for example, the making of a road or an embankment. I do not say that is the case here, but it shows that in certain cases local improvements may be made which will have a very wide effect. It is very hard if, where that part of the estate on which the improvement is made is sold, the heir has no rights under the statute against the other heirs, and yet if the Lord Ordinary is right I am afraid we should have to go that length; that consideration renders me doubtful of the soundness of the principle. To my mind the safest way of dealing with this Act of Parliament is to adhere reverently to it. The heir here has made improvements that put him in a position to assert certain rights, and I cannot see that though he has sold a part of the estate there is either justice or equity in relieving the succeeding heirs from that claim—for if the improvements were judicious, as we must assume them to have been—they having passed through the ordeal to which all such cases are subjected before they are allowed—does it not follow as matter of course that the value of the land was thereby enhanced, and consequently that the lands sold for a higher price than they would otherwise have done. The fund realised by the sale was thereby enlarged, and that fund is the property of the heirs of entail; therefore the whole body of them was benefited by the enhanced price. According to the letter and spirit of the statute, I am therefore of opinion that the heir in possession is entitled to be repaid for these improvements.

The other part of the Lord Ordinary's note relates to the payment of certain meliorations paid to tenants due to them under their leases. The question is, whether these are not of the nature of entailer's debts? The state of the facts was not very clearly brought out either in the petition or in Court, and we requested counsel to furnish further information. A minute was put in by the petitioner in which it is stated that certain of these meliorations were granted under leases granted by James Forbes of Seaton, the father and predecessor of the entailer, Lady James Hay, in the estate of Seaton, and from whom she acquired the same as heiress-at-law. The remainder of the payments were made under obligations in leases granted by Lord James Hay, the husband of the entailer. He had no written commission or authority from his wife, but during the whole period of her possession he administered it as if he were owner, and any obligations undertaken by him were invariably fulfilled by her. The leases having expired, the tenants were by their leases entitled to be repaid money expended upon their farms. Assuming that Lord James Hay was entitled to bind his wife in making leases, it is clear that Lady James Hay was debtor as regards leases made both by her father and her husband, and if so it is difficult to say that these meliorations were not entailer's debts. They were obligations by which she was personally bound, and for which her estate had she held it in fee-simple, would have been liable. But when they are upon an entailed estate, that is just the position in which entailer's debts always are. Creditors might have attached the estate, and therefore the heir of entail was entitled to pay these debts so as to free the estate from the burden. Apart from the fact that these leases were granted by Lord James Hay without express consent from Lady James Hay, I think they must be allowed. As regards the authority of Lord James Hay, there might be a nice question, but I cannot help thinking that, as he and his wife were living together, and he was managing the estate, and possession followed the leases made by him, the authority implied is sufficient to come in place of an express mandate from the wife. I am therefore for recalling the Lord Ordinary's interlocutor.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court therefore recalled the Lord Ordinary's interlocutor, and remitted to his Lordship "to allow the two items of expenditure, amounting respectively to £759, 5s. 8½d and £1,211, 11s. 0½d.; to allow the petition to be amended, if necessary, so as to embrace more clearly the said item of £759, 5s. 3½d.; and to proceed further as shall be just."

Counsel for Petitioner (Reclaimer)—Balfour—Keir. Agents—Webster, Will, & Ritchie, S.S.C.

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*Friday June 27.*

## FIRST DIVISION.

[Lord Curriehill, Ordinary.

## STEELE AND OTHERS (WALKER'S TRUSTEES) *v.* M'KINLAY.

(Before Seven Judges)

*Bills—Acceptance—Collateral Obligation—Mercantile Law Amendment (Scotland) Act* 1856 (19 *and* 20 *Vict. cap.* 60) *sec.* 11—*Bills of Exchange Act* 1878 (41 *Vict. c.* 13), *sec.* 1—*Where a Person who was not Addressee Endorsed a Bill.*

The Bills of Exchange Act 1878 provided that "Whereas by the Mercantile Law Amendment Act 1856 and the Mercantile Law Amendment Act (Scotland) 1856 it is enacted that no acceptance of any bill of exchange, whether inland or foreign, made after 31st December 1856, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorised by him: And whereas doubts have arisen as to the true effect and intention of the said enactment, and as to whether the signature of the drawee alone can constitute a sufficient acceptance of the bill so as to satisfy the requirement of the said statute, and it is expedient that the meaning of the said enactment should be further declared: Be it therefore enacted . . . . as follows: 1. An acceptance of a bill of exchange is not and shall not be deemed to be insufficient under the provisions of the said statutes by reason only that such acceptance consists merely of the signature of the drawee written on such bill."

*Held* (*rev.* Lord Curriehill, Ordinary) (1) that under the Acts of 1856 and 1878 a mere signature, without other words signifying acceptance, was not sufficient to infer liability

as an acceptor, except in the case of a drawee; and (2) (*diss.* Lord Gifford and Lord Shand) that the position of collateral obligant for the acceptor of a bill was one unknown to the law of Scotland; and therefore that one who had signed his name on the back of a bill to which, so far as appeared from the bill, he was in no way a party, was not liable either as an acceptor or as cautioner for the acceptor.

The point in dispute in this case related to the following bill of exchange:—

[Stamp 10s.] *Due* 28*th May* 1875.

"£1000 stg. *Glasgow* 25*th May* 1874.
28/5/75.

"J. A. R., N.P.

"Twelve months after date pay to me or my order, at the National Bank of Scotland's Office, Queen Street, Glasgow, the sum of One thousand pounds sterling, value received.

"JOHN E. WALKER.
"W. & T. M'KINLAY.

"To Messrs Wm. & Thos. M'Kinlay,
wood merchants, Strabane.

[Bill is endorsed on back as under:—]
"JAMES M'KINLAY.
"JOHN E. WALKER.

"Received Payment,
"For the National Bank of Scotland,
"WM. HENDERSON, M."

The bill was accepted by Messrs W. & T. M'Kinlay in consideration of an advance of £1000 to them by Mr Walker, the drawer. The signature James M'Kinlay on the back of the bill was that of the father of William and Thomas M'Kinlay, who were the sole partners of the firm of Wm. & Thos. M'Kinlay. The firm became bankrupt, and the question related to James M'Kinlay's liability in respect of his signature. The pursuers, the trustees of the late Mr Walker, the drawer of the bill, averred—"(Cond. 2) The late Mr Walker and the now deceased James M'Kinlay, horse-dealer in Glasgow, had considerable business transactions, and had been on friendly terms for a good many years; and in consequence Mr Walker was induced by Mr M'Kinlay during the year 1874 to make considerable cash advances to two sons of the latter, namely William M'Kinlay and Thomas M'Kinlay, who carried on business as timber merchants, &c., at Strabane, in Ireland, under the firm of W. & T. M'Kinlay, and to whom he, Mr James M'Kinlay, had made over the business which he had previously carried on himself, or in conjunction with a son, under the firm of James M'Kinlay & Son. (Cond. 3) These advances amounted in all at the time of Mr Walker's death, namely, on 2d September 1875, to £3784, 13s. 4d., exclusive of interest, and were, to the extent of £3676, 3s. 6d. constituted by six acceptances of W. & T. M'Kinlay to Walker. (Cond. 4) One of these bills was dated 25th May 1874, and was drawn by Mr Walker upon, and accepted by, W. & T. M'Kinlay for £1000, and was payable twelve months after date. It was endorsed by James M'Kinlay. He so endorsed it as joint obligant with the acceptors and co-acceptor with them for payment of its contents." Walker's trustees accordingly brought this action against Alexander M'Kinlay, son and legal representative of the deceased James M'Kinlay, for payment of the £1000 contained in the bill, with interest from the date of its maturity. A counter-action was brought at the defender's instance against the pursuers, which dealt with matters of accounting between the parties; and the two processes were conjoined.

The defender pleaded, *inter alia*—"The document founded on constitutes no obligation against the late James M'Kinlay, and therefore constitutes none against the defender; and *separatim*, in any view, the pursuers are bound to establish for what purpose the name of James M'Kinlay was written on the back of the said document."

The Lord Ordinary (CURRIEHILL) after a proof found that the pursuers "George Steele and others, trustees of the late John Ewing Walker, are entitled to recover from the defender Alexander M'Kinlay, son of the deceased James M'Kinlay, the sum of £1000 sterling contained in the bill libelled, with interest at 5 per cent from 28th May 1875 till paid" &c.

"*Note.*—The first question . . . . is whether old Mr James M'Kinlay was really a party obligant upon this bill for £1000? Now, I think the history of the whole transaction shows that it was part of the original intention of the parties that he should be an obligant in the bill along with his sons, and that but for his agreeing to become an obligant Mr Walker would never have made the advance to W. & T. M'Kinlay. On the record it is stated by the defender that the money was originally intended to be directly advanced to them by James M'Kinlay himself. That perhaps is not quite accurate, but it has, I think, been proved that it was arranged that the loan to W. & T. M'Kinlay should be negociated through the father. He was anxious that his sons, who were setting up in business in Strabane, should have some capital to go on with; and he undertook to procure money for them in Scotland. He was a friend of old Mr Walker, and he seems to have had verbal communings with him on the matter, which resulted in this bill being drawn and handed by Walker to James M'Kinlay in order that he might procure the signatures of his sons, and adhibit his own signature as a party liable with them. The bill was sent by M'Kinlay to Ireland, accepted there by W. & T. M'Kinlay on 25th May 1874, and returned by them to their father, who handed it with his own signature to Mr Walker on 26th May 1874, the day after it had been signed by the sons in Ireland. I think therefore it is perfectly clear that this bill, apart from all questions under the Mercantile Law Amendment Act, is a bill well accepted by the drawees, and bearing upon it the signature of another party who is not one of the drawees, but who is proved to have undertaken to give his signature as obligant upon it. And all this was done before the bill was returned by James M'Kinlay to Mr Walker, the drawer. The money was thereafter duly remitted to W. & T. M'Kinlay.

