'able to the pursuer for the value of his brother's shares, as ascertained by the 'balancing of the company's books in November 1771.' But upon advising a reclaiming petition with answers, and after a hearing in presence, the following interlocutor was pronounced: No. 1.

'The Lords, (13th February 1776,) having advised said petition, with the 'answers, and heard parties' procurators in the cause, in presence, with what 'is above set forth, and that it is asserted by the procurators for the defenders, 'and not denied by the procurators for the pursuer, that betwixt the balancing 'of the Company's books in November 1771, and Mr. Blair's death in October '1772, the said Company became totally insolvent in manner above set forth; 'therefore find, That the petitioners are not accountable to the respondent 'for the value of his brother's share, as ascertained by the balancing of their 'books in November 1771.'

And this interlocutor was, (30th April 1777,) affirmed upon appeal by the House of Lords.

Lord Ordinary, *Stonefield.* Act. *M'Queen, Blair.* Alt. *Ilay Campbell* et *Alex. Wright, Alex. Murray.*

D. C. *Fac. Coll. No. 223. p. 194.*

1776. *August* 8.

THOMAS and WILLIAM DUNLOPS, and Others, Trustees for the Creditor of JOHN CARLYLE and Co. *against* ALEXANDER SPIERS, and Others, Trustees of JAMES DUNLOP, junior.

No. 2.
Particulars of the case, No. 42. p. 14610.

JAMES DUNLOP, younger of Garnkirk, James Douglas of Mains, afterward known by the name of James Campbell of Blythswood, and James White merchant in Glasgow, entered into a copartnership, under the firm of James White and Company.

Upon the death of James White, who had been acting partner, a new copartnership was formed betwixt James Dunlop and James Douglas, and two other persons then assumed, viz. John Carlyle and Gavin White; which copartnership was carried on under the firm of John Carlyle and Company.

This copartnership failed in November 1763, and the creditors of the Company having entered into a concert, in which they became bound to follow joint measures, Thomas and William Dunlops, Robert Bogle, Thomas Scott, and the now deceased James Montgomery, merchant in Glasgow, were nominated by them as their trustees. These gentleman at the same time were also appointed trustees by Carlyle and Company for gathering in their effects, and dividing them among the creditors agreeably to the concert thus entered into.

No. 2. At the time of the failure of Carlyle and Company, the first mentioned copartnership of White and Company stood indebted to them in the sum of £5,072. 18*s.* 9¹*d.* Sterling; and the whole debts due by James Dunlop, junior, to Carlyle and Company, both on his own private account, for sums received from them, and as a member of the copartnership of White and Company, amounted in whole to about £12,000 Sterling.

Alexander Spiers, Andrew Blackburn, and Andrew Syme, who had been appointed trustees at a general meeting of James Dunlop's creditors, whose bankruptcy was a short time prior to the failure of the copartnership of Carlyle and Company in which he was engaged, having been concerned in an action at the instance of the trustees of the creditors of Carlyle and Company, in which they claimed to be ranked upon the funds of James Dunlop, both for the debts due by him to Carlyle and Company, and likewise for the whole debts due to the pursuers and their constitutents by that company itself—these trustees refused to admit those claims. Upon which, the cause being brought into the Court of Session, the Lord Kennet Ordinary appointed informations to the whole Lords, who (January 23d, 1776,) remitted the cause to the Ordinary, in order to the adjustment of some facts. And his Lordship having again ordered informations, it was pleaded for the defenders,

1*st*, That the pursuers cannot possibly be allowed to claim at one and the same time payment from James Dunlop, both of the debts supposed to be due by him to Carlyle and Company, and of the whole debts due by that Company to their creditors. Yet this is what they are attempting. They claim as trustees for the creditors of Carlyle and Company to be ranked on James Dunlop's estate for upwards of £17,000, as the alleged amount of the debts due by that Company; and they insist to be ranked upon his estate for the sum of £12,000, as the debts said to be due by him to the same Company. In the first conclusion, they insist against his trustees upon the medium of James Dunlop being a *partner* of Carlyle and Company;—and in the second, upon the medium of his being a *debtor*. They do not indeed pretend to say, that they can be ranked on these claims to the effect of their drawing full payment from both, but that they are entitled to claim in both processes, and to be ranked for the sums concluded for in each, under this quality, that they shall not in consequence of these rankings draw more than the £17,000 due to the creditors of Carlyle and Company. But this mode of ranking is by no means just. If £17,000 be the whole that the pursuers are entitled to draw, they can have no title to rank for more than this sum, and being once ranked for it, they have no right to be ranked for the £12,000, nor for any other sum whatever.

In the eye of law, when there is a bankruptcy, and when there is a ranking of creditors, the moment a creditor has produced his interest, and has been ranked upon it, that ranking is in every question with a competing creditor in the ranking, to be considered as equivalent to payment, and attended with all the

No. 2.

legal effects of payment. Of this there can be no question, where the funds turn out so well that there is no deficiency. But even, where the creditors do not in fact obtain full payment, they must, after being ranked, be considered in a question with each other as legally paid.

