No 189. SONAL OBJECTION; where it was found, that Mr Rigg having been lawyer for Mr Arrot, from whom Troup derived right, could not object the nullity of a bill granted to Mr Arrot by himſelf: And with regard to the 500 merks bill, there is a partial payment marked upon it, whereby it was homologated.

Replied, The acceptor was neither lawyer nor manager for his ſiſter, nor is it admitted the bills are in his handwriting: The marking on a null bill does not prove any payment was made, and is dated twenty-three years before commencement of the proceſs; and the allowing the bills to ly ſo long over, is pleaded as a reaſon why no action ſhould be ſuſtained upon them.

THE LORDS found, that the bills having lain over ſo long, and the granter being dead, there lay no action upon them.

Reporter, *Dun.* Act. *A. Pringle.* Alt. *Boswel.* Clerk, *Murray.*
Fol. Dic. v. 3. p. 91. *D. Falconer, v. 2. No 48. p. 46.*

No 190. A bill had for 4 years lain over without proteſt or diligence. It was found not to exclude compenſation againſt an onerous indorſee.

1749. *February 1.* THOMSON *against* COLVILL of Ochiltree.

UPON the 20th Auguſt 1744, Henry Spence, writer in Edinburgh, granted a bill to Alexander Thomſon, for L. 47 Sterling; and, at the ſame time, indorſed to Thomſon a bill of Robert Colvill's, dated in July 1742; and Thomſon, by a back note, declared that Colvill's bill was indorſed to him in ſecurity of the L. 47 contained in Spence's own bill, it being always in his (Thomſon's) option, to do diligence upon the one or the other.

Prior to Colvill's accepting his bill to Spence, he ſtood bound as cautioner for him in a greater ſum, which having now paid, it was for him *alleged*, That as he could have pleaded retention till he had been relieved of his cautionry, ſo now having paid the debt, he was entitled to compenſation; and thereupon two points occurred in the proceſs againſt him at the inſtance of Thomſon as indorſee.

1*mo*, Whether compenſation was not competent even againſt an onerous indorſee, where the indorſation was not in the way of commerce, but in ſecurity of a debt due by the indorſer, as it was in this caſe? 2*do*, Whether the bill itſelf had not loſt all its privileges, that only excepted of being tranſmiſſible by blank indorſation, by lying over ſince its date in July 1742, without proteſt or diligence done on it till November 1746 when this proceſs was brought.

On the firſt point two caſes were referred to for the defender, 15th January 1708, Crawfurd againſt Piper, No 110. p. 1524. where, on this ground, That the indorſation was in ſecurity of a prior debt, a general diſcharge by the indorſer was ſuſtained againſt the indorſee; and 16th January 1713, Campbell againſt Graham, No 192. p. 1120. where the indorſation by Campbell, after he was bankrupt, was found reducible on the act 1696, the ſuſpender proving that the indorſation was in ſecurity of a prior debt.

On the 2d point a caſe was referred to, 6th February 1719, Farquharſon againſt Brown, No 183. p. 1626. where an inland bill having lain over three years without proteſt or other diligence, compenſation was found competent on the debt of the indorſer againſt the onerous indorſee, in reſpect, that as the collector has marked the deciſion, it was not judged for the benefit of commerce, that bills not proteſted in three years ſhould be better than bonds. No 190.

Accordingly, without diſtinguiſhing between the two points, the LORDS in general found, 'That the defender was, in this caſe, entitled to plead retention or compenſation againſt the bill purſued on.'

