

given in satisfaction *pro tanto* of the obligation prestable under the prior contract between the parties, is of the nature of a preference liable to be set aside under the the Act 1696. The case of *Speir v. Dunlop* goes far to support this view, for there the indorsee of a bill, having within sixty days of the acceptors' bankruptcy obtained from him a sum of money as a provision for payment of the bill when it fell due, the House of Lords, notwithstanding the verdict of a jury, which negatived an issue of direct fraud, remitted the case to the Court of Session, to consider whether, independently of that, the transaction was not struck at by the Act 1696.

Now, here the bill was accepted in security of the freight to become due. It is not the case of a sum of money paid down by Marshall & Co. as a price for not completing the contract *simpliciter*, but as a prepayment—a payment by anticipation—to make Robb & Co. safe in going on with the transaction. It was not, therefore, in any sense a *novum debitum*. The money was truly deposited in the hands of Robb & Co. till the period of payment under the contract arrived, and if they broke their contract, they would have had to repay the money. The object of the statute, no doubt, was to protect all transactions in the ordinary course of business. But the demand for security was just a means of conussing the debtor, and, whether justifiable or not, I cannot regard it as a transaction in the ordinary course of business. On these grounds, I think we should adhere to the Lord Ordinary's interlocutor.

If I could take any other view of the case, it would be that the £1000 was paid for a debt not due. It was plainly not given as a present or as a bribe. It was given to be imputed towards the payment which was to become due on the vessel leaving the Tail of the Bank. On that event not occurring, a claim for repetition would have arisen.

In conclusion, I may add that I have not said anything in regard to the defender's alleged claim of damage, because, if they have such claim, I am of opinion that it must be vindicated in some other process.

The other Judges concurred.

Agent for Pursuer—Alexander Morison, S.S.S.

Agents for Respondents—J. W. & S. Mackenzie, W.S.

Saturday, December 24.

STEWART, PETITIONER.

*Parent and Child—Custody of Child.* Circumstances in which held that a delicate child of five years of age, whose parents lived separately under a voluntary deed of separation, should be allowed to remain under its mother's care.

This was a petition by a father for the custody of a male child, who was born in August 1865, brought in the following circumstances—By a voluntary deed the petitioner and his wife had agreed in 1867 to live apart, and that the wife should have custody of the child of the marriage, and receive a certain sum as aliment, "under reservation of the petitioner's claim at any time to the custody of his child in terms of law." The wife alleged that her husband had come to her home, and in the most violent and abusive manner demanded that his child should be given up to

him. She further alleged that the child was in delicate health, and should be allowed to remain in her custody. She produced a certificate stating—"I hereby certify, on soul and conscience, that John Paxton Stewart, presently residing at 50 King Street, Tradeston, now aged five years, had, when six months old, an attack of bronchitis with severe ophthalmia (inflammation of eyes), which weakened and reduced him very much. From the protracted character of the bronchial affection, and its frequent recurrence since that time upon slight exposure to cold, he has never regained strength. Besides, when about three years of age, he suffered long and severely from hooping-cough with bronchitis, which so shattered his slender and tender constitution that until he was three and a-half years old he was unable to walk alone. In addition, he has always been liable to stomach derangements, frequently accompanied with cerebral (brain) irritation, often followed by convergent strabismus (squint), as well as inability to speak, which even now he cannot distinctly, plainly and too strongly indicating his delicate, sensitive, and easily irritated brain. Having been in attendance at his birth, and having watched him in his numerous ailments, I have no hesitation in giving my decided opinion that to remove him from his mother, who has nursed him so carefully and tenderly, and place him under the care of a stranger, totally unacquainted with his upbringing and his delicate frame, would prove very prejudicial, and might even be dangerous to his life—A. L. KELLY, M.D., F.F.P.S., Glasgow."

She also produced a medical certificate from Professor Gairdner, to the effect—"There are sure signs that he is well taken care of at present by his most natural nurse and protector, and I think it would be a manifest injury to remove him from that protection. These things I certify on soul and conscience—W. G. GAIRDNER, M.D., F.R.C.P., Edinburgh."

The petitioner, on the other hand, produced a certificate from S. J. Moore, M.D., F.R.P.S., Glasgow, medico-legal examiner for Glasgow, to the effect—"The boy is apparently about five years of age, and very well developed for his years. After a most careful examination, I am of opinion that he is of good constitution, and at present in the enjoyment of excellent health; and I cannot see any reason why his health should be affected by his removal from the custody of his mother to that of his father."

The Court remitted to Professor Lister to visit the child, and report to the Court whether in his opinion the child would be injured by removal from the care of his mother. Professor Lister's report was that he found the child of delicate constitution, and much in need of careful tending.

SOLICITOR-GENERAL (CLARK) and MACLEAN for petitioner.

MACDONALD and LANG in answer.

The Court unanimously refused the prayer of the petition, in respect of Professor Lister's report, but suggested that means should be afforded to the petitioner to visit the child at reasonable times and places.

Agents for Petitioner—J. & R. D. Ross, W.S.

Agents for Respondents—Crawford & Guthrie, S.S.C.