

No 8.

of making compensation operate *retro* arises from this circumstance, that compensation may be pleaded by both parties; so that if either make a demand, the other can retain by the exception of compensation. Thus both of them being equally secure that the money cannot be drawn out of his hands, each has the full use of the others money from the time of the concurrence; and hence it follows, in equity, that both ought to pay interest, or neither. If the one is entitled by paction to have interest, he in effect receives that interest by having the use of the others money. But this holds only where the privilege of compensating is mutual. This was not the case of Carruthers. He was bound to pay the surplus tack-duty regularly; because, not to mention the transaction which entitled him to retain for payment only of his interest, he had in truth no claim against Longboddom upon which he could found a defence of compensation; the payment of the sum in the heritable bond being suspended during the currency of the tack. In this situation, it would be gross injustice to oblige Carruthers to pay interest for rents that he must hold in his hand ready to be paid upon demand; and it would be equally unjust to cut down the heritable bond gradually by these rents, which comes to the same with making them bear interest.

*Sel. Dec. No 112. p. 158.*

1798. May 22.

THOMAS CRANSTOUN *against* JAMES-ANN M'DOWAL, and her Factor *loco tutoris*.

No 9.

A. and B. were mutually cautioners for each other. A. died insolvent, but was never rendered bankrupt under any of the statutes. His creditors chose a trustee, and brought a multiplepoinding for the division of his funds. The creditors of B. to whom A. was cautioner, claimed in the multiplepoinding, and drew a proportional dividend with A.'s proper

DR JOHN M'FARLANE was joint obligant with James M'Dowal elder, and James M'Dowal younger, in bonds for L. 3630. The Doctor, however, was only cautioner for the others, who granted him a bond of relief.

James M'Dowal elder; and Archibald M'Dowal, were cautioners for Dr M'Farlane, in a bond for L. 1000, to Dr John Trotter.

Dr M'Farlane and James M'Dowal younger, were cautioners for Archibald M'Dowal, as treasurer of Heriot's Hospital, and in a cash-account which he held with the Royal Bank; and Archibald M'Dowal having become bankrupt, his cautioners were made liable to the Hospital for a balance of L. 757 : 4 : 4, and to the Bank for a balance of L. 243 : 19 : 5.

Dr M'Farlane, in 1788, died insolvent; but he was never rendered bankrupt under any of the statutes. His son, Mr John M'Farlane, having served heir to him *cum beneficio*, and expedite a confirmation as his executor, disposed of his whole heritable and moveable property, except an entailed estate, which was not liable for his debts. These funds were insufficient to pay 10s. a-pound of his debts.

Mr M'Farlane brought a multiplepoinding, in which he called both the proper creditors of his father, and those to whom he was bound as cautioner for the

Messrs M'Dowals, for the purpose of having the funds divided. The purchaser of the Doctor's heritable property consigned the price, and likewise brought a multiplepinding for the same object. These actions were conjoined, and the creditors of Dr M'Farlane appointed Thomas Cranstoun, writer to the signet, their common agent, and trustee; and, in compliance with their request, and an order of Court, Mr John M'Farlane executed a trust-disposition in his favour, for behoof of the whole creditors.

James M'Dowal elder and younger were by this time dead. But although the fortune left by them was more than sufficient to pay their debts, many of their creditors, to whom Dr M'Farlane had become cautioner, claimed on his estate for their whole debts, and, in consequence, drew dividends from it to the amount of L. 1441 : 3 : 7.

The debts due to Heriot's Hospital and the Royal Bank, for which James M'Dowal junior and Dr M'Farlane were joint cautioners for Archibald MacDowal, were also ranked for their full amount on Dr M'Farlane's funds. The Hospital drew from them L. 358 : 13 : 4, and the Bank L. 114 : 2s.; but these sums fell short of one-half of the debts due to these creditors.

Dr Trotter was ranked as a proper creditor of Dr M'Farlane for his bond of L. 1000, and bygone interest; and, after deducting the dividends which he drew, there remained due to him L. 1060 : 1 : 5.

