

Pitfour was uncommonly earnest in this case, replying upon every body ; and yet the more I reflect upon the decision, the more I am convinced of the justice of the decision. Monboddo told me, that the subject was not *in medio* while in the hands of Herries, but became *in medio* as soon as Herries put it in the hands of Marshall.

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1770. *January 25, February 13, and March 8.* MANSFIELD, HUNTER, &c. *against* DONALD MACILMUN.

BILL OF EXCHANGE.

Privilege of an Onerous Indorsee.

[*Faculty Collect. V. 85 ; Dictionary, Appendix I. ; Bill of Exchange, No. 2.*]

COALSTON. The remedy proposed by the chargers is worse than the disease. To rest upon the oath of the holder is too much,—an oath *ex parte* where the creditors are not parties. I do not see how the holder, deponing *negative* as to the whole, could afterwards be examined upon special interrogatories. Were caution offered to account with the creditors, the bill might be refused.

PITFOUR. This matter of discounting bills is of great moment to trade, and necessary for its existence. When there is no bankruptcy of any intermediate person, there can be no occasion for suspension ; for, unless in case of such bankruptcy, arrestment can have no effect. Here the bill was indorsed seventy days before the bankruptcy ; and, consequently, no pretence of the Act of Parliament 1696.

ELLIOCK. If we were to lay down rules as to the discounting of bills, &c. it would be *altioris indaginis*. Here is a notour bankruptcy. A bill is indorsed by the bankrupt before it is due. His creditors arrest. The acceptor can know nothing of the connexion between the bankrupt and the holder of the bill. He properly brings a multiplepinding, and suspends. The persons interested in the oath proposed to be taken by the holder, are the arresters. And they are not in the field until the multiplepinding is called.

AUCHINLECK. I am no favourer of this kind of security. If all dealers in bills were like Mansfield and Hunter, there would be no danger. This, however, is not the case. And, as matters now stand, a bankrupt, according to the charger's argument, has nothing to do but to get a good swearer to hold his bills ; and thus one dishonest man colluding with another may cheat the whole nation.

PRESIDENT. I am always afraid of determining upon general questions of commerce, where one has a natural bias. The benefit of defence against payment to the holder must accrue to the arrester. There is no *mora* here on the

part of the acceptor of the bill. He instantly raises a multiplepointing. If the arresters do not compete, the holder will be preferred. If they do, there is good reason for passing the bill of suspension. A decree of this Court, *parte inaudita*, will not be good against arresters. I am not clear that caution is sufficient here; for we ought to adhere to general rules, applicable to every dealer, as well as to Mansfield and Hunter.

KAIMES. I am sorry to see difficulties and dangers on all sides. I am not ripe for determining the general point; and, as there is here a bankruptcy, I would pass the bill.

GARDENSTON. I would refuse; for it is a general rule, that a bill, while current, must meet with no stop.

On the 25th January 1770, "The Lords passed the bill upon caution."

On the 13th February 1770, adhered.

*Diss.* Pitfour, Gardenston, Kennet, Barjarg, Monboddo; [Justice-Clerk, a party's brother, Strichen, Alemore, absent.]

[A petition was presented against this interlocutor, on advising which, with answers, the following opinions were delivered:—]

*March 8th.*—MONBODDO. Payment, made by authority of this Court, is *bona fide* payment, and will excuse the acceptor of the bill from second payment. If Mansfield and Hunter are trustees for the bankrupt, the arresters will have recourse against them. The oath required is an oath *ex officio*, in order to ascertain that the indorsation was in way of commerce. The favour of commerce is such that many things are allowed among merchants contrary to the common rules of law.

AUCHINLECK. General principles of law are not to be overturned in order to suit the conveniency of gentlemen who choose to follow a particular branch of trade. It is here proposed to render the diligence of arrestment ineffectual.

KENNET. Bills, while current, are not liable to suspension, unless you prove by oath that the bill is not for value. In such circumstances as the present, there is little danger of collusion.

COALSTON. There are inconveniences on both sides. They may be avoided by a small alteration in form. Whenever there is double distress, a debtor cannot pay safely unless upon a multiplepointing. Bills are not excepted from this rule. From the increase of trade this must occasion great inconveniency, expense, and delay. Yet I cannot take upon me to alter what the law has fixed. Wherever there is commerce, there must be bankrupts. Wherever there are bankrupts there will be attempts to disappoint the law; and there is no method of this so easy as by indorsing bills. The remedy of the indorsee finding caution is not convenient; for he may be an honest man, and yet not be able to find caution. The oath *ex parte* is something hard to be got over as a proper rule. It might be expedient, by Act of Parliament, to provide that the bill of suspension be intimated to all the arresters, upon a short day, with power to the Ordinary on the Bills to take the oath, and determine as to its import.

BARJARG. If the law of merchants is universally understood to be, that arrestments do not stop the currency of bills, I would follow that law.

