upon the petition of the ſaid Kenneth Mackenzie, It is ordered and adjudged, that the ſaid interlocutors, ſentences, or decrees complained of in the ſaid appeal be reverſed, and that the rents of the eſtate in queſtion be paid to the appellant according to his grant; but that ſuch debts of the creditors of the ſaid Alexander Mackenzie as were real, and did by the law of Scotland affect the eſtate in queſtion, at the time of the forfeiture of the life-rent eſcheat, be charged on the ſaid eſtate in due courſe, according to the ſaid law.

For Appellant, *David Dalrymple. Rob. Raymond.*
For Reſpondent, (in both caſes) *Edw. Northey. Will. Hamilton.*

William Moriſon, of Preſton Grange, Eſq; *Appellant;*
James Smith of Whitehill, and David Burton Glazier in Edinburgh - - *Reſpondents.* Caſe 54.

8th *April* 1719.

Society.—The minutes of a meeting of a company, ſubſcribed by the preſes, bore that certain members ſold to another their ſhares of the joint ſtock at a given price; the perſon to whom the ſhares were ſo aſſigned afterwards entered to the management of the whole concern, and applied the profits to his uſe; it is found that he was obliged to pay to each partner the ſums mentioned in ſaid minute, though it was objected, that the minute was eraſed in ſome ſentences, and that there was *locus pœnitentiæ* till a more formal aſſignment was made.

The aſſignee is alſo ordered to free the aſſignors from the debts of the ſociety, and pay them intereſt on the ſums found due.

Compenſation.—In a ſuſpenſion, the ſuſpender's plea of compenſation is rejected.

Coſts.—20*l.* coſts given againſt the appellant.

BY articles of agreement, executed in March 1698, between the appellant, Sir William Binning, Patrick Steel, the reſpondents, and others, it was agreed to ſet up and carry on a glaſswork in Moriſon's Haven, at their mutual expence, and to their mutual profit, and to conſiſt of ſhares of 50*l.* ſterling each ſhare; and it was agreed, that if any of the copartners ſhould be inclined to ſell or aſſign his ſhare, it ſhould not be lawful for him ſo to do, until he ſhould make the firſt offer thereof to ſome of the copartners, and if they ſhould refuſe, he might then ſell, ſo as it were not at a lower value than what was offered by the ſaid copartners: They were likewiſe by the ſaid articles to appoint ſome of their own number to be overſeers of the work; and they named George Livingſton, one of the copartners, to be their caſhier or treaſurer.

By other articles of agreement in April thereafter, between the appellant and the other copartners, and Daniel Titterie, glaſsmaker in Newcaſtle, the ſaid copartners leaſed to Titterie the ſaid glaſs-manufactory and premiſes for 9 years, commencing at Whitſunday 1698. At a meeting of the copartners in September 1699, Sir Wm. Binning and Patrick Steel, two of them, ſurrendered their ſhares to the appellant, he paying to each of them

10*l.*

10*l.* ſterling yearly during the continuance of Titterie's leaſe, till they ſhould be repaid what they had advanced of their ſhares; and it was then (as the reſpondents ſtate) expreſsly agreed, that they who had purchaſed any ſhares ſhould be liable for payment of all incumbrances theſe ſhares ſhould be liable to.

