

No 99.
 Horning may
 be taken out
 against the
 drawer, and
 the several
 indorsers at
 once.

1747. February 26.

A. against B.

A WRITER to the fignet, upon presenting a common bill of horning against the drawer of a bill, and also against the several indorsers through whose hands it had come to the porteur, and against all of whom it had been duly protested, stated it as a doubt, How far he could regularly give out horning against all at the same time, or if horning should not first proceed against the drawer, and after discussing him, against the several indorsers *subsidiare*? which the Ordinary on the bills reported.

THE LORDS, without hesitation, ' Authorized the Ordinary to pass the bill against the whole.'

So far as regards the porteur they are all drawers; and it would be very inconvenient were they to be discussed severally, especially in the case of foreign bills, or where it might be on the faith of one of the intermediate indorsers only, that the porteur had given his money for the bill.

Kilkerran, (BILL OF EXCHANGE.) No 13. p. 78.

No 100.
 Although a
 bill was given
 merely as a
 security for
 money, and
 not *in re mer-*
catoria, where
 no third party
 was concern-
 ed; it was
 found to be
 privileged.

1748. June 22.

ROBERT TUDHOPE against THOMAS TURNBULL.

ROBERT TAYLOR, writer in Hawick, having use for L. 29 Sterling, which he knew his aunt Jean Taylor had in ready money; and chusing to hide the borrowing from his aunt, to whom he gave himself the airs of being a moneyed man, prevailed upon Robert Tudhope to act the part of the borrower. Robert Tudhope accordingly got the money and granted his bill, dated 29th March 1743, and payable the 29th of March 1744, which Jean Taylor delivered to Robert Taylor, who was her ordinary doer, to be kept for her use with her other papers. The moment she was gone, Robert Tudhope delivered the L. 29 to Robert Taylor, and took his bill for it, of even date with the other bill, and payable at the same term.

Some time thereafter Robert Taylor, pressed by Thomas Turnbull, merchant in Hawick, for payment of an account of L. 17 Sterling, could find no other fund for satisfying the creditor but his aunt's bill; which remaining blank in the drawer's name, he filled up his own name as drawer, and indorsed the same to Turnbull. Diligence upon this bill against Robert Tudhope obliged him to bring a suspension before the Court of Session; founding upon the counter-bill granted to him by Taylor, as a ground of compensation; which, in this case, he insisted ought to be good against the indorsee as well as the indorser. And, *in limine*, the following fact was ascertained by the charger's acknowledgment, That the bill was indorsed to him for payment of an account of L. 17 Sterling due to him by Taylor, made up partly of lent money, and partly of goods furnished; and that he was to account to Taylor for the surplus of the bill when received.

THE LORD ORDINARY having repelled the ground of compensation, and found the letters orderly proceeded for L. 17, to which extent the indoriation was for a

valuable consideration; the suspender submitted the following reasons to the Court, premising, That a distinction ought to be made betwixt a bill *in re mercatoria*, where three persons are concerned, and a bill betwixt two persons. The former, by saving the carriage of money from place to place, has great respect paid to it, and is entitled to extraordinary privileges. The latter, a more dangerous security than a bond, and answering no end of commerce that a bond does not answer, is entitled to no peculiar privilege more than a bond; and, if compensation be good against an onerous assignee, it ought to be equally good against the indorsee of such a bill. A bill of exchange, payable to a third party, is considered in law as a bag of money, which passes freely from hand to hand, without any impediment. Thus it is established in practice, that compensation upon the debt of the indorser does not meet the onerous indorsee to a bill of exchange. But no statute, nor no decision has said, that a bill betwixt two persons, which can have no other effect than to be a security for debt, is endowed with the same privileges. So late at the year 1714, it was doubted in the Court of Session, whether inland bills of exchange are entitled to the extraordinary privilege of barring compensation; and it was resolved in the affirmative, upon the report of trading merchants, who all testified, that it was the constant practice. This happened in the case of Fairholm *contra* Cockburn, compiled by President Dalrymple, (No 94. p. 1506.) At that time there could not be the least idea that a security for money, in the form of a bill, was entitled to the same extraordinary privileges.

