

of. On the whole, therefore, I have come to think very clearly that Mr Anderson did not exceed his powers.

Their Lordships therefore sustained the claims for Mrs and Miss Paul and for William White and others, and *quoad ultra* adhered to the Lord Ordinary's interlocutor.

Counsel for Mrs Paul and Others (Reclaimers)—Kinnear—Young. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Real Raisers and Robert Whyte and Others (The Board of Management of the "Anderson Bequest")—Black. Agent—Thomas Padon, S.S.C.

Counsel for Mrs Whyte and Others—Lorimer. Agent—S. Greig, W.S.

Thursday, December 4.

FIRST DIVISION.

[Sheriff of Aberdeen and Kincardine.

CUMMING v. HAY & STEPHEN.

Partnership—Liability of Firm for Money Borrowed by Managing Partner whose Name was also Firm's Name.

A, B, and C were partners of a firm, of which A had the sole management and charge. A having borrowed money from D, and given receipts signed with his name (which was also that of the firm), D on the dissolution of the partnership sued the partners for repayment. *Held* that the money having been proved to have been borrowed by A from D for the purposes and on the credit of the firm, the partners were bound in repayment, it not being requisite that it should be further proved that A had actually applied the money to firm purposes.

George Henry, Alexander Hay, and George Stephen carried on business as fishcurers in Peterhead, under the firm of George Henry, from 29th September 1873 till 14th December 1877, when the firm was of mutual consent dissolved. George Henry had the sole management and charge of the business, the firm's bank account was kept in his name, he accepted all the company bills, and was in the habit of borrowing money for the firm's use from private persons. It appeared that on March 21, 1874, he borrowed £20, and on 18th July 1875, £25, from Mrs Cumming, his mother-in-law. Both sums were alleged to have been borrowed on behalf of the firm, and their proceeds to have been applied to the firm's purposes, and receipts for both were produced signed in his name, which was also that of the firm. Mrs Cumming raised this action for payment of the two sums against the now dissolved firm and their partners.

The pursuer pleaded, *inter alia*—“(1) The said George Henry being the managing and only ostensible partner of the firm condescended on, and having borrowed the sum sued for, for or on behalf of the said firm and applied it towards the firm's business, and the defenders Hay and Stephen being partners of the said firm, the

pursuer is entitled to decree against all the defenders as concluded for, with expenses.”

The defenders pleaded, *inter alia*—“(4) The alleged loan not being authorised by the firm, nor made on the credit thereof, nor the money applied to the purposes thereof, nor on the credit or with the consent or knowledge of the defenders Hay and Stephen, they and the said firm of George Henry are entitled to absolvitor, with costs.”

A proof was led, the result of which appears from the Lord President's opinion, *infra*, and on 6th June 1879 the Sheriff-Substitute (COMRTE THOMSON) pronounced an interlocutor containing the following findings:—“Finds as a matter of fact that the defenders were copartners; that the defender George Henry was managing partner; that he borrowed from the pursuer the sum sued for; that the other defenders who deny liability have failed to prove that the sum was borrowed for any other purpose than the business of the firm: Finds as matter of law that the whole defenders are jointly and severally liable; therefore decerns against the whole of the defenders in terms of the conclusions of the summons.”

The defenders Hay & Stephen appealed to the Court of Session.

Authorities—*Blair v. Bryson*, June 11, 1835, 13 S. 901; *Lindley on Partnership*, i. 361, and case of *Bonbonus* (8 Ves. 544) there; *Johnston v. Phillips*, July 24, 1822, 1 Shaw's App. 244; *M'Leod v. Howden*, June 27, 1839, 1 D. 1121.

At advising—

LORD PRESIDENT—It is averred in the condescence, first, that the defenders Henry, Hay, & Stephen carried on business as fishcurers at Peterhead under the firm of George Henry, from 29th September 1873 to 14th December 1877. That is admitted, and we may therefore deal with this case as a case of a proper partnership business carried on under a firm name. It is averred, in the second place, that Henry was the managing partner, and did the whole business of the firm; and that is admitted by the defender Hay, and not disputed by the other partner Stephen. Hay says—“Henry contracted all the company's debts and signed all the company's bills. The bank-book was kept in his name, and was operated upon by him on the firm's account.” Now, the the next averment, and the most important one in the case, is, that Mrs Cumming, the pursuer, lent two sums of £20 and £25 to George Henry for the purposes of the business; that is, that he borrowed them expressly for the business, and she advanced them to him on account of it. It is further stated that the sums were applied to the purposes of the business. But that is not a necessary part of the pursuer's case. This being a proper partnership, and Henry being entrusted with the whole management of it, if he borrowed for the purposes of the business, the creditor making the advance had nothing to do with the purposes to which it was applied.

