'money;' and Mr Clephan obtained a writ of extent againſt Drummond's effects, but which produced nothing. In an action in the Court of Seſſion, involving the queſtion of recourſe, Clephan *pleaded*, That holding the bill not for value, but only in ſecurity, or as a depoſit, he was not bound to ſtrict negotiation; and that, beſide, Groſſet knew Drummond's ſituation all the time, and had been verbally informed the bill had not been retired. No 156.

Groſſet *pleaded*, That the practice of remitting to the Receiver-General, by bills of exchange, was uſual and legitimate; and that Clephan had allowed the bill to lie over, in order to derive advantage by the intereſt growing on it.

Groſſet died during the dependence; and his repreſentative was made a party.

The COURT of SESSION found that Clephan was not liable for the amount of Drummond's bill:——But the caſe went to appeal; and the HOUSE of LORDS, 17th March 1763, "ORDERED and ADJUDGED, That the interlocutors complained of in the ſaid appeal be, and the ſame are, hereby reverſed; and it is further ordered, that the reſpondent is liable to the appellant, as repreſentative of his father deceaſed, for the ſum of L. 205: 6s. loſt by the inſolvency of James Drummond, the acceptor of the bill of exchange in queſtion in this cauſe; but is not liable to any intereſt on account thereof."

For the Appellant, *C. York, Al. Wedderburn.* For the Reſpondent, *Thos. Miller, Al. Forreſter.*

Fol. Dic. v. 3. p. 89. Appealed Caſes in Advocates' Library.

1764. *November* 14. STEVENSON *againſt* STEWART and LEAN. No 157.

A BILL was found regularly proteſted in London, though the notary was not preſent. His clerk preſented the bill for payment, and returned with the anſwer to his maſter; who extended the proteſt at home; and inſerted the names of two witneſſes as being preſent; this being according to the form and practice of London. *See* The particulars, No 103. p. 1518.

Fol. Dic. v. 3. p. 90.

1766. *June* 17.

MESSRS CHARLES and ROBERT FALLS, Merchants in Dunbar, Chargers, *againſt* ALEXANDER PORTERFIELD of Fulwood, Merchant in Glaſgow, Suſpender.

No 158.
A bill payable at three days *ſight*, was allowed to lie ſome time in the hands of the drawee, neither accepted

TEN pieces of Madeira wine, the property of Mr Porterfield, were, at Charlestown South Carolina, ſhipped on board the Black Prince, a ſhip of the Meſſrs. Falls, bound to Dunbar, and conſigned to the care of the Meſſrs Falls. The veſſel arrived at Dunbar 1ſt April 1764, which the Meſſrs Falls, by a letter of 3d April, notified to Mr Porterfield, and deſired to know to whom they ſhould apply, at Edinburgh, for payment of the freight, duty, and other charges, of the

No 158. nor proteſted. This, though regarding a bill at *ſight*, was an undue delay, and recourſe was loſt.

extent of which, they ſaid, they would, in a few poſts, ſend Mr Porterfield a note.

On the 24th April, the Meſſrs Falls tranſmitted to Mr Porterfield an account of the duty, freight, and charges, amounting to L. 129 : 1 : 0 Sterling; and added, 'For which you will ſend us, in courſe, an order on Edinburgh, as you know 'the duties are money down.'

Mr Porterfield, on the 3d May, tranſmitted to the Meſſrs Falls, a bill, dated 2d May, drawn by Thomas Johnſton, merchant in Glaſgow, on William Borthwick, merchant in Edinburgh, for L. 129 : 1s. Sterling, payable three days after ſight, to Mr Porterfield, or order, bearing value received, and indorſed by Mr Porterfield to the Meſſrs Falls, who, on the 7th May, acknowledged receipt of the bill, which they ſent to Mr Borthwick, the perſon drawn on, to be accepted and returned to them.

Mr Borthwick happened not to be in town at the time Meſſrs Falls letter, with the bill, reached Edinburgh; but his clerk wrote Meſſrs Falls, 11th May, that Mr Borthwick was ſoon expected home, when he ſhould preſent the bill, and doubted not but he would honour the ſame.

Upon 26th May, the Meſſrs Falls ſent a clerk to Edinburgh, to require Mr Borthwick either to return or accept the bill, when Mr Borthwick deſired the bill might be left with him a few days longer, when he ſhould either accept it, or return it proteſted for not-acceptance; but the bill not being returned, Meſſrs Falls, on 5th June, again ſent a clerk, with orders either to get the bill accepted, or to proteſt it. Mr Borthwick delivered the bill to Meſſrs Falls clerk, with a proteſt taken againſt himſelf, on 31ſt May, for not-acceptance, and againſt the drawer and indorſer for recourſe, &c. And, on 6th June, Meſſrs Falls clerk took a new proteſt, not only againſt the drawer and indorſer, but againſt Mr Borthwick for not-acceptance, and not payment, and damages, &c. on account of keeping up the bill without accepting it, or returning it with a proteſt for not-acceptance.

