

1817.

M'DOUALL
v.
BUCHAN.

ANDREW M'DOUALL, Esq. of Logan, *Appellant* ;
JOHN BUCHAN, Esq., W.S., *Respondent*.

House of Lords, 2d July 1817.

FACTOR—LIABILITY FOR NEGLIGENCE—RATE OF INTEREST.—The respondent, it was alleged, acted as a factor for the appellant, but it did not appear that he held any written factory. He had allowed the tenants on the estate to fall into arrear of their rents, and did not avail himself of the hypothec to which the landlord looked for payment, and did not render his accounts regularly. Held him not liable for the whole arrears. (2) Interest was charged against him at the rate of three per cent. by the accountant, while the appellant sought to make him liable in the legal rate of interest. This was disallowed. Affirmed on appeal.

This was an action raised by the appellant's predecessor against the respondent, who had acted, for many years, as factor on the appellant's estates, to account for his intromissions, in which the chief question was, whether, in this accounting, the factor was liable to make good certain arrears of rents of farms, which, it was alleged, the factor ought to have recovered, had he used due diligence in availing himself of the hypothec belonging to the landlord. The appellant contended, that in the accounting he was not entitled to take credit for these arrears, but must be held liable for them in consequence of his neglect to recover the same.

It appeared from the appellant's statement, that the respondent had neglected to render periodically his accounts, so that he was thus prevented from being made aware of these arrears of rents.

On the other hand, it was stated, that the respondent was a relation of the appellant's family, and had all along been dealt with on that footing, and it was chiefly the appellant's father's own fault that regular accounts were not asked and given in. He also stated, that he was employed as a cashier, conveyancer, and as law-agent in the Court of Session, in conducting law suits there, purchasing lands, borrowing and lending money, &c. But the respondent did not occupy himself in the office of factor. He had held at first a factory, but this had been withdrawn, and at no time had he held a written factory or commission.

In these circumstances, the respondent admitted a balance in his hands of £700. The Lord Ordinary, Glenlee, remitted the accounts, when lodged, to an accountant.

The arrears of rents falling under the above description, for which the appellant sought that Mr Buchan should be made liable, amounted to £1179, 16s. 6d. The accountant reported, that Mr Buchan was liable in £906, 1s. 6d. of arrears, if these should not be recovered by the subsequent factor.

The accountant also, only allowed interest on these arrears, at the rate of three per cent., while the appellant contended, that he was liable on the whole arrears, and to the legal rate of interest at five per cent., for culpable neglect in the performance of his duty.

Objections were, therefore, given in to the accountant's report, but the Court, on report of Lord Glenlee, pronounced this interlocutor: "Repel the objections to the report, and "remit to the Lord Ordinary to proceed accordingly; it "being always understood, that the defender (respondent) is "to warrant the pursuer and his heirs against any demand "that may happen to be made upon them, founded upon "the bond which was granted for the price of Blairs, and "to relieve them of such demand if made." On reclaiming petition the Court adhered.

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Against these interlocutors, the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The appellant pleaded, that the respondent was liable as factor, because, in that character, it was his duty to have taken measures to secure payment of these arrears of rents, and to make the hypothec available.

Pleaded for the Respondent.—Even an ordinary factor, managing a land estate, is not liable as surety for the rents of the tenants or farmers on that estate. Without special instructions, he has no power to sell their effects under legal execution, or to imprison their persons. There is no rule in the law of Scotland, by which factors are bound to make effectual landlords' hypothec, under penalty of being liable themselves for the rent. But, in this case, the respondent was not in the situation of an ordinary factor. He held no written factory or commission; and another person, Mr Caddell, had just as much power to interfere with the tenants as the respondent.

After hearing counsel,

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THE LORD CHANCELLOR said, after stating the case,

“ My Lords,

“ The items are many in number, which rendered it necessary to take some time to examine them with attention. I have done so, and it is my humble advice, that the judgment should be affirmed, for, under the particular circumstances of the present case, I think Buchan is not answerable, as he would have been, if he had been acting strictly in the character of factor, and had not, on the contrary, been acting on principles which displaced the obligation that would have attached to him by the general principles of law, as applicable to factors.

“ But it was insisted also, that this judgment should be affirmed with costs. I cannot, however, concur in that; for, though the just demands against Buchan were less than the claims insisted upon by the other party, yet, from the relation in which he stood with respect to the father, he ought to have kept accurate accounts always ready to be produced, and the contest has, in some measure, arisen from his failure in that duty. I propose, therefore, that the judgment be affirmed, but without costs.”

It was ordered and adjudged, that the interlocutors complained of, be, and the same are hereby affirmed.

For the Appellant, *Sir Saml. Romilly, John Greenshields.*

For the Respondents, *Alex. Maconochie, Robt. Forsyth.*

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DUFF
v.
BROWN, &C.

HUGH ROBERT DUFF Esq. of Muirtown, *Appellant;*

ROBERT BROWN, Factor for Ronald George
Macdonald, Esq. of Clanronald, and JOHN
MACDONALD, Esq. of Borrodale, } *Respondents.*

House of Lords, 11th July 1817.

SALE OF GROWING WOOD—DELIVERY—RELIEF AND DAMAGES.—

The appellant sold the growing wood on his lands of Almie to Mr Buchanan, and that right was transferred to the respondent, Brown. The appellant, from the correspondence which passed, understood that the wood was either cut, or in the course of being cut and taken away, and a bill was granted for the price, and paid. Three years thereafter, he sold the lands of Almie, with the wood growing thereon. It then turned out that the wood sold to Buchanan, and afterwards to Brown, was still on the lands uncut. In an action of relief and damages brought by Brown against the appellant, and the purchaser of the lands,