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v.
M'DOWALL,
&c.

Ordered and adjudged that the interlocutors complained of be, and the same are hereby reversed ; and that the defenders be assoilzied ; and it is further ordered that the pursuers do pay to the defenders the expenses incurred by them in the Court below, according to the course of the Court.

For Appellant, *Sir John Scott, Wm. Tait.*

For Respondents, *W. Grant, Geo. Ferguson.*

NOTE.—Unreported in Court of Session.

<p>GEORGE ROSS, sometime merchant in Dumfries, now of Stafford,</p>	}	<i>Appellant ;</i>
<p>MARGARET M'DOWALL, Sister-German and Executrix of the deceased WILLIAM M'DOWALL of Gatehill, Accountant in Dumfries, now Spouse of HUGH STEWART of Gatehill; and the said HUGH STEWART for his interest; and JOHN AIKEN, Writer in Dumfries, Husband of the deceased JEAN M'DOWALL, the other sister, and Executrix of the said WILLIAM M'DOWALL,</p>	}	<i>Respondents.</i>

House of Lords, 5th Jan. 1798.

BILL—LIABILITY FOR PAYMENT.—A bill was drawn by a party for the accommodation of the acceptor, and was indorsed by the drawer to another, and indorsed again to the bank, with whom the acceptor got it discounted, and received the money. It being dishonoured, a third party, with whom the acceptor had business dealings, and who then had funds of his in his hands, came forward and paid it for the acceptor. Circumstances in which it was held, that he had no recourse against the drawer on the bankruptcy of the acceptor, as the moment he paid the bill for *the acceptor* the bill was for ever extinguished.

At the distance of eighteen years, action was raised upon a bill, in the following circumstances :

Feb. 16, 1777. The bill was drawn by the appellant Ross for £170 upon and accepted by William Kirkpatrick, for the accommodation of the latter. The bill was indorsed by Ross specially to Thomas Stothart or order ; and again indorsed by Stothart and Ross to “ Robert Riddock, Esq., agent of the Bank

“ of Scotland at Dumfries,” with whom Kirkpatrick obtained the bill discounted, and received the amount.

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In evidence that the bill was discounted for the accommodation of Kirkpatrick, there was produced a memorandum holograph of Robert Riddock on 26th February 1777, the date of the bill, of this tenor,—“ Discounted with the bank, “ William Kirkpatrick’s acceptance to indorsed “ by Thomas Stothart.”

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Of the same date, it was proved by the private ledger of Kirkpatrick, that he made this entry, “ By my acceptance “ to Thomas Stothart this day, at three months discount, “ £170.”

In these circumstances, the bill not having been retired when it became due, was protested at Mr. Riddock’s instance against William Kirkpatrick the acceptor, for non-payment, and against Thomas Stothart, and the appellant George Ross, for recourse. The protest was recorded, and a horning raised thereon, and a charge given. The bill then lay in the bank’s hands until May 1779, when William M’Dowall, who was a private banker, and in that capacity was in the practice of receiving and paying away money for Kirkpatrick, came forward and paid the amount of the bill and costs to the bank, as the appellant stated, for behoof of Kirkpatrick alone.

On delivering over the protest and diligence to M’Dowall, there was written on the back of it, in M’Dowall’s own hand writing, “ Paid the bank on Mr. Kirkpatrick’s account, by “ William M’Dowall, bill due 29th May 1777, £170.” Then followed an enumeration of the items of expenses on the bill, which, together with the interest calculated thereon, made it amount to £187. 12s.”

Mr. Kirkpatrick became bankrupt in Sept. 1781; and this bill, along with two others, were ranked by M’Dowall on his estate, he making the usual oath that he was a lawful creditor to William Kirkpatrick in these bills, and that he held no other security for the same. He also raised action against Mr. Kirkpatrick alone for payment of this bill, and the bill besides had the names of Mr. Stothart and Mr. Ross, *as indorsers deleted*, but retaining the name of George Ross entire, as drawer of the bill.

The bank agent, Mr. Riddock, died in June 1777, leaving Mr. M’Dowall as guardian to his children; Mr. M’Dowall himself died in April 1788; and Mr. Stothart, who indorsed the bill, died in 1790, but no demand was ever made upon

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him for payment of the bill. Nor was there any claim made against the appellant, until the present action was raised by M'Dowall's executors.

