SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

WARNER—*Appellant.*
CUNNINGHAM—*Respondent.*

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PARTNERSHIP.

WHERE the proprietors of two adjoining estates, the one containing fields of coal, the other, besides coal, having salt-works belonging to it proper for the consumption of the small coal; entered into a contract for 124 years, to carry on the coal and salt-works as a joint concern, and for that purpose executed to each other mutual leases or tacks, that is, Warner set in tack for 124 years, to Cunningham, his heirs and assignees, and to himself, Warner, his heirs and assignees, equally betwixt them, certain seams of coal, and Cunningham in the same manner set in tack for 124 years to himself and Warner, and their respective heirs, certain coal-fields and salt-pans; held that this was a lawful contract, and binding on the heirs taking up the succession and representing the parties; and that when the concern was prosperous, and there was no reasonable apprehension of loss, the heir of one of the parties was not entitled to a dissolution to the prejudice of the other party.

THE Appellant's father, Mr. Warner, of Ardeer on the western coast of Ayrshire, had considerable fields of coal within his property, and his neighbour Mr. Robert Reid Cunningham, of Auchinharvie, the Respondent, besides some coal, had salt-works on his property, proper for the consumption of small coal. The expediency of a connexion, so as to carry on the coal and salt works together,

having suggested itself, a verbal agreement was entered into in 1770, for working the coal on Mr. Warner's lands, with some part of the coal on the Respondent's lands, and the Respondent's salt-works as a joint concern, under the Respondent's management, and the operations for that purpose were immediately commenced by way of experiment, it being understood that the expenses and profits were to be equally divided. After four years' experience, and when the profits had been exhausted by the necessary outlay, and a farther advance of 850*l.* was required, the agreement was in 1774 reduced into writing, in the form of a regular contract and lease. The deed, after reciting the verbal agreement and the operations under it, and that the Respondent was to keep the books and continue the management, and that it was the intention of the parties that the endurance should be twenty-five years from 1770, and an additional six years, unless revoked at the end of the twenty-five years, as therein mentioned, proceeded as follows:—

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"And the parties judging it proper to have their "agreement extended in form, and for the better "securing the same, that the mutual tack herein-"after written be executed, therefore the said "Patrick Warner hereby sets in tack to the said "Robert Reid" (afterwards Cunningham) "him-"self, and his heirs or assignees, and to the said "Patrick Warner himself, his heirs or successors, "proprietors of Ardeer, equally betwixt them the "said Robert Reid and Patrick Warner, all and "haill the whole seams or seam of coal within all

First contract, 1774

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" or any part of the said lands sometime called " Dovecote-hall, now Ardeers, and the lands " of Pyperheugh, belonging to the said Patrick " Warner, lying within the parish of Stevenston " and sheriffdom of Ayr, which includes all his " lands in that parish; also all and haill whatever " part of the said lands as are, or shall be neces- " sarily required for coal hills, coal bings, road and " canal, or otherwise, anent the work; and that " for the space of twenty-five years, and six years, " making together thirty-one years full and com- " plete, from and after the 20th April, 1770, " which was the commencement thereof; with " power to set down pits, make coal hills, and " others foresaid, excepting only such land as is " generally in tillage, on which no coal hill or bing " shall be made, without consent of the proprietor; " but the coal beneath the same is not reserved; " and on the other part, the said Robert Reid " hereby sets in tack to the said Patrick Warner, " and to himself the said Robert Reid, and to " their several and respective heirs aforesaid, equally " betwixt them, the foresaid salt pans, and mate- " rials thereof, with the salt garnel, and such of " the land belonging to the heirs of Auchinharvie, " or their assignees, as is used for the canal and " coal-yard; and that for the like space above- " mentioned: and the parties hereby agree and " condescend, that the rent of the said coal and " ground used and to be used for coal bings, canal, " and otherwise aforesaid, shall be 100*l.* sterling " yearly; and that the rent of the said salt pans " and garnel, with the ground of the rest of the

