interest and expenses. What the statute enacts is that there is to be no imprisonment for any lesser sum than £8, 6s. 8d., and that debts of a smaller amount shall not be brought up to the statutory limit by adding interest or expenses to the principal. If the debt amounted to more than that sum I see nothing to prevent the creditor recovering it, including interest and expenses, in any way known to the law at that time. I am not satisfied, therefore, that the charge in question for £40, 3s. is within the scope of the Act 5 and 6 Will. IV, cap. 70. But that is merely an academical question, for whether the debtor would have been protected by that statute or not, it is certain that he is protected by the Act of 1880; and if that Act prevents his being imprisoned for the debt in question, it follows that he cannot be made notour bankrupt by such imprisonment.

LORD PEARSON was absent.

The Court refused the appeal.

Counsel for Appellant—Lippe. Agents—Gardiner & Macfie, S.S.C.

Counsel for Respondent—D. P. Fleming. Agents—Laing & Motherwell, W.S.

Friday, January 31.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

AMERICAN MORTGAGE COMPANY LIMITED *v.* SIDWAYS.

Arrestment — Jurisdiction — Arrestment jurisdictionis fundandæ causa — Subject Arrestable—Shares in Limited Joint Stock Company.

Shares in a limited joint stock company incorporated under the Companies Acts in Scotland are arrestable *jurisdictionis fundandæ causa*. *Sinclair* v. *Staples*, January 27, 1860, 22 D. 600, *followed*.

On 21st August 1903 the American Mortgage Company of Scotland, Limited, 36 Castle Street, Edinburgh, raised an action against L. B. Sidway and H. T. Sidway, 5300 Armour Avenue, Chicago, U.S.A. (against whom arrestments had been used *ad fundandam jurisdictionem*), in which they sought decree for £6364, 4s. 7d., conform to a judgment therefor obtained by the pursuers against the defenders in the Circuit Court of Cook County, Illinois, U.S.A., on 21st July 1903.

In order to found jurisdiction against the defenders, the pursuers on 21st August 1903 arrested in the hands of the Missouri Land and Live Stock Company, Limited, 16 Castle Street, Edinburgh, all debts, sums of money, &c., then in the hands of the arrestees and due by them to the defenders, including 755 shares of the said company, belonging to L. B. Sidway, and 22 shares of the said company belonging to H. T. Sidway, and registered in their names respectively.

The defenders, who were admittedly proprietors of these shares on 21st August 1903, the date of the arrestment, pleaded, *inter alia*, no jurisdiction.

On 26th December 1907 the Lord Ordinary (GUTHRIE) found that the arrestment of the shares in question had founded jurisdiction against the defenders, and repelled the plea.

Opinion. — "The pursuers allege they have founded jurisdiction against the defenders, residents in the United States, by the arrestment of certain shares belonging to the defenders in the Missouri Land and Live Stock Company, Limited, which has its registered office in Edinburgh. The defenders are admitted to have been proprietors of these shares on 21st August 1903, the date of the alleged arrestment. But the defenders maintain that by the law of Scotland shares in limited joint stock companies are not arrestable, and therefore there is no warrant for proceeding against them in Scotland. At the date of arrestment, although dividend appears to have been earned, no sum was actually payable to the defenders either in the shape of dividend or return of capital.

"The general rule is thus enunciated by Lord Deas in *Lindsay* v. *London and North-Western Railway Company*, 1860, 22 D. 571, at page 596—'All moveable and heritable property in Scotland is attachable in one way or other. We have poinding to attach what is in a man's own possession; arrestment to attach personal estate in the hands of another; and adjudication to attach heritable property and various other things which cannot be attached by either of the two former diligences.' In the case of ordinary partnerships it is not disputed that, while the assets of the company are not arrestable for debt due by one of the partners, the share of that partner in any balance of the assets belonging to him is arrestable. See Erskine, iii, 3, 24; 2 Bell's Commentaries, 508, note 3, and 536 (i, 3); *Parnell* v. *Walter*, 1889, 16 R. 97, per Lord Kinnear, 924-5; *Cassels* v. *Stewart*, 1879, 6 R. 936, 8 R. (H.L.) 1, per Lord Gifford, 6 R. 956.

