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“ I feel much diffidence, however, in delivering this opinion. But the reversal of the interlocutor, on the legality of the condition, does not depend upon it. It is the declaration that Sir Charles Douglas was a domiciled Englishman which governs the case; that depends upon principles of general law; and the reversal of the first interlocutor is a necessary consequence of the reversal of the second.”

On the motion of the Lord Chancellor, this judgment was pronounced, (18th March, 1796).

It is ordered and adjudged, that the said interlocutors of the 17th December 1793 and the 17th February 1794, complained of in the said appeal, be, and the same are hereby reversed; and it is hereby declared that the succession to the property of Sir Charles Douglas be regulated by the law of England: And it is further ordered and adjudged, that the interlocutor of the 17th of February 1792, also complained of in the said appeal, be, and the same is hereby reversed.

For Appellants, *Wm. Grant, Thomas Macdonald.*

For Respondents, *Sir J. Scott, Wm Battiner.*

JOHN STEIN, Distiller at Canonmills,	-	<i>Appellant;</i>
THOMAS STEWART and JAMES SOMMERVAIL	}	<i>Respondents.</i>
& Co., Merchants, Leith,		

House of Lords, 18th April 1796.

CONTRACT OF SALE — PAYMENT — BILLS. — A contract for the sale of spirits, to be delivered at stated periods, and stipulating that “ Bills at three months” should be granted for each delivery. The question was, Whether, from the stipulation of “ bills at three months,” and other correspondence between the parties, the seller was entitled to discountable bills, or bills that would produce ready cash at the banks; and on failure to give such bills, whether he was entitled to stop the contract; Held, in the Court of Session, That, as by the said contract he had received the guarantee of a party, he could demand nothing farther, and was bound to perform his contract, although he offered to prove that the

alleged guarantees were the principals in the purchase,—that they had alone granted bills for the spirits as principal purchasers—that they had held out that William Allan, banker, was also concerned in the purchase as partner, and that he would discount the bills. That Mr. Allan at first discounted, but latterly refused to discount their bills, because they had dishonoured previous bills so discounted; and that Mr. Allan, upon inquiry, declared that he was not a partner of the concern, and that he could not obtain the bills discounted in any other bank, and that these parties had assured him, that if Mr. Allan did not always discount these bills, they would pay cash. Reversed in the House of Lords, and these facts allowed to be proved, if they should not be admitted by the respondents.

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On the 26th April, the appellant, John Stein, entered into a transaction with the respondent, Thomas Stewart, whereby the appellant agreed to deliver certain quantities of spirits to Mr. Stewart, at certain stated terms, as set forth in the following letters, on receiving bills from him at a certain date, guaranteed by the other respondents James Sommervail & Co.—“*Leith, 20th April 1792.* Mr. Thomas
“ Stewart, Sir, In consequence of what has just now passed
“ betwixt us, I hereby make you offer of 100 puncheons
“ common aqua vitæ, deliverable at your cellars at Leith in
“ the course of four weeks from this date, at 2s. 6d. per
“ gallon, at the strength of one in ten under hydrometer
“ proof, per Clerk’s instrument, of a quality such as the
“ sample to be shown you, and sealed to-morrow; the
“ amount to be payable by your acceptances at four months
“ from the date of the deliveries, or when you find it more
“ convenient, to pay cash, the common interest being
“ allowed. I also make you a farther offer of 600 pun-
“ cheons of the same quality, deliverable in quantities of
“ 12 puncheons weekly, at 2s. 2d. per gallon, of the strength
“ of one in ten hydrometer proof, per Clerk’s instrument, to
“ be payable by your *acceptance at three months* from the
“ date of each settlement, which shall take place at the end
“ of every fortnight; it being understood that the delivery
“ of the weekly quantity is to take place on the beginning
“ of June next, and that the spirits are to be delivered of a
“ strength under twenty per cent. over hydrometer proof.
“ Upon these terms I hereby agree to deliver you these 700
“ puncheons of aqua vitæ, and your letter of acceptance
“ shall render this conclusive. And I further promise,
“ that before making any further sale to any other house
“ upon as low terms, (the houses of William Forlong & Co.,

