

and to recover out of the estate of the said John Hamilton the sum of £1000, which was the amount of the said debt.

**ARCHIBALD WALLACE, for himself and WALLACE, CAMPBELL and Company, Appellant.—Mare. ord. of Intim.** No. 55.

**CHARLES CAMPBELL, Trustee for JOHN HAMILTON, and**

**Company, Respondent.—Cockburn—Rutherford.**

**Partnership—Competition—Bankrupt—Title to Pursue.—**

A partner of a Company having entered into a joint adventure with another, and made use of the name and credit of the Company; and the estates of the Company having been sequestrated, and a separate sequestration awarded against the partner, and different trustees having been appointed; and the trustee of the Company having raised an action against the other joint adventurer to account to him, and on the dependence arrested dividends due to the joint adventurer out of the estates of a sequestrated Company; and that joint adventurer having previously granted an assignation of these dividends to another party, and delivered relative dishonoured bills accepted by the sequestrated Company, which had been originally indorsed away and discounted by the joint adventurer, but had been returned on him; and the assignation not having been intimated till subsequent to the arrestments;—Held, (affirming the judgment of the Court of Session), That the arrestments by the trustee for the Company were preferable both to the assignation and bills held by the party acquiring them from the joint adventurer.

<sup>100</sup> **HUGH and WILLIAM HAMILTON** were the partners of a Company which carried on business, in Greenock under the firm of John Hamilton and Company, and in Liverpool under that of William Hamilton and Company. The former of these branches was managed by Hugh Hamilton, and the latter by William Hamilton; and it was alleged that the partners were bound not to engage in any business on their private account. Hugh Hamilton, however, became a partner of Hyde and Company, merchants in Greenock, and embarked in a joint adventure with Boyd Dunlop and Company, merchants in Glasgow. In the prosecution of this joint adventure, Hugh Hamilton made use of the name and credit of John Hamilton and Company. Accordingly all the goods were purchased, and the invoices granted, and the bills accepted, either under the firm of John Hamilton and Company, or under that of Boyd Dunlop and Company—the name of Hugh Hamilton not being mentioned.

On the 2d of August 1814, Hugh Hamilton addressed a letter to Boyd Dunlop, the leading partner of Boyd Dunlop and Company, in which, after mentioning that he had experienced certain misfortunes, he stated, ‘ I wish, as soon as you can, you would send me J. H. and Co’s account-current, calculating interest to this time. The tobacco concern I wish

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‘ particularly to appear in J. H. and Co’s name, keeping mine  
‘ out of sight. This will make no difference (to you), but of  
‘ much consequence to me; as I will tell you again. You need  
‘ not bring profit into the account; merely mention at the foot,  
‘ that so much may be expected to come from the specula-  
‘ tion. The three bills I got I will destroy, as you desired.  
‘ You will, of course, leave them out also. I beg most  
‘ earnestly you will say nothing of this to any body.’ On  
the 20th of the same month, Hyde and Company having  
become bankrupt, a sequestration was awarded of their estates,  
and of that of Hugh Hamilton as an individual; and Mr John  
Dunlop, writer in Greenock, was elected trustee upon these  
estates. On the 12th October thereafter, sequestration was also  
awarded against John Hamilton and Company, William Hamil-  
ton and Company, and William Hamilton as an individual; and  
on these estates the respondent, Charles Campbell, was appointed  
trustee. In this capacity he required Boyd Dunlop and Com-  
pany to account to him for one-half share of the profits of the  
joint adventure, and a correspondence took place, on the assump-  
tion on both sides that Campbell, as representing John Hamilton  
and Company, was entitled to an accounting. Campbell con-  
ceiving, however, that Boyd Dunlop and Company were desirous  
for delay, raised, on the 19th December 1814, an action, as  
trustee on the estate of John Hamilton and Company, against  
Boyd Dunlop and Company, before the Magistrates of Glasgow,  
concluding for count and reckoning.’ In defence, Boyd Dunlop  
and Company at first did not deny their liability to account to  
Campbell as representing John Hamilton and Company, but  
pleaded certain dilatory defences, which were repelled, and an  
interlocutor was pronounced, ordaining them ‘ forthwith to hold  
‘ count and reckoning with the pursuer in relation to the joint  
‘ adventure mentioned in the pleadings, and to produce a special  
‘ state of the affairs of the said joint adventure, exhibiting the  
‘ purchases made, the sales effected, and charges incurred on  
‘ joint account; the stock on hand, and result of the whole joint  
‘ transactions in point of profit and loss.’ Boyd Dunlop and  
Company then objected to Campbell’s title, that as he was not  
trustee for Hugh Hamilton, and as the adventure had taken  
place with that person, and not with John Hamilton and  
Company, they were not liable to account to him. The Magis-  
trates, however, on the 3d March 1815, pronounced an inter-  
locutor, repelling this objection, and of new ordaining them to  
account with Campbell.

