the debt was never constituted against the company—Bell's Com., ii., 508.

The pursuer argued—The arrestment used in the hands of Alexander Weir was good—Bell's Com., ii. 555; *Elliot* v. *Aiken*, June 23, 1869, 7 Macph. 894.

At advising—

Lord Young—This is an action for damages raised against a company trading in London under the name of Charles Dufourcet & Company. The damages are claimed for breach of a contract made between them and the pursuer, who is a merchant in Leith, by which the London merchants sold to the pursuer a cargo of boneshavings. The pursuer directed the cargo to be delivered at Ayr; the ship sailed, but on arrival the pursuer declared the goods were not according to contract, and he accordingly rejected them, and now claims damages.

The *forum* is in England, but on a rule of the law of Scotland the pursuer says he has arrested a debt in Ayr due to Dufourcet & Company by a debtor there, in which case the action may be pursued against the English debtor in Scotland. The propriety of this rule is questionable, and it is a rule which is not to be given effect to unless the arrestment be good in all respects.

The debt due to Dufourcet & Company was the balance of the contract price of bones sold by the defenders to Weir & Company in Ayr. The contract was in writing, and perfectly distinct. In it the defenders were the sellers, and Weir & Company the buyers, and the contract price had been paid. The arrestment was used in the hands of Alexander Weir, and was of any sums of money due by him to the defenders, and that is contended to be a good arrestment of the debt of the company.

I am of opinion that arrestment of a company debt should be in the hands of the company, and bear to be for money owing to the company, and arrestment in the hands of an individual partner for sums of money due by him will not found jurisdiction against a party to whom a debt is owed by the company. I cannot arrive at any other conclusion on principle or authority. I am therefore of opinion that the Lord Ordinary's interlocutor is wrong.

Lord Ormidale—I concur. I cannot say that I entertain any doubt about the case, which seems to me perfectly clear.

During the discussion several tests have been put before us. (1) Suppose arrestment had been used in the hands of Alexander Weir or M'Geachy on the one hand, and of the company on the other, and a competition arose as to which was to prevail, it is admitted that it would be that in the hands of the company. (2) Suppose arrestment had been used in the hands of Weir, as here, that would not prevent the company from paying its debt. This arrestment so used did not attach any of the company's debts.

These tests appear to me conclusive in addition to the principle that a company has a separate *persona*; and therefore sequestration against a company does not comprehend the assets of an individual partner unless he be the only partner. Then, and only then, are his effects carried by such a sequestration.

I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled and the action dismissed.

Lord Gifford concurred.

The Lord Justice-Clerk was absent.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Reclaimers—Trayner—Wallace. Agents—Boyd, Macdonald, & Co., S.S.C.

Counsel for Respondent—Guthrie Smith—Strachan. Agent—David Hunter, S.S.C.

Saturday, June 19.

SECOND DIVISION.

SPECIAL CASE—MONCRIEFF MITCHELL AND ANOTHER (TRUSTEES FOR BEHOOF OF CREDITORS OF MORRIS POLLOK & SON), AND OTHERS.

Agreement—Condition—Trust.

M. *primus*, anxious to retire from a manufacturing business which he carried on successfully with M. *secundus*, his son and sole partner, entered into an agreement by which he agreed to hand over to the latter his whole interest in the concern on condition, *inter alia*, that the latter should "invest £2000 for behoof of M. *tertius*, his son (then an infant), and credit him with that amount in the books of the firm—the interest on which sum was to be accumulated annually until M. *tertius* should attain majority or get an interest in the business, when the accumulated sum of principal and interest was to be put into the business as his share or part of his share of capital in the event of his becoming partner in the said business, and in the event of his refusing to become a partner the accumulated sums were to be credited in the books of the firm to the whole children of his son, equally among them, and paid to them on their respectively attaining majority." The firm several years subsequently suspended payment before M. *tertius* had attained majority.—*Held* (*diss.* Lord Gifford) that the provision contained in the agreement constituted a contingent trust for the benefit of M. *tertius*, and failing him the other children of M. *secundus*; and the fulfilment of the conditions on which that benefit was contingent having been rendered impossible by the insolvency of the firm, that the trust resulted to M. *secundus*, and through him to his company creditors.