It appeared, however, from the reaſoning, that the deciſion was put upon the ſecond point. For, as to the firſt point, How far an indorſee in ſecurity was obliged to admit compenſation or retention on the debt of the indorſer? The Court ſeemed to be of opinion, That, ſuppoſing the indorſee to proſecute on the bill within three years, he was no more obliged to admit compenſation upon the debt of the indorſer, than if he were a ſimple indorſee for value; and that without diſtinction, Whether the indorſation was given for ſecurity of an anterior contraction, or as a collateral ſecurity for the debt contracted at the time; by which diſtinction only it was that the procurators for the purſuer had endeavoured to avoid the force of the deciſions in the above caſes of Pyper and Graham, but which would not have been ſatisfying; for the diſtinction muſt ly here or no where, that an indorſation, not in the way of commerce for value, but as a collateral ſecurity of another debt, is not entitled to the privileges of an indorſation. But, as has been ſaid, the Court was of opinion, that it was entitled in the one caſe as well as the other, where the bill is duly negotiated by the indorſee: For, that nothing was more common among merchants, than ſuch indorſations for ſecurity of former balances; and that they are every day taken by both the banks; and to find them liable to every exception competent againſt the indorſer, would be attended with unforeſeen effects. At the ſame time it muſt be owned, that the above deciſions do not well conſiſt with this doctrine.

But, as to the ſecond point, the LORDS were clear, That where any bill lies over without proteſt or diligence, it loſes its privilege of excluding retention or compenſation on the debt of the drawer. How long time it muſt ly over before it loſe its privilege is not fixed; that matter has always been judged of on the caſe as it ſtood. Firſt, it was found that a bill, having lain over five years, had loſt its privileges, and afterwards, that it had loſt them, having lain over three years, which is the ſhorteſt time upon which a judgment has been given; but it is little to be doubted, that even a ſhorter time would be found ſufficient did the caſe occur.

Nay, it was ſaid, there was great reaſon to confine the endurance of the privilege of bills to the ſix months in which ſummary diligence is competent. As *firſt* in general, no good reaſon could be given why ſummary dilgence ſhould have been denied upon bills after ſix months, if it be ſuppoſed that they were to be vehicles of commerce after that period; and more particularly, *2do*,

No 190. Where a bill is protested and registered within the six months, and thereafter assigned, although the assignee will not be obliged to admit the cedent's receipts of date prior to the lapse of the six months, yet he will, as any other common assignee, be obliged to admit his receipts, of date after the lapse of the six months, and prior to the intimation of the assignation; and, is it not absurd that bills, not duly protested and registered, should have a stronger effect in favour of the indorsee, than bills duly protested and registered have in favour of the assignee?

Fol. Dic. v. 3. *p.* 91. *Kilkerran*, (BILLS of EXCHANGE.) *No* 21. *p.* 85.

*** D. Falconer reports the same case:

ROBERT COLVILL of Ochiltree accepted a bill, 6th July 1742, for L. 51 Sterling, payable, six months after date, to Henry Spence, writer in Edinburgh, who, 20th August 1744, indorsed it to Alexander Thomson, Bute-pursuivant, in security of L. 47, for which he at the same time gave his own bill: And Mr Thomson, September 1746, pursued Ochiltree thereon.

Pleaded in defence: Ochiltree and Mr Spence had jointly, at Whitsunday 1741, borrowed L. 100, of which L. 50 was applied to Mr Spence's use, and he gave his letter of relief for it. And in February 1745, he became bound for Mr Spence in L. 100, for which he gave his bond of relief, and another L. 100 in August 1744; which two sums he had been obliged to pay: That the bill lay over for two years in the drawer's hands without diligence, and was then indorsed in security, and remained other two years undemanded by the pursuer: That, in these circumstances, it was not entitled to the privileges of a bill, but the acceptor could plead compensation against the indorsee, or retention, till relieved of his obligations, Mr Spence being bankrupt.

Pleaded for the pursuer: The bill was indorsed for present value, and not in security of an old debt; which was the case of two decisions, Crawford against Pyper, No 110. p. 1524.; Campbell against Graham, No 192. p. 1120.; by which indorsees in security were found not entitled to the privileges of onerous indorsees: And it is not yet settled, that bills lose their privileges by lying over three years; which this has not done; for reckoning from the time it fell due, and deducting the endurance of the rebellion, appointed by statute not to be reckoned in short Prescriptions, the action was brought in time.

THE LORDS found the defender was entitled to plead compensation or retention against this bill.

Reporter, *Tinwald.* Act. *Fergusson* Alt. *R. Craigie.*

D. Falconer, v. 2. *No* 51. *p.* 50.