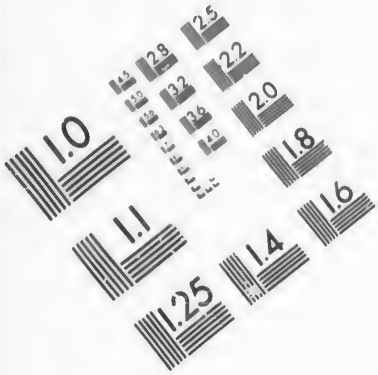

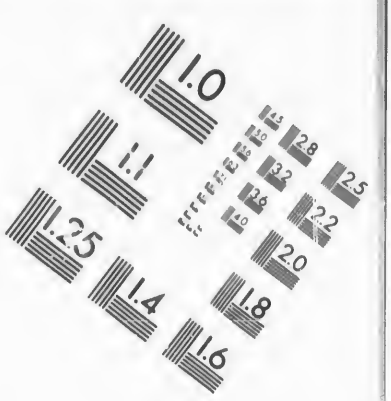

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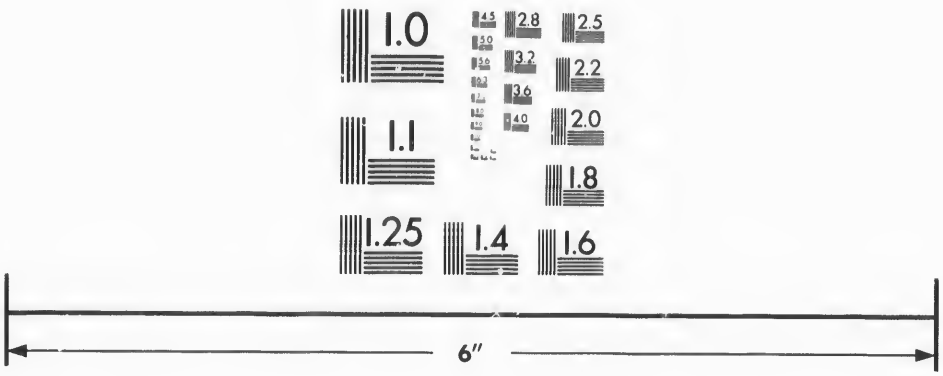

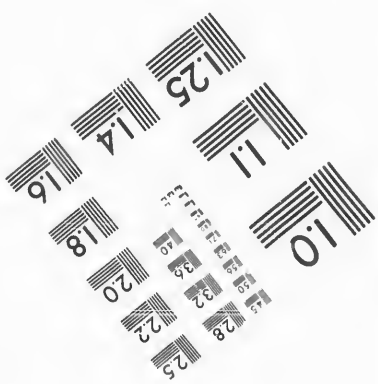

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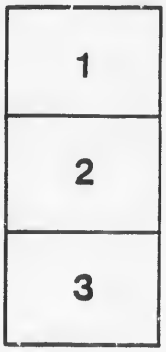

BROWN, GILLESPIE & CO.'S

REPLY

AND LEGAL OPINIONS ON THEIR CASE

WITH

KERR, BROWN & MACKENZIE.

1870.

Shelved with Kerr, Brown & MacKenzie.

Messrs. Kerr, Brown & McKenzie, having thought fit to bring before the public, in the shape of a pamphlet, a correspondence between our respective firms, arising out of their endeavour to become preferred creditors on our estate, at the time of our suspension, we have no alternative but to reply in the same manner, although we had hoped that the public would not have been troubled with a dispute in which it can take but little interest.

We would not have taken any notice of their publication, had it contained simply the correspondence between us, as we should have been quite content to abide by the verdict of public opinion, grounded on its perusal, but inasmuch as Messrs. K., B. & McK. have interspersed it with comments of their own, and correspondence with parties to whom they have appealed for support, we have merely to ask those who peruse it, to form their judgment on the true merits of the case, apart from Messrs. K. B. & McK's. comments or correspondence with their friends, as these are based on erroneous premises and have nothing in them bearing on the legal points of the dispute. We, therefore, consider it quite unnecessary to enter into any elaborate vindication of our actions or motives, or to publish the opinions of merchants and others, approving of the course we have pursued, as we will not be parties to the extension of this controversy by dragging in others, nor does the position we have taken necessitate the leaning on the testimony of our friends.

