

Saturday, February 7.

## FIRST DIVISION.

[Lord Adam, Ordinary.

LA COUR & WATSON v. HARDING AND ANOTHER (TRUSTEES ON JAMES MORTON & COMPANY'S SEQUESTERED ESTATE) AND OTHERS.

*Bill of Exchange—Non-onerosity—Process—Diligence—Where Writ of Drawers called for to be Used against Holder of a Bill.*

The acceptors of certain bills of exchange suspended a charge by the holders, on the ground that the bills were accommodation bills, and that the holders received them from the drawers knowing this, and without giving value. They further averred that the bills were used for the purpose of carrying on a gigantic series of frauds, in which the drawers and holders were equally participant. The holders pleaded that the non-onerosity of the bills could only be instructed by their writ or oath. Before answer as to this plea, diligence granted for the recovery (1) of all books, &c., of the holders, and (2) of all books, &c., of the drawers—this latter on the ground that it was impossible to tell, except from a comparison of both sets of books, whether the drawers' books might or might not be writ of the holders.

The complainers in this case were La Cour & Watson, merchants, Leith, and Lauritz La Cour and Anthony Watson, the individual partners of that firm, and the respondents were Robert Palmer Harding, accountant, London, and William Anderson, accountant, Glasgow, the trustees on the sequestered estate of James Morton & Co., merchants, Glasgow, and Maclay, Murray, & Spens, their law-agents. The complainers suspended a threatened charge upon three bills for £1314, 14s. 7d., £1266, 11s. 10d., and £1441, 3s. 9d., dated respectively 11th, 13th, and 18th September 1878, which were drawn by Matthew & Theilmann, merchants, Leith, and accepted by the complainers, and were payable in London three months after date, and alleged to be blank endorsed by Matthew & Theilmann.

The following were the averments of the complainers:—“(2) In or about 1865 the firm of William Hay, millers, Glasgow, were largely indebted to parties connected with the City of Glasgow Bank. In order to prevent the said firm stopping, and so injuring the credit of the said parties, an arrangement was entered into whereby Mr Theilmann, of Matthew & Theilmann, merchants, Glasgow, became a partner of said firm, and Mr Morton, the sole partner of James Morton & Co., arranged to advance the funds necessary for carrying on said firm. It was further arranged that these advances should be made through Matthew & Theilmann, and accordingly Mr Morton from time to time handed to Mr Matthew of Matthew & Theilmann, his brother-in-law, who resided with him, notes, drafts, and cheques to be by him handed to or disbursed for the said firm. Morton also furnished to the said firm, through Matthew & Theil-

appointment was well executed and the will entitled to probate in the country where the personal property is situate. It has been held that it is.” Reference is made by the learned authority to the case of *Tatnall v. Hankey*, 2 Moore's Privy Council Reports, 342. The main question which arose in that case in its technical aspect was, whether the Court of Probate had done rightly in refusing to consider whether a will executed at Naples according to the English form was to be admitted to probate as a valid appointment under an English will? The Judge in the Court of Probate held that he had no jurisdiction to consider or decide how far this Neapolitan will was effectual. Lord Brougham, however, held that the appointment was good, because the donee took, not by virtue of the appointment but by virtue of the trust of the deed containing the power, and that the law of the power itself must also be the law of the exercise of that power. The question, indeed, seems considered as set at rest in England by this authority. The question again arose for judgment in the case of *Crookenden v. Fuller*, 29 L.J., Prob. & Div. 1; and Sir Cresswell Cresswell, thinking that the case of *Tatnall v. Hankey* did not decide any point but the right of the Judge of Probate to consider and decide the validity of the will, disregarded the dicta of Lord Brougham in that case. But he retracted this opinion in the subsequent case of *Alexander*, 29 L.J., Prob. & Div. 93, having discovered that the judgment of the Privy Council in the case of *Tatnall v. Hankey* was to the effect that the validity of an appointment under a power did not depend on the domicile of the appointer. This case was followed in the case of *Hallyburton*, 1 L.R., Prob. & Div. 90, which related to the exercise of a power under an English will exercised in Scotland by a domiciled Scotchwoman according to the English form; Lord Penzance unwillingly but decidedly followed the authority of the previous case of *Alexander* and that of *Tatnall v. Hankey*, and sustained the appointment.