"But the defenders deny that the rule regulating ordinary partnerships applies to shares in limited joint stock companies. They found on the principle enunciated in many English cases, such as that of *in re George Newman*, 1895, 1 Ch. 674, *per* Lord Justice Lindley at page 685—'An incorporated company's assets are its property, and are not the property of the shareholders for the time being.' From this they argue that no debt was due by the Missouri Land Company, Limited, to the defenders at the date of arrestment, and therefore their shares in that company could not be arrestable. This seems to me to involve a confusion of ideas. As Mr Bell put it (2 Com. p. 71)—'It is the obligation to account which is the proper subject of attachment.' That obligation exists here as between the defenders and the Missouri Company, and I see no reason, if the obli-

gation is, as it seems to be, a present obligation, of more than nominal value, not alimentary, and not specially appropriated, why it should not form the subject of a valid arrestment, even although an accounting might be required to ascertain its value. The method of making it forthcoming is illustrated by the form of summons in Mr Graham Stewart's Law of Diligence, page 847, and the interlocutor in the undefended case of the *Mallina Gold Company*.

"I think the question is decided by the case of *Lindsay* v. *London and North-Western Railway Company*, 1860, 22 D. 571, in the First Division, and by the case of *Sinclair* v. *Staples*, 1860, 22 D. 600, in the Second Division. No doubt in Lindsay's case, as the defenders pointed out, there were dividends payable on the shares, and also other moveable property, which would of themselves, apart from the shares, have formed sufficient ground for the arrestment, but each of the First Division Judges, the Lord President M'Neill, Lord Ivory, Lord Curriehill, and Lord Deas, expressly affirm the arrestability of shares in a joint stock company. In *Sinclair's* case, where only shares were involved, the defenders argued that the debate turned on whether the proper dilgence was arrestment or adjudication, rather than on the question of whether either was competent. This is true; but the pursuer in that case maintained that arrrestment was not a diligence applicable to a species of moveable property like shares in a joint stock company, and this argument was negatived by the Second Division.

"The defenders contended that these cases were not applicable, *first*, because they were decided in regard to shares in companies under the Joint Stock Companies Act 1856, and the Missouri Land and Live Stock Company, Limited, was established under the Companies Act 1862; and *second*, because the Missouri Company is a limited company. In regard to the first point, I was not referred to any differences between the two Acts which would affect the question now under consideration. The second point disappears when it is observed that the shares of the company concerned in *Sinclair's* case were limited in liability.

"It appears to me to be sufficient warrant for arrestment in this case that there are here shares in a joint stock company, of present ostensible value, belonging to the defenders, whose interest in them is not alimentary and not specially appropriated, which shares give the defenders a substantial interest in the company and its assets, and can be turned at any time into money.

"The defenders also contended that it had not been proved that the shares possessed any value. The proof does not contain any direct statement on this point, but I think I am bound to assume that shares in a company which is regularly paying large dividends and in which there have been periodical returns of capital to the shareholders must possess substantial pecuniary value."

