May 11. 1829.

M'Phail appealed.

Appellant.—The summons is rested on the ground that Cooper was the appellant's overseer, and as such employed the respondent. But it is proved that Cooper was a sub-contractor; and as it is admitted that the respondent contracted with him, and not with the appellant, he cannot make any claim against the appellant.

Respondent.—It is proved that the appellant was the contractor for the road, and that the respondent was hired to work on that road; it is therefore irrelevant to say that Cooper was a sub-contractor, unless the knowledge of that fact be traced to the respondent. But this has not been done. On the contrary, it has been proved, that all the workmen regarded him as the appellant's overseer, acting for his behoof; and that, till Cooper became bankrupt, the alleged sub-contract was kept latent.

The House of Lords ordered, that the interlocutors complained of be affirmed.

SPOTTISWOODE and ROBERTSON—MONCREIFF, WEBSTER and THOMSON,—Solicitors.

No. 25. ARCHIBALD SPEIRS, and Others, Appellants and Respondents.

HOUSTON'S Executors, and OLIVER VILE, Houston's Assignee, Respondents and Appellants.

Cautioner—Indefinite Payment.—Where parties bound themselves to guarantee S. F. and Co. in reimbursement of all bills drawn by A. on, and accepted by them, for four years, and to see S. F. and Co. provided with funds to relieve these acceptances, before the acceptances fell due; and S. F. and Co. opened an account with A., debiting him with these acceptances, and crediting him with bills remitted by him; and at the end of the first year, S. F. and Co. desired him to draw in future on a Banking house, (of which the partners of S. F. and Co. were, with others, members), and the bills were accepted by the Bank; but no notice of this was given to the sureties; and before the lapse of the four years A. became bankrupt, indebted in a balance to S. F. and Co.;—Held, 1. (affirming the judgment of the Court of Session), That the sureties were not liable for the bills drawn on, and accepted by the Bank; and were therefore liberated from their obligation at the end of the first year; and, 2. (reversing the judgment), That although there was at the end of the first year a large balance on the account-current against A., yet as, by subsequent remittances made by him, it was extinguished, and the ultimate balance arose out of posterior transactions, the sureties were not liable for that ultimate balance.

May 22. 1829.

2D DIVISION.
Late Lord Meadowbank, and Lord Pitmilly.

WALTER LOGAN, Robert Baird, and others, were partners of the Banton Coal Company, carrying on business near Glasgow, under the firm of H. and R. Baird. In October 1808, Logan, on behalf of the Company, applied to the Honourable Simon Fraser and Company, of London, (composed of the Honourable Simon Fraser and James Henry Houston), for a cash credit, which, after some correspondence, they agreed to give, on the following letter of guarantee, dated in January 1809, being granted by the appellants:—'We request you will accept the 'drafts which Mr Walter Logan, or any other persons by his ap- 'pointment in writing, may draw on you from time to time, on 'account of H. and R. Baird, founders at the Canal Basin, near 'Glasgow; and we hereby, jointly and severally, agree to guaran- 'tee your reimbursement, together with all damages or contin- 'gencies that may occur to you from the engagements you may 'thereby come under, to the extent of L. 7000, for the period of 'one year from the 31st December 1808, when the amount of 'your outstanding acceptances, not remitted for, is to be reduced 'to L. 6000; and thenceforth the sum to be annually reduced 'L. 2000, until the whole be liquidated, which will be at the end 'of the year 1812; until which time, subject to the said annual re- 'duction, this guarantee is to remain in full force: And we further 'undertake, that the amount of your engagements from time to 'time, shall be always provided for by remittances in undoubtedly 'good bills on bankers, or other equally good houses in London, 'not having more than 65 days to run; such remittances to come 'to hand at least six days before your acceptances, for which 'they are intended to provide, shall fall due. We are, &c. '(Signed) Archibald Speirs, James Baird, Peter Murdoch, 'James Laird, James Alexander, James Hill.'

Logan immediately began to operate on the cash credit, by drawing bills at three months on Fraser and Company, which they accepted; and he provided for them, by remitting bills in favour of Fraser and Company, agreeably to the letter of guarantee. In the current account opened by Fraser and Company, they debited H. and R. Baird with the respective acceptances, and gave credit for the bills remitted.

