

## SECT. III.

In pursuing a Society, who must be called ?

1725. *January 23.*

THOMAS FAIRHOLM of Pilton, *against* ROBERT MARJORIBANKS, Merchant in Edinburgh.

## No. 7.

One who had separately agreed with a partner of a company for a proportion of his share, was found not to be a general partner, but liable only for a part of the loss corresponding to his interest.

THE estate of Grange being sequestrated at the instance of the creditors, the Lords of Session appointed the same to be set in tack, by public roup, for a certain number of years. Sir Robert Miln, Cornwall of Bonhard, and Bailie Clerk, upon the 4th of December, 1694, entered into articles for taking the aforesaid estate in farm, of the following tenor, "That the said Robert Miln and Bonhard are to be two-thirds concerned in the whole estate of Grange, and the said George Clerk another third; and both the said parties appoint Daniel Hamilton to offer the length of 11,000 merks for the same; and thereafter the said George Clerk is to come the length of 13,000 merks, and not to exceed the same."

There was a postscript subjoined to these articles, dated the 11th of December, in these terms: "We allow Bailie George Clerk to exceed the foresaid sum of 13,000 merks in 2000 merks more."

Of the same date with the first agreement, there was another writing entered into betwixt Bailie Clerk and John Marjoribanks, bailie of Edinburgh, in these terms: "Whereas there is a minute passed betwixt Sir Robert Miln, Bonhard, and George Clerk, for the tack of Grange's estate, and that the said George is to have a third part; therefore I declare, that I shall hold the half of his third part:" and this is signed by him. And on the back thereof it was writ thus: "If you be straitened to bid more, though you go to 2000 merks more, as is contained within, I am content;" and this is also subscribed.

In the month of February, 1695, George Clerk was preferred as the highest offerer at the roup; and the tack being made out in his name, he gave a bond for the tack-duty, and Bailie Marjoribanks became his cautioner.

In consequence of this tack, Bailie Clerk, with consent of Bailie Marjoribanks, granted a factory to Daniel Hamilton for managing that estate.

Bailie Clerk having paid considerable sums on account of the loss upon the tack, and likewise of the insolvency of Sir Robert Miln and Bonhard, Mr Fairholm, as the Bailie's assignee, insisted against the defender, as representing Bailie Marjoribanks his father, for payment of one half of the whole loss sustained by Clerk.

It was pleaded in defence of Mr. Marjoribanks, That his father not being bound in the original copartnery with Sir Robert Miln, Bonhard, and Bailie Clerk, he could

not be liable any farther than his limited engagement with Bailie Clerk; and as he could only have drawn a sixth part of the profit, or a half of what belonged to Clerk, so he could only be liable for a sixth part of the loss; which defence he alleged was founded both in the tenor of the writs and intention of parties, and likewise supported by the rule of law, "Socius mei socii meus socius non est." As also by the 19th, 21st, 22d, and 23d laws, D. Pro socio. "Qui admittitur socius ei tantum socius est qui admisit, et recte, cum enim societas consensu contrahatur, socius mihi esse non potest quem ego socium esse nolui; quid ergo si socius meus eum admisit ei soli socius est."

To which it was answered for the pursuer, *1mo*, That it appeared plainly from the several dates of the articles betwixt Bailie Marjoribanks and Bailie Clerk, and between him and the other copartners, that it was one society, and that Bailie Marjoribanks certainly understood it so himself, when he concurred in granting a factory with Bailie Clerk, and signed instructions to the factor. *2do*, Supposing that Bailie Clerk was (strictly speaking) only partner with Sir Robert and Bonhard, yet seeing he communicated the minute of copartnership to Mr. Marjoribanks, and apprised him of the persons with whom he was to deal, and Mr. Marjoribanks had acceded and taken a share of Bailie Clerk's interest in the copartnership; he must necessarily be subject to the half of the losses that Clerk was liable to any manner of way, and equally-answerable with Mr. Clerk for the loss arising from the failure of Sir Robert and Bonhard, that being part of the risk arising from Mr. Clerk's engagement in the copartnership; for equity required, as well as the nature of their society, that Bailie Marjoribanks, who was to have the half of the profit upon the third share, ought to bear the half of the burdens that attended it, profit and loss going always in the same proportion. Nor was it of any moment, that Bailie Marjoribanks could draw no more than a sixth part of the profit; for in this his condition was equal with Bailie Clerk's; and seeing Clerk had become the principal tacksman for the whole, Law could never interpret, that he could draw less profit, or bear a greater loss than that partner who had undertaken to bear the half of his third.

It was replied for the defender, That Bailie Marjoribanks having subscribed a separate minute with Bailie Clerk, and upon the same day that Clerk had entered into his agreement with the other partners, it showed plainly, that Bailie Marjoribanks had industriously avoided being in society with the other two. It was replied to the *second*, That this transaction did properly consist of two separate contracts, which had in law very different effects; the one a contract of location, the other of society. As to the society, Bailie Marjoribanks had no concern in it; for what he engaged to hold was plainly the half of Clerk's third to the tack, and consequently he was only liable for his share of what loss arose from that, but not for any part of the loss which Bailie Clerk sustained through his being in society with Sir Robert Miln and Bonhard.

"The Lords found, That Bailie Marjoribanks was no partner with Sir Robert

No. 7. Miln and Bonhard; and found, that Bailie Marjoribanks was only liable for a sixth part of the loss of the whole subject of the tack.

Act. Ch. Areskine, H. Dalrymple, & W. Grant.  
Reporter, Lord Newhall.

Alt. Graham, sen. & Dun. Forbes.  
Clerk, Hall.

*Fol. Dic. v. 4. p. 284. Edgar, p. 155.*

1741. February 26.

A. against B.

No. 8.

THE creditor of a company cannot pursue one of the partners for a company-debt: His action lies only against the company.

*Fol. Dic. v. 4. p. 283. Kilkerran, (SOCIETY) No. 3. p. 518.*

1757. November 14.

JOHN STEVENSON and Co. against ROBERT MACNAIR, and two other PARTNERS of the ARRAN FISHING COMPANY.

No. 9.

In a process against a company, either the whole company or the directors must be called.

By the contract of copartnership constituting the Arran Fishing Company, a share in the copartnership was declared to be £50, and the capital stock to be £2000; and that no partner should have more than four shares.

It was further agreed, That the trade should be carried on by certain directors therein named; and by one clause the directors are "empowered to give such orders and directions concerning the stock, and management of the whole of the company's affairs, as to them shall seem meet, which shall be binding on all the partners to the extent of their respective subscriptions, until the same (viz. orders and directions) shall be altered by a general meeting;" which was confirmed by another clause, in these words: "Provided, nevertheless, that nothing herein contained shall be understood to import a power to the directors, or any general meeting, to compel any partner or subscriber to pay or contribute any more money to the stock than the sum by him subscribed." And by two other clauses it was stipulated, "That none of the company's stock should be liable to be affected with the private debts of any of the parties, or to diligence at the instance of any of their creditors, so as to give the creditors using such diligence any other right to the subject than the price at which his debtor's share shall be sold for at public roup: That in the event of any partner's share being affected by legal diligence, and in the event of the death of any partner, and more persons claiming right to his share than one, or the right of that one affected by diligence, it shall be in the power of the directors, or general meeting, to sell the share so affected by diligence, or that shall be claimed by more persons than one, by public roup;