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“ and Adam and Mathie excepted), you shall have the re-
 “ fusal of such a sale at any time during this contract. It
 “ is, however, provided, that if any alteration should take
 “ place in the duties to government, either by an additional
 “ duty on the stills, or otherwise, that then, if we cannot
 “ agree with regard to the difference, either party shall have
 “ it in their power to put an end to this agreement. As
 “ you are not particularly acquainted with the quality of
 “ the sample to be produced to-morrow, I engage that it
 “ shall be such as I in general sell. The empty casks are
 “ either to be returned in the course of six months, or if at an
 “ average they contain above 470 gallons, to be paid for at the
 “ rate of 12s. each, and if less, at the rate of 10s. each. It
 “ is also understood that Messrs. James Sommervail & Co.
 “ have a concern in this agreement, and are to guarantee its
 “ due performance in every respect. (Signed) JOHN STEIN.”

April 26, 1792. Mr. Stewart, of this date, gave in counter missive of accept-
 ance to these terms, and besides delivered to Mr. Stein the
 following guarantee from Messrs. James Sommervail & Co.,
 —“ *26th April 1792.* We hereby engage that the above
 “ bargain which you have made with Mr. Thomas Stewart,
 “ shall be implemented in all respects on his part; and we
 “ become bound to see whatever acceptance he may grant
 “ on this account, paid in the same regular manner as if we
 “ were actually bound in them ourselves; and if at any
 “ time you choose to take our acceptances in preference to
 “ Mr. Stewart’s, we have no objection to grant them.”

“ We are, (Signed) JAMES SOMERVAIL & Co.”

It was alleged by the appellant, that though his letter
 was addressed to Mr. Stewart, yet that James Sommervail
 and Co. were the real parties dealt with, and Stewart merely
 their servant or rider. It was also alleged by him, that at
 the time these missives were entered into, the bills of
 Messrs. Sommervail and Co., accepted at the date stipulated,
 were currently negotiated, and could command money at the
 banks. And further, that it could not be supposed that,
 without a command of ready money, he (so recently com-
 menced business) could be able to manufacture twelve
 puncheons of spirits per week, and deliver them to the re-
 spondents. And accordingly, that it was on the faith of
 either receiving cash, or bills discountable at the bank, so
 as to produce cash as the spirits were delivered, that he
 could be able to perform his part of the transaction.

For eleven months ensuing, the appellant delivered

agreedably to his bargain, the quantities of spirits in question ; and received in payment thereof the acceptances of the respondents, which he got discounted with Mr. Alexander Allan, Banker in Edinburgh, whom Messrs. Sommervail & Co. had represented was a partner of their house, and would discount their bills.

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But in March 1793, Mr. Allan having declined to discount these bills any longer, and having also explained that he was not a partner *in* the house of James Sommervail & Co., the appellant resolved to put an end to the contract on his part, and accordingly refused to supply the respondents with any more spirits, whereupon the respondents raised the present action for implement; and the question was, Whether the stipulation of bills at short dates given in payment of the whisky, did not imply discountable bills, or bills that would produce at once money in the market; and whether the appellant was entitled to resile from the contract, on the respondents' bills becoming not discountable at the bank?

The appellant, on finding the bills not discountable at the bank, wrote the respondents, Messrs. Sommervail & Co., as follows:—“*14th March 1793.* It is not without a good deal of hesitation, and the earnest solicitation of many of my friends, that I take the liberty of addressing you on a subject so delicate as credit; I trust, however, that numerous and alarming failures, which are just now happening in every part of the country, and my inability to get your paper discounted, will plead my excuse. Previous to signing our contract, you will recollect, that I called you aside, and asked you who were your partners. I am very much mistaken if you did not then inform me, that Mr. Alexander Allan was among the number, and I have, of course, always represented him to be so when I applied for getting your paper discounted through any other channel. I have, however, been a good deal astonished within these few days, to be informed that Mr. Allan says he is not concerned with your house, and that I must have misunderstood your meaning. I, therefore, beg you will advise me how the matter stands; for if he is not concerned with you, it will be impossible for me to command cash upon your paper; but I trust that, considering the present alarming state of the country, you will have no objection, either to pay me ready money, as the spirits are delivered, or to find me such security as can command it. I have only to add, that I hope you will do me the justice, not to impute

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“ this request to any improper motive ; for I assure you,
 “ upon my honour, that though I must ultimately be a very
 “ great loser by our bargain, I have not the most distant
 “ wish or inclination to *allow* any improper obstacle to pre-
 “ vent its being faithfully fulfilled. You have still a con-
 “ siderable quantity to receive, and it shall be delivered to
 “ you as soon as possible ; but I trust that you will agree
 “ with me, that my friends, who, from the credit they grant
 “ me, must be interested in all my transactions, have a
 “ right to be satisfied with the security as well as myself.”

