

1755. February 15.

The MAGISTRATES of GLASGOW against WILLIAM MACFAIT and Others.

MACFAIT and others took a lease of the malt-mills of Glasgow, and granted bond for the rent.

Being charged by the Magistrates for payment of this bond, they obtained suspension, and *pleaded*; That the Provost of Glasgow promised, at the time of the bargain, that the brewers, who imported ale, brewed by them without the regality of Glasgow, should pay multures to the malt-mills: That this promise, which induced the suspenders to give the rent demanded, has not been performed; and that a proportional deduction ought therefore to be made from the rent. Of this promise they demanded a proof by witnesses.

Answered for the Magistrates of Glasgow; No such promise was made, nor could in reason have been made; neither is a proof by witnesses competent. The terms of a lease in writing may not be altered, nor a bond, apparently absolute, rendered conditional by the evidence of witnesses. Parties who contract in writing, are understood to reject all proof of the obligation other than what arises from the deed itself, or from writings relative to it. Solemn obligations in writing must not be invalidated by witnesses, who may forget the precise words uttered at the time of the bargain, or not understand their import, or wilfully misrepresent them.

“THE LORDS refused to grant a proof by witnesses, and found the letters orderly proceeded.”

Reporter, *Justice-Clerk.*Act. *Miller.*Alt. *Lockhart.*Clerk, *Gibson.**Fol. Dic. v. 4. p. 157. Fac. Col. No 137. p. 206.*

1757. December 16. FARQUHAR against SHAW.

EDWARD SHAW, the defender's brother, on the 16th March 1753, when on death-bed, wrote and accepted a bill, payable to David Shaw, for L. 20 Sterling, which seems to have been a legacy, or donation *mortis causa*, though bearing for value. This bill, it is said, remained in the custody of Edward Shaw, the acceptor, till his death, and was afterwards got up from among his papers, by the said David Shaw, not being then signed by him as a drawer.

David Shaw soon after adhibited his subscription as drawer to the bill, and indorsed it to William Farquhar for value received.

William Farquhar, in 1756, brought a process against the defender John Shaw, as representing his brother Edward, the acceptor of the bill, for payment of the contents.

The defence offered was, That the bill founded on was void and null, in two respects; *1mo*, As not having been granted for value, but by way of donation or legacy upon death-bed; *2do*, As not being signed by the drawer at the

No 119.

A verbal promise by a lesser, which induced the lessee to enter into a written agreement, not probable by witnesses.

No 120.

That a bill was granted on death-bed for a legacy, was not delivered, and was not signed by the drawer during the grantor's life; these facts found probable by witnesses against an onerous indorsee.

No 120. time of the acceptor's death, having remained in the acceptor's custody while he lived, and been thereafter got out of his repositories by the drawer, and then signed by him. These facts the defender offered to prove by witnesses.

The pursuer *objected*, *1mo*, To the relevancy of both these objections; and, *2do*, To the method of proof proposed; and *insisted*, That the only competent proof in this case was *scripto vel juramento* of the indorsee. And in support of this last, *pleaded*, *1mo*, That even although the question had been with David Shaw, the drawer or indorser, the only competent mean of proof would have been by his writ or oath; for as the bill appears subscribed by him as drawer, his subscription must be held, *præsumptione juris et de jure*, to have been adhibited at the date; and, to admit witnesses to prove the contrary, would be to take away writing by witnesses, contrary to one of the fixed principles of our law. The objections stated against this bill are not, properly speaking, intrinsic nullities, such as appear *ex facie* of the writing, and make it no bill; they are purely extrinsic, and such as import a ground of defence, rather than a total voidance of the debt. And when an extrinsic nullity is objected, and offered to be proved, this is offering a proof quite contrary to the averment of the bill, which the law does not allow by witnesses, but only *scripto vel juramento*.

2do, As the pursuer is an onerous indorsee, no nullity whatever, other than such as appears *ex facie* of the bill, can hurt him, who *bona fide* gave value for it on the faith of its being a good bill. The law has established it as a fixed privilege in the case of bills, that exceptions competent against an indorser cannot prejudice an onerous indorsee. Were it otherwise, the currency of bills would be at once destroyed. And this is not confined to an exception arising after the bill is duly constituted, such as payment made to the indorser, or compensation on his debt, but extended to such exceptions or nullities as affect the original constitution of the bill itself. Thus an exception founded on the statute for restraining excessive and deceitful gaming, is unquestionably a nullity which affects the original constitution of a bill; and yet such exception was found not to affect an onerous indorsee, 26th January 1740. Neilson *contra* Bruce, No 97. p. 1509.

