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the agent not having sold the goods;—while Mr. Duguid's interference before that date in stopping a sale to Brown, on the pretext that he had purchased the sugars, would, upon this view of the case, appear the more improper and unwarranted. In these circumstances, it will be evident that through the fault of the appellants, the respondents were deprived of an advantage they were entitled to, and would have secured, but for the falsehood and misrepresentation of Mr. Duguid. Their conduct, therefore, must operate to annul the bargain, or rather, so as to make it be held *that there never was a bargain.*

After hearing counsel, it was
Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *J. Anstruther, Geo. Ferguson.*
For Respondents, *T. Erskine, W. Grant.*

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[Mor. 1620.]

Messrs. PATRICK REID, DAVID KING, and Co., Merchants in New York; JAMES WILSON and Co., Merchants in Kilmarnock; and JAMES WILSON and SONS, Merchants there, - - } *Appellants;*

ARCHIBALD and JOHN COATS, Merchants in Glasgow, - - - } *Respondents.*

House of Lords, 21st Feb. 1794.

BILL—NEGOTIATION—NEGLECT.—A bill was taken in security of a prior bill, it being at same time agreed that the prior endorsers and acceptors should remain bound. The acceptors of the new bill failed, and the bill in security was never recovered. Thereupon action was raised upon the original bill against the acceptors and endorsers thereof, which had been duly protested. Held, that a bill granted in security is not exempted from the strict rules of negotiation, and this having been neglected by the holders of the new bill, that the acceptors and endorsers of the original bill were not liable in payment.

The respondents, Archibald and John Coats, having furnished goods to James Wilson and Sons, merchants in Kil-

marnock, received from them, in payment of these goods, a bill for £400, payable 12 months after date.

The bill was drawn by James Wilson and Co. upon Reid, King and Co., the appellants, by whom it was accepted. By James Wilson and Co. the bill was endorsed to James Wilson and Sons; and by them it was endorsed to the respondents, and by the respondents to Archibald Grahame, cashier of the Thistle Bank in Glasgow.

When the bill became due, it was protested by the Thistle Bank against the acceptors, drawers, and endorsers, and the respondents having paid the contents of the bill to the bank, became the holders of the bill against the prior endorsers and acceptors.

The respondents having failed to recover payment against the acceptors, Reid, King and Co., and also against the drawers and endorsers in this country, as these companies had partners residing in Antigua; they sent the bill to Ludwell and Scott, merchants in Antigua, with power of attorney, and special instructions to recover the contents.

Ludwell and Scott were unsuccessful in recovering payment of the bill from these parties; but they entered into an arrangement, without any communication with the respondents, with Cumberland Wilson, a partner of James Wilson and Co., and James Wilson and Sons, whereby it was agreed that he should give a bill, by way of additional security, by drawing another bill in favour of the respondents, on Ross and Butler, whom, it was alleged, were debtors to Wilson and Co. This was accordingly done, whereupon Ludwell and Scott granted the following receipt for the bill so received :—" Antigua, Aug. 1, 1785. Received " from Cumberland Wilson, Esq., partner in the house of " James Wilson and Co., his draft of this date, on Messrs. " Ross and Butler, for the sum of four hundred and fifty- " three pounds, seventeen shillings and five pence sterling, " and accepted by them payable in this island at 12 months' " date; which bill is received *as an additional security for* " *the said protested bill, but, by this express agreement, is in* " *no respect to exonerate the acceptors, or any of the parties* " *thereby bound, until actual payment thereof is made.*"

When this bill fell due it was not paid, although repeated letters were sent to Ludwell and Scott, urging them to recover payment. Latterly they could get no answer to their letters; and finally, on 15th January 1789, a letter was received from the agent of Mr. Ludwell, intimating his

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long illness and death, stating that Mr. Scott resided in Liverpool, and that Ross and Butler were bankrupts. Ludwell and Scott, it was alleged and not denied, were closely connected together, both by relation and in business with Ross and Butler; Ross having married Scott's sister, and Butler, Ludwell's cousin, and Ludwell and Scott were, besides, securities for Ross and Butler to their correspondents, Henry Paterson and Company of London, for large cargoes of goods exported by them.

