddes, pursuer, replies, " and duplies,—Finds, that an interest account " must be stated between the parties, giving each " of them interest on the sums they shall appear to

Interlocutor of Lord Ordinary, 13 May, 1806.

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"be in advance; and, with regard to the plea of "compensation for alleged loss, finds it too late "to insist on this claim in the present process; and, "before answer as to the other points of the cause, "remits to Mr. Claud Russell, accountant, to exa- "mine the books of the company, and vouchers, "and to report his opinion thereanent *quam* "*primum.*"

Interlocutor, June, 1815.

The action about the salary, after much further litigation, terminated in favour of the appellant, by a judgment, in June 1815 for his salary, with expenses.

Nov. 1808. New action for loss.

In the meantime, in consequence of Lord Craig's interlocutor, refusing to allow the new claim for loss to be intermingled with the original action about salary, the company, in November 1808, brought a new action, concluding against the appellant for payment of a share of alleged losses said to have been sustained by the company. The sum of 512*l.* 9*s.* was claimed as the appellant's share of loss to January 1798, with interest from that date, and a further claim was made for posterior losses.

The appellant, on his part, raised a counter action, concluding for an accounting and payment of the share of profits due to him by the company, upon the supposition that he was entitled to receive a share of profits during those years in which no loss occurred.

The action, at the instance of the company, was brought in the name of Mr. Hamilton, one of the partners of the company; upon whose death, Mr. Wallace, another partner, became the pursuer. This second action also depended before Lord Craig, by whom a remit was made to an accountant, to inquire

into the state of accounts as they stood in the books of the Glasgow glasswork company, from 31st December 1797, five years after the appellant quitted the company, to 15th May 1813. The books had been kept by the respondent, Mr. Wallace, since August 1792. It was reported by the accountant, that the charge made in these books against the appellant, amounts to 1,021 *l.* 16 *s.* 6 *d.*

The actions about profits and losses, which had been conjoined, being remitted, upon the death of Lord Craig, to Lord Gillies, as Ordinary, he pronounced the following interlocutor: "Having heard "parties procurators—Finds, that Mr. Geddes is "liable in his share of the loss as a partner of the "Glasshouse company; but that no part of the "expenses incurred in the process, at his instance, "for salary, falls to be stated as a part of the loss, "but that the same must fall entirely upon the "other partners."

Feb. 19, 1814. First interlocutor appealed from.

Against this interlocutor, the appellant presented a short representation, upon which the following interlocutor was pronounced: "The Lord Ordinary "having considered this representation, which does "not state the merits of the case—Refuses the "desire thereof, and adheres to the interlocutor "complained of."

Mar. 11, 1814. Second interlocutor appealed from.

Afterwards, this interlocutor was pronounced: "The Lord Ordinary having again considered the "representation, with the answers thereto—Refuses "the desire of the representation, and adheres to "the interlocutor complained of."

Dec. 20, 1814. Third interlocutor appealed from.

The appellant submitted these interlocutors to review of the court (first division), by petition; on

Mar. 2, 1815. Fourth interlocutor appealed from.

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advising which, with answers, the following interlocutor was pronounced by a majority of one judge: "The lords having resumed consideration of this "petition, and advised the same, with the answers "thereto—They refuse the prayer of the said peti- "tion, and adhere," &c.

Feb. 9, 1816. Fifth interlocutor appealed from.

A new petition, and additional petition, were presented by the appellant; on advising which, the following judgment was pronounced: "The lords "having resumed consideration of this petition and "additional petition, and advised the same, with the "answers thereto, and excerpts from the books of "the Glasgow glasswork company, for both parties— "Refuse the desire of the said petition, and adhere "to their former interlocutors."

Against these several interlocutors, the appeal was presented.

For the appellant.

For the respondents.

