DECISIONS

OF THE

LORDS OF COUNCIL AND SESSION,

REPORTED BY

WILLIAM FORBES, ADVOCATE.

1705. *June* 19. WILLIAM STIRLING *against* JOHN M'REACH, THOMAS, and MARY ALEXANDERS.

A gift of the bastardy and *ultimus hæres* of John M'Reach of M'Ilstoun, having been taken in the name of Mr. William Stirling, for the behoof of Sir Robert Grierson of Lag, to whom he granted backbond declaring the trust; and a declarator being raised against John M'Reach in Glen, and Thomas and Mary Alexanders, on whom M'Ilstoun had settled his fortune by provision, from which the defenders were assoilyied: Mr. William, who but lent his name to the gift and process, was decerned in L.300 of expenses of plea; reserving relief to him, as accords, against the persons principally concerned.

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1705. *June* 22. WILLIAM FEAD *against* JOHN EWART, Merchant in Edinburgh.

WILLIAM FEAD, executor of Robert Fead, merchant in London, having charged John Ewart upon a bond granted by him to Robert Fead: he suspended upon this reason, That the creditor in the bond had, by commission, uplifted from the Lord Glassford at London, the equivalent sum belonging to the suspender, for which he stood liable to hold count to him, conform to a back-bond.

ANSWERED for the charger,—That the money uplifted from Glassford was otherways satisfied; in so far as the charger did formerly remit the same by a bill drawn by Walter Ewing, merchant in London, upon his brother, John Ewing, writer in Edinburgh, payable to the suspender.

REPLIED for the suspender,—Ewing's bill was protested for not acceptance; and a protested bill is no payment. Nay, further, The drawer was utterly broken and gone off before the term of payment. *2do*, *Non constat* that Ewing's bill was granted for Ewart's money, but more probably it was for a desperate debt due by Ewing to Fead himself. *3tio*, The suspender having given no previous order to Fead for the remitting Glassford's money by bill, the risk of Ewing's draught could not lie upon him, more than a debtor sending money by post to his creditor, could pretend, that the miscarrying thereof is a loss to the creditor. *4to*, Fead not only had no mandate to remit the money, but was expressly obliged by his back-bond to count for it to Ewart; and, therefore, could not at his own hand remit the same; but should have kept it till either Ewart had occasion for it at London, or gave orders to dispose on't otherways.

DUPLIED for the charger,—*1mo*, That he having remitted the money by way of bill from Walter Ewing, a person held and reputed responsible the time of the draught, the not payment was upon Ewart's peril. *2do*, The bill must be presumed drawn for the suspender's money; being payable to him or order, and sent down to Scotland within twenty-four hours or thereby, after Mr. Fead received it from my Lord Glassford; and was indorsed by Ewart, when it came to his hands in favours of Mr. Fead. *3tio*, Mr Ewart did not return the protested bill in due time, that Mr. Fead might have done diligence against Ewing before he absconded. *4to*, Mr. Fead, who was factor for Ewart, and doing him the favour to recover Glassford's money, acted *bona fide*, as other prudent men, in taking bills for it upon Edinburgh, from a person of entire credit at the time, whose breaking and insolvency could not be foreseen. And as this was a due and faithful negociation, so it was acquiesced to, and ordered by Ewart himself, as most suitable to his conveniency and the exigence of his affairs. For in a letter to Mr. Fead, before notice of any payment made by Glassford, he says, A hundred and fifty pounds Sterling would do him great kindness, in order to the paying a sum to Sir William Maxwell who lives in Scotland. By two other letters, importing his knowledge that Glassford's L.150 was paid, and signifying to Fead, That he had received and protested Walter Ewing's bill for not acceptance; he writes, That he believes the money is safe, but fears Sir William Maxwell, whom he had positively assured of his sum against a precise day, might be disappointed through the not payment of Ewing's bill; and, therefore, entreats Mr. Fead, for saving his credit, to order L.160 payable to him at Edinburgh, cost what it will, and he should be at no loss. Accordingly Mr. Fead sent him a bill upon his correspondent for the L.160; who took Mr. Ewart's bond for it, payable to Fead. After this, Mr. Ewart by his letter to Mr. Fead, acknowledges the receipt of the L.160, and says, That he needs not fear his money, having been so kind as to help him then; which, if there come no effects of Ewart's into his hands before the term of payment, shall be in readiness on a short warning at the precise day. The haill strain of which letters implies a warrant for so remitting the money, at least an homologation thereof. For he insinuates a desire to have Glassford's money remitted to Scotland, for support-