The respondents ordered the original bill of £400 to be returned, and raised the present action against the whole parties on that bill. In defence to this action, it was stated, that the bill delivered over to Ludwell and Scott, attornies for the pursuers (respondents), on Ross and Butler, was a bill which, when paid, was to be applied to the extinction of the debt now sued for. And as at this time, and for years after, Ross and Butler were in good credit: and as they had sufficient funds in their hands to answer the above draft, the respondents, or their attornies, either did, or ought to have recovered payment from them; and as the amount of the draft fully paid the debt due to the pursuers, the defenders fell to be assoilzied from the present process.

The Lord Ordinary, after ordering a condescendence of the facts in support of the libel, pronounced this interlocu-

June 1, 1791. tor:—" Having considered the condescendence, &c., and " having considered that the pursuers (respondents) did by " their attornies, Ludwell and Scott, demand payment of the " bill in question (the bill pursued on) when due from the de- " fenders (appellants), who were then unable to pay the same; " and that the said attornies did receive from them another " bill on Ross and Butler for the amount, interest, and " charges and commission as an additional security, and un- " der the express declaration that it was in no respect to " exonerate the acceptors or others bound, until actual pay- " ment; and this was so received by the said attornies with- " out any communication with their constituents, and at the " request, and for the accommodation of the defenders: and " having further and separatim considered, what is stated in " the condescendence with regard to the transactions be- " tween Reid, King and Co. and the other defenders the " Wilsons; and that no notice is taken thereof in the answers " nor even in the duplies, although the defenders were called " upon in the replies to speak to it, and it was then averred " that the defenders, the Wilsons, got the sum in the bill to pay

" the pursuers;—repels the defences; finds the defenders " liable in the sum libelled, and decerns with expenses."

On representation, the Lord Ordinary adhered. On reclaiming petition to the whole Lords, the Court refused the prayer of the petition. And, on second petition, they adhered.*

Against these interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellants.*—It is clear that Ludwell and Scott were the attornies of the respondents; they describe themselves as such in the receipt which they gave for the bill upon Ross and Butler; and it is not denied that they acted in that character, nor that they, in doing what they did, exceeded the amount of their commission. Their actings, therefore, must be taken as if they were the acts of the respondents themselves.

There is a strong legal presumption that the bill upon Ross and Butler has been paid. The length of time which elapsed between the time when the bill became payable and that of giving notice of its being dishonoured, the relation in which the holders stood to the acceptors Ross and Butler; the holders themselves, men trained in the habits of business, and well acquainted with all the forms of it; these circumstances leave little room to doubt but that the bill has been paid.

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* Opinions of Judges:

LORD PRESIDENT CAMPBELL.—" This is a bill transaction. The bill drawn by Cumberland Wilson on Ross and Butler having only been deposited with Ludwell and Scott as a further security for the debt due by Messrs Wilson and Co. and Messrs Coats and Co., it was incumbent upon Mr Wilson himself, both as drawer of the bill, and as liable for the principal debt, to have taken care it should be duly recovered from the acceptor when due. He was more interested in this than any other person; and Ludwell and Scott acted in part of the business as his attornies, more than as the attornies of Messrs Coats and Co. It is enough for these last mentioned gentlemen to say, we have not got payment from Ross and Butler, and therefore we must have payment from the original debtors, the Messrs Wilson and Co. The case is the same as if Messrs Wilson had given a receipt for payment out of any other fund which had proved deficient."

17th Jan. 1792, " Bill transaction. No general point of law. See former notes." (Supra.)

