CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND.

1846.

[19*th February*, 1846.]

LACHLAND MACINTOSH, S.S.C., *Appellant.*

EDWARD BRIERLY, residing in Paisley, *Respondent.*

Debtor and Creditor.—Payment.—Bankruptcy.—Act 1696, *Cap.* 5.—A letter by a debtor to a third party, directing him to pay the debtor's creditor a sum certain out of a larger fund, which the third party was about to receive on account of the debtor, with an undertaking by the third party upon the letter that he would do what was directed, followed by actual receipt of the fund and by a partial payment by the third party to the debtor, operate, from the time of the fund being received by the third party, as payment by the debtor to the creditor, and to the extent of such constructive payment the fund will not be affected, under 2 and 3 Vict. cap. 41, by the bankruptcy of the debtor within sixty days of the date of the order; and the order will not be open to challenge under the statute 1696, cap. 5, as an illegal preference.

HALLIWELL and Son had contracted with a railway company to construct a portion of their line of way;—disputes arose about the performance of the contract. which gave rise to a suspension and interdict at the instance of Halliwell and Son against the company. This proceeding terminated in a refer-

ence to an arbiter of the matters in dispute between the parties. In the meanwhile several arrestments were used in the hands of the railway company by creditors of Halliwell and Son, and the appellant and respondent who were likewise their creditors, were in a condition to have adopted the same measure. On the 14th April, 1842, Halliwell and Son drew their bill on the railway company. in favour of the appellant, who was the solicitor of Halliwell and Son, for 1000*l*., as a fund for payment of his own debt, and that of the other creditors, The railway company refused to accept the draft, and it was protested for non-acceptance.

On the 16th April, the arbiter issued his award that the railway company should be at liberty to retain in their possession all the materials brought upon the railway by Halliwell and Son, on making payment to that firm of 1011*l*., all arrestments being previously loosed.

In these circumstances, on the 29th April, 1842, a meeting of the respondent and other creditors of Halliwell and Son, took place in the chambers of the appellant; at this meeting the appellant was instructed to remove the arrestments, and get up the money owing by the railway company. On the same day Halliwell and Son wrote the following letter to the appellant:—"Sir, "We have adjusted the claim due by us to Mr. Edward Brierly, "contractor, near Bishopstone, at the sum of two hundred "pounds sterling, and arranged that you should pay him that "amount out of the proceeds of our draft, of date 14th April "current, in your favour, on the Glasgow, Paisley, Kilmarnock, "and Ayr Railway Company, for 1000*l*. You will, therefore, "please to pay him accordingly, for which this shall be ample "warrant, besides that the said bill was intended to embrace "Mr. Brierly's claim when granted." The appellant wrote at the bottom of this letter: "*Edinburgh, 29th April*, 1842. "I hold the above duly intimated to me, and shall duly honour "the same."

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It did not appear whether this letter was written at the meeting which, as has been mentioned, took place on the day of its date, nor what was done with it after it was written, nor how Brierly became cognisant of it.—The pleadings contained no averments on either side, in regard to any of these particulars, and no evidence was led by either party; neither did it appear, further than might be inferred from the circumstances, in what character the appellant had acted in the matter. He averred that he acted as solicitor for Halliwell and Son, and on his own behalf as one of their creditors, having an interest to see their matters properly arranged; while the respondent averred that the appellant had been consulted by him, and had advised and acted for him in the matter, as his solicitor, which the appellant as positively denied.

On the 24th May, 1842, the railway company paid the appellant 900*l.*, to account of their debt to Halliwell and Son; and on the same day, as stated in the defences, the appellant "at the sight of James Halliwell," one of the partners, paid the respondent 50*l.* to account of his debt. On the 4th June, 1842, the estates of Halliwell and Son were sequestrated, and thereafter the appellant, on the demand of the trustee under the sequestration, paid over to him 225*l.* 11*s.* 5*d.*, as the balance of the 900*l.* remaining in his hands, after deducting the debt due to himself, the 50*l.* paid to the respondent, and payments made by him to other creditors of Halliwell and Son. In answer to subsequent applications, made to him by the respondent, for payment of 150*l.* the remainder of the 200*l.*, the appellant referred him to the trustee under Halliwell's sequestration.

