ROBERT CRAIG, Merchant, Paisley, . . *Appellant;*

THOMAS HOWIE, Merchant in Dublin, and ALEX. MURDOCK, Writer in Ayr, his Attorney, ... } *Respondents.*

House of Lords, 5th March 1817.

BILL — CONDITIONAL ACCEPTANCE — AGREEMENT — EXPENSE OF SUIT.—(1.) A party agreed to accept a bill on certain conditions. He paid one half of the bill according to the terms and conditions agreed on; but refused to pay the other half until the condition of delivery of the oats, for which the bill was granted, was complied with. Held him liable for the second half of the bill. Reversed in the House of Lords. (2.) At same time an agreement had been entered into by the parties to prosecute for delivery of the oats, against the official assignees of the sellers, who claimed right to them. The appellant (acceptor) after this suit had gone on, settled the matter of dispute with the assignees, without consent of the respondent. Held him liable in the costs (£272, 10s. 5d.) of the suit. In the House of Lords, held him liable only for the half of the costs incurred prior to the date of his letter intimating the settlement that had taken place.

John and Alexander Wilson, merchants in Limerick, were in the practice of supplying the appellant with grain and butter. Their practice was, when the goods were shipped, to transmit invoices and bills of lading, and to draw bills for the price, which the appellant accepted on receipt of the shipping vouchers.

On the 25th December 1802, and on the very eve of their bankruptcy, they drew a bill upon the appellant for £400, payable sixty-one days after sight, without transmitting previously to him the usual advice, that they had shipped goods for him to that extent.

The respondent, Thomas Howie, having acquired right to this bill, transmitted it to his agent in Ayr, by whom it was sent to Paisley to be accepted. On presentation for that purpose, the appellant refused to accept, as he had not received, as usual, any shipping vouchers for value, and had no funds of the drawers in his hands.

A few days thereafter, he was assured by John Wilson, who was their agent in Glasgow, that oats were shipped and vouchers on the way. He then offered to accept the bill,

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provided a month's delay was given in the term of payment. But this was not accepted of.

Matters were in this situation when the appellant received notice that the Wilsons, the drawers of the bill, had stopped payment; and that the oats meant for him, were consigned to Messrs Muirhead and Son, Glasgow.

The appellant was even requested by the Wilsons not to accept the bill, and he retracted the offer he had made, which, it was admitted by all parties, he had a right to do.

The appellant was thereafter informed by the Wilsons that they had set apart for him another quantity of oats in their store, upon which he would be preferable to the other creditors, and they again urged him to accept the bill, assuring him of this preference. It was not easy to see how he could be preferable, but he yielded so far as to offer to accept the bill conditionally, namely, the one half of it payable in two months, and the other half when the oats in question should be received by him. The respondent accepted of this conditional acceptance, and took steps to recover the oats in name of the appellant, at their joint expense, by an arrangement between them.

The assignees under the bankruptcy, however, opposed this, and after some litigation, in which the respondent took an active part, in order to make the oats furthcoming to the appellant, these assignees were successful in making good their claim to the oats.

In the meantime the appellant had paid the first half of the bill, but he refused to pay the second half, the oats not having been delivered as agreed to.

In an action raised by the respondent against the appellant for this half of the bill, and also for £272, 10s. 5d., as the respondent's expense incurred by him in the prosecution of the right to the oats with the assignees.

In defence, it was stated that his acceptance was conditional, and that the second half of the bill was only to be paid on delivery of the oats. In answer, it was alleged that the appellant was to blame for the respondent being unable to deliver these oats. He had, without the knowledge of the pursuer, entered into transactions and correspondence with the assignees, such as prevented the recovery of the oats, and ensured a verdict in favour of the assignees. In particular, by his letter of 6th February 1804, in which he says, "As I "have got such offers through the channel of my agent, Mr "Robert Rodger, from the assignees of the Wilsons in

" Limerick, in the matter of dispute between them and me, " as I have thought proper to agree to, I therefore intimate " to you, as I make no further claim on them for the oats, or " their production, which, I suppose, is in your hands, that " you are not, on any account, to use my name further, in " your carrying on the process or defence against the assignees " of the Wilsons; but as you are out of £200, *that* I leave " you to make good to yourself the best way you can. Mr " Rodger of Limerick, in giving up my claim to said oats, " does it upon the express condition that my giving up said " claim, does not interfere or prevent your claim for obtaining " or holding said £200 sterling, but leaves them and you to " settle that business as you think proper."

In reply, the appellant admitted the letter, but denied the construction and the effect put upon it. No transaction had been made by him with the assignees. But the respondent was not deceived as to the import of the letter. He did not stay the proceedings. He did not withdraw his name from them. He went on in his endeavours to recover these oats; and the cause was ultimately decided against him, not in consequence of that letter, but upon the *merits*.

