

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.

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 circumstantiated 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.

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

No 159.

To preserve recourse against an onerous indorsee, on a bill passed by him, in course of trade, the bill must be duly negotiated, whether the drawer was creditor or not to the person drawn on.

No 159. Mitchell, upon whom the bill was drawn, as well as Mitchell the drawer, had stopped payment.

In *answer* thereto, it was stated, that the bill falling due on the 14th April, Bedford, then in London, thought not worth his while to call for so small a sum, till the 17th, which was the last day of grace, when he was informed that Mitchell of London had failed on the 13th, the day before the bill fell due; but that, though it had been otherwise, he had not been, for a considerable time before, possessed of any of the effects of Mitchell of Aberdeen; that no protest could be taken, either for non-payment, or even for non-acceptance, till the last of the three days of grace, being the 17th, when the bill was actually presented, and when a protest might perhaps have been necessary to found Mr Bedford in his recourse against Ewen, by summary diligence; but that, under the particular circumstances of this case, a protest would have been of no avail to Ewen, in recovering the contents of the bill, either from Mitchell of Aberdeen, or Mitchell of London.

THE LORD ORDINARY, in respect the suspender did not offer to prove that the person, on whom the bill was drawn, had value of the drawer in his hands, found the letters orderly proceeded, reserving to the suspender his recourse against the drawer of the bill.

Ewen reclaimed, *contending*, that, by the universal practice of merchants, it is understood that no recourse is due upon a bill improperly negotiated, whether the person drawn upon was debtor to the drawer or not. Conformably whereto, it had been decided, in many instances, particularly Hart, No 148. p 1580.; and Tod, No 151. p. 1583. *2dly*, That the burden of a proof could not be laid on him. And the Court being clearly of opinion, that, in the question of recourse, there was a just distinction between the case of the drawer, and that of an onerous indorsee, the latter of whom was materially interested, that the bill, in all events, should be properly negotiated, and was not bound to submit to such investigations as the interlocutor pointed at;

'THE LORDS sustained the reasons of suspension *quoad* the L. 15 bill, and gave the expence of process.'

Act. W. M'Kenzie.

Alt. Buchan Hepburn.

Clerk, Kirkpatrick.

Fol. Dic. v. 3. p. 84. Fac. Col. No 53. p. 136.

1774. February 4.

JOHN REYNOLDS, Merchant in London, *against* JAMES SYME, and JOHN WEMYSS and SON, Merchants in Dundee.

No 160.

A bill drawn from Scotland upon England, is

THE defender, James Syme of Dundee, on the 20th day of January 1772, drew a bill on Alexander M'Roberts, merchants in London, in favour of the other defenders, Wemyss and Son, also of Dundee, for L. 100 Sterling, payable