

\* \* \* 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.

No 141.

On the one hand, part of the Court was of opinion, That as the porteur in case of a protest for not acceptance, or not payment, loses his recourse, if he omit by the first, or at farthest by the second post, after protest for not acceptance, or for not payment, to give notice to the drawer of the dishonour of the bill; so, where one pays *supra* protest for honour of the drawer, he in like manner loses his recourse where the like timely intimation is not made. For as in general a *negotiorum gestor* is liable to the rules by which the *negotium gestum* is governed, so the drawer ought not to be put in a worse case by another's interposing, than he would have been, had it been left to the porteur to notify the dishonour of the bill; and the reason of the thing was said to be in both cases the same, that the drawer may be put on his guard to secure the person's effects on whom he drew the bill. And accordingly, the several authors who have treated of bills, such as Marius and Scarlet, from whose authority Forbes supports his opinion, (*vide* Forbes's Treatise on Bills, page 100 and 150, Edition 1718,) concur in it as an established point, that, in order to recourse, the same timely notification is required in the one case as in the other.

On the other hand, others of the Lords were of opinion, That there was this difference between the porteur and one who pays *supra* protest for the honour of the drawer, that by the bill contract, the porteur undertakes diligence, and therefore is bound to make timely notification to the drawer when the bill is dishonoured; whereas, he who pays *supra* protest, has undertaken no diligence, and therefore, if he lost his recourse, it must be on another foundation; and that can only be damage, which, if the drawer cannot qualify, the recourse is still competent.

This, however, was no farther carried, than that a notification would not be necessary according to the strict rules of the bill contract, admitting still that equity required a notification in a reasonable time. And, as it was thought this ought not to exceed ten days or a fortnight, it was therefore unanimously agreed, that the pursuer had lost his recourse as to such of the bills as had been paid in March, and of which no notification had been made to the drawer sooner than the 20th of May: But as to one bill which had been paid on the 18th of May, and the payment notified on the 26th, on the vote stated, Whether it was competent to the defender, the drawer, to object thereto, without instructing damage through the want of more early notification? No less than six of the Lords were *non liquet*, four for finding the objection competent, four for finding it not competent, which last did, by the President's casting vote, prevail.

But, upon advising a petition and answers, though little was said farther than enlarging upon the former topics, it carried by a great majority, to 'Find the objection competent, and the notification not sufficient,' although the defender, the drawer, could not instruct damage; which was, in other words, That he who pays *supra* protest, is bound to the same timely notification as the porteur.

*N. B.* Before either of the above judgments, the Lords had remitted to two merchants in Edinburgh, noted dealers in bills, Coutts and Arbuthnot, to report their opinion upon the practice of merchants, who reported, That where a bill is taken up *supra* protest for honour of the drawer, in order to entitle the payer to recourse, notification ought to be made thereof to the drawer the post immediately after taking up the bill, or the next following post, and that such was the custom of merchants, &c.

At the same time, there was produced by Ouchterlony the opinions of several noted bankers in London, bearing, That by act of Parliament, the person who retires a bill *supra* protest for honour of the drawer, is allowed fourteen days to notify the same to the drawer, in order to entitle to recourse, and that such was the custom of merchants; and further, that the merchant, whose bills are taken up for honour, should always be liable, even where advice is wanted, unless it appear he has lost opportunities of securing himself by the want of advice. But these the Court had no regard to, as they had been mendicated by the pursuer, and not obtained by order as the others were, and as they proceeded upon a misapprehension of the act of Parliament therein referred to, which is that of the 9th and 10th of King William III. c. 17. which manifestly refers to inland bills within the kingdom of England, and allows fourteen days for sending the protest and giving notice to the drawer of the dishonour of the bill; which, as it was a law made in England before the Union, cannot govern bills between Scotland and England, or other foreign bills.

But notwithstanding the above judgments touching the notification necessary to be given, the cause came at last to be determined on a different medium, and to be given for Hunter the defender, who was found to be only a nominal drawer, whose faith was not followed by the porteur of the bills, the person by whom they were payable, nor by Ouchterlony, who accepted *supra* protest for honour.

*Fol. Dic. 3. p. 89. Kilkerran, (BILLS OF EXCHANGE.) No 9. p. 73.*

1746. December 12. ALEXANDER LITTLEJOHN against WALTER ALLAN.

WHERE a bill was not duly negotiated, by the porteur's omitting to present it in due time for acceptance, recourse was refused; notwithstanding the reply, That the drawer suffered no prejudice, the person drawn upon being, to this hour, unquestionably solvent.

That reply is never admitted, but where the drawer has no effects in the hands of the person drawn upon.

*Fol. Dic. v. 3. p. 84. Kilkerran, (BILLS OF EXCHANGE.) No 11. p. 76.*