

two months after date. This bill being accepted, was indorsed by Wemyss and Son, and sent by them to John Auld merchant in Glasgow, who transmitted the same as cash to John Reynolds of London.

M'Roberts the acceptor, having become bankrupt, the bill was, of date the 23d March 1772, duly protested by Reynolds, who, on the fifth day thereafter, viz. on 28th March 1772, returned the bill on John Wemyss and Son, the indorsers, acquainting them of the dishonour.

Reynolds being refused payment, brought an action for recourse against the drawer and indorsers. The plea stated for the defenders was, that no recourse lay against them, as the bill was a foreign bill, and no notice was sent of the dishonour till the fifth post thereafter: That bills of exchange, drawn in Scotland, and payable in England, or drawn in England, and payable in Scotland, are, and always have been held, both in law and in business, to be foreign bills, subject to their rules, and entitled to their privileges, no less than those drawn between Scotland, and any country lying beyond the seas, or belonging to another supreme power: That inland bills are opposed to foreign ones; and, as the former are universally described to be those 'which are both drawn and payable in Scotland,' the latter are no less generally understood to mean, 'such as are drawn in Scotland, and payable in another country; or drawn in another country, and payable in Scotland:' Which definitions are agreeable to the express words of statutes, to the unanimous opinions of lawyers, and to the established practice, as well as ideas of merchants, act 1681, c. 20.; 1696, c. 36.; the English statute, 9no et 10mo, Will. III. c. 17.; Sir George M'Kenzie's Observ. on the statute 1681; Erskine's Inst. b. 3. tit. 2. § 35.—Pr. b. 3. tit. *. § 17.; Blackstone, b. 2. c. 30.; and Cuninghame's Law of Bills of Exchange, § 4.

THE COURT pronounced the following judgment: 'In respect that, by the practice of merchants, not denied by the pursuer, the dishonour of bills drawn from Scotland upon England, is in use to be notified within three posts after the dishonour; therefore find, That the dishonour of the bill in question was not duly notified, and that no recourse lies thereupon; sustain the defences; affoilzie the defenders; and decern.'

Agt. *W. Nairn.*

Alt. *Geo. Wallace.*

Clerk, *Tait.*

Fol. Dic. v. 3. p. 85. Fac. Col. No 105. p. 280.

1774. December 20.

THISTLE BANK in Glasgow, against HUGH M'KAY, of Bowmore in Ilay.

M'KAY, a considerable drover or dealer in cattle, who had, for a number of years, employed James Campbell, fadler in Glasgow, as his correspondent and banker, drew a bill for L. 50 Sterling upon the now deceased John Gillies of Douchra, dated 25th May, and payable 1st December 1770, at the shop of the

* The reference is exactly copied from the original report. The Session Papers are not in the Advocates' Library.

No 160.
accounted a
foreign bill, as
to the time
limited for
notification
of its dishonour.

No 161.
The drawer
of an accept-
ed bill, trans-
mitting it,
without in-
dorsation, to

No 161.
his correspondent, (who indorsed, and, on getting it discounted, credited the drawer with the sum in his accounts with him,) found liable in recourse to the holders, upon the failure of acceptor and indorser.

said James Campbell; which Gillies accepted, and was, within a few days after its date, transmitted by M'Kay, but without an indorsation, to Campbell his correspondent in Glasgow, who having applied to the Thistle Bank to have this bill discounted, they did so, and paid him the value in ready money, on his indorsing it to them.

Gillies the acceptor having died, leaving his affairs in disorder, and Campbell's affairs having also gone into disorder, the Thistle Bank, in harvest 1772, brought a process before this Court against the representatives of Gillies, as also against M'Kay and Campbell, all conjunctly and severally, for payment of the contents of said bill, which had been regularly protested by the holders, in which a decree was allowed to pass, which was afterwards extracted, and a charge of holding given thereupon.

