

the deed; and in order to give a feudal title to Lord Mansfield, June 12, 1827. she accordingly did so, and the appellant obtained possession of Airleywight, and the unpaid consideration money. It may be true, that this was accomplished through the intervention of his mother, but this was either with the view of carrying the deed into effect, or for the collusive purpose of attempting to defraud the respondents of their legacies. But even had the appellant rejected the succession, that would not have evacuated the legacies. For whoever took up the succession, did so under the burden of paying them; they being a burden on the succession. If the appellant's mother really took up the succession, she was liable; and he, as her gratuitous disponee, remains equally responsible.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed.\*

*Appellant's Authorities.*—3 Ersk. Inst. 9. 10.—2. 2. 17.—3. 3. 48.—Lockhart, July 31, 1767 (6370).—3 Ersk. Inst. 8. 82.

*Respondents' Authorities.*—3 Ersk. Inst. 8. 51.

SPOTTISWOODE AND ROBERTSON, *Solicitors.*

ROBERT LOW, Cashier of the Dundee Banking Company, Ap- No. 47.

pellant.—*Keay—John Campbell.*

HENRY BELL, Trustee on the Sequestrated Estate of James Duncan, Respondent.—*Wetherell—Stuart.*

*Bankrupt—Stat. 1696. c. 5.*—A party having drawn two bills on another, and discounted them with a Bank, and the bills having been dishonoured by non-acceptance; and the drawer having, within sixty days of his bankruptcy, drawn a bill on his son for the amount of the dishonoured bills, which he accepted, on receiving an heritable security in relief; and this bill having been indorsed to the Bank by the drawer, and he having been sequestrated,—Held (affirming the judgment of the Court of Session,) That the indorsation to the Bank was reducible under the act 1696, c. 5, but reversing the judgment so far as it imported that the bill was to be delivered up by the Bank to the trustee for the creditors of the bankrupt.

In June 1820, James Duncan, merchant in Dundee, drew June 12, 1827. two bills for L.300 each, which he discounted with the Dundee 1ST DIVISION. Bank. The bills were forwarded to the drawers for accept- Lords Meadow-  
ance, but were dishonoured, and returned under protest to the bank and Kin-  
neder.

\* The Lord Chief-Baron heard this appeal.

June 12, 1827. **Bank.** James Duncan being, from pecuniary embarrassments, unable to retire the bills, his eldest son, Patrick Duncan, on the 28th July 1826, accepted a bill, drawn by Alexander Duncan, per procuration of his father James, for L.615, and which Alexander indorsed (per procuration) to 'David Jobson, Esq. 'cashier of the Dundee Banking Company,' in satisfaction of the two dishonoured drafts, which were accordingly delivered up.

At the same time, James Duncan granted to his son Patrick an heritable bond in security, on which Patrick took infestment.

On the 4th September 1820, James Duncan was sequestrated, and Miller, having been elected trustee, raised an action of reduction against the Bank, (in whose place Bell now stood,) on the statute 1696, c. 5, and subsuming that the bill for L.615 was indorsed to the Bank on behalf of the bankrupt, in security of a former debt, with the intention of giving the Bank a partial preference, and to defraud and disappoint the pursuer and the other just and lawful creditors, and at a time when the drawer was in insolvent and bankrupt circumstances, and within 60 days of his sequestration; and therefore concluding, 'that the foresaid 'bill, with all that has followed or is competent to follow there- 'on, ought and should be reduced, retreated, rescinded, cassed, 'annulled, decerned, and declared, by decree of our said Lords, 'to have been from the beginning, to be now and in all time 'coming, null and void, and of no avail, force, strength, or 'effect in judgment, or outwith the same, in all time coming, 'and the pursuer reponed and restored thereagainst in inte- 'grum, and the said bill delivered up to the pursuer, as trustee 'foresaid.\* The Lord Ordinary (Meadowbank) sustained the reasons of reduction, and reduced, decerned, and declared conform to the conclusions of reduction and other conclusions libelled, with expenses. The Bank now limited its claim under the renewed bill to the precise sum which would have been due under the old bills. Thereafter the Lord Ordinary (Kinne- der) found, 'that on the 28th July 1820, the date of the bill 'challenged, the Dundee Banking Company were creditors of 'James Duncan, the bankrupt, for two bills of L.300, each pay- 'able at subsequent periods, which had been discounted by the 'Company; that the bill under reduction having been drawn 'by Alexander Duncan, per procuration of his father, the bank-

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\* The pursuer also challenged James' authority to Alexander, in respect of James' state of health at the time. But this ground of reduction was not at present insisted on.

rupt, was accepted by his brother, Patrick Duncan, who had previously obtained from his father an heritable bond and disposition in security for the sum of L.600, and that this bill, payable at a distant date, was delivered to the Dundee Banking Company in lieu of the two bills above mentioned, of which the terms of payment had not then arrived; that this bill was a deed in favour of the said Company, for their further security, in preference to the other creditors of the said James Duncan; and therefore adhered.' The Court, on the 19th November, 1822, on advising petition and answers, adhered, reserving the effect of the acceptance of the bill for L.615 by Patrick Duncan, the son of the bankrupt, in so far as the petitioners may operate thereon against the said acceptors; and also reserving to the petitioners to rank upon the sum of L.600 of the original debt against the bankrupt; and reserving to the respondents all objections, as accords.'

