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JAMES LAWSON, Merchant, Glasgow, *Appellant*;
JOHN TAIT, W. S., Trustee for the Creditors and Representatives of JOHN HAMILTON, deceased, - - - *Respondent.*

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House of Lords, 28*th April* 1779.

BILL—PARTNERSHIP—INCOMPLETE CONTRACT—AGENT OR PRINCIPAL.—Circumstances in which letters and other documents held not to prove that certain bills were granted merely as agent for a third party, and only to vouch the extent of the creditor's advances to that party until a certain share in his trade in Virginia was given to him; notwithstanding it was admitted that the money so received, and for which the bills were given, was appropriated for that third party's use, and he had agreed to give the creditor in the bills the share in the concern he desired.

Action was brought by the respondent in the Court of Session, against the appellant, for the sum of £3543. 13s. 10d. with interest resting owing, and due to John Hamilton deceased, upon bills granted by the appellant to Hamilton, in whose right the respondent sued. In defence, the appellant stated, that he had come under these acceptances only as agent for John Semple of Virginia; that they were intended simply to vouch the extent of Hamilton's advances for the use of Semple, till a certain share of a concern in Virginia was given by Semple to Hamilton, and that such shares having been accordingly given and accepted of, the bills could not afford ground of action against the appellant.

The defence was rested on the following correspondence, and other writings:—Mr. Hamilton wrote to Lawson. "I have Mar. 23, 1764.
"not the least degree of hope that John (Semple) will give
"Sandy a share, or even that encouragement that he had a
"chance for from a stranger; for John is 20 degrees farther
"removed from doing what is friendly and generous than
"before, as I never knew a narrow selfish mind, but these
"dispositions increased with riches." Again, by another
letter from Hamilton to Lawson:—"I send you enclosed a April 10, 1764.
"copy of the letter sent you last week for Sandy, by which
"you may see my proposal and scheme for a 12th share,
"and the reversion to John if he shall think the profits of
"his purchase shall rise high above my computation. I
"would indeed rather chuse a sixteenth part, without any
"power of redemption." He adds, "If you think my bro-
"ther agreeing to the proposal I made will in any way hurt

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" your interest, I will write Sandy not to deliver the letter " or, if delivered, to withdraw my proposal."

On 14th April 1764 Hamilton wrote Lawson,—" Please " write Sandy for his opinion of John's establishments, as " he is pleased to term them."

Aug. 29, 1764. Of this date, A. Hamilton wrote to his father thus: " As I " wrote him (Semple) according to your directions, I did " not think proper to insist much more about the matter, as " they were pressing enough of themselves. He said he " would give a share, but what that is to be I cannot find " out."

Semple wrote to the appellant and Hamilton on the same

Oct. 10, 1764 paper, as follows:—To the appellant he wrote, " Our bro- " ther in Mauchline has importuned me for one-twelfth " share for Sandy Hamilton, which I have wrote him he " shall have on the *bills* being honoured, and his assisting " you therein." To Hamilton he wrote:—" It was my in- " tention always, with your concurrence, that Sandy might " have a share in our establishments and future trade. The " one-twelfth part you desire him to have, on the bills I " have drawn being honoured, and your assisting James " Lawson in it, as you propose, he shall have."

It was averred that this letter shewed that Hamilton had offered to advance money for payment of Semple's bills, provided he would give his son the share he required.

Oct. 15, 1764. Semple wrote again to Hamilton:—" This serves to ad- " vise you, that on your assisting James Lawson, &c. to take " up my bills I have drawed, and them being taken up this " winter for the establishment of our Virginia concerns, that " Sandy shall have one-twelfth part thereof, as you desire."

Hamilton then wrote Lawson, in reference to the above

Dec. 16, 1764. letter:—" I received yours of the 12th, covering my bro- " ther's to you and me, which I must own is very agreeable " to me, if it were in our power to answer what he requires, " but am afraid that we cannot near do."