" canal and coal-yard, shall be 100*l.* sterling; and
" both parties hereby contract and agree, and bind
" and oblige them and their foresaids, to advance
" and lay out, from time to time, whatever money
" shall be necessary for carrying on the said works;
" each party paying the one-half; and in case any
" party shall advance more than his own half at any
" time or times, he shall draw or be entitled to
" receive the lawful annual rent of the same from
" the other party, from the several times of outlay,
" until re-payment, and have power to demand the
" principal and interest when he thinks proper;
" and it is also agreed, that the parties shall equally
" draw and receive betwixt them the whole profits
" that shall be made on the said works, and in
" like manner to suffer and pay the whole loss
" that shall be made thereon." " Further it is
" hereby particularly agreed, that the said Robert
" Reid shall have the management and direction
" of the whole works, and sales of every kind; but
" in case of his decease, the managers shall be
" chosen by the tacksmen or parties for the time;
" and in case of their variance, by the sheriff
" depute of Ayrshire for the time being, upon
" caution acted in his court books: and albeit
" there is no liberty herein granted of setting down
" pits in the ground, belonging formerly to Au-
" chinharvie, now to his heirs and assignees, called
" Saltcoats Campbell, adjoining to the said lands
" of Patrick Warner, yet liberty is granted to
" work the coal beneath the same from any pit in
" Mr. Warner's ground, so far as the levels will
" admit of: provided always, as it is hereby ex-

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" pressly provided and declared, that it shall be in " the power of the said Patrick Warner himself, " or the lawful heirs of his body, or Mr. John " Warner in Kilbarchan (in case of his succeeding " to the said Patrick Warner), and the lawful heirs " of his body, but not to any other successor, or " assignee, to dissolve this contract and tack at any " time after the elapse of the said twenty-five years, " upon six months' premonition: and providing " also, that in case the coal foresaid shall happen " to be wrought out before the elapse of the said " twenty-five years, or at any time thereafter, then " and in that event this contract shall become " void thereafter, and be at an end as to both " parties." And in the close of the deed, both parties bind themselves in warrandice of the mutual tacks, as follows: " And as on the one part, " the said Patrick Warner obliges him and his " foresaids to warrant the tack herein granted by " him, so the said Robert Reid obliges him and " his foresaids to warrant the tack on his part; " and both parties bind and oblige them to perform " the premises, *hinc inde*, to others, under the pe- " nalty of 50*l.*" &c.

Under this contract the concern was carried on apparently to the satisfaction of both parties, till 1783, when it was thought proper very considerably to extend the scale of their operations, and for this purpose to add a period of ninety-nine years to the endurance of the contract and tacks, and to include some additional fields of coal, and accordingly a second contract was entered into for these purposes, previous to which Cunningham had ob-

tained from Warner a lease of an additional field of coal called the *Misk*, which the parties also wrought as a joint concern. The second contract, after reciting the former, proceeded thus:—

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Second contract, 1783.

" The parties now finding that the endurance of " the said tack or contract is too short; that it " will tend to their mutual benefit, and to the ad- " vantage of their heirs, that the same shall be " prolonged and continued for a much longer space " of time; and albeit their first intention was to " ship off coals at Saltcoats, they afterwards en- " larged the plan, and have laid out a very consi- " derable sum of money at the colliery in the Misk, " from which they now ship off a considerable " quantity of coals at Irvine;—the parties, there- " fore, by these presents, not only prorogate the " foresaid tack or contract on both sides, for the " further space of ninety-nine years; but also of " new, the said Patrick Warner sets to himself " and the said Robert Reid Cunningham, equally " betwixt them and their respective heirs, the fore- " said coal in the whole lands in Stevenson parish " belonging to him the said Patrick Warner, with " whatever land shall be necessary for coal-hills, " bings, roads, and canal, and that for the space of " 124 years, from and after the foresaid 20th April, " 1770, for the foresaid yearly rent of 100*l.* ster- " ling; and the said Robert Reid Cunningham " sets to himself and the said Patrick Warner, " equally betwixt them, and their respective heirs, " the foresaid salt-pans, materials thereof, and " garnels, and such land of his as is used for the " canal and the coal in his lands lying east of the

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"Capon-crag, and that for the like space of 124 "years, from the said 20th day of April, 1770, "for the yearly rent of 100*l.* sterling, including "in this let the coal in Little Dubs and Bog, and "also whatever coal he may succeed to in the "Broom. And they the said parties engage to "advance equally in carrying on the works, and "shall equally share in the profit and loss to be "made thereon, for and during the space of 124 "years, during which space the whole obligations "and articles contained in the former contract are "hereby prorogated; and the said Patrick Warner, "for himself and his heirs, hereby renounces the "power and liberty reserved to him and his heirs, "of annulling the said contract at the end of "twenty-five years, or any time whatever; but "providing, nevertheless, that if the said coal "shall happen to be wrought out, or become not "workable on any account, conform to the opinion "of men of skill to be mutually chosen, then, "and in that case, this contract, from thenceforth, "shall no longer be binding on both parties: but "if the coal continue workable after the expiry of "the above space of 124 years, the parties, in the "strongest manner, recommend a joint working "of the said coals, and desire their heirs to con-"tinue the contract as long as the coal can be "wrought to advantage."

