

THE LORD ORDINARY preferred Mitchell the arrefter, in respect of his diligence, to the interest produced for William Mitchell.—William Mitchell, in a petition, *pleaded*, That there was no competition between *creditors* of James Gray. The petitioner is not Gray's creditor, but the Earl's; having paid Gray full value for the draft on the Earl. Having intimated his right by the protest taken; he became as effectually possessed of the debt, as if the Earl had granted a bond for it to Gray; which Gray had assigned to the petitioner; and which the petitioner had intimated. James Mitchell's diligence, therefore, commenced after Gray was denuded, and must be utterly ineffectual.

Answered: A protest for non-acceptance, ought not to be accounted equivalent to an intimated assignation; for the drawer of the bill continues liable; whereas the assignee has no recourse on the cedent. Besides, Gray was bankrupt in terms of the statute of 1696; so that whatever the Earl owed to him, was subject only to the diligence of his creditors, not to his own arbitrary disposal.

THE LORDS altered the Lord Ordinary's interlocutor; and preferred the holder of the draft to the arrefter.

Lord Ordinary, *Lord Justice Clerk*. For Petitioner, *P. Wedderburn*. For Respondent, *P. Boyle*.
Fol. Dic. v. 1. p. 97. Session Papers in Advocates' Library.

1737. February.

KER against CHALMERS.

RICHARD BURN of Clarkston, drew a bill dated 30th July 1731, upon Sir James Dalziel of Binns, for L. 800 Scots, payable to Ker of Houndwood, or order, betwixt and Martinmas then next. This bill was presented, and protested for non-acceptance, 6th May 1732.

Burn drew another bill, dated 6th August 1731, upon Sir James, for L. 25 Sterling, payable to John Parkhill, or order, against Whitsunday thereafter; which was indorsed to Alexander Chalmers; and protested for non-acceptance upon 7th August 1731.

Ker, the pursuer of this action, representative of Ker of Houndwood, to whom the first-mentioned bill was payable, in a competition before the Sheriff, *pleaded* preference on the debt due by Sir James Dalziel, as having the first bill drawn upon him. The Sheriff preferred Chalmers, holder of the second bill; as having the first protest for non-acceptance.

Ker raised advocacy. Lord Elchies Ordinary 'repelled the reason of advocacy; found no iniquity; and remitted the cause.'

In a petition, *pleaded*, Intimation has not been considered as a necessary solemnity towards establishing a right by bill; *Stair, Inst. b. 1. tit. 11. § 7.*; and *b. 3. tit. 1. § 12.*

Let it be supposed the debt due by Sir James Dalziel were constituted by bill. A simple indorsation would carry the right to it; and the indorsee could not be excluded by arrestment or assignation; neither could he run any risk for want of

No 61.

Though a simple indorsation on the back of a bill makes a full conveyance, without necessity of intimation; a draught upon a debtor must be intimated; so as to give preference, if not accepted.

No 61.

intimation; for having the bill itself, the acceptor could never be in *bona fide* to pay the contents to any other person. It could not be this case which Lord Stair had in view, when, in the paragraph first alluded to, he thus expressed himself: 'The first order carries right to the sum in the bill without necessity of intimation; yet payment made *bona fide*, by a posterior order, secures the payer.'

It must have been such a case as the present that Lord Stair had in his eye. And, according to his opinion, the first bill ought to be preferable; though Sir James might have been in *bona fide* to pay Chalmers, holder of the second bill, delivering up that bill to him, along with the original grounds of debt.

There ought to be no difference in point of law, whether the sum due by the common debtor, was originally constituted by bill, or any other document. The first draft upon him ought still to be preferable.

