

## SCOTLAND.

## COURT OF SESSION.

(First Division.)

ALEXANDER M'DONALD - - *Appellant.*ALEXANDER ROSS AND OTHERS *Respondents.*

ARMY Agents having distinct accounts with the Colonel and the Paymaster of a regiment, upon the assurance of the Paymaster that he was authorized by the Colonel, and on his account, to provide certain articles for the regiment, transfer to the debit of the Colonel a sum standing in their books, originally debited to the Paymaster; and having settled accounts, and received the balance due from the Paymaster, sue the Colonel for the balance claimed as due from him, including the sum upon the debit transferred. Pending this action the Paymaster, on the requisition of the Agents, furnishes them with a letter from the Colonel, as the authority for the charge against him. The Agents being fully satisfied as to the meaning and extent of this authority, in the course of their pleadings maintain, strenuously, the right of the Paymaster to act under it; and judgment, in the first instance, is given in their favour. After they had obtained this judgment, apprehending the possibility that it might be reversed, they retransfer the sum in dispute from the debit of the Colonel to the debit of the Paymaster, giving him notice of that fact, and of the proceedings in and state of the action against the Colonel. The former judgment, on representation, was reversed; and it was held, by the Court below, and the House of Lords on Appeal, that the Agents were entitled in an action of relief against the Paymaster, to recover the sum in dispute, and the costs of the action against the Colonel.

If an action is brought for the benefit and through the intervention of another, he is bound to bear the costs of the action.

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ON the 14th of August 1794, Alexander M'Donell of Glengary, being authorized by government to raise a regiment of Highland fencible infantry, appointed the Respondents Ross and Ogilvie agents for the regiment. The appellant was about the same time appointed paymaster, of which Glengary apprised the respondents Ross and Ogilvie by a letter, dated in August 1794, by which he also directed them "to honour all drafts which might be drawn by the appellant as paymaster, and to pay no attention to the drafts of any other person, nor to issue money to them." This letter was mislaid, and not produced in the cause.

The regiment was not completed and embodied till May 1795; and during the intermediate period the Appellant, as paymaster, drew bills upon Ross and Ogilvie, as agents, to a large amount, for the use of the regiment, without specifying the different heads of service to which these drafts were to be applied. After the regiment was embodied the appellant was continued as paymaster, and went on as before, drawing generally on account of the regiment, without specifying the different heads of service for which he drew; the drafts in the mean time stood at his debit in their books, he being entitled to a counter credit when the particular distributions should be rendered.

The money issued by government on account of a regiment, consists of, first, the levy money for recruits; secondly, the pay and subsistence to officers and men; thirdly, contingent money for incidental expenses, such as stationery, removing

baggage, &c. ; and, lastly, money for furnishing regular clothing and accoutrements.

The levy money is issued to the agents, and is drawn *for by the colonel*, or any person whose drafts on that account he authorizes to be answered. In the letter of service the levy money to be allowed is specified, and a general letter of instructions accompanies it, directing a part to be retained from each recruit, for providing slop clothing and necessaries. This is done by the officer who enlists him. He generally does so, by obtaining the articles from the regimental store, and paying for it out of the retained bounty. With the original furnishing, or subsequently replacing of these necessaries, the colonel has no concern.

The pay and subsistence of the men is also issued to the agents, and drawn from them *by the paymaster*. The colonel has no power to draw for this money.

The contingent accounts, in like manner, are to be drawn for monthly by the paymaster; the commanding officer certifying that the account is correctly stated.

The money issued for the regular clothing and accoutrements is termed the off-reckonings. It amounts to more than is absolutely necessary for that purpose, and forms part of the emoluments of the colonel: it is the property of the colonel alone; and the paymaster-general will not pay any part of this money without an assignment of it from the colonel. When the assignment is in favour of the agents, as is usually the case, a separate

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account is opened for it, termed the Clothing Account.

This fund is kept separate for the colonel ; it is not paid into his personal account for pay and subsistence ; and no person can draw upon it without express power from him to do so.

Army agents are bound to honour all drafts made by the paymaster in that capacity. These drafts are always in advance, and to account generally, without specifying the particular service to which the sums so drawn are to be applied. The drafts are placed to the debit of the paymaster until their accounts or distributions are transmitted, when the different articles are classed under their proper heads.

