[Heard, 2*d March*, — Judgment, 9*th March*, 1843.]

WILLIAM MACKERSY, *Appellant.*

MESSRS RAMSAY, BONARS, and Co., *Respondents.*

Principal and Agent. — A banker, receiving a bill for transmission to a foreign country, in order to its acceptance and payment, is liable for the acting of the agents employed by him for that purpose.

Costs. — Where the interlocutor of the Inner-House, recalling an interlocutor of the Lord Ordinary, was reversed, and that of the Lord Ordinary affirmed, it was with costs to the appellant.

LINDSAY MACKERSY, residing in Edinburgh, had an account with Ramsay, Bonars, and Co., bankers in the same city, upon a cash credit with security.

On the 10th of August, 1829, Mackersy wrote Ramsay and Co., enclosing a bill on Clelland of Calcutta, for L.100, and saying, "which be so good as forward for payment, placing the "proceeds, when paid, to my credit." Two days afterwards, Ramsay and Co. sent the bill to Coutts and Co., bankers in London, saying, "which we will thank you to forward for pay-"ment, and advise us when you hear it is paid." Messrs Coutts and Co., on the 24th August, 1829, sent the bill to Palmer and Co., of Calcutta, "for collection, the proceeds of which you will "please remit us, after making the usual deduction."

On the 21st August, 1830, Coutts and Co., in answer to an inquiry by Ramsay and Co., made in consequence of a similar inquiry at them by Mackersy, wrote Ramsay and Co. that they had received advice of the acceptance of the bill from Palmer and Co., "and that, when paid, they would make us a remit-"tance." Inquiries as to the payment of the bill continued

throughout the remainder of the year 1830, and the years 1831 and 1832.

On the 10th February, 1832, while these inquiries were as yet unanswered, Mackersy sent a second bill on Clelland for L.100, to Messrs Ramsay and Co., in a letter, of which the following is a copy, — "I beg leave to enclose a draft, (first and second of "exchange,) on W. L. Clelland of Calcutta, dated 9th current, "at thirty d/d pro L.100, which be so good as forward for pay-"ment." To this Ramsay and Co. returned the following answer, "We have your letter of yesterday covering your draft "at thirty days on W. L. Clelland of Calcutta, pro L.100, "which we shall forward for payment, and at maturity place to "your credit."

The same day Ramsay and Co. sent the bill to Messrs Coutts and Co., their correspondents in London, in a letter in which they said, "Enclosed is Mr Lindsay Mackersy's bill on W. L. "Clelland, at thirty days, for L.100, which we will thank you to "get forwarded for payment, advising us when the amount is "received." On the 29th of February, Coutts and Co. sent the bill to Alexander and Co., their correspondents at Calcutta, in a letter in which they said, "We enclose a bill on W. L. "Clelland, Esq., which we will be much obliged to you by your "obtaining payment of, and remitting us the proceeds less your "charges."

The first bill, when it fell due, was paid to the assignees of Palmer and Co. that firm having become bankrupt before that time, and the amount was subsequently paid over to Coutts and Co.'s agents in Calcutta, as will appear in the sequel.

The second bill was paid by W. L. Clelland, when due, on the 7th of August, 1832, to Alexander and Co. Alexander and Co. credited the account of Coutts and Co., in respect of this bill, as follows: —

"1832, August 7, By cash received. L. Mackersy draft on

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" W. L. Clelland, in favour of Messrs Ramsay and Co., p.			
" L.100, at 1s. 10d. per Sa R., . .	1090	14	6
" 1833, January 10, Interest on Sa R.1090, for			
" 5 months 4 days, . . .	37	5	3
	1127	19	9"

Five months after recovering payment of the bill Alexander and Co. also became bankrupt, without having made any actual remittance to Coutts and Co. in respect of the bill.

Throughout the years 1831 to 1834, correspondence passed between Mackersy, Ramsay, and Co., and Coutts and Co., in regard to both bills. On the 7th December, 1832, Ramsay and Co. sent Mackersy an abstract of a letter they had received from Coutts and Co., in which Coutts and Co. said, that the proceeds of the first bill would be paid on their order, and that they would send out instructions for its remittance.