The defenders reclaimed, and argued—Arrestment was not a competent diligence, for shares in a joint-stock company were not arrestable. Shares in a joint-stock company were in a different position from shares in an ordinary partnership. In the former case the shareholders had no right in the company's assets. These belonged to the company, not to the individual shareholders—Lindley on Companies (6th ed.), i, 544; *Lee* v. *Neuchatel Asphalte Co.*, 1899, L.R., 41 Ch. D. 1, *per* Lindley, L.J., at p. 23; *Foster & Sons, Limited* v. *Inland Revenue Commissioners*, [1894] 1 Q.B. 516, *per* Kay, L.J., at 530; *in re George Newman & Co.*, [1895] 1 Ch. 674 at 685. There were four essentials of the competency of arrestment—(1) The arrestee must be debtor to the arrester's debtor under a direct obligation to pay or deliver the subject arrested. (2) The debt must be due at the date of the arrestment. (3) The arrestee must have possession of the subject arrested. (4) The subject must be capable of being made available in a furthcoming. There were two qualifications to these rules —(*a*) The Court had allowed a claim for an accounting to be arrested; and (*b*) Joint property was not arrestable for the debt of one of the co-owners — *Lucas's Trustees* v. *Campbell & Scott*, June 22, 1894, 21 R. 1096, 31 S.L.R. 788. The authorities for these propositions were Ersk. Inst. iii, 6, secs. 6, 8, 15-17; Bell's Com. ii, 69, 71; *North* v. *Stewart*, July 14, 1890, 17 R. (H.L.) 60, *per* Lord Watson at p. 63-64, 28 S.L.R. 397; *Heron* v. *Winfields, Limited*, December 11, 1894, 22 R. 182, *per* Lord Kinnear at p. 185, 33 S.L.R. 137; *Wyper* v. *Carr & Co.*, February 2, 1877, 4 R. 444, *per* Lord President Inglis at p. 446, 14 S.L.R. 299; *Leggatt Brothers* v. *Moss Empires, Limited*, November 5, 1907, 45 S.L.R. 67, *per* Lord President at p. 69 and Lord Kinnear at p. 72; Bell's Prin., sec. 2283. The arrestment of a share in a company was in the same position as the arrestment of a contingent claim. A person buying a share in a company bought a chance of sharing in the capital of the company in the event of the company being wound up, or the chance of a dividend in the event of profits being earned and a dividend being declared. There was no obligation which might be made furthcoming at the date of the arrestment. It was distinguished from a share in a partnership in this, that a partner was always entitled to call his co-partners to account, and an accounting might be ordered at any time. That could not be done in a company. Therefore in a partnership there was an arrestable interest which did not exist in a company—*Douglas* v. *Jones*, June 30, 1831, 9 S. 856; *Baines & Tait* v. *Compagnie Generale des Mines d'Asphalte*, March 15, 1879, 6 R. 846, 16 S.L.R. 471; *Napier, Shanks, & Bell* v. *Halvorsen*, January 29, 1892, 19 R. 412, 29 S.L.R. 343; *Lucas's Trustees* v. *Campbell & Scott, cit. sup.*, *per* Lord Kinnear at p. 1106. As to arrestment of current rents, reference was made to More's Stair, ii (Notes, p. 286). The cases of *in re National Bank of Wales*, [1897] 1 Chan. 298, and

Lindsay v. *London and North-Western Railway Co.*, Jan. 27, 1860, 22 D. 571, relied on by the respondents, did not affect the question either way, although in the latter case the Judges assumed that shares were arrestable. But in neither that case nor *Sinclair* v. *Staples*, Jan. 27, 1860, 22 D. 600, was the question argued. The proper and competent diligence against shares was adjudication, which extended to moveables when arrestment was not competent—Stair, iii, 2, 48; More's Notes, p. 299; Ersk. ii, 12, 48; Parker on Adjudications, p. 16; *Barbour* v. *M'Minn*, July 7, 1826, 4 S. 813; *Morrison* v. *Harrison*, February 3, 1876, 3 R. 406 (*per* Lord Justice-Clerk Moncreiff, at 409), 13 S.L.R. 275. Though the Court had allowed a claim for an accounting to be arrested, accountability was not a fair criterion of the competency of arrestment; there must be something actually due at the date of arrestment. The cases in which a liability to account had been the subject of arrestment, *e.g.*, *Douglas*, *cit. supra.*, *Baines*, *cit. supra*, depended on a different *ratio*, the Court holding that as there was a *prima facie* debt due, an inquiry at an inconvenient time should not be allowed. These cases accordingly were determined on the *ratio* of convenience.

Counsel for the respondents were not called on.

