1794. *December* 9.

WILLIAM CURTIS and Others, Assignees under the Commission of Bankruptcy of GIBSON and JOHNSON, *against* EDWARD CHIPPENDALE, Trustee on the Sequestrated Estate of WILLIAM M'ALPINE and Company.

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The creditors of A, a bankrupt, claimed on the bankrupt estate of B, for the amount of certain bills accepted by him, in A's possession at his bankruptcy. Found incompetent for the creditor's of B to plead retention against this claim, on account of B's having indorsed bills accepted by A, the holders of which last had drawn a dividend out of the estate of A, and were likewise claiming upon the estate of B.

WILLIAM M'ALPINE and Company, Livesay, Hargrave and Company, and Lewis and Potter agreed, that an exchange of bills should take place among them, with a view to support each other's credit.

Bills accordingly were delivered to Livesay, Hargrave and Company, and Lewis and Potter, by M'Alpine and Company, to a very large amount, drawn by them, and accepted, partly by other houses with whom they were connected, and partly by Barr and Maddox, a fictitious firm assumed by themselves.

Many of the bills thus obtained, were indorsed by Livesay and Company, and Lewis and Company, to their bankers Gibson and Johnson, in security of advances which they had made for them.

On the other hand, M'Alpine and Company received bills to a large amount from Livesay and Company, and Lewis and Potter, which were drawn by them, chiefly on their own agents, and accepted by Gibson and Johnson.

In May 1788, M'Alpine and Company, Livesay, Hargrave and Company, Lewis and Potter, and Gibson and Johnson, became bankrupt.

Bills accepted, drawn, or indorsed, by M'Alpine and Company, to the extent of L. 25,801 : 4 : 10, were then in the hands of Gibson and Johnson.

The assignees under the commission of bankruptcy awarded against them, entered a claim for this sum, upon the sequestrated estate of M'Alpine and Company.

The trustee *objected* to the claim, That bills accepted by Gibson and Johnson, to the amount of L. 22,513 : 14 : 5, had been put into the hands of M'Alpine and Company, which they had indorsed, and which not having been retired by the acceptors, were now ranked on the estate of M'Alpine and Company, and that therefore, their amount fell to be deducted from the claim of Gibson and Johnson, who could only rank for the balance, being L. 3287 : 10 : 5.

It appeared, that the holders of the bills accepted by Gibson and Johnson, had likewise claimed on their estate, and had drawn a dividend of 5s. 8d. in the pound. The estate of M'Alpine and Company had at this time paid nothing, but it was stated as pretty clear, that it would afford their creditors a dividend of 2s. 6d. in the pound.

So matters stood when the question came before the Court, when, in support of the objection, it was

Pleaded, No person can demand payment or performance from another, till he have answered any claim which that other has against him. Hence, although M'Alpine and Company are not in possession of the bills accepted by Gibson and Johnson, yet being, in consequence of their indorsing them, liable for their

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Answered, If M'Alpine and Company had still been possessed of the bills of Gibson and Johnson, they would no doubt have been entitled to plead compensation against the present claim. But by indorsing them for value, they have transferred their right in them to the present holders, who accordingly have been ranked for them on Gibson and Johnson's estate, and drawn a considerable dividend.

If, in this situation, M'Alpine and Company were entitled to plead retention, it would produce the utmost inequality and embarrassment in the division of bankrupt estates.

Bills being substitutes for cash, must necessarily pass through the hands of many indorsers, all of whom, if they happened to be debtors to the acceptor, would have a right of retention; and in this way sums might be withheld from the estate of the acceptor to ten, twenty, or thirty times the amount of the bills due by him.

Suppose that a bill of L. 1000, of which A is acceptor, pass through ten different hands, all of whom owe him L. 1000, and that afterwards they all become bankrupt, and pay only 2s. in the pound; suppose also, the estate of A to be bankrupt, and that it likewise yields a dividend of 2s.: If each of these indorsers were entitled to retain the dividend due on A's debt, the result would be, that A's bill of L. 1000 would be fully paid, while all his other creditors, equally onerous with those claiming under it, would draw a dividend of 2s. only. Ten different parties would thus virtually rank on the same estate for the same debt, which would be contrary both to justice, and to the intention of the bankrupt statutes, the great object of which is to effect a rateable distribution of the bankrupt's estate.

