1776. *November* 23. JAMES HOG and OTHERS *against* The REPRESENTATIVES of James Inglis.

CHARTER—PARTY.

Freight had been paid, before-hand, by some emigrants to America. The vessel not having proceeded on the voyage, not totally disabled, but only put back to be repaired, the freight was ordered to be returned.

[*Faculty Collection, VII.* 386; *Dict., App. No. I, Mutual Contract, No.* 1.]

COVINGTON. The Court must hold the practice in London to be the rule, for both parties agree in referring to the report of London merchants on that head. It is inherent in the nature of the contract *locati conducti*, that, if the *locator* of the ship does not perform his contract, he is not entitled to his hire; but the freight here was actually paid per advance, according to bargain. In order to secure against after disappointments on the voyage, this freight had been insured. *Query*, On whom did it lie to insure the freight? The owner could not insure it, for he had already received; but the freighter who had hired the vessel, had an interest to insure: if he did not, he must be held as standing the insurance himself. If the freight had been insured, and a total loss of the ship had happened, the insurers would have been bound to pay the freight, not if a stop only had occurred in the voyage without a total loss; here there was only a stop, and no total loss: and consequently the freighter, who stands in the place of the insurer, is not bound to make up the loss: the non-performance of the voyage proceeded from the fault and obstinacy of the master.

PRESIDENT. Approved of Lord Covington's opinion. Had Inglis made a timeous intimation to the emigrants that he was willing to proceed on the voyage, the case would have been different.

KAIMES. This case is not different from the case decided at common law, and indeed by common sense, that if one is bound to carry persons or goods to a particular place, and does not, he cannot have a freight. Inglis is not even entitled to a freight *pro rata itineris*, for he repented of his bargain, and would not carry the emigrants on. It makes no difference whether the freight was advanced or not. As to maintenance, the nature of the contract was to carry the emigrants to America, and maintain them on the voyage. He was bound to maintain them wherever they were on the passage; whether at sea, in a road, or in a harbour.

MONBODDO. The merchants at London make a report of maritime law to which I am a stranger. Inglis was a *locator operis*, and he was bound to perform the work. If any accident happened, he was bound to make it up.

On the 23d November 1776, "The Lords found the Representatives of Inglis bound to repeat the whole freight, and not to have any claim for the

provisions expended in the former parts of the voyage, in respect that the vessel was not totally disabled, and that Inglis refused to implement his contract, by completing the voyage; and remitted to the Ordinary to proceed accordingly."

Act. G. Ogilvie. *Alt.* A. Crosbie.
Reporter, Hailes.

1776. *November* 26. GEORGE WILLOX *against* JOHN CALLENDAR and WILLIAM WILSON.

BILL.

It was found that a Bill, of which the acceptance was procured by concussion, was ineffectual in the hands even of an onerous indorsee.

[*Folio Dict. III.* 81; *Dict.* 1519.]

MONBODDO. The bills were indorsed for behoof of William Willox, and for value. The only question is as to the effect of *vis et metus*: that is a good exception, even against an onerous indorsee. Although a man is imposed upon in signing a deed, it is still his deed; but when a man is forced by terror to sign a deed, it is no more his than if his hand had been led. Bills for a game debt may still be excepted against, though indorsed for value: this serves to explain the principle. The only question is, Whether the exception applies?

[As to this, his opinion was not very clear.]

GARDENSTON. It makes no difference whether the bills, when delivered, were indorsed blank or not. As to onerosity, I should doubt. If the cause rested *there*, I rather incline, from the *species facti*, to hold that here there was an indorsation in security. Be this as it will, *vis et metus* is pleadable against an onerous indorsee. My brother is mistaken as to his argument concerning game debts. In such case it has been repeatedly found that an onerous indorsee is entitled to force payment; and with good reason, for why should your facility in granting a bill hurt me an innocent person, who advances the money on seeing the security of your name. But wherever there is *vis et metus*, there is no deed: here there is as strong an instance of fraud and concussion as can be conceived.

KAIMES. I cannot perfectly concur in what is said as to the effect of force and fear. If a man clap a pistol to my breast, and make me sign a deed, the deed is good for nothing: my hand is there, but not my intention. I doubt as to the application to this case: the grant was intentional, in order to escape prison, and it was effectual to that purpose. I doubt whether this objection would be good against an indorsation for an onerous cause; but I do not see any such indorsation *here*.