

no consideration was paid for his entry, he [the superior] would not have been demanding a casualty sooner than he might have done under the prior law. There can be no question that a casualty is presently exigible, because no casualty has been paid on entry by any living vassal. It is settled by the case of *Mounsey v. Palmer*, 12 R. 365, that the superior's demand is available against the actual vassals alone, and whether they are to pay composition or relief must depend upon the character in which they have entered.

"But it has been settled law since the case of *Campbell v. Edderline's Creditors*, that an infetment under a conveyance which bears on its face to be a conveyance in trust for the payment of creditors, even although it gives a power of sale to the trustees, does not divest the grantor of his feudal title to the subject conveyed, but merely operates as an incumbrance upon his right. The feudal fee in the Marquis of Huntly therefore has not been transferred to his trust-disponees, but remains in him precisely as it was before the trust-disposition was executed, but subject to a burden, which may be extinguished by a discharge, or by payment of the debts in security of which it was created. If the trustees were to sell in the execution of these powers, the Marquis would be divested by the infetment of the purchaser, but until a sale is effected he is still the proprietor infet. This is fixed beyond all question as a principle of feudal conveyancing.

"It follows that the Marquis of Huntly is still the vassal infet in the lands, and as such he is entitled to protect his estate by tendering payment of the relief-duty, which is undoubtedly exigible and which has not been paid. It is said to have been decided by the cases of *Lamont v. Rankine* and *Ferrier v. Baillie* [*sup. cit.*] that there is no room for the entry of an heir to the grantor of a trust-disposition after the trustees have been entered by the implication of the statute, and that by the same reasoning the grantor himself cannot continue to hold the position of an entered vassal after his disponees have been infet. But all that was decided in these cases was that it is no more possible under the existing law than under the law as it stood before the Conveyancing Act for two co-ordinate infetments to co-exist in the same fee. And the principle upon which the decision in the case of *Edderline* and the numerous cases which followed it proceeded is, that the infetment of a trustee for the payment of debts is not co-ordinate with the infetment of the grantor, but may co-exist with it as a mere encumbrance. There is nothing inconsistent, therefore, with *Lamont v. Rankine* and *Ferrier v. Baillie* in holding that the Marquis of Huntly is still undivested of the feudal fee which was vested in him by his recorded service and by the operation of the Conveyancing Act. Nor would these decisions create any obstacle to the service of his heir-at-law if the fee became vacant by his death while the lands remain unsold in the hands of the trustees. The implied entry of the trustees under a mere security-title will no more divest the truster of the estate held of his superior than their infetment upon his own precept will divest him of the *dominium utile*.

"The defender, however, maintains that the implied entry of the trustees by the operation of the Conveyancing Act entitles him to payment of

a composition, because trustees for creditors, under the old law, could not have obtained an entry upon other terms. The cases must have been exceedingly rare in which such trustees thought it necessary to enter where the lands were held of a subject, since it was not desirable to begin the administration for creditors by the sacrifice of a year's rent. It is true, however, that if they did desire to enter they could not compel the superior to receive them except on payment of composition; but it does not follow that under the present law the superior can demand payment for an implied entry. He must show that he could have required the trustees to enter under the prior law, and he could not have done so if the fee was already full.

"It is said that the conveyance may turn out to be an absolute alienation because the trustees may sell, and that the pursuers are not entitled to the decree they ask so long as the effect of the conveyance is in suspense. But if the effect of the conveyance is in suspense, it has not divested the grantor. If the trustees should sell and convey the estate or a part of it to a purchaser, their disponee will be entered as a singular successor, and he will have to pay composition in that character if the fee would at that time have been vacant but for his entry. But in the meantime it is filled by Lord Huntly, and he and his trustees had a legitimate interest to secure his position by payment of the relief-duty in order to protect their disponees against any demand for composition being brought against them sooner than they could have been required to enter under the old law."

Counsel for Pursuer—Pearson. Agents—Henry & Scott, S.S.C.

Counsel for Defender—D. F. Balfour, Q.C.—Lorimer. Agent—John K. Lindsay, S.S.C.

Thursday, December 17.

FIRST DIVISION.

[Lord Lee, Ordinary.]

M'NAUGHT V. MILLIGAN

Partnership—Debt Due by Dissolved Firm—Action against One Partner—Competency—Process.

Held that an action against one partner of a firm, which has been dissolved, for payment of a debt alleged to be due by the firm is *incompetent*.

This was an action at the instance of Thomas M'Naught, S.S.C., Edinburgh, against William J. Milligan, Writer, 183 St Vincent Street, Glasgow, for payment of the sums of £61, 16s. and £7, 1s. 1d.