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In the meanwhile, and prior to this action, Boyd Dunlop and Company had become creditors of Thomson, Gibson and Company, merchants in Leith, by bills accepted by that Company, amounting to L. 648. 16s. 7d., which, after having been indorsed away by Boyd Dunlop and Company to different parties, were returned upon them. The estates of Thomson, Gibson and Company having been sequestrated, Boyd Dunlop and Company, on the 10th of March 1815, lodged a claim upon their estate for the amount of the bills. On the 4th of April thereafter they granted an assignation of the bills to Wallace, Hamilton and Company, merchants in Glasgow, in whose right the appellant, Archibald Wallace, now stood; and at the same time they delivered up the bills bearing the original blank indorsations of Boyd Dunlop and Company, but no new indorsations were granted. On the 7th of the same month, and on the 5th of May, Campbell, as trustee of John Hamilton and Company, and in virtue of the dependence of the action against Boyd Dunlop and Company, executed arrestments in the hands of the trustee on the estate of Thomson, Gibson and Company. The assignation obtained by Wallace, Hamilton and Company, was not intimated till the 8th May, being three days subsequent to the date of the last of the arrestments.

Boyd Dunlop and Company having continued to object to the title of Campbell in the action against them, a minute of concurrence by the trustee on Hugh Hamilton's estate was lodged on the 1st December 1815; and on the 4th March 1816 he granted a formal assignation of all right which he had in favour of Campbell. Appearance was thereafter made in the action by Wallace, Hamilton and Company, and the Magistrates thereupon pronounced this interlocutor:—  
 ' Finds, that the said com-  
 ' plearers have not shewn any title to resist decree going out in  
 ' the present action, and therefore refuses the desire of the said  
 ' minute: Finds it sufficiently instructed, that the joint adventure  
 ' in tobacco in question was so far carried on by means of the  
 ' credit, and at the risk of John Hamilton and Company: Finds,  
 ' that the trustee on the sequestrated estate of Hugh Hamilton,  
 ' and the pursuer as trustee on the sequestrated estate of John  
 ' Hamilton and Company, to one or other of which estates the  
 ' interest in the said joint adventure confessedly belongs, have  
 ' waved the rights of the respective creditors of these estates as  
 ' in competition with each other, and have united in the present  
 ' action in requiring the defenders to hold count and reckoning  
 ' with the pursuer, and in insisting on decree going out in favour

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of the pursuer for the balance admitted to be due by the defenders: Finds, that the defenders have no right to object to decree going out for the said balance in favour of the pursuer, as trustee on the estate of John Hamilton and Company, to draw back and take effect from the date of the assignation in the pursuer's favour by the trustee on the estate of Hugh Hamilton: Farther, finds it appears to be jus tertii to the defenders, whatever it may be to their creditors, to object to decree going out in the pursuer's favour, to draw back and take effect from the commencement of the present action: Accordingly, upon the whole, decerns also against the defenders in favour of the pursuer, as in the right of John Hamilton and Company, as well as in the right of Hugh Hamilton, for the balance of L. 4133. 8s. admitted to be due by the defenders upon the said joint adventure, and for the dues of extract; reserving to the creditors of the defenders to object to this decree, if so advised, in the proper action for discussing and deciding the competing interests; reserves also to pronounce further in the present action. Wallace, Hamilton and Company then produced their assignation, and having reclaimed, the Magistrates ultimately found, that that action was not the proper or regular process for discussing the validity of the arrestments used by the pursuer on the dependence thereof, in competition with the assignation granted by the defenders to the compearers of the debts stated to have been arrested by the pursuer; and therefore adhered to the decerniture. A multiplepoinding was then raised before the Court of Session in name of Gibson, Thomson and Company, with the view of settling the question between Campbell, as representing John Hamilton and Company, who claimed to be preferred in virtue of his arrestments, and Wallace, Hamilton and Company, who claimed a preference in virtue of the right acquired from Boyd Dunlop and Company. The action before the Magistrates was then advocated ob contingentiam, and conjoined with the multiplepoinding.

