

incidentally, a security in relief of the cautionary obligation incurred by the trustee. There is no security of any debt due to Mr Stewart, except as to the expense of the trust management. If money is owing to Stewart other than for charges properly chargeable against the income of the trust-estate, he is merely a personal creditor. The purpose of this sale, according to the trustee, is to pay off Geekie's debt, and apply the balance to his own debt. That may be an expedient course, but the question is one of power. It is not shown that the estate is insolvent, or that Geekie's assignee is pressing so hard that it is impossible to resist a sale; and if he was, it only comes to this, that he might bring the estate to sale himself. The true object of the sale is to realise the funds, and pay off the debt due to Stewart. The trustee has no power to sell for such a purpose. I think this note should be passed without caution.

LORD DEAS—I think there is a power of sale on the words of the deed, but the question is, for what? Only for the debt due to the heritable creditor, and the expenses connected with the management. The rents of the property are greatly more than enough to pay the interest on the heritable debts, and there is no probability that any balance has arisen due to the trustee, in respect that the rents were not sufficient to pay all expenses. Moreover, the trustee could only sell with concurrence of heritable creditors. They may be desiring payment or not; we cannot tell. The sale which the trustee intended was a sale without the concurrence of creditors, whose concurrence was necessary to give a good title. No one was likely to give a full price.

LORD ARDMILLAN and **LORD KINLOCH** concurred, Lord Kinloch giving no opinion as to the extent of the power of sale.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to the Lord Ordinary on the Bills to pass the note.

On the 22d September 1871 a summons of declarator, count, reckoning, and payment was raised by Mrs Macdonald and her husband against Stewart's Trustees, concluding for payment of £1000, or such other sum as shall be found due, upon Mr Stewart's intromissions. In virtue of the warrant of arrestments contained in the summons, Mrs Macdonald and her husband arrested certain rents in the hands of the factor.

Stewart's Trustees and Mr J. A. Stewart presented a petition for recall of arrestments.

SCOTT, for Mrs Macdonald, argued that the circumstances disclosed in the late proceedings were sufficient to justify the arrestments; at all events they should not be loosed except upon caution.

At advising—

LORD PRESIDENT—The arrestments must be recalled. A trustee is not entitled to use arrestments against the trustee, who, under an arrangement with him, is vested with the trust administration, unless malversation or some other ground is alleged to justify so extraordinary a proceeding.

The other Judges concurred.

Arrestments recalled.

Agent for Mrs Macdonald and Husband—D. F. Bridgeford, S.S.C.

Agent for Stewart's Trustees—Laurence M. Macara, W.S.

Tuesday, November 14.

SECOND DIVISION.

IRONSIDE v. WILSON.

Bankrupt—Bill—Illegal Preference—Discharge. The creditors of an insolvent agreed to a composition, which he was to pay by bills, falling due at certain intervals, and thereafter he was to obtain his discharge. The insolvent after the composition arrangement was completed, but before his discharge, granted a bill in favour of one of his creditors, towards further payment of his debt. *Held* that the bill did not constitute an illegal preference, and was not null under the Bankrupt Statute.

Wilson in this action sued Ironside for the sum contained in a bill granted by the latter in favour of the former, before the Sheriff of Aberdeen. The facts, as ascertained by proof, sufficiently appear from the interlocutor of the Sheriff-Substitute (**COMRIE THOMSON**), as follows:—"Finds, as matter of fact that the defender on 14th October 1867 executed a trust-disposition for behoof of his creditors, and subsequently offered a composition of 10s. per pound, payable by three instalments, of which the last fell due on 1st January 1869; that said offer was accepted, *inter alios*, by the pursuer; that at or about the time when the pursuer agreed to accept the said composition the defender said to him 'that he might get something from him in the future;' that at or about the 12th December 1867 the pursuer reminded the defender of the said promise, and received from him the bill libelled; that the same was granted by the defender when an undischarged insolvent, to the pursuer, one of his creditors, without the knowledge of the rest of his creditors: Finds, as matter of law, that the said bill constituted an illegal preference in favour of the pursuer over the other creditors of the defender; that the pursuer was not entitled to accept of the preference so constituted, and cannot now enforce the same; assolvizies the defender from the conclusions of the libel, and decerns.

"*Note.*—The Sheriff-Substitute feels this case to be one of considerable difficulty. It has not been clearly established that the bill libelled was granted to the pursuer with the view of inducing him to accept, still less as a condition of his accepting, the composition offered by the defender. That being so, it seems inequitable that the defender should now turn round and refuse payment on the ground that, although the bill was not intended to create a preference, it did in point of fact operate as such. On the other hand, the defender was not a free man, and the transaction with his creditors was not completed until he had got his discharge. So long as he was undischarged, the bill did, on its face, whatever may have been the intention of parties, operate as an illegal preference; and it is contrary to the policy of the law to sanction anything which disturbs the perfect equality among creditors, which is an essential element of a settlement by composition. The doubts which the Sheriff-Substitute was disposed to entertain are considerably modified by the opinions of the majority of the Judges in the case of the *Bank of Scotland v. Fauds*, July 8, 1870, 42 Scot. Jurist. 557. Looking to the import of the judgment in that case, the Sheriff-Substitute finds himself unable to decide the present case otherwise than he has done.