The pursuer averred that he had acted as Edinburgh agent for the successive firms of Stark, Niven, & Milligan, Stark, Niven, Milligan, & Crawford, and Stark, Milligan, & Company, Writers in Glasgow, and that the sums sued for were due to him for business done on their behalf. He further averred that the defender had been a partner of each of these firms,

and pleaded that as such he was liable *in solidum* for the debts due by them.

The defender denied that he was indebted to the pursuer, and pleaded—“(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the action. (2) The action is incompetent, being brought against an individual partner for payment of alleged debts said to have been incurred by various firms of which he was a member, without the alleged debts being constituted against the firms. (3) All parties are not called.”

The Lord Ordinary (LEE) on 16th June 1885 sustained the first and second pleas-in-law for the defender, and dismissed the action.

“*Opinion.*—The present action concludes for payment of two sums of £61, 16s. and £7, 1s. 1d., alleged to be due to the pursuer by the three firms of Stark, Niven, & Milligan, Stark, Niven, Milligan, & Crawford, and Stark, Milligan, & Co. (of each of which the defender was a partner), and by the defender, in respect of various accounts incurred by these firms to the pursuer for law business done in Edinburgh on their behalf. It seems to be admitted that the pursuer was aware of the various changes in the constitution of the firms of which the defender was a partner during the period embraced in the accounts (1881, 1882, and 1883), and that he has had transactions with another partner (Mr Stark) regarding the same accounts. But the only partner called as defender in the present action is Mr Milligan. None of the firms of which the defender was a partner is called. The alleged debt is not constituted against any of them. It appears from the allegations to be due by the several firms only in parts according to the time of the employment. It is not said to be due by any of the firms in whole. But it is claimed in slump against the defender as having been a partner of all the firms.

“It is pleaded *inter alia*—‘The action is incompetent, being brought against an individual partner for payment of alleged debts said to have been incurred by various firms, of which he was a member, without the alleged debts being constituted against the firms.’ And ‘(3) All parties are not called.’

“The pursuer did not maintain before me that he could insist in the action without calling the other partners of the several firms; but he contended, on the authority of the case of *Muir v. Collett* (24 D. 1119), that it was unnecessary to constitute the alleged debt against any of the firms.

“I think that the case of *Muir v. Collett* has no application here. It was the case of an action against a partner of a Bombay company which had been long dissolved. The ground of action was that the defender personally had made the contract in this country on behalf of the firm. The defender alone was subject to the jurisdiction. It was decided that the objection in that case was bad, because it was not possible, according to the law of the domicile of the company, to constitute the debt against the firm as a separate *persona*. The authority of the case of *Reid & M'Call v. Douglas* (June 11, 1814, F.C.) was distinctly recognised as binding in regard to cases where the debt can be constituted against the company.

“In the present case the action relates to a debt or debts due by a firm in Glasgow. I suppose there is no doubt that such a company, which is not said to be bankrupt and finally dissolved, subsists to the effect of paying its debts, and suffering such debts to be constituted against it. And the grounds of action appear to me to illustrate the necessity of constituting the alleged debt against the firm which was the primary debtor. For it is not the case of a single account incurred by one firm. The claim is made up of a series of accounts incurred by a succession of firms, of which there were different partners, although the defender and another are said to have been partners in all.

“In such a case I think that there is good ground for the plea in equity that the action cannot be maintained against an individual partner without constituting the debt against the company; and it appears to me that the judgment given in *Muir v. Collett* is entirely favourable to the plea in such a case.

“I shall only add that in my view the calling of the other partners as defenders would in no way mend the pursuer's case. Some of the partners are interested in one part of the sum sued for, others in another. Only one other partner is said to be interested in the whole, and the pursuer's answer to statement 5 implies that he has been settled with. I am clearly of opinion that the present action cannot be allowed, because it is not in shape, even if the other partners were called, to enable the defender to plead any decree which may be obtained as fixing the amount for which he is entitled to claim relief against the other partners of the several firms.”

The pursuer reclaimed, and argued that the action should be sisted until a supplementary summons was brought calling all the partners of the firms which were dissolved. When a firm was dissolved then all the partners became *correi debendi*, and in order to constitute the debt it was enough to call all the partners of the dissolved firm—Clark on Partnership, ii. 676. When a firm was in existence it was necessary before suing any one of the partners to constitute the debt against the firm. But here that was impossible, because all the firms had ceased to exist, and therefore it would be sufficient to call all the partners of the dissolved firms—*Muir v. Collett*, June 17, 1862, 24 D. 1119; *M' Tavis v. Saltoun*, Feb. 3, 1821, F.C.; *Edinburgh and Glasgow Bank v. Ewan & others*, Feb. 28, 1852, 14 D. 547; *Geddes v. Hopkirk*, June 2, 1827, 5 S. 697; *Dewar v. Munnoch*, Feb. 23, 1831, 9 S. 487; *Bell v. Williamson*, 1 Shaw's App. 220; *Shand's Pract.* 188; *Mackay's Pract.* i. 351.

