and paying the high duties of insucken multure, must go for nothing; and the mere voluntary choice of the tenants, to which the landlord was in no way consenting, resorting to this mill, (very likely because most convenient to themselves), could not constitute a servitude against the respondent, their landlord.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

For the Appellant, *Ja. Montgomery*, *Al. Wedderburn.*
For the Respondent, *Alex. Ferguson*, *Ar. Macdonald.*

Not reported in Court of Session.

JOHN ANGUS, Merchant in Edinburgh, *Appellant;*
THOMAS MANSON, Writer in Edinburgh, *Respondent.*

House of Lords, 22*d March* 1774.

BANKRUPTCY—STATUTE 1696.—Circumstances in which held depositation of a bill in the hands of a creditor, by his debtor, within 60 days of bankruptcy, reducible under the statute 1696, c. 5.

This was an action of reduction raised to set aside a depositation of a bill given to a creditor by his debtor in security of his debt. The bill was not assigned by deed of assignation. But it was alleged that this bill was indorsed by Farquhar, the bankrupt, to Angus the creditor, which was supported by general circumstances presumptive of the fact: and by a letter under the hands of the creditor, it was proved that he held this bill as security for his debt; and it was therefore concluded that the transaction was reducible under the statute 1696, as an unjust and unlawful preference or security given to one creditor to the prejudice of the others, within 60 days of Farquhar's bankruptcy. In defence, it was contended that the statute only applied to dispositions, assignations, " or other deeds," granted in security of prior debts, and not to the indorsation or depositation of a bill.

The Court of Session held that such a transaction fell under the statutory words, *all assignations* " and other deeds," and therefore reduced and decerned. *Vide* Morison, App. " Bankrupt," No. 7, for full report of case.

The case was appealed to the House of Lords.

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Pleaded for the Appellant.—That no proof had been brought of the indorsation of these bills, and that the Court had proceeded merely on conjecture and probability. But even supposing such indorsation had been made, the transaction would not have been voidable under the act 1696, but would have remained good. Indorsation of a bill is considered as payment in cash; and if Farquhar really indorsed this bill on 5th January to the appellant, his debt of £160 was thereby extinguished, leaving him creditor to the appellant for the balance £95. The mere indorsation cannot surely be construed either into a *disposition*, *assignation*, or *deed*, and these alone are declared void by the statute if *granted for the "creditors satisfaction or further security*," but a bill is not usually granted for these purposes, but for payment and extinction of debt. But if this holds where even the bill is indorsed, it must hold *a fortiori* where the bill has not been indorsed, because in that case there could be no security granted and no conveyance made, and no act or deed done by Farquhar whatever, so as to bring it under the statute 1696. The receipt granted on 5th January obliging the appellant to return these bills was the strongest possible evidence that they were not indorsed; while the respondent, who undertook to prove this fact, has failed to prove it. The depositation, therefore, of the bill, with the appellant, without indorsement, gave him no security whatever. He could not recover the contents. It was subject to arrestment, and might have been carried off at the suit of a creditor. And the cases referred to, quoted by the respondent as deciding that bills so endorsed on the eve of bankruptcy, were within the spirit and intendment of the statute 1696, are quite inapplicable, and were decided on different grounds,—these being cases where no value was granted for the bills.

Campbell v. Graham, 16 Jan. 1713; Durward v. Wilson, 2 Jan. 1700; Dalrymple's Coll. Fountainhall.

Pleaded for the Respondent.—That the indorsation of a bill to a creditor, in order that he may thereby obtain his payment, is a deed done "for his satisfaction or further security," and, consequently, falls within the meaning of the act 1696. That this was decided in the above quoted cases. The bill of £180 and the draught for £255 could not be indorsed in satisfaction and payment of the debt, because it was qualified by the receipt granted, which proves the transaction to be a security for a debt formerly contracted. It seems not seriously denied that the bill was indorsed by Farquhar to Angus. The latter merely contends, that as it was not indorsed by him when it went out

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of his hands, then no properly completed indorsation took place; but this is perfectly immaterial, because it must be presumed to have been indorsed before going out of his hands, as a bill, without this, is ineffectually transferred. And even supposing no indorsation had taken place, it is clear that such a nexus was created upon the bills, tantamount to an indorsation, as put it out of the power of any person to attach or acquire them, until the appellant's debt was paid; and which also brings the transaction under the statute. Nor is it any answer to this to say, that the money which the appellant thus acquired in extinction of his debt was a ready money payment, because, according to the construction put upon this act, it is even a question how far actual payment in cash to one creditor in preference to the rest, on the eve of bankruptcy, is not within the operation of the statute. Undoubtedly the words of the statute strike against every such act and deed of the nature here resorted to, and if the statute were not made to apply to the circumstances of this case, then it might be eluded on every occasion.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be affirmed.

For the Appellant, *Al. Wedderburn, Alex. Wight.*
For the Respondent, *Ja. Montgomery, Ar. Macdonald.*

M. Append. P. I. "Bankruptcy," No. 7.

ANDREW WAUCHOPE, Esq. - - *Appellant:*
Sir ARCHIBALD HOPE, Capt. JOHN M'DOWALL, and JOHN WAUCHOPE, Esq., *Respondents.*

House of Lords, 10*th April* 1774.

LEASE—ARBITRATION.—Construction of lease held entitling the landlord to shut up the level, communicated from his colliery to another, without his consent or remuneration. This dispute having been referred to arbitration, with power to issue orders as to the opening the level, until the question of right was determined, and this reference having fallen to the ground by expiry of the same; Held that any order of the arbiter to open the level acquiesced in by both parties during the subsistence of the submission, could not be the ground of a judgment, holding that the landlord could not shut up the level, as such a judgment was contrary to the judgment of the House of Lords in the same case finding the reverse; and also because the submission