Great stress is laid upon Mr. Blake's opinion upon an A. B. C. case, submitted to him, but this case does not fully state the facts necessary to decide the question at issue between our firms.

The answers Mr. Blake has given to the questions proposed to him, are most probably correct as far as they go, but neither in our opinion or in that of our counsel, do they cover the ground.

For our guidance, we laid the actual facts of the case before several eminent counsel, whose opinions are herewith appended.

We adhere to the intention expressed in our letter *of 22nd March last*, to divide the sum in question amongst our creditors, and are determined that Messrs. K. B. & McK. shall not be paid 20s in the £ whilst our other creditors only get a dividend.

BROWN, GILLESPIE & CO.

HAMILTON, 31st Oct., 1870.

HAMILTON, Feby. 7th, 1868.

MESSRS. BROWN, GILLESPIE, & CO.

Dear Sirs :

Referring to the conversations we have had in regard to the position of the note for $10,000 made by your firm and endorsed by Kerr, Brown & Mackenzie, and one half of which would, but for your suspension, have been paid by each firm. We are clearly of opinion that the present holders of the note are entitled to rank on your estate for the full amount, and to receive dividends thereon, and that only in the event of the dividends exceeding the half of the amount of the note, which, under the arrangement between you and Kerr, Brown & Mackenzie, you were to pay ; will your estate be entitled to call on them to make good any such excess.

If the note is retired by Kerr, Brown & Mackenzie, they of course can rank on your estate only for the amount which should have been paid by you.

Yours truly,

BURTON & BRUCE.

HAMILTON, April 13th, 1870.

MESSRS. BROWN, GILLESPIE & CO.,
Hamilton.

Gentlemen:

I understand that you desire my opinion on the facts herein stated, as to the rights of Kerr, Brown & McKenzie to rank on the estate of Brown, Gillespie & Co., in respect of the note for $10,155, mentioned below. The facts are as follows:—

1. In the autumn of 1867, Kerr, Brown & McKenzie and Brown, Gillespie & Co., jointly, bought certain sterling exchange from the Bank of Montreal, amounting (in round figures) to $30,000 in value, which they divided equally between them, the Bank received from these firms, in payment of this exchange Brown, Gillespie & Co.'s three notes for even amounts, payable to Kerr, Brown & McKenzie at three, four, and five months, respectively; the first of these notes was paid in full by Brown, Gillespie & Co., the second by Kerr, Brown & McKenzie, and the third for $10,155, (the note in question) by agreement between these two firms, was to have been met by each firm paying half thereof, when due. The $10,155 note fell due after the date of the composition deed below mentioned, and was then held by the Bank of Montreal.

2. Kerr, Brown & McKenzie were also creditors of Brown, Gillespie & Co., at the date of the composition, for $669 32, in respect of other transactions.

3. Brown, Gillespie & Co. became embarrassed in their affairs, and suspended payment in the end of December, 1867, and made an offer to their creditors, the terms of which are embodied in a composition deed, dated 19th February, 1868, which is expressed to be made between Brown, Gillespie & Co. and all their creditors, and if need be, to operate under the provisions of the Insolvent Act, and the creditors of Brown, Gillespie & Co. thereby "agree to accept a "composition of 11s 6d in the £, payable at 6, 12, "and 18 months, in discharge of and from all claims, "demands, and whatsoever, which they have a claim "against them (Brown, Gillespie & Co.) or their "estate, whether due, or accruing due."