In consequence of the expenses which these additional operations required, a debt of between five and six thousand pounds was incurred, for the payment of which Warner was under the necessity of mortgaging his estate. Till 1792, Warner

appeared to have relied wholly on the fidelity and capacity of Cunningham, and had never thought it necessary to examine the books of the concern. In that year, being then about eighty years of age, he appointed his friends Dr. Woodrow, minister at Stevenson, James Miller, and Francis Russel, his commissioners, to manage his affairs and investigate the conduct of Cunningham in the management of the coal and salt-works. The commissioners upon this investigation were dissatisfied, and caused an advertisement to be inserted in a Glasgow newspaper, that no debts of the concern from that period would be paid by Warner. In 1794 Warner died, and the powers under the commission were at an end: but the three persons who had been in the commission had been appointed tutors and curators to Warner's eldest son, the Appellant, as well as to his other children. In that character they caused a notorial intimation in their own names, and that of the Appellant, to be given to Cunningham, that, as the copartnery had never tended to the mutual benefit of the parties, and a large debt of more than 5000*l.* had been incurred, which was yearly increasing, without any prospect that these works would be sufficiently productive to discharge it, and that as by the common law of the land the Appellant was entitled to renounce, it was his intention to do so, and that he meant to avail himself of the benefit of the stipulation, to put an end to the concern at the close of the twenty-five years, viz. in April, 1795.

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Two separate actions were then raised against the Respondent, in the name of the Appellant and

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his curators. The first of them proceeded upon the narrative of the terms of the first contract of copartnery, and the intimation which had been given to the Respondent, that the Appellant meant to avail himself of the option therein stipulated, of retiring from the concern at the end of twenty-five years; and concludes, that "the defender "should be ordained to exhibit and produce the "whole books, accounts, and vouchers, which "concern or relate to the management of the coal "and salt-works carried on by him under the said "contract, and to hold just count and reckoning "with them for his management of the said works, "and intromissions with the funds which have "come into his hands in consequence thereof; that "he should be ordained to make payment to them "of 2000*l.* or such other sum as should, upon a "fair count and reckoning, appear to be due to "them from his concern."

The other was an action of reduction for setting aside the second contract. The reasons of reduction were:—1st, that the contract itself was vitiated and erased, &c. and—2d, the said contract and tack "was elicited and impetrated by the "defender, through gross fraud and circumvention "on his part, and through facility on the part of "the granter, without any onerous and just cause, "and to his and the Pursuer's great hurt and enor-"mous lesion." It therefore concludes, "that the "foresaid contract and tack, with all that has fol-"lowed or may follow upon the same, ought and "should be reduced, retreated, rescinded, cassed, "annulled, decerned, and declared, by decree of

" our said Lords, to have been from the beginning, " to be now, and in all time coming, null and void, " and of no avail, force, strength, or effect in " judgment, or outwith the same in time coming, " and the Pursuer restored and reponed there- " against."

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A third action was raised to reduce the *Misk* lease, on the ground of incapacity in Warner, and advantage taken of it; and after some previous proceedings the cause came on to be heard before the Lord Ordinary (Meadowbank), who pronounced the following interlocutor:—

" The Lord Ordinary having considered the " condescendance for the Pursuers, answers, replies, " and duplies, and being of opinion that it is for " the interest of the parties, before exposing them " to the expenses of a proof, to have the points of " law pleaded by the Pursuers determined: Finds, " That as the Pursuer Mr. Warner represents his " father, he is bound to fulfil his lawful engage- " ments: Finds, That it was a lawful engage- " ment for him to enter into a copartnery con- " nexion with the Defender, for a term beyond the " probable endurance of his own life, where the " subject of the concern was to consist of coal and " salt-works, on which a great expenditure was " required to render them profitable, and a tract of " years to realize that profit: Finds it was a lawful " provision in such a contract, to appoint the " Defender manager of the concern during his life; " and that of consequence, there is, *in hoc statu*, " little room for the Pursuer's founding on a cordial " co-operation of partners, as essential to the con-

Jan. 17, 1797. First interlocutor of the Court of Session appealed from.

