

1707. *June 5.*

THOMAS BOYES, Writer to the Signet, *against* WILLIAM SCHAW, Brother
to Balgarren.

No 89.
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FORBES of Watertoun as principal, and Thomas Boyes as cautioner, being obliged, by contract, to deliver to William Schaw, or order, at Airth, upon the Forth, the number of 340 bolls meal, at a certain day, for the price mentioned in the contract, whereof L. 600 (Scots) was to be paid within some few days after the date thereof, and before delivery of the victual, and the rest at delivery: William Schaw accepted of a bill for the L. 600, of the same date with the contract, drawn by Watertoun, payable to Thomas Boyes, in part of payment of the price of the victual; and thereafter advanced L. 20 Sterling thereof. Thomas Boyes charged William Schaw upon his accepted bill; who suspended, upon this ground, That the bill had been accepted by him as a part of the price of a bargain of meal, agreed to be delivered to him by Forbes of Watertoun, for whose performance the charger was cautioner in the contract; and the meal not being delivered, the suspender cannot be liable for the bill.

Answered for the charger: That the sum in the bill was to be allowed in part of payment of the meal, is no argument for the suspender to retain the money, which was payable before delivery of the meal, and so had no dependence thereon: And the mentioning that it was to be allowed as a part of the price of the meal, concerned not the payment to the charger, but only the clearance betwixt the drawer and acceptor.

THE LORDS found, That Mr Boyes, being cautioner in the contract, the objection, that the meal was not delivered, being competent against Watertoun, was also competent against him.

Thereafter, *July 26. 1707*, Mr Boyes *alleged*, That the contract, upon Watertoun's part, was fulfilled; in so far as William M'Alpin, by the suspender's order, had received the meal, as appeared from his receipt; and the charger offered to prove, by the suspender's oath, that he gave orders to M'Alpin for that effect.

Answered for the suspender: That he offered to prove, by Watertoun's oath, that, after M'Alpin received the victual, Watertoun intromitted with the same, at least uplifted a good part of the price thereof out of M'Alpin's hand; whereby it appeared that he did not stand to the contract, or trust to the security given him by Mr Schaw.

Replied, It being cleared that M'Alpin, as trustee from Schaw, did once receive the meal conform to the contract, there remained no more to be done upon Waterton, or his cautioner's part, relative to that bargain: And if Watertoun afterwards intromitted therewith unwarrantably, Mr Boyes is not concerned.

Duplied, Contracts of sale are *bonæ fidei*, comprehending not only express obligations, but even what tacitely *ex bono & æquo alterum alteri præstare oportet*; and the contract can never be thought fulfilled before a real and effectual delivery is made to the buyer.

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 Rossie, 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.