In the course of the argument the *Lord Chancellor* observed, that, when the stock account was first opened, the appellant was debited and credited for the same amount, or supposed value of stock, viz. 625*l.*; and asked, whether he was charged in subsequent accounts on the same principle? and whether it was a substantial credit, or only for the purposes of calculation? At first (he remarked) it clearly was so merely; and he put the further question, When afterwards the partnership credited the appellant with five eighty-fifths of the stock, whether they debited him, per contra, in the same fraction?

The *Lord Chancellor* also asked, Whether it was contended that the appellant was to have no salary,

if the loss in any one year amounted to a sum which would exceed his salary? or what he would receive if there was no profit? It was answered, that in both cases he would receive his salary; upon which answer the *Lord Chancellor* remarked, that in such view the other partners would be losers. He then added the following observations:

The Court of Session, in the former case, computed the salary on the supposition that the appellant was to have a share of profit as a partner, which appears from the *dicta* of Lords Balmuto and Balgray[illegible]. The declaratory clause provided, that on the decease or bankruptcy of any of the partners, their shares should devolve to the partnership to which they originally belonged, and of which the deceased or bankrupt parties were partners, paying an equivalent to their representatives. Now Geddes was no partner in either of those partnerships. Suppose he had died within six months, what could his representatives have claimed? In the former case my opinion was, that he was entitled to *l.* a-year only as salary, and to no further remuneration, upon the ground that he claimed and was entitled to a share in the profits; nothing having been suggested or contemplated as to losses.

*The Lord Chancellor*, after stating shortly the judgments against which the appeal was brought, proceeded as follows:— Motion for judgment, 24 July.

The question in this cause is, whether the Lord Ordinary and the court were right or not in finding that Geddes was liable, under the circumstances of the case, for his share of the loss as a partner. I observe, that when the judgment of the court was given, it was pro-

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nounced by what we are accustomed to hear termed by the bar, the narrowest possible majority, that is, two of the judges were of opinion that he was not liable for loss as a partner, three of them were of opinion that he was liable; and the question is, under all the circumstances of the case, whether that judgment is or is not right. It appears, that by an instrument, executed in 1786, this partnership was formed. Geddes had formerly been a species of manager in another glasswork concern; but when these two concerns formed one partnership, they executed this bond of co-partnership. It is entered into by Peter Murdock and several other persons, stating themselves to be all partners in the company carried on under the firm of Murdock, Warroch, & Co.; likewise, James Dunlop and several other persons, all partners in the company, carried on under the firm of Dumbarton Glasswork Company; the whole of the above, being now partners in the company carried on under the firm of the Glasgow Bottlework Company, on the first part; and Patrick Colquhoun and several other persons, all partners in the company at present carried on under the firm of Hamilton, Brown, Wallace, & Co. at Verreville, on the second part; and John Geddes, at present manager of the Glasgow bottlework company, of the third part.

In a case, in which the question is, whether Geddes was a partner, and not only a partner with respect to the world, but in what relation he stood as a partner with reference to this co-partnery, it is not immaterial to observe, that though he is unquestionably a partner to some purposes, yet he is treated, in the very descrip-

tion of the parties to this instrument, as an individual of the third part, separate from those of the first and second parts. Then this instrument proceeds to state, that " whereas the said two companies have judged it " to be for their mutual advantage to form a junction, " and enter into a co-partnership together, for the " purpose of manufacturing glass, in such branches " as they shall afterwards think best for their interest; " they have agreed, and they hereby do agree, to the " following articles, as the fundamental rules and " regulations of the said co-partnership, and which " are hereby declared to be the conditions under " which the said junction is made and this co- " partnery formed, and which the whole partners " bind and oblige themselves, their heirs, executors " and successors to conform to and implement to " each other: First, the firm of the company shall " be, the Glasgow Glasswork Company, which shall " not be used but for their behoof, and such ma- " nager only as they shall appoint shall have power " to sign the name. Second, the said co-partnership " shall continue and endure for the period of nine " years complete, from the 1st day of June next, when " the junction shall take place: and it is likewise here- " by declared, that the capital stock to be employed " therein by the partners shall extend to 12,000 *l.* " sterling, two-thirds of which shall be advanced by the " partners, according to their respective shares after- " mentioned, and one-third may be borrowed, on " the joint securities of the company." Now these words appear to me to be material to be attended to: " two-thirds of which shall be advanced by the " parties, according to their respective shares after-

