

S. STIRLING and Others, Trustees of the late JOHN M'KENZIE, No. 13.
Appellants.—*Romilly—Rutherford.*

R. FORRESTER, for the Bank of Scotland, Respondent.—
Cockburn—Walker.

Cautioner.—Four parties having guaranteed payment of bills to the extent of £8000, by four separate bills, each for £2000, and one of the original bills, and also one of the security bills, having been given up by the creditor, and another received in substitution thereof, held (reversing the judgment of the Court of Session,) that one of the cautioners, whose consent was not obtained to this transaction, was quoad hoc discharged.

JAMES and GEORGE SPENCE, manufacturers in Dunfermline, were in the practice of lodging with their banker, Mr. Paterson of Edinburgh, the bills which they obtained, at long dates, from their customers; and Paterson and his agents, in consideration thereof, accepted bills at short dates, drawn on them by the Messrs. Spence. In the early part of the year 1810, Paterson and his agents in London,—Robertson and Stein, and Todd and Company,—having accepted bills to the extent of £8200, the Messrs. Spence discounted them with Hunt, the agent for the Bank of Scotland in Dunfermline. This person, as well as his cautioners, were responsible to the Bank of Scotland for all the bills which he discounted. Before the bills fell due, Paterson and his agents, viz. Robertson and Stein, and Todd and Company, became bankrupt, and the Messrs. Spence thereupon applied to the Bank of Scotland to delay enforcing payment. An arrangement was accordingly entered into, by which it was agreed that the Messrs. Spence should accept four several bills, payable 18 months after date, for £2000 each;—that John M'Kenzie, David Beatson, William Haig, and John Spence, should each indorse one of the bills, so as to be liable to the extent of only £2000 each. The nature of the transaction was thus explained by Mr. Sandy in an official letter from the Bank: ' On the 1st ' of December 1810, James and George Spence, manufacturers ' in Dunfermline, granted their promissory note to the late John ' M'Kenzie, Esq. of Garnkirk, payable at 18 months after date, for ' £2000, which was indorsed by him and Mr. Charles Hunt, then ' agent for the Bank of Scotland in Dunfermline; and was, with ' three similar notes of the same date and currency, one payable ' to Mr. William Haig, bleacher at Dollar, another to John ' Spence, surgeon, Royal Navy, and a third to David Beatson, ' Esq. of Micklebeth, merchant, Dunfermline, each for £2000,

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1ST DIVISION.
Lord Alloway.

June 13. 1821. ' lodged with the Bank of Scotland, as a collateral security to the
' Bank of certain bills discounted to James and George Spence
' at the Bank's office at Dunfermline, through the official inter-
' vention of Mr. Charles Hunt, while the Bank's agent there,
' amounting of principal to £8200.'

On the 27th of April 1812, and before the bills became due, but after some partial payments had been made by the Messrs. Spence, they applied to the Bank of Scotland to deliver up the original bill granted by Robertson and Stein, amounting to £2300, and also the collateral bill for £2000, which had been indorsed by John Spence, and to receive in place thereof the promissory note of the Messrs. Spence for £1997 : 4 : 2, payable three months thereafter, and indorsed by John Spence and Charles Hunt to the bank. In reference to this proposal, the secretary answered, that ' The directors have ordered your pro-
' missory note to Mr. John Spence, 27th April, at three months
' date, for £1997 : 4 : 2, to be discounted and applied in pay-
' ment of your bills on Messrs. Robertson and Stein, and that
' the said bills be given up along with Mr. John Spence's corro-
' boratory bill for £2000.' This was accordingly done, but it did not appear that any communication had been made to MacKenzie on this subject. By this time Hunt had been removed from his office, and his cautioners were thereby discharged of any responsibility for his future obligations. In the month of May 1812, the Messrs. Spence applied to M'Kenzie to consent to the renewal of his bill; but being at that time on deathbed, his daughter, in answer, addressed a letter to Mr. Pearson, the agent of her father, in which she said, ' My father has received
' two letters from Mr. George Spence, in which he says he would
' pay you the annuity about the 15th instant. When you inform
' him you have the receipt, be so good as say, my father will ac-
' cept the £2000 bill when he sends it.' M'Kenzie died a few days thereafter, without any thing farther being done; and when the bill for which he was liable fell due on the 4th of June, it was protested against all concerned. Payments were afterwards recovered indefinitely from Paterson and his agents, and from the Messrs. Spence, which reduced the original debt of £8200 to £4844. 15s. An action having been brought against the appellants, as trustees of M'Kenzie, for payment of the bill of £2000, they pleaded in defence, that the true nature of the obligation of Mr. M'Kenzie was, that he was to be a cautioner along with Beatson, Haig, and John Spence, for the original debt of £8200, but that his liability was to be limited to £2000; that the bank was to receive payment from the Messrs. Spence from time to time, and to draw