"That the signature of a party to whom the bill is not addressed is effectual to bind him as acceptor, if it is clear that the signature was given with that object, is fixed by the case to which I referred in the course of the argument, viz., *Clark* v. *Blackstock*, 1816 (Holt 474), where it was held that a bill signed by a party to whom it is not addressed becomes his obligation if it is

proved that it was part of the original understanding that he should accept that bill, and that he is not a new obligant in the sense of the Stamp Acts, and therefore that the bill is not vitiated on the ground of non-compliance with the requirements of these statutes.

[*His Lordship here discussed the question whether James M'Kinlay's liability was transferred to his son, the defender.*]

"Therefore the only question which now remains on this branch of the case is, What is the effect of the Mercantile Law Amendment Act? The defender's counsel, Mr Scott, founded on the decision in the case of *Hindhaugh* in the Common Pleas in March last (L.R. 3 C.P. 136), and in the face of that decision it would have been very difficult indeed to hold that the Act should receive a different interpretation here from what the corresponding section of the English Act then received in the Court of Common Pleas. It was there held that there must be some words, in addition to signature of the drawee, indicating that the signature was placed there with the intention of accepting the bill—such as 'accepted' or some equivalent word being written before it. But the Amending Act 41 Vict. c. 13, which was passed a few weeks after, and in consequence of that decision, and which Mr Scott also very properly brought under my notice, provides that the acceptance to a bill of exchange is not and shall not be deemed insufficient by reason of such acceptance consisting only in the signature of the drawee written upon the bill—that is to say, that a bill accepted simply with the signature of the drawee is a well accepted bill, and if that is the case we are just brought back to the position in which the parties stood in the case of *Clark* v. *Blackstock* already referred to, viz., that a bill is well accepted where the drawee, or a party who is not the drawee, puts his name upon it under circumstances which are proved *aliunde* to show that he put his name there with the intention of being bound." . . . .

The defender reclaimed, and the case was, following upon a hearing before the First Division, afterwards appointed to be heard before Seven Judges.

Argued for the reclaimer—The Mercantile Law Amendment (Scotland) Act 1856, provided, sec. 11, that "no acceptance of any bill of exchange . . . . . shall be sufficient to bind or charge any person unless the same be in writing and signed by the acceptor or some person duly authorised by him." That meant that there must be both words of acceptance and also a signature—*Hindhaugh* v. *Blackey*, March 2, 1878, L.R., 3 Com. Pleas Div. 136. After *Hindhaugh* was decided the Bills of Exchange Act 1878 was passed, which enacted that "an acceptance of a bill of exchange is not and shall not be deemed to be insufficient under the provisions of the said statutes by reason only that such acceptance consists merely of the signature of the drawee written on such bill." But that enactment was in terms limited to the case of a drawee, and the distinction was a sound one in principle. For whereas there could be little doubt of the meaning and intention of the drawee's signature, it was totally different with other persons, who, as far as appeared, were entire strangers to the bill. In the one case, too, the person signing had fair warning as to what he was doing; in the other he had no such warning, and might consequently be entrapped into something he did not intend to do. Now, "drawee" was a term in Mercantile Law with a well recognised signification, and James M'Kinlay did not fall within the class of persons so designed. He might no doubt have been made a drawee in an irregular manner by his name being added to the address, but this had not been done, and that was enough. He was not a drawee, and consequently was not within the Act of 1878. As to the argument that although his signature did not constitute a valid acceptance he nevertheless was liable on the ground of a collateral undertaking or cautionary obligation, that was untenable, because section 6 of the Mercantile Law Amendment Act 1856 provided in regard to cautionary obligations exactly what section 11 provided in regard to acceptances, viz., that they "shall be in writing and shall be subscribed by the person undertaking such guarantee security or cautionary obligation." That had not been done in the present case. And see Bell's Comm. (M'Laren's ed.) i. 425, par. 6.

Argued for the respondents—(1) The first point was the construction of the Mercantile Law Amendment Act of 1856. That Act required three things—writing, writing on the bill, and a signature, but the signature alone satisfied these three requirements, and the case of *Hindhaugh* was wrongly decided. *Hindhaugh* was the decision of a foreign Court, by two judges, and after twenty years, during which the question had never been raised. That case therefore was not binding here. But if the Act of 1856 raised doubts, that of 1878 raised none. It was passed in six weeks to remedy the evil created by the case of *Hindhaugh*. It was not intended to limit the remedy to the case of an addressee. Drawee was intended to include any person sought to be charged. Besides, James M'Kinlay's name might have been added to the address, and he would thereby have become drawee in the strictest sense. But (2) it was not necessary to regard James M'Kinlay as an acceptor—the facts showed that he intended to bind himself. He was therefore collateral obligant, and if he was not an acceptor he was outside the statute. Collateral obligations were well recognised — Bell's Comm. 5th ed. i., 404 (M'L. 428), par. 8; *Jackson* v. *Hudson*, 2 Campbell. 477; *Don* v. *Watt*, May 26, 1812, F.C.; *Watters*, March 7, 1818, F.C.; *M'Dougal* v. *Foyer*, Feb. 13, 1810, F.C.

At advising—

Lord President—The question for decision is, Whether the Lord Ordinary is right in that part of his interlocutor in which he finds that the trustees of the late John Ewing Walker, the pursuers, are entitled to recover from the defender Alexander M'Kinlay, the son and representative of the deceased James M'Kinlay, the sum of £1000 contained in a bill dated May 25, 1874? That bill is drawn by Mr Walker, who is represented by the pursuers of this action. It is drawn upon Messrs W. & T. M'Kinlay, who were at its date timber merchants in Ireland, who appear to be the drawees. But on the back of the bill there appears the signature of James M'Kinlay, who is represented by the defender Alexander M'Kinlay, and the question which the Lord Ordinary has decided is, whether Mr James M'Kinlay in respect of his signature upon the

bill is debtor therein, and whether therefore his representatives are bound to pay the contents thereof to the representatives of the drawer.

Now, the ground upon which the action is laid is very distinctly stated in the condescendence—"One of these bills (this is the one in question) was dated 25th May 1874, and was drawn by Mr Walker upon, and accepted by, W. & T. M'Kinlay for £1000, and was payable 12 months after date. It was endorsed by James M'Kinlay. He so endorsed it as joint-obligant with the acceptors and co-acceptor with them for payment of its contents." The action therefore is laid against James M'Kinlay's representatives upon the ground that James M'Kinlay was a co-acceptor with W. & T. M'Kinlay, and so obligant with them and proper debtor in this bill. Now, the objection taken upon the part of the defender is that the acceptance is ineffectual and void by reason of the provision in the 11th section of the Mercantile Law (Scotland) Amendment Act, which provides that "no acceptance of any bill of Exchange, whether inland or foreign, made after the 31st day of December 1856, shall be sufficient to bind or charge any person unless the same be in writing on such bill."

Now, the defender's construction of that Act is, that to make a good acceptance there must not only be the signature of the acceptor, but there must be words of acceptance to which the signature is appended. The construction of the pursuers on the other hand is, that although it is provided that the acceptance must be written on the bill and signed by the acceptor, yet the signature of the acceptor alone sufficiently supplies two of the requisites of the statute. It is perhaps sufficient to say that the first of these constructions is the more natural construction of the statute, and that the latter construction would be very difficult to receive, because it is certainly not consistent with the letter of the enactment.

But in construing this statute we are bound to have in view the later statute, 41 Vict., cap. 13, which proceeds upon a recital of this clause (section 11 of the Mercantile Law Amendment (Scotland) Act 1856), and also upon a recital of the corresponding clause in the English Mercantile Law Amendment Act, and upon the further recital that doubts have arisen as to the true effect and intention of these enactments, and as to whether the signature of a drawee alone can constitute sufficient acceptance of a bill so as to satisfy the requirements of the statutes, and that it is expedient that their meaning should be further declared. Now, the doubts which are said to have arisen, and which we in point of fact know to have arisen, from the judgment in one of the Courts in England, were, whether the signature of the drawee alone, without words of acceptance, was sufficient to satisfy the requirements of the statute. The enactment is precisely adequate, and not more than adequate, to remove the doubt which is thus stated to have arisen. The later enactment is in these terms—"The acceptance of a bill of exchange is not and shall not be deemed to be insufficient under the provisions of said statutes by reason only that such acceptance consists merely of the signature of the drawee written on such bill." In other words, it appears to me that, taking the two statutes together, the Legislature has declared that in making the enactment in section 11 of the Mercantile Law Amendment (Scotland) Act 1856 it was not intended to cover the case of the drawee of a bill, but that the drawee was to be able, notwithstanding that Act, validly and sufficiently to accept a bill of exchange by affixing his signature to the bill without words signifying acceptance.

