

[30th May 1834.]

Sir CHARLES ABRAHAM LESLIE, Appellant.

No. 23.

ALEXANDER SHEPPERD, Respondent.

*Bill of Exchange.*—After a bill had been protested, and diligence executed against the drawer and acceptor, at the instance of an onerous indorsee, a party, at the request of the acceptor, retired it by granting his own bill at six months, but stipulated for an assignation to the bill and diligence:—Held, that he had recourse against the drawer after he had been obliged to retire his own bill, and that this was not barred by the acceptor of the original bill being allowed time, till the new bill fell due, to provide funds for retiring the original one, without any communication with the drawer.

THE appellant, Sir Charles Leslie, on the 17th Sep-

2D DIVISION.  


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 Ld. Mackenzie.

tember 1825, drew a bill on Thomas Mackenzie Paterson for 100*l.*, payable three months after date, and which Paterson accepted for value. This bill the appellant indorsed, also for value, to James Thomson, who was his ordinary law agent. When the bill fell due it was dishonoured, whereupon it was protested, at the instance of Thomson, against both Paterson and the appellant, and they were charged on letters of horning, denounced, and caption issued. On the day following the denunciation Paterson wrote to Thomson, asking for a delay in payment for six months, on condition that the respondent Shepperd would either sign or guarantee a bill for the amount. Thomson answered, that he would take Shepperd's bill, as proposed, provided it were

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immediately sent to him. After some correspondence between Thomson and Shepperd, the latter wrote, that although he was already under heavy engagements for Paterson, yet, as he thought his affairs were now in a fair train of arrangement, he would accept a bill, provided it did not exceed 100*l.*, and adding, “ I “ presume you will have no objection to give me “ an assignation to the bill, and diligence, at my own “ expense.” In consequence of this letter, Thomson on the following day drew a bill on Shepperd for 99*l.* 19*s.* 4*d.*, and he sent at the same time Paterson’s bill, with the diligence, of which he promised to grant an assignation when required. Shepperd thereupon accepted and returned the bill to Thomson, payable six months after date. No notice of these proceedings was given to the appellant, and no farther steps were taken on the diligence against him at this time, nor at all against Paterson. The latter having failed to retire the original bill, Shepperd was obliged to pay the one granted by him, when it fell due. He then required, and obtained, from Thomson, an assignation to the original bill, and diligence, both against Paterson and the appellant. Intimation of this assignation was sent by letter to the appellant, but he alleged that he had never received it. In 1829 Shepperd gave a new charge on the diligence to the appellant, who presented a bill of suspension, which was passed, in which he alleged, 1. That Shepperd had interposed merely as a friend of and to protect the true debtor, Paterson, with whom he was engaged in various pecuniary transactions, as to the purchase of land and otherwise, and having done so for his honour alone, he could make no better claim against

the appellant than Paterson himself could have done \* ; and that accordingly the amount of the bill was put to Paterson's debit in account with him. 2. That in point of fact the value with which Shepperd's own bill had been retired belonged to Paterson ; and, 3. That at all events, as by Shepperd's interposition time had been given to Paterson for six months, without the consent of the appellant, the latter was discharged.†

In answer, Shepperd denied the allegations on which the two first pleas rested ; and stated, that while he no doubt was desirous to befriend Paterson, and enable him to wind up his affairs free from diligence, he had granted his bill expressly on condition that he should receive an assignation to the diligence against the appellant, in security of his relief ; and he maintained that the allegation of having given time was, under the circumstances, and more especially as ultimate diligence had been raised both against the appellant and Paterson, of no relevancy ; that it was clear Thomson was entitled to take the respondent's bill, and if so, then, as the respondent was his assignee, he could not be in a worse position than Thomson.

The Lord Ordinary suspended the letters, on the ground that time had been unduly given to Paterson. The respondent having reclaimed, and the Court, being of opinion that the interlocutor was erroneous on the ground on which it was placed, made a remit, before

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\* Bayley on Bills, 328 ; Thomson on Bills, 498 ; Johnston v. Robertson, 2d Feb. 1830, 8 S. & D. 430.

† Chitty on Bills, 299 ; Thomson v. Forrester, 18th June 1824 ; 2 Sh. App. Ca. 317 ; Huine v. Youngson, 12th Jan. 1830, 8 S. & D. 295 ; Thomson on Bills, 580 ; Stirling v. Forrester, 13th June 1821 ; 1 Sh. App. Ca. 37 ; Moubray v. White, 17th June 1824, 3 S. & D. 146 ; Allan and Son v. Laidlaw, 3d Dec. 1834, 3 S. & D. 336.

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farther answer, to an accountant, to report ;—1. Whether or not Shepperd's acceptance to Thomson had been retired with the money and means of Paterson ; 2. Whether there was any account in process on the charger's books which imported that the acceptance had been retired with Paterson's money or means ; 3. Whether, when it fell due, Shepperd had money or means belonging to Paterson sufficient to retire it. 4. Whether, if not so, any funds afterwards came into his hands which he was bound to apply in extinction of any claim competent to him on that acceptance.

The accountant reported in the negative on all these points, but stated, that, after retiring it from his own funds, Shepperd put it to the debit of an account against Paterson, in whose favour there arose a balance due on the face of that account ; but Shepperd was then and still was under heavy obligations for Paterson ; and he left it to the Court to decide, “ Whether the charger, “ having retired the said acceptance from his own “ funds, and entered it to Paterson's debit in a particular “ account, the balance of which came by subsequent “ transactions to be in favour of the latter, is or is not “ thereby precluded from proceeding against the co- “ obligant in that bill, keeping in view that Paterson “ was all along and still is under other obligations to “ the charger to an amount greater than the balance in “ his favour of the account in question at any period of “ its currency.”

The Court, being of opinion that Shepperd was not precluded, altered (22d February 1833) the interlocutor, and found the letters orderly proceeded, with expenses.\*

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\* 11 S. & D. 436. At page 439, line 7, for Thomson read Shepperd.

The appellant entered an appeal, and pleaded on all the grounds maintained by him in the Court of Session. But —

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the sum of one hundred and seventy-eight pounds fifteen shillings and sixpence, for his costs in respect of the said appeal.

ALEXANDER DOBIE — JOHN MACQUEEN,  
Solicitors.