1814.

WRIGHT
v.
PATERSON.

For the Appellant, *Sir Samuel Romilly, John Clerk, W. Macdonald.*

For the Respondents, *Sir Charles Ross, Robert Lockhart, Thos. W. Baird, F. Jeffrey.*

NOTE.—Unreported in the Court of Session.

[13 Fac. Coll. p. 54–6.]

ADAM WRIGHT, Esq., late of Glasgow, now of Edinburgh, ... *Appellant.*

DUGALD PATERSON, Merchant in Glasgow, . *Respondent.*

House of Lords, 4th July 1814.

GUARANTEE—CAUTIONARY OBLIGATION—LEX MERCATORIA—STATUTORY SOLEMNITIES.—A letter of guarantee was granted, having reference to past as well as future contractions. In an action against the cautioner, Held that this was not a cautionary obligation, requiring to be attested in terms of the statutes, but a letter of guarantee *in re mercatoria*, and therefore constituted a valid obligation. Affirmed in the House of Lords.

The appellant granted to the respondent a letter of guarantee for Messrs Simpson and Co., manufacturers in Glasgow, in the following terms:—

"*Glasgow, July* 13, 1806.

"MR D. PATERSON,

"Sir,—I hereby bind myself to see you paid for whatever purchases of cotton yarns, &c., Messrs Joseph Simpson and Co. has made, or may make, from you, for twelve months to come from this date.—I am, yours,

(Signed) "ADAM WRIGHT."

The respondent had delivered cotton yarns to Joseph Simpson and Co. per account, to the amount of £621, 7s. 4d. £229, 17s. 5d. of these yarns had been delivered *prior to the date of the letter*, and the rest after its date.

Simpson and Co. having become bankrupt, and an action having been raised, against the cautioner, for payment of the whole amount of £621, 7s. 4d., the defence stated was, that all obligations of this nature require to be attested by witnesses, and the name of the writer mentioned in the instrument in terms of the statutes thereanent. In reply, it was pleaded

that the writing founded on was an obligation granted *in re mercatoria*, and was therefore an exception to the general rule established by the statutues.

The Lord Ordinary at first pronounced this interlocutor: Dec. 5, 1807.
" Finds that the letter founded on by the pursuer, is not a " letter *in re mercatoria*, in so far as regards the furnishings " made to Simpson and Co. *prior to the date of it;* but is a " proper cautionary obligation for payment of a debt already " due. Finds that the letter is a sufficient guarantee for the " subsequent articles of the account, which were all furnished " within twelve months after the date thereof. Finds that " the two first articles of the account, furnished prior to the " date of the letter, amount together to the sum of £229, " 17s. 5d. Sustains the defences pleaded for the said defender, " and assoilzies him from the action, so far as regards these " two articles, and decerns; but repels the defence, *quoad ultra*, " and finds the defender, Adam Wright, liable to the pur- " suers for the amount of the other articles of the account, " being £391, and for the interest thereof, from the period " libelled, and in time coming, during the non-payment, and " decerns."

The appellant lodged a representation, but the Lord Ordi- Dec. 18, 1807.
nary adhered, declaring, " That it was the meaning of the " Lord Ordinary to declare, by his interlocutor, that the " letter in question being properly a cautionary obligation for " a debt already incurred, could not be held to be a letter of " guarantee, as *in re mercatoria;* and, with this explanation, " refuses also the second prayer of the representation, super- " seding extract till the third sederunt day, in January " next."

The respondent, on his part, thereafter represented, and the Lord Ordinary pronounced this interlocutor: " In respect June 14, 1808.
" it is admitted that the two first articles of the account pur- " sued for, and from the claim for which the respondent " stands assoilzied by the interlocutor brought under review, " were furnished by the representer to Simpson, previous to " the date of the respondent's letter of guarantee to the repre- " senter Simpson—Finds, that the said letter can be con- " sidered in no other light than as a cautionary obligation by " the respondent (appellant) to the representer, for the " amount of these two articles; finds, that a cautionary obli- " gation for a debt already and actually due, cannot be held " to be *in re mercatoria*, or to be validly constituted by a " writing defective in the legal solemnities. And as it is not

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" alleged that the representer's letter of guarantee pursued " on, is either holograph, bears the writer's name, or is signed " before witnesses, adheres to the former interlocutor, and " refuses the desire of the representation, and prohibits any " more representations from being received."

