suffered six months to intervene ere you registrated it; three or four months ere you charged; and other six months elapsed before you denounced: and, after all this, you did not raise your process against me for more than a year after; so that you have been clearly *in mora*, which *mercatori tantum nocere debet, et non mihi.* And it were very dangerous to commerce, to let bills lie over dormant, and then recur against the drawer when you please; whereas, if you had duly intimated to me the protest for non-payment, I could have looked both to your security and my own, which by your neglect and their retiring is now lost. 2*do*, You have tacitly renounced any recourse against me, and betaken yourself to the acceptors of the bill, in so far as you have entered into transactions with them, and taken their securities, which is presumed to be *in solutum* of the bill, and extinguishes the debt as to the drawer: otherwise givers of bills can never be secure. *Answered*, There is no law limiting the time within which the havers of bills must recur; as is clear from Scarlet's *lex mercatoria* and others. Neither is intimation, by a legal instrument, necessary as to inland bills, but only certioration and advice that the bill was not honoured nor paid, and which was here done; and in regard letters signifying the same to the drawer may be kept up, therefore Mr Forbes upon bills of exchange, thinks the possessor of the bill not bound to instruct that he acquainted the drawer any other way but by his own oath. 2*do*, *Ratio legis hic cessat*; for they being his own servants, he ought to have inquired at them, if they had paid the bill; for *scire et scire debere hic æquiparantur*: and as to the transactions and partial payments, they are beneficial to you, seeing they will relieve you *pro tanto*, and must be presumed only in corroboration, and not in satisfaction; and I am not bound to wait till money can be made of them, (which may draw to a distance of time), but you must make your bill effectual by the warrandice implied therein. And it is known, by the practice of the Directors of the Bank, that a formal advice as to inland bills is not required, nor diligence thereon. THE LORDS found legal intimation, by way of instrument, not requisite, but any certioration was sufficient; and that the collateral securities, taken by the haver of the bill, were not to be presumed to be *in solutum*, and that they might recur against the drawer, they proving always that they had timeously acquainted him with the non-payment.

Fountainhall, v. 2. *p.* 634.

No 130.

1711. *December* 20.

The EARL of LEVEN *against* The EARL of GLENCAIRN.

No 131.
Found in opposition to No 124. p. 1543. that precepts upon factors and

THE deceased Earl of Glencairn, *in anno* 1690, granted bond to Mr David Scrimzeour, then Keeper of the Signet, for L. 273 Sterling, as the secretary's dues for 39 commissions to the officers of the regiment then under the Earl's command, payable out of the first and readiest of the pay due to the regiment;

No 131. agents, in ſecurity of debts, muſt be duly negotiated.

and drew a precept, of the ſame date with the bond, for the like ſum, upon James Oſwald and James Dunlop general-receivers, payable to Mr David Scrimzeour, out of the firſt end of the pay aforeſaid. The Earl of Leven (in whoſe perſon this bond and precept at length came) purſued William, now Earl of Glencairn, as repreſenting his father.

Alleged for the defender: No recourſe is competent againſt him, either upon the bond, or bill: Becauſe, *1mo*, The ſum is preſumed to have been paid, from the uſual method of paying for officers commiſſions very quickly after they are received; from the Earl of Melvil's then great influence and intereſt in the nation, as Secretary of State, for whoſe behoof the bond and bill were granted in truſt to Mr Scrimzeour; and from the payment of L. 150 thereof, very early after the date. *2do*, *Et separatim*, The defender's father being denuded, by the precept on the general-receivers, of the equivalent ſum due by them to him, which he was obliged to leave in their hands to anſwer it; the purſuer cannot now, after 20 years, recur againſt the defender as repreſenting his father; unleſs he can inſtruct diligence for recovery thereof. Becauſe precepts are mandates, which, in the civil law, oblige to the exacteſt diligence, *L.* 13. *L.* 23. *C. Mandati.* and, by our cuſtom, make the mandator liable to ſuch diligence as he uſeth in his own affairs. Beſides, the defender's circumſtantiate caſe is more ſtrongly ſupported than by the general rule: Soldiers, *qui arma magis quam leges scire tenentur*, are much privileged, aud their pay allowed to circulate by notes, orders, bills, or precepts, from Colonels, without neceſſity of the forms required in other caſes; the receivers, on whom the precept was drawn, were perſons of public faith and credit; the precept was out of the firſt and readieſt of the regiment's pay, which was monthly put in the receiver's hands by the government; the receivers, interpelled by the precept duly intimated, could not pay to the Earl of Glencairn; and Mr Scrimzeour has, or might have, got payment of the whole, if he had not been *in culpa lata, quam ex natura negotii tenetur præstare.*

Replied for the purſuer: *1mo*, All precepts are mandates with reſpect to the perſons they are directed to; but not with reſpect to the receivers or creditors therein, as to whom they are plainly *cessiones actionum*, or aſſignations, which being *in rem suam*, eſpecially where granted as corroborative ſecurities, do not import any obligement to do diligence: For *cuilibet licet jure suo uti vel non uti*, as well as *renunciare*, December 16. 1668, Fraſer *contra* Keith; Stair, v. 1. p. 571. *voce* INHIBITION;—July 17. 1672, Earl of Wemyſs *contra* Sir William Thomſon; Stair, v. 2. p. 105. *voce* DILIGENCE, (preſtable by factors, *&c.*)—December 27. 1709, Smith *contra* Vint; Forbes, p. 378. *voce* DILIGENCE, (preſtable by aſſignees, *&c.*)—July 27. 1666, Earl of Newburgh *contra* Sir William Stewart, No 124. p. 1543. It is true, that appriſers and adjudgers, entering into poſſeſſion by virtue of their diligences, are obliged to continue, unleſs they can ſay, debarred; that ſuch might not be allowed clandeſtinely to deſert their poſſeſſion, and thereafter pretend to the irredeemable right by expired

