

describe this as a payment in the course of trade; and it is June 12, 1827. equally obvious that Patrick Duncan was interposed, to enable the Bank to accomplish indirectly what could not be attained directly. The heritable security cannot be separated from the bill. It enabled the Bank to obtain payment. If the Bank had been permitted to exact payment from Patrick, then he would have raised money on the security, or sold the lands over which the security extended, and thus have diminished, to that extent, the bankrupt estate, at the expense of the other creditors. The only consideration given by Patrick for the bond was his acceptance, which, if reduced, he does not pretend that the security could be further available to him. It is impossible to conceive, from the circumstances of the case, that the Bank was ignorant that the bond had been required and granted.

The House of Lords ordered and adjudged, ‘ that the interlocutors complained of in the said appeal, so far as they may have the effect of directing the bill of exchange for L.615, accepted by Patrick Duncan, to be delivered up by the appellant, the cashier of the Dundee Banking Company, to the trustee of the sequestrated estate of James Duncan, be, and the same are hereby reversed; and it is further ordered, that the said interlocutors in all other respects be, and the same are hereby affirmed.’

Appellant's Authorities.—2 Bell's Com. (and cases there referred to) 220 et seq.—19 Geo. II. c. 32. § 1.—*Hawkins v. Penfold.*—2 Vesey, 550.

Respondent's Authorities.—2 Bell's Com. (and cases there referred to) 220 et seq.

RICHARDSON and CONNELL—SPOTTISWOODE and ROBERTSON
—Solicitors.

ROBERT LOW, Cashier of the Dundee Banking Company, No. 48.

Appellant.—*Keay*—*John Campbell*.

PATRICK DUNCAN, Respondent.—*Adam*.

Title to Pursue.—A party having accepted a bill for the accommodation of the drawer, from whom he received an heritable security in relief; and the bill having been indorsed to the cashier of a Bank in payment of a debt due by the drawer; and the indorsation having been reduced at the instance of the trustee for the creditors of the drawer on the act 1696, c. 5, reserving the rights of the Bank against the acceptor; and the cashier of the Bank having brought an action on the bill against the acceptor before an Inferior Court, which was advocated ob contingentiam of a reduction of the heritable security; and the Court of Session having sustained the

reasons of advocacy, and found that the Bank had no right to sue on the bill; and the heritable security having been reduced, Held, (affirming the judgment, so far as it sustained the reasons of advocacy, but reversing it so far as it found that the Bank could not sue on the bill,) That as there was no evidence that the Bank was participant in the granting to the acceptor of the heritable security, they, and their cashier for their use, were entitled to maintain an action, for payment of the bill, against the acceptor.

June 12, 1827.

1st DIVISION.
Lords Eldin and
Meadowbank.

THE circumstances which gave rise to the present question, will be found in the preceding case. Miller, the trustee for James Duncan, having raised an action against Patrick Duncan, for the purpose of reducing the bond and security granted to Patrick by James, within sixty days of bankruptcy, obtained decree to that effect. The trustee had previously got a decree of reduction, in terms of his libel against the Dundee Banking Company, reducing the bill drawn by James on and accepted by Patrick, and which had been specially indorsed to the then cashier of the Bank; but with the reservation 'of the effect of the bill, in so far as the Bank may operate thereon against the said acceptor.'

In virtue of this reservation, Low, now cashier of the Dundee Banking Company, raised an action before the Sheriff of Forfarshire against Patrick Duncan, founding on his acceptance, and concluding for payment of the amount. Patrick, in defence, stated, that the indorsation which the Bank had held to the bill, was completely destroyed by the trustee's decree of reduction; and that if they had any claim, it could only be for damages, on which he was ready to meet them; but that as the present action was laid on the bill alone, he was entitled to be assoilzied. The Sheriff found, 'that by the final interlocutor of the Supreme Court, pronounced in the action of reduction at Mr Miller's instance against the pursuer, regarding the bill in question, the effect of that bill is reserved to the pursuer, in so far as he may operate thereon against the defender, Patrick Duncan, acceptor of the bill. Therefore, that the pursuer has still right to insist for payment of said bill from the defender, Mr Duncan;' and repelled the defences. In the meanwhile, the trustee on James Duncan's estate had brought the reduction of the heritable security granted to Patrick; and in consequence of a note issued by Lord Eldin, suggesting that both cases should be decided by the same judicatory, Patrick brought an advocacy ob contingentiam, which having been remitted to the reduction, Lord Eldin repelled the reasons of advocacy, remitted the case simpliciter to the Sheriff, and decerned. The question then came by representation before

