

1665. June 21. JAMES COULTER *against* ROBERT MARTIN.

BILL.

Evidence of due notification of the dishonour having been given, so as to subject the drawer in recourse, inferred from his own posterior deed, importing an acknowledgment of his being debtor in the sum, among others to the holder.

[*Faculty Collection, VII. 90 ; Dictionary, 1601.*]

AUCHINLECK. Here is a general point, which greatly concerns the mercantile part of the world. In negotiating of bills, it is necessary that there should be great exactness. The specialty that Kellar was bankrupt, can have no influence. If we allow of that, we shall make way for a multitude of arbitrary questions; as, whether a man was not known to be absolutely insolvent and incapable of making any payments, and the like.

GARDENSTON. In matters of this kind, the plea of *omnibus notum* is not good, for notification is required. There is this particular reason for notification, that the party may be informed that he is trusted to for payment. If the general rule was departed from, endless confusion would ensue.

ALEMORE. What is the proper notification in a case like this?—and what is the practice of merchants? An instrument is not required; will not notour bankruptcy be sufficient without notification? These are questions which seem to require consideration.

COALSTON. Negotiation is necessary to entitle a party to recourse. It is not sufficient to say, you suffer no damage; nor, that the man was generally held to be bankrupt. But the question here is, Whether, when the circumstances of the case are considered, there is not presumptive evidence of notification having been *de facto* given. It seems plain that the defender thought himself liable, from the terms of his disposition to his creditors, which contains this very debt.

COVINGTON. I do not remember any case determined as to the validity of verbal intimations. As to written intimations, the Court has been always satisfied with the proof that a letter of intimation was written and put into the post-office: This shows that some sort of notification is required, and that it is not sufficient to say, That intimation was proper, and therefore presumed; but here the circumstance of acknowledging the debt is material, and seems to be decisive.

PRESIDENT. The facts stick deep in my mind. A verbal intimation is admitted to be sufficient: the parties were residing in the same place. Kellar's bankruptcy was notorious: add to all this, that the precise sum in the bill is given up as a debt; from all which, I will presume notification.

JUSTICE-CLERK. It is admitted that any sort of intimation is sufficient. The *præsumptio hominis* is irresistible. Kellar had fled two months before the

bill became due; but it is dangerous to rest the cause on that ground, for this would lead to arbitrary decisions. There is a particular circumstance pointed out, which will take this case out of the general case; namely, the acknowledgment that this precise sum was due. The general clause, reserving all objections, hurts not this; it is merely a clause of style.

MONBODDO. What if the man proceeded upon a mistake in law?

ELLIOCK. I have no doubt as to the general point. There are circumstances sufficient to take this out of the general case. Martin acknowledged the debt; which presumes notification. This is not a mistake in law.

On the 21st June 1775, "The Lords found that, from the circumstances of this case, and particularly from the tenor of the disposition whereby Martin acknowledged himself debtor, there was sufficient presumptive evidence of notification;" altering Lord Monboddo's interlocutor.

Act. R. Cullen. Alt. B. W. M'Leod.

1775. June 21. WILLIAM SHEPHERD, Merchant, London, *against* CAMPBELL, ROBERTSON, and COMPANY.

#### SALE.

The seller preferred to the price of the goods while *in medio* to the arresting creditors of the buyer, become bankrupt.

[*Fac. Coll.*, VII. 91.]

THE first question here was, Whether Vallance had purchased the cotton from Shepherd in a fraudulent manner? The second, Whether Shepherd could reclaim the cotton, being *in medio*, from the creditors of Vallance, who had arrested it?

As to the question in fact, the Lords, after a full and accurate examination of the circumstances, came to be of opinion that there was fraud in the purchase. Covington alone dissented, from a notion that Vallance had actually in his possession a sum of money sufficient to pay for 15 bags of cotton, which was the quantity he at first demanded, although the bargain was at length concluded for 35 bags on credit, which, in the event, Vallance was unable to pay.

MONBODDO. The question in law is, Whether Shepherd can recover the cotton from the creditors of Vallance? There is a difference between *bona fide* purchasers and arresters. As to *bona fide* purchasers, the case is clear: Shepherd could not recur against them. An arrester is in a different situation; he seeks to take advantage of the fraud of his debtor. This is against the civil law, and our law also. In the case of an assignee of a debt, the oath of the cedent is not good, but it is good against an arrester. This shows the difference. A distinction has been attempted between *nomina debitorum* and the