

THE LORDS found, ' That Messrs Mansfield, Ramsay, and Company, are entitled to retain, out of the fund in their hands, a proportion thereof, corresponding to their own debt, *in computo* with the debts due to the whole other creditors of the bankrupts: preferred Bailie, Pocock, and Company, *tertio loco*, according to the date of the arrestments: Found Messrs Crumlington and Company, and Messrs Walkers, Fishwick, and Company, are only entitled to be ranked on the remainder of the funds *pari passu* with Mansfield, Ramsay, and Company, for the balance of their debt, and any other creditors of the bankrupt who have used no arrestments: And, with these variations, adhered to the interlocutor reclaimed against, and refused the desire of the petition; and remitted to the Lord Justice-Clerk Ordinary to apply this interlocutor, so far as to ascertain the amount of the proper debts due to Messrs Mansfield, Ramsay, and Company, and the amount of the debts due to the whole other creditors of the bankrupts.' See FORUM COMPETENS.—PROCESS.

Lord Ordinary, *Justice-Clerk.*

Act. Dean of Faculty *Erskine.*

Alt. Solicitor-

General Blair, D. Douglas.

Clerk, *Gordon.*

D. D.

Fol. Dic. v. 3. p. 146. Fac. Col. No 177. p. 419.

1796. May 13.

ALEXANDER NAIRNE, Trustee on the Sequestrated Estate of Peter and Francis Forrester and Company, *against* THOMAS CRANSTOUN, Trustee for the Creditors of Alexander Laidlaw.

ALEXANDER LAIDLAW accepted bills drawn by Peter and Francis Forrester and Company to the amount of L. 831 : 3 : 6; and, on the other hand, they at the same time granted promissory-notes to Laidlaw for L. 833 : 9 : 7. Both sets of bills were payable either five or six months after date.

Peter and Francis Forrester and Company indorsed the bills accepted by Laidlaw, and received their value; but before they were payable the Company became bankrupt.

About the same time Laidlaw also stopped payment, while possessed of the promissory-notes of Forrester and Company.

The holders of Laidlaw's bills drew 10s. in the pound of their amount from his estate. They also ranked for them upon the estate of Forrester and Company, from which it was supposed they would draw 5s. more.

Mr Cranstoun, trustee for Laidlaw's creditors, having claimed to be ranked on Forrester and Company's estate for the promissory-notes granted to Laidlaw by them, Mr Nairne, the trustee upon it,

Objected; The granting of the promissory-notes did not create a debt against Forrester and Company, distinct from that due by them in consequence of the accommodation-bills which they received from Laidlaw, and got discounted. These bills were the only value which they received for granting them; and, had Forrester and Company paid them, Laidlaw would have had no claim for

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A. and B. granted accommodation-bills to each other nearly of the same value. A. indorsed the bills accepted by B. for value; but B. retained in his own hands those granted by A. A. and B. having afterwards become bankrupt, the indorsees of B.'s bills ranked for payment of them, both upon his estate as acceptor, and upon A.'s as drawer; from the former they drew 10s. in the

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pound, and
from the
latter 5s. In
this situation
it was found,
that B.'s cre-
ditors were
entitled like-
wise to rank
on A.'s estate
for the bills
granted by
him to B. and
that compen-
sation or re-
tention could
not be plead-
ed by A.'s
creditors a-
gainst their
doing so.

the promissory-notes. These promissory-notes, therefore, can be considered in no other light than as a security put into Laidlaw's hands by Forrester and Company, in relief of the obligation which he had undertaken by accepting the accommodation-bills. If, indeed, Laidlaw had paid these bills, and so prevented their ranking on the estate of Forrester and Company, he would have been entitled to rank upon it in virtue of his promissory-notes. But as he has failed to do so, and as the holders of these bills are already ranked on Forrester and Company's estate, and will draw a rateable proportion of it with their other creditors, it is plain, that Forrester and Company's trustee is entitled to plead compensation or retention against the claim made by Laidlaw's creditors; for, to sustain the claim, would be to allow both the creditor and the cautioner of the debtor to rank for the same debt, contrary to the established rule, that no debt can be ranked more than once on the personal estate of a bankrupt, 9th December 1794, Curtis, No 43. p. 2580.

