[18*th July*, 1842.]

JAMES GIBSON, Esq. of Hillhead, *Appellant.*

ANDREW RUTHERGLEN and Co., *Respondents.*

Bill of Exchange. — A bill for payment of the price of goods, drawn upon a party who had gratuitously undertaken their disposal, but had afterwards left it in the hands of another party, who was to account to him, is not, while the result of the sales is as yet unascertained, an accommodation bill, but one which the accepter must pay; his relief, in case of over-payment, being on the ultimate taking of the account.

Principal and Agent. — A party who had gratuitously undertaken the disposal of goods in a foreign country, whither he was going on business of his own, being unable to conclude the business before leaving the country, left it in the hands of an agent, with instructions to remit the proceeds to himself, *held* that he was liable, while the result of the sales was as yet unascertained, to pay a bill which he had accepted for the price of the goods.

THE appellant brought an action against the respondents before the Magistrates of Glasgow, alleging, that in 1837, when on the eve of setting out on a visit to Canada, he was requested by them to undertake the charge of a venture of books, which they were about sending to that country. That as his trip was to be one of pleasure, he at first refused, but ultimately agreed to comply with this request, on the express understanding that he was not to incur any risk or responsibility whatever; and that he was farther induced to undertake the collection of some accounts which were due to the respondents on the same understanding. That the goods were accordingly shipped by the respondents, and when the vessel was on the point of sailing, they handed him a paper book having the following title, — "A list of goods sent on

" venture, by Andrew Rutherglen and Company, in the 'John " 'Lee,' and consigned to the care of Mr James Gibson. The " left hand page contains a list of the goods with their cost prices " — the right hand page contains the same list with their selling " prices here." And which, after enumerating the goods, had this memorandum,—" Mr Gibson has here exbibited a list of the " whole articles consigned to his care: he has the cost and the " usual selling prices, and all the instructions we have to give " are, that he deal with them as if the articles were entirely his " own." That on arriving in Canada he found the goods to be unsaleable, and as he had never intended remaining in that country, he intrusted their disposal to Sheddon, a merchant in Montreal. That afterwards Sheddon informed him the goods had been sold by him for about L.35 sterling. That, before leaving, he was enabled to obtain a composition on one of the accounts he had been requested to collect, of 5s. in the pound, for which he took two bills for L.11, 2s. 6d. each. That on the 6th March, 1838, the respondents wrote him a letter in these terms: — " Sir — We have this day received your acceptance for " L.80, dated 6th March, at four months, as an advancement on " the consignment to Montreal, and will renew the same if the " said consignment is not arranged when the bill falls due, less " the amount of Stark's composition, if it has been paid by him." That he at first refused to accept the bill mentioned, but afterwards, on the urgent solicitations of the respondents, he did accept it. That at the time when the bill fell due, he had not received any remittance from Canada, and he therefore called upon the respondents to take it up. " That on this occasion the " pursuer saw the defender, Andrew Rutherglen, who repre- " sented that it would be inconvenient to his company to retire " the bill at that time, and solicited the pursuer to renew it. " This the pursuer very reluctantly complied with, upon the " conditions similar to that on which he had accepted the first

" bill, and, in particular, that he was, in the event of no remit-
" tances from America on account as aforesaid, to get no trouble
" with the renewed bill, either by payment or renewal thereof."
That before the renewed bill became due, he received payment of one of the bills for L.11, 2s. 6d., and paid it over to the respondents. That by the time the second bill became due, he had not received any farther remittance from Canada, and he accordingly called upon the respondents to take it up also. That they had not done this, and he had in consequence been obliged to pay the bill to an indorsee on the compulsitor of diligence, with the expense of the diligence, but under protest against the respondents of his non-liability, and after an unsuccessful attempt to suspend the diligence. That during these proceedings, he received payment of the second bill of L.11, 2s. 6d, and thereupon intimated to the respondents his readiness to pay the amount over to them.

Upon these statements, the appellant's summons subsumed, that the respondents were liable in relief and repayment to the pursuer of the foresaid respective sums of money so incurred, advanced, and paid by the pursuer for, and on their account, all as before stated. And concluded, that they should be decreed to make payment to the pursuer of the foresaid sum of L.80 sterling, contained in the said last mentioned bill, with the said sum of 19s. 3d. sterling of interest due thereon up to the said 5th day of February current, so paid as aforesaid, together with the lawful interest on said bill since the said 5th day of February current, aye and until payment. And also of the expenses of suspending the diligence, under deduction of L.11, 2s. 6d.

