

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.

May 11. 1829.

Glennie had been hired by Cooper on his own behalf, and not for M'Phail. In support of the alleged sub-contract M'Phail produced missives between him and Cooper, bearing date the 18th October 1820; but Glennie asserted, that these had been concocted subsequent to the bankruptcy of Cooper. He denied that Cooper was a sub-contractor, or, (if he was so), that this had been made known to him or the workmen; and he maintained, that having expended his labour on the road contracted for by M'Phail, he was entitled to payment from him of his wages, unless M'Phail could establish his allegation, that the pursuer had been hired by Cooper as sub-contractor. The parties having agreed to a remit to a judicial referee, to ascertain the facts on which they were at issue, the referee took evidence, and reported, 'that there was no sub-contract between M'Phail and Cooper known in the country, till the road was finished and Cooper had become insolvent; and that M'Phail had acted so as to induce a belief that he was in partnership with Cooper.' This report was afterwards superseded on alleged irregularities;* but the parties were held concluded on the proof taken by the referee. On advising it, the Lord Ordinary decerned in terms of the libel; and the Court, on the 16th June 1826, adhered.

Lord Balgray.—I take this to be a very plain case, and free from any difficulty whatever. It is just one of the common cases where a party contracts to finish a road in a certain way, and employs workmen to do the work under him. No doubt, it is a very common practice for the contractor, who is responsible for the due execution of the work, to enter into a sub-contract with some other person; and in questions between the contractor and the sub-contractor, regard must always be had to the terms and understanding on which they acted.

The case, however, is very different, when you come to consider the situation in which the workmen are placed who are employed to do the work; and I think, wherever there is a sub-contract, it should be distinctly explained to them what is the nature of the transaction between the other parties. It is said here, that there was a sub-contract; and a missive is referred to as proving this. Now, I don't say that this is to be thrown out of view in a question between M'Phail and Cooper. In arranging between themselves, this may be all very well, and Cooper may be bound to relieve M'Phail; but when you consider the

* Sec 3. Shaw and Dunlop, No. 368. p. 571.

May 11. 1829.

situation of the workmen, it appears to me that you must have evidence that this sub-contract was known to them to exist, and its nature explained to, and understood by them. Now, I can find no such evidence here. There have been a great number of witnesses examined on both sides, but I don't think they prove this knowledge. Indeed it is quite evident, that there was no such sub-contract as is now alleged; at least it is manifest that it was not known to exist.

Lord Craigie.—I view the case in a different light:—It appears to me that the difference between a sub-contractor and an overseer is very evident; and it is a difference much better understood and known by the labourers employed, than by us. I have no doubt about that at all. It may be quite true, that the precise terms of the contract were not settled between the contractor and the sub-contractor; but it is as clear as daylight, that Cooper contracted with the defender M'Phail, not to be an overseer, but as a sub-contractor; that the parties did contract from the beginning and throughout in these characters; that there was a bargain from the beginning, of the nature of a sub-contract, imperfect as it was, between these parties; and that Cooper did not stand in the situation of an overseer, but of a sub-contractor. As to these poor people not knowing of this,—they may be ignorant of many things; but as to their ignorance of the difference between an overseer and a sub-contractor, I really cannot suppose it possible;—they are good judges of what concerns their own interest. I think it is very plainly made-out, that they did know of the sub-contract, and therefore I am for altering the interlocutor.

Lord Gillies.—I confess that I am extremely puzzled with this case. I conceive that these two parties did enter into an agreement, by which the one was to give up a part of the contract to the other. I think that is quite plain; but, at the same time, I am quite satisfied that these missives are ex post facto operations. But although there may be, and I think was, an agreement between the two, the question just comes to be, Whether these poor men were aware of it, and relied for payment of their wages on Cooper alone, or on both him and M'Phail? And from the evidence I think they did not look to Cooper alone; I see nothing to prove that they did not consider both liable. Therefore I think the interlocutor right.

Lord President.—I am of the same opinion; and just on the grounds stated by Lord Gillies. In short, whatever might be the private agreement between the two, I think they are both liable.

May 11. 1829.

M'Phail appealed.

Appellant.—The summons is rested on the ground that Cooper was the appellant's overseer, and as such employed the respondent. But it is proved that Cooper was a sub-contractor; and as it is admitted that the respondent contracted with him, and not with the appellant, he cannot make any claim against the appellant.

Respondent.—It is proved that the appellant was the contractor for the road, and that the respondent was hired to work on that road; it is therefore irrelevant to say that Cooper was a sub-contractor, unless the knowledge of that fact be traced to the respondent. But this has not been done. On the contrary, it has been proved, that all the workmen regarded him as the appellant's overseer, acting for his behoof; and that, till Cooper became bankrupt, the alleged sub-contract was kept latent.

The House of Lords ordered, that the interlocutors complained of be affirmed.

SPOTTISWOODE and ROBERTSON—MONCREIFF, WEBSTER and THOMSON,—Solicitors.

No. 25. ARCHIBALD SPEIRS, and Others, Appellants and Respondents.

HOUSTON'S Executors, and OLIVER VILE, Houston's Assignee, Respondents and Appellants.

Cautioner—Indefinite Payment.—Where parties bound themselves to guarantee S. F. and Co. in reimbursement of all bills drawn by A. on, and accepted by them, for four years, and to see S. F. and Co. provided with funds to relieve these acceptances, before the acceptances fell due; and S. F. and Co. opened an account with A., debiting him with these acceptances, and crediting him with bills remitted by him; and at the end of the first year, S. F. and Co. desired him to draw in future on a Banking house, (of which the partners of S. F. and Co. were, with others, members), and the bills were accepted by the Bank; but no notice of this was given to the sureties; and before the lapse of the four years A. became bankrupt, indebted in a balance to S. F. and Co.;—Held, 1. (affirming the judgment of the Court of Session), That the sureties were not liable for the bills drawn on, and accepted by the Bank; and were therefore liberated from their obligation at the end of the first year; and, 2. (reversing the judgment), That although there was at the end of the first year a large balance on the account-current against A., yet as, by subsequent remittances made by him, it was extinguished, and the ultimate balance arose out of posterior transactions, the sureties were not liable for that ultimate balance.