

No. 51. ors, it might, *favore creditorum* have been sustained, evidence being given that Falconer was but an interposed person.

N. B. The case of an arrestment laid in the hands of one who has a right in security, would be different; for that would not affect the superplus of the sums that might remain after payment of the debt. The reason is, that one having a right in security, is liable to no diligence, and, therefore, before he recovers the debt assigned, is possessed of nothing which the arrestment can affect.

*Kilkerran, (ARRESTMENT.) No 8. p. 39.*

1742. November 19.

Competition ROBERT RAE, &c. with JOHN NEILSON, &c.

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It is competent to affect the interest of a partner, in a copartnership, by arrestment. Arrestment in the hands of the other partners will affect this interest, tho' the subjects of their copartnership should be, at the date of the arrestments, abroad; provided they be afterwards made good to the company.

ROBERT and JAMES ROBERTSONS entered into a company-trade with George Bogle, &c. merchants in Glasgow, for a particular negotiation, the import of which was, that they should send out certain cargoes of goods for building a ship in Boston in New-England, and the remainder upon merchandize to be loaded aboard that ship, and others which should be hired; with the proceeds whereof new adventures outward were to be carried on in a running trade, for the profit of the joint adventurers: All which was to be managed under the direction of certain supercargoes to be sent abroad to reside, and of others who were to accompany the goods. This joint trade continued for some years, when James Robertson having died, and Robert Robertson become bankrupt, some of their creditors arrested in the hands of George Bogle, &c. the other joint adventurers with the Robertsons, and likewise used arrestment at the market-cross of Edinburgh, pier and shore of Leith, in the hands of certain factors for the two Robertsons residing abroad, in whose custody they supposed their debtors effects might be lodged.

In the course of the furthcoming, which was brought at the instance of the creditors who had used arrestment, Messrs Bogle, &c. (who raised a multipointing) emitted a declaration, giving a detail of the joint adventures in trade, that they had with the two Robertsons; and declared, that at the time of the arrestments, they were not debtors to the Robertsons; on the contrary, *they* were debtors to the last adventure in L. 300 Sterling: That the declarants had disposed of the ship and cargo at the particular rates specified in their declaration; and that there were certain sums for which their factors abroad were accountable to the partners.

And this declaration was held as evidence, by all parties, of the interest which the Robertsons had in their adventure with Messrs Bogle, &c.

The creditors of the Robertsons, who had neglected to use arrestment, objected to the furthcoming; *imo*, That the partners, in the present case, were not only not erected into a body-politic, or corporate, but that there was not even a contract of copartnership among them: So that it was new to consider this copart-

nership as an *universitas*, as a right vested in the partners as a body corporate, and affectable by one diligence. *2do*, It was objected, That, at the date of the arrestment, no part of Robert's share was in the hands of the partners, and that the stile of an arrestment directs the arrestee to detain in his hands such liquid sums of money as he owes to the arrester's debtor, and such goods belonging to the debtor as he has in his possession. Now, none of the partners were debtors to Robert in one shilling, at the date of the arrestment; consequently, there was nothing in their hands that could be attached or secured thereby. Nor could it alter the case, that they had several parcels of goods in foreign parts common with Robert, and several other goods on ship-board, also intended for foreign parts, in common with him; for this did not put Robert's goods in their possession or custody, nor indeed under their power. Neither can it make any alteration, that some of the goods *de facto* came home, which the partners sold for the common account; and that, if the goods that are still in foreign parts come safely home, and come into the partners hands, there will be a certain share thereof the property of Robert. For an arrestment does not reach *acquirenda*; it affects only the debts or goods of the debtor, due by, or in the hands of the arrestee, at the date of the arrestment. *Lastly*, Supposing there had been a proper copartnership in this case, which was dissolved by the death of James, and the bankruptcy of Robert *quoad* their interest, and that the copartnership subsisted in the remaining partners, subject to the balance of the stock belonging to James and Robert, after payment of the debts due by them severally to the copartnership, yet such interest is not affectable by arrestment; it is neither a liquid debt, nor moveable goods belonging to the debtor, but is a sort of *universitas*, consisting possibly of heritable debts due to the partners. And the claim of the Robertsons is a balance arising upon the whole, after payment of the company debts; and therefore is the proper subject of an adjudication, but not of an arrestment, which affects only liquid debts, or *corpora mobilia*.

