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against the possessor, Forbes Treatise on bills of Exchange, p. 163. ;\* because of the exorbitant trust among traders, whose business requires more dispatch than to allow them time to inquire at the acceptors of bills, (who perhaps are at some hundreds of miles distance from them), whether they had made any partial payment to the creditor since their acceptance. Yea, to sustain separate partial receipts, would open a wide door, to much fraud ; it being easy for persons to accept bills, and, with the same breath, take private receipts of payment from the possessor, who, being bankrupt, might use them as funds of credit to entangle and cheat honest men. Therefore, no prudent man will pay the whole sum in a bill, without getting up the bill ; or pay any part, without getting the partial payment marked upon the back of the bill, or destroying the old bill, and granting a new one for the remainder. *2dly*, The receipts produced do not relate particularly to this bill, the tenor whereof bears, that there were other bills granted by the suspender to the indorser, to which *in dubio* the payments must be ascribed : Especially considering that the law presumes, That the bill charged on is not paid, from its being still unretired in the creditor's hand. And if the partial payments had been to be imputed in satisfaction thereof, the last of the receipts would not have born ' in part of payment of a greater sum owing to Kincardine, (as it does) but in full payment of the sum contained in such a bill : ' Since the sums in the two receipts make precisely the total sum in the bill charged for.

*Answered* for the suspender : Though compensation upon the indorser's debt be not receivable against the possessor of a bill, payment to the indorser is good against any possessor ; because payment extinguisheth *ipso jure* : Whereas compensation takes no effect till it be proponed ; seeing *Judex non potest vaticinari invicem quid deberi*, as the lawyers say.

THE LORDS seemed to be of opinion, That in the general, separate receipts, relative to bills, do not militate against singular possessors. And found, That far less in the present case could the receipts founded on by the suspender be sustained to extinguish the bill in question : Seeing that bill mentions other bills to have been granted by the suspender to the indorser ; and the receipts do not expressly relate to the bill charged on. See No 94. p. 1506.

*Fol. Dic. v. l. p. 98. Forbes, p. 552.*

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The possessor of a bill, to whom it was indorsed for value, was preferred to the indorser's creditor, who had arrested the money in the acceptor's hands, before indorsation.

1712. December 5. ROBERT SMITH *against* ALEXANDER HOME.

ALEXANDER FORBES draws a bill upon two tenants, payable to Henry Gladstones, at Lammas 1709, which the tenants immediately accepted. Henry Gladstones indorses the bill to Robert Smith, who protests for not payment upon the 10th of August, and charges with horning upon the 22d of the same month.

Alexander Home, a creditor to Gladstones, arrests upon the 17th of July, and pursues a furthcoming before the Sheriff of Berwick ; in which the acceptors of the bill appear, and acknowledge the debt, and thereupon there is a decree of furthcoming upon the 4th, and a charge of horning upon the 23d of August.

\* Edition 1703.

The tenants suspend upon multiplepointing ; and though the subject of debate was very small, only L. 62 Scots, yet, for the preparative, the LORDS appointed a hearing in their own presence, upon the question of preference betwixt the arrester and the possessor of the bill ; and, after informations, the debate was more full on the bench than from the bar.

It was not much contraverted by the parties ; and the reasoning of the Lords proceeded upon supposition, that bills of exchange required not the formalities of writers' names and witnesses ; and that the indorsation wanting date, was presumed to be of the date of the bill, and so prior to the arrestment ; and there was no necessity of intimating the indorsation ; but the question remained, whether the presumption that the indorsation was prior could be elided by a contrary probation by the parties oath, that the same was posterior to the arrestment.

As to which, it was *alleged* by the arrester, That his diligence was *nexus realis*, and did affect the sum due to Gladstones, his debtor, whose indorsation after the arrestment, could not put the arrester in any worse condition, seeing he had prosecuted his diligence duly, and obtained a furthcoming before the bill was protested ; and it was offered to be proven, that the indorsation was not only posterior to the arrestment, but even to the summons and to the decret of furthcoming.

It was *answered* for the possessor of the bill, That inland bills, by the act of Parl. 1696, had all the privileges competent to foreign bills ; and the favour of commerce does require many privileges for the free course of bills of exchange : That any party seeing a bill in the hands of a possessor accepted by a solvent debtor, may rely upon an indorsation as current money ; and there is nothing to be feared as to the transmission of that bill, upon the account of any exception that might be otherwise competent against the indorser ; therefore compensation takes no place ; as was expressly found lately in the case betwixt Campbell and Stewart (p. 1497.). In like manner, such is the favour of bills of exchange, that the Lords, the 12th day of Dec. 1711, in the case of Sir John Erskine *contra* William Thomson, No 91. p. 1501. found, that the receipts of a sum contained in an accepted bill not writ upon the bill itself, but contained in a paper a-part, did not affect the bill ; but that the same bill being indorsed, the possessor had right to exact the full sum in the bill ; reserving action to the acceptor who paid against the indorser ; and the reason was, because bills are considered as bags of money, transmitted *de manu in manum* by indorsation ; and for that reason, no exception can be admitted that appears not by inspection of the bill.

It was *replied* for the arrester, That the acts of Parliament 1681 and 1696, make nothing to the present question ; for the first provides only for summar execution upon bills of exchange, and that the same shall bear annualrent ; and since the act 1681, the Lords have been very favourable to foreign bills ; but have not extended all the privileges of foreign bills to inland precepts ; the supporting of public credit not requiring the like privilege to inland precepts ; on the contrary, Sir George M'Kenzie observes, it would be inconvenient to encou-

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rage inland precepts too much ; for then all buſineſs would come to be tranſacted by inland precepts, and the ordinary ſecurity by bonds neglected.

