

## SOCIETY.

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### SECT. I.

What understood a Society?—How constituted?

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1682. February. NEILSON *against* M<sup>c</sup>DOUGAL.

No. 1.

Two men having contracted for a bargain of victual, which the seller was obliged to deliver to them equally; and he having delivered the whole to one of the buyers, who was his own goodson, and pursued the other for the half of the price:

The defender alleged, That he could be liable for no part of the price, having got none of the victual;—and the conjunct buyer who received the whole, was now insolvent.

Answered: The buyers being *socii*, delivery to any one of them was sufficient.

Replied: *Emptio rei facta a pluribus ementibus* infers no society, where there is no *contributio lucri et damni*.

The Lords assoilzied the defender from payment of any part of the price.

*Fol. Dic. v. 2. p. 375. Harcarse, No. 853. p. 243.*

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1755. January 17.

CHARLES LIVINGSTON *against* CHARLES GORDON and Others.

IN March 1771, Robert Selby, plumber in Edinburgh, Henry Gutzmer, and Jack Somerville, sugar-boilers, entered into a contract of copartnery for carrying on, in company, a sugar-house for boiling, refining, and manufacturing sugar, in a house belonging to Selby, for 19 years. Gutzmer was to manage the whole business of buying raw sugars, boiling, &c. and Somerville was to keep the books; and, for this trouble, were to have a certain sum yearly.

No. 2.

A copartner-ship may be constituted, *rebus et factis*, without a written contract.

## No. 2.

In this contract they assumed the name of the New Edinburgh Sugar-house Company, and business was begun soon after; but, in February 1772, the contract was cancelled; and, of same date, the following deeds or writings were executed:

1st, A tack between Selby on the one part, and Gutzmer and Somerville on the other, whereby the former lets to them the sugar or boiling house which they then occupied, for the space of 18 years from Martinmas, 1771.

2dly, Bills were granted by Gutzmer and Somerville to Selby for the stock put in by him to the joint trade, for the rent of the sugar-house, and for an account of plumber work; and,

3dly, Discharge and obligation by Gutzmer and Somerville to Selby, narrating the contract of copartnery; that Selby had signified a desire of withdrawing and dissolving the same, so far as he was concerned, to which Gutzmer and Somerville had consented; and, in that view, had taken away all the names from each copy of the contract, and also had settled with Selby in relation to his input stock, the bygone rents of the sugar-house, and the plumber work performed by him for the Company; therefore they dissolved the copartnery, and declared the contract to be at an end, releasing Selby from all obligations thereby incumbent upon him. And they further bound themselves to relieve Selby of all debts and demands upon the Company, and to pay the same when due; Selby, on the other hand, renouncing all his interest and concern, in the profits hitherto accruing, to the said Henry Gutzmer and Jack Somerville, in proportion to the share and interest they had by the said contract. And the parties consented, that a full copy of this deed shall, immediately after the execution thereof, be ingrossed in the Company's journal; which, however, was never done.

From this period, the same business was carried on by Gutzmer and Somerville till spring 1773, when, their affairs going wrong, they applied for a sequestration under the late act of Parliament, in the name of Henry Gutzmer and Jack Somerville, sugar-boilers in Canongate, in Company; and, in consequence thereof, Mr. Livingston was appointed factor, and afterwards trustee. And objections having been made to the scheme of the first intended distribution of the funds recovered by him, the present competition ensued between Mr. Livingston, as trustee for Robert Selby, and others, in the character of Company creditors to Gutzmer and Somerville, and Charles Gordon and others, the private creditors of Gutzmer alone.

On the part of the latter, it was

Argued: That the Company in which Selby was a partner having been dissolved, no new contract was entered into, and no evidence of a copartnery appeared between Gutzmer and Somerville. That, notwithstanding the dissolution of that copartnery, Gutzmer and Somerville did agree to prosecute that branch of business, not as *socii* or in partnership, but as so many individuals in a joint adventure to subsist during pleasure, has all alongst been acknowledged. It was in this view they purchased Selby's interest in the premises, and it was in this view also that they took from Selby the sugar-house which had been possessed by the original

company: But they assumed no firm, nor granted any securities as a Company, or under a social name; and, therefore, they are only to be considered as two individuals carrying on business for their joint account, which can never constitute a copartnership between them, so as to entitle their creditors to a preference to the private creditors of Gutzmer, claiming to rank *pari passu* upon Gutzmer's share of those effects, which are the subject of this competition.

