

1697. July 21.

STONEHEWER *against* INGLIS.

No 6.

Money, *in specie*, was sent to a third party, with verbal instructions to pay a certain bill with it. The money not having been so applied, was found liable to the arrestment of other creditors, without regard to the bill.

STONEHEWER, merchant in London, being debtor to John Inglis writer to the signet, and John Mackay of Palgowan, and sundry others, he sent L. 200 Sterling of milled money to Bailie Clark in Edinburgh, and verbally signifies, that it was to pay part of Palgowan's bill of exchange; but before any written order came, John Inglis having protested his bills for not payment, arrests the money in Clark's hand. A competition arising between them, Palgowan objected, *imo*, Against John Inglis's instrument of protest, that it was null, the witnesses neither being subscribing nor designed, contrary to the act of Parliament 1681; *2do*, The money being sent to be delivered to Palgowan, this stated the dominion and property of the same in him, and so being no more Stonehewer's money, it could not be affected by his creditor's arrestments. *Answered*, The act of Parliament relates only to intimations of assignations, but not of bills of exchange, and their protests; for such are regulated by the *jus gentium* for the more expedite dispatch of trade and commerce; and municipal laws are not the rules in such cases; and by the declaration of knowing merchants, given in, no such solemnities are required in protests of bills of exchange. THE LORDS found custom behoved to be the rule here; and therefore repelled the objection, and found it to be no nullity. To the *2d*, John Inglis *answered*, That before the delivery, the money *in specie* continued still to be Stonehewer's, and so affectable by his creditors' diligence; for he might have any time before delivery altered his resolution, and countermanded his first order of giving it to Palgowan, and ordered it for another; and in law *traditionibus non conventionibus seu nudis pactis transferuntur rerum dominia*. THE LORDS found the dominion not transmitted till delivery; and therefore preferred Inglis the arrester. See WRIT.

Fol. Dic. v. 1. p. 512. Fountainball, v. 1. p. 788.

1706. January 16.

JOHN GRAY *against* LORD ROSS.

No 7.

The creditor in a bill, having given orders to his trustee, to whom it was indorsed, to pay a part of the money to a third party, his creditors, the Lords, notwithstanding the order, found the

SUTHERLAND of Kinauld draws a bill upon Mr John Middleton, payable to Gordon; Middleton accepts, and Gordon delivers the bill to Kinauld indorsed to a blank person, in which David Ross his name is filled up.

Middleton being charged in the name of David Ross, he suspends on multiplepoinding, and also upon partial payments made to Kinauld, for whose behoof he alleged the bill was indorsed to David Ross.

David Ross being ordained to be examined, depones, that the bill was sent to him blank by Kinauld, and he ordered to fill up his own name, for security of a small sum due by Kinauld to himself, and the remainder was to be applied for relief of cautionries wherein Mr Charles Ross stood engaged for Kinauld, and

thereafter he told him that the remainder was to be applied for payment of a debt due by Kinauld to my Lord Ross; and that the deponent replied, he could not comply with that desire without the allowance of Mr Charles Ross, to whom Kinauld had formerly ordered the superplus to be applied, at least for his relief; and that Mr Charles afterwards consented to the application of the money to my Lord Ross.

No 7.
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the money
remained, with
him who sent
the advice,
and therefore
might be ar-
rested by his
creditors.

Compearance was made for John Gray, who produced Kinauld's bond, with an arrestment in the hands of Middleton the debtor, and David Ross, Kinauld's trustee, and craved the money to be made forthcoming to him as belonging to Kinauld his debtor.

Compearance was also made for my Lord Ross, who *alleged*, That the money belonged to him; because albeit David Ross was originally a trustee, in so far as exceeded his own payment, yet he was ordered first to apply the money for Mr Charles's Ross's relief, and thereafter, with consent of Mr Charles Ross, was ordered to apply it to my Lord Ross; which verbal order was sufficient to convey the right of the bill to my Lord Ross, because the trust was without writ, and could no ways be instructed but by David Ross's oath, who has, as he was bound, declared the whole matter of fact, and the case is the same as if he had given a back bond in the terms of his disposition; in which case he would have been trustee, not for Kinauld, but for my Lord Ross; and for that reason David Ross declined to observe the second order without the consent of Mr Charles Ross, to whom there was *jus quæsitum* by the first, until he obtained Mr Charles's consent.

It was *answered* for the arrester; That the property of the money still belonged to Kinauld, who might alter his order at his own pleasure, because there was *nullum negotium* betwixt him and Mr Charles, or my Lord Ross; and whatever his apprehension was of a *jus quæsitum* to Mr Charles by the first order, that was but his mistake, and cannot influence the decision of the case; for all this while, my Lord Ross knew nothing of the whole affair, but laid on an arrestment as Gray did, though posterior.

THE LORDS found, that the property of the superplus of the money over and above David Ross's payment remained with Kinauld; and that therefore there was place to affect the same by an arrestment.

Fol. Dic. v. 1. p. 512. Dalrymple, No 71. p. 90.