Upon the principles laid down by Lord Stair, b. 3. tit. 1. § 12. were the competition between a bill prior in date, and a posterior assignation intimated, there would be little doubt that the creditor in the bill would be preferable to the assignee; the assignation, without controversy, would be preferable to a second bill, drawn upon the debtor, after the date of the intimation of the assignation; therefore the first bill behaved to be preferable to the second, though the second were first protested. What answer can be made to this? unless it be maintained, that a bill, or order, is truly not preferable by its date; that it needs intimation as much as an assignation does; and that the only exception is of an indorsation upon the back of a bill, which, from the nature of the thing, cannot require intimation, because the indorsee, while he holds the bill, is secure that the acceptor will not pay to another. But if this be law, Lord Stair's doctrine must be erroneous; 'that a bill drawn by a debtor, though not intimated to, or accepted by him, will be preferable to an arrestment or intimated assignation.' If it be law, that a bill drawn upon a debtor, though not intimated to, or accepted by him, will establish a right in the possessor, so as to entitle him to be preferred to a posterior arrestment, or intimated assignation; it must be a necessary consequence, that a prior, must be preferable to a posterior, bill drawn upon the same debtor.

The petitioner's bill is not only first in date, but it is first payable. The second payable so long after the first, must have been meant only to carry the residue. If the competition had commenced, prior to Whitfunday 1732, Chalmers' protest would have signified nothing; he having nothing to demand before Whitfunday. The petitioner behaved to have been preferred, as having *parata executio*. Matters ought not to turn out otherwise, merely because the competition has happened after Whitfunday.

Answered, A debt constituted by bill, and one constituted by bond, decree, or open account, are in very different situations. A bill is, for the benefit of commerce, considered in law, as a bag of money; and enjoys a variety of privileges; which, in regard to bonds, &c. are not requisite. The debt originally due by Sir James Dalziel to Burns, was not constituted by bill; therefore the passage

from Lord Stair, b. 1. tit. 11. § 7. first referred to, does not meet the present question. Lord Stair, when he mentions 'payment made *bona fide* by a posterior order,' must have meant, payment made on a bill, or an order on the back of a bill: For instance, a person takes two drafts, first and second, of the same bill; he indorses the first, and delivers it, or sends it by post, to the indorsee: The second he holds some time in his hands; and afterwards sends it with a posterior order, or indorsation, to a different person, who makes the first demand. The person drawn on pays *bona fide*.

The other citation from Stair, b. 3. tit. 1. § 12. that 'intimation being, by *our proper custom only*, a necessary solemnity, holds not in *orders*, which stand for 'assignments among merchants, *strangers* especially, *qui utuntur jure communi gentium*;' this passage regards foreigners, and throws no light on the present question.

The argument that a bill prior in date is preferable to an assignment intimated, and consequently to a second bill, is inapplicable; for no conveyance of a debt, not constituted by bill, can have the privilege of indorsation of a bill, so as to be effectual without intimation. A bill not indorsed, would not be preferable to an assignment intimated, before the bill was presented to the debtor; consequently would not be preferable to a bill posterior in date, first intimated.

It is of no importance, that the petitioner's bill was first payable. For the second bill contains no intimation to the persons to whom it was directed, that any former bill had been drawn. It was a simple draft, to pay a certain sum, at a certain day. It was presented and intimated to the debtor before the prior bill. The first intimation completed the conveyance, whatever was the term of payment: Nor can the time when the competition occurred make any difference.

Lord Ordinary, *Elbier*. For Petitioner, *H. Home*. For Respondent, *Jas. Geddes*.

Fol. Dic. v. 1. p. 97. Session Papers in Advocates' Library.

SECT. VIII.

Indorsation.

1714. July 8.

JOHN MITCHELL, Merchant in Edinburgh, *against* ALEXANDER BROWN,
Merchant there.

ALEXANDER BROWN having accepted a bill drawn upon him by Thomas Scot, merchant in London, 20th October 1713, for the sum of L. 51 : 5s. Sterling, payable to himself, or order; the first of April thereafter, to reimburse Thomas Scot, of a bill drawn by Alexander Brown upon him, payable to Robert Wilkes, on the said first day of April: Upon the 3d of the said month of April, when both these

No 62.

After the holder of a bill, had written on the back of it, that he had drawn a separate bill