Answered: That Gutzmer and Somerville acted as a Company subsequent to February 1772, and were universally known as such down to their bankruptcy, cannot possibly admit of dispute, being a notorious fact, which can be proved by hundreds of persons, as well as by numberless transactions carried on by them during that time.

In the *first* place, their books are produced, which are carried on *de die in diem*, in the same way as before the pretended dissolution of the Company, without the smallest apparent variation: They do not even contain an entry of the original copartnership's being dissolved or altered, nor any article from which it can be inferred, but proceed as if no such thing had ever happened.

*2dly*, Upon the 8th July, 1772, some months after Selby went out of the copartnership, Gutzmer and Somerville, under the title of sugar-refiners in Canongate, insured the utensils and stock in the sugar-house, at the Sun Fire Office; and the different blanks in the printed policies in which their names fell to be inserted, are filled up with Henry Gutzmer and Company.

*3dly*, It appears, from evidence produced, that they both sued and were sued as a Company.

*4thly*, A great number of other documents are produced, consisting of accounts, drawn out by them under the name of the New Sugar-house Company, letters addressed, and receipts granted to them, all under the same denomination.

*Lastly*, It can be proved, that they were notoriously known as a Company; that they dealt openly in that character; that the house, the utensils, and subjects of manufactory, were possessed by them in common; that they drew their salaries in the same way as they had done while the contract with Mr. Selby was in subsistence; and that they accounted with one another according to their respective shares, ascertained by the contract, as afterwards varied in the transaction with Selby; so that, in every respect, they were as much a mercantile or manufacturing Company as any in Britain.

This was not a momentary concern, of buying a parcel of sugar and selling it again, for the joint behoof of two persons otherwise unconnected. It was a society entered into and carried on, for the purpose of manufacturing sugars, under the name of the New Sugar-house Company; the persons concerned in it establishing themselves into a copartnership. Even if the case were otherwise, and if the Court could hold this as a mere momentary adventure, still the creditors of the individuals in this adventure could not be let in upon the common subject, till the joint debts due by the parties, and contracted on occasion of the adventure, are discharged, as was expressly found in the case of Climey and M'Caul, Sect. 14. *h. t.*

No. 2.

It is no where laid down, that a firm is one of the essentials of a contract. It is a modern invention, and mentioned as such by the writers on the law. Neither can it be maintained, that a written contract is essential to a copartnery; *vide* Erskine, B. 3. T. 3. § 20, 26. And this was very fully under the consideration of Court, in the question between Cuninghame and the Creditors of Ancrum.

In the present case, third parties have no access to know, nor business to inquire, whether Gutzmer and Somerville had a written contract or not; what were the terms of their agreement; or, whether they had first entered into one contract, and afterwards cancelled it, and went on without a contract. All these matters were only between themselves. Neither the original contract, nor the discharge of it, were on record; and, when this discharge is looked into, it is plain, that the sole intention of it was to liberate Mr. Selby, and only to dissolve the contract so far as regarded him; and, accordingly, the other two went on as partners, trading under the denomination of a Company, and were treated as such by the creditors who are now claiming upon the Company's subjects.

The Lords "preferred the Company-creditors."

*Act. Hay Campbell.*

*Alt. D. of Faculty.*

*Clerk, Campbell.*

*Fol. Dic. v. 4. p. 285. Fac. Coll: No. 147. p. 1.*

## SECT. II.

Whether a Society can sue without being incorporated?

1730. June 11.

MASONS of the LODGE of LANARK *against* HAMILTON, &c.

No. 3.

By an act of the Mason Lodge of Lanark, "all members are discharged to receive, or be witness to the receiving or passing any mason within 10 miles of the burgh of Lanark, except the benefit come to the Lodge, under the penalty of ten pounds." Upon this act, process was brought against some of the members, to account for the sums they had received by apprentices and otherways, the benefit of which ought to have accrued to the lodge, and concluding for £10 Scots of penalty for the contravention of the said act, *toties quoties*. The defence was, that this is an unlawful society, and therefore cannot have the protection of the law; that the design of the society is evidently to enhance the business of the country, by restraining any person to pass mason, unless he pay such sums to the lodge as