To apply these principles to the present case, there is a debt of £17,000, said to be due by Carlyle and Company. An action is brought against the trustees of James Dunlop, one of the partners of that Company, to be ranked upon this debt. Upon the principles above laid down, after being ranked they are to be considered in a legal view as being paid. And matters standing thus, their claim to be ranked is at an end, by their being entitled to draw such share of the bankrupt's effects as belongs to them.

The pursuers confound two things, which are totally different, viz. the case of a creditor having several debtors bound to him *in solidum*, and the present case, where James Dunlop is the only debtor. In the former case, a creditor is no doubt entitled to be ranked upon the estate of each debtor to the effect of drawing full payment of the sum due to him, nor can the other creditors of these several debtors complain of this mode of ranking, because the creditor having the whole jointly bound, is not ranked for more than each debtor owed him. But in the present case, the utmost extent for which James Dunlop is bound to the creditors of Carlyle and Company is £17,000, while the tendency of the plea maintained by these creditors is, that they should be ranked for £29,000. Nor does it vary the case, that the creditors of Carlyle and Company are entitled to be ranked upon the effects of that Company, and likewise upon the effects of each individual partner to the amount of their debts. The pursuers go much farther: They insist, that besides dividing among themselves the whole Company's effects, they are, in the first place, entitled to be ranked on the funds of James Dunlop, for the amount of the debts due by the Company in which he was a partner; and in the second place, that in the right of that Company, they shall be ranked for the debts due to them by James Dunlop. Now, it is perfectly evident, that his estate cannot be liable for both. For if he pays the first claim, viz. the debts due by Carlyle and Company to their creditors, the second claim arising from the debts due by him to the Company, must by such payment be extinguished.

Let it be supposed, that James Dunlop's effects should yield only 10*s.* in the pound, of the total debts due by him, including those due by Carlyle and Company, claimed from him as a partner, the consequence of the pursuer's doctrine would be, that the creditors of Carlyle and Company would, in the first place, draw 10*s.* in the pound of the whole debts due to them, and in the next place, draw also about £6000, which is nearly equal to about 7*s.* in the pound more, on account of the debts due by James Dunlop to Carlyle and Company. Thus, while his own proper creditors received only 10*s.* the Company creditors would come upon Mr. Dunlop, only as being one of the partners of that Company, and draw no less than 17*s.* in the pound.

No. 2. *2d*, The defenders contended in the second place, that the creditors of a company ought not to draw from the private estate of an individual partner, until his own separate creditors are fully paid. This rule, they contended, was the most equitable in itself, was established in the law of England, and other commercial countries in Europe, and was not contrary to any thing laid down in the law of our own country, there being no authority in any of our law books, and no decision in any of our courts, establishing that company creditors ought not only to be preferred on the company effects, but to have also a *pari passu* preference with the private creditors.

3d, The whole of James Dunlop's estate, out of which any dividend either has or can be made among his creditors, has been recovered from America, where the law of England prevails, and where the separate creditors would have had an undoubted preference. The law of America, that is the law of England, giving them this preference, cannot be cut down by the trust-right, and the trustees ought to divide the funds in the same manner as they would have been divided in the colonies.

For the pursuers, pleaded: The claims made by them are founded not merely on the circumstance of their sustaining two different characters, that of trustees for Carlyle and Company, and that of trustees for the creditors of the Company; but also on this circumstance, that James Dunlop sustains two different characters, or is in two different situations with regard to this Company, being both its partner, and its debtor. In the one capacity, he is certainly obliged to pay what he owes to the Company, and in the other, he is obliged to pay what the Company owes to their creditors.

These two demands are by no means one and the same, but perfectly distinct. Supposing James Dunlop had already paid every six-pence due by him to the Company, he would still in his capacity of partner be liable for the whole debts of the Company to the utmost amount. And though the pursuers cannot insist to any farther effect, than to obtain full payment of the debts which stand in their persons, still they are entitled to be ranked upon both their claims, to the amount of both sums here mentioned, and to draw in proportion to these sums along with the other creditors, these two estates being different, and the two claims altogether distinct.

Were the £12,000 due by James Dunlop to the Company, in the hands of some third person who had no connection with the Company, and who had likewise now become bankrupt, there is not a doubt that the pursuers would have been entitled to rank upon the estate of this third person for £12,000, and likewise upon the estate of James Dunlop for £17,000. All that the creditors of James Dunlop could have insisted upon is, that no more than the £17000 in whole should be drawn by the pursuers, and consequently, that they should be assigned to the claim of this third person, the debtor to the Company, for their relief *pro tanto* after the pursuers were fully paid. Now, though the debtor to the Company here be not a third person, but one of the

partners themselves, that can make no difference. In a question with the pursuers, he is to be held as two different persons. He is both debtor to the Company, and liable in the Company's debts. He is subject to a two-fold claim, because he is debtor in two different ways, and upon different *media*; though at the same time, the interest of the pursuers will cease, after they have drawn their full payment, and consequently, they will never draw more than is due to them. James Dunlop would have been liable to the creditors of the Company for their whole debts, although he had owed the Company nothing. And his being attacked by the creditors of the Company in the character of one of their partners, can be no reason why he should not make good to the Company, or their assignees, the debt which he owes them. No. 2.

