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considerable improvements upon the farm. The surrender was, in fact, the price which the respondent paid for a provision to his children; and I therefore hold them as onerous creditors to that extent. My Lords, I am anxious to impress it upon the minds of your Lordships, that I hope I shall not be understood as giving any opinion upon the general question argued in the pleadings at the Bar; and it was chiefly with a view to guard myself against any such supposition, that I wished to address to your Lordships even the few observations which I now take the liberty to offer. My Lords, I observe there was a considerable difference of opinion among the Judges in the Court below; but a majority were for sustaining the claim of the respondents; and upon the best consideration which I have been able to bestow upon this cause, I am satisfied that they have arrived at the right conclusion, and that the interlocutor appealed from ought to be affirmed. My Lords, while such is my opinion upon the merits of this cause, yet, considering the nicety of the case, and the great diversity of opinion which appeared among the Judges by whom it was decided in the Court of Session, I think the appellant, acting for a body of creditors, was justified in submitting the question to the judgment of this House, and that there is no room for awarding costs. All, therefore, that I mean to propose is, simply, that the interlocutors complained of in this case be affirmed.

Appellant's Authorities.—1. Bank. 5. 17.; 3. Ersk. 8. 39.; Graham, Jan. 24. 1677, (12,887.); Marjoribanks, Feb. 26. 1682, (12,891.); Strahan, July 21. 1754, (996.); 1. Bell, 554.; Lang, Feb. 1. 1820; F. C.

Respondents' Authorities.—1. Bell, 200. and cases there quoted.

J. RICHARDSON—J. CHALMER,—Solicitors.

(Ap. Ca. No. 38.)

No. 27.

JOHN M'CALL and Company, Appellants.—*Warren—Buchanan.*

JAMES BLACK and Company, Respondents.—*Shadwell—Stephen.*

Retention—Lien—Execution pending Appeal.—A party having been employed as a mercantile agent, to purchase and ship goods for a Company, on which he made large advances; and having by their orders purchased other goods as their broker, and of which he obtained possession, but on which he did not make any advances; and it having been afterwards disclosed that these latter goods formed part of a joint adventure, in which the Company and others were concerned;—Held in a compe-

tition with the creditors of the joint adventure, (qualifying the judgment of the Court of Session), 1. That the agent had no lien over these goods for security and payment of the general balance due to him, and arising out of the transactions with the Company: And, 2. (affirming the judgment), That the agent was bound, in a multiplepoinding relative to the price of these goods, and after the claim of lien had been rejected, to consign the whole proceeds, although one of his competitors had drawn dividends to an extent which considerably diminished his debt,—there being other claimants on the fund.

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2D DIVISION.
Lord Pitmilly.

JOHN M'CALL and Company, merchants and commission agents in Glasgow, had been occasionally employed in the latter capacity by Thomson, Gibson and Company, general merchants in Leith. Towards the end of 1813, and when, in consequence of the political changes which were then taking place upon the Continent, great expectations were entertained of a most lucrative market being opened for colonial produce, Thomson, Gibson and Company, entered into a speculation with William Tennant, merchant in Edinburgh, to purchase sugar and coffee, and export them to Holland. With that view they employed the appellants, M'Call and Company, to act as their agents, and in doing so it was arranged that they were to be paid upon the following footing:—

'To be allowed for purchasing, selling, accepting, and del credere, 3 per cent.

'Purchasing, selling, and del credere, 2 per cent.

'Purchasing and accepting, 2 per cent.

'If you merely purchase, the common brokerage to be allowed.'

In consequence of this agreement, transactions to a large extent took place, and a balance, to the amount of upwards of L.50,000, arose in favour of M'Call and Company, chiefly from advances on goods purchased by them.

