so inclined. If an advocation, in such cases, were competent, the style of the letters would be inept.

That the decreet was not extracted, does not vary the cause. When a sentence is pronounced, and is not reclaimed against, the Judge is *functus officio*. The extract is a copy of that judgment, which it belongs to the clerk to make out whenever the party demands it. This may be done after the lapse of any number of years, without a wakening or the interposition of any judge. An advocation cannot be received after sentence, though before extract, because *sententia definitiva ultimus actus judicis*, and the extract is but the clerk's part; *Lamington* against *Home of Kaimes*, 10*th July* 1662, observed by Stair.

It was understood, that an advocation in the circumstances of the present one was established in practice; and therefore,

On the 22d November 1766, the Lords adhered.

For the petitioners, A. Rolland.

1766. *November* 27. ROBERT DEWAR, Glazier in Edinburgh, *against* PATRICK MILLER and GIBSON (or Gibbon) and BALFOUR, in Company, all Merchants in Edinburgh.

SOCIETY.

The acting partner of a company, by a bill under the firm of the company, for money borrowed, binds the company.

[*Faculty Collection, IV.* 63; *Dictionary*, 14,569.]

1st July 1763, Messrs Miller, Gibson, and Balfour, together with John Weir, entered into a contract of copartnery for carrying on the linen trade. By the contract it was provided, that the trade should be managed by John Weir, in name, and by the firm of John Weir and Company, for which he was to have a salary of £80 *per annum*, besides the expense of clerks: that the capital stock should be £2400, one-half to be advanced by Weir, one-fourth by Miller, and one-fourth by Gibson and Balfour: that any further sums necessary for carrying on the trade, should be advanced by the partners according to the proportions aforesaid: that a regular book should be kept, and be patent on all occasions for the inspection of the partners: that John Weir should not be concerned in any other business, with any person whatever, without the consent of all the partners, nor make any sale or purchase exceeding £100 sterling, without the consent of one of the partners; that he should not borrow any money under their firm, without the previous consent of all the parties, under the penalty of half of the money so borrowed.

It was also provided, "That, whatever other rules and regulations, or alterations of the articles, shall be by the partners judged useful and necessary for the better carrying on the affairs of the company, and shall be inserted in the journal, and signed by them, or which shall be agreed to by any other writing under

their hands, shall be equally binding as if herein engrossed." This contract was not registered.

The trade was carried on by Weir in the name of John Weir and Company; and it appeared, upon inquiry, that Weir accepted many bills, under the firm, which, *ex facie*, had no relation to the linen more than to any other trade, and that they were discounted by the banks at Edinburgh, and by the British Linen Company. In fact, however, all those bills were on account of the linen trade, excepting one bill, which gave rise to the present question.

It also appeared that P. Miller used to advance money to Weir on account of the company.

On the 14th December 1764, Robert Dewar put L.160 sterling into the hands of Weir, and took his accepted bill for the value payable six months after date. The acceptance was under the firm of John Weir and Company.

Before this bill fell due, Weir proved bankrupt. Messrs. Miller, Gibson, and Balfour, made intimation to the two banks, and to the British Linen Company, that they were not to be thereafter liable in payment of bills accepted by Weir, under the firm of John Weir and Company.

The bill having become due, Dewar was about to charge the partners. They offered suspension, and their general defence was, that Weir, by using the firm of the company, could not bind them in a bill for borrowed money.

ARGUMENT FOR THE CHARGER:—

1*st*, As the contract was not registered, the charger was not bound to know, and neither did nor could know, any of those particulars on which the defence is founded.

2*dly*, Borrowing of money is an ordinary act of administration in companies. The charger could have no reason to suspect that John Weir and Company might not borrow money on account of the partners, as well as every other company in Edinburgh borrows money on account of the partners. This borrowing is particularly necessary in the linen-trade, as appears by the bills which the banks in Edinburgh and the British Linen Company accepted or discounted for Weir and Company.

3*dly*, This is further evident from the intimation made to the banks and to the British Linen Company, by the other partners, after Weir proved insolvent.

4*thly*, It was not upon the faith of Weir, but upon the faith of the company, whereof Weir was the acting partner, that the charger contracted. He had no acquaintance with Weir: he knew nothing of his character or credit, but he saw him to be acting partner in a company whereof the other partners were persons every way unexceptionable: he saw that bills, accepted by Weir under the firm of the company, had full credit and free course; and he considered the circumstance of Weir's being associated in such a company, as evidence that he was an honest man, and his being intrusted with the firm of the company, as evidence that his acceptance was good.

