transfer the property, still something remained to be done for completing the bargain, *viz.* delivery of the goods. *Traditionibus, non pactis, dominia rerum transferuntur*, is as much a principle of the law of Scotland as of the civil law. The linen had been delivered to the company, not to Weir; and, from their books, it appears that the property was therein said to be in the pursuers. So the possession stood on the 17th May; it was therefore incumbent on Weir to take possession in his own name, not by delivering the goods back to the pursuers, and by receiving them a second time from the pursuers, but by taking possession of the one parcel in the warehouse, and of the other on the bleaching-field of his company. Instead of doing this, Weir, by his letter of the 24th May, disclaimed the bargain altogether. But, supposing the property to have been intended to be transferred, and actually to have been transferred, still it was lawful in Weir to disclaim the bargain. Weir could not have received the letter of the 17th May until the 18th or 19th,—diligence was raised against him on the 23d,—a meeting of his creditors was called on the 24th: it was an act of justice and good conscience in him to give up a bargain made so recently before his bankruptcy: it would have been unjust, and against good conscience, for him to have adhered to a bargain which he could not perform, and thereby have divided the goods of the pursuers among his creditors. The decision in the question between *Barclay of Almerycross and the Creditors of Arnot* is not in point; for there the purchase of the iron was made by Arnot in the beginning of April 1760, and yet he did not stop payment till the 14th May 1760. The iron was originally delivered to Arnot, and had remained for some time in his possession, as his property. The bargain, payable at six months' credit, was so entered in Arnot's books; and it appeared, upon proof, that, although Arnot proved insolvent, he continued to transact business in his ordinary manner, after the bargain was concluded.

"The Lords adhered."

Act. D. Græme. *Alt.* A. Wight.

OPINIONS.

The Court was unanimously of opinion, that Weir was not precluded from giving up the bargain, and that, in giving it up, he behaved like an honest man.

1766. *June* 17. CHARLES and ROBERT FALLS, Merchants in Dunbar, *against* ALEXANDER PORTERFIELD of FULLARTON, Merchant in Glasgow.

What Negotiation required in Bills payable at sight.

[*Faculty Collection, IV.* 374; *Dictionary,* 1593.]

IN spring 1764, Mr Porterfield imported ten pipes of Madeira wine from

Carolina to Dunbar, on board the ship the Black Prince, belonging to Messrs Falls. On the 31st March 1764, Porterfield wrote to Falls, acquainting them that the wines " were recommended to their care, for entry and paying the duty :" He desired them to pay the duty and other expenses,—to take particular care of the management of the wines, and, if ready sale was not found at Dunbar, to send them up to Leith. On the 2d April Falls wrote, in answer to Porterfield, that the ship arrived on the 1st April, and that they had landed the Madeira: they added, " You will please let us know to whom we shall apply at Edinburgh for payment of the freight, duty, and charges: we will send you a note of the same in a few posts. We fancy it will be your best way to order it to Leith, where it will be at hand for sale." On the 9th April, Porterfield wrote in answer to Falls, " When I get your note of the exact sum, shall send you a draught on Edinburgh or Leith." He ordered them to fill up nine of the pipes out of the tenth; to send the wines to Messrs Bell and Rainie at Leith, and to acquaint them what was the exact quantity used in filling the pipes up, and also how many gallons, English, the tenth pipe wanted. On the 23d April, Porterfield repeated those directions, and added, " If, in place of a draught on Edinburgh, you chuse a bill on London, at the current exchange, which now runs high, let me know so much, and you shall have it." On the 24th April, in answer to the letter of the 9th April, Falls wrote that they had filled up the Madeira,—mentioned the contents of the ullage hogshead, and said that they would ship the wines by the first vessel for Leith: they added, " In the mean time, we send you an account of duty, freight, and charges, amounting to £129 : 1s. sterling, for which you will send us in course an order on Edinburgh, as you know the duties are monied down." In this account they stated no commission, nor any consideration for factor-fee or for the advance of money. On the 3d May Porterfield wrote, in answer to the letter of the 24th April, that he had inclosed his indorsement to Thomas Johnstone's bill, on William Borthwick in Edinburgh, at three days' sight, for the £129 : 1s. sterling. On the 7th May, Falls wrote in answer, " We have your favour, the 3d current, with Thomas Johnstone's bill on William Borthwick, at three days' sight, for duty and charges on your wine: when paid, will be noticed accordingly." Falls immediately sent the bill to Borthwick to be accepted and returned by him. On the 11th May, Anthony Ferguson, Borthwick's clerk, wrote to Falls, acknowledging the receipt of the bill: he added, " Mr Borthwick is out of town, but is soon expected home, when I shall present the draught, and doubt not but Mr Borthwick will honour the same, and will write you himself next post." Falls heard nothing of Borthwick for a fortnight. On the 26th May, they sent one of their clerks from Dunbar to Edinburgh; the clerk required Borthwick either to accept or return the bill: Borthwick desired that the bill might be left with him till the beginning of the following week, when, he said, he would either accept it or return it to Dunbar with a protest against himself for not-acceptance: to this proposal the clerk agreed. No account having come from Borthwick, on the 5th June Falls again sent their clerk to Edinburgh, and wrote to Borthwick, that they had ordered their clerk peremptorily to demand payment, or otherwise to get back the bill and protest. Upon this Borthwick delivered up the bill with a

