"The Lords having heard counsel for the parties on the Bill of Exceptions for the defender, Disallow the Exceptions and find no expenses due in the discussion thereon."

Counsel for Pursuer—Dean of Faculty (Clark) Q.C., Asher and Mackintosh. Agents—Hamilton, Kinnear & Beatson, W.S.

Counsel for Defenders—Solicitor-General (Watson), Balfour and R. V. Campbell. Agents—Davidson & Syme, W.S.

Tuesday, July 6.

SECOND DIVISION.

APPEAL—JACKSON (MACKENZIE'S TR.) *v.* JOHN M'IVER.

Bankruptcy — Onerous Holder — Ranking — Blank Stamp—Loan—Security—Bona Fide *Holder —Personal Obligation—Cautioner.*

A lent to B £300, taking in security B's promissory note for that amount, and also a blank bill stamp endorsed by four persons. B became bankrupt, and A having thereafter filled up the blank stamp for £2000, claimed to be the onerous holder, and to rank on B's estate for the amount of £2000. *Held* that A having lent B £300 had received the blank stamp in security only for that amount, and that consequently he was only entitled to rank as a creditor for £300.

This case came up by appeal from a deliverance of the Sheriff Substitute of Inverness-shire on a claim by John M'Iver, Douglas Row, Inverness, against the deliverance of the trustee on the bankrupt estate of Alexander Mackenzie, sole partner of the firm of Mackenzie Brothers, drapers, High Street there, rejecting M'Iver's claim to be ranked on the estate under and to the amount of a promissory note for £2000, bearing to be granted by Donald Mackay, manufacturer, Inverness, in favour of Munro & Co., Turnbull & Co., William Mackenzie, and the bankrupt. M'Iver explained that he had got the promissory from Mackay merely in security for a loan of £300 which he granted to Mackay, and which Mackay had failed to pay; and he restricted his claim under the note to that amount, but contended that he was entitled to rank on James Mackenzie's estate—Mackenzie being a cautioner under the promissory note for Mackay —to the full amount of the sum upon the paper. A reference of the matter in dispute was made to M'Iver's oath in the Sheriff Court, and under that reference the Sheriff-Substitute (BLAIR) pronounced the following deliverance.:—

"*Inverness, 10th May* 1875.—The Sheriff-Substitute. . . . . Finds that the oath is negative of the reference: Finds further, in point of fact, that the bill in question was given to the appellant in satisfaction, not of a prior debt nor in preference to other creditors of the bankrupt, but of an instant cash payment, and as a *novum debitum* arising within sixty days before bankruptcy: Finds in law that the Act 1696, c. 5, does not apply to the present case: Therefore recalls the deliverance appealed against, and remits to the respondent, the said Thomas Jackson, as trustee on the sequestrated estate of the bankrupt Alexander Mackenzie, draper, High Street, Inverness, to admit the appellant's claim, and to rank him upon the said sequestrated estate in terms of his claim, and decerns.

"*Note.*—The Sheriff-Substitute refers to the note to his interlocutor, of this date, in the appeal at the instance of the present appellant against the trustee on the sequestrated estate of William Mackenzie, draper, Inverness, for the grounds of his present judgment."

[The following is the note above referred to:]—

"*Note.*—The bill in question was given by a man named Mackay to the appellant on the 11th May 1874, and it cannot be disputed that at about that date the Mackenzies delivered the bill, signed in blank, to Mackay as a negotiable instrument. The Mackenzies were then carrying on their business as drapers, and were in a position to grant bills. They may have felt somewhat embarrassed, but it does not seem to be disputed that it was supposed that they could carry on for some time longer. Their estates, however, were sequestrated on 23rd June 1874, and the respondent was appointed trustee on their estates.

"Having received the bill-stamp blank subscribed, the appellant afterwards, on the 22nd or 23rd day of June 1874, made the bill in the form in which it now appears.

"What is now claimed by the appellant is to be ranked as a common creditor upon the bankrupt's estate. He is not claiming a preference directly or indirectly over all or any of the other creditors.

"The question originally was, whether or not the evidence upon which his claim is founded was sufficient, but at the debate the respondent stated that he challenged the claim on the ground that the bill founded on, being an acknowledgment of debt granted within sixty days of bankruptcy, was null under the Act 1696, c. 5.