During the whole period of the appellant's continuing paymaster, the agents were in advance above the sums they received from government. Of these advances they complained to the paymaster, and requested him to send particular accounts of the application of the money. The paymaster, however, was not able to make out complete accounts of the different sums he had expended for the regiment ; and matters continued in this state, the agents being constantly in advance for the regiment, till 1796, when the appellant resigned his situation as paymaster, and the colonel soon after resigned his commission. The agency of the regiment was transferred by the succeeding colonel from Ross and Ogilvie to M'Donald, Bruce, & Co. on the 25th of December 1796. Immediately upon this change the appellant called upon the agents, to have his accounts adjusted, and exhibited to them the sub-

joined Supplementary Distribution, or Account of Necessaries\*, alleged to have been disbursed by him for the regiment during the year 1795, the balance amounting to 686 *l.* 6 *s.* 1  $\frac{1}{4}$  *d.* in payment of which

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\* Account of Necessaries provided for the Glengary Regiment by Captain M'Donald, Paymaster :

Art.	1795.		£.	s.	d.	
1.	April 24.	To cash paid Mr. Graham, for false tails	-	1	16	-
2.	May 18.	To d° paid Duncan M'Alister, for 70 pair shoes, at 4 <i>s.</i> 6 <i>d.</i>	-	15	15	6
3.	June 17.	To d° paid Mutus, for stocks, cockades, and drummers caps	-	16	11	6
4.	20.	To d° paid Mr. M'Lean, for plaids	-	4	19	$-\frac{1}{2}$
5.		To d° for 461 $\frac{1}{4}$ yards linen, at 1 <i>s.</i> 3 <i>d.</i> per yard	£. 28	17	2 $\frac{3}{4}$	
6.		To d° for 12 $\frac{1}{2}$ yds. cambric, at 3 <i>s.</i> 9 <i>d.</i>	2	6	10 $\frac{1}{2}$	
7.		To d° for 20 yds. drab cloth for watch coats, at 2 <i>s.</i> 4 <i>d.</i>	2	6	8	
8.		To d° for 380 yards blue cloth for d°, at 2 <i>s.</i>	30	16	-	
9.		To d° for 92 yds. green baize, at 1 4	6	2	8	
10.		To d° for 63 yds. green linen, at 1 1	3	8	3	
11.		To d° for 3 yds. blue thread, at 2 6	-	7	6	
12.		To d° for $\frac{1}{2}$ yard wham, at - 6 6	-	3	3	
13.		To d° for 4 grs. of buttons, at 5 6	1	2	-	
			<hr/>			
14.		To d° paid Wilson, hair-dresser, for false tails	-	1	17	$5\frac{1}{2}$
15.		To d° for 17 pair of shoes, at 4 <i>s.</i> 6 <i>d.</i>	-	3	16	6
16.		To d° paid d°, for 2 dozen serjeants bonnets, at 16 <i>s.</i>	-	1	12	-
17.		To d° paid d° 50 $\frac{1}{2}$ doz. privates d°, 14 <i>s.</i>	35	7	-	
		To d° paid carriage for d°	-	5	-	
19.		To d° paid for 50 dz. pair of shoes, 5 <i>s.</i>	127	10	-	
			<hr/>			
20.		To d° paid for 43 $\frac{1}{4}$ doz. stocks, at 15 <i>s.</i>	32	12	6	
21.		To d° yaid 44 dozen cockades to d°, at 5 <i>s.</i>	-	11	-	
			<hr/>			
22.		To d° paid Mr. Ascoli, for feathers	-	45	12	6
23.		To d° paid Mr. Stevens, for 20 $\frac{1}{2}$ dozen brushes, for the use of the regiment	-	56	10	3
24.		To d° paid Mr. Campbell, Glasgow, for cockades and rosettes	-	4	10	-
			<hr/>			
			9	7	6	

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he said he had applied the different sums drawn from the agents.

