

behoof, no translation could be effectual to his prejudice; and this fact appeared from Shaw's letters in process, at least, it plainly appeared Shaw stood obliged to denude in his favours; and therefore this exception must not only be good against him, but his assignee pursuing for the debt; and that Heriot was *in mala fide* to take the assignation.

Mr Heriot *alleged*, That the debt stood made over to Shaw, who had it therefore in his power to dispose upon it; and he was his most onerous creditor, and took the assignation *bona fide*; and behaved equally to be at a loss, if it were not sustained, as the pursuer, if it were.

There was a good deal of arguing in the papers, whether this were a trust or no; or if it was, whether it could be proved otherwise than by an explicit back bond; or if the letters were not equal to one; or whether a trust of this sort, which was not a deed vesting a right in the trustee for the granter's own behoof, fell under the statute, and might not be proven by circumstances: But what weighed most with the Lords was, that Shaw was under an obligation to denude; and therefore, if he had pursued for the debt, this would have been an answer, which must also meet his assignee: So that this case is of the same nature with the decision of Glendinning's Creditors against Magbyhill; Kilkerran, p. 44. and *D. Falconer, v. I. p. 99. voce BILL OF EXCHANGE.*

Observed also, That there was a difference betwixt Mr Mackintosh's employing him to buy his own debt and another man's; for that the bond to the trustees was payment, which must be good against an assignee.

THE LORDS decerned in the declarator.

Reporter; *Lord Tinwald.*

Adv. H. Hume.

Adv. Lockhart.

Clerk, *Gibson.*

D. Falconer, v. I. p. 100.

1762. *January 7.*

JAMES COWAN, Tanner in Tranent; *against* The TRUSTEES of the deceased
JAMES MANSFIELD, Merchant in Edinburgh.

WILLIAM REID, merchant in Edinburgh, drew a bill upon William Williamson, merchant in Altona, for L. 500 Sterling, payable to William Bruce merchant in Edinburgh.

Bruce indorsed this bill to James Mansfield, who again indorsed it to Roger Hogg his correspondent at London.

The bill was accepted by Williamson; but, he having failed before it fell due, it was protested for not payment, and returned upon Mansfield, who was obliged to make good the contents, with the interest, exchange, and charges.

Mansfield demanded reimbursement from Reid and Bruce; and, upon the 2d of November 1749, they granted to him their joint acceptance for the contents of the former bill, with interest, re-exchange, and charges, amounting in all to

No 219.

A person liable for a debt in a bill, granted in a state of bankruptcy; a new bill, including interest and charges on the former: Not reduced.

No 219.

L. 528 : 19 : 1 Sterling, payable one day after date ; upon which he gave them a missive letter, acknowledging the cause of their granting this new bill, and promising to deliver up both it and the former bill upon his receiving payment.

When the new bill became due, horning was raised upon it ; and, upon the 7th of November 1749, Mansfield used arrestment in the hands of one of Bruce's debtors.

Two days thereafter, an arrestment was used in the hands of the same person, by James Cowan tanner in Tranent, another of Bruce's creditors ; and a multiple-pounding having been brought by the arrestee, a competition arose betwixt Cowan and the trustees of James Mansfield, which, by concert, was carried on upon the supposition that Bruce was rendered a notour bankrupt, within sixty days after granting the new bill for L. 528 : 19 : 1.

Pleaded for Cowan : By the act 1696, every kind of preference given by a bankrupt to any of his creditors, directly or indirectly, by any deed or writing, for satisfaction and security of a former debt, is declared to be void and null. The bill in question, which indisputably came in place of a former debt, must therefore fall to the ground, agreeably to the doctrine laid down by Lord Bankton, B. 1. tit. 13. § 28. Nor is it to the purpose to object, that this bill, though it was a security for a former debt, was no conveyance or assignation to any of the debtor's effects. It is a deed in the express terms of the statute ; and, though it did not directly convey any of these effects, yet it did the same thing indirectly ; because it enabled the creditor to put to his hand ; and the statute says, that the bankrupt shall grant no deed of preference, directly nor indirectly. Neither will it afford an answer to say, that this bill was no more than a document of the debt due by Bruce to Mansfield ; for it certainly was a superadded security : All that he had before was an action of recourse at common law ; whereas here was a security granted upon which he could both arrest and pound, and so obtain a preference over the other creditors. Had he only intended to liquidate his debt, by taking a written document for it, a missive letter, or a simple obligation, would have been sufficient ; but it is plain, from what followed, that he had something else in view in taking the new bill.

Pleaded for Mansfield's trustees : The professed purpose of the statute was to prevent fraudulent alienations by bankrupts, in prejudice of their creditors ; for so the preamble *in terminis* bears : And, for the better restraining and obviating such fraudulent alienations in time coming, it declares, ' all and whatsoever voluntary dispositions, assignations, or other deeds, which shall be found to be made and granted directly or indirectly by the foresaid dyvour or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days of before, in favour of any of his creditors, either for his satisfaction or further security, in preference to other creditors, to be void and null.'

Upon a complete view of this clause, three ingredients appear essentially requisite to bring any case within the description of the statute ; *imo*, That the deed

be of such a nature as to import an alienation of the bankrupt's effects. *2do*, That it be granted either for satisfaction or further security of a debt formerly due. And, *3tio*, That it be in preference to other creditors. But none of these ingredients are to be found in the case in hand. There is here no disposition, or other deed of alienation whatever, direct or indirect, of any part of the bankrupt's effects. Neither was it given in satisfaction or further security of a former debt. In vulgar language, indeed, every instrument of debt, bond, bill, promissory note, &c. may be denominated a security; but that is by no means either the legal or proper sense of the word. These are but the vouchers of the debt. A naked promise may, with the same propriety, be termed a security, because it imports a personal obligation to pay. But the deeds which the legislature had plainly in view by this statute were those whereby the creditor got right from the bankrupt to some part of his estate, or obtained some security thereon; which, of its own nature, would have been available to give a preference to the other creditors: And how the renewal of a bill should answer that description, it is not easy to conceive. In like manner, it is plain that no preference was even indirectly given to Mansfield, by granting the bill in question, as, upon the bare execution of an admiral-precept, which could have been got in a few minutes, a dependence would have been created for the contents of the original bill, interest, damages, &c. upon which arrests might have been used, as well as upon the renewed bill.

In short, the doctrine pleaded for the second arrester would be productive of the worst consequences. Supposing that a shopkeeper, upon discharging his account-current, should get a bill for the contents, it surely would be thought somewhat extraordinary to bring that bill under the act 1696. When once the limits of the statute are passed, it is difficult where to stop; and, at that rate, every person who gets a bond or a bill for any prior debt, as, for example, a bond in place of a bill, or a bill in place of a bond, or a bond and a bill renewed, would be in a very ticklish situation. The original obligation, in such cases, is generally given up, and probably cancelled, and the new one being vacated by the insolvency of the debtor, the creditor must lose his money altogether.

'THE LORDS preferred the trustees of James Mansfield.'

For James Cowan, *Burnet*.

For Mansfield's Trustees, *Lockhart*.

Fol. Dic. v. 3. p. 60. Fac. Col. No 74. p. 167.

A. Wight.