"1. In regard to the sufficiency of evidence to support the claim.—The oath of the appellant leaves no room for reasonable doubt that the bill was given for a valuable consideration by Mackay, the holder of it, to and received by the appellant, and that the appellant is now its true onerous holder. It is no objection that the signature of the bankrupt was on a blank bill-stamp. An acceptance written on the paper before the bill is made and delivered by the acceptor will charge the acceptor to the extent warranted by the stamp. There is nothing upon the bill to diminish the validity of the appellant's claim. There is no evidence of fraud in the whole transaction to take it away. 'Fraud to establish the claim must be pregnant, and must be brought home to the party who takes benefit by the bill. There was here no fraud. And no delay in filling up the bill can affect the question if the bankrupt was truly and fairly made chargeable in the bill.' The Sheriff-Substitute thinks he was, and that he cannot plead freedom from liability on any of the grounds which he has stated. See *Lyon* v. *Butter*, 7th December 1841, 4 D. 178.

"2. Does an acknowledgment of debt granted within sixty days of bankruptcy fall under the operation of the Act 1696, c. 5?—The Sheriff-Substitute does not think that it does. The true and only legal effect of the annulling clause of that Act is, that every person who shall take from another a grant or conveyance in security or satisfaction *of a prior debt* shall be bound, when that other party becomes bankrupt, if within sixty days,

to restore the rights so conveyed at the instance of the prior creditors.

"Here the right created in the appellant to claim on the £2000 bill was a right which at the time of granting the bankrupt was unquestionably empowered to grant and the appellant was entitled to receive. It was given not in security or satisfaction of a prior debt, nor in preference to any other creditor, but in satisfaction and security of an instant cash payment made by the appellant to the person to whom the bankrupt delivered the bill as a negotiable instrument.

"To extend the application of the Act of 1696 to a case like the present would be in reality annuling the claim of one who is not claiming any preference directly or indirectly over the bankrupt's estate, or anything more than to be ranked as a common creditor.

"In order to bring a deed within the prohibition which the Act contains, it must be one which is calculated to create, or has the effect of creating, a preference in favour of him in whose favour it is granted. There is no such speciality in the present case.

"In conclusion, 'there is no authority sufficient to entitle us to say that this Act of Parliament has either in practice or by judgment been held to strike at an acknowledgment of debt granted within the period of constructive bankruptcy.' Consult *Mathew's Trustee* v. *Mathew*, 28th June 1767, 5 Macph. 957, and the Lord President's observations on the passage in regard to indirect preferences in Mr Bell's Commentaries, vol. ii. p. 198 (M'Laren's Edit.), which the respondent's agent cited as an authority for his contention that a bare acknowledgment of debt, if granted within sixty days of bankruptcy, was void under the Statute 1696; and also the Lord President's remarks on *Wilson* v. *Drummond's Repres.* 20th Dec. 1853, 16 D. 275; and on *Gordon* v. *Tolmie*, 2d June 1854, 16 D. 905."

At advising—

Lord Gifford—This is an appeal by the trustee on the sequestrated estate of Alexander Mackenzie, draper, Inverness, against a judgment of the Sheriff-Substitute of Inverness, ordaining the appellant as trustee upon Alexander Mackenzie's sequestrated estate to admit the claim of the respondent John M'Iver, as a creditor of the said Alexander Mackenzie for the sum of £2000, and to rank the respondent for that amount, but only to the effect of the respondent receiving payment of £300, to which extent the respondent restricts his claim.

The circumstances of the case are a little peculiar, and though I entertain no doubt whatever as to what are the true rights of the parties, I am far from thinking that the questions raised are not attended with nicety, and do not deserve careful attention.

The present respondent, John M'Iver, claims to be a creditor on the estate of the bankrupt Alexander Mackenzie "for the sum of £2000 contained in a promissory note dated 11th May 1874," of which the respondent John M'Iver is the holder. This promissory note is granted by Donald Mackay, manufacturer in Inverness, in favour of four parties or firms, and by the note, *ex facie* as it now stands, Donald Mackay promises 50 days after date to pay to these four parties or order the sum of £2000, value received. The payees or promisees are (1) Munro & Company, (2) Alexander Mackenzie, the present bankrupt, (3) Turnbull & Company, and (4) William Mackenzie. The note bears to be blank endorsed by these four parties, and the present respondent, Mr M'Iver, produces the note, and claims to be onerous holder. Sequestration of Alexander Mackenzie's estate was awarded during the currency of the note. The note is produced by Mr M'Iver with an affidavit in which he depones that the bankrupt Alexander M'Kenzie is now, and was at the date of his sequestration, justly indebted to the respondent in the sum of £2000 contained in the said promissory note; but he goes on to explain that the said promissory note for £2000 was endorsed to him only in security of £300 contained in another promissory note of the same date (11th May 1874) granted to the deponent by the said Donald Mackay, the original promissor in the large note, and he restricts his ranking to the effect of drawing full payment of the sum of £300.