By the decree, ranking the creditors of Dr M'Farlane, the proper creditors of Archibald M'Dowal, and of James M'Dowal senior and junior, were ordained to assign their debts to Mr Cranstoun, to the extent of the dividends for which they were ranked before drawing them.

Mr Cranstoun, afterwards, brought an action against Miss James-Ann Macdowal, the representative of James M'Dowal senior and junior, concluding, that she should relieve Dr M'Farlane's estate, *1st*, Of the bonds in which he became cautioner for their proper creditors; *2dly*, Of one-half of the debts in which James M'Dowal junior, and Dr M'Farlane, were jointly cautioners of Archibald M'Dowal. The summons further concluded for a settlement of accounts, and payment of what should be found due to Dr M'Farlane's estate.

Miss M'Dowal, in defence, *contended*, That, as she had a right to be relieved by Dr M'Farlane of the bond to Dr Trotter, in which James M'Dowal senior was cautioner, and also of a full half of the debts for which James M'Dowal junior, and Dr M'Farlane, were bound as cautioners for Archibald M'Dowal, she was entitled to set off these claims against the dividends which had been paid to her proper creditors from Dr M'Farlane's funds.

THE LORD ORDINARY remitted the cause to Mr Keith, accountant, who gave in a report containing two views.

The first view supposed Miss M'Dowal entitled to set off her claims of relief against the dividends drawn by her proper creditors from Dr M'Farlane's estate.

No 9.  
creditors.  
The trustee for A.'s creditors afterwards claimed from B. payment of the sums which had been paid to account of his proper debts out of A.'s estate. But it was found, that B. was not liable till relieved of the obligations he had undertaken for A. although this gave B. a preference over A.'s other creditors

No 9. It accordingly debited her with these dividends, being - L. 1441 15 7  
 But, on the other hand, she was credited with the following  
 balances of Dr M'Farlane's debts, for which she was liable as  
 cautioner.

1. Dr Trotter's debt, after deducting the di- vidends he had drawn from Dr M'Farlane's estate - - - - -	L. 1060 1 5
2. One-half of the cautionry debt to Heriot's Hospital, considered as Dr M'Farlane's pro- per debt, deducting the dividends drawn from his estate on the whole debt - - -	132 2 0 $\frac{2}{12}$
3. One-half of the cautionry debt to the Royal Bank, after making the like deduc- tion - - - - -	42 10 4
	<hr/> L. 1234 13 9 $\frac{2}{12}$

By which the balance due to the pursuer by the defender, was L. 207 1 9 $\frac{2}{12}$

Mr Keith's second view proceeded on the supposition, *1st*, That Miss M'Dowal was not entitled to set off her claims of relief against the dividends drawn by her creditors from Dr M'Farlane's estate; and, *2dly*, That as Heriot's Hospital, and the Royal Bank, had ranked for their full debts upon Dr M'Farlane's estate, his creditors were entitled to draw back from Miss M'Dowal, as representing the other cautioner, one half of the dividends which had been paid to them. On these principles, the pursuer's claims against Miss M'Dowal stood thus:

1. Amount of the dividends from Dr M'Farlane's estate, drawn by the credi- tors of James M'Dowal elder and younger, - - -	L. 1441 15 7
2. One half of L. 358 : 13 : 4, drawn by Dr M'Farlane's estate by Heriot's Hospital, - - - - -	179 6 8
3. One half of L. 114 : 2s. drawn by the Royal Bank, - - -	57 1 0

Which made the sum due by Miss M'Dowal, - - - L. 1678 3 3

In support of this last view, Mr Cranstoun,  
*Pleaded* as to the *1st* point; It being the duty of every solvent person to pay his own debts, the defender ought to have paid those of James M'Dowal elder and younger, in which case they would not have ranked on the estate of Dr M'Farlane. It is therefore, in consequence of a tortious neglect on her part, that her claim of compensation arises, and from this wrong she can be allowed to reap no benefit. According to her plea, she would obtain a preference on Dr M'Farlane's funds, not only after his death and insolvency, but after his effects have been judicially set apart to be equally divided among all his creditors, a mode of obtaining a preference contrary to the spirit of our own law, and expressly reprobated by the civil law, *l. 6. et 7. ff. Quæ in fraud, cred. fact.* Voet *de Compens.* § 9. And the same debt too would rank twice on the same estate.