*2do*, The arreſter is preciſely in the caſe of the act of Parliament 1621, in as far as he has duly affected the ſubject in competition, by arreſtment before indorſation, and thereby is entitled to reduce that indorſation as poſterior to his lawful diligence ; for, albeit the indorſation be preſumed to be anterior to the arreſtment, yet a preſumptive probation can always be elided by a poſitive probation in the contrary, and it is offered to be proven, by the oath of the poſſeſſor of the bill, that the indorſation was truly poſterior.

*3tio*, This extention in favour of bills of exchange, would, in a great meaſure, take off the effect of the act of Parliament 1696, anent notour bankrupts ; for bankrupts falling under the deſcription of that act, might diſpoſe of their effects, and take accepted bills for the value, and indorſe them at their pleaſure, in deſraud of all diligence of their creditors, real or perſonal : And what hath been determined in the caſe of compenſation, or payments by receipts a-part, not upon the bills, hath no influence upon the preſent queſtion ; for in theſe deciſions no body was concerned but the acceptor of the bill perſonally ; who, by acceptance, is juſtly underſtood to renounce compenſation ; and, for the favour and currency of bills, might juſtly be obliged to take receipts of payment upon the bill itſelf ; but here the queſtion is with a lawful creditor who has uſed diligence.

It was *duplicated* for the poſſeſſor of the bill, *imo*, Law has provided the ſame privileges to inland precepts with foreign bills ; neither have the Lords, by their deciſions, made any difference ; nor is there reaſon to extend the privilege of the one more than the other ; for bills are the inſtruments of commerce, as well within the country as in foreign parts ; and without theſe, traffick could not be carried on from one remote corner of the country to another, without carrying money *in ſpecie* backward and forward, which would occaſion great delays and hazard in transportation ; neither can foreign commerce admit of that difference, becauſe foreign dealers have their factors in Scotland ; which factors cannot manage their buſineſs without depending on inland bills, which thereby have a great connection with foreign trade ; and there is no inconveniency that parties may be left at their freedom to deal by bonds or bills ; for where money is deſigned to lie for the benefit of intereſt, no body will take or give bills which require ſpeedy negotiation and diligence.

As to the ſecond reply, founded upon the act of Parliament 1621 ; that act does principally relate to diligence affecting lands ; and tho' it mention alſo arreſtments, that concerns only ordinary conveyances by diligence ; but the favour of commerce may exeem indorſations of bills of exchange obtained *bona fide* from the poſſeſſor not knowing of any interveening diligence. But indeed the caſe would alter, if it could be alleged that the poſſeſſor of the bill did know of an interveening arreſtment before indorſation ; for there, there would be fraud upon his part ; and the act of Parliament 1621 annuls deeds in deſraud of creditors ; but where

the possessor of the bill did *bona fide* acquire, it would be a great inconveniency, and far from what was intended by that act, to prejudice his purchase.

3<sup>to</sup>, As to the act of Parliament 1696, in the case of notour bankrupts, the law presumes the case of such bankrupts to be known to every person, *presumptione juris et de jure*; and therefore the privilege of bills of exchange in that case behoved to cede.

4<sup>to</sup>, It is not pretended that the indorsation is gratuitous.

'THE LORDS preferred the possessor of the bill, in respect it was not alleged that the arrestment was known to him, or the indorsation gratuitous in whole or in part.'

*Fol. Dic. v. 1. p. 98. Dalrymple, No 93. p. 130.*

\* \* \* The same case is reported by Forbes :

In a competition for the sum, in a bill of exchange payable to Henry Gladstones, Inn-keeper at Ginglekirk, betwixt Robert Smith, to whom it was indorsed for value, and, Alexander Home, who, as creditor to the indorser, had arrested the money in the acceptor's hand before indorsation :—THE LORDS preferred the indorsee or possessor of the bill; in respect it was not alleged, that the indorsation was gratuitous without an onerous cause; or, that the indorsee knew of the arrestment when the bill was indorsed to him.

*Forbes, p. 641.*

1714. June 17. JAMES ARBUTHNOT *against* PYPER of Newgrange.

JAMES ARBUTHNOT having charged Newgrange, upon his accepted bill, for 39 bolls of French salt, he suspends on this reason, That the salt bill was granted upon clearing all account betwixt the parties, and mutual general discharges given at the same time of all bills, bonds, tickets, &c.; yet, nevertheless Arbuthnot having Newgrange's accepted money bill for L. 347 Scots, which fell under the general discharge, he pretended that money bill was not in his hands, but promised faithfully to give it up next day: But, contrary to the faith of the mutual discharges and communing, he indorses that bill to a third party, for an onerous cause, and Newgrange, the suspender, was forced to pay it; but now he craves to retain the salt, until he get allowance or reimbursement of the money bill, falling under the general discharge *cum omni causa*.

It was *answered*: The reason of suspension is most relevant; but it is as false, and only probable *scripto vel juramento*; more especially the question being in the suspension of a bill, which, for the favour of commerce, ought to receive all ready execution.

It was *replied*: The charge being upon a salt bill, has not all the privilege of a money bill, but more especially, the question being betwixt the first creditor and acceptor; and the qualifications insisted on are not only relevant, but probable,

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Betwixt the drawer and indorser, where no onerous purchasers are concerned, all objections are relevant, *hinc inde*. See No 88. p. 1498.