I have therefore no hesitation in giving effect to this holograph writing. It is not necessary to consider it as a will; it is enough that it is a probative writing in exercise of the power of appointment contained in the trust-deed, and executed during the lifetime of the appointer.

LORD ORMDALE and LORD GIFFORD concurred.

The Court therefore answered the first and second questions in the affirmative, and found it unnecessary to answer the third.

Counsel for First and Third Parties—Lord Advocate (Watson)—Macfarlane. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Second Parties—Kinnear—Mackintosh. Agents—Macandrew & Wright, W.S.

mann, large quantities of grain and flour. Matthew & Theilmann acted in these transactions as agents for James Morton & Co. In or about 1868 Mr Matthew, on the instigation of Mr Morton, formed a firm of Matthew, Buchanan, & Co., which was used for the purpose of carrying on fictitious financial transactions on a gigantic scale in connection with the City of Glasgow Bank; and Mr Morton and Mr Stronach, the manager of the said bank, were apprehensive that the stoppage of the Hays would affect Matthew, Buchanan, & Co. and Matthew & Theilmann, besides other parties, creditors of the Hays, who were largely in debt to the bank, and would lead to an exposure of the system of raising money adopted by Mr Morton and the said bank, and to their own failures. They therefore refused to allow the Hays to stop, and the system of advances was continued. The advances so made to William Hay, afterwards William Hay & Sons, gradually increased until in the spring of 1876 the books of Matthew & Theilmann showed a sum of about £225,000 at the debit of William Hay & Sons. William Hay & Sons were then hopelessly and irretrievably insolvent, but Mr Morton, from fear of the consequences to himself, refused to accede to their proposals to stop. (3) In order to enable William Hay & Sons to carry on, various meetings and communings took place in or about April and May 1876 betwixt James Morton, Thomas Matthew, and William Hay & Sons, and several written agreements, prepared by the law-agents of Mr Morton, who were also the law-agents of the whole other parties concerned, were entered into, whereby it was arranged that the business of William Hay & Sons should be carried on under the firm of William Hay, Sons, & Co., and that Mr Dalgleish, coal salesman, should become a partner as a nominee of Mr Morton, who furnished him with £15,000 to put into the business. This sum also passed through the hands of Matthew & Theilmann who on their part, agreed to cancel the debt of £225,000 nominally due them, but really due James Morton & Co. Mr Matthew cancelled this debt at the request and on the instructions of Mr Morton. A contract of copartnership was accordingly drawn up by Mr Morton's law agents, which bore that Mr Dalgleish was to share in the profits and losses of the said partnership, but at the same time a separate obligation of indemnity, signed by Mr Matthew, was given to Mr Dalgleish, under which he was guaranteed against all loss through his entering the copartnership. The business of William Hay, Sons, & Co. then went on as before under the control of Mr Morton, and supplied with funds and goods by him through Matthew & Theilmann. (4) In or about October 1876 Morton supplied William Hay, Sons, & Co. with a cargo of wheat *ex* a vessel called the 'Star of the North,' through Matthew & Theilmann, who drew upon William Hay, Sons, & Co. for amounts including the price thereof, and handed over the acceptances to Morton. In order to provide himself with funds for payment of the said cargo, and for other purposes, Morton directed Matthew to obtain from the complainers, with whom Matthew was on friendly terms, accommodation bills, on the pretext that Matthew & Theilmann required the money to pay for a cargo of wheat which they had bought at that price. Accordingly Matthew represented to the complainers that his firm had

purchased a cargo of wheat at the price of £12,000, to pay which they required a loan, and the complainers, on his undertaking to hold the said cargo and its proceeds for their behoof, accepted drafts drawn on them by Matthew & Theilmann for £12,000. They then received from Matthew a letter in the following terms:—

Glasgow, 6th Oct. 1876.

'Messrs La Cour & Watson, Leith,

'Dear Sirs—Referring to the bills for £12,000, due 6th January 1877, granted to our Leith house against wheat p. "Star of the North," we hereby undertake to hold the said wheat or the proceeds thereof for special application to the retiral of the above-mentioned bills—We are, yours truly,

MATTHEW & THEILMANN.'