Thereafter an agreement was entered into between Lawson on the one hand, and Hamilton and Pagan and Crawford on the other, who respectively agreed to provide the means for retiring Semple's bills, in consideration of which, a certain proportion of the trade was to be conveyed to Hamilton and Pagan and Crawford. The agreement also bore, that Lawson was to write Semple for his concurrence, and for a formal obligation under his hand to convey these shares accordingly. It was provided, " that in case " the said John Semple refuses to sign the said obligation,

" and return the same duly execute, then and in that event, " this present agreement shall be void and null." This contract commences: " And whereas John Hamilton did " advance part of the money (for which he has the said " James Lawson's security.")

The contract and obligation were sent out for Semple's signature. A letter was returned, agreeing, which was intimated by the appellant to Hamilton, and on 13th April 1765, the obligation was signed by Semple, and was received by the appellant in July following. It was afterwards put on record, at the desire and expense of Hamilton. Nov. 20, 1764.

As Semple had long previously expressed, by letter and otherwise, his willingness to give the shares in the concern, the parties, prior to the completion of the above obligation, had acted on this representation, and Hamilton had advanced £1500, which was declared to be part of the price of the purchases of the share from Semple.

He had also advanced four other sums, in terms of his engagement to provide money for paying the remainder of the price, and carrying on the works, *for three* of which (as he had done in regard to the first) the appellant granted his acceptances—this being done prior to any notice from Semple, and before the contract and obligation were sent out to him for his signature and concurrence.

The appellant was appointed agent for the concern, and kept a regular set of books where these advances were entered, of the date they were made.

But sometime previous, the following letters had passed. Hamilton wrote to Lawson:—" I am very sorry Aug. 22, 1764.
" for this disappointment, but cannot help it; but as I have
" advanced for my twenty-fourth share (he had not by this time got Semple's answer with respect to the share for his son) " more than both Messrs. Pagan and Crawford have
" done for their twelfth share, I am confident they will find
" out £500 to assist you in the meantime, and the above
" mentioned £500 will answer another turn, and think you
" should apply to them for that end." He again wrote the appellant:—" I wrote for the loan of £2000, which is all I Oct. 27, 1764.
" could propose to borrow upon my subjects; for the folks
" in Edinburgh will not lend money but upon an heritable
" security; and I can see no help for it but allow John's
" (Semple's) bills to return for the other £1000 you men-
" tion; and, after all, I am diffident of *his* subscribing and
" returning the obligation for the eighth share; and there-
" fore I think you should, in the meantime, meet with Messrs.

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" Pagan and Crawford, in company with two or three more, " and advise them of the draught for £3000, and ask them " to assist you to advance it; and if they tell they cannot, " it certainly should be an argument with the arbitrators " between you and them, to modify their claim of damages, " if John does not agree to give the eighth share. You " should not let them to know that I am to give any further " assistance. This I beg you will not neglect to do, as, in " the event of John's refusing, it must be of real service to " you. If I can furnish this £2000 I will accept of the for- " ty-eighth share you offer me of John's purchase, as I think " it would be an argument to induce him to give it me him- " self."

Nov. 29, 1764. Again Mr. Hamilton wrote to the appellant:—" You see " by Mr. Tait's (the respondent) that he has prevailed with " the Commissioner Cochran to delay the payment till " Whitsunday. I hope in a short time we will have such fa- " vourable accounts from America as will enable me to satis- " fy him that my scheme is more for the interest of his " friend" (meaning the respondent's sister-in-law Mrs. Hamilton) " and my family, than any thing else I can do or " propose. However, I am confident I will be able to pro- " cure the loan of the money to repay him at Whitsunday, " unless something occur that I know nothing of. I expect " to get the £500 from Mr. Tait which I had the promise of " formerly."

