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to give the necessary directions for carrying the judgment into execution.

For the Appellant, *Alex. Wight, Geo. Ferguson.*
For the Respondents, *Ilay Campbell, R. Dundas.*

NOTE.—In a later case, Molle *v.* Riddle, the same point as occurs in the first branch of this case, was decided 13th December 1811, Fac. Coll.

MATTHEW BOULTON, Esq. and Others, Creditors of SAMUEL GARBET, late of Birmingham, and of Prestonpans, in Scotland, Merchant, a Bankrupt, - } *Appellants;*

MESSRS. MANSFIELD, RAMSAY, & Co. of Edinburgh, Bankers; MESSRS. DOUGLAS, HERON & Co., late Bankers in Ayr; and WALTER HOGG, Trustee for the Creditors of SAMUEL GARBET & Co. of Carron Wharf, - - - - } *Respondents.*

House of Lords, 18th April 1787.

COPARTNERY.—An agreement dissolved a Company, and transferred the retiring partner's interest in stock, &c. of the concern, to the other partners, but provided that he was still to have a share of the profits of the concern. In a question with creditors, held, that the person so retiring was still a partner of the firm, and liable as such.

A copartnership was entered into by Samuel Garbet and Dr. John Roebuck of Birmingham in 1750, for the period of 40 years, and had subsisted, and had been carried on under the firm of "*Roebuck and Garbet,*" until the year 1766. The object of the firm was, the manufacture of aquafortis, and refining gold and silver, chiefly originating with the invention and discoveries of Dr. Roebuck, and which manufacture was carried on in Birmingham. The Company had besides, other works at Prestonpans, in Scotland, principally for making oil of vitriol.

In January 1766, James Farquharson, one of their clerks,

was taken into the parternership at the Birmingham branch, which was thereafter carried on under the firm of "*Samuel Garbet & Co.*;" but the social name continued as before in regard to the Prestonpans branch, until September of that year; when a new agreement was entered into by Dr. Roebuck and Mr. Garbet. This agreement recited the articles of copartnery, and set forth, that it had now become inconvenient to the parties to carry on the said trade and firm *any longer in copartnership*; and therefore that they had agreed that the articles of copartnership should thenceforth cease and determine; but that the said parties should, notwithstanding, be equally entitled to the benefit of the said trade for time to come; and that Mr. Garbet should carry on the said trade for the term and purposes aftermentioned, without the interference of Dr. Roebuck.

It appeared that Dr. Roebuck, according to a settled account, was indebted to the copartnership over and above his share of the stock and property of the concern, in the sum of £3587. 6s. 7d. And it was mutually agreed on that the partnership should be dissolved, as if the same had never been entered into, Dr. Roebuck, on his part, assigning and conveying to Garbet all his part and share in the debts, stock, property, &c. of the Company. The agreement further provided, that Mr. Garbet was to carry on this trade for 50 years, without any molestation from Dr. Roebuck; the latter, on his part, binding himself that he, during that term, should not carry on any such trade. It was also stipulated that Mr. Garbet was to keep books of the concern, which were to be accessible only to Dr. Roebuck or his executors; and that the profits therein, so far as applicable to Dr. Roebuck's interest, were to go in the first place to extinguish the foresaid debt of £3587. 6s. 7½d; and not until then was he to uplift any profit out of the concern. The deed contained a disposition and assignation to the Prestonpans works.

After this agreement, the social name of the firm of "Roebuck and Garbet," was laid aside; and the business, both at Birmingham and Prestonpans, carried on by Mr. Garbet; but, in point of fact, it appeared that after this date, Mr. Garbet used the same firm at Prestonpans as had been done at Birmingham,—namely, "Samuel Gar-
"bet & Co;" and bills were drawn and accepted in this form both at Birmingham and Prestonpans. In the latter place the business was entirely managed by Mr. Downie.

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In 1772, James Farquharson became bankrupt, after which, the addition of "*Company*" to the name of Samuel Garbet, in the Birmingham branch, was dropt.

