

July 8. 1822. ' and severally, in terms of the libel, and finds them liable in ex-
 ' penses to the pursuer in such action, be reversed; but found that;
 ' in the action of relief at the instance of John Norman M'Leod,
 ' the said appellant was bound to relieve the said John Norman
 ' M'Leod from the demands of the said Norman M'Leod, the
 ' tenant, under the letter or missive libelled on in the original ac-
 ' tion; and it is therefore ordered and adjudged, that so much of
 ' the interlocutors complained of, as is consistent with these find-
 ' ings, be affirmed; and it is further ordered, that the cause be
 ' remitted back to the Court of Session, to do therein as shall be
 ' just and consistent with these findings.'

Respondents' Authorities.—(1.)—Arbuthnot, Feb. 1772, (10424); Bells, June 14.
 1814, (F. C.); Murray, Jan. 26. 1815, (F. C.)

J. CHALMER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 29.*)

No. 41. EDWARD BELL and Others, Representatives of the late ROBERT
 BELL, Appellants.—*Warren—Courtenay.*

ANDREW WILLISON and JAMES BELL, Respondents:—*Gifford—
 Macfarlane.*

Montag. 47
Society—Process.—It having been stipulated in a contract of copartnery, that in
 the event of the death, withdrawing, or bankruptcy of partner, the remaining
 partners should grant bond for his share of the last annual balance; and one
 of the partners having died; and thereafter all the remaining partners (with
 the exception of two) having become bankrupt; and an action having been
 raised by the representatives of the deceased partner against the two solvent
 partners; and the Court of Session having sustained the action against them,
 but assoilzied them on the merits—Held (reversing the judgment) that the claim
 of the representatives lay not against these two partners alone, but against all
 the other partners jointly, including those who had become bankrupt, and that
 these persons ought to have been called as defenders; and a remit made ac-
 cordingly.

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2D DIVISION.
 Lords Gillies
 and Bannatyne.

ON the 30th of December 1800, William Bell of Cupar's
 Bridge, Robert Bell of Chichester, Lord Kinnaird, James Bell
 junior of Blackheath, James Bell the elder of Arbroath, and Dr.
 John Willison of Dundee, entered into a contract of copartner-
 ship as manufacturers of and dealers in sugar, under the firm of
 William Bell and Company of Dundee, for the period of twenty-
 one years. The books were to be balanced annually; and by the
 16th article it was provided, that ' in case any or either of the
 ' said parties shall be desirous of withdrawing from the said co-

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‘ partnership at any time before the expiration thereof by effluxion of time, then he or they shall signify such his or their desire in writing to the others of the said parties; and the said party or parties so desirous of withdrawing shall be entitled to receive, in manner after mentioned, his share of and in the said copartnership concerns, as the same shall appear to be due and belonging to him at such yearly settlement to be made as herein before mentioned, next immediately following such notice, a fair and reasonable allowance being first made thereout for bad and dubious debts; and the others of the said parties who shall continue in the said copartnership shall give unto such party or parties so withdrawing their joint bond in a penalty of double the sum which shall so appear to belong to him or them as aforesaid, conditioned for the payment of such single sum by three equal payments of six, nine, and twelve months, to be computed from the date of such last-mentioned yearly settlement, with lawful interest for the same at and after the rate of £5 per centum per annum from such date; and the said party or parties so withdrawing shall thereupon give and execute unto the others of the said parties so continuing, a full release and discharge of all claims and demands upon the said copartnership; and the said parties so continuing shall release and discharge the said party or parties so withdrawing of and from, and indemnify him and them against all debts, claims, and demands due or to be made upon the said copartnership.’ By the 17th article it was agreed, that ‘ in case any or either of the said parties shall depart this life before the expiration of the said copartnership by effluxion of time, then the same mode of settlement shall be adopted between the surviving parties and the executors or administrators of the deceased party or parties, and the same matters and things shall take place, as is herein before mentioned and provided for, in the case of any of the said parties withdrawing from the said copartnership.’ It was also provided, that in case any or either of the said parties shall become insolvent or bankrupt, then the said copartnership, so far as respects such party or parties, shall be at an end; and a settlement was to take place, as in the case of death or withdrawing.

Soon thereafter Lord Kinnaird died. On the 12th of January 1807, Robert Bell also died in England; and a balance was struck on the 21st of that month, when it was ascertained that the share to which he had right was £1540:9:7. He left a testament, by which he bequeathed his whole effects to his son James Bell the younger, (one of the partners in the above concern,) and particularly ‘ all and every my shares and share, interests and interest, in the capital stock, business, and concern of the

July 8. 1822. ' Dundee sugar-house, carried on under the firm of William Bell and Company in Dundee aforesaid ;' but declaring that his estate should be chargeable with certain legacies in favour of the appellants, the other members of his family ; and he appointed his son James his sole executor. On the 2d of June 1807, this testament was proved in Doctors Commons by James Bell, to whom letters of administration as executor were granted.