He required them to give him credit for this sum, and state it to the debit of the colonel, because it consisted of furnishings of that description, which the colonel was bound to furnish his regiment with from the fund called the *off-reckonings*, allotted by government for that purpose; *and the appellant stated to them, that he had express orders from the colonel to pay all such accounts.* The agents con-

Art.	1795.		£.	s.	d.
25.	June 20.	To 1 pattern serjeant's shirt, 6s.; and 6 privates d <sup>o</sup> , 4 s. 2 d.	1	11	—
26.		To making ten watch coats, at 2 s. 6 d.	1	5	—
27.		To paid Urquhart, for false tails, combs, razors, &c.	47	10	—
28.		To paid bill Mr. William Shairp for plaids and tartan	51	10	—
29.		To cash paid Russell's account for shoes at Irvine	5	17	—
30.		To 4 pieces of garters given the quartermaster, for the use of the regiment	—	8	—
31.	Oct. 19.	To amount paid for shoes	14	—	—
32.		To amount paid Wormald, Fountaine, & Co. for 8 pieces drab fearnoughts, 224 yards, at 3 s. 4 d. per yard, for watch coats	37	6	8
33.		To 2 pieces drab serge, at 4 s. per yard	4	—	—
34.		To 14 yards white cloth, at 6 s. 6 d.	4	11	—
35.		To 5 bonnets given the quartermaster for the band	—	6	8
36.	Nov. 14.	To 248 yards linen, at 1 s. 4 d.	16	10	8
37.		To 6 shirts ready made, at 6 s. 4 d.	1	18	—
38.		To pairs of gaiters, per invoice, account remitted	12	9	10
39.		To 630 turn-screws and gun-worms, brushes and prickers	23	12	6
40.		To 250 priv <sup>s</sup> bonnets, at 1 s. 3 $\frac{1}{4}$ d.	£. 34	4	—
41.		To 32 serjeants d <sup>o</sup> , at 1 s. 6 d.	2	8	—
42.		To carriage of d <sup>o</sup>	1	8	—
			38		
43		To insurance on 610 l. for clothing, &c. per account, dated March 11, 1796	13	13	8

sequently allowed this sum as an article of credit to the appellant, and charged it against the colonel. But when a copy of the colonel's account was presented to his agent, an objection was made to the charge of 686*l.* 6*s.* 1¼*d.* upon the ground that the articles of which it was composed were not necessary for the regiment, and *had been bought without authority from the colonel.*

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Art. 1795.	£.	s.	d.
44. May 4. To freight and carriage from London of 11 bales and a box, to G. Hamilton & Co. per account - - -	6	2	-
45. June 4. To cartage of 11 bales tartan from Bannockburn - - - - -	5	12	6
46. To 2 carts from Glasgow to Irvine, per M'Nab - - - - -	1	9	-
47. To 9 extra carts from Kilmarnock to Carlisle, 105 miles, at 6 <i>d.</i> -	23	12	6
48. To 9 d° from Carlisle to Brampton 10 miles, at 4½ <i>d.</i> - - - - -	1	13	9
49. To 9 d° from Brampton to Haltichistle, 12 miles, at 4½ <i>d.</i> - - - - -	2	-	6
50. To 9 d° from Haltichistle to Hexham, 15 miles, at 4½ <i>d.</i> - - - - -	2	10	7½
51. To 13 d° from Hexham to Newcastle, 21 miles, at 4½ <i>d.</i> - - - - -	5	2	4½
		48	3 3
Sum - - -	£.721	13	5¼
Cr.			
1795. By allowance for watch coats, from 8th May to 24th December 1795 - - - - -		21	10 4½
By d° - d° from 25th Dec. 1795 to June 1796		13	17 -
		35	7 4½
Balance, Captain M'Donald - - -		£.686	6 1¼
Remains - - -			

(signed) A. M'Donald, Paymaster.

N. B. If the allowance for watch coats from the 14th August to the 8th May is allowed by government, of course it will be put to the credit of this account.

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This objection the agents communicated by letter to the appellant, who, in his answer to them, stated, “ that he had Glengary’s order (a copy of which he “ would send them whenever he got his papers from “ Edinburgh) for whatever had been furnished, and “ requested them to make no alteration in their ac- “ counts.”

In consequence of this communication with the appellant, the account in question was allowed to remain as it stood debited to the colonel, upon the presumption that the orders which the appellant had stated he held for furnishing these articles would be forthcoming, and would be obligatory upon the colonel. After placing this sum to the colonel’s debit, the appellant made an arrangement with Ross and Ogilvie for the balance of his account ; who, after again writing to the appellant to request that he would send them the order alluded to by him as a voucher for the charge against Glengary, raised an action against Glengary, for the payment of the balance of his account, including, *inter alia*, the amount of the necessaries already mentioned. In defence, Glengary stated, that this particular sum had been debited to him without proper authority, and that he was therefore not bound to pay it.

