

The defenders *contended*, That the indorstation had been fraudulently devised between the drawer and indorsee, in order to preclude their just defences; and they offered a proof of facts, sufficient to shew that this was the case.

Observed on the Bench: Though bills of exchange, when in the possession of fair and onerous indorsees, are, like bags of money, liable to no exception arising from the fraud of anterior holders; a collusive transference, such as is here alleged, ought not to be attended with the same privileges.

THE LORDS UNANIMOUSLY allowed the proof here offered.

Lord Ordinary, *Brasfield* A& *Honyman* Alt. *H. Erskine, John Erskine.* Clerk, *Colquhoun-Craigie.* *Fol. Dic. v. 3. p. 83. Fac. Col. No 226. p. 353.*

No 106.

ed between the drawer and indorsee, in order to preclude the acceptor's defences.

1786. November 29.

GAVIN HOGG *against* JOHN FRASER.

GAVIN HOGG, in consequence of an order from Simon Frazer, merchant in Inverness, drew bills for L. 154, on Mr John Frazer, who refused to accept, because the sums in his hands, belonging to Simon Frazer, amounted only to L. 55 : 7 : 2. But he offered, for the accommodation of his correspondent, to honour a bill of exchange for L. 100; which, however, he was not required to do.

Mr Hogg took no farther measures for thirteen months. By this time Simon Frazer had become insolvent, after Mr John Frazer had interposed his credit for him to a considerable amount. An action was then brought by Gavin Hogg, in which, in order to subject Mr Frazer to the payment of L. 55 : 7 : 2, it was

Pleaded: The drawing of a bill of exchange, or, what is the same thing, the giving authority to make such a draught, is equal to an irrevocable assignment of those effects of the drawer, which are at the time in the hands of the drawee. *Erskine, book 3. tit. 2. § 29.*

Answered: If the pursuer had, within a reasonable time, limited his demand to the sums acknowledged to be due by the drawee, his present claim might have been deemed a just one. But it would be attended with the most pernicious consequences, if, by such unfinished transactions as here occurred, any restraint could be introduced on the freedom of commercial dealings.

‘THE LORDS sustained the defences, and found the pursuer liable in expences.’

Lord Ordinary, *Hales.* A& *N. Fergusson.* Alt. *Honyman.* Clerk, *Orme.* *Craigie.* *Fac. Col. No 296. p. 455.*

No 107.

A person was drawn upon for a larger sum than he had in his hands. He refused acceptance. Several months after, the sum which had been in his hands was claimed, at the instance of the holder of the refused bill. The sum was found not to have been attached by him.

1787. December 6.

THOMAS WIGHTMAN *against* DAVID GRAHAM.

ROBERT BURGESS paid a sum of money which was due by his father, and afterwards obtained from David Graham, the creditor, an assignation of the debt with warrandice from fact and deed.

No 108.

The exception of *violence* arising from legal concurs-

No 108.
 fion, found
 good against
 the onerous
 indorsee of a
 bill of ex-
 change.

He immediately took out a caption in virtue of the clause of registration annexed to the assignment; and thus, by the terror of imprisonment, compelled the assigner to grant a bill of exchange, in which the sums originally due were accumulated, with the interest, and the expence of diligence.

For setting aside this bill, a process of reduction was brought; and, in absence of the defender, the common interlocutor was obtained, finding it null and void, until it was produced. But, a few days after, Robert Burgess indorsed it, for value, to Thomas Wightman; who, in an action for payment against David Graham,

Pleaded: No exception is competent against the onerous indorsee of a bill of exchange, which does not appear from the writing itself. And hence it has been found with regard to bank-notes, on account of their similitude to bills of exchange, that the exception of theft, which, in general, is productive of a *labes realis*, cannot be pleaded against a *bona fide* holder. In the present case, however, there does not seem to be a sufficient degree of violence to afford a relevant defence even against an ordinary assignee. Imprisonment, without the order of law, is, doubtless, a sufficient ground of reduction; and, in the same manner, any arrest of the person will be sufficient to annul an obligation which has no connection with that on which such detention has followed. But here the grounds of the diligence were *ex facie* just, and the imprisonment was followed out in the ordinary way. As to the proceedings in the action of reduction, these cannot be thought to be of any consequence; the certification in this action, when it does not contain a warrant for improbation, being only, that the writings called for shall be of no effect, until they are produced in judgment; Erskine, b. 3. tit. 2. § 31.; Bankton, b. 1. tit. 13. § 15. 24th February 1749, Crawford *contra* Royal Bank, (p. 875.); Voet. ad tit. *Quod Metus Causa*, No 10.; Stair, b. 1. tit. 9. § 8. b. 4. tit. 40. § 26. 27.; Dictionary, *voce* VIS ET METUS; Erskine, b. 4. tit. 1. § 24.

