"James Burnett is entitled to hold his lands of the Crown, "and, therefore, assoilzie the said defender, and decern."

On reclaiming petition the Court adhered.

Against these last two interlocutors the present appeal was brought to the house of Lords.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby, reversed; and it is further ordered and adjudged, that the interlocutor of the Lord Ordinary of the 10th of December 1761, be, and the same is hereby, affirmed, with an addition after the words ("and that these lands are in non-"entry"); of the following words, viz., ("but so as not to "affect the respondent with any penalties on account "of such non-entry, except from the commencement of "the present action"); and it is further ordered, that the said Court of Session do give the proper directions for carrying the judgment into execution. Journals of the House of Lords.

For the Appellant, *C. Yorke, Tho. Miller, Al. Wedderburn.*

For the Respondents, *Al. Forrester, H. Dalrymple.*

[Thomson on Bills, p. 164.]

ALEXANDER BREBNER, Merchant in Portsoy, *Appellant;*

JOHN HALIBURTON AND COMPANY, Merchants in Edinburgh, . . . *Respondents.*

House of Lords, 13th December 1763.

BILLS—NEGOTIATION—NEGLECT.—The appellant sent three bills to the respondents (with whom he had dealings in business) for the purpose of negotiation and payment, indorsing them for that purpose. The respondents delayed timeously to present the bills for payment, and failed otherwise in duly negotiating the same, but they sent them to Boyd in Glasgow, with whom they had dealings, who failed with the proceeds in their hands. Held (1), That there was no culpable negligence on the part of the respondents to subject them in liability, and (2) As regarded the sum of £200 sent by Boyd to Haliburton, on 25th March, sought to be imputed *pro rata* of this debt, this remitted to the

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Lord Ordinary. In the House of Lords reversed, and held the appellant entitled to credit for the three bills, as from 25th March 1762, when they were recovered.

The appellant, living in the north of Scotland had been in the practice of having business dealings with the respondents.

On the 2d March 1752, the appellant sent in a letter to the respondents, three bills drawn by another person, payable to the appellant, one for £124, 3s. 4d., upon merchants in Greenock, payable 14th March same month; the other two, of which one was for £151, 7s. 9d., the other for £19, 13s, 9d., upon merchants in Paisley, payable on the 25th of the said month. In all amounting to £295, 4s. 10d.

These bills were endorsed to the respondents, Haliburton and Company, that they might negotiate the same and receive the contents; and as they were considered to be equal to cash, the appellant, by his aforesaid letter, directed the respondents, out of the contents, to pay £230, being the price of a ship or vessel he had purchased.

The appellant stated that his letter of 2d March, with the bills enclosed, must, in course of post, have reached the respondents, in three days after its date, that is, upon the 5th March, with the bills enclosed, and the contrary not having been alleged at the time, the fact certainly was so, though the respondents did not acknowledge the receipt thereof sooner than by letter to the appellant of the 12th, in which the respondents promised, in the usual way, to negotiate the bills, and to credit the appellant therewith.

Including the three days of grace, the bill upon Greenock, being payable the 14th March, fell due on the 17th; and the bills upon Paisley being payable on the 25th, were to become due on the 28th; and it was the course of business, and the respondents' indispensable duty, immediately on receipt of those bills, either to have negotiated them at Edinburgh, where the money might have been had for them, or if that could not be done, to have sent them to Greenock and Paisley, or to Glasgow, which is in the neighbourhood of both these places, by the first post after he received them, which fell to be on the 6th March, to be there duly negotiated. Instead of doing this, however, the respondents kept up these bills, and totally neglected to send away these bills for negotiation or for payment, till the 19th March, *fourteen* days after Haliburton had received them, and two days after the

days of grace were run upon the one payable at Greenock, which appeared from the respondents' letter to Mr Boyd, merchant, Glasgow, to whom these bills were then sent for negotiation and payment.

It turned out that Boyd endorsed all these three bills away on his own account, and got immediate cash for them.

At least, it appeared, that he had recovered payment of the Greenock bill; and also of the others, although this was concealed by him; but it did not appear that the respondents had been very diligent in calling him to account. On the 25th March, Boyd remitted to Haliburton and Company £200, desiring them generally to place the money so remitted to his (Boyd's) credit; and that some days after he remitted £100 to be also placed to his credit.

The respondents, however, holding that these latter remittances had been sent on their own account as creditors of Boyd, and Boyd having become bankrupt soon thereafter, refused to give the appellant credit for the amount, and thereafter brought an action against the appellant for payment of £466, 7s. 4d. as the balance pretended to be due by the appellant.

In defence to this action, the appellant stated several objections to the items, which made no part of this suit, but in particular, he claimed allowance or credit in the account for the sum of £295, 4s. 10d., being the contents of the three bills before mentioned.

