

No 124.

Upon a debate *in præsentia*, it was found, That the said letter was not a bill of exchange, but a precept; and that the receiving of such precepts upon Chamberlains and others, being for the creditors further security, do not oblige them to the formalities of presenting, protesting and intimating; which are in use in the matter of exchange and trade betwixt merchant and merchant.

Advocates, *Lockhart, Wallace*, contra *Wedderburn & Chalmers*.

Fol. Dic. v. 1. p. 100. Dirleton, No 37. p. 15.

No 125.

A person in Edinburgh bought a bill on London, payable to his correspondent at Bristol, who happened to be abroad; so that the bill was not regularly negotiated. Before his return, the drawee had become bankrupt. The porteur having been guilty of no neglect, did not lose his recourse against the drawer.

1676. June.

DOCTOR WALLAGE *contra* SYMSON.

A BILL of exchange being drawn by a merchant in Edinburgh, upon his correspondent at London, payable to a merchant at Bristol; the person, to whom the said bill was payable, was not in England for the time, but had gone to Ireland; but his friend having broken up the letter directed to him, and having found inclosed the said bill of exchange, did indorse the same to be paid to another person upon the place, who did accordingly present the said bill to the merchant on whom it was drawn, who did accept the same conditionally, when it should be right indorsed: And thereafter, the person to whom the said bill was payable, having duly indorsed the same to be paid, as the indorsation did bear; the merchant, upon whom the said bill was drawn, did in the interim break, before the bill so indorsed was presented to him; there having intervened betwixt the date of the bill, which was 2d January, and the right indorsement of the same, which was about the end of April, about four months; so that the question was, whether the drawer of the said bill should be liable to refund the sum therein-contained?

It was *alleged*, That he could not be liable, in respect the said bill was not returned to him protested, either for not acceptance or for not payment: And albeit in law, and by the custom of merchants, the drawer be liable unless the bill be paid; yet that is ever understood with a proviso, that diligence should be done, and protests should be taken, unless the person upon whom the bill had been drawn, had been evidently *not solvent* the time of drawing the said bill; which could not be alleged in this case, seeing the defender had drawn upon the same person after the said bill, to the value of L. 2000 Sterling, which had been answered; and had likewise answered bills of his, of great value; whereas, if the bill in question had been returned protested, he would have retained the provision he had in his hand, or done diligence, to recover the value of the said bill; or might have countermanded the said bill, and given another bill, payable to a person that was upon the place.

THE LORDS notwithstanding found, That the defender and drawer of the said bill should be liable; but some of the Lords were of another judgment: And the defender repined, and gave in a bill, desiring to be heard.

Fol. Dic. v. 1. p. 101. Dirleton, No 365. p. 179.

* * * Stair reports the same case :

1676. July 1.

No 125.

