Appellants' Authorities.—Act of Sederunt, 25th Nov. 1825; 4 Ersk. 3, 8, 20; Dickson, 6th March 1816 (F.C.); Tatnell, 2d February 1827 (S. & D); 55 Geo. 3, c. 42, s. 7; 59 Geo. 3, c. 35, s. 17; Gordon, 3d Dec. 1794 (M. 16,785). Sept. 28, 1831.

Respondent's Authorities.—55 Geo. 3, c. 42 and 35; 6 Geo. 4, c. 120; Feuars and Merchants of Fraserburgh, 19th June 1707 (M. 16,712).

CRAWFURD and MEGGET—RICHARDSON and CONNELL,—Solicitors.

No. 48.

DAVID CLYNE, Appellant.—*Mr. J. Campbell—Dr. Lushington.*

ROBERT SCLATER, &c., Respondents.

Partnership—Clause.—Held (reversing the judgment of the Court of Session), that calling up payment of instalments on shares subscribed for in a joint stock company did not fall under "ordinary business," and could not be effectually done by a quorum of the committee of management entrusted with the ordinary business of the company.

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2D DIVISION.
Ld. Fullerton.

IN 1824 a joint stock concern was formed in Edinburgh, called the "Caledonian Iron and Foundry Company;" and it was proposed that their capital should be 100,000*l.* sterling, divided into 4,000 shares of 25*l.* each, and that of these no subscriber should hold more than twenty. David Clyne became an original subscriber to the extent of twenty shares. In October 1824 a meeting was held, and 246 individuals having obtained 3,676 shares of the stock, a committee of management was appointed, the draft of a contract of copartnery ordered to be submitted to counsel for revisal, a deposit of 1*l.* per share called up, and directions given to the committee to look out for works, or ground for the erection of works, and to purchase the same forthwith. Clyne attended this meeting, paid his deposit on his twenty shares, and he was thereafter nominated a member of committee to revise the contract of copartnery, which was finally approved in December 1825, and signed by seventy-three shareholders; he also attended the various other meetings of the company. The contract of copartnery contains, inter alia, the following clauses (3d section): "For raising the said capital "stock, the persons contracting and hereto subscribing do each "of them bind and oblige themselves, their heirs and successors,

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" to advance by instalments, as herein-after provided, a sum of " money corresponding to the number of shares of the value afore- " said, annexed to their respective subscriptions. That the first in- " stalment shall be 1*l.* sterling per share, which shall be paid as " upon the 9th day of November 1824; and the remainder of the " said stock shall be advanced in such instalments, not exceeding " ten per cent. each on the amount of the said capital, and at " such periods, as the directors or committee of management " herein-after named may appoint, notice in writing of each " call for the instalments being always given by the manager " or other person acting under the said committee of manage- " ment to each partner, twenty-one days at least previous to " the day of payment; and the said sums shall bear interest at " the rate of five per cent. per annum, from and after the se- " veral periods of payment so fixed, until paid. And it is hereby " declared, that each and every partner failing to make pay- " ment of any instalment within thirty days from the day fixed " for making such payment, (notice in writing of the call having " been given as herein-before required,) it shall be in the power " of the committee of management, in all cases where the sum " advanced by such defaulter or defaulters on his, her, or their " share or shares or interest in the company does not amount " to 20*l.* sterling, to declare, as they are hereby authorized and " empowered to declare, the same to be forfeited to the com- " pany, and to sell or otherwise dispose of the share or shares " so declared forfeited, as they may consider most beneficial for " the interest of the company, and that without any pro- " cess of declarator or other legal proceeding whatever, but " simply by recording such declaration of forfeiture in the " minute book, to be kept by the committee of management, of " the proceedings of the company. But in the event of such " defaulter or defaulters having advanced a sum amounting to " 20*l.* or upwards on his, her, or their respective share or " shares or interest in the concern, then and in that case " the committee of management shall have no power of for- " feiture, but shall be bound to bring the said share or shares " to public roup and sale, on due advertisement to be given in " one Edinburgh and one Glasgow newspaper, once a week in " each, for three successive weeks prior to the day of sale, under " such articles and conditions of sale, and at such upset prices