The said bills bore on the face of them to be for value in wheat *ex* 'Star of the North,' being the cargo furnished to Messrs Hay as aforesaid; but the complainers did not purchase or receive any wheat *ex* that vessel, nor did they receive any value for the said bills. The said bills were accepted by the complainers solely for the accommodation of Matthew & Theilmann, and for that of Morton & Co. through them, and in reliance upon the statements made to them by Matthew; and the complainers aver that the said bills were obtained from them by Matthew & Theilmann as agents for, and authorised by James Morton & Co., and for Morton & Co.'s accommodation. The said bills were endorsed by Matthew & Theilmann to Morton a few days before the price of the cargo became payable to the London sellers without value, and were used by him as a means of raising money in order to supply the wants of William Hay, Sons, & Co., and for carrying on the other financial operations in which he was engaged. Morton thus received from Matthew & Theilmann both the said £12,000 of acceptances granted by the complainers and the acceptances of Messrs. Hay, which included the price of said cargo. The price of the said cargo also was £9000, and not £12,000 as represented by Mr Matthew. (5) The said £12,000 of accommodation bills accepted by the complainers and payable in London were discounted by Morton, and the proceeds retained by him. In December 1876 Matthew wrote to the complainer Mr Watson asking him to renew the bills to the extent of £9000, on the pretext that he would not get payment for more than £3,4000 of the price of the said cargo in January. The complainers, who had perfect confidence in Mr Matthew, consented to renew the bills to said extent, and thereafter from time to time renewed the bills down to March 1878, when the amount of the said renewals was reduced to £7484, 3s. 3d., the acceptances forming which were drawn out by Matthew & Theilmann at Morton's request, and were made of different dates. These acceptances fell due in May and June 1878, and were again renewed, the last renewals being in August and September 1878. The amount of these renewals was £7563, 16s. 5d., composed as follows:—

|  |       |    |    |
|--|-------|----|----|
| Bill dated 20th August, at 3 months' date, | £1477 | 2  | 8  |
| Do. 26th August, . . . . .                 | 500   | 0  | 0  |
| Do. 3d September, . . . . .                | 1564  | 3  | 7  |
| Do. 11th Do., . . . . .                    | 1314  | 14 | 7  |
| Do. 13th Do., . . . . .                    | 1266  | 11 | 10 |
| Do. 18th Do., . . . . .                    | 1441  | 3  | 9  |

The latter three bills are the bills upon which

the complainers are threatened to be charged. The said bills were handed by Matthew to Morton without value, and were in his hands undiscounted at the date of his stoppage in 1878. (6) The same course was followed with all the acceptances granted in these transactions by the complainers. They were drawn by Matthew & Theilmann, accepted by the complainers, and handed by Matthew to Morton without value, and discounted by him. No advice was sent to the complainers as to whether they were paid or not, and in point of fact Mr Morton arranged London credit for taking them up, and made no request for payment from the complainers. The said bills were treated by Matthew & Theilmann and by Morton as accommodation bills, and neither Matthew & Theilmann nor James Morton & Co. ever looked upon them as debts due by the complainers. Throughout the whole of the said transactions Matthew & Theilmann acted as the agents of, and under the instructions of, Morton, to assist him in raising money and financing. (7) Owing to the complication created by the stoppage of the City of Glasgow Bank the complainers were obliged to convene a meeting of their creditors, which was held at Glasgow on the 22d October 1878. At that meeting the complainers exhibited a state of their affairs, exhibiting a large surplus of assets over liabilities. They proposed to their creditors to pay 20s. per pound, provided time were given for the realisation of the assets, which in the then state of affairs could not have been realised but at a ruinous sacrifice. The creditors unanimously approved of and accepted the complainers' proposal, and did not even require them to grant a trust-deed. They, however, appointed a committee of inspection, which still continues to act. The respondents as trustees on James Morton & Co.'s estate acceded to the said arrangement along with the other creditors. An interim dividend of 5s. per £ has already been made, but the committee are not yet in a position to sanction any further declaration of dividend. (8) The said bills have not been duly protested, and no notice of dishonour was given by the said James Morton to the complainers, although he well knew that the said bills were accommodation bills."

The respondents, *inter alia*, averred that—“(2) Messrs James Morton & Company had for a considerable period prior to their bankruptcy made advances to Messrs Matthew & Theilmann, merchants, Glasgow. They received from Messrs Matthew & Theilmann various acceptances of the complainers Messrs La Cour & Watson, partly to cover advances already made to Messrs Matthew & Theilmann, and partly against advances made at the time when the bills were handed to them, and on the security of these bills. (3) The bills referred to in the note of suspension, and upon which the respondents propose to do diligence, were handed to Messrs James Morton & Company by Messrs Matthew & Theilmann against advances made upon them to their full amount. (4) For the bills in question Messrs James Morton & Company gave full value to Messrs Matthew & Theilmann, and they were holders of the bills for value at the time of their bankruptcy.”

