1797.

CURTIS, &c. *v.* CHIPPENDALE.

case he had the most important interest in the proceedings, being both titular of the teinds and parish minister, because the reverse is presumable from the evidence of the record, which mentions the names of so many other persons, but makes no mention whatever of the minister, and thus the proceedings laboured under a radical and fundamental defect. On the cross-appeal: On the point of dereliction. The stipend paid the minister for time far exceeding the long prescription is greater than the amount fixed and ascertained by the report of the sub-commissioners; and as it is clearly established law that any heritor who, *sciens et prudens*, pays either to the minister or titular more than the amount of the teind as fixed by the sub-commissioners, he must be considered as having abandoned the sub-valuation, and lost the benefit thereof by dereliction.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed, with £150 costs to the respondent in respect of the appeal: And it is farther ordered and adjudged, that the cross-appeal be dismissed this House: And it declared that the said order of dismissal of the said cross-appeal be without prejudice, it being unnecessary to enter into the matter of the same.

For Appellant.—*Sir John Scott, Wm. Adam.*

For Respondents.—*Ro. Dundas, Sir Wm. Grant, John Anstruther, Wm. Robertson, Arch. Campbell.*

[M. 2589.]

WM. CURTIS, E. MAITLAND, and JOHN NEWMAN, (Assignees under Messrs. GIBSON & JOHNSON's bankruptcy, London, } *Appellants;*

EDWARD CHIPPENDALE, Trustee on the Sequestrated Estate of WM. M'ALPINE & Co. Calico Printers, Scotland, } *Respondent.*

House of Lords, 23d February 1797.

COMPENSATION—RETENTION—BILL TRANSACTIONS—FOREIGN DEBT—RANKING.—Circumstances in which held (reversing the judgment of the Court of Session), that bankrupts in England were entitled to rank on a bankrupt estate in Scotland, without the latter

being entitled to set off against their claim, bills of the bankrupts in England which they had held, but which they had indorsed away for value, not being now holders thereof, and the proper holders having ranked on the bankrupts' estate in England.

M'Alpine and Co. were traders in Scotland. Gibson and Johnson were bankers in London. Both became bankrupt, and the respondent was trustee on M'Alpine & Co.'s estate; the appellants being official assignees under the bankruptcy of Gibson & Johnson. The question which arose was, a claim of set off or retention made by M'Alpine and Co. against a claim lodged on their estate, by the official assignees of Gibson and Johnson, in the following circumstances:—

A great many bills drawn, indorsed, and accepted by M'Alpine and Co. had, in the common course of dealing, been indorsed to Gibson and Johnson by Livesey, Hargreave, and Co., and other persons, for good and valuable considerations paid by Gibson and Johnson: On the other hand, Gibson and Johnson having accepted various bills of exchange in the course of their dealings, these bills, in the course of circulation, had passed into the hands of M'Alpine and Co., who again indorsed them to others, receiving a full and valuable consideration; and at the time of Gibson and Johnson's bankruptcy, all these bills had a variety of names upon them as indorsers.

The objection by the respondent, trustee on M'Alpine & Co.'s estate, was as follows:—"Gibson and Johnson having claimed to be ranked for the sum of £25,801. 4s. 10d. as the amount of thirty-six bills drawn by the bankrupts (M'Alpine & Co.), upon various persons, and indorsed to the claimants." To this large claim, this general objection is stated, "That the bankrupts held bills to the amount of £22,513. 14s. 5d. accepted by Messrs. Gibson and Johnson, which the bankrupts indorsed away to different persons. These bills not being retired by Messrs. Gibson and Johnson the acceptors, were duly protested against them for not payment, and against the bankrupts and the other indorsers for recourse and payment, and are accordingly now claimed, and ranked on the estate of Wm. M'Alpine and Co. The claimants therefore can only rank for the balance, amounting to £3257. 11s. 5d., after setting off the amount due to M'Alpine & Co."

The Lord Ordinary, of this date, sustained the objection, in respect of no answers; but the assignees of Gibson and Johnson afterwards appearing, and being heard, the Lord

Nov. 26, 1790.

1797.

CURTIS, &c. *v.* CHIPPENDALE. May 12, 1791. Dec. 13, 1793. Dec. 1, 1794. Dec. 9, 1794.