THOMAS GARVINE having delivered 50l. Sterling, belonging to Doctor Wallace to Alexander Simpson, merchant in Edinburgh; he thereupon drew a bill of exchange upon David Bryson, merchant in London, payable to Lawrence Wallace, merchant in Bristol, upon ten days sight, in January 1675; which bill being then sent inclosed in a letter of advice to Bristol to the said Lawrence Wallace, he was gone from thence two days before, on a voyage by sea, to Ireland; and the letter having lain long unopened at Bristol, Captain Crumpt, who was Lawrence Wallace's landlord, broke up the same, and finding the bill of exchange inclosed, presented it to Bryson, who refused to accept or pay it, in respect of the absence of Lawrence Wallace, to whom it was payable, or to his order; but in March 1675, wrote upon the bill, *accepts, when rightly indorsed*. Lawrence Wallace returned to Scotland from Ireland in April 1675, and the bill being sent down to Scotland, did indorse the same to be paid to Crumpt, or his order; but before the bill returned to England so indorsed, Bryson was broken and fled, and there was no protest taken for not acceptance, or not payment of the bill. Dr Wallace and Thomas Garvine pursue Alexander Simpson for payment of the L. 50 Sterling, because the bill proved ineffectual; who alleged absolutor, because the drawer of a bill is only liable for non-acceptance, or non-payment of his bill, after protest is taken thereupon; but here there is no protest. *2do*, The receiver of the bill is obliged to do diligence to present the bill, and demand the money; and if, through his negligence, the person on whom it is drawn be broken, the loss must be his, and the drawer of the bill is not liable.—The pursuer *answered*, That there was no definite time, either by the tenor of the bill, or custom, to present bills of exchange, but with the conveniency of him that receives it. *2do*, Though supine negligence might turn the loss upon him, for whose use the bill is drawn, as if he should keep it up for many months, without a just cause; yet he can only be obliged to such diligence as is ordinary and accustomed with provident men; which diligence hath always excepted all accidents, as if he who received the bill were robbed of it, or that he to whom it was ordered to be paid, should happen to be prisoner, or absent; and it is offered to be proven, that in this case there intervened an accident that could not be foreseen, viz. Lawrence Wallace *his being absent on a voyage*, whereby Doctor Wallace had good ground to believe that he had presented the bill, and received the money; and that so soon as it was known where Lawrence Wallace was, after his return to Scotland, the bill was indorsed, and presently sent up; but then Bryson was broken and fled, and, therefore, there could be no protest taken for not acceptance or not payment; and though these protests be the ordinary way for recourse on the drawer, yet they are not the only way; but in case of his breaking and flying, no protest is usual or necessary: And it is the duty of the drawer of money to have his bills secure, for which he receives equivalent value; and it is his fault that his provision is in an insufficient hand; for it cannot be pretended,

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that Bryson became insolvent by any thing occurring after the date of the bill ; and, as the not presenting the bill, if Bryson had been absent on a voyage, would have taken off the pretence of negligence, so must the accidental absence of Wallace, to whom it was ordered.—The defender *replied*, That the bill miscarrying through the negligence of the receiver, the loss behoved to be his ; for he offered to prove, that he had drawn posterior bills upon Bryson, which were paid. *2do*, The receiver of the bill ought to have taken his bill to a person that would have been present, and have presented it ; and so having ordered it to be paid to Wallace in Bristol, the peril of his absence must be upon the pursuer ; and it appears, by Bryson's qualified acceptance, that he had provision. It was *duplicated*, That whatever might be pretended, if the bill had been ordered to be paid to a person who had not a fixed and known residence, yet Wallace being residenter at Bristol, from which it might have been dispatched for London in two or three days, the pursuer is neither in fault nor negligence, otherwise all commerce would be destroyed ; for no bill might be ordered to be paid to any person, unless he were in prison, and could not be absent ; which would ruin commerce, and the great trust among merchants ; but the trusting Bryson, who was insufficient, is certainly a failure in Simpson, who ought, therefore, to have made out his bill, seeing Bryson is become insolvent.

THE LORDS found the libel, and reply upon the accidental absence of Lawrence Wallace, as before-expressed, relevant, to make Simpson, who drew the bill, liable, albeit there was no protest, in respect of the breaking and flying of Bryson.

Stair, v. 2. p. 435.

1705. November 14.

ALEXANDER BROWN, Merchant in Edinburgh, *against* ALEXANDER HUME of Coldinghamlaw.

No 126.

A bill was protested for non-acceptance at the term of payment. It was afterwards accepted *qualitate* payable after fourteen days. When these expired, it was again protested. Found, that recourse against the drawer was not lost. This was an

ALEXANDER HUME of Coldinghamlaw, having, in July 1703, drawn a bill for L. 146 Scots, upon Silias Foirfide, in Eymouth, (who owed him the like sum by bond) payable to Alexander Brown, merchant in Edinburgh, at Lammas thereafter, which was protested for not acceptance : Upon the 2d of August, Foirfide accepted the bill, payable the 16th day of that month ; upon the 5th and 17th days, the possessor protested for not payment ; and, in September following, received from Foirfide L. 100, in part of payment : And thereafter obtained a decret against the drawer, before the Commissary of Lauder, for the remainder. He suspended upon this reason, That the charger had not duly negotiated the bill, in so far as he, at his own hand, had prorogated the term of payment to the 16th of August, without the drawer's advice or consent ; and had neglected to protest, for not payment, within the three respite days after the term in the bill ; and had not discussed the acceptor by using due and timeous diligence against