

1788. July 2. GEORGE CHARLES *against* JAMES SKIRVING, and Others.

No 172.

A bill of exchange cannot be protested against the acceptor on the day of payment.

GEORGE CHARLES obtained from a debtor of his, a bill of exchange, payable one day after date; and, on the day of payment, the debtor being confessedly unable to pay, he took a protest against him for not payment, and thereupon used arrestments, the validity of which was afterwards called in question by James Skirving and the other creditors of the bankrupt.

THE LORDS seemed to be of opinion, that if the protest had been taken on the day after, though within the days of grace, it would have been sufficiently regular. But this not being the case,

'THE LORDS sustained the objection to the arrestment, that the bill of exchange on which it was founded, was protested on the same day on which it became due.'

Lord Ordinary, *Hailer.* Aft. *Cha. Brown.* Alt. *Maconochie.* Clerk, *Home.*

Craigie.

Fol. Dic. v. 3. p. 84. Fac. Col. No 27. p. 44.

1790. May 23. ROBERT CARRICK *against* HENRY-WILLIAM HARPER.

No 173.

Although, on account of circumstances, the dishonour of a promissory note was not intimated by one indorser to another, till the 19th day; the Court found recourse was not lost, there being no negligence or unnecessary delay.

HUMPHRY KER granted a promissory note for L. 217: 11s. to Henry-William Harper, or order, payable in London three months after date.

This note Harper indorsed to Robert Carrick at Glasgow, who indorsed it to Walker, one of the agents or riders of Thomas Johnstone, merchant in Manchester. By Walker it was indorsed to Johnstone his employer, from whom it came by another indorsation into the hands of Joseph Jones and Company in London.

On the last day of grace, the note was protested for non-payment by Joseph Jones and Company, and within three days after, the dishonour was intimated to Johnstone at Manchester. Walker, Johnstone's rider, being at this time from home, Johnstone, owing to his ignorance of the address of Carrick, the preceding indorser, did not give any intimation till the 14th day after the date of the protest; a letter for Carrick being then put into the post-office. Carrick received this letter on the 19th day after the date of the protest, and he immediately gave notice to Harper, to whom the note had been originally granted.

The contents of the note having been paid by Johnstone to Joseph Jones and Company, and by Carrick to Johnstone, the question arose, whether Harper was obliged to relieve Carrick from the loss.

Pleaded for Harper: Viewing the promissory note in the light of a foreign bill of exchange, as all documents conceived in this form, and neither payable nor dated in Scotland, ought to be, it cannot now be the foundation of any legal claim, unless against the particular indorser to whom intimation of the dishonour was given within three posts after the date of the protest; Erskine, b. 3. tit. 2. § 33.; 14th February 1781, Elliot *contra* Bell, (No 167. p. 1606.)

Even considering the note as an inland bill of exchange, and regulated either by the English or Scots law, the same conclusion would seem to follow. By the former, it is required, that in case of dishonour, 'the protest shall, within *fourteen* days after the making thereof, *be sent*, or otherwise due notice be given to 'the party from whom the bill was received.' By the latter, it is required, 'that 'notice of the dishonour shall be *given* within fourteen days after the protest is 'taken.' Act 9th and 10th Will. III. ; act 3d and 4th Anne ; act 12th Geo. III. cap. 72. made perpetual by act 23d Geo. III. cap. 81.

It may perhaps be said, that these rules ought not to be applied to the case of indorsers claiming relief from one another. But even with regard to them, in a territory so limited as that of Britain, the space of fourteen days seems in general to be sufficient for the purpose of intimation ; and although some latitude were to be allowed, a silence for so long a period as here intervened can admit of no excuse, unless it were to be held, that every indorser was to have a fortnight for intimating the dishonour to the party from whom he received the bill or promissory note. But such a construction of the law would be attended with the most pernicious consequences to trade.

