

No 139.

safe, might have been considered as *in mora* for not accepting it; but, as that offer was made in Glasgow, at a time when the bill neither was, nor could be presumed to have been in the charger's hand, no regard ought to be paid thereto.

THE LORDS found no recourse now competent against the drawer, in respect the bill was not duly negotiated; and therefore suspended the letters.

G. Home, No 54. p. 95.

1743. July 6.

JAMES RAMSAY of London, Saddler, Charger, *against* WILLIAM HOG, Merchant in Edinburgh, Suspender.

No 140.

Found, that a bill must be protested for non-acceptance on the day of payment at farthest, not on or after the last day of grace, otherwise recourse is lost. This decision afterwards departed from.

ON the 6th May 1742, Andrew Simpson drew a bill upon Messrs Skinner and Simpson, merchants in London, payable 40 days after date, to the said William Hog, value of him, which place to account, as *per* advice.

Mr Hog indorsed this bill to James Ramsay, (value of Willoughby Ramsay), and, at the same time, wrote this memorandum at the bottom of the bill: 'In case of need, apply to Mr Roger Hog, for William Hog.'

The bill was not paid when it became due, and, upon the 19th June, the day after the last day of grace, and not sooner, was protested for not payment; and then the possessor went, as directed by the memorandum, to Mr Roger Hog, who, observing that it had not been protested till after the last day of grace, believed he could not warrantably pay the same, and therefore refused payment.

Upon this, James Ramsay brought an action of recourse against Mr William Hog, who suspended on the following grounds: *Imo*, That the bill, though sent to London soon after its date, was not protested for not acceptance, though it was presented for acceptance, and the same refused, the persons drawn on making this answer, That, though they had advice from Andrew Simpson, the drawer, that the bill was drawn on them, yet they had not, at that time, any effects of his in their hands; but, how soon the same should come to hand, they should accept or pay the bill. Upon which answer, it was the charger's duty to have protested for non-acceptance, which he not only omitted to do, but likewise omitted to give notice, by letter, to the suspender, that the bill was dishonoured, so as the suspender might, in due time, look after his own security or relief at home, against Andrew Simpson, the drawer; nay, the charger did not so much as acquaint Roger Hog, who was at his hand.

2do, The charger grossly failed in not protesting the bill for not payment until the 19th June, the day after the last day of grace; whereas payment ought to have been demanded on the 15th; especially where acceptance was not sooner insisted upon: It is true, payment could not be exacted until the third day of grace, viz. the 18th June.

Both which reasons of suspension are good, even supposing the defender could not qualify he had any loss or damage by the neglect of such notice: But, in

the present case, he offers to prove, that he did not part with the value of the bill to Andrew Simpson, the drawer, (who is now failed) until such time as he had reason to believe the bill had been accepted, and he was safe.

Answered for the charger: That the suspender was rash in giving up the value (to wit, another bill) to Andrew Simpson, the drawer, on the 5th June, full ten days before the bill in question became due; especially as Willoughby Ramsay, brother to the charger, and who purchased the bill from the suspender, lived in the same town with him, whereby he had daily opportunities of knowing the fate of the bill. And, with respect to the first reason of suspension, it was *answered*, That, where a bill is drawn, as in the present case, payable at a day certain, 'as *per* advice,' there is no obligation on the porteur to present the same, for acceptance, before the term of payment; because it is the drawer's business to notify the draft to the designed acceptor, without which it cannot safely be accepted, being drawn *per advice*; nor is it necessary for the porteur to present the bill until the term of payment, because, before that term, the designed acceptor is neither bound to accept nor pay.—To the *second* reason, it was *answered*, That notification came to the suspender, of the dishonour of the bill, as soon as he had reason to expect. By the act 1681, no more is necessary (in order to recourse), than that the bill be duly protested for non-acceptance: It is true, that the custom of merchants has made a previous advertisement necessary; but then a *laxamentum temporis* is allowed for giving this advertisement; particularly in England, where it was negotiated, a fortnight is allowed; nay, if the suspender had got notice ten days before the term of payment, it would have done him no service, as Andrew Simpson was at that time a broken man; and the suspender will not pretend to say, that, in that interval, he could have recovered his money. Besides, as the last day of grace, to wit the 18th June, was on a Friday, which is not a post-day, though the charger had protested it on that day, he could not have notified the protest to the suspender sooner than the 19th, which he accordingly did.

