ROBERT BOGLE, junior, Merchant, Glasgow, and JOHN and ANDREW BLACKBURN, St. Thomas, in Island of Jamaica, and MARION and MARTHA BLACKBURN, all Children of PETER BLACKBURN, Merchant, Glasgow, } *Appellants;*

MARGARET ANDERSON, Wife of JAMES STEWART, Watchmaker in Glasgow, only Daughter of the deceased JAMES ANDERSON, late Manufacturer in Glasgow, in her own right, and as *executrix dative* to her deceased Father, and to her Brother, the Rev. JOHN ANDERSON, . . . } *Respondents.*

House of Lords, 13th Nov. 1801.

MANDATE—ATTORNEYS—FOREIGN.—A power of attorney was executed, by parties in this country, to uplift and administer estates of a person deceased in Jamaica, and to remit the proceeds. The attorneys in Jamaica, after selling a plantation estate for £5000, remitted the proceeds, in bills, to their correspondents in this country, with instructions to hand them over to the executors or heirs, if they all agreed in granting a discharge, and an obligation to refund, if the funds received fell short to pay the deceased's debts. This was agreed to by the executors; but the parties to whom these bills were remitted, still refusing to deliver them, an action was raised to compel them. They agreed to consign the bills, with the exception of one, from which they claimed a deduction of their accounts, as agent for the attorneys in Jamaica. Held the agents bound to consign the full amount, without such deduction. Objection to their liability to account in this country repelled.

James and Robert Anderson, brothers of the respondent, went in early life to Jamaica. James died in 1791, leaving all his means, by will, to his parents, residing in Glasgow, in liferent, and, after their death, to his brother Robert, his sister Margaret, and his other brother John, in fee, equally among them. This will appointed his brother Robert, along with Mr. Gardner, both in Jamaica, his executors, for the purpose of executing the will. On Mr. Gardner's death, Alexander Park succeeded to the management; and, in the spring 1794, Robert Anderson himself died; whereupon the respondent, and the other relations in Scotland, executed a power of attorney in favour of the appellants, John and Andrew Blackburn, and Alexander and Keith Jopps, all of the island of Jamaica. This power of attorney empower-

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ed them to obtain administration of the defunct's estate, to convert the same into money, and remit the proceeds.

The attorneys entered on the administration, and sold a plantation estate for £5000, and there were two bonds due the deceased of £900 and £500. In a letter written by John Blackburn, of this date, to John Anderson, he says, in so far as seen, "it appears to me, after paying all debts and "every charge, that there will be a clear remainder of near "£5000 sterling."

Sept. 12, 1794.

The price of the plantation was paid by the purchaser in five bills, at long dates, for £1000 sterling each, and payable to the order of Alexander Jopp and John Anderson, on Hibbert, Fisher, and Hibbert of London.

Dec. 13, 1794.

Of this date, the attorneys wrote to their correspondent in Glasgow, Mr. Peter Blackburn, since deceased, and Robert Bogle, the appellant, in the following terms:—"Under cover you will receive the four first sets of bills, which "you will hold subject to our order, as we are not yet advised how the subject is to be divided, nor informed what "proportions will arise from the separate estates; but if the "whole family, jointly and severally, join in giving you a "receipt, (the form of which you will draw by advice), and "become bound to refund to us, if the funds we have received fall short of paying the debts, you may give them "the whole bills. As soon as possible, we will get accounts "made up and transmitted; and we will, at same time, take "legal advice as to the division, and in as much as possible "separate the estate accounts. We are very happy to have "disposed of this property so advantageously, and to have "got so considerable a part of the proceeds so easily remitted. The heirs need not be alarmed at our taking them "bound to refund—it is only matter of form. We flatter "ourselves with remitting them near £1000 more when "every thing is settled. If we did not think we had funds "enough in our hands to pay all debts, we should have "reserved more. We, however, may be mistaken. All "depends upon the accounts between Gardner and the doctor's estate." Another letter, of same date, was written by Alexander Jopp, who, apparently differing from the Blackburns as to the prospects of the affairs, writes Bogle, stating the propriety of a reservation, or condition of relief, with regard to debts that might emerge after the bills were delivered up. He says, "On the subject of Anderson's "affairs, in addition to the joint letter to you and Peter

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" Blackburn, I think it proper to say, that in consequence " of a letter received, (which John Blackburn had not seen " when he wrote), from Mr. Park, one of the executors of " Mr. Gardner, it does not appear to me that so much is ex- " pected from that quarter as John Blackburn apprehend- " ed; and as a good deal evidently depends upon that, as " to the remaining funds here, I advise that, for the pre- " sent, you do not deliver up the bills, at least unreserv- " edly; but the heirs should not want any thing."

