1783. *June* 18. JOSEPH CAUVIN, *against* DR JOSEPH ROBERTSON.

No 39.
The tenant of a house, belonging to a person who became bankrupt, found entitled to retain the rents, in payment of a debt due to himself, but not in payment of a bill due by the bankrupt to a company, of which the tenant was a partner, indorsed to him after the bankruptcy.

DR ROBERTSON rented a house belonging to Louis Cauvin, who was debtor by bill to a company of which Dr Robertson was a partner; and who likewise owed a debt to the Doctor individually. Louis Cauvin died insolvent, and his son Joseph Cauvin entered heir to him *cum beneficio inventarii*. Dr Robertson who had paid to Louis Cauvin the rents due during his lifetime, continued to possess the house several years after his death, and in the mean time took an indorsation to himself alone of the aforesaid bill.

Joseph Cauvin, the heir *cum beneficio*, having demanded payment of the rents for these last-mentioned years, the Doctor claimed retention, *first*, of the debt due by Louis Cauvin to him as an individual; and, *secondly*, of the contents of the bill indorsed to him after the latter had died insolvent.

The COURT seemed to be influenced by this consideration, that if the debtors of persons insolvent were to be permitted thus to avail themselves of assignations obtained from particular creditors, it would be easy to disappoint the remainder of them of that rateable and just payment of debt to which they are entitled.

THE LORD ORDINARY had 'found Dr Robertson not entitled to retention of *either* debt.'

THE COURT altered his Lordship's interlocutor, so far as to find Dr Robertson entitled to retention of the debt originally due to him as an individual; while they adhered to it with regard to the bill indorsed after the bankruptcy. *See* SOCIETY.

Lord Ordinary, *Alva*. Act. *Cha. Hay*. Alt. *Nairne*. Clerk, *Colquhoun*.
Fol. Dic. v. 3. *p.* 145. *Fac. Col. No* 107. *p.* 170.

1793. *July* 8.

The TRUSTEES for the CREDITORS of WILLIAM BOGLE *against* JOHN BALLANTYNE.

No 40.
Two surviving and solvent partners of a dissolved company being sued for payment of a company-debt, at the instance of trustees for the creditors of a bankrupt to whom it was due, it was found competent for

IN the year 1777, William Bogle, Thomas Blane, John Ballantyne, William Wilson and William Ballantyne, engaged in a joint adventure, under the firm of Ballantyne, Wilson, and Company, for the purpose of exporting goods to New York.

By their agreement, it was provided, that if any of the partners died, or became insolvent, before the sale of the goods, their heirs or creditors should draw out, without either profit or loss, the sums which such partner had advanced.

The affairs of William Bogle having gone into disorder, he, in the year 1778, disponed his estate to trustees for his creditors.

No 40.
one of the defenders to plead compensation to the full amount upon a private debt due to him by the bankrupt.

Mr Bogle had advanced L. 300 in the concern of Ballantyne, Wilson, and Company, which, as the sale of their goods was not finished when he became insolvent, his creditors, in terms of the contract, had a right to draw out. The other partners accordingly granted a missive, binding themselves to pay the L. 300 by certain instalments to Mr Bogle's trustees, who, on the other hand, obliged themselves to assign over Mr Bogle's share in the concern to the other partners.

When this transaction took place, John Ballantyne was a private creditor to Mr Bogle in a bill for L. 333 : 15s.

While the partnership subsisted, Wilson, another of the partners, became bankrupt, and William Ballantyne died.

In 1788, after the concern was supposed to be at an end, Mr Bogle's trustees brought an action, concluding, 'That John Ballantyne and Thomas Blane, 'the surviving partners of the said Company of Ballantyne, Wilson, and Com-'pany, ought and should be decerned and ordained, conjunctly and severally, 'to repeat and pay back to the pursuers the foresaid sum of L. 300 Sterling 'paid in to the said Company by the said William Bogle.'

In this action, although Blane was solvent, appearance was made only for Ballantyne, who contended, that he was entitled to compensate the claim brought against him and the other defender, as the existing partners of Ballantyne, Wilson, and Company, with the private debt of L. 333 : 15s. due to himself by Bogle, and

Pleaded; In the eye of law, a co-partnery, and the individuals of whom it is composed, are distinct from each other. The individual partners are not even proprietors of the Company estate, but merely creditors upon it, in proportion to their original shares, Erskine, b. 3. tit. 3. § 24. Hence the creditors of a partner may arrest what is due to him in the hands of the Company, but cannot attach the Company estate; and, for the same reason, upon the death of a partner, no part of the estate is transmitted to his representatives, but merely a claim against the Company, which must be carried by confirmation, even where the Company estate is heritable.