Ordinary adhered to his former interlocutor. On another representation, he took the case to report to the Court, who found the plea of retention well founded; and, on reclaiming petition, they adhered.*

* Opinions of the Judges:—

LORD PRESIDENT CAMPBELL.—"I first consider the case upon the principles of the law of Scotland, and the rules of ranking founded on common law and reason, independent of any peculiarities with respect to compensation in the law of England.

2d. I examine whether there are any such peculiarities, and what effect these ought to have on the question.

1st. Point.—Suppose A as principal, and B as cautioner, owe £100 to C, and A becomes bankrupt, C claims upon his estate, is ranked for the whole debt, and recovers ten shillings in the pound, *i. e.* £50. He then recovers the other £50 from B; can B be admitted as a claimant also upon A's estate either for £100 or for £50? B has paid *ex mandato* for A £50, and to that extent (not to the extent of £100) he seems to have a just demand against A, and would certainly, if A were solvent, recover his payment; but the other creditors of A have an interest and title to object to any further claim upon his bankrupt funds for this debt, the same having already got its due proportion of these funds. If A shall afterwards acquire any funds, these may be liable, but not the bankrupt funds, which have already been claimed upon; for it is enough that each debt is ranked for twenty shillings in the pound. The same debt cannot be ranked for thirty shillings or forty shillings, whether in name of one creditor, or two or more jointly or successively; so it was laid down as clear law in the case of Sir John Anstruther, 27th May and 17th June 1790, which was supposed to be in a different situation.

"The principal and the cautioner may, either jointly or separately, claim that the debt in question shall be ranked for its full amount to the effect of drawing the dividend belonging, in proportion with other creditors, but they cannot, in justice to the other creditors, in any form or shape whatever do more.

"This principle applies equally, or rather *a fortiori,* to the case of indorsed bills; the indorsers being in a situation even less favourable than cautioners; for, after having parted with the bill by indorsation, they quit all hold of it for a time, and have no claim of relief against prior indorsers, drawer or acceptor, upon the contingency of the bill returning back upon them. No such action of relief, it is presumed, was ever attempted, as it is not founded in the nature of a bill: for the indorsation of a bill is not of the nature of a cautionary obligation. None of the rules with respect to cautionary, such as the benefit of discussion, septennial prescription, &c.

Against these interlocutors the present appeal was brought. 1797.

CURTIS, &c. v. CHIPPENDALE.

Pleaded by the Appellants.—The plea of set off or retention does not here apply. The two estates do not stand in

---

apply to it. Each indorsation is considered as a new draft or order, which subjects the indorser as drawer, if the bill happens to be dishonoured. But the law does not presume any such case until it really happens; and he is liable, not as cautioner but as principal, to pay his draft. When the bill does come back upon him, and when he pays it, either in whole or in part, he becomes the holder of that bill; and he may carry his claim backward to those who are liable to him. But the bill, as one entire debt, whether in the hands of one holder or another, or claimed upon by many holders, against the bankrupt estate of that person ultimately liable, can only be made the subject of one entire claim, and can only draw a dividend along with other creditors of the bankrupt according to that claim; for although there may be different persons concerned, yet the debt can only be ranked to one or all of them for twenty shillings in the pound, not for thirty shillings or forty shillings.

"To illustrate this still more, suppose C, the holder of the bill, claims upon the bankrupt estate of A, the acceptor, for £100, and out of that estate draws ten shillings in the pound, *i. e.* £50, he also claims upon the bankrupt estate of B, the drawer and endorser, and receives five shillings in the pound, *i. e.* £25. Can B, or the trustee for his creditors, say, I must now also rank upon A's estate, in order that I may get this £25, for which I am just creditor to him, as having paid this part of the bill for him. If B is entitled to draw any thing at all out of A's estate, whether the dividend be more or less, he ought instantly to yield it up to C, because it is to him that every thing that can be recovered is due, until he is fully paid. But this would substantially resolve into a preference in favour of C, over all the other creditors of A, and would result in his obtaining perhaps fifteen shillings in the pound out of that estate, when other creditors who are *pari passu* with him, receive only ten shillings in the pound.

"These principles appear obvious enough in a case of direct claim of ranking being made by two different persons, interested as creditors in the same debt. But the question is, whether the same objection occurs, where one of them has no occasion to make any claim at all, or at least delays it till a claim is made *ex alia causa*, in order that he may then have an opportunity of pleading compensation?

"If this counter claim cannot be made directly for the purpose of ranking upon the estate of a debtor, which has been once claimed

1797.

