No 135.

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.

No 136.
to retain the stock of an insolvent proprietor, for payment of debts due to the Bank, by a company of which he was a partner.

Adam Keir, one of the partners of the Company, held L. 2000 of the stock of the Bank, who, in terms of a by-law passed in 1728, refused to allow it to be transferred to the Trustee for the creditors, till security was found for payment of the debt due by the Company to the Bank.

Upon this, Richard Hotchkis, the trustee, brought an action against the Bank, to compel them to transfer the stock, in which he

Pleaded; By 5th Geo. I. c. 20. the public creditors of Scotland were incorporated under the name of the Equivalent Company, and their stock, (for payment of the interest of which an annuity was funded,) was made transmissible by a transfer in the books of the Company, § 6.

In 1727, a charter was granted, allowing such of the members as should choose it, to subscribe their stock, and carry on the trade of banking, under the name of the Royal Bank of Scotland, with authority to make calls, not exceeding L. 50 *per cent.* on the sum subscribed.

By the original, and all the subsequent charters to the Bank, it is declared, that the shares 'shall not be liable to any arrestment or attachment that shall 'be laid thereupon, by any law, custom, or usage to the contrary notwithstanding.' And the shares are made transferable, as in the original Company, with these exceptions, that the Directors may prohibit a transfer, while the proprietor has not paid up the calls on his subscribed capital, and that they may retain dividends both in this case, and when fines have been incurred, imposed in consequence of by-laws, a power to make which, so far as consistent with the public law, is expressly given.

But the by-law in question was *ultra vires* of the Bank. The proprietors of the stock of a public incorporated company have a definite interest in their shares very different from the right of a partner in a private company, which extends only to the balance remaining after the debts of the company are discharged, and the right of retention competent to the latter society is excluded in the former; Equity Cases Abridged, v. 1. p. 8. 1728, Assignees of Beck against the Royal Assurance Company. If it had been understood that the Bank had a right of retention at common law, there would have been no occasion for giving it in the two particular instances above-mentioned; and as legal diligence is excluded, *a fortiori* must the private right of retention.

Answered; There is no difference at common law, as to the question of retention, between the shares of incorporated and other societies.

The charters of the Bank were meant to introduce exceptions from the common law in its favour, and nothing short of an express enactment could exclude it from the right of retention competent to every private society. The two cases in which it is expressly given were mentioned merely *ob majorem cautelam;* and the clause excluding diligence applies only to third parties.

The by-law passed in 1728, has been uniformly enforced.

THE LORD ORDINARY reported the cause on informations.

No 136.

It was observed, that the by-law in question was merely corroborative of the common law.

THE LORDS unanimously 'assoilzied the defenders.'

A reclaiming petition was (11th March) refused, without answers.

Reporter, *Lord Methven*. Act. *Jo. Clerk*. Alt. *H. Erskine*. Clerk, *Sinclair*.

D. D. *Fac. Col. No* 19. *p.* 42.

*** Two other cases, in similar circumstances, were decided in the same manner.

SECT. XVI.

Effect relative to Prescribed Debts.

1705. *January* 31.

SIR JOHN GORDON of Park, and ANDERSON of Auchinreath, his Assignee, *against* HAY of Ranas.

No 137.
The Lords sustained compensation by way of exception, although it could not be pursued by way of action, the ground of compensation being long since prescribed.

SIR JOHN GORDON of Park, and Anderson of Auchinreath, his assignee, pursue Hay of Ranas, on his predecessor's bond.—*Alleged*, Park's father was debtor in 6000 merks of tocher, by a contract of marriage betwixt his daughter and Ranas's father, and thereon he craved compensation.—*Answered*, The contract of marriage whereon the compensation is craved is long ago prescribed, the last document taken being in 1659.—*Replied*, However actions prescribe in 40 years, yet the exception of compensation is always competent to be proponed, and never prescribes, because *ipso jure* there is *concursus et contributio debiti et crediti*, and operates from the concourse whenever it is opponed, unless the concourse of the two debts were without the 40 years; and thus it was lately found, between Crawford and Creditors of Cornwall of Bonhard, that a debt prescribed *quoad actionem*, yet was receiveable *per exceptionem recompensationis*. *See* PROCESS.—*Duplied*, That exceptions are likewise the ground and foundation whereon actions, either of declarator or payment, may proceed; and therefore, no such actions being intented within the 40 years, the exception expires, as well as the action on the principal writ founded on; and if Ranas were now pursuing Park for the 6000 merks of tocher on that contract, he would be excluded, because not pursued for within 40 years; so, by the same rule, he cannot claim compensation for that tocher contained in that contract, for *sublato fundamento totum opus corruit*, and it has no ground to stand upon; and he ought to have craved