Upon this defence, Ross and Ogilvie again wrote to the appellant in these terms : “ Your charge of “ 686*l.* 6*s.* 1¼*d.* for necessaries furnished the Glen- “ gary Fencibles, being disputed by Mr. Alexander “ M’Donell of Glengary, we request you will have “ the goodness to transmit to Mr. Anderson, W.S. “ Edinburgh, *the original instructions given you “ by Glengary*, or any other document in your



“ possession, which may support any part of the  
“ same.”

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In conséquence of this communication, the letter of instructions was produced by the appellant, and exhibited in the process against Glengary,—it is as follows :

“ Dear Sir, 29th May 1795.

“ As I am about to leave this quarter for the  
“ North, in my absence it may save you further  
“ trouble to have these instructions to show, when  
“ you see it proper. You will be particular in your  
“ advancing money to officers, not exceed five gui-  
“ neas, as bounty, for each man brought and passed  
“ at the inspection, according to orders, in regard to  
“ appearance ; and you will also, previous to the  
“ settling of their accounts, require to have the men  
“ paraded as furnished by each officer, and let those  
“ serjeants who were employed to recruit for me, as  
“ well as the Reverend Alexander M'Dowell, be  
“ there present, so as to establish their claims, and  
“ prevent future disputes. You will also be so good  
“ as to subsist the supernumerary serjeants of my  
“ appointment till vacancies occur, so as to relieve  
“ me of that burden. And I hereby beg of you to  
“ settle with the different men enlisted by me, or on  
“ my account by those so employed. As also, I au-  
“ thorize you to settle my private accounts, properly  
“ vouched, that may appear against me ; as likewise  
“ those things ordered by my sister Miss M'Donell.  
“ You will also please to *settle what appears proper*  
“ *to you in regard to the clothing* and other ap-  
“ pointments of the regiment. I have moreover to  
“ request of you to get all accounts for or against

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“ me drawn up, whether between us, or between me  
“ and any other, in regard to my military transac-  
“ tions, or transactions whatever, subsequent to our  
“ first concerns ; and by attending to all these things  
“ with all possible convenient dispatch, you will in-  
“ finitely oblige,

“ Dear sir,  
“ Yours, &c. (signed) “ *A. M'Donell.*

Ross and Ogilvie considering this letter a sufficient authority to the appellant to furnish the necessities in question, on the 8th of June 1802, proceeded with their action against Glengary.

In the course of the action against Glengary the respondents presented a petition, in which the following passage occurs :

“ Glengary apprised Ross and Ogilvie of the pay-  
“ master's appointment, by a letter, dated August  
“ 1794 (which has unfortunately fallen aside), and  
“ directed them to honour *all* drafts which might be  
“ drawn by him the paymaster, and to pay no atten-  
“ tion to the drafts of any other persons, or to issue  
“ money to them. The paymaster was not merely  
“ empowered to draw the pay and usual allowances  
“ of the regiment, but was also authorized, as has  
“ been admitted by the defender (M'Donell of  
“ Glengary) to uplift the levy money, the allowance  
“ for haversacks, and a variety of other allowances,  
“ with which, as paymaster, he had nothing to do.  
“ He was likewise empowered to draw the pay and  
“ allowances due to the colonel himself—a power  
“ which is seldom or never entrusted to the pay-  
“ master—and with these discharge the private ac-  
“ counts of Glengary. In short, this paymaster

