

bank to bank, although even then there is more water on the defender's than the pursuer's side, because the channel which the river has made for itself is deeper on the defender's side than on the other. But it is not now open to controversy that where the water of a river in its ordinary condition covers the *alveus* from bank to bank it is the centre of the *alveus* between the banks that is the *medium filum*, and consequently the boundary of the properties on the opposite banks. If the pursuer's view were adopted, the boundary of the lands on either side would be constantly changing, according to the state of the river in dry weather and wet. I think the Sheriff was right, and that the appeal should be dismissed.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent.

The Court dismissed the appeal, found in fact and in law in terms of the findings in fact and in law in the interlocutors appealed against, and assoiized the defender.

Counsel for the Pursuer and Appellant—Campbell, K.C.—D. Anderson. Agents—W. & J. Cook, W.S.

Counsel for the Defender and Respondent—Wilson, K.C.—Dewar. Agents—Davidson & Syme, W.S.

Friday, November 1.

## SECOND DIVISION.

[Lord Stormonth Darling,  
Ordinary.]

### BREMBER v. RUTHERFORD.

*Partnership—Holding out—Diligence—Charge—Decree against Firm not Warrant for Diligence against Person not Partner even if Proved to have Held Himself out as Partner.*

Held that a decree against a firm was not a warrant for executing diligence against a person who was not a partner of the firm, even although he might be proved to have held himself out as a partner so as to incur liability to third parties.

On 11th December 1890 John Rutherford, joiner, Annan, obtained decree in the Small Debt Court at Dumfries, against Brember & Company, chemists, 134 High Street, Annan, for £9, 19s. being the amount of an account for tenant's fittings in their shop at Annan executed in May and June of that year.

On 8th January 1901 William Brember, hotel-keeper, Strathaven, was charged, "as one of the partners of Brember & Company above designed, as such partner and as an individual" to implement the said decree within ten free days from that date under pain of poinding and sale, if the same be competent without further notice.

Brember presented a note of suspension against Rutherford, praying the Court to suspend the charge.

The complainer averred—"The complainer is not, and never was, a partner of the said firm of Brember & Company, nor is he in any way responsible for their obligations. In particular, he is not in any way responsible for the charger's claim against the said firm, and is not liable to be called upon to make payment of said claim, either as a partner of said firm or as an individual. The complainer was not in any way affected by said decree, and there is no warrant for the execution of diligence against him at the instance of the charger."

The complainer pleaded, *inter alia*—" (1) There being no warrant for the execution of diligence at the instance of the charger against the complainer, the proceedings complained of should be suspended. (3) The complainer not being a partner of said firm of Brember & Company, and not having held himself out as such, is entitled to have the said charge suspended as concluded for."

The respondent pleaded, *inter alia*—" 1. The complainer being the proprietor of the business carried on under the firm name of Brember & Company, and being liable for the debts thereof, said charge is orderly proceeded, and the note should be refused. 2. The complainer being one of the partners of the firm of Brember & Company, is liable for the debts thereof, and the note should be refused. 3. The complainer having by his actings held himself out as (1) owner, and (2) as partner of said business, and the respondent having relied on his name and credit as such owner and partner, the note should be refused."

On 26th January 1901 the note was passed, and on 26th February 1901 the Lord Ordinary (STORMONTH DARLING) allowed a proof, which was taken on 12th March.

Thereafter on 28th March 1901 the Lord Ordinary (STORMONTH DARLING) sustained the third plea-in-law for the respondent, found the charge orderly proceeded, and refused the note of suspension.

*Note.*—[After a statement of the facts]—"Rutherford seeks to justify the charge on the ground either that Brember was in fact a partner or that he held himself out as such. It is admitted on record that Brember was tenant of the shop for a year from Whitsunday 1900, but that circumstance is not enough to make the charge good, because the decree was taken against Brember & Company, and not against Brember individually as tenant. It is proved to my satisfaction that he was not in point of fact a partner in the business nor the owner of it. He contributed by way of loan the greater part of the capital with which the business was started, but the business itself belonged to one Flynn, Brember's brother-in-law, who traded under the name of Brember & Company," for a reason (*which it is not necessary to specify*), "and it was thought desirable both by Brember and himself that his own name should be kept dark.