PITFOUR. Upon the decision in this case depends the commerce of this country. No principle of law stands in the way of the opinion I am to give. If the Bank of England were to stop the discounting of bills for two days, universal bankruptcy would ensue, and we should hear of real instead of imaginary grievances. We have all seen the benefit of cash accounts with our banks: the practice of discounting bills is still more beneficial. It affords a daily mint to merchants for converting effects into money. A delay of the currency of bills for a single day might prove fatal. The principles of law are clear; for a bill indorsed upon immediate payment of money is equivalent to money: There is no exception but what may be made out by writ or oath of party. An arrestment has no hold of such a bill. Besides, this bill was transacted 70 days before the term of legal bankruptcy. Suppose the bill to have been transacted but the day before real bankruptcy, this would make no difference, unless fraud were alleged.

PRESIDENT. *Quot homines, tot sententiæ.* When my learned brother says that a thing is law, I must, with difficulty, oppose my opinion to his. We are to try this case, not as the case of Mansfield and Hunter, but as the case of one suspicious in his character and circumstances: it comes to this, that every man may, by his own oath, secure a subject against creditors who are not in the field. The oath administered to the holder of a bill is not an oath *ex officio*. An oath, *ex officio*, is for expiscation in order to judgment, and proceeds from the judge's own motion. The acceptor of the bill, in this case, has no concern what the oath is. Who is to produce the writ in order to show the trust? Not the arrestee, but the arrester. The arrestee neither has nor can have the writ: the arrester may have it, and yet we will not hear him. There may be inconveniences on the other side; though, I must say, that I do not know that cash accounts, or any thing of the kind, have proved so exceedingly advantageous; nor do I think that dealers in money are the most useful traders in a nation. Is it possible to maintain that there is no method of affecting a bill? There may be trust,—there may be falsehood,—still there may be inconveniences; but they will not alter the law. If a remedy is necessary, it may be applied. Even an Act of Sederunt, as proposed by Lord Coalston, may do. If you once bring parties into the field, my argument ceases; for bringing them into the field, even an edictal citation may be sufficient; because parties arresting must be supposed to have procurators in this country. A payment, by authority of this Court, is, in one sense, a *bona fide* payment; but I should have difficulty to find it good against a third party not in the field.

GARDENSTON. I am not for introducing new law; but I am persuaded that no merchant will say that arrestment can have any effect in this case. Mansfield and Hunter should not have offered to make oath; for arrestments can never compete with onerous indorsees. If the debtor in the bill says, trust or not onerous, he must prove his allegation.

ELLOCK. Inconveniences ought not to abolish the laws of the land; neither ought the opinions of money dealers. The parties here force the Court to give a determination on a general point without necessity. Mansfield and Hunter might have drawn their money before this time in the multiplepounding.

On the 8th March 1770, "The Lords altered and remitted to the Ordinary to refuse the bill."

*Act.* R. M'Queen. *Alt.* J. M'Laurin.

*Reporter,* Hailes.

*Diss.* Coalston, Auchinleck, ElliocK, Hailes, President. Justice-Clerk did not vote.—*Absent,* Kaimes, Alemore, Stonefield.

This question interested the merchants very much ; and they are said to have been clamorous without doors against the first interlocutor. The President observed that there were no *termini habiles* for putting any oath to Mansfield and Company ; for that the debtor in the bill had not the same interest in requiring that oath which the arresters might have had, upon being admitted into the field : and thus, the holder of a bill may exact payment, although he should in reality be no more than a trustee. The President also said that this single decision should never be considered by him as establishing the law. There was rather more warmth in agitating this question than might have been wished.

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1770. *June 13.* GEORGE CAMPBELL *against* JOHN CAMPBELL of Ottar.

CLAUSE—PROVISION TO HEIRS AND CHILDREN.

Interpretation of Clauses in a Contract of Marriage, containing a special provision, and providing the conquest to the Heirs of the Marriage.

[*Faculty Collection, V. 87 ; Dict. 13,020.*]

PITFOUR. The writings for proving the causes of complaint against George Campbell are incompetent, because not produced before the Ordinary ; and irrelevant, because such causes of complaint will not authorise exheredation. As to the 8300 merks, 5000 merks were paid to the daughter as tocher. Here there was not a provision to the heirs-male of the marriage ; but a provision to the heirs of the marriage, of a sum of money, by one who had no estate : I would therefore deduce the 5000 merks, but not the sums allowed to the son. Even in the case of collation, nothing comes in that was considered as sustenance : and here there was very scrimp sustenance. [Afterwards, moved by the arguments on the bench, he thought that the 5000 merks did not impute.] Lands purchased by money, to which one has succeeded, is conquest ; as much as if the lands had been purchased by borrowed money. The succeeding to an adjudication is just the same as succeeding to an heritable bond. The adjudication could not be the capital title ; for it extended over the whole estate of Taret. It is impossible to say that the legal, while not expired as to the whole, was expired as to a part.

MONBODDO. I do not think that the father had a power of punishing the son, however profligate, by taking his property from him. I doubt as to any