

1804.

ARROT
v.
KER, &c.

JAMES ARROT, Surgeon, Edinburgh, *Appellant* ;
 JAMES KER, Manager of the Leith Banking
 Company, JAMES MACLEAN, Merchant in
 Edinburgh, and THOMAS GORDON, Writer
 to the Signet, } *Respondents.*

House of Lords, 17th July 1804.

BANKRUPT—COMPOSITION—CAUTIONER—33 GEO. III. c. 74, § 49.

A person having become bankrupt, entered into a contract with his creditors, whereby they agreed to withdraw the sequestration, upon condition of his paying 12s. 6d. per pound, proposed to his creditors some time before, in a previous arrangement, he paying all the debts contracted subsequent to that date in full. This was agreed to. He applied for his discharge, without having paid the respondent's claim in full. In an action against his cautioner, held that this was not a contract preferring one creditor to the hurt of the others, and so not struck at by the act 33 Geo. III. c. 74, § 49.

Mar. 26, 1793. Angus M'Kinnon, upholsterer in Edinburgh, having become embarrassed in his circumstances, offered his creditors a composition of 12s. 6d. in the pound, with his father's personal security, and a conveyance in further security of certain of his stock, until the composition should be paid. This offer was accepted by the creditors, upon condition of the whole other creditors agreeing to the measure, and they agreed to grant him a discharge.

Mar. 26, 1794. Sometime thereafter, a few creditors, who had not acceded to the composition, threatened diligence; and, to prevent them obtaining a preference, it became necessary to apply for sequestration, which was accordingly awarded, of this date. After the usual statutory requisites were gone through, a meeting of the creditors was called, at which it was agreed, by a great majority, to follow out the agreement formerly entered into, and to withdraw the sequestration, upon condition of Angus M'Kinnon finding sufficient caution for payment of the composition of 12s. 6d. per pound to the creditors who were parties to the first agreement, and to pay all the debts which had been contracted posterior to that date in full.

The debtor's father, Daniel M'Kinnon, and James Arrot, surgeon in Edinburgh, the appellant, became the cautioners,

and bound themselves by bond, conjunctly and severally, to pay the composition of 12s. 6d. in the pound to the one class of creditors, and the debts in full to the others.

Among the debts contracted by Angus M'Kinnon, subsequent to the voluntary trust-deed and agreement in 1793, there was a bill due by him to John Maclean for £97. 2s., and indorsed by him to James Ker, manager of the Leith Bank, by whom it had been discounted previous to the sequestration, upon the faith that the voluntary trust-deed and agreement had been acceded to, and M'Kinnon discharged.

When the sequestration was applied for and awarded, and the creditors had agreed to recall the same, on the arrangement above set forth, namely, that all creditors subsequent to the first agreement were to be paid in full, Mr. Ker did not doubt that his claim fell within those that were to be paid in full; but, in order to put the matter on a secure footing, his agent addressed a letter to the trustee, Mr. Gordon, as follows:—"Mr. Ker, manager of the Leith Bank, is a good deal alarmed that an application has been made to discharge Angus M'Kinnon's sequestration, and about which he says he never was consulted. I have just now seen a copy of the petition and of your report; and from the report, as well as what you once said to me, it appears that all debts contracted by him after March 1793 are to be paid in full; and that those contracted prior to that date are to be compounded at 12s. 6d. If this is the case, Mr. Ker cannot object to the prayer of the petition; but as he wishes to know explicitly how the matter stands, and means to oppose the petition unless matters are regulated as I conceive them to be, I beg you will be so good as write me a line immediately, and mention whether the creditors, after March 1793, are to receive full payment."

The answer to this letter was:—"As authorized by Angus M'Kinnon and his cautioners, I now agree that his debt to the Leith Bank, per £97. 2s. shall be comprehended among the debts which, by the bond of caution granted for the composition to his creditors, are to be paid in full, and shall be *so paid, agreeably to the terms of that bond accordingly.*" Upon which Mr. Ker consented to the recall of the sequestration.

Mr. Ker not having received payment, raised action against the cautioners of M'Kinnon, and against Thomas

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Gordon his trustee, narrating the whole circumstances above set forth, and concluding for full payment of his debt. The defences stated by the cautioners were, 1. That the bill libelled for, does not fall under the cautionary bond; and, 2. That they gave no authority to Mr. Gordon, the other defender, to write the letter above quoted, and therefore it could not affect them. Separate defences for Mr. Gordon set forth, That he acted merely in a ministerial capacity, as agent for the other parties; and that he was warranted in writing the letter to Mr. Adair, agreeing that the bill should be paid in full.

The Lord Ordinary pronounced this interlocutor:—

Jan. 14, 1800. “ Finds that there is no sufficient evidence that the bill
 “ sued for was not the proper debt of Angus M’Kinnon the
 “ acceptor, and therefore adheres to the former interlocutor,
 “ repelling the defences; and further, finds the defender,
 “ Thomas Gordon, in consequence of the action of relief
 “ brought by him against the representers, Messrs. M’Kin-
 “ non and Arrot, entitled to be relieved, and decerns ac-
 May 28, 1801. “ cordingly.” On reclaiming petition the Court adhered,
 June 9, 1801. finding Gordon also entitled to his expenses of establishing
 his claim against Arrot.

