

and not liable to any objections which might have been competent against the indorser: *2dly*, Without insisting on this privilege, but supposing a bond had been deposited, to be given up to him, on condition of a disposition being delivered to the grantor; he was in *bona fide* to take up the bond, and thereon discharge his own debt, on seeing the condition implemented, as it really was, and Mr Graham's letter retired.

No 101.

*Answered*: The charger cannot plead the privileges of an onerous indorsee, as the bill was not drawn by the Earl and indorsed; but the draught being blank, he admitted his subscription: And, regarding him as an assignee, or as having right to a bond, on the condition of the deposition being implemented, it is plain it was not: An obligation to deliver a disposition to land for an adequate price, especially in a letter which is shortly conceived, necessarily implying an obligation to give a progress.

THE LORDS found, That the purchasers could not retain the money for which the bill charged on was granted.

Agt. *D. Grene.*Alt. *A. Murray.**Fol. Dic. v. 3. p. 80. D. Falconer, v. 2. No 18. p. 20.*1757. *January 7.*

Sir JOHN DOUGLAS of Killhead, Baronet, pursuer, *against* WILLIAM ELLIOT,  
Writer in Edinburgh.

WILLIAM SCOT, drover, being debtor to William Elliot, writer in Edinburgh, in considerable sums; in December 1746, executed an assignation of his effects, in security to the said William Elliot, for himself, and as trustee for Scot's other creditors; *first*, in payment of a bond for L. 200, due by Scot to Elliot himself; *secondly*, for relief of two bills for L. 300, which Elliot stood bound in for Scot, and which he was afterwards obliged to pay; and *next*, in trust for behoof of the other creditors of Scot. This assignation particularly conveyed a bill, dated 25th June 1746, drawn by Irvine, Scot's partner, and accepted by Sir John Douglas of Killhead; and George Douglas, merchant in Hitchill, for L. 450, payable to the said William Scott; which bill, Scot assured Elliot, was a just and true debt; and, in that belief, Elliot proceeded, in the year 1747, to lead an adjudication against Sir John Douglas's estate; in payment of this bill, and some other debts.

Sir John Douglas afterwards brought an action of reduction of the foresaid bill of L. 450, and the adjudication following thereon; *alleging*, That this bill had been granted by him without any onerous cause, or value paid for it; and that it was only intended as a fund of credit for Scot: In proof of which he produced a letter signed by Scot and Irvine, of the same date with the bill, and addressed to Sir John Douglas and his co-obligant, in the following terms: 'Gentlemen, Whereas you have, of this date, accepted a bill for L. 450 Sterling, to William Scot, or his order, we hereby oblige ourselves to relieve you of the said sum, and all expences that may happen to arise on said bill.'

No 102.

A back-letter granted to the acceptor of a bill, found ineffectual against a creditor to whom the bill was indorsed in security; but good against other creditors, for whose behoof also the bill was indorsed to that creditor as their trustee.

No 102.

From which the pursuer *contended*, That as this bill had not been granted by him for value received, but only as a fund of credit to Scot and Irvine, however effectual it might be to an onerous indorsee, who had paid value for it; it could not have any privilege as a bill, when it was not indorsed for value instantly paid, but as a security for debts contracted, or to be contracted: That then it was to be considered as no better than a common assignation, where the assignee was subject to the back-bonds, or qualifications, granted by the cedent before the assignation.

*Answered* for the defender: That he was, in every respect, an onerous indorsee to this bill; as it was upon the faith of it, and the other debts assigned to him, that he had, in various transactions, engaged his credit for Scot; and allowed him to become debtor to him of new, for upwards of L. 500.

That it is a certain rule, and become in a manner the law of nations, That a bill of exchange is considered as a bag of money. That, in consequence of this, no back-bond or obligation, of the drawer, or indorfer, of the bill, to the acceptor, can have any effect against an indorsee for valuable considerations. And, after a bill goes out of the acceptor's hands, he can trust to no separate security from the drawer, or porteur of the bill; but must hold himself bound to pay it, in whatever third hand it appears; and must operate his relief from the original creditor.

'THE LORDS found, That the letter, or back-bond, granted by Scot and Irvine to the pursuer Sir John Douglas, did not affect the debts properly due to William Elliot himself; and, therefore, repelled the reasons of reduction, in so far as concerned the said debts; and assailed William Elliot.'