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“ acted as sole manager of the colonel, in all trans-  
 “ actions relating to the regiment, whether falling  
 “ within his own province or not ; and during the  
 “ experience of half a century, Ross and Ogilvie  
 “ have never known an instance of such unlimited  
 “ trust and confidence being placed in any per-  
 “ son in a similar situation.” In another part of  
 their pleadings they express themselves as follows :  
 “ Glengary was desirous to shake himself loose, if  
 “ possible, from his obligation to repay to the agents  
 “ the money they had advanced the paymaster by  
 “ his instruction, and upon his responsibility, and  
 “ which had been applied to the use of the regiment.  
 “ He did not pretend either that the money was not  
 “ actually advanced by the agents, or that it had not  
 “ been applied to the use of the regiment, but he  
 “ insisted that the agents had no right to make the  
 “ advances to the paymaster without his authority ;  
 “ his object was, to have the paymaster to deal with  
 “ instead of Ross and Ogilvie ; in which case he  
 “ would have set against the advances the balance  
 “ which he pretended to be due to him by the pay-  
 “ master on his own private account. In this way  
 “ he wished to roll over the agents upon the pay-  
 “ master, when demanding payment of a sum admit-  
 “ tedly advanced and applied to the use of the regi-  
 “ ment, which was advanced solely on his responsi-  
 “ bility, and for which he was at any rate liable, as  
 “ colonel of the regiment. It was a matter of in-  
 “ difference to Ross and Ogilvie which of the two  
 “ paid the advances they had made. Had they con-  
 “ sidered both equally liable, they would have pre-  
 “ ferred coming against the paymaster, who was

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“equally able to pay with the colonel, and whom  
“they always found more willing to settle his ac-  
“counts; but they considered the colonel as the  
“party primarily liable to them, and they did not  
“wish to lend themselves to a scheme which they  
“conceived to be unjust, by refusing to give to the  
“paymaster the credit to which he was entitled.”

Lord Hermand, ordinary, pronounced judgment in their favour; but in consequence of some doubts which had arisen, in a letter, dated on the 6th of July 1806, and addressed to the appellant, Ross and Ogilvie apprised the appellant “*that they had re-  
“charged to his account the sum of 686l. 6s. 1¼d.  
“for clothing disbursements, until allowed to them  
“by the Court of Session.*”

On the 9th of July 1808, after reconsidering the case, Lord Hermand pronounced an interlocutor, sustaining the claim of Ross and Ogilvie. Against this interlocutor Glengary put in a representation; in which he asserted: 1st, That the furnishings comprising the account in question, neither were necessary for the regiment, nor were made by the appellant; and 2dly, That Ross and Ogilvie had not made any advance for payment of the necessaries, but had merely transferred the account in question from the debit of the appellant to Mr. M'Donell's debit, upon finding that the appellant was their debtor to the extent of 2,000*l.*

15 Dec. 1808. The Lord Ordinary thereupon appointed Ross and Ogilvie to explain “at what time, whether it  
“was while they continued agents for the Glengary  
“regiment, or after the agency was transferred to  
“another house, that they placed the account of

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“ 686*l.* 6*s.* 1½*d.* now pursued for, to the repre-  
 “ senter’s debit. As also, whether they actually  
 “ paid that account in any other way than by placing  
 “ it to the credit of the paymaster.”

In the answer to this representation, Ross and Ogilvie stated to the Lord Ordinary, that owing to the great embarrassment and confusion into which their bankruptcy had thrown their affairs, their agent had not been able to get sufficient information within the short space limited for giving in the answers, to enable them to reply pointedly to the interrogatories put by the Lord Ordinary. Ross and Ogilvie endeavoured to show that these new averments made by Glengary were not only altogether unfounded, but were contradicted by his former admissions in the cause. Upon advising the representation, with answers, the Lord Ordinary pronounced an interlocutor, by which he found, “ That prior to the 1 March 1809.  
 “ regulations 1798, as stated in other cases, which  
 “ have occurred subsequent to the interlocutor re-  
 “ presented against, paymasters were appointed by  
 “ the colonel, or by the field officers and captains  
 “ jointly, though in the circumstances of this case  
 “ it is immaterial in which of these ways the pay-  
 “ master of the Glengary regiment may have been  
 “ appointed: Finds, that in so far as concerns the  
 “ business of the regiment, no extraordinary powers  
 “ were conferred on Lyndale, the original paymaster,  
 “ by the letter of the 29th May 1795, relating chiefly  
 “ to the settlement of accounts already contracted,  
 “ nor any thing more than would have been implied  
 “ from the nature of his office, and in particular that  
 “ it did not empower him to draw upon the respon-

