No 198.

3*tio*, It is not neceſſary to plead the partial payment marked on the back of the bill as an interruption; for though no receipt had been there, the bill itſelf was not preſcribed. Nor does the opinion of Sir George Mackenzie on the act 1669 apply to the preſent caſe: For, 1*mo*, There is no law by which bills preſcribe, like holograph writings, in twenty years. 2*do*, This bill was made a ground of action within that time.

'THE LORDS ſuſtained action on the bill, the purſuer making oath, That the contents of the ſaid bill, drawn by himſelf, were ſtill reſting owing, ſo far as by him claimed in this proceſs.'

Act. *G. Pringle.* Alt. *Rae.*

Fac. Col. No 246. *p.* 448.

1762. *February* 24. GEORGE SCOUGAL *againſt* ANDREW KER.

No 199.
A bill was indorſed away 20 months after the term of payment, during which time no diligence had been done upon it. It was found to have loſt its privileges, ſo as to render compenſation againſt an onerous indorſee competent. *See* No 12. p. 1407.

ANDREW KER purchaſed ſome cattle from Charles Ker, in May 1755, for the price of which he accepted a bill to Charles, payable at the term of Martinmas thereafter.

In July 1757, about 20 months after the term of payment, Charles Ker indorſed the bill for value to George Scougal, who brought his action againſt Andrew Ker the acceptor, for payment; *and having obtained decreet* in abſence, the ſame was ſuſpended by Andrew Ker.

Pleaded for the ſuſpender: The bill having been allowed to lie over for 20 months after the term of payment, without being indorſed, or any diligence done upon it, has loſt the privilege peculiar to bills, and is now ſubject to every exception competent againſt the original creditor: The ſuſpender is therefore at liberty to plead compenſation upon a debt which Charles Ker the indorſer owes to him, equal to the contents of the bill.

By the cuſtom of merchants in all the nations of Europe, bills, *before the term of payment*, paſs current by indorſation as bags of money, without being ſubject to compenſation, arreſtment, ſeparate diſcharge, or other defence, ariſing from the debt or deed of the original creditor, or intermediate indorſees, in prejudice of the laſt onerous indorſee: But, after the term of payment is elapſed, and the money is not paid in terms of the acceptance, the debtor in the bill is conſidered as in a ſtate of bankruptcy, and no merchant will give value for ſuch bill: It may be taken in ſecurity of debt, in the ſame way as an aſſignation to a decreet, or any other ground of debt, but will not be taken as a bag of money. The indorſee, in this caſe, truſts ſolely to the faith of the indorſer, nor is he tied down to any of the rules of negotiation; if the bill is not paid, he returns it upon the indorſers, and gives himſelf no further trouble; he is, in effect, a truſtee for the indorſers; and therefore, he cannot complain, if every legal objection, competent againſt the indorſers, is pleaded againſt him. Nor does it make any difference, whether the non-payment has been owing to

No 199. any *mora* upon the part of the acceptor, or merely to the creditors indulgence in keeping the bill too long by him; for, if we ſhall ſuppoſe that the bill has been preſented for payment at the term, and that the acceptor has refuſed to pay, very poſſibly the cauſe of his refuſal may have been, that he had a liquid ground of compenſation againſt the creditor in the bill; in which caſe, the creditor ought not thereafter to have indorſed it; and, at any rate, the perſon who takes the indorſation, takes it on the faith of the indorſer, and not of the acceptor, who has thus failed. If, on the other hand, the drawer has kept the bill by him, without ever taking any ſtep againſt the acceptor, or ſo much as preſenting it to him when the term of payment comes, it is plain, that ſuch bill has not been taken as a proper bill, to paſs current in the way of commerce, but has been intended as a ſecurity for money, which is but too common a practice; and as ſuch writings are the moſt frail and informal of all ſecurities, there is no reaſon why in that caſe they ſhould be indulged with any extraordinary privileges.