At advising—

Lord President—In this case jurisdiction is alleged to have been founded against the defenders by the arrestment of certain shares belonging to them in a limited company registered in Scotland under the Companies Act 1862 and the subsequent Acts, and the objection made is that, inasmuch as in the case of this particular company no dividend was at that moment payable and unpaid, there was nothing due by the company to the common debtor, who was the shareholder, and that consequently there was nothing arrested. We have had a very ingenious and a very interesting argument from Mr Watson, and indeed it needed one. It is a somewhat startling proposition to find at this time of day, over forty years after 1862, that the practice, which has certainly been going on all this time, of arresting shares of limited companies is radically wrong. Although there may not have been many cases of arrestment of shares *jurisdictionis fundandæ causa*, there certainly have been countless cases of arrestment in execution, and it is quite evident that the two matters depend upon the same principles. If this is a bad arrestment *jurisdictionis fundandæ causa*, it would have been an equally bad arrestment in execution. I think that as a mere matter of authority the question is decided by the case of *Sinclair* v. *Staples*, 1860, 22 D. 600. *Sinclair* v. *Staples* was decided no doubt upon an earlier Act—before the Companies Act of 1862—but the provision of the earlier Act was the same as in the present series of Acts, namely, that shares in a joint-stock limited liability company are declared to be personal property. Accordingly the decision directly applies. The case there was put, so to speak, the other way. The action was one of adjudication, and the first plea stated by the defenders was against the competency of the action, the defenders saying that adjudication was wrong because arrestment was the proper diligence. Accordingly the whole argument turned upon that matter, and the action of adjudication was dismissed upon the ground that arrestment was competent. The mere statement of the case shows that it is a direct authority. Mr Watson, however, says, and I think says truly, that so far as one can gather from the report the point was not argued in precisely the same way as it has been argued to-day.

But I do not think that the argument to-day alters the authority of that case. I think the matter is exceedingly well put by the Lord Ordinary. After stating that the objectors here do not deny that it is quite competent to arrest in the hands of a partnership the right, whatever it is, of the partner in an ordinary partnership, the Lord Ordinary goes on to say this—"But the defenders deny that the rule regulating ordinary partnerships applies to shares in limited joint-stock companies. They found on the principle enunciated in many English cases, such as that of *in re George Newman*, [1895] 1 Ch. 674, *per* Lord Justice Lindley at p. 685—'An incorporated company's assets are its property, and are not the property of the shareholders for the time being.' From this they argue that no debt was due by the Missouri Land Company, Limited, to the defenders at the date of arrestment, and therefore their shares in that company could not be arrestable. This seems to me to involve a confusion of ideas. As Mr Bell put it (Com. ii, 71), 'It is the obligation to account which is the proper subject of attachment.'"

Now, I think that is the whole substance of the matter. It seems to me there is an obligation to account, in the sense in which Mr Bell puts it, between the limited company and the shareholders of that company, and that this obligation is not at all touched by the doctrine laid down by Lord Justice Lindley, as to which I take it there is no doubt whatsoever. It must be remembered that Lord Justice Lindley was speaking as an English lawyer, and naturally had before his mind the fact that according to the English law of partnership what one might call the partnership assets really belong, in a way which we should call *pro indiviso* property, to the various partners. There will be found a learned judgment of my brother Lord Kinnear in the case of *Parnell* v. *Walter*, 1889, 16 R. 917, which describes the nature of the rights that a partner in England has in the assets of the partnership. Lord Justice Lindley points out that that is altered when you come to an incorporated company, where the property in any particular asset does not belong to the shareholders of the company but belongs to the company. That, in Scotland, is a very familiar notion, because in our law in an ordinary common law