" as they shall deem expedient, with power to reduce the upset " prices, and adjourn the sale from time to time; and they " shall have full power and authority to convey the said share " or shares which shall be so sold to the purchasers, and to " receive and discharge the prices; the committee of manage- " ment being, in all such cases, bound to account for and pay " to the former partners, or those in their right, the surplus of " the price or prices received, if any, after deducting interest, " all charges and expenses, and whatever debts may be due by " said partners to the company, which are hereby declared to " be preferable claims against all such surplus prices, or to " consign or deposit the same within the Bank of Scotland, " Royal Bank of Scotland, British Linen Company, or other " chartered bank in Edinburgh; and that for behoof of and at " the peril of such former partners, or those in their right who " shall be bound to receive the same, and to discharge the " company accordingly." (7th section.) "That the business and " affairs of this company shall be conducted under the superin- " tendence of a board of directors, to consist of a chairman, " deputy chairman, and fifteen ordinary directors, who shall " form the committee of management, and shall be named and " elected by the company at the aforesaid stated general meet- " ing to be held annually, as herein-before mentioned. That " any five of their number shall be a quorum for ordinary " business, and shall have full power to purchase or sell any " heritable property, to feu or take in lease lands or houses " connected with or which may be necessary for the foundry " department; but declaring that the committee of manage- " ment only, or a majority of their number, shall have power to " enter into any agreement regarding the purchase or sale of " any heritable property, feuing or taking in lease lands, mines, " metals, or minerals, for the smelting department; providing " always, that such agreement shall not be binding on the " partners, unless approved of at a general meeting to be called " for that purpose. And it is further declared, that the com- " mittee of management, or the majority of their number, shall " have power and they are hereby authorized to nominate and " appoint a manager, agents, and other officers for the company, " and generally all clerks and servants whom they may deem " necessary for the business of the company, with power also to

Sept. 29, 1831. "fix the salaries, allowances, or wages of such persons, and to "dismiss all or any of them whenever they may think proper." (16th and 17th sections.) "That in case any legal disputes, "differences, or controversies shall arise or occur between this "company and any person or persons whomsoever, it is hereby "declared and specially agreed, that in all cases where the "company is obliged to act as pursuers, plaintiffs, or complainers, "the manager acting for the time, or such other person or "persons as the committee of management may think proper "to nominate and appoint, shall have full power, and they are "accordingly hereby not only authorized and empowered to "prosecute and sue all needful actions or diligence in his or "their own names, as attorney or attorneys for and in name "and behalf of the company, but also to receive and discharge, "and upon payment to grant acquittances for all sums of "money which may be found due, or ordered or awarded to "be paid to this company by any person or persons whomso- "ever, any law or practice to the contrary notwithstanding; "and in like manner, where any suit, action, or diligence is to "be raised against the company, they shall be held as lawfully "cited to such suits and actions; and diligence shall always be "held as lawfully executed against them, if such actions or "diligence be regularly executed against the manager for the "time individually, and the chairman, deputy chairman, and "directors, at the company's office or principal establishment in "Scotland." (41st section.) "In regard that by reason of the "number of subscriptions which may be adhibited to this deed, "it is impossible to procure one sheet of paper, or skin of "vellum or parchment, large enough to contain the whole of "this contract, together with the subscriptions thereto, in con- "sequence of which it becomes necessary that various skins of "vellum or parchment should be joined together; while at "the same time there cannot be sufficient room for all the "parties to sign the joinings of the several skins upon which "these presents are written, it is therefore agreed, by the whole "parties hereto contracting, that the said Alexander Henderson, "Colonel Robert Anstruther, Joseph Gordon, Dr. William "M'Farlane, John Kennedy, and H. J. Williams, or any two "of them, shall have full power and authority to sign the "joinings of the said skins or sheets, upon the margin, which it

" is hereby declared shall be as valid and effectual as if the " same had been subscribed by all and each of the parties " hereto, any law or practice to the contrary notwithstanding."

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Clyne, on the 12th January 1826, signed one of the sheets for twenty shares. A manager and directors were appointed, and ground and a foundry purchased for carrying on the operations of the company. The speculating fever of the day speedily however abated, and comparatively few of the original subscribers came forward to sign the contract. The affairs of the company were carried on with indifferent success; various calls were made by the committee of management upon the subscribers for instalments, and in particular a call of 5*l.* per cent., then two for 10*l.*, and one for 9*l.* per cent. on the shares subscribed for. But at the several meetings at which these calls were made there were never more than seven directors present, which, though a quorum, was not an absolute majority of the committee of management. Clyne refused payment of these instalments on his twenty shares; he did not, however, express disapprobation of the proceedings, or give any intimation that he no longer held himself bound by the contract. An action was raised against him by seventy-two of the subscribers.