As the respondent Mr M'Iver was *ex facie* onerous holder of the note for £2000, want of value or other objections could only be proved by his writ or oath, and, accordingly, in the proceedings before the Sheriff the trustee on Alexander Mackenzie's estate referred the whole cause to Mr M'Iver's oath. We have his deposition before us, and in that deposition alone we must find the facts of the case. The deposition, however, is quite candid, and there can be no real dispute as to what the facts truly are.

It appears from the deposition that about 11th May 1874 Donald Mackay applied to the respondent M'Iver to assist him in raising money. Mackay brought with him a blank bill stamp with four endorsements on it, and he asked the respondent M'Iver to sign it as an additional endorser. This blank bill stamp is now the note claimed on for £2000. Mackay's object was, by means of the respondent's indorsation along with the four other names already indorsed, to raise money by discounting the note, the same being filled up as a bill or note for £2000 or for some smaller sum; and he in substance explained this to the respondent. The stamp would carry £2000. The respondent M'Iver refused to sign the blank stamp or to pledge his credit for any such sum, but he ultimately agreed to lend Mackay £300, provided he received security therefor. Both parties, Mackay and M'Iver, adjourned to the Commercial Bank with a view to carrying out the transaction, and in order to obtain the advice of the bank agent Mr Fraser, who was also the respondent's agent. The whole matter was explained to Mr Fraser, and the first proposal seems to have been that the bank should discount the note which it was proposed to fill up for £2000. Fraser, as bank agent, refused to do this, and then the proposal was reverted to that the respondent M'Iver should lend Donald Mackay £300. It was found that Mackay had no security to offer for this £300 excepting the blank bill with the four indorsements, and ultimately on the security of this blank bill stamp M'Iver lent Mackay £300, taking his promissory note for that amount dated 11th May 1874, for which Mackay got cash over the bank counter. In security of this bill for £300 Mackay delivered to M'Iver the blank bill stamp for £2000, putting his name on the face of it as promissor, but without filling it up for any sum or in any way, and in this state M'Iver received it as security and left it with the bank agent to keep for him unfilled up.

The £300 note fell due on the 14th June 1874 and was dishonoured by Mackay. The respondent M'Iver had to retire it, and thereby was and is the undoubted creditor of Mackay for £300 and interest. M'Iver got back the bill stamp still blank from Fraser and took it to his law agent, Mr Macandrew, instructing that gentleman to "protect my interests." The respondent gave no specific instructions to Mr Macandrew, but simply gave him the blank bill stamp with the four blank indorsements, with a general order to protect his, M'Iver's, interests. In pursuance of these general instructions it appears that Macandrew, the respondent's agent, did fill up the blank bill stamp for the sum of £2000, making Mackay the promissor, and inserting the names of the four indorsers as the promissees. It does not appear when the blank stamp was so filled up, but it must have been after the 14th June and before 24th August. It was after Mackay had dishonoured the £300 bill and before the claim in Mackenzie's sequestration. It was filled up by Macandrew as the respondent's agent, and of course this is just the same as if it had been filled up by the respondent himself. The affidavit and claim in Mackenzie's sequestration followed, and the question now is—Is the respondent entitled to rank on Alexander Mackenzie's estate for the full sum of £2000 in order that the respondent may draw dividends to the full amount of £300, which admittedly was his sole and only debt.

I am of opinion that the respondent, on the proved facts of the case, is not entitled to rank on Alexander Mackenzie's estate for £2000, but only £300, being the full sum which the respondent actually advanced.

