

At advising—

LORD PRESIDENT—This is an application for suspension and interdict on behalf of Richard Dudgeon, who is the owner of a patent for the invention of “improvements in apparatus used in expanding boiler-tubes,” against the firm of William Thomson & Co. It appears that there were previous proceedings of the same kind directed against William Thomson, one of the partners of this company, and in that process the validity of the patent was brought in question by the pleas of the respondent, but his objections were not given effect to, and interdict was granted in terms identical with those which are now applied for in the case before us. The judgment of the Lord Ordinary was adhered to in this Division.

The allegations of the complainer in the present case are that the patent has been, and is being, infringed by William Thomson, or at least that he has been and is actively participating in the infringement. From their own statements the respondents, through their counsel, have sold expanders of the patent; but they do not admit all resembling the complainer's machine, and they allege that they communicated drawings of their machines which the complainer says are infringements of his patent.

The respondents, beyond saying that they are not infringing the complainer's patent, plead its invalidity, and that upon four grounds, none of which were alleged in the previous process. The complainer says that these pleas are excluded as being *res judicata*, or, if not, as competent but *incompetent* in the former process. The Lord Ordinary has repelled the plea of *res judicata*, and this reclaiming note has been presented.

But it appears to me that, before considering the question, there is a preliminary one, and that is, whether the complainer has chosen his proper remedy. The respondents are the firm of Thomson & Co., which the complainer alleges is only another name for William Thomson. But that allegation is not correct, for the contract of co-partnership has been produced, from which it appears that another partner has been taken into the concern. But if the complainer's allegations are true, and his case depends upon their truth, it is plain that a breach of interdict has been committed by the respondent Thomson. Whether the other partner has participated in that breach, in the knowledge that he was so doing, does not appear; but it is beyond dispute that Thomson is alleged to have violated it.

With these facts before us, we cannot permit the complainer to take the course he proposes unless he presents a complaint for breach of interdict. To grant a second interdict where a first has been broken would be a course to which the Court would not resort. Interdicts must be obeyed, and it is impossible for a party to come and ask for a repetition of a previous interdict in place of bringing a complaint for breach of it. The present suspension must be sisted to enable the complainer to bring a petition and complaint.

LORD DEAS, LORD ABERMILLAN, and LORD MURE concurred.

The Court pronounced the following interlocutor:—

“Sist process to give the complainer an
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opportunity of presenting a petition and complaint for breach of the interdict granted by the interlocutor of Lord Mackenzie, dated 31st January 1873, adhered to by this Division of the Court on 4th July following: Reserving all questions of expenses.”

Counsel for Complainer (Reclaimer)—Balfour—Hunter. Agent—D. Curror, S.S.C.

Counsel for Respondents—Asher—Jameson. Agents—Auld & Macdonald, W.S.

Friday, March 17.

FIRST DIVISION.

[Sheriff of Renfrew.]

MACKINNON (CRAWFORD'S TRUSTEE) v. ANDERSON (WATSON & CAMPBELL'S TRUSTEE).

Bankruptcy—Ranking—Guarantee—Double Ranking.

C guaranteed W from all loss arising out of transactions between him and S. W drew bills on S and discounted them. These were partly for value and partly not. C, W and S, became bankrupt. The banks holding the bills ranked on the estates of S and W, and drew a dividend from each, but not amounting in all to full payment.

A question between W's trustee and C's trustee—*Held*, that W's trustee could only rank on C's estate for the sum actually paid by him as dividend in respect of the bills, and not for the whole amount of the bills to the extent of drawing what was actually paid; and (2) that the trustee on C's estate was not entitled to require the trustee on W's estate to give any relief to the estate of S in respect of the dividend paid from that estate on bills accepted or drawn by S for the accommodation of W, or to state the amount thereof, or of any dividend paid thereon by the estate of S as an item to the debit of W in balancing accounts between the two estates.

C and W were also engaged in other transactions, and bills were drawn for accommodation of W, and the banks holding the bills ranked upon and drew dividends from the estates of C and W.