Meſſrs Falls, on the 7th June, wrote Mr Porterfield, acquainting him of what had happened, and incloſing the bill, with the two proteſts, and deſiring to be reimburſed of their money, in reſpect the draught had not been anſwered; and, on 14th June, Mr Porterfield returned the bill and proteſts, and refuſed payment, on account of the bills not being properly negotiated; and, at ſame time, informed Meſſrs Falls, that Johnſton, the drawer of the bill, had ſtopt payment on the 5th June. On receipt of that letter, Meſſrs Falls cauſed regiſtrate the proteſt, and charge Mr Porterfield for payment; and ſuſpenſion being preſented, the queſtion came before Lord Coalſton as Ordinary, who took the cauſe to report to the Court.

Pleaded for the ſuſpender: The laws and practice of all mercantile nations, require the moſt exact diligence in the regular negotiation of bills; they muſt be preſented *quam primum* for acceptance, and, when due, for payment; and very fatal conſequences may enſue from the ſmalleſt neglect or delay in the regular

negotiation of them. It may, in ſome very particular caſes, happen, that acci- No 158.
dents occur, which muſt prevent the taking of thoſe ſteps of negotiation, which are in general required, and that without the holder of the bill being to blame; and, in ſuch caſes, it would be unjuſt he ſhould forfeit his recourſe; but, where the delay proceeds from his own neglect or fault, he muſt anſwer for the conſequences; and, in this caſe, the chargers have been groſsly negligent in the negotiation. Their entruſting the bill to Borthwick himſelf; leaving it in his hands for ſuch a ſpace of time, without inquiring whether he had accepted or not; indulging him in a farther time to deliberate; neglecting to inquire after that time was elapſed; the bill itſelf ſtill allowed to remain in his hands, though proteſted by him on the 31ſt May; no proteſt taken by the chargers till 6th June, the day after Johnſtone had failed; no notice given the ſuſpender of theſe proceedings before 7th June, evince, in the ſtrongeſt manner, not only an undue negotiation, but even a negligence not common among men of buſineſs in their own affairs; and, ſo ſenſible were the chargers of the irregular negotiation of this bill, that, in the inſtrument of proteſt taken againſt Borthwick, by them, they ſet forth the irregularity of his proceedings, and proteſt againſt him for damage, &c. on that account.

It has been *argued* for the chargers, That this being a bill payable three days after ſight, they were not bound to preſent it for acceptance *quam primum*; and, in ſupport of this argument, reference was made to two deciſions, Innes *contra* Gordon, 7th February 1735, No 138. p. 1562.; and William Andrew *contra* Syme, 21ſt November 1759, No 152. p. 1584. In the firſt of theſe caſes, the delay of preſenting the bill was very ſmall; all that could be alleged being, that, if it had been tranſmitted for acceptance, in courſe of poſt, it might have been exigible four days before the acceptor broke; whereas, by neglecting a poſt, the acceptor broke before it was exigible. In the other caſe of Syme, the delay of preſenting the bill for acceptance was occaſioned by unavoidable accidents, the porteur of the bill being detained by contrary winds on his paſſage to Holland; by which means the bill could not be preſented till about the time the Dunlops of Rotterdam, on whom it was drawn, broke; which is a very different caſe from the preſent. Some latitude may be allowed as to preſenting bills at ſight for acceptance; but it is impoſſible to maintain that ſuch bills are totally exeemed from the common rules of negotiation; and, after being preſented for acceptance, which aſcertains the term of payment as preciſely as if the bill had been drawn payable at a day certain, it is abſurd to maintain that the ſame exact diligence is not requiſite in the after-ſteps of negotiation, as in the caſe of other bills; this is a diſtinction no lawyer ever thought of, for which no reaſon can be aſſigned, nor precedent produced.

Another defence was maintained by the chargers, that the bill in queſtion being indorſed to them, not for value inſtantly received, or *in ſolutum* of what the ſuſpender owed them, but in ſecurity of a prior debt, for which, when paid, the ſuſpender was to have credit, they were not bound to do diligence; and, in

No 158. ſupport of this plea, reference was made to the deciſion, William Alexander *contra* Robert Cuming, No 150. p. 1582. The ſuſpender has no occaſion to conteſt the authority of that deciſion, the circumſtances of which were very different from what occur in this caſe; and a ſimilar queſtion occurred in a much later caſe, between Murray and Groſſet, No 156. p. 1592.; where Groſſet, contending that no recourſe was competent againſt him, in reſpect of the undue negotiation of a bill tranſmitted by him to the receiver-general, who, on the other hand, pleaded, as the chargers here do, that it was but a depoſit or pledge for a prior debt, to be credited when paid, and that an aſſignee in ſecurity was not bound to diligence; and though this Court, in February 1762, ſuſtained the receiver-general's defence, the judgment was, in March 1763, reverſed upon an appeal, and the receiver-general found liable for the contents of the bill; but, in the preſent caſe, the bill was not indorſed to, or depoſited with the chargers, as a ſecurity for a prior debt, but as an immediate remittance for replacing the money deburſed by the chargers on the ſuſpender's account.

