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can never be extended to bills of exchange, which are reputed as bags of money going *de manu in manum*, which are neither capable of being ſtopped by arreſtment nor compenſation; otherwiſe all commerce by bills would be clogged and confounded. *Replied* to the 1ſt, They now crave Balfour may be declared bankrupt. And for the 2d, if a bill of exchange be inſtructed to have been drawn for money actually paid down, or equivalent goods delivered, then that bill may not be quarrelled, though he break within 60 days thereafter; but where it is given to a creditor by a partial gratification to prefer him to the reſt, there is no doubt it falls under the act of Parliament, and becomes reducible; as was lately found betwixt Hary Baird and Henry Mein's Creditors;* and, if it were otherwiſe, then all bankrupts, within 60 days of their breaking, would make all their fraudulent conveyances by bills.——THE LORDS found bills included within the act of Parliament as well as other aſſignations, unleſs they bore value received, or ſo proven, &c. The great inconvenience by the interlocutor is, that it puts parties to prove the onerous cauſe of their bills, which may be a retardment to the currency of trade. *See* BILL of EXCHANGE.

Fol. Dic. v. 1. *p.* 82. *Fountainhall, v.* 2. *p.* 86.

1713. *January* 16. CAMPBELL of Glenerowall *againſt* GRAHAM of GORTHIE.

No 192.
Indorſation of a bill of exchange, made by a notour bankrupt, or his truſtee, in payment or ſecurity of an anterior debt, falls under the act 1696.

ROBERT CAMPBELL, *alias* Rob Roy, draws a bill upon Graham of Gorthie payable to the drawer, which Gorthie accepted; and the drawer having indorſed that bill to Hamilton of Bardowie, about the ſame time the indorſer broke and fled; Gorthie thereupon raiſed reduction and declarator againſt Bardowie, ſetting forth the matter of fact, and occaſion of drawing and accepting the bill, viz. That the cauſe of the bill was a contract of the ſame date, whereby Rob Roy was obliged to deliver to Gorthie a certain number of Highland cattle; that he had made the like bargains with a great many gentlemen, who had truſted him with money, in contemplation of receiving the value in cattle; and having thus amaſſed a great ſum of money in his hands, he did moſt fraudulently withdraw; and fled without performing any thing on his part; and thereby became unqueſtionably a notour and fraudulent bankrupt, under the deſcription of the act of Parliament 1696 anent bankrupts; and about the ſame time indorſed this bill to Bardowie, againſt the faith of this contract.

Bardowie having indorſed the bill to Campbell of Glenderowall, he charged Gorthie upon the accepted bill, who ſuſpended on this reaſon, that the ſubject of the bill was rendered litigious againſt Bardowie upon the act of Parliament 1696.

It was *anſwered*, That the proceſs againſt Bardowie, or the act of Parliament 1696 upon which it is founded, can take no effect in prejudice of the charger, to whom the purſuer's accepted bill was indorſed *bona fide*, and for a moſt onerous cauſe; becauſe bills of exchange are conſidered as bags of money not liable to exceptions competent againſt other debts and claims, but paſs *de manu in manum*,

* Examine General Liſt of Names.

without the formalities requiſite in other writs, as an inſtrument of trade, upon which all dealers reckon them ſecure; and in this caſe, Bardowie being a truſtee for his behoof, he took the conveyance as better for his uſe than money; for Rob Roy having money in hand, was ready and willing to have paid the charger the value of the bill in money, but having no occaſion for it, he thought the bill more profitable for him; and he was *in bona fide* to rely upon it; becauſe the Lords by many deciſions in favour of commerce have exeemed bills of exchange from all exceptions competent againſt other debts; particularly compenſation (which operates *ipſo jure* againſt bonds of borrowed money) takes no place againſt bills of exchange; and arreſtments do not hinder poſterior indorſations to take effect, as was found 5th December 1712, Smith *contra* Home,* decided after debate in *præſentia*, of purpoſe to be a rule in like caſes; and an arreſtment being one of the diligences expreſsly mentioned in the excellent ſtatute 1621 againſt fraudful alienations, it follows by plain conſequence, that the act of Parliament 1696 ought as little to take place, to hinder the currency of bills of exchange; which is agreeable alſo to the practice of moſt trading nations, as obſerved by Du Puy in his *L'art de Lettres de change*, Chap. 10. § 1.; and Scaccia, § 2.; Gloſſ. 5. No 327. and Molloy *de jure maritimo*, L. 2 Ch. 10. § 28. No 192.

