

1745.

 OCHTERLONY
 v.
 HUNTER.

“ the 22d January, 1742, complained of, be, and
 “ the same are hereby affirmed.”

For the Earl and Countess of Cassilis, *Ro. Craigie,*
C. Erskine.

For the Countess of Ruglen and Earl of March,
A. Hume Campbell, Alexander Forrester.

For Lord Archibald Hamilton, *Wm. Murray,*
W. Hamilton.

GEORGE OCHTERLONY, - - *Appellant ;*
 ARCHIBALD HUNTER, *et alii,* - *Respondents.*

9 April, 1745.

BILL OF EXCHANGE.—Found that one who had retired bills in London, *supra* protest, for the honour of the drawer, (who was in Scotland,) was not debarred of his recourse against the drawer, although he did not give notice of the dishonour of the bills for eight days.

Found also that this was a sufficient notification of the dishonour of other bills, retired in the same way, although payable after the date of the letter.

[Kilkerran, p. 73. Elch. *voce* Bill of Exchange, No. 32 ; Dict. III. 54 ; Mor. 1567 ; Brown's Supp. v. 733.]

No. 76.

SEVERAL bills were drawn in Scotland by Hunter, upon Charles Murray in London, payable to Peter Murdoch, merchant in Glasgow, or order. These bills were paid by Ochterlony *supra* protest, for

the honour of the drawer. There were a variety of questions between the parties ; but the present report relates only, 1st, to a bill for L.400, dated the 19 March, 1736, which was paid by Ochterlony on the 18 May following ; 2dly, to a bill dated 19 March for L.250, and paid 22 May, with regard to which two bills, Ochterlony, on the 26 of May, wrote to Hunter, saying, “ I have paid all of them “ that have fallen due since the 18 March last, “ *supra* protest, for your honour, &c.” and 3dly, to certain other bills which were paid in the same way subsequent to the date of this letter.

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In the action at Ochterlony’s instance, against Hunter (the drawer) for recourse, the question occurred, How far one who pays *supra* protest, for the honour of the drawer, is bound to give the same timeous notification, as the holder is of the dishonour of the bill ?*

The pursuer argued, that there was a great difference between the case of a bill being paid *supra* protest for the honour of the drawer, and that of a bill being protested for non-payment or non-acceptance by the holder of it. In the latter case, the holder undertakes diligence in virtue of the bill contract, and the most exact diligence therefore is required in every respect, and particularly in the point of notification ; and if he fail in this, he is held to have lost his recourse, although damage cannot be proved : but it is different with regard to him who pays *supra* protest for the honour of the drawer. He has undertaken no diligence, and has interfered merely from motives of friendship,

* With regard to certain bills, which had been paid a considerable time before the date of the letter above referred to, it was held to be clear that the pursuer had lost his recourse.

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and can therefore only lose his recourse, if it be proved that damage has been incurred by his interposition, and by his failure to notify.

Hunter answered, that the two cases were the same ; that 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 holder to notify the dishonour ; and that the reason of the thing applied to both cases, viz. that the drawer may be put on his guard, to secure the effects of the person on whom he has drawn the bills.

The Lord Ordinary, Dun, (February 8, 1743,) remitted to Messrs. Coutts, Arbuthnot, and Hay, bankers in Edinburgh, to report their opinion ‘ as
 ‘ to what time notification ought to be sent to the
 ‘ drawer of a bill, and how soon that the same is
 ‘ dishonoured by not payment, in order to entitle
 ‘ to recourse ; and as to the effect of the pursuer's
 ‘ letter of notice to the defender of the 26 May,
 ‘ and what effect the said notification might have,
 ‘ both with respect to the bills formerly due, tak-
 ‘ ing notice of the respective terms of payment,
 ‘ anterior to the said notification, and also what
 ‘ effect the same can have with respect to those
 ‘ bills which were on the said 26 May not due or
 ‘ payable, but which were afterwards paid by the
 ‘ pursuer, and whereof he gave notification that
 ‘ they were dishonoured ; and allowed either party
 ‘ to get what opinions they thought fit from mer-
 ‘ chants in Edinburgh or in London, to clear up
 ‘ the custom observed in such cases.’

The gentlemen above named reported their opinions to be, that in the case of a bill taken up *supra* protest for honour of the drawer, in order to entitle the payer of the bill to recourse, notifi-

cation ought to be made to the drawer the post immediately after taking up the bill or the next following post. That therefore the letter of 26 May was not due notification with regard to a bill that had been received five days before its date. On the other hand, the London bankers were of opinion that by law as well as by custom of merchants, a person who retired a bill *supra* protest for the honour of the drawer, was allowed fourteen days to notify the same to the drawer, in order to entitle him to recourse, and that the letter of the 26 May was a sufficient notification for all the bills that fell due within fourteen days after the date of the said letter; and they therefore thought Hunter liable unless he could show that he had sustained loss for want of notification.

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The Court, (24 November, 1743,)* found that the letter of the 26 May was a sufficient notification to entitle the pursuer to recourse against the defender for two of the bills, viz. the bill of the 19 March, which was paid on the 18 May, and the bill of the same date, paid on the 22d; but found that the said letter was not a sufficient notification of the dishonour of the bills paid after its date. But upon advising a reclaiming petition and answers, the Lords found, ‘ That the above letter was
 21 Dec. 1743.
 ‘ not a sufficient notification to entitle the pursuer
 ‘ to recourse for the bill paid on the 18 May; and
 ‘ they adhered to the rest of the former interlocu-
 ‘ tor.’

An appeal was brought from that part of the interlocutor of the 24 November, 1743, which found
 Entered
 17 Jan. 1744.
 that the letter of the 26 May was not a sufficient

* See Kilkerran as to the opinions of the Court.

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 Judgment,
 9 April, 1745.

After hearing counsel, “ it is ordered and ad-
 “ judged, &c. That so much of the interlocu-
 “ tor of the 24 November, 1743, whereby it is
 “ found, ‘ That the letter of the 26 May, 1736, was
 ‘ no sufficient notification of the dishonour of the
 ‘ bills paid by the appellant after the date of said
 ‘ letter,’ and also so much of the said interlocutor
 “ of the 21 December, 1743, whereby it is found,”
 ‘ that the said letter was not a sufficient notification
 ‘ to entitle the appellant to recourse against the
 ‘ said Robert Hunter for the bill dated 19 March,
 ‘ 1736, and paid *supra protest* on the 18th May
 ‘ thereafter,’ be and the same is hereby reversed ;
 “ And it is further ordered and adjudged, that the
 “ residue of the said interlocutors complained of
 “ be, and the same is hereby affirmed.”

For Appellant, *Ro. Craigie, W. Murray.*

For Respondents, *A. Hume Campbell, C. Ers-
 kine.*

This reversal is not noticed in the reports. Kilkerran, how-
 ever, states, that the judgment of the Court of Session proceed-
 ed on the ground that Hunter was “ only a nominal drawer,
 “ whose faith was not followed by the porteur of the bills, the
 “ person by whom they were payable, nor by Ochterlony, who
 “ accepted *supra protest* for honour.”