In the summer of 1765 Semple's connections in Scotland were alarmed by the accounts which they received of the mismanagement of the whole concerns abroad. Pagan and Crawford had by this time advanced £3000, and Hamilton nearly £4000. The appellant himself was deeply engaged, Semple having, without his knowledge, applied the proceeds of the Maryland concern, to the amount of £20,000, in payment of the purchases and carrying on the works at Virginia.

In this posture of affairs, the parties thus concerned solicited the appellant to go to America, to investigate into Semple's conduct and affairs, and to act for their interest. They gave him powers of attorney, which were subscribed by Hamilton, and he went to America, and found the affairs in a desperate condition.

On this being communicated to Hamilton at home, he wrote to the appellant:—" Therefore my brother will do " well to make a just and exact state of the concern, and " sell off, to make us all easy, or take a partner *in my place*,

" who will advance money to pay what I am in advance, and " what he owes me and Sandy."

Other letters followed, referring to the disastrous state of affairs. Some difference arose, and Hamilton wrote to Lawson. Dec. 11, 1765.

" If my brother had the smallest regard to justice, he April 8, 1766.
" must consider that this large advance on my part, was on
" the faith of his assurances, by his letters to you and me,
" that he would have, before this time, remitted to pay off a con-
" siderable part, and that I am in advance, (though I have only
" an equal share with Messrs. Pagan and Crawford), four times
" as much as either of them; and when I have wrote him
" that I could not support my credit, he should have remit-
" ted me to have paid the interest, but, in place of that, he
" has drawn upon me. I insist that you will settle ac-
" counts with him, and remit me, in the meantime, £300 or
" £400 to pay interest, and get undoubted security for pay-
" ment of the rest, payable in Glasgow or Edinburgh; other-
" wise, when I am pressed by my creditors, *I must make use*
" *of the security I have from you*, to answer my credit."

Again, " It is inconsistent with the nature of all partnership, May 12, 1766.
" and any shadow of justice, (I may call it robbery), in
" my brother to withhold a state, and refuse to give a full
" and particular account of every part of his procedure.
" These the other partners have a right to call for, that
" they might judge for themselves, and as they see cause, to
" give up the partnership or not. I have still a better
" right, and I am determined, if my demands are not an-
" swered to my satisfaction by the 1st August, to use dili-
" gence on the bills." Letters followed in the same strain.

Of this date, Hamilton wrote Lawson:—" As I considered July 29, 1768.
" yourself as having a share, and that you was acting as
" agent for Mr. Semple, and that what money I advanced to
" you more than paid the share conveyed to me, I was to
" have your security, I continued to advance upon your
" security by bill."

Sometime afterwards, the appellant, who, it was alleged, was himself a partner in Semple's concerns, managed to procure a settlement with Semple, for the benefit of all parties. At sametime, he advanced £1750 to carry on the works. The settlement was, by Semple granting an obligation and mortgage over his estates, to secure and pay the appellants and his constituents' claims, as follows:—States were made out, and five bonds were taken from Semple; one to Hamilton, another to Pagan and Crawford, and three to the ap-

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pellant, for their respective advances. And a mortgage granted, wherein the whole of these bonds were included, and heritably secured. The appellant thereupon executed a bond of indemnity to Semple, wherein there was this clause, " Whereas the above bound James Lawson, is an- " swerable in security for the said John Semple, to the said. " John Hamilton, for the payment of the said sums," &c.

Sometime aftewards Semple died. Hamilton had predeceased him, having previously conveyed his estate to the respondent in trust. The present action was then raised, upon the four acceptances above set forth, which were granted by the appellant to Hamilton.

Previous to this, the appellant had written to the respon-

Dec. 29, 1769. dent :—" Yours of the 11th July, I received sometime last " month; the contents of which, I observe, and think they are " very harsh ; also unreasonable in you to insist on me pay- " ing the money which you advanced, to retire Mr. Semple's " bills for a concern wherein you was a partner, and I acted " only as clerk or manager for the company. You never " lent me one penny of all that money for any use of mine, " but wholly to be applied in payment of the bills drawn on " account of that concern, which the obligation you entered " into will plainly shew," &c.