Morris Pollok *primus* and his son Morris Pollok *secundus* were the two partners of Morris Pollok & Son, a firm carrying on a prosperous business as silk throwsters in Govan. As Morris Pollok *primus* was desirous of retiring from the firm, he on the 28th May 1861 entered, together with his son, into the following minute of agreement, by which it was agreed—"(First) That the said first party shall retire from and cease to be a partner in the said concern of Morris Pollok & Son as at

the 31st day of May 1861, and that his retirement shall be advertised in the *Gazette* and newspapers in the usual way; (Second) That the business carried on by the said company, and the whole property, stock, and funds belonging thereto, and generally the whole assets of the said company (under the burdens after mentioned), and the whole of the said first party's right, title, and interest therein, shall be and are hereby made over to the said Morris Pollok younger, on condition of his coming under the obligations after mentioned; (Third) For which causes, and on the other part, the said second party shall be bound, and hereby binds and obliges himself, to grant in favour of the said first party a liferent of the mansion-house, &c.; and the said second party shall also grant, and hereby binds and obliges himself, to grant a bond of annuity binding himself to pay to the said first party an annuity of £500 during all the days and years of his life, and in which bond of annuity the heritable property of the said company shall be conveyed to the said first party in security of the payment of the said annuity; . . . . (Fifth) That the said second party shall further invest the sum of £2000 for behoof of his son Morris Pollok *tertius*, or credit him with that amount in the books of the said firm, and the interest upon which sum, at the rate of 4 per cent. per annum, shall be accumulated annually until the said Morris Pollok *tertius* shall attain majority or get an interest in the business, when the accumulated sum of principal and interest shall be put into the business as his share or part of his share of capital in the event of his becoming a partner in the said business, and in the event of his refusing to become a partner in the said business the said accumulated sum shall be credited in the books of the said firm to the whole children of the said Morris Pollok younger, equally among them, and the shares of said sum falling to each of said children shall be paid to them on their respectively attaining majority."

The conditions of this agreement were duly fulfilled during the lifetime of Morris Pollok *primus*, and thereafter the business was carried on by Morris Pollok *secundus* as sole partner. Morris Pollok *tertius* was at this time an infant.

The £2000 mentioned in the fifth clause of the agreement was not invested, but was credited to Morris Pollok *tertius* in the books of the firm. For many years subsequent to 1861 the firm was quite solvent and able to set apart the interest which accrued on the said sum of £2000. The accumulation of principal and interest went on accordingly year by year down to 1875 in the books of the firm, on the basis of there being a subsisting debt due by the firm under the agreement of 1861, and in particular clause 5 thereof.

In the spring of 1879 the firm was, on account of financial difficulties, compelled to suspend payment and to arrange with their creditors for a liquidation of their affairs. A voluntary trust-disposition and assignation was accordingly granted by them for behoof of their creditors on 16th April 1879, and under it Moncrieff Mitchell and Robert Reid, chartered accountants in Glasgow, were empowered as trustees to receive and adjudicate on the various claims lodged, and they appeared as the first parties in this Special Case. The second party, William Holms, M.P. for the Burgh of Paisley, and a manufacturer in Glasgow, appeared as attorney for Morris Pollok *tertius*, and claimed "to be ranked for £4668, 13s. 7d., being the accumulated sum of principal and interest as at the 16th April 1879—the date of the suspension of Morris Pollok & Son—payable in virtue of the fifth clause in the 1861 agreement; and alleged 'that the said principal and interest is due to the said Morris Pollok younger (*i.e.*, Morris Pollok *tertius*), and payable to him on his attaining majority, which will occur on 12th October 1880, in respect while he was and is willing to become a partner in the said business of Morris Pollok & Son, yet there is no going business of which he might become a partner, and the accumulated sum of principal and interest foresaid, intended as his share of capital, is now conveyed to the said trustees for behoof of the creditors.'"

This claim the first parties rejected, and maintained that as trustees foresaid they were under no obligation whatever to anyone in respect of the said agreement, and that, even supposing any obligation thereunder had at one time subsisted against the firm of Morris Pollok & Son, it had come to an end in consequence of the insolvency and stoppage of the said firm, and of there being no going business of which Morris Pollok *tertius* might become or elect to become a partner, and in consequence of the condition on which the other children of Morris Pollok *secundus* were to come in never having been purified.