Mr. Garbet himself became bankrupt in 1782; and a commission of bankruptcy was issued by the name of "Samuel "Garbet of Birmingham, merchant," in consequence of which, the works, effects, &c. at Birmingham were seized and sold, and the proceeds distributed as the private estate of Mr. Garbet.

1782. A sequestration was also at same time issued under the bankrupt act, 12 Geo. III. c. 72, in Scotland—the petition on which being presented in name of the respondents, Mansfield and Company, and Douglas, Heron and Company, as creditors of the said *Samuel Garbet*, wherein it was set forth, that Mr. Garbet had for many years carried on business in England and Scotland, under the name of Samuel Garbet and of Samuel Garbet and Company; but nothing was stated about Dr. Roebuck being a partner. But at the first meeting of creditors which took place in Scotland, it was brought under the notice of the meeting, that Dr. Roebuck had all along been a partner of the trade at Prestonpans, and that the effects were consequently first liable to payment of the joint debts. The creditors who made this allegation further stated, that as they were copartnery creditors, they had a deep interest in the matter. It was agreed that the sequestration should proceed as it stood, and the estate be converted into money, reserving all objections and all prior claims until the distribution thereof.

The respondent, Mr. Hogg, being elected trustee, proceeded to realize the whole estate; which being done, he brought the present action of multiplepoinding to try the question between the two competing class of creditors.

The appellants were the private creditors of Samuel Garbet alone; and contended, That money in the hands of the trustee, as arising from the private estate of Samuel Garbet, must be distributed among his creditors rateably.

The respondents, on the other hand, maintained that the money arose from the joint estate of Roebuck and Garbet, that between these two gentlemen there was still a subsisting copartnership, notwithstanding the deed of dissolution and agreement in September 1766; that the copartnership had not, in point of fact, been dissolved by that deed; and that, at all events, such deed could have no effect, as latent and not published, to alter the responsibilities in a question with

creditors; consequently the funds fell to be distributed among the copartnery creditors in the first place. 1787.

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The respondents, Mansfield, Ramsay and Company, further stated, that their demand arose for a balance of a current account between them and Roebuck and Garbet, commencing in 1765, when that partnership certainly subsisted. That they had no intimation of Dr. Roebuck's leaving the concern in 1766; and that they continued to advance money from time to time upon account with Downie, their Prestonpans manager, whose letter was produced, acknowledging receipt of "my accounts for Messrs. Roebuck and Garbet," up to 1773; but nothing was adduced to show that this firm was used as a signature. Sept. 24, 1766.

Douglas, Heron and Company's (the other respondents) demand arose upon an account for money advanced by them from time to time, commencing in August 1771, which in their own books was titled simply "Patrick Downie of Prestonpans;" and they produced a letter signed "Samuel Garbet and Company," dated 7th Jan. 1771, whereby *they* engaged to be answerable for any money advanced to Mr. Downie; and likewise produced four bills, two of which were accepted by Samuel Garbet and Co., and the other two by Samuel Garbet.

Mr. Hogg farther claimed on the same ground, as trustee for Samuel Garbet and Company, who, he alleged, were creditors of Roebuck and Garbet, which company was continued by Samuel Garbet and Co., Roebuck being all the time a partner in that concern.

The case was reported by the Lord Ordinary to the Court. The Lords at first found for the appellant, on the ground that the partnership with Roebuck was dissolved, but on reclaiming petition the Court, of this date, pronounced this interlocutor: "The Lords having advised this petition, with "answers thereto for Matthew Bolton and other creditors of "Samuel Garbet, and having also considered the correspon- Nov. 21, 1786.
"dence that passed between the petitioners and Messrs. "Garbet and Co. of Prestonpans and their managers, both "prior and posterior to the period when the petitioners "granted them the cash accounts, and that the articles and "agreement entered into between Dr. Roebuck, and Samuel "Garbet, partners of said company, dated 26th September "and 14th October 1766, was a latent and secret deed, un-"known to the petitioners (respondents); and therefore "find that the petitioners (respondents) are preferable upon

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"the subjects and funds *in medio* to the private creditors of "the said Samuel Garbet; and remit to the Lord Ordinary "to proceed accordingly."