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The question therefore is, Whether Mr. M'Dowall paid the bill to the bank on behalf of Mr. Kirkpatrick, the acceptor, and whether the respondents are entitled to insist against the appellant for payment?

Dec. 19, 1795.

The Lord Ordinary (Stonefield) found, "In respect it appears that the bill charged on was retired by Mr. M'Dowall for behoof of the acceptor, suspends the letters simpliciter, and decerns, superseding extract till the third sederunt day in January next."

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But, on reclaiming petition to the Court, the Lords pronounced this interlocutor: "Alter the interlocutor reclaimed against, find the letters orderly proceeded, and decern: Find the respondent liable in expenses." And, on further

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petition, the Court adhered to their own interlocutor.

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—From the nature of the obligation which lies upon the drawer of a bill, he is liable only in payment in the event of the acceptor having failed to retire the same, and of course, if the bill is taken up, either by the acceptor himself, or any person acting on his behalf, the obligation of the drawer is for ever extinguished, and there is no longer any ground for maintaining an action of recourse against him. That this is the precise state of the fact in the present instance, is proved by every sort of evidence which the nature of the case required, or could possibly admit of. The entry in the account current, between M'Dowall and Kirkpatrick, of date 20th May 1779, which specifies to a fraction the precise sum paid for the bill. The marking in the handwriting of Mr. M'Dowall on the back of the registered protest to the same effect—his entering a claim three years thereafter in the ranking of Kirkpatrick's estate, his own directions to his agent in Edinburgh, by letter of 7th October 1782, instructing him to make that claim in *name* of himself, his instituting an action against Mr. Kirkpatrick for this very bill, his affidavit in the ranking, his settlement of accounts with Riddock's executors without including this bill, and the deletion of both Mr. Stothart's name and the appellant's from the bill, all demonstrate the fact that he retired the bill, not on be-

half of Mr. Riddock, or Mr. Stothart, or the appellant, but for Mr. Kirkpatrick alone, as the acceptor of the bill.

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Pleaded for the Respondents.—In virtue of the appellant having drawn and indorsed the bill in question, and of the Bank of Scotland, as holders thereof, having duly intimated the dishonour to the appellant, and drawer, and indorser, it is indisputable that the bank was entitled to demand payment from the appellant as well as from the acceptor ; and if so, M'Dowall, who paid the sum therein contained to the bank out of his own funds, had right, in virtue of the assignation which he obtained from the bank, to have maintained the same claim against the drawer and indorsers, as well as the acceptor of this bill, which the bank might have done before granting the assignation. And even though the bill had been discounted at the bank for the sole accommodation of Kirkpatrick, the acceptor, that would not have afforded a plea to the drawer or indorsers against the claim of the bank for payment against them, as by putting their names upon it they became security for the contents. If, therefore, the bank had good title to recover from the appellant, so must the respondent, to whose brother that title and claim were assigned. And the evidence alluded to does not in the least degree deprive M'Dowall of his legal rights on the bill, or show clearly that he paid the bill for Kirkpatrick's behoof alone, and not on their account, or that he paid without a special regard to his rights against every party liable therein.

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After hearing counsel,

The LORD CHANCELLOR, (LOUGHBOROUGH) said :—

“ My LORDS,

“ This is a case of an appeal from two interlocutors of the Court of Session, which are stated to have been pronounced unanimously ; though, as these interlocutors were an alteration of one pronounced by the Lord Ordinary, it is difficult to conceive that they could be unanimous. No memorandums of the opinions of the judges are given to us ; and, on a point of law which is the same in both countries, I must regret if the judgment in the present case were unanimous. The opinion which I have to submit is so plain, that I conceive the Court has been misled by attending to the arguments in another cause, which has nothing to do with that between the present parties.

“ The facts in the present case are these : In 1777, a bill was drawn by the appellant, and accepted by one Kirkpatrick, and discounted with Riddock, agent for the Bank of Scotland at Dumfries ; and it

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then bore the indorsement of the appellant as drawer, and of one Stothart as indorser, below whose name the appellant again indorsed the bill. Stothart was merely as a security to the bank ; and *prima facie* from the circumstance and mode of discounting the bill, it is to be presumed that it was for the benefit of Kirkpatrick, and that the name of Ross was only added for his credit with Stothart. In the private memorandum of Kirkpatrick this is confirmed.

