

them, for they had given full value for them in the produce against which they were drawn, and they got them for the express purpose of being discounted. But the Lord Ordinary is of opinion that the bankruptcy having taken place, and the complainers having intimated that they hold the debts compensated, the trustee is not now entitled to discount the bills for the purpose of defeating the plea of compensation at present available to the complainers. He thinks it is involved in the principles of bankrupt law, as they have gradually come to be established, both here and in England, that the state of indebtedness by or to the bankrupts, as that is to be ascertained by the rules for balancing accounts in bankruptcy, shall be fixed as at the date of the bankruptcy, and shall not be altered by either party to the prejudice of the other. No third party is at present interested in this question between the complainers and the trustee in the sequestration, and it is thought that the complainers are entitled in respect of the bankruptcy to have effect given to their rights as they now stand, without being liable to have them defeated by a third party being brought in as discounter of the bills. It results from bankruptcy that parties having accounts with the bankrupt are entitled to bring them to an immediate close, and to plead compensation or retention in respect even of future or illiquid claims, as equivalent to payment. The Lord Ordinary thinks it is not in the power of the trustee in the sequestration to postpone or set aside this equitable balancing of the account by assigning his claim to a third party, so as to defeat the plea of compensation.

"There is a fifth bill included in the application for interdict, which is in a different situation from the other four, in so far as it is drawn by Hall & Co., of Penang, upon and accepted by the complainers in favour of the bankrupts. In the view which the Lord Ordinary takes of the question this bill must be dealt with in the same way as the others. It would have been different if he had proceeded on the ground contended for by the complainers, that the other four were accommodation bills. "E. F. M."

Counsel for Complainers—Mr Shand. Agents—Webster & Sprott, S.S.C.

Counsel for Respondent—Mr Balfour. Agents—Gibson-Craig, Dalziel, and Brodies, W.S.

WHEATCROFT & TURNER v. HAWTHORNS AND COMPANY.

MP.—HAWTHORNS AND CO. v. M'FARLANE AND SON AND OTHERS.

Arrestment—Double Distress—English Firm. Held by Lord Barcaple (and judgment acquiesced in) that an arrestment against one of the partners of an English firm, used in the hands of Scotch debtors to the firm, did not entitle the debtors to refuse payment of their debt or to bring an action of multiplepointing.

In the first of these actions Wheatcroft & Turner who are wire and india rubber merchants in Derby, sued Hawthorns and Company, engineers in Leith, for the sum of £53, 8s., as the price of a quantity of india rubber goods which were sold and delivered to them by the pursuers on 23d September 1865. The defenders admitted the debt, but refused payment on the ground that they had been interpellated by an arrestment used in their hands against Thomas Turner, one of the individual partners of the pursuers' firm. This

arrestment had proceeded on the dependence of an action of damages at the instance of M'Farlane & Son, wire merchants in Leith, against Turner, who had formerly been in their employment. The defenders averred that they were advised that it might be held that the said arrestment attached the share or interest of Turner in the sums sued for, and that they would not be in safety to make payment to the pursuers until the arrestment was withdrawn. By the law of England, an unincorporated partnership is not a distinct person, and cannot sue in the partnership name. Neither can it possess any property or funds, but what is called the property of the firm is the property of the partners composing it in the proportion of their respective shares in the copartnership concern. They therefore contended, in point of law, that the action was unnecessary, in respect (1) that they were and had been all along willing to make payment to the pursuers of the sum sued for, on the arrestment in their hands being withdrawn; (2) that they had and now again tendered payment of the proportion of the sum sued for effeiring to the partners of the pursuers' company other than Turner; and (3) that the action should be sisted till an action of multiplepointing was brought to have the matter determined as among the whole parties interested. After lodging these defences in the action of constitution, Hawthorns & Company raised an action of multiplepointing in which they called M'Farlane & Son and Wheatcroft & Turner as defenders. They maintained that in the circumstances which have been stated above there was double distress, and it was necessary and they were entitled to raise the multiplepointing in which the rights and interests of all parties might be judicially determined. Defences and objections to the action were lodged by Wheatcroft and Turner, in which they maintained that the fund *in medio* being due to them, and no arrestment having been laid against them in the hands of the raisers, there was no double distress nor any conflicting claim in reference to the fund or any part thereof, and that the action was unnecessary and incompetent. Hawthorns & Company moved to have the action of constitution sisted till the determination of the action of multiplepointing, but this motion was refused by the Lord Ordinary. A record was thereupon made up in each action and both cases were debated together.

FRASER and STRACHAN argued for Wheatcroft and Turner, that their claims under these actions must be determined by the law of Scotland, and that there was no question of English law involved in the matter. It was a well-known and recognised rule of international law, that whatever the domicile of the parties or the origin of the right, the remedies and modes of proceeding must be determined by the law of the country where the action had to be enforced. They had nothing to do here with the constitution of English companies, or the respective rights and interests of the company and individual partners. These suits related to the enforcement or discharge of obligations to the company and fell to be determined by the *lex fori*. If it were held otherwise, no debt due to a foreign company could be recovered or discharged in this country without an inquiry as to the partnership laws of the country where the company was domiciled, and the individual rights of the various partners. The rights of Wheatcroft and Turner must therefore be dealt with in these actions on the same footing as if they were a Scotch company. It was settled by the law of

Scotland, that a debt due to a company was not attached or in any way affected by an arrestment against an individual partner. (Ersk., 3. 3. 24. Bell's Com., vol. 2. 612.) There was therefore no ground for the action of multiplepoinding. By the law of Scotland such an arrestment did not affect the company debt, and there was therefore no double distress, nor any ground for making the fund the subject of a multiplepoinding.