CURTIS, &c. v. CHIPPENDALE.

the relation of debtor and creditor to each other. Had M'Alpine and Co. still been possessed of the bills, then retention, and compensation would have been pleadable by them against Gibson and Johnson's claim. But, by in-

---

upon for the same debt, can it be made indirectly, by stating it in the way of compensation or retention? The objection to such a course is, that, in order to make way for compensation or retention, the ground of the counter claim must be produced, and sustained as a good demand against the estate of the original claimant; and if it cannot be sustained as a good claim, neither can it as a ground of compensation or retention, *e. g.* if it shall happen to be prescribed.

"The case here seems to be the same; for the holders of the bills having already claimed, and their claim having been sustained upon the estate of the acceptor, for the whole contents of these bills, they cannot be claimed on a second time by M'Alpine the indorser, *ergo* there are not *termini habiles* for setting them off by compensation or retention, for a bad debt cannot be set off against a good one.

"Besides, if M'Alpine's trustee could make his counter claim effectual in this manner, out of the bankrupt effects of Gibson and Johnson, he would be obliged to yield up the advantage thereby acquired to the holders of the bills, to whom M'Alpine has only paid a small dividend. Compensation or retention operates as a preferable security, and this preference he must communicate to the party to whom he himself is bound, and at whose expense he is pleading it.

"The debt which M'Alpine owes to Gibson and Johnson makes a part of the bankrupt estate of the latter, and if detained, the creditors of Gibson and Johnson will so far be deprived of their payment, and therefore M'Alpine makes this claim to the prejudice of the bill holders to whom he is bound.

2nd. Point.—Suppose these principles were inadmissible by the law of Scotland, yet if they are founded in the law of England, which would seem to be the case, it is next to be considered, whether we ought not in this case to decide according to the laws of England; as the question truly resolves into this, whether we ought to admit a plea of compensation against the assignees of Gibson and Johnson, suing for recovery of their debtors' estate here, or, in other words, whether a counter claim against that estate, which would not be admitted in England, can be set up here?

"The principles of reconvention must be attended to in this question, Gibson and Johnson being an English house, the assignees under their bankruptcy must be permitted to recover their effects here, in order to divide them in England, according to the rule laid down in the cases of Thomson and Taler, &c; and although, in making that recovery effectual, they must be regulated by the law of

dorsing them away for value long before the bankruptcy of Gibson and Johnson, they thereby transferred their right to the holders, who are entitled to rank, and who have accordingly ranked on Gibson and Johnson's estate. It is a mis-

---

Scotland, and must give way to the legal diligence of this country, the present question is of a different nature, for it goes to the validity of their claim, or rather to the constitution of a counter claim against them, which is supposed to be founded in a rule of the law of Scotland, but not in any rule of the law of England, which is the *forum* of the party against whom this counter claim is pleaded, and which alone ought to be regarded. See Huber, B. I. tit. 3, § 7. Lib. II. tit. 2, § 2, &c. Voet, lib. 5, tit. 1, § 7, 8, &c.

" It is an important and very general question, whether being so reached by the jurisdiction of this court, so as to make way for a claim of debt against the bankrupt estate under their management, the adverse party is entitled to set up a plea of compensation and retention, however well founded in the law of Scotland, if it has no foundation at all in the law of England, to which last country the estate now claimed on belongs.

" M'Alpine's trustee is undoubtedly entitled to meet the action these assignees have brought, by any good claim which M'Alpine may have against the estate of Gibson and Johnson, *i. e.* any claim which can in law be made effectual against that estate ; but the question is, whether they can meet it by a claim which is not good in law, and could not be made the subject of a direct demand against the assignees of Gibson and Johnson.—This does not go to the mere matter of forum, but to the nature of the debt, and the validity of the claim; for it is admitted that Gibson and Johnson were liable in recourse upon these bills to M'Alpine; but if it can be said that the demand of recourse, so far as it lay against the estate of Gibson and Johnson, is already satisfied, and that no further claim is admissible by the law of the country where the claim fell to be made, and where satisfaction was due, can the claim, by any circuitous mode of procedure elsewhere, be revived and set up again in the manner which is here contended ?

