

March 25. 1829. . 1667, (11,498.); Borthwick, Jan. 20. 1686, (7735.); Sinclair, June 26. 1707, (11,572.); Hamilton, Jan. 9. 1741, (11,576.); 1. Stair, 10. 5. and 7. 14.; 3. Ersk. 2. 43.; Riddell, Jan. 3. 1750, (11,577.)

J. & A. SMITH—RICHARDSON and CONNELL,—Solicitors.

No. 23. COLIN CAMPBELL, Appellant.—*Pollock*—*T. H. Miller*.

ALEXANDER ANDERSON, Respondent.—*Adam*—*Wilson*.

Mandate—Res noviter.—1. Held, (affirming the judgment of the Court of Session), that a mandatary or factor of a person abroad, is entitled to act in that character, until he receive authentic intelligence of the death of his constituent. 2. Circumstances under which a proof of facts alleged to be *res noviter* refused.

May 1. 1829.
 1ST DIVISION.
 Lord Medwyn.

ANDERSON was factor for Gordon of Draikies, a landed estate in Inverness-shire. Campbells, Fraser and Company, of Glasgow, were the commercial agents of Gordon in relation to his West Indian possessions. Gordon having occasion to visit his West Indian estates, granted to Anderson, on the 19th September 1808, a factory, inter alia giving extensive powers for the management of Draikies, ‘and if he shall judge it for my interest, to borrow such sum or sums of money as he may think proper ‘on my account, to the extent of L. 5000;’ and for that purpose to grant and subscribe bonds, &c.; ‘and likewise to draw bills ‘and other drafts in my name, and on my account, on such ‘commercial houses as I have, or hereafter may happen to have ‘dealings with; and generally, all and sundry other things to ‘do in my affairs, which I could do if personally present, or ‘which any factor might do in like cases.’

A copy of this factory was sent to Campbells, Fraser and Company, and they agreed to advance what money Anderson might require during Gordon’s absence.—Gordon sailed in November; and thereafter various pecuniary transactions took place between them and Anderson.

In the course of their correspondence, Anderson, on the 15th March 1809, wrote to Campbells, Fraser and Company:—‘I ‘had a letter from Mr Gordon yesterday by the Marywell of ‘Liverpool, acquainting me that he had arrived (at Berbice) in ‘good health;’ and on the 30th of March he wrote to Colin Campbell the acting partner:—‘I had a letter from Mr Gordon, ‘dated 27th January, when his health continued better than ‘when he left home.’

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On the 28th October 1809 Anderson wrote to Campbell, that, as Gordon's ' purposes here would require an accommoda-
 ' tion of L. 500, I have advised him of my intention of soliciting
 ' your house to this extent; and if you will permit me to draw
 ' on you at three months for the same, be so good as acquaint
 ' him therewith, per the Harmony, that he may have the earliest
 ' knowledge of this addition to his engagements with you, and
 ' provide accordingly.' Campbell answered, (4th Nov. 1809),
 ' Your draft on Campbells, Fraser and Company, will meet
 ' honour to the extent you mention; and should remittances not
 ' be received, and that they require it, you can reimburse them in
 ' some shape until the crop comes round.' Accordingly Ander-
 son, ' per procuration of Robert Gordon,' (11th Nov. 1809),
 drew on Campbells, Fraser and Company, for L. 500, at three
 months' date, in favour of John Fraser, agent, at Inverness,
 for behoof of the Bank of Scotland, and discounted the bill at
 Fraser's office. Of the same date, he intimated the draft to
 Campbells, Fraser and Company; and wrote to Campbell,
 ' Agreeable to your permission, I have this day drawn upon
 ' your house, as advised, per L. 500, at three months' date, to
 ' complete Mr Gordon's arrangements at this term; and by the
 ' time it falls due, I trust you will be in possession of funds to
 ' meet it, or that it can be otherwise provided for should you
 ' find it necessary.'

