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were added to the addreſs; as no ſtipulation for intereſt entered the bill. *See* No 7. p. 478.

THE LORDS 'adhered.'

Pet. *R. Craigie & J. Sinclair.*
D. Falconer, v. 2. No 228. p. 277.

1757. *November 15.*

WILLIAM DOUGLAS and PATRICK LINDSAY, Merchants in Edinburgh, *againſt* ALEXANDER BROWN, Merchant in Edinburgh.

No 32.
A bill bearing intereſt from the date found null.

IN the ranking of the creditors of Robert Brown of Whitecroft, Alexander Brown produced, as his intereſt, a bill for L. 76:5:5 Sterling, dated in 1725, accepted by the common debtor, payable at a certain day, and bearing in it a ſtipulation of *intereſt from the date.* It appeared to have been taken for the amount of an account of goods, which was diſcharged at the time of the acceptance. Inhibition was executed upon this bill in the 1726, and followed by an adjudication.

Objected by Douglas and Lindſay, competing creditors, That the ſtipulation of intereſt from the date contained in the bill, renders it void and null; becauſe bills are not intended to be ſubſiſting ſecurities for ſums lent out upon intereſt; but are conſidered as bags of money paſſing like ſpecie from hand to hand. The law has provided, that they ſhall bear intereſt againſt the acceptor from the term of payment, only *in pœnam* of his neglect of making payment at the preciſe term; and no intereſt is, *ex lege*, due upon them, when accepted, between the date and the term of payment, as till then the acceptor is not *in mora*. Where other ſtipulations are intended, the preciſe form of executing and teſting an effectual obligation is directed by ſtatute; and as bills, whether foreign or inland, make a ſingular exception from the general rule, wiſely calculated to prevent frauds and forgeries, their privilege is loſt by any material deviation from the known and eſtabliſhed form of bills uſed in this and other countries: And, *a fortiori*, ſhould it be ſo in a caſe like this, where a condition is introduced inconſiſtent with the very end and intention of bills.

Answered for Brown; 1*mo*, The bill in queſtion was accepted for full value received; and it would be very hard to forfeit a lawful onerous creditor, on account of a trivial miſtake in drawing the bill. 2*do*, It has all the known requiſites of a bill *jure gentium*; and therefore cannot be annulled without the force of a ſtatute. 3*tio*, This addition to the bill cannot change it into a writ of another kind, not entitled to the privileges of bills; 1*ſt*, becauſe there is nothing unlawful in a creditor's taking intereſt from the date of his ſecurity on a debt then ſubſiſting; nor is ſuch a ſtipulation foreign to the nature of bills, eſpecially inland ones, which, in general, were only intended to be ſecurities for lent money, or debts; and, 2*dly*, if it were foreign, it could not have the effect, by law, to vitiate a bill, otherwiſe good; but the condition muſt be held *pro non adjecta*. 4*to*,

No 32. Suppoſing this writ could not be ſuſtained as a bill entitled to the privileges of the acts 1681 and 1696; yet it ought to be held as a probative and privileged writ, and as ſuch allowed to be a ſufficient document of debt, and ground of action, in the ſame manner as miſſive letters *in re mercatoria*, and other privileged writs. And, 5*to*, It was, for many years before and after the date of this bill, the general practice, to draw bills with ſuch a condition in them; and ſuch bills were ſuſtained by many deciſions ſince the 1725, when this bill was drawn: And therefore, whatever may be the fate of new bills, this ought, *ex æquitate*, to be ſuſtained; otherwiſe the deciſion muſt have a ſevere retroſpect.