The Lord Ordinary (9th June 1830) issued the following interlocutor:—" In respect that the action is brought against " the defender, as the partner of a company, for performance of " obligations set forth as arising under the contract of co- " partnery, and is raised and insisted in by the whole of the " numerous individual partners, with a comparatively very few " exceptions — repels the objections to the title of the pursuers: " Finds, farther, that the defender did become a party to the " contract libelled, and is consequently bound by the provisions " therein contained: Finds, that the contract expressly provides, " 'that the 26th day of October 1824 shall be held, notwith- " standing the dates hereof, to have been the commencement of " this copartnery,' and that the copartnery must consequently " be held to have been constituted and in operation from that " date: Finds, that by the said contract each member became " bound to pay his subscribed share of the stock 'in such in- " stalments not exceeding 10 per cent. each on the amount of " the said capital, and at such periods as the directors or com- " mittee of management herein-after named may appoint.'

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" Finds, that the sums now concluded for consist of the instal-
" ments of the defender's subscribed share of the company's
" stock, called for in terms of the clause libelled; and therefore
" repels the defences, and decerns in terms of the libel: Finds
" the defender liable in expenses; allows an account thereof to
" be given in, and remits the same to the auditor to tax, and
" to report." And his lordship added the subjoined note.*

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* The Lord Ordinary has formed the following opinion, on the various and complicated pleas maintained by the defender:—The company here consists of between seventy and eighty individuals, and of these nearly seventy concur in the present action. Even if it had been an action directed against a third party, for the performance of obligations contracted towards the company, this concurrence of the great body of the partners would have been sufficient to support it; but for some such equitable modification of the ordinary rule, a company, consisting of so many individuals, would be practically incapable of either asserting or defending its rights. Accordingly, the principle seems to have been expressly recognised in the case of the Shotts Iron Company against Hopkirk, in which the disclamations of the action, by " a comparatively small number of the partners," were disregarded. The English cases referred to by the pursuers afford instances of the adoption of a similar course, and upon the same ground, in the law of England. But there is the less room for difficulty here, as the present action is brought, not properly speaking by the company against a third party, but by the great body of the partners against one of their own number, for the performance of obligations contracted by him to his copartners, and concludes for payment of the sums to the pursuers, ' or the manager ' of the company for behoof of the company;' an action which appears to the Lord Ordinary to be maintainable, not only at the instance of the great body of the partners against a few recusants, but at the instance of any number of the partners, however small, as every one of them has a legal interest to insist that the articles of the contract shall be fulfilled. 2dly, The defender's objection to the execution of the contract is inadmissible, by way of exception. The contract in process presents the appearance of a complete and formal deed, bearing the subscription of the defender, with a certain number of shares added, in his own handwriting, and that subscription is set forth in due form in the testing clause. The defender does not deny his subscription, and does not aver that it had any other object than that of attesting his accession to the contract. In these circumstances, his allegation that the sheet of parchment on which he signed was separate at the time of his signature, and his plea thence arising, form an objection to the execution at variance with the present appearance of the deed and with the testing clause, which ought to be made good in a reduction. 3dly, The circumstances of the present case do not admit of the objection, that the copartnery contemplated by the defender was substantially different from that to the support of which he is now called upon to contribute. It is true the contract provides that the capital stock of the company shall be 100,000*l.*, divisible into 4,000 shares of 25*l.* each; and such a clause might, in some supposable cases, bear the construction, that the completion of the subscription formed the condition of the contract taking effect. But that construction is inadmissible here, because the printed prospectus, referred to in the original subscription paper, signed by the defender in

The Court (11th January 1831) adhered, and found additional expenses due. * Sept. 29, 1831.