In April 1814, by which time the ports of France had been opened to the importation of British goods, Thomson, Gibson and Company, and William Tennant, entered into a joint adventure with Gibson and Duncan, merchants in Leith, to purchase colonial produce, and export to France. About the same time, Black and Company, the respondents, had imported into the Clyde a cargo of 616 boxes of sugar, which were placed in bonded cellars at Greenock, in their own names. Under the instructions of Gibson, Thomson and Company, and so far as appeared without being made aware that Gibson and Duncan had any interest in the adventure, M'Call and Company purchased 300 of these boxes, for which they granted their own acceptances to Black and Company. A few days thereafter one of the part-

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ners of Thomson, Gibson and Company, came to Glasgow, and entered into a communing with Black and Company for the purchase of the remaining 316 boxes, at which he was assisted by one of the partners of M'Call and Company; but it was disputed whether the purchase was concluded by the partner of Thomson, Gibson and Company, or by that of M'Call and Company. It was, however, admitted, that for the price of these 316 boxes, being L.8055. 10s., Thomson, Gibson and Company granted their own acceptances, and that M'Call and Company did not come under any advance in relation to them; and accordingly, in subsequently rendering their accounts, they merely charged the common brokerage of 1 per cent.

Part of the first parcel, consisting of the 300 boxes, was shipped by M'Call and Company to France, and the bill of lading stated that this had been done by Thomson, Gibson and Company, and that the goods were to be delivered to Archibald Duncan, who was one of the partners of Gibson and Duncan. For relief of their engagements on account of this parcel, M'Call and Company obtained securities from Thomson, Gibson and Company, and Tennant, but they were still their creditors for upwards of L. 50,000. Orders were then given by Thomson, Gibson and Company, (but still without any mention being made of Gibson and Duncan), to ship the parcel of 316 boxes to France. In the meanwhile M'Call and Company had obtained from Black and Company an order of delivery in their own favour on the keeper of the bonded warehouse for this parcel, and when they received orders to ship them, they intimated to Thomson, Gibson and Company, that it would be necessary, in the first place, to make some provision for the large balance which was due to them. After some correspondence on this subject, it was found that the French market was not favourable for the goods, and Thomson, Gibson and Company therefore gave orders to M'Call and Company to send them to Hamburgh. M'Call and Company, in consequence, engaged a vessel for that port; but having become suspicious of the circumstances of Thomson, Gibson and Company, they intimated the order of delivery in their own favour, on the 16th of May, to the keepers of the bonded warehouse, and directed them to take the bill of lading in the name of M'Call and Company, and to make the goods deliverable to their order. This was accordingly done, but no notice of it was given to Thomson, Gibson and Company; and the shipment appeared, from the Clyde list, to have been made by the keepers of the bonded warehouse.

On the 21st of May, Thomson, Gibson and Company, and Tennant, became insolvent; and M'Call and Company then transmitted the bill of lading to their agents at Hamburgh, with instructions to hold the 316 boxes on their account. By an arrangement among the creditors of Thomson, Gibson and Company, and Tennant, it was agreed, that the affairs should be wound up under a voluntary trust, and that all questions of preference should be decided as if a sequestration under the Bankrupt Act had been issued on the 23d of May. Thereafter the interest of Gibson and Duncan in the adventure having been disclosed, the respondents, Black and Company, brought an action against them for payment of the *first* parcel of sugars, on the footing of being partners in the adventure, in which they obtained decree, and succeeded in recovering the amount. On the same footing, and after Gibson and Duncan had also become bankrupt, Black and Company brought an action against them, and also against Thomson, Gibson and Company, and Tennant, for payment of the price of the 316 boxes, in which they obtained decree. On the dependence of this action, they raised and executed letters of arrestment in the hands of M'Call and Company, for the purpose of attaching the proceeds of the 316 boxes which had been sold at Hamburgh; and certain other creditors of the joint adventure also arrested. A multiplepoinding was then brought in name of M'Call and Company, in which appearance was made by Black and Company, and A. Newbigging, as trustee for M'Gowns, Watson and Company, and by other creditors of the joint adventure. By M'Call and Company it was contended, that as they had been employed in the capacity of mercantile factors by Thomson, Gibson and Company, and Tennant, to purchase these and other goods, and were their creditors to a large amount; and as the goods in question had come into their possession in the course of their employment in that character, they had a lien over them for security and payment of their general balance. To this it was answered by Black and Company, that M'Call and Company were not creditors of the joint adventure, but only of Thomson, Gibson and Company, and Tennant; that they had not been employed as proper factors to purchase the goods, but only as brokers; that they had not come under any advance on the faith of, or at least in relation to, these goods; and therefore, although it might be true that the existence of the joint adventure was not communicated to them, yet as, de facto, the goods did not belong to Thomson, Gibson and Company, and Tennant, but to another and different