partnership the partnership has always been considered a separate *persona*. Accordingly the doctrine that the partnership assets do not belong to the partners but belong to the partnership has always been held quite consistent with our well-established Scottish doctrine that a share of a common law partnership is perfectly well arrestable. It seems to me that the point put by Mr Bell is the true criterion. It is the obligation to account which is the subject of attachment; and the obligation to account does not mean that there is then and there a debt due in the sense of something due and payable. That will depend upon circumstances, and the circumstances will vary according to the particular deed of partnership, or according to the particular constituent deed which makes the limited company. I am aware that the right of the shareholder to have a payment made to him (in proportion to his share) of profits that have been earned in the limited company is not a direct right, because before he can get it these profits have to be declared as a dividend, and the declaring as dividend is an operation which rests on the will of the properly constituted authorities of the company according to the company deeds—that is to say, its memorandum and articles of association. In the same way, in a private partnership the particular time at which a partner might say "Now you have made profits give me my share," will depend entirely upon the provisions of the partnership deed. There might be a partnership deed in which it was covenanted between the partners that they should not draw any profits until the expiry of the partnership. There might, on the other hand, be a stipulation, and it is a very common one, that the drawings during the currency of the partnership should be limited to a certain amount, and there would be no objection to adding to that stipulation that the payment of the certain amount should only be at certain seasons of the year. So that it would be perfectly possible to put your finger upon a date in a private partnership where it would be impossible for a partner to say "pay me something"; and yet, notwithstanding, there has never been any doubt in our law that the obligation to account is an arrestable subject.

The truth is that any difficulty which exists is really a metaphysical one, and is, I think, satisfactorily dealt with by Lord Cowan in the case of *Sinclair* v. *Staples*, and the metaphysical difficulty seems to me precisely the same whether you take the case of a private partnership in Scotland or the case of shares in a joint-stock company, because there is separate *persona* in a Scottish partnership which corresponds exactly with the separate *persona* of an incorporated company. I am of opinion that it would be a great pity to alter the law, and I do not think there is any reason for doing so. The case of *Sinclair* v. *Staples*, which has ruled the practice for nearly half a century, ought, I think, to be followed here. Accordingly I am of opinion that the Lord Ordinary's interlocutor is right and ought to be adhered to.

LORD M'LAREN—I think the Lord Ordinary's decision is right and put on the right grounds. The nature of the subject arrestable is not always the same. Some things are arrestable upon one ground and others upon a different ground. In this case the subject is said to be arrestable in the hands of the company because of the principle of accountability to a shareholder by the company. In Scotland we are not embarrassed by a distinction which exists in the law of England—I mean the distinction between a private partnership and a public company—because the law of Scotland recognises a separate *persona* in a private partnership; so much so that in an action against a social firm it is not even necessary to call one of the partners. In this respect I think there is nothing but a formal difference between the right of a partner in a private partnership and the right of a shareholder in a company incorporated under the Companies Acts. Of course, if it could be shown that there was no way in which the company could be made responsible to its shareholders in an action for the protection of their interests, then the *substratum* of the doctrine that these shares are arrestable would be gone. But then that is not the law, because although no doubt the determination of the rights of the shareholders rests with the company itself, either through the directors, or in certain matters through meetings of the whole body of shareholders, yet a company managed by dishonest directors, or a dishonest majority of the shareholders acting oppressively and in such a way as to prejudice the legal rights of a minority of the shareholders, or the legal rights of even a single shareholder, can be compelled to give redress. That, I think, shows that the interest or right of the shareholder is always something which though held by the company must be administered for his behoof. I think it also shows that the relation between the company and the shareholder is not merely a theoretical but a very real and practical one, that, when necessary, the rights of the shareholders are under the protection of the law. It is true that in the ordinary case the shareholder can only establish his interest through the company, yet if the company refuse redress his interest does not fail but can be made effectual through the Court. I agree that the question is exactly the same whether we are dealing with an arrestment to found jurisdiction or an arrestment in execution. In either case the arrestment of shares in a company registered in Scotland is a sufficient ground for puting diligence in force.

LORD KINNEAR—I agree with your Lordships. The question, like every other question of diligence, is highly technical, and therefore we are all the more bound to follow the decisions which have stood for a long series of years and have fixed the practice.