*Answered* for the creditors, pursuers of the furthcoming. That, if the effects of a copartner could not be attached by an arrestment in the hands of the managers of a copartnership (who had the power to sell and dispose of the goods, &c.) our law would be extremely deficient; but as any one partner may sue the rest to account, so every creditor of his may do the same for recovering the sums due to him.

Neither was there any necessity for a charter to create a body-politic, or a contract in writing; consent is sufficient for this purpose, and the actings of the several partners is sufficient evidence of that consent. What was advanced by each partner became common stock; debts contracted for carrying on the company concerns bound the whole; books were kept: And if these circumstances do not infer a copartnership, so as the managing partners should be accountable to the other partners (or their creditors doing diligence) for the profits, the pursuers do not know what will.

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As to the *second* objection, it was *answered*, That the surviving partner, having the power and command over the subject of the co-partnery, wherever the same might be lodged for the time, the case was the same as if the whole had been in their custody, and so subjected to the arrestment. In the same manner, the custody of the supercargoes abroad, or in their ships at sea, who were accountable to the surviving partners, or their constituents, must be deemed in law the custody of the constituents themselves; as much as goods consigned to a merchant in Edinburgh, though the goods ly at Leith, in cellars and warehouses, of which his servants have the keys, will be constructed in the custody of the merchant himself; and an arrestment in the merchant's hands for the debt of the consigner will reach such goods. See a late case betwixt Sir Hary Innes and the Creditors of Gordon, No 51. p. 715.

And, with respect to the *last* objection, it was *answered*, That the surviving partners have declared, that the subject of the co-partnery consisted in moveables; and although, in some respect, the co-partnery may go under the name of an *universitas*, while it subsists, yet when it is at an end, and that there is a necessity for the division of the subject of the co-partnery, as in the present case, so as that the company debts must be paid off, and each partner have his share in the free profit, it remains no more an *universitas*; but the case falls to be considered, as if there was an actual division, and each partner's share was ascertained, which is the purpose of the present action. See 18th March 1707, Alison, No 43. p. 707. The only habile diligence therefore in this case is arrestment, and not an adjudication.

THE LORDS found it was competent for the creditors of Robert and James Robertsons, the two bankrupt partners, to affect the debtors interest in the co-partnery by arrestment, and that the arrestments used in the hands of George Bogle, &c. the remaining partners, did habily affect the same, notwithstanding the subjects of their co-partnery were, at the date of the arrestments, in the hands of the company's supercargoes at sea, or of their factors abroad; and found the same liable to be made furthcoming by the said partners to the creditors arresters, so far as the same have been made good to the company by the said supercargoes or factors.

*C. Home, No 209. p. 347.*

\* \* \* The same case is thus stated by Lord Kames :

A SET of Glasgow merchants having contributed a common stock to carry on a joint trade to the West Indies, by purchasing a ship, loading her outward, and, with the produce, to purchase a homeward cargo; one of the partners became bankrupt after the society had subsisted several years. Some of his creditors used arrestments in the hands of the company, and he dying soon thereafter, others confirmed his interest in the company. A competition ensued betwixt these different sets of creditors, where it was *objected* to the arresters, That arrestment is

not proper execution to carry a partner's stock in a trading company. This point was new, and produced a hearing in presence. The sum of what was pleaded for the executor's creditors, was as follows: They admitted, in the *first* place, That in all trading companies the common stock belongs to the company, in the same manner as in companies incorporated by charter; and that the company debts must come off the whole head of the company's stock, before any partner can draw his share. They proceeded to ascertain, as follows, the nature of the share and interest that belongs to a member of a trading company. A man who joins as a partner, pays in his proportion; the money is sunk into, and becomes part of the company's stock: What the man gets in lieu of his money, is a *right of partnership*; whereby, on the one hand, he is entitled to a proportion of the profits arising upon the joint trade; on the other, is subjected to a proportion of the loss; and, in all events, to draw a proportion of the common stock, when the company is dissolved. They observed, that this right of partnership is, properly speaking, the only thing that can be called a partner's stock; though, in common language, the money contributed by a partner is called his stock; which is not without a meaning, because the extent of a right of partnership is in proportion to the money contributed, unless the contrary be specified. Hence the stock belonging to the company, is a very different thing from the stock of any particular partner: The company's stock is made up of bonds, bills, goods, houses, ships, lands, &c. which, considered as an *universitas*, belong to the company as if it were a politic body: The stock belonging to a partner, does not affect any subject nor any person; it is neither a right of property nor of credit; it is a right different from both; by which the partner is entitled to a proportion of the profits arising from the joint stock.

