

and found, that Lamingtoun behoved to prove the conjunct fee lands to have been so much worth as the samen were given up for, the time of the marriage ; and found it sufficient for the defender Lamingtoun, in time coming, to offer sufficient tenants for taking of the land at the said rental, and for whom he should be cautioner, which was sufficient to assoilzie the defender in time coming, as was found in a former practique.

*Fol. Dic. v. 1. p. 239. Newbyth, MS. p. 64.*

No 75.

1724. June 20.

ELIZABETH MACLEOD and PATRICK DOUGLAS Her Husband *against* SIR WILLIAM GORDON of Invergordon and ALEXANDER GORDON of Ardoch.

No 76.

The indorser of a bill found to have lost recourse for not having followed out diligence, and not having intimated that he could not recover.

UPON the 26th of October 1704, a bill for 800 merks was drawn by John Gray of Newton, upon and accepted by Andrew Ross younger of Balblair, payable at Martinmas thereafter to Sir William Gordon, or order, for value of him; who indorsed it to his brother Alexander Gordon likewise for value, and he reindorsed it, without a date, to Alexander MacLeod and John Watson for value of them : The bill was protested the 11th December 1704, registrate the 12th, horning was raised the 13th, executed the 14th, and caption taken out the 5th January 1705, all in Ardoch's name, against Mr Ross the acceptor.

The pursuer and her husband having got right to the whole sum in the bill, insisted in an action of recourse against Sir William and Mr Gordon.

It was *pleaded* in defence, That supposing the indorsation by Ardoch to have been for value, yet no recourse was competent against him or Sir William, because the pursuer's authors ought to have proceeded to put the caption in execution, since they had accepted of an indorsation to a bill, after diligence had been raised and carried on so far by the indorser, and the rather that the acceptor lived in the town of Edinburgh with them, and was in publick office. *2do*, If they had done any further diligence, they ought to have advised the indorsers that they could not recover payment.

It was *answered*, *1mo*, That an indorsation of a bill for value, subjects the indorser to an action of recourse ; for, where it is otherwise intended, and the indorser resolves to be free, there is always adjected to the indorsation this quality, without recourse. *2do*, Since the bill was protested in Ardoch's name, it must rationally be presumed that the subsequent diligences were raised by Macleod and Watson after the indorsation to them, because it could not be supposed that these gentlemen, who were well known in business, would have paid value for a bill, after horning and caption were raised against the acceptor : And as to the notification of what they had done, they had made it in a more solemn manner than ordinary, for within ten months after the term of payment in the bill, a summons at their instance was executed against the defenders,

No 76.

and likewise the drawer ; and although the summons was blank, as was the custom at that time, yet it must be presumed to have been for this recourse, since the defenders could not condescend upon any other ground of action Mr M'Leod and Watson had against them.

*Replied* for the defenders, that the bill and protest being registered the 12th of December, it was certain that at that time there was no indorsation to the pursuers authors, else the registration would have borne it ; and the horning being raised next day, and the caption in a few days thereafter, all in the indorser's name, it must reasonably be presumed that these diligences were used before the indorsation, and delivered up with the bill. As to the intimation, it was *replied*, that a blank summons was no more than a general intimation that the defenders were called to answer to what should be thereafter libelled ; and this summons never was libelled, nor any procedure made therein, and therefore could not be regarded.

THE LORDS found, That from the dates of the diligences, and that they were in Ardoch's name, it was to be presumed the indorsation to Watson and Macleod was posterior thereto ; and that they were bound to put the diligence to execution, and advise the indorsers of their not having recovered payment : And found it not proven that they had put the diligence in execution ; and likewise found, that the blank summons at M'Leod and Watson's instance, executed in September 1705, was not a sufficient intimation, and therefore found the indorsers not liable in recourse.

The pursuers reclaimed, and founded upon certain letters wrote by the drawer, and by the acceptor and his father, to shew that the design of the blank summons was known ; and likewise they craved Sir William's and Mr Gordon's oaths as to their knowledge of it : But the Lords had no regard to the letters ; and the defenders having deponed *negative*, they adhered. See BILL OF EXCHANGE, No 133. p. 1558.

Act. H. Dalrymple, sen. & Jo. Forbes.

Alt. Ja. Boswell.

Clerk, Justice.

Edgar, p. 52.

See Lamb against Duncan, 16th March 1798, *voce* IMPLIED OBLIGATION.

See Gib against Gib, *voce* TUTOR AND PUPIL.

See PERICULUM.

See APPENDIX.