The second party and the third parties (who were the children of Morris Pollok *secundus*) maintained that in respect of the said minute of agreement, and the credit entries in the books of the said firm which followed thereon, there was a binding obligation on the firm of Morris Pollok & Son to implement the provisions of the fifth clause of the said minute of agreement, and that the £2000, with interest accumulated annually down to the date of the insolvency of the firm, was a subsisting debt due by the said firm of Morris Pollok & Son, and which the first parties, as trustees foresaid, were bound to rank on the trust-estate *pari passu* with the other ordinary debts. The second and third parties, however, differed on the question as to who was now entitled to the said debt of £2000 with interest. The second party maintained that Morris Pollok *tertius* never having refused to become a partner in the business of Morris Pollok & Son, and the prospect of his being offered such partnership being now at an end, he was entitled, on a sound construction of the fifth clause of the said agreement, to the said sum of £2000 and interest. The third parties, on the other hand, maintained that as *de facto* the said Morris Pollok *tertius* had not and could not hereafter become a partner of the said firm, the said £2000 with interest, on a sound construction of the said fifth clause, fell to be paid to the whole children of Morris Pollok *secundus* equally among them. There was a further dispute between the parties as to the mode of calculating interest on the said sum. The first parties maintained that on the assumption that there was a debt due, the interest thereon fell to be calculated as simple interest only. The second and third parties maintained that interest fell to be added to the principal at the end of each year, and the interest for the next year calculated on the total sum throughout, according

to the system followed in the cash-book of the firm of Morris Pollok & Son.

In these circumstances the parties agreed to submit this Special Case, and humbly requested the opinion and judgment of the Court on the following questions:—"(1) Is the £2000 set apart in the books of Morris Pollok & Son, as mentioned in the foregoing Case, with accumulated interest at four per cent. since 31st May 1861 to 16th April 1879, a subsisting debt due by the said firm, and are the first parties, as trustees for behoof of the creditors on the estate of Morris Pollok & Son, entitled and bound to rank the said debt on the said estate *pari passu* with the other ordinary debts of the said firm? (2) Assuming the preceding question to be answered in the affirmative, is the interest directed by the minute of agreement of 28th May 1861 to be accumulated annually to be calculated as simple interest or as compound interest? (3) If question 1 be answered affirmatively, is the second party, as representing Morris Pollok *tertius*, entitled to payment of the whole dividends payable from the estates of Morris Pollok & Son in respect of the said £2000 and interest? or do the said dividends fall to be paid for behoof of the whole children of Morris Pollok *secundus* equally among them?"

The second and third parties relied on the cases of *Edmonds* (De Gex, Fisher, & Jones' Reps. 488; also quoted in Lindley on Partnership), 1189; *Dunbar* v. *Scott's Trustees*, July 18, 1872, 10 Macph. 982.

At advising—

Lord Gifford—This case is attended with some nicety and difficulty, but I have come to be of opinion that the trustees for the creditors of Morris Pollok & Son, and of Morris Pollok *secundus*, the sole partner of that firm, are bound to rank the £2000 and interest as a subsisting debt due by the said firm and by the sole partner thereof.

The debt arises out of an onerous minute of agreement and contract of dissolution entered into between Morris Pollok *primus* and Morris Pollok *secundus*, dated 28th May 1861—a contract involving valuable considerations in reference to both parties, and a contract which has been acted upon ever since its date. When that contract was entered into, the two parties thereto—Morris Pollok *primus* and his son Morris Pollok *secundus*—were the two partners of Morris Pollok & Son, silk throwsters at Govan, and the object of the agreement was to provide for the retirement of Morris Pollok *primus* from the firm, he being secured in certain retiring allowances, and to provide eventually for the adoption as a partner of Morris Pollok *tertius*, the grandson of Morris Pollok *primus*, and who was then a child about a year old.

