No. 41. HUGH ROBERT DUFF, Esq. Appellant.—*A. Connel—J. Tait.*

JAMES GRANT, Esq. Respondent.—*Mackenzie—R. Grant.*

June 9. 1824.

2D DIVISION. Lord Pitmilly.

THIS was a question, whether a small piece of ground, called the Kilnhead or Kilnlead, belonged to the appellant or the respondent, the decision of which depended upon the terms of their titles. Duff having brought an action for having it found that it belonged to him, the Lord Ordinary assoilzied Grant, and to this judgment the Court adhered on the 21st June 1822.* Duff then entered an appeal; but the House of Lords 'ordered 'and adjudged, that the appeal be dismissed, and the interlocu-'tors complained of affirmed, with L. 150 costs.'

J. CHALMER—SPOTTISWOODE and ROBERTSON,—Solicitors.

(Ap. Ca. No. 54.)

No. 42. DAVID GORDON, Appellant.—*Solicitor-General Wetherell—Shadwell.*

WILLIAM HUGHES, and WILLIAM M'MURDO DUNBAR, Respondents.—*Hart—Pemberton.*

Appropriation—Repetition.—A debtor having ordered a Company to hold funds, to be remitted to them for behoof of his creditor, and the Company having agreed to do so by a letter to the creditor; and money having been remitted to them, but they having thereafter per incuriam paid it to the debtor; and after consulting a law adviser, having paid it a second time to the creditor;—Held, (reversing the judgment of the Court of Session), That the Company was not entitled to repetition from the creditor.

June 11. 1824.

2D DIVISION. Late Lord Newton, and Lord Bannatyne.

MAXWELL HYSLOP resided, for some time prior to 1805, with his brother-in-law, David Gordon, the appellant, who was settled as a merchant in the city of New York, and became indebted to him for advances, on his individual account, to the extent of about L. 500. Having formed a partnership with his brother, Wellwood Hyslop, who was a merchant in Jamaica, to which place Maxwell intended to proceed; and having right to certain funds, forming his share of the succession of his father, who had died in Scotland, he proposed, before his departure from

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* See 1. Shaw and Ballantine, No. 565.

New York, to give the appellant right to these funds in liquidation of his claims against him. With this view he executed a power of attorney in favour of Sir Alexander Gordon, the father of the appellant, residing in Dumfries-shire, and Mr Samuel Clark, of Dumfries, authorizing them to uplift the amount, and remit it to Messrs Rathbone, Hughes and Duncan, merchants in Liverpool. Thereafter, on the 30th of December 1805, Maxwell Hyslop addressed this letter to that Company:—'New York, 30th December 1805. Having a few days since apprised you that I had 'ordered my attorney in Scotland to place in your hands whatever money he may receive on my account from the estate of my deceased father, I have now to request, that you will honour the 'bills of my brother-in-law, Mr David Gordon of this place, to the 'amount that may be at my credit with you from the above source.' This letter he delivered to the appellant, and at the same time gave him a letter addressed to himself, in which he acknowledged the amount of the debt, and stated, that 'I have given a 'letter to Messrs Rathbone, Hughes and Duncan, of Liverpool, authorizing them to honour your bills to the amount of 'whatever property they may receive from Scotland on my account, by way of collateral security, or a convenience to you.' The appellant, on the 28th of January 1806, transmitted the letter of Maxwell Hyslop to Rathbone, Hughes and Duncan, with one from himself in these terms:—'Enclosed I hand you a letter 'from my wife's brother, requesting you to hold any money that 'may be paid into your hands by his attorney to my order. The 'expected funds are to arise from his share of his deceased 'father's property, and which, with my wife's and his share, are 'both directed to be paid into your hands. It is uncertain when 'these funds may be divided, but we hope in the course of this 'year; and we have to request you will give us the earliest notice 'of their receipt.' In answer, that Company wrote to the appellant on the 21st of March 1806, that 'We have been favoured 'with your letter of 28th January, covering one from Maxwell Hyslop, instructing us to account with you for such 'monies as we may receive from his attorney in Scotland on his 'account. Also informing us, that you had ordered Mrs Gordon's proportion of her father's property to be lodged with us. 'We shall conform to the directions of our young friend, and 'give you the earliest intimation of the receipt of the money.' In the meanwhile they had corresponded with Mr Clark, who informed them that Maxwell Hyslop's share would perhaps amount to about L.1000.

June 11. 1824.