It was *anſwered*, That bills of exchange have indeed many privileges for the favour of commerce; but there is no deciſion in Scotland, nor the opinion of any author, that would favour an indorſation in the preſent circumſtances; for the indorſer being undoubtedly under the deſcription of the fifth act of Parliament 1696, the words thereof are plain, poſitive, and general, declaring that all and whatſomever voluntary aſſignations, diſpoſitions, or other deeds, made and granted, directly or indirectly, by the foreſaid dyvor or bankrupt, at or after his becoming bankrupt, or within the ſpace of ſixty days before, in favour of any of his creditors, either for his ſatisfaction, or for his further ſecurity, in preference to other creditors, to be void and null; which law leaves no place for any exception, nor is there any reaſon or expediency for trade, that bills of exchange ſhould be exeemed from the effect of that law, for otherwiſe there would be a great opportunity for fraud; for perſons knowing themſelves to be in a bad and deſperate condition might diſpoſe of their effects real or perſonal, take bills for the value, and then indorſe theſe bills for money, as that exigence ſhould require; and enjoy their eſtates for themſelves and their heirs, to the utter defraud of their creditors; and there is nothing determined in any former caſe, that can afford the leaſt argument in the preſent queſtion; for, in the deciſion, Smith againſt Hume, the Lords had particular conſideration of the acts of Parliament 1621 and 1696, that nothing ſhould be determined, to evacuate the effect of theſe excellent laws, which were ſpecially noticed both in the reaſoning and deciſion; for the queſtion being a competition betwixt an arreſter and the poſſeſſor of an accepted bill, the Lords did indeed prefer the poſſeſſor of the bill; but the interlocutor does expreſs the reaſon, viz. it was not *alleged*, that the arreſtment was known to the poſſeſſor, or that the indorſation was gratuitous in whole or in part; whereas in the caſe of the

* Dalrymple, No 93. p. 130. *voce* BILL of EXCHANGE.

No 192. act of Parliament 1696, the law introduces a preſumption *juris et de jure*, of the notoriety that the party was bankrupt; which in this particular caſe was well known to Bardowie; but the ſuſpender founds upon the preſumption introduced by the law; and it is not peculiar to Scotland what is thereby enacted; for it appears, that in France (where commerce and caſes relating to bankrupts are as well regulated as in any place of the world), the law in relation to bankrupts is the ſame as with us, with this difference only, that whereas our act 1696 annuls all deeds within ſixty days, their reglement of the 26th of June, and in Council the 27th July 1667, and in Parliament the 18th of May 1668, is in theſe words, *Que toutes ceſſions et transports ſur les effects des faillis ſeront nuls s'ils ne ſont faits dix jours aux moins avant la failite publiquement connu;* that is, all aſſignations and indorſements upon the effects of bankrupts are null, if they be not made ten days at leaſt before the bankruptcy is publicly known.

'THE LORDS found, the ſaid act of Parliament takes place, the purſuer proving 'the indorſation to have been made not for preſent value, but in ſatisfaction or 'ſecurity of a prior debt. *See* BILL of EXCHANGE.

Fol. Dic. v. 1. p. 82. Dalrymple, No 97. p. 136.

