No. 33.

payment. As the creditors themselves could only have attached Young's part of the subject, his trustees can have no right to insist, that the share belonging to the other co-proprietor should be applied to relief of the security which the trustees have given to these creditors.

But, although this should be considered as a copartnership *rebus ipsis et factis*, the stock was divided among the partners by the sale of the houses.—The bond for the price is not made payable to Young's trustees and Porteous as in company; it is due to them each for his own share.—The transaction was the same as if the money had been divided, at the time of the sale, among the two co-proprietors, and afterwards lent out by them to the purchaser, each for his own behoof, on a separate bond. This, therefore, is not a fund belonging to the company, but the private effects of the partners; and consequently company creditors can have no preference on it.

The Court "found the creditors in debts contracted by the *socii* for carrying on the joint adventure for building the houses, are preferable on the price of said houses to the creditors in separate debts contracted by any of the *socii*."

Lord Ordinary, *Elliock*. For Crooks, *H. Erskine*. Alt. *Miller*. Clerk, *Orme*.

Fol. Dic. v. 4. *p.* 288. *Fac. Coll. No.* 62. *p.* 113.

1774. *June* 16.

WILLIAM GALDIE, Factor on the Sequestrated Estate of JAMES ANDERSON, *against* WILLIAM GRAY.

No. 34.
Whether retention is competent, at common law, to one partner, of another partner's share of the company's stock, in payment of debts due to him by that partner, in a competition with his creditors?

Whether, in such competition, the partner-creditor can claim a preference upon

JAMES ANDERSON was concerned in a copartnership with John Brown, Robert Carrick, and William Gray, for carrying on a trade of manufacturing lawns and linens, in the town of Glasgow; and their contract contained the following article: "That the said parties above written shall have no liberty, access, or privilege, to withdraw any part of his stock, until first the debts of the company be paid and cleared off the whole head; and, for the better security and more sure payment of the company's debts, and of any private particular debts that may be due by any of them to the company, or for any private debts any one of them may be bound for another, each of them do hereby assign and dispone to the others their own particular and proper stock and interest in the said company, not only ay and while their part of the company debts be paid off the whole head, but also ay and while their own private and particular debt due, or that may be due, to the company, and also ay and while all debts for which any of them may be bound in security for one another, be paid."

William Gray, in consequence of engagements for James Anderson, was creditor to him in various sums.

Anderson having failed in his circumstances, a sequestration of his personal estate was awarded by the Court, in terms of the late statute; but afterwards

trustees were chosen by his creditors; and William Galdie was by them appointed factor.

No. 34. that share, in virtue of an assignment in the contract of copartnership?

The above copartnership (whose firm was that of Brown, Carrick, and Company) having proved successful, James Anderson's interest in it amounted to about £.1200; and arrestments having been used in their hands, with a view to attach the above sum due by that company to Anderson, they brought a multiplepoinding, in which they called, as defenders, the said William Gray and Messrs. Coats, arresting creditors of Anderson, and William Galdie, as factor for his whole creditors under the sequestration.

Gray founded his claim of preference upon two grounds: In the *first* place, Upon a right of retention, which, he maintained, was competent to every partner of a company at common law, of the share belonging to another partner in the same company, for payment of any debt due by the former to the latter; *2dly*, Upon the special clause of assignment contained in this contract. This plea was opposed by the arresting creditor, and also by the factor.

Upon the *first* head it was pleaded, on the part of Gray: The share and interest of any partner of a company is a *jus crediti* against the company; but a society not being a corporation, there is no distinction between the company and the several partners, considered as individuals; that they cannot sue or be sued in any other way but as so many individuals; and, in short, that the sum due by the company to Anderson is to be considered in the same light as if it had been due by a joint bond granted by the partners; and, in this view, each of the obligants being liable *in solidum* for the debt, so, when action is brought against them for payment, it does not appear where the doubt can be, that all, or any of them, are entitled to say, that he has already payment in his own hands, and that the one ought to be set off against the other.

