No 154.

The purſuers, in right of Mrs Edie, brought a proceſs againſt Mr Crawfurd for payment of an account due by him to her. He inſiſted that credit ſhould be given him for the ſum contained in this promiſſory note; becauſe, as is was not duly negotiated, there could be no recourſe againſt him for it.

Pleaded for the purſuers: That the note was properly negotiated, and that all had been done that was incumbent on any perſon to do, to whom a promiſſory note drawn in Scotland is indorſed; and as the matter falls to be tried by the law of Scotland, there could be no doubt; becauſe, by that law, no negotiation, properly, is required on promiſſory notes.

It is indeed true, that, by c. 9. 3tio et 4to Annæ, promiſſory notes are put on the ſame footing with inland bills of exchange; but then, it is as true, that only ſuch inland bills are privileged as are drawn in England or Wales; as, therefore, promiſſory notes can be in no better condition than inland bills, it follows of conſequence, that unleſs they be drawn in England, they have none of the privileges of inland bills; nor is the porreur obliged to uſe the form of negotiation.

Pleaded for the defender: That as the promiſſory note is payable in London, ſo it ſeems to follow of conſequence, that the queſtion of negotiation falls to be judged of by the law of England. Indorſees, in taking indorſations, are tacitly underſtood to contract, that they will follow the cuſtom of the country where the payment is to be made, in demanding payment, and doing every thing elſe neceſſary to entitle them to recourſe. But it is very clear, that by the ſtatute of Queen Anne, promiſſory notes in England require the ſame negotiation as bills; and it is as clear, that ſuch negotiation was not made in the preſent caſe.

The Court was of opinion, that the promiſſory note was not properly negotiated; and therefore 'ſuſtained the defence.'

Act. *Burnet.* Alt. *Montgomery.* Clerk, *Kirkpatrick.*

Fol. Dic. v. 3. *p.* 88. *Fac. Col. No* 32. *p.* 61.

1761. *June* 23.

Meſſrs Fairholms, *&c.* Merchants in Edinburgh, *againſt* The Sun-Fire-Office at London, and John Puget.

No 155.

If the diſhonour of a bill is not duly notified, recourſe is not competent, altho' the bill be timeouſly proteſted for not payment, and although the perſon

The Earl of Rothes was debtor to Captain Wilſon of London, merchant, in four bonds, to the extent of L. 8,840 Sterling. One of them had been aſſigned by the Captain, in the 1748, to Claud Johnſton, merchant in London; other two, in September 1750, to Alexander Hamilton, ſolicitor in London, as truſtee for the Sun-Fire-Office; and the fourth bond, being for L. 1900 Sterling, was aſſigned in February thereafter to John Puget. Theſe aſſignments were concealed from the Earl of Rothes.

No 155. drawn upon has no effects of the drawer's in his hands.

Three days after this laſt aſſignment, Captain Wilſon became bankrupt; and, in a multiplepoinding raiſed by the Earl, a competition enſued betwixt theſe voluntary aſſignees, and the aſſignees under the commiſſion taken out upon Captain Wilſon's bankruptcy, and certain other creditors of the Captain's who had uſed arreſtments in the Earl of Rothes's hands; and the Court, in that queſtion, preferred the voluntary aſſignees.

In December 1750, the Earl drew three ſeveral bills upon Captain Wilſon, payable to Meſſrs Fairholms, which were accepted by the Captain or his clerk, but never paid. Two of theſe bills, to the extent of L. 1710, were formerly the ſubject of diſpute before the Court of Seſſion. The aſſignees, in ſtating the account of the balance due on the Earl's bonds aſſigned to them, had taken credit for theſe two bills as paid by the Captain. But the Earl and Meſſrs Fairholms objected, That the Captain, or his aſſignees, could not take credit for them, in order to enlarge the balance due on the bonds; becauſe the bills, though accepted, had not been paid by the Captain, but returned under proteſt; and the Earl was liable in recourſe to the porteurs of the bills, both in reſpect of the proteſt, and in reſpect that he had no effects in Captain Wilſon's hands when he drew the ſame.

In that queſtion, the LORDS, 6th March 1759, found, 'That Captain Wilſon, 'or his aſſignees, are to have no credit for the bill of the 28th December 1750, 'for L. 1000 Sterling, or for the other bill of 31ſt Dec. 1750, for L. 710 : 10 : 0 'Sterling, drawn by the Earl of Rothes upon, and accepted by Captain Wilſon, 'to Meſſrs Fairholms, in reſpect they were not paid; but being duly negotiated, 'the Earl of Rothes is liable in recourſe for the value of theſe two bills.'