In these circumstances the respondent brought an action against the appellant for payment of 150*l.*, on the footing that the letter of 29th April, 1842, and the appellant's writing upon it, amounted to an obligation upon the latter to pay him the sum mentioned in the letter, so soon as it should have been received.

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The appellant pleaded in defence:—

" 1*mo*, As Halliwell and Son do not admit there is any sum " due to the pursuer, there are no grounds in point of fact on " which he can insist on the payment concluded for in this " action.

" 2*do*, If the pursuer possesses any well-founded claim, as " set forth in this action, he is bound to make good the same in " the process of sequestration.

" 3*tio*, In the circumstance before stated, the defender was " justified and bound to pay over the sum in his hands at the " date of the sequestration to the trustee.

" 4*to*, The alleged order or draft on the defender not being " stamped, is null on the stamp laws."

The Lord Ordinary, (*Cockburn*,) pronounced the following interlocutor, and added the subjoined note:—

" Sustains the 2d and 3d defences, and dismisses the " action, reserving to the pursuer to make his claim in the " sequestration, and decerns."

" *Note*.—The Lord Ordinary does not consider the 900*l*. as " having actually *passed out of the property* of Halliwell, and " been lodged with the defender, as partly belonging to the " pursuer. He thinks that the meaning, and the law of the " arrangement was, that the sum was merely placed with the " defender as money *belonging to Halliwell, but on which the* " *pursuer had a claim*, which claim the defender was to satisfy. " The defender accordingly paid the pursuer 50*l*.; but within six " days after the *money* had been lodged with him, Halliwell was " *sequestrated;* and before any farther payment was made, the " trustee claimed the whole balance. The Lord Ordinary " thinks that it was the defender's duty to give up the balance " to the trustee, as a sum belonging to the bankrupt, though " subject to claims; and that how clear soever the pursuer's " right to be paid preferably may be, it is before the trustee " that this right must be asserted. This would have been the

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" case had there even been an arrestment, (Gordon, 12th Janu-
" ary, 1842,) but what occurs here is a mere unsecured claim."

The respondent reclaimed; and on the 1st June, 1843, the Court pronounced the following interlocutor:—

" Alter the interlocutor of the Lord Ordinary complained
" of. Find that it is sufficiently instructed that the defender
" received and held the sum of 200*l.* paid to him on the 24th
" May, 1842, for behoof and on account of the pursuer, and
" was accountable to the pursuer for the same, from the date
" on which he received it. Find that no question can com-
" petently be raised on this record as to the validity of this
" transaction under the bankrupt statutes; therefore, repel the
" 2d and 3d defences; and having farther heard parties on the
" cause, repel the 4th defence. Find that there remains no
" other matter on the record which can raise any defence against
" the action; therefore, repel the whole defences. Find that the
" defender is bound to pay the sum of 150*l.* concluded for in the
" summons, with the legal interest thereof from the 24th day of
" May, 1842, and decern."

The appeal was against the interlocutor of the Court.

Mr. Turner and *Mr. Anderson* for the Appellant.—There is no undertaking to pay other than what is adjected to the order of 29th April; but Brierly was neither party nor privy to that document, there is no evidence that he was even aware of its existence; so far as he is concerned, it is a mere order by a debtor to a third party, to pay his creditor when in funds, with an undertaking by the party to comply with the order. There was no privity, therefore, between Macintosh and Brierly, nor any contract between them which could entitle the latter to sue the former. It was open at any time to Halliwell and Son to have countermanded the order upon Macintosh, and the latter was bound to obey the countermand so long as he was free from any engagement with Brierly. Williams *v.* Everett,

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14 *East*, 582; Walwyn *v.* Coutts, 3 *Mer.* 707; Garrard *v.* Lauderdale, 3 *Sim.* 1; Payan *v.* Eaton, 2 *S.* & *D.* 117.