Feb. 16, 1809. The respondent then reclaimed to the Second Division of
July 4, 1809. the Court, but the Court adhered. On further reclaiming petition by the respondent, the Court *altered* " the interlocu- " tor complained of; repel the defences pleaded against the " first articles of the account libelled on. Find the defender " liable to the pursuer for the amount thereof, being £229, " 17s. 5d., and for the interest thereof as libelled, and decern; " superseding extract till the first box-day in the ensuing " vacation; and if a petition shall then be printed and boxed, " supersede further until that petition shall be disposed of." *

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* Opinions of the Judges:—

LORD MEADOWBANK.—" The law of Scotland bends to the *lex mercatoria* for the facility of commerce, and on this principle, there is strong reason to doubt the judgment. A letter of guarantee is as often given on account of a transaction finished, as on account of future furnishings; because a person will often furnish no more unless he is guaranteed for payment of what he has already advanced. This is done every day by bills, and by ordinary letters *in rebus mercatoriis;* and it would be detrimental to commerce to require regular writings in transactions of frequent occurrence. By a bill which is neither holograph nor tested, a cautionary obligation might, undoubtedly, have been undertaken; and there is no very good reason why it should not by a missive letter. But this case is still stronger; of two obligations (one of them confessedly valid), both are contained in the same sentence. The second never would have been acted upon without the first. It extended credit to the future transactions. There is, therefore, a *rei interventus.* The guarantee of the first was relied upon when credit was given for the future."

LORD GLENLEE.—" I am for altering; I think the guarantee of past transactions is *in rê mercatoriâ.* The only criterion of what is so is, What is necessary for explication of mercantile business? In that view, I cannot distinguish between past and future transactions. The situation is frequent; and to give a bond for the one, and a missive for the other, is quite unnatural. If a bond were taken at all, both would be thrown into it. A letter of credit for a sum advanced, including former advances, is very ordinary, and has always been held good. The making of the further advances proceeds on that faith, and the transaction occurs daily, and is quite natural."

On reclaiming petition by the appellant, the Court adhered, and found the defender liable in expenses, subject to modification.

On further reclaiming petition, the Court adhered, but corrected their interlocutor in regard to the point of expenses, and remitted to the Lord Ordinary, to adjust and determine as to these. This being done,

The appellant brought his appeal to the House of Lords against these interlocutors.

Pleaded for the Appellant.— By the authority of the Scottish statutes, 1540 c. 117; 1579 c. 80; 1593 c. 175; 1681 c. 5; the writing founded on by the respondent is null and void, because it is not attested by witnesses named and designed in it, and, because, the name of the writer of the document is not mentioned in it. This branch of the law of Scotland, by preventing forgery, and insuring deliberate attention to important deeds, ought not to be relaxed. And the writing in question, so far as it contains a cautionary obligation or guarantee for a debt previously due, is not a document

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Lord Newton.—"I distinguish as to *res mercatoria* between furnishings made on a missive at the time, and a cautionary obligation for a debt already existing. In the one case, there may be a limitation of time, and in the other there is not. As to the notion of *rei interventus*, that plea is not well founded. My opinion of the law is clear, that cautionary is a *literarum obligatio*. It is true about seventy years ago, doubts were stirred about obligations, in the form of a missive, but these were groundless, and put an end to, by the judgments in Lawson's case and others. I was counsel in the case of Syme in 1772, and the result was, that in reference to a verbal engagement, prior to the missive, the party swore that he bound himself for a third only, and he was assoilzied, *quoad ultra*. If the case is not so reported, it ought to be so."

Lord Justice Clerk (Boyle).—"I have doubts as to the interlocutor. The letter cannot be separated, and we are not entitled to presume that any further furnishings would have been made, but for this letter. That is matter of opinion and conjecture, it is true; but that the thing is doubtful, is reason sufficient why we should not take on us to divide a transaction which, on the face of the writing, is one and indivisible. If there had been a simple cautionary obligation for the past furnishings, it would have required a *bond*. I go on the circumstances of the case, not on the general law of cautionary as laid down by Lord Newton."

Vide Hume's Collection of Session Papers.