Thus, Dr Trotter has already drawn a proportional dividend from Dr M'Farlane's estate, so that were the defender allowed to set off her claim to be relieved of that debt, against the sums which Dr M'Farlane's creditors have paid to account of her proper debts, it would follow that the debt to Dr Trotter would be fully paid out of Dr M'Farlane's funds, while his other creditors will not get one half of what is due to them.

Besides, a creditor having a principal debtor, and a cautioner bound to him, jointly and severally, is like a catholic creditor having two securities, both of which he may no doubt use in what order he pleases, in so far as his own interest is concerned, but not arbitrarily to the prejudice of others; Erskine, b. 2. tit. 12. § 66. Now, where the principal debtor is solvent, the only advantage which his creditor can derive from ranking on the estate of the cautioner, is to get more prompt payment of his debt, or part of it, than he might otherwise have done. The proper creditors of the cautioner have therefore a right to insist that they shall not be injured by the manner in which he has used his two securities, and that the rights of all parties shall be preserved the same as if he had followed the natural course, and drawn his payment from the principal debtor; and for this purpose, he is bound to assign his security to the proper creditors of the cautioner. Accordingly, in this case, the creditors of James M'Dowal senior, are expressly ordained by the decree of ranking to assign their securities to the pursuer as trustee for Dr M'Farlane's creditors, to the extent of the sums which they have drawn from the Doctor's estate. And these sums are not in law considered as payment of a debt or dividends from a debtor's estate, but as a price paid for the purchase of the creditor's right; Kames' Principles of Equity, p. 85. Consequently, the pursuer, as standing precisely in the right of the cedents, is entitled to draw back from the defender the money paid to them, free from any claim of compensation which she might have had against Dr M'Farlane, had he been alive and solvent. (*See DEBTOR and CREDITOR.*) Indeed, had it not been for the form of the bonds by which Dr M'Farlane was bound as joint obligant, the defender's plea could not have occurred, as the benefit of discussion would have forced the creditors to have taken payment from the principal debtor. The form, however, of the cautionary obligation was merely for the accommodation of the creditors, and can make no difference on the right of relief competent to the cautioner.

*Second point:* With regard to the dividends drawn by the Royal Bank and Heriot's Hospital, the pursuer further *contended*, That as Dr M'Farlane and James M'Dowal senior were co-cautioners to these creditors for Archibald M'Dowal, the Doctor was liable as principal debtor only for one half of the balances due to them. Consequently, they ought in justice to have ranked only for one half of their debts on Dr M'Farlane's estate, and claimed the other half from the defender. And that, as it was unjust that Dr M'Farlane's creditors should be losers by their having ranked arbitrarily on the Doctor's funds for their whole debts, the pursuer was entitled to insist for relief from Miss M'Dowal of

No 9.

one half of the sums which they had drawn ; House of Lords, 11th June 1794. Creditors of Maxwell against Heron, No 63. p. 2136.

*Answered* as to the 1st point, Dr M'Farlane was not rendered bankrupt under any of the statutes ; and neither the deficiency in his funds, the trust-deed granted by his heir to the pursuer, nor the multiplepounding which has been raised, can entitle the Doctor's creditors to state any plea which would not have been competent to himself. And it is plain, that before the Doctor could have claimed relief of the debts which he might have paid for the defender, he must have relieved her of the obligations which her predecessors had undertaken for him. The defender had no control over her creditors. They were entitled to claim on Dr M'Farlane's estate. Indeed, as they saw mutual claims of relief existing in the Doctor's lifetime, it was but just in them to act in such a manner as to give them effect, in place of assisting the Doctor's other creditors to evade them. They have accordingly done so ; and there is no principle of law which can prevent the defender from availing herself of the fair advantage which she has thereby obtained. It is indeed far from being uncommon, in the distribution of an insolvent person's effects, for one creditor to obtain a greater relief, or a broader preference, than his competitors, by the accidental operation of other claims upon the fund ; 5th July 1796, Trustee for Bertram, Gardner and Company against White.\*

The pursuer's having obtained assignments from the defender's creditors, does not in the least strengthen his case. The sole ground on which they were obtained, was the right which Dr M'Farlane's creditors had to be relieved by the defender, and this right is exactly met by her right to be relieved by Dr M'Farlane.