Nobody disputes that a share in a joint-stock company is attachable for the debts of a shareholder, and the only question is whether the proper diligence to attach it is arrestment or adjudication. I say that is the only question, because it has not been suggested that it can be reached by poinding, or that it is protected from attachment altogether. Now I think there is a series of decisions which would govern this case even apart from the decision in *Sinclair* v. *Staples*—I mean decisions to the effect that the interest of a partner in an ordinary copartnery is attachable by arrestment even although it may be said that there is no money due at that moment to the partner, and although upon an accounting it might be found that there was no balance in his favour. I should have thought these cases in point; but any doubt I should have had is entirely removed by the decision in *Sinclair* v. *Staples*, which is to my mind a decision directly in point, and which I think we are bound to follow.

LORD PEARSON was absent.

The Court adhered.

Counsel for Pursuers (Respondents)—Lorimer, K.C.—R. S. Horne. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for Defenders (Reclaimers)—Morison, K.C.—Hon. W. Watson. Agents—Webster, Will, & Co., S.S.C.

Saturday, February 1.

SECOND DIVISION.

(Together with Lords M'Laren, Pearson, and Dundas.)

[Sheriff Court at Stirling.

DONNELLY *v.* WILLIAM BAIRD & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *Schedule I* (12)—*Workman's Refusal to Undergo Surgical Operation—Right to Further Compensation.*

An injured workman who refused to undergo a surgical operation, unattended with danger to life or health or with serious suffering, which according to the best professional opinion offered a reasonable prospect of the removal or at least relief of the incapacity from which he suffered, *held* (*diss.* Lords Stormonth Darling and Pearson) to have precluded himself from any right to receive further compensation under the Workmen's Compensation Act 1897.

This was an appeal by way of stated case from a judgment of the Sheriff-Substitute (MITCHELL) at Stirling in an arbitration under the Workmen's Compensation Act 1897.

The case stated—"This is an arbitration under said Act in which the Sheriff of Stirling, Dumbarton, and Clackmannan at Stirling was asked to review and end or diminish a weekly payment of 7s., of which the appellant was in receipt in virtue of an agreement entered into by the appellant and the respondents on 24th May 1904.

"On 9th January 1906 the then Sheriff-Substitute found that the appellant was still totally incapacitated as the result of injuries sustained by him while in the employment of the respondents, and entitled to the weekly payment of 7s. in virtue of the agreement before mentioned. On 9th April 1907 a minute was lodged by the respondents again asking the Court to review and end or diminish the weekly payment before mentioned, and on 1st June 1907 I found '(1) that the respondent (the present appellant), on or about 28th January 1903, lost the use of his left hand in consequence of injuries sustained by him while in the employment of the petitioners (the present respondents), and that respondent still continues to be without the use of said hand; (2) that by agreement between petitioners and respondent, entered into on or about 24th May 1904, respondent became entitled to compensation at the rate of seven shillings weekly during incapacity, and that payment thereof has been made to him up to the present time; (3) that respondent's loss of use of his left hand was and is caused by the removal from said hand of the third finger and of the top of the thumb, the existence of pain in the palm at or near the knuckle from which said finger was removed, and the curvature into the palm and permanent fixing in that position of the second finger; (4) that the respondent has been examined by five doctors, three of whom were asked to examine by petitioners, and that the said three doctors recommend that the crooked second finger should be removed at the knuckle, or the joint next the knuckle, and that a nodule in the palm of said hand, which they believe to be the source or centre of the pain complained of, should also be removed; (5) that said proposed operations are simple or minor operations, not attended with appreciable risk or serious pain, and operations likely to restore to respondent in large measure, or altogether, use of his said hand for the purpose of his former work, viz., 'drawing,' that is pushing, guiding, or pulling hutches in a coal pit, or for manual work of some kind in or about a pit or elsewhere, and to enable him to earn the same wages as before the accident, or wages to some substantial amount; (6) that respondent is of good constitution and in sound general health; (7) that he has not undergone and refuses to undergo such operations; (8) that his continued incapacity to use his left hand and any continued pain in his left palm are fairly attributable to the want of such operations; (9) that in these circumstances respondent is not entitled to refuse and ought to undergo said operations,'—and I continued the cause till 1st July 1907 that the respondent (now appellant) might intimate whether he was then willing to submit himself to said operations.