On the 8th of December, Mackersy thanked Ramsay and Co. for this information, and added, " You will of course take care, " that interest, from the time at which bills on India are usually " paid here, be also recovered. I will be glad to hear from you " when you have advices of the payment of my other bill. With " your permission, I shall leave the balance of my cash account " unsettled till then, but should you have any objections, it can " be paid up whenever you wish it."

In March, 1834, Mackersy, while in ignorance as to the payment of the second bill, asked Ramsay and Co., whether the first bill had " been placed to his credit," and whether " advice of payment of the other bill had been received." The respondents answered, that " no remittance on account of them " had been received by Coutts and Co.," and at the same time they transmitted their account, balanced against Mackersy by L.187, 4s. 11d.

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Mackersy, on 7th April, 1834, expressed his surprise to Ramsay and Co., "that no remittance, in payment of either of "these bills, had yet reached Coutts and Co.," and his desire that they would see that interest was accounted for. At the same time he enclosed an order for payment of the L.187, 4s. 11d.

On the 23d June, 1834, Ramsay and Co. sent Mackersy an extract of a letter, which they had received from Coutts and Co., in which Coutts and Co. advised payment of the second bill to Alexander and Co., and said, that the dividend upon it, from their estate, would be applied for, and placed to Ramsay and Co.'s credit, and that they had sent out instructions for remittance of the proceeds of the first bill.

On the 30th June, 1834, Mackersy intimated to Ramsay and Co. that he held them responsible for their agents, and liable to him for the amount of both bills.

In November, 1835, Ramsay and Co. wrote W. Mackersy, (Lindsay Mackersy being dead by this time,) that Coutts and Co. had received the proceeds of the first bill, and that they, Ramsay and Co., had accordingly placed the amount, less L.2, 4s. 6d., to the credit of Lindsay Mackersy's account. This deduction of L.2, 4s. 6d., consisted of L.1 for commission, and L.1, 4s. 6d. for postages, retained by Ramsay and Co.

In the result, Mackersy's account was credited by Ramsay and Co. with the proceeds of the first bill, without any allowance for interest during the years which had elapsed from the time at which the proceeds had been received; and as to the second bill, the proposal was to give Mackersy the dividends from Alexander & Co.'s estate, upon the proceeds of this bill, without any allowance for interest.

In October, 1836, the respondents brought action against W. Mackersy, as executor of Lindsay Mackersy, for payment of a balance of L.97, 19s. 11d., upon Lindsay Mackersy's cash account.

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Mackersy, in his defences, set forth the circumstances in regard to the two bills sent to India, and insisted that he was entitled to receive credit for the amount of the second bill, and interest on the amount of both bills, and pleaded, *inter alia*, — "2. The "pursuers are liable for the interest due upon the bill first above "mentioned from the date of payment, or from a reasonable "date, when the remittance might have been made.

"3. The pursuers are bound, by their written engagement, to "give credit for the second bill of L.100 from the time of its "coming to maturity, or at least from the time when it might "have been paid.

"4. The pursuers are at least bound to procure and furnish "to the defender a full explanation of the circumstances attend- "ing the transmission, negotiation, and payment of the bill, "and the state of accounts between the parties concerned; as "also, to give credit to the defender for any dividend that may "have been received from Alexander and Company's estate."

On the 21st December, 1839, the Lord Ordinary sustained Mackersy's plea, that "in accounting with him Ramsay and Co. "must give him credit for the principal and interest of the two "bills in question," and assoilzied him from the action.

The Court altered this interlocutor, and decerned in terms of the libel. The appeal was against the interlocutor of the Court.