“But then the question remains whether Brember incurred liability to Rutherford by holding himself out as a partner, and I am of opinion that he did.” [*His Lordship then gave the grounds on which this opinion was based.*]

The complainer reclaimed, and argued, *inter alia*—His first plea-in-law should be sustained. The decree was against the firm alone, and he admitted that such a decree was competent—*Forsyth v. Hare & Company*, November 18, 1834, 13 S. 42. There was also no doubt that under such a decree diligence could proceed against any partner of the firm—Partnership Act 1890 (53 and 54 Vict. cap. 39), sec. 4, sub-sec. 2. But the complainer was not a partner of the firm, and although a person holding himself out as a partner might make himself liable to third parties just as if he was a partner, that did not make him a partner of the firm—*Clippens Shale Oil Company v. Scott*, May 17, 1876, 3 R. 651, 13 S.L.R. 429. There was therefore no warrant for the execution of diligence against him.

Argued for the respondent—A person holding himself out as a partner so as to incur liability to a third party was liable to the same diligence as if he was a partner. In any event, under the general law of holding out he was personally barred from maintaining that he was not a partner in a question with the innocent third party whom he had deceived—*Findlay v. Currie*, December 7, 1850, 13 D. 278; *Goodwin v. Industrial and General Trust Company, Limited*, December 6, 1890, 18 R. 193.

LORD YOUNG—I have read this record carefully, and also the judgment of the Lord Ordinary, and have given my best attention to the arguments for and against the suspension. My opinion is that this charge against the present suspender cannot be sustained. It is a charge on a decree in absence, not against the suspender, but against a firm of the name of Brember & Company. Now, the Lord Ordinary holds it to be proved that if there ever was such a company, the suspender was not a partner of it. I agree with the Lord Ordinary in that—indeed I go the length of holding that there was no such company at all. I think it is according to the evidence that the man Flynn made use of the name “Brember & Company” in his business because he did not want his own name to be known. Brember was a relative of Flynn, and assisted him, but he was not a partner in the business. Brember may have so conducted himself as to make himself liable for the debts of Flynn in a question with the respondent, but he is not liable as the firm of Brember & Company or as a partner of that firm. If the action had been brought against himself, it would have been a good ground for decree against him that he had represented himself as trading under that name, or as the true employer of Flynn, even if there was no partnership, and he would have had no ground for objecting to a charge on such a decree. But here the decree is not against himself, but against Brember & Company. I am

quite of opinion that in a suspension of a charge against Brember on that decree there is no answer to the plea for the suspender that there is no decree against him at all, and in such a suspension it is impossible for the Court to enter upon the question whether he acted in such a manner as to hold himself out to the respondent as a partner of the firm. It will be competent for the respondent, if so advised, to proceed directly against Brember on that ground.

I think that the Lord Ordinary has fallen into error, and that his interlocutor should be recalled.

LORD TRAYNER—I agree. The question here appears to be a very simple one. The respondent has obtained a decree against Brember & Company. That decree is a good warrant for diligence against Brember & Company, and against any partner of Brember & Company, but it is a warrant for diligence against nobody else. The question therefore is—Is the complainer a partner of Brember & Company? The Lord Ordinary is of opinion, and I agree with him, that it has been proved that he is not a member of the firm. That is conclusive of the whole matter, for if the complainer is not a partner there is no warrant for the charge complained of.

I am therefore of opinion that the first plea for the complainer must be sustained and the charge suspended.

I offer no opinion as to whether the complainer held himself out as a partner and thus made himself liable for the company's debts. That is not the question here. The question is—Does the charge proceed on a sufficient warrant? and I am of opinion that it does not.

The LORD JUSTICE-CLERK concurred.

LORD MONCREIFF was absent.

The Court recalled the interlocutor reclaimed against, sustained the first plea-in-law for the complainer, and suspended the letters and charge *simpliciter*.

Counsel for the Complainer and Reclaimant—Salvesen, K.C.—A. M. Anderson. Agents—J. Knox Crawford & Son, S.S.C.

Counsel for the Respondent—Chree—Ingram. Agents—Purves & Barbour, S.S.C.

Saturday, November 2.

FIRST DIVISION.

FERGUSON, PETITIONER.

*Company—Shares Issued as Fully Paid-up—Authority to File Contract or Memorandum—Title of Individual Shareholder to Petition—Companies Act 1898 (61 and 62 Vict. c. 26), sec. 1, sub-secs. 1 and 4.*

In a petition under the Companies Act 1898 for authority to file a contract or memorandum with the Registrar of