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“ dents for the expense of alleged furnishings out  
 “ of the off-reckonings, a construction confirmed by  
 “ the conduct of Lyndale himself, who cannot be  
 “ presumed to have lain out of so large a sum as  
 “ 686*l.* 6*s.* 1*d.* sterling, the amount of the account  
 “ objected to, as well as by the conduct of the pur-  
 “ suers, who, while they continued agents for the  
 “ regiment, did not state that account to the debit  
 “ of the representer: Finds it stated by the repre-  
 “ senter, and not denied, that Lyndale was removed  
 “ from the office of paymaster in June 1796, and  
 “ that in July thereafter, the representer resigned  
 “ the regiment; after which the new colonel trans-  
 “ ferred the agency from the pursuers to M'Donald,  
 “ Bruce, & Co. London: Finds it instructed by the  
 “ books of the respondents, that the account in  
 “ question was not paid on or before the 30th Sep-  
 “ tember 1796, seeing that account is not stated in  
 “ the account rendered upon that day: Finds that  
 “ by the deliverance on the representation, the re-  
 “ spondents were directed to say explicitly at what  
 “ time, whether it was while they continued agents  
 “ for the Glengary regiment, or after the agency was  
 “ transferred to another house, that they placed the  
 “ account of 686*l.* 6*s.* 1*d.* now pursued for, to the  
 “ respondents' debit; as also, whether they actually  
 “ paid that account in any other way than by placing  
 “ it to the credit of the paymaster: Finds that no  
 “ direct answer has been made to these plain ques-  
 “ tions, which are evaded on the ground of the want  
 “ of information from the respondents themselves,  
 “ or their agents in London, whence it was to be in-  
 “ ferred that no safe answer could be given: Finds

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“ that the account 686*l.* 6*s.* 1*d.* was not placed to  
 “ the representer’s debit till after the respondents  
 “ had been deprived of their agency, as well as that  
 “ said account was not actually paid, but merely by  
 “ an operation on the books transferred to the credit  
 “ of the paymaster : Finds that the representer can-  
 “ not be affected by such irregular transfer, alters  
 “ the interlocutor represented against, sustains the  
 “ defences so far as respects said account, and de-  
 “ cerns, reserving to the respondents to state what  
 “ balance, exclusive of said account, if any, be due  
 “ to them.”

Against this interlocutor the respondents Ross and Ogilvie prepared a representation, and at the same time raised an action of relief against the appellant, in which they concluded that the defender should be decerned to repeat and pay back to the pursuers the foresaid sum of 686*l.* 6*s.* 1½*d.* with interest thereof since the same was credited to him, and also that he should be ordained to make payment to the pursuers of “ the expenses of the fore-  
 “ said action presently depending against the said  
 “ Alexander M’Donell of Glengary, and which  
 “ hitherto have been wholly incurred in discussing  
 “ objections to payment of the foresaid sum,” and of the expenses of this action.

This action being brought into Court, various orders were made upon the defender to put in defences.

In the mean time Lord Hermand, in the action May 13, 1812.  
 against Glengary, refused the representation for the respondents, and adhered to his former interlocutor.

The respondents prepared a petition against these June 24, 1812.

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judgments of the Lord Ordinary, and at the same time they lodged a minute in the process against the appellant, in which, after mentioning the procedure in the process with Glengary, they state, “ that, as  
 “ Lord Hermand had adhered to his interlocutor  
 “ before mentioned, upon advising a full represent-  
 “ ation and answers, a petition against his Lordship’s  
 “ judgment had been prepared and lodged yesterday,  
 “ and will probably be under the consideration of  
 “ the court to-morrow. A copy of that petition was  
 “ herewith produced, that the defender in this action  
 “ might see that the pursuers have done every thing  
 “ in their power to make the claim against Glengary  
 “ effectual, and might satisfy himself that the argu-  
 “ ment was properly stated ; and, as it is unquestion-  
 “ able that, if the pursuers shall ultimately fail in  
 “ recovering this sum from Glengary, the defender  
 “ must make repetition to them of the foresaid ac-  
 “ count, credited to him on the faith that it was a  
 “ proper charge against Glengary, he may hold him-  
 “ self in readiness to make repetition, or to take such  
 “ steps to substantiate his charge against Glengary  
 “ as he may think advisable.” Lord Armadale,  
 ordinary, allowed this minute to be seen.