M'Kay obtained a suspension of the charge; and, at first, he maintained, that distrusting the acceptor's circumstances, he never meant to indorse this bill to Mr Campbell, or to be answerable for the value of it; but that he put it into Campbell's hands, merely in trust or exchange, in order that he might endeavour to get payment of it from the debtor. Hence he argued, that, if the Thistle Bank thought fit to discount the bill, on Mr Campbell's indorsing it to them, they could only claim their recourse from him, but not from the defender. In the course of the debate, the defender gave different accounts of the terms on which he understood that Campbell was to hold, and agreed to take this bill without an indorsation, insinuating, that it was because Campbell was also in bad circumstances, and in the defender's debt; and that the pursuers, again, were glad thus to take it from Campbell, in payment, *pro tanto*, of a debt which he owed them. But, admitting that the circumstances occurring in this case were equivalent to his having granted to Campbell an assignation to this bill, he argued that this cannot supply the want of an indorsation; for that, if the defender had only assigned this bill to Campbell, the pursuers, deriving right to the bill from him, must have taken it subject to the counter claims which the defender had against Mr Campbell; but that nothing but an actual indorsation can entitle the holder to recourse, without being subject to such counter claims.

An investigation into facts having been made, and writings recovered, by authority of the Lord Ordinary, particularly a docketed account between the defender and Mr Campbell, of date 26th October 1772, subsequent to the execution of the present summons, the pursuers insisted, That the circumstances of the present case are so clearly demonstrative of the defender's intention to be bound, as leave not the least room for a doubt. It is in evidence, that Mr Campbell, the defender's ordinary correspondent and factor, was in the daily practice of discounting bills transmitted to him by the defender; that the bill in question was transmitted within a few days after its date, and six months before it became payable. In these circumstances, when Mr Campbell brought this bill to the pursuers to be discounted, and assured them that the want of an indorsation by the defender was a mere oversight, the pursuers had all the reason in the world to be-

lieve him; but when, further, the defender is seen acknowledging, that he did put this into Mr Campbell's hands, in order that he might convert it into cash; when, at an after clearing of accounts with Mr Campbell, this bill is stated in the doquetted account of date 1st June 1772, though not payable till 1st December; so that the defender takes credit for the sum of this bill, as so much cash paid to Mr Campbell at the time of its being transmitted; when, recently before this clearance, the defender is apprised that cash had been got for this bill, by discounting it with the pursuers, and that they had inteded process against him for recourse; and when he, upon this, takes credit for this bill from Mr Campbell, and allows a decree for recourse to go against himself at the instance of the pursuers; it is impossible, from all these circumstances, to draw any conclusion, other than that the defender was conscious that his conduct, with respect to this bill, was in all respects equivalent to an actual indorsation, and that the pursuers had a just claim against him for recourse. At the same time, the pursuers must observe, that the distinction which the defender would here establish, between the effect of an assignation and an indorsation of a bill, is by no means well founded in law. They have precisely the same effect; (*vide* Erskine, p. 438. § 31.; No 102. p. 1515.) wherefore, the admission made by the defender, of the circumstances arising in this case being tantamount to an assignation of this bill by him to Mr Campbell, is all that the pursuers have occasion to contend for, in order to establish their recourse against the defender. And, indeed, the defender's error in this particular proceeds from a misapprehension of the principles on which questions of this kind fall to be decided. *Vide* Forbes on Bills of Exchange, p. 23. and 24.; Cuninghame on Bills of Exchange, p. 26.—105.

THE COURT adhered to the Lord Ordinary's interlocutor, which 'repelled the reasons of suspension, and found the letters orderly proceeded.'

A. W. Baillie.

Alt. J. Boswell.

Clerk, Tait.

Fol. Dic. v. 3. p. 90. Fac. Col. No 145. p. 378.

1775. June 21. JAMES COULTER against ROBERT MARTIN.

A BILL was drawn by Robert Martin, 20th December 1764, upon, and accepted by George Kellar, for L. 194 : 17 : 6, payable to the drawer four months after date. It was indorsed for value by Martin to Thomas Johnston, and by him indorsed for value to David Nisbet; in whose hands it remained when it became due, 20th and 23d April 1765. Kellar the acceptor having become notour bankrupt about the middle of February 1765, immediately thereafter fled from Scotland; and Mr Coulter having come lately to have right to this bill, as creditor to David Nisbet,

In a question of recourse between him and Martin, the drawer and indorser, the latter *objected* to the due negotiation of the bill, in respect there was no proof of the notification of its dishonour.

No 161.

No 162.

Evidence of due notification of the dishonour having been given, so as to subject the drawer in recourse, was inferred from his own posterior deed, importing an acknowledgement of his being debtor in the sum, among others, to the holder.