

[12th July 1833.]

No.33. THOMAS BAILLIE, Appellant.—*Lord Advocate (Jeffrey)*
—*Dr. Lushington.*

THOMAS BAILLIE, and others, Executors of CHARLES
BAILLIE, Respondents.—*Serjeant Spankie—Murray.*

Clause—Proof—1. Construction of an agreement under which the appellant was bound, not merely to account for, but to pay 2,000*l.*; and interim decree granted for the same affirmed. 2. Incompetent to control the agreement by extrinsic evidence.

1ST DIVISION.

Lord Newton.

THE late Charles Baillie executed a deed in favour of the appellant, under which the latter intromitted with his funds to the extent of 3,000*l.* On the death of Charles, the respondents, as his executors, raised an action of reduction of the deed against the appellant, and also an action of count and reckoning. These actions were conjoined; and the case having been prepared for trial by a Jury, the parties, on 11th July 1831, entered into the following agreement:—“ The parties agree to dis-
“ miss the jury on the following terms:—1. The deed
“ shall be held to be reduced. 2. The pursuers shall
“ be entitled to vindicate their rights as if the deed under
“ reduction had never been executed. 3. Except, that in
“ settling with the defender for the 3,000*l.* odds sterling,
“ which he acknowledges himself to have intromitted
“ with, belonging to the pursuers, they shall give him
“ credit for the sum of 1,000*l.* as his outlay and account.”

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The Court thereafter pronounced this judgment:—
 “ 15th November 1831.—The Lords, in terms of the
 “ minute of arrangement of 11th July last, between the
 “ parties, reduce, decern, and declare in terms of the
 “ reductive conclusions of the libel, and quoad ultra
 “ remit the conjoined actions to Lord Newton, Ordi-
 “ nary to the cause, to hear parties in the count and
 “ reckoning, and dispose of the cause generally, as to
 “ his Lordship may seem proper.”

Lord Newton then, on 19th November 1831, “ de-
 “ cerned in the meantime against the defender for pay-
 “ ment to the pursuers of the sum of 2,000*l.* sterling,
 “ and allowed interim decree for the same to go out and
 “ be extracted, the pursuers before extract producing
 “ confirmation of their title as executors, and ap-
 “ pointed the defender within three weeks to give in a
 “ state of his intromissions.”

The Court having adhered to this interlocutor, Baillie
 appealed.

Appellant.—The true meaning of the compromise is,
 that, to save the necessity of investigating the amount of
 the appellant’s intromissions, it was to be stated at the
 sum of 3,000*l.*; that in settling or calling him to account
 he was to be allowed to retain one third part thereof;
 but that it was to be open to him to shew discharges of
 the remaining 2,000*l.* Notwithstanding, the Court
 below have pronounced an interim decree, de plano, for
 the full sum of 2,000*l.*; and, quoad ultra, have ordered
 a state of the appellant’s whole intromissions. Their
 Lordships could not have gone so far, supposing there
 had been no compromise, and that the respondents had

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gained the case at the trial. They could only in that event have reduced the deed, and ordered an investigation as to the amount of the appellant's intrusions under it; and no interim decree could have been pronounced, as the appellant never admitted that there was any balance whatever in his hands. But it is not to be presumed that the appellant, by compromising the case, meant to put himself in a worse situation than he would have been in by losing it. Besides, he offered to prove, by the draft of the agreement and other evidence, that the extent of his liability of accounting was to be restricted to the sum of 2,000*l.*; and that he should also be allowed the opportunity of accounting for the 2,000*l.*

Respondents.—The agreement is in itself quite explicit, and the attempt to control the construction of it by production of the unauthenticated draft, is incompetent.

LORD CHANCELLOR.—My Lords, I humbly move your Lordships that these interlocutors be affirmed, with full costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the sum of 21*l.* 9*s.* 10*d.* for their costs in respect of the said appeal.

ATWOOD SMITH—MACDOUGALL and BAINBRIGGE,
Solicitors.