

BADGLEY, J. Durrell, a former clerk of M'Gibbon, established himself in business as a grocer in May, 1862, and failed early in July, 1863. On the 13th of July, 1863, by deed of cession, he assigned his stock-in-trade, outstanding debts, and unexpired lease, to assignees, for the benefit of his creditors, with power to wind up his estate. On the 31st of July, M'Gibbon, by deed between him, Kinloch, the assignee, the debtor Durrell, and the creditors generally, purchased absolutely the stock and debts of the bankrupt, and took subrogation from his creditors of their several claims against him, in consideration of 7s. 6d. in the £., which he undertook to pay to them. The composition was afterwards paid. On the 31st of August following, by another deed, the appellant, in consideration of \$3880 paid by him to M'Gibbon, purchased from the latter all his right, interest and property in Durrell's late stock and debts, as they then were unsold and uncollected, as well as the unexpired portion of his lease; and M'Gibbon specially subrogated the appellant in and transferred to him the creditors' claims against Durrell, with his own, together amounting to upwards of \$6000. The appellant made his purchase without any warranty by M'Gibbon, and declared himself satisfied with the goods purchased, as having seen them, and having them in actual possession.

On the 22nd Sept. following, by deed, the appellant constituted Durrell his agent to realize the remaining stock, and to collect the outstanding debts, but for no other purpose, binding Durrell to make weekly payments to him of the moneys received from sales and collections, and reserving to himself the power to take possession and summarily to eject Durrell even without notice, and at any time. He agreed, however, to transfer to Durrell the balance of stock and goods remaining, when Durrell should repay to him the \$3880 paid to M'Gibbon, with interest and ten per cent. commission. Durrell ratified the appellant's previous purchase from M'Gibbon, and acknowledged his indebtedness to appellant as his creditor, representing the creditors' claim transferred to him. From the time of the appellant's purchase from M'Gibbon in August, the shop had been kept

open in charge of Durrell, whose sign still remained visible as usual, and Durrell went about making purchases in his own name, to enable him to continue the necessary supply of stock, the appellant in some instances making advances in money to assist him in his purchases, in others endorsing his paper. This continued until the business premises were closed by the appellant on the 23rd Dec. following, and during that time it is in evidence that Durrell made purchases at an average of about \$800 per month, buying, selling and collecting in his own name, with the knowledge of the appellant. The deed between the appellant and Durrell, as just stated, was executed on the 22nd Sept., and on the 1st Oct. Durrell first purchased goods from the respondents, and continued his purchases until the 31st of that month, when they amounted to upwards of \$500, the recovery of which has given rise to these proceedings.

On the 23rd December, the appellant exercised his right, and took absolute possession of the premises, with all its stock of goods, and closed the shop until the 4th January, 1864, when, by deed of that date, he sold and conveyed to Burke all the goods and merchandizes in and about and upon the premises, with also the unexpired lease, in consideration of \$2200, which he thereby acknowledged to have received in cash from the purchaser Burke. Durrell became a party to this deed at appellant's request, ratified the sale, and relinquished to Burke all right, if any he had, in the effects sold. This is stated in the deed. At the time of the appellant taking possession of the goods in the premises, and of his sale of them to Burke in his own name as his own property, he knew that Durrell was a bankrupt, that he himself was Durrell's creditor for upwards of \$6000 as the representative of Durrell's creditors, and also a further creditor for advances and endorsements for him since the deed between them in September; that he knowingly allowed Durrell in his own name to supplement his selling stock to considerable amounts, during the entire period receiving the proceeds of sales and collections for his own account; that these proceeds came from the appellant's old stock purchased from M'Gibbon