

THE LORDS found it relevant, That M'Alpin received the bargain of meal by the suspender's order, the order being proved by the suspender's oath. And repelled the allegiance, that, posterior to the delivery of the meal, Watertoun intronitted with a part thereof, or a part of the price; reserving to Mr Schaw to insist against Watertoun as accords.

Fol. Dic. v. 1. p. 98. Forbes, p. 167.

1709. July 15.

BEATRIX COLVIL LADY ROSSIE *against* COLONEL PATRICK OGILVIE.

IN a competition betwixt the Lady Roffie, who had arrested a debt due to Colvil of Kincardine in my Lord Bargany's hand; and Colonel Ogilvie, who pretended right to the same debt, by virtue of a precept drawn by my Lord upon his chamberlain, payable to Kincardine, and indorsed by him to the Colonel, the precept being of a date anterior to the arrestment, and the indorsation wanting a date: THE LORDS found, That the indorsation is presumed to be of the same date with the precept, unless the contrary were proved; and therefore preferred Colonel Ogilvie; albeit assignations, blank in the date, in a competition with legal diligence, are presumed to have been made after the diligence; because writs of that nature are ordinarily dated, and it is a kind of fault to omit what is ordinary: Whereas indorsations of bills of exchange are commonly blank in the date; and all the privileges of these are, by the act of Parliament 1696, extended to inland bills and precepts.

Fol. Dic. v. 1. p. 98. Forbes, p. 347.

1711. December 12.

SIR JOHN ERSKINE of Alva *against* WILLIAM THOMSON, Merchant in Leith.

WILLIAM THOMSON having accepted a bill drawn upon him by Alexander Colvil of Kincardine, in these terms, 'William Thomson pay to me, or my order, against the term of Whitfunday, Lammas, and Martinmas, next to come, 120 pound Scots; and this, without receipt, shall be a sufficient discharge to you of 25 bolls of beer bought and received by you from me, this being but prejudice of any bills formerly accepted by you to me.' Alexander Colvil indorsed this bill to Sir John Erskine, who charged William Thomson for payment. He suspended upon payment made to the indorser before the indorsation, conform to his two receipts: Whereof one bore, 'Received from William Thomson 100 pound in part of payment, and to account of a greater sum due by him to me.' And another bore, 'Received from William Thomson 20 pound, in part payment of a greater sum resting by him to me, per accepted bills.'

Alleged for the charger: No debt of the indorser of a bill can be a ground of compensation, nor his separate receipts of partial payments a ground of extinction

No 89.

No 90.

A debtor drew a bill upon his factor, payable to his creditor. An arrestment was afterwards laid in the factor's hands for a debt due by the creditor. In a competition betwixt the arrester, and an onerous indorsee to the bill, the indorsation being blank, was presumed of the date of the bill, in order to prefer the indorsee.

No 91.

Separate receipts of partial payments of bills of exchange, do not militate against possessors, to whom these bills are afterwards indorsed.

No 91.

against the possessor, Forbes Treatise on bills of Exchange, p. 163. ;* because of the exorbitant trust among traders, whose business requires more dispatch than to allow them time to inquire at the acceptors of bills, (who perhaps are at some hundreds of miles distance from them), whether they had made any partial payment to the creditor since their acceptance. Yea, to sustain separate partial receipts, would open a wide door, to much fraud ; it being easy for persons to accept bills, and, with the same breath, take private receipts of payment from the possessor, who, being bankrupt, might use them as funds of credit to entangle and cheat honest men. Therefore, no prudent man will pay the whole sum in a bill, without getting up the bill ; or pay any part, without getting the partial payment marked upon the back of the bill, or destroying the old bill, and granting a new one for the remainder. *2dly*, The receipts produced do not relate particularly to this bill, the tenor whereof bears, that there were other bills granted by the suspender to the indorser, to which *in dubio* the payments must be ascribed : Especially considering that the law presumes, That the bill charged on is not paid, from its being still unretired in the creditor's hand. And if the partial payments had been to be imputed in satisfaction thereof, the last of the receipts would not have born ' in part of payment of a greater sum owing to Kincardine, (as it does) but in full payment of the sum contained in such a bill : ' Since the sums in the two receipts make precisely the total sum in the bill charged for.

Answered for the suspender : Though compensation upon the indorser's debt be not receivable against the possessor of a bill, payment to the indorser is good against any possessor ; because payment extinguisheth *ipso jure* : Whereas compensation takes no effect till it be proponed ; seeing *Judex non potest vaticinari invicem quid deberi*, as the lawyers say.

THE LORDS seemed to be of opinion, That in the general, separate receipts, relative to bills, do not militate against singular possessors. And found, That far less in the present case could the receipts founded on by the suspender be sustained to extinguish the bill in question : Seeing that bill mentions other bills to have been granted by the suspender to the indorser ; and the receipts do not expressly relate to the bill charged on. See No 94. p. 1506.

Fol. Dic. v. l. p. 98. Forbes, p. 552.

No 92.

The possessor of a bill, to whom it was indorsed for value, was preferred to the indorser's creditor, who had arrested the money in the acceptor's hands, before indorsation.

1712. December 5. ROBERT SMITH *against* ALEXANDER HOME.

ALEXANDER FORBES draws a bill upon two tenants, payable to Henry Gladstones, at Lammas 1709, which the tenants immediately accepted. Henry Gladstones indorses the bill to Robert Smith, who protests for not payment upon the 10th of August, and charges with horning upon the 22d of the same month.

Alexander Home, a creditor to Gladstones, arrests upon the 17th of July, and pursues a furthcoming before the Sheriff of Berwick ; in which the acceptors of the bill appear, and acknowledge the debt, and thereupon there is a decree of furthcoming upon the 4th, and a charge of horning upon the 23d of August.

* Edition 1703.