

infringement that would thereby be made upon the nature and privileges of bills, without which trade could not be carried on; and the embarrassment and discouragement that would be given to the discounting of bills, a measure equally expedient and necessary for these important purposes.

One of the Judges suggested the following expedient: When the sum in a bill is arrested, that the suspension should be intimated to all concerned; and within a limited time thereafter, the Lord Ordinary on the Bills should examine the holders upon oath on all pertinent interrogatories; and if from them it appeared that the bill had been indorsed for money instantly paid, the suspension should be refused; if not, that it should be passed.

The Court was almost equally divided; but it was carried to *alter* the former interlocutor; so that the bill of suspension was refused.

Lord Ordinary, *Hailes*.
Clerk, *Tait*.

For Mansfield & Co. *Macqueen*.
For M'Ilmuir, *Maclaurin*.

* * Upon the 11th of December 1770, the same point occurred in a question betwixt Mansfield, Hunter, and Co. and William Douglas; when the Lords were unanimously of opinion that the former decision should be adhered to. No special interlocutor, however, to that import was pronounced. The question was remitted *simpliciter* to the Ordinary to do as he should see cause; it being understood that his Lordship was to take the oath of the charger as to the onerosity of the indorsation; and if that was properly instructed, the bill of suspension was to be refused.

For Mansfield & Hunter, *Macqueen*.

For Douglas, *Maclaurin*.

Clerk, *Ross*.

R. H.

Fac. Coll. No. 31. p. 85.

1777. February 27.

JOHN COOPER *against* WILLIAM CLARK, and ROBERT M'LINTOCH *against* JAMES and JOHN COOPERS and JOHN ARTHUR.

JOHN COOPER, in Millhill, applied to William Clark, baker in Renfrew, for the loan of £100. Sterling. Clark could not advance the money, but proposed to indorse a bill for that amount due to him by Wann and Watson of Portglasgow. To this Cooper at length agreed, but does not appear to have received the bill until the term of payment was past. Upon the 4th of January 1774, Cooper received from Clark Wann and Watson's bill of £100. due upon the 19th December 1773, and of the same date he granted his own bill conjointly with his father James Cooper, and John Arthur at Boghall, for £102. 10s. thus including the interest for six months, at which time their bill was payable. Wann and Watson could not pay the amount of their bill, which was therefore protested against them for not payment, and against Clark for recourse. Dili-

No. 3.

Whether when a bill is indorsed after the term of payment, the usual recourse can be obtained?

No. 3. gence was first raised and executed against the accepters of the bill ; but being unable to recover the money in that way, Cooper was at last obliged to raise diligence against Clark, who presented a bill of suspension, which was passed.

The bill for £102. 10s. granted by the Coopers and Arthur to Clark had been indorsed by him to Thomas Whitehead, tanner in Paisley, at whose instance it had been protested, and horning raised upon it. But Whitehead, who had been only trustee for Clark in this business, upon being informed of the nature of the transaction, would have no farther concern with it, but, at Clark's desire, assigned the protested bill and horning to Robert M'Lintock, merchant in Glasgow, who appears also to have been a confidential trustee for Clark. M'Lintock, having charged John and James Coopers, and John Arthur, for payment of the money contained in their accepted bill to William Clark, they also obtained a suspension ; and both suspensions came to be discussed before Lord Alva Ordinary.

In the first of these suspensions, at Clark's instance, the Ordinary was pleased to suspend the letters simpliciter ; and in the latter, at the instance of Cooper, he found the letters orderly proceeded. These interlocutors, however, were brought before the Court by reclaiming petitions, in which, on the first suspension, it was maintained by Clark in his answers, that an indorsation to a bill of which the term of payment is past, is an assignation to that bill, importing that the sum assigned is due, and the assignee or indorsee takes the debt *tantum et tale* as it stood in the person of the original creditor. That there must, from the nature of the thing, be a distinction betwixt a bill which can be protested before the days of grace are expired, and a bill protested after the days of grace.