4. Brown, Gillespie & Co. prepared their statement of assets and liabilities, prior to the execution of the composition deed, showing this $10,155 note then current, as a liability against the firm for one-half of that sum, but learning that Kerr, Brown & McKenzie contended that they could, with the assistance of or in the name of the Bank of Montreal, rank for $10,155 on this note; they consulted Messrs. Burton & Bruce, who were the legal advisers of both firms, and who gave their opinion by letter dated 7th February, 1868, which states that the then holders of this note could rank for $10,155 on this note, if it remained their property. Brown, Gillespie & Co., being informed that Kerr, Brown & McKenzie had deposited collaterals with the Bank of Montreal, and so induced that Bank to agree to hold the note, altered their schedule shewing the full $10,155 as a liability of their estate, naming

Kerr, Brown & McKenzie as creditors for this note, but they did this simply in assumed compliance with the opinion of Messrs. Burton & Bruce, and the facts which had happened, and they never agreed with Kerr, Brown & McKenzie, to recognize them as the creditors for $10,155, unless legally so entitled, on the contrary Brown, Gillespie & Co. still objected to this ranking, while Kerr, Brown & McKenzie insisted on it as their strict legal right, and in this position of affairs Kerr, Brown & McKenzie signed the composition deed only, but not the statement, and no amount is set opposite their names or that of any other creditors as amounts for which they were creditors.

5. At the meeting of Brown, Gillespie & Co.'s creditors, held on 19th Feb'y, 1868, these facts were stated, and subsequently, objection was made to the ranking of Kerr, Brown & McKenzie for the $10,155 note, and inspectors were appointed at this meeting, to examine Brown, Gillespie & Co.'s statement.

Before these inspectors made their reports, Kerr, Brown & McKenzie retired the $10,155 note from the Bank of Montreal. Subsequently the inspectors made their report, which, after stating the offer made to be a fair one, refers to this $10,155 note transaction in these words :—

"Since the meeting of creditors on the 19th inst., "the ranking of one creditor has been reduced from "$10,155 to half that amount, the committee are of "opinion that the amount thus saved to the estate, "would effect so trifling a change in the total divi- "dend, that it should not render any new proposition "necessary."

6. The deed was subsequently assented to by all

Brown, Gillespie & Co.'s creditors without proceedings in insolvency.

7. The creditors of Brown, Gillespie & Co. were willing to accept a compromise from them at the rate named, the objection was to Kerr, Brown & McKenzie obtaining a preference over other creditors.

8. The questions asked are:

(I.) Could the Bank of Montreal rank on Brown, Gillespie & Co., in insolvency, for the full amount of $10,155?

(II.) Under the above facts, if the $10,155 note was ranked for in full on Brown Gillespie & Co.'s estate, could Brown, Gillespie & Co.'s estate have recovered from Kerr, Brown & McKenzie, in insolvency or otherwise, any sums paid in excess of 11s 6d in the £ on the half of the $10,155 note; in fact what were the strict legal rights of Kerr, Brown & McKenzie and Brown, Gillespie & Co.'s estate respectively, in regard to this note?

9. As to the first question:

It is clearly settled, that upon the insolvency of any or all the parties to a note, the *bona fide* holder of the note can rank for the full amount on the estate of each of the insolvents, until he has received his full claim: there is not the shadow of doubt as to this; it has been law ever since there was a Court of Bankruptcy. But this right of ranking is a rule of convenience adopted for the distribution of insolvent estates, it is the right of the holder of the note only, and in no way affects the rights of the parties to the note, as between themselves: for instance, if the estate of the maker and endorser were both in insol-

vency and the maker of the note were really only an accommodation maker, he or his insolvent estate would, on the bill being paid, either by the maker direct or by the dividends, (*i.e.*: say 11s from maker's estate and 10s from the endorsers) be entitled to recover from the estate of the endorser, all further dividends coming from the endorser's estate, assuming that it was not exhausted by the payment of the 10s dividend.

On the facts stated it was Kerr, Brown & McKenzie's duty, as between them and the Bank of Montreal, to have paid the note in full when due, in discharge of their liability as endorsers, and as between Kerr, Brown & McKenzie and Brown, Gillespie & Co., it was Kerr, Brown & McKenzie's duty to have paid half of the note, if therefore Kerr, Brown & McKenzie kept their agreement either with the Bank or Brown Gillespie & Co., no difficulty could have arisen, but if in violation of their agreement and with a view to procure the Bank of Montreal to rank for their benefit for $10,155 in full, Kerr, Brown & McKenzie in pursuance of this plan with the consent and agreement of the Bank of Montreal deliberately abstained from paying either the whole or half of the note but lodged collaterals for it with the understanding and intention on their part, and that of the Bank, that the Bank of Montreal should in the interest of Kerr, Brown & McKenzie, rank for the full amount of the $10,155 note. I think it would be fairly open to contend that the Bank of Montreal were not the bona-fide holders of the note, and that they could stand in no better position than Kerr, Brown & McKenzie, and I think such would be the decision of the courts.