Now, it appears to me that in the later statute there is a great deal of light thrown on the construction of the prior statute, because it plainly expresses a distinction between the case of a drawee and any other person accepting a bill of exchange. Both in Scotland and in England bills may be accepted by persons who are not in the position of drawee—a familiar instance of that being an acceptor for honour. But there are many other cases in Scotland, to which I shall advert immediately, in which bills are accepted by persons who are not drawn upon. But I notice this case, which is common to the laws of both countries, because it affords the best illustration of the distinction drawn in this later statute between a person who is not a drawee and a person who is a drawee. Now, it must be borne in mind in the construction of this statute (I mean the Mercantile Law Amendment (Scotland) Act 1856) that it is a statute applicable to Scotland alone. It is quite true that there is in the English Mercantile Law Amendment Act a clause exactly in the same words, and therefore the intention of the Legislature was that this change in the law should be introduced both in England and in Scotland, because they considered that it would be a beneficial correction both to the English law and to the Scotch law, not by any means thereby inferring that the English and Scotch law were in this respect the same, but because they were of opinion that it would be expedient that this should be engrafted both upon the one system and upon the other, and because it would be an improvement on each of these systems. Then we must also keep in mind that this statute is said to be correctory of the common law, and therefore in construing it we must have special regard to what the common law of Scotland was at the time that this statute was passed. I shall have occasion bye and bye, in dealing with another branch of this case, to state more particularly what I conceive to have been the common law of Scotland in regard to the matter of acceptance of bills by persons not in the position of drawees at the date of the passing of this Act, but I must just mention in the meantime that there are at least three positions, according to the law of Scotland, in which a person who is not drawee may stand as an acceptor. There is, in the first place, a party accepting for honour who is a stranger to the bill altogether, and who interposes for a particular object and purpose, but who nevertheless renders himself liable as acceptor of the bill. He will have recourse against the party for whose honour he interposes, but as regards the drawer he will be just as liable as any other acceptor. Then, again, a person who is not drawn upon may accept, not for honour, but because he believes himself to be holder of the funds intended to be drawn upon. It is he, and not the drawee, who is in fact the debtor in the sum that was intended to be drawn upon, and therefore he accepts the bill in place of the drawee. That is a perfectly regular proceeding. But, again, a person, according to the law of Scotland, may accept and will make himself liable for a bill after the drawee has accepted. He may make himself

liable as an additional acceptor jointly and severally with the drawee. All these cases are within the section of the Mercantile Law Amendment Act with which we are dealing, and the provision of that statute which requires acceptance to be made in a particular form is quite applicable to every one of these cases, because the statute says that no acceptance shall be valid unless it is made in the particular way there described. But further, it is not immaterial to observe that the requisites of the Mercantile Law Amendment Act 1856 are made applicable not only to parties signing in their own names, but also to parties authorised by others to accept for them—in other words, acceptances per procuration. That is expressly provided for in the 11th section of the Act. But the statute 41 Vict. cap. 13 gives no effect to the signature of a procurator for a drawee or for anybody else. It must be the signature of the drawee, and not the signature of the person authorised by him, to fall within the declaration of that recent Act.

Now, the case that we are dealing with here is the case of a person who, according to the statement upon the record—and I think a perfectly accurate statement so far as the law is concerned—has accepted after the drawee has accepted, and has made himself, if he be liable at all, jointly and severally liable as co-acceptor with the drawee, and if that be so, it rather appears to me that it is very difficult to say that the Mercantile Law Amendment Act 1856 does not require in such a case that the signature shall not be there alone, but that it shall be accompanied by words expressing the purpose for which the signature is there placed, and I can hardly conceive a better illustration of the expediency of such enactments than the various conflicting views that have been presented in the case as to what James M'Kinlay meant by attaching his signature there. It seems to me, further, that the distinction which has been drawn by the later statute of the 41st of Victoria, between the case of a drawee and all other acceptors, is a very sound and wholesome distinction. If a person is addressed and is ordered or commanded to make payment of a sum of money in his hands to a certain person at a certain place on a certain day, and he puts his signature upon that instrument, there can be no doubt or hesitation as to what the meaning of that is—it signifies his intention to obey the command. But it is a very different thing indeed where a person who is not the drawee in the draft, and who has no demand made on him, puts his name upon a bill or a draft. It is susceptible of more than one construction. It may mean a great many things, whereas in the case of a drawee there can be no room for dubiety at all. And here, again, I I would just remark that the 41st of Victoria comes very prominently into view in not allowing a procurator to bind a drawee by his signature. It seems to me, therefore, that the Legislature intended to establish in the particular case of a drawee that the signature alone was to be sufficient, therefore clearly implying that in all other cases the Mercantile Law Amendment Act, as it has been understood, was to receive effect for the future.

But an argument was addressed to us to the effect that the term "drawee" in the Act 41st Victoria might be construed so as to include every person who accepts a draft—that a person by accepting a draft constitutes himself a drawee. Now, I have not been able to give any weight to that argument. It appears to me that there is probably no word in the legal language both of England and Scotland in connection with bills of exchange that has come to have so precise and technical a meaning as the word "drawee." It can mean but one thing—the person drawn upon. It is just as fixed in its meaning as the word "drawer." You may just as well say that a man endorsing a bill is a drawer, or that a man dealing with it some other way is a drawer. There can be but one drawer; and nobody can be a drawee except the person or persons to whom the note is addressed to make payment of the money. And it is not immaterial to observe that the term does not merely express the fact that the person called the drawee has been drawn upon, or addressed, or ordered, but it expresses also certain legal consequences. The drawee of a bill is not at liberty simply to treat the draft with contempt and to say he will have nothing to do with it, because if he has funds in his hands belonging to the drawer, and the draft is protested for non-acceptance, the drawee will be placed in the position of acceptor, and if he pays the amount in the draft to the payee he will be entitled to transfer the same to the debit of the drawer. But if, after the draft has been protested, he pays to the drawer, he will be liable in double payment. The position of drawee is well known and fixed in law, and therefore it is impossible to say that it can include any person other than the person who has been drawn upon.

We heard a great many suggestions in the course of the argument as to whether a man could not be made a drawee after the person to whom it was addressed had accepted the bill—or whether an additional drawee might not be added to the bill—and so forth. All these things may be done, and nothing is more common than to make the different parts of a bill of exchange in very irregular order. Sometimes the first writing on a stamped paper is the signature of the acceptor; that is beginning at the end. But the answer to all these suggestions is that nothing of that kind can be done after the bill is made and issued. Until it is made and issued anything may be done that is honest, but after it has been made and issued no addition can be made to the drawee or drawer, and no circumstances will warrant any change in the person drawing and the person drawn upon.

Now, I should have thought that was sufficient for the determination of the case, and it does dispose of the only case raised upon this record, viz., that James M'Kinlay was a co-acceptor with the addressees of the bill of exchange; but we have had in argument another view of the case presented which is not covered by the record at all, and that is that James M'Kinlay's undertaking by putting his name upon this bill was not an undertaking of an acceptor at all, but was what is called a collateral undertaking. Now, what is meant by a collateral undertaking? I know no sense in which that phrase can be used except a cautionary or guarantee obligation. An undertaking to see a bill paid is just a cautionary or guarantee obligation for the acceptor, and the question comes to be, whether according to our law a signature so appearing upon

a bill could have that effect. It may be so in England; there seems to be some authority for that; with that I have no concern whatever, because, as I have said before, I am dealing with a statute which is corrective of the common law of Scotland. The English Act may be construed in some way with reference to the common law of that country that may not entirely harmonise with the judgment which I have formed, but with this I have nothing to do. But as to the common law of Scotland as settled by decisions, Can a person putting his name upon a bill, as James M'Kinlay did here, be sued as a cautioner? —I use that phrase in the sense of a collateral obligation.

Now, undoubtedly at an early date in the history of our jurisprudence this matter was in great doubt, and there is a series of cases in Elchies' collection which show that the Courts hesitated long before they came to a conclusion upon the subject, and in one case in particular, which I think was mentioned in the course of the argument, the case of *Gibson* v. *Campbell*, at page 1406 of the Dictionary, of which a very instructive account will be found in Lord Elchies' notes, it appears that Gibson had signed a bill as a cautioner for the acceptor, and the judgment of the Court was that that person was liable to pay the bill. But such eminent Judges as Lords Drumore, Kilkerran, and Elchies all went on different grounds in repelling the objection to payment of the bill, so that down to that time the whole affair was in great doubt. But in the course of half a century after this the application of the mercantile law of the country had become more extended, and Judges too had become more conversant with mercantile questions. And then there arose in the year 1808 a very important case indeed, which I think for the first time settled conclusively the rule of the law upon this subject—I mean the case of *Sharp* v. *Harvey*, which will be found in Mor. App. *voce* Bill of Exchange, No 22. The bill in that case was drawn on Thomson as principal and Harvey as cautioner jointly and severally, and the Court held them jointly and severally liable to the drawer, and the principle of the law was thus authoritatively laid down. "A bill is a document of a nature distinct from that of a bond or contract, is introduced for different purposes, and is invested with different privileges. Its province is in law considered to be the transference, not the loan, of money. It does not therefore come under any of these transactions enumerated in the Act 1695, and to which that Act was intended to apply. With the nature of a bill a cautionary obligation is altogether incompatible, and in a question with the drawer or creditor there can be no cautioner; a party subscribing incurs a joint and several obligation, and is not entitled to the benefit of discussion." It appears to me that nothing can be clearer and more distinct than the rule there laid down; the law has remained as settled by that case ever since.

In the case which next occurred, viz., *Macdougal* v. *Foyer*, 13th Feb. 1810, F.C., it is quite clear that the Court proceeded upon the authority of *Sharp* v. *Harvey*. The argument of the pursuer was founded on the case of *Sharp* v. *Harvey*, and he pleaded that the decision there showed that *quoad* the creditor a cautionary obligation could not be constituted at all by a bill, otherwise it must be subject to the septennial prescription. He further argued that the acceptance in this case was totally different from a conditional one, for there the creditor's right depended upon an event which might or might not happen, whereas here there was no doubt about the matter. It was not conditional, merely cautionary, and would of course be of use in settling questions of relief among the co-obligants, but could have no effect upon the creditor in the bill. This case was followed by the case of *Don* v. *Watt*, 26th May 1812, F.C., and *Watters*, 7th March 1818, F.C., and I think therefore that Professor Bell was very well justified—in the passage in his Commentaries (p. 400, and 425 M'L's ed.) read in the course of the discussion—in stating the difference between the law of England and Scotland to be, that while in England a person not a drawee may sign a bill after it has been duly accepted, and will not thereby accept the liability of an acceptor, but will only be subject to a collateral undertaking, the law in Scotland is the reverse, and such a signature in Scotland will import acceptance of the bill jointly with the accepting drawee.