Even if the respondent could be held to have any right under the order of April, that document did not make any specific appropriation of the money to be received—at the utmost it created a mere general charge upon the fund—that did not divest the right of Halliwell and Son. The effect of the sequestration of their estates was to vest this right under the sequestration, subject, no doubt, to the charge so created; 2 & 3 Vict., c. 41. sec. 78. The sequestration, therefore, put an end to all right of action previously competent to the respondent, and the only course which then remained open to him was to make his charge effectual by a claim under the sequestration. Lindsay *v.* Paterson, 2 *D. B.* & *M.* 1373; Gordon *v.* Miller, 4 *D. B.* & *M.* 352.

[*Lord Cottenham.*—Neither of these were cases of appropriation.]

Not exactly, but they were cases of preferential right, which the present is no more.

But if the order of 29th April and the appellant's undertaking annexed, should be held to have conveyed to the respondent a right to the debt owing from the railway company to the extent of 200*l.*, as the estates of Halliwell and Son were sequestrated on the 4th June following, within sixty days of the date of the order, it will be void under the Act 1696, cap. 5, as a voluntary assignation in preference to other creditors. Campbell *v.* Mc Gibbon, *Mor.* 1139; Robertson *v.* Ogilvie, *Mor. App. voce*, B. of Exchange, No. 6; Spier *v.* Dunlop, 5 *S.* & *D.* 680; Dawson *v.* Lauder, 2 *D. B.* & *M.* 525; White *v.* Briggs, 5 *B. M. D.* & *Y.* 1148.

Any claim upon the order is further void under 55 Geo. III., c. 184, as it is an order for the payment of a sum out of a particular fund, and if it was delivered to the appellant, as the trustee of the respondent, which the Judges below held to

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have been the case, then it was delivered to some person on behalf of the payee, and under the statute is null for want of a proper stamp being affixed to it. Ernly *v.* Collins, 6 *Mau. & Sel.* 144; and Braybrook *v.* Meredith, 13 *Sim.* 271.

Lord Cottenham, in the course of the argument, interrupted counsel to ask how they could maintain that the letter had been delivered to Macintosh on behalf of the respondent, without necessarily destroying the first branch of their argument altogether? The argument on this head received so little countenance from the House, that the counsel for the respondent were desired to disregard it in their address.

Mr. Attorney-General and *Mr. Bethel* for the Respondent.—Being in a matter of trade, the order of 29th April, with the appellant's undertaking upon it, coupled with the subsequent payment of 50*l.* by the appellant to the respondent, is sufficient to establish an agreement between Halliwell and Son, the appellant and the respondent. The money was not in the appellant's hands at the date of this agreement, and, but for his undertaking to pay it over, the respondent might, by arrestment against Halliwell and Son, have prevented the appellant from receiving it. If what took place amounted to an agreement, then, from the moment that the appellant received the money, the respondent was, in fact, paid his debt. The appellant thenceforth held the money as the money of the respondent, and Halliwell and Son ceased to have any right in or controul over it. In Everett *v.* Williams the money was already in the hands of the bankers, who not only had not undertaken to pay as the debtor directed, but had refused to do so; and in Walwyn *v.* Coutts, and Garrard *v.* Lauderdale, the deeds in question were for the benefit of creditors executing them; but in neither case had the party seeking the benefit of the deed executed it: none of these cases, therefore, has any application to the present. If the respondent be right upon this ground,

there is an end of any argument upon the effect of the sequestration under 2 & 3 Vict. The 78 sect. transfers the estate of the bankrupt; but the money received by the appellant had ceased to be any part of that estate, and had become the property of the respondent.