The respondents, in their defences, denied the statements in the summons generally, and declined to go into them particularly, as the conclusions were limited to asking repayment of the bill; and pleaded, that they had not come under any obligation to take up *that* bill, and they were not bound to do so, whatever might be their liability on the ultimate accounting.

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Under a diligence for recovery of writings, issued at the instance of the appellant, a letter from the respondents to the appellant, dated 14th March, 1838, was produced, which was in these terms: — " On presenting your bill, along with a few others, " for discounting at the Glasgow Bank, I was met with a demur " to your bill, on account, I could perceive, of some old sore. " As I wish no favour on the score of a regular business transac- " tion with bankers, I withdrew the bill, and will esteem it a " favour if you could serve me in one of the two following ways: " — 1st, Say where you do your own business; if I 'll get the " needful there; or 2d, You will probably be able to get Mr " Watt or some other friend to add his name on the bill as an " indorser. This will answer me equally well. As a matter of " course, I 'll hold by the original agreement, to renew when it " falls due, if our American business is not arranged by that " time. I have enclosed the bill, so that if you add an indorser, " you can do so and return it to me indorsed. I would not at " all have troubled you but for the great difficulty of getting " payment at this time."

There was also produced another letter from the respondents to the appellant, dated 12th December, 1838, which was in these terms: — " Sir, — Your agent, Mr Wilkie, having declined to " receive from our agent an answer to the protest he yesterday " served on us at your instance, we think it proper to lay before " you the following brief narrative of your business connection " with us, a copy of which, in our own justification, we shall " also submit to Mr Inglis, since you have chosen to include " him in the most uncalled for manner in this protest. Every " word of what follows you know to be true: —

" In June 1837, you were introduced to us by Mr Robert " Watt, as being about to visit Canada, in a vessel of your own, " on a business venture; and we were requested, and, on the " faith of Mr Watt's recommendation agreed, to consign to your " care, goods, the net cost of which to us was L.108, 1s. 4d. We

" also gave you a statement in detail of the usual selling prices " of the goods here, and entered into an express agreement with " you that you should receive for your trouble the one-half of " the nett profit derived from the venture. In short, we com- " mitted the goods to your care, as if they were your own. On " reaching Canada, however, instead of superintending the con- " verting of these goods into cash, as we were assured you would " do, you now informed us that you turned them over to a per- " son named Sheddon, of whom we knew nothing, and who " never received any instructions from us anent their sale. You " have also now stated that Mr Sheddon has sold the goods at " prices that, after deducting charges, will only remit L.35. Now " the goods were of such a description that we would not on any " account have made the smallest sacrifice upon them, and had " you informed us that there was any difficulty in netting our " cash prices with the charges, we would at once have ordered " the goods home.

" In addition to this consignment you also took charge of col- " lecting several accounts due us in America, and among these " you accepted for us a composition of 5s. a-pound upon a claim " of L.89, payable in two instalments, at one and six months. " Our instructions were to take 6s. 8d. only, but we made no " complaint on this point, as we wished the account closed. " Towards the close of 1837, you returned from America, and " on the day after your return our Mr R. met you by accident " in Mr Watt's shop. You then stated that you had received " the first instalment of the composition, and that on the follow- " ing day you would call at our shop and pay over the amount, " and give us information anent the consignment. This, how- " ever, you never performed; and although waited upon at your " house, and frequently applied to on the subject elsewhere, and " on all occasions, you promised to wait on us; yet the month of " March last 1838 arrived without our having the smallest " information on the transactions; thus exhibiting such a degree

" of carelessness as surprised us very much. With the view of " bringing the matter to a close, we wrote you at this time inti- " mating our intention of drawing on you for L.80 at four " months, to account, and you then called upon us, and expressed " your willingness to accept the bill, provided we would promise " to renew it when due, if you had not then got your accounts " settled with your agent in Canada, and we agreed to this, but " stipulated that the renewal should be less the amount of the " composition you had received in Canada. This bill fell due in " July, and we were ready to renew it as agreed upon. You then " asked as a personal favour that we would renew it for the full " amount, L.80, as it was not convenient for you at the time to " pay us the amount of the composition, and that you would " willingly pay us the interest for retaining this amount, and " accordingly we did renew the bill again for its former amount; " but we were neither asked nor gave any promise of a farther " renewal.