In support of their claim, Wallace, Hamilton and Company maintained,—

1. That as Hugh Hamilton had been the partner in the joint adventure, he and his trustee alone had right to demand an accounting from Boyd Dunlop and Company; and therefore, as Campbell was trustee on the estate of John Hamilton and Company, he had no title to raise the action before the Magistrates of Glasgow; and that, although his arrestments were prior in date to the intimation of the assignation, yet as they had been

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executed on the dependence of an action in which he had no right to insist, they were inept, and consequently he had no title to appear in the competition; that, although it was true that he had got an assignation from Hugh Hamilton's trustee, yet it was posterior in date to the intimation of Wallace, Hamilton and Company's assignation, and could not have the retrospective effect of creating in him a valid title as at the date of the arrestments.

2. That, supposing it were to be held that the arrestments were effectual, still, as the bills, bearing the blank indorsation of Boyd Dunlop and Company, were delivered to Wallace, Hamilton and Company on the 4th of April, whereas the first arrestment was not executed till the 7th of that month, and as these indorsations were equivalent to an intimated assignation, and were consequently prior to the arrestments, Wallace, Hamilton and Company were entitled to be preferred.

To this it was answered,—

That, assuming it to be true, (which was not admitted), that the joint adventure was entered into with Hugh Hamilton alone, still, as he had made use of the name and credit of John Hamilton and Company, (of which he was the managing partner), all the profits thence arising accrued not to him, but immediately to the Company: that although he had not actually employed the funds of the Company, yet it was sufficient to vest the property in the partnership that he had made use of its name and credit: that besides, as Boyd Dunlop and Company were participant in this, which must be regarded as a fraud on John Hamilton and Company, they were directly accountable to them; and accordingly Hugh Hamilton, in his letter of the 2d August 1814, had desired them to state the accounts in name of that Company: that as Boyd Dunlop and Company were thus directly accountable to John Hamilton and Company, Campbell as their trustee had a good title to insist in the action of count and reckoning; and consequently (independent of the assignation from Hugh Hamilton's trustee) the arrestments were effectual, and being prior in date to the intimation of the assignation in favour of Wallace, Hamilton and Company, must be preferred. And,

2. That the bills could not operate as an intimated assignation, first, Because they were dishonoured documents,—had been delivered as mere accessories to the assignation, and did not bear any new and special indorsation, but merely that which had been originally granted to other parties; and, second, Because, as the estate of Thomson, Gibson and Company, had been seques-

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trated and transferred to a trustee, on which Boyd Dunlop and Company had lodged a claim and affidavit, (which, in terms of the statute, constituted the ground on which they were entitled to the dividends), it was impossible that the delivery of the bills could operate as a transfer of these dividends, and that for that purpose a special assignation was necessary.

