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GORDON v. DOUGLAS, HERON & CO.

The grant to General Frazer was of that estate, as so vested in the crown, as fully and freely as if it had been in Lord Lovat, and therefore the appellant has no right to challenge the conveyance of General Frazer to the trustees.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutor therein complained of be affirmed.

For Appellant, *W. Grant, R. M'Intosh.*
For Respondents, *W. Adam.*

(Fac. Col.)

ALEX. GORDON of Culvenan, Esq., . *Appellant;*

DOUGLAS, HERON & Co., Bankers, Ayr, and GEORGE HOME, their Factor, . . } *Respondents.*

House of Lords, 24th Dec. 1795.

PARTNERSHIP — DISSOLUTION OF — TITLE TO SUE.—The Douglas, Heron & Co. Banking Company stopped payment, and having resolved to wind up the concern, they, in conformity with an article in their contract, held a general meeting of the Company, and appointed a committee with full powers to wind up the concern, and authorized the committee, or their quorum, to do so. The quorum of the committee, by commission, delegated their powers on George Home. It was found that a large deficiency required to be made up by the individual partners in proportion to their shares. The appellant, as a partner, refused to pay his share, and action being raised, in name of Douglas, Heron & Co., late bankers in Ayr, and George Home, Esq., their factor and manager; and objection being stated to this title to sue, on the ground that action was not competent in the Company's social name, without also naming the individual partners, the Company being dissolved: Held, that every copartnery must from its nature subsist after its dissolution to the effect of winding up its affairs, supposing there were no provision in the contract to this effect; but, in the present case, there was in the contract a special provision for this purpose, and therefore that the title to sue was unexceptionable.

The appellant was a partner, holding two shares of £500 each, in Douglas, Heron & Co.'s banking concern. The Company proving unfortunate in business, was obliged to

stop payment, and finally resolve to wind up the concern in August 1733, which resolution was fixed on at a general meeting of the Company, they appointing a committee, with full powers to them or their quorum. The quorum of this committee, by a commission signed by them, delegated their powers for this purpose on the respondent, George Home.

The debts of the Company being ascertained, a large deficiency fell to be made up by the shareholders, amounting to £2200 per share, and the appellant being called on to pay the deficiency on his shares, refused, the consequence was, that the respondents raised an action for payment in June 22, 1789. name of "Douglas, Heron & Company, late bankers in "Ayr, and George Home, Esq. of Branxton, their factor and "manager, conform to factory and commission, granted by "a quorum of the committee named for winding up the "affairs of the said Company, bearing date 13th and 14th "August, 3d September 1773, and 12th July 1774;" and concluding that he should be decerned "to make pay-"ment to the said Messrs. Douglas, Heron & Co., and to the "said George Home, their factor and manager, pursuers, of "the above-mentioned sum of £4400 Sterling, as his propor-"tion of the present deficiency in the funds of the Company "and interest thereof, from and since the term of Lammas "1788 years, until payment."

The defences stated to this action were confined to the title to sue, and preliminary in their nature. 1. That as the "concern of Douglas, Heron & Co., *late* bankers in Ayr," at whose instance the suit was raised, was long since and is now a dissolved Company, action was not competent in their social name, without the names of the individual partners. 2. The addition of the name of Mr. Home, as manager or factor, did not mend the matter, because, although he is said to have been appointed by a quorum of the committee of management, yet it did not state that the action proceeded at the instance of that committee or quorum thereof.

The Lord Ordinary pronounced this interlocutor:—"Finds Dec. 24, 1791. "that every copartnery must, from its nature, subsist after "it has been dissolved, or the term for which it was en-"tered into expired, to the effect of winding up its affairs, "although there were no proviso in the contract constituting "it for that purpose: Finds, that the contract in question "does, in the 15th Article, contain a special proviso for that "purpose, which has been followed out, by naming persons "as therein directed: Finds, that the powers and proceed-

