

No 199. 2do, There is no definite term of forbearance, or new term of payment expressed in the corroborative right, but only a new additional fund of payment pointed to the creditor.

THE LORDS found, that the ticket was payable at the term when the cess fell due by the country to the public; and that Captain Oswald's taking the posterior bill did not innovate the former ticket.

Fol. Dic. v. 2. p. 150. Forbes, p. 511.

* * A similar case was decided, 10th July 1706, Brand against Yorston, No 128. p. 1549. *voce* BILL OF EXCHANGE.

1713. July 10.

JAMES RAMSAY, and DANIEL REID, his Assignee, *against* DAVID SPALDING of Ashintilly.

No 200.

A creditor charged for the whole sum in a bond, after the debtor had accepted a bill for a part. The debtor, notwithstanding, found liable for the whole sum charged for.

IN the action at the instance of James Ramsay against Ashintilly, as attester of the sufficiency of Knockfoldich, cautioner in the suspension of a charge of horning given by the pursuer to Joseph Watson; the LORDS, 19th July 1710, found, that the defender's attestation doth not oblige him for the sufficiency of the cautioner simply, but only for his sufficiency at the time of the attestation, No 85. p. 2162.

The defender now *alleged*; That James Ramsay the charger, having drawn a bill upon Watson the suspender, for L. 300 of the sum in the bond upon which he was charged, payable to Thomas Rattray, which the suspender accepted; this was an answering of so much of the sum in the bond, and putting it upon another footing and method of payment, or an innovation, equivalent as if the creditor in the bond had assigned a third party to so much of his debt, and the assignation had been formally intimated to the debtor. Yea, a debtor's accepting of a bill, payable to a third party, puts him under a stronger tie than an intimated assignation; because the former goes from hand to hand by blank indorsing, without being affected by arrestment or compensation for the indorser's debt. So that it being unwarrantable in Ramsay to charge for the full sum in the bond, after he was denuded, as aforesaid, of a part thereof by the bill, and the suspender not being *in tuto* to pay, he having accepted a bill in part, payable to another; the reason of suspension was just, and, consequently, the cautioner ought to go free.

Replied for the pursuer; The suspender not having paid the bill, he could plead no defalcation thereon, but only to be secured against paying the same, in case he should pay the whole sum in the bond, which may be easily done; seeing Rattray, the creditor therein, acknowledges, by a declaration under his hand, that he was but a trustee for the behoof of Ramsay the drawer, and

obligeth him to make the bill forthcoming to him, or his order, and hold count to him for what he should recover by virtue thereof.

No 200.

Duplied for the defender; The suspender is never *in tuto* till the bill be retired to him, seeing the creditor therein might have indorsed it to any third party, who could not be prejudiced by the indorser's separate declaration.

THE LORDS repelled the defence founded on the accepted bill; the pursuer, upon payment, finding caution to warrant the defender against all further payment by virtue of that bill.

Fol. Dic. v. 2. p. 150. Forbes, p. 702.

DIVISION V. *

Payment being made, who understood to have advanced the Money.

1662. *January 25.* EARL OF WINTON *against* RAMSAY.

THE Earl of Winton being debtor to the Lady Semple, his daughter, in a sum of money, she assigns the same to umquhile Sir George Seton, who was one of the tutors testamentar nominated and accepting to this Earl; and Sir George transfers the said debt to Mr James Ramsay of Fawside, who pursues the Earl for payment. It was *alleged* by the Earl, That Sir George being one of his tutors, accepting, and acting, as tutor, having acquired right to a debt due by his pupil, law presumes, that he has acquired the same with the pupil's own means or *intuitu* that he was debtor to his pupil in as much; and consequently, that *ab initio* it was taken for his pupil's behoof; and the excipient offered to pay the sum to the pursuer, he finding caution to refund *pro tanto*, if after compt and reckoning it should be found, that Sir George, being a conjunct tutor, should be found debtor to the excipient. It was *answered*, That though Sir George was tutor, yet he was not intromitter; the Viscount of Kingston being intromitter, against whom the Earl had action of compt and reckoning depending. It was *replied*, That though Sir George did not intromit, but suffered Kingston or any of the rest to intromit; yet by the law, *singuli tenentur in solidum*.

No 201.

Effect of a tutor's acquiring right to a debt due by his pupil.

THE LORDS ordained the pursuer to find caution to refund.

Gilmour, No 22, p. 18.

* * Stair's report of this case is No 2. p. 9977, *voce* PAYMENT.