July 11, 1815. HEIR AT LAW.—RESULTING TRUST—PERPETUITY.

" back to the Court of Exchequer, to do what shall " be fit to be done therein, according to such de- " claration and judgment."

Agent for Appellant, SANDYS, HORTON, and ROARKE.
Agent for Respondents, PARRY.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION, (1ST DIV.)

DAVISON—*Appellant.*
ROBERTSON AND OTHERS—*Respondents.*

April 19, July 4, 1815. BILLS OF EXCHANGE.—PARTNERS.

A. and B. are partners, and goods are purchased on the partnership account. A. gives one bill for the price, B. gives another, and each accepts for the firm. One of the bills comes into the hands of C., the other into the hands of D., and both raise their actions against A. and B. the acceptors.

A. and B. raise a process of multiplepoinding, and by the Court below are found liable in only once and single payment, and the matter is reduced to a competition between the holders of the two bills.

C.'s bill has been indorsed by E., *per* procuration of F., and it being denied that E. had any power so to indorse, proof is offered of acts of agency by E. for F., which would lead the world in general to believe that E. had such power; but the evidence is not allowed by the Court below to be gone into, and D.'s bill is preferred.

C. appeals from this last judgment; but there is no appeal from the judgment in the multiplepoinding.

It was said *arguendo* by Lord Eldon (Chancellor) and Lord Redesdale, that a power of indorsing *per* procuration did not require a special mandate, but might be proved by inference from facts and circumstances; and though there might be fraud by E. upon F., that was no answer to a *bonâ fide* holder for *val. con.*

And that where two or more bills were accepted by a firm, each of them for the whole price of an article furnished, and these bills got into the hands of *bonâ fide* holders for *val. con.* the firm was liable for them all, and therefore this was no case for multiplepoinding.

Judgment, that the cause be remitted with instructions to receive the evidence as to the procuration, &c. *sed. qr.* if it should turn out that both bills are perfectly and equally good, as the judgment that the acceptors are liable in only once and single payment is not appealed from, and is final in the cause; upon what principle is it to be determined that the one bill should be paid, and not the other? *Per* Lord Eldon, (C.) "He must see clearer than I do, who can see the way out of this difficulty."

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BILLS OF EXCHANGE.—PARTNERS.

MASON, Baird, and Co. merchants, in Aberdeen, acted as commission agents of George Lockwood and Co., in the disposal of goods for the latter. The agents had a commission of 7½ per cent., and guaranteed the payment of the goods to the extent of one half of the price. The practice was for Mason, Baird, and Co. to draw bills on the purchasers of the goods, in their own name, and indorse them to G. Lockwood and Co.; and sometimes Mason, Baird, and Co. discounted the bills, and remitted the price of the goods in Bank of Scotland bills, or other unexceptionable paper. They had no special mandate from Lockwood and Co. to indorse their bills to others *per* procuration. Baird, one of the partners in the house of Mason, Baird, and Co., engaged in an adventure to Quebec, along with John Robertson and William Carlier, under the firm of John Robertson and Co.; and this last company, upon the application of Baird, obtained goods from Lockwood and Co., to the amount of 1492*l.* 4*s.* 8*d.* for the ad-

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BILLS OF EXCHANGE.—PARTNERS.

First bill.

venture. The goods were furnished in April 1809, to be paid for in twelve months from that date. Three months previous to the time at which the goods were payable, Mason, Baird, and Co. according to Robertson's statement, drew a bill for the value, which Robertson (signing for the firm) accepted for the firm of Robertson and Co. This bill was dated January 22, 1810, for 1492*l.* 14*s.* 9*d.*, purporting to be for value in cloth to Quebec, of G. Lockwood and Co. It was indorsed by Mason, Baird, and Co. to G. Lockwood and Co. or order, and again indorsed by Mason, Baird, and Co., *per* procuration of G. Lockwood and Co., to Andrew Davidson, or order, who indorsed it to his brother Robert Davidson, or order, by whom it was indorsed to Alexander Walker, who indorsed it to John Thomson, agent for the Bank of Scotland, who reindorsed the bill to Robert Davidson. The reason for this reindorsation, as stated by Robert Davidson, was that payment had been refused by the acceptors, and that he being liable to Walker and Thomson, paid the amount to the bank agent, who reindorsed to him that he might recover against the acceptors and prior indorsers. According to Lockwood's statement (no evidence was gone into) Andrew Davidson had become cautioner for the payment of certain bills granted by Mason, Baird, and Co. to Walker, and being apprehensive of the failure of the Co., which soon afterwards happened, he contrived the expedient of this bill, which through the medium of his brother Robert Davidson he delivered to Walker, and got up some of the bills for the payment of which he had so become bound.

