

of the superior. *4to*, It is scarce possible to find out habile circumstances for finding such a pretext.

The Lords found the creditors liable for the full rents, from the time that their objections against the pursuer's title were repelled.

*Act. Ro. Dundass. Alt Ila. M'Kenzie Clerk.*

*Vol. II. No. 36. page 46.*

1716. *November 30.* WILLIAM M'ILLMORROW *against* WHITEFOORD of Dunduff, and others.

THE said William M'Ilmorrow having accepted a bill payable to Whitefoord of Dunduff, he obtains the suspension; but, before the suspension arrived, Dunduff had put the bill out of his person, by indorsing it to his baron-officer Gilbert Kennedy, only so far in trust for the indorser, that it was for taking off a debt due by the said indorser to a third party: yet the suspender having intimated the suspension both to Dunduff and Kennedy, the said Kennedy nevertheless registers the bill, and charges; and a poiding is made in his name, at which Dunduff was present, and gave orders. Whereupon M'Ilmorrow gives in a complaint to the Lords against them both, for contempt of their authority, in poiding after a suspension was intimated.

ANSWERED for the defenders,—No contempt, because the suspension did not meet the diligence; for the charge being at the instance of the indorser, a suspension against Dunduff, who was denuded by the indorsation prior to the suspension, could not stop diligence at the instance of the indorsee, more than the indorser had never been creditor in the bill. For, when a bill is indorsed, the indorsee is not only a procurator *in rem suam*, as in the case of assignations, but is vested in the right itself, in the same case as a bag of money had been delivered to him; and no right remains in the person of the indorser more than the bill had been accepted directly payable to the indorsee: to whom, though the suspension was intimated, yet this could not, upon the foresaid ground, put him *in mala fide* to do execution on the bill.

REPLIED for the complainer,—That the indorsee being to uplift the money, and apply it for extinguishing a debt due by Dunduff to a third party, it was plain that Dunduff stood still in the property, as he in whose favour it was accepted; and having indorsed it to Kennedy for no onerous cause respecting the said Kennedy, he clearly remained Dunduff's trustee, to this effect, that he should uplift the money, and therewith extinguish the debt due to the third party by Dunduff. and Dunduff's creditors arresting would have been preferable to the said third party: as was found in the like case, 17th *Jan.* 1706, the *Lord Ross against Gray of Newton*, which was yet more favourable; for there the creditors in the bill had ordered the indorsee verbally to pay to a third party; whereas here there is nothing to instruct the third party's right.

The Lords found, That the defender was guilty of contempt of their Lordships' authority, and found him liable in damages and expenses.

*Act.* Jo. Kennedy. *Alt.* Ja. Ferguson. M'Kenzie, *Clerk.*

*Vol. II. No. 39. page 51.*

1716. *December 5.*

MICHAEL FRASER, Supplicant.

THE said Mr. Fraser, minister at Doviots, being convened before the presbytery of Inverness, to answer for several treasonable practices, such as aiding, assisting, and abetting the rebels, &c.

He presented a bill of advocation before the Ordinary, founded on the Act 21st, *septimo Annæ*, entitled, an Act for improving the Union of the two kingdoms by the justice-courts of commissioners of oyer and terminer, specially appointed by his Majesty for that effect; but the Ordinary having refused to pass his bill, he next gives in a petition to the Lords, wherein he alleges, That his reason of advocation ought to be sustained, because that no church-judicature being competent to determine in high treason, there can no reason be given why that presbytery should have ordained him to be cited for that effect before them; if it is not that, though they are not competent to high treason, yet that they thought themselves competent to inflict such censures and punishment on the party found guilty as consisted with their authority. But the supplicant alleged they were as incompetent to that as the other: because,

*1mo*, Before they could pretend to punish, they behoved to lead a proof that the petitioner did assist the rebels.

*2do*, That these persons alleged to be so aided and assisted by him were rebels, and guilty of high treason, which no presbytery is competent to do; since this were plainly to determine in high treason.

*3tio*, They behoved to find that the deeds alleged against him imported assistance to rebels, and so were criminal; since, if they were not, he could not be subject to censure or punishment: and, upon all this, they behoved to lead a probation. All which is undoubtedly to determine in high treason; only they are not competent judges to hang and forfeit; but this does nowise alter the case, since, if they are not competent to determine, they cannot be competent to cognosce.

The Lords refused the desire of the petition.

Patrick Grant, *Procurator and Clerk*, ut supra.

*Vol. II. No. 41. page 56.*

1716. *December 13.* Sir GEORGE MAXWELL of Orchardtown and MAXWELL of Cuill *against* M'LELAND of Barklay.

M'LELAND of Barklay having taken a decret of removing against Sir George Maxwell, and Maxwell of Cuill, his factor, before the Baron Court of Bargallan,