I think it is proved by the respondent's oath that he knew that the four indorsers of the blank stamp, of whom the bankrupt was one, had not given any money to Donald Mackay, the proposed promissor in the note. They were not Mackay's creditors to any extent, but had merely lent him their names by endorsing the black stamp in order that he might raise money thereon. This is perfectly apparent upon the oath—Mackay brought the blank stamp unfilled up, and his proposal was that the respondent should subscribe with the other indorsers so as to enable him, Mackay, the better to raise money. At that time there was no real debt between Mackay and the four indorsers. There was only a mandate enabling Mackay to raise money by filling up and discounting the blank stamp. Now, if Mackay had got £2000 from the respondent, and thereupon the bill had been filled up for that sum, there is no doubt the indorser, as well as Mackay, would have been liable to the respondent for the sum so advanced. But this was not what was done. The respondent only lent £300 to Mackay, and it was only in security of this £300 that he received the blank stamp. The legal result is, that the indorsers of the blank stamp became cautioners or securities to the respondent for the £300 he had lent Mackay. That was their legal relation and position—nothing more. No doubt they signed a blank obligation carrying £2000, and gave Mackay a mandate to make it a bill for that amount, which would have been good in the hands of any *bona fide* holder. And if £2000 had been raised upon it they would have been liable for that full sum, but as only £300 was raised they were cautioners for that limited amount and for no more. The moment the respondent admits, as he was bound to do, that he only lent £300, and that he got the indorsers' names as security therefor, that moment he fixes the liability of the indorsers as simple cautioners for the sum lent, and for nothing else. It is just as if the indorsers had said to Mackay—we will be cautioners for you either to the bank or to anybody else for whatever sum you can raise not exceeding £2000; and this being fairly communicated to the creditor who advanced the money he cannot hold them liable for more than the sum he actually lent. A mere cautioner, who is admittedly nothing else than a cautioner, can never be liable for a larger sum than was due by the principal debtor. Cautionry is an accessory obligation, and the accessory can never be bound for more than the principal. Cautioners in a cash credit bond, admitted to be such, or holding a back letter, can never be liable for more than the balance due by the principal, although the bond *ex facie* may be for a much larger amount. In short, whenever it is admitted, or is shown by competent evidence, that a *personal obligant* (for I am dealing with the case only of personal obligation) is merely cautioner for another, and this to the knowledge of the creditor, then the creditor cannot claim from the cautioner or rank upon his estate for a larger sum than was due by the principal debtor.

The fallacy of the very ingenious argument submitted for the respondent lay in not distinguishing between the personal obligation of a cautioner and a real debt or real subject assigned in security. If there had been a real debt of £2000 due by the four indorsers to Mackay, and if this debt had been assigned to the respondent, he being in *bona fide* and believing it to be a debt and taking the £2000 bill and debt in security of the £300 which he lent, then the case would have been wholly different. The respondent would have been out and out assignee to the debt which formed the subject of the security, just as if the security had been a policy of insurance which might be for a sum ten times the loan advanced on it. In such a case the creditor would be entitled to recover the full debt or the full sum in the policy as absolute assignee, subject only to a liability to account to his debtor the cedent. It is quite otherwise with the mere personal obligation of a cautioner brought home to the knowledge of the creditor as such, that is as mere cautioner at the time the debt is contracted. In such a case I know no instance where the cautioner was held liable to the creditor in a larger sum than that due to the creditor by the principal debtor.

So far as regards the proposed ranking for £2000 is concerned, therefore I think it must be disallowed and restricted to a ranking for £300, the only real debt, but the respondent will be entitled to a ranking for this limited sum of £300 against the estates of each of the co-obligants. The trustee was wrong in rejecting the claim altogether—the Sheriff-Substitute has erred in admitting a ranking for too large a sum.

The grounds of judgment which I have above indicated are different from those taken by the trustee in his deliverance, and from those pleaded by the trustee before the Sheriff-Substitute. I do not think that the statute 1621 or the statute 1696 have any relation whatever to the present case. There is no question of conjunct or confidant parties holding gratuitous deeds from the bankrupt, struck at by 1621—there is no question of a security given

for a prior debt contrary to the Act 1696—there is no room for the plea of fraud at common law—and these are the points which seem to have exclusively occupied the attention of parties in the Court below. But the sole question really is, Is it proved that the respondent took these indorsers as simple cautioners for the £300, the only sum lent, and if so, for what sum is he entitled to rank on their respective estates? He cannot rank on these estates for a larger sum than he could have required them actually to pay had Mackay been the only party insolvent.

The other Judges concurred.

Counsel for the Trustee—Balfour and M'Kechnie. Agents—G. & H. Cairns, W.S.

Counsel for M'Iver—Kinnear and Trayner. Agents—Irons & Roberts, S.S.C.

Wednesday, July 7.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

(Before the Judges of the Second Division and Lord President, Lord Ardmillan, and Lord Mure.)