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party, viz. the joint adventurers,—M'Call and Company were not entitled to a lien over them for payment of a general balance due by Thomson, Gibson and Company, and Tennant.

The Lord Ordinary found, 'That the purchase of the sugars 'in question from Messrs Black and Company, whether it was 'made by Messrs M'Call and Company solely, or by Mr Archi-'bald Gibson, through the medium of M'Call and Company, is 'proved to have been made for the behoof of the joint adventure 'undertaken by Messrs John Thomson, Gibson and Company, 'William Tennant, and Gibson and Duncan: That acceptances 'for the price of the sugars were granted by the purchasers, John 'Thomson, Gibson and Company, and that an order of delivery 'was granted by the sellers in favour of M'Call and Company: 'That it is not alleged that M'Call and Company made any 'advances to John Thomson, Gibson and Company, for whom 'they acted as brokers or agents, on the security of the particu-'lar purchase of sugars now in question; and that their claim 'of retention is founded entirely on their having been the factors 'of John Thomson, Gibson and Company, and on their having 'become, in the course of their dealings with that house, their 'creditors to a large amount: That although it has not been esta-'blished by the other competing parties, that M'Call and Com-'pany, when they took the order for delivery, were in the know-'ledge of the fact, that the sugars belonged, not to the house of 'John Thomson, Gibson and Company solely, but to that Com-'pany as joint adventurers along with other parties; yet this fact 'being now established, M'Call and Company are not entitled to 'retain the price of the sugars in payment of their claims against 'John Thomson, Gibson and Company, but are accountable to 'the creditors of the joint adventure for the proceeds of the 'sugars, with interest from December 1814: and therefore 'found, That Messrs James Black and Company must be pre-'ferred, in virtue of their arrestments, over the fund in medio, 'to the extent of their debt still unpaid.'

M'Call and Company having reclaimed, and the Court considering it of importance to ascertain the facts in regard to the possession of the goods, their Lordships appointed condescendences, and granted diligence for recovery of documents; and after a hearing in presence, they adhered to the interlocutor complained of, and refused the petition. M'Call and Company again reclaimed, and contended, that they were entitled to have the facts decided by the verdict of a jury; but the Court, on the

20th of January 1821, refused the petition, and found them liable in expenses.* May 18. 1824.

In the meanwhile, Black and Company had ranked upon the estate of Thomson, Gibson and Company, and Tennant, for the price of the goods, being L.8055, on which they drew a dividend of 10s. in the pound, amounting to L.4027. At the same time M'Call and Company had ranked for the general balance due to them, but under deduction of the proceeds of the goods, amounting to L.4880, and drew a dividend on the sum remaining after such deduction; so that in this way they did not draw a dividend on the L.4880, which would have given to them L.2440.

M'Call and Company having appealed, Black and Company, and the other arresting creditors, applied to the Court for interim execution, by ordering the proceeds of sugar to be consigned in bank till the issue of the appeal. This was resisted by M'Call and Company, who contended, that as Black and Company had already drawn a dividend on the original price, this sum ought to be deducted from the proceeds, and the balance only consigned. But the Court granted warrant for consignation of the whole proceeds; and against this order M'Call and Company also appealed.

On the merits of the case they contended,—

1. That as they had been employed by Thomson, Gibson and Company, and Tennant, in their professional character of mercantile factors, or commission agents, to buy, sell, and ship the goods forming the subject of their speculations; and as they had under this employment made large advances, they had a lien over all the goods which were put into their possession by these parties, for payment and relief of the general balance which was due to them on the account-current: That although it was true that they had not come under any advance in regard to the goods in question, yet, as they were led to believe that these belonged to their employers, and as on that faith they had incurred heavy obligations, and as an order of delivery had been granted to them by Black and Company, which they had duly intimated, whereby they had obtained legitimate possession, they were entitled to retain them till relieved of their balance.

