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\* \* D. Falconer reports the same case :

WALTER ALLAN, hammerman in Stirling, having furnished some iron-work to the town, an order was made by the Council upon their Treasurer, inscribed upon the foot of his account, to pay it, amounting to L.20 : 13s. Scots ; and he, 5th March 1743, drew upon the Treasurer on the same paper, to make the payment to Alexander Littlejohn, merchant in Stirling, ' as above restricted, according to the act of Council above-mentioned.'

Littlejohn being creditor to Allan in this sum, he, 4th April 1743, discharged him of all preceding accounts.

The bill was protested, 15th December 1743, against the Treasurer for non-acceptance ; and Littlejohn obtained a decret of the Magistrates of Stirling against Allan, for the sum, with interest and expence of process ; which being suspended, the Lord Ordinary found, ' That the bill was not duly negotiated, by protesting thereof several months after it was indorsed.'

*Pleaded* in a reclaiming bill, That the drawer sustained no prejudice, since it could not be pretended that the Treasurer was not solvent.

*Answered* : The defender is not obliged to enter into this discussion, and any cases wherein the allegiance of *no prejudice* has been sustained, have been where the drawer had no effects in the intended acceptor's hands.

THE LORDS adhered.

A.A. J. Dundas.

Alt. H. Home.

Clerk, Forbes.

D. Falconer, v. I. No 147. p. 185.

1747. July 21.

JOHNSTON against HOGG.

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The dishonour of a bill must be notified in a manner so distinct, that there can be no room for uncertainty, otherwise recourse will be lost.

IN the action for recourse, at the instance of Claud Johnston against William Hogg, as indorser of a bill drawn by William M'Lean of Inverness, on John M'Lean of London, his son, payable to William Hogg, accepted by John M'Lean, and duly protested for not payment ; and which having been, in the common course of business, sold to Thomas and Adam Fairholms, with a blank indorsation, came to be filled up in the name of Claud Johnston : The defence was, That the dishonour of the bill had not been duly notified.

The pursuer *answered* : That it had been duly notified to the defender, by a letter from John M'Lean himself, acquainting him of his having been obliged to re-draw on him for the payment of it, and by the said draft being sent down to Thomas and Adam Fairholms, factors for Claud Johnston, and presented to him for acceptance.

But, as this letter from John M'Lean did not particularly bear, that the re-draft he had given to Claud Johnston was on account of this bill of John

M'Lean's, but only in general, that for retiring a bill of his in Claud Johnston's hand for L. 150, he had, of that date, drawn on him for that sum; the debate turned upon the import of this letter, and on what passed between Fairholm and Hogg at presenting the re-draft for acceptance, wherein they did not quite agree in fact, and other circumstances, from which the pursuer would have it to appear, that Hogg must have known that the re-draft was on account of this very bill; which it would be of no general use to recite minutely.

It shall suffice to observe the general reasoning, upon which the LORDS found, 'That there was no such notification given to the defender, of the dishonour, of the bill in question, as to entitle the pursuer to recourse,' viz.

That notification of the dishonour of a bill must be distinct and positive, especially when it is to be given to an indorser; as the only purpose of notification to him, is that he may thereby be entitled to operate his relief against the drawer; that no other is sufficient than what may put him *in tuto* to attach the effects of the drawer for his relief, and which, how soon proper notification is given, he may immediately sue for, and, on the dependence, arrest: There is no doubt but there was enough in this case to have given great ground to the defender to suspect, that the bill of L. 150 Sterling, mentioned in John M'Lean's letter, was that very bill of William M'Lean's which he had indorsed to Fairholms; but it might have been a different bill; and, had he proceeded to attach the effects of William M'Lean, and, in the event, it had appeared that it was not that bill, he must have been liable in the highest damages and expences to William M'Lean; and he was not bound to run any such hazard.

A separate defence was *pleaded* for Hogg, That even notification by John M'Lean, of the dishonour of the bill, had not been enough, unless the bill and protest had been sent to him. On this the Court had no occasion to give judgment; but their opinion was, that the holder of a bill, which he has duly negotiated, is not obliged to part with the bill; he is bound indeed to send the protest, though not by the first post, when the notification is made; it is enough that it be sent in a reasonable time thereafter.