ing his credit with Sir William Maxwell, whom he had assured of payment; and for supplying the want thereof, most earnestly writes for the L.160, promising payment faithfully, both by letters and the bond charged on: which he would not have done, had Glassford's money been remitted without his consent; but would certainly have challenged Fead for so doing, and desired him to pay it himself. And as the remise of Glassford's money by bill to Edinburgh, cannot be pretended an unwarrantable step of procedure in Mr. Fead, upon the account of Ewart's acquiescence and the drawer's solvency at the time: neither is there any ground for Mr. Ewart to obtrude compensation on the other's back-bond concerning Glassford's money, against his own L.160 Sterling bond charged on; albeit Fead's way of remitting Glassford's money to Scotland had been quarrelable. Because compensation that is but tacitly past from, can never be afterwards recurred to.—27th February, 1668, Henderson *contra* Birnie: Where the granting a bond blank in the creditor's name, was sustained as a passing from compensation, upon a debt due by the receiver against a singular successor, whose name was filled up in the blank. And so it is that Ewart's letters above-mentioned, are strong evidences of his having renounced the benefit of compensation upon Mr. Fead's back-bond: particularly the last, whereby he states himself in the case of one who absolutely promised payment at his day, except in the event of his effects coming afterward to be lodged with Mr. Fead: and not being able to say, That any such effects fell into his hands, after the said promise and bond charged on; he, Ewart, must be understood to have renounced all exceptions and objections that might be founded on the said obligement and bill for the L.150.

TRIPLIED for the suspender,—1*mo*, Until the delivery of the individual money received from the Lord Glassford be proved, it must be presumed, That Mr. Fead, a Scotsman and factor, would keep it himself, and draw bills for it upon Scotland, rather than put it in Ewing's hand, who could not but be in a tottering condition, having turned bankrupt so suddenly thereafter. As for Ewart's indorsing the bill in favours of Fead, that argues, if any thing, that he did not accept it in satisfaction of Glassford's debt; for it is not supposeable he would then have assigned it to Fead. But it was just and honest for Ewart to indorse it to Fead; because he having taken the bill in Mr. Ewart's name without his knowledge, could make no use on't had not such an indorsement been granted. 2*do*, As to the pretence that the bill was not timeously returned for doing diligence against the drawer; [the] suspender cannot prove, now after Fead's death, what time the bill and protest were returned to him, he having the instructions thereof himself. But the bill being produced by the charger, who is Fead's executor, it is very probable he got it in due time; else he had not accepted it. But, then again, such an allegeance is frivolous, since it is known that by the English law a person may be arrested without instruction of debt against him. 3*tio*, Mr. Fead being obliged in his back-bond to hold count for Glassford's money, he was in *mala fide* to remit it by bill without special warrant. Nor doth it better his case, that we consider him as a factor; seeing it is a received maxim, even among merchants, that *delegatus non potest delegare*, one trustee cannot safely trust another. As to the pretext of homologation of the remit, by writing the letters and granting the bond; approbation or homologation is never inferred from a deed that is capable of another construction: for *respiciendum quod actum est, et agentium actus*

non operantur ultra eorum intentionem. But here the suspender's design was not to discharge the back-bond; but only to borrow money for supplying his present necessity; and to repay, if Mr. Fead's occasions should peremptorily call for it, before recovering payment of Ewing's bill: whereas, at the same time, Mr. Ewart knew that Fead's obligement to hold count was still effectual to him, either for pursuing payment of the sum therein-contained, or to compense the bond charged upon. Nor is it of any moment, that Ewart granted the bond for borrowed money after the date of Fead's back-bond; for, in every compensation almost, the one debt is contracted before the other: and a charge upon a bond granted to one who was debtor to the granter by a former bond, hinders not the debtor in the last bond, either to compense or charge for payment upon the first, as he thinks fit.

The Lords having considered Ewart's letters, find that Mr. Fead acted warrantably in remitting the money; Ewing being held and reputed in good condition, and solvent, the time of the draught; and, therefore, repelled the compensation.

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1705. *July* 14. NICOL SOMERVELL, Writer in Edinburgh, *against* JOHN DUNDAS, Advocate, and NINIAN ANDERSON, Merchant in Edinburgh.

MARGARET ABERCROMBIE, having disponed her whole estate to Nicol Somervell, her husband; and delivered, on her death-bed, L.100 Scots to a trustee, to be given to Mr. John Dundas, and Ninian Anderson, which they received the day after her decease: Nicol, the husband, pursued the legatars for repetition of the money, upon this ground, that what was lying by his wife, belonged to him *jure mariti*, and could not be disposed of without his consent.

ANSWERED.—Margaret Abercrombie, the testatrix, leaving a considerable estate to the pursuer, in bonds bearing annual-rent, which fell not under the *jus mariti*, she might have burdened the same with legacies at her pleasure, which he would have found himself obliged to make effectual; and, therefore, he cannot repeat so small a compliment, actually delivered to the defenders by the defunct's order.

The Lords' assoilyied the defenders, and found them not liable to refund the L. 100.

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1705. *July* 20. ALEXANDER ALISON, *Supplicant.*

ALEXANDER ALISON, writer to the signet, as tacksman of the estate of Halkertoun, set to him by the Lords of Session, being put to for the proportion imposed upon that estate, for repairing the parish church that was ruinous,—applied by a bill to the Lords for a warrant to pay,—Craving, they would declare either