Answered for the chargers: Bills, when firſt introduced, were always drawn payable at a day certain; ſo that the drawer or indorſer had reaſon to expect the money to be paid, and their obligation to be extinguiſhed at that preciſe day; and, if it was not ſo, it was equitable that the holder of the bill ſhould be obliged to take a proteſt, and give due notice to the indorſer or drawer, to enable them to take the proper ſteps for their relief. But bills are ſometimes intended for the conveniency of the perſon to whom they are indorſed or made payable, who being uncertain of the time he can demand acceptance or payment, gets the bill made payable at ſight; and ſuch bills are, in effect, no other than letters of credit, which the porteur may uſe ſooner or later according to his conveniency; and, on this principle, the Court determined in the caſe mentioned above, 7th February 1735, that bills drawn on ſight did not require the ſame negotiation with bills payable on a certain day; and ſo was again determined, William Andrew *contra* Syme, 21ſt November 1759. In order to get free of the weight of this deciſion, the ſuſpender *argued*, that, though the porteur had a diſcretionary power as to preſenting a bill on ſight, yet, after it was preſented, he became liable to the ſame exact negotiation as is required in the caſe of bills payable on a day certain. But the chargers can ſee no foundation for this diſtinction. It ſeems ſtrange, that the porteur ſhould put himſelf in a worſe condition by preſenting his bill, than if he had taken no ſtep at all. If he could not forfeit his recourſe by not preſenting it, neither can he do ſo by lodging the bill ſooner than he needed to do.

The negotiation of bills of every kind muſt depend on circumſtances; where an accident prevents exact negotiation, the creditor will not forfeit his recourſe. The chargers tranſmitted the bill to Borthwick the very day they received it; it was owing to the accident of his abſence, and their reſiding at a diſtance, that they were ſo long in getting his final anſwer. It is a common practice to ſend bills to merchants on whom they are drawn, if the porteur does not reſide in the

same place. The bill, by its nature, did not lay them under any obligation for using exact negotiation to secure their recourse, of which they cannot be deprived by the supervening unexpected event of Johnston the drawer's bankruptcy. The negotiation used would have founded both the chargers and suspender in recourse upon Johnston; and, as the chargers have been guilty of no *lata culpa*, there is no ground in law for throwing the whole loss occasioned by Johnston's bankruptcy upon them. No 158.

The chargers accepted of this bill, not in payment, but in security of the debt due them by the suspender; they were not to pass it to his credit till it was actually paid, and, as indorsees in security, were not bound to exact diligence; so was determined, Alexander *contra* Cuming, (mentioned above.) In the case of Murray *contra* Grosset, founded on by the suspender, many specialities occurred upon which Grosset *pleaded*, to show, that, in that circumstantiate case, the indorsee had taken the risk of the bill entirely upon himself.

'Upon report of Lord Coalston, and having advised the informations given in 'by each party, the LORDS found, that the chargers, Messrs Charles and Robert 'Fall, have no recourse against the suspender, Mr Porterfield, for the contents of 'the bill charged on; and therefore suspend the letters *simpliciter*, and decern.'

G. Fergusson. *Fac. Col. No* 109. *p.* 374.

1773. *February* 2. JOHN FINLASON *against* JOHN EWING.

No 159.
To preserve recourse against an onerous indorsee, on a bill passed by him, in course of trade, the bill must be duly negotiared, whether the drawer was creditor or not to the person drawn on.

EWEN, merchant in Aberdeen, having had some dealings with Stephen Bedford of Birmingham, in February 1769 transmitted to him, in part payment, an indorsed bill of L. 15 Sterling, dated at Aberdeen, February 18. 1769, bearing value received, and drawn by William Mitchell there, upon Alexander Mitchell, merchant in London, payable to Ewen, or order, 35 days after date.

Ewen being sued before the Sheriff of Aberdeen, for payment of Bedford's draught on him for L. 28 Sterling, indorsed to Finlason, he *objected*, that Bedford had not given him credit for the above-mentioned bill of L. 15; but the Sheriff having over-ruled his defence, which was, that the bill in question had not been duly negotiated, and therefore Bedford had forfeited his recourse, Ewen brought a suspension of the decree, on the same ground, and *pleaded*, that, although the bill was sent to Bedford in course of post, he had neglected to present it for acceptance, till seven days after it became due, viz. April 21st, when acceptance was refused; and, even then, no protest was taken; nor was the dishonour notified sooner than seven days after the bill fell due, when Bedford wrote from London the following letter to Ewen: 'April 21. 1769. Sir, The bill on Alexander 'Mitchell you sent me to Birmingham I kept, as I was going to London, for 'pocket-money; but, to my disappointment, when I came to present it, I was 'told it would not be paid; they had no effects, &c.; therefore I have returned 'it; for which please send me another,' &c. And, by this time, Alexander