of the correspondence, it is clear that Mr Pollok considered those as made upon his own account. I am unable to come to a different conclusion from that to which the Court of Session arrived with respect to either of those cargoes; and therefore, after a most attentive consideration of the case, I am of opinion that I ought to advise your Lordships to affirm the judgment of the Court below. The case must be remitted back to the Court of Session to proceed farther, as there is one question still open in the taking those accounts. May 19, 1826.

My Lords, in this case I do not feel that I can advise your Lordships to give any costs. As I have already said, the evidence is strongly in favour of the conclusion to which the Court of Session arrived: but considering the complexity of the case, and the difficulty of it, I should advise your Lordships simply to affirm the interlocutors complained of, and to remit to the Court of Session to proceed therein as they shall think fit.

J. RICHARDSON—A. MUNDELL—Solicitors.

ADELIZA STRUTHERS and Others, Appellants.—*Robertson*—*Sandford.* No. 17.
JOHN BARR, Respondent.

Society—Circumstances in which it was held ex parte (reversing the judgment of the Court of Session), that the extent of the interest of a partner in a company, where this was not fixed by contract, was not to be regulated by the amount of his input stock, as compared with that of the other partners, but that he was to be held as having an equal share.

IN 1792, John and James M'Ilwham, Alexander Spiers, and Robert Barr, formed a copartnery for the purpose of spinning cotton yarn at Crosslee, in Renfrewshire. The capital stock, the appellants stated, was fixed first at £4000, and afterwards at £5000, which was to be advanced in equal parts by the partners, and it was said each partner was to hold one third share. There was, however, no written contract. May 19, 1826. 1st DIVISION. Lords Craig and Alloway.

Innumerable disputes occurred between Barr, who had been intrusted with the active management, and his partners, which it is unnecessary to detail—a heavy loss was incurred—Barr was removed from the management—the mills were sold—and mutual actions, at the instance of the different parties, were instituted in the Court of Session in 1798. The principal question which occurred related to the extent of Barr's interest in the concern, and his consequent liability for the loss. He had advanced £1300 (which his partners maintained was less than the amount

May 19, 1826. of his stock, and much less than what they had contributed); and the proportion which he or his representatives had a right to reclaim of this input, would depend on the amount of the share he held. Lord Craig, as Ordinary, remitted to an accountant; and, on advising his report, found 'that Robert Barr 'must be held to have had a full third of the stock of the Crosslee 'Company in question, there being no evidence that his share was 'less; and, therefore, upon the supposition that there has been a 'loss sustained by that concern, found that he must be subject-'ed in one third share or proportion thereof;' and appointed parties to state, whether there had been a loss, and to what extent. The Court, however, on the 28th of January 1806, recalled the Lord Ordinary's interlocutor, and found that Barr was 'to be held a partner of profit or loss down to the dissolu-'tion by the sale of the works, only to the extent of the stock 'paid in by him, compared with the input stock of the other 'partners,' and remitted to the Lord Ordinary to proceed on these data. Lord Alloway, as Ordinary, then pronounced an articulate judgment upon the claims of the parties; but thereafter, 'in respect that this process has depended in Court since 'the year 1798, and from the delays in the proceedings, it seems 'hardly possible to bring it to a conclusion in the Outer-house, 'appointed informations to the Inner-house.' Ultimately, the Court, on the 23d February 1821, held that a loan of £350, made originally to the concern in the name of Robert Barr and Company, was to be accounted a part of Robert Barr's input stock; found Barr entitled to £35 of damages for want of a house—that he had no claim to damages, on the allegation that the company was dissolved intempestivè—that he was entitled to a certain salary—that of an outlay on the works and machinery, a proportion, applicable to repairs and keeping of the mill and machinery, fell to be stated as a proper expenditure of the company; but that what regarded the erection of new and additional buildings or machinery, was chargeable only against the other partners;—and as to a claim of commission of three and a half per cent, found it a regular charge upon such goods as were sold upon credit to strangers; but disallowed it on such sales as were made for ready money, or to partners of the company themselves, reserving the parties to be heard on a claim for a lesser rate of commission on sales to strangers for ready money —disallowed Barr's claim for the current insurance, the purchasers being entitled to it,—and to the manufactory bell, it being a fixture of the mill and machinery—and, in general, remitted

to the Lord Ordinary to apply these findings, and to inquire into the facts on which they depended. May 19, 1826.