On the 22d November Anderson wrote to Campbell, ' Toge-
 ' ther with your favour of the 18th current I have just received
 ' a letter from Mr Lewis Cameron of Berbice, dated 27th
 ' August, communicating the death of our worthy friend Mr
 ' Gordon on the 25th of same month,—an event as distressing as
 ' it was unexpected. About a month ago a report of this cir-
 ' cumstance was circulated here; but as it came from no autho-
 ' rity, and similar groundless stories had been handed about on
 ' former occasions, his friends experienced no uneasiness, parti-
 ' cularly as the Hawk, that sailed from Demerara on the 14th
 ' September, and arrived in the Clyde on the 23d October,
 ' brought no such intelligence.' In answer Campbell (30th
 November 1809) mentioned the heavy balance due to his house
 by Gordon, and stated, ' that the draft you lately drew for
 ' L. 500 is also unaccepted, as until something is arranged I
 ' could not ask Campbells, Fraser and Company to do the
 ' needful; but I have no doubt whatever of my concern doing
 ' this the moment they learn the views of the executors.' The
 result however was, that Campbells, Fraser and Company, re-

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 ‘ under the condition that you was to provide for its payment
 ‘ when due, should no remittances be received from Demerara.
 ‘ From the unexpected change of circumstances, considered you
 ‘ were prevented fulfilling your part of that understanding,
 ‘ therefore I do not think it could be expected that Campbells,
 ‘ Fraser and Company, were to come under the engagement,
 ‘ until they were informed more particularly of the situation of
 ‘ Mr Gordon’s affairs.’ But no objection was raised on the
 communication made in Anderson’s letter of the 23d of November.

Campbells, Fraser and Company, having been compelled by an action to pay the bill, with expenses, to the holder,* and having received the bill, and assigned their claim to their partner Campbell, he raised an action against Anderson, concluding for reduction of the bill, for repetition of the amount, and relief of the expenses in the primary action. The ground of action was, that Anderson was informed, and in the knowledge of Gordon’s death, before he drew the bill; that his powers as factor necessarily ceased from the time of his constituent’s death, and that he had therefore no power to draw the bill as factor per procuration of Gordon, whether he had been previously in the knowledge of Gordon’s death or not; and that, at all events, his letters imported an individual liability. To this it was answered, 1. That as the bill was in the hands of the pursuer, and was the document which formed the foundation of his claim of relief, a reduction was an improper process; but, 2. That as the defender acted on the bona fide belief that Gordon was alive when he drew the bill, and as it was drawn expressly factorio nomine, the defender could not be rendered personally liable.

The Lord Ordinary repelled the reasons of reduction, and assolzied the defender with expenses; and issued the subjoined note.† To this judgment the Court, on the 7th December 1826,

* See 2. Shaw and Dunlop, No. 330. p. 346.

† ‘ The form of reduction adopted here does not seem accurately calculated for
 ‘ the grounds of the action. The bill sought to be reduced is not in the defender’s
 ‘ hands, but in the pursuer’s, nor does he found any action upon it against the pursuer;
 ‘ and if it be null, this defence ought to have been pleaded in the action where the
 ‘ pursuer was found liable to pay the amount to the holder of it. Moreover, after the
 ‘ reason of reduction founded on the clause of *stipule*, the two next may afford grounds
 ‘ for relief, but not for reduction of the bill, which is the only writ called for. The
 ‘ fourth reason is the only proper ground of reduction, that the bill is null, as having

adhered.*

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Campbell appealed.†

‘ been drawn subsequent to the death of the mandant. But as this event was not
‘ known at the time in this country, the defender’s having continued to act on his
‘ factory was legal, and therefore the bill cannot be set aside on that ground.