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" mentioned, and one-third may be borrowed, on the " joint security of the company." With respect to what thus appears to be advanced by this agreement among the partners, according to their respective shares after-mentioned, I have mistaken the facts of this case altogether, if I am not at liberty to state, that Geddes unquestionably (though in a sense a partner) could not be considered as one of *those* partners who was to advance any part of the two-thirds, according to their respective shares after-mentioned. I take it to be a fact, that Geddes was to contribute nothing of the capital; and it becomes material therefore to observe, that the words " the partners in this bond of co-partnery," must be construed, in reference to the subject matter of the clause in which it is used. The partners who are to contribute according to their respective shares, must be those partners who were to contribute some share of the capital, and Geddes was not to contribute any share of the capital.

These articles further provide, that " in the said " capital stock of 12,000 *l.* sterling, the partners shall " be interested in the profit or loss in the following " proportions; namely, the partners, under the firm " of the Glasgow bottlework company, eight seven- " teenths; and the partners, under the firm of Ha- " milton, Brown, Wallace, & Co. eight seventeenth " shares; and the said John Geddes one seventeenth " share." Under this clause, which is the third article in the bond of co-partnery, it is insisted, that Geddes was to be liable to loss as well as profit; and this is the clause upon which, in addition to docquets and entries in the books of the company, &c. the Court

of Session held, that he was not merely entitled to profit but liable to loss. Now, that these words do, in the most express terms, render him liable to loss, there can be no doubt, but you are to take the whole of this instrument together, and you are not only to look at the whole of this instrument together, but you are to look at the transactions of the parties; for, whatever may be the language of a partnership deed, the dealings and transactions among the partners may be such as to amount to distinct evidence that some of the articles in that partnership deed were waived by all parties, and that some of the articles in that deed were not to be considered as rules which should regulate the rights and duties of the partners. It becomes necessary therefore in this case, to examine accurately, not only the whole instrument, but what have been the dealings among these parties. With this view, it is material to consider the eighth article, by which it is provided, " that on the 1st of June next, each " of the parties shall advance and pay in to the " company's manager, their respective proportions of " stock as before mentioned; in payment of which " stock shall be reckoned the foresaid ground, houses, " utensils, goods, materials, &c. as before specified, " (the stock of goods at Verreville being always ex- " cepted); and in case the amount of the property, " belonging to either of the said two companies shall " exceed their respective proportions of stock, the " overplus shall be repaid to them by the united com- " pany, by granting them bills for the same, payable " in six or nine months, with interest thereon from " the 1st day of June next, the date of the junction."

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Here is another clause purporting to relate to all the partners, which can have no relation, as it seems to me, to Geddes, because he was not to contribute any part of this capital.

The fifteenth clause is expressed in these words, "although, by this contract, John Geddes is "admitted a partner, and holds one seventeenth "share in this company, yet, it is expressly declared "and understood, to be under the conditions and "restrictions more particularly specified in an agree-"ment of this date, made and entered into between "him and the company, and to which all the parties "hereto bind and oblige themselves to conform." It is quite clear, from this fifteenth article, that Geddes was to be, in some sense, a qualified partner; in what sense and with what qualifications is to be collected from an agreement of even date; and, it will be in your recollection, that there was an instrument which Geddes firmly denied to be an agreement of even date, which the other parties asserted to be an agreement of even date, and the substance of which I shall have occasion to state.