Upon debate, the Lord Ordinary pronounced this judg-

July 16, 1776. ment :—" Having considered the summons, with the several " bills libelled ; and having also considered the defences " pleaded for the said James Lawson, answers, and together " with the many and various letters, and other writs pro- " duced by either party ; repels the defences pleaded for the " said James Lawson defender, and finds the said James " Lawson liable in payment to the said John Tait, pursuer, " of the several sums of money following, contained in and " due by the bills libelled, accepted by the defendant," (here the bills are enumerated.) " Finds that by the letter " libelled, dated 26th January 1765, the defendant is not " bound personally to pay the sum of £100, sterling, therein " mentioned, and therefore assoilzies him as to that sum,

Aug. 11, 1776. " and decerns." On representation, the Lord Ordinary adhered.

Feb. 6, 1777. On reclaiming petition to the whole Lords, " The Lords " having advised this petition, with the answers, find suffi- " cient evidence that John Hamilton was associated as a part- " ner in the purchases within mentioned, to the extent of " one-twenty-fourth share; and find that the petitioner, (ap-

" pellant) also was a partner to the extent of one-fourth; but, " before further procedure, appoint the parties to give in " memorials, first, upon the effect of the deed of mortgage, " 1769, to relieve John Hamilton from his said partnership. " 2d, If not so relieved; but continuing a partner, to what " extent is the petitioner (appellant) entitled to retain, of " the sums contained in the bills in question against Ha- " milton, being a partner as aforesaid."

The appellant preferred a petition against this interlocutor, in so far as it found him to be a partner of the concern, but, of this date, they adhered. And, on the reclaiming petition of the respondent, the Lords adhered " to the former " interlocutor reclaimed against, in so far as it finds John " Hamilton was associated as a partner in the purchases in " question, to the extent of a twenty-fourth share, and in so " far refuse the desire of the bill; and they further ordain " the memorials on the other points of the case, appointed by " interlocutor of 6th February last, reserving the considera- " tion to what extent Lawson was concerned as a partner, " till the said memorials be advised."

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July 5, ——

The appellant put in another reclaiming petition, as to his son's twelfth share.

The respondent contended, 1st, that if ever there was a partnership, it was put an end to by the mortgage; the whole tenor of which shewed that this was meant, and understood to be the effect of it; and, 2d, that the appellant could not therefore plead any retention. 3d, That the appellant was, besides, a partner with Semple, and as such liable.

" The Lords find, that the effect of the deed of mort- " gage in 1769 did not liberate or relieve Hamilton of his " copartnery, which is formerly found to extend to one " twenty-fourth share. They further find Lawson to be a part- " ner to the extent of one-fourth share only, and remit to the " Ordinary to hear parties further on the other point, viz. " To what extent is Lawson entitled to retain of the sums in " his bills to Hamilton, on account of Hamilton's being bound " to continue a partner as above; and also, to remit to the " Lord Ordinary the petition for Hamilton; and answers for " Lawson, relative to the interim decreet craved by Hamil- " ton, with power to his Lordship to do in the premises as " he shall see cause."

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When this interlocutor was pronounced, the appellant produced a bond of indemnity granted to him by Semple; by which, and the mortgage, he contended the intended copartnery was effectually extinguished by mutual agreement.

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The cause having returned to the Lord Ordinary, his Lordship pronounced this interlocutor, "Upon a representation "from the respondent—In respect the Court has found, by "interlocutors now final, that John Hamilton was a partner "in the company of Semple, finds that it is not now compe- "tent for him to grant the prayer of the representation," (which prayed to prove by persons recently arrived from Virginia, that no such partnership as that contended for by the appellant ever existed.)