5*thly*, If gentlemen will associate themselves in companies, without inquiring into the integrity of the acting partner, and if they intrust such an untried person with their firm, they have themselves to blame for the consequences. If, on the other hand, they associate themselves in companies, which imply a power of becoming bound in name of the company, and then, in the event of a fraud or bankruptcy of the acting partner, seek to throw the loss on those who

contracted with the company, there is an end put at once to all credit in Scotland. Where stocks are small and business complicated, companies are necessary; such is the case in Scotland. But, if it is to be understood that one partner may, whenever occasion offers, throw the load of paying debts off himself, and lay it upon another, then a merchant engaged in a copartnery trade must cease to find credit in the mercantile world.

If the suspenders have unwarily associated themselves with a false man,—if they have suffered him to act in their names,—if they have taken no measures to inspect and control his management, who is it that ought to suffer?—the charger who trusted to the firm of Weir and Company, or the suspenders who trusted Weir?

6*thly*, The clause in the contract, which provides that Weir should not borrow money under the firm of the company without the previous consent of all the partners, under the penalty of half the money borrowed, does of itself afford a strong argument in support of the charger's plea.

From this clause it appears that the partners had the borrowing of money in view, a necessary measure in the linen-trade, where the capital was only L.2400, burdened with L.80 to Weir, besides salaries to clerks.

From this clause, it further appears that the partners imagined that Weir, by borrowing money under their firm, would have bound them; that Weir was authorised to borrow any sum of money under their firm, in case he previously obtained their consent: and there is here no irritancy provided against the creditor who should lend money even without such consent.

7*thly*, By the 11th article of the contract, it is agreed, "That whatsoever other rules and regulations, or alterations of the articles before mentioned, shall be by the partners judged useful and necessary for the better carrying on and managing the affairs of the company, and shall be inserted in their journal and signed by them, or which shall be agreed to by any other writing under their hands, the same shall be equally binding as if they were here ingrossed and insert; and to the faithful performance of which all the said partners are hereby expressly bound." Now, supposing that the contract had been registered, and made patent to the petitioner and the whole world, how could any one, purposing to deal with Weir and Company, be instructed in the proper and safe method of regulating his conduct? All the articles, appearing *ex facie* of the contract, might have been altered, either by an agreement entered into the journal of that company, or by any other writings which could not be registered; and all such alterations are held as ingrossed in the contract.

ARGUMENT FOR THE SUSPENDERS:—

The suspenders were not engaged in a general copartnery with Weir, but only in an adventure of the linen-trade. The nature of this contract was ascertained by the articles above mentioned. As the partners agreed to pay each of them a particular sum, it is obvious that they did not mean to intrust Weir with the borrowing of money: whenever they borrowed money it was upon their own security.

The contract of copartnery did expressly prohibit Weir from borrowing money without consent of the partners; so that the charger cannot plead that he lent money to Weir upon the faith of the contract.

The circumstance of Weir having added, *and company*, to his acceptance, is

not sufficient to subject the suspenders in payment. It is true that Weir accepted many bills under the firm of Weir and Company, and that the suspenders discounted them. But all those bills related to the copartnery trade of linen.

Although Weir could bind the company in matters relating to that trade, he could not bind them at large. His power extended no farther than to acts of ordinary administration. The borrowing money is not such; whenever the partners borrowed money they all joined in the security.

To the particular arguments for the charger, the following answers occur:

As to the first argument, there is no register provided in law for registration of copartnery contracts. The charger had the same security that every one has who deals with persons in copartnery. Had he sold his goods, the firm of the company would have been his security: but, when he lent money, he ought to have taken the company bound.

As to the second argument, it proceeds upon a mistake, by confounding, under the general name of companies, all copartneries, however different in their nature and manner of dealing. Banking companies borrow money for a short space, for such borrowing is part of their trade. Companies in a branch of manufacture do not; for such borrowing is no part of their trade: they borrow upon permanent security; and, accordingly, though the suspenders have borrowed money upon permanent security, yet they never accepted bills under the firm of the company, unless for the price of goods.

As to the third argument, the intimation to the banks was necessary, because the suspenders were bound with respect to bills accepted by Weir and Company for the price of goods.

The fourth argument is affected; for the charger could not know that the suspenders were partners under the firm of Weir and Company. It is plain that he trusted solely to the credit and veracity of Weir.

The fifth argument, from inconveniences, tends the other way; for, if the acting partner can, by borrowing money, bind his associates to any extent, the fortune of the richest merchants will be at the mercy of every mean mechanic. With them they may have a copartnery concern. Such mechanics must, in the nature of the thing, be the acting partners.

As to the sixth argument, the suspenders will be very unhappy, if a clause, which they inserted, in order to prevent Weir from borrowing money, should have the effect of making them liable for his private debts.

The purpose of the clause was to prevent Weir from borrowing money imprudently, and laying it out on the Company's account. It could not be meant to prevent Weir from borrowing money on his own account. The obligation on Weir, to contribute L.1200, was nominal as often happens in such contracts.

As to argument seventh, the power of making alterations is common in all contracts of this kind, and can only regulate the obligations among the partners.