In the first case, the law indulges recourse : In the other no recourse is competent, the bill having lost the particular privileges attending strict negotiation. For how could it be said, that a protest taken within the days of grace preserves recourse against the drawer ; if a protest taken long after the days of grace have expired, and the bill has become due, were to have the same effect ? In this view, the enactment of the statute for preserving the recourse upon the due negotiation of a bill appears altogether nugatory.

It was contended by John Cooper, that this doctrine is contrary to the nature of bills, the practice of merchants, and the decisions of the Court, as well as the authority of our lawyers. For a bill is a mandate by the drawer, on another person, to pay a certain sum to the porteur ; and by subscribing this mandate, he becomes liable for the sum therein contained, if the mandatary is either unable or unwilling to pay. But if the creditor is negligent in demanding payment, then he is answerable for the consequences ; and in order to save the necessity of proof, it is held, *presumptione juris et de jure*, that if payment is not demanded within the three days of grace, he is guilty of so great negligence as must forfeit his recourse : But if the term of payment is already past, when it is impossible that he can observe the established rule of strict negotiation ; in that case the Court must have a discretionary power of determining whether the *porteurs*

negligence has been so great as to merit the forfeiture of recourse. So it was determined in the case of Young against Forbes, 16th June 1749, No. 147. p. 1580. which decision is strongly supported by what Mr. Erskine observes, B. 3. T. 2. § 25. and there is no lawyer, ancient or modern, who has maintained a contrary opinion.

No. 3.

With regard to the second suspension, at the instance of James and John Coopers, and John Arthur, the Court found no difficulty in conjoining it with the former, as it appeared pretty evident, that M'Lintock was no onerous indorsee, but only acted as trustee for Clark's behoof: They therefore altered the Ordinary's interlocutor, and pronounced the following judgment, (Feb. 27, 1777) "Con-
" join the two processes, find recourse due upon Wann and Watson's bill indors-
" ed by William Clark to John Cooper; find the letters at the instance of John
" Cooper against William Clark orderly proceeded; sustain the said claim of
" recourse, in compensation of the bill granted by the said James and John
" Coopers and John Arthur to William Clark, indorsed by him to Robert
" M'Lintock, and decern; Find William Clark and Robert M'Lintock, con-
" jointly and severally, liable in expenses, and allow an account to be given in."

Lord Ordinary, *Alva*. For Petitioners, *C. Hay*. Alt. *James Grant*.

D. C.

* * See No. 164. p. 1604.

1777. July 16.

DAVID ELLIOT, Merchant in Glasgow, against HUGH M'KAY, in Downmore
in the Islay of Villa.

MACKAY, on the 27th day of January 1772, had accepted a bill, for £24. 2s. 10d. Sterling, drawn upon him by Archibald Grahame, and payable to the drawer or order at the shop of William Grahame, coppersmith in Glasgow, against Whitsunday then next. This bill was afterward indorsed by the said Archibald to the said William Grahame, who again indorsed it to Mr. Elliot the pursuer.

This bill was never protested, nor any demand made for payment sooner than December 1773, nearly two years after its date, and 18 months after the term of payment, when an action was brought at the instance of Mr. Elliot the indorsee, against the acceptor, who pleaded compensation against the drawer of bill as effectual against the indorsee.

The process came before the Lord Pitfour Ordinary, who pronounced the following interlocutor: "Finds that as the term of payment of the bill libelled on
" was at Whitsunday 1772, consequently the privileges thereof expired upon the
" 15th November said year, before any action was brought upon it; therefore it is
" competent to the defender to plead compensation against it; and finds that the
" grounds of compensation produced exceed the sum in the bill libelled on,

No. 4.
Privileges when lost? Can compensation be pleaded against an onerous indorsee for a debt of the drawer, eighteen months after the bill has become due, when no diligence has been used upon it?