Held that C not entitled to retain the sum paid in respect of these other bills as a set-off against W's claim under the guarantee in the first transaction, because, as these other bills had already been ranked on W's estate by the banks, to admit C's retention in respect of them would be to sanction a double ranking on W's estate.

This was a question of ranking in bankruptcy, which arose from the following circumstances:—

Crawford gave Messrs Watson & Campbell a letter of guarantee by which he bound himself to “undertake liability for and guarantee payment to you of all sums due or to become due to you by Messrs Thomas Shaw & Company.”

Thereafter several bills were drawn by Watson & Campbell, and accepted by Shaw & Co. These bills were discounted by various banks, and Watson & Campbell received the proceeds. They amounted in all to £11,000 odd, of which £8000

odd were for value, the rest being accommodation to Watson & Campbell.

Crawford, Watson & Campbell and Shaw & Co. all became bankrupt. The banks who were holders of the bills ranked on the estates of Shaw & Co. and Watson & Campbell, and drew a dividend from both estates, but not to the extent of full payment. Watson & Campbell's trustee thereupon lodged a claim with Crawford's trustee in virtue of the guarantee, and it was upon this claim that the present question arose.

Watson & Campbell's trustee claimed to rank for £5003, 16s., being the total amount of the bills (£11,000) minus what had been already paid by the dividend of Shaw & Co., and minus also the £3000 which was accommodation to Watson & Campbell.

Crawford's trustee, on the other hand, maintained that Watson & Campbell could only rank for the sum actually paid by them to the banks as dividend on the amount of the bills. He also maintained that he was entitled to set off against any claim the sum of £666, 13s. 4d., being the dividend which was about to be paid by him to the banks holding another and different set of bills, which the trustee alleged were accommodation to Watson & Campbell by Crawford; and lastly, he maintained that he was entitled to be relieved of that part of the dividend paid by Watson & Campbell in the first set of bills which effected to the accommodation bills of £3000 odd.

Crawford's trustee accordingly pronounced his deliverance in accordance with the above contentions.

Watson & Campbell's trustee appealed to the Sheriff, who issued a note as follows, in accordance with which his interlocutor was pronounced:—

"*Note.*—The principal question at issue is, whether the appellant, as trustee, is entitled to rank under the guarantee for the whole sums due by Shaw & Co., or only for the dividend which the appellant may be able to pay on the bills covered by the guarantee? The Sheriff-Substitute fails to see why the creditors of Watson & Campbell should not get the benefit of the undertaking by Crawford to pay all Watson & Campbell's advances to Shaw & Co. If Watson & Campbell had remained solvent, Crawford's trustee must have paid, or rather allowed, a ranking for everything due under the guarantee. Why should Watson & Campbell's insolvency put him in a better position?

"As regards the claim to set off the £666, 13s. 4d. against the appellant's ranking, the Sheriff-Substitute thinks that the respondent has shown no good reason for it. The bills referred to in the agreement between Watson & Campbell and Shaw & Co., on which the respondent founds, have been ranked already on Watson and Campbell's estate.

"On the other points raised by the trustee's deliverance there seems to be now no room for objection to the appellant's claim.

"The guarantee has been duly stamped, the sum of £3402, 10s. 5d., has been deducted from the amount of the bills falling under the guarantee, and full credit has been given for the dividend received from the estate of Shaw & Co."

Crawford's trustee appealed to Court of Session.

Argued for him—(1) The guarantee is to free W. & C. from all loss arising in transactions with

S. & Co. That loss can only be what they paid to the banks, *i.e.* the dividend. The banks bought the bills, and gave W. & C. the price. If S. & Co. had retired them in due course, W. & C. would have been fully paid. As S. & Co. did not do so, the banks recovered on W. & C., and what they then had to pay was their loss. The Sheriff's decision is erroneous, because, according to it, had Crawford been solvent W. & C. might have paid a dividend of a farthing in the pound to the banks, and yet recovered the whole amount in the bills from Crawford. (2) Through W. & C.'s failure Crawford has to pay a dividend on bills for which he never got any value. He may therefore retain this to meet a claim of W. & C. in any other matter. (3) Had these £3000 of accommodation bills not existed, S. & Co. would have paid more dividend to the bank. W. & C. would consequently have been called on to pay less, and so could only have come on Crawford for less under the guarantee. As these bills were accommodation to W. & C., they must be treated as non-existent, and so the dividend paid by S. & Co. for them must be deducted from W. & C.'s claim.