" The distinctions laid down in the case of Watson *v.* Renton, 21st Jan. 1792, (Mor. 4582) appear to be founded in just principles. It is a mere accident that this demand against the estate of Gibson and Johnson comes to be made here in the way of exception. It is by accident that any part of the bankrupt estate of Gibson and Johnson (namely the money due by M'Alpine) happens to be in Scotland ; for England is the place of their residence and trade. It is not stated that Scotland was the *locus solutionis* with respect to these claims which M'Alpine had against Gibson and Johnston. England

1797.

CURTIS, &c. *v.* CHIPPENDALE.

take, therefore, to hold that their right to compensation is upon the bills themselves, and therefore in existence before the bankruptcy of Gibson and Johnson, because at that time they were not the holders of these bills. They are not *now* therefore was the *locus solutionis* as well as *locus contractus*, with respect to those bills so accepted and issued by Gibson and Johnson; and the nature and the extent of the obligation ought to be regulated by the law of England, and not by the law of Scotland, if there be a difference betwixt these two laws.

"Suppose the debt which is the subject of the counter claim, were cut off by prescription, or by some short limitation of the law of England, while the other debt is entire by the law of Scotland, and no such short limitation takes place here, it is thought that the limitation of the law of England would be pleadable against the counter claim. In the same way, if by some municipal rule the counter claim is good in England, while it is contrary to the law in Scotland, it is thought we must sustain it, when set up here against an English estate. What is said about the law merchant and *jus gentium*, &c. is also misapplied to this branch of the argument.

"A position is laid down, that if all parties were solvent, M'Alpine would be entitled to say, "I won't pay you my acceptances till you relieve me of yours, which I have indorsed away; and then it is said, insolvency can make no difference. But, 1st. Such a defence against payment of an accepted bill, it is believed, would not be listened to without producing the counter acceptances themselves, even in a case of solvency. 2nd. One half of the fact is here kept out of view, viz. that the bills which are the subject of the counter claim have actually been claimed upon, and drawn its dividend, and is now claiming to be ranked a second time. It is said that the inequality or the preference arising from compensation is legal and fair, and certainly it is so, and indeed is at bottom no inequality at all, in those cases where it applies. But what is the case here? The demand is carried much further. The two original parties, Gibson and M'Alpine exchanged their acceptances to the extent, we shall say, of £20,000 each. If each party still had these bills in his own hands, they would be set off against one another, and there would be no loss arising from the transaction either to the one estate or to the other. But M'Alpine has indorsed away Gibson's bills, and the indorser has already claimed upon Gibson's estate, and drawn five shillings in the pound, *i. e.* £5000 out of it. Now, in what situation does Gibson stand. He has not a farthing in his pocket arising from M'Alpine's acceptances, and when he produces them, in order to rank upon M'Alpine's estate, he is met with a plea of compensation to the extent of the whole of Gibson's acceptances, *i. e.* that no-

the holders of them. The real holders have actually proved them under Gibson and Johnson's commission as acceptors. The same bills cannot be proved twice over, and receive a double dividend. The contract of the acceptor is single; and although the benefit of it may be transferred from hand to hand, yet it cannot be split so as to remain entire both in the indorser and indorsee at one and the same time. He is bound to pay the bills only once, and to one person; and if M'Alpine and Co.'s claim be considered as a claim upon the bills, it is evident that Gibson and Johnson's estate would, if it were sustained, pay that twice over. The question always must be, in the distribution of a bankrupt's estate, were M'Alpine and Co. creditors of Gibson and Johnson at the time of the latter's bankruptcy? because the right of parties, as at the date of that bankruptcy, must govern the distribution of the estate. Now it is clear that, before this event, M'Alpine and Co. had indorsed away these bills, and thereby ceased to be holders. They admit this, but maintain that, as indorsers, they are to be viewed as cautioners, and

---

thing at all is to be paid. The result of this is, that Gibson and Johnson's estate just loses £5000 upon the transaction, and M'Alpine's estate has gained £17,500, partly at the expense of Gibson and Johnson, and partly at the expense of an onerous indorsee. There is surely no equity here, and it is plain that M'Alpine is demanding what is already in his pocket (at least must be presumed to be so). He is not contending for indemnification, but is *in lucro captando*."

LORD JUSTICE CLERK.—"The question must be determined on the common law of Scotland. It is not a question of ranking, but of compensation. If I have a pledge, I am entitled to retain it for the claim of debt due to me, although part of my debt has been recovered. Although my estate has paid all that it could pay, I am still personably liable, and so also is any estate I may subsequently acquire."

