SECT. X.

The Company Stock of a Bankrupt Partner is liable PRIMARIO to the Company Debts; but not to a Debt due to another Partner individually.

1761. *January* 24.

JOHN CORRIE and SON *against* The TRUSTEES for JAMES CALDER's CREDITORS.

No. 32.
Creditors to a company preferable on the company's subjects to the private creditors of one of the partners.

JOHN CORRIE and Son having sold goods to Rob and Calder in company, and the company having become bankrupt, Calder assigned his share in it to trustees for behoof of his creditors.

Corrie and Son pursued these trustees, before the Magistrates of Glasgow, for their debt, and insisted upon a preference before the private creditors of Calder; because the only subject of the company which Calder could assign to his trustees, was his share of the company's effects, after it was cleared of the company's debts; for, till then, it was not his estate, but the estate of the company.

The Magistrates of Glasgow found, "That the debts due by persons in society and copartnership, for subjects furnished to the copartnership, could not be affected for the debts due by any of the persons in the copartnership on their proper account, until the debts furnished to the company be paid."

In a suspension of this decreet, "the Lords found the letters orderly proceeded."

Act. *Miller, Dalrymple.* Alt. *Lockhart, Ferguson.* Clerk, *Home.*

J. M. *Fol. Dic. v.* 4. *p.* 288. *Fac. Coll. No.* 11. *p.* 18.

1779. *January* 29. JOHN CROOKS *against* JOHN TAWES.

No. 33.
Creditors in debts contracted by *socii* in a joint adventure are preferable on the proceeds to the particular creditors of either of the *socii*.

ANDREW PORTEOUS, mason, and Robert Young, slater, engaged in a joint undertaking of building a tenement of houses, on a spot of ground which they had purchased for that purpose. There was no written contract of copartnership, nor articles of agreement executed by them.

Young died after the building was begun, having appointed Crooks and other trustees for his children, and disponed to them his share of this adventure. The trustees, in order to forward this work, gave their own security to several persons who had debts due to them for materials furnished, or work done at the building.

No. 33.

The subject being finished, part of it was sold. One tenement was purchased by Mr. Bell for £.212 Sterling; and a half of the money was paid, and applied to extinction of the debts for which the trustees were bound. Mr. Bell gave bond for the other half to Porteous and the trustees.

Soon after, Porteous became bankrupt.—A sequestration was awarded against him, and a factor appointed. Mr. Bell, in order to pay safely, raised a multiplepoinding; and a competition ensued for the sum in the bond, betwixt the factor for the creditors of Porteous, who claimed one half of the bond as due to Porteous, and Young's trustees, who insisted, that they had right to the whole sum, to be applied by them in paying off the debts for which they had given security.

Pleaded for the trustees: It is a fixed point, that, in every copartnership, the partners, until the division of the company's subjects is made, are each in possession of the whole *pro indiviso*:—On this account, each partner is entitled to retain possession against the other partners, or their creditors, till such time as he is relieved of every engagement he has come under on account of the copartnership. The law makes no distinction, in this respect, betwixt a proper copartnership and a joint adventure. The reason and justice of the rule apply equally to both; Ersk. B. 3. T. 3. § 29.; and it was so found in the case of a joint adventure, Creditors of M'Caul *contra* Ramsay and Ritchie, 11th January, 1740, No. 39. p. 14608.

In the present case, though there was no contract of copartnership, yet the *res gesta* proves, that there was a joint adventure, and those concerned in it were in a company trade to a certain extent. The persons who furnished materials for the building, or their own work, when not paid, became creditors of the company, and, as such, would have been preferable on the company's funds to the private creditors of the partners. When the trustees, therefore, gave their security to the creditors in these debts for their payment, they were in effect entering into an engagement for behoof of the copartnership; consequently, on the principles above mentioned, the trustees are entitled, so far as the common stock remains undivided, to pay off those creditors out of it, in order to relieve themselves. The money of this bond must be applied to this purpose in the first place. After the company's debts are cleared, the stock will be divided; and Porteous's share of it will, no doubt, go to his own private creditors.

Answered for the creditors of Porteous: There was no copartnership betwixt Young and Porteous. The circumstance of their joining in the expense of building the tenement, can go no further than to make it a common property, in which each had a right to an equal share *pro indiviso*.

Common proprietors, if they are not in a copartnership, cannot bind one another. The tradesmen who furnished materials, or worked at the building, have no hypothec on the house; and consequently no body is bound to them, excepting their proper employer, and those whom they have taken bound. They may attach Young's share of the common property, like any other private creditor of his; but they could not adjudge or carry off the share of the other co-proprietor for their

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