*** Forbes reports the ſame caſe:

GLENDERUEL having charged Gorthie to make payment of 1250 merks, contained in a bill drawn by Robert Campbell (commonly called Rob Roy,) upon and accepted by Gorthie, payable to the drawer or order, for value received, and indorſed to the charger alſo for value; Gorthie ſuſpended, and raiſed a reduction of the indorſation to the charger, upon the act of Parliament 1696, anent bankrupts, for this reaſon, That Robert Campbell the indorſer, at or within ſome few days after the indorſation, was a notour bankrupt.

Alleged for the charger: The act of Parliament 1696, anent bankrupts, takes no place in bills of exchange; becauſe, 1*mo*, Acts of Parliament relative to the formality, conſtitution, or extinction of writs, uſe not to be extended to bills of exchange. 2*do*, Sums even in inland bills, are not compenſable by the acceptor for the indorſer's debts, 31ſt January 1699, Stuart *contra* Campbell;* conſequently not quarrellable upon the ſtatute of bankrupt; ſeeing that were ſtill to elide the indorſation upon the account of the indorſer's debt, which would derogate from the faith and currency of bills, and occaſion trade to ſtagnate, 3*tio*, The generality of the writers upon bills do center and agree in this, That the obligement of the acceptor of a bill is good, and effectual, and cannot be revoked, though the drawer was *lapsus* before acceptance, or became inſolvent immediately after, Du Puy L'Art des Letters de Change, Chap. 10. § 1. 2.; Scaccia, § 2. Gloſſ. 5. N. 327.; Molloy de Jure Maritimo, Lib. 2. Ch. 10. § 28. 4*to*, It is the ſame upon the matter whether the value of bills be paid in money or goods, or be diſcounted, that is value due to the poſſeſſor upon ſome former account, Ricard.

* Dalrymple, No 13. p. 16. *voce* BILL of EXCHANGE.

Traite du Commerce, p. 102.; Scarlet, Stile of Exchanges, Ch. 35. R. 5. When one having intruſted goods to a merchant, or indulged ſome delay till he be able to pay accepted bills, takes bills from that merchant for the price of ſuch goods, or in ſatisfaction of ſuch former bills; were it not out of meaſure hard to quarrel that bill upon the act of Parliament 1696? eſpecially, conſidering, that the indorſee in a bill is not, like an ordinary aſſignee, bound to notice or enquire, if the perſon on whom the bill is drawn, be debtor to the drawer or not; or to enquire about the drawer's condition, if he find the acceptor to be ſufficiently ſolvent. Nor is it neceſſary that value be given for a bill immediately when it is drawn, Du Puy, ch. 3. § 29. No 196.

Answered for the ſuſpender, 1*mo*, The act of Parliament 1696, being conceived in general terms, without exception of bills of exchange, ought to be extended to the indorſing of theſe, as well as to the aſſignation of any other debt or right; eſpecially in this caſe, where the indorſement was granted for ſecurity of bygone debt, and not for preſent value in the way of trade. 2*do*, Compenſation is not ſuſtained at the inſtance of the acceptor of a bill againſt the indorſee or *porteur*, upon the debts of the indorſer or original creditor,—only where the indorſee purchaſed the bill for ready money, or other preſent value in the way of commerce. And 3*tio*, It is only in that caſe Du Puy, Scaccia, et Molloy ſay, That the obligement of the acceptor of a bill is good and effectual, though the drawer was *lapsus* before acceptance, or became inſolvent ſoon after; for 'tis certain, that if the bill be for the drawer's behoof, his indorſement to any of his creditors in ſecurity or ſatisfaction of a prior debt, in defraud of his other juſt and lawful creditors, will not be a valid tranſport or indorſation; as is clear from the cuſtom of other trading nations, particularly France, as related by Le Sieur Savary, in his Le Parfait Negotiant, p. 143. *que toutes ceſſions et transports ſur les effects de faillis ſeron null s'ils ne ſont faits dix jours aux moins avant la faillite publiquement connue*: Which is the ſame thing that with us is ſtatuted by the act 1696, with this difference only, that our law annuls ſuch deeds of bankrupts within 60 days; whereas the French edicts 1667 and 1668, limit the time to 10 days: And our lawyers have always made this diſtinction betwixt ſatisfaction for bygone and preſent value, Stair, Inſt. lib. 1. tit. 9. p. 83. (85.) 4*to*, What the lawyers cited by the charger ſay concerning the different kinds of value paid for bills, doth not meet the preſent caſe; for it needs not be diſputed, but that one merchant may diſcount to another a prior debt by bill in the courſe of trade as value furniſhed, which is indeed value received in ſome ſenſe; yet if ſuch a bill be given for payment of a prior debt, while the drawer is actually bankrupt, or upon the point of breaking, the law takes place.