In answer, the respondents stated, that they had transmitted the bills to the said Robert Boyd at Glasgow, who was in good credit at the time; that though Boyd had received the contents of these bills, even before all the bills became due, he had concealed his having the money, and only gave them promises and assurances, from time to time, that this money would be soon paid and remitted, till at length he became bankrupt in May 1752; and that the loss arising from Boyd's insolvency could not fall on the respondents.

The Lord Ordinary (Shewalton), pronounced this interlocutor; "Having considered the forgoing debate, with the "representation for the defender, relating to the three bills "endorsed to Mr Boyd at Glasgow, answers for the pursuer, "&c., finds, that the defender is not entitled to have credit "for £290, the contents of the three bills sent by the pur- "suer to Mr Boyd at Glasgow, in respect it does not appear "Mr Haliburton was guilty of any culpable negligence in

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"recovering the contents of the said bills; finds, that the "defender is not entitled to any proportion of the £200 "sterling, remitted by Robert Boyd to Haliburton, on the "5th March 1752, in respect that money was not remitted "to Mr Haliburton, on account of the defender's bill, but in "payment of the bill drawn by Coutts and Company upon "Mr John Boyd, but finds the defender entitled to a pro-"portional part of the £100 afterwards remitted by Boyd to "Haliburton *pro rata* of the debts due from Boyd to Hali-"burton and the defender."

July 30, 1762. On reclaiming petition from the appellant to the Court, the Lords pronounced this interlocutor: "Adhere to the "Lord Ordinary's interlocutor, with this variation, that the "three bills sent by the pursuers to Mr Boyd at Glasgow, "amounted to £295, 4s. 10d., instead of £290 specified in "the interlocutor; and with this variation, they adhere to "the Lord Ordinary's interlocutor, and refuse the desire of "the petition; find the defender (appellant) liable in the "expense of extracting the decree, as the same shall be ascer-"tained by the collector of the clerk's dues; but find no "other expenses due, and remit to the Lord Ordinary to "proceed accordingly."

Aug. 11, 1762. On reclaiming petition to the Court, the Lords pronounced this interlocutor: "Having heard this petition, refuse the "same, in so far as respects the first article, whether the "petitioner is entitled to have credit, in his account current "with the pursuer, for £295, 4s. 10d., and in so far adheres "to their former interlocutor; but ordain the petition to be "seen and answered against the 16th day of February next, "upon the second article, viz., whether the £200 sterling "remitted by Boyd to Haliburton on the 25th March 1752, "ought to be imputed *pro rata* to the whole sums which "Boyd, at the time, was due to Haliburton."

Nov. 24, 1762. On further reclaiming petition, the Court adhered.

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

After hearing counsel,

Journals of the House of Lords. It was ordered and adjudged that the interlocutors complained of be reversed; and it is further declared and adjudged, that the appellant is entitled to have credit in his account current with the respondents for £295, 4s. 10d. being the amount of the three bills in question in this

cause, as upon the 25th March 1752, when the money was received by Boyd; and it is further ordered that the Court of Session do give the proper directions for carrying this judgment into execution.

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For the Appellant, *Alex. Lockhart, R. Mackintosh.*

For the Respondents, *C. Yorke, Al. Wedderburn.*

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THE EARL OF ABERCORN, . . . *Appellant;*
ANDREW WALLACE of Woolmet, Esq., W.S., *Respondent.*

THE EARL OF ABERCORN v. WALLACE.

House of Lords, 25th January 1764.

LEASE of COAL—CLAUSE AS TO LEVEL.—Held, that a clause in a lease of coal, by which it was agreed that either party was to have the power of communicating the level of the said coal to any neighbouring coal works, did not cease or determine with the lease, but continued so long as the lessee continued to possess a right and interest in the neighbouring coal-work.

A lease of coal was granted by the appellant to the respondent's brother-in-law, in which there was the following clause: "And it is hereby declared, that it shall be in the power of "either parties, or their foresaids (if they shall hereafter find "it necessary), to communicate the level of the said coal to "any neighbouring coal-works: Providing always, that they "be obliged like as they hereby bind and oblige them and "their foresaids, to submit to arbiters, to ascertain the consi-"deration to be paid by any one of the said parties to the "other on that account; upon payment whereof, both the "said parties are hereby obliged to consent and agree to such "communicating reciprocally."

Immediately follows the clause whereby "John Biggar "(the respondent's brother-in-law), binds and obliges him "and his foresaids, to leave a sufficient chinny wall between "the Duddingston coal and those of the neighbourhood; and "if he and his foresaids shall at any time take the water from "the corn-mill (of Duddingston), so that there shall not "remain a sufficiency for working the said mill regularly, in "that case, he shall either satisfy the tenant of the corn-mill "for his damages, or shall take the said mill at the same rent "it is then let at."