1785. *June* 16.

The CREDITORS of KILDONAN *against* DOUGLAS, HERON and COMPANY.

No 37.
Whether a disponee in security is entitled to charge the expense of a factor in levying the rents?

JAMES CHALMERS of Kildonan disponed his lands to Douglas, Heron and Company, in security of certain sums owing by him. The disposition contained the usual clause, authorising the creditors to enter into possession, and to name stewards and factors for recovering the rents; declaring, that they should be liable only for their intromissions, deducting all expenses in levying the said rents, and not for omissions or negligence of any kind.

Douglas, Heron and Company having assumed possession of the lands, and afterwards accounting with the postponed creditors for their intromissions, insisted for deduction of several sums as the salary of a factor, or as disbursed by him in the execution of his office, such as the expense of intimating his appointment to the tenants, and enquiring into the situation of the farms.

Observed on the Bench; An heritable creditor entering into possession, is to be viewed as a proprietor; and it would therefore be equally unreasonable, in this case, to allow a charge in name of factor-fee, or for any trouble undertaken in that capacity, as it would have been to award the like sums to the creditor himself when using, in person, those measures he thinks necessary for his security.

The Lord Ordinary had sustained these articles; but that judgment was altered by the COURT, after advising a reclaiming petition for the postponed creditors, with answers for Douglas, Heron and Company.

Lord Ordinary, *Justice-Clerk.* For the Postponed Creditors, *G. Ferguson.*
For Douglas, Heron and Company, *Maconochie.* Clerk, *Menzies.*

Fol. Dic. v. 4. *p.* 246. *Fac. Col. No* 209. *p.* 328.

1790. *May* 27.

The TRUSTEES for the CREDITORS of Messrs FALL and COMPANY, *against* Sir WILLIAM FORBES, JAMES HUNTER and COMPANY, and Sir JOHN ANSTRUTHER.

No 38.
A mercantile house had advanced money for a correspond-

SIR WILLIAM FORBES and COMPANY were in the practice of advancing money for the behoof of Messrs Fall; and on the other hand, the bills payable to them were usually indorsed and transmitted to the former.

In particular, Sir John Anstruther having accepted, without any value, several bills in favour of Messrs Fall, to aid their credit, those bills were indorsed to and deposited with Sir William Forbes and Company.

No 38.
ent, and was possessed of bills indorsed and transmitted by him.—Allowed, upon sequestration being awarded against him, to rank for the full debt, without deduction of the payment of the bills, received after the sequestration.

The debtor in these bills who had received no value for them, also allowed to rank.

Long after the bills were due, Messrs Fall became bankrupt, and a sequestration of their effects, under the authority of the statute of 1783, was awarded. Sir William Forbes and Company immediately afterwards received full payment of these bills; but being still creditors to Messrs Fall to a large amount, they claimed to be ranked to the extent of the whole debt due to them at the time of the sequestration, without deduction of the money so paid. On the other hand, Sir John Anstruther claimed to be ranked as a creditor, for the contents of the bills, for which he had not got any value.

To these claims the Trustees under the sequestration *objected*, That Sir William Forbes and Company's claim of ranking ought to be restricted to the balance remaining after the payments received by them; and at any rate, that both they and Sir John Anstruther could not be ranked, which would be a double ranking for one and the same debt. In support of the objections, it was

Pleaded; The claim of Sir William Forbes and Company seems to be ill founded, whether it be considered in reference to the common law, or to the statute of 1783.

Their right to the bills in question, not being derived either from voluntary security or from legal diligence, was merely that of retention, in the character of factors or agents for Messrs Fall; and being thus founded in equity, it ought to be confined in its exercise to an equitable purpose. But to rank for the whole of a debt, after a part of it has been paid, is contrary to equity.

