In Re Laubscher.

Moller, q.q. Sundry Creditors *v.* Sequestrator and Others.

[2d June, 1829.]

1. *Sequestration, (old Law)—no release from Sequestration can take place, before the expiration of the period allowed to Creditors, to lodge their Claims,—nor effectual against the Creditors, who have not consented to such Release.*

2. *A Person discharging the Debt of an Insolvent, after surrender, entitled to rank in the same order, as the Creditor, whose Claim has been discharged, would have ranked.*

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1. In this case, Laubscher, on the 25th June, 1827, surrendered, in the usual form, his whole estate to the Sequestrator as insolvent, and in the *Gazette* of the 29th June, the Sequestrator inserted the notice to his creditors, to lodge their claims, which by law was required to be given, when the surrender of an estate was accepted by the Sequestrator.

It was proved by an affidavit of the Sequestrator, that Laubscher stated in his letter of the 25th June, 1821, by which he surrendered his estate as insolvent, that he did so,—in consequence of the sentences which had been given against him, and lodged with the Sequestrator, one of them at the instance of the Discount Bank;—that, notwithstanding the above notice in the *Gazette*, no other claims had been filed by Laubscher's creditors, with the Sequestrator, before the 5th July, 1827, on which day Laubscher had called at his office, and paid the amount of the above mentioned two sentences, which alone had been lodged against him, and gave the Sequestrator, a notice in writing of that date, stating, that he withdrew his surrender of the estate. In consequence of which, the Sequestrator gave notice in the *Gazette* of the 6th July, "that the sentences, filed for enforcement against N. W. Laubscher, having been withdrawn from this office, and he having recalled his letter, by which he surrendered his estate under sequestration, his estate was in consequence released from such sequestration."

On the 22d August, 1827, Laubscher finally surrendered his estate.

On the 21st June, 1827, Laubscher had granted a bond, for £250, to A. Brink, D.s., and on the 22d June, another bond for £350 to A. J. Louw. These bonds were registered on the 25th June, the very day of the first surrender; and on the 6th July, the said A. Brink, to whom Laubscher had on

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the 4th July, granted a general power of attorney, executed a mortgage bond for £90, specially mortgaging three slaves to and in favour of Spengler, which bond, subsequently by cession, came to belong to W. J. Louw.

The Sequestrator, in framing his scheme of distribution, under the second sequestration, preferred those three bonds, before the claims of the creditors, who were now represented by Moller, all of which, were prior to the date of the first surrender, but were concurrent claims, having no privilege or preference. If the first surrender, had not been recalled, Brink's and A. J. Louw's bonds, registered on the 25th June, and Spengler's bond, would have been entitled to no preference. It was contended by those three creditors, that the whole transaction was *bonâ fide*, and unimpeachable, and by Moller, that the withdrawal of the first surrender, was a fraudulent scheme, to obtain an undue preference, for these three creditors. But the Court, without reference, to whether the transaction was fraudulent or *bonâ fide, held*, that a debtor, who has surrendered his estate, cannot, within the six weeks allowed to creditors, to lodge their claims, obtain its release, merely because those creditors, who have lodged their claims, have had their claims discharged, or have consented to the release,—and that no creditor, who has not consented to the release, can in respect of such release, be deprived of the rights and privileges, which he was entitled to, in virtue of the sequestration, if the release had not taken place; and *ordered* the Sequestrator, to prepare a new scheme of distribution, on the principle, that the first surrender was effectual, and had not been withdrawn or discharged.

And gave costs to Moller, against the then opposing creditors.

Denyssen for Moller, quoted: Matthæus de Auctionibus, lib. 1, c. 19, § 102–107; *l.* 6, § 7; *ff quæ in fraudem credit* (42. 8); Voet, 42: 8, 17, 18.

Brand *contra* quoted Huber Prælect ad. Pand. l. 42, t. 3, § 3; Voet 42: 3, 9.

24th October, 1829.

2. *Postea.*—On the application of A. Brink, by whom, or with whose funds, it appeared, that the sentence above mentioned, in favor of the Discount Bank had been discharged;

The *Court ordered* the Sequestrator, to amend the scheme of distribution, which he had made up in terms of the order of the 2d June, so as to rank Brink, for the amount paid by him, in discharge of the said sentence, in favor of the Discount Bank, in the same way, that the Discount Bank would have been ranked, in respect of that sentence, if it had not been discharged.