*Kilkerran, (BILLS OF EXCHANGE.) No 14. p. 79.*

\* \* \* D. Falconer reports the same case :

WILLIAM M'LEAN merchant in Inverness, drew upon his son John M'Lean, merchant in London, 19th November 1743, for L. 150 Sterling, payable twenty days after date, to William Hogg, merchant in Edinburgh, for value in account with him, ordering the intended acceptor to place the same as per advice.

This bill was sold, blank indorsed, to Thomas and Adam Fairholms, merchants in Edinburgh, who transmitted it to Claud Johnston and his son, merchants in London, indorsed to whom it afterwards appeared, and was accepted by John M'Lean; and falling due 8th February 1743-4, was protested on the

No 143. 11th for not payment, and Mr Hogg pursued for recourse, who pleaded that it was not duly negotiated.

It appeared, that, 16th February 1743-4, John M'Lean wrote to Mr Hogg, acknowledging an advice from him of his acceptance of bills to the extent of L. 309, and of his having drawn on M'Lean for L. 441, and advising Mr Hogg that Mr M'Lean had drawn on him for L. 100: ' And to retire a bill in Claud Johnstons's hands of L. 150, I gave him bill on you this date for that sum, and he is to keep the other, till he has advice of this being accepted, and then will deliver it me up.' Advising further, that he, M'Lean, had applied to Roger Hogg for payment of two L. 50 bills, which were due that week, who desired to know what sums were in circulation; that he had informed him of L. 250 which was due that month, and Roger declared he was willing to serve William Hogg; desiring to know, if he were distressed on any of William Hogg's bills, if he should apply to Roger, or draw on any other.

Mr Roger wrote, 21st February, that he could not find any of his bills fell due at the time of the draughts upon him, viz. of the L. 100 and L. 150 to Johnstons; and added, ' If it appears you have retired my bills at same time, I might accept, but otherwise I hope you would not bring me in further; you know I must draw further to answer your bills on me to be retired; advise if you will accept.'

The Johnstons advised the Fairholms, 18th February, that they then remitted a bill by John M'Lean on William Hogg to them, of the 16th, at forty-five days date, L. 150, which was in lieu of one for the same sum on him, which was noted and kept by them till advice of the acceptance of that sent; and they returned, 23d February, ' Mr Hogg won't accept, but desires to know the date of the bill for which this is drawn, and the date it was noted, and he says he will then accept;' adding, they suppose the bill on John M'Lean was that drawn by William M'Lean; and the Johnstons replied, 1st March, that it was the same, and was noted 11th February, when due; and that M'Lean told them he had Mr Hogg's leave to re-draw for it. The Fairholms wrote, 6th March, that Mr Hogg refused to accept, and complained of the dishonour of his bill not being intimated to him; and the Johnstons, 17th March, sent down the bill.

William Hogg *answered* to a condescendence of facts for the pursuers, That about the 23d of February, the Fairholms' clerk presented to him a bill of John M'Lean's for L. 150, which he believed was the bill mentioned by him, 16th February, that he had refused to accept; that he was told it was in lieu of a bill of his, due of that date; to which he answered, he knew of no bill of his then due, but did not add he would accept, if it was for retiring a bill of his; neither was any mention made to him of a protest on the bill, for the value of which this was drawn; he denied Mr Fairholm spoke to him for many days after; he did not exactly remember the time, but thought it might be

about three weeks, or when they got the bill on which recourse was fought: He owned he promised to write to William M'Lean; but not having done it till 22d March, that was an evidence to him he had not been informed till a few days before: He affirmed that he did not know what bill it was till it was presented to him after it came down, though he doubted not he was told that it was not a bill of his drawing, but indorsing; he affirmed also, that it was never notified to him that it was protested, nor the protest shown at the time of showing the bill.

*Pleaded* for the pursuers, That from the correspondence, and above declaration, it appeared there was sufficient notification of the not payment of the bill on John M'Lean; that the defender and he were in a course of drawing and re-drawing, as was evident from their letters, particularly M'Lean's of the 16th February, wherein he took notice of several bills drawn on him, as well as by him, particularly of this L. 150 to retire a bill of Hogg's, in Johnstons' hands, and of his being obliged to apply to Roger Hogg for his assistance, to answer other bills then in circulation. This was notice the third post after the protest; and Mr Hogg could not fail to know from his books, that it behoved to be the bill he had indorsed to the Fairholms, whom he knew to have the Johnstons for their ordinary correspondents; and he had owned, in his answers, he was bound to accept, if it were for retiring any bills of his.