Besides being a partner of the above concern of William Bell and Company, James Bell was also a partner of James Bell and Company, merchants in London, where he resided ; and he, as the principal partner of that company, had been in the practice of drawing in the name of that house on William Bell and Company ; and in the course of the nine months which immediately followed his father's death, it was alleged that the balance of these drafts exceeded by £1500 the credit which he held on his own account.

In the month of August 1807 James Bell stopped payment ; but no commission of bankruptcy was issued against him ; and on the 6th of November of that year William Bell (who was the managing partner of William Bell and Company in Dundee, and also brother of James) became bankrupt, and a sequestration was awarded of his estates. The only solvent partners who remained were James Bell the elder, and Dr. Andrew Willison. These two partners, on the 30th of March 1808, dissolved the company ; appointed a factor for winding up its affairs, and thereupon brought an action of declarator for having it found, that ' the said copartnership, so far as respects the said James and William Bell, is at an end ; that the pursuers are the only surviving and remaining solvent partners of said copartnership, and that the same mode of settlement should be adopted between the pursuers, the solvent partners, and the trustees or assignees of the said James Bell the younger, and William Bell, as is provided for in the case of the death of any of the parties.' At the same time, they raised a multiplepinding for dividing the company funds ; and appearance was made for James Bell, both on his own account, and as representing his father Robert Bell. These actions, however, fell asleep ; and the present action was thereafter raised by the appellants, libelling on the testament of the late Robert Bell bequeathing to them the several legacies in their favour, and concluding for payment of his share, in terms of the contract, with interest, against the respondent Andrew Willison, as representing Dr. Willison (who was now dead,) and James Bell the elder, as the only ' solvent partners of the said company of William Bell and Company, and as such, in terms of the fore-said contract, liable in payment of the debts of the said company.'

In defence it was pleaded by the respondents,—

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1. That the appellants had no title to pursue, as James Bell was nominated executor.

2. That by the testament of Robert Bell, his share in the co-partnership was specially assigned to James Bell; and that he, having founded upon that testament in the multiplepoinding, had thereby judicially intimated the assignation, so that the share was now vested in him, subject to the burdens created by the will, and therefore James Bell, and not the appellants, was their proper debtor; and,—

3. That such being the case, and as the appellants could only claim through James Bell, and as the respondents would be entitled to set off any claim which they had against that person, and as the debt which he owed to the company was equal to the share which belonged to his father, they were entitled to plead compensation as to that share, so as to extinguish the claim of James Bell.

To this it was answered,—

1. That the testament bequeathing them the legacies formed a sufficient title in their favour.

2. That it could not operate as a special assignation to James Bell, so as to vest in him the share thereby bequeathed, without a confirmation from the Commissaries, which he had not obtained; and the letters of administration which had been granted to him in England, had not the effect to transfer it to, and vest it in him, but only to entitle him to administer the fund; and therefore the appellants, as legatees of the late Robert Bell, were entitled to insist in the action against the respondents as their proper debtors; and,—

3. That the defence of compensation was not relevant, seeing that it was alleged to have arisen, not between William Bell and Company, and James Bell as an individual, but between the former and a separate and third party, viz. James Bell and Company.

Lord Gillies assoilzied the defenders; and the appellants having thereupon represented, Lord Bannatyne (who had come in place of his Lordship as Lord Ordinary) refused a representation, ‘ in respect that, independent of the question, to what extent the
‘ defenders, as individual partners of Bell and Company, could be
‘ personally called to answer to Robert Bell, an individual member
‘ of that company, or to his representatives, for the supposed
‘ amount of his share in the hands of the company, that neither the
‘ company, nor they as partners thereof, to whatever extent they
‘ might be liable to account for such share to Robert Bell' or his
‘ representatives, can be under any such responsibility to the pur-
‘ suers as special legatees or creditors, further than as they shall,
‘ as such, have used proper legal means for attaching and establish-