2. That as this possession had been obtained bona fide, and as Thomson and Company, and Tennant, were the ostensible and

* Not reported.

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reputed owners, the appellants could not be affected by the concealed and subsequent emerging interest of Gibson and Duncan in the joint adventure.

3. That on the assumption of the existence of such an interest, still, as Thomson, Gibson and Company, and Tennant, were partners, possessing the full powers of the joint concern, it was competent for them to pledge the goods to any third party ignorant of their being partnership property; and in the absence of collusion or fraud, such a pledge was effectual so as to bind Gibson and Duncan. And,

4. That with regard to the order for interim execution, it was contrary to justice to ordain the appellants to consign the whole proceeds, without giving them credit for the dividends which had been drawn by Black and Company.

To this it was answered,—

1. That as Black and Company were creditors of a special partnership, consisting of Thomson, Gibson and Company, Tennant, and Gibson and Duncan; and as the goods which had been arrested formed part of the estate of that partnership; and as the appellants had not made any special advances on these goods, and merely alleged that they were creditors of another and a different party, they could not lawfully retain these goods in liquidation of their general balance.

2. That in relation to the sugars in question, the appellants were not employed, as proper mercantile factors, to incur obligations on the faith of them, but merely as brokers, to carry the purchase of them into effect, and ship them, under the orders of their employers; in which latter capacity they could not claim a lien over the goods, on the footing of having made advances, in the course of other transactions, in the separate and different character of mercantile agents.

3. That the possession had been obtained under circumstances which deprived it of the character of being legitimate, whereby the foundation of the claim of lien was entirely removed. And,

4. That as it was admitted that the proceeds of the goods amounted to L.4880, and as it formed the fund in medio, the appellants were bound to consign.

The House of Lords found, 'That under the circumstances 'of this case, M'Call and Company had no lien upon the sugars 'in question for the general balance due to them from John 'Thomson, Gibson and Company, and William Tennant; and 'it is therefore ordered and adjudged, that the several interlocu-

'tors complained of be affirmed, without regard to the findings 'in the said interlocutor of the Lord Ordinary of the 12th May '1818, and adhered to in the said subsequent interlocutors, with 'respect to which the Lords do not find it necessary to give any 'opinion.' May 18. 1824.

And in the question relative to interim execution, their Lordships 'ordered, that the appeal be dismissed with L.100 costs.'

LORD GIFFORD.—My Lords, In a case in which John M'Call and Company, of Glasgow, are the appellants, and James Black and Company, of Glasgow, and Archibald Newbigging, trustee on the sequestrated estate of M'Gowns, Watson and Company, of Greenock, are the respondents, I will now address to your Lordships the observations which it occurs to me to offer to your Lordships upon this case.

My Lords,—The case arises out of certain transactions in business, which I will very shortly state to your Lordships. The respondents, James Black and Company, are merchants in Glasgow. The appellants are mercantile factors, or commission agents, in the same place, and in that character were employed by Messrs Thomson, Gibson and Company, merchants of Leith, in various commercial speculations; and it appears, from the correspondence which took place between those parties in the month of February 1814, that the terms on which Messrs M'Call and Company proposed to transact this business were as follows:—That they were to be allowed for purchasing, selling, accepting del credere, three per cent; purchasing, selling, and del credere, two per cent; purchasing and accepting, two per cent: it being understood, that if Thomson, Gibson and Company shipped the goods they were to buy, M'Call and Company were to value upon them at two or three months from the date their bills fell due; but that if they sold in Scotland, the bills for what they were under acceptance to be handed them. If Messrs M'Call and Company acted merely as agents to purchase goods, that is to say, if they were not to advance any money on account of those purchases, then they were to receive only the common brokerage. The stated accounts, afterwards rendered, stated the brokerage at one per cent.