The question is, Was this money borrowed by him for the partnership purposes? Now, if that question depended solely on the evidence of Henry, I should be very slow to find it proved, for I do not give much credit to his evidence; his conduct throughout is open to the gravest suspicion, and except in so far as he is confirmed by other wit-

nesses I should give his evidence small credence. But I see no reason to suspect the honesty of the pursuer [Mrs Cumming. She states very distinctly that she advanced the sums, and produces two acknowledgments which she says she received from George Henry, and which are signed by him, which may mean either George Henry the individual or George Henry the firm, his being the firm name. If he represented to Mrs Cumming that he borrowed for partnership purposes, and she advanced money on the faith of that, "George Henry" must be held to be the firm name; and if so, we have here an acknowledgment of money advanced which is signed by the firm. That question depends on the credit to be given to Mrs Cumming and to George Henry, in so far as supported by her evidence. Now, I see no reason to doubt Mrs Cumming. One important point is this—she was in that condition of life in which she would not be presumed to have that money at hand; but when she is asked to explain how she was possessed of the money, she says it belonged to her son, who was abroad with his ship—that the first sum advanced consisted of his wages deposited in her hands, and the second was part of £50 which he sent her in a bill of exchange. The son is examined, and confirms his mother's statement; and we have further this important piece of real evidence—that the bill is produced, and was discounted at the bank, just at a time which would account for her being in possession of money at the date of the second advance.

Taking all these considerations together, I think we must hold that the money was advanced by Mrs Cumming, and for the purposes of the partnership which she knew George Henry was carrying on. I am satisfied with the result of the Sheriff-Substitute's interlocutor, though I am not disposed to agree with his finding that the defenders "have failed to prove that the sum was borrowed for any other purpose than the business of the firm." I think it fell on the pursuer to prove that she advanced the money to the managing partner for the purposes of the firm, and if that is established, it is sufficient for the pursuer's case.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court therefore refused the appeal.

Counsel for Pursuer (Respondent)—Mackintosh.
Agent—A. Morison, S.S.C.

Counsel for Defenders (Appellants)—Trayner—Lorimer. Agent—C. S. Taylor, S.S.C.

Thursday, December 4.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

MARTIN (HERON MAXWELL'S JUDICIAL FACTOR) v. STOPFORD BLAIR'S EXECUTORS.

Jurisdiction—Forum non competens—Trial of Questions Arising in an Executory Estate under Chancery Administration at Time.

Certain questions were raised in the administration of an executory estate regarding

(1) the apportionment of rents upon a Scotch estate as between heir and executor, and (2) a balance of accounting arising upon West Indian property which had belonged to the deceased. The executory estate had been put under an administration suit in Chancery, which was still in dependence. The executor having questioned the jurisdiction of the Court of Session, *held* that both Courts had jurisdiction to try the questions, but that the matter of apportionment depending on Scotch law only, the *forum conveniens* as regarded that point was the Court of Session.

Colonel W. H. Stopford Blair died on 20th September 1868, at which date he was heir of entail in possession of the estate of Penninghame, in Wigtownshire, and also proprietor of certain unentailed lands in Scotland and Ireland, and of an estate in the West Indies. By his last will and codicils one-half of the residue of his personal estate, which was very large, was destined to his only daughter Mrs Heron Maxwell, and the other half to his son Mr E. J. Stopford Blair, one of the defenders. The said defender was also one of his father's executors, his heir of entail, and heir in the fee-simple estates, and a trustee under the marriage-contract of his sister Mrs Heron Maxwell. Upon the trust-estate created under that marriage-contract (dated October 14, 1847), by which Mrs Maxwell *inter alia* assigned in trust the whole property and estate, real and personal, then belonging to her or which she might acquire during the subsistence of the marriage, the pursuer had been appointed judicial factor on 21st July 1874; and it was in connection with the management of that estate that the present action was raised.

Two main questions had arisen between the judicial factor and the executors of Colonel Blair. The first was as to the apportionment of the rents of Penninghame as between heir and executor, involving a dispute as to fore-hand payment and the previous usage on the estate. The other was in connection with the West Indian property belonging to the testator. The factor claimed a large balance from the profits and produce up to 31st Dec. 1868, the date of an arrangement entered into between the parties.

The present action was accordingly raised by the pursuer as judicial factor against Mr E. J. Stopford Blair and Mr Macnaughten, as the executors of Colonel Stopford Blair, and against the said Mr E. J. Stopford Blair as an individual, and the summons concluded for an order on the executors to exhibit and produce a full and particular account of their whole intromissions, and for payment with interest of such balance as should be found due by them to the pursuer as factor foresaid. The defenders explained in their statement of facts that a bill of complaint, of date 1st July 1869, having been filed in Chancery by the children of Mr and Mrs Heron Maxwell (as ultimate beneficiaries in the marriage-trust represented by the pursuer) against the present defenders and Mr and Mrs Maxwell and their marriage-contract trustees, Vice-Chancellor Sir J. Stuart gave decree on 24th July 1869 in terms of the prayer, and directed, *inter alia*, that so far as necessary the trusts of the marriage-contract and also of Colonel Blair's will and codicils should be carried into execution