The Court will consider upon what footing these bills stand. They have no privilege, by act of Parliament, as inland bills of exchange have; for the act 36th Parl. 1696, obviously relates to bills of exchange only. It statutes, 'That the same execution shall be competent, and proceed upon inland bills or precepts, as is provided to pass upon foreign bills of exchange by the act 1681.' The execution provided by that act, is registration and horning, within six months of the date, in case of not acceptance, and within six months of the term of payment, in case of acceptance; against the drawer or indorser in the former case; and against the acceptor in the latter. This is the diligence which is appointed to proceed upon inland bills and precepts, relative only to bills of exchange, where three persons are concerned. It follows then, that a security for debt, in the form of a bill, having no authority from the statute, is only supported by custom. Now let us examine whether there be either reason or custom for giving such bills any privilege beyond a bond: There are reasons for giving them less indulgence, but none for giving them greater. And as for practice it has been observed, that, so late as the 1714, it was doubted, whether even inland bills of exchange had these extraordinary privileges. If, since that time, simple securities in the form of bills have acquired these privileges, it is incumbent upon the charger to give evidence of it.

In England such a thing is not known as a security for money in the form of a bill, where there are only two persons concerned as in a bond. The very defini-

No 100. tion given by all the writers of an inland bill is, ' That which is drawn by one merchant, residing in one part of the kingdom, upon another residing in some city or town, within the same city or kingdom, payable to the person expressed in the bill.' And the 9th and 10th Will. III. cap. 17. direct the manner of presenting such bills, and of the porteur's doing diligence upon them, just as in Scotland. What the English have in place of bills betwixt two persons, are promissory-notes, binding, though not holograph, and also indorsable; but the promissory-notes have no extraordinary privilege, such as bills of exchange have. And there can be no reason for giving the bills under consideration a greater privilege than the deed which corresponds to them in England, viz. a promissory-note.

2do, It ought to be separately relevant, that the term of payment of the bill is at the distance of a full twelvemonth, which proves, that it could not be *in re mercatoria*; and therefore, at any rate, not entitled to any extraordinary privilege. What if the term of payment were put off for two years, or for three years, would the Court still bar compensation and arrestment, and would they even bar payment, if vouched only by a precept on a paper a-part? These extraordinary privileges are even denied to bills of exchange, that are allowed to ly over beyond the ordinary time of negotiation. *Multo magis* ought they to be denied to bills, that by their very conception are designed to ly over, and not to have any quick or regular circulation.

3tio, Suppose the bill in question were a proper bill of exchange, yet the compensation proposed ought to be sustained against Turnbull. In practice we make a great distinction betwixt indorsations in the course of commerce, and indorsations granted for security of anterior debt, as well as we make betwixt bills granted in the course of commerce, and bills for security of anterior debt. An indorsation for security of anterior debt is effectual in law, but then the indorsee has none of the extraordinary privileges: He must condescend to stand upon the same footing with an assignee to a bond. Thus a discharge was found good against an indorsee, though not marked on the back of the bill; because the indorsation was not for an adequate onerous cause, nor for value given at the time, but only in security of bygone debt. Fountainhall, 15th January 1708, Crawford against Pyper, *in far*, Div. 2. Sec. 3.

THE LORDS, at advising, gave very different opinions upon this case.—ARNISTON declared strongly for the distinction above stated, betwixt a bill of exchange, and a bill chosen in place of a bond, to vouch a debt betwixt two persons. TINWALD thought that a bill containing a distant term of payment is scarce entitled to any privilege. ELCHIES was of opinion, that where a bill of exchange is indorsed for security of debt, the indorsee is not entitled to any privilege; which was the case of the decision cited from Fountainhall. But he observed, that the bill in the present case was indorsed for *payment* of the seventeen pounds Sterling, which is strictly an onerous cause, and the same as if the indorsee had paid the L. 17 in

ready money for the indorsation. But the result was, to adhere to the Lord Ordinary's interlocutor, repelling the ground of compensation. See No 39. p. 1437. *Fol. Dic. v. 3. p. 81. Rem. Dec. v. 2. No 93. p. 162.*

No 100.