On the 28th of December 1809 Fraser and Company wrote the following letter to Logan:—'We have the pleasure to in- 'form you, that we have established a banking concern in this 'city, which will open on the first proximo, under the firm of 'the Honourable Simon Fraser, Perring, Godfrey, Shaw, Barber 'and Company. The Company consists also of our J. H. Hous-

May 22. 1829.

'ton; and the principal reason why his name does not appear in 'the firm, is to preserve a more marked distinction between our 'banking concern and our commercial one, the firm of which, 'from and after the 31st of this month, will be "The Honourable 'Simon Fraser, Houston and Company.' "—'We are induced, 'by motives of personal convenience, to request that you will 'have the goodness henceforward to draw on, and make your 'engagements payable with the new firm, stating in the body 'of the bill, value in account with Fraser, Houston and Com-'pany, or of F. H. and Co. will do equally well; and for this 'purpose we use the freedom to send some fresh bill stamps, 'and have filled up, for your government, a blank one in the 'way we mean. Your letters and remittances you will have 'the goodness to address to us as heretofore, with the dif-'ference only of the introduction into our firm of the name of 'our Mr H. Arrangements have been made by us to prevent 'the possibility of the least interruption or mistake arising out 'of the change; besides which, our Mr H. will take a principal 'share in the management of the new concern. We hope, there-'fore, that this arrangement will not prove otherwise than 'agreeable to your good self.'

Accordingly, from and after the 31st December 1809, Fraser and Company carried on business under the new name of the Honourable Simon Fraser, Houston and Company, but without any change in the partners; and the banking establishment commenced under the firm mentioned in the letter. No notice of this change was communicated to the sureties. From this period Logan ceased to draw on Fraser and Company, (or Fraser, Houston and Company), but drew on the Banking Company, the drafts bearing to be 'for value in account, as advised, with Fraser, Hous-'ton and Company;' and these were accepted by the Banking Company. All his remittances were made directly to and in favour of Fraser, Houston and Company.

At the above date, (31st December 1809), Fraser and Company were under acceptances to Logan for L. 7130, which were payable in January, February, and March 1810, and stood at the debit of H. and R. Baird. Remittances to that amount were made by Logan to Fraser, Houston and Company, before the acceptances fell due, and were put to the credit of H. and R. Baird, in the account current. The transactions were carried on in the same way till February 1811, when H. and R. Baird became bankrupt.

May 22. 1829.

At this period Mr Fraser died, leaving Mr Houston the sole surviving partner of Fraser, Houston and Company. In this character he raised an action, in 1812, against H. and R. Baird, and the appellants, as sureties under the above letter, claiming a balance of L.5739. 11s. 7d., due on the cash-account from the 31st December 1808 till April 1811, when it was closed. In defence the appellants maintained, 1*st*, That the conclusion of the libel was not warranted by the letter of guarantee on which it was founded, in as much as the letter, which was not transferable to other parties than those in whose favour it was granted, bound the appellants to guarantee Mr Logan's drafts on the Honourable Simon Fraser and Company alone, while the balance claimed arose upon drafts, not on Simon Fraser and Company, but on the banking-house, and in account, not with Simon Fraser and Company, but with Simon Fraser, Houston and Company. 2*d*, That even if the letter of guarantee had been applicable to the drafts and advances made subsequently to the 31st of December 1809, yet its terms and conditions had not been attended to, in so far as it provided for the gradual reduction and liquidation of the advance; and that the claim fell to be reduced to the amount of L. 4000, as in December 1810. And, 3*d*, That the balance due on the 31st December 1809 had been extinguished by subsequent remittances. The Lord Ordinary, (the late Lord Meadowbank), on 12th November 1813, observing 'that there is no difficulty as to the 'facts of the cause, or in the statement of accounts, which seem 'to call for further investigation, or for remit to an accountant; and being of opinion that the drafts of Walter Logan, 'in the year 1809, on Fraser and Company, for behoof of H. and 'R. Baird, are paid and extinguished by remittances from that 'gentleman, and cannot now become a ground of action to 'Fraser and Company against that gentleman, the Banton Coal 'Company, or the defenders the guarantees; and being also of 'opinion that the drafts of Walter Logan, accepted by Fraser, 'Perring, Godfrey, Shaw, Barber and Company, though authorized by Fraser and Company, or the Honourable Simon 'Fraser, and James Henry Houston, Esq. the sole partners of 'that Company, or of its successors, Fraser, Houston and Company, were not so conceived as to be entitled to the benefit of 'the obligation of guarantee granted by the defenders, without 'at least notice of the change of firm thereby adopted being 'given to the defenders, so that they might have had an oppor-

May 22. 1829.