Replied for the charger: Le Sieur Savary's opinion, v. 1. p. 143. doth not militate againſt him. The caſe ſtated by that author is this: Paul, a merchant in Amſterdam, ſuſpecting the condition of James his debtor there, prevails upon James to draw upon Alexander his correſpondent at Paris, for ſixty thouſand livers, value received, payable to Paul or order, albeit he paid no value for this

No 192. bill, but only gave his note to the drawer, to hold compt to him for the money, when he ſhould get payment of it. Immediately after Alexander at Paris accepted this bill, James the drawer broke; upon which matter of fact, the author gives his opinion in three points, viz. *1mo*, If Alexander the acceptor had been debtor to the drawer, before his acceptance, the ſum in the bill would have been brought into the bankrupt's effects, and diſtributed among his creditors; but if Alexander the acceptor was not formerly debtor to the drawer, but accepted his bill in hopes of getting effects from him to pay before it fell due, Paul the creditor in the bill behoved to be anſwered with payment, and the bankrupt's creditors could not complain nor pretend to any ſhare thereof; becauſe the bill is not to be paid with the effects of the drawer their common debtor, and ſo they are not wronged; but the acceptor, who has himſelf to blame for giving truſt to the drawer, whoſe faith he followed; which is a good argument to decide in the charger's favour; ſeeing the ſuſpender acknowledgeth that he was not debtor to Rob Roy the indorſer at the accepting of his bill, but accepted the ſame for cattle that were never delivered. *2do*, That author is of opinion, That Alexander the acceptor of the bill would not be bound to pay the ſame to Paul, if he could prove by a note under Paul's hand, that he was only to hold compt to James the drawer, for the value of that bill when it ſhould be paid; which makes nothing againſt the charger, who accepted of an indorſement to the ſuſpender's bill, not to hold compt to Rob Roy when paid; but took it in payment and ſatisfaction of what he owed him; againſt whom he had no recourſe if Gorthie had bankrupted and Rob Roy ſtood. *3tio*, Le Sieur Savary gives his opinion as to a third point, That Alexander the acceptor of the bill for value received, could not be free of his acceptance, but behoved to pay conform; becauſe there was no fraud on Paul's part, but only in the drawer of the bill; conſequently for the ſame reaſon Gorthie muſt pay the ſum in this bill.

THE LORDS found, That the act of Parliament 1696, anent bankrupts, takes place in this caſe, if the ſuſpender prove that the indorſation was for ſatisfaction or ſecurity of a prior debt, and not for preſent value received. *See* BILL of EXCHANGE.

Forbes, p. 646.

1715. *January* 27.

FORBES of Ballogie *againſt* the DEBTORS of FORBES of Craigie.

No 193. Delivery of goods and merchandice by bankrupts, in ſatisfaction of anterior debts, found to be challengeable upon the act of Parliament 1696.

IN the furthcoming at Ballogie's inſtance, againſt the Debtors of Forbes of Craigie, the purſuer extracted ſeveral accompts from the common debtor's compt-book, and referred the accompts to the defender's oaths, who deponed and acknowledged the articles and prices in the accompt; but added this quality, that the ſaid articles were received and given them in payment and ſatisfaction of debts due by the common debtor to the defenders.