October 1824, expressly provides, that, "as soon as 2,000 shares are subscribed for, "the company shall be held as constituted; and the partners shall be then called "together for the purpose of adjusting the articles of partnership, electing office-"bearers, and giving directions for carrying the objects of the company into effect;" because, at a general meeting of the subscribers of the 26th of October 1824, at which the defender was present, and when little more than 2,000 shares were subscribed for, directions were given to the committee to inquire after and purchase the ground and buildings necessary for carrying on the works; and at subsequent meetings, at which also the defender was present, certain purchases of ground and works actually made were approved of; and because the contract itself expressly provides, "that "the 26th day of October 1824 is hereby declared, notwithstanding the dates "hereof, to have been the commencement of this copartnery," &c. In these circumstances it appears to the Lord Ordinary impossible to consider the provisions as to the number of shares as a condition of the contract taking effect, or in any other light than that of a prospective declaration of the amount to which the company's stock and the number of copartners might possibly be increased. 4thly, As, by the terms of the contract, the shares are transferable, and as it contains a provision regarding the descent of the shares of deceasing members to their executors, there is no ground for holding that the copartnery was dissolved by the death or the bankruptcy of some of the individual members. 5thly, The alleged acts of mismanagement and violation of the terms of the contract by the directors, or the other individuals who took an active share in the administration of the company's affairs, however relevant they may be as grounds of action against the parties concerned, do not appear to the Lord Ordinary to afford a defence against the present action. The mismanagement of the affairs of the company, and even the violation of the terms of the contract in some particulars, do not necessarily void the contract between the whole copartners, and certainly do not authorize the defender to plead, by way of exception, his non-liability for his subscribed shares of the company's stock in an action at the instance of the great body of his copartners, who, if any injury has been sustained by the alleged acts of mismanagement and violation of the contract, are as great sufferers as himself. 6thly, The provision in the third section of the contract, empowering the directors to declare the forfeiture of the shares of the partners who shall fail to pay the instalments within a certain period, is clearly an option in favour of the company, and does not bar an action for the actual performance of the obligation by the defaulter. 7thly, There seems no good objection to the form in which the calls were made. They are to be made by the directors or the committee of management; and it is declared, by the 5th clause, "that any five of the number shall be a quorum for "ordinary business." What shall be considered as "ordinary business" seems a point which admits of being determined by the practice of the company, and according to that view the calls for instalments seem to have been understood as falling under that description. Besides, the 7th clause evidently includes, as falling under the powers of a quorum, various acts which seem, to say the least, as important and extraordinary as that of calling up the instalments of the subscriptions. Lastly, The plea urged in the defender's case, that the contract bound the parties to submit all disputes to arbitration, is one which admits of being waived, and the Lord Ordinary holds it to have been waived, as it is not stated on the part of the defender in the record.

* 9 Shaw and Dunlop, p. 248.

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Clyne appealed on various grounds, but it is only necessary to particularize one, viz. that the call for the instalments was not authorized, and was not made agreeable to the conditions and provisions of the contract of copartnery, calling up payment of instalments on the shares subscribed for, did not fall under "ordinary business," and therefore would not be effectually done by a quorum of the committee of management entrusted with the ordinary business of the company.

Respondents.—The instalments sued for were duly called up by the directors in terms of the contract, and according to the true meaning and reading of the clauses of the contract relating to that point, and therefore the appellant is liable in payment of them.

Lord Chancellor.—My Lords, I should be guilty of a waste of your Lordships' valuable time, and that of the suitors, if I were to call upon the learned counsel to argue any other point than the main objection to this judgment, and on which I feel it to be my duty to advise your Lordships. It is not correct to state that where a party is indebted by a natural obligation as well as civil—of paying his debts or performing his obligation—questions of law ought not to be nicely raised when he is called upon to pay that debt or to perform that natural obligation. It is the undoubted right of the individual to maintain that the obligation is not cast upon him in the manner or to the extent contended for—that he is not liable to the process, because the debt does not lie upon him in the way in which the obligation is endeavoured to be enforced, or to the amount sought from him; and of his taking those objections, if he can sustain them, the other party unquestionably has no right to complain. Bearing in mind this general remark, the present is the simplest and clearest case, if you look at the circumstances, that can possibly come before a court of justice, of a contract between two parties. The one person calls upon the other to perform his part of the contract; and the simple question is, whether the party so calling has a right to that performance? In a word, whether the defender has contracted to do that which the pursuer calls upon him to perform? The appellant has contracted to pay a hundred per cent. on certain shares, but the company on the other hand have contracted, and he is entitled to the benefit of the stipulation, that this hundred per cent. shall be obtained from him on those shares only according to