Replied, 1*mo*, The bill's being onerous, cannot ſupport it againſt a legal objection; eſpecially in a queſtion with creditors equally onerous: For were it gratuitous, it would be ſet aſide on that ſingle ground. 2*do*, It is not the practice of other nations, to make bills with this condition in them. By the French King's ordinance 1673, intereſt on bills is only due from the date of the proteſt for not-payment, when accepted. And the ſame rule is eſtabliſhed by the regulations of Holland; and the trading cities of Hamburgh, Frankfort, Augſburg, and Leipſic, in Germany; and Bologna in Italy; which proves, that there intereſt could not be exacted or *ſtipulated from the date*, in caſe of acceptance. The acts 1681 and 1696, only ſupport bills executed according to the cuſtom of nations; and conſequently, by declaring this writ null, the Court will not forfeit the creditor of a valid obligation, or aſſume legiſlative powers; but only find, that the writ founded on does not fall within the deſcription of what is intended to be privileged by thoſe ſtatutes; and is therefore null at common law, as wanting the form and ſolemnities of atteſtation requiſite to other obligations by the acts 1579 and 1681. 3*tio*, This addition renders it not a proper bill; becauſe the nature of a bill implies, that the creditor has no uſe for his money till the term of payment; ſo that he cannot even be obliged to take payment ſooner; and conſequently his exacting intereſt from the date is unjuſt, as well as informal. Neither can this clauſe be held *pro non adjecta*; as it is not a ſuperfluous addition, like a ſtipulation of intereſt from the term of payment, but an unlawful condition; which muſt vitiate the writ, and have the ſame effect as an uſurious ſtipulation in a common contract or obligation. Inland bills never were intended as laſting ſecurities more than foreign ones; but were authoriſed by the act 1696, for the benefit of inland commerce, upon the ſame footing as foreign bills. 4*to*, If this writ is not a bill, it is good for nothing; becauſe it wants all the requiſites for conſtituting a valid obligation at common law. Miſſives, *in re mercatoria*, are held probative, in reſpect to the practice of nations, and benefit of commerce; and other writs have been privileged from different conſiderations, that do not apply to ſuch writs as the preſent; which can only derive validity, in ſo far as authoriſed by ſtatute, in exception from the common rules of law; and where they do not come up to the exact nature of the writs intended to be privileged as bills, they muſt be altogether ineffectual. And, 5*to*, No evidence appears of its having been a general practice to draw bills in this country after this manner.

It is true, ſome ſuch bills were formerly ſuſtained; but this bill was drawn before any of thoſe deciſions; and therefore the drawer could not have relied on them. Beſides, an erroneous practice, when diſcovered, cannot be too ſoon corrected. The deciſions ſince the 1738, have uniformly ſuſtained the preſent objection; and in doing ſo they do not make a new law, having a retroſpect, but only declare what is now found to have been originally an intrinſic nullity. No 32.

'THE LORDS ſuſtained the objection to the bill, and found the ſame null.'

Act. *Dav. Rae.* Alt. *Ja. Burnett.*
D. Rae. *Fol. Dic. v.* 3. *p.* 75. *Fac. Col. No* 57. *p.* 94.

*** Lord Kames reports the ſame caſe:

SOME years ago it was an uſual practice, when bills were taken for an antecedent ground of debt, to make them bear intereſt from the date; and this practice was authoriſed by a number of deciſions, of the Court of Seſſion, prior to the 1740. After that period a different opinion prevailed. To ſtipulate intereſt was reckoned not ſtrictly conformable to the nature of a bill; and ſuch bills at preſent are therefore annulled.

Robert Brown of Whitecroft was debtor to George Brown merchant in Edinburgh, in a ſhop account of L. 76 Sterling, for which a bill was granted 19th April 1725, ſtipulating intereſt from the date. And with the bill was produced in proceſs an account of the furniſhings taken from the drawer's books, amounting preciſely to the ſum in the bill, and coming down to within a few days of the date of the bill. In November 1726, the bill was proteſted for not payment, and inhibition paſt in December thereafter. A horning was raiſed and executed in July 1730; and an adjudication was led in June 1740.

In the ranking of Robert Brown's creditors, it was *objected* againſt the adjudication, That the bill, upon which it proceeded, was null and void, as bearing intereſt from the date; and the Court accordingly ſuſtained the objection.

