

APPENDIX.

PART I.

RIGHT IN SECURITY.

1801. *June 5.*

ALEXANDER MACDOUGAL and his ATTORNEY, *against* ALLAN MACDOUGAL,
and the TRUSTEE for his Creditors.

ALLAN MACDOUGAL, Writer to the Signet, and two other persons, joined in the purchase of a ship. In consequence of a letter of credit from Mr. Macdougall, Alexander Macdougall, solicitor in London, (where the purchase was made,) accepted bills for three-fourths of the price. The venders of the ship took a mortgage on it, containing a power to sell for their further security.

Allan Macdougall became bankrupt, which prevented his paying the bills, and a complicated transaction took place, which resulted in Alexander Macdougall paying the price to the owners, upon which the bills were delivered to him, and he obtained a vendition of the ship.

Having afterward been obliged to sell it at a loss, he and his attorney brought an action in the Court of Admiralty, against Allan Macdougall, and the trustee for his creditors, in which, for his indemnification on the whole transaction, he claimed to rank on Mr. Macdougall's estate for the full sum in the bills, without deduction of the price received by him for the vessel.

The case was advocated to the Court of Session.

The points at issue came to be the amount of his claim,—and the mode of ranking for it.

On the latter, the defenders

Pleaded: The pursuer can be in no better situation than the original venders of the ship, who, after obtaining a partial payment in virtue of the mortgage, could have ranked on the bills, upon the general funds of the bankrupt, only for the balance due to them. If they had adjudged for more, their dili-

No. 1.

Three persons concurred in the purchase of a ship. The agent of one of them, in consequence of a letter of credit from his constituent, accepted bills for three-fourths of the price. The venders took a mortgage on the ship, with power to sell, in further security. In consequence of the bankruptcy of his constituent, the agent found it necessary to pay the price, on obtaining a vendition to

No. 1. the ship, and delivery of the bills. The ship was afterward sold at a lower price; and, in order to cover his loss upon the whole transaction, the agent was found entitled to rank on the bankrupt estate of his constituent for the full sum in the bills, without deduction of the price of the vessel received by him.

gence would have been reducible on the ground of *pluris petitio*; 20th November 1797, Edie and Laird, APPENDIX, PART I. *voce* ADJUDICATION, No. 9; and the difference between their case, and that of a creditor having real security on separate individual subjects, (where the right to rank *in solidum* on each may safely be admitted,) would have been obvious.

Besides, the present claim is to be considered as arising from a copartnership transaction; and upon the principle of the case, 18th November 1796, Campbell against Blackie, No. 44. p. 14612. the pursuer, after exhausting the company funds, is entitled to rank, only for the balance, on the private estates of the partners.

The transaction took place in England, where, it is believed, the claim even for the balance would have been rejected.

Answered: All questions in rankings must be taken according to the situation of parties at the bankruptcy of the common debtor. At Mr. Macdougals bankruptcy, the original owners of the ship (and the pursuer admits himself to stand in their right) held two securities, the bills and the mortgage; but had realized nothing from either. They might at that time have adjudged for the full amount of the debt due to them; and upon the defenders' own principles, would have been entitled to claim *in solidum*, (to the effect of obtaining full payment only,) both on the adjudication and the mortgage, without deduction of a partial payment *afterward* received from either; 2d August 1781, Douglas Heron and Company against the Bank of England, No. 35. p. 14131. The pursuer is entitled, on the same principle, to rank on the full amount of the bills; 27th May 1790, Fall's Creditors against Sir William Forbes and Company, No. 38. p. 14135.

There was here no company nor copartnership-funds, but a single joint purchase, which can authorise no separate ranking. The law of England is decidedly in favour of the claim: Atk. Chanc. Rep. vol. 1. p. 110; vol. 2. p. 528; Cooke's Bank. Law, p. 172; 3 Vessey *junior*, p. 248.

The Lord Ordinary decerned in terms of the libel, "*constitutionis causâ tantum*, to entitle the pursuer to rank upon the estate of the said Allan Macdougals."

Upon advising a petition, with answers, the case was considered to be attended with difficulty; but the Court, upon the general ground, that a creditor having two securities at bankruptcy, is entitled to rank *in solidum* on each, without deduction of a partial payment afterward obtained from either, adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, Dunsinnan. Act. H. Erskine, Rac. Alt. Craigie. Clerk, Menzies.

D. D.

Fa. Coll. No. 234. p. 529.