Even in the present case, as the holders of Gibson and Johnson's bills have drawn a dividend of 5s. 8d. in the pound from their estate, if the objector were to prevail, a further dividend would virtually be paid on them, corresponding to the dividend which Gibson and Johnson would otherwise be entitled to draw from the estate of M'Alpine and Company, for the bills on which they now claim.

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And were this to turn out no more than 2s. 6d. still the bills of Gibson and Johnson indorsed by M'Alpine and Company, would be drawing nearly a third more than their other debts, *i. e.* 8s. 2d. and the others only 5s. 8d.

Besides, M'Alpine and Company, by indorsing the bills of Gibson and Johnson, came under an implied warrandice, that they would do nothing to the prejudice of their indorsee. But were they to prevail in this question, they would be guilty of a breach of it, by diminishing the funds divisible among Gibson and Johnson's creditors, of which their own indorsees will receive a proportional share.

It is also to be considered, that, on the principle pleaded by the objectors, retention would be competent not merely to the holder of the bill, but to every indorsee, against the drawer and preceding indorsers; and as a bill may circulate over all the trading world, the claims competent to the holders or posterior indorsees against prior indorsees, might be infinitely diversified; and the ranking of creditors thus rendered inextricable.

The municipal law of this country, with respect to retention, when applied to cautioners, cannot affect this case. As it arises from bills of exchange, and may therefore, as a precedent, affect the interest of strangers, it must be determined on those established principles of mercantile law, which, from views of expediency and justice, regulate the transactions of merchants in other trading countries; M'Kenzie's Obs. on 1681, c. 20. p. 466. In England, where these principles are better understood, from being more frequently resorted to, the identical point at issue has more than once occurred, and has been uniformly decided in favour of the claimants; 5th November 1792, Gibson and Johnson against Edenson's Assignees, determined by the Commissioners for the custody of the Great Seal; King's Bench, Term. Reports, v. 4. No 714. 13th June 1792, Howis *v.* Wiggins*. Other reasons also concur for the law of that country being adopted in the decision of the present question. It was the *locus contractus*, the *locus solutioni destinatus*; it is of importance, that in mercantile questions there should be an uniformity in the law of the two countries, and no opposite judgment has yet been given in our own Courts, none of the decisions quoted by the other party having been pronounced between merchant and merchant; indeed, all of them at a period when there was little trade in this country.

Replied, The objector does not argue, that one document of debt can in any case draw more than full payment, but merely, that where the creditor of a bankrupt is debtor to him to an equal amount, he will be secured by the right of retention from suffering by his insolvency. The inequality and hardship figured by the claimant, is what must occur in every case of mutual debts, where either party becomes bankrupt. Let it be supposed, that A becomes bankrupt, indebted to B and C in L. 1000 each, and pays only 2s. in the pound, and that B owes him nothing, but that C owes him L. 1000, the consequence will be, that C, by pleading compensation, will lose nothing, while B will only

* *See* APPENDIX.

No 43. draw 2s. in the pound. In like manner, if C were cautioner for A for L. 1000, he would, by pleading retention till relieved, be freed from any loss on A's bankruptcy. And on the very same principle, if C, being creditor in a bill for L. 1000 to A, indorse it for value, he is entitled to retain till relieved of his subsidiary obligation as indorser. Neither would more than full payment be drawn for A's bill, although it should pass through ten different hands, each of them his debtor. If the creditors of A found it for their interest, they might pay the whole contents of the bill to the holder, and thus at once put an end to all claims of retention by prior indorsees: And on the same principle, whenever the bill was fully paid out of A's estate, either by actual dividends, or by the operation of retention, each indorsee would be obliged to pay what he owed to the bankrupt. The plea of the other party seems to be, that whenever the principal debtor becomes bankrupt, all claims of retention, and in short all preferable securities, should cease, although it is only in cases of insolvency that they can be of any use.