Argued for Watson & Campbell.—(1) The Sheriff's judgment is, it is true, untenable, but we claim to rank for the full amount of the bills to the extent of drawing no more than the dividend actually paid. This is just what a creditor does on co-obligants; he ranks for full sums on each estate to the extent of drawing no more than the whole. This also is a double ranking. (2) Denied that the bills were accommodation. Even if they were, the bank has already ranked for them, and so all claim on them is extinguished.

Authorities—Bell's Prin., § 1365; *Trustees for Creditors of Fall & Co. v. Sir W. Forbes & Co.* M. 14,135, *Keith (Maxwell's Trs.) v. Forbes*, 3 Paton, 350; *Black v. Melrose*, 29 Feb. 1840, 2 D. 707.

At advising—

LORD PRESIDENT—This is an appeal by the trustee on the sequestrated estate of Crawford against a judgment of the Sheriff on a deliverance by him. Three questions have arisen concerning the interests of the three sequestrated estates concerned. The first arises on the guarantee given by Crawford before his sequestration to Watson & Campbell, by which he undertook to "undertake liability for and guarantee payment to you of all sums due or to become due to you by Messrs Thomas Shaw & Company."

At the date of the sequestration of Watson & Campbell's estate, which occurred on 17th March 1874, there were in the hands of various bankers a large number of bills with the names of Watson & Campbell and Shaw & Company on them. Shaw & Company were sequestrated on the 30th of the same month, so the two sequestrations were practically contemporaneous. The total of these bills was £11,175, and if Shaw & Company had been debtors in the whole for value, of course the claim against Crawford under the guarantee would have been for the whole amount; but it appears that to the extent of £3402, 10s. 5d. these bills had been drawn for the accommodation of Watson & Campbell, and accordingly the trustee on Watson & Campbell's estate deducts the above amount from the total amount of the bills in claiming under the guarantee against the trustee on Crawford's estate. It appears that the bank holding the bills ranked on both estates, and ac-

ordingly, so far as the bills were accepted for value, the claim was for £7622, 18s. The dividend paid on that by Shaw & Company was £2619, 2s. The amount paid by Watson & Campbell is not stated. It is necessary, in order to judge of the claim made by Watson & Campbell under the guarantee, to see what Watson & Campbell have lost, and of what consequently they are entitled to be relieved. These bills having been accepted by Shaw & Company for value, were discounted in ordinary course by Watson & Campbell, and they receiving the proceeds, received full payment of the debt due by Shaw & Company. If nothing more had taken place, and the bills had been retired by Shaw & Company, Watson & Campbell would have been fully paid. But both parties became bankrupt, and consequently the banks were entitled to rank on both estates to the effect of drawing the whole sum due. Now, to the extent of the dividend paid by them, and to that extent only, has the estate of Watson & Campbell been damaged by Shaw & Company. It is perfectly clear it has not been damaged to any greater extent. Watson & Campbell obtained the full benefit of the discounting of the bills, and all that they refunded was just the amount of the dividend paid by them to the banks. That, therefore, is the amount for which Crawford is liable under his guarantee. If Crawford were solvent he would be bound to pay that full amount, but Watson & Campbell have in Crawford a bankrupt cautioner instead of a solvent one, and so they must just be content with a dividend.

It has been contended for Watson & Campbell that they should rank for the amount of the full debt to the extent of drawing what was actually paid. This is a startling proposition. First, what is the full debt. They have had the full debt paid, and it is only to the extent that they have been called on to refund that money, *i.e.*, to the extent of the dividend paid by them to the banks that they are the creditors of Crawford. Really this argument is entirely founded on an attempt to drag in a principle which has here no application, *viz.*, that a creditor may go against several co-obligants for the full amount of his debt to the extent of drawing it all. Here we have no co-obligants. What room there is for giving Watson & Campbell a preference over the other creditors of the bankrupt Crawford I do not see, for that would be the real effect of admitting this argument. It would just be to reimburse them at the expense of the other creditors. I am therefore very clear that Watson & Campbell's trustee is only entitled to rank on Crawford's estate for the dividend which Watson & Campbell paid to the bank on bills accepted for value by Shaw & Company.