June 11. 1824. Maxwell and his brother having entered into partnership, under the firm of Maxwell Hyslop and Company, the appellant carried the debt to the debit of Maxwell Hyslop and Company, with whom he carried on commercial transactions to a considerable extent. Thereafter, Maxwell Hyslop, in April 1808, drew a bill upon Rathbone, Hughes and Duncan, for L.400, payable to Bogles and Company at sixty days; and at the same time addressed to them this letter:—'In consequence of the full ex-'pectation that L.500, or thereabout, will be placed in your 'hands on my account early next month, added to the proba-'bility of the present rate of exchange falling, I have been in-'duced to draw on you under this date, at sixty days' sight, in 'favour of Messrs Bogle and Company for L.400 sterling, 'which bill I hope will be regularly honoured. I have this day 'written to my friend Mr. Samuel Clark of Dumfries to the 'above effect, and I have no doubt, from the tenor of his last letter 'to me, that the needful will be forwarded in good season by 'him.' At the time when the bill arrived, funds had not been remitted to Rathbone, Hughes and Duncan; and on receiving his letter they wrote to Clark, that unless this was done immediately, they would be obliged to refuse acceptance of the bill. Clark then remitted funds, and, in consequence thereof, Rathbone, Hughes and Duncan accepted and paid the bill. On learning that this had been done, the appellant, who had returned to Britain, laid a statement of his case before a solicitor in Liverpool, who gave an opinion, that Rathbone, Hughes and Duncan, were bound to account to him for any funds remitted to them on behalf of Maxwell Hyslop, in so far as that person was indebted to him. On shewing this opinion to that Company, they consulted their own solicitor, and he having concurred in the opinion of the other solicitor, they paid the L.400 to the appellant, after receiving his affidavit as to the amount of the debt. They then wrote this letter to Hyslop:—'For some time 'back David Gordon has been applying to us to pay him the 'L.400 received from Samuel Clark, which we refused to do, 'informing him that we had already paid your draft on us to 'that amount. Not being satisfied with our answer, however, 'he came to Liverpool, and took the opinion of an attorney as 'to the liability of our house to pay the money remitted to us 'by your late father's executors, of which opinion he delivered 'us a copy, which was decisively against us. We then laid the 'whole circumstances of the case before our own attorney, who 'thought that your letter to us of 30th December 1805, trans-

'mitted by David Gordon, and our acceptance of your instruc- June 11. 1824.
'tions contained therein, by our letter to him dated 21st March
'1806, together with the credit which we thereupon gave him,
'was conclusive on us to account to him for the L.400 received,
'and amounted in substance to an acceptance in his favour to
'that extent on your behalf; and that your letter of 20th April
'1808, advising of your having drawn on us, written apparently
'from forgetfulness of your former directions, and previous en-
'gagements consequent thereon, would not annul the engage-
'ments we had entered into. After maturely reflecting on these
'considerations, we thought it advisable to pay David Gordon
'the sum of L.400, and accordingly paid him the same with
'interest, rather than incur the expense of a law-suit, which we
'saw was inevitable had we persisted in our refusal, and in which
'there was no prospect of a favourable issue. With respect to
'the payment of your bill, we can only repeat, that it was paid
'by one of the partners of our house during the absence of
'another, who had the business more immediately under his
'care, without recollecting the engagement we had before entered
'into on your behalf, and at your request, with David Gordon.
'We therefore trust you will see the propriety of accounting with
'us for the amount of the bill so paid under mistake, and the
'interest as at foot, which we request you to pay to our friends
'Messrs Hibberts, Taylor and Markland, of your place, who
'we have authorized to give you an acquittance.' D. Gordon's
'affidavit as to the facts is in their hands; but we are persuaded
'that it will not be necessary for them to commence any pro-
'ceedings at law relative to this business.'

Hyslop having refused to repay the money, the respondents, as representing Rathbone, Hughes and Company, brought an action both against him and the appellant, concluding that one or other of them should be ordained to repay to them the L.400.

In defence the appellant maintained, that as Hyslop was indebted to him, and the respondents had become bound to hold the funds which they might receive as appropriated to the payment of that debt, they had no right of relief against him. In the meanwhile, an action of accounting had been raised by Gordon against Maxwell Hyslop and Company, and after various proceedings, a remit was made to an accountant. On the question of repetition, Lord Newton at first appointed the respondents 'to confess or deny, whether or not, before making pay-
'ment to the defender Gordon of the sum mentioned in the libel,

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'it was in any shape notified to them that they ought not to do 'so, as his claim against Hyslop was otherwise paid.' This having been answered in the negative, his Lordship found, 'that the pursuers may be entitled to repetition of the sums pur-'sued for against one or other of the defenders; but in respect 'they undertook to pay that money to the defender Gordon, for 'repayment of sums due by Hyslop to him, they were not en-'titled to pay it to Hyslop till accounts are settled between him 'and Gordon;' and therefore sisted procedure till the report of the accountant should be lodged in the action between these parties. The respondents and Hyslop having represented, his Lordship, 'in respect Maxwell Hyslop had by a letter to the 'representers, transmitted to them by David Gordon, instructed 'them to pay such money as should be remitted to them out of 'the proceeds of his father's succession, to the said David Gor-'don, they were not at liberty to pay the said sum to Hyslop 'without Gordon's consent; and in respect that Hyslop had 'countermanded the order to pay the money to Gordon, they 'were not entitled to pay the money to him, unless he should 'shew evidence that Hyslop was indebted to him to that amount; 'and as, notwithstanding thereof, they paid the money both to 'Hyslop and Gordon, adhered to the former interlocutor, which 'finds in substance, that they are not entitled to a decreet either 'against Hyslop or Gordon, till it shall be ascertained how 'accounts stand between them; and refused the desire of the 'representation.' Thereafter, judgment having been pronounced in the process of count and reckoning, finding a balance due to the appellant of upwards of 20,000 dollars; and the action of repetition having come before Lord Bannatyne, and been reported to the Court, Hyslop then maintained, that no liability could attach to him, because the appellant had discharged his liability by carrying his individual debt to the debit of Maxwell Hyslop and Company, and had thereby adopted that Company as his debtor; and that, besides, the remittance had been made in order to meet the bill with the knowledge of the appellant's father, who acted not only as attorney for Hyslop, but also in that capacity for the appellant.

