

No 93.

by the witnesses to the mutual general discharges, and the comuners, at the finishing their accounts; by whom it will be proven that this particular bill was communed upon to be comprehended in the mutual general discharges; and that the charger pretended he had it not upon him, but promised, and by oath, to give it up the next morning; all which could operate nothing against the third party to whom it was indorsed; but was most relevant against the granter of the discharge, who did indorse it; considering, that the charger being the original creditor in the money bill also, he does not pretend that there was the least intimation given to the suspender, that the said bill was indorsed; whereby the suspender had reason to believe that the charger was still his creditor, and thereby that he was exonerated by the general discharge; especially considering, that the charger was very careful to indorse the said bill likewise. But the suspender observing that he delayed to deliver the money bill, and hearing that he intended to indorse the said bill, he sent express to his correspondent at Leith, to advise him of the matter, and to forbid him to comply with the said bill; whereupon the person to whom the said bill was indorsed, did return it to the charger; which letter, writ while the whole matter was recent, was produced.

‘THE LORDS allowed a probation by the witnesses in the mutual discharges, and such as should be proven to be comuners, *cum onere expensarum* of the party that should succumb.’

*Fol. Dic. v. 1. p. 98. Dalrymple, No 107. p. 150.*

1714. June 24.

JAMES FAIRHOLM Merchant, *against* WILLIAM COCKBURN.

No 94.

Separate receipts, of partial payments of bills of exchange, do not militate against possessors, to whom the bills are afterwards indorsed.

MESSRS HUNTER and CRAWFORD having drawn a bill of L. 400 Sterling, on William Cockburn, payable to Alexander Campbell; the bill being accepted and part paid, Mr Campbell indorses the bill in these terms: ‘Pay L. 118 of the principal within mentioned, with the exchange current of the whole, to James Fairholm, or order; but this my indorsation is noways to militate against me.’

Cockburn the acceptor of the bill suspends, and *alleges* payment to Hunter and Crawford the drawers of the bill, conform to two receipts extending to L. 168, which ought to be allowed; because Campbell was but a name and trustee for the behoof of the drawers.

It was *answered*, Supposing Campbell a trustee, yet no respect to these receipts, because not written upon the accepted bill; for such is the favour of bills of exchange, that they are to pass current *de manu in manum*, as bags of money, and are affected with nothing but what appears upon the bill itself; otherwise merchants would be at great uncertainty in the course of trade, and would not know what bills could be safely relied upon; and it is for the same reason, that compensation, which takes place against all other debts, is not regarded to stop the currency of bills of exchange; and this is the opinion of Mr Forbes, who has written on that subject, p. 161. § 2. par. 4. *in fine*. (Edition 1703.)

It was *replied*, There is no law nor settled custom for rejecting payments upon receipts a-part; and there is here also a speciality, that the bill is indorsed no ways to militate against the indorser; and the indorser being but a trustee, the suspender was *in optima fide* to make payment to the true creditor in the bill.

It was *duplicated*, The Lords have, of late, had respect to no exception that might diminish the credit or currency of bills of exchange; and there is in this case not only the opinion of Mr Forbes, but the practice of trading nations, and especially the merchants of this country; and the Ordinary, for his fuller satisfaction in this matter, having desired the opinion of merchants of the first credit, their is a report of two merchants, one named by either party, declaring the constant practice of merchants to be for the charger; and that the speciality of providing that there shall be no recourse against the indorser, makes no alteration. It is not, nor can be pretended, but that the charger obtained the indorsation for a just and onerous cause, and therefore ought not to be disappointed of the security that all merchants do rely upon.

‘THE LORDS repelled the reason of suspension.’ See No 91. p. 1501.

*Fol. Dic. v. 1. p. 98. Dalrymple, No 109. p. 152.*

1714: July 9.

JOHN MITCHEL, Merchant in Edinburgh, against ALEXANDER BROWN, Merchant there.

THOMAS SCOT, by commission from Alexander Brown, buys goods from Mr Wilks in London, to the value of L. 50 Sterling, on six months trust; for which Brown draws a bill on Scot, payable to Wilks, which Scot accepts; and, for Scot's reimbursement, Brown accepts a bill for the like sum, payable to Scot at the same time that the bill to Wilks falls due.

Scot suffers his accepted bill to Wilks to be protested; and, at the same time, viz. the 3d of April 1714, draws a bill, for the like sum, upon Brown, payable to Alexander Mitchel, or order; and, notes upon the back of Brown's accepted bill, thus, ‘3d April 1714, This day, at 14 days sight, drawn on you for the contents of this bill, payable to Alexander Mitchel or order; value which I have posted to your credit.’

Alexander Mitchel having indorsed the bill to John Mitchel; and the same being protested for not acceptance, the said John, as creditor to Scot, arrests in the hands of Brown; and others of Scot's creditors likewise arrest; and, thereafter, on the 11th of May, Scot indorses Alexander Brown's accepted bill, bearing the note above-mentioned on the back thereof, in these words, ‘Pay the contents to Mr Alexander Mitchel, or order, value received of him as above;’ whereupon Brown being charged, suspends on these reasons: *imo*, As to the bill protested for not acceptance, he had no reason to accept, because he had no effects of Scot's who had accepted his bill; and, failing in his credit, had suffered it to be protested, whereby his bill would necessarily return upon him the drawer; he had, therefore, good reason to retain, in his own hands, the money contained in his bill, accepted only for reimbursing Scot of what he ought to have paid to

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The possessor of an accepted bill drew for the same sum upon the acceptor. He at the same time noted upon the accepted bill, his draught for that sum. The acceptor of the first bill refused to accept the second. The possessor of the first bill having indorsed both to the same person; the acceptor of first found liable to the indorsee.