company's funds, not out of the estate of Mr M'Dowal; and what precise amount of the company's effects may in the end belong to Mr M'Dowal, it is impossible to ascertain till the company itself is dissolved. No 36.

THE COURT, by two consecutive interlocutors, 'adhered to the Lord Ordinary's, which had found, That the suspenders Donald and Company merchants in Greenock, and Donald and M'Dowal merchants in Glasgow, cannot plead compensation or retention of the sums due by them to Ebenezer M'Culloch and Company, on account of any debt which Ebenezer M'Culloch and Company may be due the suspender John M'Dowal, or which the said Ebenezer M'Culloch may be due to him; and, therefore, repels the reasons of suspension pleaded for the respective companies, and found the letters orderly proceeded against them.'

Act. *Ilay Campbell.* Alt. *Wight.* Clerk, *Tait.*

Fol. Dic. v. 3. *p.* 143. *Fac. Col. No* 142. *p.* 372.

1775. *February* 22.

HERRIES and Company, of London, merchants *against* ANDREW CROSBIE.

No 37.
Found that the accepter of bills indorsed by the drawer before the 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 upon a relative bill of the same date, granted to himself as creditor in a balance due upon former transactions, and, *quoad ultra*, as the only consideration received for his own acceptances, from the drawer and

UPON the 2d December 1773, Mr Crosbie granted two acceptances to Alexander Sheriff for L. 150 each, the one payable three months, and the other six months, after date; and Mr Sherriff, on the other hand, granted his acceptance to Mr Crosbie for L. 700.

The above two bills accepted by Mr Crosbie, were soon after indorsed by Mr Sherriff to Sir William Forbes, James Hunter and Co., who granted the following receipt: 'Received, Edinburgh, 8th December 1773, from Mr Alexander 'Sherriff, his two bills on and accepted by Andrew Crosbie, Esq; L. 150 each, 'which, when paid, we shall remit the value to Herries and Company, on account of the debt owing them by Messrs Sherriff and Guthrie.'

Mr Sherriff failed in February thereafter; and, upon the 1st of March, a protest was taken against Sir William Forbes and Company, stating in substance, that Mr Crosbie had only accepted these two bills in order to enable Mr Sherriff to raise L. 300, by discounting them, to pay a bill which he owed to Mansfield, Hunter and Company, for which he and another gentleman were bound; and being a creditor to Mr Sherriff himself in L. 400, had got a bill of the same date with the two L. 150 bills from Mr Sherriff, for L. 700, as the amount of these two bills, and the balance due to Mr Crosbie upon former transactions, and therefore that he was entitled to compensate the two L. 150 bills with the L. 700 bill, as the two coeval bills had not been purchased in the way of commerce, but indorsed in security of a preceding debt.

Mr Crosbie, in order to take the opinion of the Court upon his plea of compensation, presented a bill of suspension of the two bills which had been accepted by him.

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indorser of the latter. The law knows no distinction between indorsement for money presently paid, and indorsement in security of a former debt.

On the part of the chargers, the following state of the matter was given: That Herries and Company did, in the year 1772, agree to give Alexander Sherriff and Company, wine merchants in Leith, a credit upon a current account to the extent of L. 4,000, to be kept in name of Alexander Sherriff; and he, and Robert Arbuthnot and James Guthrie, his partners in trade, granted bond to pay the L. 4,000 when demanded, or so much thereof as should appear to be due by the account to be kept: That Arbuthnot and Guthrie, who were partners in other branches of trade in which Sherriff had no concern, failed some time after the establishment of this credit; and, at the time of their failure, there was due upon the current account L. 1896, but was reduced by after payments to L. 1263: That Herries and Company having transmitted the bond of credit, and a copy of the account current to their correspondents here, with powers to act for them, Sherriff, with the consent of the trustee for the creditors of Arbuthnot and Guthrie, did, in Jan. 1773, execute a regular assignment to Sir William Forbes and Company, of the stock of wines which belonged to the partnership, and remained unsold, in security of the balance due upon the account current: That, notwithstanding this conveyance, the greatest part of the wines were allowed to remain in the cellars of Sherriff, that he might be assistant in the disposing of them, and who accordingly sold most of them, and accounted for part of the price; but Sir William Forbes and Company having discovered that he had sold much more than he had accounted for, and having challenged his conduct, he acknowledged his having applied part of the proceeds to his own uses; but, in order to discharge what he owed them in that manner, he indorsed to them the two bills in question.

The suspender *contended*, That from the way and manner in which the chargers got possession of the bills in question, they can be in no better situation than if these bills had remained in the hands of Sherriff himself, and that he must be entitled to plead compensation against the chargers, upon the larger debt due to him by Sherriff, and instructed by his acceptance of the same date for L. 700.

In support of this proposition, it was

Argued, 1*mo*, That, whenever a bill is turned out of the commercial line, by being impledged in further security of an old debt, it is the undoubted law of this country, that the person who so acquires right to it can only hold it *tantum et tale* as it stood in the person of the drawer, and must be affected by every claim of compensation that would have been good against the drawer himself; and that the bills in question fall under the latter predicament, is instructed in the clearest manner from the charger's own state of the facts. They do not pretend that they advanced value in cash to Sherriff when they got these bills from him; neither do they so much as pretend that they accepted of them in payment, or that they even became bound to do diligence upon them, in order to recover their contents, or to impute them to Mr Sherriff's credit, unless they

should actually recover payment of them from the accepter. The very reverse of all this is proved by their own receipt. No 37.

