

stop in the administration of justice ; but how soon these parties qualified, then immediately these deputations became, *ipso facto*, void and null. And it was never heard that a fiat, on the death of a liferenter, needed a declarator before he could enter.

It was suggested, That the Duke of Lennox, at the time of his qualifying himself, had promised to the Queen not to fill these offices without her consent : But that being *in causa*, the Lords considered there was no more at present before them, but if horning should be granted for bringing the affair summarily in ; and, by plurality, it carried in the affirmative, that horning ought to pass in this case.

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1702. December 11. COUNT LESLIE of BALQUHAIN *against* JAMES FAIRHOLM.

COUNT Leslie of Balquhain pursues James Fairholm, merchant in Edinburgh, on this ground, That, in September 1669, his son going to France, he caused James Riddoch, his agent, deliver to the said James £1920 Scots, for which he got a bill of exchange, from the said James, for the like sum of 1920 livres on Mr Foulis at Paris, payable to one Mr Robert Scot there, for his son's use ; and having presented it to Foulis, he refusing to accept the bill, they protested against him, and now recur against James Fairholm, the drawer ;

Who ALLEGED,—You are excluded from any recourse against me, and that, by your own fault, in so far as the bill having come to your hands in due time, and you, not being hindered by any just impediment, neglected to present it by the space of two months to Mr Foulis, and he failing in his credit *medio tempore*, you have none to blame but yourself, that did not duly present it, by which you have both lost the money to me and to yourself ; and the possessors of bills are obliged to do diligence thereon, by the nature of the thing and the mercatorian law, with the very first conveniency.

ANSWERED,—Whatever diligence may be required in presenting bills at usance, yet the same takes no place in bills on days sight, which the possessor may keep up as long as he pleases, though it were for a year, till his conveniency call for the money, seeing he relies on the drawer's faith and credit ; and here the Count's son needed not the money these two months, till he came to Paris, having gone by the way of London, and staid there some weeks ; and there is no determinate time in law within which the creditor is obliged to present the bill, except that general one of conveniency, which may be very well interpreted of the creditor's conveniency, and not the drawer's.

REPLIED,—The distinction of bills at usance and on days, as to this point, is chimerical and imaginary ; for a bill is either a mandate or an emption vendition : if the first, then it implies an obligation of diligence, being *mandatum utriusque causa*, that the subject perish to neither ; if the second, then *periculum est emptoris, et, ubi dies non ponitur, presentis die debetur*. And it ought to be presented with the first conveniency, that is, as soon as it arrives at his hand, with the due latitude of a post or two ; and so does *lex mercatoria* determine, *cap. 6. p. 272 et 276* ; and Marius on Bills of Exchange, *p. 12 et 15* ; Scarlet, *p. 59* ; and

Molloy, *De Jure Maritimo*, p. 276; and Voet. *ad tit. De Nautico Fænore*, sec. 5 et 7; Stair's Institute, p. 106; and 7th February 1681, *Ewing* against *Burnet*.

DUPLIED,—All thir holds only in bills drawn at usance, which is not the present case; and that, in June 1676, *Wallace* against *Simpson*, though a bill was kept up four months, yet the drawer was found liable.

The Lords thought this a general point, and deserved to be well considered, seeing merchants differed thereon; therefore they, before answer, allowed trial to be taken how soon the bill came to Mr Robert Scot's hands at Paris, why he kept it up, and what condition Foulis was then in, and when he broke, and if they would have got their money if they had presented it on its first arrival; to see if there was any culpable negligence in the creditor of the bill.

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1702. December 18. The EARL of ERROL against GEORGE SETON of BARNS.

SIR John Seton, father to the said George, being married to Lady Margaret Hay, and provided her to a liferent-annuity of 2400 merks; and she having assigned the bygones of it to the Earl of Errol, he pursues a pouding of the ground; against which Barns craved compensation on a bond of 10,000 merks, due by Errol's predecessors, as her tocher; and Errol alleging that Sir John had assigned his lady to that sum, and from whom he derived right thereto:

ANSWERED by Barns,—That the assignation was given to her by his father when *in lecto*, only five days before his decease, and that he had raised reduction thereof upon that head.

ERROL CONTENTED,—His action of reduction was prescribed by the negative prescription; the assignation being in February 1659, and not quarrelled till the forty years were run.

ALLEGED for Barns, 1mo, His action would not prescribe, because he was *non valens agere* during the lady's lifetime, in regard she was liferenter of the sum, and it was wholly unnecessary for him to quarrel her right of fee till the liferent expired; as was found, the last of February 1666, *Earl of Lauderdale* against *the Viscount of Oxford*; and 5th February 1680, *Brown* against *Hepburn*. 2do, This assignation was a latent deed, so Barns, morally speaking, could not quarrel it till he knew it; which is of the nature of an exception, *quæ non nascitur* till the right be some way made use of or produced. And what if a deed done *in lecto*, or posterior to an inhibition, be kept quiet for forty years, and then insisted in; will it be a good defence to say, Your action of reduction, *ex capite inhibitionis*, or that it was on death-bed, is prescribed, because not intented within forty years of the date of the bond? I think it would not; and as little here. 3tio, The bond given by Barns to Lady Margaret, for her annuity in 1683, reserves, *per expressum*, Barns's reduction of her fee of the said 10,000 merks, which is a clear and plain interruption within the forty years; and as this prescription is odious, so the Lords have found interruptions favourable, 26th July, 1637, *L. of Lawers* against *Dunbar*; and 25th November 1665, *White* against *Horn*.

ANSWERED for Errol to the first,—That Barns was *valens agere*, even *cum effectu*, from the very moment of his father's death; and though she liferented