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" tract of partnership, rendering it impossible for " the ancestor to bind his heir to succeed to him " as a partner. But the Lord Ordinary being, " nevertheless, of opinion, that if the partnership " challenged was obtained by deception practised " against the late Mr. Warner, a reduction of it " is competent; and also, that if it is a losing con- " cern, and threatens to involve the Pursuers in " future loss, or if the Defender's conduct as ma- " nager has been such as to render his fidelity or " ability for the undertaking justly suspected, it " must be competent to the Pursuer to get free of " the concern, by obtaining a dissolution of the " partnership, and a sale of its property, whether " heritable or moveable, and thereupon a final di- " vision of the profits and loss. Appoints the " Pursuers to put in an articulate condescendance " of facts, without any argument, of what they " allege on one or all of these grounds for getting " free of the partnership."

This interlocutor having been brought under the review of the Court in a reclaiming petition, after considering it with the answers, the Court adhered.

Jan. 24, 1798. The law having been thus finally determined in the Court of Session that the contract was binding on the heir, as representing his father; a condescendance was given in as to the other points, and a proof was allowed, and a great deal of evidence taken. After the evidence was closed and before decision upon it, the Appellant, by permission of the Court, amended his summons of reduction by adding the following words, " that whether tho " said contract and tacks should be reduced or not,

" it ought and should be found and declared, that " in the circumstances of the case, the copartnery " concern, and the joint leases of the coal and " salt-works contained in the said contract, and " executed in contemplation of the said copartnery, " ought and should be dissolved and put an end " to, from thenceforth and for all time coming."

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The Court, in 1802, then pronounced the following Judgment:—

" The Lords having advised the state of the " process, and having also considered the amend- " ment allowed to be given in by the Pursuers of " their summons of reduction of the coal contracts, " conjoin the process of reduction of the Misk lease, " with the previous process of declarator and re- " duction regarding said coal contracts; and in " these reductions repel the reasons thereof, assoilzie " the defender, and decern; find him also entitled " to the expenses of these reductions, and allow an " accompt thereof to be given in; but before an- " swer as to the other conclusions of the Pursuer's " actions, as now amended, appoint the parties to " prepare memorials on the case, and to see and " interchange the same betwixt and the 4th day of " May next."

Dated 9th, signed 12th Feb. 1802.

It being thus decided that there were no grounds, from deception or otherwise, to reduce the contract and tacks as void from the beginning, the question came to this, whether in terms of the amendment there was a reasonable apprehension of loss as to call for a dissolution *hinc inde*. A correspondence having taken place with a view to a compromise,

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the Appellant did not give in the memorial ordered by the Court till nearly seven years from the date of the last interlocutor; but memorials having at length been given in, the Court (2d division), in 1809, pronounced this judgment:—

Feb. 7th and 14th, 1809. Third interlocutor of the Court of Session appealed from.

"The Lords having advised the mutual memo-
"rials for the parties,—Find the Pursuer barred by
"final interlocutors from maintaining in this Court,
"that he was not bound by either or both the
"contracts of copartnery entered into by his father
"with the Defender for long terms of years, or
"challenging these contracts on account of fraud,
"lesion, circumvention, or facility; or challenging,
"the leases mutually granted by his father and the
"Defender as following the fate of the contracts:
"and as to the point, whether, when the investiga-
"tion took place, there were sufficient grounds to
"entitle the Pursuer to get free of the concern as a
"losing one, or to have the Defender removed from
"the management, on account of want of skill, or
"want of fidelity then detected: Find, That what-
"ever grounds or appearances of grounds, there
"might have been at the time for one or more of
"these claims, there has been unreasonable and
"unjustifiable delay in putting in the memorials
"with respect to this matter, implying a conscious-
"ness, that, as circumstances then stood, these
"claims would not appear tenable, under the very
"full and recent investigation which had taken
"place: Find, that it is incompetent now to insist
"in this matter, without taking into consideration
"the subsequent events that have occurred in this
"concern down to the present time, during which

" period, it seems not to be disputed that above
" 4000*l.* per annum of profits have been divided
" betwixt the parties; so that the concern, instead
" of having threatened impending ruin, as held
" out by the Pursuer when the memorials were
" ordered, has proved the source of great emo-
" lument to both the Pursuer and the Defender:
" Therefore, *in hoc statu*, sustain the defences
" against any conclusion in the Pursuer's libel, not
" formerly disposed of by final interlocutors."