Now, that being so, I have no hesitation in refusing to give effect to this additional ground upon which the Lord Ordinary's interlocutor is sought to be supported, viz., that the signature imports an obligation upon James M'Kinlay different from that of an acceptor. But I must say in conclusion that that question is not raised in this record or in this action in any way whatever, and the only question we have to determine is, whether the acceptance of James M'Kinlay was a good and valid acceptance under the Mercantile Law Amendment Act as that Act stands expressed by the 41st of Victoria? I am of opinion that the Lord Ordinary's interlocutor ought to be altered.

Lord Justice-Clerk—The bill of exchange on the effect of which our opinion is desired bears to be dated on the 25th May 1874, to be drawn by John Ewing Walker, and accepted by W. & T. M'Kinlay, to whom it is addressed. It also bears on the back of it the name James M'Kinlay, and below it John E. Walker. The sum in the bill is £1000 stg., and it is drawn at twelve months date. It was discounted with the National Bank of Scotland, from whom it was retired when due.

James M'Kinlay, whose name appears on the back of the bill, died shortly after its date in 1874, and Walker, the drawer, died on the 2d September 1875. The present action has been raised by Walker's representatives for the amount of the bill against the representatives of James M'Kinlay, whose name appears on the back of it. It is said on the record for the pursuers that M'Kinlay so endorsed it as joint obligant with the acceptors and co-acceptor with them for payment of its contents. The question we have to answer is whether the signature on the back of the bill is a valid acceptance of it.

I should have considered this a question of considerable difficulty even if it had occurred prior to the Mercantile Law Amendment Act. The law on the subject was not in a satisfactory state in either country before that statute passed; and indeed the respective clauses in the two statutes of 1856 were intended to apply a remedy to the anomalies which existed in both systems. In

England it has been held that if a bill has been once accepted by the drawee or the person to whom it is addressed there cannot be a second valid acceptance by another; and accordingly, if one put his name on a bill, not being the drawee, and with the intention of not being responsible for the amount, he does not and cannot thereby become a acceptor, but undertakes a collateral obligation. In Scotland the rule was different, or at least the doctrine of collateral obligation has never been admitted as being dependent, as I think it is on the less stringent rule of evidence which prevailed and still prevails in England in regard to the proof of pecuniary obligations. It would be inconsistent with the rule of the law of Scotland, which agrees in this aspect, I imagine, with that of most continental nations in regard to the proof of such money obligations. Accordingly we find several cases, none of them to my mind very conclusive that such a signature amounts to a joint acceptance, and in particular the cases of *Don* and of *Watters* appear from the reports, and have always been considered as authorities for the proposition that such a signature is an acceptance and nothing else.

Mr Bell lays it down (b. 3, pt. 1, ch. 2—vol. i. M'L.'s ed. 425) that while in England a collateral undertaking may be constituted by a subscription as acceptor in circumstances which do not admit of proper acceptance, in Scotland a different view has been adopted, and, instead of a collateral undertaking, the subscription has been held to import a joint undertaking as acceptor of the bill or maker of the note. The learned author doubts the accuracy of either view, holding the rule in England to be inconsistent with the Stamp Laws, and in Scotland to be opposed both to the Stamp Laws and to mercantile usage. Three pages further on in his work Mr Bell says—"A collateral engagement may be undertaken by signing as indorser in circumstances which do not admit of a proper indorsement. Thus, no one can properly indorse who has no right to the bill. But the subscription as an indorser with the intention of giving credit to the bill is an effectual collateral undertaking."

I have referred to these authorities mainly for the purpose of showing that prior to the date of the Mercantile Law Amendment Act these questions were far from having been satisfactorily solved in the mind at least of the learned author.

It is unnecessary to inquire into this, as the practice in both countries has been altered by the two statutes which were passed both for England and Scotland in pursuance of the Report of the Mercantile Law Commission in 1856. The clause relating to this subject is clause 6 of the English, and clause 11 of the Scottish Act, and as far as relates to the present question both clauses are identical and are in the following terms—[*His Lordship here read the section of the Act*].

As far as this statute is concerned, the question would have been, whether the writing James M'Kinlay on the back of this bill be an acceptance in writing signed by the acceptor?

In the Court of Common Pleas Division in England it was decided in a very analogous case (*Hindhaugh*) that a signature, without words of acceptance written on the bill, was not sufficient to constitute a valid acceptance, and that there must also be upon the face of the bill some word or words indicating an intention on the part of the drawee to be bound by it as an acceptor. In that case the drawee had written his name across the bill without any words of acceptance, and Mr Justice Grove and Mr Justice Denman held that the requisites of the Act had not been complied with. Shortly after this judgment a bill of two clauses was introduced into Parliament and passed, to the effect that it should not render an acceptance invalid that it consisted only of the signature of the drawee.

I think it unnecessary in the present case to discuss the question whether the judgment of the Common Pleas Division in this case was sound or not. It stands as a deliberate decision of the Court, and in the general case I should have been inclined to say that the words in the Mercantile Law Amendment Act were properly construed by those learned judges; and finding a deliberate decision of one of the Superior Courts in England to this effect I should have been inclined to follow it. But the statute last referred to has so far altered the law as to render such a signature as that of the drawee in the case of *Hindhaugh* in question not necessarily invalid merely because there were no other words of acceptance. But it is very plain that the case of the drawee or the person drawn upon, to which alone the provisions of this last statute apply, is entirely different with reference to the provisions in the Mercantile Law Amendment Act to that of a third party signing or endorsing the bill. It may be reasonably assumed that when a demand or requisition is made by the written words of the bill on a certain individual to pay the amount entertained in it, the signature of him to whom the bill is addressed can impart nothing else than an acknowledgment of the obligation and an undertaking to fulfil it. But where the signature is that of a third party no way connected with the bill as far as its terms import, there is nothing to indicate that the signature is an acceptance of any demand or obligation, seeing that none was made and none rested upon him. I am therefore of opinion that under the Mercantile Law Amendment Act this signature of James M'Kinlay does not constitute a valid acceptance, and that the statute of 41st Victoria does not affect the law applicable to the present case. With us this distinction between the party to whom the bill is addressed and a third party is stronger than it is in England, as the draft operates an assignation of the funds in the hands of the drawee—an effect which notwithstanding the recommendation of the Mercantile Law Commission is still denied to it in England.

If this signature therefore be an acceptance, it is invalid under the Mercantile Law Amendment Act. But it has been pleaded, 1st, that it is a collateral obligation, and 2d, that it is an indorsation.

In regard to the first, it is sufficient to answer that if such a signature infer any obligation at all, it is, upon the authorities to which I have referred, joint acceptance and nothing else; and that it has been decided to be so by the authorities to which

As an indorsation the signature may be good we have been referred. Even were it otherwise, I should be disinclined to admit that the salutary provisions of the Mercantile Law Amendment Act could be defeated by dealing with an imperfect acceptance as a collateral obligation. But looking to the current of the decisions in Scotland, I think it unnecessary to pursue this further.

to render James M'Kinlay liable to subsequent holders, but I can see no principle upon which it can possibly make him liable to the drawer. The bill had been signed by the drawer before M'Kinlay indorsed it; and I do not think the drawer by indorsing it could render M'Kinlay liable to him.

I have hitherto considered this case in its purely abstract aspect, and on the assumption that it was established as a matter of fact that the intention of M'Kinlay when he adhibited his signature was to render himself liable as co-acceptor. If it be so, this was precisely the kind of evidence which the Mercantile Law Amendment Act was intended to exclude. The policy of the Mercantile Law Amendment Act was that the evidence of intention to accept should appear in plain words on the face of the bill itself, and should be derivable from no other source. Nor is the recent statute, which holds the address to the drawee coupled with his signature to be admissible evidence of the fact, inconsistent with this principle. We know very well—and the whole matter will be found admirably summarised at the end of the third volume of Mr Ross' Leading Cases, as well as in the last edition of Byles on Bills, in the author's commentary on the Mercantile Law Amendment Act, that the rules of evidence in England prior to that statute were of the loosest possible description. The policy of the Mercantile Law Amendment Act was to secure that the signature of persons to a bill of exchange should be adhibited to written words on the face of the bill itself which would convey to any man of ordinary intelligence the nature of the obligation so undertaken.

Lord Deas—I confess I have come to the same conclusion with your Lordship in the chair and the Lord Justice-Clerk very unwillingly, because looking to the evidence in this case I can have no doubt that James M'Kinlay put his name upon the back of that bill with the intention of becoming responsible for its contents.

The question is whether he adhibited that signature in the way which renders him legally so liable? I do not think it can be held that he put his name there as endorser; there was no endorsation to him, and I have been all along of opinion that he put his name there as an acceptor, and that he was either an acceptor or nothing. I could have had no doubt, apart from the Mercantile Law Amendment Act, and that subsequent statute by which it was amended, that by the law of Scotland James M'Kinlay's signature upon the back of the bill was an acceptance, and that he was bound by that acceptance—that is to say, he became liable for the principal. But although that would have been so, of course we cannot so decide because of these Acts of Parliament, as we are obliged to construe these Acts of Parliament as inferring that an acceptance can only be made in one way, and any further reference to the common law of Scotland becomes of very little or no moment.

There may have been a doubt—I think a more reasonable doubt than your Lordship in the chair considers it—whether by becoming an acceptor James M'Kinlay did not also become the drawee. The bill was not issued at that time, and therefore there was no incompetency on that ground. I think it is a possible view that he became an acceptor and thereby became an additional drawee, and if there was no drawee mentioned in it, I should be inclined to think that those who signed themselves as acceptors made themselves not only acceptors but also drawees. I think there is a possibility of that, but at the same time I do not think that gets us over the difficulty of his having his name there but not in terms of the statutes.