protest, dated 31st May, taken against himself for not-acceptance, and against the drawer and indorser for recourse. On the 6th June, the clerk took a new protest on the bill, not only against the drawer and indorser, but also against Borthwick, for not-acceptance, for not-payment, and for damages and expenses which might arise from his not having negotiated the bill regularly; "in respect that the bill had been sent to him in due time for acceptance, but that he had kept it up for some time, without either accepting it or returning it with a protestation for not-acceptance." On the 7th June Falls wrote to Porterfield, acquainting him with what had happened, inclosing the bill with the two protests, and desiring to be reimbursed of their money, as the draught had not been answered. On the 14th June Porterfield signified to Falls his surprise at their conduct; mentioned that Johnstone had failed on the 5th June; that they could not but know they had lost their recourse against him, Porterfield, "but that, if any doubt remained with them, he could leave it to any two bankers of repute, versant in exchange." Falls registered their protest, and charged Porterfield with horning. He suspended; and the Lord Coalston, Ordinary, took the question to report.

Argument for the suspender:—

The laws and the practice of all mercantile nations require exact diligence in the negotiation of bills, in securities, which are the vehicles of trade, and indeed considered as ready money: Nothing can be more reasonable than the requiring such exact diligence: were it not for this, numberless inconveniences and inextricable confusion would arise in the mercantile world. Bills ought to be protested without delay for acceptance, and, when due, for payment: Protesting them, and notifying their dishonour, are steps of diligence essentially requisite. When, by accident, the holder is retarded or prevented from using such diligence, he is not to blame, and therefore he loses not his recourse; but when his delay is owing to his own negligence, or his own fault, he must answer for the consequences; he loses his recourse. The whole conduct of the chargers displays the most supine negligence: their intrusting the bill to Borthwick either to accept or protest; their leaving it in his hands from the 8th to the 26th May, without inquiring what had become of it,—their indulging Borthwick in a farther time to deliberate,—their neglect to inquire, after that time, whether he had accepted or not,—their not taking any protest till the 7th June, after the drawer had failed, and, during all this period of a month, never giving the suspender any notice of what was passing: all these circumstances exhibit a scene of unexampled carelessness in men of business. So sensible did the chargers seem of their own negligence, that, by their protest against Borthwick, they charge him with irregular and undue negotiation: and this is a direct admission, on their part, that the negotiation was irregular and undue. If Borthwick was guilty of a breach of trust in not protesting the bill more timeously, he must be actionable to the chargers who employed him, not to the suspender, who employed him not. Whether bills, payable at a day certain, do require a more exact diligence by the custom of merchants, than bills payable at so many days after sight, is unnecessary to inquire in the present case; for it cannot be pretended that the bills payable at so many days after sight are exemed from the common rules of negotiation. After a

