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do diligence, and likewise transacted and purchased in sundry others of his debts. but wholly neglected this, which was *latissima culpa*, and next to dole. Some thought, if he could prove Inglis was then so denuded that his creditors were infest on their adjudications, or had charged the superiors, it should exoner him; but others said it was hard to leave this arbitrary to his choice, where his own writ *dedit legem contractui*; and therefore the plurality found he ought to have done diligence, at least by attempting incarceration, and having neglected it, they found him liable. There was a second point debated in this cause. Troquhen had paid Birny the annualrents from time to time, and craved repetition of the half from Balmaghie. *Alleged*, The discharges produced to instruct the payment, bear, 'received from Troquhen, for himself, and in name and behalf of Balmaghie,' which must be understood, that Balmaghie's money paid the half at least. *Answered*, The receipt of the money is acknowledged to be from Troquhen, and the addition of Balmaghie's name is only to shew the debt was *pro tanto* extinguished *quoad* Birny the creditor; but the discharges being in Troquhen's hand, presume the money was his, except Balmaghie prove he furnished the half of the money.—THE LORDS having read the discharges, found them of two different tenors. Some of them discharged singly Troquhen, when it came to the exonerating part. Others discharged both Troquhen and Balmaghie. In the first case, they found that the presumption lay, that the money was solely Troquhen's; but, in the last, that it was equally advanced by both. See PRESUMPTION.

*Fol. Dic. v. 1. p. 243. Fountainball, v. 2. p. 679.*

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A merchant, with whom bills of exchange, with blank indorsations, were deposited in trust, having acknowledged his receiving them, and that he was to negotiate them for the trust, upon getting allowance of necessary expenses, was found liable to do exact diligence.

WILLIAM STARK, Merchant in Glasgow, against WILLIAM M'KAY, Merchant in Inverness.

WILLIAM STARK happening to be at Inverness in September 1712, and having an accepted bill for L. 20 Sterling, payable to him by Alexander Ritchie, merchant in Orkney, the first of April preceding, and another accepted bill for L. 4 Sterling, payable to him by John Russel, merchant in Elgin, the first of February; he deposited those bills, with blank indorsations, in the hands of William M'Kay, merchant in Inverness, upon his granting a receipt and obligation, dated 19th September 1712, in the following terms; *Which writs I have received in trust for the said William Stark, and am to negotiate for him, he allowing me my necessary expenses and debursments, &c.* About a year and a half thereafter William Stark pursued William M'Kay to make good these debts, or to shew exact diligence done by him for recovering payment, by protesting, registering, and charging, for Ritchie's bill, within the time allowed for summary diligence; and by pursuing, arresting, or otherwise, for Russel's bill.

*Answered* for the defender; The trust being foreign to his employment of a merchant, and the obligation to negotiate being gratuitous, without fee, reward, or commission-money, the same must be constructed in the mildest sense, viz. that he should commune, treat, and transact, with the debtors, whom he had frequent opportunities to see at Inverness. Protesting could not be understood here by negotiating, seeing John Russel's bill was expired, as to summary diligence, before it came to the defender's hands; and the other bill wanted but eleven days of expiring, in which time it was scarce possible to have had it protested at the pursuer's shop at Glasgow, the place of payment. Nor is it to be imagined that the defender would have undertaken gratuitously to protest a bill at 160 miles distance, at the pursuer's own shop, within eleven days, under no less penalty than himself becoming debtor for the same. As little can the obligation to negotiate be extended to pursue an ordinary action against the debtors before the Session, for the behoof of the pursuer, who lives by far nearer to Edinburgh than he, or to follow Ritchie to Orkney, and Russel to Elgin, and in these foreign jurisdictions to agent a cause of so small moment for the pursuer. But the defender is content to repon the pursuer to his right to the bills aforesaid, which ought to exoner *ne officium ei sit damnosum*.

*Replied* for the pursuer; The obligation to negotiate must be understood and taken *secundum subjectam materiam* still *cum effectu*; and, in the mercantile law, a neglect or trip in negotiating bills is ruinous to commerce. And seeing the defender has, contrary to the terms of his obligation, and to known laws of merchandising, which tie him to exact diligence, done no diligence for two or three years time, wherein the debtors are become insolvent, he cannot exoner himself by an offer to repon the pursuers, unless he instruct, that *res is adhuc integra*, that the debtors are held and reputed as responsible now, as they were at his undertaking the trust.

THE LORDS found, that the defender, by his obligation to negotiate, was was liable to exact diligence.

*Fol. Dic. v. I. p. 243. Forbes, MS. p. 69.*

*See Bowhill against Creditors of Gala, voce GIFT OF ESCHEAT.*