The defenders argued that the action was incompetent as the debt had not been constituted against the firms, and that it should be dismissed, as was done in *Reid & M'Call v. Douglas*, June 11, 1814, F.C.

At advising—

LORD PRESIDENT—This action is raised for the recovery of certain accounts which are said to have been incurred by three successive firms conducting business under the names of Stark, Niven, & Milligan, Stark, Niven, Milligan, & Crawford, and Stark, Milligan, &

Company, of each of which firms the defender was one of several partners. The defender alone is called upon to answer for the various firms and the other partners.

It appears to me that according to the authorities this is an incompetent action. The pursuer, however, desires that the action should not be thrown out, but that he should be allowed to cure the defect by a supplementary summons. I think that would be a bad form of procedure. The pursuer can bring a new action against all the partners. Whether he is bound to call the firm which has been dissolved depends on circumstances we do not know of, but he is at any rate bound to call all the partners, and there is nothing in dismissing the action that can prevent him from doing so.

LORD MURE—I agree with your Lordship.

The pursuer here knew that there were other partners of the firms, and according to the case of *Muir v. Collett*, even assuming that it was not necessary to call the firm as a defender to the action, I think he was bound to call all the partners.

LORD SHAND—I am of the same opinion.

It is not said here that the other partners must be called for their interest merely in order that they may see decree pronounced in the cause. It is admitted that it would be necessary to have a separate action against the other partners, and then the two would be conjoined. I think that would serve no good purpose. It seems to me clear that the whole partners of the dissolved firm must be called in order to make a relevant action.

There may be a question whether the pursuer is not bound to call the firm in order to constitute the debt; but if the firm is dissolved, and has now no place of business, it would appear that the only way in which the firm could be called would be by serving the summons on all the partners.

LORD ADAM—I see no good purpose to be served by keeping the action in Court. The conclusions of the action should be sufficient to exhaust the whole matter, and that is not the case with the action before us.

The Court varied the interlocutor of the Lord Ordinary to the effect of sustaining the first and third pleas-in-law for the defender, and dismissed the action.

Counsel for Pursuer and Reclaimer—Scott—Salvesen. Agent—T. M'Naught, S.S.C.

Counsel for Defender—Rhind. Agents—Ferguson & Junner, W.S.

Thursday, December 17.

SECOND DIVISION.

[Lord M'Laren, Ordinary.]

PATERSON'S TRUSTEES *v.* CALEDONIAN
HERITABLE SECURITY COMPANY (LIMITED),
AND LIQUIDATOR.

*Public Company—Heritable Security Company—
Power to Receive Money by Loan—Purchase to
Avoid Sacrifice of Security—Ultra vires.*

A heritable security company, the objects of which were to lend money on heritable security, and to "receive money by way of loan by cash-credit, debenture, deposit, or otherwise," and to do all such things as were conducive to these objects, received through their manager a loan, which he applied to the purchase of heritable property over which the company had lent money on a postponed bond, and which the prior bondholder had brought to sale. There being a doubt as to the company's power to hold heritage, the manager made the purchase in his own name; he also granted the lender a bond for his money over the subjects. The company and its liquidator afterwards disputed liability for the loan, on the ground that the company had no authority to purchase or hold heritable property, that the manager was the proper debtor, and that he had no authority from the directors for the transaction. *Held* that the company having borrowed the money through its proper officer, who was entitled to accept money on loan, the lender had no concern with inquiring into its powers to apply it, and was therefore entitled to demand repayment.

Opinions that the purchase by such a company of heritage in order to avoid a sacrifice of its loan was not *ultra vires*.

Prior to June 1877 the Caledonian Heritable Security Company (Limited) agreed to lend money to Robert Johnston, builder, the security being some house property which he was erecting at Clarinda Terrace, Pollokshields. The loan arranged was £1000. There was a prior security for £2500, and the company only advanced £650, depositing the rest in bank. By the articles of the association of the company the objects for which it was established were thus defined—"To advance or lend money on security of all kinds of heritable property, or for the purpose of building, draining, enclosing, or otherwise improving the same. To make advances for the execution of works undertaken, in virtue of powers conferred by any public or local Act of Parliament, on the securities thereby authorised; and also on the security of annuities, and on other assignable properties, and on or for the purchase of reversionary interests heritably secured. To receive money by way of loan by cash-credit, debenture, deposit, or otherwise; and the doing of all such other things as are incidental or conducive to the attainment of the above objects."

Johnston was sequestrated on 13th June 1877, and the prior bondholder, after an unsuccessful