certain rules and regulations; and the question before your Lordships simply is, whether it is according to those rules and regulations that he is now called upon to pay the two instalments of that hundred per cent.? Now, in order to see whether it is so or not, your Lordships will be pleased shortly to look at the terms prescribed for the obtaining of those calls. I need hardly remind your Lordships that in all these joint stock transactions, (which have been in so many instances ruinous in their consequences, and, I must say, to a certain degree were dishonourable in their nature to the mercantile character of the country, five or six years back,) one of the most important parts of the contract, by which the parties bound themselves was that which related to the payments on the shares by way of call; because, though at the time it was not possible that the persons who entered into the contracts should expect that they were all to sell their shares without having paid up any portion, yet it is quite clear that every person expected that before, at all events, any large proportion, amounting to nearly the whole of those shares, should be paid up by them, they were to be made in some way or other available in one or both of two cases; they looked to the profit that they were to make by getting rid of the shares, when they bore a premium, or, they intended to retain their shares, and having paid but a moderate proportion upon them, expected to derive a large profit from the concern. Now, with regard to each of these two ways of making a profit, nothing could be more material than the mode in which the instalments on the shares were to be exigible, and accordingly in all the contracts I have seen, coming from either part of the kingdom, it has been a matter of anxious provision in what manner the calls should be made. Now, let us see how it is in this case:—"That the first instalment shall be "1*l.* sterling per share, which shall be paid as upon the 9th day of "November 1824," that is for the expenses, "and the remainder "of the said stock shall be advanced in such instalments, not "exceeding ten per cent. each on the amount of the said capital, "and at such periods as the directors or committee of management "herein-after named may appoint," notice in writing being given. I should have said it would have been clearly an evasion of the plain intent, almost of the letter of this stipulation, which the shareholder may be said to have made by the third article, if two instalments of ten per cent., each having been ordered on the same day,—they should have been both payable also on the same day. I should have reckoned that a clear evasion of this condition, because it would have been doing that which they were not warranted by the meaning of parties to do, and doing it as it were surreptitiously and evasively, the directors being allowed only to

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Sept. 29, 1831. call for one instalment of ten per cent. at a time; this would have been calling in effect for twenty per cent., though under colour of calling for two of ten; but the force of that observation is lessened by the time for each payment being different. I still have a considerable doubt whether that was a regular course, but I should not upon that ground advise your Lordships to reverse the judgment of the Court below. But then, my Lords, the payments are to be by instalments, fixed by "the directors or committee of management "herein-after named;" we must look then to see in what manner the "committee of management herein-after named" are stated to be authorized, or rather required, to perform all their duties, and, among others, that of fixing the periods and the amount of the instalments. That is laid down in the seventh condition, out of which the question arises:—"The business and affairs of this company shall be conducted "under the superintendence of a board of directors, to consist of a "chairman, deputy chairman, and fifteen ordinary directors, who "shall form the committee of management, and shall be named and "elected by the company at the aforesaid stated general meeting "to be held annually, as herein-before mentioned." Now, there is no doubt that it must have been done by the majority of those, if there had been no other regulation; but then there comes a condition that any five of their number shall be a quorum for ordinary business; and my observation in respect of quorum clauses generally is, that they are of strict and not of lax construction, and for this most obvious reason, that if it were not so, you enable a small number to bind the majority, you enable a few to deal as for the whole, and you take the power out of the whole body, in whom generally it ought to rest, and in whom, but for the quorum clause, it does rest; for which reason a quorum clause, both in articles of partnership and in matters of a similar kind, must be of strict construction—"That any five of their number shall be a quorum for ordinary "business." By ordinary business I understand business of inferior importance, those common transactions without the doing of which the concern could not go on, and which may be as well done by five as by nine, or by the whole seventeen. It is quite clear that it would be impossible to carry on the business of any concern, if you were obliged to procure the attendance of great numbers for every matter of minor importance, and which may be as well done by five as by a larger number. But then it is said (and upon this an argument at the bar in support of the judgment below has been raised), that what follows is to be the only limitation of the business, and the only exception, and that the words "ordinary business" are to be either rejected altogether or to be qualified by the words which follow, and that that which is specified is the only business which is to be called