A. R. CLARK and MACLEAN, for Hawthorns and Company maintained (1) that it was not clear that by Scotch law an arrestment against an individual partner did not attach company funds; (2) that it was a delicate question, into which they were not bound to enter, how far the law of England, as to the rights of partners and the *status* of a company, fell to be applied to the present case—this was a question for the claimants *inter se*; (3) that they were entitled to resist payment and raise the multiplepoinding if there were competing claims to the same fund, although one of these might appear to be much better founded than the others, and although only one claimant had done diligence; and (4) that they were not obliged as arrestees to litigate with any of the claimants, and were entitled to be kept free in paying from any risk of a second demand. Here, if they had paid to Wheatcroft and Turner, they were liable to be sued again by M'Farlane & Son. The effect of the arrestment was the action between M'Farlane & Son and Wheatcroft and Turner. In support of this argument they referred to Shand's Practice, vol. ii. 582-3, and cases there cited, Erskine, 4. 3. 23; *Watson v. Crooks and Douglas*, M. 9133; *Lang v. Railton*, 11th Feb. 1824, 2 S. 693; *Sandilands v. Mercer*, 30th May 1833, 11 S. 665.

The Lord Ordinary (Barcuple), by interlocutor dated 5th July 1866 (which has been acquiesced in), dismissed the action of multiplepoinding, and found the pursuers liable in expenses—referring to the note appended to a judgment of the same date, pronounced by his Lordship in the action of constitution, in which his Lordship decerned against the defenders in that action for the amount of the debt, with expenses. The note is in the following terms:—

“The debt sued for is admitted, and the defenders state their readiness to pay it, except for the arrestment used in their hands at the instance of a creditor of one of the partners of the pursuers' firm. The defence is rested upon an averment in regard to the law of England, that ‘by the law of England an unincorporated partnership is not a distinct person, and cannot sue in the partnership name. Further, by the said law a firm or partnership cannot possess funds or other property, but what is called the property of the firm is the property of the partners composing it in the proportion of their respective shares in the copartnery concern.’

“Assuming this to be a correct statement of the law of England, it does not appear to the Lord Ordinary that it would support the defence which is rested upon it. The circumstance that a partnership is not a distinct person, and cannot sue in the partnership name, can only affect proceedings taken in England. Actions are every day brought in Scotland at the instance of English partnerships in the partnership name. The present action is so brought without any objection being taken to it on that ground. Neither does it appear to be material that it is averred that the partnership cannot possess funds or property, and that what is called the property of the firm is the property of the partners in the proportion of their respective

shares. It is not said that the partnership cannot recover and discharge a debt, whatever may be the rights of the partners in the money when recovered.

“This action by the partnership for payment of a partnership debt, being unquestionably good, the Lord Ordinary does not think that the remedy can be interfered with by a creditor of one of the partners, on the ground that when recovered it will be, in the proportion of his share, the property of their debtor. It is not said that it will not be liable, in the first place, to the debts of the partnership. Nor is it said that even in England it ought not, in the first place, to be recovered and brought into the assets of the company.

“The Lord Ordinary thinks that if the pursuers had been a Scotch firm, the illegal and incompetent arrestment at the instance of a creditor of a partner would not have constituted double distress. In the view which he takes of the present case, it is not materially different, and he is of opinion that the defenders were not entitled to state the defence, or to bring the relative multiplepoinding.”

Agents for Wheatcroft & Turner—J. S. Mack, S.S.C.

Agents for Hawthorns & Company—White-Millar & Robson, S.S.C.

Thursday, Nov. 15.

SECOND DIVISION.

MUNN v. SHAW.

Parent and Child—Filiation—Aliment. Circumstances in which held that the pursuer of an action of filiation and aliment had failed to establish her case.

This was an advocacy from the Sheriff Court of Renfrewshire of an action of filiation and aliment, at the instance of *Poor Mary Munn*, residing in Greenock, against *William Shaw, jun.*, cabinetmaker there. The Sheriff-Substitute (Tennent) assolized the defender, holding the pursuer to have failed in establishing her case, there being little evidence in support of it, except her own deposition; while, on the other hand, she had ascribed the paternity to another person. The Sheriff (Fraser) adhered to this judgment, and pronounced the following interlocutor and note, from which the main facts and arguments relied upon sufficiently appear:—

“*Edinburgh, 7th June 1865.*—The Sheriff having considered the reclaiming petition for the pursuer, No. 17 of process, closed record, proof, and whole process, refuses the prayer of the said reclaiming petition, dismisses the appeal for the pursuer, and adheres to the interlocutor of the Sheriff-Substitute appealed against, and decerns.

(Signed) PATRICK FRASER.

“*Note.*—When a master repeatedly kisses his female servant under twenty years of age, and she becomes pregnant, the reasonable inference is that he is the father. The defender—a licentiate of the U. P. Church—did several times kiss the pursuer, his servant, according to his own confession, and it is proved that he had abundant opportunities of having carnal connection with her.

“Had the matter stood there, the Sheriff would have had no doubt whatever that the defender must be found liable in the aliment of the pursuer's child. But, fortunately for him, he admits the fact that he kissed her several times; and secondly, there is the fact which cannot be got over, that she charged another man with being the father of