WILLIAM STIRLING and SONS, Appellants.—*Gifford—Clerk—Skene—Gillies.* No. 54.
JOHN DUNCAN Junior and COMPANY, Respondents.—*Moncreiff—Wilson.*

Sale—Lien—Mercantile Agent.—A mercantile agent having sold goods and taken the purchaser's bill, which he guaranteed and indorsed to the owner of the goods; and the purchaser having become bankrupt, and the owner having accepted of a composition on the bill, and delivered it up—Held, (reversing the judgment of the Court of Session,) that the agent was not entitled to withhold delivery of the goods from the purchaser, till relieved of the effect of his guarantee.

Bell II. 122.

March 5. 1823.

1ST DIVISION.
Lord Gillies.

PATRICK HODGE, merchant in Leith, consigned to John Duncan junior and Company, mercantile agents in Glasgow, a quantity of madder in casks for sale. On the 5th of December 1815 Duncan and Company sold two casks to Stirling and Sons, merchants in Glasgow, the invoice of which expressed that they were bought of 'Patrick Hodge per John Duncan junior and 'Company;' and on the 23d they again sold to Stirling and Sons 10 casks more, rendering the invoice in their own name; but it was admitted that Stirling and Sons knew that the whole of the madder belonged to Hodge. Duncan and Company having intimated these sales to Hodge, he, on the 25th, desired them to take Stirling and Sons' bill for the price, and to guarantee its payment. Accordingly, on the 29th, Stirling and Sons granted their bill for the price, being £528: 17: 9, to Duncan and Company, payable at six months date. In the course of January 1816, Duncan and Company wrote to Hodge that they would guarantee the bill, which they thereupon indorsed to him. After four casks had been delivered, Stirling and Sons became bankrupt, and their estates were sequestrated under the bankrupt act. Duncan and Company thereupon refused to deliver any more of the madder.

After the bill fell due, Hodge claimed and ranked on the estate of Stirling and Sons for the amount, and deponed that he held no other security except the bill itself. Stirling and Sons having settled with their creditors for a composition of five shillings in the pound, to which Hodge acceded, the amount of it was paid to him, and he thereupon delivered up the bill. He afterwards recovered the balance from Duncan and Company under their guarantee.

Stirling and Sons, being thus discharged, demanded the remaining casks of the madder from Duncan and Company; but they having refused to deliver it until they were indemnified for the sum which they had paid to Hodge, Stirling and Sons pre-

March 5. 1823. sented a petition to the Magistrates of Glasgow, concluding for delivery, or for payment of £500 as the value of the madder.

In defence against this action, Duncan and Company maintained,—

1. That having sold the goods, acting under a del credere commission, they were substantially the proprietors of them, and as such were not obliged to deliver them till the full price was paid.

2. That at all events, and supposing they were to be regarded as agents, still, as they had interposed their guarantee, and made advances in consequence of it, and in reliance on the security of the goods, they were entitled to retain them till they were indemnified: And,—

3. That as they truly stood in the situation of cautioners for Stirling and Sons, and as the sale would not have been effected unless they had pledged their credit on their behalf, they had a right to withhold delivery till they should be relieved of the effects of their cautionary obligation.

To this it was answered,—

1. That the goods were sold, not as the property of Duncan and Company, but as that of Hodge: that by ranking on the estate of Stirling and Sons for the full amount of the price, drawing the composition, and delivering up the bill, Hodge had received payment of the price, and had discharged all claim against Stirling and Sons, who consequently were entitled to delivery of the goods.

2. That although, in a question between a principal and his agent, (whether acting del credere or otherwise,) the latter was entitled to retention against the former for advances on his behalf, yet no such rule existed as between the agent and a purchaser: And,—

3. That Duncan and Company had not been required to interpose as cautioners for Stirling and Sons; and, in point of fact, the sale was completed before they had agreed to guarantee the bill.

The Magistrates found ‘ it sufficiently established that the ‘ defenders guaranteed the price of the madders in question to ‘ their constituent Patrick Hodge; but that, as guarantees, the ‘ defenders were in no other or better situation than the said ‘ Patrick Hodge:—that in place of ranking on the sequestrated ‘ estate of the pursuers for the full amount of the price of the ‘ said madders, as has been done by the said Patrick Hodge, he ‘ ought either to have got the said madders sold under judicial ‘ authority, so as in that way to have ascertained the deficiency,

'if any, that would arise, or to have valued them as a security 'under the provisions of the bankrupt statute, and then to have 'ranked for the balance or deficiency so ascertained, leaving, as a 'charge against the defenders under their guarantee, any balance 'which might still remain due to the said Patrick Hodge, after 'deducting the price got, or value put upon the said madders, 'and the composition on the sum to be ranked for:—that the 'settlement of the said Patrick Hodge with the pursuers must 'be altered accordingly, and for that purpose it is necessary to 'call the said Patrick Hodge as a party to this action; and 'accordingly granted diligence at the instance of the defenders 'for citing the said Patrick Hodge.'