The remaining price, after remitting the four bills, was retained to meet the debts due by the defunct in Jamaica.

The heirs were for some time kept ignorant of the arrival of these bills; but, when apprised of it, they applied for delivery of the same, and, on being refused, they raised the present action, by petition to the sheriff, for their delivery. After various procedure, the sheriff, of this date, found that the bills in question were the property of the petitioners; that the defenders had assigned no sufficient reason for refusing to deliver them up; and that they ought to have been delivered over to them on their arrival. "Therefore, or- " dered them to be delivered up accordingly, the petition- " ers granting a receipt to the defenders in terms of the be- " fore-mentioned paragraph or letter, and containing an " obligation to keep the attorneys *indemnes* at the hands of " the heirs of Margaret Paton," (Anderson's mother.) On advocation of this judgment, Lord Meadowbank ordered " production and exhibition of all letters and correspond- " ence, or excerpts thereof, between them and the attor- " neys of the original pursuers, in so far as the same re- " spects the affairs of the said pursuers, and to depone " thereupon as in an exhibition; and also to exhibit and " produce at the bar the whole bills transmitted to them by " the said attorneys; and, in the meantime, prohibits, inter- " dicts, and discharges them from indorsing, giving away, or " disposing of any of the bills in their custody." They acquiesced in giving up the bills, with the exception of part of one, as to which the subsequent procedure occurred; these bills having been paid, the defenders, after some opposition, were ordered to consign the amount, £1000, which they did, less deductions amounting to £266. The question assumed the nature of an accounting, and the attorneys' accounts were ordered to be produced, but were not. And his Lordship finally, of this date, pronounced this interlocutor, whereby he ordained " the defenders to consign in the same hands, and in similar

Nov. 5, 1796.

Nov. 26, 1796.

Jan. 21, 1797.

Mar. 10, 1798.

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"terms, as was done with respect to the sum of £266. 4s. 8d. "sterling, the further sum of £617. 10s. 4d. sterling, and "that on or before the 15th day of May next; and desires "to hear parties at the Ordinary's first hour in the summer "session, on the question, Whether farther proceedings in "this process should not be sisted, until a regular exonera-"tion of the attorneys in Jamaica, with a balance consti-"tuted for or against them, is produced in process, without "prejudice to the pursuers applying for and obtaining war-"rant to uplift the consigned sums, and even to proceed "against the defenders for the remainder of the sums in-"tromitted with by them, and to the defenders their defen-"ces, in case the attorneys delay the obtaining such ex-"oneration." *

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* Note by LORD ORDINARY (MEADOWBANK.)—The defenders are mistaken in supposing that an unfavourable impression of them was made on my mind, owing to past circumstances that could be explained. I presume the conduct of the cause, in its commencement, is alluded to; but they may rest assured that has left no impression whatever, for, at the time, I attributed it to what has since appeared to be its true cause. On the other hand, I entertain personally a high opinion of the character of the defenders, and particularly of one of them, whom I have the honour to be acquainted with. But the best men are subject to error; and, especially, no person is entitled to hold himself exempt from it in a case where his son has any concern.

In the first place, I think the defenders mistake the fact very much, when they plead, that they were entitled to put the sums paid, to the credit of the attorneys in Jamaica, by the terms of the mandate of December 1794. That mandate by no means directs them to hold the bills subject to the order of the attorneys; that order was only given for the especial case of the pursuers differing among themselves, which has not occurred, and Mr. Jopp's postscript goes no farther in restraining the defenders, than to direct that the bills should not be delivered up unreservedly, by which could be meant nothing more, than that the defenders should preserve, in favour of their constituents, a reasonable lien for security of their reimbursement of unforeseen expenses, in case these should unexpectedly be requisite. In no view possible, therefore, were the defenders entitled to consider the £2000 sterling in question as funds of the attorneys, on which the defenders might operate in conducting their private affairs.