The English case of *Hindhaugh* v. *Blackey* decided that the clause of the Mercantile Law Amendment Act meant that there must not simply be a signature, but that there must be a writing over and above showing that the intention of the signature was to accept. That was a very narrow case upon the Mercantile Law Amendment Act, and there may perhaps be room for doubt whether it was rightly decided or not, if it had not been for the subsequent Act 41 Vict. cap. 13, which makes the provision with which we are now dealing, and which, I think, very much strengthens the construction put upon the Mercantile Law Amendment Act by that decision.

I entirely agree with the observations which have been made by both your Lordships—at all events by your Lordship in the chair—that if a man puts his name upon a bill as acceptor he is liable out and out, not as cautioner, but as full debtor for the sum in it. And if James M'Kinlay in putting his name on the back of the bill in question had put on the necessary words of acceptance there could have been no doubt that he would on the face of it have been liable. The difficulty otherwise remains. He has not accepted in the terms required by the Act, and although it is my desire to do justice between the parties, I feel compelled to say that the pursuer is barred by non-compliance with the statutes from succeeding in the action. I am also for altering the interlocutor of the Lord Ordinary.

Lord Ormidale—I concur in the opinions which have been delivered. But as the case is one of importance, and as the decision to be pronounced will have a very general application in regard to the liability of parties whose names appear upon bills of exchange, it is right that I should express for myself the precise grounds upon which I desire to rest my judgment.

By the interlocutor under which the argument has proceeded the only question we have to determine is that referred to in the first finding of the Lord Ordinary, viz., whether the pursuers, the testamentary trustees of the late John Ewing Walker, "are entitled to recover from the defender Alexander M'Kinlay, son of the deceased James M'Kinlay, the sum of £1000 contained in the bill libelled, with interest at the rate of 5 per centum per annum from the 28th of May 1875 till paid," &c.

This question has been discussed with reference to the bill alone, and also with reference to the bill taken in connection with extrinsic evidence. But in order to see what the ground of liability relied upon by the pursuer against the defenders as representing the late James M'Kinlay is, it is necessary to examine the record. Doing so, I find that in the pursuer's condescendence it is stated that the bill in question "was drawn by Mr Walker upon, and accepted by, W. & T. M'Kinlay for £1000, was endorsed by James

M'Kinlay, and that he so endorsed it as joint obligant with the acceptors, and co-acceptor with them for payment of its contents." And I also find that in answer to the defender's statement of facts the pursuers say that James M'Kinlay "by arrangement signed the bill as acceptor or joint obligant" with W. & T. M'Kinlay; and again the pursuers say that "Mr James M'Kinlay's name was put upon the bill as an acceptor or joint obligant by arrangement in the knowledge of all the circumstances."

Nothing therefore could be clearer than that according to these statements by the pursuers of their ground of action the late James M'Kinlay was liable for the contents of the bill, if liable at all, as an acceptor, or, in the words of the pursuers, "as joint obligant with the acceptors and co-acceptor with them." This, it was argued on the part of the pursuers, was established by the bill itself without looking beyond it, and at any rate by the bill taken in connection with the extrinsic evidence in the case as showing that James M'Kinlay came under a collateral obligation to pay the contents of the bill just as if he had been an acceptor. Unless the pursuers establish one or other of these propositions, I do not see how it is possible for them to prevail in the present action, for it cannot be supposed that they deliberately and advisedly stated a particular ground of liability, in order merely to mislead the defenders, while they truly intended to establish another and different ground altogether.

Now, in regard to the first of the propositions referred to, I am satisfied, without going back upon the law as it stood prior to the recent statutes, and the case of *Hindhaugh* v. *Blackey*, 2d March 1878 (L.R. 3 Com. Pleas Division 136), referred to by the Lord Ordinary, that it cannot be sustained. By the Mercantile Law Amendment (Scotland) Act of 1856 (19 and 20 Vict. cap. 60, sec. 11), and the case of *Hindhaugh*, which followed upon the corresponding English Act, it is impossible to hold that a party can be dealt with and made liable as an acceptor of a bill who has not, in addition to his signature written something on the bill indicative that he had accepted it and signed it as an acceptor. It was open, no doubt, to the pursuers to argue, and they did state, rather than argue, that the decision in the case of *Hindhaugh* was unsound, and ought not to be taken as a ruling precedent, but I can see no reason to doubt the soundness of that decision, and so long as it stands unaltered I think that it ought to be followed and given effect to in this Court. I need not remark that in regard to mercantile documents, such as bills of exchange, it is very desirable that the law should as far as possible be the same in all parts of the Kingdom.

Looking, then, at the bill in question itself, the late James M'Kinlay cannot be held to have been an acceptor of it, for not only is his name not where an acceptor usually adhibits his signature, but he has written nothing whatever on the bill to indicate that he signed it as an acceptor. And it is clear, I think, that the Act of 1878 (41 Vict. cap. 13), relating as it does exclusively to drawees of a bill, does not alter this state of matters, for the late James M'Kinlay was not and is nowhere said to have been a drawee of the bill. It is true that his name appears on the back of the bill, and in that sense he may be said to have been an endorser. But supposing it to be so, that cannot make him liable as an acceptor, for, independently of anything else, there is awanting, as has been already remarked, the additional writing on the bill required by the Act of 1856 to indicate that he had placed his signature on the back of the bill as an acceptor; and yet unless the pursuers can show that James M'Kinlay did sign or put his name on the bill as an acceptor they must, as it appears to me, be held to have entirely failed in the present action as laid, where the only ground of liability averred against him is that he put his name on the bill as an acceptor of it.

But it has been suggested that the late James M'Kinlay became liable for the contents of the bill as a new drawer and endorser, if not an acceptor, and this might in certain circumstances be so, having regard to the case of *Penny* v. *Innes*, 1 Compton, Meeson, and Roscoe, 439. But here the pursuers are endeavouring to establish, and must establish if they are to prevail at all, that James M'Kinlay was liable to the drawer John E. Walker, for it is he, or what is the same thing his testamentary trustees, who are suing the present action, not as endorsee but as drawer of the bill; and, as I have already shown, liability is averred against James M'Kinlay not as a drawer and endorser but as an acceptor. I do not see, therefore, how the case referred to gives any aid to the pursuers in the present case; and, besides, if James M'Kinlay was to be regarded as a new drawer of the bill, the objection of want of the requisite stamp would arise and be fatal to the pursuers, in conformity with the decision in the case of *Plymley* v. *Westley*, 2 Bingham's New Cases, 249, and that case was subsequent in date to that of *Penny* v. *Innes*. I refer in part to the opinion of Tindal, C.-J, in that case of *Plymley*, and the observations of Mr Justice Byles at p. 149 of the last addition of his work on Bills.

In regard to the only question which remains, whether, supposing the preceding considerations could be got over, the liability of James M'Kinlay can be maintained on the ground that he by placing his name where he did on the bill became a collateral obligant along with the acceptor for its contents, I am unable to see how this can be so. Even if there had been a separate written obligation by James M'Kinlay to the effect that he had endorsed the bill, or, in other words, signed his name on the back of it for the purpose of becoming liable for its contents as an acceptor, that would not satisfy section 11 of the Statute 19 and 20 Vict. cap. 60, which enacts that no acceptance of any bill of exchange, inland or foreign, "shall be sufficient to bind or charge any person unless the same be in writing on such bill." And at any rate no such separate written obligation, or anything like it, has either been produced or referred to. The only evidence in any way indicative of liability on the part of James M'Kinlay, so far as I can discover, is to be found in the parole testimony of William Black and the two Steeles. But the evidence, supposing it to be admissible at all, which I do not think it is, is not only very vague and inconclusive in itself, but at best merely the hearsay statements of Walker, the creditor in the bill. Taking it, however, as it is, and giving it the fullest weight that it is fairly susceptible of, the only reasonable inference that can, in my opinion, be deduced from it is, that the late James M'Kinlay, if he ever intended to become liable for the contents of the bill at all, did so merely as

cautioner or security for his sons, the acceptors; and if so, the objection at once arises to any such liability being enforced that by section 6 of the same statute it is enacted that all guarantees, securities, or cautionary obligations shall be in writing, and subscribed by the person undertaking such obligation, otherwise the same shall have no effect.

These are the grounds upon which, in my opinion, the first finding in the Lord Ordinary's interlocutor ought not to be adhered to.

Lord Mure—I concur, and mainly on the same grounds.

The question is, What is the effect of James M'Kinlay's signature? Now, apart from the Mercantile Law Amendment Act, the case of the pursuers seems to me to be well founded, because I think that it was well settled in the law of Scotland that a party so signing was liable as an acceptor. Mr Bell says—"In Scotland a different rule has been adopted, and instead of a collateral undertaking the subscription has been held to import a joint undertaking as acceptor of the bill or maker of the note."—(Bell's Comm. 400, M'L. 425.) And that view is adopted by later writers on the subject, and is supported by the cases to which your Lordship referred. I think it is quite plain that the ground of judgment in *Watters* and in *M'Dougal* v. *Foyer* was that the parties were liable as acceptors of the bill. In 1856, therefore, the claim of the pursuers would have been well founded; but this has been changed by the Act of 1856, which requires not only a signature but words of acceptance, and the only point is whether the Act of 41st Vict. obviated this difficulty. I am clearly of opinion that this later Act applies only to the person to whom the bill is addressed, and in these circumstances I concur in the opinion which your Lordships have expressed.

Lord Gifford—After the opinions now delivered it is impossible not to feel some diffidence in adopting an opposite view; but after the fullest consideration I am of opinion that the first finding in the Lord Ordinary's interlocutor of 17th June is right, and that the pursuers are entitled to recover from the defender the sum of £1000, being the amount contained in the bill sued on, with interest.