The pursuers desire no superiority over the other creditors. They are creditors in the £12,000, as well as in the £17,000, and when they are ranked upon both debts, and draw a share of James Dunlop's funds in proportion to both, they claim no superiority over the other creditors.

2d, As to the plea of the defenders, that as the creditors of a company are preferable upon the Company's effects, so the private creditors of an individual ought to be preferable on his private effects—this doctrine is not founded in our law. The expediency of it seems questionable; and the circumstance of there having been no decision upon it, when the case must have so often occurred, affords a stronger proof than any decision, of the contrary doctrine being the fixed law of the country.

3d, With regard to the argument, that James Dunlop's funds were at the time of his bankruptcy in America, and ought therefore to be governed by the law of that country, there is no room for that question in the present case, where all parties are acquiescing in the trust right.

The Court were of opinion that a middle mode of ranking should be devised; that Carlyle and Company should, in the first place, be found entitled to be ranked on Dunlop's effects for a proportion effeiring to £12,000, and that the share so drawn should be imputed in extinction *pro tanto* of the debts due by the Company; and that credit being given for this sum, there ought to be a second ranking, in which the creditors of Carlyle and Company should be entitled to rank for what remained due of their debt, after deducting the sum drawn for the £12000, due by Dunlop to the Company, and the sums which the creditors have received, or are still entitled to receive, from the Company's own funds.

As to the two last defences, the Court did not enter into them.

The following interlocutor was (4th July 1776,) pronounced: 'Find, that 'the pursuers Thomas and William Dunlops, Robert Bogle, and Thomas 'Scott, as trustees for the copartnership of John Carlyle and Company, are en- 'titled to be ranked on the estate and effects of James Dunlop junior for the 'amount of the debt due to the said copartnership of John Carlyle and Com- 'pany, by the said James Dunlop. And that after imputing the dividend

No. 2.

'arising from the said debt due by the said James Dunlop, and the dividend already paid from the Company's effects, in extinction of the debts due by the said John Carlyle and Company to their creditors, along with the other funds arising from the estate of the said John Carlyle and Company, remaining in the hands of the pursuers, and yet undivided, that the said pursuers, as trustees for the creditors of the said John Carlyle and Company, are entitled to be again ranked on the estate and effects of the said James Dunlop, for the balance which will then be remaining due to the creditors of the said John Carlyle and Company; the trustees of the said James Dunlop junior being entitled to an assignation from the said John Carlyle and Company's creditors, so far as they shall draw upon the said second ranking, for the purpose of operating a relief to the estate of the said James Dunlop, from the other partners of the said John Carlyle and Company, in so far as the said creditors, by the said second ranking, shall draw from the effects of the said James Dunlop more than his proportional share, as an individual of the Company; and remit to the Lord Ordinary to proceed accordingly.'

Both parties having reclaimed against this interlocutor, and both petitions having been answered, the Court (8th August 1776,) 'adhered.'

Lord Ordinary, *Kennet.* Act. *M'Queen, Ilay Campbell.* Alt. *Wight, D. F. Dundas, Blair, Craig.*

J. W.

*** Both parties having appealed, The HOUSE of LORDS (9th May 1777,) ORDERED and ADJUDGED, that the original and cross appeals be, and the same are hereby dismissed, and that the several interlocutors therein complained of be affirmed, with the following addition, viz. that no dividend fairly made, before notice of the respondent's claim, ought to be disturbed, but the respondents are to be paid up equal to the other creditors, before the other creditors receive any more.

1801. *May* 13.

WILLIAM DUNN and Others, *against* The Reverend WILLIAM BRUNTON.

No. 3.

A schism having taken place in a congregation of Burgher Seceders, a majority of the congregation, including the managers, in whom the meeting-house and minister's dwelling-house stood

IN 1757, a subscription was opened by the Burgher Seceders in Aberdeen for purchasing ground, and building a meeting-house. The subscription papers bore, 'That this house, when built, is to be employed as a church or meeting-house by a minister of the Old Associate Synod, who strictly maintains the principles of the Church of Scotland, both in doctrine, worship, discipline, and government, as contained in the Scriptures of the Old and New Testament, and in agreeableness thereto, summed up in the Westminister Confession of Faith, Larger and Shorter Catechisms; and this minister to be regularly called, after trial had, by the voice of the people, who are statedly to attend his Ministry, and settled among us agreeable to the ancient practice of the Church of Scotland, and still practised by the said Synod. Contributors having a title to the ground and house, according to the quantity of their