or his money in trust for the purpose of an entail, the truster should have made the entail himself. But any practical difficulty is entirely removed by the subsequent part of the clause, which really does not admit of more than one construction, and it is that the date of the trust deed coming into operation shall be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail. The true answer to all the criticisms which have been made upon the 28th section seems to me to be that of Lord President Inglis, that the statute for its own purposes has imposed an artificial date upon all entails of a certain class, and it is of no consequence that this artificial date may not square with the facts which have determined the actual date of a particular deed of entail. I therefore agree with your Lordship in the chair that the petition must be granted.

LORD LOW—I concur with your Lordship in the chair and with Lord Kinnear. Your Lordships have so fully expressed my views upon the case that I do not think I could usefully add anything to what has been said.

LORD ARDWALL—I also concur in the opinions expressed by your Lordship and Lord Kinnear.

LORD PRESIDENT—Lord Stormonth Darling concurs in my opinion, and Lord Pearson concurs in the opinion of Lord M'Laren. We will remit to the Lord Ordinary to grant the prayer of the petition.

The Court remitted to the Lord Ordinary to grant the prayer of the petition.

Counsel for the Petitioner—Cullen, K.C. —Chree. Agent—F. J. Martin, W.S.

Counsel for the Respondent (Lord Scone's *tutor ad litem*)—The Dean of Faculty (Campbell, K.C.)—J. R. Christie. Agent—F. J. Martin, W.S.

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*Saturday, January* 18.

## FIRST DIVISION.

[Sheriff Court at Kilmarnock.

## HARVIE *v.* SMITH.

*Bankruptcy—Notour Bankruptcy—Constitution of Notour Bankruptcy—Expired Charge for the Sum of Expenses Contained in a Decree—Small Debts (Scotland) Act* 1835 (5 *and* 6 *Will. IV, c.* 70)—*Debtors (Scotland) Act* 1880 (43 *and* 44 *Vict. c.* 34), *sec.* 6.

Decree was pronounced against a tenant for two principal sums of £12 and £35 with £40, 3s. of modified expenses. The landlord having charged for the £40, 3s. on the extract decree, and the charge having expired, petitioned for cessio. The tenant maintained that he was not notour bankrupt inasmuch as the £40, 3s. was not a debt to which the Debtors (Scotland) Act 1880, section 6, applied, imprisonment for it not having been "rendered incompetent" by that Act, but having been incompetent prior to it under the Small Debts (Scotland) Act 1835, sec. 1.

*Held* that the expired charge was good evidence of notour bankruptcy, in respect that (1) the provisions of section 6 of the Debtors (Scotland) Act 1880 applied to all cases in which by that Act imprisonment had been rendered incompetent, even though at its date imprisonment in such cases was already incompetent; and (2) the sum of £40, 3s., contained in the charge, was outwith the provisions of section 1 of the Small Debts (Scotland) Act 1835.

The Small Debts (Scotland) Act 1835 (5 and 6 Will. IV, c. 70), repealed by the Statute Law Revision Act 1891 (54 and 55 Vict. c. 67), provides, section 1, that it shall not be lawful to imprison any person "on account of any civil debt which shall not exceed the sum of £8, 6s. 8d. exclusive of interest and expenses thereon. . . ."

The Debtors (Scotland) Act 1880 (43 and 44 Vict. c. 34), which abolished imprisonment for debt, except in certain specified cases, enacts (section 6)—"In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment, or where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to execution without payment having been made. Nothing in this section contained shall affect the provisions of section 7 of the Bankruptcy (Scotland) Act 1856."

Marion Harvie of Little Auchengree, Dalry, Ayrshire, presented in the Sheriff Court at Kilmarnock a petition for cessio against William Smith, farmer, residing there, in which she averred that the defender had been charged, at her instance, to make payment of a sum of £40, 3s. of modified expenses in virtue of an extract decree of the Sheriff of Ayrshire dated at Kilmarnock 9th May 1906; that the charge had expired without payment, and that the defender was accordingly notour bankrupt. The extract decree was for two sums of (*a*) £12 and (*b*) £35 in addition to the said sum of expenses.

On 5th August 1907 the Sheriff-Substitute (D. J. MACKENZIE), after hearing parties on a caveat lodged by the defender, made the usual order for service and intimation of the petition, holding that there was *prima facie* evidence of the defender's notour bankruptcy.