'tunity of acquiescing therein, or objecting thereto;'—sustained the defences, but found no expenses due.*

Thereafter, the case having come before Lord Pitmilly, he refused, on the 15th November 1816, and 25th June 1817, two representations by the pursuer. To these judgments, the Court, on 10th December 1818, adhered. In the meanwhile Mr Houston died, and his executors, being sisted in his place as pursuers, again reclaimed, and, *inter alia*, contended, that the remittances made posterior to the 31st December 1809 could not be held as applicable to the balance due as of that date, but that the account must, in a question with the sureties, who alleged that the obligation then terminated, be held as closed on the 31st December 1809, and therefore, as the balance then due exceeded the sum sued for, they were liable in terms of the libel.

The Court (4th March 1820) found, that 'the drafts of Walter Logan, for behoof of H. and R. Baird, upon and accepted 'by Fraser, Perring, Godfrey, Shaw, Barber and Company, 'though authorized by Fraser and Company, or the Honourable 'Simon Fraser, and James Henry Houston, Esq. the sole partners of that company, or of its successors, Fraser, Houston and 'Company, are not to be held as entitled to the benefit of the 'obligation of guarantee granted by the defenders to the pursuers, and in so far sustained the defences, and adhered to the 'interlocutors complained of; but, before answer in regard to 'the question, Whether the drafts of Walter Logan, for behoof 'of H. and R. Baird, or the Honourable Simon Fraser and

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* His Lordship added in a note,—'This case is certainly difficult; and, of course, 'my opinion will bend to authority or practice of merchants, if quoted to me. I 'should not have much regarded the mere change of firm of 'Fraser and Company,' or 'if 'Fraser, Houston and Company,' had proceeded to receive and accept Walter Lo-'gan's drafts, and referred the parties to get payment at Fraser, Perring, Godfrey, 'Shaw, Barber and Company. This was merely equivalent to giving an order on their 'own bankers. But the guarantees, by the conception of the obligation, rely on the 'acceptances of Fraser and Company, not of any bankers Fraser and Company might 'employ; and though the acceptances of the bankers might be better, it is not clear 'that the holders of the acceptances would be entitled to the benefit of Fraser and 'Houston's warranty, though the bankers themselves had a right to it; and, even if the 'holders were so entitled, they must have had recourse to an action at law for the pur-'pose, since Fraser, Houston and Company, did not appear as obligants on the face of 'the document. So that there was a great and essential change produced by the new 'measure on the security in contemplation under the obligation of guarantee, and there-'fore intimation and approbation seem to me to be required. It need not be added, 'that the defenders might have had private reasons for not dealing with the house of 'Fraser, Perring, Godfrey, Shaw, Barber and Company, however unexceptionable their 'security, or superior to that of Fraser and Company.'

May 22. 1829.

'Company, are to be held as having been paid and extinguished 'by remittances from Walter Logan, for behoof of H. and R. 'Baird?'—remitted to an accountant to consider and report his opinion on the state of accounting between the parties, and the question reserved.* The accountant (Mr Scott Moncreiff) reported, that, on the 31st December 1809, a balance had arisen against H. and R. Baird of L.7130, but that remittances had subsequently been made; and therefore, 'in proceeding to the 'consideration of the question still at issue between the parties, 'it appears to the accountant to resolve into the two following 'subjects of inquiry; viz.

'1. Whether there is any evidence, that it was the understand-'ing of Simon Fraser and Company and Mr Logan, that the 'remittances by the latter were to be applied specifically to the 'discharge of such of his drafts as were about to fall due, in terms 'of the stipulation contained in the letter of guarantee?