The next question was, How far the bill, and the adjudication founded upon it, could be effectual to the defender, as trustee for William Scot's other creditors; for whose behoof the bill was also assigned?

*Pleaded* for the pursuer: That it could not be pretended, that any of these creditors trusted William Scot, on the faith of this bill, as all their debts were contracted prior to the date of the assignation; nor, was the bill ever in the custody of any person but William Elliot, the defender, their trustee; in whose possession it still remained: That, therefore, they could, in no sense, be held as onerous indorseees; and, that all objections competent against the cedent must, agreeable to the established principles of law, be good against them, his assignees, as in the case of every common assignation.

*Answered* for the creditors: In this case William Elliot obtained the trust-assignation from Scot, *optima fide*, for behoof of Scot's creditors. It was certainly a just cause for Scot to assign this bill, in security and payment of his onerous debts. The bill in question was conceived in the most regular style, having all the appearance of a fair bill *in re mercatoria*; and, therefore, being a proper subject of commerce, ought to be supported to every party who procured a right to it honestly and fairly, for valuable considerations. There was here an onerous cause, or a valuable consideration given for it by the creditors, in so far as, by

that assignment, they were, upon the faith of the debt's being just, put off from doing diligence against the debtor, whereby they might have recovered their payment. When bills are thus assigned, they may be justly looked upon as the most certain funds for the relief of creditors, who have reason not to suppose them, like other personal obligations, to be subject to the back-bonds of the indorsers, or the cedent. If the creditors had discharged their debts, upon getting a transference of this bill, it would undoubtedly have been supported against the effects of Scot's back-bond; because they had thereby paid a valuable consideration for it. So, in the present case, though they did not, in form, discharge their debts; yet they, nevertheless, paid full value for this bill, when, upon the faith of it, they delayed to do diligence; and, in effect, would lose their debts if it was not sustained. The very design of the bill, in this case, as the pursuer himself insisted, was to procure credit for Scot, and to give him the appearance of funds; either to entice people to make further advances to him, or to persuade his former creditors to be easy; which probably they would not have otherwise been; and, therefore, as this bill was granted as a fund of credit, and made use of as such by Scot, when he assigned it to his creditors, in security, and thereby obtained a delay of diligence from them; which was equal to the contracting a new debt upon the faith of it; it was most reasonable that Sir John should still be liable to pay it. That it would have the most pernicious consequences, to allow bills, seemingly good, to be put into a trading man's hands, which, at the same time, might be rendered ineffectual by latent back-bonds. And the Court has been in use, in questions with assignees, to pay no regard to discharges, granted of even date with the bonds; 4th December 1665, Thomson *contra* Henderfon, Stair, v. 1. p. 320. *voce* FRAUD; 21st January 1680, Caddel *contra* Raith, Stair, v. 2. p. 743. *voce* FRAUD; 11th June 1708, Bundie *contra* Kennedy, Fount. v. 2. p. 442. *voce* FRAUD.

A separate objection was made, on the behalf of the creditors, to this back-bond, or letter, *viz.* That though it seemed to be intended as a bond of relief to the pursuer; and as such, was a matter of importance; yet it had none of the necessary solemnities of a formal deed, nor was it holograph of the granter. And, supposing it could be sustained as a holograph deed, inferring an obligation upon Scot; yet, as it only made its appearance lately, there was no evidence that it was granted prior to the assignation to the creditors; nor could it prove its date against the defender, their trustee, in this more than in other cases, in which the law would not hold it probative; of which a variety of instances are to be found in the Dictionary of Decisions, *voce* PRESUMPTION, Rights when presumed simulate.

THE LORDS found, That the said letter or back-bond did affect the debts due to the other creditors, which were contracted prior to the date of the bill in question; and, therefore, sustained the reasons of reduction of the said bill, and adjudication following thereon, against them, and William Elliot their trustee: And refused a reclaiming petition for the creditors, without answers.'

A&C. *Hugh Dalrymple.*

Alt. *Andrew Pringle.*

Clerk, *Forbes.*

*Fol. Dic. v. 3. p. 82. Fac. Col. No 8. p. 13.*