No. 13. troduced on such bills; and that, consequently, the only consequence yet arising from the failure to negotiate strictly, was, that the holder has no recourse for the interest and for damages, a rule extended to promissory notes, by 3d and 4th Anne, C. 9; yet with us no distinction relative to protesting has ever been made between foreign and inland bills. In both, the same rules hold; making it in all cases essential to protest upon the last day of grace in case of non-payment.

Lord Ordinary, *Hermand.* For Suspender, *Montgomery*.. Agent, *Coll Macdonald*, W. S.
Alt. *W. Erskine.* Agent, *A. Young*, W. S.

F. *Fac. Coll. No.* 111. *p.* 244.

1803. *June* 17. JARRON *against* SMITH and COMPANY.

No. 14.
Due negotiation not necessary among co-cautioners in a debt constituted by bill, the recourse being preserved against each other by the bond of caution.

What is the last day of grace?

JOHN COBB, tenant in Auchphorsie, along with Robert Cuthbert, James Peter, Charles and John Alexander, granted a bond of caution (January 1794) to James Smith and Son, agents for the Bank of Scotland at Brechin, to relieve them to the extent of £2000, for all bills which they might hold in the name of Cobb, either as drawer, accepter or indorser.

In 1796 Cobb became insolvent, which made the two Alexanders also stop payment.

Robert Jarron, who had married the daughter and representative of Peter, and Cuthbert, were thus the only solvent cautioners, and were jointly obliged to relieve Smith and Son from Cobb's bills, getting from them an assignation to the bills, of which they were thus obliged to make payment, (August 6th, 1799), "in order to enable them to operate their relief against the parties "liable in payment thereof."

Among these bills was one for £300. drawn by Charles Alexander, and accepted by Cobb. It was blank indorsed to John Alexander, by whom again it was indorsed to Cuthbert, and by him to Smith and Son. It was dated the 30th April, and payable three months after date; and protested for non-payment on 3d of August.

Jarron, in virtue of the assignation, raised letters of horning upon the bill and protest against Cuthbert as being the last indorser, to relieve him from the half which he had paid as cautioner for Cobb.

Cuthbert suspended, upon the ground that the bill was not duly negotiated; that, therefore, he could not be liable as indorser; and that having paid one-half of the bill, in virtue of the bond of caution, he could not be called upon to pay the other half to Jarron, who must ultimately pay it in virtue of the same bond of caution.

No. 14.

The letters were suspended *simpliciter* (8th February 1800.)

Jarron now raised an action against Smith and Son to repay the half of this bill, which he had formerly paid them, because, owing to undue negotiation, his relief against the indorsers had not been effectual.

The Lord Ordinary sustained the defences (26th November 1800.)

Jarron reclaimed, and

Pleaded: The holder of a bill must negotiate duly, otherwise recourse against the last indorser is lost; and it is competent for every one antecedently liable in the bill to plead this objection except the accepter. Cautioners are similar to indorsers, and the same rules are applicable to both. In the present case, the bill was not protested till 3d August; and as it was dated on 30th April, this was one day after the third day of grace, which, by the universal practice of merchants, sanctioned by law, is the day on which a protest should be taken. As the agents of the bank were bound to convey to the obligants paying the debt, the bill or promissory-note, in order to operate their relief, this obligation is not implemented if recourse be lost through failure duly to negotiate.

Nor does the bond of caution alter this claim. When the debt was paid by the pursuer and Cuthbert, the bond of caution was extinguished; and the pursuer, not as cautioner, but as assignee to the bill, sues for repayment from Cuthbert as the last indorser, which made him liable in that separate character to pay the whole contents of the bill. Being already cautioner, it was not necessary for Smith's security that he should also become indorser; but since he took this separate obligation upon himself, he must abide by the legal consequences of it.

Cuthbert, and Smith and Son,

Answered: If payment had been obtained from the indorser's of Cobb's bills, they would have been entitled to demand an assignation of the separate security of the bond of caution, which they hold for payment of their bills, and, in virtue of this assignation, would have recovered payment from the pursuer and Cuthbert, the only solvent obligants; so that the pursuer must have paid the half, and his situation been just the same as it is now; and the rule is, *Frustra petis, quod mox es restituturus.* The circumstance of due negotiation, would make no difference whatever. All parties are exactly as if payment had been demanded from the last indorser. Negotiation may be necessary to preserve recourse against prior indorsers, but this was effectually done by the bond of caution, by which they were all bound to each other. The holder of the bill may trust to this separate security; and he is not bound to do diligence for the sake of the co-obligants, already bound to relieve each other.

Smith and Son *separatim*

Answered: The bill in question is duly negotiated. It is dated on the last day of April, and, consequently, it is not payable till the last day of July, which is three kalendar *months* from its date; so that the 3d August was the third day of grace, and therefore the legal day for protesting for non-payment.

No. 14. The Court adhered, (15th June.)

The obligation of cautionry is not affected by the failure duly to negotiate, provided always that no prejudice arises from the omission. But if any of the indorsers previous to Cuthbert had been solvent, and not obligants in the bond of caution, and recourse had been lost against them, this might be a difficult question.

There was no occasion to determine relative to the due negotiation; but it was understood, that by the practice of merchants the 2d August was the last day of grace.

Lord Ordinary, *Meadowbank*. For Smith and Son, *Hay*. Agent, *Jo. Hanton*. For Jarron, *Baird*. Agent, *Tho. Duncan*. Clerk, *Home*. Agent, *James Young*. For Cuthbert, *Gillies*.

F. *Fac. Coll. No.* 112. *p.* 246.

1804. *May* 16. ARMSTRONG *against* JOHNSTONE.

No. 15.

A bill of exchange, when prescribed, cannot authorise summary execution, though the debtor's oath afterward prove the debt.

*** This case is No. 338. p. 11140. *voce* PRESCRIPTION.

1804. *June* 21. BOWACK, Petitioner.

No. 16.
A bill is valid, though written on a stamp of a higher denomination than required by statute.

AN action was brought before the Sheriff of Kincardineshire against James Bowack, tenant in Pitskelly, upon a bill for £100, dated 17th March 1802. Among other defences, he pleaded, that the bill is written upon an improper stamp; instead of one denoting a duty of 2*s*. a bill stamp denoting 3*s*. having been made use of; and reference was made to 37th Geo. III. C. 136. which begins thus, "Whereas, deeds or other instruments cannot be given in evi- "dence, nor are in any manner of way available, unless stamped with the "proper stamp provided for such purpose; and whereas," &c.

After referring to a bill, &c. wrote on a stamp of higher value or different denomination than required, the 5th section says: "And be it further enacted, "That if any such bill of exchange, promissory-note, or other note or order, "shall be produced to the said commissioners before the same shall be payable, "according to the tenor and effect thereof, the same all be stamped on pay- "ment of said duty, and with a penalty of 40*s*.; but in case such bill, &c. shall "be payable, according to the tenor and effect thereof, before the production "thereof (as in the case here) to the said commissioners for the purposes be-