faculty of burdening, with £5000, could he take it up again even if it came to a remote substitute? Besides, this discharge shews Sir Robert's own sense of the matter. Sees that there is no room for exercising it afterwards."

PRESIDENT.—"Late practice has made marriage contracts so binding—Dirleton—This contract not in the common style—meaning of reservation—father was to give him ample powers, bound only *familæ* tied down to heirs-male for preservation of family; but if it comes to heirs-portioners, power is reserved to give it to any. Admitted that would give it to descendants. This only another exclusion. Suppose two daughters of Lady C. and no sons *Second Point*, discharge. Lady C. no creditor in it, only substitute."

MONBODDO.—"Powers not discharged. Only done so as to Mrs. Fletcher and heirs of her body—Case of Baillie, &c. *Second Point*, Two or more—how can I add another clause? Words clear—No evidence what his intention was. Defender not the heir, either by the law or by contract. If it was his intention, he has not executed it."—"Adhere."

[M. App. P. 1. No. 2. "Society.]

ALEXANDER SPEIRS, ANDREW BLACKBURN, and ANDREW SYME, JAMES DUNLOP's Trustees, } *Appellants;*

THOMAS and WM. DUNLOP and Co., Trustees for the Creditors of JOHN CARLYLE and Co. } *Respondents*

House of Lords, *9th May* 1777.

RANKING—SOCIETY—COMPANY AND INDIVIDUAL ESTATE—PRINCIPLES OF RANKING.—(1) Held that a company are entitled to rank on an individual partner's separate estate, *pari passu* with the creditors of that separate estate, for the whole amount of debts owing by the company after deducting any dividends that may have been paid to the company creditors. But, (2) Held in the House of Lords, that where, after a dividend on an estate was declared, and most of the creditors paid, a new claim was lodged for the first time on the estate, that such claim will not be allowed to disturb or affect the dividend paid before any notice was received of such claim.

James Dunlop, merchant in Glasgow, carried on an extensive Virginia trade on his own separate account. He was also partner of another concern, carried on under the firm of John Carlyle and Co., merchants in Glasgow. A misfortune in the Virginia trade obliged Dunlop to stop payment; and sometime after the company of Carlyle and Co., in which he was a partner, also failed.

At the time Dunlop failed, the only claim which Carlyle and Co. appeared to have against Dunlop as an individual, was a sum of £4500, for goods furnished him in his separate

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trade. In three years afterwards the company of Carlyle and Co. made a dividend to the creditors of 6s. in the pound, and it was not until 10 years after the failure, and after a dividend of 10s. in the pound had been declared, and paid to the greater number of the creditors of the estate of James Dunlop, that a new claim was lodged by the company of Carlyle and Co. against the estate for £12,000 due by him, per account, and also of £17,000, being the amount of debts due by Carlyle and Co. to their creditors. Waving all objections as to particular items, the main objection insisted on against the ranking of these two claims on James Dunlop's individual estate was as to the principle of ranking. The trustees of John Carlyle and Co. claimed on the first sum £12,000, as a common debt due to the company. They claimed also the £17,000 on the principle, that as James Dunlop was one of the partners of Carlyle and Co., he and his estate was personally liable for the whole debts of that company, and that the creditors of the latter were entitled to be ranked *pari passu* along with Dunlop's creditors on his separate estate. To this latter claim of £17,000, it was objected that the creditors of Carlyle and Co. were not entitled to rank and claim a dividend on James Dunlop's separate estate, until his own separate creditors were fully paid. That to rank and draw a dividend on both sums of £12,000 and the £17,000 was double ranking, inasmuch as if the £12,000 were paid there was so much struck off the debt of £17,000 due by that company, and *vice versa* if the £17,000 were paid, the whole claim would be extinguished. Besides, the creditors of Carlyle and Co. had already been paid 6s. in the pound, so that there was no more due to the creditors than £9,200. To this it was answered, that these creditors were entitled to rank on both claims, to the effect of recovering the full amount of these debts on Dunlop's separate estate *pari passu* with his separate creditors.

July 4, 1776. The Court, on report of the Lord Ordinary, pronounced this interlocutor, finding that the trustees of John Carlyle and Company "are entitled to be ranked on the estate and "effects of James Dunlop junior, for the amount of the debt "due to the said co-partnership of John Carlyle and Co. by "the said James Dunlop: and after imputing the dividend "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 Co. to their creditors, along with the other funds

" arising from the estate of John Carlyle and Co. remaining " in the hands of the pursuers, yet undivided, that the said " pursuers, as trustees for the creditors of the said John " Carlyle and Co., are entitled to be again ranked on the " estate and effects of the said James Dunlop for the ba- " lance which shall then be remaining due to the said credi- " tors of the said John Carlyle and Co.; the trustees of the " said James Dunlop being entitled to an assignation from " the said John Carlyle and Co.'s creditors, so far as they " shall draw upon the second ranking, for the purpose of " operating relief to the estate of James Dunlop from the " other partners of the said John Carlyle and Co., in so far " as the said creditors shall draw more than his proportional " share as an individual of that company, and remit to the " Lord Ordinary to proceed accordingly." On reclaiming petitions the Court adhered.* Aug. 9, 1776. Dec. 8, ——

Against this interlocutor both parties appealed to the House of Lords; the respondents, because they were only admitted to rank the second time on the balance that might remain due to the creditors of Carlyle and Co. after imputing the sum set forth in the interlocutor.