Against this interlocutor both parties reclaimed, and the Magistrates then pronounced this judgment:—'In the first place, 'find it not distinctly ascertained whether the defenders sold the 'pursuers the madders in question in their own name as the 'ostensible owners thereof, or as consignees or agents for the actual owner, Patrick Hodge; but of new find it sufficiently 'established that the defenders sold the said goods as consignees 'or agents in possession thereof under a del credere commission; 'and finds that, in the said circumstances, the defenders had not 'only a right of retention or lien against the said Patrick Hodge, 'the principal and consignee of the goods, in security and satisfaction of their advances or engagements on account of the 'goods, but were also entitled to be considered and held as 'owners of the goods, as between themselves and the pursuers, 'the vendees, to the extent at least of retaining possession, or 'withholding delivery, until they had received payment of the 'price which they had guaranteed, or were otherwise repaid 'their advances, or relieved of their engagements, on account 'of the goods; (see in illustration the opinions of the Judges in 'the case of Houghton *v.* Matthews, 29th June 1803, Bos. 'and Pull. C. P. Rep. Vol. III. p. 485.) In the second place, 'find that as no delivery whatever, not even constructive delivery, of the casks of madder now in dispute, had taken place 'prior to the date of the bankruptcy of the pursuers, the defenders were not reduced to the necessity of stopping in transitu, and of voiding the contract; but were entitled, upon the 'common principles of mutual contract, to retain the madders 'still undelivered, and in their complete possession, until they obtained full payment of the price, and, in the event of their not 'obtaining full payment of the price, to dispose of the goods by 'judicial sale or otherwise, habili modo, and to claim damages, 'or to rank for the balance of the stipulated price upon the bank-

March 5. 1823.

'rupt estate of the pursuers. In the third place, find that the 'act of the said Patrick Hodge, in taking from the pursuers a 'composition of five shillings per pound upon the bill which the 'pursuers had granted for the price of the whole madders sold 'them by the defenders, and which the defenders had indorsed 'to Hodge, although it indirectly and by implication confirmed 'and homologated the sale of the madder to the pursuers, so far 'as he still retained an interest therein, was not relevant in law, 'though done with their knowledge, to deprive the defenders of 'the right competent to them, as agent-venders under a del credere 'commission, and considered as owners of the goods, as between 'themselves and the pursuers, the vendees, to retain the goods 'still in their possession, until repaid the advances made by them 'to Hodge on account of the said goods. In the fourth place, 'find that in the circumstances, and upon the grounds before 'mentioned, the defenders are still entitled to retain the casks of 'madder remaining in their possession, until they receive pay-'ment of the balance of the price of the whole madders still due, 'or be repaid their advances, or relieved of their engagements to 'Hodge on account of the said goods; reserving to the pursuers 'any claim they may have against Hodge on the ground of his 'having acceded to their composition-contract, or otherwise; and, 'before further judgment, appoint the pursuers to state in a 'minute what they offer to do upon the said footing, and whether 'they consent to the sale of the madders in dispute in the mean 'time.'

Stirling and Sons again reclaimed, and presented a petition praying for an order to have the madders sold, and the price consigned under authority of the Court, in consequence of which the Magistrates granted interim interdict against Duncan and Company selling them for their own behoof; but thereafter, on advising both processes, they adhered to their last interlocutor, and further found, 'That, to all appearance, the price of the 'madders still in possession of the defenders will not be sufficient 'to relieve them of their cautionary engagement to Patrick 'Hodge under the del credere commission, and accordingly re-'cal the interdict granted in the said incidental application on 'the 12th of February last; reserving to the defenders to exercise 'the right competent to them of disposing of the said madders 'in relief of the obligations undertaken, or in repayment of the 'advances made by them on the faith of the said goods, upon the 'principle recognised in the case of Broughton against Stewart, 'Primrose, and Company, 17th of December 1814: But, before 'further judgment, and for the purpose of ascertaining whether

March 5. 1823.

'any balance of the price of the said madders may remain after 'relieving the defenders of their obligation of guarantee, ap- 'point the defenders to report the sale as soon as it is effected 'by them.'

The madders having been thereupon sold, and Duncan and Company having claimed credit for their del credere commission, the Magistrates found, 'That the defenders did not exceed their 'powers as agents who had made advances, or come under en- 'gagements in selling the madders in question at the ordinary 'credit of the Glasgow market, and find them entitled to the 'del credere commission charged by them: find it unnecessary 'to determine whether the defenders' right of retention covers 'any extraneous claims not arising out of the particular transac- 'tion in question: find the proceeds of the sales of the said mad- 'ders are scarcely sufficient to relieve the defenders of the en- 'gagements undertaken by them on the faith of the said goods: 'therefore assoilzie the defenders, and decern; and remit to the 'auditor to tax the defenders' expenses.'

Against these judgments Stirling and Sons complained by advocation; but the Lord Ordinary repelled the reasons, and remitted simpliciter; and the Court, on the 4th of February 1819, adhered, and decerned against Stirling and Sons for £63. 10s. of expenses.*

Stirling and Sons having appealed, the House of Lords 'ordered 'and adjudged, that the said interlocutors complained of in the 'said appeal be, and the same are hereby reversed.'

The Lord Chancellor observed, that the interlocutors of the Courts below proceeded upon an entire mistake in point of fact, because it was admitted on all hands that the guarantee had taken place subsequent to the time when the sale had been completed. The sale was made by the respondents as agents of Hodge, and the price was included in the appellants' bill which was indorsed to Hodge, the owner of the goods, who had taken a composition, and delivered up the bill. The price was therefore paid, and it was impossible to maintain that the respondents had any lien on the goods. If the cause had been tried at Guildhall, it could not have lasted a moment.

Appellants' Authorities.—2. Esp. 557; 2. Roll, 79; 54. Geo. III. c. 137. sect. 59.
Respondents' Authorities.—1. Term Rep. 112; 7. Term Rep. 359.

J. Campbell,—J. Chalmer,—Solicitors.

(*Ap. Ca. No.* 4.)

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* Not reported.