With regard to the Act 1696, no question whatever was raised upon it in the Court below, nor even in the printed papers upon the table. But, if necessary to argue the point, there is no case in which a present payment, in the ordinary course of trade, either of money or of bills treated as money, or which by efflux of time have become money, had been overreached by that statute. The Act is directed against voluntary dispositions or assignations; here there was neither, but an order for actual payment, which was completed so soon as Macintosh received the money. Neither was what took place voluntary; the respondent had it in his power to use arrestments against the Halliwells, the effect of which might have been very detrimental to them. The order for payment was the price they paid to be liberated from this hazard. In this view the statute is further inapplicable on another ground, that the order was made upon a new consideration. The railway company were not ordered by the arbiter to pay to Halliwell and Son, and deliver their effects to them, but upon the condition of the arrestments used in their hands being previously loosed. The respondent was in a condition to use arrestments, and the consideration for his refraining from doing so was this order for payment. In every view, therefore, the transaction comes under one and all of the exceptions to the application of the statute stated, 2 *Bell's Com.* But even were it otherwise, however competent it might be to the trustee or creditors under the sequestration to raise a challenge on this ground, it cannot lie in the mouth of the appellant, who has neither title nor interest to maintain it.

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LORD COTTENHAM.—My Lords, the question which has been principally argued at the bar is one upon which we have heard no opinion expressed by the learned Judges in the Court below, and for this reason, that they were of opinion the proceedings and the pleadings did not raise it. Now, on examining those proceedings, it appears to me that they were perfectly correct in that view of the case.

The pursuer founds his claim upon a transaction that took place between a person of whom he was originally the creditor, Mr. Halliwell, and a Mr. Macintosh, who was the solicitor and agent of Halliwell and himself. And he states, that there being a sum of money due to Halliwell from a railway company, and he and others pressing Halliwell for payment of their debts, it was arranged that Macintosh should receive the monies due to Halliwell from the railway company, and when received, should pay the amount claimed out of those monies. These instructions were reduced into writing, and Macintosh, upon receiving those instructions, underwrote the paper with these words, "I "hold the above duly intimated to me, and shall duly honour the "same." The money was received; 900*l.* was received from the railway company. Out of that 900*l.* Macintosh paid 50*l.* to the pursuer, in pursuance of the undertaking to pay 200*l.*; and the present claim is against Macintosh under this undertaking to pay the remaining 150*l.* Subsequently to this undertaking, and subsequently to the receipt of the money, and subsequently to everything being completed which constituted the plaintiff's claim, as against Macintosh, Halliwell became a bankrupt. Now, the summons has simply stated these transactions as far as they lead to the undertaking by Macintosh.

The defence set up to this was that which has by no means been the subject of argument at the bar of this House; it did not enter into the question of the plaintiff's right at all, but it merely raised a question as to the person to whom he was to look for payment; it stated that the sequestration having issued

before the money was actually paid, Macintosh was bound to account for it to the trustee under the sequestration; and that the plaintiff, therefore, if he had any claim, must look to the proceedings under the sequestration for payment; not raising any question as to the legality of the pursuer's claim, but disputing his right to go against Macintosh and telling him that the effect of the sequestration is this: that whatever claim he may have he is bound to go in under the sequestration and make it good there; leaving the question whether he had any claim or not, and the ground now insisted upon in resistance to his claim, totally untouched, not raised by the pleadings at all, nor the state of the law at all referred to upon which this claim is now resisted.

Now the Lord Ordinary was of opinion that the defender was so far right, that the claim ought to have been made under the sequestration, and he disposed of the case upon that ground. When it came into the Inner House, the Judges were of opinion that that was a mistake, and that whether the plaintiff's right as against Macintosh, was one in which he might or might not succeed, as against Macintosh, he was not bound to go in under the sequestration; and they were of opinion that Macintosh's liability was not affected by that provision of the Statute of the present Queen, by which, in certain cases, the proceedings are to be under sequestration, the whole property being invested in the trustee, subject to such claims as there might exist against the bankrupt himself. And so we have no opinion whatever from the Judges upon the point which has been so much argued.

I think that this alone is quite sufficient to dispose of the case, because I think that the Judges were quite correct, and that as against Macintosh, the defences have not set up the ground upon which he now insists. But, my Lords, the case has been so much argued upon that ground, (upon which my opinion is also very clear,) that it perhaps might not be satisfactory if the case were disposed of without adverting shortly to it, namely:

that this transaction is altogether void under the provisions of the Statute 1696.