'2. If there was no such understanding, Whether the balance 'due by H. and R. Baird on 31st December 1809, must be held 'to have been extinguished by the first remittances made in 1810? 'or whether Fraser, Houston and Company, were entitled, as 'creditors, to apply these remittances, in the first place, to the 'unguaranteed debt contracted after 31st December 1809, so as 'to leave the balance at that date still undischarged?

'With regard to the first of these questions, the accountant 'humbly reports, that Mr Logan, in his letters to S. Fraser and 'Company, and Fraser, Houston and Company, desired the re-'mittances he enclosed to be placed to the credit, and the drafts 'he advised to have made, to be placed to the debit of H. and R. 'Baird; and the accountant has not observed, in any of these 'letters, any special appropriation of the remittances to particular 'drafts, either past due, or about to become due. By the letter 'of guarantee, the defenders became bound that S. Fraser and 'Company should be possessed, six days before their acceptances 'fell due, of remittances having not more than sixty-five days to 'run; but this does not seem to have been attended to by Mr 'Logan, whose remittances had frequently more than sixty-five 'days to run after they reached London; and S. Fraser and 'Company's acceptances sometimes fell due before they received 'remittances to provide for them.

'The accountant therefore submits, that there was no under-'standing between the parties, binding the house in London to

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* See Houston *v.* Speirs and others, March 4. 1820; Fac. Coll.

May 22. 1829.

'apply the remittances they received from Mr Logan to the dis-
'charge of specific drafts, but that the remittances were made,
'generally and indefinitely, to account of H. and R. Baird.

'On the second point, regarding the right claimed by the pur-
'suers, of applying the remittances made by Mr Logan, in the be-
'ginning of 1810, to the acceptances granted at that period, and
'not to the balance of the former year, it is with deference that
'the accountant submits his opinion, that, as the Court have
'found that the defenders are not liable for Mr Logan's drafts
'on the banking-house, because they were not made in terms of
'the letter of guarantee, they are not entitled to derive benefit
'from remittances made to a different firm from that to which
'this letter of guarantee is addressed; and but for which remit-
'tances, it is not probable that the new firm would have author-
'ized the banking-house to accept Mr Logan's drafts. The ac-
'countant is aware, that although there was an alteration in the
'firm of the house of the Honourable Simon Fraser and Com-
'pany, yet there was none in the number or names of the part-
'ners; but he humbly conceives that this alteration in the firm is
'as much in favour of the pursuers, as the alteration in the mode
'of drawing has been found in favour of the defenders, whose let-
'ter of guarantee was addressed to the Honourable Simon Fra-
'ser and Company, and not to Messrs Fraser, Houston and Com-
'pany, to the latter of whom the remittances were made at the
'same time that they were advised of drafts having been made on
'their banking-house. If, however, their Lordships shall think
'that the alteration of the firm does not avail the pursuers, be-
'cause that firm consisted of the individuals of the former firm, the
'accountant humbly submits his opinion, that the case will fall
'to be determined in favour of the defenders, as, in that case,
'the balance claimed by the pursuers will consist of drafts on
'the banking-house not remitted for by Mr Logan.'

On advising this report, with objections, &c. the Court found, (20th November 1823),* 'that there was no specific appropria-
'tion of the remittances made by Walter Logan after the change
'of the firm from Simon Fraser and Company to that of Fraser,
'Houston and Company, in January 1810, to the drafts which
'had been drawn by him on the old firm prior to that period;
'and that the defenders are not entitled to derive benefit from
'the remittances made to the new firm, except in so far as these

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* 3. Shaw and Dunlop, No. 126. p. 180.

'remittances, when compared at any one period of the account with the drafts drawn by Logan on the banking-house of Fraser, Perring and Company, had the effect of reducing the balance below the amount for which the defenders were bound as the account stood in the end of December 1809; and of new remitted to the accountant to make up a state, shewing the exact balance due by the defenders according to the finding.' May 22. 1829.