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But supposing the bill not to have been paid, it is established law that the holders of a bill must demand payment of it immediately as it becomes due; and that he must take the earliest opportunity of informing the endorser or drawer, of its dishonour, otherwise he will lose his recourse. In the present case, it does not appear, nor is it even pretended, that any demand was made at the time of the bill's becoming due, nor indeed at any time after; no notice at all was taken for nearly three years, not till the insolvent circumstances of the acceptors Ross and Butler rendered it impossible to take any measures for recovering payment of it from them. The respondents, therefore, by their laches, or which is the same thing, by the laches of their agents, have made the bill their own, and have forfeited all claim upon the appellants. And the wisdom of the law in requiring this diligence in the holder, was perhaps never more manifest than upon the present occasion, since, if the bill had been presented in the regular course, there is no reason to doubt it would have been paid, as Ross and Butler were at the time solvent, and continued so for two years after. From the negligence of Ludwell and Scott, therefore, the appellants have sustained an actual loss.

It is no answer to say, that the bill of Ross and Butler, having only been received as an additional security, any neglect of proper diligence upon it can have no weight; because there is no difference in law between a bill sent as a remittance from one correspondent to another, or given as an additional security for debt. The bill has the same properties, and the same obligations attach upon the holder with respect to it in the latter case as in the former. Where a bill is remitted to another, as in the present instance, as security for one that has been dishonoured, this bill does not cease to be a negotiable instrument, nor is it discharged of the rules required in negotiation; and it makes no difference as to the consequences of neglect of such negotiation, that the party, in giving and taking the new bill, has stipulated that it is not to liberate the parties on the old bill. But even supposing the holders of a bill in security to be in general not liable for any neglect whatever, still there are some circumstances which would render the respondents accountable for the amount of the bill: 1. Ludwell and Scott knew that Cumberland Wilson, in settling with Ross and Butler, took security for the balance remaining due to him and his partners after deduction of the bill which he

had some months before drawn in favour of the respondents, one of them being a party to the transaction; and they further knew, that after he had settled with Ross and Butler in this manner, he returned to Britain a short time before the bill he had drawn in their favour became due. From all which it is evident that it must have been understood between the parties that Ludwell and Scott, who received the bill, were also to pay attention to the recovery of it, and that it was given them on these terms. 2. Ludwell and Scott were not merely guilty of neglect; their conduct amounts to positive wrong done to the appellants, they having recovered large sums from Ross and Butler after this bill became due, which they applied wholly to relieve themselves of debts for which they were bound, but which they did not apply (at least so it is now pretended) any part they so received in payment of this bill which was lying in their hands past due. 3. It is to be observed, that the respondents, or their attornies for them, took a sum for commission for receiving the money for Ross and Butler, as appears from the sums added to the bill, a state of which was transmitted to the respondents in August 1785, when the bill was given. This, therefore, independently of every thing else, makes them liable, if not for strict negotiation, at least to some diligence in which they and their attornies have totally failed.

*Pleaded for the Respondents.*—The bill for £400, upon which the appellants put their names, has never been paid, and neither has the bill granted by Ross and Butler in security of the former bill; consequently the respondents have not recovered payment of the debt justly due to them for value received from the respondents by the appellants, in consequence of goods furnished in the fair course of trade. This is proved by the fact of both the bills being now in possession of the respondents, who upon receiving payment of the £400 bill with interest and expenses, will deliver up both the original bill and the bill granted in security by Ross and Butler.

The defence pleaded by the appellants against paying the debt, which is in this manner proved to be still owing to the respondents is, that the respondents should have recovered payment of the bill due by Ross and Butler; and that if they have not done so, they have themselves to blame, and cannot now have recourse against the appellants. The respondents, it is said, should have negotiated the bill a-

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gainst Ross and Butler, in all the forms known in law and practice; but, instead of doing so, they took no step whatever to recover its contents, but neglected demanding payment till Ross and Butler became bankrupt. They were therefore guilty of a gross neglect, and the damage arising from that neglect they must bear themselves.

