

No 131.

subsumes in the terms of the quality, that if the precept had been negotiated, the money might have been recovered. The case betwixt the Earl of Newburgh and Sir William Stewart has probably been stopped and altered; seeing the Lord Stair, whose collection is very full and exact, before and after that time, hath not taken notice thereof. Besides, that case toucheth a missive, and not a precept; it relates to a debt personally due by the writer, and was neither presented, intimated, nor protested; which differenceth it from this case, where the precept was presented, partial payment made, and sufficient effects left to answer the superplus, which, through wilful neglect, were omitted to be taken up. The practick betwixt Smith and Vint hath no contingency with this case; for there it was found, that the assignation being granted in security, and never intimated, the property continued, notwithstanding, in the cedent's person, who suffered the loss through the debtor's bankruptcy, conform to the rule, *res perit suo Damino*. Just so, in the present case, the money being transferred to the assignee, by the intimation to the receivers, the creditor in the precept has himself to blame that he did not look after it.

THE LORDS sustained the payment of L. 150 to Mr Scrimzeour, to extinguish the bond and precept *pro tanto*; and found, that the Earl of Leven hath no recourse against the Earl of Glencairn for the remainder; but that he, the Earl of Glencairn, must assign, to the Earl of Leven, the first and readiest of the debentures due to him by the government for his father's regiment, for payment of that remainder.

*Fol. Dic. v. 1. p. 100. Forbes, p. 555.*

1715. February 1.

CLAUD JOHNSTON, Merchant in Edinburgh, *against* JAMES MURRAY, Merchant in Leith.

No 132.

An acceptor, instead of payment, gave a draught, and received his own acceptance. This found to afford no defence against recourse upon him, the draught not having been paid.

WILLIAM BOUDEN, merchant in London, being creditor to James Murray, draws a bill upon him, payable to himself, or order, which is accepted by Murray; and Bouden remits the bill to his correspondent in Edinburgh, Andrew Edgar, to receive the contents. Instead of paying to Edgar, Murray draws another bill on George Johnston, merchant in London, in these terms, 'At Ten days sight of this my bill of exchange, pay to Mr William Bouden, or order, Fifty-seven pounds Ten shillings Sterling, and retire my bill for the said sum, which fell due in September last; place it to my account, without further advice.' This bill is dated 10th November 1709; upon the 19th of the said month the bill is accepted by Johnston, and that night Bouden acquaints his correspondent Edgar of its being accepted, and orders his delivery up of the former bill to Murray: Which was accordingly done by Edgar, without any new value, but only that George Johnston had accepted the

second bill. Fourteen days after acceptance, Bouden protests Johnston's bill for not payment, and that night advises Murray thereof, and tells him, that by the next post he is to send the bill and protest to Mr Edgar, in order to get payment: And accordingly, by the post following, writes to Murray that he had sent them, and desires him to pay in the contents to Edgar. Thereafter Bouden breaks, and Claud Johnston, to whom the bill was indorsed, pursues Murray for payment.

*Answered* for the defender, *1mo*, That the bill was not duly negotiated; for being payable ten days after sight, it ought to have been protested immediately after falling due, whereas it was not protested till the fourth day thereafter. *2do*, Though it had been duly protested, yet Bouden could have no recourse; because, supposing he had been duly advised of the protest, yet the protested bill was not proffered timeously to him, which ought to have been done, that he might thereon have operated his relief against Johnston. *3tio*, *Esto* that all these necessary forms had been used, yet that he could not be liable in recourse, because Bouden had acquiesced in the bill, so soon as accepted by Johnston, *in solutum*: And, in consequence thereof, had ordered the delivery up of the first bill, whereby he had for ever debarred himself from any recourse against the defender; and the defender, in belief that he was no more liable, had given credit to Johnston for that sum, and the first bill being in the defender's hands discharged, was all one as if he had got a discharge of both.

*Replied* for the pursuer to the *1st*, That the bill was protested in the precise form prescribed by cap. 17. 9th William III. which regulates the manner of diligence on bills; and whereby no protest can be till after three days from the time of the bill's falling due; which was duly observed here, it being the 29th of November, and protested 3d December. To the *2d*, That no law requires the creditor to offer to the drawer the protested bill, it being sufficient to give timeous advice: Which being done in this case, it was Murray's part to call for the bill and pay it, since he was already certiorate; and if he needed the protested bill, he ought to have first paid Bouden or his correspondent, and then taken it up: But Bouden was not bound to seek after him with the bill. To the *3d*, That certainly the defender was liable to Bouden, not only to procure the bill accepted, but paid; for all the transaction was, that Bouden, in place of a bill, whereof he was to receive payment at Edinburgh from Murray, got a bill of like value payable at London, which certainly the drawer was as much obliged to see implemented at London, as if money had been actually paid for the second bill, because on account of the second he got up the first.

THE LORDS found, that the retiring or delivery up to Murray of his own accepted bill, did not afford him any defence against Bouden or his assignee, as to the recourse upon him as drawer of the bill on George Johnston; and that notwithstanding that the said Johnston had debited him therewith in his accounts; and found the bill accepted by the said Johnston duly negotiated by Bouden.

*Act. Boswell.*

*Act. Graham.*

*Clerk, Robertson.*

*Bruce, No 48. p. 61.*