Answered; It is a mistake to suppose, that, in consequence of the transaction between Forrester and Company and Laidlaw, the latter stood in the situation of cautioner for the former. Had this been its object, Forrester and Company would not have given Laidlaw promissory-notes as his security in relief. The transaction that took place between them, was, in fact, an exchange of bills, entered into with a view reciprocally to support each other's credit; and, at its commencement, it was a fair and equal transaction. The only risk which either party ran, was the possibility of the bills of the one becoming of less value than those of the other, when they should become payable. If both parties had continued solvent till that period, the transaction would have been finished, by each taking back their own bills, and it would have thus ended in the same equality and fairness with which it began. Suppose even that both had become bankrupt, and that both had indorsed the bills received by them, the holders of either set of bills would have been entitled to rank for them, without any regard to the dividends drawn on the other; and still there would have been no unfairness in the transaction; for it was foreseen from the beginning, that the bills of the one might become less valuable than those of the other.

But, as in the case which has occurred, Forrester and Company have indorsed for value the bills accepted by Laidlaw, while he has retained their promissory-notes; if the present objection were sustained, the transaction would result in the greatest unfairness and inequality. For Forrester and Company, by indorsing the bills of Laidlaw for value, have benefited their estate to their full amount, of which the holders of these bills have only got back from it 5s. in the pound; so that even after Laidlaw's creditors shall rank upon Forrester's estate for the promissory-notes, and get other 5s. it will, in fact, gain 10s. in the pound; whereas the holders of the bills accepted by Laidlaw having drawn 10s. in the pound of their amount from his estate, it is obvious, that his creditors will lose at all events a sum equal to 5s. in the pound on these bills; and,

were the present objection sustained, they would lose precisely the 10s. in the pound which has been paid of them out of his estate.

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THE LORD ORDINARY 'sustained the objection to the claim.'

On advising a reclaiming petition, with answers, some of the Judges thought, that Laidlaw stood in the same situation as if he had got a letter of relief from Forrester and Company, on accepting the bills drawn by them, and that, as these bills had already ranked upon their estate, Laidlaw could not also rank for his promissory-notes.

A considerable majority were of an opposite opinion. The two sets of bills, (it was said), created two distinct debts; and as Forrester and Company derived the benefit of those accepted by Laidlaw, it was no bar to his ranking on their estate for their promissory-notes, that the holders of the bills accepted by him had also ranked upon it. In complicated cases of this sort, the object is, as far as possible, to preserve equality between the parties, which would not be done were the judgment of the Lord Ordinary adhered to. On this principle, however, it is equally clear, that Laidlaw's creditors ought to be allowed to draw no more from Forrester and Company's estate than what is sufficient to indemnify them.

It was also *observed*, that the case of Curtis was ill decided; and, accordingly, the decision has been since reversed by the House of Lords.

THE LORDS, 24th November 1795, repelled the objection to the petitioner's claim; and, on advising a reclaiming petition, with answers, they 'adhered.'

Lord Ordinary, *Mathuen*. For the Objector, *Hay, Walker Baird*. Alt. Mat. *Ross, Tai*.
Clerk, *Menzies*.

R. D. *Fal. Dic. v. 3. p. 145. Fac. Col. No 213. p. 502.*

* * * See *McGilchrist against Arthur, voce BANKRUPT, No 4. p. 877.*

S E C T. V.

Compensation, its Effect Relative to Onerous Assignees.

1610. February. MUIRHEAD and M'MITCHELL against MILLER.

IN an action of suspension, pursued by William Muirhead and Thomas M'Mitchell, burgesses of Edinburgh, against William Miller, as assignee to Alexander Williamson burgess of the said burgh, it was found that the debt owing by Alexander Williamson to the said pursuers ought to be received by way of compensation against the assignees.

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Kerse, MS. fol. 245.