In fact, Kerr, Brown & McKenzie never were creditors of Brown, Gillespie & Co. for $10,155 and they could not by deliberately breaking their own contracts, as above stated, directly or indirectly rank on Brown, Gillespie & Co. for that sum. A bona-fide holder of the bill could alone do so, and what is stated as to the right of ranking of the Bank of Montreal would apply to any persons to whom the note was transferred with notice.

10. As to the second question

The answer to the first question shews to a great extent the rights of the parties and how far they could be affected by the Bank of Montreal or those claiming, as indorsers of the note.

Kerr, Brown & McKenzie were bound by the composition deed to accept the composition thereby fixed, on whatever was the true legal amount of the demand which they could make on Brown, Gillespie & Co., and they could not evade this by refusing to take up the $10,155 note.

They never were the creditors of Brown, Gillespie & Co. for $10,155 on the note in question, what took place as to changing the figures in the statement did not make them creditors for $10,155, and indeed if Brown, Gillespie & Co. had been acting in collusion with Kerr, Brown & McKenzie and endeavouring to make them creditors for $10,155 they could not have done so. Any creditor could, without difficulty, cut down Kerr, Brown & Mckenzie's claim to its true figure.

The statement should have shown the Bank of Montreal creditors for $10,155, and Kerr, Brown &

McKenzie liable for half of this sum, and so left the balance as first stated. As between the two firms, Kerr, Brown & McKenzie were bound to pay off half of this $10,155 note, and if they failed to keep this engagement and Brown, Gillespie & Co. had to pay any part of what Kerr, Brown & McKenzie should have paid or anything beyond the composition agreed on, Brown, Gillespie & Co., or their assignee, could have maintained a suit against Kerr, Brown & McKenzie to recover the amount so paid, and this without paying the $10,155 in full. The action would be founded on the agreement between the two firms, each to pay half the note, and not on the Bill itself. Indeed we are strongly inclined to think that immediately on Kerr, Brown & McKenzie making default in payment of the $10,155, Brown, Gillespie & Co. could have sued them and recovered the half of this amount on the principal that the agreement of Kerr, Brown & McKenzie was to pay off a liability and not merely to indemnify Brown, Gillespie & Co. Brown, Gillespie & Co would have been bound to apply the amount so recovered in payment of the $10,155 note.

From what is stated in answer to the first question it is apparent that Kerr, Brown & McKenzie's plan of securing their debt in full, by having the Bank of Montreal rank for the $10,155, would necessarily fail. If Kerr, Brown & McKenzie were merely passive, and let things take their ordinary course, for in that event the Bank of Montreal would either have sued Kerr, Brown & McKenzie or made them pay in full the balance after receiving Brown, Gillespie & Co's. dividend (assuming that the Bank would wait 18 months for this purpose), and the moment the Bank of Montreal were paid off by Kerr, Brown & McKenzie, then

all difficulties, caused by the note being outstanding in the hands of a creditor, vanish, and Kerr, Brown & McKenzie would simply be creditors of Brown, Gillespie & Co. for half the amount of the note on which they had agreed to accept a composition.

The note therefore could never, in ordinary course of events, be outstanding in the hands of a creditor for any length of time, unless the creditor and Kerr, Brown & McKenzie colluded for the purpose of aiding Kerr, Brown & McKenzie to violate their agreement by receiving a dividend on $10,155, when only half of this sum was due; and if there was this collusion, then we think the ranking would be reduced to the real sum for which Kerr, Brown & McKenzie were creditors of Brown, Gillespie & Co., otherwise it would be allowing Kerr, Brown & McKenzie to take advantage of their own wrong in not keeping their engagement, and thereby receiving more than other creditors; but the law will not permit this to happen.