To this it was answered by the appellant, that there never was any intention to discharge the individual liability of Hyslop; that besides, final interlocutors had been pronounced, fixing the principle, that if a debt were found to be due by Hyslop and Company to the appellant, the respondents could have no claim

against him; and that the appellant's father never had discharged, nor could he discharge, the claim against the respondents. June 11. 1824.

The Court sustained the defences for Maxwell Hyslop, and assoilzied him; but repelled the defences urged by the appellant, and decerned against him in terms of the libel, 'reserving to the 'said David Gordon all claims of relief competent to him against 'the other defender Maxwell Hyslop, and to the said Maxwell 'Hyslop his defences, as accords.' And to this judgment their Lordships adhered on the 20th of February 1823.*

The appellant then entered an appeal, (in which no appearance was made by Hyslop), and maintained,—

1. That the order by Maxwell Hyslop to Rathbone, Hughes, and Duncan, and their acceptance of that order, was completely binding upon both of these parties, and could not be rescinded by either of them; and especially could not be rescinded while a balance was due either from Maxwell Hyslop, or from him and his partner Wellwood Hyslop, to the appellant; so that upon the money in question coming into the hands of the respondents, an action at law at the suit of the appellant would have lain against them, to which no legal defence could have been made. The only remedy which the respondents could have had against the appellant, if the parties had been in England, would have been by bill in equity against the appellant and Mr Maxwell Hyslop, shewing that the appellant had no claim upon Maxwell Hyslop previous to the receipt of this money, and that he had been fully paid and satisfied; and therefore that he was liable to refund it. But the action in the Court of Session was a proceeding precisely of this nature; and it was therefore incumbent on the respondents to prove clearly that the appellant had been paid, which had not been done.

2. That by the final interlocutors of the Lord Ordinary, which were acquiesced in by all parties, it was established that the respondents were not entitled to recover back the money which they had paid to the appellant, unless, from the state of the accounts which were under discussion in the other action, it should be found that the appellant was thereby overpaid in respect of his demand upon Mr Hyslop, whereas the reverse had been found.

3. That it is a rule of law, that where, in consequence of a demand founded on an alleged right, money has been paid by a person who knows the facts upon which the demand is made,

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* See 1. Shaw and Dunlop, No. 206.

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the money cannot be recovered back even if the demand were unfounded; and as it appeared from the respondents' letter to Maxwell Hyslop, that they paid the appellant the L.400, with interest, deliberately and advisedly, and after having laid the whole circumstances of the case before their own attorney; they ought not to be at liberty to recover back from him what they so paid, even if they had not been by law compellable to pay the appellant.

To this it was answered,—

1. That the respondents having, under the circumstances before stated, paid the same sum twice, they are entitled to call it back from one of the parties; and it is clear, upon the facts disclosed in the proceedings, (whatever doubt might originally have been entertained upon the subject), that as this was a fund specially belonging to Mr Maxwell Hyslop, he was entitled to regulate the disposal of it as he saw fit; and the appellant was the party who improperly received that money. And,

2. That the appellant obtained payment of the sum in question upon a misrepresentation of a most important fact, viz. that the debt, to secure which the alleged assignment was made, was still subsisting; whereas, in fact, that account had been satisfied, and the money had been applied in payment of Maxwell Hyslop's draft, with the concurrence of Sir Alexander Gordon, the appellant's attorney.

The House of Lords 'ordered and adjudged, that the interlocutors, so far as complained of, be reversed.

Appellant's Authorities.—(3.)—Brisbane v. Dacres, 5. Taunt.; Gomery v. Bond, 3. Maule and Selwyn, 378.

A. GORDON—ADLINGTON, GREGORY and FAULKNER,—Solicitors.

(Ap. Ca. No. 56.)

No. 43.

ANDREW THOMSON, Esq. and Others, Appellants.—*Campbell—Miller.*

ROBERT FORRESTER, Esq. for the Bank of Scotland, Respondent.—*Cockburn—Walker.*

Cautioner—Bank Agent.—Cautioners having granted bond to the Bank of Scotland to the extent of L.10,000, for the due performance of the duties of joint agents by two