The complainers pleaded, *inter alia*—“(1) The foresaid bills having been granted by the com-

plainers at the request of the said Matthew & Theilmann, acting for and authorised by James Morton & Co., without value, and being solely for the accommodation of the said James Morton & Co., the foresaid threatened charges, and the whole grounds and warrants thereof, should be suspended as prayed for.”

The respondents pleaded, *inter alia*—“2. The averments of the complainers as to want of value can only be instructed by writ or oath.”

This was a reclaiming-note against an interlocutor of the Lord Ordinary (ADAM) granting a diligence before answer as to the respondents' second plea (*supra*) for the recovery of the documents called for in the following specification:—“(1) All ledgers, cash-books, account-books, bill-books, or other business or memorandum-books or memoranda kept by James Morton & Company, or by James Morton, between 1st October 1876 and 31st December 1878, that excerpts may be taken of all entries relating—1st, to the obtaining the bills mentioned on record, and renewals thereof; 2d, to the discounting and taking up of the same. (2) All ledgers, cash-books, account-books, bill-books, memorandum-books, or other business-books or memoranda kept by Matthew & Theilmann, or by Thomas Matthew, between 1st October 1876 and 31st December 1878, that excerpts may be taken of all entries relating—1st, to the obtaining the bills mentioned on record, and renewals thereof; 2d, to the handing the same to James Morton & Company or James Morton; 3d, to the discounting and taking up of the same. (3) All letters, telegrams, memoranda, or writings passing between Robert Hardie, merchant, Leith, a partner of the firm of Matthew & Theilmann, or any person on his behalf, and Matthew & Theilmann or Thomas Matthew, or any person on their or his behalf; 2d, between Matthew & Theilmann or Thomas Matthew, or any person on their or his behalf, and James Morton & Company or James Morton, or any person on their or his behalf, prior to the raising of the present suspension—(a) relating to the bills mentioned on record, or renewals thereof; (b) relating to the discounting and payment of the same; (c) showing or tending to show that Matthew & Theilmann and Thomas Matthew acted as agents for James Morton & Co. and James Morton. (4) All letters, telegrams, memoranda, or writings passing—1st, between Matthew & Theilmann or Thomas Matthew, or any person on their or his behalf, and La Cour & Watson, or any person on their behalf; 2d, between James Morton & Co. or James Morton, or any person on their or his behalf, and La Cour & Watson, or any person on their behalf, prior to the raising of this suspension,” in regard to the same matters. “(5) All letters, telegrams, memoranda, or writings passing between James Morton & Co. or James Morton, or any person on their or his behalf, and Messrs White & Shackston, bill-brokers, London, or other parties with or through whom said bills were discounted, prior to the raising of this suspension, relating to the discounting or taking up of the bills drawn by Matthew & Theilmann and accepted by La Cour & Watson, mentioned on record, and renewals thereof. (6) All ledgers, cash-books, account-books, bill-books, memorandum-books, or other business-books or memoranda kept by—1st,