Brown, Gillespie & Co., or their assignee, and Kerr, Brown & McKenzie, had a right at any time to pay or take up the note from the Bank of Montreal, or whoever they transferred it to, and this right could be enforced by suit.

So long as the proper majority of creditors in number and value agreed to accept a composition from Brown, Gillespie & Co., it would be quite immaterial whether Kerr, Brown & McKenzie signed the composition deed or not, it would be equally binding on them whether they executed it or not.

I have not entered into the question as to how far it was likely the Bank of Montreal would assist one creditor over others, if a statement of the facts were

laid before the Bank; because this is merely a question of whether Kerr, Brown & McKenzie or Brown, Gillespie & Co., and their creditors, had the most influence with the Bank, and is of no consequence as affecting the legal rights of the parties.

I am of opinion that no member of the firm of Kerr, Brown & McKenzie could, as holder of the note, stand in a better position than the firm itself, otherwise there would be a violation of the principle that a release by or to one of several joint contractors enures to the benefit of the rest.

Yours truly,

EDWARD MARTIN.

Mr. Martin at the request of Brown, Gillespie & Co., forwarded Mr. Blake's and his own opinion to the Hon. J. J. C. Abbott, of Montreal, the framer of the Insolvency Act, and the following is his reply:

OTTAWA, 28th April, 1870.

EDWARD MARTIN, ESQ.,
Hamilton,

Dear Sir:

I have to apologize for not sooner replying to the questions submitted to me in your favor of 4th instant, but an extreme press of business has prevented me from doing so. I think it hardly necessary to reply in extenso to the questions contained in the case submitted to me, as I concur in nearly all that you have said on the subject. The only point on which I feel some hesitation, is, as to the right of the Bank of Montreal, to rank for the full amount of

the note. I find difficulty in concluding that it is deprived of the right of ranking for the full amount by the fact of having received securities from Kerr, Brown & McKenzie, in consideration of doing so—even though made fully aware of the motives of that firm for making such an arrangement. I should consider the Bank only exercising its legal right in ranking, and should think that its reasons for exercising that right could not be inquired into. With us the firm of Brown, Gillespie & Co. would have the right of paying the Bank in full the one half of the debt, as being due by Kerr, Brown & Mackenzie, and 8s. 6d. in the £ on the balance, as being the amount which that firm agreed by the composition deed to lose, and then to claim from the Bank upon payment of the composition on their own half of the note, the securities deposited by Kerr, Brown & McKenzie, subject to the obligation to account to that firm for any surplus after recouping themselves for half the debt, and 8s 6d in the £ on the other half. Or they could with us allow the Bank to rank for the whole amount of the note, and claim on Kerr, Brown & Mackenzie for the dividend appropriated to their half, and if that firm is solvent, this course would appear to be the most simple.

But as I understand the note to have been retired by the firm of Kerr, Brown & Mackenzie, or one of its members, the difficulty seems to me to disappear. I do not think that the mere fact that a third party paying and procuring a subrogation from the Bank of its rights upon the note had a knowledge of the circumstances would prevent his exercising the same remedies that the Bank could. But if such third party were himself bound to indemnify Brown, Gillespie & Co. the case would be quite different. If as

seems to be admitted, Kerr, Brown & Mackenzie are themselves bound to pay one half of the note, they are equally bound jointly and severally to protect the insolvents from being ranked upon for that half, and as they have accepted the composition, the fact that they are obliged to pay a part of the other half, does not seem to me to affect the question. The insertion of Kerr, Brown & Mackenzie as creditors for the full amount of the note, is an unfortunate circumstance, but in my opinion does not preclude the insolvents from proving the facts, and placing Kerr, Brown & Mackenzie in their correct legal position.

I might therefore sum up my views of the matter thus: I think if the Bank had retained the note it might have ranked for the full amount of it, but might have been compelled to give to Brown, Gillespie & Co. the benefit of the securities it held to the extent which Brown, Gillespie & Co. might pay, above the proper liability of that firm, under its agreement with Kerr, Brown & Mackenzie, and under the composition deed. But as the note has been retired by Kerr, Brown & Mackenzie, or by one of the members of that firm, Brown Gillespie & Co. can only be ranked upon for one half of its amount, and I say so because I do not consider that the firm of Kerr, Brown & Mackenzie or any of the members of it can claim to hold any rights from the Bank of Montreal against Brown, Gillespie & Co. from which the former firm is bound to protect the latter. If Kerr, Brown & Mackenzie had not signed the composition deed, but the requisite proportion of creditors had done so, and the estate had passed through insolvency, they would have been as fully bound by it as if they had signed it.