The ſaid glaſs-work was carried on amicably by the company till the 21ſt of October 1699; when at a meeting of the co-partners a tranſaction took place, relative to a reſignation by the reſpondents and one other of the copartners, of their ſhares to the appellant. In 1700, the reſpondents and the other partners brought an action againſt the appellant, before the ſheriff of Edinburgh, ſtating, that among others the reſpondent Smith had paid in 100*l.* ſterling towards carrying on the ſaid manufactory, and the reſpondent Burton 76*l.*, for which ſums they had got receipts from the ſaid George Livingſton, caſhier to the copartners; that at the ſaid meeting on the 21ſt of October 1699, the reſpondents, and one other of the copartners, reſigned their ſhares to the appellant, he paying to each of them 10*l.* per annum, during the continuance of Titterie's leaſe, and after the expiration of the ſaid leaſe paying what ſhould then remain due upon the original ſhares, upon which terms the appellant accepted the ſame; and, that this, (as all the other tranſactions of the company were) was marked in the minutes of their ſederunts, and ſigned by the preſident of the meeting: that the appellant having thus purchaſed almoſt all the ſhares of the manufactory, he took the ſole management of the works upon himſelf, and on the laſt day of February 1700 granted a factory to one James Smith, to overſee, inſpect, manage, act, and do as principal clerk, overſeer, and accountant at Moriſon's haven, and uplift all debts owing to the ſaid glaſs work, &c. and generally to do every thing concerning the premiſes as if the appellant were perſonally preſent. And their action concluded, that the appellant ſhould be decerned to make payment of the ſeveral ſums agreed upon. The ſheriff, on the 2d of October 1700, decerned againſt the appellant for payment to each of the purſuers of 10*l.* ſterling yearly, beginning the firſt year's payment upon the 21ſt of October 1700, and ſo on yearly thereafter until the term of Whitſunday 1707, when the contract with the ſaid Daniel Titterie expired, and at that term the appellant to make full payment to each of them, of what ſhould remain unpaid of their original ſhares advanced and paid in, among others, the reſpondent Smith's ſhare being 100*l.* and the reſpondent Burton's being 76*l.*, with the intereſt of the ſaid ſums, and to relieve the reſpondents of all debts contracted and loſs ſuſtained upon account of the ſaid works, and further to pay 14*l.* Scots to each of the reſpondents for expences.

The reſpondents extracted the ſheriff's decree, and gave the appellant a charge of payment; and he thereupon preſented a bill of ſuſpenſion to the Court of Seſſion. When this cauſe came firſt to be heard, the Court, before determining the principal queſtion, directed the reſpondents and the other copartners to condeſcend

condeſcend and inſtruct how the ſaid copartnerſhip was managed before, and how after, they renounced their ſhares; and ordained the appellant to condeſcend and prove if any part of the ſhares of the reſpondents (or other partners reſigning) was unpaid, and what the ſame was; and if the ſaid copartners had any effects of the ſaid ſociety in their own hands not accounted for, and what the ſame was at the time of their foreſaid renunciation.

A proof was accordingly taken; the import of which as ſtated by the reſpondents was, that it appeared that before the time of the reſignation of the reſpondents, the affairs of the ſaid glaſs-manufactory were managed by a committee of the ſociety in general, but after their reſignations the appellant managed all by himſelf, and he alone gave a commiſſion to Mr. Smith to act as overſeer of the works; and Mr. Smith deponed, that as the commiſſion was given by the appellant alone, ſo with him only he treated, and with no other of the ſociety; and the appellant ſolely managed, bought and ſold every thing of the ſaid manufactory by himſelf, he only paid the charges and applied the profits to his own uſe. The appellant did not examine any witneſs to prove his allegations, and the term was circumduced againſt him.

The cauſe coming to be heard before the Lord Ordinary, his lordſhip in 1705, found it inſtructed by the writs produced, "that the reſpondents had paid their ſhares, and allowed the ap-"pellant, notwithſtanding of the circumduction of the term, to "prove by the reſpondents' oaths the having of any writs or "books belonging to the ſociety, and ordained the reſpondents "to produce any ſuch as they ſhould acknowledge by their oaths, "but found it not clearly proved by the reſpondents' renuncia-"tion, and the appellant's acceptance, that the appellant was "obliged to releaſe the reſpondents of the debts of the ſociety, "unleſs the ſame be inſtructed *aliunde*.

About this period Livingſtone, one of the partners, made over his claims to the reſpondent Burton: the action was afterwards diſcontinued for upwards of ten years; but being again revived, the Court, in abſence, gave judgment againſt the appellant, confirming the original decree of the ſheriff of Edinburgh. The reſpondents thereupon gave him a charge of payment; and arreſted the rents in the hands of his tenants. They alſo brought a proceſs of forthcoming: and in that action, the appellant appeared for his intereſt. The Court in June 1717 adhered to their former decrees, and ordained the tenants to make payment in terms thereof.