Even with respect to regular securities, such a claim would not be permitted. It has been found indeed, that an adjudger might be ranked for the full sum contained in his diligence, notwithstanding partial payments posterior to its date; 16th February 1734, Earls of Loudon and Glasgow *contra* Lord Ross, No 23. p. 14114. But that this determination proceeded from the peculiar nature of adjudication as a sale under reversion, by which the adjudger's right continues entire until the last farthing of the debt be paid, appears from the argument contained in the reclaiming petition, in consequence of which that judgment was pronounced. When Mr Erskine mentions the same rule as holding in other cases, such as that of arrestment, he hazards an opinion which is not supported by any decision. In regard to adjudications themselves, the rule was so far restricted, that an adjudger having a separate heritable security, was not allowed to rank upon his adjudication on the same subject, without deducting what he drew in virtue of his heritable right; 12th July 1769, Creditors of Auchinbreck, No 34. p. 14131. In the *pari passu* rankings introduced by the act of sederunt of 1662, though there must have been frequent room for this question, it never was pretended that creditors were to be ranked for their full debts, without deduction of partial payments received at any time before the actual division.

Nor is the claim supported by the statute of 1783, which in § 35. enacts, "That in case any of the creditors shall have received any partial payment

out of the estates of other obligants, or in consequence of any preferable security upon any particular subject belonging to the bankrupt himself before the sequestration, he shall only be ranked for the balance, after deduction of such partial payment; but if the partial payment be posterior to the sequestration, he shall be entitled to rank for his full debt." For by the words "preferable security upon a particular subject," cannot be understood a right of retention, but a proper legal security constituted either by deed or diligence, for the express purpose of securing a debt. No 38.

With regard to Sir John Anstruther, it is at any rate plain that he cannot be also ranked, because this would be a double ranking for one sum. To illustrate this, suppose Sir William Forbes and Company's debt to be L. 16,000; and that Sir John Anstruther's acceptances were for L. 12,000, Sir William Forbes and Company receive after the bankruptcy L. 12,000, but still rank for L. 16,000, and recover L. 4000 from the bankrupt estate, while Sir John Anstruther again ranks for L. 12,000. Thus, a debt of L. 16,000 in effect draws as L. 28,000; or, in other words, the same debt draws twice. In like manner it is evident, that a triple or quadruple ranking may equally take place, as another set of bills might have been deposited in Sir John Anstruther's hands, the granters of which would have had the same title to rank; and so forth *ad infinitum*.

No man can grant two or more documents for the same debt, to the effect of making it rank, and draw more than once upon his estate in the event of bankruptcy. For example, upon getting a loan of L. 100, one cannot, by granting five bonds for L. 100 each, enable the creditor thus to rank for L. 500. But by depositing bills or bonds in the manner above mentioned, if the double ranking were allowed, the very same thing would be done. Such a practice would operate as a tacit hypothec over a man's whole property, personal and real; and a merchant's stock in trade, which in no other way could be covered with any latent security, might in this way have one favourite debt privately and preferably secured upon it, by the multiplication of the personal obligation for the same sum.

Answered for Sir William Forbes and Company; Though Sir William Forbes and Company be considered in the character of factors, and their right to the bills as that of retention, they are not the less entitled to avail themselves of it for the payment of their debt. It is a point quite established, that factors are entitled to retention of their constituents' property, till every claim competent to them against their constituents is satisfied; Bankton, B. 1. Tit. 24. § 34.; Erskine, B. 3. Tit. 4. § 21. The fact however is, that the bills were indorsed to and deposited with them, for the express purpose of securing money advanced. But in either case it would be a right in security.

That right they are entitled to hold, until the debt due to them be wholly discharged. In other words, they have a title to be ranked according to the

No 38. full amount of their debt, notwithstanding the partial payment of it thereby obtained.