Lord Medwyn, who took the case to report, observing—(in a June 12, 1827.
note to a similar order in the process *Miller v. Patrick Duncan*)—that he could ‘not concur in the interlocutor last pronounced in these cases. He does not understand how the Dundee Bank can bring an action against the acceptor of the bill for L.615, when the indorsation in their favour stands reduced, and the bill ordained to be delivered up to Duncan’s trustee, the pursuer of the reduction. Farther, the Lord Ordinary thinks, that if the defender is to be called upon to pay this bill, and thus relieve the bankrupt estate of the debt due to the Bank, he ought not, in a question with the trustee, to be deprived of the heritable security, which was the condition on which alone he agreed to become bound to interpose his credit, and make the payment. On the other hand, if the disposition in security is to be set aside, it appears equitable, and according to the view indicated in Lord Mackenzie’s interlocutor, (5th March 1823)*, that Duncan’s trustee should hand over to the defender the bill which, in his action against the Dundee Bank, is ordered to be delivered up to him, so that there should be a *restitutio in integrum*. Besides, the parties differ about the meaning and effect of the reservation thrown into the interlocutor of the Court. The Dundee Bank allege that it was held, although the indorsation was reduced, that this was only against the drawer, but not against the acceptor, which does not appear to be very likely, as that would be giving a very anomalous effect to an indorsation of a bill; nor is it very consistent with the farther reservation, to rank on the original debt, which the Dundee Bank could have no pretence for doing, if they recovered payment of the bill, which came in place of it, from the defender. It appears probable, that the reservation was introduced in case the Dundee Bank could qualify any damage, in consequence of the defender having interposed with the security, which has proved ineffectual, and which, perhaps, might have prevented the Bank from recovering payment at the time by more vigorous proceedings against the original debtor. At all events, the Court are the proper interpreters of the reservation in their own interlocutors.’ Informations having been accordingly prepared and advised, the Court, on the 8th December 1825, sustained the reasons of advocacy, advocated the cause, and found ‘that the Dundee Banking Company, and Robert Low their cashier, can main-

* Pronounced in the action of reduction, *Miller v. Duncan*. The Court, 9th Dec. 1826, reduced. This judgment was not appealed.

June 12, 1827. 'tain no action against Patrick Duncan upon the bill libelled, 'and decerned, with expenses.'*

Patrick Duncan appealed.

Appellant.—The appellant has a title to pursue. The respondent's acceptance of the bill was part of an onerous contract with the Bank, who surrendered the old drafts on receiving Patrick's acceptance, thereby giving full value for it. Patrick's liability cannot be affected by the circumstance of the indorsation to them by James being reduced. That was, as to Patrick, *res inter alios judicata*. The document stands in full force as to third parties; and must bind Patrick, who neither denies that the debt was contracted, nor that it is still due. But independent of the plea in law, the appellant's right of action is effectually preserved by the reservation in the interlocutor of the 19th November 1822. Under this interlocutor, the respondent found that he could not force delivery of the bill; which shows its force and meaning. The respondent cannot plead *res inter alios*, on the ground that he was not a party to the action in which the reservation was made,—for he rests on the reduction, which unquestionably was to him *res inter alios*, and he cannot be permitted to entertain contradictory pleas. Neither can the explanation stand, that the reservation was intended merely to save the Bank's claim of damages; that is not supported by the words of the reservation. And even if otherwise,—and if the appellant has suffered damage,—it is from being refused action on the bill. But that would import, that the Court felt they were doing the appellant an injury, and therefore they reserved the means of redress,—an untenable supposition. The respondent does not pretend that the Bank was aware of the heritable bond.

Respondent.—The appellant has no title to pursue. The action is raised in his name, as cashier of the Dundee Banking Company, for behoof of that Company. But that Company is not incorporated either by statute or royal charter. Besides, the bill on which the action is raised, is indorsed not to the appellant, but to the former cashier.