On these terms these parties entered into very large transactions: purchases to a very large extent were made, and advances to a considerable extent undoubtedly were made by Messrs M'Call and Company.

My Lords,—In some of these speculations, a gentleman of the name of Tennant was concerned; and it also appeared, that, with respect to some of the transactions, particularly the transactions with respect to some sugars, other parties were also interested in those transactions together with Tennant. In the view I have taken of this case, after the best consideration that I have been able to apply to it, although it

May 18. 1824. does not appear to me that it is very important for your Lordships to attend particularly to the various persons concerned in those respective speculations, yet I should state to your Lordships, that in the month of April 1824, purchases of sugar to a very large extent were made on behalf of these gentlemen, Thomson, Gibson and Company. In those purchases Mr Tennant was also interested, and also persons who carried on trade under the name of Gibson and Duncan. It should seem that, to M'Call and Company, the only persons known in these transactions were Thomson, Gibson and Company, and Mr Tennant. My Lords, two purchases were made, one of 300 hogsheads of sugar, and another from persons of the names of Black and Company, of 316 hogsheads of Havannah sugars, the amount of which purchases is very large—several thousand pounds:—It is not necessary to trouble your Lordships with the figures.

My Lords,—With respect to one of those purchases, namely, that of 300 hogsheads, they were purchased on behalf of those parties by M'Call and Company, and M'Call and Company appear to have advanced money to pay the seller: But with respect to the 316 boxes of sugar purchased shortly after the first, it appears by the correspondence which has been produced, that they were paid for by advances or by bills drawn by Thomson, Gibson and Company; and that with respect to those no part of the advance was made, or was to be made, by M'Call and Company.

My Lords,—That distinctly appears by letter written by M'Call and Company to Thomson, Gibson and Company, of the 19th of April 1814, in which they state,—'We notice your directions as to the different 'shipments as noted by your A. G., which we will attend to. By to-'morrow's coach we will forward you average samples of the last pur-'chase from Messrs Black and Company; and enclosed we hand you 'the invoice of them—amount, L.8055. 10s. for which you will settle 'with Messrs Black and Company by your acceptances—the invoice 'of the other parcel we will hand you in a post or two. We have 'settled for it. We will write to Greenock about those two vessels 'mentioned by Mr Tasker to you. We observe we are to ship '70 hogsheads refined sugar for Leghorn. We presume you are 'aware, that in the event of such shipments, no extension of the usual 'credit can be allowed, and that a cash remittance will be requisite. 'We mention this for your government, in case of your wishing to ship 'further of what we are under acceptance for.' So that they here state, with respect to sugars for which they were under acceptance, that they hesitate with respect to shipping any portion of them without receiving from Messrs Thomson and Company remittances on account of those sugars. In answer to that, there is a letter from Thomson and Company, of the 20th April 1814, in which they notice what M'Call and Company say as to cash remittances 'for any part of such 'goods as we may have occasion to ship for which you are under 'acceptance;' and they express their surprise, that, with respect to

