are dilatory defences, the only act in this Court is to remit the case to the Court of Session.

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LORD MACKENZIE.—The party had no right to be fully prepared to discuss the question, as we could not decide it. But, looking to the claim, I am not sure if a party is entitled to subject his opponent in the expence of clearing up his title, as he may have profited by the investigation; but this is not the ground on which my opinion is founded.

Moncreiff, D. F., and *Maconochie*, for the Pursuer.
Jeffrey and *More*, for the Defender.
(Agents, *John Tait Jun.* W. S. and *George M'Callum*, W. S.)

PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

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1827. July 20.

Finding that a creditor did not privately accept of a gratuity for giving his concurrence to an offer of composition by his debtor.

AN action of reduction of a bond of caution for a composition offered by a bankrupt, on the ground that the assent of a creditor had not been fairly obtained; and an action by that creditor for payment of the composition.

DEFENCE in the reduction.—There was no

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fraud, but the securities held for the debt were stated in the claim given in by the defender.

ISSUES.

" It being admitted, that, on the 27th day " of September 1811, Patrick Wallace, mer- " chant in Brechin, was rendered bankrupt, " and his whole estate and effects sequestrated " under the statute, 33 Geo. III. cap. 74, and " that on the 31st of October 1811, the de- " fender, John Watt, claimed to be ranked on " the said estate as a creditor, in a bill for " L. 1256, 15s. 8d. Sterling, dated Dundee, " 21st May 1811, and stated that he held in " security, for part payment of the said sums, " *inter alia*, two bills, each for the sum of L.50 " Sterling, the one dated 3d September 1811, " and accepted by George Deuchar, the other " dated the 6th September 1811, and accepted " by Robert Law.

" It being also admitted, that, on the 11th " day of September 1811, and prior to the said " sequestration, the said two bills for L. 50 " each were indorsed by the said Patrick Wal- " lace to the said John Watt, and that the said " bills were paid to the said John Watt subse- " quently to the claim given in by the said " John Watt under the sequestration.

" It being also admitted, that on, or prior

" to the 22d day of February 1812, the said
" John Watt and the other creditors, agreed
" to accept of a composition of 10s. per pound
" on their debts, and that on the 7th day of
" March 1812, the said Patrick Wallace ob-
" tained his discharge.

" Whether the said John Watt, in violation
" of the statute, 33 Geo. III. cap. 74, privately
" accepted of a gratuity, for giving his concur-
" rence to the foresaid offer of composition?"

Currie, for the pursuer, said, This case is simple, but it must be proved by circumstances which may render it tedious. In addition to the composition, the defender stipulated that he was to get full payment of two bills of L. 50 each as a *bonus*, and that the bankrupt should pay another bill amounting to L. 31.

A copy of a letter given by a party from his letter-book admitted in evidence against him.

When a copy of a letter taken by the defender from his letter-book was tendered in evidence,

Moncreiff, D. F., for the defender.—They ought to produce the original, or, if it is lost, they ought to produce the defender's letter-book.

Jeffrey.—The letter is not in our possession, and this is an excerpt made by himself. In a

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question of fraud, am I not entitled to prove that he entered such a letter in his letter-book?

LORD CHIEF COMMISSIONER.—There is very little difficulty here, as this is the letter of the party himself, and not produced to affect others. His giving this is stronger than if the book had been produced.

Act Sed. March 8, 1826. A document rejected, not having been produced eight days before the trial.

To the production of another document, it was objected, that it had not been lodged eight days before the trial, in terms of the act of sederunt.

Jeffrey.—We searched in vain for this paper in the sequestration. It was found accidentally among the papers of an agent, who has retired from business; and notice was given immediately to the agent of the opposite party. The rule in the act can only apply when papers are in the place where they may reasonably be expected.

Moncreiff.—This is the main document on which the case rests; and the lateness at which it was produced, prevented us from having other documents which would have taken off from the effect of it. I do not doubt the power, but the discretion of the Court, if they allow this production.

LORD CHIEF COMMISSIONER.—The clause in the act of sederunt requires that the facts should be proved before we take any step.

(The agent having sworn to the facts, his Lordship said,) Suppose this had not been found, must not the case have been tried on the other evidence? This issue was prepared in March; much attention was given to it, and the party ought to have sooner made the search, and I think it would encourage laxity in practice were we to admit it.

LORD CRINGLETIE.—I think this of more consequence than merely its effects on the present case. There are many papers that are never returned to process; and the agent ought to have looked at the receipts; and this paper was found in the natural place, where it might have been found years before.

LORD MACKENZIE.—I am of the same opinion. I cannot hold that "could not" in the Act of Sederunt, merely means that the papers *were not* found.

Moncrieff, D. F. opened for the defender, and said, The defender was a true creditor for L. 1260, and they lay hold of a few words in one of his letters, in which he mentioned a

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bonus, and refuse to pay any thing. As to the bill for L. 31, they must bring it under the terms of the statute, which is a most penal one, and must prove clearly, which they have not done, that it was a gratuity privately accepted, for giving his concurrence to the offer of composition. As to the L. 50 bills there is no case, as the transaction was public.

As to the L. 31 bill, the bankrupt was liable for the sum, as he recommended the debtor in it to the defender; but where is the evidence that this was given for concurring in the offer of composition, or that he received a higher composition?

LORD CHIEF COMMISSIONER.—I quite agree in the observation, that this is an action of a most penal nature, and that, though it is not by the public prosecutor, but by a private person, still the jury must look as narrowly to the evidence as if it were a prosecution for a crime. It is an unpleasant case for either a judge or jury, as there are many minute circumstances which it is difficult to pick up in the course of the evidence.

The clause in the act is very material, as on it the whole rests. The terms of it are, that, " if it shall be proved that any creditor has pri-

" vately accepted of a gratuity or higher com-
" position, for giving his concurrence to the
" measures proposed on behalf of the bankrupt
" or his friend, he shall forfeit his debt, and be
" liable in restitution," &c. Even the preamble is important, as it bears to be for the purpose of rendering the payment of creditors more *equal;* you must therefore particularly attend to the evidence, and see whether it is proved that he privately accepted of either of the bills as a gratuity for acceding to the composition. The clause forfeits the debt, which in this case is very considerable.

The dates in the issue are material, and particularly the date of his getting the bills, as bearing on the question, whether they were a gratuity? You will attend particularly to the letter of the defender, founded on, which certainly mentions a *bonus;* but the sentence is defective and unintelligible, and the question is, how is it to be explained? A subsequent letter is not produced, which might perhaps have explained this, and the withholding it attaches nearly equally to both parties. As the evidence is left in obscurity, you will judge whether it is made out that he privately accepted this as a gratuity. A particular feature in this case is

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the question, whether it can be said he privately accepted of the L. 50 bills, when his holding them was communicated to the trustee? The Lord Ordinary in the cause is of opinion that this takes it out of the statute; and though this may be too nice a point on which to decide the case, still it is most important for your consideration.

The L. 31 bill is in a different situation from the others. It arises out of a transaction with a different party from the bankrupt; and you will consider whether the payment of this bill was by the bankrupt or by the other party. In all this there is something which is not brought out on the evidence, and which must be left to the good sense of a jury. If you think it was paid by the bankrupt, and privately accepted as a gratuity, you will find for the pursuers; but if not, then for the defender.

Verdict—For the defender.

Jeffrey and *Currie*, for the pursuer.
Moncreiff, *D. F.* and *Sandford*, for the defenders.
(Agents, *William Gardiner*, *W.* and *Arch. Duncan.*)