2*do*, The debt due to the chargers is not to be considered a debt contracted *in re mercatoria*. The account which Sherriff and Company held with Herries and Company of London, was shut upon the 20th June 1772. The balance was then struck, and from that period no further transaction took place upon the footing of that account. Payments were indeed made from time to time, in extinction of the balance due on the 20th June 1772; but, from that day Sherriff and Company never drew another bill upon Herries and Company; and, although the debt due to that company was contracted *in re mercatoria*, they were not entitled to any privileges beyond other common creditors, who might have lent Sherriff and Company upon their bond. They, therefore, cannot with any reason pretend, that the bills in question, which were indorsed to them at the distance of 18 months after the account was closed, not by Sherriff and Company, but by Alexander Sherriff alone, can be held as acquired by them in the ordinary course of trade, or claim any greater privileges than if such bills had been indorsed in security of a debt that had not arisen from a mercantile transaction, but from an immediate loan for which a bond had been granted in the common way of business.

Answered: Bills are the creatures of commerce, and the custom of merchants in them makes the law of the land; and there is no part of the mercantile law better established, universally in Great Britain, than that all persons who purchase bills with their money, or take indorsements to them, value in accompt, are held to be onerous indorsees, and not to be subjected to any hazard of disappointment in payment from the debts or deeds of the indorsers.—If the law stood otherwise, mercantile transactions would be unsafe, and credit would be undone; for who would trust to the faith of bills indorsed, if the debt, act, or deed, of the indorser was to militate against the indorsee? The chargers never before heard that a merchant's closing an accompt has the consequence of making the balance be considered in law as a debt not contracted *in re mercatoria;* nor did they ever hear that an indorsement to a creditor upon an accompt current was not to be held an onerous indorsation, so as to bar compensation, because the accompt was closed when the indorsement was made. Merchants generally close or balance their current accompts twice a-year, and the closure of an accompt cannot alter the nature of the balance, however long the accompt may remain unoperated upon; nor can the balancing or closing of an accompt have any effect or operation in rendering the indorsement of a bill towards satisfaction of the balance less onerous than it would have been before closing the accompt.

The distinctions which the suspender aims at in all his argument, between an indorsement of bills for money paid, or value in accompt, and indorsements in security of a former debt, are unknown in the mercantile law of this kingdom. In practice, there is nothing more common than for merchants who are debtors to other merchants, by bills or accompts, to remit or indorse bills in satisfaction

No 37.

of such debt, which are all indorsements *ex figura* in payment, but, from the nature of the transaction, are only indorsements or remittances in security. If the bill is not paid, the indorsee has his remedy against the drawer, indorser, and all preceding indorsees.

There is another ground upon which this matter falls to be decided in favour of the chargers, viz. that the suspender having accepted the two bills of L. 150 each, for the professed purpose of supporting Sherriff by his raising money upon them, and thereby agreeing that his acceptances should go out into the world, cannot be admitted to plead compensation upon a bill taken from Sherriff, of the same date, as the consideration for those other bills, against the chargers, who, if they did not acquire right to the suspender's bills as onerous indorsees, did certainly acquire right to them from a most onerous cause; and, consequently, ought not to have the right acquired by them defeated by a counter bill, which the suspender's known character will not allow them to suppose or believe was intended for any other purpose, than merely operating a relief from Sheriff. But the law disapproves of such transactions, as they may be a means of ensnaring the lieges; and so the Court has in different cases refused to allow a discharge to operate in extinction of a bond, or other ground of debt, against an assignee to the debt, when the discharge bore the same date with the document of debt conveyed.

'THE LORDS repel the defence of compensation.'

Act. *L. Advocate Montgomery.* Alt. *Wight.* Clerk, *Ross.*

Fol. Dic. v. 3. *p.* 146. *Fac. Col. No* 162. *p.* 44.

1781. *December* 11. CAMPBELL *against* CAMPBELL.

No 38.
A trustee found not entitled to retain money belonging to his constituent, in payment of a debt due to himself, having received the money *qua* trustee.

ASHNISH and Silvercraigs, trustees for Campbell of Danna, sold the estate of the latter, which was burdened with certain annuities; and, Silvercraigs being himself a creditor to Danna, prevailed on the purchaser to pay to him and Ashnish that part of the price which he might have retained as the stock corresponding to the annuities, they granting him a bond, obliging themselves to indemnify him from these annuities. On the death of one of the annuitants, a creditor of Danna having arrested in the hands of the trustees, a competition took place in a multiplepoinding betwixt this creditor and Silvercraigs, who insisted, that he was entitled to retain the stock of the annuity, that had fallen, for payment of the debt due to himself.

THE LORDS found, that the money was in Silvercraigs' hands merely in the character of trustee to Danna, and that he had no right of retention therein. *See* APPENDIX.

Fol. Dic. v. 3. *p.* 145.