Mar. 18, 1793. In answer to this letter, Mr. Sommervail wrote the fol-
 lowing :—“ *Leith, 18th March 1793.* Sir, I have yours of
 “ the 15th current, the first of the kind I ever received.
 “ The situation of my company is not such that they can-
 “ not bring money or security for the remainder of the con-
 “ tract with you ; so that, on that score, you may keep your-
 “ self easy. In supposing that I ever mentioned A. Allan
 “ as one of my partners, you are mistaken ; the only persons
 “ I am so connected with, are Mr. Thomas Gladstone and
 “ Mr. A. Allan’s nephew, Mr. Marr ; with these, under the
 “ firm of James Sommervail and Co., I have been a partner
 “ about four years, during which period they have main-
 “ tained credit far beyond what they had occasion for. I
 “ by no means blame you in being cautious ; were it generally
 “ the case, such large failures would never have happened,
 “ because they never would have got so extensive credits.”

Mar. 23, 1793. Relying on the representation this letter held out, that
 “ money or security for the remainder of the contract,”
 would be forthcoming, the appellant, subsequent to these
 letters, delivered an invoice of spirits to the amount of
 £1500. After which another transaction happened with re-
 spect to a parcel of these spirits, which, as it is material for
 illustrating the meaning of the parties, shall appear from
 the following words of the appellant’s condescendence,
 which were offered to be established by proof, had the Court
 below allowed it. “ Condescendence, article 12th, that owing to
 “ the pursuers not being able about this time (March 1793),
 “ to procure cash or discountable bills to the defender in
 “ return for his spirits, no spirits were delivered to them for
 “ some weeks. From this circumstance, the defendant had
 “ upon hand spirits to the value of about £1500 sterling,
 “ ready to be delivered ; that several letters, and a good
 “ deal of conversation, took place between the parties with
 “ regard to these spirits ; and that, in particular, Mr.

“ Stewart came to the defender’s counting-house at Cannon-
 “ mills, and told him, in the presence of his clerks, that he
 “ was in perfect safety to deliver over the spirits, because
 “ cash would be paid for what was at present to be taken
 “ away, and that Mr. Sommervail had spoken to Mr. Allan,
 “ who would now discount the bills for the remainder.
 “ 13th, That, in consequence of the assurance, the defender
 “ did deliver to the pursuers spirits to the value of £400, for
 “ which he received Somervail & Co.’s bill at four months
 “ date, which, in mercantile transactions, is equivalent to
 “ cash. The remainder of the spirits, (about £1100 worth),
 “ were laid aside in a cellar within the defender’s works ;
 “ that he received for the spirits so laid aside, Sommervail
 “ & Co.’s bills, at two and three months, under a positive
 “ and explicit assurance that Mr. Allan would discount them
 “ when presented. 14th, The above mentioned transaction
 “ was not finished in the same way in which the other
 “ transactions betwixt the parties had been finished, be-
 “ fore the difficulty of discounting the bills occurred. In
 “ every transaction before that time, the defender handed
 “ to Mr. Stewart, or to Messrs. Sommervail & Co., a settled
 “ account, in which, after charging them with the spirits,
 “ he gave them credit for their acceptances, as so much
 “ value received from them. On this occasion, no such
 “ account was handed them, nor was any receipt given for
 “ the bills, as had always been done in former transactions,
 “ until it was known whether the bills would be discounted
 “ by Mr. Allan or not”

“ 15th, That when Mr. James Reid, the defender’s clerk,
 “ presented the bills to Mr. Allan, he refused to discount
 “ them, giving as his reason, that he was exceedingly dis-
 “ satisfied with the mode in which Sommervail & Co. were
 “ doing business, and that they had extended their transac-
 “ tions beyond the bounds of prudence, adding farther, (a
 “ circumstance to which the attention of your Lordships is
 “ particularly called), that he had not been able to procure
 “ payment of some of the bills of Sommervail & Co., which
 “ he had discounted to the defender, in any other way than
 “ by taking from Sommervail & Co. other bills in lieu of
 “ them.”