Now the transaction is simply this: that the debtor having a fund due to him, authorizes a person to receive the amount of money so due, and out of the proceeds to pay the debt due from him; and that agent undertakes the duty and actually receives the money; and then it is said, the undertaking by which the agent contracts to pay that money, when it shall be received, is not binding upon him, because the person to whom the debt was originally due, became bankrupt after the agent had received the money; but before he had in point of fact carried into effect the contract which he had entered into; that is to say, that this is not a transaction which, upon the money being received, brings into operation his contract and gives to the person for whose benefit he had entered into that contract, a right, as against him, to demand its performance.

My Lords, many authorities have been referred to in the course of the argument, but not one which appears to me to have the slightest application to the present case. It is admitted, that if the party had himself received the money and paid the debt, there would have been an end of the case. He sends an agent to receive it. That agent does receive it, and that agent has previously acknowledged that upon the receipt, he would pay it over to the plaintiff. Is he not, therefore, liable to pay it over to the plaintiff? Whether he chooses to keep the money in his own hands or not, the event has happened under which he agreed to pay 200*l.* to the pursuer. He had that money in his hands, and he therefore had that money as the property of the plaintiff. The event has taken place upon which his contract was made to depend; he had it for the plaintiff, and he was bound to pay it over to the plaintiff; and it was as much severed from the bankrupt's estate, and became as much the money of the pursuer as if the person who originally owed it had paid it over to the pursuer.

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This is the view I have taken of this transaction. I have waited to see whether any case could be produced, of a decision in the law of Scotland, at all impeaching the obvious and natural result of the transaction, as stated in these proceedings. No such case has been produced. Those cases which have been produced, refer to transactions which are very distinguishable from the present; and there are none which raise so extraordinary a proposition as this: that a transaction not impeached for fraud, or for any improper motive, a transaction in which a man is to pay a debt which he justly owes, is to be affected by a transaction subsequent to the completion of it; that is say, subsequent to the events happening which are to perfect the right of the pursuer to receive the money which has been so contracted for. In the absence of any authority, I must assume that there is none; and I should be sorry if in the result of the investigation it had appeared that the law of Scotland went to sanction a proposition so totally inconsistent with, and so fatal to, the security of the ordinary transactions of mankind, as that a transaction like this, so completed, was liable to be overturned by a subsequent sequestration issuing. No such authority having been produced, if we are to decide this question upon the merits which I own are not raised upon the pleadings, I should be of opinion upon that ground also, that the judgment of the Court of Session is correct.

LORD BROUGHAM.—My Lords, having been absent elsewhere on judicial business during part of the argument, I should not have taken any part in the consideration of this case, but that I entirely agree with my noble and learned friend, and my other noble and learned friend who is about to address your Lordships, in holding that the Court below have well decided both points.

My Lords, I certainly did, when I came back the other day, expect from what took place at the bar, that some authorities

would have been produced, and I rather put off the case upon that expectation. However, nothing has been so produced, and I should have been a little surprised if there had been. I do not see how a mercantile country could go on at all, if such could be the effect of a subsequent sequestration; and therefore I am not in the least surprised that no authorities were produced. Indeed I should have been surprised if there had been. I think the case is perfectly clear.

LORD CAMPBELL.—My Lords, I continue to entertain the opinion which I at first had after I had carefully examined the facts of this case: that the result in point of law is the same as if Halliwell had received with his own hand the money from the railway company, and had paid that money, or *200l.* of that money, into the hands of Brierly; because the result in point of law, seems to me to be precisely the same. Macintosh went to receive that money, and received it as the agent of Brierly. It was Brierly's money, from the time he received it, and the subsequent sequestration could have no effect at all to carry that money under the sequestration, any more than if it had come into Brierly's own hand.

My Lords, I regret that this case should have occupied so much time, but we have always a duty to perform here. It is our duty to know what is to be said on both sides. I have listened with great attention to the argument, and notwithstanding all that has been urged, my opinion continues what it was when I originally understood the case. I have no doubt whatever that the interlocutor should be affirmed and with costs.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.