

as if he had paid or undertaken the same; and the bill bears, *as per advice*; and, when it came to be presented, the defender was persuaded by John Ewen to accept, though no letter of advice was come, upon his assurance, that the letter of advice would come by the next post; whereas the first advice he received, was, that Ewen, the drawer, was broken and fled, and thereby he was liable to pay the price of the goods to the merchants with whom he corresponded; and craved Ewen's oath upon what past.

No 71.

It was *answered*: That the pursuer had sufficiently instructed his libel, by the defender's accepted bill, and John Ewen's oath, acknowledging the trust; whereby there was *ius quaesitum* to him, which could not be prejudged by any thing that John Ewen could depone, his arrestment being a legal assignation, equivalent to an indorsed bill.

It was *replied*: *imo*, An arrestment is not equivalent to an indorsed bill; because indorsations are for value advanced or performed, for obtaining the indorsation; and the favour of commerce admits few exceptions; whereas an arrefter pays or performs nothing, in contemplation of the debt pursued to be made further coming, but comes in the debtor's place, and must only claim the debt as it is. *2do*, Were the bill payable to the common debtor, his oath could not prejudice the arrefter; but, being payable to John Ewen, and the common debtor's interest arising from John Ewen's oath, the pursuer, who pretends to instruct his claim by that oath, cannot decline, that the defender should also have the benefit to examine John Ewen, upon any quality or circumstance that would operate a defence. *3tio*, The oath already emitted is not equivalent to a back-bond or indorsation; because, if this bill were indorsed, or the trust proven by any writ, the defender would have access to recur upon John Ewen, for denuding himself of that bill, which he had induced the defender to accept, without any just or onerous cause, to ensnare or subject him to double payment; whereas, if his oath were taken strictly upon the pursuer's interrogatory; and the defender (who had not access to interrogate him formerly) excluded from clearing his defence; he would both be subjected to the debt, and want the benefit of relief.

'THE LORDS, before answer, ordained John Ewen to exhibit any letter of advice he received with the bill; or any other letter concerning the same; and also to depone upon what was treated, and communed, at accepting of the bill; and for what cause the same was drawn; and the defender to produce any letters received by him, concerning the said bill; as also the instructions and documents of his paying the value of the said goods, to the merchants who furnished the same.'

Dalrymple, No 25. p. 31.

1711. *June 27.*

GEORGE WILSON of Sands *against* GEORGE M'KENZIE in Stonehive.

IN the action, at the instance of George Wilson against George M'Kenzie, for repayment of L. 60 Sterling, contained in a bill drawn by George M'Kenzie,

No 72.

An acceptor who had paid, found to have recourse upon

No 72.

the drawer, although the drawer alleged the acceptor was not meant to be drawn upon, but another person.

and directed upon Alexander Deuchar and George Wilson, payable to John Campbell, Deuchar's servant, and indorsed by him to the treasurer of the bank; which bill the pursuer paid, upon distress, at the bank's instance: THE LORDS repelled this defence, that George M'Kenzie drew the bill only upon Alexander Deuchar, and that George Wilson's name was afterwards added to the direction by Deuchar, without M'Kenzie's knowledge; and sustained Wilson's recourse against the defender as drawer, in respect, George Wilson, finding a bill subscribed by M'Kenzie, directed to Deuchar and himself, was *in bona fide* to accept the same upon the drawer's faith, and was not bound to know but M'Kenzie had drawn upon him. Besides, he having paid to the bank a debt for which M'Kenzie was liable *in omnem eventum*, he ought to be repaid as a *negotiorum gestor*, whether the bill had been drawn upon him or not. See This case, Div. 3. *b. t.*

Forbes, p. 512.

1717. *January 29.*

JAMES ARTHUR, Skipper, *against* DUNCAN Oldcorn, Merchant.

No 73.

A shipmaster drew in favour of the freighter, at the freighter's desire, on a merchant to whom the goods belonged. The bill bore 'value received.' Yet, the merchant refusing, the freighter, previously liable to the shipmaster, had no recourse on him as drawer.

DUNCAN Oldcorn having entered into a charter-party with James Arthur, skipper; whereby James was to perform a voyage to Rotterdam, and to take in such goods as the freighter pleased, and to return with another loading to Alloa; and both at a certain freight, payable within 24 hours after liverying at the respective ports, and with all average, and other dues, used and wont: The ship being stranded in a storm, the skipper was obliged, for getting her saved, to pay a great sum, which he borrowed from Oldcorn's factor in Holland, to whom the goods were consigned, and drew a bill for the same upon Oldcorn: This he refused to accept, till the skipper and he should count, that it might be known, what proportion of this great average belonged to him to pay, and the ship should bear. Accordingly, the same was adjusted betwixt him and the skipper after his return, and a bill drawn on the owners by the skipper for the ship's part, which they paid; but Oldcorn then alleging, that (as to the cargo's part of the average) the goods, though shipped by him, belonged to Mr Blair merchant in Edinburgh, upon whom the skipper ought likewise to draw for the proportional part; the skipper accordingly drew upon Blair payable to Oldcorn; but Blair refusing to accept, Oldcorn returns upon the drawer; who suspends, on this reason, That, though the bill did bear value received, yet the true cause of granting it was for Mr Oldcorn's relief of the skipper's Dutch bills, which he drew for paying the salvage *pro tanto*; and that the charger was debtor himself in that sum, as the proportional salvage of the cargo paid out by the skipper in Holland; and therefore, this being a liquid debt, instantly instructed, and the charger being both possessor of the bill, and merchant-freighter, loader of the goods, he by law is liable in that sum; for, though sometimes compensation be not good on a debt of the indorser's, yet it is always good upon a debt of the possessor's.