dividends from the three estates of Paterson, Robertson and Stein, and Todd and Company, on the original bills, and to apply them in reduction of the total debt,—the cautioners being liable rateably and proportionally for the eventual balance; that, notwithstanding, the bank had, without the consent of M'Kenzie, delivered up the bill of Robertson and Stein, for which both Hunt and his cautioners were responsible, and also the collateral bill of John Spence, and had received in substitution thereof a new bill postponing the term of payment, and for which the cautioners of Hunt could not be made liable. They therefore contended, that the obligation of M'Kenzie had been discharged. To this it was answered, 1. That the bill on which the action was founded was unqualified by any condition, and did not bear reference to any cautionary obligation undertaken along with others; that when the bank took this bill and the others above mentioned, they considered each to be a separate and independent obligation, and that they were entitled to transact with each of the obligants as they thought proper; and, 2. That it was proved by Miss M'Kenzie's letter, that her father had consented to the renewal; and, at all events, the bills which had been delivered up had been returned, the object of giving them having been to enable the Messrs. Spence to recover the dividends due by the estate of Robertson and Stein; and the trustees of M'Kenzie might have brought matters to a close when the bill due by him was protested. Lord Alloway found, ' That this action proceeds on a ' bill granted to the late Mr. M'Kenzie by Messrs. Spence, and ' discounted by Mr. Hunt, as agent of the Bank of Scotland at ' Dunfermline: That this bill was indorsed by Mr. M'Kenzie, ' together with other three bills, by Mr. Haig, by Mr. Beatson, ' and by Mr. John Spence, for £2000 each, in order to operate ' to the Bank of Scotland as a security for a sum exceeding ' £8000, in which Messrs. Spence then stood indebted to the ' bank, arising from the returned bills of David Paterson, Robertson and Stein, and Todd and Company, which Messrs. ' Spence had negotiated with the bank: That when the bills indorsed by Mr. M'Kenzie and the other three gentlemen became ' due, although Mr. M'Kenzie was not a joint obligant for the ' £8000, and could only be liable for his separate obligation for ' £2000, yet, as it appears from Mr. Sandy's letter that the bank ' were well acquainted with the nature of the transaction, and ' that these four obligants had merely interposed their security for ' Messrs. Spence to the amount of £2000 each, in relief of £8000 ' due by the Spences to the bank, so the bank could only have proceeded against them by giving them a proportional and equit-

June 13. 1821. ' able relief of the debts which they had been able to recover from
 ' the original obligants: That although it is alleged that the
 ' bank had given up to Messrs. Spence the bills which they held
 ' of Robertson and Stein, which formed part of the £8000, yet
 ' this was done merely for the purpose of drawing the dividend
 ' from Robertson and Stein; and this being done, these bills were
 ' again restored to the bank, and credit is given in the accounts
 ' exhibited by the bank for the dividends so drawn: That when
 ' the four bills for £2000 each became due, Messrs. Spence had
 ' applied to their friends and to the bank for a renewal of the
 ' same for three months; and that it is instructed by Miss Mac-
 ' Kenzie's letter, written by her father's order, that he had also
 ' agreed to renew his obligation for three months; and Mr. Haig,
 ' Mr. Beatson, and Mr. John Spence having also assented to a
 ' renewal of their obligation, new bills upon their part were dis-
 ' counted; but Mr. M'Kenzie having died after the bill had been
 ' sent to him to be signed, his bill was not renewed, but the for-
 ' mer bill was protested, and duly intimated to his representa-
 ' tives: That, in these circumstances, the renewal of the other
 ' three bills, and Mr. M'Kenzie having previously assented to a
 ' renewal, cannot entitle his representatives to be relieved of the
 ' payment of his bill: That the intimation to his representatives
 ' of the dishonour of the bill, upon which Mr. M'Kenzie stood
 ' bound, put it in their power to have brought the matter to a
 ' close, and to have insisted that the bank should immediately
 ' close the account, and receive their proportion of the loss, cor-
 ' responding to Mr. M'Kenzie's obligation of £2000, but so as
 ' not to exceed that sum: That nothing has been stated upon
 ' the part of the defenders, to show that the bank had attempted
 ' to give any of the obligants the least preference over the rest;
 ' and as it is not disputed that the balance due to the bank still
 ' greatly exceeds the sum of £2000 contained in the promissory
 ' note indorsed by Mr. M'Kenzie, after giving credit for all the
 ' sums which they have been enabled to recover from the other
 ' obligants, decerns against the defenders, as Mr. M'Kenzie's re-
 ' presentatives, for payment of the sum contained in the said pro-
 ' missory note, with interest thereon since the same became due.'
 To this interlocutor the Court adhered on the 4th of July and
 28th of November 1816, by refusing petitions by both parties,
 without answers.*

Mutual appeals having been entered, the House of Lords pro-
 nounced this interlocutor: ' The Lords find that the Governor

* Not reported.