The next question arises in this way—Crawford granted bills for the accommodation of Watson & Campbell and Shaw and Company, all being solvent, and these bills, Crawford being the acceptor, were discounted partly for the accommodation of Watson & Campbell and partly for that of Shaw & Company, each to the extent of £4000. The bankrupt Crawford received no value for these bills, and accordingly became a creditor of Watson & Campbell for the said £4000, or at any rate for the amount of dividend paid by him hereon. The fact as to the value is disputed,

but we may consider it as settled for the meantime. It is plain that if all parties were solvent Crawford would have a good claim for the £4000, and Watson & Campbell being bankrupt, Crawford would rank on their estate for that amount, if nothing else had happened, but then there are other circumstances which must be taken into account. The banks have, of course, claimed and drawn dividends on the estates of all parties. The dividend which they drew from Crawford was £666, and Crawford's trustee says 'I am entitled to draw this from Watson & Campbell's estate, and as I hold money to meet my liability to them under the guarantee, I will retain that £666 as a set off *pro tanto* of my liability.' In fact he pleads retention. If Crawford's trustee be entitled to rank, he is, I think, entitled to retain; but it is quite obvious that the right of retention depends on the right of ranking. I am of opinion that he is here not entitled to rank, on the ground that there can be no double ranking for the same debt. The £4000 has already been ranked to its full amount on the bankrupt estate, and that debt has in fact been paid, for a bankrupt estate pays the debt by its dividend, and no cautioner is entitled to rank on the estate of the principal debtor for a debt which the debtor has already paid by a dividend.

The third question arises as to a sum of £3402, 10s. 5d., and requires more explanation than is given in the record, but the real import is easily gathered.

Crawford's trustee says that before paying he is entitled to see accounts properly settled between Watson & Campbell and Shaw & Company, and that proposition is sound. Now, bills to the extent of this £3000 odds were accommodation to Watson & Campbell, and what Crawford's trustee says is, that before he pays that sum should be placed to the debit of Watson & Campbell, or at least that sum to the extent of the dividend paid thereon by Shaw's estate. The banks, of course, ranked on both estates; but he says Shaw and Company ought to be relieved from all loss arising out of these accommodation-bills. Now, I do not dispute the right of Crawford's trustee to put himself in the place of Shaw & Company, but then here we have just another attempt to get a double ranking, because these bills have already ranked on the estates both of Watson & Campbell and Shaw & Company, so this is just an endeavour to make Shaw & Company rank on Watson & Campbell for a part of the debt which has already been ranked for by the banks on both estates, and so this too must be disallowed. The result is, that the trustee was right in the first point of his deliverance, but wrong in the two others.

LORD DEAS—The first question, and what the Sheriff holds to be the principal question, is, Whether the appellant, who is trustee on Crawford's estate, is entitled to rank Watson & Campbell for the dividend they actually paid, or whether he must rank them for the full amount of the bills? "The Sheriff-Substitute fails to see why the creditors of Watson & Campbell should not get the benefit of the undertaking by Crawford to pay all Watson & Campbell's advances to Shaw & Co. If Watson & Campbell had remained solvent, Crawford's trustee must have paid, or rather allowed, a ranking for everything

due under the guarantee. Why should Watson & Campbell's insolvency put him in a better position?" In the case of *Melrose v. Black*, Mr Melrose held bills for debts of another party, and he claimed to rank on the estates of each party to the extent of getting the full debt. These parties were no parties to the arrangement by which Mr Melrose held the bills; for in fact he only held them in pledge, and the argument there turned very much on the question, if Melrose holding the bills in pledge was the same as a cautioner. It was found he was not. Now, if the cases were the same that case would rule this. But the difference is that Melrose was solvent and in right of the debt. Here all are bankrupt, and, as your Lordship observes, not in right of the debt except in so far as they have been compelled to refund. The bills had been in fact sold to the bank. It seems plain enough they can only rank to the extent of the dividend paid.