" You are aware of the efforts since made to obtain a settle- " ment with you, and of these efforts having hitherto proved " vain. You are aware too, that it is only now for the first time " that you tell us that you have not got payment of the second " instalment of the composition, and that the bill for it lies in " Canada unpaid, while it should have been paid last February.

" Now that these circumstances, instead of being advised in " course, are for the first time communicated to us, you can " scarcely be surprised at our repeatedly expressed determination " to hold you responsible for this instalment, and as well as to " insist for an immediate and final winding up of our accounts.

" As to your statement that the bill is held by a pretended " indorsee, we beg to repeat what you know, that Mr Inglis " regularly and faithfully discounted your bill; and farther, that " as we have often stated to you, we are quite ready to settle our " accounts with you whenever you please. — We are, &c."

The appellant referred " the averments on the record, so far

" as not established by the admissions and productions in pro-
" cess," to the oath of the respondents. Under that reference, the respondent Rutherglen emitted a deposition, which, in regard to the renewal of the bills was in these terms: — " The
" deponent adds of his own accord, that two or three days before
" the first bill became due, the pursuer came to the deponent,
" and stated that he was not able then to pay Stark's composi-
" tion; and that he had not got his American affairs wound up,
" and that it would be an obligation to him if deponent would
" agree to renew said bill; and he farther states, that his reason
" for not immediately paying the pursuer the amount of the
" renewed bill in one sum on the said 9th of July was, that the
" person who was to discount it was from home, and in fact the
" subsequent payments, to the amount of L.50, composed of the
" L.20 and L.30, were paid before the bill was got discounted."
This deposition confirmed the appellant's statement in regard to the two bills of L.11, 2s. 6d. each.

The Magistrates of Glasgow assoilzied the respondents. The appellant carried the case by advocation to the Court of Session, and the Lord Ordinary, on the 17th November, 1840, pronounced the following interlocutor, adding the subjoined note: —
" The Lord Ordinary having considered the record in the infe-
" rior court, additional pleas in law, documents produced, and
" whole process, advocates the cause, and Finds that the present
" is an action of relief brought by the pursuer and advocator,
" James Gibson, against the defender, Andrew Rutherglen,
" trading under the firm of Andrew Rutherglen and Company,
" whereby the pursuer seeks relief of a certain bill, and expenses
" incurred thereon, as accepted by the pursuer for the defenders'
" accommodation, and latterly retired by the pursuer: Finds it
" proved by the documents recovered and produced, and by the
" defender's deposition *in causa*, that the bill libelled on was
" granted in order to procure a fund for retiring a prior bill

" which had been solicited from the pursuer by the defender,
" who received the contents of the same: Finds it proved by the
" missive dated 6th March, 1838, under the hand of the
" defender, that these bills were not drawn by the defender, or
" accepted by the pursuer, in liquidation of any debt due by the
" pursuer, but as 'an advancement on a previous consignment
" 'by the defender to Montreal:' Finds, that the pursuer has
" specially alleged, that no funds of the defender, other than
" those admitted in the summons, had come into his hands from
" the said consignment, or otherwise, prior to the closing of the
" record; and that the defender has neither proved, nor pointedly
" averred the contrary, nor established in any form, that the
" pursuer is personally liable in the value of the said consign-
" ment: Finds, under these circumstances, that the defender
" ought to have retired the bill libelled on when it fell due, and
" that he is now bound to relieve the pursuer of the same:
" Therefore recalls the interlocutor of the Magistrates com-
" plained of, and decerns against the defender for relief and
" payment to the pursuer in terms of the libel: Finds the advo-
" cator entitled to the expenses incurred by him, both in this
" Court and in the inferior court, as the same may be taxed by
" the auditor, and decerns; reserving to the defender to call
" the pursuer to account for the proceeds of the books and
" accounts sent with the pursuer to Canada, and to the present
" pursuer all competent defences against such action as accords."