The preſent queſtion aroſe with regard to a third bill drawn by the Earl in December 1750, for L. 816 : 2 : 6, payable to the Meſſrs Fairholms; of which there was a balance of L. 281 : 9 : 0, ſtill remaining due. This bill was indorſed to Innes and Clark, Meſſrs Fairholm's correſpondents, and was accepted by Captain Wilſon's clerk, according to the cuſtom of London, and was duly proteſted within the days of grace, and the proteſt marked upon the back of the bill; but the proteſt was not extended, nor was the diſhonour of the bill intimated to the Earl; But Innes and Clark having received ſundry partial payments to account thereof from Captain Wilſon, they at laſt took from him a draft upon Lord Cranſton, for L. 819 : 3 : 2, for which they granted receipt; and, in their account current with Meſſrs Fairholms, ſtated Lord Cranſton's bill to their credit. This bill was not paid, and appears afterwards to have been given up to Captain Wilſon.

Upon theſe grounds, ſome objections having been made for the Captain's aſſignees, the LORD JUSTICE CLERK, Ordinary, upon the 20th February 1760, pronounced this interlocutor: 'Having conſidered the foregoing debate, and that 'there was no due notice given to the Earl of Rothes of the diſhonour of the 'bill in queſtion, Finds no recourſe lies againſt him for the balance due on ſaid 'bill; and that no deduction can be made of the ſaid balance, out of the ſums 'on the Earl's bond aſſigned to the Sun-Fire-Office and John Puget.'

No 155. *Pleaded* in a reclaiming petition for Meſſrs Fairholms: The deciſion of the preſent queſtion depends exactly upon the ſame principles which the Court followed in pronouncing the above interlocutor, in March 1759. The only difference betwixt the two caſes lies in this circumſtance, that the two bills for L. 1710: 10: 0, were duly negotiated, not only by a proteſt taken within the days of grace, but alſo by being duly intimated to the Earl; whereas, in the preſent caſe, the proteſt was timeouſly taken, yet the diſhonour was not intimated in due time to the Earl.

If the Earl had had effects in Captain Wilſon's hands, this might be objected as a bar to the recourſe at Meſſrs Fairholm's inſtance. But if, upon the other hand, the Earl was debtor to the Captain, it could not be competent to him to object to the petitioner's recourſe, that the diſhonour of the bills had not been duly notified. The Earl could ſuffer nothing by the want of ſuch negotiation, as he himſelf would have been liable to repay the ſum to the Captain, if the bills had been paid; and, conſequently, muſt be liable, in all events, to pay the ſame to Meſſrs Fairholms, from whom he received the money.

The only reaſon why recourſe is denied upon bills not duly negotiated, is, that the drawer of the bill, on a correſpondent poſſeſſed of his effects, means to retrieve the ſame out of his correſpondent's hands; and, as he has reaſon to believe, that his bill will be duly honoured, he cannot, after the draft, make any demand upon his correſpondent, until the diſhonour is notified to him. This notification, therefore, is incumbent on the porteur, in order to certiorate the drawer, that he may take the proper method to withdraw his effects; and, if the porteur fails, he is juſtly denied his recourſe, becauſe the drawer is, by his fault, deprived of the opportunity of recovering the effects he had lying in his correſpondent's hands.

But none of theſe things can apply to the caſe where a bill is drawn upon a perſon who has no effects of the drawer's in his hand; in ſuch caſe the drawer is truly the principal debtor, who muſt be bound ultimately to pay his own debt; and the acceptor ſtands in the place of the cautioner, who, if he pays, has recourſe againſt the drawer; and if he does not pay, the drawer ſuffers no damage, and can make no objection, that he was not ſooner informed that the ſum had not been paid by his cautioner, to whom he muſt have repaid it, if it had.

The application of this to the preſent caſe is obvious: For, as the Earl had no effects in the Captain's hands, which he could have recovered upon the intimation, it was of no moment whether the diſhonour was intimated to him or not. February 1731, M'Kenzie of Inchcoulter *contra* Urquhart, No 137. p. 1561.

With regard to what the aſſignees have *pleaded*, That Meſſrs Fairholms had given up their recourſe againſt the Earl, by accepting ſundry partial payments from Captain Wilſon, and by their taking a bill upon Lord Cranſton for payment of this debt:

It proceeds upon an erroneous ſuppoſition, as if the Earl had been creditor to Captain Wilſon, in ſums which ought to have been applied in payment of this

bill: But, as the Earl was truly the Captain's debtor, and liable to repay him the sum in the bill, if he had honoured it, it is absurd to speak of the Messrs Fairholms giving up their recourse against the Earl, by their taking partial payments from the Captain, or a bill of Lord Cranston's, out of which they might expect to recover it. These were steps which were beneficial to the Earl, and the Captain's assignees, as they are entitled to take credit for the sums, of which the Messrs Fairholms, or their correspondents, recovered payment. At any rate, it is equally proper to speak of losing recourse against the Earl, because of not recovering the full debt from Captain Wilson, as it would be to speak of the creditor's losing his action against the principal debtor, because he had not done the utmost diligence to recover the debt from the cautioner. No 155.

Pleaded for the Sun-Fire-Office and Puget:—Bills are *juris gentium*; and the negotiation of these is matter of public law, depending upon fixed principles which cannot change.

