

make bargains, and bind his constituents for the same; and *ex natura societatis* they are all liable *in solidum*; and the Lords now found them to be so, and not singly *pro parte virili*.

No. 41.

*Fol. Dic. v. 2. p. 380. Fountainhall, v. 1. p. 815.*

1742. June 10.

DAVID RAMSAY, Shipmaster in Leith, against JOHN BALFOUR.

No. 42.

DAVID RAMSAY having brought home some velvets, by commission, for Archibald Balfour and Samuel Welsh, merchants in Edinburgh, they paid him the prime cost of two thirds thereof, and agreed to give him a third share of the profits in disposing of the same, conform to an obligation, wherein they acknowledge the receipt of the velvets, and that he had paid one third of the price. "Therefore they oblige themselves to hold account to him for the third part of the neat proceeds of the sales of said goods, he always running all risks, according to his proportion, in all shapes with them." Part of the velvets were given to Patrick Manderston, merchant in Edinburgh, to be disposed of for their behoof, and he in his books gives them credit for the sum of £.117 Sterling, as the proceeds thereof; and marks the same on the back of a bill, which Balfour and Welsh had accepted, payable to Manderston. Shortly after, Samuel Welsh gave way; whereupon Ramsay brought a process against John Balfour, as representing Archibald his brother, to account to him for the third of the neat proceeds of the velvets. The defence was, That Archibald Balfour was not liable for Welsh's insolvency, and that he, the defender, was willing to implement Archibald's part, but was not bound to implement what was incumbent on Welsh.

Insolvency of a partner, upon whom the loss lies?

Answered: That the co-obligants were liable conjunctly, though not conjunctly and severally; the effect of which behoved to be, that the one failing, the other was liable in the whole; for, without division or separation, they grant receipt for the cargo, and oblige themselves to hold account; which is just the same as if they had said, we bind ourselves conjunctly to account: And this being fixed, the consequence is, that Archibald was liable *in solidum*, both because the performance in this case is indivisible, and also because the other co-obligant is bankrupt. The trust reposed in Balfour and Welsh was plainly indivisible, and the consequential obligation, to account for the proceeds, must partake of the nature of the principal obligation. But even supposing the original obligation divisible, yet, even there, one of the obligants proving insolvent, the other is liable *in solidum*, because they are bound conjunctly. The goods were delivered to the obligants as partners, and they were to have the sole disposal; they could run no risk by the pursuer's bankruptcy, as little ought he by the failure of any of them. And as to the clause in the obligation, he running all risks, it means no more than such as the obligants should run in common, such as bad debtors, fire, &c. which it was most reasonable the pursuer should run as well as the others, since he was to have a

No. 42. third share of the profits ; see 14th June, 1672, Sutherland, No. 9. p. 14631. 16th December, 1710, Mushet, No. 13. p. 14636.

2dly, As to the separate point, that the pursuer's money, viz. the third part of £.117 Sterling, was applied to the payment of a bill which Archibald Balfour and Welsh owed, conjunctly and severally, to Patrick Manderston ; this of itself made them both liable *in solidum*. It came thereby to be *in rem versam* of them both, and the surrogated debt must partake of the same nature with the debt in place of which it came.

Replied for John Balfour, That the determination of the present question did not depend upon the nature of divisible or indivisible obligations, or upon any consequences of persons being bound conjunctly, or conjunctly and severally, but on the known laws of society ; by the nature of which, as each party is to have his share of gain, so he must bear a proportional part of the loss, if any be. Therefore, when the society dissolves by the death or bankruptcy of any of the partners, each is not liable to the other *in solidum* for his share ; that would be absurd ; but each partner is obliged to give account of his own dealings, and to communicate the profits to the rest according to their respective proportions ; and if there be no profit, but loss, he is entitled to demand of the others, that they indemnify him *pro rata* ; and this rule takes place when the loss happens through the insolvency of one of the partners, L. 63. § 5. and L. 67. D. *Pro socio* ; agreeable to which, the defender is willing to communicate, with the pursuer, what his brother intromitted with belonging to the Company. Nay, the obligation itself declares, that the pursuer was to run all risks without exception ; and consequently comprehends this of the insolvency of one of the partners, which indeed it would have done from the nature of the contract, though there had been no writing. And as to the separate point, the only rule of judging whether the money applied in payment of the bill due to Manderston was *in rem versam* of Balfour or Welsh, is to consider whose debt was thereby extinguished. With respect to which, it is believed several persons may be bound *in solidum* for one debt to the creditor ; and yet it might not follow, that the whole is the proper debt of any one of the obligants. In the present case, Balfour and Welch were debtors to Manderston by bill ; and although he might have demanded payment from either of them, yet the debt still subsisted for the one half against the other ; he was bound to pay it in all events, and his obligation could not be extinguished but by his making payment. Now, if the money retained by Manderston was applied for the one half, to extinguish the proper debt of Welsh, as it really was, is it not the same thing as if Welsh had put the money in his pocket ? How can it then be said to be *in rem versam* of Balfour, when it was applied to pay the debt of Welsh ?

The Lords found the defender liable for the whole.

*Fol. Dic. v. 4. p. 296. C. Home, No. 192. p. 321.*