" *Note.*—The grounds of the pursuer's claim appear to be stated
" very correctly (though perhaps with too much detail) in the libel
" in the inferior court; and if that statement be correct in point of
" fact, it is humbly conceived that its justice and relevancy in point
" of law are alike undeniable. The Lord Ordinary, however, cannot
" find that any essential fact, on which the pursuer relies, has been in
" any one point shewn to be erroneous. Hence he has found himself
" compelled to differ from the learned judge in the inferior court, and

" having set forth in the interlocutor the series of facts on which he " proceeds, a short additional explanation of his views will now " suffice.

" 1. In the first place, it is supposed to be clear that anterior to the " granting of the first bill referred to in the record, the pursuer, " Gibson, was not the debtor of the defender in any definite sum. " Even when goods are sent to an ordinary agent for sale or commis- " sion, the agent is not liable for the price, unless he has acted be- " yond his powers, or has undertaken to sell on a *del credere* com- " mission. Nothing of the kind is alleged here. Indeed, it deserves " especial notice that the pursuer got charge of the defender's goods " and claims under peculiar circumstances. He was not going to " America to remain permanently there; he had no partner abroad; " but apparently he was going on a short visit, carrying a few goods " of his own, and the defender took that opportunity of asking the " pursuer to take certain accounts and boxes of books along with him, " while he specially added a memorandum to the list which accom- " panied them, bearing 'all the instructions we have to give are, that " 'he deal with them as if the articles were entirely his own.' It is " out of the question to hold that a party who had goods proffered to " him upon such terms incurred any personal liability respecting them, " unless gross negligence or dishonesty were alleged.

" 2. It is next to be noticed that the pursuer seems to have re- " mained a very short time in Canada. He sailed in June, 1837, and " had returned by the beginning of 1838; and during the interval, it " is probable that Canada was not in a state for getting mercantile " adventures disposed of to advantage. Be that as it may, it appears " that the pursuer could recover none of the debts, though he agreed " to a composition payable in instalments, on one of the largest debts " assigned, being that due by one Stark. He alleges he could not " sell the books at any price satisfactory to him; so he put them into " the hands of a Mr Sheddon, for sale, at Montreal, who seems to " have employed an auctioneer, who afterwards sold them at a very " great loss. In the meantime, the defender applied to the pursuer " to sign a bill for L.80, setting forth that he was in want of a tem- " porary accommodation; and the pursuer agreed to accept the bill,

" on the defender giving the acknowledgment dated 6th March, 1838,
" which is engrossed in the summons. It sets forth that his company
" had received the bill 'as an advance on the consignment to Mon-
" 'treal, and will renew the same if the said consignment is not
" 'arranged when the bill falls due, less the amount of Stark's com-
" 'position, if it has been paid by him.'

" 3. The pursuer has averred (explicitly) that, subsequent to the
" date of these bills, he got no part of the proceeds of the consign-
" ment from America, save and except one of the instalments of
" Stark's composition, which he offered instantly to account for; and
" he specially avers in the libel that this was 'the whole funds in his
" 'hands belonging to the defender.'

" Under these circumstances, it humbly appears to the Lord Ordi-
" nary that the plea of the defender is neither founded in the law or
" justice of the case. His main proposition in defence is, that he
" bound himself only once to renew the bill granted by the pursuer
" to him; and that if the pursuer had got no settlement or remittance
" from America when the second bill fell due, he must bear the ad-
" vance for an indefinite time; in short, the plea is, that the pursuer,
" by acceding to the defender's application for the accommodation,
" thereby became bound to guarantee that the goods would yield at
" least L.80, and that he was to suffer the whole loss if there was any
" deficiency. The Lord Ordinary must own that he takes a very
" different view of the real nature of the transaction between the
" parties in the present instance. In the first place, the letter does
" not say that the bill is to be renewed only once; on the contrary,
" it implies that the defender was to keep the pursuer free of advance
" by renewed bills till the consignment in America was arranged, *i. e.*
" finally realized.

