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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.

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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.

which the defender might have got himself possessed of. That were the defender found liable as indorser, he would have his recourse against the drawer; and it is a damage to be subject to the same litigation over again with him, whether the bill not protested affords recourse. And *pro*, As the defender cannot be certain, but that the drawer, who is no party to the present question, may qualify an actual damage, he cannot be obliged to submit to that uncertainty.

*N. B.* Though it be a good reply to a drawer objecting untill negotiation. That he had no effects in the person's hands on whom he drew; yet it is no good reply to an indorser, who is not supposed to have any effects in the hands of the person on whom the bill is drawn.

*Fol. Dic. v. 3. p. 84. Kilkerran, (BILL of EXCHANGE.) No 16. p. 81.*

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

JAMES MORISON, merchant in Aberdeen, drew for L. 50 Sterling, 16th March 1745, upon his son Thomas Morison, merchant in London, payable forty-five days after date, to William Hogg, merchant in Edinburgh; which came by indorsement into the person of Thomas Langley, merchant in London, and was protested by him, 5th May, for not payment, and an action for recourse raised against Mr Hogg.

*Defence:* No due negotiation.

*Reply:* No prejudice, in respect Thomas Morison was notoriously bankrupt before the day of payment, as appeared by an advertisement in the London Gazette 25th April, of a commission of bankrupt being taken out against him.

THE LORD ORDINARY, 22d January 1745, found, That the bill not having been protested in due time, there could be no recourse against the indorser; and that he was not bound to instruct that he sustained damage by not protesting. And further found, that there was an apparent damage; for that the bill not having been protested, could not be stated before the commission of bankrupt, or classed upon the bankrupt's effects: And further found, there was a damage; in that the indorser, claiming recourse against the drawer, behoved to be subject to the same litigation, whether the bill, not having been duly protested, afforded any recourse.

*Pleaded* in a reclaiming bill, The pursuer has instructed there was no damage, the acceptor being bankrupt, and no place for any diligence against his effects; and the accepted bill, though not protested, might have been founded on before the commissioners, who met on the 4th of May and 2d of June. The indorser had certainly the same recourse against the drawer, that the indorsee had against him; besides, Mr Hogg being acquainted with the bankruptcy, made answer, that the bill would be taken up either for his honour or the drawer's.

*Answered.* There may have been damage in many respects, notwithstanding the acceptor's bankruptcy; one post was lost between the 3d and 5th of May;

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in which time his effects might have been arrested in Scotland; the indorser's correspondent would have paid it for his honour, but was prevented by its not being protested; and so it was not laid before the commissioners on the 4th, when the debts were to be proved before them. It might at best be a doubtful question betwixt the indorser and drawer, who might be able to qualify damages; and what Mr Hogg wrote of the bill's being to be taken up, was on the supposition of its being duly negotiated.

THE LORDS adhered.

Act. *J. Graham.*

Alt. *Lockhart.*

Clerk, *Justice.*

*D. Falconer, v. I. No 160. p. 352.*

No 145.

Found, that the protest for not payment ought to be *within* the days of grace; otherwise recourse is lost.

1748. *June 17. & 29.*CRUICKSHANKS *against* MITCHEL.

ALEXANDER MITCHEL, merchant in Aberdeen, drew a bill on Thomas Morison at London, for L. 100 Sterling, payable to Charles Cruickshanks 40 days after date, which was duly accepted; but Morison having failed to make payment, the bill was protested for not payment on the day after the third day of grace.

In the action for recourse, Mitchel's defence being, That the bill was not duly negotiated, not having been protested for not payment within the days of grace; and *2dly*, That the dishonour of the bill was not notified till the fourth post thereafter: The Ordinary remitted to four of the most noted dealers in bills in Edinburgh, to give their opinion; who agreed, That the bill ought to have been protested upon the last of the three days of grace; and that intimation of the dishonour ought to have been given by the third post at farthest.

The Ordinary, notwithstanding, reported the case, and the LORDS being much divided, recommended to Sir John Bernard, knight, and Benjamin Longate of London, to report what the custom of London was, with respect to the time of protesting, for not payment, bills drawn in Scotland upon London, and which, the recommendation bore to be, in Scotland, reputed foreign bills.

But these gentlemen declining to give their opinion, the LORDS, upon advising the debate, on the 17th June 1748, found, That 'bills ought to be protested for not payment within the days of grace, and therefore found no recourse.' But, upon a petition for Charles Cruickshanks, they, on the 29th, allowed a proof to either party, of the practice of London.

Whether the dishonour was notified by the third or by the fourth post, depended on the other question, Whether the protest fell to have been taken on the third day of grace, or if it was sufficient that it was taken on the first day after expiry of the three days of grace? for, according to the course of the post, if the protest must have been taken on the third day of grace, then the notification of the dishonour was no sooner made than by the fourth post; whereas, if it was sufficient to protest after expiry of the third day of grace, the notification was