It occurred at adviſing, 1*mo*, That the act 18th, Parl. 1621, allows, at the lending of money, a year's intereſt to be added in the bond. The act gives no authority for the like practice in bills; and yet this is allowed in bills, by the authority of cuſtom. And if this practice be good by cuſtom; much more the practice of ſtipulating intereſt from the date; becauſe no inſtance can be given in law, where the greater liberty is lawful and the leſs liberty unlawful. 2*do*, Here was a debt of L. 76, for which a bill was taken. It was at that period the duty of the debtor, if he could not pay the debt, to pay at leaſt intereſt for it. Now, it is inconceivable that any objection ſhould lie againſt a bill, or any writing, containing a ſtipulation for payment of intereſt, which the debtor in conſcience was bound to pay independent of the ſtipulation. 3*tio*, The pactioning intereſt, from the date of the bill, if it annulled the bill, did not certainly forfeit the anterior debt. Suppoſing the bill to be invalid as a *literarum obligatio*, it is at leaſt a good evidence of the debt. Therefore, inſtead of finding the bill null, it

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was propoſed, but without ſucceſs, to remit the cauſe to the Ordinary, in order to give an opportunity to aſtruct the debt by further evidence.

In adviſing a reclaiming petition for the adjudger, it was *urged*, That the bill was taken *anno* 1725; when, by the deciſions of the Court, it was publiſhed to the nation, that bills with intereſt from their date were legal ſecurities; and therefore, to cut down this bill is ſhowing a ſovereign contempt to the deciſions of the Court of Seſſion, as not in the leaſt degree to be truſted or regarded. I propoſed, therefore, that the bill ſhould be ſuſtained upon this particular medium, of being granted by the authority of the Court; and that an act of ſederunt ſhould be made againſt ſuch bills in time coming. The interlocutor notwithſtanding was adhered to; a laſting reproach upon the Judges who voted for it, as being inſenſible, or blind, to the groſſeſt act of injuſtice, viz. the forfeiting a man for doing what was declared, at the time, lawful by the Sovereign Court of the kingdom.

Select Dec. No 136. *p.* 192.

1760. *January* 2.

ROBERT M'LAUCHLAN of that Ilk *againſt* ALLAN M'LAUCHLAN.

No 33.
A bill bearing annualrent and penalty, ſuſtained, where the debt was acknowledged by the acceptor.

IN the year 1726, Allan M'Lauchlan accepted a bill to Evan M'Lauchlan, for 1000 merks, *with annualrents and penalty, conform to law*; which is holograph of Allan the acceptor.

Robert M'Lauchlan acquired right to this bill. Allan paid the annualrents regularly for ſeveral years; but having at length refuſed payment, Robert brought an action againſt him.

Objected for the defender, The bill is null, as bearing annualrent and penalty.

Pleaded for the purſuer, 1*mo*, At the period when this bill was granted, the form in which it was executed was held legal. By deciſions of a later date, the contrary has been found; but ſuch deciſions ought not to have a retroſpect. 2*do*, The words in the bill, 'annualrent and penalty, *conform to law*,' can have no effect. Annualrent is due, whether it be ſtipulated or not; penalty is not due, although ſtipulated: The words are therefore ſuperfluous, and muſt be held *pro non adjectis*. The defender is barred, *personali exceptione*, from objecting this nullity; for that he himſelf both wrote the bill, and homologated it, by payment of annualrent for ſeveral years.

Answered for the defender, Bills were introduced for the benefit of commerce, to facilitate tranſactions, by ſupplying the place of ready money, but not to remain as permanent ſecurities: That therefore the form of bills, in all trading countries, is preciſe and uniform; and in every country, except Scotland, their endurance is limited by a ſhort preſcription: But as in this country there is no ſtatute of limitations, the Court has been the more attentive to define the nature and form of ſuch ſlender ſecurities; and to declare them void when they contain ſtipulations beyond their proper form. The conſequences ariſing from their be-