From these premises it was inferred, that a partner's stock in a trading company, cannot be subject of arrestment. *Imo*, No other subjects but debts or goods are described in an arrestment, and therefore no other subject can be affected by it. A right of fishing, a right of division, servitudes, and privileges of all kinds, are legal subjects, none of which can be affected by arrestment; because none of them can be brought under the denomination of debts or goods. A right of partnership is similar to these as to the point in dispute. *2do*, As the effect of an arrestment is to oblige the arrestee to detain the subject till it be called for by the arrester, in a process of furthcoming, nothing can be the subject of an arrestment but what can fall under detention or custody; which cannot be said of a right of partnership, more than of a right of servitude. A right of partnership is not a claim, nor *jus crediti*; the company is not liable in any sum, nor in any prestation; a partner's stock is not in their custody or keeping to be made furthcoming by them.

It was further *urged*, That, when the arrestments were laid in the hands of the company, the whole stock belonging to the company was either in the hands of their supercargoes at sea, or of their factors abroad; and therefore, supposing the arrestments otherways well founded, there was nothing in the company's hands to be made furthcoming.

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The arresters *maintained*, That a partner's stock is a proper *jus crediti*, which he purchases with his money that goes into the company's stock; similar to a bond of borrowed money purchased with a sum, the property of which is transferred to the debtor; differing only in the following particular, that, instead of a certain yearly profit, the profits are casual, depending upon the success of the company trade; that the company is the debtor; for does not a proper action lie against the company, at the instance of every partner, to make his stock effectual, whether by accounting for the profits, or by delivering to him a proportion of the company's stock? Were not the company debtors to each particular partner, no action could lie against the company *communi dividendo*, nor an action to account for profits, but only against the intromitters with the company's stock and profits.

Hence it was inferred, That a partner's stock, being properly a company debt, is arrestable, and may be ordained to be detained by the company, till it be called for in an action of furthcoming. And, if so, it is of no importance whether or not the company's effects were in the hands of supercargoes or factors, when the arrestments were executed. When a partner's stock is transferred to his creditor by a decret of furthcoming, the profits arising after the arrestment are transferred with the stock; precisely as annualrents are, that become due after arrestment of the bond.

The arresters *insisted* on a separate topic, That, by their debtor's bankruptcy, the society was dissolved as to him; after which there remained nothing with him but a claim against the company for a proportion of the common stock, *deductis debitis*; which, in all views, must be the subject of an arrestment.

The Court, laying bankruptcy out of the question, were of opinion, That a right of partnership in a trading company is arrestable; and consequently, that the supervenient profits, from the date of the arrestment to the decret of furthcoming, will be carried. They considered, that a right of partnership, after a partner's death, may be confirmed, to the end of pursuing a division of the company's effects; and were of opinion, That an arrestment, with a decree of furthcoming, will carry every subject which can be confirmed. And to prove that a right of partnership is arrestable, even while the society subsists, an example was given of bank stock, which *de praxi* is carried by arrestment and forthcoming. And so they adhered to the Ordinary's interlocutor, which was in the following terms: ' Finds, That it was competent for the creditors of the bankrupt partner, to affect their debtor's interest in the co-partnery by arrestment: And that the arrestments laid in the hands of the remaining partners did habilely affect the same, though the company effects were, at the date of the arrestments, in the hands of the company's supercargoes at sea, or of their factors abroad; and finds the same liable to be made furthcoming to the creditors by the partners, as far as made good to the company by their supercargoes or factors.'

But here it was not understood, that an arrestment can carry a right of partnership to any other effect than to pursue a division. The Court was not of opi-

nion, that an arrefter is entitled to be a partner in place of his debtor. Hence it may be inferred, That an arrestment of a partner's stock, will not carry the benefit of any new adventure, begun after the date of the arrestment. (See SOCIETY.)

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*Rem. Dec. v. 2. No 33. p. 50.*

\* \* \* The same case is also thus reported by Lord Kilkerran :

AFTER a co-partnery in trade to the West Indies had for some time subsisted among certain Glasgow merchants, Robert Robertson, one of the partners, gave way, and his creditors arrested in the hands of the other partners.

