

## 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 livery 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.

*Answered* for the charger: That, though he was freighter, yet the said Mr Blair was proprietor of the goods; and, by bills of loading, the goods were to be delivered at Rotterdam to him or his order, (he paying the freight and average conform to the custom of sea); and seeing the skipper had delivered out the goods to Mr Blair's order at Rotterdam, *sibi imputet*, who might and ought to have retained them till he was paid.

*Replied* for the suspender: That the bill of loading bears, that the goods were all shipped by the charger, and by his order to be delivered to Mr Blair, or his order, at Rotterdam; and that the clause in the bill of loading (he or they paying freight and average) was but an additional security to the ship-master for the same; but did not innovate or annul the charter-party; neither was it the practice (and it would be destructive to trade if it were always so) to the master to plead the right of hypothec, and not return the goods till paid, when he is sufficiently secured by charter-party.

THE LORDS found, That the charger could not have recourse against the drawer of the bill charged on.

Aff. *Abercromby.*

Alt. *Jó. Ogilvie.*

Clerk, *Robertson.*

*Bruce, No 51. p. 69.*

1785. *July 27.*

JAMES GOODFELLOW *against* ANDREW MÄDDEK.

MÄDDEK was charged with horning, at the instance of Goodfellow, for payment of a bill of exchange which had been accepted by him. He presented a bill of suspension, on this ground, that he had been fraudulently induced to admit his subscription to the acceptance, without full value, and he insisted for the charger's being judicially examined; urging, that, in this manner, he would have an opportunity, if the charger should advance what was not true, to disprove it, and so to invalidate his claim.

*Observed* on the Bench: Where circumstances of fraud are relevantly stated against the holder of a bill of exchange, and a proof offered, such a previous examination as is here required might be highly expedient, both for superseding the necessity of farther evidence, and for the better investigation of the truth. But to allow that method of proceeding, in consequence of general allegations like the present, would tend in a great measure to obstruct that free currency of bills of exchange, which is so essential to trade.

THE LORD ORDINARY found the letters orderly proceeded. And his judgment was affirmed by the Court, after advising a reclaiming petition for the suspender, with answers for the charger.

Lord Ordinary, *Monboddo.*  
*Craigie.*

Aff. *H. Erskine.*

Alt. *Dalzell.*

Clerk, *Home.*

*Fol. Dic. v. 3. p. 78. Fac. Col. No 227. p. 353.*

No 73.

No 74.

The acceptor of a bill alleged he had been fraudulently induced to admit his subscription. His allegation was only general, not of particular facts, and circumstances. He insisted for a judicial examination of the holder of the bill, which was refused.