The accountant reported,—'According to the principles by which the Court has fixed that the accounting in this case is to be regulated, the remittances made by Mr Logan, begun in January 1810, fall to be applied, in the first instance, to the drafts drawn in terms of that arrangement, which have been found not to fall under the guarantee, and the surplus only, if any, falls to be applied to the reduction of the old balance at 31st December 1809, covered by the guarantee. But it sometimes happened, that Fraser, Houston and Company, received advice from Mr Logan of his having drawn on the banking-house before the bill was actually presented for acceptance, and, consequently, entered in the account, and at the same time received a remittance from him; and the question therefore arises, whether, in applying such remittance to the drafts on the banking-house, Fraser, Houston and Company, were entitled to take into account the draft of which they had received advice, though it was not yet presented for acceptance? This question is of considerable importance in the case, as will be apparent by referring to a single example. By letter of 20th January 1810, Mr Logan remitted to the new firm bills to the amount of L. 916. 15s. 8d., and advised them at the same time of his having drawn on the banking-house for L. 1000. The account-current shews that this letter was received on the 23d January, on which date the remittance was placed to Mr Logan's credit, but the draft was not accepted, nor, consequently, placed to his debit, till the following day. But as this draft is the first which Mr Logan drew on the banking-house, it will follow, that if it is not to be taken into account, on comparing the remittances with the drafts under the new arrangements as on 23d January 1810, the whole sum of L. 916. 15s. 8d., received on that date, will fall to be applied to the old balance covered by the guarantee. But, on the other hand, if the Court should be of opinion that Fraser, Houston and Company, were entitled to apply such remittances, not only to the drafts actually accepted by the banking-house, but to those which they knew, by regular advice from Mr

May 22. 1829. 'Logan, had been drawn, and would be immediately presented 'for acceptance, then the whole bills remitted in Mr Logan's 'letter of 20th January 1810, will be exhausted by the draft 'advised in that letter, so as to leave no surplus to be applied to 'reduction of the old balance.

'The accountant, leaving this point for the determination of 'the Court, begs leave humbly to report two states of the 'account between the parties, framed upon the opposite views of 'that question.

'1*st*, Account shewing the balance of H. and R. Baird's ac- 'count with the Honourable Simon Fraser and Company, stat- 'ing Mr Logan's remittances to Fraser, Houston and Company, 'on the dates of his making them, and his drafts on the dates 'of his advising them; from which it will be seen, that, on this 'footing, the ultimate balance is not reduced below the sum 'claimed by the pursuers.

'2*d*, Account shewing the balance of said account, charging 'Fraser, Houston and Company, with Mr Logan's remittances, 'when received by them, and giving him credit for his drafts on 'the dates of acceptance; from whence it will be seen, that, on 'comparing his remittances with his drafts, upon this principle, 'the former at various periods exceeded the latter, so far as to 'reduce the balance due to the old firm of the Honourable 'Simon Fraser and Company to the extent of L. 522. 13s. 7d. 'below the balance claimed in this action.'

In the meanwhile the respondent, Mr Vile, as creditor and assignee of Fraser, Houston and Company, was sisted as pursuer, along with the executors; and the Court, on the 16th December 1825, 'approved of the principles of accounting adopted 'in the first branch of the report, according to which Mr Logan's 'remittances to Fraser, Houston and Company, are to be 'stated on the dates of his making them, and his drafts on the 'dates of his advising them; and in respect the parties differ as 'to the effect of the interlocutor already pronounced, appoint 'parties to prepare Cases on the effect of this interlocutor, and 'on such points of the cause as shall be shewn to be still unde- 'termined.' Thereafter (12th May 1826) 'the Court, having 'advised mutual cases, &c. decerned and ordained the defenders, 'jointly and severally, to make payment to Oliver Vile, assignee 'of James Henry Houston, the surviving partner of the original 'pursuer, and now a party in the cause, of the sum of L. 5739. '11s. 7d., being the sum concluded for in this action, with inte- 'rest of L. 5655. 10s. as a principal sum, from the 28th day of

'April 1811, and in time coming till payment;' and afterwards (12th December 1826) found the pursuer entitled to L.150 of modified expenses.* May 22. 1829.

Speirs, and the other sureties, appealed, and the executors and Vile cross-appealed.

Appellants, (Speirs, &c.)—1. It is undoubted law that all guarantees are strictissimi juris, not to be extended by implication, and to be enforced only in so far as the terms and conditions with which they are qualified have been observed. But the drafts subsequent to 31st December 1809 were not drawn upon and accepted by Simon Fraser and Company. They were the acceptances of the banking-house of Simon Fraser, Perring, Godfrey, Shaw, Barber and Company, and in account, not with Simon Fraser and Company, but with Simon Fraser, Houston and Company. These bills, therefore, are not covered by the appellants' letter of guarantee.