those, they should require any further remittances before the shipments were made; for they say, 'we understood that any goods you 'purchased, and came under acceptance for on our account, we were 'to have the complete controul over that, as an additional charge was 'made for your coming under such acceptances; that if we at any 'time were to ship a part, the same was to be settled for by our accept-'ances at three months; and that if we sold any part here, the bills '' of the purchasers were to be handed you, if required.' My Lords, I merely point out these passages in the correspondence to shew, that the parties themselves always appear to have made a distinction between 'the goods on which advances were made by M'Call and Company, and those where the purchases were paid for, or stipulated to be paid for, by Messrs Thomson, Gibson and Company. Some short time after those purchases, in the month of May or June of the same year, these parties not having profited by their speculations, Thomson, Gibson and Company appear to have fallen into difficulties. On that occa-'sion, the 316 boxes of Havannah sugar, which were purchased in the manner I have stated to your Lordships, and that remained in a warehouse in the names of M'Call and Company, were directed to be shipped by Messrs M'Call and Company; and they beginning to suspect the solvency of their correspondents, shipped them in their own names; and after the failure of Thomson, Gibson and Company, which took place before the goods had arrived on the continent, these goods were sold in the names of M'Call and Company, and the proceeds applied to their account. And the question in this case, which has been argued at your Lordships' Bar, is this, Whether Messrs 'M'Call and Company, having undoubtedly in many transactions acted 'as factors for Thomson, Gibson and Company, in which case they made advances on the goods purchased, and had the power of sale and disposition, and in which character by the law of Scotland, (which in this respect is similar to the law of England), a factor has a lien upon goods in his possession, as factor, for the general balance due to him upon that account—the question, I say, is, whether they have a lien in respect of these goods? My Lords, in this case M'Call and Company say that they have a right to apply this law, with respect to a lien, not only to the goods which they had in their possession in their character of factors, but that those 316 boxes of sugar, on which they made no advance, upon which, as I have stated to your Lordships, a different rate of remuneration was to be paid them, they say we will apply to our account; and therefore we claim to retain the prices they have produced by their sale on the continent, and reduce the account of Messrs Thomson, Gibson and Company, which much exceeds the value of those goods.

My Lords,—In consequence of these claims, proceedings have been had in the Courts below. Messrs Black and Company, who were the sellers of these goods, instituted proceedings against the parties on whose behalf they were purchased, and who were concerned in this

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speculation. And it is stated, that, upon the dependence of this action, the respondents sued out letters of arrestment against Gibson and Duncan, and they executed this writ in the hands of the appellants, pretending in this manner to attach the proceeds of the 316 boxes of Havannah sugar, upon the assumption that these belonged in whole or in part to Gibson and Duncan, or to the joint adventure. Other arrestments were, in like manner, used in the hands of the appellants by a different house, (the respondents, M'Gowns, Watson and Company), designing themselves creditors of Gibson and Duncan, and who say they had a right to sue out letters of arrestment against these goods, and by virtue of which they contend that they have a right to claim the proceeds of these sugars.

My Lords,—In consequence of this a process of multiplepoinding, as it is called in Scotland, was raised in the name of the appellants, in which the different claimants on the funds were called as parties, and which contained the ordinary conclusions for dividing it between them; and in that process, the case having come before Lord Pitmilly as Lord Ordinary, his Lordship, on the 12th of May 1818, pronounced an interlocutor, the first appealed from in this case, by which it is found, that the purchase of the sugars in question from Messrs Black and Company, whether it was by Messrs M'Call and Company solely, or by Archibald Gibson through the medium of M'Call and Company, is proved to have been made for the behoof of the joint adventure undertaken by Messrs John Thomson, Gibson and Company, William Tennant, and Gibson and Duncan. Then he finds, that acceptances for the price of the sugars were granted by the purchasers, John Thomson, Gibson and Company, and that an order for delivery was granted by the sellers in favour of M'Call and Company: that it is not alleged that M'Call and Company made any advances to John Thomson, Gibson and Company, for whom they acted as brokers or agents, on the security of the particular purchase of sugars now in question; and that their claim of retention is founded entirely on their having been the factors of John Thomson, Gibson and Company, and of their having become, in the course of their dealings with that house, their creditors to a large amount. Then he finds, that although it had not been established by the other competing parties that M'Call and Company, when they took the order for delivery, were in the knowledge of the fact that the sugars belonged not to the house of John Thomson, Gibson and Company, solely, but to that Company as joint adventurers along with other parties, yet that fact being now established, M'Call and Company are not entitled to retain the price of the sugars in payment of their claims against John Thomson, Gibson and Company, but are accountable to the creditors of the joint adventure for the proceeds of the sugars, with interest from December 1814. Then he finds, 'that Messrs James Black and Company must be pre-
'ferred, in virtue of their arrestments, over the fund in medio, to the
'extent of their debt still unpaid; and appoints parties to debate on

'the other points of the case which are not fully stated and argued in 'the memorials.' May 18. 1824.

