1775. *February* 22. MESSRS HERRIES and COMPANY *against* ANDREW CROSBIE, Esq.

COMPENSATION—RETENTION.

Found that the acceptor of bills, indorsed by the drawer before the term of payment to his creditors' factor, upon a receipt bearing that the value, when paid, should be remitted to his constituents, on account of the debt owing them, could not propone compensation on a bill of the same date, granted to himself as a creditor, in a balance due upon former transactions, and *quoad ultra* as the only consideration received for his own acceptances from the drawer and indorser of the latter. The law knows no distinction between indorsement for money presently paid and indorsement in security of a former debt.

[*Faculty Collection, VII. p.* 44; *Dictionary,* 2577.]

PITFOUR. I always thought that there was a distinction, and a reasonable one, between bills indorsed for value, and in security. That, as to the former, compensation could not be pleaded; but, as to the latter, might. But I see it is said that the practice is different.

PRESIDENT. I admit that practice has gone strong for such a distinction. I have been sometimes tempted to think that some decisions have been pronounced on this point without much attention to principles. Mr Sherriff wrongfully intromitted with, and disposed of certain parcels of wine:—his creditors complained. Mr Sherriff offered to secure them, by indorsing bills not yet payable. The creditors accept of this, and demand payment. It is answered, This indorsation is not in the way of trade, but merely for security; therefore compensation is pleadable. What is that compensation? Bills granted of the same date for equivalent sums. If this were law, it would be ruinous to commerce. A man in labouring circumstances might procure bills from his friends, produce them as a fund of security, quiet his creditors, and at length disappoint their payment by means of a plea of compensation reserved for his friends. I acquit Mr Crosbie of any similar intention, but I must argue on the case as it stands. I say that compensation would be repelled *exceptione doli*; for the bills were given to procure credit, while a counterpart, defeating that credit, remained in the pocket of the giver. Were the question as to a bill in the common course of business, I should be satisfied to follow the course of the former decisions.

KAIMES. Altogether of the President's opinion. As to the last point, from the nature of the transaction, there was either a fraud intended or compensation was barred. But it will be observed that *here* the bill granted to Mr Crosbie was for L.700: of this L.400 was already due, so that there is still a debt sufficient to cover the sum of L.300.

JUSTICE-CLERK. If compensation were admitted here, it would destroy the whole commerce of Scotland. As to the first point, I cannot see how the balancing of accounts, which is practised by merchants from time to time, should

have the effect to make posterior payments not to be considered as indorsations for value. This is adverse to every principle of commerce, and would extinguish it altogether. As to the second point, of even date with the bills counter-bills are taken. How can the counter-bills be pleaded in compensation? If such ideas were received, we should be no longer a trading country:—no one would take security on a Scotch bill, though accepted by a person of the greatest opulence and most established credit.

Coalston. Compensation is no doubt strongly founded in law and equity. And if bills were to be held like bonds and ordinary vouchers of debt, compensation might be received. But *that* is not the case. Bills indorsed in the way of commerce are to be considered as cash, or as bank-notes. It is utterly inconsistent with that idea that compensation should be admitted. When one merchant indorses bills to another, although no money is actually advanced, the receiver continues to give credit. I admit that some of our ancient decisions have gone too great lengths. I admit that, when the privileges of bills are expired, all exceptions are competent; but *that* is not the case here. As to the *second* point, I am equally clear. I do not like to see a bill granted as a fund of credit, while at the same time there is a counter-bill tending to render that credit ineffectual.

Monboddo. There is a great difference between bills indorsed in the way of commerce, and in security. In the last case they are compensable just as a bond. A bill indorsed in security requires no diligence. In payment it does. I do not sit here to judge of utility, but to judge according to my notions of law. I think that the practice of merchants, were it different, must bend to the law. The commerce between Herries and Sherriff was long before at an end; a balance was struck, and security granted. Suppose that Sherriff had granted his bond, and then indorsed the bills in part of that bond, might not Crosbie have pleaded compensation? Where is the difference between that case and this? The only thing that moved me was the counter-bill. If Crosbie had known that Sherriff was to have indorsed the bill to Herries, he might have been barred *personali exceptione*: but that is not the *species facti;* the bills were indorsed in order to raise money for discharging another bill due by Crosbie.

Elliock. If the defence here pleaded were sustained, we must abolish that method of transacting business which is carried on by bills. All bills are in effect in security, never *in solutum;* for the indorsee has recourse against the indorser. This would not be the case if they were *in solutum.* Whether the debt was contracted by bond or *in re mercatoria,* it matters not. When a bill is once indorsed, we must judge from the nature of a bill. There is no merchant in Europe who would say that this is a difficult case.

Kaimes. Compensation was sustained against an onerous assignee, in bonds, because originally the assignation of a bond was no transference *in jure,* but merely a procuratory *in rem suam.* The Court incautiously continued to sustain compensation, even after an assignation came to be a transference *in jure.* This would not stand, if it were sifted to the bottom. However, bills were never in the situation that bonds were:—merchants always deal by balances; every bill is given credit for in the general balance; it is not imputed in payment of any particular debt. The assignation to the wines was no more than altering the balance. The law of bills is from practice, for the benefit of commerce. If

we sustain compensation *here*, we ruin commerce. When I grant a bill, in order to procure credit to a man, what can that mean but to allow him to make whatever he can of it? If I can plead compensation, I undo the credit which I gave. As to what I formerly observed, that Mr Crosbie had still L.400 due, with which he might be permitted to cover his bill for L.300, I observe that the L.400 was due *ab ante*, and therefore cannot affect the credit for the L.300 given to Sherriff.

GARDENSTON. The plain import of the transaction was, that the bill should pass for money: the consequences of sustaining compensation would be to put an end to the commerce of this country. Balancing of accounts does not alter the nature of the credit. If the merchant in London had made further payments, the account would have been current. What difference can it make that the merchant in this country has made the further payments.

On the 22d February 1775, "the Lords repelled the defence of a compensation, and found the letters orderly proceeded."

Act. J. Montgomery. *Alt.* A. Wight. *Reporter*, Gardenston.

Diss. Monboddo. Pitfour, on the second point, came over to the general opinion of the bench.

1775. *January* 24. JAMES ANDREW and OTHERS *against* The MAGISTRATES and TOWN COUNCIL of LINLITHGOW.

BURGH-ROYAL.

Found that non-residence was no objection to the election of a burgh-councillor.

[*Faculty Collection, VII. p.* 16; *Dictionary*, 1883.]

HAILES. The complainers, in their argument, take it for granted that *Alderman* means councillor, and consequently that the old statute requires the residence of councillors. But they should not have taken for granted what may be contradicted from ancient writings. In the Chartulary of Aberdeen there is a grant *aldermanno*, ballivis, et communitati. *Aldermanno* here means the chief-magistrate. The statute which mentions "provost, bailies, and aldermen," means the chief magistrates, however they are denominated. Much in the ancient system of burghs is misunderstood. From ancient writings I see that there were sometimes more than one *præpositus* in a burgh, and that sometimes the bailies were considered as the bailies or deputies of the provost. There are grants "præposito et ejus ballivis." All this might tend to illustrate the old statute, were there room for such inquiries. But I think that the practice here must determine the question *in possessorio*. It seems evident that the practice of this burgh has been to choose councillors who do not reside.

JUSTICE-CLERK. The constitution of burghs depends on custom—custom may abrogate a set. *Here* the set does not limit the election of councillors to