2. Although the appellants were liable for any balance, as at 31st December 1809, which is still resting owing, yet in point of fact there is no such balance remaining due. It is true that the respondents say that there was then a balance of L.7130, which by posterior operations has been reduced to the balance libelled; and they contend that the appellants must be liable for that balance. But although it is true that there were outstanding acceptances, as at 31st December 1809, amounting to L.7130, for which the appellants were responsible, yet those acceptances were provided for and retired in the manner pointed out in the letter of guarantee. The appellants thereby bound themselves that H. and R. Baird should remit good bills a certain number of days before the acceptances of Fraser and Company became due. The acceptances which were in the circle in December 1809, were not payable till January, February, and March 1810. But remittances were made in good bills to the full amount, before these acceptances fell due. Accordingly, when the account libelled is balanced, by these acceptances on the one hand, and the remittances on the other, there remains nothing due. But it is said, that because the obligation of the appellants terminated on 31st December 1809, the account must be balanced as at that date; that the bills remitted cannot be included, because they were subsequently granted; and that on

* 4. Shaw and Dunlop, No. 366.

May 22. 1829.

this footing there is a balance against the appellants of L. 7130. But this mode of stating the account is inadmissible under the terms of the letter,—is contrary to mercantile practice,—and to the authority of various decisions, particularly that of Devaynes, (1. Merivale, p. 605.) By the practice of merchants, and particularly of bankers, in regard to cash-accounts, each payment is held to extinguish, either in toto or pro tanto, the previous debit side of the account; and this rule was given effect to in the case of Devaynes. In that case, Clayton was a customer of a bank of which Devaynes was a partner. At his death nothing was due to Clayton; but by subsequent transactions with the surviving partners a balance arose in favour of Clayton. On their bankruptcy he claimed against the estate of Devaynes; but Sir W. Grant held, that each item on the debit side is to be considered as discharged or reduced by the next item on the credit side, and that it is not competent to carry back the ultimate balance against a party who may, during the currency, have been under a responsibility. In the present case, the balance due at 31st December 1809 was greatly more than extinguished by subsequent remittances; and it was only towards the middle of 1810, when H. and R. Baird became embarrassed, that the balance began to bear against them.

3. But even were the remittances, as well as acceptances, after 31st December 1809, to be held as falling under the guarantee, the appellants would be liberated, because Fraser and Company failed to intimate to them that the balance at that date remained unpaid.

Respondents, (executors and assignees of Houston).—1. When the terms of the letter of guarantee, and the nature of the change in the form of drawing the bills, and the object and true situation of parties, are considered, there will be found no ground for depriving the drafts, after 31st December 1809, of the protection of the guarantee. There was no attempt to transfer the benefit of the guarantee, nor was there any extension or variation of the hazard run by the sureties. In point of substance, the drafts were on the agents of Simon Fraser, Houston and Company. But a person who, in accepting bills drawn on himself, relies on the security of a guarantee, cannot lose the benefit of it, because the bills are drawn at his request upon a third party, 'value in account with himself,' especially when the drafts are accepted by that third party by special mandate applicable to each acceptance?

2. At all events, the guarantee covered the operations of 1809; and these operations left a balance due the respondents of L. 7130. Of this sum (under the terms of the guarantee) the appellants were bound to replace L. 7000. The question must be taken as if, on the 31st December 1809, the sureties had been informed that the guarantee was not in future to be acted upon. Now, have the acceptances constituting the L. 7000 been paid or not? No doubt an excess of payment by Logan on the subsequent transactions operated as a payment pro tanto by the sureties, or rather diminished the guaranteed debt to the sum sued for; but to no greater extent. The appellants endeavour to escape from liability for the balance as at December 1809 by maintaining, that although the guarantee had become inoperative quoad the debit side of Logan's account, it continued as to the credit side. This could only hold if there were evidence that the remittances either were specifically, or by inference from circumstances, applicable to the discharge of the 1809 acceptances. But there is no evidence to that effect. The guarantee being as it were erased, the remittances made after it ceased to exist, cannot be held referable to it. The remittances before January 1810 were with reference to a debt due to Fraser and Houston, and secured by guarantee. Those after January 1810 were relative to a debt not secured by guarantee. The creditor, in absence of specific directions, appropriated, as he was entitled to do, the remittance to the debt least secured; and the circumstances authorize the respondents to consider that there was a specific application ordered. May 22. 1829.

