

1743.

AINSLIE
v.
ARBUTHNOT,
&c.

GEORGE AINSLIE, - - - - - *Appellant*;
ARBUTHNOT & Co., - - - - - *Respondents*.

7th February 1743.

FACTOR—BILL OF EXCHANGE.—A factor taking bills in his own name, from his constituent's debtor, without giving notice thereof to his constituent, found liable for the loss arising from the bankruptcy of the debtor.

[Kilk. p. 182. Fol. Dict. III. 202. Elchies, *voce* Bill of Exchange, No. 20. Mor. Dict. 4065.]

No. 66. ARBUTHNOT and Co. were employed by Ainslie, merchant at Bourdeaux, to receive and collect the rents of an estate which he had purchased near Edinburgh.

They agreed in 1731 with one Cave, a brewer, to let him have the barley on the estate for two years at a certain rate per boll, and that the price should be paid at Martinmas in each year after the delivery of the barley; and they immediately gave Ainslie notice of this agreement by letter. At the term of payment, however, instead of the money, Arbuthnot and Company took Cave's bills or promissory notes, bearing interest, to the company. No intimation of this arrangement was given to Ainslie; nor did he appear to have received the interest thus stipulated when he received the price of the barley at the settlement of his account with his factors in 1731.

Arbuthnot and Co. continued to deal with Cave, upon the same terms as formerly, until Cave's bankruptcy in January 1735; but they did not give Ainslie notice of the nature of these terms by letter, nor did these appear from their accounts. Ainslie

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then brought an action of count and reckoning against Arbuthnot and Co., and insisted that they were accountable to him for all the sums contained in the bills, and must suffer the loss occasioned by Cave's bankruptcy. The defenders objected that the bills had been taken with a view of placing so much of the appellant's money out at interest, which otherwise would have yielded him no profit. The pursuer answered that he had never authorized the transaction; that it could not have been intended for his advantage, he never having received notice of it either by letter or in his accounts; and that the interest never having been paid to him, but having, in regard to some of the bills at least, gone into the pockets of the defenders, the loss ought to fall upon them.

The Lord Ordinary (Elchies) reported the case to the Court upon informations; upon advising which, their Lordships found, (7th June 1739,) 'That Arbuthnot and Co. having taken bills in their own names from Joseph Cave, and having given up the receipts given by Cave to the tenants, without making entry in their books, or taking any other document that these bills were for the behoof of George Ainslie, and without giving any notice to George Ainslie that they had taken these bills in their own name for his behoof,—that the bills so taken were upon the proper risk of Arbuthnot and Co.,' &c.

Upon advising a reclaiming petition, however, with answers, the Court (July 14, 1739) altered this interlocutor, and found, 'That in this case there is no fault or neglect chargeable on the part of the petitioners, Arbuthnot and Co., sufficient to transfer the risk of the bills in question

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‘ upon them ; but that the contents of these bills,
 ‘ in so far as composed from Joseph Cave’s ac-
 ‘ counts in the company’s books, and taken for the
 ‘ pursuer’s barley therein stated as sold and deli-
 ‘ vered to Joseph Cave, do still remain a debt up-
 ‘ on Mr. Ainslie, the pursuer’s proper risk ; and
 ‘ therefore repelled the objection proposed for the
 ‘ pursuer against stating such part of these bills to
 ‘ the company’s credit, and remitted to the Lord
 ‘ Ordinary to proceed accordingly.’ They after-
 wards adhered.

Entered,
 23d Nov. 1742.

The appeal was brought from these interlocu-
 tors of the 14th of July and 18th of December,
 1739.

Judgment,
 7th Feb. 1743.

After hearing counsel, “ it is ordered and ad-
 “ judged &c. that the said interlocutor of 14th
 “ July 1739, and the interlocutor of the 18th De-
 “ cember following, adhering thereto, be, and the
 “ same are hereby reversed ; and that in the inter-
 “ locutor of the 7th June 1739, in the appeal men-
 “ tioned, these words (‘ without making entry in
 ‘ their books, or taking any other document that
 ‘ these bills were for the behoof of George Ain-
 ‘ slie, and’) be omitted ; and that the said interlocu-
 “ tor with this omission be, and the same is hereby
 “ affirmed.”

For Appellant, *G. Clark, C. Erskine.*

For Respondents, *R. Craigie, W. Murray.*

Kilkerran says that the interlocutor 14th July “ was pronounced,
 “ not upon the general point, but upon the *species facti*, it being
 “ thought to appear from a book called a Bill Book, that there was
 “ evidence of such posting as the former interlocutor had supposed
 “ necessary ; but this last judgment was reversed upon an appeal, the
 “ House of Peers having no regard to a bill-book, as not *nomen juris*.”