

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-

change; and his bill, of the same date, is protested upon the 19th of February, both against Wilkie and Paton, for not acceptance.

Wilkie having broke, and retired to the Abbey, upon the 8th of the said month of February, Mr Alexander Carstairs pursues Paton for the sum in the said re-draught, with annualrent and damages; and insists on this ground, that he accepted Wilkie's bill, payable to Paton, indorsed to Vanderpot, for the honour, not only of Wilkie the drawer, but Paton the indorser; and having paid accordingly, Paton is bound to re-imburse him.

It was *alleged* for Paton: *1mo*, He indorsed to Vanderpot, not for value received, but as his factor, and so was liable in no warrandice to him, he having only the trust to receive the money; and it was neither Vanderpot's intention, nor in his power to oblige Paton. *2do*, The pursuer did accept of Wilkie's bill, to support his credit, and could lay no obligation upon the defender; and by his missive of the 4th of February, it is clear, that Wilkie had writ to him to accept, if Stewart should decline, and that he did accept in compliance with Wilkie's desire, and on his account.

It was *answered*: *1mo*, A bill indorsed is, in law, presumed for value received, unless the contrary be expressed. *2do*, The pursuer opposes the acceptance of the bill, bearing for honour of the drawer and indorser; and, however he might have been moved by Wilkie's advice to interpose, yet he provided for his own security, by a qualified acceptance for the honour of both, which, by the known and undoubted practice of merchants, and unanimous opinion of all writers, does oblige all persons, for whose honour the bill is accepted.

The defender *replied*: That, by the custom of merchants, and the opinion of lawyers, bills may indeed be accepted for the honour of drawer or indorser, one or more, and sometimes also for the honour of the acceptor, for further securing of the money: But, in these cases, all the lawyers that write upon bills of exchange, as Marius, Scarlet, Scaccia, Dupny, Macwardus, do agree, that in such cases it is not sufficient to qualify the acceptance; but that, at the time of acceptance, in case a third party interpose for preventing the bill's being returned, he must necessarily take a protest in the hands of a notary, expressing for whose honour he does accept, and the notorial instrument must contain the quality of the acceptance; and the like protest must be made at the payment; and the party for whose honour he accepts must, with all possible diligence, be advised, that he may provide for his own relief; and the reasons are, if a qualified acceptance were sufficient, then the acceptor of the bill, becoming master of it at payment, might adject a quality *ex post facto*. And in this very case, these words, *for the honour of the drawer and indorser*, may be suspected to have been so adjected; for the subscription is below the words *accepts*, as is usual; and these words, *for the honour of the drawer and indorser*, are drawn out in the line; which might have been *ex post facto*; and it is not possible to prevent collusion or fraud, unless a document be taken at the time of the acceptance, and the like at payment; and,

No 113. if advice were timeously given, those concerned might provide for their own relief.

‘ THE LORDS found, That a protestation was necessary at the acceptance and payment of a bill, accepted and paid by a third party, for the honour of the drawer and indorser, expressing the quality of the acceptance ; and therefore sustained the defence, and assolizied.’

Fol. Dic. v. 1. p. 99. Dalrymple, No 40. p. 51.

* * * The same case is reported by Fountainhall :

JOHN WILKIE, merchant in Edinburgh, draws a bill, in December 1697, for 1200 guilders on Gilbert Stewart in Rotterdam, payable to John Paton, or his order ; Paton indorses the bill, and makes it payable to Cornelius Vanderpot ; who presenting it to the said Gilbert, and he refusing to accept or pay, the same was protested. Alexander Carstairs factor there, hearing of this, he, out of respect to Wilkie and Paton, accepts the bill, though not drawn on him, and adds these words to his acceptance, ‘ for honour of the drawer and indorser,’ and then pays it, taking a discharge ; then he acquaints Wilkie and Paton, and re-draws on them ; but they suffer it to be protested. In the mean time Wilkie breaks, and Carstairs pursues Paton, the indorser, for payment, on this ground, that Vanderpot the factor received his money.—*Alleged* for Paton, That he had never any dealing or correspondence with Carstairs, neither had he any commission from him to accept or pay that bill ; and if he did it to honour Wilkie, his acquaintance and friend, *sibi imputet*, having followed his faith ; and though he mentions the indorser as well as the drawer in his acceptance, yet he has not followed the rules of law, nor custom of merchants, to make Paton the indorser liable to him, seeing they all require a super-protest in such a case, and a notorial instrument, and timeous advertisement thereof ; all which he neglected.—*Answered* for Carstairs, That whoever simply indorses a bill, he becomes as absolutely obliged as the drawer, and is a cumulative security to the payer ; and the French edict of Versailles in 1673, defines, in case a bill be protested, the bill may be honoured, paid, or acquitted by any other, beside the person on whom it is drawn, and he will have all the rights of the person to whom the bill was payable, without either assignment, substitution, or explicit order ; and so the law says, *tit. de negot. gestis, quisque solvendo pro alio licet invito et ignorante liberat eum, et negotium ejus gessit* ; and the taking a super-protest and notorial instrument was not necessary in this case ; and he did all he was obliged to, in acquainting both Wilkie and Paton, and re-drawing on them.—THE LORDS sustained Paton’s defence, and assolizied him from this pursuit ; Mr Carstairs not having followed the course prescribed by the custom of merchants in this case.

Fountainhall, v. 2. p. 200.