adjudications. But it cannot be thence inferred, That the receiver of an assignation or precept in security, (though he hath recovered partial payments thereby) is obliged to use diligence for the remainder. There are not wanting special grounds why Mr Scrimzeour could not be liable to negotiate the precept: It was drawn upon the general receivers, who never used to accept precepts, and did not accept this, and against whom no man ever protested bill, or precept, or used diligence; but other methods were taken, by applying to the treasurer, where the cashier refused to pay. Again, the defender cannot object want of diligence, because he himself hath uplifted the fund of payment; in so far as the precept is payable out of the first and readiest of the pay; and the Earl of Glencairn hath uplifted more pay, since the date of the precept, than would have satisfied the same. Nor is it sufficient, that he left more pay in the receiver's hands than would do it; for the question is not, what pay was due to the Earl of Glencairn over and above his receipts; but, whether he exhausted the subject out of which the precept was payable? And since, at several times, he received a great deal of the regiment's pay, after granting of the precept; what hindered him to receive the whole, had there been sufficient cash in the receiver's hands? No 131.

Duplied for the defender: What is argued from the parallel of assignations, or precepts, in the usual form, is foreign to the present debate; for the Earl of Glencairn was not personally bound to pay, and the precept was limited to the pay of the regiment. Though the general receivers have been so far indulged, as not to be obliged to accept precepts drawn on them, even when they had effects in their hands, (which was necessary for expediting the public concerns of the government); the porteur creditor in the precept was still obliged to negociate it, and do what diligence the nature of the thing required. It is but trifling, what is pleaded for the pursuer, on the precept's being to be paid out of the first and readiest of the regiment's pay, and the Earl of Glencairn's receiving great payments; for it is not to be supposed, that when the Earl of Glencairn drew this precept, his regiment was to starve. The Earl was only tied up by the precept from acting any thing in defraud of it, which he never did; on the contrary, he never uplifted any payments, but with a due and suitable regard to the honour of this precept, leaving always, in the receiver's hand, much more than was needful to answer it. And, in a late case, 1703, James Henderson having charged Daniel Hamilton,* for payment of three precepts, protested both for not-acceptance and for not-payment; the letters were simpliciter suspended, upon this ground, That the protestation was not for four months after the drawing, and three months after they fell due. The Decisions cited for the pursuer do not meet the case. For in that, December 16. 1668, betwixt Fraser and Keith, the *ratio decidendi* was, That the minute wanted a procuratory of resignation necessary for expediting the commission; and the old evidents were not delivered. The decision, July 17. 1672, betwixt the Earl of Wemyss and Sir William Thomson, makes for the defender, who

* General List of Names.

No 131. ſubſumes in the terms of the quality, that if the precept had been negotiated, the money might have been recovered. The caſe betwixt the Earl of Newburgh and Sir William Stewart has probably been ſtopped and altered; ſeeing the Lord Stair, whoſe collection is very full and exact, before and after that time, hath not taken notice thereof. Beſides, that caſe toucheth a miſſive, and not a precept; it relates to a debt perſonally due by the writer, and was neither preſented, intimated, nor proteſted; which differenceth it from this caſe, where the precept was preſented, partial payment made, and ſufficient effects left to anſwer the ſuperplus, which, through wilful neglect, were omitted to be taken up. The practick betwixt Smith and Vint hath no contingency with this caſe; for there it was found, that the aſſignation being granted in ſecurity, and never intimated, the property continued, notwithſtanding, in the cedent's perſon, who ſuffered the loſs through the debtor's bankruptcy, conform to the rule, *res perit suo Domino*. Juſt ſo, in the preſent caſe, the money being transferred to the aſſignee, by the intimation to the receivers, the creditor in the precept has himſelf to blame that he did not look after it.

THE LORDS ſuſtained the payment of L. 150 to Mr Scrimzeour, to extinguiſh the bond and precept *pro tanto*; and found, that the Earl of Leven hath no recourſe againſt the Earl of Glencairn for the remainder; but that he, the Earl of Glencairn, muſt aſſign, to the Earl of Leven, the firſt and readieſt of the debentures due to him by the government for his father's regiment, for payment of that remainder.

Fol. Dic. v. 1. p. 100. Forbes, p. 555.

1715. *February* 1.

CLAUD JOHNSTON, Merchant in Edinburgh, *againſt* JAMES MURRAY, Merchant in Leith.

No 132.
An acceptor, inſtead of payment, gave a draught, and received his own acceptance. This found to afford no defence againſt recourſe upon him, the draught not having been paid.

WILLIAM BOUDEN, merchant in London, being creditor to James Murray, draws a bill upon him, payable to himſelf, or order, which is accepted by Murray; and Bouden remits the bill to his correſpondent in Edinburgh, Andrew Edgar, to receive the contents. Inſtead of paying to Edgar, Murray draws another bill on George Johnſton, merchant in London, in theſe terms, 'At 'Ten days ſight of this my bill of exchange, pay to Mr William Bouden, or 'order, Fifty-ſeven pounds Ten ſhillings Sterling, and retire my bill for the 'ſaid ſum, which fell due in September laſt; place it to my account, without 'further advice.' This bill is dated 10th November 1709; upon the 19th of the ſaid month the bill is accepted by Johnſton, and that night Bouden acquaints his correſpondent Edgar of its being accepted, and orders his delivery up of the former bill to Murray: Which was accordingly done by Edgar, without any new value, but only that George Johnſton had accepted the