3. The respondents incurred no liability by not giving intimation of the state of the balance.

The House of Lords ordered and adjudged, 'that the interlocutor of the Court of Session of the 4th March 1820, in so far as it altered the previous interlocutors in the cause and remitted to the accountant, and also the interlocutors (mentioning them by date) complained of in the original appeal, be reversed; and that the cross-appeal be dismissed; and that the several interlocutors of the Lord Ordinary, (mentioning them by date), and also the several interlocutors of the Court of Session, of the 10th December 1818, and the 4th of March 1820, in so far as it adheres to the previous interlocutors therein complained of, be affirmed.'*

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* The result of the judgment is a simple adherence to the interlocutor of Lord Meadowbank. See p. 395.

May 22. 1829.

Appellants' Authorities.—Paisley, Jan. 13. 1779, (8228.); University of Glasgow, Nov. 18. 1790, (2104.); Philip, Feb. 21. 1809, (F. C.); M'Laggan, Nov. 19. 1813, (F. C.); Hammond, June 24. 1812, (F. C.); Taylor, Nov. 20. 1817, (not reported); 3. Wilson's Reports, 530.; 7. T. R. 254.; Fell on Guarantee, p. 126., &c.; 1. Starkie, Rep. 193.; 2. Bell's Com. p. 237.; Devaynes *v.* Noble, 1. Merivale's Rep. p. 605.; Reid, Jan. 29. 1792, (6818.); 6. Dow, p. 238.; Thomson, Jan. 29. 1822, (1. Shaw and Ballantine, No. 319.): reversed in House of Lords, (2. Shaw, p. 316.); 3. Ersk. 4. 2.; Buccleuch, Feb. 1725, (6807.)

Respondents' Authorities.—Spiers, June 22. 1822, (1. Shaw and Ball. No. 566.); Booth, May 16. 1823, (2. Shaw and Dunlop, No. 290.); Mansfield, June 9. 1749, (8224.); Hamilton, June 13. 1766, (8227.); Ewing, June 2. 1808, (App. voce Letter of Credit); 1. Bankt. p. 487.; Forbes, Nov. 9. 1739, (6813.); Cochrane, June 22. 1821, (1. Shaw and Ball. 103.)

RICHARDSON and CONNELL—GREGSON and FONNEREAU,—Solicitors.

No. 26. ALEXANDER AND WILLIAM MALCOLMS, Appellants.
T. H. Miller—Rodger.

THOMAS YOUNG, Respondent.

Lease—Assignation—Bona et mala fides.—Circumstances under which it was held, ex parte, (reversing the judgment of the Court of Session), that an assignation of a building lease by a father to his sons was not collusive, and therefore sustained in a question with a creditor of the father.

June 5. 1829.

1ST DIVISION. Lord Eldin.

ARCHIBALD MALCOLM, in 1807, obtained from Crawford of Auchnames a building lease, for 999 years, of two pieces of ground in the village of Port-Crawford in the county of Ayr. In 1809, Malcolm borrowed L. 120 from Robert Montgomerie, repayable in 1813, and assigned the lease to him in security. Malcolm remained in possession; but the assignation was published at the market-cross of Ayr, and registered in the Sheriff books of the County, but was not intimated to the landlord. On the 14th November 1814, Malcolm, with consent of Montgomerie, sold the lease to Malcolm's two sons, Alexander and William, for L. 160. They stated, that they were upwards of forty years of age, and had borrowed L. 100 of this money, to prevent Montgomerie from selling the lease to a stranger, which he had threatened to do. They resided in family with their father, who they said was now an old man. The deed, which was an assignation written 'by the said Archibald Malcolm, acting as 'clerk to David Brydon, writer in Saltcoats,' and concurred in by Montgomery, bore, that the sons had paid the amount to