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From these interlocutors viz., the Lord Ordinary's of the 17th Jan., 1797, adhered to 1798, of the Court, Feb. 12, 1802, and this last one of 1809, Warner appealed.

For the Appellant it was argued, that from the very nature of the contract of partnership, which depended more than any other upon a *dilectus personæ*, it was impossible that an original party could bind his heir so as to prevent his withdrawing from the concern at the death of that party: that as the contract is founded upon mutual confidence, and a sense of mutual benefit, consent was necessary not only to its formation, but to its continuance, Stair b. 1. t. 7. s. 4.—and that by the Roman law, which was also as to this point the law of Scotland, either party might at any time renounce, answering only to the other in damages, and that if the party himself could not be bound to continue the concern against his will, much less could the heir be so bound; and that the opinions of the text-writers on the law of Scotland were in this respect conformable to the Roman law, Bank. b. 1. t. 22. s. 18.—Stair, b. 1. t. 16. s. 5.—Ersk. b. 3. t. 3.

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s. 18.—that there was nothing peculiar in the working of collieries to take them out of the general rule: that the Appellant, at the time of his father's death, had a right to continue a partner under either or both of the contracts if he chiose, and that he did elect to become a partner under the first contract for twenty-five years, and in that character brought his first action for an account, and for taking the benefit of the conventional breach: that the Appellant had brought another action to set aside the second contract *in toto*, and that as to his receiving the dividends in the mean time, it was *pendente lite*, and at any rate they were the produce of his own collieries, so that there was no homologation: that the leases were merely ancillary to the contract of copartnery, and must therefore fall with it; for when the end failed, the obligation granted with a view to that end must also cease, *Young v. Erskine*, Falc. Jan. 25, 1745.—This was binding the heir not merely to the extent of the property derived from the ancestor, but binding him personally, which could not be. There was an inconsistency in the leases being made to the party himself and another, by which means he was landlord and tenant. The purpose could not be effected unless they had been made to trustees.

For the Respondent it was argued, that there was no authority in the laws or customs of modern nations by which a contract of copartnership, extended by special provision to the heirs and successors of the parties, was thereby rendered incompetent, null, and void; that neither the heir nor any one else could be bound to accept and make

himself personally liable against his will, and no such doctrine was here maintained. If the heir thought the scheme too hazardous, he might throw up the succession; but if he chose to take up the succession and represent his ancestor, he must take it with its burthens, and by the law of Scotland he became personally bound to fulfil that ancestor's lawful engagements. The Romans were not a commercial people, and therefore a question of partnership was not to be judged of by the civil law, but by the laws and customs of modern Europe; though even by the civil law such a contract as this would have been good to every substantial effect; and Stair was of opinion that such a contract would by special provision or custom have been good, Stair, b. 1. t. 16. s. 5.—The ancestor holding in fee simple might alienate altogether, and certainly might make leases beyond the probable endurance of human life, which would be binding on the heir; and by the law of Scotland, a lease would not merge in the fee, where the interest of a third party was concerned to keep them separate. The leases here were not ancillary, but the principal subject; and even though there should be a defect in form the heir was bound to execute them in proper form as representing his ancestor. The general law of partnership was the same throughout the civilized world, though there might be some peculiarities in that law in each country, and such partnerships as this were common here, and it happened that their Lordships had lately such a one before them, *Stuart v. Bute.* (*Redesdale.* The legality of the partnership was not in question there.) The question of

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law had been in this case finally settled in 1802, and it was doubtful whether it was competent to appeal from it seven years after. The opinion of Lord Braxfield (M'Queen) was in favour of Lord Meadowbank's interlocutor.

Leach and *Horner* for the Appellant; *Romilly* and *Cunningham* for the Respondent.

May 19, 1815. Judgment.

