

1744. June 15. STEWART and EWING, Competing.

JAMES FALL and Brothers in Company, merchants in Dunbar, had in their hands a parcel of dry fish belonging to Sinclair of Brow, which they had undertaken to transport to Barcelona, on Brow's risk, and to account to him for the proceeds. Brow drew a bill upon James Fall and Company, payable to Robert Ewing; which the Falls having refused to accept, by reason they had no cash in their hands at the time, Ewing protested the bill for not acceptance.

About a month thereafter, and while the fish were still on hand, Bailie James Stewart, a creditor of Brow's, arrested in the hands of the Falls.

In the competition between Ewing and Stewart, the LORDS having remitted to the Ordinary to take the opinion of merchants, Whether a bill protested for not acceptance, against a person who has only effects, and not value in his hands, is, by the custom of merchants, equivalent to an intimated assignation to these effects, so as to prefer the porteur of the bill to one, who thereafter arrests, before these effects be turned into money? The most noted merchants of Edinburgh made answer, That they always understood that protesting a bill drawn upon a correspondent, for the answering which bill, he had in his hands a cargo that may produce money, was sufficient to affect such goods, or the produce of them, when turned into cash, without the form of an arrestment; and that they had relied on bills so protested, (without using the formality of arresting) judging it equal to an assignation intimated.

Notwithstanding which the LORDS found, ' That the protesting the bill against James Fall and Company, for not acceptance, when they had no money of Brow's the drawer, in their hands, did not affect the parcel of fish in question, then in their hands, *so as to prefer the porteur of that bill to a subsequent arrester*: And therefore preferred Bailie Stewart, on his arrestment, to the sum of L. 63, being the value of the said fish now turned into money.'

The ground the LORDS went on was not what had been chiefly argued for the arrester; that a correspondent who has no cash, but only effects in his hands, is not bound to accept a bill: For, neither is he bound to accept, even where he has cash of the drawer's, when the bill is drawn for a greater sum; yet the draught and protest will be an effectual conveyance to the extent of the sum in his hands. But the ground was this, That an assignation to a sum of money, as due by a third party to the cedent, will in no case imply a conveyance to effects of the cedent's, that may happen to be in his hands; and the implied assignation, by drawing a bill, cannot have a stronger effect, than an assignation itself, to so much money as due by the person on whom the bill was drawn, would have had, *cum fictio in casu facto, &c.*

It was at the same time admitted, that where, in such a case, the effects are, after protesting the bill, turned into money, action would ly to the holder of the bill, where no mid impediment had intervened. Not that the drawing of the

No 82.

Found, that when the correspondent has not money of the drawer's, but effects, a draught not accepted, is not preferable to a posterior arrestment.

No 82. bill implied an assignation to the effects; for such action would ly to the holder of a bill, where the correspondent, on whom it was drawn, came afterwards to have the drawer's cash in his hands, though at the time the bill was protested for not acceptance, he had neither cash nor effects of the drawer's; while yet, for certain such draught would not import an assignation to money, that came only into the correspondent's hands after the protest for not acceptance: But on this ground, that the mandate or order to pay, is supposed to continue, and will have effect, how soon the correspondent comes to be possessed of value; but still under this exception, unless a mid impediment has interveened: And such the arrestment was considered to be in this case, as it is a habile diligence to affect the subject, and is for that reason preferable to the action. And therefore it was, that by the interlocutor here pronounced, it was only found that the protesting of the bill did not affect the fish, *so as to prefer the porteur to the subsequent arrestment.*

*Fol. Dic. v. 3. p. 79. Kilkerran, (BILL OF EXCHANGE.) No 10. p. 75.*

No 83.

Found, that a bill need not be protested for not acceptance, before the last day of grace.

1749. June 28.

JAMIESON against GILLESPIE.

It has been found, that a bill payable at usances, need not be presented for acceptance sooner than the term of payment. It has also been found, that, when the term of payment comes, it must be that very day presented for acceptance; for, that notwithstanding there are days of grace for payment, there are none for acceptance: And, no longer ago than 6th July 1743, Ramsay against Hogg, (*infra h. t. Div. 4. Sec. 2.*) where the *species facti* was of a bill drawn, payable at London forty days after date, not protested by the indorsee till the day after expiry of the three days of grace; when, at one and the same time, it was protested for not-acceptance, and for not payment: The Lords willing, it would seem, to avoid determining the question, Whether it was sufficient to protest the next day after the days of grace; (a question that is at present in dependence in another case,\*) found in the words following: 'That, in respect it was not alleged, that the practice with respect 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; the pursuer could have no recourse.' And, in the terms of that decision, the Ordinary, in the present case, 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.'

But the pursuer having reclaimed, the Lords doubted, whether the practice of merchants, even in this country, was such as had been taken for granted in the case of Ramsay and Hogg; and the merchants of Edinburgh, to whom the Lords recommended to give their opinion, declared that the bill in question was duly negotiated, by presenting the same for payment, and protesting for want of

\* See Div. 4. Sec. 2.