“ When the bill fell due, it was not paid ; and Riddock protested it against the acceptor Kirkpatrick, and against the appellant and Stothart the indorsers. Upon this protest a horning was raised at the suit of the bank ; at this time Stothart’s indorsement continued upon the bill.

“ The matter lay over till the 20th of May 1779, when M’Dowall, the brother of the respondent, pays the bill to the bank on account of Kirkpatrick. In 1782, M’Dowall took an assignment of the bill ; and afterwards, on the bankruptcy of Kirkpatrick, who was then indebted to him, he claimed a balance out of the estate of Kirkpatrick, of which this bill was stated to be a part. At the time of the payment of the bill by M’Dowall, it appears that he had in his hands £1500 or £1600 belonging to Kirkpatrick, and, subsequent to that, larger sums came into his hands ; but, by dealings between the parties, the balance came to be in favour of M’Dowall. He keeps his accounts regularly all this while ; the name of Stothart, as indorser, was struck off the bill, and no demand during his life was made against the appellant Ross.

“ After M’Dowall’s death, disputes arose between his representatives and the family of Riddock. Riddock was affected indirectly in this bill, being guarantee to the bank for all bills discounted by him. But in the case of this bill there existed no reason for anxiety on the part of Riddock’s family, for Stothart, who was bound to them, was perfectly sufficient and solvent. In the arrangement of Riddock’s affairs, when his son came of age, an action was brought against the respondents for their late brother’s intromissions ; and a counter action by the respondents, in which they made several claims against the estate of Riddock, among others, an account of the bill in question, the payment of which the respondents endeavoured to connect with their late brother’s administration of Riddock’s affairs. But with these matters the appellant Ross had nothing at all to do.

“ After a lapse of eighteen years, however, an action was brought against the appellant, the drawer of the bill. But it appears that Kirkpatrick the acceptor’s own money, had already paid it, from the account stated by M’Dowall, and his affidavit in the bankruptcy of Kirkpatrick. And the moment that the acceptor paid the bill it was gone ; it was paid as it ought to be paid, and so was for ever extinguished. I lay no blame upon M’Dowall in this business ; he has been dead several years. He settled accounts with the accep-

tor, putting this bill to his debit, and for the balance of the account due to him he enters into the ranking.

“ Under these circumstances, I am sorry to find this case come before you. And I must therefore move that the interlocutors complained of be reversed, and the interlocutor of the Lord Ordinary be affirmed, that the appellant be assoilzied, and that the respondents do pay to the appellant his costs in the Court below, according to the course of the Court.”

It was accordingly

Ordered and adjudged, that the interlocutors of the Lords of Session, of the 1st and 21st February 1797, be reversed. And it is further ordered, that the defender (appellant) be assoilzied; and that the pursuers (respondents) do pay to the defender (appellant) the expenses incurred by him in the Court below, according to the course of the Court.

For Appellant, *W. Grant, W. Adam, Thos. W. Baird.*

For Respondents, *Sir John Scott, Chas. Hay, Wm. Tait.*

(M. 7625.)

WILLIAM SMITH, WILLIAM DRYSDALE of the Turf Coffee-House, WILLIAM DUMBRECK of the Hotel, JAMES ROBERTSON of the Black Bull, JOHN HAY, and JOHN MACKAY, and Others, Chaise Hirers or Postmasters in Edinburgh, . . . } *Appellants;*

WILLIAM SCOTT, Procurator-Fiscal of the County of Edinburgh, . . . } *Respondent.*

House of Lords, 8th Jan. 1798.

POSTMASTERS—ILLEGAL COMBINATION TO RAISE RATES OF POSTING—JURISDICTION OF THE JUSTICES.—Circumstances in which it was held that an agreement among the posting masters in Edinburgh, to raise the rates of posting, was an illegal combination, and that the justices had jurisdiction to decide in such a case. An appeal being taken to the House of Lords, the Lord Chancellor, in affirming the judgment, intimated that such a combination was illegal; but that the justices had no powers to fix the rate of posting. And that, neither for the disposal of these points, nor the other questions appealed against, had the appeal been brought in a regular manner; it being brought prematurely, and before the whole question was exhausted in the Court below.