Each partner is, nevertheless, liable for the whole Company debts. But since the Company and the individual partners are distinct, it follows as a necessary consequence, that he can be liable for these debts only in the character of guarantee or cautioner for the Company. Accordingly, he is entitled to an assignment from the Company creditor, in order to operate his relief against the Company; and even without such assignment, he has a total right of relief against the Company, of precisely the same nature with that which a proper cautioner has against the principal debtor; and upon the very same principle, he is entitled to a proportional relief from the other partners, as being co-cautioners along with him for the Company. But as he is universally liable to the Company creditors, when he is sued for payment of any such debt, he must,

whatever be the situation of the Company, like any other obligant, be entitled to plead compensation upon a debt due to himself by the creditor pursuing. No 40.

If indeed an action were brought by a Company for payment of a debt due to the partnership, it is plain they could not be obliged to allow compensation upon a debt due to the defender by an individual partner, for this obvious reason, that they are in no shape liable for his private debts, and compensation can be pleaded only where payment could be demanded; and, upon the same principle, it might be admitted, that were an action brought against a subsisting Company *qua* such for payment of a Company debt, they could not set off against the demand a debt due by the pursuer to an individual partner, to which they had acquired no right; but, in the present case, the partnership is at an end, and the demand is made against each of the two defenders individually, as liable *in solidum* for the debt.

Answered: Although each partner in a Company has both a private and a social character, which are distinct, and which produce the difference between his private and his co-partnery debts; yet still a Company and its partners are one and the same, and of consequence each partner is bound, not as cautioner, but as co-principal for the debts of the Company. Indeed, the idea of their being cautioners only, is unintelligible, as in that case there would be no principal debtor. It is also a quality of the Company debts, arising both from the nature of co-partnership and from expediency, that they cannot be compensated with, but, on the contrary, must in all cases be kept entirely distinct from the debts and obligations of the individual partners; *Voet de Compensationibus*, § 10. 16th June 1774, Galdie against Gray, *voce* SOCIETY; 29th November 1774, Mackie against Macdowall and others, No 36. p. 2575.; 18th June 1783, Cauvine against Robertson, No 39. p. 2581.

Besides, the defender acknowledges, that when the action proceeds solely against a Company, compensation cannot be pleaded upon a debt due to an individual partner. But it is not easy to conceive, in what other manner a decree could be obtained against a Company, than by calling all the existing partners, and concluding against them, conjunctly and severally, in that character, which is precisely the mode the pursuers have followed. A summons brought in this form is, in the strictest sense, a summons brought against the Company; and consequently, no compensation upon a private debt can be pleaded in bar of a decree following upon it against the Company. In all events, therefore, decree should proceed in the present action. If diligence shall afterward be used upon it personally against Mr Ballantyne, it will then be time enough to try the question, whether a partner can set off his own private debt against that of the Company. At present, the pursuers only ask a decree against the Company, *i. e.* against the partners conjunctly and severally, as representing the Company, which, when obtained, will enable them to make their payment effectual from either or both of the defenders, or perhaps to attach the effects of the Company, if they can find them.

No 40.

THE LORD ORDINARY repelled the defence, and decerned against Messrs Ballantyne and Blane, in terms of the libel. A petition for Ballantye, reclaiming against this interlocutor, was refused. But, on advising a second, the COURT 'sustained Mr Ballantyne's defence.' On advising a reclaiming petition for the pursuers, the LORDS 'altered their interlocutor, and repelled Mr Ballantyne's plea of compensation.' Mr Ballantyne having again reclaimed, the COURT once more sustained his defence. Upon which Bogle's Trustees having reclaimed, the COURT, considering the point of law to be attended with difficulty, and that there was a diversity of opinion on the Bench with regard to it, ordered a hearing in presence. When the cause came to be advised, the COURT still continued to be divided in their sentiments.