In this contract, there are reciprocal obligations undertaken. On the part of the porteur of the bill, he becomes bound timeously to present the bill for acceptance; and, in case of dishonour, either by non-acceptance or non-payment, he is obliged to protest the bill, and to notify the dishonour thereof *quamprimum*; and, where there is no failure in these particulars, the drawer of the bill is undoubtedly liable to make good the damages which the creditor sustains through the bills being dishonoured; but a failure, or neglect, in any one of the above particulars, forfeits that recourse which otherwise would be competent against the drawer. For it is the acceptor of the bill, not the drawer, who is the principal debtor; and the drawer is but *subsidiarie* liable, where, the bill being duly negotiated, the acceptor fails to pay.

These forms law and practice have deemed essentially necessary to found the recourse: And no case did ever occur, where, if a protest was not taken for non-payment, recourse was allowed against the drawer: For, in such case, the porteur is understood to rely upon the acceptor, who, by his acceptance, is bound to pay, whether he had the drawer's effects in his hands or not.

In the case of M'Kenzie of Inchcoulter, there was this material difference from the present case, that the bill was duly protested for non-payment within the days of grace. And the only objection against the recourse was, That the dishonour was not notified to the drawer so soon as it might have been. But, in the present case, the bill was either never protested for not-payment, or, if it was protested, the protest was never extended, and was thereafter departed from; nor was there ever any notice given of the dishonour of the bill to the drawer, which was in every respect the same thing as if no protest had ever been taken; and, at any rate, this is but a single decision.

2*do*, It was *pleaded* for the Sun-Fire Office, &c.—Recourse is not competent, not only as no notification of the dishonour was given to the drawer; but also, that sundry partial payments were accepted of from Captain Wilson himself, by which the pursuers agreed to hold Captain Wilson as their sole debtor

No 155. for the contents of the bill. *Vid.* Teſſal and Lee *versus* Lewis, vol. 1. of Lord Raymond's Reports, p. 743. where it is laid down in expreſs words, That, if the indorſee of a bill accepts but twopence from the acceptor, he can never after reſort to the drawer. And this authority directly applies to the preſent caſe, which has been, in ſeveral inſtances, already adjudged to concern Engliſh debts, and conſequently muſt be governed by the laws of that country, where both Captain Wilſon and the Earl reſided at the time, and where the debts were contracted.

That, beſides all this, Meſſrs Innes and Clark, the purſuers' correſpondents, got from Captain Wilſon, a bill on Lord Cranſton, for payment of this very debt; and they muſt be preſumed to have got payment out of that ſeparate fund. But whether they did or not, they could not lawfully return that bill to Captain Wilſon, if they meant to preſerve their recourſe againſt the Earl.

For ſuppoſing the Meſſrs Fairholms had recurred againſt the Earl himſelf, they muſt have aſſigned him to Lord Cranſton's bill, which they had got for ſecurity and payment of Captain Wilſon's acceptance; but, if the Earl himſelf would have been entitled to demand an aſſignment to Lord Cranſton's bill, the defenders, as aſſignees to Lord Rothes's bonds, muſt *a fortiori* be entitled to demand the like aſſignment to Lord Cranſton's bill: But, as the purſuers had diſabled themſelves to grant ſuch aſſignment, by the re-delivery of that bill to Captain Wilſon, this, of itſelf, is ſufficient to bar the recourſe.

THE LORDS 'adhered to the Lord Ordinary's interlocutor, and refuſed the petition in reſpect of the anſwers.'

Act. *Ferguson.* Alt. *Lockhart.*

Fol. Dic. v. 3. *p.* 89. *Fac. Col. No* 41. *p.* 86.

1762. *February* 16.

SIR JAMES MURRAY, Bart. Receiver-General of his Majeſty's Cuſtoms, *againſt* JAMES GROSSET, Merchant in London.

No 156.
Found in oppoſition to No 150. p. 1582. that bills indorſed in ſecurity require due negotiation.

WALTER GROSSET, collector of the cuſtoms at Alloa, tranſmitted to the Receiver-General an acceptance of James Drummond, of 6th November 1747, for L. 205 : 6s. deſiring, by the letter which incloſed it, that it ſhould 'lie as a 'depoſit till applied.' Mr Groſſet ſome time after, before that bill became due, deſired Mr Clephan, the Deputy Receiver-General, to pay a ſum which exceeded the ſum at the time in his hands belonging to Groſſet by L. 92 : 3 : $9\frac{1}{2}$; conſequently he advanced that ſum, it might be ſaid, on the faith of Drummond's acceptance not yet due. When this bill became due, Clephan did not proteſt for non-payment, but allowed it to lie over, without diligence of any kind, or any notification to Groſſet for ſeveral months. Drummond turned out to be entirely bankrupt; and it was alleged he had been ſo even before he granted the acceptance. Groſſet's indorſation of it, bore 'for value, being his Majeſty's