The Lord Ordinary pronounced this interlocutor:—‘ Finds  
 ‘ that Hugh Hamilton, a partner of John Hamilton and Com-  
 ‘ pany, who carried on business under the same firm, both at  
 ‘ Liverpool, and Greenock, was jointly concerned with Boyd Dun-  
 ‘ lop and Company, merchants in Glasgow, in various speculations  
 ‘ in tobacco and other articles: Finds it clearly instructed by the  
 ‘ whole correspondence, and the books of both parties, that Hugh  
 ‘ Hamilton engaged in the said joint adventures or trade as an  
 ‘ individual, and that he, and not John Hamilton and Company,  
 ‘ would have been liable for the whole loss, if any loss had been  
 ‘ sustained by such joint trade: Finds it stated, and not contra-  
 ‘ dicted, that Hugh Hamilton was the managing and only resi-  
 ‘ dent partner at Greenock, of John Hamilton and Company,  
 ‘ and that he was prohibited, by the articles of copartnery, from  
 ‘ engaging in any separate trade; and finds, that in the course  
 ‘ of the said joint trade, Hugh Hamilton frequently availed  
 ‘ himself of the credit of John Hamilton and Company, by ac-  
 ‘ cepting bills to a great amount with the firm of the Company;  
 ‘ but finds that such bills were always retired, either by the pro-  
 ‘ ceeds of the joint trade, or by Boyd Dunlop and Company, or  
 ‘ Hugh Hamilton as an individual, and that no part of John  
 ‘ Hamilton and Company’s funds was ever employed either in  
 ‘ retiring said bills, or otherwise, in carrying on said joint trade:  
 ‘ Finds, that although the improper conduct of Hugh Hamilton,  
 ‘ in engaging in said joint trade, contrary to the articles of co-  
 ‘ partnery, and still more in adhibiting the firm of the Company  
 ‘ to bills drawn in the course of said trade, might have subject-  
 ‘ ed him in damages to John Hamilton and Company, yet that  
 ‘ these circumstances could not have the effect of making the  
 ‘ said Company parties in the said joint trade: Finds, that in a  
 ‘ confidential letter to Boyd Dunlop and Company, which bears  
 ‘ the post-mark the 2d August 1814, Hugh Hamilton requests  
 ‘ them, for private reasons, which he promises afterwards to ex-  
 ‘ plain, to conceal his name as concerned individually in said  
 ‘ joint trade, and to make out the accounts relative thereto in  
 ‘ name of John Hamilton and Company; and finds, that an un-  
 ‘ signed account was accordingly transmitted by Boyd Dunlop

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and Company, made up in name of John Hamilton and Company, as requested by Hugh Hamilton: Finds, that at this period both Hugh Hamilton, as an individual, and John Hamilton and Company, as a Company, appear to have been in embarrassed circumstances; and finds, that on the 20th August following, and within three weeks after he wrote the said confidential letter, sequestration was awarded against Hugh Hamilton, as an individual; and that, not long after, a sequestration was awarded against John Hamilton and Company: Finds, that John Dunlop, writer in Greenock, was named trustee on the sequestrated estate of Hugh Hamilton, as an individual, while the memorialist, Charles Campbell, was named trustee on the estate of John Hamilton and Company: Finds, that Charles Campbell, as trustee on said estate, brought an action before the Magistrates of Glasgow against Boyd Dunlop and Company, to account to him for the profits on the aforesaid joint trade: Finds, that Boyd Dunlop and Company, in defence against said action, did not at first object to Charles Campbell's title, but ultimately they did state such defence, and explained that it was with Hugh Hamilton as an individual, and not with Hamilton and Company, that the joint trade had been carried on: Finds, that Charles Campbell, thereafter, for a valuable consideration, obtained an assignation from the said John Dunlop, the trustee on Hugh Hamilton's estate, to the profits on said trade; and in consequence thereof, decree was ultimately pronounced in his favour by the Magistrates in said action: Finds, that on the 7th day of April and 5th day of May 1815, during the dependence of said action, but before the assignation was granted him by John Dunlop, Charles Campbell used arrestments in the hands of Thomson, Gibson and Company, and of their trustee, of a considerable sum due by them to Boyd Dunlop and Company: Finds, that on the 4th day of April 1815, Wallace, Hamilton and Company, the constituents of the memorialist Archibald Wallace, obtained, for a valuable consideration, from Boyd Dunlop and Company, an assignation to the sum due to them by Thomson, Gibson and Company, which was the subject of the aforesaid arrestments, and forms the fund in medio in the present process; but finds, that this assignation was not intimated until the 8th of May 1815, which was posterior to the date of the arrestment: Finds, that the said assignation, though not completed till after the arrestment, was sufficient to carry the fund in medio, in respect that