Owing to the death both of the late John E. Walker, by whom the bill in question was drawn, and of the late James M'Kinlay, whose signature is on the back thereof, the true circumstances in which the bill was made and signed are not ascertained with the precision and exactness which might have been desirable, but I am of opinion that it is sufficiently proved that the late James M'Kinlay wrote his name on the back of the bill with the intention of becoming bound to John E. Walker for the full amount thereof, along with his two sons William and Thomas M'Kinlay, the wood merchants in Strabane, the proper acceptors, for whose use the loan was wanted. I think it proved that John E. Walker accepted the signature of James M'Kinlay the father as an obligation for the full amount along with the obligation of the sons; that Walker advanced the money on the faith of the father's obligation; and that he would not have advanced the money had not the father undertaken an obligation to repay it, and in testimony of that obligation had signed his name on the back of the bill. I think all this is sufficiently proved, and therefore I take the case in exactly the same way as I would have done if the original parties had been alive, and as if they had admitted on oath—M'Kinlay, that he signed the bill on the back with the intention of becoming liable to Walker for the amount—and Walker, that he accepted the obligation as such, and on the faith thereof advanced the money to M'Kinlay's two sons. I think that this is the true state of the facts, and it seems to me that it is on this state of facts that the question of law arises. Accordingly, I understand that the majority of your Lordships take the legal question just as it would have arisen if the late James M'Kinlay and John Walker had been alive and had deponed as I have now supposed; and on this footing the hearing before seven Judges has proceeded.

The legal question then is—Does the signature of the late James M'Kinlay on the back of the bill constitute a valid and legally enforceable obligation binding him and his representatives to pay the amount of the bill to Walker or his representatives, William and Thomas M'Kinlay the proper acceptors having failed to retire it?—and I answer this question in the affirmative. I think the late Mr M'Kinlay was bound by the rules of strict law to make good the bill to Walker, as he undoubtedly was so bound by every rule of equity and justice. The pleas relied on by the defenders are strictly technical, and even if well founded in law they seem to me to be against the justice of the case.

The defence virtually comes to this, that the signature of the late James M'Kinlay upon the back of the bill must be regarded in law as an acceptance of the bill, or as the signature of an acceptor, and must be dealt with as such strictly and in accordance with the provisions of the Mercantile Law Amendment (Scotland) Act 1856 (19 and 20 Vict. c. 60), and of the recent declaratory Bills of Exchange Act 1878 (41 Vict. c. 13).

The Mercantile Law Amendment Act provides that no acceptance of any bill of exchange shall be sufficient to bind or charge any person unless the same be in writing on such bill and signed by the acceptor, or by some person duly authorised by him; and this statute has been interpreted by a decision of the Common Pleas Division in *Hindhaugh* v. *Blackey* to mean that besides the signature of the acceptor there must be some words of acceptance written on the bill, or part thereof, importing acceptance. This decision led to the declaratory Act of 1878 above referred to, which enacts that an acceptance of a bill of exchange shall not be deemed to be insufficient under the provisions of the Mercantile Amendment Acts by "reason only that such acceptance consists merely of the signature of the drawee written on such bill."

Now, the defenders contend that James M'Kinlay must be held to be an acceptor of the bill in the sense of the statutes, and his signature on the back of the bill must be held as his acceptance; but such acceptance, it is said, is void under the statutes for want of any word or words importing acceptance, which is an essential under the Mercantile Law Amendment Act, as explained in *Hindhaugh* v. *Blackey;* and then it is said that the declaratory provision in the Act of 1878 does not apply, be-

cause James M'Kinlay is not on the face of the bill made a "drawee." The argument is that it is only in the case of persons expressly made drawees that actual words of acceptance are dispensed with and mere signature made sufficient.

It appears to me that it is a sufficient answer to this whole defence to say that James M'Kinlay is not, in the technical sense of the statutes, an acceptor at all. He is an obligant on the bill, bound, it may be, to the drawer or holder as much as an acceptor would be, but he is not, either in the ordinary or the statutory sense of the word, an acceptor, and therefore the strict, and perhaps I may be permitted to say the technical, interpretation of the statute, the Mercantile Amendment Act, does not apply. I am willing to assume that the decision in *Hindhaugh* v. *Blackey* is a sound one, and correctly interprets the Mercantile Law Amendment Act, although perhaps this may be doubted, not only because it is merely a decision of two Judges, however eminent these Judges are, but because the subsequent statute of 1878, obviously referring to the judgment, merely recites that doubts have arisen as to the effect of the enactment in the Mercantile Law Amendment Act, and as to whether the signature of the drawee alone is a sufficient acceptance of a bill. But assuming the law to be well laid down in *Hindhaugh* v. *Blackey*, it applies, and can only apply, to the signature of a drawee—that is, of a person drawn upon—which when once affixed becomes the signature of an acceptor. It has and can have no relation whatever to the signature of endorsers or of other obligants, or of any persons (other than express drawees) who by signature may become obligants upon a bill. In the present case nothing is more certain than that James M'Kinlay was not on the face of the bill a drawee. It was not addressed to him, but only to his two sons in Strabane, and when he put his name upon the back of the bill he introduced his name for the first time upon the document which previously, and upon the face of it or upon the back of it, had no reference to him whatever. If, therefore, a person may become an obligant on a bill by signing it either on the face or on the back, and either with or without words of obligation, not being a drawee or acceptor, then neither the Mercantile Amendment Act nor the case of *Hindhaugh* have any reference to or bearing upon such an obligant.

Previous to the Mercantile Law Amendment Act I think it was quite fixed law, both in England and in Scotland, that a person by signing his name either on the back or on the face of a bill of exchange or of a promissory-note (for in this respect the law applicable to both seems the same) might become liable for the full amount if his signature was affixed *eo intuitu*, and for the purpose of being so bound, and he might become liable to third parties acquiring the bill for onerous causes whatever his intention in adhibiting his signature was. Thus in Scotland, in *Don* v. *Watt*, 26th May 1812, F.C., where a promissory-note was endorsed—that is, signed on the back by a person who was neither promissor nor promissee—such endorser was held liable for the full amount to the promissee, although it was pleaded that the endorsement was made simply to give the promissee credit at the bank; and in *Watters*, 7th March 1818, F.C., where a party endorsed a bill of exchange on which there was no previous endorsation, and of which he was not the drawer, he was held liable for the amount. It is true the report bears that he must be "regarded as an acceptor," but I think this means no more than that he became liable to the drawer just as much as if he had been an acceptor, especially as it appears that he had actually been one of the acceptors of a previous bill of which the bill sued on was a renewal. "To be regarded as an acceptor" seems to imply that the person is not strictly an acceptor, but that as in a question with an onerous holder he may be liable as an acceptor would be, but that as in a question with the proper and original acceptors his rights may be quite different, and as against them he may have full relief. In England the liability incurred by a stranger endorsing a bill or signing it, not being drawee, has also been recognised. In *Jackson* v. *Hudson*, 2 Campbell 477, Jackson drew a bill on Irving, and Irving accepted. Hudson, who was not a drawee, and whose name was not previously on the bill in any form, then wrote under Irving's acceptance the words "Accepted. Jos. Hudson." Lord Ellenborough held that this was not an acceptance although Hudson had written and signed the word "accepted," and that Hudson was not liable as an acceptor, but that he was liable as a collateral obligant. *Penny* v. *Innes*, 1834, 1 Cro. M. and R. 439, is an express authority that if a stranger to a bill, neither drawer nor drawee nor endorsee, signs his name on the back he is liable to the holder for the full sum. All the Judges held him as a new drawer, and liable as such to the endorsee, and they also held that no new stamp was necessary. In the present case I have no difficulty as to the Stamp Laws, for I think it clearly proved that it was part of the original arrangement that James M'Kinlay should be an obligant on the bill. It is laid down by all the institutional writers on bills that a valid obligation for the sum on the bill or note may be incurred even by a stranger to the instrument, and whose name does not appear on any part thereof, by putting his name on the back—if obligation was the real intention of the parties, and I think that this is a just and equitable law. I see no reason why the true intention of the parties should not be carried out by the judgment and diligence of the law.

It is to be observed that the present case is not one regarding the competency or use of summary diligence, warrant for which is obtained as a matter of course and *ex parte* by merely recording the bill and protest in the Register of Protests. It is an ordinary action of constitution, in which the pursuers seek to constitute their debt, and in which they may found upon and prove all relevant facts and circumstances creating the obligation. Had there been letters by the late James M'Kinlay acknowledging the liability, these would have been quite competent and admissible, and the Court is not fettered by any technical rules of pleading limiting the grounds of action, as when a plaintiff declares only on the bill itself against a defendant simply as acceptor. Every ground involving legal liability may be tried under the present summons.

If I am asked what is the precise character under which the late James M'Kinlay became liable to the late John E. Walker by signing his name on the back of the bill in the circumstances proved, I think the true answer is that he became liable as collateral obligant for and with his two

sons, who were then the sole and proper drawees, and the sole proper acceptors of the bill. There is surely nothing illegal in such an obligation, and nothing illegal in the mode in which it was undertaken. There is no statute against it, and the cases which I have already cited show that it is in accordance with usage and with judicial decision. Why should the late James M'Kinlay himself or his representatives escape the liability which he deliberately undertook and intended to undertake by signing the bill in question and delivering it to Mr Walker, and on the faith of which obligation Mr Walker advanced, at M'Kinlay's request and with M'Kinlay's knowledge, to M'Kinlay's sons the £1000 in question. I can give no reason, founded either in law or in equity, why the obligation should not be enforced. The statute—the Mercantile Law Amendment Act—does not apply to James M'Kinlay, for he not being the person drawn on, is not and cannot be the acceptor of the bill as it stands. The declaratory Act itself makes this clear, for it only deals with the signature of a drawee as constituting an acceptance, and if M'Kinlay's signature is to be held by implication as the signature of an acceptor, it can only be by holding that he became by implication an additional drawee. But I think he cannot be held as acceptor at all, and the case of *Jackson* v. *Hudson* and the high authority of Lord Ellenborough show that even if he had written the words "I accept" he would not have been an acceptor, for after the bill was accepted by William and Thomas M'Kinlay, the two sons, who were the sole drawees, it could not be accepted by anybody else.

