

No 76.

by signing a bill as drawer, instead of letting the feller draw a bill himself upon the buyer, he thereby became liable for the price.'

Lord Ordinary, *Monbeddo.* Act. *Sir J. Ramsay.* Alt. *Mat. Ross.* Clerk, *Robertson.*  
*Stewart.* Fol. *Dic. v. 3. p. 78.* Fac. *Col. No 50. p. 79.*

No 77.

A factor in Scotland, employed to sell goods belonging to English merchants, was accustomed to lodge the price in a private banking-house, on an account in his own name, and to take from them, bills drawn on their correspondent in London, payable to himself, which he indorsed, and transmitted to his employers; against whom he charged two and a half *per cent.* commission. Upon the bankruptcy of the drawers and acceptors, he was found liable for such bills as had not been paid by them.

1795. December 1.

RICHARD BAINES, against THOMAS TURNBULL.

THOMAS TURNBULL was extensively employed by English merchants, in circulating their patterns in different parts of Scotland, selling their goods, and receiving the price of them. It was his custom to lodge the money and bills, received from the purchasers, (whose solvency, it was admitted, he was not bound to guarantee), with Bertram, Gardner, and Company, bankers in Edinburgh, upon an account kept in his own name, and, from time to time, to receive from them bills on Baillie, Pocock, and Company, their correspondents, and, as it has since appeared, their partners in London, payable to himself; which he indorsed, and transmitted to his employers; against whom he charged two and a half *per cent.* commission. He had acted for Richard Baines, merchant at Preston, on these terms, for several years. When Bertram, Gardner, and Company, and Baillie, Pocock, and Company, became bankrupt, Baines held two bills, drawn by the former, and accepted by the latter, which had been sent to him by Turnbull in the usual way, but which had not then become due.

After some correspondence on the subject, Baines charged Turnbull for payment of them; upon which he brought a suspension.

The charger founded on the correspondence between him and the suspender, both before and after the bankruptcy of the drawers and acceptors, as shewing it to be the understanding of both parties, that the suspender's credit was pledged for payment of the bills. Turnbull, on the other hand, contended, that no such inference could be deduced from it; and further stated, that, of his numerous employers, who held bills in the same situation, Baines was the only person who had made a similar demand against him.

The charger mentioned the profit made by Turnbull on his cash account with Bertram, Gardner, and Company, as a strong circumstance against the suspender. The latter, however, denied that he received any interest, or made any profit, upon the money lodged with them. The Court directed the trustee on the estate of the bankrupts, to ascertain, from their books, how the matter stood. He accordingly gave in a report, from which it appeared, that the books did not throw much light on the matter; but it seemed to be understood, that interest was allowed in certain circumstances.

The charger further

*Pleaded:* The suspender was debtor to him for the money received from the purchasers of the goods; and the obligation thence arising could only be discharged by the charger actually receiving payment. If the suspender had not

understood himself bound to warrant the remittances, he ought to have asked instructions from the charger as to the manner in which the money was to be remitted, or at least to have taken bills from a public bank. On the contrary, without consulting the charger, he threw the money into his general account with his private banker, whose credit and situation were unknown to the charger, and made a profit by so doing. While the money lay in their hands, it certainly was at the risk of the suspender; and it cannot be said to have been taken out of their possession by a draught on their correspondent, which was afterwards dishonoured.

If the bills had been taken payable to the charger, or if the suspender had prefixed the words 'without recourse' to his indorsation, the charger would have been called upon to enquire into the responsibility of the drawers and acceptors; and his acquiescing in this mode of remitting the money would have been equivalent to express instructions for that purpose. But, as Turnbull uniformly took the bills payable to himself, and indorsed them simply, the charger, on the one hand, satisfied with the security of the suspender, had no occasion to enquire into the solvency of the debtors in the bills; and the suspender, on the other, shewed his own sense of his obligation to warrant the remittances; *Kilk. p. 182. 6th June 1739, Ainslie and Factor against Arbuthnot, voce FACTOR; 5th July 1782, Connel, No 76. p. 1485.; 15th January 1795, Scot against M'Kenzie and Lindsay, voce PERICULUM.*

*Answered:* As the suspender got no special instructions from the charger, his duty, like that of any other mandatary, consisted merely in acting with that degree of prudence which it is to be presumed the charger himself would have exhibited, had he been present. Provided the purchasers of the goods were in good credit at the time he contracted with them, he was not bound to guarantee the payment of the price; and, for the same reason, in making the remittances, all that was incumbent on him was, to transmit bills of a house of acknowledged credit; and Bertram, Gardner, and Company, were in that situation. So contrary is it to the ordinary duty of a factor to warrant remittances to his constituent, that an obligation to that effect is not implied even where 5 per cent. commission is allowed; *July 1791, Fife against Hog. (Not yet reported, see FACTOR.)*

The suspender lodged the money with Bertram, Gardner, and Company, merely as a matter of conveniency; and, when their bills were granted, the case came to be the same as if he had purchased bills from a neutral banker.

If the suspender would not have been liable had the bills been taken payable to the charger, his taking them payable to himself, and indorsing them, cannot be sufficient to create such an obligation against him. It is only where the indorser receives value from the indorsee, or where the indorsation is made to accommodate the drawer, that the indorser is liable to the indorsee. But here the suspender acted merely as the servant of his employer; and it cannot be presumed that he meant gratuitously to undertake an obligation not otherwise binding on him. The situation of the parties makes the case the same as if the words 'without recourse' had been added.

No 77.

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.

No 78.  
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.