Lord Redesdale. The contract of 1770 and 1774 had been complained of as unfavourable to the Appellant, who was stated to have derived no advantage from it, proportionate to the property which he had contributed. And in the farther contract of 1783, it had been said that Warner had been imposed upon, by the accounts of profits exhibited by Cunningham. Their Lordships would see that this contract being entered into in 1783, the parties had been engaged in the business of the partnership for thirteen years before, so that they had all that time to inform themselves of the nature and prospects of the concern. The second contract was in effect a prorogation of the former with some little addition, and after several years' trial it appeared that the plan of working the Misk colliery, and shipping coals at Irvine, was given up; and that a considerable debt was incurred by the company, for the payment of which Warner mortgaged his estate, the fact being that Cunningham was not in circumstances to advance the money, which was therefore supplied by Warner. In 1792 some dissatisfaction arose on the part of Warner, who was then stated to be about eighty years of age,

and having thought proper to institute an investigation into the state of the concern, he granted a commission to three persons therein named, to take upon them the management of his affairs, and investigate the plan of management pursued by Cunningham; and they represented to Warner what appeared to them to have been improper conduct on the part of Cunningham. While this proceeding was going forward Warner died; and his son, for whom the commissioners had been appointed to act as tutors and curators, succeeded to the estate. These persons being advised that in terms of the first contract Warner's heir might put an end to the copartnership at the close of the twenty-five years, resolved to give an intimation of their resolution to insist upon a dissolution at that period; and a notorial intimation was accordingly given to Cunningham, narrating the contract, and stating that the copartnery had never been productive of mutual advantage to the parties, but on the contrary that after a trial of twenty-five years a debt of 5000*l.* had been incurred, and that there was no prospect of these works discharging the debt which was yearly increasing; and it was represented that as by the common law of the land the Appellant was entitled to renounce all interest and concern in the copartnery and contracts, he accordingly intimated his intention of doing so. Their Lordships would observe that this intimation was given upon the foundation of the first contract, not adverting to the second, by which the right of determining the copartnership at the end of the twenty-five years was renounced. Then two actions

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were raised against the Respondent in the name of the Appellant and his curators. The first action proceeded on the narrative of the terms of the first contract, and the intimation given that the Appellant intended to avail himself of the option to retire from the concern at the end of twenty-five years, and then concluded for production of the books &c., and for an account and payment of what should appear due to the Appellant. The other was an action of reduction for setting aside the second contract, and the reasons were, 1st, that the contract itself was vitiated and erased; 2d, that it was elicited and impetrated by fraud and circumvention through facility on the part of Warner, without onerous cause and to his great hurt and enormous lesion, and concluded to have it declared void from the beginning. It appeared that Cunningham had obtained a lease from Warner of a large tract of land for fifty-seven years, from Whitsunday 1781, at the rent of 58*l.* during the first nineteen years, and 68*l.* during the remainder of the term; and another action was raised to set aside that lease on the ground of incapacity in Warner. A condescendance and answers having been given in, in which the parties differed as to their statements of facts, the Lord Ordinary pronounced the interlocutor first appealed from. Their Lordships would observe that it had been contended by the Appellant that where a copartnery was by the contract to endure for 124 years, that was a contract which by the law of Scotland could not be entered into so as to bind the heirs of the parties. The Lord Ordinary however found (*vide*

ante). Their Lordships would observe therefore that the question was determined by this interlocutor to this extent, that as Mr. Warner (the Appellant) represented his father, he was bound to fulfil his lawful engagements, and that it was a lawful engagement for him to enter into a copartnery concern with the Defender (Respondent) for a term beyond the probable endurance of his own life, where the subject of the concern was to consist of coal and salt-works, where a great expenditure was required to render them profitable, and a tract of years to realize that profit: but that if the partnership was obtained by deception, a reduction of it was competent; and that if it was a losing concern it was competent to the Appellant to quit it; and that if the Respondent had not acted as a proper manager, this was a ground for putting an end to the partnership, or to that part of the contract by which Cunningham was appointed manager for life. And the Lord Ordinary appointed the Pursuers to give in an articulate condescendance of what they alleged on one or all of these grounds. A reclaiming petition was presented to the Court, and the desire of it refused; and the consequence was that the case rested on the deception, the reasonable apprehension of future loss, and the incapability and suspected fidelity of the Respondent as a manager. A statement of facts applicable to those grounds was accordingly given in, and on this statement evidence was allowed. But before the decision the Appellant with permission of the Court amended his original summons of reduction by adding that "whether the contract