" But besides the obligation to renew, the letter expressly states,
" that the first bill was granted as 'an advancement on the consign-
" 'ment.' Surely, however, it is a trite rule in mercantile law, that
" if a consignment yield less than a sum advanced on it by an agent,
" or if the goods are lost, not by any fraudulent act imputable to the
" agent, the consigner must repay the advance to the agent. Accord-
" ingly, let it be supposed that by the time the first bill fell due, it

" had been finally ascertained, from accounts and remittances, that " the goods were only to yield L.40 instead of L.80, and that the " consignment had been wound up in Canada with that great loss, " could the defender have thrown it on the pursuer? Possibly he " might have done so by establishing, in a competent action, fraud " or culpable negligence; but no such case is raised here. If the " pursuer, however, would have been entitled to relief even of the " first bill, in so far as not reimbursed by remittances from America, " wherein is the case altered by the granting of the renewed bill? " Surely the pursuer was not thereby deprived of any right of relief " which could have been competent to him at the maturity of the first " bill, if the final arrangement of the consignment in America had " then brought a deficiency.

" It is said that there has, as yet, been no final arrangement of the " said consignment, as the price of the books has never been remitted. " From whatever cause, however, the want of remittances has arisen, " it is enough to state that no blame, or ground of personal liability " is condescended on against the pursuer; and if so, the party who " got the accommodation from him is legally bound in relief. One " thing is proved by the productions, that the defender, so far back " as June, 1838, got Sheddon's account of the sale of the books, (see " letter of 14th June, 1838,) but it is not alleged that he has as yet " taken any measures abroad (if any would be available) to compel " Sheddon to remit the balance due.

" It was strenuously argued at the bar that the pursuer was strictly " limited by the terms of his libel from seeking relief from the bill " sued for on any other ground than under the obligation contained " in the acknowledgment of 6th March, 1838, which was said to apply " to the first bill only, and not to the second; but this appears to be " altogether a very strained and erroneous construction of the libel. " The letter, besides its obligatory clause, contains an acknowledg- " ment of the relation between pursuer and defender, of consignee " and consigner; and it being thus established *scripto* of the defender, " that he had no constituted claim of debt against the pursuer, " while it was moreover set forth specially in the summons, that the " pursuer had accounted for 'the whole funds in his hands belonging

" ' to the defender.' The libel thus seems to be most correctly " adapted to the proper nature of the claim in which the pursuer had " occasion to insist.

" Before concluding, the Lord Ordinary must remark, that the terms " of the reference to oath in the present case seem to be peculiar. " The pursuer refers to the defender's oath ' the whole averments in " ' the closed record, so far as not already established.' This seems " greatly too loose and vague to be approved of as a precedent. But " truly the defender's oath is of little consequence, unless it be held " sufficient to establish *per se* the pursuer's case, as Rutherglen swears " on the reference that ' he gave no other goods, money or value " for the said bill, except what are stated in the excerpt ' from his " ' ledger, No. 1-4 of No. 14 of process, and that the said excerpt " ' contains a complete statement of the whole transactions between " ' the parties.'

" The account thus referred to is an account between consigner and " consignee, which of course infers no liability on the latter beyond " that of exonerating himself of the consignment. If the defender " had thought that he had any grounds for subjecting the pursuer " personally for the value or proceeds of the consignment, he should " have set forth his allegations to that effect on record, and probably " have raised a counter action to establish his claim. In the record, as " made, there are no *termini habiles* for entering into such proof, but a " reservation is made to the defender to raise a proper action to that " effect, if so advised."

The respondents reclaimed against this interlocutor, and on the 6th March, 1841, the Court altered it by an interlocutor in these terms: — " The Lords having considered the reclaiming " note for the respondents, and heard the counsel for the parties, " alter the interlocutor of the Lord Ordinary reclaimed against, " Repel the reasons of advocation, and remit to the Magistrates " of Glasgow, *simpliciter*, and decern: Find the advocator liable " in expenses, and remit to the auditor to tax the same, and to " report."

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The appeal was against the interlocutors of the Magistrates, and of the Inner House.

Solicitor General and Anderson for appellants.

[*Lord Campbell.* — In the summons it is alleged that a guarantee was given against the second bill; this is denied. You must shew that it was the duty of the respondents to take up the second bill.]

The action is not confined to any special undertaking, but is founded on a general statement of the whole *res gestæ*, and the duty of the respondents to take up the bill, in respect of its being given as an accommodation.