The term of payment, therefore, is the period at which the privileges of bills ought regularly to expire, as it is then that a bill ceaſes to be conſidered as a bag of money; at the ſame time, as the act 20th Parl. 1681 has allowed ſix months after the term of payment for regiſtration and ſummary diligence, it may be thought that the other privileges of bills ought, from analogy, to have the ſame endurance; but certainly they ought then to be at an end; the bill no longer admits of ſummary execution, but muſt be purſued by way of ordinary action, like any other ſimple ground of debt, and conſequently ought to be ſubject to the common defences pleadable in ordinary actions. Accordingly, it has been found in many caſes, that compenſation upon a debt of the indorſer, is pleadable after the elapſe of three, four, and five years; and for the ſame reaſon, the compenſation ought to be ſuſtained in the preſent caſe; for, unleſs either the term of payment, or the ſix months allowed for ſummary diligence, ſhall be adopted as the rule for the expiration of all the extraordinary privileges of bills, it does not occur what other period can be fixed upon between theſe and the long preſcription; and it is obvious what miſchief would follow if bills were allowed to paſs current as bags of money for 40 years.

Answered for the charger:—It is clear, that bills paſs current *for ſome time* at leaſt, without being liable to any exceptions proponable againſt the authors and indorſers: This ariſes from the very nature of ſuch writings, without which they could not anſwer the end for which they were introduced and received in all trading nations. The only queſtion is, At what period of time does this privilege expire? The natural and obvious anſwer is, That it laſts as long as the bill paſſes current by indorſation, and produces action as a probative writ. The term of endurance of bills is indeed, in moſt nations, limited to a few years; in England to ſix, in Holland to ſeven, and in France to five. In Scotland, it happens unluckily, that there is no ſhort preſcription of bills; and perhaps it might be inconvenient, if all their privileges were allowed to accompany them as long as they are probative, and paſs by indorſation; but ſurely it is equally improper to go to the contrary extreme, and circumſcribe theſe privileges to

the ſhort term of ſix months. It is true, that the form of regiſtration and ſummary diligence is confined by the legiſlature to ſix months from the term of payment; but this has no manner of connection with the other privileges of bills: It is a ſtatutory privilege, ſuperadded by the law of this country to thoſe which bills had from their own nature, and from the law of nations. The legiſlature did not mean to abridge thoſe other privileges; on the contrary, the preamble of the act expreſsly refers to the law and cuſtom of other nations. Nor is it of any importance, that, after the ſix months, payment muſt be ſued for by way of ordinary action. Before the ſtatute, no ſummary execution at all was competent; and yet it is admitted, that bills even then paſſed current for *ſome time*, without being liable to exceptions ariſing from the debt or deed of the indorſer. No 199.

And it would be ſtill more unreaſonable to limit the privileges of bills to the *term of payment*. No perſon ſcruples to give money for an indorſation where the term of payment is but a ſhort time elapſed: He may indeed recur upon the indorſer, though he ſhould not negotiate very punctually; but he likewiſe truſts to the faith of the debtor in the bill, who is bound by his acceptance, and lays his account with being liable to every perſon into whoſe hands the bill may come; nor can there be any good reaſon why the acceptor ſhould be benefited by the negligence or indulgence of the creditor in not demanding payment exactly when the bill becomes due.

As the law, therefore, does not limit the privileges of bills to either of the periods above-mentioned, the only queſtion is, How far the Court, from motives of expediency and public utility, ought to limit thoſe privileges to any ſhorter term than the duration of the bill itſelf, and what this ſhorter term ought to be? This queſtion, originally arbitrary, is now fixed by deciſions; upon the faith of which, the lieges have in all probability reſted; for the Court having found, in the caſe of Farquharſon *contra* Brown, 6th February 1719, No 183. p. 1626. that a bill which had lain over for three years had loſt its privileges, it was thereafter decided, in the caſe of Grierſon *contra* Earl of Sutherland, February 1728, (No 184. p. 1626.) That a bill which had lain over for two years and eleven months, from the term of payment, was ſtill current as at the beginning; and that compenſation upon a debt of the indorſer's was not pleadable againſt the onerous indorſee: From which deciſions, it is plain, that the ſpace of three years from the term of payment has been fixed upon by the Court as the proper period for the duration of the extraordinary privileges annexed to bills in this country.

'THE LORDS found compenſation competent.' *See* COMPENSATION.

Act. *Ilay Campbell* et *Burnet*. Alt. *Pat. Murray* et *Walter Stewart*.

Fol. Dic. v. 3. *p.* 91. *Fac. Col. No* 79. *p.* 174.

*** Lord Kames has taken occaſion, in reporting this caſe, to make ſome general obſervations on the nature of bills. His report is, therefore, placed in Div. I. ſect. 2. p. 1407.