This bond of co-partnership being executed, and this unexecuted agreement, either being or not being the agreement, meant to be referred to by the fifteenth article, the parties go on dealing in partnership from 1786 to 1792. It is undoubtedly to be looked at as a circumstance of evidence, that in several instances Geddes's name is put into securities given by the company as a body. He, acting as one of the partners in the partnership, is unquestionably a partner with respect to all the rest of the world; and from the circumstance of his joining in the securities,

(a circumstance that happens every day where a man is not a partner for loss), it must be admitted, that he was clearly and undoubtedly a partner as to the world for loss; but the question here is, whether he was a partner as between himself and his partners, for loss as well as for profit. He contends, that he was entitled to so much a year for salary, that he was likewise to have the inducement of sharing a seventeenth of the profits, if there were any profits; but if there were no profits, and the thing was on the whole a losing concern, that he was not to be liable, as between himself and his partners, to pay part of that loss. It struck me very early in the argument, as a very singular thing, if he was to be so liable; because if, as manager he was to have a salary, (put it so, that he was to have 100 *l.* a year as a salary;) and there was a loss in the course of the year of 1,700 *l.* and he was to bear his proportion of that loss as between the partners, that proportion being 100 *l.* he could not get one shilling of his salary.

Similar difficulties run through the whole deed.

Without entering into particulars, I observe, that there was an end of this partnership about the year 1792, and it is reasonable to suppose, that, in the year 1792, when the partners were about to dissolve all connection with each other, they should have contemplated the obligations they were under to each other, and the demands they would have on each other.

The law, as I apprehend, is, that the transactions of partners are always to be looked at, in order that you may determine between them, even

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against the written articles, what clauses in those articles will not bind them, provided those transactions afford a higher probability, amounting almost to demonstration. Taking that to be the law, it appears to me, notwithstanding all the difficulties which belong to certain transactions, which are stated as having taken place while the partnership existed between 1786 and 1792, that the transactions after 1792 are such in their nature, that, consistently with the safety and the interests of mankind, it is impossible to permit these copartners after those transactions, in my judgment, to say that Geddes was a partner with them for loss. Observe what those transactions are: Geddes brings them into court in 1792, demanding from them his salary; what do they do upon this? they refer the matter to arbitration—that arbitration goes off; they refer it to arbitration again—that arbitration goes off. He then brings an action in the Court of Session, in order to have his salary calculated, estimated and paid; the parties proceed in the Court of Session, until a judgment is obtained in that Court, that the appellant is entitled to such a sum of money. There is then an appeal to this House. In the petitions of appeal he is represented as a partner without capital,—those are the very words which are used in some of the petitions; and your Lordships affirmed that judgment of the Court of Session.

The first demand in any tenable form, that he should be liable to loss, was made in a suit instituted in the Court of Session, in Scotland, in the year 1807, that is fifteen years after this partnership was dissolved, and in the mean time, he was suing them

for the amount of his salary, a claim upon which they would have been entitled to have said: If you establish your right to this salary, you are, on the other hand, liable to us for so much loss; therefore, calculate it as you will, you cannot be entitled to demand any thing, or, at all events, not so much.

The first intimation of a claim upon him was in the year 1798, six years after the partnership was dissolved, when one of the partners wrote a letter to him, insisting that he was liable to losses in partnership. He wrote in answer: I was not a partner in capital, I am not liable. With that exception, they did not make a demand upon him, in a form in which he could resist it, until the year 1807, fifteen years after the partnership was dissolved; it appearing that, in the mean time, there were statements made out of the different proportions of the various shares, (amounting, I think, in the whole to eighty,) in which persons were supposed to have an interest in the stock, and his name never occurred in any one of them.