I am not moved by the expressions which occur in some of the Scotch reports that a volunteer endorser who has no right to the bill, and who is not drawee therein, is to be held as an acceptor. I think that expression is only used to express the measure of his liability. His liability to the onerous holder is to be as broad as if he had been drawn upon and had accepted, and the law will give him no rights of discussion or benefits, such as discussion as cautioner or of merely subsidiary liability, because all such limitations are foreign to the nature of bills or notes in the mercantile circle, whatever claims of relief they may give rise to after the bill is finally retired.

There is another view which I think it worth while to mention. I am disposed to think that when James M'Kinlay put his name on the back of the bill, and delivered it to Walker for value—that is, for £1000 sent to M'Kinlay's sons at Strabane—the delivery of the endorsed bill was a mandate to Walker to fill up the bill or to prefix to M'Kinlay's signature any words in accordance with the real intention of the parties. I think Walker might then and there have inserted James M'Kinlay's name as an additional drawee, and have written the words "I accept" or "I bind myself," or some similar words, above M'Kinlay's signature, and I am by no means sure that as in a question with M'Kinlay Walker lost the right to complete the bill or fill in such words by merely discounting the bill with the bank. The bill was not retired, but taken up again by Walker himself, and it may reasonably be said that using it as a means of credit with the bank did not destroy any mandate which Walker held from M'Kinlay. At all events, in an action like the present, where all pleas and all legal considerations as between Walker and M'Kinlay, who were really the only contracting parties, are open, I am disposed to think effect may fairly be given to any mandate which M'Kinlay onerously gave to Walker, and which mandate, after the money had been paid on the faith of it, was really irrevocable.

I have already said that M'Kinlay, not being the person drawn upon or addressed, cannot in any proper sense be held an acceptor, and I have regarded him simply as an onerous obligant; but the case of *Penny* v. *Innes*, already referred to, and other cases, show that James M'Kinlay may be regarded quite in accordance with principle as a drawer. Every endorser, it has been often said, is truly a drawer, for by his endorsation he orders the acceptors to pay to the endorsee or holder to whom such endorser delivers the bill. No doubt endorsers in the proper sense and in the general case have a right to the bill, and by their endorsation transfer it, and thus order the acceptors to pay to the transferee; but there may be an endorser who has no right to the bill and yet incurs liability by endorsing, and the Mercantile Law Amendment Acts and the declaratory statute have no reference whatever either to the signatures or to the liabilities of drawers or endorsers. I am strengthened in the conclusion which I have reached by considering the anomalies which an opposite view would necessarily involve. If James M'Kinlay is not to be bound by his signature on this bill in this case, then the law of Scotland will be different from that of England, for so far as I can read the law of England he would be held liable there, not as an acceptor but as a collateral obligant. Nay further, if the defender escaped in the present case, then the law of Scotland itself will be different in the case of bills from what it is in the case of promissory-notes. A stranger endorser of a promissory-note will be liable to the promissee for the full sum, while a stranger endorser of a bill will not be liable to the drawer for a penny. Such anomalies—and I might figure others—will sometimes occur, but in a case like the present, and dealing with the law merchant and with the mercantile law of bills and promissory-notes, which surely should be consistent with itself and uniform in all parts of the kingdom, I should feel exceedingly unwilling to introduce inconsistencies in law where they do not already exist. I prefer the judgment by which all such anomalies will be avoided.

Lord Shand—I am of opinion with Lord Gifford and the Lord Ordinary that the defender Alexander M'Kinlay, as representing his father the late James M'Kinlay, is liable in payment of the bill in question for £1000. Although Mr Walker, the drawer of the bill, and James M'Kinlay are both dead, I think the facts as to the making of the bill are clearly enough established. The late James M'Kinlay, on the occasion of his sons William and Thomas taking over a business in Strabane, Ireland, promised to arrange for a loan of £1000 being made to them. He arranged for this loan being obtained from the late Mr Walker. The bill was the obligation or security on which the money was advanced, and the amount was remitted by Mr Walker to William and Thomas M'Kinlay by the letter of 1st June 1874, within a few days after Mr Walker's receipt of the bill.

When Mr Walker got the bill, it bore the signatures of W. & T. M'Kinlay, the drawees, as acceptors, and the signature of the late James M'Kinlay on the back, as these signatures are now on the bill. The money was advanced on the faith of these signatures, and particularly on the faith of the signature of James M'Kinlay, without which the loan would not have been given. It was the purpose and intention of James M'Kinlay when he put his signature on the bill to bind himself for payment of the contents, and Mr Walker made the advance in reliance on the obligation so undertaken. I am satisfied it was not the purpose or intention of James M'Kinlay to become an acceptor of the bill with his sons. It must, I think, be taken that he meant to become an endorser, liable for the contents if his sons failed to pay it at maturity, and of course without recourse against Mr Walker, the holder, who was to advance the money, and that Mr Walker fully understood and relied on this. That it was not the intention either of Mr James M'Kinlay or Mr Walker that M'Kinlay should be an acceptor of the bill is, I think, apparent from the fact—(1) that he was not made a drawee by having his name included in the address either when the bill was first written out or after his signature was adhibited, and before the advance was made, the drawees and acceptors being W. & T. M'Kinlay, to whom alone the bill was addressed; (2) that the signature of James M'Kinlay was not adhibited on the face of the bill, where the signature of an acceptor is according to all mercantile usage in use to be given, but on the back, where endorsers invariably sign; and (3) that the money given on the faith of the document was an advance sent directly to W. & T. M'Kinlay, who as acceptors became primarily bound to repay it, while Mr James M'Kinlay as an endorser undertook the liability of an obligant bound to pay the bill if and when dishonoured by the acceptors, but having his relief against them by the form of his obligation.

Being of opinion that James M'Kinlay was neither in intention, in form, or in fact an acceptor of the bill, the provisions of the Mercantile Law Amendment Act and the late statute of 41 Vict. cap. 13, appear to me to have no application to the case. If the true intention of the parties had been, notwithstanding the fact that the signature was endorsed on the back of the bill, that Mr James M'Kinlay was to be an acceptor, it is, I think, to be presumed that his name would have been added to the address so as to make him a drawee, in which case also no question as to his liability could have been raised under the statutes.

The question remains, whether Mr M'Kinlay's signature bound him to any effect? The bill was discounted with the bank about two months before it fell due. I cannot doubt that as an endorser he was liable to the bank in the contents. It is true he was an endorser who did not acquire any right to the bill by virtue of any endorsation by the drawer. It was not the nature of the transaction between the parties that he should acquire any such right. His purpose was to undertake a collateral obligation by his endorsement, and I see no reason to doubt that such an obligation was effectually undertaken. It would, I think, be startling to bankers and merchants to learn that persons may endorse bills of exchange without incurring responsibility for the contents to any *bona fide* holder for value, and I think it will be an unfortunate result in this case that a decision to that effect will be pronounced. The Court of Exchequer in England took a different view in a case which was not referred to in the argument, but which was, as it appears to me, substantially the same as the present—*Penny* v. *Innes*, 1834, Crompt. Mees. and Roscoe, i. 441. Baron Parke there said of an endorser who had interposed his signature after an endorsement to another party or order, and without any endorsation by that party in his own favour—"It is urged that the defendant when he endorsed the bill had no property in it; but that is not necessary in order to render him liable to be sued on the bill." That case settles also that an endorsation so interposed is not objectionable under the Stamp Acts. Lord Lyndhurst observed—"The endorsement of this bill by the defendant gave it all the effect of a new instrument as against him, though it did not in fact create a new instrument;" while Baron Parke observed "That it is part of the inherent property of the original instrument that an endorsement operates as against the endorser in the nature of a new drawing of the bill by him. Still it remains the same instrument as before, and does not require a fresh stamp, for it is not a fresh instrument." In the present case there is the further answer to any question of stamp that the original conception of the instrument was carried out by the endorsement as it stands, before the instrument was complete according to the intention of the parties. Assuming that the bank, by whom the bill was duly protested at maturity for non-payment, would have been entitled to enforce liability against James M'Kinlay on his endorsement as being practically a new drawing of the bill on his sons as acceptors, I see no ground for a distinction in a question with Mr Walker. As the holder of the instrument delivered to him with M'Kinlay's endorsation on it for value in money advanced—a new drawing on the acceptors—he was, I think, entitled to enforce liability as soon as the bill was dishonoured. It has been ingeniously suggested that the endorsement may have been given merely to facilitate discount. This is plainly against the reality of the transaction. The money was only advanced on M'Kinlay's signature and credit, and discount was not required. The bill was not discounted for ten months after. If the endorsement had been intended merely to facilitate discount, James M'Kinlay would have required Mr Walker to endorse above him before adding his own endorsement, and would on payment by him to the bank have fallen back on Mr Walker in the character of a prior endorser. After the bank got repayment of the bill from Mr Walker he was entitled to delete his endorsation and recover from the defender on his father's endorsement.

The law of Scotland is, I think, in accordance with the view now stated. Thus Professor Bell, 1 Com. 404 (M'Laren's Ed. 428) says:—"A collateral engagement may be undertaken by signing as endorser in circumstances which do not admit of a proper endorsement. Thus, no one can properly endorse who has no right to the bill. But the subscription as an endorser with the intention of giving credit to the bill is an effectual collateral undertaking." Two cases only have been referred to in the argument that Mr M'Kinlay

became in law an acceptor. In the first of these, the case of *Don* v. *Watt*, May 26, 1812, F.C., to which Professor Bell refers in support of the passage just quoted, the father of the granter of a promissory-note, having no right to the note, endorsed it exactly in the same way as M'Kinlay endorsed the bill in question, his name being endorsed before that of the payee, in precisely the same position as the name of M'Kinlay here occupies before the endorsement of the drawer. The granter of the note became bankrupt, and his father was held liable to pay it. The Lord Ordinary found "that *ex facie* of the promissory-note libelled on as it stands, the defender Thomas Watt could not be an endorsee, though if he chose to add to the credit of his son he might be an endorser, and repelled the defences;" and his decision was affirmed. The very terms of his judgment are applicable to the endorsement of M'Kinlay in this case. In that case, as here, it was maintained that the endorsement was made to facilitate discount, and with the intention that the payee should "put his name above the defender's, who would have then become endorsee, and liable to third parties to whom it might be delivered. Accordingly, the defender's signature is so placed upon the note as to leave room for the pursuer's above it." But this defence was repelled. The decree of Court found all parties to the bill conjunctly and severally liable, for the granter of the note was bankrupt and had dishonoured it.

