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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.

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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

made by the third post. And, as all seemed to agree, that a notification later than the third post could not be sustained, all that the Lords wanted to have proof upon, was, the practice as to the time of protesting.

The *pleading* on this point, for the pursuer, was plausible, That in all cases, where obligations are conceived prestable at a day certain, the day is considered to be adjected in favour of the debtor, who would otherwise be obliged to perform instantly; and, as he satisfies his engagement, if he perform on any part of that day, so no diligence can be used against him till it expire; l. 42. de Verb. Oblig.; and if this is law, with respect to ordinary obligations, much more ought it to be so in the case of the bill-contract, which is regulated by equity. But, as the Court considered the matter to depend solely upon the practice of merchants, and especially upon the practice of the place where the bill was payable, and to be negotiated, they allowed to either party a proof of the practice of London as above.

July 7. 1750. The dispute between the said parties is stated *supra* 17th and 29th June 1748; and the Lords having, of this date, advised the proof then allowed to either party, by which it appeared to be the practice of merchants to protest within the days of grace, Adhered to their interlocutor of the 17th June 1748, sustaining the defence against the recourse, that the bill had not been protested till the day after the days of grace were elapsed.

Where payment is deferred till a day, demand is not competent till the day elapse. But the days of grace are not a *dilatio solutionis*, for the bill is actually due at the day of payment, and accordingly annual interest is due from that day; the drawer may countermand the bill at any time before the day of payment, but not after; if it were *dilatio solutionis*, a protest within the days of grace would be void, which will not be said. They are days of favour or grace, and the merchants custom explains how they are to be understood: Nor is it of small consequence to the drawer, that the protest should be within the days of grace, as it obliges the porteur to notify one post sooner, on which much may depend.

There is a decision observed by Bruce in 1715, between Claud Johnston of London, and James Murray of Leith, No 132. p. 1556, sustaining recourse, altho' the protest was not till the day after the days of grace, which seems to have erroneously gone upon King William's statute in England, which has nothing to do with foreign bills, unless, which is more probable, the observer has committed some mistake.

Jan. 29. 1751. The case between the said parties, stated *supra* 7th July 1750, being still kept open by a petition, was this day finally determined; when the Lords altered an interlocutor which had been given by a thin Bench, upon the 17th November last, finding, 'That the bill, not having been protested till the day after the last day of grace, was not sufficient to cut off the recourse upon the drawer;' and, agreeably to their former judgment of the 7th July 1750,

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‘Sustained the defence, that the bill had not been protested till the day after the days of grace were elapsed.’

Besides what had formerly been said in point of argument, a case was now quoted from Raymond's Reports, which was decisive of the practice of England, consequently of the present case, the bill in question being payable in England. It was in the 7th of King William, before the Lord Chief Justice Holt, Tuffin and Lee *versus* Lewis, where the custom of London merchants, in the case of foreign bills of exchange, was proved to be, to protest within the days of grace; and if the last of the three is a Sunday, or great holy day, as Christmas, on which money uses not to be paid, to protest on the second; and if the porteur fail so to protest, the drawer will not be chargeable; for it is reckoned his folly, that he did not protest, which, adds the reporter, was approved by Holt Chief Justice.

Fol. Dic. v. 3. p. 83. Kilkerran, (BILLS of EXCHANGE.) No 17. 25. & 27. p. 82. 89. & 90.

* * * D. Falconer reports the same case :

ALEXANDER MITCHEL, merchant in Aberdeen, drew a bill upon Thomas Monifon, merchant in London, payable to Charles Cruikshanks of Auchmadies; which being accepted, was protested for not payment on the fourth day after it fell due.

Mr Cruikshanks pursued Mr Mitchel for recourse; and *pleaded*, That the diligence was sufficient; for that three days of grace were allowed to pay in; and, till the last day was elapsed, it could not be said payment had not been made; nor could, consequently, a protest be properly taken, Ricard's Treatise of Commerce, tit. de Protests, et de jours de faveur, p. 135; * English Statutes, 9no and 10mo Gul. III. cap. 17. § 3tio et 4to Annae, c. 9. 4to; 4th Feb. 1715, Johnston against Murray, No 132. p. 1356.

Pleaded for the defender, Bills ought to be protested on the last of the days of grace, Molloy, tit. Bills of Exchange, § 30. § Scarlet, c. 17. Rules, 2d, 5th, 6th, 9th, 10th; Forbes, p. 120. (Edition 1718.) And the English statutes relate only to bills drawn from one place in England to another.

THE LORD ORDINARY took the opinion of merchants here, who agreed, that the protest ought to be on the last of the days of grace; and the Lords recommended to two eminent merchants in London, to report the practice, who declined to make any report, as being little acquainted with the course of business betwixt London and Edinburgh: But a letter from a person employed at London bore, that there foreign bills behoved to be protested on the last day of grace; but some of the merchants inclined to think, bills from Edinburgh were to be negotiated as inland ones; and hereupon the Lords made at that time no further enquiry, but found, That the bill not having been protested at London till the day after the last day of grace, there was no recourse against the drawer.

* The work of Ricard here meant, seems to be Le Negoce d'Amsterdam, of which see p. 609. and 655.

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On a bill and answers, a proof was allowed of the custom at London, in protesting bills from Scotland; whereby it came out to be the custom to protest them on the third day; but some of the witnesses gave their opinion, that the protest on the fourth ought to be sustained, unless damage had accrued to the drawer by the delay; and others gave instances within their knowledge of protests on the fourth, whereon the money had been recovered.

The Lords adhered.

Another bill was presented; to which it was answered, The matter was settled by two interlocutors: Wherein it was replied, They were not consecutive, as the second was on new matter.

The Lords, by their interlocutor adhered to finally, found recourse was due. See Note under No 131. p. 1384.

A. J. Grant. Alt. Ferguson. Clerk, Justice.

D. Falconer, v. 2. No 187. p. 226.

1749. June 29. Andrew Jamieson against Gillespies.

WILLIAM SCOTT drover, drew on John Scoon, of Whitlawside, drover, 21st February 1745, for L. 80 Sterling, payable 18th May next, to Thomas Gillespie, at Mr William Highmore's in London, which was indorsed to John Gillespie; by him to Andrew Jamieson, merchant in Edinburgh; and by him to Claud Johnston, by whom it was protested for not payment 21st May, and re-indorsed to Andrew Jamieson.

Mr Jamieson pursued the Gillespies for recourse; who made answer, that the bill was not duly negotiated, being only protested for not payment; whereas it ought to have been presented for acceptance; and if that was not done, protested for the failure.

The Lord Ordinary, 20th January 1748, found, That the bill not having been presented for acceptance on or before the day of payment, nor earlier than the last day of grace, when once for all it was protested for not payment, the bill was not duly negotiated; and that no recourse lay against drawer or indorsers.

On a petition, pleading a distinction betwixt a bill payable at a certain time after sight, which behoved to be presented for acceptance, and one due at a day, which needed not; and answers.

The Lords having taken the opinion of merchants at London and Edinburgh, who agreed that the diligence was regular; and one of whom founded his opinion upon its being a bill on a drover, who seldom came to town, and could not be found to present it to him;

Found no necessity that the bill should have been presented for acceptance. See No 83. p. 1494.

A. A. Macdougall. Alt. Lockhart. Clerk, Gibson.

Fol. Dic. v. 3. p. 83. D. Falconer, v. 2. No 75. p. 8L.

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Found, that a bill need not be presented for acceptance, and protested for non-acceptance, till the last day of grace.