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Answered, 1mo, The objector has acknowledged himself debtor to Nisbet for the contents of the bill in question; *2do,* That the actual notification of the dishonour is to be presumed; and, *3tio,* That the notoriety of the acceptor's bankruptcy before the bill became due, was equivalent to an actual notification, and excluded the supposition of any damage having arisen from the want of it.

The Court went upon the particular circumstances in this case. Accordingly, "Having considered the disposition by the objector, Martin, to David Nisbet, and the other trustees for his, Martin's, creditors, wherein he acknowledges that he is owing to the said David Nisbet the sum of L. 514 : 17 : 6 Sterling; and that it is not denied by his procurators that the sum in the bill in question is therein included, Find sufficient evidence that the dishonour of the said bill was properly intimated to Robert Martin; therefore decern against him for the sums, principal and interest, contained in the bill libelled on."

The trust disposition by Martin to Nisbet, bearing in general that Nisbet was a creditor in L. 514 : 17 : 6, it was argued, contained a clause, that the stating of the debts as claimed by the creditors themselves, was without prejudice to all competent objections that might be made to any of them; therefore it was entire to Martin himself. But this, it was observed, was no more than a clause of file, generally thrown in, in all such deeds.

A. & Cullen.

Alt. B. W. M'Leod.

Clerk, Gibson.

Fac. Col. No 174. p. 90.

1775. August 5.

ALEXANDER ELLIOT against HENRY RICHMOND and JOHN POLLOCK.

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Found, that by the act 12. Geo. III. cap. 72. summary diligence cannot proceed by horning against drawers and indorsers of bills within the three days of grace.

No horning could proceed summarily against any person upon a bill, previous to the act 1681, c. 20. This act statutes and ordains, 'That, in case of any foreign bill of exchange, from or to this realm, duly protested for not acceptance or for not payment, the said protest having the bill of exchange prefixed, shall be registrable within six months after the date of the said bill, in case of non-acceptance, or after the falling due thereof, in case of non-payment, in the books of Council and Session, or other competent judicatories, at the instance of the person to whom the same is made payable, or his order, either against the drawer or indorser, in case of a protest for non-acceptance, or against the acceptor, in case of a protest for non-payment, to the effect it may have the authority of the judges thereof interponed thereto, that letters of horning, upon a simple charge of six days, and executorial necessary, may pass thereupon for the whole sums contained in the bill, as well exchange as principal,' &c.

Upon this footing did our law stand down to the act 1696, c. 36. the words of which are: 'Statutes, enacts, and declares, 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 twentieth act of the third Parliament of King Charles the Second, holden in anno 1681, which act is hereby extended to inland bills and precepts in all points.’

By these two acts, horning was competent, after a bill was accepted, only against the acceptor himself, but neither against the drawer nor any of the indorsers, against whom a common action of recourse only lay before the late act of George III. c. 72. for rendering the payment of the creditors of insolvent debtors more equal and expeditious, &c. And the words of the act, in so far as they respect this question, are, ‘ That all inland bills and promissory notes shall be protested in like manner as foreign bills, before the expiration of the three days of grace, otherwise there shall be no recourse against the drawers or indorsers of such inland bills, or against the indorsers of such promissory notes; and it shall be sufficient to preserve the said recourse, if notice is given of the dishonour within fourteen days after the protest is taken, without prejudice to the notification of the dishonour of foreign bills, to be made within such time as is required by the usage and custom of merchants.’—And the very next clause of the act runs thus: ‘ That, from and after the said 15th day of May 1772, summary execution, by horning or other diligence, shall pass upon bills, whether foreign or inland, and whether accepted or protested for non-acceptance, and upon all promissory notes, duly negotiated, not only against the acceptors of such bills, or granters of such notes, but also against the drawers of such bills, and the whole indorsers of the said bills and notes, jointly and severally, excepting where the indorsation is qualified to be without recourse; saving and reserving to the drawers or indorsers their respective claims of recourse against each other, and all defences against the same, according to law.’

The present question arose in a suspension of a charge given to the drawers and indorsers of a bill, which was accepted, but not paid when due, in order to have recourse against them.

Pleaded: It is clear, that no summary diligence by horning against drawers and indorsers is authorized by this act, unless a protest has been regularly taken within the three days of grace; now, it is not pretended that, in the present case, the bill was protested within the three days of grace, or for many days afterwards. Hence no horning was competent against the suspenders; and, consequently, the present bill falls to be passed without caution or consignation of any kind.

Observed on the Bench: That, in this case, it was clearly the sense and understanding of all parties, as shown by the correspondence and other circumstances, that this bill was not to be subject to strict negotiation; therefore the suspenders were still liable in the contents of this bill. But the whole difficulty lay on the words of the statute, *duly negotiated*, i. e. in terms of the preceding statute; that it was inaccurate in the writer to the signet to issue letters of

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horning in such a case; and, therefore, the charger must be referred to his action at common law.

The bill was ordered to passed on juratory caution, because it was offered, otherwise would have been passed simply without caution. *See* SUMMAR DILLIGENCE.

A&C. *W. Baillie.*Alt. *Al. Miller.*

Clerk, ———.

Fac. Col. No 196. p. 132.

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A bill was indorsed after the term of payment was past. Recourse was found competent, though the ordinary rules of negotiation could not be applied.

1777. *February 27.*COOPER *against* CLARK.

COOPER applied to Clark for the loan of L. 100, and Clark, instead of cash, indorsed him a bill to that amount, due to him by Wann and Watson, but of which the term of payment was past, the bill being due 19th December 1793, and the indorsation given 4th January 1774. Clark, in return, granted his own bill, payable at six months, for L. 102 : 10s. thus including the interest. Wann and Watson being unable to pay, Cooper protested the bill against them, and against Clark for recourse; who being sued, presented a bill of suspension. Clark, in the mean time, indorsed Cooper's bill to Maclintock, merely as a trustee; and he suing for payment against Cooper, the latter presented a bill of suspension; and both being conjoined, came to be discussed together. It was urged for Clark, That though recourse is competent against the drawer or indorser, where the indorsation is made before the bill is payable, it is otherwise where the indorsation is made after the term of payment is past, for the bill has then lost its privileges; for, what is the meaning of recourse being preserved by a protest taken within the days of grace, if a protest taken long after their expiry, and after the bill had become due, were to have the same effect? *Answered,* The forfeiture, of recourse, in ordinary cases, is the just consequence of the negligence of the holder of a bill, in not taking early and timeous measures for obtaining payment; which negligence is imputable, if a protest is not taken within the days of grace: but, in the present case, the indorsee had no opportunity of taking such timeous measures; for the term of payment was past before he got right to the bill.

THE LORDS found recourse competent to Cooper against Clark, on Wann and Watson's bill; and therefore, in the first suspension; found the letters orderly proceeded, and sustained the said claim of recourse in compensation of the bill granted by Cooper to Clark, and indorsed to Maclintock; and found Cooper and Maclintock jointly liable in expences. *See* APPENDIX.

Fol. Dic. v. 3. p. 85.