Upon this branch of Gray's plea, Galdie the factor argued: It is impossible that there can be room for compensation or retention, where there is not a *concursus mutui debiti et crediti*. In the present case, there is no such concourse. The subject of competition is Anderson's interest in a copartnership; and it is not the Company that is here demanding retention of that interest for any debts due by him to the Company, but an individual member of that Company, who says that he is creditor to Anderson, *privato nomine*, in a debt with which the Company has no concern. It is clear that there are not *termini habiles* for such retention; for Gray is not possessed of the subject of competition, and therefore cannot retain it; and the Company, who are indeed possessed of the subject, are not creditors to the common debtor, and therefore cannot withhold what is due to him.—There are three different persons, or parties, employed in making up this plea of retention, whereas there ought only to be two. The intervention of a third party makes it evident, that there is no mutual concourse, and consequently no room for retention or compensation.

That a trading society is a distinct *nomen juris*, and having different qualities and rights from the individuals composing it, there can be no doubt. The distinction between a company and the individuals goes through every species of transaction.

No. 34.

As retention presupposes possession, the plea of retention, urged on the part of Gray, must proceed upon the supposition, that the several partners of a Company are possessors of the Company-funds *pro indiviso*. But the truth is, that as the partners, *qua* individuals, are not proprietors of the Company-estate, so neither are they possessors of the Company-funds. And it is of no moment what is said on the other side, that all the partners are liable, *in solidum*, to pay the £.1200 which is due to Anderson, or rather to his creditors, as his interest or share ascertained by the balance preceding his bankruptcy. This only arises from the circumstance, that every partner in a Company must be liable for the debts of the Company. But it will be observed, that the claim here made did not exist till the very moment of Anderson's bankruptcy; and at that moment it became a claim competent to his whole creditors, or to the factor or trustee appointed for him under the statute.

With respect to the preference claimed, in the *second* place, by Gray, on the clause of assignment in the contract, it was observed for Galdie: That he has not been able to learn of above three such contracts in the whole town of Glasgow, lately indeed devised, and which, till the present inquiry, were not known of. But, upon attending to the words of the clause, it does not seem to apply to private debts due by one partner to another, with which the Company has no concern. Supposing, however, it could bear that construction, such an assignment can have no effect in law to the prejudice of other creditors; indeed, it would be highly dangerous to give it any effect. It would clearly be laying a snare for strangers; and as no transaction whatever can have a more dangerous tendency than the creation of a security upon a man's personal effects, for payment of debts not existing, so the assignment in question cannot have effect; 1*st*, Because it is an assignment in security of a debt which does not exist; 2*dly*, Because it is an assignation to a sum which does not exist.

Further, in competitions, assignations can only be ranked according to the date of the intimations made upon them. But here, supposing the assignation were otherwise unexceptionable, it is impossible to maintain that there was a proper intimation. The clause being inserted in the contract, was no proper intimation to denude the partners in favour of each other, in terms of the assignation. It is even a contradiction in terms, to say that they were all denuded in favour of each other; such a transaction appears altogether absurd and unintelligible. The purpose of intimation is to certify the debtor of the amount of the assignee's right, and to prevent him from paying to the cedent, or any in the right of the cedent. Hence, it is evident, that the intimation must be special; it must be of an assignation already made, and specifying the sum already assigned. But here, at the time the contract was executed, there was no subject to be assigned, nor was it certain whether there ever would be any; neither was it known whether any partners would ever become bound for one another, or who of them might be in that condition; as it was also uncertain who was ultimately to be cedent, and who was to be assignee.

No. 34.

Upon this *second* head, it was argued for Gray: It cannot be disputed that this is a lawful contract, neither is it an unusual clause; and, therefore, no reason does occur why full effect should not be given to it. There is nothing in law to hinder any person to convey his funds in security of debts, either already contracted or to be contracted. In heritable rights, the security of the records will not permit any general or unknown burdens; but, in the case of personal rights, as the only security which the lieges have or can have in such cases, is the good faith of the persons with whom they contract, so a personal right may be validly and effectually conveyed, in security of debts either contracted or to be contracted, and there is nothing in law reprobating such conveyance; and, therefore, although the particular debts now claimed upon may not have existed at the date of the assignation, it is not obvious in what respect the assignation is defective, and to be denied effect upon that account.

