

No 85.  
 terior arrest-  
 ment in the  
 hands of the  
 person drawn  
 upon.

of M'Tavish, 17th September 1775, upon a depending action against Grahame, in which he afterwards obtained decret.

A competition ensued betwixt Spotifwood and M'Neil, as to their preference upon the funds in M'Tavish's hands; in the course of which, Spotifwood repeated an action against M'Tavish for payment.

*Pleaded* for Spotifwood: Grahame's bill on M'Tavish, and the protest for non-acceptance, are equivalent to an intimated assignation; and, therefore, must be preferable to M'Neil's arrestment, which is posterior to the protest.

*Pleaded* for M'Neil: If Spotifwood had chosen to take the bill and protest as a virtual assignation, his action for payment lay against M'Tavish alone, as his proper debtor. He could not have had recourse against Grahame; for, the only warrantice implied in an assignation, is, that the debt exists; not that the debtor is solvent. But Spotifwood, by using arrestment in the hands of M'Tavish, rejected to rest on his security, and hold the bill as an assignation. The diligence imported, that M'Tavish remained debtor to Grahame, and that Spotifwood had still recourse on Grahame; which is inconsistent with the plea, that he is assigned to the debt. M'Neil's arrestment being prior to that used by Spotifwood, he is preferable.

The Court were of opinion, that the using of the arrestment afterwards, did not bar Spotifwood from pleading his preference on the bill and protest, as equivalent to an assignation intimated.

The judgment was, 'In respect of the bill drawn by Grahame upon M'Tavish, presented to him for acceptance on the first March 1775, and protested against him for not payment, on the first of May thereafter, find John Spotifwood and his attorney, preferable on the sums due by M'Tavish to the common debtor.'

For Spotifwood, *Solicitor General.*

*Alt. Crosbie.*

*Fol. Dic. v. 3. p. 79. Fac. Col. No 18. p. 33.*

\* \* \* *See* Mitchell against Mitchell, No 60. p. 1464.

\* \* \* *See* Hog against Frazer, in the next Section.

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## S E C T. II.

### Extraordinary Privileges of Bills.

1664. July 8. HUGH KENNEDY *against* GEORGE HUTCHISON.

No 86.  
 The acceptor  
 of a bill died  
 soon after ac-  
 ceptance, be-  
 fore any  
*mora* was in-  
 curred. No  
 exchange or  
 re-exchange

HUGH KENNEDY as assignee, by Sir Mark Ker, to a bill of exchange, which was drawn by George Hutchison, upon William Shaw at London, payable to Sir Mark, for like value received from him, did obtain decret against George Hutchison and one Shaw, as intromitters with the goods of William Shaw, both for the bill itself, and for the exchange, and re-exchange; the bill being protested for not payment. This decret being suspended, it was *alleged*, That there could

be no exchange, or re-exchange, nor any thing paid for the bill ; because the bill was not lawfully protested ; but being accepted by Shaw in London, he shortly after died ; and it was protested at his house where he died, before none of his relations, having neither wife nor children. The charger *answered*, That he took instruments on the defence, and alleged, that he needed not to prove the passive title. *Secondly*, That he had done all that was requisite, having protested at the dwelling-house where Shaw resided.

THE LORDS found, That in this case, death intervening, which was an accident, there could be no exchange nor re-exchange, because this was no voluntary failure, nor fault ; but found that the charger, as assignee, might either take himself for the single value against the person drawer of the bill, or to his successors on whom it was drawn.

*Fol. Dic. v. 1. p. 99. Stair; v. 1. p. 211.*

1699. *January 31.*

STUART and GORDON *against* ALEXANDER CAMPBELL, Merchant in Edinburgh.

A BILL of exchange is drawn upon two partners, which is accepted. Afterwards, one of the partners dying, the other is charged, and suspends on this reason, that he to whom the bill was first indorsed and made payable, was debtor, by a ticket, to one of the partners in the equivalent sum, before he assigned it ; and so he must have compensation.—*Answered, 1mo*, That could only reach his half of the bill who had the ground of compensation ; but can never operate for his half who had no such ground. *2do*, By the laws of France, and all other trading nations, compensation takes not place in bills of exchange ; which must have summary course, and may not be clogged with such inconveniencies, else all commerce may be stopped ; for a bill is reputed as a bag of money, which goes from hand to hand, *fictione brevis manus*, and serves as a fund of credit for a considerable space of time, like bank notes.—*Replied*, Compensation is, by construction of law, reputed equivalent to payment ; and, by the *concursus debiti et crediti*, operates extinction *ipso jure*. *2do*, Though foreign bills of exchange may claim this privilege, for celerity of trade, favoured *jure gentium* ; yet inland bills, as this is, cannot be excepted from the common law of compensation.—*Duplied*, By the very acceptance of the bill, you renounce any ground of compensation you had ; for, however it was competent before, you have passed from it now. The case being new, and having inconveniencies on both hands ; some moved to have it farther reasoned in their own presence ; but the plurality being clear, they repelled the compensation.

*Fol. Dic. v. 1. p. 98. Fountainball; v. 2. p. 39.*

\* \* \* The same case is reported by Dalrymple :

THERE being an inland precept drawn upon George Clerk and Alexander Campbell, payable to Gordon, or his order, and accepted ; Gordon indorsed the same to Stewart, who charges Campbell for payment.

No 86.  
found due,  
there being  
no voluntary  
fault.

No 87.  
Compensation upon the indorser's debt, not receivable against the onerous purchaser. This holds both in foreign and inland bills.