‘ If it be competent, under this summons, to consider whether the pursuer has any
‘ claim of relief against the defender, it appears to the Lord Ordinary to be quite clear,
‘ that the defender neither meant to undertake any personal responsibility, nor did
‘ the pursuer understand that he did. The pursuer was the chief partner in the house
‘ of Campbells, Fraser and Company, who were the consignees of the late Mr Gor-
‘ don of Draikies, for his West India estates. The defender, as factor on the estate of
‘ Draikies, was authorized by the pursuer to draw upon his house on behalf of Mr
‘ Gordon. He accordingly asked leave (28th October 1809) to draw for L.500; and
‘ if this was permitted, he begged the pursuer to write Mr Gordon, that he may have
‘ the earliest knowledge of this addition to his engagements with you, and provide ac-
‘ cordingly. The pursuer, on 4th November 1809, says, “ Your draft on Campbells,
‘ Fraser and Company, will meet honour to the extent you mention; and should remit-
‘ tances not be received, and that they require it, you can reimburse them in some shape,
‘ until the crop comes round.” The defender accordingly draws the bill under reduc-
‘ tion for L.500, “ per procuracion of Robert Gordon;” and besides notifying officially
‘ to the house, he notifies also privately to the pursuer, and adds, “ By the time it falls
‘ due, I trust you will be in possession of produce to meet it, or that it can be otherwise
‘ provided for, should you find it necessary.” Before the bill was presented for accept-
‘ ance, the accounts of the death of Mr Gordon reached this country, when the em-
‘ barrasment of his affairs became known, and Campbells, Fraser and Company,
‘ refused to accept the bill, being then, as they state, in advance about L.5000 for Mr
‘ Gordon. The Court, at the instance of the holder of the bill, found them liable in
‘ terms of the permission to draw in the letter of 4th November 1809, and the pursuer
‘ has been compelled to pay.

‘ Now it appears, that in the whole transaction the defender was acting, and was
‘ known to be acting, as the factor of Mr Gordon, and for his behoof. The reimburse-
‘ ment was to come from the crop in the West Indies, all of which was consigned to
‘ Campbells and Company; and the utmost that the defender was asked to do was, if
‘ remittances did not arrive, and if Gordon’s agents required it, he, as Gordon’s factor,
‘ should reimburse them till the crop came round; that is, provide some temporary
‘ accommodation, by discount or otherwise, if they really required it, till the crop
‘ arrived from which both parties contemplated that it was ultimately to be paid. In
‘ the correspondence subsequently, (see letter 10th February, and 29th March 1810),
‘ any thing like a personal responsibility by the defender is not pleaded. They refused,
‘ however, to accept, or to take charge of this bill; they never, therefore, did, or could
‘ call upon the defender to provide for it till the crop came round. Further, it would
‘ appear that they actually received the crop as consignees; for it is admitted by them,
‘ that their debt, stated to have amounted to L.5000, has been paid off; and if, by pay-
‘ ing this bill at the time, they had put themselves into a condition to claim reimburse-
‘ ment for it, they would probably have been successful to this further extent also.
‘ But when they did not do so, it appears to the Lord Ordinary that they cannot claim
‘ relief from the defender personally.’

* 5. Shaw and Dunlop, No. 58.

† *Res Noviter*.—When this case came on for hearing, Campbell prayed the House to allow him to present a petition relative to certain facts alleged to be important to the

May 1. 1829. *Appellant.*—1. The correspondence shews, that if funds of Gordon did not come forward to sufficient amount to meet the bill, Anderson was to supply them himself. He not only acted as Gordon's factor, but interposed his own personal credit; to both his characters, as factor and individually, the appellant and his house looked for relief. 2. Before the bill was drawn Gordon was dead, and the defender's power abated. The mandate had expired. 3. Although the respondent, before he drew the bill, knew that reports of Gordon's death were in circulation, yet he in pessima fide withheld the intelligence from the appellant's house.

Respondent.—1. The correspondence clearly establishes that the respondent merely acted as factor, and that the appellant and his house regarded the respondent as such. 2. Death does not extinguish a mandate from the date of the death; and what the mandatary does ignorantia facti, is as valid and obligatory as if the mandant still lived. 3. The respondent

question at issue; and which facts, he averred, had come to his knowledge subsequently to the removal of the record from the Court of Session by the petition of appeal. The House gave the permission prayed for, on condition that he should in the meantime pay the costs decerned for by the Court of Session, and of the day's appearance.