LORD HENDERLAND.—"I doubt if retention can be carried so far as the present plea of compensation. If these bills have already been ranked on *M'Alpine and Co's.* (Gibson and Johnson's?) estate, they cannot be ranked and draw any further. Therefore no room for pleading retention on them."

LORD ESKGROVE.—"I am clear for adhering to the former judgment."

LORD SWINTON.—"What he draws by compensation, he does not draw from the estate. I am therefore for adhering."

The Lords adhered.

Vide President Campbell's Session Papers, vol. lxxv.

1797.

CURTIS, &c. v. CHIPPENDALE.

so entitled to all the remedies which the law affords to a cautioner. Yet this, the foundation of their whole case, fails because indorsers of bills are *not* mere cautioners but principals. Indorsers receive the value of the bill from the indorsee, and, on doing so, sell it absolutely to him. Their right cannot again revive, unless they pay the bill, and thereby become again the holders, and they and the acceptors are mere strangers to each other. Besides, this being an English debt, arising out of an English transaction, and due to an English insolvent estate, must be governed by the English law. In England, if the surety or cautioner has not paid, he has no claim; the bankrupt law there destroys these remedies, and it is submitted that it is according to that law that the case ought to be decided.

Pleaded for the Respondent.—The present question occurs in a Scotch court of law, and regards the claim of creditors in a bankrupt estate *in manibus* of that Court, and must be determined by the law of Scotland; and cannot be influenced by the law of England on the subject. Although in questions of a mercantile nature, it is competent and fitting to resort to that law for illustration and authority, yet this can only take place in questions in regard to the constitution, transmission, or extinction of debts due by mercantile documents; but can have no place in questions regarding the *execution* against the *person* or *effects* of a debtor. These must always be regulated by the law of the country where such execution is sued out, and consequently, if by this latter law, it can be shown that there is room for pleading compensation or retention, full effect will be given to the plea. And whatever may be the case with compensation which may require that the debt should be presently due to the party, and the documents thereof in his hand; the case is totally different with retention, which is a defence that must meet every claim of debt. Accordingly, on this subject the authorities in the law of Scotland are clear beyond a doubt. A claim may be made back upon these bills against M'Alpine and Co., who, on the acceptor's failure, are undoubtedly liable, and the law of Scotland allows retention to be pleaded, whether the debt be already due, or one that has not yet fallen due, on a future debt, a contingent debt, or an obligation of relief upon whatever ground arising, and, consequently, by the law of Scotland, M'Alpine and Co. are entitled to the compensation or retention they claim.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be reversed. And it is farther ordered and adjudged, 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 £25,081. 4s. 10d., and to proceed farther in the cause according to justice.

1797.

EARL OF FIFE *v.* MACKENZIE, &c.

For Appellants, *Sir J. Scott, J. Anstruther.*
For Respondent, *J. Mitford, W. Grant.*

[M. 2325.]

JAMES EARL OF FIFE, . . *Appellant;*
MRS. MACKENZIE and ELIZABETH FRAZER, *Respondents.*

(*Et e contra.*)

House of Lords, 6th March 1797.

CLAUSE—EXECUTRY—RENTS—DESTINATION.—A clause conveying all moveable *goods, gear, and effects*, belonging to the party at death, held not to carry debts and sums of money, bank notes, &c., but only *ipsa corpora.*

In 1768 Mr. Udny, who possessed considerable landed estate, married Mrs. Margaret Duff, a widow, and took the name of Mr. Udny Duff. A few months afterwards a *post-nuptial* contract was entered into between them, whereby Mr. Udny Duff, on his part, "assigns and dispones to and "in favour of the said Mrs. Margaret Duff, in case she shall "happen to survive him, and to *her heirs, executors, and as-*"*signees*, the whole moveable goods, gear, and effects, "which shall belong to him at the time of his death, includ-"ing heirship moveables, household furniture, outsight and "insight plenishing, silver plate, jewels, and linen, and in "general, all moveable goods and effects of whatever kind "and denomination, that shall belong to him at the time of "his death, and that free of all debts and deductions what-"ever." He also charged his estate with an annuity to her of £300 in case she survived him; in consideration of which, and on her part, Mrs. Duff became bound "to convey to "her husband, his heirs and assigns, her whole heritable "and moveable estate which presently do belong to her, or "which may fall, accresce, or belong to her at any time "hereafter during the subsistence of the marriage, and par-