Against these interlocutors the present appeal was brought by the appellant, in so far as they found him liable in payment of any part of the said bills, or him to be a partner in Semple's concerns. The respondent also presented a cross appeal, in so far as the interlocutors of the whole Lords found that John Hamilton was associated with Semple as a partner, and refused to find the appellant liable in the sums sued for.

Pleaded for the Appellant.—On the original appeal, the interlocutors of the Lord Ordinary, 16th July, and 10th August 1776, are clearly ill founded. No part of the money in suit was applied, or meant to be applied to the appellant's use. The whole was advanced by Hamilton, in the view of his obtaining a share for himself and son in Semple's concerns abroad, and for the purpose of paying the price of Semple's purchases in this country. The contract, August 1764, the correspondent obligation, with numberless letters under his own hand, place this beyond all dispute. Hamilton obtained the object he had in view by those advances. He and his son were admitted to shares with Semple. The sums advanced were confessedly applied in the manner Hamilton meant they should: In effect they were applied for his own use, and upon an estate whereof he became part-owner. Of course, any claim against the appellant became extinguished *confusione*. Hamilton could not both have the share, and the price paid for the share. Accordingly, he himself acknowledged by his letters, that he had no claim against any person whatever, except for the surplus above the value of his share, *i. e.* above his proportion of the price of the purchases and expenses defrayed by Semple in erecting and carrying on the works. In his letter, of 28th July 1768, though at that period, it is clear from the other parts of the correspondence, he was disposed to relieve himself at any expense, yet he expressly admits, that it was not intimated he should have the appellant's security, except for the surplus above his stock. This was admitting, that, as to the value of his stock at least, the ap-

pellant's acceptances neither were, nor could be meant to be securities, but simply vouchers for his advances to Semple, which sufficiently obviates the presumptions which the respondent deduces, from the terms of the contract and correspondent obligation, and from the circumstances of these bills not being taken up upon the arrival of Semple's obligation from *America*. In point of fact, there is nothing to shew that the appellant became bound to repeat or guarantee either his stock or the surplus. 2d, The appellant was no partner. He acknowledges that one may be admitted a partner by letters, as well as by a formal contract; yet, in every case, especially where the consequences draw so very deep, the correspondence must, in order to this effect, be very conclusive and direct. But, in the present case, those characters cannot be applied to the correspondence in question, which do not make him out a partner. There was merely an offer on the part of Semple to give him a one-fourth share,—and a declaration on his part, that he would take no less than a half. To this Semple never agreed. There was therefore no completed bargain between them, and therefore no partnery. 3d, Besides the one-twenty fourth share that John Hamilton got for himself, he got a twelfth share for his son, which is clearly established by the correspondence, shewing, when Hamilton demanded the twelfth for his son, Semple expressly agreed to it. ON THE CROSS APPEAL. The appellant further contended, that he was never a partner, he was only manager for the company, that the acceptances granted by him, were as agent for Semple, with whom Hamilton was associated as a partner,—that the books which he kept, containing the advances made by Hamilton, and for which he had granted his acceptances, shewed that these sums were appropriated for the behoof of the company. As, therefore, the advances made by Hamilton, (for which the bills in question were granted), were made for the purpose of purchasing shares in the concerns of Semple abroad, and as Hamilton, in consideration thereof, accepted of these shares, and became a copartner with Semple, it is clear that the respondent had no claim upon these bills against him. No doubt it is contended by the respondent, that supposing the copartnery existed, and to have been dissolved by the mortgage, the obligation upon the appellant, in consequence of his acceptances to Hamilton, would subsist in the same manner as if Semple had refused to accede to the contract betwixt Hamilton, Pagan and Crawford, and had not returned the obligation; but, in

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answer to this, the appellant contended, that a more unjust plea could hardly be figured. That a copartnery was formed was indisputable, and had been, times without number, admitted by Hamilton himself. The moment this result was effectuated between Hamilton and Semple, the appellant's obligations, come under by the acceptances, ceased and were extinguished. Thus matters stood, when the appellant went to America, furnished with a power of attorney, signed by Hamilton. He executed the trust reposed in him to the best of his ability. He succeeded in getting a security for Hamilton's advances, with interest; and it would be an extraordinary proposition, to hold that his negotiation of this transaction was to subject him in liability for Hamilton's advances.