Very truly yours,

J. J. C. ABBOTT.

HAMILTON, 13th Sept., 1870.

MESSRS. BROWN, GILLESPIE & CO,
Hamilton.

I have carefully perused the several opinions of Mr. Blake. Mr. Martin and Mr. Abbott.

I quite concur in opinion with Mr. Blake upon the questions submitted to him. With regard to the fourth query he appears to have felt some doubt, but he evidently inclines to the opinion afterwards expressed by Mr. Martin and Mr. Abbott, which for the reasons they assign, is in my judgment, indisputably correct.

Whilst I agree with Mr. Blake in his opinion on the facts stated for it, I think that the case submitted to him omits a very material fact. The question, as it seems to me, is not whether the Bank of Montreal, or the firm of Kerr, Brown & McKenzie, or an individual member of that firm, had the right, under the various aspects of the case presented to Mr. Blake, to rank upon the estate of Messrs. Brown, Gillespie & Co., for the whole amount of the $10,000 note, but whether, after Messrs. K., B. & McK. had retired the note and reduced the amount of their ranking to one half of it, they are entitled either in law or equity to the whole benefit of the gain which occurred to the estate of B., G. & Co. by such reduction; whether, in fact, they were in a position better than that of any of the other creditors. This question was not submitted to Mr. Blake, nor does his opinion touch upon it.

The case appears to me to be plain enough. Messrs. K., B. & McK. were bound by their agreement with B., G. & Co. to pay one half of the note—they paid the whole. For the excess which they paid

beyond what they were bound to pay they were creditors of B., G. & Co., but they were creditors for no more. Their right to prove as creditors on the estate of B., G. & Co. was limited to that amount.—To hold otherwise would be to give them a preference over the other creditors. I can see no principle, either legal or equitable, upon which K., B. & McK. can claim a dividend on more than the actual debt which B., G. & Co. owed them, namely, one half of the note.

In the view I take of the case it seems unnecessary to consider what the rights of the parties would have been, if the Bank, or the firm of K., B. & McK., or a member of it had insisted on proving for the whole amount of the note leaving it in the hands of the Bank. The inclination of my opinion is with Mr. Abbott's view rather than with Mr. Martin's; but, unless you desire it, I need not enter into this question. Mr. Abbott is clear that all difficulty was obviated by the retirement of the note, and in that respect both Mr. Martin's opinion and mine concur.

Yours, truly,

W. CRAIGIE.

I concur in the above opinion.

S. B. FREEMAN.

HAMILTON, 22nd Sept., 1870.

MESSRS. BROWN, GILLESPIE & CO.,

Gentlemen:

I have already expressed my opinion respecting the claim of Kerr, Brown & McKinzie under the whole state of facts mentioned in Mr. Martin's opinion. I thought it unnecessary to enter into any

consideration of the rights of the parties as existing previous to the retiremen of the note by K. B. & McK., because I thought that fact removed all difficulty as to the present rights of the parties. You desire, however, to know what I think the rights and liabilities of the respective parties were before the note was retired. I conceive they were as follows:

1. At that time the Bank of Montreal held the note and had signified their intention of acceding to your composition deed, and Messrs. K., B. & Mc.K. had signed it. The Bank had the right to claim payment in full of the note from either your firm or K., B. & McK., and had the right to rank on your estate for the whole amount of the note; and I think the Bank was not deprived of this right by the fact of receiving collateral securities from K., B. & McK., or from a member of that firm.

You, or your assignee had the right to pay to the Bank the amount of the note, and then to claim the collateral securities, and to hold them as a security for the payment to your estate by K., B. & McK. of whatever sum they were legally bound to pay.