Some of the Judges were of opinion, that as there were no visible funds of the Company extant, and as no business had been done for many years under the Company firm, the partnership was to be considered as at an end; and that the debt owing to Bogle's trustees was now in reality due by Ballantyne and Blane as *correi debendi*. In this situation, however, it was observed, no more than one half of the sum was the proper debt of Ballantyne, and therefore he was only entitled to compensate to that extent. Blane himself was solvent and in the field. The pursuers were therefore entitled to a decree against him for the other half, as he surely had no right to plead compensation on a private debt due to the other defender. If indeed Bogle's private debt had been due to both defenders, compensation might have been pleaded upon it to its full amount. But as the doctrine of compensation had been introduced solely from considerations of expediency, and was not founded in strict law, it ought never to be stretched beyond the limits of material justice, which required, that each of the two *correi debendi* should himself specifically fulfil his own part of the obligation. Blane was therefore bound to pay down his half of the L. 300. It was true indeed, that Ballantyne, before Bogle's bankruptcy, might, by a transaction with the other defender, have taken his share of the debt entirely upon himself *delegatione*, and then he might have pleaded compensation to the whole extent; but no such transaction could now take place, as, by Bogle's insolvency, his creditors had a *jus quæsitum* in the debt as it then stood. The general rule of law certainly was, that a Company debt would not be set off against a private debt, nor *vice versa*; and in the present case, the defenders were called *socio nomine*, not to pay a private, but a Company debt; but supposing this rule could be got over, on account of the dissolved state of the Company, (which one Judge maintained it could not), it still remained a clear proposition, that Mr Ballantyne was only to pay out of his private pocket one half of the sum demanded; and therefore he had no legal interest or title to insist, that his private debt should be set off against it to a greater amount. His desiring more was for the purpose of obtaining, by the acquiescence of his partner, a partial preference for his whole private debt, over the other creditors of Bogle the bankrupt.

No 40.

A majority of the Judges, on the other hand, thought that compensation was pleadable by Mr Ballantyne in its fullest latitude. That in determining the question, there was no occasion to enquire whether the Company was solvent or insolvent, dissolved or not dissolved, for in all these situations the same rule would hold: That when a creditor pursues a Company for payment, he cannot prevent any one partner from standing forward, and discharging the debt, although out of his own private funds. That, on the other hand, a creditor has it in his power to demand payment *in solidum* from any individual partner, without discussing the Company. And as every partner therefore may not only make an ultroneous offer, but may even be compelled to pay, so he also must be entitled to plead compensation, it being a general rule, that the obligation to pay always implies a right to compensate. It is true indeed, that the Company may, in certain situations, object to an individual partner being allowed to discharge their debt; but if they do not, such objection is *jus tertii* to the creditor. Thus, in the present case, had Blane been a private creditor of Bogle, he might have himself insisted on compensating his own half of the debt; but if he did not, the pursuers, even in that case, could not have opposed the extinction of the whole claim, by the compensation pleaded by Ballantyne.

THE COURT adhered to their last interlocutor, sustaining the defence of compensation. *See* SOCIETY. *See* Sec. 15. *h. t.*

Lord Ordinary, *Justice-Clerk.* Act. *Maconochie, M. Ross.*
Alt. *Rolland, G. Fergusson, Cathcart.* Clerk, *Sinclair.*

Fol. Dic. v. 3. *p.* 144. *Fac. Col. No* 69. *p.* 148.

1793. *November* 26.

The CREDITORS of JOHN BROUGH *against* JAMES JOLLIE.

No 41.
A person purchasing a subject for another, in consequence of a commission from him, and, with his consent, taking the rights to it in his own name, is entitled to retain it, in competition with the other creditors of his constituent, till he is

IN 1786, James Jollie, writer to the signet, in virtue of a verbal mandate from John Brough, purchased for him, at a public auction, an area at the price of L. 2,200. The enactment of roup was, with Brough's consent, made out in Jollie's name, who became personally bound to pay the price, and fulfil the conditions of the sale.

Brough soon after paid the price of the area, and erected a large building on it.

In 1784, Jollie became cautioner for Brough, to the extent of L. 500; and in 1787, for L. 500 more.

Brough having become bankrupt in 1788, Jollie *contended*, That he was entitled to retain the area, and building erected upon it, till he should be relieved of both these cautionary engagements. His right to do so was disputed by Brough's other creditors, who