

No 149.

THE COURT repelled the defence, upon this ground, That the bill and protest belonged to the pursuer of the recourse; and that he was not bound to part with the document of his debt or his diligence, till he got payment.

Sel. Dec. No 130. p. 186.

* * * The same case is reported in the Faculty Collection :

JOHN COCHRAN drew a bill, bearing value, upon Fergus Kennedy, for L. 28, payable seventy days after date. This bill was indorsed to Woodrop, by him to Hawkins Hamilton and Company of Lynn-Regis, by them to Hawkins of Sunderland, and from him, through several hands, it came to Townshend of London; who not getting payment, regularly protested it, and returned it upon Hawkins of Sunderland.

Hawkins Hamilton and Company of Lynn-Regis, gave due notification of the dishonour of the bill to John Cochran; but Hawkins of Sunderland, instead of returning the bill and protest to Cochran, sent it back to a correspondent in London, to try if payment could be got of it; by which means the bill and protest did not come into the hands of Cochran till 39 days after the dishonour of it.

Cochran being pursued upon recourse by Hawkins Hamilton and Company of Lynn-Regis, and by Hawkins of Sunderland, *objected*, That they had lost the recourse, by keeping up the bill and protest so long as 39 days after the dishonour, and that they ought to have been returned the third post.

' THE LORDS repelled the defence, and found expences due.'

A&. Lockhart.

Alt. Burnett.

Fol. Dic. v. 3. p. 88. Fac. Col. No. 29. p. 50.

1758. *January 9.*

WILLIAM ALEXANDER, Cashier for the Edinburgh Ropery Company, *against*
ROBERT CUMING, Shipmaster in Leith.

No 150.

A bill indorsed in security, found not to require negotiation. See Murray against Groffett, *infra*.

ROBERT CUMING became debtor to the Ropery Company in fundry articles, amounting to L. 119 : 8 : 8½ Sterling. Upon the 25th September 1753, he fitted his account with Alexander Ogilvie, the Company's clerk; and not being in cash, he indorsed some bills to Ogilvie, particularly one accepted by James Cuming his brother, for L. 29 : 9 : 11 Sterling; to which he added an acceptance of his own for the balance. Ogilvie, on the other hand, gave Cuming a copy of his account, with a note of the bills indorsed, and the following doquet subjoined: ' Received from Mr Robert Cuming the above bills L. 81 : 16 : 8½, with his own acceptance, of this date, payable in six months, for L. 37 : 4s. Sterling, *which, when paid, are in full of the above account; and the same is discharged for the Edinburgh Ropery Company.*'

The Company received punctual payment of Cuming's one acceptance, and of the other bills indorsed, excepting James Cuming's bill above mentioned. It became due in March 1754; but the acceptor being by that time in a state of bankruptcy, the Company did not strictly negotiate it, trusting to the indorser for their payment, in respect of the conception of the above doquet. In June 1754, they protested the bill, and raised horning and caption upon it.

James Cuming's effects not being sufficient to pay above eighteen pence in the pound of his debts, the Ropery Company brought an action before the High Court of Admiralty, against Robert Cuming, for payment of the contents of the said bill.

Cuming, in his defence, *alleged*, That the bill was indorsed *in solutum* of the account; and not having been duly protested for not payment, recourse was not competent against him.—The pursuers, on the other hand, *maintained*, That by the doquet of the account, it appeared, the bill was only indorsed *in security* of the debt; and therefore there was no need for exact negotiation to entitle them to recourse.

The Judge found the defender liable in the contents of the bill, with interest from the citation.

Cuming, in a bill of advocacy, *pleaded*, That it would be of the most dangerous consequence, to overlook a point so essential to commerce, as the exact negotiation of bills, and to sustain an action of recourse upon bills not duly negotiated.

Answered for the pursuers, The words of the doquet, *which, when paid*, clearly imply, that the bill was not taken in payment, but only in security *pro tanto* of the debt. An assignee in security is not bound to do diligence; neither can an indorsee in security be so bound. Where a bill is indorsed in payment, or for present value, recourse can only be had upon exact negotiation; because the indorser is no otherwise bound than by the indorsation: But where an indorsation of a bill is given *in security* of a former debt, or on condition, that, *when paid*, it shall operate a discharge of it, the indorsation is no more than a corroborative right. The indorsee is only obliged to apply the payment *when made*; and if the bill is not paid, the indorser is still liable in the original ground of debt.

'THE LORDS refused the bill of advocacy.' See Murray against Grossett, *infra, b. t.*

Reporter, *Strichen*:

A&C. *Rae*.

Alt. *Montgomery*.

Rae.

Fol. Dic. v. 3. p. 89. Fac. Col. No 82. p. 145.

1758. July 12.

WILLIAM TOD against PATRICK MAXWELL, Merchant in Dundee.

UPON the 25th March 1757, Maxwell drew a bill upon Butter and Crawford at London, for L. 50, payable 24th April 1757, directing the money to be placed to his account. This bill was indorsed to William Tod, and duly accepted.

No 151.

Recourse refused on a bill protested on the day after the last