By the minute of agreement the whole business carried on by the firm, and the whole property, stock, and funds belonging thereto, and in particular the share of the stock and assets belonging to the senior partner Morris Pollok *primus*, are made over to his son Morris Pollok *secundus*, "on condition of his coming under the obligations under mentioned;" and then the deed imposes various definite pecuniary obligations upon Morris Polok *secundus*. These may be described shortly thus—(1) to secure to the retiring partner certain liferents and annuities therein mentioned; and (2) that the continuing partner Morris Pollok *secundus* shall undertake certain pecuniary obligations to a Mrs Fleming, and to Morris Pollok *tertius*, the grandson of the retiring partner, and the son of the partner to whom the business and its assets are made over. To Mrs Fleming the continuing partner is taken bound to pay a sum of £1000 at any time within five years, in his discretion; and then in reference to Morris Pollok *tertius* the provision is in the fifth article of the agreement, the terms of which are as follows—"(Fifth) That the said second party shall further invest the sum of £2000 for behoof of his son Morris Pollok *tertius*, or credit him with that amount in the books of the said firm, and the interest upon which sum, at the rate of four per cent. per annum, shall be accumulated annually until the said Morris Pollok *tertius* shall attain majority or get an interest in the business, when the accumulated sum of principal and interest shall be put into the business as his share or part of his share of capital in the event of his becoming a partner in the said business; and in the event of his refusing to become a partner in the said business the said accumulated sum shall be credited in the books of the said firm to the whole children of the said Morris Pollok younger, equally among them, and the shares of said sum falling to each of said children shall be paid to them on their respectively attaining majority." The leading object of this clause was to give the grandson on his attaining majority an interest in the business, with a capital equal to £2000 with accumulated interest for twenty years.

Now, I am of opinion that the continuing partner Morris Pollok *secundus* became, both as an individual and as the sole continuing partner of Morris Pollok & Son, a proper debtor under the agreement in the said sum of £2000 and in accumulated interest thereon. I think this obligation of debt was absolute, and was not contingent in any proper sense of the term. No doubt there were contingencies connected with the debt, and created by the peculiar terms of the agreement, but I think there was no contingency provided which in any event would relieve Morris Pollok *secundus* of the debt altogether or discharge him thereof, so that he should not have to pay it to anybody. The primary case contemplated was that Morris Pollok *tertius*, who would attain majority sometime in 1881, should then agree to join his father in business, in which case he should then have a capital equal to £2000 with twenty years' accumulated interest thereon. There is only one other case provided for by the words of the agreement, and that is the case of Morris Pollok *tertius* declining at majority to become a partner with his father, in which case the sum of £2000 and interest is to become the property of the whole children of the said Morris Pollok *secundus*, including Morris Pollok *tertius*, and the shares belonging to each are to be paid to them on their respectively attaining majority. These are the only cases provided for in the agreement, but I am of opinion that in all other possible cases—and there are many cases possible—Morris Pollok *secundus* was in all of them to remain debtor in the full sum and interest.

Here I may remark in passing that there is no distinction in law between Morris Pollok *secundus* as an individual debtor and Morris Pollok

secundus as the sole partner of the nominal firm of Morris Pollok & Son. There is no difference between the debts of a sole trader as an individual and the debts of the firm of which he is sole partner, and the name of which he uses in trade. Both classes of debts rank alike, just as if the whole were, as they really are, the individual debts of the sole traders—see 2 Bell's Com. (M'Laren's ed.) 514—so that no difference will arise in the present case whether the debt now in question is considered as the debt of Morris Pollok *secundus* as an individual or as the debt of the firm of which he was sole partner. The ranking in both cases will be precisely the same.