The Lord Ordinary pronounced this interlocutor: " Finds Nov. 14, 1809.
" that by the original transaction and correspondence betwixt " the parties, the defender had agreed to pay the bill for " £400, drawn upon him by John and Alexander Wilsons, his " agents at Limerick, provided a delay of one month as to " the term of payment was granted: Finds, that by subse- " quent letters of correspondence, in March and May 1803, " parties had agreed to divide the risk, and to pursue joint " measures at their joint expense for recovering the oats pur- " chased by Messrs Wilsons for the defender, and on account " of which the bill in question for £400 was drawn, and by " indorsation came into the pursuer's hands: Finds, that " after this arrangement, it was improper and unwarrantable " in the defender, without the permission or knowledge of the " pursuer, to make any transaction with the assignees of the " nature and to the effect specified in his letter of the 6th " February 1804; and, therefore, upon the whole circum- " stances of the case, finds the defender liable in the sums " pursued for, and decerns."

On two several reclaiming petitions to the First Division May 28, 1813.
of the Court, the Court refused and adhered. June 18, 1813.

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

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Pleaded for the Appellant.—1. The appellant is not liable to pay the second half of the bill with interest (£216, 13s. 4d.) claimed in the first conclusion of the respondent's summons, because the appellant never received the oats as his property, which was the condition of his granting the bill; and because it was not owing to any fault on the part of the appellant that the oats were not ascertained to be his property. In withdrawing his name, which he had simply given to assist Mr Howie in recovering the oats, he did no more than was right and proper, in so far as he was concerned. In doing so, this did not affect the right of the respondent to proceed with the action to recover the oats. Besides, the verdict given in that cause was a verdict given a twelvemonth after the date of the appellant's letter, and not in consequence of the disclamation of the proceedings on his part, but a verdict given on the merits, after the fullest investigation and proof had been led.

2. Even though by the agreement of parties the right to the oats was to be prosecuted at their joint risk and expense, the appellant could only have been liable to one half of £272, 10s. 5d., claimed in the second conclusion of the libel.

Pleaded for the Respondent.—Whatever view may be taken of the appellant's conduct, it leads to the conclusion of the respondent's summons, namely, that he is liable in the amount remaining due on the bill of exchange, and in the costs of suit, loss and expenses incurred, in the proceedings instituted for recovery of the oats.

After hearing counsel,

Journals of the House of Lords.

It was ordered and adjudged, that the interlocutors complained of in the said appeal be, and the same are hereby reversed. And it is hereby declared, That the respondent is entitled to be paid by the said appellant a moiety of the costs incurred in the proceedings against the assignees of John and Alexander Wilson, prior to the date of the appellant's letter to the respondent of 6th February 1804: And it is ordered, That the cause be remitted back to the Court of Session in Scotland, to settle the said costs and do further what shall be just in consequence of the said reversal and declaration: And it is further ordered and adjudged, that with this declaration and remit the defences of the appellant (defender in the Court below) be, and the same are hereby sustained,

and that the said defender be, and he is hereby assoilzied, save so far as relates to the moiety of the said costs. 1817. CRAIG v. HOWIE, &c.

For the Appellant, *Sir Saml. Romilly, David Douglas.*

For the Respondents, *John Leach, M. Nolan.*

NOTE.—Unreported in the Court of Session.

SILVESTER DOIG, Bookseller in Edinburgh, and JOHN PITCAIRN, Papermaker, there, *Appellants;*

PATRICK SANGSTER, Manufacturer, Perth, Trustee for Messrs Colin Mitchell and Co., late Booksellers there, and for their Creditors, ... *Respondent.*

1817. DOIG, &c. v. SANGSTER.

House of Lords, 24th March 1817.

SALE—ARTICLES OF ROUP—CONDITIONS—WARRANDICE.—The dictionary called the "Encyclopœdia Perthensis," during its publication in parts, was sold by public roup, but no person offered at the sale. Sometime thereafter, the appellants gave an offer for the entire work, "as lately exposed for sale at Edinburgh," which was accepted of. Thereafter, the appellants declined to grant the bills for the price, on the ground that the sellers did not convey the published parts lying in the hands of the booksellers. Held that the articles of roup must govern the sale, and that in these articles nothing was mentioned about conveying the parts consigned in the hands of the booksellers; but that it was a purchase of "all and whole the copies "or parts, perfect or imperfect, remaining unsold, *conformably* "*to inventory;*" and the whole that was contained in the inventory, it was admitted had been delivered. Affirmed on appeal.

The dictionary called the "Encyclopædia Perthensis," was originally projected by James Morrison, Bookseller in Perth, whose representative became connected in partnership with Messrs Colin Mitchell and Co.

The work, on their stopping payment, was exposed by public auction, while its publication was going on, and in the course of being brought out in parts or numbers. The articles of roup were written out in these terms:—"All and "whole the right of property or copyright of the 'Encyclo-"'pædia Perthensis,' so far as the same is an original work, "and of the whole copperplates or engravings connected "with the said work, those of the maps excepted; together