Answered: The promissory note in question being dated and payable in London, is to be regulated by the law of England. Indeed since the late enactments in 1772 and 1783, prescribing the mode of negotiation to be observed in Scotland with regard to inland bills of exchange and promissory notes, there is no material difference between the laws of the two countries. In both, it is incumbent on the holder to send notice of the dishonour within fourteen days after taking the protest. But the same rule does not hold in questions between indorsers, otherwise it would be in the power of the person in whose hands the bill or promissory note was first dishonoured, by withholding the intimation till the fourteenth day, to throw the loss on any of the indorsers he chose to single out. Accordingly, in the case of *Elliot contra Bell*, No 167. p. 1606. where it was found, that notification to the last indorser was not *per se* sufficient to preserve recourse against the prior indorsers, the opinion of eminent merchants was produced, that the period for notification between indorsers themselves 'was not 'yet fixed by any precise rule ; only it behoved to be such as was not protracted by any undue delay.'

The question was tried in a suspension of a charge against Harper.

THE LORD ORDINARY suspended the letters, thus sustaining the defences pleaded for Harper.

Against this interlocutor a reclaiming petition was preferred, which was followed with answers.

It was observed on the Bench, that the doctrine laid down by Mr Erskine, with regard to the negotiation of foreign bills of exchange, was unsupported by any authority ; the rule in England being, that the dishonour should in general be notified by the next post, although particular circumstances might justify a longer delay.

No 173.

The judgment of the Court, however, proceeded on this ground, that in a question between two indorsers, it was sufficient for authorising a claim of recourse, that in intimating the dishonour no improper negligence could be alleged.

After advising the reclaiming petition and answers, the LORDS altered the interlocutor of the Lord Ordinary, and 'found the letters orderly proceeded.'

Lord Ordinary, *Justice-Clerk.* A&S. *Solicitor-General.* Alt. *Wight.* Clerk, *Colquhoun.*
Craigie. *Fol. Dic. v. 3. p. 86.* *Fac. Col. No. 132. p. 259.*

1791.

ORR *against* TURNBULL.

No 174.

The indorser of an accommodation bill, found entitled to plead the want of due negotiation, in defence against payment.

THOMAS TURNBULL was drawer of a bill for L. 81, accepted by Alexander Brown and James Turnbull. It was indorsed by the drawer to John Laurie; by Laurie to *Robert* Turnbull; by him to Alexander Orr. Although *Robert* Turnbull was the last indorser, it appeared that Orr, who discounted it, gave the cash to *Thomas* Turnbull the drawer, in *Robert's* presence.

The bill fell due on 6th June 1788, and was regularly protested. It was not till 1st April 1789, that horning was executed against *Robert* Turnbull.

Orr having died, his nephew, his general disponee, brought an action against the drawer and indorsers in June 1790. All the parties except *Robert* Turnbull had by this time become bankrupt. He stated in defence, that recourse against him was lost, he having received no intimation of the dishonour in due time.

There was no evidence produced of intimation previous to the charge of horning.

Pleaded, in a reclaiming petition: This bill was not entitled to the privileges of bills originating in the course of trade. In these the drawer has effects in the hands of the acceptor; and recourse is denied, if negotiation be neglected; because the drawer cannot otherwise take the steps which may be requisite for securing his property; *Erskine*, b. 3. tit. 2. § 24.; *M'Kenzie* against *Urquhart*, No 137. p. 1561.; *M'Adam* against *M'William*, No 171. p. 1631.

Every new indorsation is in fact a new bill, *A. against B.* No 99. p. 1510. The defender, therefore, in the knowledge of the nature of the transaction, and a party in it, is in the same situation with the drawer, and is no more entitled to plead want of intimation than he is.

Accommodation bills are in themselves improper, and entitled to no favour.

Pleaded for the defender: Although it were admitted, that when the acceptor has no effects, the drawer cannot plead want of notification; the defender's plea is not injured; for, by the *indorsation*, he acquired a right to relief from the drawer and previous indorsers; of consequence, by his *jus crediti* he was entitled to require that the rules of negotiation should be observed.