[M. 10101.]

MACKENZIE and LINDSAY, . . . *Appellants;*
CLAUDE SCOTT, Corn-Factor, London, . *Respondent.*

House of Lords, 19th Dec. 1796.

DEL CREDERE COMMISSION.—Held that such a guarantee not only covers the sales of goods effected, but also warrants the remittances made as the proceeds of those sales.

The appellants, merchants in Dundee, had purchased corn on the respondent's account, intended for foreign export, but the government having prohibited the exportation of grain at the time, he ordered Mackenzie & Lindsay to sell it for him. This was done accordingly; and Mr. Scott having written for a remittance on account of sales, the appellants, of this date, wrote, enclosing a remittance by draft or bill, in the following terms:—"We are happy to wait upon you with the enclosed draft of Messrs. Bertram, Gardner, & Co. upon Baillie, Pocock, & Co., of this date, at seventy-five days, for £1000, to account of your wheat resold by us, which please pass to our credit. The wheat is sold at three months credit; but as we wish you reimbursed of your outlay of money, *we have taken that upon ourselves, which must be more agreeable to you.*" Mar. 20, 1793.

[Bill or draft.]

"*Edinburgh*, 20*th March*, 1793.—£1000.

"Seventy-five days after date, pay this, our first of exchange, to the order of Messrs. Mackenzie & Lindsay, One Thousand Pounds, sterling value, on account, which place to account, with or without advice, from

"BERTRAM, GARDNER, & Co.

"*To* Messrs. BAILLIE, POCOCK & Co., London.

"Indorsed—Pay to Claude Scott, Esq., or order.

"MACKENZIE & LINDSAY."

The bill was duly accepted, but before it fell due, both acceptors and drawers had failed; and the question was, who was liable to bear the loss, whether M'Kenzie & Lindsay, the remitters, or Mr. Scott, to whom it had been indorsed in payment of the corn. The latter had not desired, and did not expect the remittance in this form, but did not ob-

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ject to it when sent in this shape. Previous thereto, and on the resale of the wheat, M'Kenzie & Lindsay had sent him an account of the sales, in which it appeared, after deducting 2½ per cent. for trouble on the sale, and 1½ per cent. of *del credere* commission, there was a balance on hand of £1441. 12s. 11d. Before raising legal proceedings, a correspondence took place, in which the appellants held themselves out as liable for the £1000 bill; but after taking legal advice, they changed their view, and denied liability.

On the respondent then proceeding to charge on the bill, a bill of suspension was offered, the appellants contending that a *del credere* commission, which they admitted to have charged and received, did not import any other guarantee or obligation on them than the solvency of the purchasers of the grain sold, and that this guarantee did not cover or extend to the remittance of money by them to their employer, and that the circumstance of taking a bill *for remittance* by Messrs Bertram, Gardner & Co., payable to themselves, and indorsing that bill to the respondent, did not subject them to any obligation to which they would not otherwise, or independent of any such obligation, be liable; and that the letters written by them were written under a misapprehension of a *del credere* commission, and of their liability, and cannot foreclose them from contending that the *del credere* does not cover the remittances. And when remittances made by good bills are sent and accepted of in payment of the wheat, their liability under the *del credere* commission expired. In answer, the respondent contended that a factor, under a *del credere* commission, is absolutely bound, in all events, to make good the sales effected by him. That, in this respect, he is as absolutely bound as if he himself were the purchaser. And, on the only point on which the appellants' case rests, the opinions of merchants produced are against them. Messrs. Booth & Co., merchants in Liverpool:—"We have always considered ourselves re-"sponsible for the bills we remit, when we charge a *del cre-*"*dere* commission; and when it has happened that any "such bills have been returned for non-payment, we have, "ever since we have been in business, immediately replaced "them."

Messrs. Corrie, Gladstones, and Bradshaw, an eminent company in Liverpool:—"Whatever bills we remit on account of the proceeds of grain or flour consigned to us for sale, we guarantee the payment of, as we always charge the

del credere commission, and such we believe to be the general practice here, at least we never knew of any instance to the contrary anywhere."

The Lord Ordinary (Lord Justice Clerk) repelled the reasons of suspension, and on representation adhered. And on a reclaiming petition to the whole Court, the Lords adhered.

Feb. 21, 1794. Jan. 14, 1795. — 15, ——

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The *del credere* commission only guaranteed the sale of the wheat, but the *remittance* of *money* being a transaction totally different and distinct, was not covered by such guarantee. His obligation ends by remitting bills of a house in good credit at the time; and if these are accepted of in payment, a new and distinct transaction takes place, by which the factors are no longer liable under their *del credere* commission. Nor can the indorsement of the bill by them, nor the correspondence founded on, make them so liable, if the *del credere* does not otherwise make them responsible.

Pleaded for the Respondent.—A factor holding a *del credere* commission for the sale of goods, is absolutely liable for payment of the price of sales effected by him, and such being the nature and extent of the guarantee undertaken by the appellants in this case, they are liable for remittances by bills instead of cash, for the wheat sold by them. At all events, the appellants, by indorsing the bill remitted to the respondents, did *eo ipso* subject themselves in payment; and the whole circumstances of the case corroborate the obligation on them as the indorsers of this bill. Besides, the appellants, by their letters, held themselves out as liable, and obtained repeated delays for the payment, and have been guilty of a gross breach of faith, in obtaining that delay on their assurance "that no event whatever would prevent their discharging this debt."

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Sir J. Scott, R. Dundas.*
For Respondent, *Wm. Adam, John Bayley.*