The appellant thereupon wrote the respondents, declin-
 ing their acceptances as a settlement for the spirits, on the
 ground that he could not get them discounted, and wish-
 ing to know if they were ready to comply with their offer,
 “ either to give cash, or find satisfactory security that would

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“ command it,” otherwise he would be under the disagreeable necessity of dissolving the contract.

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To this letter Messrs. Sommervail & Co. returned for answer,—“ Sir, As it is inconvenient for you to accept our bills
“ for the balance of last settlement of whisky, we shall, on
“ or before this day week, or Thursday following, get you
“ cash, or such security as will entitle you to it. If cash is
“ actually wanted, it will be given you; and if not given, to
“ dispose of the whisky on our account to best advantage for
“ money.”

Apr. 15, 1793. Whereupon the appellant was under the necessity of answering as follows:—“ You owe me, by acceptances now
“ current, £2237. 7s. 9d., and that when I agreed to lay
“ aside the last parcel (of spirits) for you, it was upon the
“ express condition of your either paying me money, upon
“ the usual discount, or finding me such security as would
“ command it. As, however, you have been unable either
“ to do the one or the other, and as I possibly cannot hold
“ the goods longer, I am sorry to be under the necessity
“ of informing you, that if the amount is not paid in money
“ before 11 o’clock to-morrow forenoon, I shall hold our con-
“ tract to be at an end, and will immediately dispose of the
“ spirits on my own account.”

Apr. 17, — In reply to this, the appellant received for answer:—“ 17th
“ April 1793. In answer to yours of yesterday, we have
“ consulted our man of business, and several others, upon
“ the propriety of your insisting on cash or security from
“ us, all of whom decidedly say, you have no right whatever.
“ We are determined not to take back the bills we gave you,
“ unless it suits our own conveniency. You must prove that
“ we are not in good credit ere you can insist on security.
“ Were you but commonly polite, in a few days we might
“ pay you cash, but your behaviour merits no favour. If law
“ is your recourse, we are prepared for you.—We are,” &c.

Jan. 14, 1794. The action was brought before the sheriff, who, having found that the appellant was bound to implement his contract, an advocacy was brought, in which the Lord Ordinary found, 1st, “ That by the terms of the contract between the said John Stein and Thomas Stewart, the
“ spirits furnished by the said John Stein were declared to
“ be payable by the acceptance of the said Thomas Stewart.
“ 2d. That by the letter of guarantee, granted by the pursuers, Messrs. Sommervail & Co. they became bound that
“ the said contract should be duly implemented in all re-
“ spects by the said Thomas Stewart, and to see whatever

“ acceptances he may grant on this account paid in the
 “ same regular manner as if we were actually bound in
 “ them ourselves. 3d. That such being the terms of the
 “ contract, the defender was not entitled to insist that the
 “ pursuers should enable him to discount the said accept-
 “ ances, or to raise cash on them, before the term of pay-
 “ ment. Therefore, finds, 4th, That the contract must be
 “ held to have been a subsisting contract down till the
 “ period when the additional duty on spirits imposed in last
 “ session of Parliament took place; and, before further
 “ answer, appoints the pursuers, within ten days, to give
 “ in a precise state of their claims against the defender upon
 “ the footing of this interlocutor.” On representation, the
 Lord Ordinary adhered: And, on reclaiming petition to the
 Court, they adhered (21st Feb. 1794). And, on second pe-
 tition, they ordered the appellant to give, before answer, a
 condescendence, “ stating the special facts he offers to prove
 “ in support of the pleas maintained by him, and the mode
 “ of proof proposed for establishing the same.”

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May 14, —

A condescendence was accordingly given in; and besides the articles above quoted, the appellant also offered, in this condescendence, to prove the understanding and custom of merchants as authorizing a dealer to withhold delivery of the goods agreed to be sold on credit, if the credit of the purchaser is suspected, or the bills cease to be marketable.