On the 22d January 1766, the Lord Kaimes, Ordinary,—having considered the contract of copartnery by which no power was given to Weir, the managing partner, to borrow money, but only to buy and sell; and having also considered the condescendence of the bills accepted by Weir, under the firm of

the Company, which bills appear all to be for goods purchased by Weir for the company,—finds that the defenders are not liable for payment of the bill in question.

The charger preferred a reclaiming petition, to which answers were put in by the suspenders.

On the 14th July 1766, the Lords repelled the reasons of suspension, found the letters orderly proceeded, and decerned.

On advising a reclaiming petition and answers, the Lords ordained memorials, more with a view to the general point than to this particular cause.

On the 27th November 1766, the Lords adhered.

Act. R. Blair. A. Lockhart. *Alt.* A. Wight.

OPINIONS.

PITFOUR. It is said you ought to have published your copartnery. Answer, No. If you trust John Weir, you must inquire in what manner I trusted him. When a trade is carried on by a Banking Company, the firm of the Company will bind, because the nature of the money dealings of such company is unlimited. But here there is no evidence of such power either from practice or from the tenor of the contract.

N.B. At second hearing of the cause he said: I formerly thought the Ordinary's interlocutor was right, because it was reasonable for the company to limit a partner. But the thing which now satisfies me to alter the Ordinary's interlocutor, is this, that Weir used to grant bills under the firm of the company, and that the company discounted these bills. Thirty years ago a poor gentleman, Duff of Cubin, was ruined by M'Kay of Scourie's drawing bills under the firm of the company. There is no help for this when one partner trusts another.

PRESIDENT. I am not yet satisfied that the articles of the copartnery are favourable to the plea of the suspenders. I would have done the same thing that Dewar did—there is a clause in the contract giving a power to borrow under a penalty.

GARDENSTON. Adding of a penalty will not give a power to borrow: an acting partner has no power but according to the articles of the copartnery. I cannot see a ground of differing on the general point. Unless the partner is authorised to borrow money, his bond will not be effectual. But here the question is as to practice. Weir was not in the use of borrowing money or granting documents which the mercantile world could understand as borrowing money. His bills would be considered as implying purchases of goods.

KAIMES. The sense of the clause mentioned by the President is,—"You are prohibited to borrow. If you do, you are liable in a penalty." No man can be bound without his consent. If one man has lent money, and the company discounted, I will consent as to borrowing; but my difficulty is this, that here is the only bill for borrowed money. It does not affect me that creditors may be ensnared, for they have themselves to blame. The charger, here, had ready access to know whether the company borrowed money.

KENNET. For adhering to the Ordinary's interlocutor. Weir was not authorised to contract debts, but on the contrary. But, upon the second hear-

ing for altering that interlocutor, upon the *species facti*, not upon the general point. The bills accepted by Weir, and discounted by the company, did not bear for value in goods.

BARJARG. The world can have no rule to walk by but that of the practice of the company.

AUCHINLECK. The general point is not the thing at all. One man cannot bind another in company without a commission; but here there is a company which has been in use to allow Weir to take up money by granting bills, and those bills paid without objection. No recourse need be had to a general point where there is a declaration so express of the company's purpose. If a servant has been in use to purchase, upon credit, necessaries for his master, and the master has been in use to pay, may the master stop short and refuse to pay? The company must pay this debt, as they have brought it upon themselves, by granting Weir such credit; otherwise Dewar would lose his money upon the faith of the company.

COALSTON. If the interlocutor of the Ordinary be adhered to, an end is put to trade: consent may be given either by implication or expressly. I shall admit that there are no express powers, but there are clearly implied powers. Had the whole bills been for the *price of goods*, there might have been some difficulty; but most of the bills bear for *value received*, and so the company led the world to believe that Weir had power to borrow money. No man is bound to look into contracts of copartnery or the books of partners. Besides, the contract bears only, that their books are to be patent to the partners. I am also clear upon the special circumstances of the case: Mr Patrick Miller himself advanced money to Weir upon the firm of the company. The contract, then, was deviated from. Weir was bound, by the contract, not to make purchases for more than L.100; yet the bills produced show that this also was deviated from: much larger sums have been paid for goods.

At the first hearing: *Diss.*—Kaimes, Pitfour, Gardenston, Kennet. *Non liquet*,—Auchinleck. *Not present.*—Barjarg, Alemore, Coalston, Milton.

At the second hearing: *Diss.*—Kaimes, Gardenston. Justice-Clerk did not vote on account of relationship.

1766. *November 27.* MR PATRICK HALDANE, Advocate, *against* ANN HALDANE, and the other Five Daughters of Haldane of Lanark.

SERVICE OF HEIRS.

Effect of a General Service, *tanquam legitimus et propinquior hæres* to a father.

[*Faculty Collection, IV.* p. 379; *Dict.* 14,443.]

FOR understanding the question between the parties, the following genealogical tree is necessary:—