[*Lord Campbell.* — It is impossible, if you mean by an accommodation bill one for which no value was given, to hold this to be an accommodation bill. The appellant "accommodated" the parties, no doubt, by accepting the bill before receiving payment of the goods.]

The letters in the summons shew no more than an agreement for an accommodation. The appellant was under no obligation to advance upon the goods.

[*Lord Campbell.* — To whom was Sheddon to account?]

To the respondents.

[*Lord Cottenham.* — What proof is there that they adopted Sheddon as their agent?

Lord Campbell. — There can be no doubt he was to account to the appellant.]

The letter of 14th March, 1838, shews the idea the respondents themselves had of the transaction as being one of favour, not of business; and that neither party contemplated an advance as in an ordinary case of consignment.

[*Lord Campbell.* — That referred to the original bill.]

Yes, but it explains the nature of the transaction, and shews, that originally there was no consideration, and that the advance was asked as a favour, not on the faith of the consignment.

[*Lord Cottenham.* — The second bill is a contract to pay a certain sum at a certain date; what is there to do away that?

Lord Campbell. — How can you say there was a failure of consideration? the consideration was the right to receive money from Sheddon, and that still subsists.]

But Gibson was not under any obligation, legal, equitable, or honourable, to advance; his position was one purely friendly and gratuitous. The undertaking in the letter of 6th March was not confined to any particular bill; it was an obligation to renew generally. The whole transaction entitles us to assume that the second bill was accepted on the same terms as the first. It was a fraud, therefore, to pay it away.

[*Lord Cottenham.* — The question might have been put direct under the reference to oath.]

The respondent's voluntary statement in the conclusion of his deposition confirms our statement.

[*Lord Cottenham.* — If a common consignee accepts a bill to the consignor, can he refuse payment because he has not received the price of the goods?]

Gibson was not a consignee.

[*Lord Cottenham.* — He was the agent who undertook to sell.

Lord Campbell. — He was not a mere carrier; he had a power of sale.

Lord Cottenham. — The letter of 6th March saying the bill was an advance, would not Gibson have been entitled to receive payment from Sheddon?

Lord Campbell. — Unless you can make out that the guarantee was to apply *toties quoties*, you have no case.

Lord Cottenham. — The case is not by the summons put upon that, but upon a new contract. It says the appellant complied with the request of renewal "upon conditions similar to that on which he had accepted the first bill."]

But Gibson, independently of that, was not under any obligation to accept the bill.

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[*Lord Campbell.* — Neither is an ordinary consignee, but if he accept he must pay.]

If Sheddon had failed the day after, Gibson, as a gratuitous bailee, getting no advantage by the transaction, could not have been liable for the value of the goods. Even if viewed as a consignee, he would be liable only for what he actually received.

[*Lord Cottenham.* — That is not the case your summons puts. You go upon a contract to renew the bill.

Lord Campbell. — Nothing is said in the summons about the value of the goods, or your right to recover the difference between the value of the goods and the actual sale.]

The summons is larger, it asks for the whole L.80, *minus* the L.11, 2s. 6d, without taking into account Sheddon's receipts.

[*Lord Brougham.* — Would not the respondents be liable to Gibson for commission ?]

We submit not.

[*Lord Brougham.* — It would be very difficult to resist such a claim.]

It is admitted that the appellant is not to sustain the loss, but that the whole matter may be ripped up in an action of accounting; why should he unnecessarily be put to that at present? The House is not sitting as a mere court of law, and is entitled to take into consideration what is a fair inference.

[*Lord Brougham.* — There were two letters on the 6th March, why was not the same care taken on the second occasion ?]

Because the party thought he was safe by what had passed on the first.

Pemberton and Wilmer for the respondents were not called upon.