REV. ALEX. HARPER AND OTHERS *v.* REV. R. HUTTON AND OTHERS.

Statute 7 and 8 Vict., c. 44, sec. 8—Marriage Proclamation of Banns—Church and Parish Erected Quoad Sacra.

Held that where, under the provisions of 7 and 8 Vict., c. 44, sec. 8, a church has been erected into a parish church, with a district attached *quoad sacra*, the minister and kirk-session of the *quoad sacra* parish are entitled to make proclamation of banns within the church so erected into a parish church.

The summons in this suit, at the instance of the Rev. R. Hutton and the Kirk-Session of the parish of Cambusnethan, concludes for declarator that the Rev. Alex. Harper and the Kirk-Session of the *quoad sacra* parish of Wishaw are not entitled to make proclamation of banns in the *quoad sacra* church and take fees therefor, and for interdict against them so doing.

It appeared from the record that in 1855 a district of the parish of Cambusnethan was erected into a parish *quoad sacra* under the name of the Church and Parish of Wishaw. The church of the *quoad sacra* parish is situated not more than a mile from the parish church of Cambusnethan. The proclamation of banns of parties residing in the area of the original parish of Cambusnethan continued for some years to be made in the parish church of Cambusnethan, but recently the proclamation in the church at Wishaw of parties residing within the *quoad sacra* parish was introduced.

The plea in law for the pursuers was:—"The defenders are not entitled to make proclamations of banns of marriages in the church of the said *quoad sacra* parish of Wishaw, or to permit such proclamations to be made in the said church, and in respect that they have been and are making such proclamations and exacting such dues or fees, the pursuers are entitled to have decree of declarator and interdict as concluded for, with expenses."

The pleas for the defenders were:—"1. No jurisdiction, in respect the proclamation of banns is not a civil but an ecclesiastical institution. 2. The pursuers have not set forth, and do not possess, any right or title to insist in the present action. 3. *Separatim.*—The defenders are entitled to absolvitor, in respect the parish of Wishaw was regularly erected as a *quoad sacra* parish in virtue of the Act 7 and 8 Vict., cap. 44; and the defenders, as the kirk-session thereof, are entitled to continue the practice of proclamations of banns in the church of said parish as hitherto."

The Lord Ordinary (MACKENZIE) pronounced the following interlocutor and note:—

"*Edinburgh, 30th January* 1875.—The Lord Ordinary having heard counsel, and considered the closed record and process—Finds, declares, and decerns that the defenders are not entitled to make proclamations of banns of marriages in the church of the *quoad sacra* parish of Wishaw, or to cause or permit proclamations of banns of marriages to be made in the said church, or to demand, exact, or receive dues or fees in respect of such proclamations made in the said church, and that proclamations of the banns of marriage in the church of the said *quoad sacra* parish of Wishaw are not legal or valid, but are, on the contrary, illegal and invalid: interdicts, prohibits, and discharges the defenders in terms of the conclusion of interdict, and decerns; finds the pursuers entitled to expenses, of which allows an account to be given in, and remits the same, when lodged, to the Auditor to tax and to report.

"*Note.*—The question raised in the present case is whether the minister and kirk-session of a *quoad sacra* parish, erected under the provisions contained in the 8th section of the statute 7 and 8 Vict., c. 84, are entitled to make proclamations of banns of marriages within such *quoad sacra* church for the district designated and attached thereto.

"Although publication of banns was first introduced by the Lateran Council of 1216, and was afterwards confirmed by the Canons of our Provincial Council in 1242 and 1269, it became on the Reformation part of the common law of Scotland. It is one of the requisites of a regular marriage, which is a civil contract. Since the Reformation publication of banns has had, as Lord Jeffrey remarks in the case of *M'Donald* v. *Campbell*, March 1836, Jurist 9, p. 5, more of a civil than of a religious character. And although by the Act of Assembly 1638, Sess. 23, c. 21, marriage was prohibited without proclamation of banns, 'except the Presbyterie in some necessarie exigents dispense therewith,' yet the Presbyterian clergy, as Mr Erskine states (6, 1, 10), have not exercised such dispensation since the Revolution.

"Various provisions have been made by statute with reference to proclamation of banns. By the Act 1661, c. 34, all persons having their ordinary residences within this kingdom are prohibited from marrying others within England or Ireland, 'without proclamation of banns here in Scotland, and against the order and constitution of this church or kingdom,' under the penalties therein specified, one-half whereof belong to the Crown, and the other half to the parish or parishes where