Pleaded for the Respondent.—On the original appeal. The respondent's title to recover payment of the bills against the appellant is indisputable, and it lies upon him to prove that the obligation he thereby came under was *conditional*, and that the condition has taken place. His plea is, that he gave his own security for the money advanced by Hamilton, upon an understanding, that if *Hamilton* was admitted to a share of Semple's purchases and undertakings, then he was to be quit, and Hamilton's security to depend upon Semple, or the partnership estate. Thus admitting that he did once stand bound for the money, an admission which the appellant was obliged to make, to account for giving his own acceptances, in place of receipts, as the agent of Semple. But there is no evidence of such understanding or agreement between the appellant and Hamilton. The appellant relies on the letters and correspondence, as sufficient evidence, especially where Hamilton expresses his knowledge or belief, that the money was applied to the use of Semple, and he founds on the deeds where the same thing is set forth, and on other parts of the letters, where he seems to consider Semple as debtor to him. All this, it is apprehended, does not amount to evidence sufficient to elide the presumption which the bills themselves afford. Because these bills, taken together with other expressions in Hamilton's letters, particularly the deeds, which clearly expressed that he held the appellant personally responsible to him for his advances, were the most conclusive evidence to the contrary. 2d. No share of Semple's purchases and trade having been actually given to Hamilton, or in other words, no partnership having been formed or concluded, the appellant's obligation, according to his own shewing, still remains, because, the conditions upon which he says he was to be free from his

personal responsibility, has not existed, and never did exist. Until articles were executed, assuming Hamilton as partner, and until a due proportion of the purchases and property of the proposed partnership was conveyed to him, no share can be said to have belonged to him. The obligation of Semple was only a first step, necessarily implying others which were to follow, and, till these followed, there was no completed contract between them; and by Semple's death before this consummation, it must ever remain so. It seems admitted that Hamilton was ignorant of the extent of the purchases—the prices of them—the incumbrances upon them—the nature of the business proposed to be carried on—the capital required—the endurance of the partnership—all these things were undetermined, and it is therefore preposterous to suppose that, in these circumstances, there could be a concluded agreement. The mortgage and bond of indemnity does not prove that a partnership had been formed, and was thereby dissolved; but only, that a project or scheme for a partnership had been proposed, and put an end to, so that the appellant can draw no argument from these deeds. The interlocutors of the Court of Session, finding Hamilton associated with Semple, are therefore erroneous.—ON THE CROSS APPEAL. It is established by the letters and other documents, that the appellant was a partner, concerned in the Virginia purchases and works, upon the same terms that Semple and he were connected in the tobacco trade. And in regard to the attempt to have Alexander Hamilton, the son of John, declared to be a partner with Semple, it seems altogether incompetent, in the present action, to which he is not made a party, even if otherwise there was any foundation for it; but, further than a mere proposal, there are no ground for it whatever.

After hearing counsel, LORD MANSFIELD moved to affirm as follows:—It was

Ordered and adjudged, that the interlocutors of the Lord Ordinary in Scotland, of the 16th of July, and 10th of August 1776, complained of in the original appeal, be affirmed. And it is declared, that it being unnecessary precisely to determine the questions to which the other interlocutors complained of relate, it is, therefore, hereby further ordered, that the several other interlocutors complained of in the original and cross appeals, be reversed, without prejudice.

For Appellant, *Al. Wedderburn*, *Henry Dundas*.
For Respondent, *J. Dunning*, *Ilay Campbell*.

Unreported in Court of Session.