The Bank reclaimed, praying the Court to find, 'that the bill challenged is not to be delivered up;' and the trustee reclaimed, (he having also instituted an action of reduction against Patrick Duncan of the heritable security,) praying for a simple adherence to the Ordinary's interlocutor. The Court, on the 11th December 1822, refused the prayer of both as unnecessary.\*

The Bank then raised an action, in name of Low, their cashier, who had succeeded Jobson, before the Sheriff, against Patrick Duncan, founding on his acceptance, and concluding for payment of the amount. The Sheriff decerned in terms of the libel; but the Court of Session altered, and found, that as, by their interlocutor, they had cut down all right and title which the Bank could have to that bill, the indorsation could no longer be made the ground of action against the acceptor.†

Thereupon the Dundee Banking Company appealed against the judgments in the action at the instance of Duncan's trustee against them.

*Appellants.*—Patrick Duncan was not debtor to the bankrupt estate; an indorsation of his bill, therefore, cannot injure that estate. Patrick is solvent. Besides, the bill took the place of other bills, against which no objection existed, and on which there was parata executio. There is no accumulation of inte-

\* 2 Shaw and Dunlop, No. 74.

† See next case.

June 12, 1827. rest or expenses, and the bankrupt estate was liable under equally liquid documents of debt for the full amount of the second bill, as restricted. The title of the trustee to reduce is therefore discharged, for the estate suffered no prejudice. It appears that Patrick had taken an heritable bond from the bankrupt, but the Dundee Banking Company was ignorant of that transaction. They stand exactly as if no such bond had been granted. Even this bond bears date several days before the bill; and it is against all feudal principle that an heritable security should cover advances subsequently made. The Bank received the bill *optima fide*, in the ordinary course of business, and as full value for the original drafts. The statute 1696, c. 5. does not apply. The payment here was equivalent to cash, or to a payment in the course of trade; and, besides, the granting of the second bill was not voluntary.

*Chief Baron.*—Does it appear that any diligence was used on this bill?

*Campbell.*—We do not understand so. Execution on bills is, however, summary, and there was *parata executio*. Neither was any preference created by the last bill; no creditor was prejudiced. The contents of the bill would not otherwise have been divided among the other creditors on the estate. The bill neither increased the amount of debt against the estate, nor saved the appellants any process of law for the recovery of the amount due them.

*Chief Baron.*—Have we before us the question as to the heritable bond, except in so far as it may be used in argument?

*Campbell.*—No, my Lord, the House has not.

*Respondent.*—A bill was drawn (by Alexander per procurator of James) on 18th July, 1810, the date of the bond, but the Bank conceiving the procurator not to have been regular, another bill (the one in question) was drawn on the 28th of the same month; the bond, therefore, was not in security of a future advance. The respondent raised an action of reduction of the bond against Patrick, and succeeded, and the question has not been appealed. The bill itself has also been reduced, and on insuperable grounds. The transaction falls within the statute 1696, c. 5; the indorsation was an assignation made within 60 days before bankruptcy in favour of one creditor, for the purpose of his payment or further security, in preference to the other creditors; and, being so, is cut down by the statute. To prevail, the appellant must show that his case is an exception to the general rule. But in this he has failed. It is in vain to

describe this as a payment in the course of trade; and it is June 12, 1827. equally obvious that Patrick Duncan was interposed, to enable the Bank to accomplish indirectly what could not be attained directly. The heritable security cannot be separated from the bill. It enabled the Bank to obtain payment. If the Bank had been permitted to exact payment from Patrick, then he would have raised money on the security, or sold the lands over which the security extended, and thus have diminished, to that extent, the bankrupt estate, at the expense of the other creditors. The only consideration given by Patrick for the bond was his acceptance, which, if reduced, he does not pretend that the security could be further available to him. It is impossible to conceive, from the circumstances of the case, that the Bank was ignorant that the bond had been required and granted.

The House of Lords ordered and adjudged, ‘ that the interlocutors complained of in the said appeal, so far as they may have the effect of directing the bill of exchange for L.615, accepted by Patrick Duncan, to be delivered up by the appellant, the cashier of the Dundee Banking Company, to the trustee of the sequestrated estate of James Duncan, be, and the same are hereby reversed; and it is further ordered, that the said interlocutors in all other respects be, and the same are hereby affirmed.’

*Appellant's Authorities.*—2 Bell's Com. (and cases there referred to) 220 et seq.—19 Geo. II. c. 32. § 1.—*Hawkins v. Penfold.*—2 Vesey, 550.

*Respondent's Authorities.*—2 Bell's Com. (and cases there referred to) 220 et seq.

RICHARDSON and CONNELL—SPOTTISWOODE and ROBERTSON  
—Solicitors.

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ROBERT LOW, Cashier of the Dundee Banking Company, No. 48.

Appellant.—*Keay*—*John Campbell*.

PATRICK DUNCAN, Respondent.—*Adam*.

*Title to Pursue.*—A party having accepted a bill for the accommodation of the drawer, from whom he received an heritable security in relief; and the bill having been indorsed to the cashier of a Bank in payment of a debt due by the drawer; and the indorsation having been reduced at the instance of the trustee for the creditors of the drawer on the act 1696, c. 5, reserving the rights of the Bank against the acceptor; and the cashier of the Bank having brought an action on the bill against the acceptor before an Inferior Court, which was advocated ob contingentiam of a reduction of the heritable security; and the Court of Session having sustained the