"*Note.*—It is argued on behalf of the debtor that he is not notour bankrupt, in respect that the debt which he was charged to pay was one for expenses in an action at the instance of the petitioner. This argument is founded on the provisions of the 6th section of the Debtors Act 1880,

which provides the mode of constituting notour bankruptcy 'in any case in which, under the provisions of this Act, imprisonment is rendered incompetent.' It is said that this section, under which the petitioner has proceeded to charge, is not applicable in respect that liability for imprisonment in the present circumstances did not exist before the Act of 1880, having been already removed by the Act 5 and 6 Will. IV, c. 70, secs. 1-5. That Act (now repealed, but in force in 1880) provides that imprisonment shall not be competent in respect of debts less in amount than £8, 6s. 8d., 'exclusive of interest and expenses.' The present petitioner has only charged on a sum of £40 of expenses in the previous action, and it is therefore held that there is here no principal sum at all on which the charge has expired, but only a sum of expenses; that such a debt did not carry liability for imprisonment before 1880; and that, consequently, it was not one of those cases in which imprisonment was rendered incompetent by the Act of that year.

"I am not satisfied that this argument is a good one. The sum on which the charge proceeded is £40. That consists, no doubt, of expenses decerned for in another action, but it is none the less a debt due by the defender. I do not know of any principle which would prevent the petitioner from doing diligence in respect of that sum as a substantive debt. He has, indeed, a warrant for 'all lawful execution,' and has to this extent put it in force. If that sum be above £8, 6s. 8d., I do not see how the provisions of the older Act can help the debtor. If the Act of 1880 had not been passed, I apprehend that the debtor here would have been liable to imprisonment for non-payment of this sum of £40. The decree for it might have been issued in the name of an agent, and I do not see that, in that event, the remedy of imprisonment at his instance could have been avoided.

"If this be so, the Act of 1880 applies, and the charge having expired, I am of opinion that there is *prima facie* evidence of notour bankruptcy.

"I have not been referred to any reported decision on this question, but I may observe that the competency of proceeding to apply for cessio on a decree of expenses alone seems not to have been questioned on the grounds here stated in the case of the *Magistrates of Falkirk* v. *Lundie*, 1892, 8 S. L. Review 272, in the Sheriff Court of Stirlingshire."

On 2nd September 1907 the Sheriff-Substitute granted the prayer of the petitioner, and on 9th November the Sheriff (BRAND), on appeal, affirmed his Substitute's interlocutor.

The defender appealed, and argued—The defender was not notour bankrupt, for the appropriate method of constituting notour bankruptcy had not been taken. The method introduced by the Debtors Act 1880 (*cit. supra*) had been followed, but that was only applicable in a case where "under the provisions of" that Act imprisonment was "rendered" incompetent. It was therefore inapplicable here, for at the date of that Act imprisonment was in this case already incompetent. The charge was for a sum of expenses alone, and for such a sum a debtor could not in 1880 have been imprisoned. The Small Debts (Scotland) Act 1835 (*cit. supra*) now repealed, but in force in 1880, provided that imprisonment should not be competent in respect of debts less in amount than £8, 6s. 8d., exclusive of interest and expenses. The charge here showing no principal sum was no better than if it had been for a sum less than £8, 6s. 8d. Accordingly this not being a case in which imprisonment was rendered incompetent by the Act of 1880, the methods of constituting notour bankruptcy prescribed by the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79, sec. 7) ought to have been followed—*Black* v. *Watson*, November 29, 1881, 9 R. 167, 19 S.L.R. 141. As they had not, the defender was not notour bankrupt, and the petition for cessio should have been dismissed.

Counsel for respondent were not called on.

LORD PRESIDENT—The point which we have to decide is a very short one, namely, whether there was here good evidence of notour bankruptcy on which a petition for cessio might be granted.

Now, the evidence of notour bankruptcy on which the petition was granted was an expired charge for a sum of £40, 3s. of modified expenses, which expenses the defender was charged to pay under an extract decree *in foro*. On comparing the decree with the execution of charge one sees that the sum of £40, 3s. of modified expenses are the modified expenses contained in the decree.

The point raised by the appellant is that the provisions of the 6th section of the Debtors Act 1880 (43 and 44 Vict., c. 34) do not apply. The heading of that section is "New Mode of Constituting Notour Bankruptcy," and the section says—"In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by expiry of the days of charge without payment, or where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to execution without payment having been made."

And then the section proceeds:—"Nothing in this section contained shall affect the provisions of section seven of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79)."