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‘ and Company of the Bank of Scotland having accepted the
‘ promissory note of James and George Spence to John Spence,
‘ and indorsed by him and Charles Hunt, in substitution for the
‘ balance due on the bills in the proceedings mentioned, drawn
‘ by James and George Spence on, and accepted by Robertson
‘ and Stein, are not entitled to make any demand against the
‘ estate of John M’Kenzie, deceased, upon the indorsement of the
‘ said John M’Kenzie on the promissory note of James and
‘ George Spence, dated the 1st December 1810, in the proceed-
‘ ings mentioned, in respect of the said bills drawn by James and
‘ George Spence on, and accepted by Robertson and Stein: And
‘ the Lords further find, that, under the circumstances of this
‘ case, the Governor and Company are entitled to demand against
‘ the estate of the said John M’Kenzie, on the said promissory
‘ note of the 1st December 1810, one fourth part only of the
‘ balance which shall appear to be due to the said Governor and
‘ Company from the said James and George Spence, in respect
‘ of the several bills drawn by the said James and George Spence
‘ on, and accepted by David Paterson and Todd and Company, in
‘ the proceedings mentioned, after giving credit for all the sums
‘ of money received by the said Governor and Company, or
‘ which might have been received by them from all or any of the
‘ parties to such bills respectively, or their respective estates, to-
‘ wards discharge of the debts due to the said Governor and
‘ Company upon such bills: And it is therefore ordered and ad-
‘ judged, that the several interlocutors complained of in the said
‘ original appeal, so far as they are inconsistent with these find-
‘ ings, be reversed: And it is further ordered, that the cause be
‘ remitted back to the Court of Session, to ascertain the balance
‘ due from the estate of the said John M’Kenzie to the said Go-
‘ vernor and Company, according to such findings: And the
‘ Lords further find, that upon payment of such fourth part of
‘ such balance, the said Governor and Company are bound to
‘ answer to the estate of the said John M’Kenzie one fourth part
‘ of any future dividends which, after the adjustment of the said
‘ account between the said Governor and Company and the estate
‘ of the said John M’Kenzie, according to the findings foresaid,
‘ may become payable to the said Governor and Company from
‘ the several parties to the said bills drawn by James and George
‘ Spence on, and accepted by David Paterson and Todd and Com-
‘ pany, in respect of such bills respectively: And it is further
‘ ordered and adjudged, that the said cross appeal be dismissed,
‘ and that the said interlocutors, so far as they are therein com-
‘ plained of, be affirmed.’

June 13. 1821. *Respondent's Authorities.*—(1.)—3. Ersk. 2. 31 ;—(2.)—3. Ersk. 3. 66 ; 1. Bank. 23. 44.

SPOTTISWOODE and ROBERTSON,—J. CHALMER,—Solicitors.
(*Ap. Ca. No. 26.*)

No. 14. A. WALLACE, for the Glasgow Glass-Work Company, Appellant.
—*Leach—Cunninghame.*
J. GEDDES, Respondent.—*Warren—Forsyth.*

Interest—Expenses.—Held,—1.—(reversing the judgment of the Court of Session,) That interest on a salary, of the amount of which there was no evidence, was not due prior to constitution by decree ; and,—2.—That expenses, in the circumstances, were not due to either party.

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—
1st DIVISION.
Lord Craig.

IN 1795 Geddes brought an action against the Glasgow Glass-work Company, alleging that he had been employed by them as their manager at a salary of £275 per annum, besides being entitled to a share as a partner ; that they had failed to pay him his salary, except certain small sums which he had received for his subsistence, and concluding against them for £1790, being the arrears which were due to him. The case then resolved into a count and reckoning, and only two questions of any general importance arose,—the first relating to a claim of interest by Geddes, and the other to the expenses of process. The Lord Ordinary, on the 13th of November 1798, after finding that no specific sum of salary had been agreed upon, found Geddes entitled to £120 per annum. This interlocutor was recalled by the Inner-House on the 13th of December 1799, by whom it was fixed at £226. 18s. 5½d. per annum ; and by a subsequent interlocutor of the 2d of June 1801, they found Wallace ‘ liable in the full expense ‘ of extract,’ without mentioning any other expenses. These judgments were affirmed simpliciter by the House of Lords on the 26th of February 1805, without any allusion to costs. The case then returned to the Court of Session, to make up a state of accounts between the parties. On the 13th of May 1806, the Lord Ordinary found ‘ that an interest account must be stated ‘ between the parties, giving each of them interest on the sums ‘ they shall appear to be in advance.’ Thereafter, on the 3d of March 1808, his Lordship, on advising the report of an accountant, and objections by Geddes, found ‘ that interest must be ‘ stated on the salary due to Mr. Geddes, at the rate of 5 per ‘ cent., from the end of each year.’ This interlocutor was ad-