The *second* objection has as little foundation in law. The *jus crediti*, competent to each of the parties, existed from the date of the contract; and, although the subject assigned was an assignation to an *universitas*, there is nothing in law to forbid such security. It is uncertain whether there may be more or less, or whether any thing may arise in consequence of the assignation; but still there is no objection to the assignation itself.

3dly, It is no doubt true, that an assignation must be intimated; the meaning of which is, that the debtor may be certified not to pay the debt to the cedent. But here, the intimation is, of all others, the most regular and formal: It is contained in the contract of copartnership itself, signed by the whole contracting parties; so that it is difficult to conceive any intimation better calculated to answer the purposes of an intimation. It was such an intimation as put the parties in *mala fide* to account to each other for the profits of the stock, so long as either their copartnership-debts were undischarged, or their private engagements were unsettled. Nothing more was requisite; and the benefit of this assignation, so intimated, is all that Mr. Gray contends for in the present case.

With regard to what has been argued, that the assignation should have been specially intimated, when the subjects had existed which the assignation was meant to affect, it does not occur where the authority is for such a proposition. If a person procures an assignation to the rents of an estate, it is sufficient that the assignation be once intimated; and there is no occasion for the renewal of the intimation, when every term's rent becomes due; and yet this is a consequence which would necessarily follow, if the doctrine of the other party were well founded.

Lastly, As to the imputation against this assignation, as being of an unfavourable nature, and calculated to ensnare creditors, there never was less foundation for clamour of this kind. It is admitted, that if, in virtue of his debts, Mr. Gray had arrested in the hands of each of the partners, he must have been preferable to every other creditor upon the copartnership-stock and profits; and yet other creditors had no better opportunity of being certified, with regard to such latent arrestments, than they have with regard to a latent assignation.

No. 34.

It was observed by the Court, That, at the date of the assignation, the whole was a *non ens* both to as to debit and credit. There was no debt due by the cedent to the assignee at the time; and it was uncertain, whether, in the end, he would have any free stock or not; so that the question comes to this, Whether a man can create a latent hypothec upon effects not yet acquired, for security of debts not yet contracted?

The Court, by two consecutive judgments, "adhered to the Lord Ordinary's interlocutor, which preferred Galdie, the factor on Anderson's sequestrated effects, to the sum due by Brown, Carrick, and Company."

Act. *L. Advocate, Macqueen.* Alt. *Il. Campbell, Rolland.* Clerk, *Gibson.*

Fol. Dic. v. 4. *p.* 289. *Fac. Coll. No.* 112. *p.* 297.

SECT. XI.

The Rights and Obligations of Partners must be determined by the Custom of the Company.

1746 *June* 13.

MR. ROBERT FREEBAIRN *against* RICHARD WATKINS.

No. 35.
Sharers in a patent for a monopoly were found not obliged to trade in Company, after they had traded separately for a long time, seeing that the copartnership had been in that respect departed from, and matters were not entire.

MR. ROBERT FREEBAIRN, in concert with James Watson and John Basket, obtained, *anno* 1711, to himself and his assignees, a gift of the office of King's printer, and assigned third shares thereof to his two partners, and articles of agreement were drawn up amongst them for the joint management of the trade. This project however never took effect, but the three partners traded separately, printing each for their own benefit such books as fell under the patent.

Mr. Freebairn brought a process against Richard Watkins, assignee to Watson and Basket, to have it declared, that he behoved to carry on the trade in company with him, and offered proposals for setting up a joint house.

Pleaded for Mr. Watkins, That as the original agreement was certainly departed from, and he at had at a great expense provided materials and set up a printing-house, he could not be obliged to enter of new into a society with Mr. Freebairn.

Pleaded for Mr. Freebairn, That the original patent to him and his assignees meant that they should together carry on the trade, else the intent was lost of confining the printing the books which fell under the patent to a privileged person or Company, since by assignations it could be divided into numberless shares, all the owners whereof might trade separately: That the assignations were to certain de-