Answered: The privilege of current bills is not disputed. But, in every action founded on a written document, it is necessary that the obligation, of which it is the voucher, shall not be destitute of those qualities that are essential to every agreement. If it has been impetrated by force or fear, the shape in which it has been framed cannot be of any importance. This reasoning, indeed, is peculiarly applicable to the present case. For, as it arises from the implied will of the acceptor of a bill of exchange, that those defences, which would otherwise be competent, are not available against an onerous indorsee; this being a necessary consequence of subscribing a writing of this sort; so, where the subscription has not been the result of his free-will, but extorted by violence, there is no ground on which an obligation so unlimited, can receive any support. So, accordingly, it was expressly found, 26th November 1776, Willocks *contra* Callender and Wilson, No 104. p. 1519. The circumstance of a decree of reduction having been obtained before the indorsation, is a strong confirmation of the general argument. For, if by the mere execution of a summons, or, by its being called in

Court, the right becomes litigious, and incapable of alienation; surely, when a decree has been obtained, finding the right itself to be void and null, the same consequence must unavoidably follow.

THE LORD ORDINARY gave judgment against the defender.

But, after advising a reclaiming petition and answers, the Court being of opinion, that a writing, impetrated like the one in question, was of no validity.

THE LORDS sustained the defences, and assolizied.' See VIS et METUS.

Lord Ordinary, *Hailes*. Aft. Geo. *Fergusson*. Alt. *Corbet*. Clerk, *Menzies*.
Craigie. Fol. Dic v. 3. p. 81. Fac. Col. No 9. p. 16.

1793: February 20.

Messrs PERCHARD and BROCK, against JAMES BRACKENRIDGE, and Others.

PERCHARD and BROCK of London, were the correspondents of Messrs Agnew and Sheppard, merchants in Guernsey. In this character, they were in the practice of paying bills drawn upon them by Agnew and Sheppard, on receiving one half *per cent.* of commission. In consequence of such payments, they were, in the year 1788, above L. 1000 in advance for that Company. In order to repay these advances, Agnew and Sheppard, made the bills, which they drew on their debtors in this country, payable to Perchard and Brock. And, in this way, they transmitted certain bills to them, payable in this manner, drawn on James Brackenridge and others, residing in Ayrshire. These bills were afterwards accepted; but when they became due, payment was refused. The present action was therefore brought against the acceptors, by Perchard and Brock, and their attorney. In defence it was

Pleaded: The bills in question were accepted as value for contraband goods, which the defenders never received. And, at any rate, for the price of such goods, no action can be sustained. And, as this defence would be good against Agnew and Sheppard, it must also be good against the present pursuers, who are merely their agents in this country. The bills are only made payable to them on account of the greater conveniency and advantage of remitting money to London, than to Guernsey. The pursuers, according to their own admission, give the drawers no credit for bills in this situation; but only for their proceeds, when received. They, therefore, are not entitled to the same privileges with onerous purchasers of bills, who, upon the faith of them, immediately advance their contents to the drawers. They must be considered as holding the bills in question, either as consignees of the drawers, or as *creditores hypothecarii*, for the sums advanced by them. In either view, they can have no higher right to the bills, than they would have to any other mercantile goods possessed upon the same footing; that is, a right burdened with every exception competent against their author.

Besides, if the pursuers are to be considered as onerous holders, there is an end to the objection of *pactum illicitum*, in smuggling contracts; as it is a very easy

No 109.

The holder of a bill in security for sums formerly advanced, or to whom a general balance is due, has the same privileges with a holder for value instantly paid.