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" or lease should be reduced or not, it ought to be " found and declared that in the circumstances of " the case the copartnership concern and joint " leases ought to be dissolved, and put an end to " from henceforth," so as to make the period of the institution of the suit the time from which the copartnership ought to be dissolved. The Court pronounced a judgment " conjoining the processes " of the reduction of the Misk lease, with the pre- " vious processes of declarator and reduction re- " garding the coal contracts, and repelling the " reasons of *reduction*; but as to the other con- " clusions of the actions as amended (the *dissolu- " tion*), appointing memorials to be given in." Some correspondence then took place between the parties with the view of settling matters by a compromise, and a considerable delay took place in giving in the memorials. But this proposal for a compromise having failed, the Appellant gave in a memorial, in which he endeavoured to prove the reasonable apprehension of future loss, and the incapacity of Cunningham as a manager. In the counter memorial a statement of profits was given for the purpose of showing that the concern was prosperous and lucrative. The Court then pronounced the interlocutor of the 7th and 14th Feb. 1809, which was the last appealed from (*vide ante*), finding " that the Appellant was barred by " final interlocutors from maintaining in that Court " that he was not bound by the contracts for long " terms of years, and from challenging the con- " tracts on account of fraud, lesion, circumvention, " or facility, or challenging the leases as following

" the fate of the contracts, and that as to the " grounds of getting free of the concern on account " of apprehension of loss, or removing the Re- " spondent from the management on account of " inability or want of fidelity, there had been an " unjustifiable delay in putting in the memorials, " and that the state of the concern down to the " present period must, under these circumstances, " be taken into consideration, and the concern " appeared now to be in a flourishing condition, " above 4000*l.* per annum of profits having been " divided, and therefore *in hoc statu* they sustained " the defences as to all the conclusions not before " disposed of by final interlocutors." From this Warner appealed, and it remained for their Lordships to determine as to the propriety of the judgment.

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The first question which was raised, and which was a material one, was that which was decided by the first interlocutor, viz., whether Warner the father could legally bind his heirs as well as himself by the contract of 1783, for 124 years, from 1770. On that point it had been contended that this was a personal contract, and that the father could not bind his heir to engage in it unless the heir thought fit to do so; as otherwise the consequence would be to involve the whole property of the son in the contract. The answer was, that the question was not whether a father could bind his son or heir to enter into a copartnership whether he would or not; but whether the son, as he represented the father and took up the succession, was bound to fulfil the engagements attached to that succession.

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And as far as he could judge there appeared no good reason to quarrel with that decision. It was not uncommon in the working of collieries to carry on the coal-works of two or more adjoining estates as a joint concern, and thus managing them in the way most beneficial to all the proprietors. And thus in a case which their Lordships had lately before them, it appeared that an estate of the Bute family was involved with those of two other families for ninety-nine years. And their Lordships would likewise observe that the concern was of such a nature as to require a certain length of time to make it beneficial to the parties. The coals belonged to Warner, but the expense of working was to be joint, though Warner advanced the money; and if a large sum were expended, and there was a reasonable prospect of the concern turning out a profitable one, it would be injurious in the highest degree to put an end to it before the time came for realizing the profits, which must be at the latter part of the term. And he confessed therefore that he saw no ground for quarrelling with that decision.

The heir representing his father bound by the copartnery contract and leases.

The concern of a nature to require a long time to realize the profits.

Deception.

That reduced the question to the point of deception, whether a reduction was competent on that ground. On this point evidence had been entered into, and it had been contended that Warner was a man far advanced in life, and had been imposed upon in the contracts of 1770, 1774, and 1783. Now it was to be observed that the verbal contract in 1770 was acted on for four years, and Warner was not then so advanced in life that he could not understand it, and he might have refused

