curities, but two separate transactions; while, in the present, there was but one transaction, one debt, and one security. No. 6.

The pursuers' argument rested upon the supposition, that, previous to the date of the bond, the defender was merely a personal creditor of Nisbet's for this sum. But the reverse of this was the fact; for all the advances were made by Hart at his own risk, and upon a bill or note granted by Nisbet to him; and if Hart had failed previous to the granting of the heritable security, he, and not Nisbet, would have been held as the defender's debtor. No inference could be drawn from the narrative of the bond, which bore that the money had been borrowed as at Martinmas last. It was well known, that such narratives occurred every day in the course of business, always indeed when money was borrowed between terms; but it never was maintained that this mode of transacting made such debts, truly *nova debita*, to be regarded as securities only for prior debts. It was equally a mistake to say there was here an old debt and a new creditor; as in fact both the debt and the creditor were new upon the 19th of January when the bond was granted.

It was observed upon the Bench, That where money was advanced in consequence of a communing, that an heritable security should be granted, such bond was truly a *novum debitum*, and did not fall under the statute.

The Lords accordingly adhered.

Lord Ordinary, *Kennet*. For Mansfield, &c. *Macqueen*.
Clerk, *Kirkpatrick*. For Cairns *Sol. H. Dundas*.

R. H. *Fac. Coll. No. 77. p. 222.*

1771. *July* 16.

THOMAS MANSON, Writer in Edinburgh, *against* JOHN ANGUS, Merchant in Edinburgh.

No. 7.
Reduction upon the act 1696, c. 5. —Deposition of a bill of exchange, in security of a former debt, falls under the statute.

ANGUS had for several years been engaged in different transactions with Andrew Farquhar, in furnishing him with goods from his shop, and in discounting and giving him cash, on his own acceptances, for his bills. In the course of these, Farquhar had indorsed to Angus two bills, one for £110, accepted by Neil Campbell, and another for £50, accepted by John Austin. Payment of these having been demanded from the accepters without effect, Angus, upon the 5th January 1767, applied to Farquhar; who offered to indorse him a bill for £255, drawn by Thomas Johnston of Glasgow upon Johnston and Smith in Edinburgh. Farquhar and Angus went immediately to the house of Johnston and Smith, who demurred as to accepting or making payment of the bill unless they were allowed to retain a part of the contents on account of a debt due by Farquhar. This matter was not then settled; but

No. 7. the bill was put into the hands of Angus; who accordingly granted to Farquhar the following obligation and receipt:

"*Edinburgh, January 5*, 1767.

"Received from Mr. Andrew Farquhar a draught upon Messrs. Johnston "and Smith, payable one day after date, drawn by Thomas Johnston in Glas- "gow, value £255 Sterling; as also another bill accepted by the said Thomas "Johnston for £180. 18s. Sterling, five months after date; which I oblige "myself to deliver up to Mr. Farquhar upon his paying £160 Sterling of "bills accepted by Messrs. Farquhar and Campbell; and the above bills I "promise to deliver up to the said Mr. Farquhar upon his paying me the above "sum."

Three days thereafter, the bill for £255 was presented by Angus, was accepted by Johnston and Smith, and the negociation closed by Johnston and Smith placing £160 to the credit of Angus's account with them, and £95 to that of Farquhar's. Farquhar's name was on the bill as indorsee; but, in point of fact, it was not positively ascertained whether that had been done upon the 5th, when the bill was delived over to Angus, or on the 8th, when the transaction was settled with Johnston and Smith.

Farquhar became notourly bankrupt upon the 15th February 1767, being within less than 60 days of the above transaction.

Previous thereto, Manson had granted a bill to Farquhar, dated 29th November 1766, for £85. This bill was indorsed to Angus; who having charged Manson for payment, he obtained a suspension, and at the same time brought a process of reduction, founding upon the above transaction; and concluding, that as Farquhar, upon the eve, and within 60 days of notour bankruptcy, had made a conveyance to Angus, in security of former contractions, such conveyance fell to be reduced upon the act 1696, c. 5.

In support of his action, the pursuer pleaded:

1*mo*, If the bill was indorsed, there could be no doubt of the result: It fell directly under the terms of the statute; and that such was the fact was clearly shewn from a variety of circumstances. The bill had Farquhar's name on the back of it; and it was in proof, that the words, "received the contents," had been written by Johnston and Smith's clerk only very lately, when the draught was recovered out of their hands; so that it must be presumed to have been indorsed when first delivered to Angus.

