

out the term of payment as long as he will; and if he fail to present timeously, it is just he himself, not the drawer, suffer by the omission; but where the money is payable at a precise day, of the drawer's own naming, the obtaining or not obtaining acceptance, neither lengthens nor shortens the day of payment; and the drawer is not one bit the better of acceptance, if the person drawn on fail before that time. He has therefore no reason to complain of the porteur, that made no demand before the day of payment; and if, in the meantime, the person on whom the draught is made, become bankrupt, the loss must lie upon the drawer, who gave his debtor so long a day, not the porteur, who was not guilty of any omission.

THE LORDS found, That the bill being drawn, payable upon a day and place certain, there was no necessity of a protest for not-acceptance.

And, upon a reclaiming petition and answers, the LORDS considering, that the bill was drawn payable in Ireland, a foreign part, and that he who was to be acceptor resided in Scotland, adhered to the former interlocutor. See The next case.

Fol. Dic. v. 1. p. 101. Rem. Dec. No 93. p. 184.

1729. July 12. FERGUSON against MALCOLM.

QUINTIN MALCOLM being in the Ile of Man in May 1720 (the period of the plague at Marseilles, when all ships were ordered to undergo quarantine), drew a bill on John Ferguson, merchant in Ayr, payable to William Flood, merchant in the Ile of Man, on 1st September following, at the house of Walter Davie in Dublin.

The bill was sent to Dublin, indorsed to Davie for behoof of Flood. It was, when due, protested for not payment. It was afterwards sent by Davie to Peter Murdoch, merchant in Glasgow, with orders to prosecute the drawer and drawee. During the dependence of the process before the Commissary of Glasgow, Murdoch wrote to Malcolm on 15th January 1723, who answered, 'That, without any action at law, he should certainly have his money, though it could not be just now paid.' Ferguson, the drawee, wrote at the same time, and on the same paper, to Murdoch, requesting delay. The bill was afterwards conveyed by Murdoch to William Ferguson of Auchinblain, the father of John Ferguson the drawee, who insisted in the Court of Session, for recourse against Malcolm the drawer.

Pleaded in defence:—That the drawer had received no intimation of the dishonour of the bill, till eight months after the term of payment.

Answered: It was impossible to notify, there being no intercourse of correspondence on account of the quarantine.

THE LORD ORDINARY had found, 'That the protesting of the bill had been duly notified.'

THE COURT found, That the protestation being in September, the notification

No 134.

No 135.

Recourse refused, when the porteur had failed timeously to intimate the dishonour of the bill to the drawer.

No 135. in April is not sufficient, and, therefore, that there is no recourse against the drawer.

Against this interlocutor, a petition was refused without answers.

Lord Ordinary, *Kimmerghame*. Act. *Hugh Dalrymple, Jas Ferguson*. Alt. *Andrew M^dDowall*.
Fol. Dic. v. 1. p. 102. Session Papers in Advocates' Library.

No 136.

Porteurs are bound to strict diligence. The least failure throws the hazard upon them. It is sufficient, in defence against recourse, for the drawer to say, that he might possibly have recovered from the acceptor.

1729. December 18.

FLOWER against PRINGLE.

EDWARD FLOWER and Son, merchants in London, pursued Robert Pringle, merchant in Edinburgh, in an action of recourse, upon a bill of L. 93 : 7s. drawn by Pringle when at Bourdeaux, upon James Scot in Dalkeith, in favour of Flower and Son. It had been accepted, and protested for not payment.

The bill, had been payable at *three usances*. An *usance* is 30 days; consequently, counting from the date, it had become due on 10th and 13th June; but had not been protested till 15th June.

Besides this error in the negotiation, it was *alleged*, That the protest had not been intimated to the drawer till many years after, when Scot had become bankrupt: That the possessor of the bill had voluntarily prorogated the term of payment to the acceptor, by drawing a new bill on him for a larger sum (including the bill in question, after it had been protested), payable at 30 days sight, by which he had innovated the debt, and renounced recourse against the drawer: That the new bill had been paid to an extent exceeding the sum in the bill, drawn by Pringle; which payment ought to be imputed, in the *first* place, in extinction of Pringle's bill: And *lastly*, That when Scot had been prosecuted upon the new bill, and had procured a bond of presentation, the possessor of the bill had voluntarily discharged that security.

It was *answered*, That it was immaterial whether the bill was duly protested and intimated or not, unless the drawer would undertake to prove, that had the protest been duly taken, and he timely informed of it, he might have recovered his payment: That the taking a new bill was no innovation of the debt, but only a corroborative security for it; the pursuers retaining in their hands the bill drawn by the defender; so that he could qualify no damage by the transaction; as the moment the bill drawn by him was protested, he could have proceeded against the acceptor, without regard to the new bill: That the partial payment made upon the new bill, would be imputed proportionably towards extinction of the pursuer's debt, and the other debts included in it, and ought not, in justice, to be held to extinguish any debt exclusively: That, although the cautioner in the bond of presentation was relieved, the principal remained bound.

Upon report of LORD GRANGE—THE LORDS sustained the defence, ' That the pursuers did not duly intimate to the defender, the non-payment and protesting of the defender's draught on Scot; and also sustained the other defence, that the pursuer had drawn a new bill for a greater sum, wherein it was acknow-