The Court, of this date, only allowed a proof of this conde-
 scendence, in so far as it alleged that it was stated by the
 Messrs. Sommervail & Co. that Mr. Allan was a partner
 in that concern. The contract of copartnery was produced.
 The appellant then craved to be allowed to prove their whole
 statements in their condescendence, but their Lordships re-
 fused the desire of the petition, and adhered to their former
 interlocutor; thereafter the appellant put in another peti-
 tion, the Court renewed the term for proving, and *quoad*
ultra, adhered. They afterwards “ circumduced the term
 “ against the defender, for proving, in terms of the inter-
 “ locutors of 12th June and 11th December.” And, of this
 date:—“ The Lords having resumed consideration of the
 “ cause, with the whole former proceedings held therein,
 “ they of new adhere to their interlocutor of date 21st Fe-
 “ bruary 1794, adhering to the Lord Ordinary’s interlocutor
 “ of date 31st January 1794, and remit to his Lordship to
 “ proceed accordingly, and do further as he shall see just.”

June 12, —

Nov. 27, —

Dec. 11, —

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May 28, —

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

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Pleaded for the Appellant.—The bills of merchants of good credit are a marketable commodity. A banker has a certain profit in buying them with ready money; and the privileges conferred upon them by law, which render them transferable to the purchaser, free of all embargo, renders this traffic in the purchase of bills among the least hazardous of commercial dealings. When, therefore, the appellant stipulated for bills *at short* dates from the respondents for his goods, instead of leaving the price standing upon an open account, he must be understood to have stipulated for a security convertible into cash upon carrying them to the proper market. But it is allowed, that when the appellant withheld his goods, and demanded cash, or additional credit, to render the bills of the respondents marketable, no cash could be obtained for the bills, upon the security of the respondents, from any banker in Edinburgh. There was here, therefore, a failure of performance of a mutual contract, according to the true meaning and intent thereof, on the part of the respondents, and, according to the general rules of law, the appellant was entitled to refuse implement on his part.

It is evident from the tenor of the correspondence between the parties, from the 14th March to the 17th April 1793, when the respondents had recourse to the opinion of a solicitor or attorney, that they, as well as the appellant, understood perfectly that the appellant was justly entitled to have, in return for his goods, cash, or bills saleable at market; and it cannot be questioned but that the respondents, had they felt a doubt on this point, would have availed themselves of it in their letters to the appellant, as these letters both prove that they were offended at the implied suspicions against their credit, and were under considerable difficulty how to manage the negotiation successfully. This conduct, therefore, upon the part of the respondents, demonstrates either that they understood the true meaning of their contract with the appellant to import an obligation on their part, to find him marketable bills, or that it was their belief, as merchants, that, according to the custom of trade, the appellant was entitled to the demand he made. In either case, it is plain this affords a strong ground to justify the proposition maintained by the appellant, that, by the meaning of the contract, and by the custom of merchants, he was entitled to marketable bills for his goods, and when such bills were no longer delivered, he was of course free from the contract.

Even independent of the express stipulation for bills of short or discountable dates, it is a rule of practice among merchants, and a rule which the Court below seemed to recognize, at least in the opinion of the judges, that no dealer is bound to fulfil an agreement to deliver goods to another dealer on credit, if circumstances occur that are sufficient to justify a suspicion of the credit of the merchant purchaser at the time. Now, it is thought, there could not be a better criterion of a merchant's credit being impaired than that the bankers, who are constantly in use to discount his bills, and in the knowledge of his dealings, refuse to discount them any longer, and that not because their own situation might render it inconvenient for them to discount bills at all, but because the purchaser had acted discreditably in not retiring with cash certain of his bills which they had recently discounted, but had sought for a delay of payment, and renewal of the bills; and if the banker who thus refused to discount the bills was, or had recently been connected with the purchaser in business, it is conceived the seller was justified in entertaining the most serious alarm as to the credit of the purchaser, and in withholding his goods, unless his fears were removed by additional security. The appellant has invariably offered to prove, by the most unexceptionable witnesses, that previous to his applying to the respondents for further security, Mr. Allan, whose interests with the respondents' house has been pointed out, refused to discount their bills, on account of their not having retired their bills formerly discounted, otherwise than by renewal; and that no other banking house in Edinburgh would discount them at that period, without additional security. It is contended, therefore, that the appellant was entitled to withhold his goods, for which he could command cash otherwise.