Thereafter, the Lord Ordinary made another remit to an accountant, and decerned for £423, 5s. 2d. of principal, and £84, 4s. 1½d. of interest, in favour of Barr. On a petition, the case was of new remitted to the accountant, and, on resuming consideration of the petition and report, the Court adhered, and found the petitioners liable in the expenses of opposing the petition, and those attending the additional report of the accountant;* and thereafter, having granted leave to appeal, Struthers and others, representatives of M'Ilwham, one of the partners of the Croslee Company, appealed. John Barr, representative of Robert, made no appearance, and the case was in consequence heard ex parte.

Appellant.—The presumption of law is in favour of equality of interest, and this presumption is fortified by the documentary evidence in the case. It is not true, that there is evidence in the correspondence between the parties that a new arrangement was entered into. The rate of commission was inadequate, and the claim of damages unfounded.

The House of Lords ordered and adjudged 'that Robert Barr 'ought to be held to have had an interest to the extent of one 'third in the partnership concern, and to have been liable to that 'extent in the loss sustained therein; and it is ordered, that, with 'this declaration, the cause be remitted back to the Court of Ses-'sion in Scotland.'

Lord Gifford.—In this case of Struthers *v.* Barr, I will detain your Lordships but for a few minutes. No person appeared at your Lordships' bar to support that part of the judgment of the Court below, which is appealed against. In consequence of that, I certainly felt it my duty more particularly to attend to the circumstances of this case; because although no person appeared on the part of the respondent, your Lordships ought to be clearly satisfied that the judgment was wrong, before you could be induced to alter or vary that judgment.

In this case the question is one merely of evidence. It appears that a Mr Robert Barr, in conjunction with two persons of the names of James and John M'Ilwham, and a gentleman of the name of Spiers, entered into copartnership in the year 1792, at Crosslee, in Renfrewshire, for the purpose of spinning cotton yarn. I think it must be taken without doubt, when these parties entered into copartnership, that each of the

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* 1 Shaw, No. 158, 4 Shaw and Dunlop, No. 97.

May 19, 1826. partners were to have equal proportions in the concerns. No contract of copartnership was ever executed between these parties. Originally the capital was fixed to be £4000, to which they were to contribute. They obtained a grant in feu-farm of a place called Crosslee, with houses and other buildings, on which this concern was to be carried on. It appears that although scrolls had been prepared, on which a deed of copartnership was to be founded, they went on with the concern as I have stated, from 1792 until 1798, without any deed of copartnership being executed. Then disputes arose between the parties, and I regret to be under the necessity of stating, that from the year 1798, to the period at which I am now addressing your Lordships, these parties have been in litigation in the Court of Session. When I said these parties, I should explain that several of them are dead. Mr Barr is dead, and several of the others. Several actions were brought, and they dissolved the partnership in 1799. A suit was instituted to obtain a contribution for losses sustained, and I regret to state to your Lordships, that interlocutors to the amount of twenty-three have been pronounced by the Court of Session. The last interlocutor, in fact, exhausts the whole case; but in order to remove any doubt which the respondent might state to the competency of an appeal in the present stage of the proceedings, leave was obtained to appeal against that last interlocutor; and the appeal has accordingly been brought before your Lordships. The main question upon this appeal is with respect to the extent of interest which Mr Barr had in this copartnership. The Lord Ordinary before whom the cause originally came, namely, Lord Craig, was of opinion that Mr Barr must be held to have had a full third share of the stock, there being no evidence that his share was less, and therefore was to be liable to a similar proportion of the loss; but that interlocutor coming before the Court of Session, they differed from the Lord Ordinary; and in a similar manner as in that case of Buchanan *v.* Morris, which your Lordships had before you this morning, and in which a long correspondence occurred, the Court of Session thought, upon looking to the whole of the correspondence, and as no articles of-partnership were executed, the result was, that Mr Barr was to be considered a partner only to the extent of the capital contributed by him; and he not having contributed a third, his profit and loss were only to be proportionable to the share which he had actually contributed, and therefore they 'find the petitioner is to be held a partner of profit and loss down to the 'dissolution by the sale of the works, only to the extent of the stock paid 'in by him, compared with the input stocks of the other partners.' Upon that basis a great variety of subsequent interlocutors proceeded, and which are appealed against to your Lordships, and also certain of the interlocutors pronounced upon the subject of an allowance of commission on the accounts, which they say was inadequate, but which I need not trouble your Lordships with, because there was not much said upon it at the bar, and I do not think that upon that part of the case there is any ground to differ from the judgment pronounced by the Court of Session.

