1749. *November* 21. WILLIAM BRODIE *against* JOHN STEVEN.

No 36.
Indorſation of a bill from a father, actually, but not notourly inſolvent, to a ſon, found not to fall under the act 1621.

JOHN DUNBAR of Burgie drew on Sir Ludovick Grant, in theſe terms, " Out of " the firſt and readieſt of my fund of the eſtate of Dalmahoy, pay to Simon Dun- " bar, or his order, L. 100 Sterling; which ſhall be allowed you in part payment " of the ſame."

Simon Dunbar had been ſent to town by his father Burgie, for his education as a merchant; and being in the ſervice of John Steven, indorſed the bill to him for value; after which he went abroad; the value being a liſt of debts to be paid when he recovered the money.

A creditor of Burgie's arreſted in Grant's hands; and, upon its being owned that his intereſt on Dalmahoy was a truſt for Burgie, pleaded to be preferred to Mr Steven, on the act 1621; as the bill was a gratuity from a father, after he was inſolvent, to his ſon.

THE LORD ORDINARY, 15th Febuary, " In reſpect it was admitted it was not " proven Burgie was habite and repute inſolvent, at the time of his drawing the " bill in queſtion; repelled the objection to it founded on the act of Parliament " 1621, Mr Steven being an onerous aſſignee to the ſaid bill."

Pleaded in a reclaiming bill, To reduce a deed in favour of a conjunct perſon, it is not neceſſary to prove known, but only actual inſolvency.

Answered, The indorſee cannot be looked upon as in any fraud, for having taken an indorſation of a bill, from a father to a ſon, deſigned to furniſh him with neceſſaries for his education, and outſetting in buſineſs; and with which neceſſaries he furniſhed him accordingly.

Observed, that this caſe was the ſame as if the father, for neceſſaries furniſhed to his ſon, had granted bill to the furniſher; being only made payable to the ſon for conveniency, that he might provide himſelf by indorſing it, his father not being at hand.

THE LORDS found that the caſe did not fall under the ſtatute 1621.

Act. *H. Home.* Alt. *T. Hay.* Clerk, *Pringle.*

Fol. Dic. v. 3. *p.* 48. *D. Falconer, v.* 2. *p.* 112.

1760. *Auguſt* 1.

GEORGE BEAN, Deputy Sheriff-Clerk of Aberdeen, *againſt* RACHEL STRACHAN, Daughter of William Strachan ſenior, Merchant in Aberdeen.

No 37.
A perſon inſolvent diſcounted bills, and paid a debt to his *ſiſter* with the *caſh*. She was ignorant of his inſolven-

WILLIAM STRACHAN junior, merchant in Aberdeen, being debtor to his ſiſter Rachel Strachan in a bond for L. 240,* and finding his affairs in a deſperate ſitu-

* *See* Executors of M'Commie againſt Strachans, 29th July 1760, Fac. Col. p. 440. *vote* LEGACY in this Dictionary.

No 37.
cy, and did not know how he came by the money. Although he was rendered bankrupt within 60 days, the payment found good.

ation, he, in the beginning of September 1754, was adviſed by a friend, whom he conſulted on the occaſion, to raiſe money by diſcounting bills which he then had, and to apply the proceeds for payment of his ſiſter's bond, which had been granted for her proportion of her father's effects.

Accordingly, by the aſſiſtance of his ordinary agent, who did not know his real ſituation, he got bills diſcounted to the amount of L. 272 Sterling; and with that money he paid his ſiſter the principal and intereſt due on the above bond, and on a ſeparate note, amounting together to L. 260 Sterling: But it did not appear, that he then explained to her the ſtate of his affairs, or that ſhe knew in what manner he had raiſed the money.

This happened on the 2d of September, and immediately thereafter William Strachan abſconded. On the 14th of that month he was apprehended on a warrant of the Sheriff, at the application of his creditors; and horning and caption were, within the ſixty days, raiſed againſt him. On the 16th of September he granted a diſpoſition *omnium bonorum* to truſtees for behoof of his creditors; to which almoſt all of them acceded, (particularly George Bean, a creditor in about L. 50,) and received a dividend far ſhort of paying their debts.

George Bean afterwards uſed arreſtment in the hands of ſundry perſons, particularly of Rachel Strachan; againſt whom he *insisted* in a furthcoming, upon this ground, That ſhe had improperly received payment of her bond from her brother when bankrupt. Upon a proof, the facts appeared as already ſtated.