Even if the law of England were evidence of the law-mercantile, which it is not, it could have no effect on the present question, as both are equally inapplicable. For although bills arise from commerce, and owe their validity to the common consent of nations, yet it is only with regard to their constitution and mode of transference, that the law-mercantile has place. But in whatever country a bill may have been granted or negotiated, the mode of recovering payment of it, and the pleas of retention or compensation competent on it, must be regulated by the law of the country where payment is demanded.

THE LORD ORDINARY took the cause to report on informations.

THE COURT 'found, That to the amount of the acceptances due by Gibson and Johnson, the plea of retention is well founded, and that till relief is given to that amount, the assignees under the commission of bankruptcy awarded against Gibson and Johnson, are not entitled to be ranked upon the sequestrated estate of M'Alpine and Company; and, in so far sustained the objection in question.'

On considering a reclaiming petition and answers, the Court being of opinion, that the case was attended with very great difficulty, a hearing in presence was ordered, and after that memorials.

When the cause came again to be advised, several of the Judges thought there were no *termini habiles* for retention. Although (it was observed) the exceptions of compensation and retention, while founded on principles of equality, are attended with beneficial effects to both parties in saving counter actions, and on that account entitled to the favour of the law; yet in this case retention ought not to be admitted, because, when the situation of the parties, and the effect of their transactions, are thoroughly considered, it will be found, that to sustain M'Alpine and Company's plea of retention would be attended with great injustice to the creditors of Gibson and Johnson. If both parties had continued solvent, the question would have been of no importance, or even although one

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or both had become bankrupt, if both sets of bills had remained in their hands, the one set might have been fairly set off against the other, although the dividends had been unequal. But the case here is quite different; Gibson and Johnson have indeed kept the bills of M'Alpine and Company in their own hands, but M'Alpine and Company have indorsed the bills of Gibson and Johnson for value. Their indorsees are entitled to rank on both estates, and have accordingly done so. From that of Gibson and Johnson they have drawn a dividend of 5s. 8d. They will likewise draw from that of M'Alpine and Company a dividend of 2s. 6d. If these estates should afford no further dividends, the indorsees will draw only 8s. 2d. in the pound, but M'Alpine and Company the indorsers, have already got a great deal more; for having indorsed the bills of Gibson and Johnson for *full value*, and only repaid 2s. 6d. they have gained 17s. 6d. in the pound by the transaction; while, on the other hand, those of Gibson and Johnson must at all events be losers by it. For the bills of M'Alpine and Company, which still remain in their hands, they had accepted bills which have drawn from their estates at the rate of 5s. 8d. in the pound, so that even should they be allowed to rank on the estate of M'Alpine and Company, if it yield only 2s. 6d. they will still lose 3s. 2d. in the pound: The result therefore of the whole transaction is, that while the creditors of Gibson and Johnson are losers to this extent, the creditors of M'Alpine and Company, even after paying a dividend of 2s. 6d. not only on their own acceptances, but also on those of Gibson and Johnson which they indorsed, will be gainers to the extent of 15s. in the pound.

On the other hand, a majority of the Court still remained of opinion, that as Gibson and Johnson were claiming to be ranked on the effects of Scotch bankrupts situated in this country, their right must be determined by the law and practice of Scotland, in which no principle is better established, than that a person may plead retention, till the creditor claiming a debt of any sort from him relieve him of all obligations for which that creditor is primarily liable. *See* No 179. p. 1620.

THE COURT 'adhered.'

Lord Ordinary, *Henderland.* For the Claimants, *Rolland, Geo. Fergusson, J. Grant.* For the Objectors, *Dean of Faculty Erskine, Honyman, Cha. Ross.* Clerk, *Sinclair.*]

R. D. *Fol. Dic. v. 3. p. 145. Fac. Col. No 140. p. 318.*

*** This case was appealed.

1797. *February* 23.—THE HOUSE of LORDS ORDERED and ADJUDGED, That the several interlocutors complained of be reversed; and it is further ORDERED, That the said cause be remitted back to the Court of Session in Scotland, to rank the appellants pursuant to their claim, to the amount of L. 25,801: 4: 10, and to proceed further in the cause, according to justice.