The remaining question is with respect to the extent of interest which Barr had in the concern. It appears evident, that in the outset, he was

to have an equal share; they were each to contribute one-third of the capital. In the years 1796 and 1797, disputes arising between these parties, it does appear, in the correspondence which took place, that certain propositions were made by Mr Barr, in order to settle matters to this effect; that if they would not consent to let him have a third, he would be content with a share in proportion to the capital advanced by him. Though no answer appeared to those propositions, and though I think it is clear they were not receivable, the Judges thought the parties ought to be considered as having assented to them. But, my Lords, in the course of the proceedings, I observed that Mr Barr himself brought an action against the other parties, Alexander Spiers and John and James M'Ilwham, for the purpose of compelling them to execute and subscribe a regular contract of copartnery. I requested to see the summons in that action, because it did occur to me, that if Mr Barr himself, in the year 1799, in that action, insisted that the copartnership ought to be carried into execution upon the terms of the original agreement, and if I found that the original agreement was that they were to have equal proportions in the concern, it would be a very strong thing to say, he having asserted that he was interested to the extent of one-third, that he was only interested in proportion to the extent of the capital originally advanced. That summons, my Lords, has been furnished to me; and I observe, that, in the summons, it set forth what I suppose was an agreement between the parties, and in which he claims to have an interest to the extent of one-third. However, in whatever way originally the partnership might have consisted, the Court of Session held that his share should be according to his stock; but I do not find in the correspondence in the cause, which I have looked through very attentively, at least those portions of it to which reference has been made, anything which tends to such a result. I think it amounts to no more than this, that when the parties were quarrelling among themselves, Mr Barr made several propositions, but which propositions so made were never carried into effect. Then, my Lords, in this summons I find him claiming one-third; so that it does appear to me, that the decision pronounced originally by the Lord Ordinary was right, and in which one of the learned Judges afterwards concurred, whereas the Court have held, that looking at the whole of the case, they ought to conclude that Mr Barr consented to reduce his share in proportion to the whole capital. After looking through this correspondence, and considering the whole of the circumstances in the case, it does appear to me that the appellants have been right in asking to vary the decision to that extent.

May 19, 1826.

I have already stated to your Lordships, that in consequence of no one appearing on the part of the respondent, it is peculiarly my duty to advise your Lordships to take care to see that the judgment is wrong before any alteration is made in it. There are various circumstances why the parties might not appear—the expense, and other reasons might operate upon them. At the same time, looking at the correspondence between these parties, and the facts of this case, I am compelled to come to the conclusion, that nothing sufficiently satisfactory appears to show that the

May 19, 1826. parties had definitely altered the relative situation in which they stood; and which, according to their original contract between them, entitled each party to one-third interest in the concern. Therefore I should propose to your Lordships in this case to declare, that Robert Barr ought to be held to have had an interest in this concern to the extent of one-third, and consequently to be liable to that extent for any losses that may have been sustained therein; and that your Lordships should order that the case be remitted back to the Court of Session, with such a declaration.

SPOTTISWOODE and ROBERTSON—Solicitors.

No. 18.

MURDO M'KENZIE, Appellant.—*Adam—Robertson.*
GEORGE SUTHERLAND, Respondent.—*Keay—Murray.*

Possessory Judgment—Salmon Fishing.—Two opposite heritors on the banks of a river, having each right to one half of the salmon fishing, and having exercised it for more than seven years by one and the same tenant, Held (affirming the judgment of the Court of Session), that a tenant who had so enjoyed that possession by virtue of a joint lease, was entitled to the benefit of a possessory judgment after the one heritor had let his one-half share to another tenant.

May 19, 1826.
1st DIVISION.
Lord Eldin.

THE water of Cassley falls, at almost right angles, into the Kyle of Oykell, or upper extremity of the Dornoch Frith. On the west lie the lands of Inner Cassley, belonging to Sir Charles Ross, Bart. of Balnagown, whose title-deeds give him a right to one-half of the salmon-fishings in the Cassley, and to the whole of the salmon-fishing in the Oykell. On the east bank of the Cassley lies the estate of Rosehall, liferented by Lady Ashburton, whose titles give her one half of the salmon-fishings in the river Cassley, but do not convey to her any right of fishing in the Oykell. On Lady Ashburton's side of the river, Sir Charles Ross is proprietor of two pendicles of ground, (which are afterwards referred to as Nos. 1 and 5 of a plan,) the one of which extends a considerable way along the bank of the river, and the other, although of smaller dimensions, holds a similar position. He is besides proprietor of two small islands situated at the mouth of the Cassley, and at its junction with the Oykell. These are denominated by the Nos. 2 and 3. From the nature of the banks it was scarcely possible to fish in the Cassley on Lady Ashburton's side, except on these pendicles of ground and islands, so that the proprietors had found it necessary to let the fishings to one and the same tenant. Accordingly, the tenant had been in the practice for upwards of forty years of exercising the right of fishing indiscriminately on both sides of the river, and parti-