This presumption was confirmed by a number of circumstances. It was acknowledged by Angus, that Farquhar had offered to indorse the bill to him; and in every other transaction in which they had been engaged, Farquhar's bills had uniformly been conveyed to Angus by indorsation. Johnston and Smith's hesitating about accepting the draught rendered it the more necessary that there should be an indorsation; for as their scruples might not have been

got over, so that they might neither have accepted nor paid the draught at all, Angus's security would have depended upon his recourse against the drawer; which, without an indorsation from Farquhar, he could not have obtained. The mode in which the transaction was settled proved the same thing; as, unless Angus had been an onerous indorsee, he had no right to make a demand for any part of the bill; nor would Johnston and Smith have put any part of it to his credit upon other terms. Angus himself had acknowledged that Farquhar's name had been adhibited "either in the shop of Johnston and "Smith, or immediately before going into the shop, in order to get payment;" which, qualified as it was, amounted to a sufficient admission that there was an indorsation previous to the payment, and that Angus of course had presented it indorsed. No. 7.

From this fact, if sufficiently established, the conclusion was obvious. The statute expressly annulled all assignations "or other deeds" in favour of a creditor, either "for his satisfaction or farther security." The indorsation of a bill to a creditor was a deed done for his satisfaction or farther security: It was a conveyance of a *nomen debitoris* as much as any common assignation; and as such reducible according to the express terms of the statute. 2d February 1700, Durward *contra* Wilson, No. 191. p. 1119. 16th January 1713, Campbell against Grahame, No. 192. p. 1120.

2do, Although there had been no actual indorsation, there was in the present question security granted *tantamount* thereto; which equally fell under the description of an unfair and partial preference, and was directly struck at by the statute. An assignation to a bond was a written conveyance to the debt, and an order to pay it to the assignee: An indorsation to a bill was of the same nature. But if the same thing was done *rebus ipsis et factis*, where lay the difference, whether a formal written conveyance was executed or not? Though the defender had truly declined to take a written indorsation, he took what was equivalent. He received the bill from his debtor, and gave his receipt, specifying the purpose for which it was given. He carried the bill to the person on whom it was drawn; and lest any scruple should be made for want of an indorsation, the creditor went along with him, *viva voce* confirmed his statement, and not only verbally ordered Johnston and Smith to pay it in the manner agreed on, but blank indorsed his name in token of his assent.

If the defender therefore had not a real indorsation from the beginning, he at any rate recovered payment for his debt, with all the advantages that security could have bestowed. To say that this was no conveyance in his favour, was *fraudem facere legi*. It would have been putting it in his power to hold the bill as indorsed or not indorsed as best suited his purpose; for as the draught was produced with his name upon it, and as he had the same benefit which would have resulted from the most formal conveyance, the necessary consequence of his doctrine was, that he might either call it an indorsed bill or not as he should find convenient.

No. 7. The scheme practised, in the present instance, was a complete device; and if effect was given to it, it would be opening a door to elude the act 1696, and would be productive of the most dangerous consequences. Laws against fraud ought to have their full effect. The bankrupt statutes had never received a narrow construction, nor had protection been given to any species of device which fell within their intendment. M'Kenzie's obs. Statute 1621. In the present case, indeed, no extension was necessary: The voucher of debt was given to the creditor for the express purpose of enabling him to recover his payment: That purpose was accomplished; so that the whole transaction fell directly under the express terms and spirit of the enactment.

The defence stated, that the transaction called in question was a *bona fide* payment, and not struck at by the statute, was totally unfounded, both as to the fact and conclusion. It was a question indeed of some difficulty, how far actual payment in cash to one creditor in preference to the rest, ought not to be considered as within the intendment of the statute; and accordingly, whenever ready money payments on the eve of bankruptcy had been sustained, the rule of law was, that they ought at least to be narrowly watched and strictly interpreted; 27th January 1715, Forbes, No. 193. p. 1124. 4th February 1729, Eccles against Creditors of Merchiston, No. 197. p. 1128. But whatever might be admitted in cases directly of that nature, it was unquestionable, that the transferring of securities, or delivering of effects, for the purpose of operating payment, stood upon a very different footing. A person on the eve of bankruptcy was not allowed to put a hand to his effects, far less to his bonds and bills, so as to give a preference to one creditor over another. If such measures were permitted, another palpable device would be sanctioned to elude the statute; and, in the present instance, no ready money payment had been made, but a security merely granted to a much larger amount than the debt, from which indeed it was expected that payment would be obtained.