Campbell accordingly petitioned the House, stating, that since the record of the case had been removed from Scotland by the appeal, he had ascertained, that at the time Anderson applied for accommodation, he was in the knowledge of Gordon's death; that had the record still remained in Scotland, the appellant would have been allowed to prove the facts as being *res noviter*: 4. Stair, l. 44.; Grahame, May 29. 1821, (l. Shaw and Dunlop, No. 39.); M'Whirter, February 14. 1822, (l. Shaw and Dunlop, No. 360.); 6. Geo. IV. c. 120. § 10.; and concluding, that he was entitled still to lead the proof (*suo periculo*) of his allegation in point of fact; and therefore praying the House to remit to the Court of Session, with instructions to allow a proof of the new facts which he alleged to be material to the question at issue.

To this Anderson answered, that this application was unprecedented;—that the supposed fact, if true, occurred more than twenty years ago,—had not been averred during the protracted litigation which followed,—and had not been stated until two years after the Court of Session's final judgment. No intimation is given of the nature of the evidence to be adduced, or of the names of the witnesses to be cited, nor the circumstances which so long kept the fact unknown.—The Court of Session always regards allegations of *res noviter* with great jealousy and reluctance. They insist on being satisfied that the fact bears closely on the question at issue,—that it has been recently discovered,—and that there is good reason why it was not discovered sooner. Dundas, March 1810, (F. C.); Magistrates of Dumbarton, November 18. 1813, (F. C.) The appellant must therefore either proceed with his case, or withdraw his appeal entirely; and if the prayer of the petition be granted, it should only be so on payment of the whole costs incurred in the appeal.

The House refused the prayer of the petition.

did not know of the death of Gordon when the bill was drawn, nor had reasonable ground to suspect that such an event had occurred. No person believed the reports which prevailed, as described in the letter of the 22d November 1809; and the respondent was justified in disbelieving them. The appellant's arguments, if good for any thing, would have saved him from the decree in Fraser's action. May 1. 1829.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed, with L. 50 costs.

LORD CHANCELLOR.—There can be no doubt what is the law of Scotland on the present point. The case resolves into a question of bona fides. The Court below seem to have been of opinion that there was bona fides on the part of Anderson; and I see no ground for drawing a different conclusion. I therefore move your Lordships to affirm the judgments complained of, with L. 50 costs.

Appellant's Authorities.—Ayton, March 2. 1769, as reversed in House of Lords; (14,573.)

Respondent's Authorities.—3. Ersk. Inst. 3. 41.; 1. Bell's Com. p. 395. and authorities there cited.

M'DOUGALLS and CALLENDER—FRASER,—Solicitors.

ARCH. M'PHAIL, (a Pauper), Appellant.—*Murray—Heath.* No. 24.

WILLIAM GLENNIE, (a Pauper), Respondent.—*Wilson.*

Implied Obligation—Mutual Contract.—Held, (affirming the judgment of the Court of Session), that a road-contractor is liable for the wages of workmen hired by a person acting ostensibly as the overseer of the contractor, but who, it was alleged, was a sub-contractor,—there being no satisfactory evidence that he was known in this character to the workmen.

GLENNIE raised an action before the Court of Session against the appellant M'Phail and Robert Cooper, alleging, that in 1820 M'Phail had contracted to form and make a road from New Pitsligo to Banff; that he had employed Cooper as his overseer or foreman; and that Cooper had hired him (Glennie) to work on the road, which he had done, and for which there remained due to him a balance of wages, for payment of which he concluded. In defence, M'Phail admitted that he was the principal contractor, but alleged, that Cooper had entered into a sub-contract with him for executing a part of the road, and that May 11. 1829.

1ST DIVISION.
Lords Alloway
and Eldin.