* * * Forbes reports the same case:

DAVID ROSS as having right, by indorsation, to a sixty pound Sterling bill from Mr Robert Gordon, drawn by Sutherland of Kinauld, upon, and accepted by Mr John Middleton, pursued the acceptor, who offered to prove by the oath of the possessor of the bill, that he was but Kinauld's trustee, and by Kinauld's oath that he had received some partial payment. David Ross deponed that by Kinauld's order and advice, he had filled up his name in the indor-

No 7.

sation when blank, for payment to himself of 200. merks, and annualrents thereof due to him by Kinauld, and was to apply the remainder to pay a debt due by Kinauld to the Lord Ross. Upon this, compearance was made for my Lord, and also for John Gray of Newtown, both creditors to Kinauld, and arresters in the hands of John Middleton and David Ross.

Alleged for Gray of Newtown, that he ought to be preferred to the superplus sum in the bill, over and above the 200 merks, and annualrents thereof due to David Ross; in respect his arrestment in the hands of the acceptor, was prior to that laid on in his hands by the Lord Ross, and both had arrested in the hands of David Ross on the same day. And the said superplus sum continued to be Kinauld's money, notwithstanding his orders to David Ross the trustee, anent the application in favours of the Lord Ross, which he could freely alter and countermand at any time before payment; in the same manner as if Kinauld having ordered David Ross to pay my Lord out of so much deposited money might *re integra* call back for his own money from the depositor, or order him to dispose of it otherways. Especially seeing the order was never intimated to my Lord, and he could pretend no *jus quæsitum* by such an order, whereof he knew no more than the man in the moon. For it is ordinary among merchants to get bills consigned from abroad, with advice to post them to such a one's account, and sometimes a second advice comes afterward recalling the former. But then the person in whose favours the first advice was sent never pretends any interest thereby, if countermanded before actual application, by credit given conform. And a contrary practice would destroy trade, and occasion innumerable pleas among merchants, by pursuing repetition from such as got payment of bills, by virtue of letters of advice in their favours, upon pretext that others had right to these bills by former advice, which might be proved by an exhibition of the consignatar's books and letters of advice.

Answered for the Lord Ross, that he ought to be preferred as to the remainder of the bill more than satisfied David Ross's own debt; in respect the same was in David's person for my Lord's behoof, as appears from his oath, and he cannot be obliged to denude but in the terms thereof; which oath is as good to my Lord Ross, as if the delegation in his favours had been concerted by a back-bond. Nor is it of any moment that he knew not of what past; seeing Kinauld might have ordered the payment of that debt without his Lordship's knowledge. *2do*, Newtown's arresting before my Lord Ross in the acceptor's hand, cannot afford him any ground of preference; because Mr Middleton was properly debtor to David Ross, by virtue of the indorsement of the bill; and arrestment was only proper in his hand.

Replied for Gray of Newtown, the oath is not in the case of a backbond or written delegation; but in case of different orders concerning the application or disposal of money deposited with a factor or trustee, whereof the property

remains in the mandant, till the execution of his last orders by payment. *2do*, If any back-bond had been given in the terms of the oath to Kinauld without intimation to my Lord Ross, that *negotium* betwixt Kinauld and his trustee, could not hinder him to destroy the back-bond, and call for his money *in specie* from his trustee.

The Lords found that the property of the money remained with Kinauld, and was therefore arrestable by his creditors.

Forbes, p. 71.

1707. December 18.

LADY PITMEDDEN and her Husband *against* SIR ROBERT GORDON.

ALEXANDER FARQUHAR merchant in Aberdeen being creditor to umquhile Sir Ludovick Gordon of Gordonston, conform to a back-bond, Farquhar assigns that debt to Mr Robert Forbes, and takes his back-bond, declaring it was but in trust, and that he should denude (being always paid in the first place any expense he should ware out upon the process), and that in favours of Mr William Lauder (to whom he stood debtor in a considerable sum of money) in the first place, and, after his payment, to William Gordon and some others of the said Farquhar's creditors, in the next place. Farquhar and Forbes his trustee being remiss in carrying on the process against Gordonston, Mr William Lauder applies to the Lords, craving to be admitted for his interest; but before this is determined, the parties die, and the Lady Pitmedden, as heir and executrix to her father, raises a transferring against Sir Ludovick's heirs; and her title being objected against, the process is transferred *in statu quo*, and being now insisted in, the dilator is renewed, that you have no action against Gordonston till you first denude Forbes the trustee, and you obtain the concurrence of the other creditors of Farquhar's, mentioned in Forbes's back-bond, otherwise we have not a legal full contradictor; for a *res judicata* betwixt the lady and me, will not produce me an absolvitor against Farquhar's other creditors mentioned in the backbond, in case they should pursue me; so the lady's direct action lies not against Gordonston, but against the heirs of Mr Robert Forbes, the trustee, to make him denude in the terms of his back-bond in favours of Mr William Lauder, and his heirs; and this is plainly insinuated by my Lord Dirleton, *voce* TRUSTEE, committing treason, and was decided in a parallel case 18th January 1706, betwixt Chaplain and Henderson *, where the Lords did not think a back-bond equal to a retrocession and transmission of the right. *Answered*, That Mr William Lauder being *nomina-tim* insert in the backbond, and ranked *primo loco*, who can doubt but Forbes was only his hand, and so it accresces to him; and in a case betwixt Mac-

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No 8.

One assigned a bond to a trustee, taking him bound by back-bond to denude in favour of certain creditors in order. Both parties deceased before the money was recovered. The first named creditors found to have sufficient interest and title to prosecute the debtor in the bond.

* Examine General List of Names.