Against these interlocutors the present appeal was brought by the appellant alone.

Pleaded for the Appellant.—The transaction which gave rise to this action is expressly condemned by the bankrupt law, because it is contrary to the spirit and express words of the statute, that the onerous creditors of M’Kinnon should consent that Ker, the holder only of an accommodation bill, should receive payment in full, while they only received payment at the rate of 12s. 6d. per pound. This being the case, it was clear that Ker, having accepted without the knowledge of the other creditors, an obligation for full payment, forfeited his debt under the bankrupt statute, 53 Geo. III. c. 74, § 49, which declares: “ And if it shall be proved
 “ that any creditor has privately accepted of a gratuity or
 “ higher composition for giving his concurrence to the
 “ measures proposed on behalf of the bankrupt or his
 “ friends, he shall forfeit his debt, and be liable in restitu-
 “ tion of what he has received.” It is, besides, clear that the appellant, by the bond, was only bound to pay, “ in as
 “ far as they were the proper debts of the said
 “ Angus M’Kinnon.” These words, as well in legal as in common language, must clearly apply to all obligations

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whatever, which were *truly* granted on account, or for the accommodation of others, without any value received by Angus M'Kinnon himself, whether that appeared *ex facie* of the obligations themselves or not. That it was so understood by Mr. Ker, the manager of the Leith Bank, to whom the bill was indorsed, as well as by Mr. Adair his agent, the respondent Thomas Gordon, by whom the bond was drawn, and the two M'Kinnons, is evident beyond all question from the foregoing correspondence. Were this matter of doubt, the bond, being a cautionary obligation, ought to receive a strict interpretation, and therefore *in dubio* to be construed in favour of the appellant. Supposing therefore Mr. Ker to be an onerous indorsee, and as such entitled to recover as against Angus M'Kinnon, whatever objections the latter might have had against payment of the bill in the hands of John Maclean, it did not therefore become the *proper debt* of Angus M'Kinnon within the meaning of the bond. It was an accommodation bill for M'Lean. The bill is now his, and the debt his—Angus M'Kinnon being only a surety. Further, the respondent, Thomas Gordon, had no authority whatever from the appellant to enter into the illegal transaction alluded to, and therefore he is entitled to be relieved against the effect of his letter. Mr. Gordon had no mandate or power so to communicate before calling a meeting of the creditors. Had he done so, they would have resisted, and had the appellant known that the bankrupt had agreed to pay Ker in full, he would have withdrawn his security.

Pleaded for the Respondent.—The appellant, by his bond of caution, bound himself to pay in full the proper debts of Angus M'Kinnon, contracted subsequent to the date of the first agreement with his creditors; and the debt in question, in which Angus M'Kinnon, as acceptor of the bill, was bound to the Leith Bank, as principal debtor, and not *subsidiarie* as cautioner for the drawer, being a debt so contracted, and the proper debt of Angus M'Kinnon, it fell to be paid in full. In the strict legal interpretation, Angus M'Kinnon was the proper debtor to the Leith Bank, and not John Maclean, the indorser of the bill; so that, apart altogether from the special circumstances attending this case, the debt was one comprehended under the appellant's bond of caution. Were there any doubt, the transaction, and the manner in which M'Kinnon's trustee dealt with Mr. Ker in the matter, expressly assuring him by letter, on a threat to oppose the application to recall the sequestration

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After hearing counsel, it was
Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellant, *W. Adamson, David Williamson.*

For Respondent, *Wm. Alexander, John Clerk.*

NOTE.—Unreported in the Court of Session.

ROBERT SCOTT MONCRIEFF, Esq.,	<i>Appellant;</i>
WM. CUNNINGHAM, Esq. of Bonnington,	<i>Respondent.</i>

House of Lords, 20th July 1804.

ENTAIL—FETTERS—RESOLUTIVE CLAUSE—SALES.—In the entail of the estate of Bonnington, there were perfect prohibitory and irritant clauses against the sale of the estate; but the resolute clause, which contained an enumeration of the acts which were to be deemed a contravention of the entail, did not mention sales;—held that the entail was not good to protect against the sale of the estate.

The question here was, whether the entail of Bonnington, in possession of the respondent, was sufficiently protected against sales of the estate? And whether the sales made by him of part of the estate to King and Gibson, in the belief that the entail did not validly protect against sales, were good and effectual? In an action raised by the respondent to have it found that the sales were effectual, the appellant was called as a party, being the next substitute after the death of the respondent and his two sisters, neither of whom had any issue.

The entail contained the following prohibitory clause, declaring that it should not be lawful “to sell, annailzie, dis-
“pone, dilapidate or put away, the foresaid lands and
“estate, or any part or portion thereof, nor to innovate or
“infringe this tailzie and order of succession hereby made
“by me, nor to contract debts, nor do any other fact or