bill at so many days' sight is presented, the term of payment is as exactly ascertained as if it had originally borne payment at a certain time. After such presenting, therefore, the same negotiation is required in the one case as in the other, and no custom or precedent has made a distinction. Neither will it vary the case, that here the bill was not indorsed for value instantly received, but, according to the chargers' plea, indorsed in security of a prior debt, for which, when paid, the suspender was to have credit, in consequence of which they were not bound either to present for acceptance, or to protest it, as was determined, *9th January* 1758, *Alexander* against *Cumming;* for, 1*mo*, This notion of the bill being only in security is inconsistent with the charger's own demand of an immediate remittance to Edinburgh, with which the suspender instantly complied. The remittance of a bill, apparently good, and payable upon so short a notice as three days, could not be meant by the one party or accepted by the other as a security. This is very different from the case of *Alexander* against *Cumming:* There, the *species facti* was this; Robert Cumming being debtor to the Ropery-company in an account current, the account was settled, and a balance of £119 struck against Cumming. For security of this debt, he indorsed to the company certain bills, particularly one due by his brother James Cumming, payable at a distant day. By the doquet of this account, it was declared, that those bills, when paid, should be in full of the account. The bill accepted by James Cumming was dishonoured, and the question arose, whether an indorsation in security obliged the indorsee to do exact diligence on the bill; and it is acknowledged, that, in a case so circumstanced, the Court found it did not: but, in a later question, more similar to the present one, the Court pronounced a different judgment. The case was this: Grosset transmitted to Murray, receiver-general of the customs, a bill upon James Drummond, in payment, *pro tanto*, of the balance Grosset was due upon his collections. The receiver-general, or his deputy, acknowledged the receipt of this bill, to be allowed to Grosset's credit when paid. No protest was taken for the dishonour of this bill, till a considerable time after it had become due, and, in the interim, Drummond proved a bankrupt. Upon this state of the case, Grosset contended that he ought to have credit for the contents of the bill, and that, in respect of the undue negotiation, no recourse was competent against him. On the other hand, it was contended for the receiver-general, That here there was no more than a pledge in security of a prior debt, to be credited when paid, and that an assignee in security was not bound in diligence. The Court of Session sustained the defence in February 1762; but the House of Peers, in March 1763, reversed this judgment, and found the receiver-general liable in the contents of the bill. The present defence is stronger than that moved for Grosset, and sustained in the last resort; for, from the whole strain of the correspondence between Falls and Porterfield, it appears that the bill in controversy was not deposited with the chargers as a security for a prior debt, but indorsed as an immediate remittance for the instant payment of money advanced; and that the loss was occasioned by the negligence of the chargers, by what they themselves, in their protest against Borthwick, term irregular negotiation.

Argument for the Chargers :—

The chargers propose to prove, 1*mo*, That here there has been no such omission of due negotiation as could, upon the footing of the bill alone, deprive the creditor of his recourse on the drawer and the indorser. 2*do*, That, supposing recourse did not strictly lie upon the bill, yet, that the chargers' having gratuitously executed the suspender's mandate, and advanced their money for him, he stood bound to repay them, without their being put to any trouble, or incurring any hazard. 3*tio*, That as the bill was taken by the chargers only in security, or to be credited when paid, the suspender cannot liberate himself from his obligation of debt, under the pretence of failure in negotiation of the bill.

1*mo*, " That here there has been no such omission of due negotiation, as could, upon the footing of the bill alone, deprive the creditor of his recourse on the drawer and indorser."

Bills were originally drawn payable at a day certain : In such case the drawer and indorser had reason to expect payment at that precise day : if it was not so paid, reason required that the indorsee should take a protest, and give due notification, to the drawer or indorser, that they might immediately take the proper measures for operating their own relief. But bills are sometimes intended, not merely for the benefit of the drawer or indorser, but also for the benefit of the indorsee ; such indorsee may be uncertain at what time he can conveniently demand acceptance or payment, or when he will have occasion for the money : He may moreover be unwilling to incur the hazard of exact negotiation. To secure the creditor in all these respects, bills on sight have, by later practice, been introduced.—Forbes, Treatise of Bills, p. 57. That author observes, " That though such bills cannot be kept up indefinitely, but must, in a convenient time, be presented, in order to acceptance, it is hard to determine this convenient time, which may be longer or shorter according to accidents or circumstances."

