

No. 44. Graham, and Company, as a company, on the estates of the individual partners, merely as contingent ones; and ordain him, agreeably to the 38th section of the bankrupt statute, passed in the 33d of his Majesty's reign, to deposit a sum equal to the interim dividends which he is about to pay from the private estates, corresponding to the balance of the company-debts, after deduction of 3s. *per* pound already paid; and afterwards to reduce the sum deposited from time to time, in proportion to the dividends to be made from the company-estate, until the whole be finished, so as thereby to ascertain the exact amount of the ultimate claim of the company-creditors on the individual estates."

Reporter, *Lord Probationer Cullen.*  
Alt. *H. Erskine.*

For the private Creditors, *Tait.*  
Clerk, *Colquhoun.*

*D. D.*

*Fol. Dic. v. 4. p. 294. Fac. Coll. No. 2. p. 4.*

1804. January 24. MONACH'S CREDITORS *against* The TRUSTEE.

No. 45.  
Furnishers of goods to an individual who carried on business in this country, apparently in his own name alone, but in connection with others, whom he called his partners, abroad, how entitled to claim, in the event of his bankruptcy?

ANDREW MONACH having carried on business, on his own account, as a merchant in Glasgow, for several years, sent out two of his clerks, George Scott and John Don, the one to New York, the other to Charleston, for the purpose of carrying on his business more extensively. While the concern in America was managed under the firms of George Scott and Co. and John Don and Co. the business of the first, in this country, was carried on in the name of Monach and Co. and of the other in Monach's name alone. By him all purchases were made, and goods sent out, without his taking any commission from the partners, who furnished no part of the common stock.

Having become embarrassed in his circumstances, Monach applied for, and obtained, a sequestration of his estate, which was (25th June, 1800) awarded against him individually and against Monach and Company.

The estate of Monach and Don was also sequestrated.

The trustees proceeded to rank the creditors according as they appeared to belong to the respective estates of Monach or of the copartnerships, as follows:

	FUNDS.	DEBTS DUE.
John Don and Company,.....	£. 2750 0 0	£. 1305 16 6
George Scott and Company,.....	12020 0 0	4632 13 4
Monach alone,.....	3617 7 3	11684 5 11
	£. 18387 7 3	£. 17622 15 9

On the other hand, Messrs. Henshaw, Barker, and Company, and other creditors, petitioned the Court, complaining of this mode of ranking, as they contended that the copartnerships were entirely fictitious, or rather unfair companies, and that the classing of the creditors was an arbitrary act of Monach, to give a preference to favourite creditors, who will draw the full amount of their

debts, while those he calls his own creditors will receive only a very small composition.

The petition having been remitted to the Lord Ordinary, informations were ordered, and the question reported.

The objecting creditors

Pleaded: At the time the various debts of the different sets of creditors were contracted, they all stood upon the same footing. The goods were sold to Monach, as an individual, upon his own credit, and by persons who heard nothing of those other companies. The invoices were all made out in his name alone, and he granted his own bill for payment. He could not, without the knowledge of his creditors, give a preference to certain classes of them over the rest, either by actually sending the goods to these companies, or by alleging that he has sent them. This after event, in the history of the goods furnished to him individually, can make no difference in the mode of ranking the creditors upon those bills which he individually had granted to the furnishers, and who were satisfied with this security, as they knew of no other. The property of the goods, by the transfer from his creditors, became Monach's; and, while they remained in his possession, they might have been attached for his individual debts, and the persons who furnished them could have had no preference upon their price. Does, then, the original vender become the creditor of the person to whom his goods are sent by the person who has purchased them from him? And, if the consignee and the purchaser should have settled accounts together, would the consignee be obliged to pay the price over again to the original vender, if the purchaser should fail to discharge his obligation to him? The vender contracted with the purchaser alone, while the consignee never was heard of. If the consignee could not be bound to the original vender, still less, where a foreign merchant commissioned goods by means of a broker, could there be any connection of responsibility between the vender and the foreign merchant. The case is just the same, if the goods are first sold in this country to a broker, and he afterwards supplies his correspondents abroad with them. Now, after the goods were furnished to Monach as an individual, he disposed of them to the companies in which he was concerned; and it makes no difference whether it be to them or to any other person; for the companies were just as separate and distinct from Monach himself, as any third party could possibly be. A company becomes even a distinct personage from all its different members or individuals; much more is it distinct and separate from one of the individuals composing it. If two persons furnished goods to him, and never knew of or had any dealings with any other person; but if the quantity sold by the one had been sent to America, while the goods sold by the other was disposed of in this country; can the first, upon just principles, obtain his full payment, while the other, in exactly the same circumstances, will receive only a small dividend? The original vendors must therefore claim their payment from Monach alone; and he or his trustees, that is, the whole body of the creditors, will obtain payment from those to whom he has furnished the goods, or at least

No. 45. rank upon their estates; Kerr against Bryson, 12th June, 1747, No. 17. p. 14567. Greig against Wilkie, 26th November, 1799, (not yet reported), reversed in the House of Lords. See APPENDIX.

