

No 109.

matter, for natives of this country, who carry on an illicit trade, to take their bills payable to a friendly house in Britain, in place of making them payable to themselves.

Answered: The pursuers did not receive the bills in question, merely for the purpose of getting payment of them, as factors for Agnew and Sheppard. They received them as a partial reimbursement of former advances made to that Company. Having, therefore, formerly given full value for these bills, they are onerous holders, just as much as if they had paid down their contents at the time of their delivery; 7th January 1757, Sir John Douglas against Elliot, No 102. p. 1515. — 12th February 1778, Burnet against Ritchie, No 105. p. 1519.; Erskine, b. 3. tit. 2. § 31. Indeed, if a contrary rule were established, it would be destructive to the commerce of bills; as, at least, one half of those which occur in mercantile transactions, are granted not for money instantly received, but in payment of debts formerly contracted.

THE LORD ORDINARY reported the cause on informations.

Observed on the Bench: Bills sent to bankers, or others, as value in account, are considered by merchants as having every privilege of bills sent for any other sort of value, and, on faith of them, those to whom they are transmitted, give credit, and make further advances.

The COURT, by a great majority, found, 'That the pursuers were onerous holders of the bills in question, to the extent of the balance due to them by the drawers; and, therefore, repelled the defences.'

Lord Reporter, *Abercromby*. A&C. *Connell*. Alt. *Maconochie, Corbet*. Clerk *Menzies*.
R. *Davidson*. Fol. *Dic. v. 2. p. 83*. Fac. *Col. No 30. p. 60*.

. See More particulars relative to this case *voce* PACTUM ILLICITUM.

SECT. III.

Of Bills which have no Extraordinary Privileges.

No 110.

A bill being indorsed, not for value given at the time, but in security of debt, was found excluded by an anterior discharge granted by the drawer to the acceptor.

1708. *January 15.*

HENRY CRAWFORD, Merchant in Crail, *against* ALEXANDER PIPER of Newgrange.

ALEXANDER PIPER having accepted a bill for L. 347, payable to James Arbuthnot, skipper in Montrose; and thereafter, upon clearing accounts with Arbuthnot, having procured from him a general discharge of all bills, except another bill specially therein mentioned: Mr Arbuthnot indorsed the L. 347 bill, for his own behoof, to John Auchterlony, his trustee, by whom it was indorsed blank, and left with Arbuthnot, who filled up Henry Crawford's name therein. Mr

Piper being charged by Crawford, he suspended, upon Arbuthnot's general discharge, which, he offered to prove, by Crawford's oath, was anterior to the indorsement in his favour.

Alleged for the charger: The indorsement to him for an onerous cause, cannot be prejudiced by any such private separate discharge; no objection being competent against the payment of a bill transmitted to singular successors for onerous causes; except upon qualities ingrossed therein, or receipts and discharges on the back thereof. And if it were otherwise, the currency of bills would stop; for no man would take an indorsement of a bill, lest it might be rendered ineffectual by the indorser's separate receipts and discharges.

Answered for the suspender: To advance this doctrine, That Bills of Exchange cannot be extinguished by a discharge, were to lay an embargo on the most valuable branch of commerce, and to enervate, if not destroy, the chief vehicle thereof; seeing it is impossible that the vast number of bills of exchange that go out of the hands of merchants and factors on all occasions, can be returned to them, and cancelled before their eyes, before a final clearing with their several constituents and correspondents in the remotest corners of the world. *2do*, Supposing such a discharge could not exclude an accepted bill, but that the same were to be considered as a bag of money, which third parties might *bona fide* acquire; yet Crawford not having paid sums of money for obtaining the indorsement, which was made by Auchterlony, for payment of a debt due by Arbuthnot to him, less than the sum in the bill, and taken in security of the said debt, and of what expences Crawford should be at in recovering payment thereof; such a conveyance, by Auchterlony the trustee, is not relevant to elide Arbuthnot's anterior discharge.

Replied for the charger: There is no distinction in the present case, whether the indorsement be for down told money, or in satisfaction of anterior just debts, the discharging thereof *fictione brevis manus* is equivalent to the paying money: And to make a difference, would occasion confusion in commerce; for where one bill is indorsed for money paid down, twenty are transmitted in satisfaction of by-gone debts or accounts.

THE LORDS sustained the reason of suspension founded on the general discharge: In regard the indorsement to Crawford was not for an adequate onerous cause; nor for value given at the time, but only in security of by-gone debt; and the taking it in security of what expences might be deburred, implied the view of buying a plea, which deserved no favour.

Fol. Dic. v. 1. p. 98. Forbes, p. 221.

* * Fountainhall reports the same case :

ALEXANDER PYPER of Newgrange accepts a bill drawn upon him for L. 347, payable to James Arbuthnot ikipper in Montrose. There having been many dealings betwixt them, Pyper and Arbuthnot adjust and fit their accounts, and

No 110. Pyper gets a full and general discharge from Arbuthnot of all bills, bonds, accounts, and others whatsoever, (except a bill of 61 rix-dollars,) preceding the date; and because Arbuthnot said he had not the bill of L. 347 then on him, he promised to send it; but instead thereof he indorsed it to Henry Crawford in Dundee, to whom he owed a lesser sum; and he having charged Newgrange on it, he suspended, that, before the indorsation of the bill to you, I had Arbuthnot the indorser's general discharge of all bills, and he was *in pessima fide* to convey it to you, when it was paid. *Answered*, However the discharge meets Arbuthnot, it can never militate against me a singular successor to the bill for an onerous cause; for bills cannot be clogged with such extrinsic deeds, but are considered like a bag of money passing from hand to hand; so nothing burdens them, but what is contained in the bills themselves, else all commerce would cease; and for this cause, the Lords have refused to admit compensation against bills, as was decided, Stewart *contra* Campbell, No 87. p. 1497. observed by Forbes in his Treatise on Bills of Exchange: yea, payment made to the first creditor in the bill, did not liberate a singular successor in the bill, who produced it in his hand, unless the said possessor knew of that payment, 5th February 1702, Van Muiren and Allen *contra* Wood*. And the same Mr Forbes thinks bills should not be incumbered with any discharges, receipts, declarations, or restrictions, not adjoined to the bill or acceptance. *Replied*, That foreign bills of exchange, where actually money or goods have been delivered for them, are both favourable and deserve all dispatch; but this is not in that case, it is but an inland precept, and no money paid for it, but only given in corroboration and farther security of a debt owing by the indorser to the receiver, and that not adequate to the sum of this bill either; and so can never plead the privilege of other bills, especially in such a manifest fraud, that, after counting and allowing this bill, he should indorse it to another, posterior to his own general discharge; and what other way have merchants, in a long tract of business with skippers, and others, for many years, where there has been frequent occasion for drawing bills, notes, precepts, orders, letters, &c. to extinguish all these obligatory writs, but by general discharges; and if this were not sustained, endless pleas would arise. Neither is the retiring and taking up these bills a sufficient remedy, for they are oft-times not at hand, and for one sum more bills are drawn; neither did Mr Crawford trust to this indorsement, nor take it as payment, but only for his better security, and did not rely on the faith of it, and may yet seek his debt from Arbuthnot. THE LORDS thought bills ought to have free course, and not be clogged with the deeds of the drawer and indorser; but this bill not being purchased by money, was not in that case; and therefore sustained the indorser's general discharge relevant to cut off this bill, especially seeing it excepted another bill and not this, and that the indorsement was long posterior to the discharge; though generally they bear no date, and pass like bank-notes, for the conveniency of traffic, without intimation.

Fountainball, v. 2. p. 418.

* General List of Names.