Upon the separate petition of Douglas, Heron and Co. the Lords pronounced an interlocutor, of same date, in the same terms.

And upon the petition of the respondent Mr. Hogg, they remitted the same to the Lord Ordinary, to do therein as he might deem just. The Lord Ordinary thereafter preferred Dec. 13,1786. Mr. Hogg *pari passu* with the other respondents.*

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The only question is, Whether the property and effects at Prestonpans belonged, at the date of the sequestration awarded against Samuel Garbet, to him singly, or to him and Dr. Roebuck jointly, in copartnership? By the deed of 1766, it is most clearly shown, that the partnership which previously existed between them was thereby dissolved; and that Dr. Roebuck had actually conveyed and disponed to Garbet his share of, and all interest in the stock, property, utensils, &c. at Prestonpans, which thereupon became vested in him only. And there is no evidence whatever to show that this was other than a real *bona fide* transfer of the whole estate from Dr. Roebuck to Mr. Garbet. Nor is it proved that, after this event and transaction, that the firm of Roebuck and Garbet was ever used, or that Dr. Roebuck ever interfered in the concern as joint proprietor or partner. On the con-

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* Note on Lord President Campbell's Papers as to the grounds of the judgment in the Court of Session.

PRESIDENT CAMPBELL.—"See Downie's letter, 24th September 1766. Balance then as high as ever. This was two days before the dissolution on 26th September. Correspondence read over—in same tenor. Garbet's letters conceal dissolution. Doubt if partnership truly dissolved. Letters always mention a company.—Petitioners deceived.—Fraud.—Latent deed.—Garbet's creditors cannot take advantage of it."

LORD BRAXFIELD.—"Clear that former copartnery dissolved, and no new company created. But now clear for altering the interlocutor.—This agreement may regulate matters between those two persons;—but of great importance to credit that the public should be apprised of any dissolution. Common mode is to intimate in Newspapers. Dr. Roebuck, in question with creditors, must be held as a partner still."

trary, Mr. Garbet assumed to be, and continued the sole owner, down to his bankruptcy. And it is no answer to this to say, that as by that deed, Dr. Roebuck was to have a share of the profits, that therefore he continued a partner, and as such was liable; because this was merely a share to be paid him for a certain purpose, and can have no more effect than if Garbet had engaged to give him an annuity, or to pay him a specific sum for renouncing the copartnership in his favour.—Further, there was no obligation in law, which made it necessary to publish the dissolution of the copartnery to the world; and the acknowledged fact of the partnership being laid aside, was sufficient notification to all concerned.

Pleaded for the Respondents.—The agreement 1766 did not dissolve the copartnership between Dr. Roebuck and Mr. Garbet. The terms of that deed do not, in themselves, import such a dissolution, and the subsequent conduct of the parties shows it was not intended to have that result. The funds in dispute are therefore company funds, and must be applied, in the first place, to pay the respondents, who are company creditors. But even if this deed did, in point of fact, dissolve the company, still, in consequence of the concealment of this from the public, and the transacting business with the respondents as if the company still subsisted, was, on the part of Mr. Garbet, grossly fraudulent, so as to deprive his private and individual creditors from deriving any benefit from it. Because the dissolution of the copartnership never having been made public, but having remained a private and latent transaction, Dr. Roebuck stands bound to the respondents for their whole debt, reserving his relief against Mr. Garbet himself, or his creditors claiming through him; and, in virtue of this right of relief, the respondents, as creditors to the Doctor, are preferable over the funds in dispute.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For the Appellants, *Ilay Campbell, John Scott, Arch. Campbell.*

For the Respondents, *R. Dundas, Edw. Bearcroft, W. Miller.*

NOTE.—Unreported in Court of Session.