Whatever security for his debt a creditor may have obtained, whether by voluntary deed of the debtor, by legal diligence, or by lawful possession of the debtor's goods, he is entitled to the full effect of such security, as long as any part of the debt continues due. Hence, no partial payment, however large, diminishes in the least his right to the security. Thus, if a creditor-adjudger should receive a payment out of some fund belonging to the debtor, beside the subject adjudged, he will not be obliged in ranking under the adjudication to deduct that payment, but will be entitled to hold the adjudication, or, which is the same thing, to rank for the whole accumulated sum in it, till complete payment is effected; 16th February 1734, Earls of Loudon and Glasgow, No 23. p. 14114.; 2d July 1658, Creditors of Auchinbreck *contra* Lockwood, No 33. p. 14129. Nor was the decision in 1769 inconsistent with these, as it was then found only, that the same creditors could not be ranked twice on the same subject.

In like manner, if one has two obligants personally bound for a debt, though he should recover a partial payment from one of them, he is entitled to hold the obligation of the other to its full extent.

The same principle, it is evident, applies to bonds assigned, or to bills indorsed in security, the holder of which, by means of them, is entitled to effectuate complete payment; Erskine, B. 2. Tit. 12. § 67.

In order to afford a rule for fixing the precise period from which the amount of the claims of creditors, in rankings, ought to be determined, the above mentioned statute, in the passage already quoted, has ordained partial payments recovered prior to sequestration, by means " of any preferable security upon any particular subject belonging to the bankrupt," to be deducted, while no deduction is to be made of those posterior. Now, by the indorsation and deposita-tion of the bills in question, the claimants acquired a preferable security upon the contents of those bills, being a particular subject belonging to the bankrupt; and therefore the payments obtained in consequence of that security, after the sequestration, are not to be deducted from their claims in the ranking. Nor is there any foundation, either in the words or the object of the statute, for the supposed distinction between different sorts of securities.

Neither can the claim of Sir John Anstruther be set in oppostion to this. If he granted the bills for value, then their contents plainly formed a part of Messrs Falls's estate, affected by a preferable security in favour of the claimants. If again the bills were accepted without value, he became in effect a cautioner for Messrs Fall; and by the very nature of his obligation, he must be understood to have renounced his claim of relief, as far as it might interfere with the right of the claimants to obtain their full payment; Creditors of Macintosh *contra* Maxton, in January 1777, (See APPENDIX.)

No 38.

On the part of Sir John Anstruther it was *maintained*, That he had the same title to be ranked, as if he had advanced to Messrs Fall the contents of his acceptances, taking their obligation to repay him at the expiration of a certain period.

Prior to the appearance of Sir John Anstruther in the cause, the LORD ORDINARY pronounced this interlocusor:

"Finds, that Sir William Forbes and Company are entitled to be ranked for their whole debt, as it stood at the date of the sequestration, without previously imputing thereto the sums they have received since the sequestration, upon the bills indorsed to them in security before the bankruptcy; and so far repels the objection."

Sir John Anstruther having afterwards appeared and stated his claim, his Lordship took the cause to report; when

"THE LORDS found, that Sir William Forbes and Company are entitled to be ranked for their whole debt as it stood at the date of the sequestration, without deducting the payment since received from the bills indorsed to them in security: And found, That Sir John Anstruther is entitled to be ranked for the debts due to him by Messrs Fall, arising from the bills he paid to Sir William Forbes and Company."

A petition reclaiming against this judgment was refused without answers.

Reporter, *Lord Dreghorn.* For the Trustees, *Buchan-Hepburn, M. Ross.* For Sir William Forbes and Company, *Rolland.* For Sir J. Anstruther, *Wight.* Clerk, *Home.*

S. *Fol. Dic. v.* 4. *p.* 243. *Fac. Col. No* 136. *p.* 267.

1791. *March* 2. GRANT *against* CREDITORS of GRANT of Carron.

No 39.

THE COURT in this case, (not reported in the Faculty Collection), decided again in conformity with the cases of Auchinbreck, No 34. p. 14130., and of Douglas, Heron and Co., No 35. p. 14131. See APPENDIX.