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in question *simply*, to qualify his acceptance with the conditions contained in the letter to his agent. It was equally incompetent for James Campbell to have agreed that the acceptance should be cancelled on any account. He had no right to *discharge* Carnbeg, who, by accepting the bills, constituted himself the *proper* debtor, and rendered Balinaby's obligation, as drawer, only *subsidiary*.

But, at any rate, Carnbeg was culpable in retaining the bills, or in directing his agent to keep possession of them, till Balinaby should be gone. He ought to have determined positively, either to honour or to dishonour the draughts. Had he returned them unaccepted, James Campbell might immediately have had recourse against the drawer; and, by withholding them improperly, Carnbeg became answerable, even although he had not accepted.

*Observed* on the Bench: The obligation of a bond, already signed, may be qualified before delivery: But the acceptor of a bill is not entitled to retain it an hour, or to adject any condition to his acceptance, without the holder's consent. It is the holder's document of debt against the drawer, and must immediately be returned to him.

The COURT adhered to the Lord Ordinary's interlocutor, 'repelling the reasons of reduction in the action at Carnbeg's instance, and decerning against him in that, at the instance of the indorsee.'

Lord Ordinary, *Alva*.Act. Blair & A. Abercromby.  
Clerks, Tait & Home.

Alt. Cullen.

*Fol. Dic. v. 3. p. 77. Fac. Col. No 5. p. 10.*

## S E C T. X.

## Effect of Fraud on the part of the Drawer; and of False Description of the Value.

1701. November 14.

COWAN against DOUGLAS.\*

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Where it was alleged that a party had been ensnared to accept a bill; in a furthcoming, at the instance of a creditor of the drawer, an explication of the fact was allowed.

COWAN being a creditor to Walter Ewen, arrests in the hands of Robert Douglas, and John Ewen his debtor's brother; and the said John Ewen having deponed in the furthcoming, acknowledges, that certain bills, drawn by his brother, payable to him, were for his brother's behoof; and, particularly, a bill for L. 100 Sterling, drawn upon, and accepted by the said Robert Douglas; whereupon he insists against Douglas for payment of the sum in his accepted bill, which was instructed, by John Ewen's oath, to be for the behoof of the common debtor.

It was *alleged* for the defender: That he was over-reached and ensnared to accept the bill, in so far as he having employed Walter Ewen, then in London, to buy certain merchandise for his use; and having engaged himself to the merchants who sold the goods, the said Walter draws a bill for the value of the goods,

as if he had paid or undertaken the same; and the bill bears, *as per advice*; and, when it came to be presented, the defender was persuaded by John Ewen to accept, though no letter of advice was come, upon his assurance, that the letter of advice would come by the next post; whereas the first advice he received, was, that Ewen, the drawer, was broken and fled, and thereby he was liable to pay the price of the goods to the merchants with whom he corresponded; and craved Ewen's oath upon what past.

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It was *answered*: That the pursuer had sufficiently instructed his libel, by the defender's accepted bill, and John Ewen's oath, acknowledging the trust; whereby there was *jus quæsitum* to him, which could not be prejudged by any thing that John Ewen could depone, his arrestment being a legal assignation, equivalent to an indorsed bill.

It was *replied*: *imo*, An arrestment is not equivalent to an indorsed bill; because indorsations are for value advanced or performed, for obtaining the indorsation; and the favour of commerce admits few exceptions; whereas an arrefter pays or performs nothing, in contemplation of the debt pursued to be made further coming, but comes in the debtor's place, and must only claim the debt as it is. *2do*, Were the bill payable to the common debtor, his oath could not prejudice the arrefter; but, being payable to John Ewen, and the common debtor's interest arising from John Ewen's oath, the pursuer, who pretends to instruct his claim by that oath, cannot decline, that the defender should also have the benefit to examine John Ewen, upon any quality or circumstance that would operate a defence. *3tio*, The oath already emitted is not equivalent to a back-bond or indorsation; because, if this bill were indorsed, or the trust proven by any writ, the defender would have access to recur upon John Ewen, for denuding himself of that bill, which he had induced the defender to accept, without any just or onerous cause, to ensnare or subject him to double payment; whereas, if his oath were taken strictly upon the pursuer's interrogatory; and the defender (who had not access to interrogate him formerly) excluded from clearing his defence; he would both be subjected to the debt, and want the benefit of relief.

'THE LORDS, before answer, ordained John Ewen to exhibit any letter of advice he received with the bill; or any other letter concerning the same; and also to depone upon what was treated, and communed, at accepting of the bill; and for what cause the same was drawn; and the defender to produce any letters received by him, concerning the said bill; as also the instructions and documents of his paying the value of the said goods, to the merchants who furnished the same.'

*Dalrymple, No 25. p. 31.*

1711. *June 27.*

GEORGE WILSON of Sands *against* GEORGE M'KENZIE in Stonehive.

IN the action, at the instance of George Wilson against George M'Kenzie, for repayment of L. 60 Sterling, contained in a bill drawn by George M'Kenzie,

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An acceptor who had paid, found to have recourse upon