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THE LORD ORDINARY reported the cause.

The Court considered the case to be attended with much difficulty, and were greatly divided in opinion with regard to it. On the one hand, it was

Observed: It makes no difference on the question, whether the suspender made any profit on the account with Bertram, Gardner, and Company, or not. While the money was in their hands, it was, in the eye of law, in his own possession, and lay at his risk; but the low rate of commission allowed him, excludes the supposition of his being bound to warrant the remittances; all that was incumbent on him was, to transmit bills of a house in good credit. When the bills were granted by Bertram, Gardner, and Company, the risk passed to the charger.

On the other hand, it was said: While the money lay in the possession of Bertram, Gardner and Company, it was clearly at the risk of the suspender; and as the draught granted by them on their correspondent was not paid, the money must be considered as still remaining in Turnbull's cash account. Much weight was also laid by some of the Judges on the understanding of parties, as established by the indorsation of the bills, the correspondence, and whole circumstances of the case.

THE LORDS, (15th January 1795) by a narrow majority, 'sustained' the reasons of suspension. But, upon advising a reclaiming petition, and answers, they (7th July 1795) 'found the letters orderly proceeded;' and to this interlocutor, upon considering a petition for the suspender, with answers, they 'adhered.'

Lord Reporter, *Dunsinnan.*Alt. Dean of Faculty *Erskine, Morison.**D. Douglas.*For the Charger, *Geo. Fergusson.*Clerk, *Menzies.**Fac. Col. No 187. p. 452.*

* * * See More particulars relative to this case, *voce* PERICULUM.

See Scot against M'Kenzie and Lindsay, 15th January 1795; *Fac. Col. No 149.*
p. 341. *voce* PERICULUM.

* * * See FACTOR.

S E C T. XII.

Effect of a Receipt on a Bill.

1793. November 29. ANDREW FERGUSSON against ROBERT YOUNG.

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A bill having
a receipt, in
general
terms, on the

ROBERT YOUNG accepted a bill drawn by Robert Steel junior, and Company, payable 100 days after date, which the drawers afterwards discounted with the Falkirk Banking Company.

When it became due, it was retired by Thomas Steel, one of the partners of Steel and Company, who took a receipt from the cashier of the bank in the following terms : ' Received payment of the within.'

Thomas Steel died soon after, and the retired bill having been found in his repositories, it was assigned by Robert Steel, his partner, to Andrew Fergusson, in security of a Company debt.

Fergusson raised an action against Young the acceptor, for payment of its contents.

Young *pleaded* in defence, That he had put the money with which Thomas Steel had retired the bill into his hands for that express purpose, and that this action was a fraudulent and collusive attempt to make him pay the debt twice. And, in support of this allegation, he founded upon the nature of the receipt granted by the bank, contending, That wherever a bill appears with a receipt on the back of it in general terms, not mentioning by whom it was paid, the presumption of law is, that it has been retired by the acceptor the proper debtor, or at least with his money; and that this presumption can only be removed by his writ or oath: That if Thomas Steel had retired the bill with his own funds, he would, in order to have preserved his recourse against the defender, have, according to the usual practice, taken a receipt, bearing that its contents had been paid by himself.

It was *answered* for Fergusson, That it was highly improbable, that Young, a man conversant in business, would have given money to one of the drawers to pay the bill, without taking a receipt for it; and that since he had not, it was incumbent on him to establish the fact by proof; and that the discharge by the creditor, however loosely worded, could not cut off the drawer's right of relief against the acceptor.

THE LORD ORDINARY *afforded* the defender.

On advising a reclaiming petition, with answers, it was

Observed on the Bench: When a bill is retired by a person not primarily liable for it, he will always take care to get a special receipt. A receipt in general terms, like the one in question, operates as an extinction of the debt in favour of the acceptor, unless the contrary is proved by his writ or oath.

The Court unanimously adhered.

Lord Ordinary, *Ankerville.* A.G. *Corbet.* Alt. C. *Hay.* Clerk, *Menzies.*
R. *Davidson.* Fol. Dic. v. 3. p. 79. Fac. Col. No 80. p. 175.

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back of it, is presumed to have been paid by the acceptor.