Taking, therefore, the whole circumstances into consideration—the fact, that it was believed among mercantile people, that Mr. Allan was a partner in the respondents' concern: Also, that the appellant was distinctly made to understand this from Sommervail & Co. themselves when asked the question, (both of which facts the Court below erroneously refused a proof, although material and relevant to the question at issue). Also, taking into consideration the fact now proved by their contract of copartnership, that, in point of fact, Mr. Allan was a partner of that house down to the month of October 1791, when he transferred his in-

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terest to his nephew, it is demonstrable that the appellant must have entered into the bargain under the sole belief that Mr. Allan was a partner. And whether this belief was right or wrong, it is clear that the proof offered that Messrs. Sommervail had held him out as still a partner, ought to have been allowed; because it was on the faith of this fact that he entered into the bargain. Still, from the evidence of the facts already in process, the appellant hopes that there are sufficient grounds for reversing the judgment appealed from.

Pleaded for the Respondents.—The appellant had no right, during the currency of the agreement between him and the respondents, to alter the nature of that agreement, by demanding cash or security, when bills only were stipulated. He has not stated any relevant facts or circumstances sufficient to make his case an exception to the general rule of law, or at least of the only facts which had any colour of relevancy. The appellant stipulated only for bills, not for bills that should always be discountable. Bills are discountable or not just as the bankers chance to find it convenient to buy bills; and at this time bankers found it necessary to contract their dealings; but it would be an extreme hardship to allow, on this account, the appellant to change the nature of the bargain from payments by their bills, to payments in cash, or additional security.

After hearing counsel, it was

Ordered and adjudged that the several interlocutors of the Lords of Session of the 21st of February, 27th November, and 11th December 1794, and 15th, 27th, and 28th of May 1795, be, and the same are hereby reversed: And it is farther ordered that the cause be remitted back to the Court of Session to allow a proof to the appellant in terms of the interlocutor of the 12th June 1794; and also of the facts stated in the condescendence given into the Court by the appellant, referred to in the interlocutor of the 27th November 1794, as hereby altered and restricted, if the same shall not be admitted by the respondents; viz. of that part of article first, which states that Mr. Allan had made large advances to James Sommervail & Co., for which he took more than five per centum of interest or profit; of that part of article 3, which states that Mr. Sommervail, previous to the contract in April 1792, told Mr. Mal-

colm Brown, the defender's rider, that Mr. Allan was his partner; and that Mr. Allan had sent his nephew, Mr. Marr, to the house of Sommervail & Co. with a view to succeed him; that Mr. Sommervail was extremely jealous of this, and meant to keep Mr. Marr in the dark as to his business, lest Mr. Marr's knowledge, and Mr. Allan's money, might give them too great an ascendancy in the house; of the whole of article 8;—of article 9, in as far as it states, that Mr. Sommervail assured the appellant that he might always depend upon Mr. Allan discounting the bills of his company, or otherways they would pay cash; that the appellant proposed to insert a clause in the missive to this effect, and Mr. Sommervail assured him that such a clause was totally unnecessary; of the whole of articles 10 and 11;—of that part of article 12, which states that the appellant had upon hand spirits to the value of above £1500, ready to be delivered; that several letters, and a good deal of conversation took place between the parties with regard to these spirits; and that, in particular, Mr. Stewart came to the appellant's counting-house at Cannonmills, and told him in the presence of his clerks, that he was in perfect safety to deliver the spirits, because cash would be paid for what was then to be taken away, and that Mr. Sommervail had spoken to Mr. Allan, who would now discount the bills for the remainder; and of the whole of articles 13, 14, 15, 16, 17, 18, 19, 21, 22, and 26: And it is also ordered, that the Court do also allow a conjunct proof to the respondents of all relevant facts and circumstances: And it is further ordered, that on such proofs being taken, the Court of Session do review the interlocutors of the Lord Ordinary of the 14th and 31st January 1794, and pronounce such decree as shall be just, upon the whole matter in question: And it is also further ordered, that the said Court do give all necessary and proper directions for carrying this judgment into execution.

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For Appellant, *Sir John Scott, W. Adam.*

For Respondents, *W. Grant, Matthew Ross, C. Hope.*

NOTE.—Professor Bell notices the decision in the Court of Session, (Principles, § 105; and Illustrations, p. 106), without observing that the case was reversed in the House of Lords.