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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.

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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

him, before he turned bankrupt; nor did so much as return advice to the drawer by the first post, that the bill was protested for not payment, to the end he might have taken course with the acceptor: And therefore, the drawer was no further liable; but the charger must seek the acceptor for what he wants of payment of the bill.

Answered for the charger:—He had duly negotiated the bill, in protesting for non-acceptance upon the 30th July 1703, and for not payment the 5th of August, the last of the respite days: By which two protests, he secured to himself both the drawer and the acceptor, as having the drawer's effects the time of protesting the bill. *2do*, The taking acceptance, after protesting for not-acceptance, payable fourteen days after the term of the bill, was an advantage to the drawer; because Mr Brown could have got Mr Fairside decerned in payment, by an ordinary action, as having the drawer's effects; and the insisting that way, would have exhausted more time than fourteen days, besides the expence and trouble. As Mr Brown's procedure was to the drawer's best advantage; so it was conform to the merchant custom; for, according to Marius, upon bills of exchange, p. 21, the possessor of a bill having protested the same, in the terms of its draught, can take an acceptance as the same is offered. And Mr Forbes, chap. 6. concerning protesting of bills, observes, That a bill being duly protested for not-acceptance and payment within the respite days, preserves both the drawer and acceptor. *3tio*, The merchant law prescribes no further diligence than duly protesting for non-acceptance and not payment; and if merchants should not have ready recourse against the drawers of bills, whom they principally trust with their money, but be obliged to prosecute acceptors with utmost diligence, that would involve them in insuperable difficulties, especially when the sum is small. If any person, for example, shall draw a bill upon a Zealand merchant, payable at Edinburgh, and accepted by him there, the possessor, by duly protesting the bill for not payment, has immediate access against the drawer, and can never be obliged to go seek his money in Zealand. *4to*, There was no necessity of writing advice to the Merse, where the drawer lives, when he was at Edinburgh, where the charger had occasion to speak with him every day, and could depone, that he acquainted him that the bill was not honoured.

Replied for the suspender:—That it had been a greater kindness to him, if the possessor had not prorogued the term of the bill, but returned it protested for not acceptance, that the drawer might seek to his own security, by using execution upon the designed acceptor's bond, which he delayed in confidence that his bill was complied with. *2do*, Albeit the possessor might have protested for not acceptance, he could not protest for not payment till elapsing of the term to which it was prorogated; but could only pursue in an ordinary action the person drawn upon, as having the drawer's effects. Nor could he recur against the drawer, the protest for not acceptance being taken off and past from by the posterior acceptance and partial payment. *3tio*, A simple protest, which is but the assertion of a notary, cannot be all the diligence required in the possessor of a bill; for, af-

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inland bill for
a small sum.
The rules of
negotiation
were not then
well ascer-
tained. See
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ter acceptance, the drawer is only liable *subsidiarie*, the acceptor, who is considered as principal debtor, being first discussed; and the possessor should use the summary diligence allowed by the act 20th, Par. 3. Cha. II. against the acceptor, in case of not payment, before any recourse against the drawer; otherwise that recourse had been competent summarily upon the registrate protest, and not by way of ordinary action. Mr Forbes also, in his treatise of Bills of Exchange, p. 93. asserts, That any accident happening to the acceptor, after the term of payment, should be upon the possessor's risk; it being just that the drawer should not suffer through his neglect.

THE LORDS found the drawer of the bill liable, and repelled the reasons of suspension.

Fol. Dic. v. 1. p. 100. Forbes, p. 40.

No 127.

Recourse still competent upon a bill, though not duly negotiated; if the person drawn upon, continue responsible.

1706. June 28. SIR JOHN SWINTON, against The LADY CRAIGMILLAR.

IN the action at the instance of Sir John Swinton, against the old Lady Craigmillar, for payment of a bill drawn by her upon Sir Alexander Gilmore of Craigmillar her son, payable to John Inglis, writer to the signet, as the pursuer's trustee, for value resting to the pursuer by the Laird of Langton, the drawer's brother; in regard the bill was refused by Sir Alexander, and protested for not acceptance,

Alleged for the defender: That she having drawn the bill for supporting her brother's credit, upon his promise to relieve her, the possessor of the bill was bound to negotiate the same, not only by a protest for not acceptance, but also by intimation thereof to her the drawer, that she might timeously have operated her relief against Langtoun, in his lifetime; which she could effectually have done, he having, till the day of his death, betwixt two and three thousand merks yearly, paid him out of the estate. And the want of advertisement from the creditor, of the bill's being dishonoured, made her slip the opportunity.

Answered for the pursuer:—Though foreign bills *favore commercii*, in respect of the great distance of places, must be duly negotiated, by certiorating the drawer of the not acceptance thereof, lest he might lose his effects in the hands of the person drawn upon, by his breaking before the drawer get notice of the protesting of his bill for not acceptance; no body can require this in the case of inland bills, where the foresaid reason takes no place; and we have no statute to determine us therein; for the act 1696, provides only the same execution upon inland bills, as, by the act 1681, is allowed to pass upon foreign bills. In the which act, no time is prefixed to the negotiating bills, or intimation to drawers in case of not acceptance. *2do*, Though the bill in controversy were a foreign bill, the neglect to advise the drawer concerning its being protested for not acceptance, would not cut off the possessor from his recourse against her, unless the person drawn upon were broken with her effects, which she did not recover out of his hands, for want of intelligence that her bill was refused; which cannot be