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‘ing a right thereto.’ The appellants then applied to the Commis-
saries, and got a license to pursue, and at the same time obtained
themselves decerned executors-creditors qua legatees of the late
Robert Bell; but they did not expedite a confirmation. Having
done so, they offered a second representation; on advising which,
his Lordship, ‘in respect that so far as Bell and Company, and
‘the defenders as individual partners thereof, stood indebted to the
‘personal estate of the late Robert Bell for the value of his in-
‘terest as a partner in the company, ascertained in terms of their
‘contract of copartnery, the representers (appellants) being cre-
‘ditors on his estate for the amount of the legacies severally pro-
‘vided to them by his testamentary settlement, and having pro-
‘duced a decree-dative decerning them as executors-creditors
‘qua legatees, and a license to pursue, altered the interlocutor
‘complained of, to the effect of sustaining their title to insist in
‘the present action; and further found that the defenders (none
‘of whom deny that they continue members of the company) are
‘accountable to his estate for the amount of the late Robert Bell’s
‘interest in the company stock, ascertained by the last year’s
‘balance, immediately preceding his death; and appointed them
‘at next calling to say whether they do or do not admit that
‘balance to have stood as in the note produced and founded on
‘by the representers; and the representers, so far as that shall be
‘disputed, to say in what manner they are prepared to instruct
‘the accuracy thereof, or the actual amount of that balance,
‘for which they are entitled to claim credit.’—Thereafter, on ad-
vising a representation for the respondents, his Lordship reported
the case on memorials to the Court; and their Lordships there-
upon sustained the defences, and assoilzied the respondents, but
found no expenses due. To this interlocutor they adhered on
the 26th of January 1819, ‘reserving to the petitioners (appel-
‘lants) to be further heard before the Lord Ordinary upon any
‘claim they may be advised to make upon any residue, if such
‘be, in the hands of the respondents, and in bonis of the defunct
‘Robert Bell, and to the respondents their defences, as accords.’*

Bell and others having appealed, the LORD CHANCELLOR moved,
and the House of Lords ‘ordered and adjudged, that the inter-
‘locutors complained of, so far as they sustain the defences, and
‘assoilzie the defenders, be reversed; and found that the demand
‘of the appellants in the said action, if any they have, is a de-
‘mand against the representatives of William Bell of Cupar’s
‘Bridge, and James Bell younger of Blackheath, jointly with the

* Not reported.

‘ respondents: And it is further ordered, that the appellants be at
 ‘ liberty to proceed in the Court of Session, for the purpose of
 ‘ bringing before the said Court such parties as may be necessary
 ‘ according to this finding; and thereupon, or in case the ap-
 ‘ pellants shall not proceed to bring the parties before the Court
 ‘ within a reasonable time to be appointed by the said Court,
 ‘ then the said Court shall proceed in the said cause, and do
 ‘ therein as shall be just.’

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Respondents' Authorities.—(1.)—3. Stair, 1. 19; 1690, c. 26; Gordon v. Campbell,
 Jan. 1729, (14384); 3. Ersk. 9. 11.

A. MUNDELL,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 30.*)

R. MENZIES, W. S. Appellant.—*Warren—Clerk—Irving.*
 JOHN EARL of BREADALBANE and HOLLAND, Respondent.—
Jardine—Davidson—Evans.

No. 42.

Superior and Vassal—Clause.—Held, (affirming the judgment of the Court of Ses-
 sion,) that a clause by which a superior reserved in a feu-contract right to the
 mines and minerals, did not give him right to a quarry of freestone situated within
 the lands.

IN the year 1699, King William III., by a charter under the
 Great Seal, granted to John Marquis of Atholl, (proprietor of
 extensive estates in Perthshire,) and his son in fee, ‘ omnes et
 ‘ singulas auri fodinas, argentarium metallum, seu fodinas ar-
 ‘ genti, molybdinam, seu fodinas plumbi, fodinas stanni, fodinas
 ‘ cupri, et alia mineralia, colores et metalla quæcunque, de qui-
 ‘ buscunque naturâ, generibus, vel qualitate eadem sunt, hactenus
 ‘ inventa, vel quæ ullo tempore in posterum infra totas bondas
 ‘ dict. terrarum et comitatûs de Atholl comprehendens. ut in
 ‘ infeofamentis earundem, jacens. infra vicecomitatum de Perth,
 ‘ et infra bondas omnium aliarum terrarum, dominiorum, baro-
 ‘ niarum, aliorumque, sub quâcunque designatione eadem sunt,
 ‘ ad eos pertinen. et spectan., tam in superioritate quam in pro-
 ‘ prietate, ubicunque eadem jacent. infra dictum regnum invent.
 ‘ erunt, cum omni jure, titulo, et interesse quibuscunque quæ
 ‘ nos vel nostri successores habemus, vel alio modo habere, cla-
 ‘ mare, vel ad easdem, vel ad aliquam partem seu portionem ea-
 ‘ rundem, ullo modo pretendere poterimus; cum plena potestate
 ‘ prænominato Joanni Marchione de Atholl, et dicto suo filio,
 ‘ ejusque antedictis, lucrare, operare, scrutare, et adinvenire
 ‘ prædict. fodinas, mineralia, colores, et metalla infra aliquam
 ‘ seu quamlibet partem terrarum generaliter et particulariter su-

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2D DIVISION.
 Lord Pitmilley.