*2dly*, By the fourth post the Johnstons sent down the bill to the Fairholms, which was time enough, as was found in Hunter against Ouchterlony, No 141. p. 1567.; and he owned it was intimated to him on the 23d, which was in course. He was then told it was in lieu of one of his on M'Lean, which was protested; and though he had, as it seemed, forgot this circumstance, there was evidence he was informed of it. The Johnstons wrote, the bill remitted was in lieu of one of Mr Hogg's, noted when it became due; the Fairholms answered, that Mr Hogg desired to know the date of the protest, of which he was informed in return; this, joined with Mr Hogg's acknowledgment of the bill's being presented to him, amounted to a proof that he was informed of the protest; nor was it necessary the bill and protest should be transmitted, to found an action of recourse, but that notice should be given thereof.

*Pleaded* for the defender, That he was in no course of drawing and re-drawing with John M'Lean, for the mutual support of their credit, though he had gone great lengths, and brought himself into inconveniences to assist his father and him; but that he never drew, except for sums in which he was already in advance: That this bill was for a sum owing to him by William M'Lean, as appeared by the conception thereof; and John, upon retiring it, was not entitled to re-draw upon him, nor had he reason to expect it: That he sold it to the Fairholms in the ordinary course of trade, and indorsed it blank; and so, upon hearing of a bill of his, which behoved to be understood of his draught in the hand of the Johnstons dishonoured, he had no ground to conclude it was this,

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either from M'Lean's letter, or the intimation made to him by the Fairholms' clerk, at which time he was not informed of the protest; nor did he promise to accept, on being informed of the date of the bill, however the clerk had mistaken him.

*Observed* on the Bench, That it was not enough such notice was given as a party might suspect, or even collect, from circumstances, what the bill dishonoured was; but it ought to be so special, as to put an indorser *in tuto* to proceed against the drawer thereon; that it was not necessary the bill itself should be transmitted, nor the protest, together with the notification, but mention ought to be made of the protest, which should be sent in a reasonable time.

The Lords, 26th June, found that there was not sufficient notification given to Mr Hogg, the defender, of the dishonour of the bill in question, to entitle the pursuers to recourse on him; and, on bill and answers, adhered.

A&amp;. T. Hay &amp; Maitland

Alt. Lockhart.

Clerk, Kirkpatrick.

D. Falconer, v. I. No 200. p. 270.

No 144.

No recourse where the bill is not duly negotiated, altho' the acceptor was bankrupt.

1748. June 17.

LANGLEY against HOGG.

JAMES MORISON of Aberdeen, by his bill, 16th March 1744, drawn on, and accepted by Thomas Morison of London, his son, ordered the said Thomas Morison, 45 days after date, to pay to Mr William Hogg, L. 50 Sterling, value in account with him. This bill was indorsed by Hogg to Adam Watkins, for value received, and by him re-indorsed to Thomas Langley, who protested for not payment no sooner than the 5th of May, and thereupon brought an action of recourse against Mr Hogg; whose defence was; not duly negotiated, in respect the 45 days elapsed upon the 30th of April, on which day, therefore, the bill became due, and the last day of grace was the 3d of May, and yet the protest for not payment was not taken till the 5th.

To which it was *answered*, That the defender sustained no damage from the omission to protest sooner, because Morison, the acceptor, had become bankrupt on the 25th April, several days before the day of payment, which was notified by the London Gazette, and, in so much known to Mr Hogg, that he advised his correspondent to take up the bill *supra* protest for his honour. And though it may be true that the person against whom recourse is sought, is not bound to instruct damage from an undue negotiation; yet here it is instructed he could have none, which is a different case.

It was notwithstanding found, ' That no recourse lay, the bill not having been ' protested in due time,' on the following grounds:

That, as there was one post lost in protesting and notifying the dishonour, some effects of the acceptor's may, in that time, have been discovered in Scotland.