That the sum of £2000 and interest formed under the agreement a proper debt of Morris Pollok *secundus* is, I think, evident from the following considerations:—(First) The duty of investing or crediting that sum for behoof of Morris Pollok *tertius* is unqualified by the words of the agreement laid upon Morris Pollok *secundus*. It is an absolute engagement, to be fulfilled in every possible event. There is no condition attached. The continuing partner is just as absolutely bound to invest or to credit the sum of £2000 for his son as he is bound to pay the £1000 to Mrs Fleming or to secure the annuity and liferents to his father as retiring partner. (Second) Morris Pollok *secundus* received full value for all these obligations. He got absolutely the company business and his father's share of the stock and assets thereof. In short, the grandfather quite as much purchased and paid for the stock which was intended to set up his grandson as he purchased and paid for his own retiring annuity, or as he purchased and paid for the provision to Mrs Fleming. All three are equally indefeasible. (Third) The true onerous nature of the obligation is made quite clear by the alternative form in which it may be discharged. Morris Pollok *secundus* may either (1) invest the sum of £2000 for behoof of the grandson—that is, he may lend it out on good security, or perhaps even buy heritable property, taking the titles in trust "for behoof of Morris Pollok *tertius*,"—or (2) he may credit Morris Pollok *tertius* with the sum in the books of the firm, and this is just giving him liberty to invest the sum in the business; but in both cases the money is not to be the property of Morris Pollok *secundus*, but is to be exclusively "for behoof of"—that is, the property of,—and held in trust for, the grandson. It is the grandfather's way of providing absolutely for his grandchild. If the sum had been actually invested on loan or on security in the hands of some third party, and the title taken in trust for behoof of Morris Pollok *tertius*, there could, I think, have been little doubt that such sum or security could never have been claimed by the general creditors of Morris Pollok *secundus* or his firm. Not less clearly does it appear to me that the creditors must submit to a *pari passu* ranking for the sum invested with or lent to Morris Pollok *secundus* himself or his firm. The money if invested would not have been the money of Morris Pollok *secundus*, and could not have been carried off by his creditors. I think it makes no difference that instead of being invested on security it was lent to Morris Pollok *secundus* himself. (Fourth) Although there are many possible cases which might occur, and although only two of them are provided for by the words of the agreement, still in no case would Morris Pollok *secundus* escape payment of, or an accounting for, the debt. Suppose the grandson had died in pupillarity, the debt of £2000 and interest would still be due to the other grandchildren, six in number, either as the executors of Morris Pollok *tertius* or as substituted to him by the terms of the agreement. Or suppose Morris Pollok *secundus* to have given up the business and no longer carried on the trade or the firm, this would not have discharged the debt, which would then have belonged to the grandson absolutely, his father having voluntarily rendered it impossible to assume him as a partner. Or suppose at the grandson's majority his father had refused to admit him as a partner, he must still have paid him the debt and interest, that the grandson might employ it elsewhere as his own fund. The counterpart of this case is actually provided for in agreement, for if the grandson at majority had refused to become a partner, the whole sum would have been divided equally between him and his brothers and sisters. If all the grandchildren fail, Morris Pollok *secundus* might have taken the sum as the executor of his own children, but this would not be discharging the debt, but only extinguishing it *confusione*, the debtor therein becoming also the creditor. In no case that I can see, or even imagine, is the debt to be forfeited to Morris Pollok *secundus*, the proper debtor therein, or to cease to be a burden upon him and the firm which he represents. I am therefore for answering the first question put in the affirmative.

The second question relates to the amount of interest—whether it should be calculated as simple interest? I think the words of the agreement are conclusive as to this. It expressly directs compound interest. The interest at 4 per cent. is to be "accumulated annually," and that is just a stipulation for compound interest, which when expressly bargained for is perfectly legal.

The third question involves considerations of some nicety, but I think that the dividends on the debt will belong to Morris Pollok *tertius* alone, and that his brothers and sisters will not be entitled to participate therein.

The grandfather's primary and leading intention was to provide for his grandson and namesake Morris Pollok *tertius* alone. He looked upon his firm and business as a sort of entailed estate to be enjoyed by his elder grandson if he survived. The only case in which the other grandchildren were to be admitted was if Morris Pollok *tertius* should decline to join the business. But this cannot now happen, for the business has been destroyed and terminated by the bankruptcy of the immediate son. I do not think it will do to say that Morris Pollok *secundus* might after settling with his creditors set up the business again and a year hence offer to take his son into partnership. That would not be the partnership in view in terms of the agreement, for such business would not be the business the grandfather contemplated, but really a new business altogether, and a mere dividend upon the £2000 and interest would, whether large or small, not be the capital which the grandfather intended his grandson to have. I think the case is in the same position as it would have been if Morris Pollok *secundus* had voluntarily and at his own hand given up business without the consent of anyone during the pupillarity or minority of Morris

Pollok *tertius*. In such case, and in the present case, he must pay his son the proportion of capital which belongs to him, and as his son has not refused to become a partner in circumstances contemplated by the agreement, the other children are not entitled to share with their brother either the debt or the dividend.