Answered: Where the partner of a company buys goods for them, although solely in his own name, and where, accordingly, the goods are made part of the company stock, the furnishers become creditors of that company, although they were ignorant of its existence at the time the goods were sold. The original packages of goods, and the original invoices, were sent out by Monach to his partners; by which means they knew who were the furnishers, although these furnishers were ignorant of the destination of the goods. The property of the goods might be fully vested in Monach; yet it does not follow, that his partners acquired their interest in them by a new transfer from him, which would thus make him debtor for the whole price of the goods. Though he was the only apparent buyer, and has pledged his credit for the price, he may not, on this account, be the exclusive owner. If he acted for others, who gave him full power to do so, they must be joint owners along with him, although he has not made it known to the party that there were any other persons concerned. His conduct is sufficient to found an obligation against himself for the price; but then those for whom he made the purchase must be owners also; so that the new bargain between them is necessary to transfer the property. The property, then, of the goods was never vested in Monach individually, but was, from the first, part of the common stock of the companies; from which accordingly the furnishers are entitled to obtain payment; and if they had both continued solvent, while Monach's estate alone was sequestrated, any creditor might resort to the solvent concern for payment; who could show, that although his goods had been furnished upon the credit of the bankrupt alone, yet that they had been intended from the first as a joint adventure; that the chance of profit had never been in the individual, but had belonged, together with the goods themselves, to the companies. These, then, ought not to be freed from their responsibility to the furnishers. Nor is there any thing absurd in the supposition, that of two creditors trusting to the faith of the same individual, one may find he has an unknown company bound to him, while the other has no more than the responsibility he originally trusted to. The claim of relief must follow the ownership of the goods; and this depends, not on any metaphysical principle of faith or trust, but on the actual destination of the subject. The first depends upon the buyer and seller jointly; but the other may depend upon the buyer binding along with himself those for whom he has power to act, though unknown to the seller. Though apparently the same in both, the transaction is in fact very different with regard to the parties interested. Those creditors, then, who furnished goods, which had become part of the company stock, would have had an action against the companies, although the furnishings were made without any knowledge of their existence. But those creditors to whom not only the existence of the company was unknown, but who could not show that their property became part of the company stock, never could, in an

action, have subjected those companies, and therefore cannot rank upon their estates; Logie against Durham, 30th December, 1697, No. 15. p. 14566.; Kinnear against Cunningham, 1764, Withers and Company against Cowan, 9th March, 1790. (These two cases not reported.) See APPENDIX. No. 45.

Some of the Court questioned the reality of the Companies, or, if they existed, doubted whether they could be considered as fair Companies; because, when Monach sent out goods, he paid for them out of his own private funds, and therefore at the expense of the creditors. Others of the Judges considered it an unnecessary inquiry, whether they were fair or unfair companies; as Monach, being a creditor of both the companies for the price of the goods purchased by him, his individual creditors would, at any rate, be entitled to rank on his share of the Company funds; and, in all probability, it would turn out that the whole funds of these Companies belonged to him.

Upon the whole, the following interlocutor was pronounced, (24th January, 1804):

“The Lords alter the mode of ranking proposed to be made on the sequestrated estates in question, and find, that the trustee must rank all the creditors equally as creditors of the said Andrew Monach, and recommend to the trustee to proceed immediately to recover the effects of the alleged copartnerships, and to divide the same, as truly belonging to the said Andrew Monach.”

Lord Ordinary, *Dunsinnan*,  
Clerk, *Colquhoun*.

For Trustee, *Semple*.  
Alt. *Cathcart*.

Agent, *J. Buchan, W. S.*  
Agent, *Alex. Walker*.

F.

*Fac. Coll. No. 139. p. 312.*

See SOLIDUM ET PRO RATA.

See APPENDIX.