

1728. *February.* GRIERSON *against* EARL OF SUTHERLAND.

No III.

A BILL drawn payable to a third party, bore this clause: 'This, with the porteur's receipt, shall oblige me to pay the like sum to you or your order.' The acceptor having paid the bill, indorsed the obligation for repayment. In a process, at the indorsee's instance against the drawer, this defence was proposed, that the obligation to repay was of the nature of an ordinary obligation, no bill of exchange, and though indorsable, a privilege competent to any simple obligation, it was liable to compensation upon the debt of the cedent. THE LORDS repelled the defence. See No 50. p. 1447.

Fol. Dic. v. 1. p. 99.

1755. *March 6.* DAVID OGILVIE *against* ROBERTSON of Redleikie.

No III.

OGILVIE accepted a bill to the order of Robertson, bearing for value; this bill was duly protested for non-payment, and the protest registered. After the bill had lien over five years, Ogilvie brought a process against Robertson before the baron-bailie of Alyth, setting forth, That Robertson having purchased some victual from Ogilvie's brother, did, at the seller's desire, pay part of the price to Ogilvie before receiving the victual, and took the bill in question for the sum, agreeing to return the bill when the victual should be delivered: That the victual was soon after delivered; and therefore concluding, That the bill should be returned. Robertson having denied the libel, the bailie allowed a proof by witnesses; to which Robertson, who was present, made no objection. The witnesses deposed in terms of the libel. The bailie decerned Robertson to deliver up the bill, and Ogilvie charged him for that effect; but went no farther in diligence. Robertson obtained a suspension, but did not intimate it till nine years thereafter; when, at the same time, he charged Ogilvie with horning to pay the bill. Ogilvie thereupon wakened the suspension, and put up protestation for production thereof; and, on 7th July 1750, in common form, gave it out with the process of wakening, to be seen. Robertson did not return it that session; but, in the ensuing vacation, proceeded to extreme diligence upon his horning; and, by a caption, obliged Ogilvie to pay the sum in the bill with fourteen years interest. Ogilvie thereupon raised process of oppression and damages, setting forth these facts; and further alleging, as an aggravation of the oppression, That though Robertson lived in his neighbourhood, and had a messenger at hand, yet he did nothing till he found him in the market of Perth, 16 miles from his home; and there apprehended him by the caption, in order to distress him, and ruin his credit.

This process being conjoined with the suspension, it was *pleaded* for Robertson, That the proof brought before the inferior court was inhabile; for that a written obligation is not to be taken away by parole evidence; therefore the proof was

One person granted a bill to another for goods to be delivered. After some years the acceptor brought an action to have the bill returned, the goods not having been delivered. A parole proof of this fact was allowed by an inferior court, who ordered the bill to be returned. The holder, while a suspension depended, proceeded in diligence on the bill; found liable in damages and expenses.

No 112. to be rejected. This being the case, argued, that the suspension opened the bailie's decret, so that it could not stand in the way of diligence upon the bill, far less be a ground for a process of oppression and damages.

Answered for Ogilvie : Robertson was present when the proof by witnesses was allowed, and acquiesced in it ; he does not even now pretend to say that he paid the whole price of the corn over and above the sum in the bill. *2do*, A passed bill of suspension, though it has the effect to stop diligence upon the decret, whereof it is a suspension, yet, until the reasons of suspension are discussed and sustained, it does not reverse, take away, or annihilate the decret : and Ogilvie was not *in mora* ; for, as soon as he knew of the suspension, he did his part to have it discussed.

' THE LORDS repelled the reasons of suspension, and found the letters orderly proceeded ; and found Robertson, the suspender, liable in damages and expenses to Ogilvie the charger.'

Aff. *And. Pringle.*

Alt. *A. Lockhart.*

Clerk, *Gibson.*

Fac. Col. No 151. p. 225.

DIVISION III.

Acceptor's Recourse against the Drawer.

1703. December 15. MR ALEXANDER CARSTAIRS *against* JOHN PATON:

No 113.

Found, that when a bill is accepted by a third party, for the honour of the drawer and indorser, a protest, taken to that effect, is necessary at the time of acceptance, otherwise there is no recourse.

JOHN WILKIE draws a bill for 1200 guilders upon Gilbert Stewart, payable to John Paton, for value received, dated the 22d December 1697. Paton indorses the bill to Vanderpot, in these words, *Pay the contents to Cornelius Vanderpot.*

The bill being payable upon fourteen days sight, Vanderpot presents it to Stewart upon the 14th of January 1698, and protests for not acceptance ; and shortly after advises Paton of his protest.

Mr Alexander Carstairs, upon the 24th January 1698, accepts the bill in these words, *Accepts for the honour of the drawer and indorser ;* and shortly after pays, and takes a receipt, blank in the day, but bearing the month of February 1698.

Carstairs advises Wilkie the drawer, that, in compliance with his desire, he had accepted the bill, and would re-draw, and that he would not have done it, but upon his account ; but withal expresses, that he had accepted for honour of the drawer and indorser. This letter being dated the 4th of February, upon the 7th of the same month and year, he writes to Wilkie and Paton, that he had accepted the said bill for their honour, and had re-drawn for the value and ex-