Bills payable on sight, or on days after sight, are, in effect, letters of credit, which the *porteur* may use sooner or later, according to his conveniency. Hence the Court found,—" That bills drawn on sight did not require the same rigorous negotiation with bills payable on a day certain."—*7th February* 1735. The same point was in like manner petermined, *21st November* 1759, *William Andrew* against *Andrew Syme*.—Collection of Decisions by the Faculty of Advocates. There, a bill drawn on the 5th May 1755, upon the Dunlops of Rotterdam, and payable at twenty-one days' sight, was not presented for acceptance until the 20th June, whereby it became payable on the 11th July, whereas, had it been transmitted for acceptance by the post, it might have been accepted on the 5th May, and become payable on the 15th June. During the interval between the 15th June and 11th July the Dunlops became bankrupts ; yet the Court thought that the *porteur* had not exceeded his discretionary powers of presenting for acceptance; and, therefore, in an action against the drawer, " repelled the defence that the bill was not duly presented for acceptance." The suspender here endeavours to make a distinction between the negotiation required on bills at sight *before* and *after* presenting. And he pleads that—whatever may be the case of bills at sight before presenting, yet that, after presenting, the same negotiation is required in them as in bills payable on a certain day. For this distinction the chargers

can discover no reason nor precedent. It is contradictory to suppose that the *porteur* puts himself in a more unfavourable condition, by taking one step of diligence, that of presenting the bill, than if he had taken no step of diligence at all: If he could not forfeit his recourse by not presenting it, he cannot forfeit his recourse by presenting it sooner than required, without insisting for immediate payment or acceptance. Inchoate diligence can never have stronger consequences than no diligence, as to the *porteur*. But farther, in the case of bills of every kind, the question, as to due or an undue negotiation, depends upon circumstances; and whenever exact negotiation is prevented by accident, the creditor will not be forfeited of his recourse.—Forbes, Treatise on Bills, p. 95. In this case, the chargers transmitted the bill to Borthwick immediately upon their receiving it: it was owing to the accident of his absence from Edinburgh, and of their residence at a distance, that a final answer from Borthwick was not more early obtained. By sending the bill to Borthwick, they did no more than what a *porteur* commonly does, when he resides in a different place from the person on whom the bill is drawn. This practice is justified by the authority of Molloy, b. 2., c. 10., § 16. "Merchants," says he, "who have generous spirits, will not surprise a man, but will first procure an acceptance, or at least leave the bill for the party to consider, and give his answer." The chargers did not know that Borthwick had returned to Edinburgh, till the 26th May. The clerk, whom they then sent, did no more than what is customary, in allowing a few days more to Borthwick for accepting or returning the bill. After a delay of no more than eight days, they again sent their clerk to him, on the 5th June, and got back the bill with a protest, dated 31st May. The clerk, upon his own judgment, took a separate protest against Borthwick. At this time the chargers had no apprehension of the circumstances of the drawer: as soon as they were certain of the refusal of acceptance, they made notification to the suspender. Had Borthwick accepted the bill on the 31st May, instead of refusing and protesting, the bill would have fallen due on the 3d June, the days of grace would have run until the 6th June. The chargers could not have protested the bill for payment sooner than that day: if so, then the protest for not acceptance of the 31st May, renewed on the 6th June, and immediately intimated to the suspender, ought to have the same effect that a protest for not payment would have had at the same period. The recourse or not recourse of the chargers against the indorser, could not depend upon the acceptance or not acceptance of Borthwick at that particular period. The form of the protest against Borthwick, on which the suspender founds so much of his argument, was the operation of the charger's clerk, in their absence, and without their knowledge. Whether he did right or wrong in this, it is evident that he did not mean thereby to establish a charge of undue negotiation against his masters.

2do. "Supposing recourse did not strictly lie upon the bill, yet, the chargers having gratuitously executed the suspender's mandate, and advanced their money for him, he stood bound to repay them, without their being put to any trouble, or incurring any hazard."

From the state of the facts, it appeared that the chargers acted gratuitously for the suspender; advanced their money, and gave their pains, without seeking that reward which they were entitled to demand, and the suspender bound to

pay. As they desired no more than to be reimbursed, they were entitled to this without expense or hazard. Suppose that the suspender had done what the chargers at first desired him to do;—had ordered his correspondent at Edinburgh to pay them the money; that, the first time they happened to be in Edinburgh, they had called for this correspondent, and found that he was not in town; that they had called a second time, as soon as they conveniently could, and had been answered with excuses and promises; and that, upon calling a third time, they had found he was become bankrupt:—In such case it cannot be disputed that the loss would have fallen on the suspender, not on the chargers, who, as they reaped no advantage, could run no risk. The case which has happened is, in every material circumstance, the same.