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" ings of the said persons were recognized and approved of " by the defender himself in his proposals, 3d January 1774, " given 'to the committee for managing the affairs of " Douglas, Heron & Co.' and in his representation to the " General Meeting in 1778. On all, and each of these " grounds, repels the defender's objections to the title of the Feb. 14, 1792. " pursuers to insist in this action." On representation, this June 16, 1792. interlocutor was adhered to, and, on two reclaiming peti- July 11, —— tions, the Court also adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—Undoubtedly, the copartnery subsists to some effects after its dissolution, but not to all and to every effect. In so far as the joint and separate obligation of the partners are concerned to discharge partnership, engagements to strangers, and their implied engagements to one another, it certainly does subsist. But it does not subsist to the effect of authorizing a number of partners to bring an action against their copartners, in the name and by assuming the style or form of the late copartnership; because of the dissolution, they, as pursuers, have no more right to assume the style and firm of the Company than the defenders have who are sued, and who with themselves have an equal right to assume that style and firm. It is quite evident, therefore, that an action brought in the circumstances of this case, ought to have been by the *whole* individual partners, alleging themselves damnified by the defender's refusal to pay his share of the deficiency. And it makes no difference to this objection, whether the articles, in this case, contain a special provision for the subsistence of the partnership, because that clause cannot be construed to cover a plain and evident irregularity, or mend a glaring defect in the instance. Nor is the proviso in the contract such as to warrant this construction. It only provides, that in the event of a dissolution, " proper persons should be appointed " to levy the whole debts due to the Company, and to turn " the estate and effects into cash, and apply the neat pro- " ceeds thereof, in the first place, to the extinction of the " debts due by the Company; and next, towards reimbursing " the partners of the sums as may have been advanced by " them for carrying on the joint business, and the remainder " to be divided among all the partners proportionally." But no power is given to sue in the form objected to, and no power given to call for money from partners beyond the subscribed stock. Again, it is equally aside from the ques-

tion, to say, that the appellant recognized the proceedings of the committee of partners appointed to wind up the affairs, becauso they are not the pursuers here, and the very objection raised is, that they are not pursuers.

Pleaded for the Respondents.—That this Company does, and that every other company may subsist, after its dissolution, for the purpose of winding up its affairs, and that they may act in all respects as a company, whether in carrying on actions or otherwise, is a point admitted by the appellant. Under the term winding up its affairs, is necessarily implied, the power to bring actions, if necessary, for that purpose, just in the same manner as if no dissolution existed. This being a point of settled law, it is further strengthened by the proviso in the contract in question, which makes the company to subsist after its dissolution, *inter alia* "to *compel* "any partner to contribute more to the company's stock "than the precise sum by him originally subscribed for." The exception to the instance, in so far as brought in the descriptive name or style of the firm, is therefore groundless. The Company has always' been recognized by this style, in the copartnery, in acts of Parliament, and by its own practice in pursuing otherwise, all of which the appellant has homologated, so as to bar him now from stating the objection. He says, that all the individual members ought to have joined in the instance; but all are, in point of fact, joined in the action under the social firm, and it is therefore immaterial which way they appear, whether enumerated or otherwise. Nor is it any answer to this to say, that a corporation only can have such a privilege of so pursuing in its corporate name; because this case is different—to sue in a corporate name is to sue as a body politic; but it does not follow that the rules applicable to such bodies are to be applied to a mercantile company, which is united for a different object. Here the general meeting of partners authorised certain things to be done for the purpose of winding up. In doing this, they necessarily gave instructions to raise an action at the instance of the Company, and the action being so authorised, it can make no difference whether the partners be enumerated, or the social name alone be used. But here, in addition to the style and firm of the Company, there is the factor and manager authorised by the general body of creditors.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed,

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and that the action do proceed in the Court below between the appellant and respondents. And it is further ordered, that an account be taken of all the dealings and transactions of the partnership, and in winding up the affairs thereof, in as far as necessary, to ascertain the loss of the concern generally, to which the copartners are obliged to contribute rateably. And also, what sums have been paid or contributed by individual partners beyond the rateable proportions of such individuals, and applied in diminution of the debts of the partnership; and that the appellant do pay what shall be found to be his proportion of the balance of loss upon the result of such account, rateably with those who had paid their proportions in relief, proportionably of what has been reasonably and properly paid or contributed by any of his copartners beyond their rateable proportions of the balance, so to be ascertained and applied towards diminution of what the whole partners were liable to pay. And with these instructions, the cause be remitted to the Court of Session to proceed accordingly.

For Appellant, *Sir J. Scott, Wm. Grant.*
For Respondents, *George Ferguson, Robert Dallas.*

DAVID LINDSAY, General Disponee of Mrs. Margaret Balneaves, his late Wife, Daughter of John Balneaves of Carnbaddie, ... } *Appellant;*

GEORGE KINLOCH of Kinloch, and JOHN NAIRN, *et e contra.* } *Respondents.*

House of Lords, 17th Feb. 1796.

EXECUTRY—TACITURNITY.—In a claim made for a daughter's share in the executry of her deceased father, thirty-six years after his death. Held, in the circumstances, that there was no free executry, and nothing due to her.

This was an action raised by the appellant, at the distance of thirty-six years, for his deceased wife's share of executry in her father's estate, which after a great deal of procedure