Mr Kelly, and Mr Wilmer, for the appellant.—The argument for the appellant is fully noticed by the Peers who delivered judgment. The authorities cited by them were Cartwright *v.* Hately, 1 *Ves.* 292; Pinto *v.* Santos, 5 *Taunt.* 447; Schmaling *v.* Thomlinson, 6 *Taunt.* 147; M'Donald *v.* M'Donald, *Hume's Dec.* p. 344; Thomson *v.* Logan, 5 *Bro. Supp.* 266; *Paley on Prin. and Ag.* p. 5; *Storey on Prin. and Ag.* p. 166; Stevens *v.* Badcock, 2 *B.* and *A.* 354; Cullen *v.* Backhouse, 6 *Taunt.* 148 *note*;

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Mathews *v.* Haydon, *Esp.* 509; M'Vicar *v.* M'Gregor, *Hume's Dec.* p. 348.

[*Lord Campbell.* — If you obtain a reversal as to the second bill alone, that will be all you desire, I suppose — it will turn the balance.] Certainly.

The Lord Advocate, and Mr Pemberton Leigh, for the respondents. — Nothing farther was undertaken by the respondents than payment over of the proceeds of the bills, when they themselves should receive them. It was no part of the contract between the parties, and the correspondence shews, that it was not the intention, or understanding, of either of them, that the receipt in India, by persons whom it was known the respondents must employ there, should be the receipt of the respondents. If the respondents could themselves have received payment, and had, nevertheless, employed others, there might be some ground to allege a responsibility by them for the acts of these parties; but it was known to Mackersy that the respondents had no branch of their firm, nor any agent in Calcutta, and that the only way in which they could negotiate the bill was through a house in London having these advantages. When, therefore, Mackersy intrusted the bill to the respondents, with this knowledge, he must be understood to have done so at the risk of these foreign parties failing in their duty. The bill was not discounted by the respondents so as to give the form of a purchase. There was a mere transmission for negotiation. Accordingly, when Mackersy was advised in 1832, that the first bill had been paid, he did not insist that the amount should immediately be placed to his credit. He waited until the money should be actually remitted, and even in 1834, he did not insist that the proceeds of the first bill should be placed to the credit of his account, so as to reduce the balance for which he was then giving an order. He only complained that the remittance had not then been

made, shewing his own understanding of the contract between the parties as not implying any right, on his part, to receive credit from the respondents, until they themselves had received the money.

LORD CAMPBELL.—My Lords, I am humbly of opinion, that the interlocutor of the Lord Ordinary was right, and that it ought to be affirmed.

Ramsay and Company, in the way of their business as bankers, were employed for reward by a customer, with whom they had a cash account, to obtain payment of a bill of exchange, drawn on a person in Calcutta, payable to their order. They did not become the owners of the bill, or discount it, but they were to receive payment for Mackersy, having a lien on the bill and its proceeds, for any balance due to them from him. The payment was to be made to persons to be employed by them, to whom the bill must be indorsed. Mackersy was not to interfere with the proceeds of the bill, till he was credited, or entitled to be credited, by them for the amount.

They employed as their agents, Coutts and Company, who employed Alexander and Company, who duly received payment from the acceptor, and having given Coutts and Company credit in account, five months afterwards became bankrupt. I conceive, my Lords, that under these circumstances, in point of law, this was payment to Ramsay and Company, and that they were bound to place the amount to the credit of Mackersy.

The general rule of law, that an agent is liable for a sub-agent employed by him, is not confined to cases where the principal has reason to suppose that the act may be done by the agent himself, without employing a sub-agent; and here I conceive, that the money is to be considered as received by Coutts and Company, whose correspondents actually received it at Calcutta, and credited them with the amount five months before their

failure. Mackersy could not have interfered with the money, either in the hands of Alexander and Company, or of Coutts and Company. There was no privity between him and either of those houses. But payment to Alexander and Company was payment to Coutts and Company, and payment to Coutts and Company was payment to Ramsay and Company, the respondents. I approve of the expression of the Lord Ordinary, "*at "that moment the law placed it to the credit of the defender.*"

The judges of the First Division truly say, that Ramsay and Company had not become the owners of the bill. If by *vis major* or *casus fortuitus*, the bill had been destroyed before it reached Calcutta, or if Clelland the drawer, had become insolvent before it was paid, the loss would not have been theirs. But they might, nevertheless, be agents to receive payment, and be liable for the amount when payment was received.