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* *Notes from Lord President Campbell's Session Papers.*

COVINGTON.—" If J. Dunlop, junior, pays £19,000, *i. e.* whole debts due by the company, then if he comes to be a creditor, so far as he pays beyond his own proportion he may compensate. But I doubt if he becomes a creditor to the company, he becomes creditor to the individual whose proportion he has paid."

PRESIDENT.—" Suppose both assignments."

COVINGTON.—" Cannot take assignments."

KAMES.—" Do not see why he may not."

MONBODDO.—" If company fails, will he have recourse against his partners?"

PRESIDENT.—" I incline for the middle way, which was the equitable plan."

COVINGTON.—" Suppose some of the partners become bankrupt, and a solvent man pays: he can only demand from the other solvent partners their shares—cannot demand whole from any one. Because he is a *creditor to each* for his share, *not to company*."

PRESIDENT.—" Suppose £19,000 of debt, and £12,000 of funds—Cannot come against the other partners for whole; but if any one insolvent, will draw from other a proportion of loss thereby sustained."

GARDENSTON.—" No ground for ranking them in their double capacity. The principle is this:—Creditor claiming on a bankrupt estate can be in no better case than individual person himself. Suppose those actions brought against Dunlop himself—could have had *no*

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Pleaded for the Appellants.—The company of Carlyle and Co. are not entitled to rank on James Dunlop's separate estate *pari passu* with the creditors of that separate estate. That company has its own proper estate to go to, out of which it must seek relief, and then come against the separate estates of its individual partners only after the creditors on that separate estate are fully paid. And it would be repugnant to every principle of mercantile law if the copartnership creditors were entitled, after exhausting the proper partnership effects, to come in and rank *pari passu* with the creditors on James Dunlop's separate estate. Each class of creditors ought to look to its own proper and separate estate, and ought to be preferable on that estate, before there be any claim allowed from the one estate to the other. The other position of the respondents is untenable, that they are entitled to rank on both sums of £12,000 and £17,000, and to claim a dividend effeiring to these, until they are paid the full sum of £17,000. But it is clear that a dividend made upon any sum is equivalent to full payment of that sum, and therefore £17,000 is all their demand; they cannot have a dividend for £29,000; but the view the Court has taken seems more correct, in allowing a dividend only on the £12,000, and to extinguish *pro tanto* the £17,000, and cre-

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defence against payment of this company debt *in solidum*. But then suppose, *simul et semel*, the company pursue him for £12,000, he has the defence, that *I am* pursued for company's whole debt. If you relieve him, good and well. But if this to him a good defence, the creditors must have the same—entitled to be ranked for the £19,000 and not for £12,000."

MONBODDO.—" Suppose the reverse, that the company pursued for the £12,000."

GARDENSTON.—" Entitled to retain, till relieved of the £19,000."

COVINGTON.—" Same opinion as Lord Gardenston. Wrong formerly in supposing that he is not a creditor of the company for what he pays beyond his own proportion of company's debts."

GARDENSTON.—" If any payments be made out of Carlyle and Company's effects—these to be deducted from the £12,000, and he may then be ranked for the difference."

PRESIDENT.—" If balance reduced before £12,000, will insist to be ranked for the £12,000, or charge Dunlop with that sum."

COVINGTON.—" Liable for the £12,000 as debtor to the company; but likewise liable for debt of company. Suppose £12,000, and that £3,000 is his own proportion, then, by paying the whole, becomes the creditor to company for £9,000."

dit being given for this and the other sums mentioned in the interlocutor, they should be allowed to rank for the balance. But even though this principle were to weigh against the appellants, the respondents not having proved the debt of £17,000 till the month of February 1773, ought not at any rate to be allowed to disturb the dividend declared in November preceding, and actually paid by the appellants to the greater number of the creditors before the claim was heard of. If admitted at all, it can only be on Dunlop's estate coming to hands after that period.

Pleaded by the Respondents.—Both the claims of £12,000 and £17,000 were justly due at the time of Dunlop's bankruptcy, and the company of Carlyle and Co. are entitled to rank on both sums on James Dunlop's estate *pari passu* with the creditors of that separate estate, to the effect of recovering the full amount of the debt due them. The result of this is, that they rank to the effect of recovering, in the first place, the £12,000 he owed the company, and over and above that sum his just proportion of the company's debts; but, in order to do so, they must rank, and ought to be allowed to rank, for the full sum of £12,000, and also for the full sum of £17,000 of debts due by Carlyle and Co. For the latter sum James Dunlop undoubtedly is liable for the whole, reserving to him his relief for what his estate may be called on to pay beyond his just proportion of these debts. The respondents ought, therefore, to rank for the £29,000 in the first ranking, and not for £12,000, as allowed by the Court; or, in the second ranking, he ought to be allowed to draw a dividend on the £17,000, and not on the balance merely, after drawing on the £12,000 claim.

After hearing counsel, it was

Ordered and adjudged that the interlocutors 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.

For the Appellants, *Henry Dundas, Al. Wedderburn, Alex. Wight, Ar. Macdonald.*

For the Respondents, *E. Thurlow, Dav. Rae.*