The appellant says that the section I have just read is not applicable, because this is not a case in which imprisonment was rendered incompetent, inasmuch as imprisonment was already incompetent at the date of the Act. In other words, he seeks to put a gloss on the expression "rendered incompetent" to the effect that it really means "rendered for the first time

incompetent." I do not think the appellant has any right to put such a gloss on these words. There were other ways of constituting notour bankruptcy than imprisonment, and the case of *Black v. Watson*, 9 R. 167, cited by the appellant, really points to that, though Mr Lippe's argument at first sight is supported by the form of expression used by the Lord President in his opinion in that case, that the 6th section of the Act of 1880 provides, not for cases in which previous to that Act imprisonment was incompetent, but to cases in which imprisonment was rendered incompetent by force of the provisions of that Act itself. That form of expression really went, I think, beyond the requirements of the case. The point really decided by the case was that the grounds of constituting notour bankruptcy detailed in the Act of 1856 stand on their own basis apart from the Act of 1880. But when imprisonment for debt was abolished practically *in toto*, it became necessary to provide a new method of constituting notour bankruptcy in those cases in which under the old law imprisonment was required, but it was not necessary to interfere with the other methods of constituting notour bankruptcy, which still stand. Accordingly, I do not think the appellant has any right to put on the words of the 6th section the gloss he proposes. The Act applies to all cases in which by its provisions imprisonment is incompetent. The matter can be very well tested by supposing that the respondent had attempted to imprison the appellant. I think in that case he would at once have been met by the Act of 1880.

Apart from that, however, it is necessary that for the argument of the appellant he could have been met by the Act of 5 and 6 Will. IV, c. 70, also, which provides that imprisonment shall not be competent in respect of debts less in amount than £8, 6s. 8d., exclusive of interest and expenses. That is, it says, that such debts shall not be swollen by interest and expenses. Now, the objection here is that the sum charged for consists solely of expenses. But if we look at the decree here we see that the principal sums decerned for were each of them greater than £8, 6s. 8d. It is no answer for the appellant to say that you can only find that out by looking at the decree. It is for the person objecting to the notour bankruptcy to show that it was wrongly constituted on the ground that the principal sum to which the expenses related was a sum less in amount than £8, 6s. 8d. He cannot show that here, and I am therefore of opinion that on both grounds the appellant has failed.

LORD M'LAREN—It is not surprising that the Bankruptcy Act of 1856 does not make provision for rendering a person notour bankrupt under a decree for expenses of a Small Debt action, for sequestration under that statute could only proceed on the application of a creditor whose debt amounted to not less than £50, or in the case of more than one creditor, to £70 or £100, as the case might be, and it was not to be expected that the expenses of a Small Debt action would amount to such a sum. Accordingly when imprisonment for debt was abolished by the Debtors Act of 1880—except in the case of alimentary debts and debts due to the Crown—it became necessary to have some mode of constituting notour bankruptcy in cases where under the older law diligence by imprisonment was competent.

Now the appellant contends that the provisions of the 6th section of the Debtors Act regarding the constitution of notour bankruptcy in such cases do not apply, inasmuch as imprisonment was not, in the present circumstances, rendered incompetent by that enactment. I do not think it is a good objection to the applicability of the Debtors Act to say that it did not for the first time render imprisonment incompetent in cases where at the date of the Act it was already incompetent under the prior Act of 1835 (5 and 6 Will. IV, cap. 70). The two Acts are to be read concurrently.

I also agree with your Lordship in thinking that no legal question really arises here, for if you suspend a charge, or bring an action to enforce payment of a debt, we are always entitled to look at the grounds on which the decree is founded. Doing so here one sees that the two principal sums in the decree are each of them greater than £8, 6s. 8d.—viz., £12 and £35—and it has not been shown that the sum of £40, 3s. of modified expenses is a sum of the nature described in the Act of 5 and 6 Will. IV, cap. 70.

LORD KINNEAR — I am entirely of the same opinion. The Debtors Act of 1880 provides that, with certain exceptions, "no person shall, after the commencement of this Act, be apprehended or imprisoned on account of any civil debt." There is no question that the appellant is entitled to the benefit of that general enactment. Then it goes on to say, in section 6, that where, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by certain modes of procedure which do not involve imprisonment. I think that provision applies to cases where a debtor might have escaped imprisonment, even although the Act of 1880 had not been passed. The intention was to provide a new method for creating notour bankruptcy in place of the method by imprisonment which the Act had abolished; and if the debt is one which, under the provisions of the Act, cannot be enforced by imprisonment, the condition for bringing about notour bankruptcy in a different way, will attach, although the debtor may be protected from imprisonment by an earlier statute as well as by the Act of 1880.

I am not satisfied, however, that the appellant's construction of the Act of 1835 (5 and 6 Will. IV, cap. 70) is correct. What is there provided for is that imprisonment shall not be competent in respect of debts less in amount than £8, 6s. 8d., "exclusive of interest and expenses." Now that is not a general enactment that no person is to be imprisoned for a debt consisting merely of

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.

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*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-