No 126. ter acceptance, the drawer is only liable *subsidarie*, the acceptor, who is conſidered as principal debtor, being firſt diſcuſſed; and the poſſeſſor ſhould uſe the ſummary diligence allowed by the act 20th, Par. 3. Cha. II. againſt the acceptor, in caſe of not payment, before any recourſe againſt the drawer; otherwiſe that recourſe had been competent ſummarily upon the regiſtrate proteſt, and not by way of ordinary action. Mr Forbes alſo, in his treatiſe of Bills of Exchange, p. 93. aſſerts, That any accident happening to the acceptor, after the term of payment, ſhould be upon the poſſeſſor's riſk; it being juſt that the drawer ſhould not ſuffer through his neglect.

THE LORDS found the drawer of the bill liable, and repelled the reaſons of ſuſpenſion.

Fol. Dic. v. 1. p. 100. Forbes, p. 40.

No 127. Recourſe ſtill competent upon a bill, though not duly negotiated; if the perſon drawn upon, continue reſponſible.

1706. *June* 28. SIR JOHN SWINTON, *againſt* The LADY CRAIGMILLAR.

IN the action at the inſtance of Sir John Swinton, againſt the old Lady Craigmillar, for payment of a bill drawn by her upon Sir Alexander Gilmore of Craigmillar her ſon, payable to John Inglis, writer to the ſignet, as the purſuer's truſtee, for value reſting to the purſuer by the Laird of Langton, the drawer's brother; in regard the bill was refuſed by Sir Alexander, and proteſted for not acceptance,

Alleged for the defender: That ſhe having drawn the bill for ſupporting her brother's credit, upon his promiſe to relieve her, the poſſeſſor of the bill was bound to negotiate the ſame, not only by a proteſt for not acceptance, but alſo by intimation thereof to her the drawer, that ſhe might timeouſly have operated her relief againſt Langtoun, in his lifetime; which ſhe could effectually have done, he having, till the day of his death, betwixt two and three thouſand merks yearly, paid him out of the eſtate. And the want of advertiſement from the creditor, of the bill's being diſhonoured, made her ſlip the opportunity.

Answered for the purſuer:—Though foreign bills *favore commercii*, in reſpect of the great diſtance of places, muſt be duly negotiated, by certiorating the drawer of the not acceptance thereof, leſt he might loſe his effects in the hands of the perſon drawn upon, by his breaking before the drawer get notice of the proteſting of his bill for not acceptance; no body can require this in the caſe of inland bills, where the foreſaid reaſon takes no place; and we have no ſtatute to determine us therein; for the act 1696, provides only the ſame execution upon inland bills, as, by the act 1681, is allowed to paſs upon foreign bills. In the which act, no time is prefixed to the negotiating bills, or intimation to drawers in caſe of not acceptance. 2*do*, Though the bill in controverſy were a foreign bill, the neglect to adviſe the drawer concerning its being proteſted for not acceptance, would not cut off the poſſeſſor from his recourſe againſt her, unleſs the perſon drawn upon were broken with her effects, which ſhe did not recover out of his hands, for want of intelligence that her bill was refuſed; which cannot be

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