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extraordinary business on the one side and ordinary on the other,— " and shall have full power to purchase or sell any heritable pro-" perty, to feu, or take in lease, lands or houses connected with or " which may be necessary for the foundry department." That is considered as ordinary business,—" but declaring that the com-" mittee of management only, or a majority of their number, shall " have power to enter into any agreement regarding the purchase " or sale of any heritable property, feuing or taking in lease lands, " mines, metals, or minerals for the smelting department," for the reason I have flung out, the one being of large and the other of small importance; " providing always, that such agreement shall " not be binding on the partners, unless approved of at a general " meeting to be called for that purpose." Even if it is by a general committee, the business of the smelting department shall not be conducted unless the general meeting sanction it. " And it is further declared "—which I cannot reject from my consideration of this clause, for we must construe the terms ordinary and extraordinary business by what follows:—" That the committee of management, or the majo-" rity of their number, shall have power and they are hereby autho-" rized to nominate and appoint a manager, agents, and other officers " of the company, and generally all clerks and servants whom they " may deem necessary for the business of the company, with power " also to fix the salaries, allowances, or wages of such persons, and " to dismiss all or any of them whenever they may think proper." Now, can any person read this section without being convinced that what follows the words " ordinary business " is intended to limit ordinary business, and that all which is not strictly within the limit is comprehended in the subsequent part as extraordinary business. In the first place, can any person, consistently with the common rules of construction, say that that which has been suggested from the bar is the sound mode of interpreting these words? One answer is decisive. If this is intended to limit the description of ordinary business, that which follows must also, by parity of reasoning, limit the expression of extraordinary business. If, taking this as the foundry department, the ordinary business is confined to that, so the words relating to the smelting department, and so forth, must, in exact parity of reason, be taken to be only description and definition of extraordinary business; and what follows must be considered as having the highest degree of importance, namely, the dismissing a common servant, or the saying whether he shall have twelve or eighteen pounds. Now, it is useless to observe that that would be the wildest construction to be put upon these words, and accordingly no person has maintained that construction, though it has been argued that the words " ordinary " business " are to be taken as mere tautology, for that ordinary

Sept. 29, 1831. business follows by enumeration. It is a more clear and less absurd view of the subject certainly, to say that you are to construe the words " ordinary business " with reference to what follows, and that what follows does not exhaust the description of ordinary business, but is merely a sort of outline by which you are to be guided in discovering the meaning of the word " ordinary." Perhaps I might not much object to that, if I did not see that what follows is held to be something excepted out of the description of ordinary business, rather than qualifying it either directly or by analogy. It is quite clear that the dismissing a servant or the apportioning his wages is the most ordinary of all ordinary business; and therefore, if it had not been conferred upon the general committee, to the exclusion of the quorum by the latter part of the section, it would have come under the description of ordinary business—the five might have done it; and therefore I should hold that, in soundness of construction, the words " ordinary business" are so far from being controlled by the latter part of the section, that the latter part of the section has taken out of that which may be considered as ordinary business, and which is done, generally speaking, by the quorum—one branch of ordinary business, and conferred it upon the majority of the committee;—that is the only sensible and rational construction I can put upon this clause. Now it is said that, independent of this, the term " ordinary business " certainly must mean to include this business of making calls upon shares. My Lords, I cannot go so far; I look upon " ordinary business " to mean business of constant occurrence—of daily and weekly occurrence—which does not require the calling a general meeting—which does not require that the proceedings should be suspended for want of a larger number of persons. The reason why quorums are appointed at all is not, in most cases, for the transaction of concerns of importance, but that the quorum named may do the common and ordinary business. It is not uncommon to have a small quorum limited by the amount of the business they are empowered to transact; but can it be said that the making of calls is a matter of common occurrence? No; for ten operations, or five operations, if you are to have two orders in one day, payable on different days, will exhaust the whole of that branch of business—that will not, therefore, be of frequent occurrence; but even if it were to be for smaller sums and not two calls made at a time, it is clear that is by no means an ordinary transaction. My Lords, I should distinguish between the dealing with the annual expense, the wear and tear, the profit and loss, and any dealing whatever with the capital, the corpus, the subject matter of the property. The same observation would apply, whether to a joint stock company or a part-