Lord Young—The question is, Whether the insolvent Morris Pollok *secundus* is indebted to either the second party or the third parties, and if so, to which of them, for the sum of £2000 and accumulated interest referred to in the case, to the effect of entitling the one or the other to be ranked under the trust for behoof of his creditors.

That question depends on the legal effect and operation of the fifth article of the minute of agreement of May 1861 between Morris Pollok *secundus* and his father, by which the former, on the occasion of taking over as a sole trader the business heretofore carried on by him and his father in partnership, undertook to hold £2000 at the credit of his own son—then in infancy—and to accumulate interest thereon annually till he attained majority, when, according to the undertaking, the accumulated sum was to be put into the business as his (the son's) share, or part of his share, of capital "in the event of his becoming a partner in the said business, and in the event of his refusing to become a partner in the said business the said accumulated sum" was to be held to the credit of the holder's whole children equally, and the share of each paid on his or her attaining majority.

I have no doubt a man may effectually declare a trust and constitute himself trustee for behoof of another of his own estate or money, and that this may be well done by a written undertaking to hold a specific sum of money to the credit or for behoof of another. The relation of trustee and *cestuique* trust may undoubtedly, in my opinion, be so constituted, and being constituted the Court will enforce the trust according to its terms, expressed or implied. But such a trust may, like any other, be contingent, so that it shall depend on uncertain future events who shall take benefit under it, or even whether any benefit shall be taken at all, in which last case the question would arise, to whom it resulted.

Here, assuming, as I do, that a trust was constituted by the fifth article of the agreement, it is clear that the primary purpose of it was to provide a capital for Morris Pollok *tertius* "in the event" of his attaining majority, and then choosing to enter into partnership with his father in the business which he took over in 1861 from his father. This purpose was conspicuously contingent, contemplating the concurrence of three events, each of them uncertain, viz., first, the survivance of the business for about twenty years; second, the survivance of the child for the same period; and third, his desire to become a partner in the business. In point of fact, the business has not survived, having ceased to exist within about eighteen years. The child is still in minority, and it would manifestly be idle to conjecture whether on his majority—which is still *in futuro*, and may never arrive—he would choose to join the business had it not happened to terminate last year. I must therefore conclude that this primary purpose of the contingent trust has failed, and that nothing can be taken under it, which disposes of the claim of the second party.

With respect to the parties of the third part, I have to remark that their right, or the trust purpose in their favour, was not only on its inception contingent, but that the contingency on which it depended was itself dependent on the prior contingency which affected the right of the second party. It was, in truth, a second contingency added to the first. The undertaking of Morris Pollok *secundus* was in substance this—that if alive and carrying on the business referred to when his son—then an infant—attained majority, he would take him into partnership if he pleased to join, and credit him with a capital of so much as his share in the going concern, and if he declined would divide a like sum equally among his whole children, payable at their respective majorities. This, although a unique undertaking, is intelligible, and enforcible, I assume, against a prosperous man carrying on a business which his son has declined to join on the favourable terms offered to him. But we must, in my opinion, take it exactly as it stands, and have no authority to convert it either into an absolute money obligation in favour of the son or a provision to the family in general, except only in the event of the father's continuance in a prosperous business and the son's willingness to become his partner.

The trust undertaking as it stands, and the legal import of which in my opinion I have stated, was what the father and son bargained for in 1861. It was, judging from its terms, exacted and given in contemplation of continuing trade prosperity down to the majority of Morris Pollok *tertius*, and was not intended to have any operation as an individual or family provision in the event of insolvency occurring before that time. There was a trust undoubtedly, and that not voluntary, in the sense of gratuitous, but it was of the truster's own funds, and contingent with respect to the benefits under it. The purposes expressed and intended having in the event failed, I am of opinion that the trust results to Morris Pollok *secundus* himself, and through him to his estate, now under trust for his creditors, without any claim on the part of either the second or third parties to this case.

Lord Ormidale concurred with Lord Young.

The Court answered the first question in the negative, and found it unnecessary to answer the others.

Counsel for First Parties—Alison. Agent—William Duncan, S.S.C.

Counsel for Second and Third Parties—Jameson—Goudy. Agents—Frasers, Stodart, & Mackenzie, W.S.