My Lords,—That interlocutor was brought under the review of the Lord Ordinary; but, on the 20th of May, he pronounced another interlocutor, by which he 'prefers the claimants, Messrs James Black 'and Company, upon the fund in medio, in virtue of their arrestments, 'to the extent of their debt still unpaid; and decerns in the preference 'and against the raisers of the multiplepoinding for payment accordingly.' The Court of Session was then petitioned against these judgments; but, on the 22d of June 1820, that Court, having heard Counsel, pronounced an interlocutor, by which they 'adhere to the interlocutor complained of, and refuse the desire of the petition; find 'the petitioners liable in expenses; and remit to the auditor to report 'on the account thereof when lodged.' My Lords, a reclaiming petition was afterwards presented to the Court of Session; but, on the 20th of January 1821, the Court pronounced an interlocutor, by which they still adhered to the interlocutor complained of. The case was then returned to the Lord Ordinary, as it was necessary, in point of form, that, in applying the previous judgments, his Lordship should prefer the trustee upon M'Gowns, Watson and Company's estate, upon the fund in medio secundo loco; and on the 25th of January 1821, his Lordship pronounced the interlocutor which I will read to your Lordships. 'The Lord Ordinary having heard the Counsel for the claim-'ant, Archibald Newbigging, trustee on the sequestrated estate of 'M'Gowns, Watson and Company, prefers the said Archibald New-'bigging, as trustee aforesaid, for ought yet seen, in virtue of his in-'terest produced, secundo loco upon the funds in medio, for payment 'to him of the sum therein contained; and decerns in the preference 'and against the raisers of the multiplepoinding for payment accord-'ingly, and dispenses with any representation against this interlocutor.' Against this interlocutor the appellant reclaimed to the Court by a petition, which was refused by the following interlocutor: 'The Lords 'having heard this petition, they adhere to the interlocutor reclaimed 'against, and refuse the desire of the petition.'

My Lords,—The result of this interlocutor is this, that the Lord Ordinary in the first place, and the Court of Session in the second, have decided, that M'Call and Company have no right to retain the proceeds of these goods in liquidation of their balance; but that Black and Company, who were the sellers to Gibson, Thomson and Company, have a right, in the first place, to the proceeds, in liquidation of the debts due to them in respect of those various goods; and that if there should be more than enough to satisfy their demand, Archibald Newbigging, trustee for M'Gowns and Company, who were also creditors of Thomson, Gibson and Company, has a right, in the second place, to the produce of those funds.

I should have stated to your Lordships, that, besides the correspondence which I have taken the liberty of calling your Lordships' attention to, an account-current was produced in the Court below, between

May 18. 1824. Thomson, Gibson and Company, and William Tennant, and John M'Call and Company, with the charge of mere brokerage or commission of one per cent on the 316 boxes of sugar—the stipulated remuneration where they merely purchased, and where they made no advances; but where they acted as factors, and made advances, then they charged in their account-current the three per cent commission to which they were undoubtedly entitled under the agreement which had been made on their commencing those transactions with Thomson, Gibson and Company.

My Lords,—When this case was argued at your Lordships' Bar, I took the liberty of asking the Counsel for the appellants, whether any case could be produced in the law of Scotland, or the law of England, in which it had been determined, that where a man united in himself the character of a factor, and some other character in which he had no right to a general lien, he could, in respect of goods in his possession, over which he had no controul in his second character, apply his right in the first as factor, and retain the goods which came into his hands in the second character for his right in the first? It was admitted that no such case could be produced; and since this case has been argued before your Lordships, I have, with as much diligence as I have been able, examined these cases, and none such can I find in the law of England or the law of Scotland. Indeed in the law of England (and I presume it is the same in Scotland) there is a maxim, that when a man unites two characters, where they are applied to any right, he is to be considered as if they were in different persons; and that appears to be the common-sense rule to be applied in such cases. Now in this case it is quite clear, that M'Call and Company never had these goods in their possession as factors: they made no advances upon those goods; on the contrary, they distinctly declined making any advances. It appears from the correspondence I have stated to your Lordships, they merely charged the common brokerage; and it is clear the goods were deposited in their warehouse in their name, that they might take their measures when it became necessary to ship them. But I cannot help observing, that their authority to ship was an authority to ship in the names of Thomson, Gibson and Company; and it was concealed from Thomson, Gibson and Company, till after the shipments had been made, that the shipments had not been made in their names, and that they had not complete controul over them by the bills of lading: that was a contrivance on the part of M'Call and Company, I do not say an improper one under those failing circumstances of Thomson, Gibson and Company, to preserve to themselves a controul over those sugars on their being landed on the continent, and to enable them to lay their hands upon them, if Thomson, Gibson and Company were disabled from paying them their balance. And some little anxiety was shewn by M'Call and Company to prevent their appearing in the Clyde list, as shipped in their own names; and if it had been necessary to examine that part of the case, it might have become a very material part of the case, whether, under the circumstances of the shipment,