Pleaded for the purſuer, Rachel Strachan lived in family with her brother, before and at the time of his bankruptcy, ſo could not be ſuppoſed altogether ignorant of his affairs; and the method taken for giving her an unjuſt preference, by getting bills diſcounted, and then paying over to her the money, when he well knew he was utterly inſolvent, and within ſixty days of his notour bankrutcy, was a fraudulent device, which muſt be preſumed to have been contrived between them for eluding the effect of the act 1696. Therefore ſuch tranſaction between conjunct and confident perſons is challengeable or reducible at common law, and as falling within the ſpirit and intendment of both the acts 1621 and 1696.

Answered for the defender, That her ignorance of her brother's ſituation is as clearly proved as a negative can be; and it is alſo proved, that ſhe had no concern in the diſcounting the bills. The payment made to her is therefore not challengeable at common law, as the *actio Pauliana* was only competent againſt creditors who were *participes fraudis* with the bankrupt; and did not debar lawful creditors from taking payment, even when they knew their debtor to be *lapsus*; *l.* 6. § 6. 8. *et l.* 10. § 16. *ff. Quæ in fraud. cred.*

It is lawful for every creditor to take his payment when he can get it, and the fraud of his debtor cannot hurt him. Again, the firſt alternative of the act 1621 only relates to *gratuitous* alienations; and the ſecond to voluntary payments, or conveyances made after diligence is done againſt the debtor. This caſe falls within neither of them, as the defender was an onerous creditor, and no diligence had been done againſt the debtor at the time. Beſides, by the *payments* men-

tioned in the act, it is thought, are to be underſtood, conveyances of *nomina*, or other ſubjects *in ſolutum*; and not thoſe made in ready money. Nor does the act 1696 extend to this caſe; for although the word *deeds* in it has been found to extend to the delivery of goods, which is a ſpecies of alienation; yet payment in caſh being a natural extinction of the debt, cannot be recalled. Nor can the debt be revived by the debtor's afterwards becoming a notour bankrupt; 26th January 1751, Forbes *contra* Brebner, *infra*, *h. t.* The annulling ſuch payments would be in effect deſtructive of all commerce. No 37.

'THE LORDS found, The payment made to Rachel Strachan, the defender, does not fall within the act 1696; and therefore aſſoilzie the defender, and decern; but find no expences due.'

Act. *Burnet.* Alt. *Rae, Ferguson.*

D. Rae. *Fol. Dic. v. 3. p. 48. Fac. Col. No 243. p. 444.*

1766. *July* 25. JANET GIBB *againſt* ALEXANDER LIVINGSTON.

No 38.
In a reduction of a bond upon the firſt branch of the act 1621; found competent to redargue by parole evidence the narrative of the bond, bearing to be for borrowed money.

LAURENCE GIBB, upon the narrative, that he had borrowed and received from Andrew Williamſon, his ſon-in-law, the ſum of L. 50 Sterling, granted an heritable bond for that ſum, over a tenement in the town of St Andrew's. This bond was adjudged by Livingſton, a creditor of Williamſon.

Janet Gibb, a creditor of Laurence Gibb, having brought a reduction of this bond, upon the firſt branch of the act 1621, the firſt queſtion was, whether a reduction was competent againſt the defender, a creditor-adjudger of the bond. The Court 'Repelled the defence, that adjudgers from a conjunct and confident perſon, are not liable to the challenge ariſing from the act 1621; but, in reſpect of the particular circumſtances of this caſe, found that the defender is not obliged to aſtruct the heritable bond in queſtion.'

The purſuer having offered to prove by witneſſes, that the bond was gratuitous, the defender *contended*, That parole-evidence was not competent to redargue the narrative of the bond; founding both upon the general principal, that writing cannot be defeated by witneſſes, and alſo on the tenor of the act, which mentions only a proof by writing, or the oath of party.

Answered for the purſuer, A proof by witneſſes is admitted in all caſes of fraud, though the effect of that proof may be to cut down a writing. Had it been alleged that Laurence Gibb was impoſed on in granting the bond, parole-evidence would have been unqueſtionably competent. It ought to make no difference, that Gibb himſelf was a partaker of the fraud.

The act only ſays, That a proof by oath or writ of party ſhall *be ſufficient*. But this is not abſolutely excluſive of a proof by witneſſes.