2. I think the defenders were bound to have given instant intelligence to the pursuers of this valuable remittance for their behoof,

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In a reclaiming petition, the ground maintained here, and throughout by the defenders, was, that they, Blackburn and Bogle in Glasgow, were mere agents or mandatories for Blackburn and Jopp in Jamaica, they lay under no obliga-

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and, if in distress at the time, it was the more fitting that they should be informed speedily of what might change the current of their thoughts, and so alleviate them.

3. It appears to me a question, not altogether without difficulty, Whether the attorneys, after giving their mandate of December 1791, could operate at pleasure on the £2000, which the defenders got into their hands, by availing themselves of the indorsation of the attorneys on two of the bills? Had the defenders deposited the bills in the hands of Scott, Moncrieff and Dale, reserving a lien for reimbursement, (which perhaps, or something like it, in a fair construction of the original mandate, should have been done), this lien could not have been made effectual till the attorneys constituted a balance in their own favour, by obtaining an exoneration in the proper court. Now, ought not the defenders to be held as trustees, standing in the place of the agents of the Royal Bank, and not entitled to transfer the fund, or any part of it, back to the attorneys, without legal authority, especially subsequent to the commencement of the pursuers' proceedings in law?

4. But supposing that Mr. Jopp's expression, 'I advise you not to deliver up the bills, at least unreservedly,' should be held to warrant the defenders' levying the funds, to the effect of enabling the attorneys to operate upon them, I still conceive, that after what the attorneys wrote in December 1794, concerning the probable result of the business, and all that has yet been specified, as to emerging debts, it will be difficult for the defenders to maintain that they are entitled to apply so large a sum as £563. 15s. 4½d. of commission, to the private benefit of the attorneys, upon no other evidence than a charge to that amount made by the attorneys. This is emolument, not indemnification for advances; and, consistently with what is stated December 1794, and the amount of emerging debts, could hardly, I think, have been then in contemplation of the attorneys.

5. Why do not letters appear from the attorneys expressing their change of views of the affairs? Why, also, do they not get themselves exonered in Jamaica, either judicially or extra-judicially, as attorneys, from the pursuers? or why do they not send materials by the conveyance of a ship of war to account in this country?

6. The charge for remitting the monies advanced to the pursuers out of their own funds, as by a remittance of cash from Jamaica, appears to me unjustifiable, and calculated merely to affect the apparent balance.

7. Considering, however, the affidavits, even without the inven-

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tion whatever to the respondents, unless in consequence of orders given them by their constituents; that the order in December 1794, concerning delivery of the bills, was a qualified order; that whether qualified or not, it might at all events be recalled by the Jamaica attorneys; that these attorneys were not bound to account in this country, but in Jamaica only; and that, from an examination of their accounts, it appeared that the balance in the attorneys' hands was only £383, so that there was no just ground for ordering the consignation of more than £177 over that already consigned, £266.

June 21, 1800. The Lord Ordinary, of this date, pronounced this interlocutor, conjoining the process of wakening and transference raised by the respondents after Mrs. Anderson's death, with the former process. And, of this date, ordained "the de- July 3, —— "fenders to consign the sum of £617. 10s. 4d., in terms of "the interlocutor of the 10th March 1798; and in case they "fail so to do, finds the defenders liable in the expense "of extracting an act and warrant for the recovery of the "said sum, and allows said act and warrant to go out and "be extracted in the name of James Marshall, W. S., for "the purpose of his consigning the said sum, in terms of "the said interlocutor, and decerns." On reclaiming petition the Court adhered. Nov. 12, ——

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The appellants, as the mere agents or mandatories of the attorneys in Jamaica, are not responsible for the correctness of any accounts transmitted from Jamaica by the administrators, nor for the propriety of any charge made by them against the estate; but such accounts and charges must, as between the appellants and respondents, be taken as conclusive. Acting in this capacity, they are responsible only to their constituents in Jamaica,

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tory or appraisement of the succession, as a sort of *prima facie* evidence of the actual advances, it strikes me, that it is fit to order consignment of what is only claimed as a reward for trouble, and of what was improperly stated as a charge of remittance never incurred. The attorneys, I apprehend, cannot complain if they are not rewarded till they account, especially as there is apparently a *mora* in the case for not already accounting regularly, which, as long as we have ships of war to convoy our fleets, may be done, even in this country, as I apprehend, as safely in war as in peace.