We have been much pressed with the case of Campbell *v.* the Bank of Scotland, decided by Lord Moncrieff, a judge for whose opinion I should entertain as much deference as for the opinion of any judge in Scotland or England, but the facts of the case are not distinctly stated. If he had decided that in a case like this, the bankers were not liable for the money received by their correspondents, I should have been bound to say, with all respect, that he had come to an erroneous conclusion.

I therefore move your Lordships, that the interlocutors of the First Division of the Court of Session complained of, be reversed, and that the interlocutor of the Lord Ordinary, assoilzieing the defender, with the costs, be affirmed.

Lord Cottenham. — My Lords, this case, though it does not appear to me to raise any question of difficulty, has acquired a considerable degree of importance from the manner in which the rule of law involved in it has been viewed in Scotland.

That rule of law is of general application, and I do not find any special circumstances in this case to take it out of the general

rule. The correspondence, if it proves any special contract, establishes only such an agreement as the law would have inferred from the dealings between the parties. The appellant having an open cash account with Messrs Ramsay, transmitted to them two bills drawn by himself upon Mr Clelland of Calcutta, and made payable to them. This is an authority to them to receive the money, which in the ordinary course of business, they proceeded to do, and the money was paid in pursuance of the order. From the time the bills were sent to the pursuers, the appellant did not interfere. It was not intended that he should do so; nor, indeed, could he have done so, as none of the intended agents acted under his authority: he therefore had no control over them; all that Mackersy undertook to do by the bills has been accomplished. His debtor in Calcutta has, as directed, paid the sum for which the bills were drawn. In the ordinary course of business, therefore, the bankers to whom he delivered the bills, and to whom they were payable, were bound to credit him with the amount received, and by these letters they in effect agreed to do so.

The money, indeed, was lost, not by any failure on the part of Mackersy, or of the party who had by the bills been ordered to pay the amount to the bankers, the drawers, but by the insolvency of the person in Calcutta, who had actually received the proceeds of the bills; and this loss the Court of Session has said is to fall upon the drawer.

The learned judges below do not altogether agree as to the ground upon which this judgment is founded. Lord Gillies thinks, that the contract of the bankers was to give the credit only upon getting the payment themselves, which, as such transactions are always matters of account, would never happen, if he means receipt of the identical sum paid by the acceptor. The Lord President, indeed, puts the case upon much the same ground, saying, that he could not hold that payment to Alexan-

der and Company, in Calcutta, was the same thing as payment to the pursuer in Edinburgh ; but Lord Fullerton rather relies upon the admitted fact, that the bankers did not discount the bills, saying, that the result of the cases quoted, was, that unless there was some clear indication of intention of the parties, at the time, that the bills remitted should be taken by the bankers on discount, or terms equivalent to discount, they would be taken as remitted to, and taken by, the bankers as mere agents, and that he thought that there was no such indication in this case. And Lord Mackenzie says, the case turns upon this, that the bankers agreed to take the bills as payment in India; and the interlocutor of Lord Moncrieff, in Campbell *v.* the Royal Bank, upon which this decision now under consideration appears to be principally rested, draws a distinction between the cases which were cited, and the case before him, because, in that case, it must have been known that the agent could not himself have received the money.

Now, certainly, the present was not a case of discount, and there was no such special contract as is referred to by Lord Mackenzie, and it must have been known to the appellant, that Messrs Ramsay and Company could not themselves go to Calcutta, and receive the money. But none of these circumstances appear to me to be necessary in order to entitle the appellant to have credit with Messrs Ramsay, for the proceeds of those bills actually paid by his debtor, the acceptor of the bills. I cannot distinguish this case from the ordinary transactions between parties having accounts between them. If I send to my bankers a bill, or draft, upon another banker in London, I do not expect that they will themselves go, and receive the amount, and pay me the proceeds, but that they will send a clerk in the course of the day, to the clearing house, and settle the balances in which my bill or draft will form one item. If such clerk, instead of returning to the bankers with the balance, absconds with it, can my banker refuse to credit me with the amount of the bill or draft? If the bill had

been upon a person at York, the case would have been the same; although, instead of the bankers employing a clerk to receive the amount, they would probably employ their correspondent at York to do so, and if such correspondent received the amount, am I to be refused credit just because he afterwards became bankrupt, whilst in debt to my bankers? If the balance were in favour of my bankers, the question would not arise, so that my title to the credit would depend upon the state of the account between my bankers and their correspondent. The amount in money was received by the correspondent of my bankers at York, as between me and them it was received by them, and nothing which might subsequently take place could deprive me of the right to have credit with them for the amount.