nership, both in respect of its occurrence and in respect of its importance. Can it be said, that the instalments by which and the times at which the capital shall be paid up are matters of inferior or subordinate consequence? I take them to be clearly the reverse. I conceive, that if the shareholders, at the time those clauses were framed, had been told, "Any five of the committee may order you to "pay up the whole—it does not require the whole seventeen; the "whole seventeen are required to turn off a servant, even though "he may be a thief; that is an important matter which they cannot "do without a public meeting; but any five may order you to pay "up the whole of your shares,"—it would have astonished them a good deal. In none of the lights in which I have put it can I bring my mind to see on what ground the opposite has been ruled by the learned judges in the Court below; but if I am right, instead of the debt being due, and the obligation contracted, and the question only being as to the mode in which it shall be enforced, the question is, whether the debt does exist, whether the obligation has been contracted, and whether that which the party is now called upon to do is that which he has bound himself to perform? Now, he has bound himself to pay instalments, if those instalments are called for in a prescribed mode; and this is not only a point put at the bar, but it is clear it was one of the most important matters the parties had in view when they were binding themselves on the one hand, and stipulating for themselves on the other that they shall not be called upon to pay unless the demand is made in a particular way; and I consider this not a mere technical objection, though indeed it would be sufficient if it were. Now, let us refer to a part of the elaborate judgment of the Lord Ordinary, and see whether he has very successfully dealt with this matter:—"There seems no objec- "tion to the mode in which the calls were made;"—the question is, whether there is not an objection? "They are to be made by the "directors or committee of management;" so they are. The question is—how? "And it is declared by the fifth clause, that any "five of the number shall be a quorum for ordinary business. What "shall be considered as 'ordinary business' seems"—(now that is just the point in the cause)—"a point which admits of being deter- "mined by the practice of the company; and, according to that "view, the calls for instalments seem to have been understood as "falling under that description." Now, who "understood" it so, or in what way we find that any one so understood it, I cannot tell. It is said the appellant attended a meeting at which the fact of calls having been made was reported, but there is not a tittle of evidence of his having attended that meeting, except the production of the minute; and when you look at the minute, it does not appear

Sept. 29, 1831. that he understood any thing of the kind which now appears, for it only says that the report of the committee set forth that two calls had been made, namely, one pound and twenty-five shillings, and that was followed by a vote of thanks to the committee who made the report; but it does not say that this was reported as a call by the committee of five. For any thing which appears it may have been by a committee of nine, or it may have been unanimous. There is no proof whatever of the practice of the company having been as assumed; and even if there were, there is no proof that this party was cognizant what was the fact; and when we are told that it has been understood that those calls fall within the description of ordinary business, I feel it proper to say I can find no evidence of that. The learned Judge then proceeds, " Besides, the seventh " clause evidently includes, as falling under the powers of a quorum, " various acts which seem, to say the least, as important and extra- " ordinary as that of calling up the instalments of the subscriptions." There are certain things—the turning away clerks, or the apportioning their wages—which might be consdiered ordinary business, but which still are not to be allowed to be done by a quorum of five —they are to be done by a quorum of the whole nine, (which the Lord Ordinary seems to forget,) " as important and extraordinary." There is a special provision as to the making arrangements ancillary to carrying on the foundry business. I may be disposed to admit that is as important as the calling for instalments on shares; but then the section does not leave it to the words " ordinary business;" it says, notwithstanding, a quorum of five are to have the power of transacting ordinary business, we do not rest upon that, but give them, per expressum, the power of letting and selling as far as regards the foundry, and no further. Taken accurately, that makes as much against the inference of the learned lord as for it, and I should say more. For these reasons I am unable to understand or to follow the grounds of the learned lord who has pronounced this interlocutor. On these grounds, I move your Lordships that the interlocutor of the Court below be reversed.

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

Appellant's Authorities.—Carey on partnership, 1825, p. 595, 160–1.; Wms. Saunders, 1. p. 291; 2. p. 116; Gow, ed. 1825, p. 109, Appendix, 404; 2 Ersk. 3, sec. 25; 1 Montagu, p. 89; 2 Bell's Com. pp. 634, 641, 2, 4, 8; 2 Merivale, p. 614; Marshall, 26th Jan. 1815; Bell's Principles (and cases there quoted), p. 91–2; Portable Gas Company, 13th Feb. 1829, (S. & D.); Moore v. Hammond, 30th April 1827; 6 Barnwell and Cresswell, p. 456; stat. 1696, c. 15; 1592, c. 179; 1593, c. 175; 1681, c. 5; 1540, c. 117; 1579, c. 80; 1680. c. 5.

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

Sept. 29, 1831.

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

No. 49.

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

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

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

Sept. 30, 1831.

2D DIVISION.
Ld. Mackenzie.

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