On appeal the Sheriff (GUTHRIE SMITH) reversed this judgment in an interlocutor in which he found "it proved that on 14th October 1867 the defender, being insolvent, granted a trust-deed for behoof of his creditors, and on 13th November made offer of composition of 10s. per pound, which was accepted by his creditors, and for which bills were granted, falling due on 1st January 1868, 1st July 1868, and 1st January 1869: Finds that, in terms of said arrangement, the pursuer, being a creditor of the defender, received from him a bill for £54, 1s. 9d., dated the 13th November 1867, and payable in three instalments as aforesaid, and that thereafter defender granted him another bill for £25, dated the 12th day of December 1867, payable five months after date, being the bill now sued for: Finds that the defender has failed to prove that said bill was granted as an accommodation bill, and that, on the contrary, it was granted to account of pursuer's debt over and above the said composition; and in respect there is no evidence that it was either stipulated for by the pursuer as a condition of his accepting said composition, or was granted by the defender as an inducement to him to accede to said composition arrangement, finds that the pursuer is entitled to recover payment of the said bill: Therefore repels the defences; deems in terms of the conclusions of the summons."

He observed in his note—"It is plain that the bill in question was not granted in payment of goods or for any present pecuniary value. The defender says it was an accommodation bill, of which the pursuer obtained the defender's acceptance 'by taking undue advantage of the defender's circumstances at the time.' The proper way of proving a defence of this kind to a bill of exchange is writ or oath. But, with the acquiescence of the pursuer, the Sheriff-Substitute allowed a proof at large. There is no evidence of the defender's statement of the cause of granting beyond his own testimony. It is not shown that the bill was used by the pursuer as an accommodation bill, and the defender's statement is contradicted by both the pursuer and his shopman. The defence therefore fails.

"The only other explanation of how the bill came to be granted is that which is given by the pursuer—namely, that it was granted to account of full payment of the defender's debt to him over and above the composition, the defender having previously promised that he would do so. This, it has been lately decided, is a sufficient consideration to support a bill, because every man is morally bound to pay his lawful debts in full—*Clark v. Clark*, Jan. 5, 1869, 7 Macph. p. 335. 'It is perfectly competent,' said Lord Neaves, 'for a bankrupt to pay all or any of his creditors in full after his discharge, provided there has been no antecedent stipulation to that effect.'

"If the defender had been able to show that when the pursuer agreed to the composition arrangement there was an understanding between them that he was to receive something more than the other creditors, the transaction would have been clearly illegal, and the consideration could not have been supported. But the defender carefully abstains from making any averment to this effect. Indeed he expressly denies it when examined on oath. His whole case is that the bill had nothing whatever to do with the composition arrangement, and the pursuer is no less emphatic in his statement that it was not a condition of his

taking the composition that he should get the bill libelled. Considering the relation which subsisted between the parties at the time, slight evidence might have been sufficient to impeach the transaction, but here there is no evidence at all, and therefore decree falls to be pronounced in terms of the conclusions of the summons."

The defender appealed.

M'LAREN for him.

FRASER and STRACHAN in answer.

The Court (the LORD JUSTICE-CLERK being absent) dismissed the appeal.

Agent for Pursuer—T. J. Gordon, W.S.

Agent for defender—J. F. Weir, W.S.

Wednesday, November 15.

FIRST DIVISION.

LORD DUPLIN, PETITIONER.

Entail—Disentail—Heir of Entail—Propulsion of Succession—11 and 12 Vict. c. 36, § 2. Held that an heir of entail in possession, through a deed of propulsion of a portion only of the entire estate, was not "an heir of entail in possession in virtue of the tailzie" within the meaning of the Act 11 and 12 Vict. c. 36, and other Entail Amendment Acts; and that consequently he was not entitled to disentail that portion of the estate the succession to which had been propelled to him.

In this petition for authority to record an instrument of disentail a remit was made by the Lord Ordinary (MACKENZIE) to Mr Robert Burt Ranken, W.S., to report. The facts of the case and the question of law arising thereon will be seen from the following paragraphs of Mr Ranken's report:—

"The present application is made by the petitioner as 'the heir of entail in possession' of the *dominium directum* or superiority of certain parts and portions of the lands and baronies of Balhousie, Kinnoull, and others, lying in the county of Perth, for the purpose of obtaining authority to disentail the same, and acquire the superiorities in fee-simple. The superiorities are situated in the immediate neighbourhood of the city of Perth, and are of the gross annual value of about £500, while their saleable value if they were disentailed would amount, at twenty-two and a half years' purchase, to upwards of £11,000.

"The petition is founded on the Entail Amendment Act of 1848, and on the Act passed in 1853 for the purpose of extending the benefits of that Act, special reference being made to the 2d and 32d sections of the first of these Acts, and to the 4th section of the second.

"The entailed estate, of which the said superiorities form part, is held under two dispositions and tailzies thereof made and granted by the now deceased Thomas Earl of Kinnoull in favour of himself and the heirs-male of his body, which failing, to the other heirs and substitutes therein specified, dated respectively 14th March 1774 and 28th July 1779. The entailments were both recorded in the Register of Tailzies, and their dates are correctly set forth in the petition.

"The petitioner is infest in the superiorities (with the exceptions of certain subjects to be afterwards mentioned, in respect of which a feu-duty or ground-annual of £140 is payable), conform to disposition by the Right Honourable George