Matthew & Theilmann or by Thomas Matthew; 2d, James Morton & Co. or James Morton; and 3d, William Hay & Sons and William Hay, Sons, & Co.—that excerpts may be taken of all entries subsequent to 1st January 1875 relating (a) to the averments set forth in statements 2 and 3; (b) to the purchase of the cargo of wheat *ex* 'Star of the North,' and the transference thereof to William Hay, Sons, & Co., and the payment therefor by William Hay, Sons, & Co.; (c) quantities of flour debited by James Morton & Co. to Matthew & Theilmann, and by Matthew & Theilmann to William Hay, Sons, & Co., in or about May 1876, amounting in price or value to £5020, 7s. and £1060, 16s. or thereby. (7) All letters, telegrams, memoranda, or writings passing subsequent to 1st January 1875—1st, between Matthew & Theilmann or Thomas Matthew, or any person on their or his behalf, and James Morton & Co. or James Morton, or any person on their or his behalf; 2d, between Matthew & Theilmann or Thomas Matthew, or any person on their or his behalf, and William Hay, William Hay & Sons, and William Hay, Sons, & Co., or any person on his or their behalf; 3d, between William Hay, William Hay & Sons, or William Hay, Sons, & Co., or any person on his or their behalf, and James Morton & Co. or James Morton, or any person on their or his behalf, relating to (a) the averments set forth in statements 2 and 3; to (b) the purchase of the cargo of wheat *ex* 'Star of the North,' and the transference thereof to William Hay, Sons, & Co., and payment therefor by William Hay, Sons, & Co. (8) The agreements between William Hay, Sons, & Co. and Matthew & Theilmann, or to which all or any of these firms or the partners thereof were parties, referred to in statement 3; and the contract of copartnership of the firm of William Hay, Sons, & Co., referred to in statement 3; the balance-sheets of William Hay & Sons made up in connection with the admission of Mr Dalgleish as a partner in William Hay, Sons, & Co., and the accountant's report thereon; and the obligation of indemnity by Mr Matthew in favour of Mr Dalgleish, referred to in statement 3. (9) All law agency accounts against William Hay, William Hay & Sons, William Hay, Sons, & Co., Matthew & Theilmann, or any partner of that firm, James Morton & Co. or James Morton or Dalgleish, having reference to the negotiation, execution, or implement of the documents referred to in the preceding article; and the books of the respondents Maclay, Murray, & Spens, that excerpts may be taken of all entries therein of such business. (10) All cheques, receipts, or other vouchers or other writings showing the payments made by James Morton & Co. or James Morton in taking up the bills mentioned on record, and the renewals thereof. (11) The letter-books and telegram-books kept by the several parties before mentioned, that copies may be taken therefrom of all letters or telegrams called for. (12) Failing principals, copies, extracts, drafts, or scrolls are called for."

The respondents reclaimed, and argued—The non-onerosity of bills of exchange could only be proved by the holder's writ or oath,—and in this case, as the holder was bankrupt, by his writ only,—unless there was an averment of fraud by the debtor and something suspicious in the answers

or writings or conduct of the holder. Here the latter element was wanting. But even granting that the writ of Morton might be recovered, it was premature to grant a diligence for the recovery of the books of the other parties mentioned in the specification, who *ex facie* had no such connection with Morton as to make their writ his.

Authorities—*Paterson v. Baxter*, Nov. 13, 1856, 19 D. 37; *Livingstone v. Dinwoodie*, June 28, 1860, 22 D. 1333.

The respondents (complainers) were not called on.

At advising—

LORD PRESIDENT—We are not called upon at present to determine whether the proof in this case ought to be limited to writ or oath; on the contrary, I am willing to assume that it will be so limited, and notwithstanding that assumption I think the complainers are entitled before answer to have a diligence granted to recover the documents mentioned in their specification.

It is impossible to deny that this is in many respects an anomalous case. The bills charged upon came into the hands of James Morton & Co., and they charge the complainers, who are the principal debtors in the bills. The complainers then bring this suspension, and their allegations open up a very wide field of inquiry. They show Morton as the master mind in carrying on a gigantic series of frauds, and they aver that the bills in question were granted by them for the accommodation of Matthew, or of Matthew & Theilmann, and that they came into the hands of Morton, he being perfectly aware of the purpose for which they had been granted. That being so, the Lord Ordinary has granted a diligence for the recovery of documents set forth in a very wide specification, and the ground upon which I suppose his Lordship has proceeded is that it is quite impossible to determine beforehand what is or is not the writ of Morton. Of course his own writing is his writ, but then it may turn out that the writ of Matthew & Theilmann is in law also the writ of Morton. Mr Jameson argued that it was at least premature to grant a diligence to recover the books of Matthew & Theilmann before determining that they were the writ of Morton, and that it could be discovered only by an investigation of Morton's books whether any other books than those which bear to be his are his writ. But it may be impossible to discover, except from an examination of both sets of books, that the books of Matthew & Theilmann are truly the writ of Morton. No doubt this may throw on the Court or the Lord Ordinary a very delicate duty. The inquiry may lead to nothing, but it may also lead to the complainers' plea being sustained, entitling them to a complete proof of all that they have averred. I think therefore that we should adopt the course which the Lord Ordinary has chosen, and adhere to his interlocutor.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court adhered.

Counsel for Complainers (Respondents)—Asher—Thorburn. Agents—Boyd, Macdonald, & Co., S.S.C.

Counsel for Reclaimers—Kinnear—Jameson. Agents—J. & J. Ross, W.S.