2. As regards the position of K., B. & McK., if you or your assignee had retired the note, they would have immediately become liable to your estate for one half of the note, being the proportion of it which they were bound by the original agreement to pay; and they would also have become liable to your estate for 8s. 6d. in the £ on the other half; and if the Bank had continued to hold the note, and had received the composition of 11s. 6d. in the £ on the whole amount of it, then I think K., B. & McK. would have been liable to account to your estate for

one half of of the composition received by the Bank.

I will briefly mention my reasons for this opinion.

As between your firm and that of K., B. & McK, each was bound upon the maturity of the note to pay one half of it. And whatever amount beyond above one half either firm, continuing solvent might have paid, would have been recoverable as a debt from the other.

On becoming insolvent, your estate became liable, as between yourselves, K., B. & McK. and your other creditors to pay a rateable dividend upon one half of the note, being the amount which you actually owed. The Bank no doubt was entitled to rank for and receive a dividend on the whole amount of the note, but whatever sum they might receive over and above the rateable dividend on half the note would in effect be a payment made by your estate on what as between your firm and K., B. & McK. was a liability of the latter firm, which they ought to have paid, and could therefore be recovered from them for the benefit of your creditors.

In fact the whole question, I think, turns upon the principle that, *as between the two* firms, you were only liable for half the note, and any payment after your insolvency, in excess of the rateable dividends on that amount, could be objected to by your creditors as preferential; and if the rights of third parties (such as the Bank) were such that they could compel payments of dividends to a greater extent, then the excess should be recoverable from the persons whose failure to perform their obligation placed your estate in such a position.

The only effect of the composition deed in this view was to render the amount of the dividends certain.

Independently of that deed I think any creditor would have had a right to object to any portion of the estate going to discharge a liability of K., B. & McK., and to have called upon that firm to make good to the estate the loss occasioned by their default.

As between that firm and your estate, I do not think that your estate could be called upon to pay more than 11s 6d in the £ on half the note without becoming entitled to recover from them any excess paid beyond that amount.

Yours truly,

W. CRAIGIE.

P. S.—It may make my meaning plainer to add that I consider that upon the suspension of your firm, your creditors had the right to insist on K., B. & McK. paying one half of the note, and that this was a right which could be enforced, and that the latter firm could not, by deliberately refusing or delaying to fulfil this obligation, be permitted to obtain an advantage over your other creditors

W. CRAIGIE.

I concur in the above opinion.

S. B. FREEMAN.

HAMILTON, Ont., 25th Oct., 1870.

MESSRS. BROWN, GILLESPIE & CO.,
Hamilton.

Gentlemen :

I have read a number of opinions, in reference the $10,155 note, the subject of controversy between Messrs. Kerr, Brown & McKenzie and yourselves,

given by Messrs. Burton & Bruce, Mr. Blake, Mr. Abbott, Mr. Martin, Mr. Craigie and Mr. Freeman.

Assuming the facts to be as stated by Mr. Martin, I have little need to say more than that I fully concur in the opinions of Mr. Abbott and Mr. Craigie, and in that of Mr. Martin as qualified by them.

It is conceded throughout, I believe, that although the holder of the note might have enforced payment in full from either of the firms, parties to it, yet as between themselves, these firms were each liable only for half the note. Each was therefore a surety, as regards one half, and a principal as regards the other half. At the time of the suspension of B., G. & Co., they or their creditors were entitled to require Kerr, Brown & McKenzie to pay one half, which would have compelled the holder to rank upon the estate of B., G. & Co. for the other half, the amount of the true debt owing by them. But it would be plainly inequitable to permit Kerr, Brown & McKenzie, by any arrangement with the Bank, to receive dividends upon their own debt out of the estate of B., G. & Co., to indemnify themselves against their suretyship for the portion of the note properly payable by B., G. & Co., at the expense of the other creditors, or in other words, to get paid in full while the others get only a dividend.

By insisting upon this right of B., G. & Co., there is no compulsion on Kerr, Brown & McKenzie to make them creditors against their will. That was a liability they (K., B. & McK.) incurred long prior to the suspension, by becoming parties to the note, and placing it in the power of the Bank to enforce payment in full from them, and there is no injustice in