Replied to the *first* answer: That Mr Forbes, chap. 5. § 4. p. 64. (Edit. 1703), lays it down as the practice of the trading world, that any person, to whom a bill is entrusted, must immediately, upon receiving it, demand acceptance of him on whom it is directed; and, in case of refusal, protest for non-acceptance; and, if the general rule stands thus, much more must it hold in the present case, where the possessor has actually presented the bill for acceptance, and the same is refused, which the charger confesses to be the fact: And, with regard to the excuse, for not sending notice, that the last day of grace was on Friday, though it may be a good excuse for not sending notice, as he was not bound to send an express, it is surely no excuse for not taking the protest itself on the last day of grace: For, in order to entitle the porteur of a bill to recourse, two things are necessary, *imo*, That the bill be protested in due time; *2do*, That intimation thereof be sent by the first post: Both of which must be done. The in-

No 140. timation will not do without protesting, nor will the protesting without intimation. And as to what is said, that the custom of England allows a fortnight to give notice to the party liable in recourse, the respondent knows nothing of any such custom, in respect of foreign bills, which this in effect was, being drawn from Edinburgh upon London; and as the indorser, liable in recourse, resided at Edinburgh, it was incumbent on the charger to use such diligence as, by the law and practice of Scotland, is requisite, where the defender resides, and where the action of recourse is now brought. See February 1731, M'Kenzie against Urquhart, No 137. p. 1561.

THE LORDS, in respect that there is no evidence brought, that the practice with regard to bills of exchange in London, differs from the practice of this country, which is, that bills must be protested for not acceptance, on or before the day of payment; found the charger can have no recourse against the suspender, and therefore suspended the letters *simpliciter*.

C. Home, No 241. p. 390.

* * * Lord Kames reports the same case:

UPON the 6th of May 1742, Andrew Simson drew a bill for L. 60 Sterling upon Messrs Skinner and Simson, merchants in London, payable 40 days after date, to William Hogg, merchant in Edinburgh, or order. This bill, which was indorsed to James Ramsay, became due on the 15th June; and, reckoning the three days of grace, was payable the 18th. Upon the 19th, and no sooner, it was protested for not-acceptance and not-payment at the same time. William Hogg being charged for recourse, suspended upon want of due negotiation, in respect that the bill ought to have been protested for not-acceptance when it became due. *Answered*, The dishonour of the bill was notified to the suspender within fourteen days after it was due, being notified the very day of the protest, which, with the bill, was returned by post, and intimated to the suspender. And, therefore, whatever be the practice, the suspender can take no advantage of the delay, since notice was given him of the dishonour of the bill, as soon as it was incumbent upon the indorsee to give notice; even supposing a protest to have been taken upon the day of payment. *Replied*, The form of negotiating bills, which is established by practice, admits of no latitude; strict rules must be observed to prevent law-suits among merchants; and did loss or damage come at all under consideration in a case like the present, it is enough for the suspender to say, that a protest for not-acceptance, taken in due time, might have procured payment from Skinner and Simson.

'In respect there is no evidence brought, that the London practice with regard to bills of exchange differs from the practice of this country, which is, that bills must be protested for non-acceptance on or before the day of payment; find, That the charger can have no recourse against the suspender.'

Fol. Dic. v. 3. p. 83. Rem. Dec. v. 2. No 42. p. 70.

* * * Kilkerran reports the same case :

WHERE a bill was drawn payable at London forty days after date, and not protested by the indorsee till the day after the three days of grace were expired, when, at one and the same time, it was protested for not acceptance and for not payment; in an action of recourse against the indorser, the LORDS, in respect it was not alleged that the practice, with regard to bills of exchange in London, differs from the practice in this country, which is, that bills must be protested for not acceptance on or before the day of payment; Found, ' that the pursuer could have no recourse.'

And this also determines, by implication at least, another point agreeable to former judgments, that where bills are drawn at certain usances, it is not necessary to present them for acceptance before the day of payment; but that must not be allowed to elapse; for, though there be days of grace for payment, there is not one hour of grace for acceptance.

It was thought *separatim* relevant, that the protest for not payment was not till the day after expiry of the days of grace; notwithstanding it might have been true, as was alleged, that by the course of the post, the notification of the dishonour was as soon made as it could have been, if the protest had been taken upon the last day of grace. For the due negotiation and the due notification are different things, and the failure in the one or the other is fatal to the recourse; and though it is unnecessary to assign reasons for an established custom, which has the force of a law, it is a possible case that a person, on whom a bill is drawn, may be willing to pay on the last day of grace, and next day a reason have occurred for refusing it. But there was no occasion to give judgment on this point, the point the interlocutor puts it on having been sufficient. *Vide* 28th July 1749, Jamieson *contra* Gillespie, No 147. p. 1579.

Kilkerran, (BILLS OF EXCHANGE.) No 8. p. 72.

1743. December 20. OUCHTERLONY *against* HUNTER.

SEVERAL bills having been drawn in Scotland, by Hunter upon Charles Murray in London, payable to Peter Murdoch merchant in Glasgow, or order, which were paid by Ouchterlony *supra* protest for honour of the drawer: In the action at Ouchterlony's instance against Hunter the drawer for recourse, the question occurred, How far one who pays *supra* protest for honour of the drawer, is bound to give the same timeous notification, as the porteur is, of the dishonour of the bill?

No 141.

A person paying, under protest for honour of the drawer, is bound to give timeous notification.