* * * Kilkerran reports the same case :

It was very plausibly argued for the defender, pleading compensation against the indorsee to a bill upon the debt of the indorser, That no bills are entitled to privileges, but such as are *in re mercatoria*, where three persons are concerned; which is the case of all foreign bills, intended to save the carriage of money from place to place; but that a bill between two persons only, as it is a more dangerous security than a bond, and answers no end of commerce, is by no law entitled to any privilege, nor is there any reason it should. All that the act 1696 statutes, is, that the same execution shall be competent upon inland bills and precepts, as upon foreign bills by the act 1681; that is, registration and horning against drawer and indorser, within six months of the date, in case of not acceptance, and within six months of the term of payment against the acceptor, in case of acceptance; but not a word of communicating any of the other privileges of foreign bills; in so much, that on the 24th June 1714, Fairholm against Cockburn, observed by Prof. Dalrymple, (No 94. p. 1506.) it was doubted in this Court, Whether even inland bills of exchange, where three persons are concerned, were entitled to the privilege of not admitting compensation against the indorsee? and determined in the affirmative, only because of the report of merchants, that it was the constant practice; and as at that time there could be no idea that a security for money in the form of a bill had these extraordinary privileges, it does not appear how it should have acquired them since.

In England such a thing is not known as a security for money in the form of a bill, where only two persons are concerned. The very definition given by their writers of an inland bill, is, that which is drawn by one merchant residing in one part of the kingdom, upon another residing in some city or town within the same kingdom; and the acts 9th and 10th of King William direct the manner of presenting and doing diligence upon them. What the English have in place of bills between two persons, are promissory notes, indorsable and binding with them, though not holograph, but which have no privileges; as there is neither authority nor reason for giving bills with us, which are only a security for money between two persons, any privileges.

This reasoning did to some appear to have a good deal in it, and that were the matter entire, such as ought to be harkened to; but as it had now, for a course of many years, been the universal sense of the country, that bills between two persons were entitled to the same privileges as proper bills of exchange, it was not to be altered by a judgment, and therefore the "objection was repelled."

It was *separatim* pleaded for the defender, That the bill being drawn payable at the distance of twelve months, was, upon that account, not entitled to privi-

leges, as it departed from the proper nature of a bill. But this was also repelled, as there are instances, even among merchants, of bills drawn payable at a great distance of time; and there is no certain time fixed in the practice for the length of the term of payment.

A third ground urged for sustaining the compensation, viz. That the indorsement had been made not for value given, but in security of debt, was also repelled.

Kilkerran, (BILL OF EXCHANGE.) No 16. p. 81.

A purchaser accepted bills blank in the drawer's name, for the price of lands. They were effectual in the hands of an onerous indorsee; although the purchaser had objections against the validity of the disposition of the lands.

1748. December 6.

BRUCE of Kinnaird, *against* GUTHRIE & HUTCHISON.

HAMILTON of Pencaitland, and Glen of Longcrofts, tacksmen of the estates of Linlithgow and Callander, obtained from Bailie Bowie in Falkirk, their factor thereon, a disposition to his lands of Barns, and other subjects, in satisfaction of his arrears of intromissions.

The Earl and Countess of Kilmarnock, for whom the tacksmen were trustees, sold the lands of Barns to Eupham Hutchison, relict of David Miln, merchant in Edinburgh, and Henry Guthrie, writer there, for the agreed price of 6000 merks Scots; and they accepted two bills, one for 4,500 merks, payable at Whitsunday 1745; and the other for 1500 merks at Martinmas thereafter; and deposited them in the hand of Mr James Graham of Airth; who, by his missive, promised to procure them a disposition from the Earl and Countess; upon delivery of which, he was to give up the bills to David Bruce of Kinnaird.

The disposition was executed and delivered; and thereupon Mr Graham retired his letter, and delivered up the bills to Mr Bruce, to which he adhibited his subscription as drawer; having, as the value thereof, discharged a debt due to him by the Earl and Countess.

The acceptors paid the first bill; but suspended the second, on account of this defect in their progress; that there was no disposition from the trustees to the Earl and Countess, although the disposition to them, narrated the delivery of an extract of one; whereby they did not doubt, as they said, but that it was on record, and an extract would be given them; and, therefore, they gave up Mr Graham's letter; but now it appeared that no such paper could be found registered; and they offered, if the charger would shew in what register it was, to pass from their suspension, and take an extract.

THE LORD ORDINARY, 16th February 1748, ' Found, that there was sufficient evidence, that the bill pursued on, was granted for part of the price of the lands purchased by the suspenders; and that they had right to retain the sum in the said bill, until the disposition to the Earl and Countess of Kilmarnock were delivered to them.'

Pleaded in a reclaiming bill: The charger having discharged a debt due to him as the value of the bills, is to be considered as an indorsee for an onerous cause,