Now it is true, that during the existence of the partnership there are to be found docquets, there are to be found statements, and there are to be found writings, from which you would infer that he was a partner, both for profit and for loss. But looking at the whole of these entries, as he had no interest whatever in the capital, it is as impossible that many of those entries can refer to him, though he was a partner, as it is that some of those clauses in this instrument of co-partnery could refer to him. He was a partner capable of being dismissed at any time; he was a partner having no right to draw out any part of the stock, for he had

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no stock in it; and therefore the terms which are used lead forcibly, according to my notion, to the conclusion, that though he was a partner, he was, in some qualified sense, a partner different from the sense in which the other partners were interested; and if he had thought proper to quit the partnership, if he had died, or become a bankrupt, the *provisions*, with respect to death or bankruptcy, could not have applied to him as they would have applied to all the other partners in this co-partnery concern; but, on the contrary, he stands distinguished from first to last in the nature of his interest.

In the course of dealings among men, there are a great many things done, some with more, some with less, regularity; some with more, some with less, irregularity; and men, before they quarrel, are much too apt to suppose they shall be set right easily when they happen to quarrel; but I wish to ask this question: How happened it, that if this partnership was dissolved in 1792, no special demand should be made upon the appellant, I say special demand, till 1807? fifteen years afterwards. The reasons they attempt to give in this case appear to me the most futile and ridiculous possible: They say, so long as the amount of his salary could not be ascertained, they had no reason to talk about losses; then, I ask, why did they, in the letter of 1798, talk about losses; and what signifies it, whether it was ascertained, if they had a single demand, which would extinguish, or *pro tanto* extinguish, that salary. It appears to me utterly impossible that that could be the reason on which they acted; but besides, they impute to him the receiving, as he actually did receive, some sums of money after he left the part-

nership -- they paid him sums of money after he left the partnership; and you will recollect in the former cause we had notices of that fact. If he was liable to losses for the partnership, and they contemplated them as due from him, is it possible they could have paid this, and not have demanded the losses?

The case has difficulties and peculiarities upon the bond of co-partnery itself. It has many difficulties and peculiarities with respect to an agreement, which is referred to by the fifteenth article of the bond of co-partnery; one of the parties having contended that a certain paper, unexecuted and unsigned, is that agreement; which is denied by the other party, the appellant. It is undeniable on the face of this bond of co-partnery itself, that he was to be, in some qualified sense, a co-partner; but then it is said, as this deed was never executed, he must be taken to be a partner in the sense in which other persons were; I say, that is impossible from some other parts of that deed of co-partnery; and with respect to the docquets and entries to which I have been referring, they admit of this explanation: that they must be taken to apply to those partners, and those partners only, who had part of the stock belonging to them, and who were to be dealt with, in case of bankruptcy or death, according to principles which do not apply to this person.

I say further, that if you had found unequivocal proof in the transactions, during the partnership, that he was to be considered a partner, liable to his share of profit and loss; supposing the articles,

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clearly and unequivocally to express that he was to be liable to loss, he would, upon the construction of the articles, and by inference from his conduct, have been liable to loss; but even if the case did amount to that unequivocal proof, (which it does not,) the subsequent transactions might have so weakened and destroyed that proof, that you could not act fifteen years afterwards upon the effect of any such transactions as those. For the conduct of these persons, from 1792 down to 1807, is a conduct from which you would be authorized to infer that they never did, prior to 1792, or in 1792, draw those inferences from those transactions which they wish you in 1820 to draw from those transactions.

It is, therefore, on the ground of the subsequent transactions that I entertain the opinion very confidently, (I must say, at the same time, very humbly differing from the majority of the Court,) that no jury in this country could have been brought to find this man a partner on this suit, instituted in 1807; and therefore I move the House,—To find that Mr. Geddes ought not to be considered, as between him and his partners, as a partner liable to any share of loss; and, with that finding, to remit the cause to the Court of Session, to do in it what is right and consistent with that finding.

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The Lords find the Appellant ought not to be considered, as between him and his partners, as a partner liable to any share of loss; and with this finding, it is ordered that the cause be remitted to the Court of Session, to do as is just and consistent with this finding.