If this be so in a transaction between London and York, it must be the same in one between Edinburgh and Calcutta, not by virtue of any special contract, but as resulting from the ordinary course of business, and in this case, from the letters which raised the undertaking to procure payment of the bill if it should be accepted and honoured, and to credit the proceeds. It was accepted and honoured, and the proceeds received by those employed for the purpose by them, and the appellant's title to credit for the amount was thereby perfected. If there were any negligence in the conduct of the parties actually employed to receive the money, it could only affect those by whom they were so immediately employed, for certainly they were not the agents of the appellant. Over them he had no control. The money received by Alexander and Company, properly formed an item in the account between them and Messrs Coutts and Company, their employers. If a larger balance had been due to them from Coutts and Company, than the amount of the money so received, they would have been entitled to claim the whole, as in fact they did retain part.

To solve the question in this case, it is not necessary to go

deeper than to refer to the maxim, *qui facit per alium facit per se.* Ramsay and Company agreed, for consideration, to apply for payment of the bill; they necessarily employed agents for that purpose, who received the amount; their receipt was, in law, a receipt by them, and subjected them to all the consequences. The appellant with whom they so agreed, cannot have any thing to do with the conduct of those whom they so employed, or with the state of the account between different parties engaged in this agency.

These principles and these consequences were so much and so properly felt, that they were scarcely disputed at the bar; but it was urged that the appellant had not put forward this case in the proceedings in such a manner as to entitle him to the benefit of it. I have for this purpose carefully examined the proceedings, and I think the objection is not well founded. The defence states the fact of the two bills having been paid to Alexander and Company, the agents of Coutts and Company, and the first plea in law raises the question, that, under the circumstances, Messrs Ramsay are liable for the money so received. There is far too much in the papers about negligence, but I think there is quite sufficient to raise the question, namely, the receipt by the agent being a receipt by the principal.

Lord Cockburn, the Lord Ordinary, appears to me to have taken a very correct view of the case, in saying, "both bills were "paid to persons empowered by the pursuer to receive payment; "at that moment the law placed them to the credit of the "defender."

On these grounds it appears to me, that the interlocutor of the Court should be reversed, and that of the Lord Ordinary substituted in its place.

Mr Graham. — Will your Lordships allow me to call your attention to the matter of costs? I presume it is your Lord-

ships intention, that the appellant should have the whole costs in the Court below.

Lord Campbell. — We ought to pronounce the judgment which ought to have been pronounced by the First Division of the Court.

Lord Brougham. — My Lords, I have no doubt about this, I shall take no part in the discussion on the merits, for I was not present at the argument, but I have no doubt that your Lordships feeling it right to reverse the interlocutor of the Inner House, and to affirm the interlocutor of the Lord Ordinary, the costs of the proceedings in the Inner House ought to be given. You never give the costs against a party coming to defend and protect a decree in his favour, therefore the appellant never gets his costs here; but in this case, we are putting ourselves into the place of the Court below, and giving those costs which the party ought to have had there. I think that is quite right.

Lord Cottenham. — We have affirmed the judgment of the Lord Ordinary, and the necessary effect of our so doing, is to give the costs of the hearing in the Court below.

Ordered and Adjudged, that the interlocutors complained of in the appeal be reversed; and that the interlocutor of the Lord Ordinary of the 21st December, 1839, (mentioned in the appeal,) be affirmed with costs.

WIRE & CHILD. — SPOTTISWOODE & ROBERTSON, Agents.