The defender's argument, with regard to the impignoration of *nomina debitorum*, when applied to the present case, resolved into a mere verbal dispute, and was in other respects inconclusive. *Nomina debitorum*, under which were included bonds and bills, might be given security, or, according to the doctrine of the civil law, might be impignorated without an absolute transference of the right. Title deeds of estates had sometimes been impignorated, and effect given to the transaction, 21st December 1626, Dundas against Strang, No. 35. p. 8354. and the decision, in the case of Milligan against Milligan, in 1760, (not reported) established, that the impignoration of a bond would have been effectual, provided there had been sufficient evidence of the fact. The pursuer could not agree to the defender's doctrine, that, notwithstanding the impignoration of a *nomen debitoris*, the full right might be conveyed by voluntary assignation, or carried off by the legal diligence of creditors; so that, in the present case, the bill being still attachable by the diligence of Farquhar's creditors, no certain preference or security was created. For though a right no doubt still remained in the person of Farquhar, it was a right sub-

ject to the security which had been constituted in favour of Angus; and it was impossible that either voluntary conveyance or legal diligence could carry out of the person of Farquhar a better or more ample right than he himself had at the time. Stair, B. 1. T. 13. § 11. No. 7.

But it was perfectly immaterial, whether the present transaction was termed a pledge or depositation, or received some other appellation. From the *res gesta*, it was unquestionable that a security was intended; that a security was accordingly granted, in consequence of which the creditor *de facto* operated his payment: And as the act 1696 admitted of no distinction with regard to the precise denomination of the security challenged, the partial preference created, fell equally under the words as under the spirit and intendment of the enactment.

The defender pleaded:

1*mo*, As the pursuer was insisting for reduction of a particular transaction, as falling under the retrospect of the act 1696, it was incumbent upon him, in a complete manner, to prove the facts and circumstances on which his action was founded. In this, however, he had totally failed; for, so far from having proved that the bill had been indorsed by Farquhar to the defender, there was, so far as a negative was capable of proof, sufficient circumstantial evidence that no indorsation had been granted.

From the style of the receipt, it was evident that the bills were only put into the defender's hands to lie as a deposit; as, instead of being obliged to account to Farquhar for the surplus after his own payment, he was expressly taken bound to re-deliver the bills themselves; which was inconsistent with the idea of there having been an indorsation, and the defender thereby vested in the full right to receive payment. The name of Farquhar only was found upon the bill; but if the defender had been truly the holder or indorsee, his name also must necessarily have been indorsed on it when the contents were paid. If the bill had been vested in the defender by indorsation, he would naturally have gone with it directly to Johnston and Smith, either to get it accepted, or to protest it, which would have entitled him to recourse against the drawer; but when, instead of doing so, Farquhar always went alongst with him when payment of the bill was demanded, it could be owing to no other reason, than that he was all along considered as the holder, and as the only person entitled to uplift and discharge the contents.

2*do*, In order to bring a case within the enactment of the statute, it was incumbent upon the pursuer of the reduction to shew that there had been a deed granted by the bankrupt, in favour of one of his creditors, either for his satisfaction or farther security, in preference to the rest. It was also obvious, that a deed for satisfaction, or farther security, must mean such a right as in a competition would entitle the receiver to be preferred to other creditors. According to the circumstances of the present question, no security of that nature had been granted. The nature of the subject did not admit of it; nor could it be by delivery or depositation alone that a preference could be created.

No. 7. A bill, which was *nomen debitoris*, was, in its own nature, an incorporeal right, incapable of being transferred by actual delivery. In order therefore to transfer a *nomen debitoris* either absolutely or in security, the law required that there should be a written conveyance executed by the creditor, either a disposition, assignation, or indorsation, according to the nature of the debt. Till this was done, the right *inhæret ossibus creditoris*, and the delivery of the *instrumentum* without the conveyance, was of no consequence. This being the rule of law, the nature and tendency of the transaction challenged was easily explained. It amounted to nothing more than a depositation of the bill in the defender's hands, where the contents were as much affectable by the diligence of creditors as if it had all along remained in Farquhar's possession. No real lien therefore was created in the defender's favour, either on the bill itself or the contents, which could have been available in a competition with other creditors; any one of whom, upon getting right to the contents by arrestment and furthcoming, would have been entitled to force it out of his hands by legal process.

