

LETTER OF CREDIT.

1681. *January 7.*EWING *against* BURNET.

JOHN EWING, merchant in London, pursues Mr Andrew Burnet for payment of L. 600 Sterling contained in his bond, which being formerly disputed, it was found, 'That this bond was but a corroborative security, for what sums were due by Burnet to his brother Thomas to Ewing, unless the bond had been granted upon transaction, to wit, that Ewing having arrested Burnet at London, he had given in an account to Burnet of sums alleged due by him or his brother, exceeding the sum in this bond, and had given him an abatement to prevent plea, which was found relevant *scripto vel juramento*.'—It was now further *alleged*, That though the transaction was not so proven, yet Burnet must be liable not only for his own debt, but for his brothers, there being produced a tract of letters for several years by Burnet to Ewing, 'desiring him to 'honour his brother Thomas Burnet's bills, and that he should put provisions in 'his hands for satisfying thereof;' and now he produceth bills of Thomas, exceeding the sum in this bond, which were protested and not paid.—It was *answered* for Burnet, That these letters being amongst merchants *in re mercatoria*, can oblige Burnet no further than for such debts of his brother's, whereof Ewing gave notice in due time, but cannot import an absolute engagement for the sums, especially after Thomas is broken; for though bills granted by a merchant upon his correspondent, have the most ready execution, yet if the obtainer of the bills do not, with competent diligence, present them for acceptance, and in case of non-acceptance protest; and in case of acceptance present them again at the time of payment, and in case of no payment protest, and in due time return upon the drawer; the protested bills will not oblige the drawer, if, *medio tempore*, the correspondent brake; much more must this hold *ex natura negotii* in this case, that Burnet cannot be liable unless he had timeous advertisement to put provisions in Ewing's hand; and whereas Ewing produces his copy-book of letters, bearing letters from Ewing to Burnet, 'advertising him of his 'brother's bills,' he is content to hold that book for probation, Ewing deponing that it was made up of the original letters written to Burnet.—It was *replied*,

No 1.

A merchant's letter of credit to honour another merchant's bills, was found effectual only as to such bills as were accepted and paid, and whereof repayment was not made, and advertisement given to the writer of the letter in due time, before the other merchant became insolvent.

No 1. That Burnet's letters are absolute and reiterate engagements for all his brother's bills, and he ought to have secured himself by infestment of his brother's estate in Scotland, or otherwise, his brother being then a factor in Holland of great credit, and having a considerable estate in Scotland, the defender might better know the condition of his brother than a stranger.

THE LORDS found that these letters being *in re mercatoria*, did only oblige Burnet for his brother's protested bills, whereof Ewing gave him timeous advertisement after the bills were protested, and that he might have procured provisions from his brother, or secured himself for these bills; but that the bills having lain long over protested, without advertisement, till his brother was broken, that he was not liable further than was made known to him in due time; but found the advertisements probable by his oath, or by Ewing's letter-book, he deponing that it was truly made up.

Fol. Dic. v. 1. p. 547. Stair, v. 2. p. 828.

* * * Fountainhall reports this case.

January 31. 1680.—In a pursuit, William Ewing, merchant at London, *contra* Mr Andrew Burnet, advocate, upon a bond granted by Mr Andrew at London, when he had put him under arrest for vast sums of money alleged owing by him and his brother, Thomas Burnet, near to L. 10,000 Sterling, Newton inclined to reduce this bond as presumed to be *vi et metu* extorted, unless Ewing would instruct a cause of debt prior to the said bond. This would not hold as to bonds granted in Scotland, where a man under caption, or to shun poinding, grants a bond; for such bond will be obligatory against him, since *executio legis non habet secum injuriam*. This point being heard *in præsentia*, the LORDS, on the 18th February 1680, "found, since the bond was presumed to be in corroboration of former bonds, bills, and debts, (though it did not mention that,) therefore Ewing ought to condescend on these prior rights and debts." *Quer.* What if they had been all retired and cancelled at the granting of this new bond? The LORDS abstracted therefrom that point of the *vis et metus*, which is to be presumed from the English way of arresting and imprisoning on a naked assertion, as being of a dangerous preparative on both hands; and decided this merely upon the presumption foresaid, that it was corroborative.

July 2.—In Mr Andrew Burnet's case with William Ewing, (31st January 1680,) the LORDS ordained Mr Andrew's oath to be taken on the causes of debt prior to the bond of corroboration.

January 7. 1681.—A reduction of a bond that he was forced to grant, being imprisoned in London, and not being able to find caution. THE LORDS found this answer relevant to elide it, that it was granted upon making up ac-

counts betwixt them, wherein Mr Andrew got abatement, and so was *lis transacta*, though not *litis transactio*, for *dubius est eventus litis, et transigens pacem suam redimit*, for the arresting him here was not *lis pendens*, but antecedent and preparatory to it. Yea, the LORDS are in use to consider bonds granted by parties, under caption, valid, as transactions, if a part of the debt be remitted, as was found betwixt

and which is more strange, though there were captions proceeded upon decreets, *nam ubi lis est finita per sententiam* there can be no transaction, because no plea depends, *L. I. D. De transactionibus*, as was decided betwixt Pitfoddells and John Donaldson's Creditors. * THE LORDS also found Mr Andrew's letters to Ewing not obligatory, because, *ex natura negotii*, this being a cautionary for bills of exchange, (for which he was to have recourse on his brother,) Ewing was obliged to have given Mr Andrew notice when they were drawn, which he did not for two or three years. Likeas, Mr Andrew's letters desired Ewing to acquaint him, though the first ground moved the LORDS most *ex natura negotii*.

Fountainhall, v. I. p. 80. & 106. & MS.

1705. July 26. ELLIOT against GEORGE HOME of Kaims.

GEORGE HOME of Kaims having written a letter to his brother, John Home, at London, in these terms, That he was content to advance him L. 30 Sterling to supply his necessity, and had written to Edinburgh to send him credit for it; but if he thought it would be too long ere it came to his hand that way, he might shew his letter to Mr Foulis, and give him a bill upon him for the L. 30, which should be honoured; and so to get the money from him or Mr Elliot, and it should be punctually paid. John Home having taken up the L. 30 Sterling from Mr Foulis, drew a bill upon his brother Kaims for it, which was paid, and some months after drew another bill upon him for L. 13 Sterling, payable to Mr Elliot, who pursued Kaims for payment.

Alleged for the defender, He could not be liable for the L. 13 Sterling, because his letter was fulfilled by paying to Mr Foulis the L. 30 Sterling therein contained several months before his brother received the L. 13 from Mr Elliot; and he could never be liable by his lester for twice payment of the sum, or any part of it.

Replied for the pursuer, The defender's letter to his brother being a letter of credit, for taking up L. 30 Sterling from Mr Foulis or Mr Elliot; albeit he got the sum from Mr Foulis, yet having kept the letter, and shewed it afterward to Mr Elliot, he was *in bona fide* to advance money upon it; not knowing that Foulis had already made payment. For the defender, after he paid

No 1.

No 2.

A person gave his brother a letter of credit for L. 30 Sterling, which he desired him to draw by bill from one or other of two persons, and it should be punctually honoured. Having received the L. 30 from the one, and L. 13 from the other, the writer of the letter was found liable to satisfy both.