

1782. *January 29.*WILLIAM REID, and Others, CREDITORS of JOHN GEILS, *against*  
STEPHEN MAXWELL.

## No 13.

The estate of a bankrupt being sold, part of it was purchased by one of his creditors, who granted bond with a cautioner for the price, with this *proviso*, That the dividends due to him as a creditor should be allowed out of the sums in his hands. This purchaser having also become bankrupt, the question occurred, whether the dividends due to him ought to be allowed out of the principal sum and annualrents that fell due during the seven years after the date of the bond, for which the cautioner was liable, by which means he would be relieved; or out of those that had become due after that period, and of which payment could only be claimed from the bankrupt purchaser. The Lords found, that the dividend

GEILS having become bankrupt, his estate was sold by trustees vested in it for behoof of his creditors; and William Sheills, one of these creditors, having purchased a part of it, he, along with Maxwell, as his cautioner, granted bond for the price; with this *proviso*, That the dividends which might be due to Sheills, as a creditor of Geils, should, when settled in the ranking, be allowed out of the sums in his own hands.

During the pendency of that process, which continued many years, Sheills too became bankrupt; and by a decision of the Court, it was found, that the cautioner, in terms of the act 1695, c. 5. was liable for the principal sum only, and that part of the interest which had become due within seven years after the date of the bond. When, therefore, the dividends were at length to be determined, about 40 years after the date of the bond, it became a question of importance to the cautioner, and to the creditors, whether those due to Sheills were to be allotted out of the principal sum, and the annualrents that were owing during the seven years above mentioned; annualrents for which the cautioner was answerable; or out of such as had become due after the lapse of the seven years, of which payment could be claimed from no person but the principal debtor, who was a bankrupt.

*Pleaded* for the cautioner; In terms of the *proviso* above mentioned, the dividend in question ought to be wholly allotted out of that part of the debt for which the cautioner is bound; for otherwise he would not have the full benefit of that stipulation. Even independently of the *proviso*, it ought to be so applied, because it is to be considered as an indefinite payment made by Sheills. That part of the debt for which the cautioner is bound, and that for which there is no cautioner, should be held as distinct from each other; and the principal debtor being bankrupt, an indefinite payment is to be applied for the benefit of the cautioner rather than of the creditors. In this manner it will operate, in the first place, to the extinction of the annualrent, for which the former is bound, and then, so far as it extends, to that of the principal sum. Or, if this may not be touched while any interest is outstanding, and even though no preference were given to the cautioner, still the application must, in the first place, be made to the annualrents first due; that is, those for which he is responsible.

*Pleaded* for the creditors; The *proviso* will have its full operation, if the dividend of the bankrupt's effects be allowed out of any part of the debt due by Sheills. This dividend, however, is not a payment by Sheills, but one made to him of his proportion of the fund belonging to the whole creditors; which share may be taken from any part of these common funds; and out of no part

of them can it be more properly allotted than from the unsecured annualrents in his own hands, as these, unless applied in this way, must be altogether lost. Even considered as an indefinite payment made by Sheills, the dividend ought to be applied to that portion of the debt which is least secured, and therefore not to the annualrents that first became due, but to those for which no cautioner's security is interposed; the circumstance of priority here being immaterial, as the whole debt is now equally exigible; or, at least, the application should be made proportionally to both.

THE LORDS, after a hearing in presence, adhered to the interlocutor of the Lord Ordinary, 'finding, That the dividend was to be applied in extinction of the annualrents before the principal, and of the annualrents falling first due before the posterior annualrents.'

Lord Ordinary, *Braxfield*. For the Cautioner, *Ilay Campbell*. For the Creditors, *M. Ross*.  
Clerk, *Colquhoun*.

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*Fol. Dic. v. 3. p. 315. Fac. Col. No 26. p. 46.*

See APPENDIX.

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