alleged, ſince he is abundantly ſolvent and reſponal. 3*tio*, Langton being none of the parties concerned in the bill, the poſſeſſor, who got it for an onerous cauſe, was not obliged, in the negotiating thereof, to regard the drawer's buſineſs with her brother, or what moved her to draw the bill upon his account. But the truth is, this bill has been given either for debt due by her to him, or elſe freely to ſave his credit and perſon at the time; for he was notourly inſolvent. No 127.

THE LORDS repelled the defence.

Fol. Dic. v. 1. *p.* 100. *Forbes, p.* 113.

*** *See* Yule *againſt* Richardſon, Fount. v. 2. p. 64. *voce* SUMMAR DILIGENCE.

1706. *July* 10.

SIR ALEXANDER BRAND of Brandsfield, *againſt* EDWARD YORSTOUN, Tenant in Balbertoun.

No 128.
The poſſeſſor of a bill, was denied recourſe, not having proteſted for not payment, nor done any diligence againſt the perſon drawn upon, until he became inſolvent.

ALEXANDER BRAND of Reidhall as principal, and Edward Yorſtoun as cautioner, having granted bond to Sir Alexander Brand, for the ſum of L. 1944: 18s. Sir Alexander thereafter obtained a precept from Reidhall upon Riccarton, for L. 2536: 6s.; whereby Riccarton was to retire his bonds, tickets, and aſſignations, by John Brand to his uncle, with all diligences done againſt him, and to take a general diſcharge from Sir Alexander, of all he could aſk or crave of Reidhall, preceding the date; which ſhould oblige him to allow the ſame to Riccarton, in part of payment of his bond for the price of the lands of Weſterhails. Sir Alexander, in December 1700, about thirteen months after the term of payment of the precept, which Riccarton accepted, received from him 1000 merks in part of payment; and, the firſt of March 1701, took from him a bond of corroboration for the remaining ſum, ſuperceding payment till a certain term after the date of it. Riccarton's affairs falling into diſorder, and he thereby failing in payment, Sir Alexander charged Edward Yorſtoun upon the bond wherein he was cautioner; who ſuſpended upon theſe reaſons, 1*mo*, The charger had innovated the debt by not only accepting the precept upon Riccarton, and receiving partial payment thereof; but alſo by taking his bond of corroboration thereof, more than a year after the term of payment, and by prorogating the term of payment without the drawer's conſent, and adjudging Riccarton's eſtate upon the ſaid bond. 2*do*, The charger did not duly negotiate the precept, by proteſting for not payment againſt the acceptor *debito tempore*; but ſuffered him to break without timeouſly certiorating the drawer as he ought to have done; ſince by the act 1696, inland precepts are equivalent to foreign bills, which muſt be ſo negotiated, otherwiſe the poſſeſſor can have no recourſe againſt the drawer; and conſequently Reidhall and the ſuſpender his cautioner are free.

Answered for the charger: The taking a precept upon Riccarton can never be underſtood an innovation; becauſe innovation is never preſumed, unleſs expreſt. The ſum in the bond is leſs than that in the precept, and the bond was not diſcharged at the giving of the precept, but was only to have been retired upon

No 128. payment; and if the accepting Riccarton's precept be no innovation, it muſt only be underſtood a right in further ſecurity, which obliges to no diligence. 2*do*, By the practice of all trading nations, inland precepts, or (as they are termed in England and Holland) aſſignations, are tied to no ſuch rules of preciſe negotiation as are required in foreign bills, by reaſon of the diſtance of places; in reſpect all perſons concerned in inland bills do ordinarily live not far from one another; and here the drawer, acceptor, and poſſeſſor, reſide within the compaſs of a mile: Nor have we any ſtatute that determines a fixed time for negotiating bills; and the act 1696 gives inland bills no other privilege than is allowed to foreign bills by the act 1681, which is only that they ſhould have ſummary execution and bear annualrent. But ſuppoſe inland and foreign bills were equiparate in all things, this precept is not a ſimple inland bill, but a clogged and qualified note or order; and the charger hath, *habili modo*, exonered himſelf of any truſt he had thereby, which was principally *mandantis gratia;* in ſo far as no ordinary diligence for making the payment effectual was neglected.

Replied for the ſuſpender: There is the ſame reaſon for punctually negotiating inland and foreign bills; neither of them being deſigned for lying ſecurities, but to be preſently paid; and the nearer that parties live together, they can be the more eaſily proteſted and returned, that the drawer may take courſe with the perſon who diſhonoured his bill; ſo that there is a great difference betwixt a precept that is to be negotiated and returned, upon not acceptance or not payment, and an aſſignation in ſecurity, which the aſſignee may keep by him as long as he thinks fit: Nor hath the charger any ways exonered himſelf of his truſt, which was given both *mandatarii et mandantis gratia;* in ſo far as he never proteſted for not payment, indulged the acceptor of the precept thirteen months delay after it fell due, and prorogated the term of payment ſeveral months longer by accepting of a corroborative ſecurity, during which time he broke; and any diligence the charger uſed againſt him was not upon the precept, or when *res* was *integra*, but only upon the corroboration-right after Riccarton's affairs had gone in diſorder.

THE LORDS found, That the bond charged on was not innovated by the taking of a precept upon Riccarton obtaining the ſame accepted, receiving partial payment, and a bond of corroboration for the remainder, payable at a certain term; but found it relevant to liberate the debtor in the bond charged on, and his cautioner, that the charger did not proteſt for not payment of the precept, nor did diligence for payment of the ſame againſt Riccarton, till his circumſtances were altered.

Fol. Dic. v. 1. *p.* 100. *Forbes, p.* 118.