The petition for the respondents in the other ac-  
 tion having been appointed to be answered, answers  
 were given in for Glengary accordingly. Upon this  
 the respondents lodged another minute in the pro-  
 cess against the appellant, stating, “ That, upon the  
 “ 23d October last, the agent for the pursuers had  
 “ sent to the agent for the defender a copy of the  
 “ answers which had been given in for Glengary to  
 “ the said petition ; but that, in order to prevent



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“ the possibility of the defender’s pleading ignorance  
 “ of the proceedings in the original action, and that  
 “ he might be prepared to obviate any statements in  
 “ these answers which he judged erroneous, the pur-  
 “ suers now produced in process a printed copy of  
 “ the answers for Glengary, and intimated to the  
 “ defender that the case stood in the short roll  
 “ of the First Division for determination upon the  
 “ 2d of December.”

The Lords of the First Division, upon advising the petition for the respondents, with answers, adhered to the Lord Ordinary’s interlocutor, and found the respondents liable in expenses; whereupon the respondents enrolled the action, against which the present is an appeal, to ask decree against the defender.

The appellant gave in defences to the following effect:

“ First, The defender does not conceive that  
 “ Messrs. Ross and Ogilvie have any claim against  
 “ him for advances made on account of the regiment  
 “ raised by Glengary, as they were made to him in  
 “ the capacity of paymaster and agent for Glengary.

“ Secondly, Messrs. Ross and Ogilvie, by hav-  
 “ ing mislaid the letter of credit lodged with them  
 “ by Glengary in August 1794, lost their recourse  
 “ on Glengary: by this their neglect the defend-  
 “ ant ought not to suffer.

“ Thirdly, If Messrs. Ross and Ogilvie had dis-  
 “ allowed the articles in the defender’s account  
 “ when it was claimed, he would have recovered  
 “ the money from the regiment, which he cannot  
 “ now do.

“ Fourthly, This claim is prescribed.”

1820.

M'DONALD

v.

ROSS.

Dec. 19, 1812.

When the case was debated before the Lord Ordinary, he pronounced an interlocutor, by which, in respect of the contingency between this action and the original action, still in dependence before the First Division of the Court, he made avizandum with the cause to the Lords of that division; and gave directions that the case might be reported.

The case was accordingly reported, and the following judgment was pronounced:

May 14, 1813. , “ Upon report of the Lord President, and having  
 “ advised the mutual informations of the parties, the  
 “ Lords repel the defences, find the defender liable  
 “ in terms of the conclusions of the libel, and discern,  
 “ find expenses due, and allow an account thereof  
 “ to be given in, and remit to the auditor to tax the  
 “ same, and to report.”

The appellant preferred a reclaiming petition against the interlocutor above recited; but it was refused without answers.

Against this interlocutor the appeal was presented.

For the Appellants, *Mr. Charles Warren, Mr. Robert Grant.*

For the Respondents, *Mr. Scarlett, Mr. West\*.*

July 19, 1820. The *Lord Chancellor*:—This case involves two questions; the first is, Whether, under the circumstances of the case, Mr. M'Donald was liable to pay Messrs. Ross and Ogilvie the amount of money demanded by their summons? The next question is, Whether, supposing the Court of Session to have been right in awarding payment by him of that sum,

\* Now Sir Edward West, Chief Justice of Bombay.

they ought to have charged him with the expenses of the antecedent proceeding, by which the now respondents sought to charge with that debt M'Donell of Glengary?

When it was argued at the bar, it appeared to me proper in this case, attending to all the circumstances of it, that we should have time to consider it. I had more doubt with respect to the point, whether this appellant ought to have been charged with the expenses of the antecedent proceeding, than on the question, whether he should be charged with the sum of six hundred and odd pounds; but on looking at it again and again, I offer it to you as my opinion, that the decision of the Court of Session is right on both points. In the first place, I think the appellant is chargeable in the account, under the circumstances here stated, at the suit of these respondents; and looking at the whole nature of the proceeding in the action that was brought against Glengary, as a principal, it appears to me that it is fairly to be considered as an action for the benefit and behoof, and in a great measure through their intervention, the action of Mr. M'Donald himself, and that therefore he ought to pay the costs of that action. The consequence of that is, that on moving, according to the forms of this House, for a reversal of this judgment, for my own part I must say, Non-content, meaning thereby that the judgment should be affirmed, but without costs.

Judgment affirmed.