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peculiar to merchants, like a bill of exchange, or a bill of lading. It, therefore, forms no exception to the general rules laid down in the several Scottish statutes, relative to the mode of authenticating deeds. 2d. Although a cautionary obligation may be entered into verbally, yet in this case, the appellant and respondent had no communication with each other. The action, therefore, rests upon the written instrument exclusively; and as the writing is defective, the action must prove unsuccessful. 3d. The writing is not fortified by *rei interventus*, or act done on the faith of it; that is to say, so far as the writing contains an obligation to pay money previously due, nothing that occurred afterwards tended to render that obligation stronger than it was at the original date of it.

Pleaded for the Respondent.—1st. As to the price of the goods sold subsequently to the letter of guarantee, the respondent contended, (1st), that the appeal was incompetent, because, after the interlocutors of 6th December, and 18th December 1806, he did not submit these to the review of the Inner House, in so far as the amount of these goods was concerned, £391, 9s. 11d., but acquiesced in the same, and, therefore, the appeal is in violation of the statute, 48 Geo. III. c. 151, disallowing "appeals from interlocutors or decrees of the Lord "Ordinary, which have not been reviewed by the judges, sit-"ting in the division to which such Lord Ordinary belongs." As to one part of the account, namely, the goods delivered subsequent to the date of the guarantee, the cause was never reviewed by the judges of the second division, and, therefore, the appeal is incompetent. But (2d), there are no grounds, either in law or in fact, for questioning the judgment of the Lord Ordinary with regard to the future furnishings. The appellant on the contrary, in the pleadings on the other branch of the cause, never disputed that the letter was a writing *in rê mercatoriâ*, with regard to these furnishings; and, consequently, the objection of the want of legal solemnities, does not apply to it. 2d. In regard to the price of the goods sold before the date of the guarantee, it is quite clear, that the letter is a writing *in rê mercatoriâ*, with regard to these past furnishings; and there is no ground for a distinction between the one and the other in the terms of the letter, or in the principles of mercantile law, or in precedent, or in the practice of merchants. Though even the letter were a simple cautionary obligation, yet as the appellant's subscription is acknowledged, it is thereby rendered a probative and legal obligation, without the aid of the statutory solemnities.

After hearing counsel, it was

Ordered and adjuged that the interlocutors complained of be, and the same are, hereby affirmed.

For the Appellant, *Robert Forsyth, J. P. Grant.*
For the Respondent, *Wm. Adam, W. G. Adam.*

HIS MAJESTY'S ADVOCATE FOR SCOTLAND
on behalf of His Majesty, . . . *Appellant;*

The Honourable Mrs MARIA MACKENZIE of Cromarty, and EDWARD HAY MACKENZIE, Esq. of Newhall, her Husband, for his interest, ... } *Respondents.*

(*Et e Contra*).

House of Lords, 27th July 1814.

PATRONAGES—CROWN'S RIGHT—PRESCRIPTION.—Certain patronages were claimed by the Crown as coming in place of the Bishop of Ross. The Crown had granted a right to these patronages to Sir William Keith of Delny, and through various singular successors deriving right from him, they at last came into the possession of the Bishop of Ross in 1636; and upon the suppression of Episcopacy, they again devolved on the Crown. The Barony of Delny, together with these patronages, had been acquired in 1656, from Sir Robert Innes, by the Cromarty family. The Earl of Cromarty was attainted in 1746, but afterwards his forfeited estates and patronages were, by 24 Geo. III. c. 57, restored to the heirs of the former owners. The question arose, whether these patronages belonged to the Crown, or to the Cromarty family. Held that fourteen of them belonged to the Cromarty family, but, in regard to the other five, no prescriptive right, and no possession having been established thereto, the Crown was preferred to them. Affirmed in the House of Lords in part, and *quoad ultra* remitted.

An action of declarator was raised by the appellant against the deceased Kenneth Mackenzie, Esq. of Cromarty, for the purpose of having it found and declared that the right of patronage of nineteen churches lying within the ancient diocese of Ross in the counties of Inverness, Ross, and Cromarty respectively, belonged to the Crown, and should be exercised by His Majesty and his royal successors; and that the defender should be found to have no right or title whatever to the patronages of the said churches. The patronages were of the churches of Fodderty, the united parishes of Kil-