*Second Point* : In defence against the pursuer's claim to be relieved of one half of the dividends paid to the Royal Bank and Heriot's Hospital, the defender *answered*, That the case of Maxwell's Creditors, as decided in the House of Lords, did not at all bear upon the present. It was no doubt there found, that a cautioner, paying the whole debt, could only rank on the estate of a co-cautioner for one half it. But here the original creditors ranked for their full debts on the estate of one of the co-cautioners, which they were clearly entitled, and indeed called upon, to do, as they would have acted partially and unjustly had they done otherwise ; 12th January 1796, Hunter and Company against Mac-hutcheon.† And as, in the present case, the dividends which these catholic creditors have drawn, have not fully paid even Dr M'Farlane's half of the debt, no claim for relief of any part of them can lie against the defender.

THE LORD ORDINARY found, ' That this question must be determined by the situation and circumstances of the parties, with respect to their mutual obligations for each other at the time of Dr M'Farlane's death and bankruptcy, not

\* Not reported. See APPENDIX.

† Not reported. It is believed, that a case in the ranking of Tilloch's Creditors in 1776, (not reported,) was decided on the same principle. See APPENDIX.

by the accidental and very uncommon situation and circumstances in which the parties are now placed, in consequence of those creditors of the defenders, who held the Doctor bound in relief to them, claiming upon his funds, and drawing dividends therefrom before they made any demand upon the defender, who continued solvent; therefore the LORD ORDINARY approved of the second view reported by Mr Keith.'

Miss M'Dowal having reclaimed against this judgment, the COURT, (24th January 1798,) upon the first point, 'found the petitioner James-Ann M'Dowal, and her factor *loco tutoris*, bound to pay the respondent, (Mr Cranstoun,) as trustee for the creditors of Dr John M'Farlane, the dividends received out of that estate by the proper creditors of James M'Dowal elder and younger; but, (upon the second point) assoilzied the petitioner, and her factor, from the claim for any part of the dividends received out of that estate, upon debts for which Dr M'Farlane was jointly bound, in respect these dividends do not exceed the proportion of those debts for which the Doctor was liable.'

A reclaiming petition for Mr Cranstoun against this judgment, (27th February 1798,) upon the second point, was refused without answers. But one for the defender Miss M'Dowal, upon the other branch of the cause, was appointed to be answered. And, on advising this last-mentioned petition, with the answers, it was

*Observed on the Bench.* When the case was formerly before the Court, it was taken upon the supposition, that the giving effect to the defender's claim of compensation, would be to allow the debt to rank twice on the same estate. It appears, however, on further consideration, that there is no double ranking in the case, nor any injustice done; and that the defender's plea is grounded on the necessary operation of mutual claims of relief, and consequently of compensation or retention, which are entitled to their legal effects wherever they occur.

THE LORDS accordingly, with only one dissenting voice, 'altered the interlocutor reclaimed against, and sustained the petitioner's defences to the extent of L. 1234: 13: 9 $\frac{2}{12}$  Sterling.'

A reclaiming petition for Mr Cranstoun was refused, (8th June 1798,) without answers.

Lord Ordinary, *Monboddo.*

Act. Mat. *Ross, J. W. Murray, Macfarlane.*

Alt. Geo. *Fergusson, Jo. Clerk.*

Clerk, *Pringle.*

R. D.

*Fac. Col. No 75. p. 174.*

## SECT. II.

### What understood to be a Liquid Claim.

1662. December. CHILDREN of WOLMET *against* KER.

PATRICK EDMISTON of Carden having comprised, from the Laird of Wolmet, the reversion of a wadset granted to James Loch, which the said James dispon-

No 10.

The plea of compensation was sus-