

No 135. in April is not sufficient, and, therefore, that there is no recourse against the drawer.

Against this interlocutor, a petition was refused without answers.

Lord Ordinary, *Kimmerghame*. Act. *Hugh Dalrymple, Jas Ferguson*. Alt. *Andrew M<sup>d</sup>Dowall*.  
*Fol. Dic. v. 1. p. 102. Session Papers in Advocates' Library.*

No 136.

Porteurs are bound to strict diligence. The least failure throws the hazard upon them. It is sufficient, in defence against recourse, for the drawer to say, that he might possibly have recovered from the acceptor.

1729. December 18.

FLOWER against PRINGLE.

EDWARD FLOWER and Son, merchants in London, pursued Robert Pringle, merchant in Edinburgh, in an action of recourse, upon a bill of L. 93 : 7s. drawn by Pringle when at Bourdeaux, upon James Scot in Dalkeith, in favour of Flower and Son. It had been accepted, and protested for not payment.

The bill, had been payable at *three usances*. An *usage* is 30 days; consequently, counting from the date, it had become due on 10th and 13th June; but had not been protested till 15th June.

Besides this error in the negotiation, it was *alleged*, That the protest had not been intimated to the drawer till many years after, when Scot had become bankrupt: That the possessor of the bill had voluntarily prorogated the term of payment to the acceptor, by drawing a new bill on him for a larger sum (including the bill in question, after it had been protested), payable at 30 days sight, by which he had innovated the debt, and renounced recourse against the drawer: That the new bill had been paid to an extent exceeding the sum in the bill, drawn by Pringle; which payment ought to be imputed, in the *first* place, in extinction of Pringle's bill: And *lastly*, That when Scot had been prosecuted upon the new bill, and had procured a bond of presentation, the possessor of the bill had voluntarily discharged that security.

It was *answered*, That it was immaterial whether the bill was duly protested and intimated or not, unless the drawer would undertake to prove, that had the protest been duly taken, and he timely informed of it, he might have recovered his payment: That the taking a new bill was no innovation of the debt, but only a corroborative security for it; the pursuers retaining in their hands the bill drawn by the defender; so that he could qualify no damage by the transaction; as the moment the bill drawn by him was protested, he could have proceeded against the acceptor, without regard to the new bill: That the partial payment made upon the new bill, would be imputed proportionably towards extinction of the pursuer's debt, and the other debts included in it, and ought not, in justice, to be held to extinguish any debt exclusively: That, although the cautioner in the bond of presentation was relieved, the principal remained bound.

Upon report of LORD GRANGE—THE LORDS sustained the defence, ' That the pursuers did not duly intimate to the defender, the non-payment and protesting of the defender's draught on Scot; and also sustained the other defence, that the pursuer had drawn a new bill for a greater sum, wherein it was acknow-

ledged the smaller sum was included, and had prorogated the term for paying the said last bill, beyond the term at which the first bill was payable; and found he had thereby lost his action of recourse; therefore assolizied the defender.'

Lord Ordinary, Grange.      Aft. Pet. Wedderburn.      Alt. Jas. Fergusson.

Fol. Dic. v. 1. p. 101. Session Papers in Advocates' Library.

No 136.

1731. Jan. Feb.

M'KENZIE against URQUHART.

GEORGE M'KENZIE of Inchcoulter brought an action for recourse against George Urquhart, merchant in Cromarty, as drawer of the following bill:—  
 'Cromarty, 24th April 1727. Upon the 11th November next, pay to John Earl of Cromarty, or order, *within your dwelling house*, L. 100 Sterling, value received of his Lordship; which place to account with (signed) GEORGE URQUHART.' Addressed; Colonel Urquhart of Newhall; and accepted by him; indorsed by the Earl of Cromarty to the pursuer.

The defender *alleged* that the bill had not been duly negotiated. It was not protested till several days after the last day of grace; and the protest bore, not that payment had been demanded in *the acceptor's house*, in terms of the bill, but only *in Cromarty*, a large village: And no notification had been given, until about a year after the protest, when the acceptor had become bankrupt.

The pursuer *contended*, That strict negotiation is not requisite in inland bills: That it is not necessary, in a protest, to specify the precise spot where payment is demanded, especially in an inconsiderable village; and that proof could be brought, that although notification of the dishonour had not been made by the porteur himself, yet the drawer had been informed by a third party.

It was found, that the bill was not duly negotiated; that the porteurs of inland bills are subject to the necessity of rigorous negotiation, equally with the porteurs of foreign bills; and that it was irrelevant to state that the drawer had heard of the dishonour of the bill, by means of third parties, since he was to rely upon notification only from the porteur himself, or his order; therefore recourse was lost.

It was afterwards *urged* for the pursuer, That admitting the bill had not been duly negotiated, still recourse was competent, if the drawer could not show, that he had effects in the acceptor's hands: For in that case, *nihil illi deerat*.

THE LORDS found it was incumbent on the drawer, to prove he had effects in the acceptor's hands at the time of the draught.

There were cited, as authorities in support of this judgment, a decision in the *Journal de Palais*, quoted by Forbes; Yule against Richardson, Fountainhall, v. 2. p. 64. *voce* SUMMAR DILIGENCE; and Coupar against Stewart, Div. 5. *b.t.*

Aft. Boswell, Areskine.      Alt. Hay, Graham, Grant.

Fol. Dic. v. 1. p. 100. & 101. Session Papers in Advocates' Library.

No 137.

Inland bills require strict negotiation, as well as foreign ones.

Recourse is not lost, if the drawer had no effects in the acceptor's hands.