The appellant preſented another bill of ſuſpenſion, contending that he and his tenants were forced to pay theſe ſums without any legal proof of their being due; and he produced bonds and other writings by which, he contended, it appeared, that the reſpondents were at the ſame time debtors to the appellant in far greater ſums than thoſe claimed by the reſpondents. The Court on the 12th of July 1717 found it proved, that the ſhares of the

above

above "glaſswork belonging to the reſpondents were by them "ſold to the appellant on the 21ſt of October 1699, and that "the ſaid ſhares were bought and accepted at that time by the "appellant, and were thereafter managed by him as his own, "and remitted to the Lord Ordinary to hear upon what further "remained to be determined."

The appellant reclaimed, and after anſwers for the reſpondents the Court on the 14th of November 1717, "having conſidered "the ſaid cauſe with the ſederunt of the partners of the 21ſt of "October 1699, and the factory granted by the appellant in "1700, to the ſaid Smith, found it proved that after the ſaid "ſederunt, the appellant acted and managed as proprietor of the "ſhares in the ſaid glaſswork, which belonged to the reſpondents; "and therefore found that the appellant was obliged to accept of "the diſpoſition of the ſaid ſhares, and that he was obliged to "make payment to the reſpondents in terms of the ſaid ſede-"runt, and decerned accordingly." And to this interlocutor, the Court adhered on the 27th of December 1717, and the 15th and 21ſt of January 1718.

Entered, 8 Feb. 1717-18.

The appeal was brought from "a decree of the ſheriffs of "Edinburgh of the 2d of October 1700, and of two ſeveral in-"terlocutors of the Lords of Seſſion of the 12th of July, and "14th of November 1717, and others in the cauſe."

Heads of the Appellant's Argument.

The reſpondents contended, that they had proved their reſig-nations, and the appellant's acceptation thereof, both by an act of ſederunt, or meeting of the company, and by the depoſitions of ſome witneſſes. But that pretended meeting conſiſted chiefly of the reſpondents, who had entered into a concert to withdraw at the ſame time, and the depoſitions are of the ſame ſort; beſides the pretended act of the meeting is ſuch as never was offered in evidence in any court, being croſſed and cancelled in whole paragraphs; which if it had been ever ſo regular, could never have bound the appellant, unleſs he had either ſigned his accept-ance at the ſame time, or had had the ſhares made over to him, by deeds in writing, as is uſual in matters of conſequence, by the law of Scotland, before which there is *locus pœnitentiæ* allowed in any treaty or agreement.

Had it been proved (as it never has) that the reſpondents had reſigned, and that the appellant had accepted regularly, yet it ap-pears very unjuſt to have allowed the reſpondents all the ſums that they themſelves aſſerted they had advanced for the works, without any proof of ſuch advance; and before clearing off the debts due by the company, and before they had accounted for the product of the manufactory, proved to be in their own hands at the time, as public officers of the company and otherwiſe; and before any account of the partnerſhip was taken or ſtated.

The ſaid decrees ordained the appellant, not only, to pay the aforeſaid ſums, but likewiſe intereſt for the ſame, whereas there

there is no intereſt due upon any ſums, except where the ſame is ſtipulated by the parties, or ordered by expreſs law; eſpecially where the account is not liquidated.

It appeared in court by bonds and other authentic documents, that the reſpondents were debtors to the appellant in far greater ſums than thoſe claimed (had they been ever ſo juſt) and ſo theſe claims were *ipſo jure* extinguiſhed by compenſation.

The reſpondents objected, that compenſation is denied by act of Parliament, if the ſame be neglected to be proponed by the party before the decree be entered; which being the appellant's caſe, he therefore could not have the benefit thereof. But the firſt decree complained of was in the appellant's abſence, when he was engaged in the ſervice of the government; which was the reaſon of his preferring ſo many bills of ſuſpenſion afterwards, in which he fully inſtructed his grounds of compenſation, and even where the law denies compenſation, in moſt caſes it allows of retention to ſtop execution, being matter of diſcharge, eſpecially where it is evident, as in this caſe. Where a perſon having a ground of compenſation, is refuſed the ſame, it is in effect likewiſe to refuſe all action upon the ground of debt, be it ever ſo juſt, becauſe the party againſt whom the compenſation was to operate may not be able to allow ſatisfaction any other way. 1592. c. 143.