The case of *Watters*, March 7, 1818, F.C., the only other case to which the defender has referred in support of his argument that M'Kinlay became an acceptor, is very briefly reported in the Faculty Collection. Baron Hume (Reports, p. 68) has this note of the case:—"A person who was meant to be joint acceptor with two others puts his name on the back of the bill. He is found liable nevertheless as joint acceptor, the purpose being plain. The bill came in place of a former, to which he was one of three acceptors." The case was a very special one. I have looked at the session papers, and the following are the findings of the Lord Ordinary's judgment, to which the Court adhered:—"Finds that it is admitted that the advocator was a joint acceptor with Scoular and Cunningham in the former bill: Finds that when a bill is renewed, it is always an indulgence granted by the holder of the bill to the obligants therein, and that it is impossible to conceive that the holder of a bill, by agreeing to take a renewal of it, could ever mean to deprive himself of the security which he held by the former bill, and instead of having the advocator bound as an acceptor, to render himself liable to the acceptor in recourse as an endorser, and that the advocator has not stated any circumstances from which such an intention could have been inferred: Finds that this bill was written by Scoular, one of the acceptors, and was delivered to the representer in lieu of the former bill which he gave up; and whether the advocator subscribed this bill as endorser by mistake or by design it cannot relieve him from the obligations he lay under by the former bill; and that a country man such as the representer, not versant in bills, might not be at all aware of there being any difference whether the advocator's name was subscribed as acceptor or upon the back of the bill: Therefore, and in the whole circumstances of this case, and upon the authority of the late case decided by the Court—*Don* v. *Watt*, May 26, 1812—remits *simpliciter* to the Sheriff, and decerns." The decision in that case does not appear to me to warrant or even support the general inference which the defender seeks to draw from it, that an endorsement by a third party on the back of a bill before the endorsement of the drawee or payee is an acceptance. At the utmost, it was held, in the special circumstances of that case, that the endorser was an acceptor, or at least had incurred the obligations of an acceptor.

The cases of *Sharp* (Mor. Bill of Exchange, App. No. 22) and *Macdougall* (Feb. 13, 1810, F.C.) do not appear to me to have any bearing on this question. In the latter of these cases an admitted acceptor of a bill, who added his name to the address, and also his signature as acceptor, appended the words "as cautioner." It was held that these words were effectual merely to settle relief among the acceptors, but did not control the individual acceptor's liability on the bill. It is quite settled by that case, and the case of *Sharp* and other authorities, that no party who signs a bill can plead the equitable rights of a cautioner, such as discussion and the benefit of securities. No point of that kind is raised by this case. An endorser is entitled to have a bill duly negotiated, but has certainly not the rights of a cautioner; and such rights cannot be made part either of the acceptance or of the endorsement of a bill to the effect of controlling the obligations of the parties as resulting from their signatures.

In my opinion, for the reasons I have fully stated, I think M'Kinlay was an endorser, and neither a cautioner, with a cautioner's rights, nor an acceptor of the bill. But I must add that if I had been of opinion with the majority of your Lordships that the true arrangement and understanding on which his signature was given, and in respect of which the money was advanced, was that he should become an acceptor, then it seems clearly to follow that a mandate was thereby given to Mr Walker to add his name to the address as one of the drawees. In that case he must be regarded as an intended drawee; and as it was part of the original conception of the instrument before it was taken by Mr Walker as the security for his advance that M'Kinlay should be a drawee, it appears to me that the address might still be added by the holders, and that the case should be determined on that footing. It is true the instrument has been in the meantime in the hands of Mr Walker's bankers for discount, but it came back to him as his own on repayment of the temporary advance made by the bank. The addition to the address of M'Kinlay's name would not be the making of a new instrument, but only the completion of the instrument so as to make it what the parties to it intended. I cannot see that M'Kinlay or his representatives have any good objection to this; and if M'Kinlay's address were added there could be no objection under the statutes to the signature as a valid acceptance, for the acceptance in that view is that of a drawee.

A point has been made against the pursuers because of their statements on record, in which they represent the effect of the endorsement to have been to make James M'Kinlay joint obligant with the acceptors, and co-acceptor with them in the bill for payment of its contents, or, as it is expressed in other parts of the record, as acceptor or joint obligant. It would, I think, be a

very strict reading of the record to hold the pursuers tied down to the view that M'Kinlay was an acceptor. The alternative of "joint obligant" fairly covers the case of his having been an endorser, his collateral obligation having been for the whole sum; and really the point is not so much one of fact as of the legal result of facts, about which both parties are agreed. But by the form of action, in the conclusions of which the fact of endorsement is the medium of liability, I think the pursuers are entitled to maintain any legal ground on which the endorsement infers the obligation of payment of the bill. The ground of action is the signature on the bill, and the advance made on the faith of it, and I think the pursuers are entitled to succeed if the legal effect of that signature was to create an obligation for payment of the bill. If this be doubtful, the pursuers, under the 29th section of the Court of Session Act 1868, which has proved so beneficial in practice, would in my opinion be entitled to amend the record to the effect of stating, as an alternative view of the legal effect of the endorsement, that Mr M'Kinlay merely gave a collateral obligation as endorser; and in any view, if the case were to be decided, after all the procedure and proof that has taken place, on the technical ground that the only liability founded on is that of an acceptor, it would be only just and proper to dismiss the action on that ground, reserving the pursuers' claim against the defender founded on the obligation as being that of an endorser—a result which would indeed be very unfortunate, and without a parallel in recent years, seeing the case is now ripe for decision, and is to be decided on the merits of the question whether M'Kinlay undertook liability for payment of the bill.

On these grounds I am of opinion with Lord Gifford that the first finding in the Lord Ordinary's interlocutor ought to be adhered to.

The Court recalled the interlocutor of the Lord Ordinary, finding that the pursuers were not entitled to recover the amount of the bill in question.

Counsel for Pursuers (Respondents)—Balfour-Pearson—C. A. Paterson. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defender (Reclaimer)—Scott—J. P. B. Robertson. Agents—Morton, Neilson, & Smart, W.S.

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# HOUSE OF LORDS.

*Thursday, June* 19.

## LORD BLANTYRE *v.* THE LORD ADVOCATE AND THE CLYDE TRUSTEES.

(Before Lord Hatherley, Lord Blackburn, and Lord Gordon.)

(In the Court of Session December 19, 1877, *ante*, vol. xv. p. 382.)

*Property—Right to Foreshore of a Public Navigable River—Where Barony Title followed by Possession—Acts constituting Possession.*

A proprietor who held upon a barony title certain lands which were bounded by the river Clyde, which was a tidal navigable river, brought an action of declarator against the Crown and the Clyde Trustees to have it found that the shores and banks of the river *ex adverso* of his lands belonged to him, subject to the rights of the Crown as trustee for public uses, and to the rights conferred by Parliament upon the Clyde Trustees. The title contained no express grant of the shore, and no such specific and definite boundary as was sufficient to instruct that it was intended to be conveyed. The proprietor proved acts of possession for forty years by pasturing cattle, by cutting reeds for thatching, by taking sea-weed and drift-ware, by carrying away sand and stone for building, &c. *Held* (*aff.* judgment of Court of Session) that the pursuer's title, taken in connection with the evidence of the possession had of the foreshore, was sufficient to entitle him to decree as asked.

*Observations per* Lord Blackburn upon the legal estimate to be put upon acts of possession in a case of that kind, and upon the circumstances which will give these acts weight in considering the evidence.

This was an appeal at the instance of the Crown against a decision of the First Division of the Court of Session in an action by Lord Blantyre and another against them, in which the Clyde Trustees were afterwards sisted as co-defenders along with them. The case is shortly reported, 19th Dec. 1877, *ante*, vol. xv. p. 382, and the circumstances of it are sufficiently detailed in the opinion of Lord Blackburn (*infra*).

At delivering judgment—

Lord Blackburn—My Lords, the respondents sought, against the Lord Advocate as representing the Crown, to have it "found and declared, by decree of the Lords of our Council and Session, that the ground forming the shores and banks of the river Clyde, between high water-mark and low water-mark, including the space between high water-mark and the longitudinal walls or dykes which have been erected along or near to certain parts of the deepened channel of the said river, *ex adverso* of the estates of Erskine, Bishopton, and Northbar, in the county of Renfrew, and *ex adverso* of Kilpatrick and Dalnottar, and of Shorepark and Glenarbuck, ni the county of Dumbarton, belonging to the pursuers, belongs in property to the pursuers, and is part and pertinent of the adjoining lands, but subject always to any rights of navigation or other rights which the public may have over the same, and subject also to any rights conferred upon the Trustees of the Clyde Navigation by their Acts of Parliament." The River Clyde Trustees were added as defenders.

The pleas-in-law for the pursuers, the respondents, were two—(1) The shores and banks of the river Clyde *ex adverso* of the lands and baronies libelled, being the property of the pursuers by virtue of their titles, subject to the right of the Crown as trustee for public uses, the pursuers are entitled to decree in terms of the conclusion of the summons. (2) *Separatim*—The shores and banks libelled having been for