

No 133.

1724. June 20.

M'LEOD *against* GORDON.

A BILL was indorsed for value after diligence had been done upon it.—THE LORDS denied recourse against the indorser, on this ground, That the indorsee had not followed out their diligence, nor intimated that they could not recover payment. It was here found, that a blank summons was not sufficient intimation. See The particulars, *voce* DILIGENCE.

Fol. Dic. v. 3. p. 88. Edgar, p. 52.

1727. February 16.

FERGUSSON of Auchinblain *against* MR QUINTIN MALCOLM.

No 134.
A bill, payable at a certain day, need not be presented by the porteur for acceptance, before the day of payment.

A BILL was drawn in the Isle of Man, 25th May 1720, by Mr Quintin Malcolm, upon John Fergusson, merchant in Ayr, for the sum of L. 73 Sterling, payable to Mr William Flood, merchant in Dublin, on the 1st September thereafter, at the house of Mr Davie, merchant in Dublin; and farther bearing, 'to state the same to account as *per* advice.' This bill, by indorsation, coming into the person of Auchinblain, he insisted in a recourse against Malcolm the drawer; the bill, upon its falling due, having been regularly protested for non-payment against John Fergusson, upon whom it was drawn.

The defence was, That John Fergusson was broke with the drawer's effects in his hands; and the possessor could have no recourse against the drawer, in that he had not done sufficient diligence; particularly, that he did not present the bill, to be accepted by John Fergusson, having never applied to him before the day of payment. And the defender urged in the general, That it is an indispensable duty in every sort of bills, to offer them to be accepted, and in case of non-acceptance, to protest. And he endeavoured to make it appear, that he suffered by this neglect; for if John Fergusson had accepted, there would have been ready access against him, immediately after the day of payment, to make the bill effectual: If he refused to accept, the drawer, being duly advertised, would have taken care to draw his effects out of his hands.

On the other hand, it was *pleaded, 1mo*, Where a bill is drawn, 'as *per* advice,' payable at a day certain, it is the drawer's business to give advice of the draught; because, wherever that clause is, the person on whom the bill is drawn, is neither bound to accept nor pay, unless advice be given. The possessor then of such a bill reasonably supposes, that he, to whom the bill is directed, is acquainted of the draught, in order to his making provision for payment: And as the drawer, and person drawn upon, are understood to be in a correspondence, the possessor is likewise, in reason, to suppose, that the drawer will be advised by his own correspondent, on whom he drew, whether the bill is to be honoured or not. *2do*, It was *pleaded*, That it would make no alteration, suppose the clause *per advice*, had not been in the bill, which was made out from consideration of bills payable on or some time after sight; in which the possessor may lengthen

out the term of payment as long as he will; and if he fail to present timeously, it is just he himself, not the drawer, suffer by the omission; but where the money is payable at a precise day, of the drawer's own naming, the obtaining or not obtaining acceptance, neither lengthens nor shortens the day of payment; and the drawer is not one bit the better of acceptance, if the person drawn on fail before that time. He has therefore no reason to complain of the porteur, that made no demand before the day of payment; and if, in the meantime, the person on whom the draught is made, become bankrupt, the loss must lie upon the drawer, who gave his debtor so long a day, not the porteur, who was not guilty of any omission.

THE LORDS found, That the bill being drawn, payable upon a day and place certain, there was no necessity of a protest for not-acceptance.

And, upon a reclaiming petition and answers, the LORDS considering, that the bill was drawn payable in Ireland, a foreign part, and that he who was to be acceptor resided in Scotland, adhered to the former interlocutor. See The next case.

Fol. Dic. v. 1. p. 101. Rem. Dec. No 93. p. 184.

1729. July 12. FERGUSON against MALCOLM.

QUINTIN MALCOLM being in the Ile of Man in May 1720 (the period of the plague at Marseilles, when all ships were ordered to undergo quarantine), drew a bill on John Ferguson, merchant in Ayr, payable to William Flood, merchant in the Ile of Man, on 1st September following, at the house of Walter Davie in Dublin.

The bill was sent to Dublin, indorsed to Davie for behoof of Flood. It was, when due, protested for not payment. It was afterwards sent by Davie to Peter Murdoch, merchant in Glasgow, with orders to prosecute the drawer and drawee. During the dependence of the process before the Commissary of Glasgow, Murdoch wrote to Malcolm on 15th January 1723, who answered, 'That, without any action at law, he should certainly have his money, though it could not be just now paid.' Ferguson, the drawee, wrote at the same time, and on the same paper, to Murdoch, requesting delay. The bill was afterwards conveyed by Murdoch to William Ferguson of Auchinblain, the father of John Ferguson the drawee, who insisted in the Court of Session, for recourse against Malcolm the drawer.

Pleaded in defence:—That the drawer had received no intimation of the dishonour of the bill, till eight months after the term of payment.

Answered: It was impossible to notify, there being no intercourse of correspondence on account of the quarantine.

THE LORD ORDINARY had found, 'That the protesting of the bill had been duly notified.'

THE COURT found, That the protestation being in September, the notification

No 134.

No 135.

Recourse refused, when the porteur had failed timeously to intimate the dishonour of the bill to the drawer.