Written title-deeds, or *instrumenta* of every description, were merely an accessory to the right which they served to vouch, and incapable of being transmitted as a distinct subject of property, either absolutely or in security of debt. In a question which occurred upon the bankruptcy of Thomson and Tabor, the opinion of the Court was, that the *ipsa corpora* of bills, nothing having been done to affect the contents, were not capable of being attached by arrestment; and if they were not attachable as a separate subject by legal diligence, it was equally clear that they could not be transferred, or a security created on them by a voluntary deed of the party. See No. 82. p. 756.

Such being the nature of *nomina debitorum* by the law of Scotland, the pursuer's argument, upon the impignoration of such subjects, was entirely misconceived. The doctrine referred to was that of the Roman law, and was only applicable to what were properly moveable subjects, where the *jus in re* was truly transferred; but not to cases where, it being impossible that any real lien could be created, the transaction might be a depositation or some such contract, but could never amount to a pledge or right in security.

The enactment of the statute therefore could have no effect upon the *species facti* now stated; no security was granted which could be reduced; no preference was created which it was the object and intendment of the law to set aside; and though the defender had thereafter received payment of his debt, his doing so, provided it was accompanied with *bona fides* upon his part, was what the law did not prohibit.

3tio, The statute, with regard to actual payments made by the debtor to the creditor upon the very eve of bankruptcy, was perfectly silent. These, for obvious reasons, were not intended to fall within the retrospective operations of the enactment; and it had accordingly been frequently decided, that such transactions were as much excepted as if there had been a clause expressly saving them. The question therefore came to be, Whether the transaction, in the present instance, was not substantially a payment?

No. 7.

It point of fact, it was undeniable, that, at the time of the transaction challenged, Farquhar was publicly carrying on trade in his usual way, and was not rendered bankrupt till more than forty days thereafter. It was further certain, that, under these circumstances, the defender had received real and actual payment of a debt justly due; and there was no evidence whatever that he was then privy to or in the knowledge of his debtor's approaching bankruptcy. Every reason which could be assigned for sustaining payments in general, though within sixty days of the debtor's bankruptcy, applied with equal force to the present case. If the payment the defender had received was voided, and the money once fairly vested in him drawn back, upon account of a future contingency which he could not forsee, the hardship and inconvenience to trade and commerce occurred in as strong a degree as could be figured. When the sum in question was paid, the bills, the vouchers of the claim, were immediately delivered up, and the debt extinguished. By this payment, therefore, which by law the defender was bound to accept of when offered, he was disabled from doing diligence, upon the footing of his former debt, alongst with the other creditors, as effectually as in any other case of actual payment, and without the corresponding advantage.

The statute was a correctory law, and was therefore to receive the most strict and limited interpretation. M'Kenzie, B. 1. T. 4. § 14, Bankton, B. 1. T. 1. § 67. Erskine, B. 1. T. 1. § 50. Feb. 1728, Creditors of Chatney, No. 195. p. 1127; 25th Jan. 1733, Buchanan *contra* Arbuchnot, No. 198. p. 1128; Jan. 1734, Creditors of Scot *contra* Charteris, No. 202. p. 1229; 13th Nov. 1744, Shedgrass *contra* Reate's Creditors, No. 194. p. 1095; 18th Feb. 1755, Creditors of Woodstone *contra* Scott, No. 178. p. 1102; 15th Feb. 1771, Mansfield and Co. *contra* Cairns, APPENDIX, PART I. No. 6. *supra*.

Several of the Judges thought there was sufficient evidence of there having been an indorsation. They did not, however, rest their judgment upon that point; but were of opinion, 1*st*, That there was no ready money payment; 2*d*, That by the transaction and deposition of the bill, a security had been intended, contrived also in such a way as if possible to elude the statute; and as this was a devise entered into *fraudem facere legi*, no doubt was entertained that it should be set aside.

The judgment of the Court was, "Sustain the reasons of reduction founded "on the act 1696, and reduce, decern, and also suspend the letters at the in"stance of John Angus, &c." To which, upon advising a reclaiming petition and answers, the Court adhered.

Lord Ordinary, *Elliock*. For Manson, *A. Lockhart, Ilay Campbell, Maclaurin*
Clerk, *Kirkpatrick*. For Angus, *Marquess, Blair*.

R. H. *Fac. Coll. No. 95. p. 283.*

*** The cause was appealed. The House of Lords (22d March 1774) ORDERED and ADJUDGED, that the appeal be dismissed, and that the interlocutors therein complained of be, and are hereby affirmed.