No 134.

The majority of the Court seemed to be of opinion, That although an artist's right of retaining, for security of his hire, the goods on which his labour has been bestowed, be understood as *pars contractus;* yet his possession or custody being only *ad hunc effectum*, it becomes unlawful when stretched beyond these limits; that the proper possession therefore still remains with the owner; of which, it was observed, the competency of poinding goods in that situation for his debts is a farther evidence; and consequently that there is not any room in such a case for the claim of retention.

Some of the Judges observed, That as in this case there had been a continuation from year to year of the same work performed to the owner, so the whole money due might be considered as an individual price for manufacturing one quantity of goods, and therefore that of the former any part might be retained, for whatever was due on account of the latter. And it was said, that the same principle of justice on which as to money compensation was founded, comprehended equally retention in respect of goods, which last would not, from its latency, give any peculiar occasion to fraud; for if this were intended, it could be as easily accomplished by a private agreement; nor would the bankrupt-statutes be less effectual against retention than other modes of security, when unduly attempted.

One Judge, who concurred with the majority as to the possession remaining with the owner, maintained at the same time, that in consequence of the owner's bankruptcy, effect ought to be given to the plea of retention; for that, by this event, the nature of all the contracts subsisting between him and his creditors was changed, and the whole converted into one general count and reckoning, insomuch that any special claim for delivery under a particular contract must have ceased. The same Judge too noticed, that it was because the right of retention was always viewed as an attribute of the various contracts out of which it rose, that it had not been more specifically treated of by writers on law.

THE LORDS 'repelled the plea of retention.'

To this judgment, a reclaiming petition having been preferred and followed with answers, the Court, by a very narrow majority, adhered.

Reporter, *Lord Justice-Clerk.* Act. *Wight, Cullen.*
Alt. *Dean of Faculty, Cathcart.* Clerk, *Sinclair.*

S. *Fol. Dic. v.* 3. *p.* 150. *Fac. Col. No* 163. *p.* 328.

1796. *January* 15.

JOHN DUNLOP, Trustee on the Sequestrated Estate of JAMES DUNLOP, *against* The DUNBARTON GLASSWORK COMPANY, and their CREDITORS.

No 135.
The creditors of a solvent company can rank on the

THE affairs of James Dunlop having gone into disorder, his estate was sequestrated in 1793.

No 135. sequestrated estate of one of the partners, who happens to be debtor to the company, only to the extent of the *balance* due by him to the Company, and not for the amount of the debts due to themselves.

Mr Dunlop was at this time a partner of the Dunbarton Glasswork Company; but it was provided by the contract of copartnery, that, if any of the partners became bankrupt, they should be obliged to withdraw; and that their interest in the concern should resolve into a claim for their share of the stock at the last balance of the books preceding their bankruptcy.

Mr Dunlop owed the Company a much larger sum than his share of the stock; over which last, it was admitted the Company had a right of retention, but they had only a personal claim against him for the balance.

The capital of the Company having been inadequate to carry on their business, they had borrowed money to a large extent, chiefly upon bonds, in which all the partners were bound conjunctly and severally.

At Mr Dunlop's bankruptcy, the funds of the Company were more than sufficient to pay all their debts. Most of their creditors, however, in place of demanding their money, accepted corroborative securities: But at the same time they claimed payment from James Dunlop's sequestrated estate; a step which they seem to have taken by desire of the Company, who probably had it in view to compensate *pro tanto* the claim for reimbursement of the dividends drawn by these creditors, which would, in this way, have arisen to James Dunlop's private estate against the Company, with the balance which he owed them; by which means they would have drawn full payment of their debt, in place of ranking for it *pari passu* with the other creditors.

The Trustee on James Dunlop's estate gave in objections to the claim of the Company creditors in the usual form, and at the same time brought an action both against them and the Company, concluding, that the latter should be ordained to pay the debt due to the former, or, if they should decline to accept payment, that it should be found they were not entitled to claim on the sequestrated estate; and

Pleaded; Although in the case of a bankrupt Company their creditors are entitled to rank on the estates of individual partners, 4th July 1776, Creditors of Carlisle and Company against Creditors of Dunlop, *voce* Society, they can have no interest or title to do so where they can instantly get payment from the Company, their proper debtor. This, therefore, in reality, is a question not with the Creditors, but with the Company, to whom the former are attempting to create an undue preference.

But if they shall, nevertheless, be allowed to rank, it should at all events be found, that their doing so cannot give the Company any advantage as creditors of James Dunlop, which they would not have possessed if they had themselves paid the Company debts. In every case of a sequestration, the rights of the creditors must be taken as they stood when it was awarded, at which period the estate of the bankrupt becomes a fund of division among the creditors at large, *pro rata* of their debts, subject only to such preferences as then exist; but when Mr Dunlop's estate was sequestrated, the Company were merely personal creditors, without any preference for the balance remaining due to them. As,

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therefore, by sustaining the claims of the Company Creditors, a part of the sequestrated estate, which the Company would not otherwise have got, would come indirectly into their hands, it must *ante omnia* be refunded to the trustee, in the same manner as if by any accident a common creditor had got possession of it after the date of sequestration.

Answered for the Company Creditors; It is a fixed principle of law, that every partner of a Company is liable for the Company debts. Although, therefore, the bonds of the claimants had been granted by the Company alone, the creditors would have been entitled to rank upon James Dunlop's estate. The case, however, is the stronger, from Mr Dunlop's being bound jointly and severally with the Company. The solvency of the Company cannot prevent the claimants from seeking payment from any obligant in their bonds. It was indeed for the very purpose of obtaining it more readily, that they took Mr Dunlop and the other individul partners bound *in solidum* for the debts. How far their claim to rank on Mr Dunlop's estate may benefit the Dunbarton Glasswork Company, is a question with which they have no concern. The Court will take care that it shall not give them any improper advantage.

THE LORD ORDINARY took the cause to report.

Observed on the Bench; This is plainly an attempt on the part of the claimants to give an indirect preference to the Glasswork Company, to which they have no right. The Company being solvent, ought to pay their own debts; and if these should be paid in part out of the sequestrated estate, the Company would not be allowed, in ranking for the balance due to them by Mr Dunlop, to insist on any preference which they would not have possessed, had the Company Creditors been paid wholly from the Company funds.

THE COURT 'found, That the claim now made by the Creditors of the Glasshouse Company must be viewed in the same light as if it had been made by the said Company itself; and therefore found, That said Glasshouse Company are only entitled to rank for the debt due to said Company by James Dunlop, after deduction therefrom of the value of his share of said Company's funds, as at the 31st December 1792; and found expences due.'

Lord Ordinary, *Craig.*
For the Trustee, *Lord Advocate Dundas, Solicitor-General Blair, Davidson, Moodie.*
For Creditors of the Company, *Rolland, Hope.* Clerk, *Menzies.*

R. D. *Fac. Col. No* 195. *p.* 469.

1797. *February* 28.

RICHARD HOTCHKIS, Trustee for the Creditors of ADAM KEIR, *against* The ROYAL BANK of SCOTLAND.

No 136.
The Royal Bank of Scotland was found entitled

BERTRAM, GARDNER and COMPANY became bankrupt, deeply indebted to the Royal Bank of Scotland.