they had a right to lay their hands on the proceeds, or whether the possession of the goods was not taken out of them, so as to disable them from applying their character of factors to those goods. But as in the short view of this case which I have taken, it appears to me clear they have no right to apply their character of factors, and claim a right of general lien to the proceeds of these goods, it is unnecessary to trouble your Lordships with observations upon that part of the case. The result, therefore, of the best view I have been able to give to the case is, that these interlocutors deciding that M'Call and Company have no general lien, are right; but at the same time there is so much specialty in the findings of the Lord Ordinary, that perhaps in some of those findings I might find a difficulty in concurring. The result of my opinion would go to the affirmance of those interlocutors; but, undoubtedly, the judgment which should be framed by your Lordships will require some specialty in it; and therefore, with your Lordships' permission, I will not move for judgment to-day in this case; but I will, on the next day I have the honour of attending your Lordships, propose for your adoption the form of a judgment, embodying in it the short view I have taken of it, namely, that under these circumstances the parties have no right to the general lien. The result will be the affirmance of the interlocutors, but not adopting, perhaps, all the special findings of the Lord Ordinary. It appears that the judgment of the Court of Session finally did not proceed on all those specialties, though the general form has been affirmed by the subsequent judgment of the Court of Session. With these observations, therefore, I shall now close what I have to state on this case, by requesting of your Lordships permission on Friday next, when I shall have the honour of attending your Lordships again, to propose the form in which I should humbly move your Lordships would, in this case, affirm the interlocutors, with the grounds on which the finding should be made.

Appellants' Authorities.—Kinloch, 3. Durn. and East, 119. and 783.; Ellis, 3. Durn. and East, 468.; Wright, 4. East, 82.; 1. Campbell, 452.; Harman, 2. Campbell, 243.; 15. East, 21.; 2. Barn. and Ald. 131.; Ambler, 252; 1. Alth. 228. 237.; 2. Vesey, 674.; 2. Burr. 937.; 1. Blackst. Rep. 652.; 4. Burr. 2221.; Cowp. 251.; 6. Durn. and East, 632.; 3. Bos. and Pull. 498.; 1. East, 335.; 2. Campbell, 218. 597.; 4. Campbell, 60. 349.; Paley, 253.; 7. Durn. and East, 361.; Cullen's Bankrupt Law, 206. N. 71.; 7. East, 210.; 8. Vesey, jun. 542.

Respondents' Authorities.—1. Atk. 228.; 1. Stair, 18. 7.; 3. Ersk. 4. 21.; Chalmers, June 30. 1666, (9137.); 4. Burr. 221.; Harper's Creditors, July 27. 1791, (Bell's Cases, 440.); 2. Vernon, 217.; 4. Burr. 2218.; 1. Gow, 132.; Colquhoun, Nov. 15. 1816, (F. C.); Ede and Bond, May 15. 1818, (F. C.); Johnston and Manly, Feb. 13. 1818, (F. C.); Johnston, Nov. 18. 1818, (F. C.); 3. P. Williams, 185.; 5. T. R. 226.; 3. Maule and Selw. 573.; 1. Price, 116.

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(Ap. Ca. 39. and 41.)