to enter into the written contract, and so have put an end to the experiment. But he did enter into the written contract of 1774, and it did not appear that he had not then before him what might have enabled him to judge with accuracy of its nature. From this time to 1783, the concern was carried on under the management of Cunningham. With respect to the management, the state of the accounts was a different question from that which they had now to consider. The question here was, whether there was fraud so as to avoid the contract. Now nine years elapsed, during which time Warner had an opportunity of examining into the accounts, and no dissatisfaction appeared to have been expressed till 1792. Then it appeared that Warner was dissatisfied, and appointed certain persons to examine the accounts. He should mention here that it had been objected that the salt-works bore no proportion to the coals, which were chiefly the property of Warner, that part which belonged to Cunningham being much inferior. But this equality of advantage did not appear to be the foundation of the contract, the real ground of which seemed to be this, that as some sorts of coal were good for salt-works, which would answer no other purpose so well, the union of the two concerns would operate so as to enable the proprietor of the coals to sell the whole to the greatest advantage. The commissioners proceeded to examine the state of the accounts, with which they were not satisfied, and then Warner the father's death put an end to their investigations in that character. But being appointed tutors and curators for the

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younger Mr. Warner, they instituted these several actions. As to the first action, if the second contract was good, there must be an end of that action, as it proceeded on the ground that the Appellant had a right to put an end to the copartnery at the end of the twenty-five years. But that was at any rate immaterial, as the whole term of the first contract expired in 1801. As to the second point

Apprehension of loss.

which was left open by the Lord Ordinary's interlocutor, viz. the reasonable apprehension of future loss, it appeared, as far as he could judge from the statement, that, whatever might have been the case in 1792, the state of the concern in 1809 was prosperous, so that during the course of the intermediate twelve years, the concern had become not a losing but a profitable one. But then it was said that this arose from the coals. Well, be it so; but that was the nature of the contract, the coal-works being the object which occasioned the greatest expenditure, and which therefore ought to produce the greatest profit. Then as to the conduct of

Management.

Cunningham as a manager; on that point it was difficult to ascertain upon the evidence what was the best plan of management, and a great deal had been said on that subject. But as far as he could form a judgment from the evidence, it seemed clear that there was no such mismanagement as ought to put an end to the concern, and that was the whole that appeared to him to have been decided in this case. The Court found "that whatever grounds, "or appearances of grounds, there might have been "at the time when the investigation took place, to "entitle the Appellant to get free of the concern as

" a losing one, or to have removed the Respondent " from the management, there had been an unrea- " sonable and unjustifiable delay in putting in the " memorials with respect to that matter, and that it " was incompetent now to insist in it without taking " into consideration the subsequent events that had " occurred in this concern down to the present time, " during which period it seemed not to be disputed " that above 4000*l.* per annum of profits had been " divided between the parties: so that the concern, " instead of having threatened impending ruin, as " held out by the Pursuer when the memorials were " ordered, had proved the source of great emolu- " ment to both Pursuer and Defender." Their Lordships would observe then that the whole object being to get rid of the contract, the decision was that there was nothing to show that the contract was not a valid one, and that the question as to profits was decided by events which took place in the mean time, that the delay between the time of ordering and giving in the memorials was attributable to the Pursuers, and that therefore it was proper to consider the state of the funds in 1809, and that the concern was not then a losing one arising from mismanagement, or any other cause. And it did appear to him that, under the circumstances, it was a fair way of judging to say that this was finally a productive concern.

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Upon the whole therefore it did appear to him that there was no ground to invalidate the contracts, and that there was no ground to invalidate the leases, which leases were made solely for the purposes of the contracts at a nominal rent which was

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the same in both; that there was no fraud so as to invalidate the contract; and that there was no ground to put an end to the concern on account of its being a ruinous one, or from any improper advantage having been taken of the appointment of the Respondent to the management for life. That stipulation would end with his life, and then the parties would have an opportunity to determine who should be the manager. It appeared to him then that there was no sufficient ground to reverse this judgment, and that it ought to be *affirmed*.

Judgment accordingly *affirmed*.

Agent for Appellant, RICHARDSON.
Agent for Respondent, SPOTTISWOODE and ROBERTSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION, (2D DIV.)

SHARPE and others—*Appellants*.
BICKERDYKE and others—*Respondents*.

Feb. 20, 22, 24, 1815.

DECREET ARBITRAL—(AWARD).

WHERE an arbitrator thought it necessary before decision to have the admission of the parties in writing that they had nothing further to offer, and that they desired a decision on the case as it stood, and was led to believe that a letter to that effect signed by all the parties was in the hands of the clerk to the submission, and stated on the face of the award that he had considered that letter, and it afterwards appeared that one of the parties had made no such ad-