Heads of the Reſpondents' Argument.

The appellant contended, in the court below, that the original contract of co partnerſhip was blank in ſeveral particulars, eſpecially as to the quantity of capital ſtock, and that the writer and witneſſes were not deſigned, which was neceſſary by law. But this being a contract in relation to merchandize *is uberrimæ fidei*, and the ſolemnities in other writings are not required in ſuch deeds; eſpecially where the ſame have been followed out by ſeveral parties, by acting according to the ſame; and as to filling up the capital ſtock, that could not be, ſince it was not certain how many ſharers or ſubſcribers they might have.

With regard to the obliteration of the minutes of ſederunt founded on by the appellant; there is no queſtion, but the ſederunts of all companies or ſocieties, when legally ſigned, are probative for or againſt any member of the ſociety, eſpecially ſuch as were preſent, who, if any thing material had been omitted, had an opportunity of having it rectified; and in this caſe there was no direction for any writing more ſolemn to be made uſe of where the ſhares of the ſociety were transferred from one partner to another. And the appellant certainly looked upon this reſignation as marked in the minutes as ſufficient, ſince he after that time took upon himſelf the ſole management of the glaſs work, without ever conſulting the reſpondents, or the other reſigning partners, and did likewiſe under his hand declare, he had right to the reſpondent Smith's ſhare; and he had no other right but the reſignation made in the ſaid ſederunt. The obliteration was only of two proteſts taken by the appellant and the reſpondent Smith

as

as to the method of management, through which a line was drawn as unneceſſary after they had agreed to reſign their ſhares.

The appellant objected, that the reſpondents had not paid up their ſhares: But that they had, appears by the receipts of the treaſurer to the ſociety, who was legally authorized to receive the ſame.

He objected alſo, that the reſpondents ought to bear their proportion of the debts owing by the co-partnerſhip prior to their reſignation: but it were very unreaſonable, that the reſpondents ſhould be anſwerable for the partnerſhip debts, ſince they had upon terms parted with their ſhares to the appellant, who upon that account got all the co-partnerſhip ſtock into his hands, which muſt and ought to be the fund for payment of theſe debts.

Judgment, 8 April 1719. It is ordered and adjudged, *That the ſaid petition and appeal be diſmiſſed; and that the decree and interlocutors therein complained of be affirmed: and it is further ordered, that the ſaid appellant do pay, or cauſe to be paid to the ſaid reſpondents the ſum of* 20*l. for their coſts in reſpect of this appeal.*

For Appellant, *Tho. Lutwyche. Pat. Turnbull.*
For Reſpondents, *Rob. Raymond. Will. Hamilton.*

Caſe 55. Stair, 25 Feb. 1669. William Brown, Merchant in Edinburgh, and Andrew Roſs, Maſter of the Woollen Manufactory at Muſſelburgh, *Appellants;*
Robert Earl of Morton, - - *Reſpondent.*

3 *Feb.* 1719-20.

Kirg's annexed Property.—A perſon, to whom part of the annexed property had been granted, creates a heritable ſecurity thereon: his grant is afterwards reduced, and the decree confirmed by an act of reannexation: an act of diſannexation is ſubſequently made, and a new grant of part of the premiſes paſſed to the repreſentative of the family of the original grantee, though not his heir: this does not revive the heritable ſecurity granted by him.

Coſts.—60*l.* coſts given againſt the appellants.

THE lands and lordſhips of Orkney, Zetland, and the Iſles thereto belonging, formed part of the annexed property of the crown. In 1643, King Charles the 1ſt, being indebted to William then Earl of Morton, in divers ſums of money, lent to and diſburſed for his majeſty, by charter under the great ſeal of Scotland, granted and conveyed to the ſaid earl and his heirs, the Iſles of Orkney and Zetland redeemable on payment of 30,000*l.* ſterling. By virtue of this charter the earl was infeft; and the ſaid grant was ratified in Parliament: but no previous act of diſſolution was obtained.

In 1647, the ſaid earl and Robert Lord Dalkeith his ſon, granted an heritable ſecurity over the ſaid Iſles, to Sir William Dick