June 23. 1824. ' the arrestment was inept, having been used at the instance of  
 ' the trustee on the estate of Hamilton and Company, and being  
 ' founded on the aforesaid action brought at his instance against  
 ' Boyd Dunlop and Company, against whom he had no title to  
 ' insist in such action: Finds, that the letter of Hugh Hamil-  
 ' ton to Boyd Dunlop and Company, of the 2d. August 1814;  
 ' on which the memorialist, Mr Campbell, founds, as equivalent  
 ' to an assignation by Hugh Hamilton in favour of Hamilton  
 ' and Company, cannot have the effect contended for, both as it  
 ' appears to have been intended for no such purpose, and as it  
 ' was written within less than sixty days of the bankruptcy of  
 ' Hugh Hamilton: Therefore, in the multiplepoinding ranks  
 ' and prefers the memorialist, Archibald Wallace, upon the  
 ' fund in medio, and decerns in the preference, and for payment,  
 ' accordingly; and in the advocacy advocates the cause, and  
 ' finds that the memorialist, Charles Campbell, was only entitled  
 ' to a decree from the date of the assignation in his favour by  
 ' Mr Dunlop, of date the 4th March 1816: quoad ultra, assoil-  
 ' zies the memorialist, Archibald Wallace, and decerns.' Camp-  
 ' bell having reclaimed, the Court recalled ' the interlocutor of  
 ' the Lord Ordinary reclaimed against: Find, that Dunlop and  
 ' Company were bound to account to the petitioner, as Hamil-  
 ' ton and Company's trustee, and that the action was duly and  
 ' competently brought; decern in favour of the pursuer for  
 ' L.4,133. 8s. being the admitted balance found due by the  
 ' interlocutors of the Magistrates, the decree to have effect as  
 ' from the date of the libel in the Inferior Court; and, in the  
 ' multiplepoinding, prefer the petitioner to the fund in medio,  
 ' and decern in the preference, and for payment, accordingly;' and, quoad ultra, remitted to the Lord Ordinary to proceed in the accounting between Boyd Dunlop and Company, and found Wallace, Hamilton and Company, liable in expenses. To this judgment their Lordships adhered upon the 8th June 1821.\*

In the meanwhile, Wallace, Hamilton and Company, had uplifted the dividends from Thomson, Gibson and Company, on caution, and the Lord Ordinary having ordained them to consign the amount, they reclaimed; but the Court, on the 20th June 1822, adhered.†

Against these judgments, Wallace, as in right of Wallace, Hamilton and Company, appealed. But the House of Lords

\* See 1. Shaw and Ballantine, No. 65.

† Ibid. No. 557.



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ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.

*Appellants' Authorities.*—3. Ersk. 5, 6.; M'Adam, June 14, 1787, (1618.); Freer, Nov. 18, 1806, (No. 19. App. Bill of Exchange); Ewart, Rutson and Company, v. Richardson, Jan. 28, 1819, (not reported).

*Respondents' Authorities.*—2. Bell, 508.; 10 Montague, 101.; 5. Vesey, 193.; 1015. Vesey, 218.; 2. Bell, 24.

*Hamilton* as *J. RICHARDSON—MONCREIFF and WEBSTER, Solicitors*

appears to have been intended for a case (Ap. Ca. No. 80.)

Hamilton: Therefore, in the multipounding ranks and prefers the memorialist, Archibald Wallace, upon the

fund in medio, and decerns in the preference, and for payment accordingly; and in the advocacy advocates the cause, and

finds that the memorialist, Charles Campbell, was only entitled to a decree from the date of the assignment in his favour by

Mr Dunlop, of date the 4th March 1816: quoad ultra, assol- dies the memorialist, Archibald Wallace, and decerns, Camp-

bell having reclaimed, the Court recalled the interlocutor of the Lord Ordinary reclaimed against: Find, that Dunlop and

Company were bound to account to the petitioner, as Hamil- ton and Company's trustee, and that the action was duly and

competently brought; decern in favour of the pursuer for L. 4,133. 8s. being the admitted balance found due by the

interlocutors of the Magistrates, the decree to have effect as from the date of the libel in the Interior Court; and, in the

multipounding, prefer the petitioner to the fund in medio, and decern in the preference, and for payment accordingly;

and, quoad ultra, remitted to the Lord Ordinary to proceed in the accounting between Boyd Dunlop and Company, and found

Wallace, Hamilton and Company, liable in expenses. To this judgment their Lordships adhered upon the 8th June 1821.

In the meanwhile, Wallace, Hamilton and Company, had liquidated the dividends from Thomson, Gibson and Company on caution, and the Lord Ordinary having ordained them to consign the amount, they reclaimed; but the Court, on the 20th

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Against these judgments, Wallace, as in right of Wallace, Hamilton and Company, appeared. But the House of Lords