Answered for the defender, *1mo*, The relevancy of both the objections to this bill is founded on the principles of law, and the decisions of the court. With regard to the mean of proof, *1mo*, Supposing David Shaw, the indorser, had been the pursuer, it is clear, that the nullities here proponed would have been probable against him by the witnesses present at the granting of the bill, and who saw it unsigned by the drawer, among the granter's papers after his death. Such facts in their nature, cannot be proved by writings, but only by witnesses. This general point, that a deed was in the possession of a granter at the time of his death, and the condition of the deed at that time, and the way and manner in which it passed into the hands of the pretended creditor, are all probable by witnesses, as consisting in facts which fall under the obser-

vation of witnesses. And the Court has applied this general rule even in the case of bills. Thus, in a competition betwixt an onerous indorsee to a bill, and an arrester, it having been alleged by the arrester, that the bill was not completed by subscription of the drawer at the time of the arrestment, the allegiance was found relevant to be proved *prout de jure*; 14th February 1734, Neilson, No 24. p. 1685.

2do, There is no solid ground in law for making a distinction betwixt the case of the indorser and indorsee. The exceptions made against this bill are intrinsic nullities in the constitution of the bill itself; and consequently must destroy the foundation upon which the indorsee pleads the privilege which the law has given to bills. If the facts set forth are true, the bill was void *ab initio*, *quoad* the acceptor, as if it had not been granted; and therefore, the same mean of proof which would be competent against the person to whom the bill was first granted, must also be competent against the indorsee. If it were otherwise, the law, in every case of this nature, could easily be eluded. The person who receives a bill by way of legacy from a person upon death-bed, would have no more *ado*, but to indorse it away to a third person for value, which would effectually exclude the challenge against the bill, and the representatives of the defunct would be left without remedy. The case of Neilson *contra* Bruce, quoted by the pursuer, does not apply; for the exception there founded on from the statute, was not an intrinsic nullity of the bill, which did not bear, that it had been granted for money lost at play.

“ THE LORDS allowed a proof before answer.”

Act. Wallace.

Alt. Miller.

G. G.

Fol. Dic. v. 4. p. 157. Fac. Col. No 73. p. 122.

* * * Lord Kames reports this case :

IN a pursuit for payment of L. 20 Sterling, contained in a bill of exchange, the defender, heir of the acceptor, *objected*, That the bill, though bearing value, was a legacy granted on death-bed; that it remained with the acceptor till his death, and was got from his repositories by David Shaw, in whose favours it was granted, and was signed by him as drawer. It was *answered*, That these circumstances might be relevant against David Shaw, but not against the pursuer, an onerous indorsee, unless these circumstances were known to him when he took the indorsation, to be proved by his own oath.

A proof, by witnesses, of the foregoing circumstances was admitted, before answer.

It appears to me a general rule, founded on the common principles of justice, that whatever is relevant must be admitted to proof; and that every fact must be probable by witnesses, unless the party who demands the proof has, by his own fault, cut himself out of the privilege of parole evidence. A man

No 120. lending money ought to take a document in writing ; and, therefore, is justly denied a proof by witnesses. A partial payment of the sum in a bill ought to be marked on the bill ; and therefore, a proof of such payment, even by the drawer's oath, will not be admitted against the onerous indorsee. But even intromission with money-rent may be proved by witnesses, at the instance of any person having interest, provided he had not access to take a document in writing. Bills have extraordinary privileges for the sake of commerce. But commerce ought not to be encouraged at the expence of justice.

Sel. Dcc. No 137. p. 193.

1758. December 6. REID against PROUDFOOT.

No 121.
Obligation of relief of a written obligation cannot be created by parole evidence.

REID being charged for payment of a bill of L. 7 : 3 : 6, accepted by him in favour of Lundy, and indorsed away by Lundy, brought a process before the Justices of Peace, against Proudfoot, founded upon the following facts :

That Proudfoot having bought linens from Lundy, Lundy refused to deliver them, unless Proudfoot should get some person to be security with him for the price : That thereafter, Proudfoot prevailed upon Reid, who was then a young country lad, not of age, and a servant to a farmer, to accept a bill for the price, on a promise, that Reid should never be troubled for the money ; and Proudfoot having told Lundy, that Reid was factor to a country gentleman, prevailed upon Lundy to take the bill, and got the linens from him. On these facts, Reid concluded against Proudfoot to be relieved by him of the above bill.

The Justices having allowed a proof to Reid, he proved the above facts by the oaths of Lundy and his wife, and two other witnesses. The Justices gave decree in favour of Reid.

Proudfoot suspended. In his suspension, he *alleged*, That he had got the linens, and that Reid had accepted the bill for the price of them ; but maintained, that Reid had accepted the bill, not as security for him, but as debtor himself, to account betwixt Reid and him.

Pleaded for Proudfoot, the suspender, from the sentence of the Justices, No proof ought to have been allowed by the Justices to Reid, of the facts alleged by him ; and since it hath been brought, it ought to be disregarded, because the intention of it was to create, by parole-evidence, an obligation of relief of a written obligation ; whereas, such obligation of relief could only be created by oath or writ of party. This rule is general in the law of Scotland ; and no suspicion or presumptions should make courts remove general land-marks.

Answered for Reid the charger, By the pursuer's own account, it appears, Reid was imposed upon, as he accepted the bill, and yet did not get the linens. This gives a right to courts to expiscate by a proof the other circumstances of