As regards the second point, I think it would be a double ranking.

As regards the third point, the argument for Crawford's trustee comes to this, that accounts must now be made out between the two estates. But the fallacy lies in this, that the sequestration is the *punctum temporis inspicendum*, and no account can be made out subsequently.

LORD ARDMILLAN concurred.

LORD MURE—The first question resolves itself into these—For what sum was Crawford indebted to Watson & Campbell under the guarantee, and when that is fixed, for what sum are they to be ranked? Under the letter they are entitled to be relieved from whatever is paid. The loss sustained is clearly the dividend paid. For that sum they are entitled to be ranked, but simply as the other creditors of Crawford. If he had been solvent the whole would have been paid, but he being a bankrupt, they must just take a dividend, for there is no law that a creditor under a letter of guarantee should be in a more favourable position than the creditors.

On the second and third points I also concur.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff-Substitute of 17th January 1876: Find that the trustee on the sequestrated estate of Watson & Campbell is entitled to rank on the sequestrated estate of Alexander Crawford for the dividends actually paid from Watson & Campbell's estate on the bills referred to in his claim, and for no more: Find that the trustee on the sequestrated estate of Alexander Crawford is not entitled to retain the dividend payable to the trustee on Watson & Campbell's estate in security or satisfaction of the sum of £666, 13s. 4d. claimed by him, and that he is not entitled to be ranked on Watson & Campbell's estate for the said sum of £666, 13s. 4d., or any part thereof: Find that the trustee on the sequestrated estate of Alexander Crawford is not entitled to require the trustee on Watson & Campbell's sequestrated estate to give any relief to the sequestrated estate of Shaw & Company in respect of the dividend paid

from that estate on bills accepted or drawn by Shaw & Co. for the accommodation of Watson & Campbell, or to state the amount thereof, or of any dividend paid thereon by Shaw & Co.'s estate as an item to the debit of Watson & Campbell in balancing accounts between the two estates: Remit to the trustee in Alexander Crawford's sequestration, being the appellant in this process, to give effect to the above findings, and to rank Watson & Campbell's trustee accordingly: Find the said appellant entitled to expenses in this Court, modified to two-thirds of the taxed amount thereof: Allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Appellant—Asher—Pearson.
Agents—Mason & Smith, S.S.C.

Counsel for Respondent—Dean of Faculty (Watson)—Balfour. Agents—Hamilton, Kinnear & Beatson, W.S.

Saturday, March 18.

SECOND DIVISION.

[Lord Curriehill.

JACKSON & MACFARLANE v. M'MILLAN AND ANOTHER.

Succession—Provisions to Children—Vesting.

A testator declared his wish to be that his wife, should she survive him, should have the liferent of his house and the interest of his money, and that at her death all his personal property should be divided amongst his younger children, or, if dead, their nearest lawful heirs, share and share alike. Trustees were appointed for carrying his will into effect.—*Held* that these shares vested in the children upon the death of the testator.

Observations (per the Lord Justice-Clerk) upon the practical tests to be applied to such cases.

Thomas Sproat of Kirkcudbright, by will dated 15th November 1853, declared his wish to be that his wife should "have her lifetime of the whole of the house and premises now occupied by me, as well as the interest of all monies that may be due me, or lying in the bank, or lent out on bills or receipts, and that during her natural life; and that at her death my said cash, property and all other effects (with the exception of my dwelling-house, offices, and field of ground, which I wish to be given to my eldest son William, or his heirs lawfully begotten) shall be equally divided between my other children, or, if dead, their nearest lawful heirs, share and share alike, and should their respective shares prove of more value than the house and property to be William's, my wish is that a portion of cash, to make his share equal to the others, be added to his property, so as all my children may receive an equal share in value, and that the bills for lent cash to William and John be counted as part of