

HALLILLY, &amp;C.

v.

RAILTON.



1830.

July 23.



PRESENT,

LORDS CHIEF COMMISSIONER AND MACKENZIE.



## HALLILLY, &amp;C. v. RAILTON.

Finding that the estate of a bankrupt who had been employed to sell goods for ready money was liable for the price of goods sold on credit.

A petition and complaint against the decision of the trustee on the estate of one Drew, by which it was found that the pursuers were not entitled to rank on the estate for the price of certain goods transmitted to Glasgow for sale.

DEFENCE.—The pursuers knew and approved of the goods being sold on credit.

## ISSUE.

“ It being admitted, that, in the year 1821,  
 “ John Drew was employed by the pursuers  
 “ for the sale of certain articles at Glasgow, in  
 “ terms of the deed of agreement, No. 16 of  
 “ process, and that certain goods were, by the  
 “ pursuers, transmitted to the said John Drew :

“ It being also admitted, that John Drew’s  
 “ estate was sequestrated on the 5th day of  
 “ December 1826, and that the defender is the  
 “ trustee on the said estate :

.. “ Whether, on the said 5th day of December  
 “ 1826, the said John Drew was indebted and  
 “ resting owing to the pursuers in the sum of  
 “ L. 1660 Sterling, or any part thereof?”

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*Neaves* opened for the pursuer, and said,—  
 Carpets were transmitted to be sold by Drew  
 for ready money ; and the question is, Whe-  
 ther he transgressed his instructions, and is  
 liable for the price ?—Whether, on account of  
 his misconduct, the pursuers are to rank on his  
 estate for the price of goods sold by him on  
 credit, though the purchasers may also be liable  
 for sums not drawn by him ? Having fixed  
 the goods on him, he and his trustee must free  
 themselves from them.

When a person in the same trade, and  
 through whom the letter of instructions had  
 been transmitted to Drew, was called to prove  
 the contents of the letter,

Circumstances in  
 which parol evi-  
 dence was admit-  
 ted of the con-  
 tents of a letter.

*Robertson*, for the defender, objects.—There  
 is no evidence that the letter seen by this wit-  
 ness was the one sent to Drew ; and parol evi-  
 dence is incompetent ; the letter-book of the  
 pursuers ought to have been produced.

*Hope, Sol.-Gen.*—There is no doubt of the  
 identity of the letter ; and we produced a copy  
 from our letter-book.

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LORD CHIEF COMMISSIONER.—There is nothing in which the Court are more cautious than in admitting secondary evidence, unless the primary is not to be found. But here there is no doubt every thing was done to get the best evidence. The bankrupt says it is either lost, or that he gave it to his trustee ; and as he cannot produce it, there is the best evidence that the letter is not to be produced. This, however, does not entitle us to come to a conclusion as to its contents, separate from the writing. The first evidence is the writing, the next and weaker is the memory of man ; but this is in the present case stronger than what is contended for by the defender, viz. the letter-book.

What is the fact here ? This agreement is made at Glasgow, and one is made with the witness here at the same time. They are identical ; and the letter to Glasgow was transmitted open to the witness, who read it before sending it to Drew, who at the same time made an agreement on the same terms as to the same goods. What can be so strong evidence as that proposed to be given ?—It is higher than the letter-book, as there was a transaction founded on it.

LORD MACKENZIE.—I entirely concur.

The witness having proved the instructions,  
**LORD CHIEF COMMISSIONER.**—The instructions being proved, there appears to me a conclusive right to recover, unless the defender can prove abandonment on the part of the pursuers.

*Robertson.*—The facts might be stated in a case.

**LORD CHIEF COMMISSIONER.**—There is now no ground for that, in consequence of the proof of the instructions, and that he did not act on them. The only way now is to prove that they let him off from the terms of these instructions, that they released him from the responsibility. It is not sufficient to show that the pursuers knew that he dealt on credit; this is merely the first step. It must also be proved that they took the purchasers as their debtors. The grand criterion of the case is, that the names of the purchasers were not transmitted. This would be a question for the jury, not the Court, but I would tell them that before finding for the defender they must be completely satisfied that the pursuers took the purchasers as their debtors.

The defender not being in a situation to prove this, a verdict was returned for the pursuers.

*Hope, Sol.-Gen. and Neaves, for the Pursuers.*

*Robertson, for the Defender.*

(Agents, *Brodies and Kennedy, w. s., and David Smith, w. s.*)

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The estate of a defender employed to sell for cash held liable for the price of goods sold on credit, unless he can prove that his employer sanctioned the sale on credit.