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and are not authorized to pay more to the respondents than their principals admit to be due; and, consequently, whatever remedy the respondents insist in against the appellants must be limited by the same authority. Their proper remedy undoubtedly was against the attorneys in Jamaica. They are not, although they ought to have been, called as parties to this suit, but even supposing them to have been called as parties, still, as the subject matter is such as ought only to be brought before the courts of Jamaica, where the defuncts were domiciled, where the administration of their estates was granted, and security given by the administrators to account, the Court of Session had no jurisdiction over the matter; even supposing it had, yet it is manifest that the claims on the administrators in Jamaica ought to be determined by the laws of Jamaica, and not by the laws of Scotland. By the law of Jamaica, the claim of commission charged was perfectly unexceptionable.

Pleaded for the Respondents.—Had Mr. Bogle and the late Mr. Peter Blackburn done their duty in regard to the mandate transmitted to them from Jamaica, in the letter of Messrs. Blackburn and Jopp, dated 13th Dec. 1794, no such question as the present could ever have occurred. In compliance with the terms of that letter, which was expressly written "for the information of the heirs," they ought, immediately on receipt thereof, to have communicated to the relations of the deceased, the information which that letter conveyed, and in which those relations had so deep an interest. They ought also to have delivered over all the four bills at that time transmitted to them by Blackburn and Jopp. And there was not the least ground or excuse, neither on their part, nor on the part of the attorneys in Jamaica, for retaining the contents of the two first bills, or any of the bills. But even allowing the appellants every latitude in the construction of the conditions annexed to the mandate, as also of the power of revocation, competent to the granters of it, no reason has been assigned for carrying either the one or the other beyond a security for reimbursement of actual expenditure, and indemnification of obligations come under by the attorneys. The very accounts, however, which those gentlemen themselves have produced, show that there is a large balance in their hands, after reimbursing them completely, and that they are further possessed of a sufficiency of fund for answering all the claims they have been able to specify. In these circumstances, even if

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the appellants could make it appear that they were warranted in withholding the bills, yet there would not be any ground of pretence, either for them or their constituents contending, that they are entitled to retain the value of the bills, to the effect of satisfying their own unauthenticated claims. The attorneys are liable to account in this country, from the particular circumstances of this case. It was a condition, understood by both parties, at the time the power of attorney was granted, that they were to account to the constituents in Glasgow; and, accordingly, upon this understanding the attorneys themselves had acted, by transmitting accounts from time to time, although these were in themselves defective, and liable to exception. Besides, the fund is now really in this country, and the remittance of that fund, shows at once that they were so liable to account.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed.

For Appellants, *R. Dallas. J. Scarlett.*

For Respondents, *W. Grant, W. Adam, T. W. Baird.*

NOTE.—Unreported in the Court of Session.

JOHN PHILIPS, Merchant in Glasgow, *Appellant;*

MESSRS. BLAIR and MARTIN, Spirit Dealers and Merchants in Greenock, *Respondents.*

House of Lords, 16th Nov. 1801.

CONTRACT OF SALE—DELIVERY IN REASONABLE TIME—DAMAGES FOR NON-FULFILMENT. — A sale of 12 puncheons of spirits, distilled from molasses, was bargained for, and four puncheons delivered. The buyer continued urging the delivery of the remainder, but the sellers delayed, until after an act of parliament was passed on 18th Dec. 1795, prohibiting distillation of spirits from molasses, and annulling all bargains or contracts for the delivery of such. The sellers refused to furnish the spirits, and, in action, stated this defence, that having had three months to deliver, and the act of parliament having been passed in the interval, they were not bound; Held in the Court of Session, that there was no evidence to show that the sellers were bound to deliver before the 18th Dec. 1795. Reversed in