When Ludwell and Scott took the bill upon Ross and Butler from Cumberland Wilson, they took it as an additional security for the debt owing by the appellants, and under the *express declaration that it was in no respect to exonerate the acceptors of the original bill, or any of the parties* thereby bound, till actual payment of the bill by Ross and Butler was made. The bill of Ross and Butler, therefore, was not taken in solutum of the debt due by the appellants, but merely in security of that debt.

In point of law there is nothing more clearly fixed in the law of Scotland than this, that where a bill is granted in security, it does not require to be duly negotiated like other bills, in order to preserve the right of the person who holds it to insist for the original debt, in security of which the bill was granted; if the bill given in security is paid, the debt is of course extinguished to the amount of that payment; but if the bill given in security is not paid, the debt remains still due, and it does so though the holder of the bill in security has taken no step whatever to operate payment. This has been found by repeated decisions:—In particular, it was decided to be the law in the case of Alexander *v.* Cumming, 3d Jan. 1758; in which case it was found that where a bill is granted not in solutum of a debt, but only in security, the endorser was still liable on the original ground of debt, though the holder of the bill had taken no step whatever to recover payment of the bill given him in security. The same doctrine was held to be law in the still later cases of M'Kinnon *v.* Garroch, 1st Feb. 1775; Glass *v.* Kellie, 26th Nov. 1776; Pringle *v.* Keltie, 11th Feb. 1777; and M'Ausland *v.* Hamilton and Co. 27th Nov. 1779.

Had the bill of Ross and Butler been taken in solutum of the debt owing by the appellants, the case would have been different. But a *novatio debiti* is never to be presumed; and in this case there is no room for presumption, as the fact, that the bill upon Ross and Butler was taken merely as an additional security for the bill in which the appellants were bound, is proved not only by the terms of the receipt

granted by Ludwell and Scott to Cumberland Wilson, but by this circumstance of real evidence, that both the original bill, and the bill drawn upon Ross and Butler, remained in the possession of Ludwell and Scott. Whether Ludwell and Scott took any steps to recover payment of this bill (original bill) the respondents cannot tell; but it is certain that from the moment that Ludwell and Scott took the bill in security, which they did without any authority from the respondents, repeated letters were written by the respondents, during the course of two years, urging Ludwell and Scott to recover payment of the bill from Ross and Butler, and urging them to procure payment of the debt in question. Whether Ludwell and Scott took any steps to that purpose, it is immaterial to inquire, because it was not incumbent upon the respondents to make a single demand upon Ross and Butler to pay the bill which they had granted; for it is clearly contrary to law, to say that if a creditor does not pursue a cautioner or surety for a debt, he is not to be allowed to make a demand upon the principal obligant: That a creditor cannot distress a surety without discussing the principal is established law; but to reverse the rule, and to say that a creditor must discuss the cautioner, or lose his claim against the principal obligant, is a doctrine that was never heard of before. As Ross and Butler were merely sureties for the appellants, it is impossible to conceive upon what ground the fact of the respondents not having prosecuted the sureties while they were solvent ought to have the effect of liberating the appellants. On these grounds, and in particular also of the precise terms of the receipt, which expressly stipulated that the acceptors and endorsers of the old bill were to remain bound, the interlocutor of the Court of Session ought to be affirmed.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be reversed, and that the defenders (appellants) be assoilzied.

For Appellants, *J. Anstruther*, *Wm. Adam*.

For Respondents, *W. Grant*, *Ar. Campbell*, *Wm. Tait*.

NOTE.—It is stated in Morison (1620) that this case was reversed on the same principles as those decided in Sir J. Murray *v.* Grosset, 16th Feb. 1762, House of Lords, 17th March 1763; ante vol. ii. p. 81; namely, that a bill given in security was not exempted from the strict rules of negotiation. Vide also Professor Bell's Com. vol. i. p. 425.