On the merits: The indorsation has been reduced and set aside by the final decree of the Bank. The objection, that that action is *res inter alios*, is of no weight. The respondent has

* 4 Shaw and Dunlop, No. 209.

a legal interest to plead the nullity of his opponent's title, though ^{June 12, 1827.} that nullity was declared in an action to which the respondent was not a party. The respondent is, owing no debt to his father's estate. The value given for his acceptance, was the bond and security; and that being cut down, the debt in the acceptance falls also. The object of the reservation was solely to enable the Bank to raise action against the respondent, or any other medium concludendi,—nor can another meaning be maintained, consistent with the conclusion of the summons, and the interlocutors which followed, decerning conform to these conclusions. The bill ought to have been delivered up, and at this moment the Bank are truly wrongful possessors of it. Even although the indorsation had not been reduced, the Bank could not have enforced payment against the respondent; for as far as the Bank was concerned, the transaction was illegal. Neither would the Bank be benefitted in this action, if a reversal ensued in the case against the Bank. If the Bank considered, that thereby there opened a claim against the respondent, the question must be tried in a new action,—for the present action rests on the assumption, that in October 1823, the Bank had an undoubted right to the bill, but which is not the fact; for at that very moment, the bill stood reduced by a decree then final and unappealed.

The House of Lords found, that ‘ for as much as it does
 ‘ not appear, either by admission or evidence, that the cashier
 ‘ of the Dundee Banking Company, or any other person au-
 ‘ thorized on their behalf, did concert with James Duncan
 ‘ or the said Patrick Duncan that the said James Duncan
 ‘ should give to the said Patrick Duncan the heritable secu-
 ‘ rity mentioned in the proceedings, in consideration of his
 ‘ the said Patrick Duncan's accepting the bill of exchange for
 ‘ six hundred and fifteen pounds in question: It is therefore
 ‘ ordered and adjudged, by the Lords Spiritual and Temporal
 ‘ in Parliament assembled, That the interlocutor of the 8th De-
 ‘ cember 1825, complained of in the said appeal, in so far as it
 ‘ sustains the reasons of advocacy, be, and the same is hereby
 ‘ affirmed; but that the same, and the several other interlocu-
 ‘ tors complained of, be, and the same are hereby in all other re-
 ‘ spects reversed; and it is declared, that the Dundee Banking
 ‘ Company, and Robert Low, their cashier, for their use, as the
 ‘ holders of the said bill, can, in the circumstances beforemen-
 ‘ tioned, maintain an action against the said Patrick Duncan
 ‘ as acceptor of the said bill: And it is further declared, that

June 12, 1827. ' the said cashier and the said Banking Company are entitled
 ' to their expenses in the Court below: And it is further or-
 ' dered, that the cause be remitted back to the Court of Session
 ' in Scotland, to proceed according to the aforesaid declarations,
 ' as shall be just.*

Appellant's Authorities.—Dictionary of Decisions, ("Res inter alios.") Bell's Com.
 2d vol. p. 407; 3d edition.

Respondent's Authorities.—Bell, vol. 1, p. 232.

RICHARDSON AND CONNELL,—ALEX. MUNDELL, Solicitors.

No. 49.

BUDGE and Co. and Others, Appellants.—

MAGISTRATES OF EDINBURGH, Respondents.—

Statute 25 Geo. III. c. 28.—Found, (affirming the judgment of the Court of Ses-
 sion,) that, under this statute, the Magistrates of Edinburgh have right to levy im-
 post-duty from all vintners and tavern keepers within their bounds, on all foreign
 wines and other liquors specified in the act, consumed within the taverns, whether
 the vintners themselves imported those liquors, or purchased them from other im-
 porters who had not paid the duty; but that if the Magistrates so levy the duty, they
 cannot assess the tavern keepers in the commutation tax, in respect of the taverns
 where the liquors are sold and consumed.

June 13, 1827.

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 2D DIVISION.
 Lord Macken-
 zie.

By royal grant, dated 1st April 1671, the Magistrates of
 Edinburgh were authorized to levy a certain impost on every
 pint of certain wines, and other liquors, ' importando et ven-
 ' dendo infra dictam civitatem de Edinburgh,'—' solvendum
 ' per venditores et cunctos alios inuectores dictos.' This grant
 was ratified by Parliament, 11th September 1672. In 1785,
 the statute 25 Geo. III., c. 28, was passed, by which it was
 enacted, (§ 59,) that all grants and ratifications in Parliament, in
 favour of the city of Edinburgh, ' for payment of the impost or
 ' duties on French, Rhenish, brandy wines, &c. shall subsist in
 ' force and effect, respecting all vintners, keepers of taverns or
 ' inns, and all others who keep public houses, shops, cellars, or
 ' other places, wherein these liquors, or any of them, are or shall
 ' be consumed by drinking, and sold for the purpose of their being
 ' consumed by drinkers; and that the Magistrates of Edinburgh
 ' shall have full power and authority to continue to collect and

* This appeal was heard by the Lord Chief Baron.