But, *3tio*, " As the bill was taken by the chargers only in security, or to be credited when paid, the suspender cannot liberate himself from his obligation of debt, under the pretence of failure in negotiation of the bill." It will be observed, that the suspender stood debtor in the chargers' books for L.129 : 1s. sterling. Above a month before, he sent them the bill on Borthwick. In their letter, acknowledging the receipt of it, they added, that, when paid, it should be noticed, &c. This was a declaration that they accepted the bill only in security of the debt due, and that they understood they were to be at no hazard or trouble in exact negotiation; that they were not to pass it to the suspender's credit until paid; and that they were not to give him any more early notice of the fate of the bill. In these conditions the suspender tacitly acquiesced: he cannot now throw the hazard of this bill on the chargers. If Borthwick had been a creditor of the suspender, he would have been founded in a claim of compensation or retention, because the bill was indorsed to the chargers, not for value instantly paid, but only in security of their debt, or in satisfaction when paid,—*15th January* 1708, *Crawfurd.* Upon the same principles, the chargers could not be bound in exact diligence, for that indorsees in security are no more bound to exact diligence than assignees in security. So the question was determined in the case, *Alexander* against *Cumming*, *9th January* 1758, *New Collection.* The suspender, sensible of the weight of that decision, opposes to it the judgment in the last resort, *Grosset* against *Murray*, the receiver-general, *March* 1763. That case, however, was ultimately determined upon specialties, independent of the principles for which the chargers contend. There the bill was indorsed by Grosset to the receiver-general, in November 1747; it was payable in February 1748; it was not protested till August 1748, nor was notification of its dishonour made to Grosset till January 1749, five months after the protest, and a considerable time after the utter insolvency of Drummond, the acceptor. It moreover appeared, that the collectors of the customs, such as Grosset, were, by their instructions, authorised to remit the money collected by them to the receiver-general either in cash or bills, and the receiver had a salary allowed him for negotiating such bills. It further appeared, that the receiver-general or his deputy, as taking the hazard of those bills upon themselves, did frequently suffer them to stand out unpaid; and, in return, had the benefit of the interest falling due on them. And lastly, when the bill in question was protested, the receiver-general filled up the indoration " as value, being his Majesty's money;" and he afterwards made oath that the acceptor was indebted to the crown in the contents, and thereupon obtained a writ of extent against his estate and effects.

These specialties exempted that case from the general rules for which the chargers contend. It is farther to be remarked, that, in the case *Grosset* against *Murray*, it was proved, by the evidence of the most eminent merchants, that, when bills are indorsed in security, or to be applied in extinction of a debt when paid, the indorsee is not held in practice to be bound even to protest such bills, unless he be particularly desired. Grosset admitted the justice of this rule; but he ultimately prevailed by showing that it was not applicable to the circumstances of his case.

"The Lords suspended the letters *simpliciter*."

OPINIONS.

AUCHINLECK. The question is, What was the nature of the right granted to Falls, whether in payment or in security only? The bill was transmitted by Porterfield, taken by Falls, under the condition when paid. This did not bind them to take it in payment, but to do the needful for recovering payment. Were they not obliged to do some diligence, their correspondent would have been in a miserable situation. The next question is, Whether there was proper negotiation in this case? A bill, payable at sight, differs from a bill payable at a day certain; for the holder of a bill at sight may present sooner or later at his conveniency: but here the bill was not accepted by Borthwick, when presented: intimation ought to have been to Porterfield: this neglected, no recourse.

GARDENSTON. If the *porteur* negotiates, and does not obtain payment, he has recourse; but not, when, instead of negotiating, he sits with his hands across.

ALEMORE. This bill was contended to be in payment. Suppose Falls had ordered the money to be sent to a particular person, any loss thence arising would have been theirs: So here they ordered a bill on Edinburgh at sight. The case of *Cumming* against *Alexander* is not fit to be a precedent. The case *Murray* against *Grosset* was determined upon this, that exact negotiation was always required. The like was determined in the case of *Haliburton and Brebner*.

PRESIDENT. This bill was granted *in solutum*, so far that Falls ordered the money to be sent, and got the bill upon sight in return of that order.

COALSTON. Upon the supposition that here a security alone was received, which I incline to believe, I doubt whether there was any need of negotiation at all.

1766. *June* 18. ANN MURRAY *against* ELIZABETH DREW.

BILL OF EXCHANGE.

The Drawer of a Bill, bearing to be "for value received," having, in the course of an action on the Bill given different and inconsistent accounts of the cause of granting; *found* that he must prove onerosity.

DAVID Drew, merchant in the isle of Whithorn, acquired some fortune by