Mean time Robertson died, and others of his creditors confirmed his interest in the company ; and, in a competition between the arresters and executors-creditors, it was *objected* to the arrestments, that they were not an habile diligence to affect a partner's interest in a company, as such interest is neither a claim of credit against the company, (for the company is liable in no sum to the several partners,) nor a right of property ; for the property of all goods and effects contributed belongs to the company considered as an *universitas*, and is the company's stock ; but what each partner has, is not a right to any of these goods *pro indiviso*, but is a right of partnership, whereby he is entitled to a proportion of the profits; and subjected to a proportion of the loss, and is entitled to draw a proportion of the common stock when the company dissolves. And this right of partnership, or stock of a partner, was argued to be a *jus incorporale*, not affectable by arrestment, but only by adjudication ; for where there is neither a debt due by the arrestee, nor effects in his hands, there are no habile terms for an arrestment.

*Separatim*, that in all events the arrestments were ineffectual, in so far as, when the arrestments were laid on in the hands of the other partners, the whole stock belonging to the company was either in the hands of their supercargoes at sea, or their factors in the West Indies ; and therefore, supposing the arrestments to be habile diligences, there was nothing in the company's hands to be made furthcoming.

*Answered* for the arresters, That they could not at all admit what was pleaded for the executors, That when a partner is divested of the property of what he contributes to the society, he gets not, in place thereof, either a right of property or credit ; on the contrary, they apprehended that each partner, when he makes his contribution, becomes creditor to the company, as well for his proportion of the stock itself, as for his proportion of the profits made upon it. This proportion the company has power to detain till the company debts are paid ; but whatever remains free, the company are debtors in it to each partner, in proportion to what he contributed, which therefore his creditor is entitled to affect by arrestment and furthcoming ; and if that is so, it was immaterial, that, in the present case, the company's effects were in the hands of their factors or supercargoes when the arrestments were executed ; for whatever is in the hands of their supercargoes or factors, is in the eye of the law in their own hands ; and when a partner's stock is affected by arrestment, and transferred to his creditor by a decree of

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Upon this debate, the LORDS found, ' That it was competent for the creditors of Robert Robertson to affect his interest in the company by arrestment, and that the arrestments in the hands of the remaining partners did habily affect the same, though the company's effects were, at the date of the arrestments, in the hands of the company's supercargoes at sea, or of their factors abroad; and found the same liable to be made furthcoming by the partners to the creditors, so far as the same had been made good to the company by their supercargoes or factors. (*See SOCIETY.*)  
*Kilkerran, (ARRESTMENT.) No 10. p. 40.*

1742. December 9.

ELIZABETH MACKENZIE, Relict of PATRICK DURHAM, against GRAHAM & Others.

No 53.

FOUND that arrestment in the hands of a purchaser, at a judicial sale, is not an habile diligence to affect the share of the price for which the creditors are ranked, in respect that, notwithstanding the sale, the creditors debts stand still secured by adjudication till payment.

*Fol. Dic. v. 3. p. 40. Kilkerran, (ARRESTMENT.) No 11. p. 42.*

1743. February.

CREDITORS of MR JAMES HOG, Lecturer in the Tron-Church, against The TOWN of EDINBURGH, and the said JAMES HOG.

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Whether the annualrents of a sum mortified for the behoof of a lecturer in a church, are arrestable for his debts?

JAMES HOG being received lecturer in the said church, was thereby entitled to the annualrents of L. 1000 Sterling yearly, which had been mortified for that purpose; his creditors arrested the same in the hands of the Magistrates.

In the furthcoming, Hog appeared, and *pleaded*, That the subject arrested being a fund appropriated and set aside for a certain purpose, could not, even by legal diligence, be diverted to any other purposes, so as to disappoint the intention of the mortification. Indeed, where an obligation is granted to a man entirely for his own behoof, and where the debtor has no interest, other than to pay securely, such a subject is attachable by all sort of legal diligence; but the case is quite different, where an obligation is granted *ad certum effectum*, and where the granter has an interest to see the money applied to the purposes for which the same is destined. In that case, as the money cannot be applied to other purposes, it cannot be affected with legal diligence, *e. g.* A servant's fee is not arrestable, because it is appropriated to the maintenance and support of the servant, without which he would be incapable to perform his work; the master has a direct interest to apply the money this way, that he may have the benefit of the servant's work; and the servant has an interest, because he is bound to perform his work, which he cannot possibly do if he has not his wages: the application of which to the present question is obvious. It is true, this doctrine admits of a limitation; if the