LORD CAMPBELL. — My Lords, the opinion of the Lord Ordinary is undoubtedly entitled to the highest possible respect. I am sure there is no judge in England or Scotland for whom I

entertain more sincere deference; but I am of opinion, that he has taken an erroneous view of this subject, and that the interlocutor of the magistrates with the assistance of Mr Reddie and of the Inner House, ought to be affirmed. Now for what is the action? The action is against Rutherglen and Co., for not taking up this second acceptance. It proceeds upon the ground, that they were bound to have taken up that acceptance, and that they were guilty of breach of contract in endorsing it to another person, and enabling that other person to enforce payment from Gibson the acceptor. How is that to be made out? First, it is said that this was an accommodation bill. It is quite clear to me that it was not an accommodation bill. It was a bill accepted to oblige Rutherglen and Co., but it was not an accommodation bill in the general sense of the word, it was not such in their contemplation. Mr Gibson was intrusted with certain goods to sell; he carried them to Canada, according to the mandate he had received; he did not sell them there himself, but he left them with Sheddon to sell, Sheddon being considered as the agent, and Sheddon being to pay the proceeds to Gibson in Scotland. Gibson knowing these circumstances, returned to Scotland, expecting the proceeds to be remitted to him; there he accepted a bill for L.80, the selling price, according to Rutherglen and Company, being L.200. Is that an accommodation bill? It certainly is not, for it is in consideration of the proceeds of those goods to be received by Gibson from Sheddon. But it is said, there is a contract whereby Rutherglen and Company were not to take this as a bill on which they might have maintained an action against the acceptor. How is that contract to be proved? There is an express contract with respect to the first bill given by Rutherglen and Company, "We have this day received your "acceptance for L.80, dated 6th of March, at four months, as "an advancement on the consignment to Montreal, and will "renew the same, if the said consignment is not arranged when "the bill falls due, less the amount of Stark's composition, if it

" has been paid by him." That applies to the bill of the 6th of March, and if Gibson had been sued upon that bill, in respect of this guarantee, he would have had a clear remedy for the sum he was obliged to pay upon it. But that does not apply to the subsequent renewal, and the pursuer feeling that, alleges upon his summons that there was at that time, the 6th of March, an express undertaking, that he, the pursuer, the acceptor, should never be called upon to pay, or be brought into trouble about this debt, until he had received the proceeds from America. If he had proved that, he would have made out his case, but there is not a tittle of evidence to support it; and though he refers the Court to the oath of the party, he does not venture to put a single question upon that subject to the party when examined. Therefore it stands entirely without evidence. Then here you have Gibson, the accepting party, entitled to receive the proceeds of the goods from America, who accepts a bill of L.80 at four months. Of course he is liable upon that bill, unless he shews some contract whereby he was to be relieved from the liability he incurred when he put his name as acceptor. He has shewn no such contract; it appears to me, therefore, that he would be liable as the acceptor of that bill, and being liable as the acceptor of that bill, that he has no action at all against Rutherglen and Company, on any special undertaking they had entered into that they would indemnify him for being the acceptor of that bill. He does not prove that Rutherglen and Company undertook either to take it up or to renew it. He stands then in the common situation of a party who has accepted a bill, and who is sued upon it. It appears to me that the interlocutor of the Inner House, reversing the interlocutor of the Lord Ordinary, ought to be affirmed.

Lord Cottenham. — The only question is, whether the defenders are under an obligation to repay what the acceptor of the bill has paid. If he can establish that, there must be some contract proved. A contract is alleged, but we cannot act upon that alleged con-

tract without some proof of it, and of that there is no evidence. The summons does not rely upon any supposed understanding between the parties, that the second bill was to be given upon the same terms as the first, but it states in terms, that a contract was entered into for that purpose, and it was necessary on the part of the pursuer, to prove that which he has alleged. Now it may very well be, consistently with the facts, as far as they appear, and that probably will turn out, that more has been paid by Gibson than Gibson expected he would have been responsible for, in respect of those goods; but the bill is a mere payment on account of that transaction, and if, when the account is taken, it turns out that he has paid more than he has received, of course he will be entitled to be repaid. But that is not the object of this suit; the object of this suit is not to have an account taken of the proceeds of these goods which Gibson had received, and for which he was responsible to the respondents, but to establish a right to have the repayment of this sum of L.80, independently of the account pending between the parties. It is quite sufficient to say, that this suit, resting itself on a contract which alone could entitle the pursuer to the judgment he asks, and of which he has given no proof, the suit necessarily fails for want of evidence.

Lord Campbell. — I ought to state, that Lord Brougham, who has heard the whole of the argument, is entirely of the same opinion.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor, so far as therein complained of, be affirmed with costs.

DEANS & DUNLOP — GRAHAM, MONCRIEFF, & WEEMS, Agents.