Another bill drawn by Mason, Baird, and Co., and accepted by John Robertson and Co. (Baird signing for the firm) for 1492*l.* 4*s.* 8*d.* purporting to be for value in woollen to Quebec, was given by Baird to G. Lockwood and Co. This bill, according to the statement of the Lockwoods, was tendered to them by Baird in November, 1809, for the goods furnished by them for the Quebec adventure, and to give it a negociable appearance was dated February 12, 1810, and made payable sixty-five days after date, so as to make it fall due at the time the price of the goods was payable.

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Second bill.

A charge was given to the acceptors on Lockwood's bill, and Robert Davidson having also given a charge to the acceptors and indorsers, they presented bills of suspension. Robertson in his suspension admitted his signature to Davidson's bill, but stated that he had received a charge on another bill, on account of the same matter. Carlier in his suspension stated that he was not a partner of the firm of Robertson and Co.; and the Lockwoods in their suspension stated the circumstances respecting the bills; as above.

Charges given on both bills.

Suspensions.

A process of multiplepoinding was also raised by Robertson, Carlier, and Baird, concluding to be found liable only in once and single payment.

Multiplepoinding.

In Robertson's suspension, the Lord Ordinary (Hermand) found that Mason, Baird, and Co., either had authority to indorse *per* procuration, or that they had not; that in the latter case they had no right to indorse Davidson's bill in the name of Lockwood and Co.; that in the former case the Lockwoods must relieve Robertson and Co. of

Nov. 29, 1810. Interlocutors in the suspensions.

April 19, July 4, 1815.

BILLS OF EXCHANGE — PARTNERS.

Davidson's bill: and then he found that an indorsation *per* procuration required a special mandate, and suspended the letters till the production of the bill in Lockwood's hands, with a discharge. In Carlier's suspension he found that, whatever might be the case in a proper partnership, one person concerned in a joint adventure was not entitled, by subscribing the firm, to bind another; and in the Lockwoods' suspension, that they could not by a circuit of indorsations, which had every appearance of being fraudulent, be made liable in the payment of a bill for goods, for the price of which they were not debtors, but creditors; and as to them and Carlier, supended *simpliciter*. In the process of multiplepoinding, his Lordship found the pursuers liable only in once and single payment, and afterwards conjoined the suspensions with the multiplepoinding.

In the multiplepoinding. Nov. 29, 1810.

In representations given in against these interlocutors, it was alleged that Mason, Baird, and Co., had been in the habit of indorsing, &c. bills *per* procuration of the Lockwoods, and a condescendance was ordered and given in for Davidson, stating circumstances which he offered to prove on that head. The

June 13, 1811.

Lord Ordinary afterwards pronounced an interlocutor, finding that there was real evidence in the terms of the last indorsations on Davidson's bill; that he paid no value for it; that there was no evidence of the procuration, and that the letters and charge at the instance of the Lockwoods against Robertson were orderly proceeded in, and preferred them to the sum *in medio* in the multiplepoinding; and as to Carlier, allowed them to state in a condescendance the facts which they offered to prove, in order

to show that he was bound by Robertson's subscription, if they chose. Davidson reclaimed to the first division of the Court of Session, which adhered to the Lord Ordinary's interlocutors; and thereupon Davidson appealed from all the interlocutors adverse to his claim, except the interlocutor in the multiplepoinding, against which there was no appeal.

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BILLS OF EXCHANGE — PARTNERS.

Dec. 11, 1811.

Leach and Adam for Appellant; *Romilly, Brougham, and Horner,* for Respondents.

Lord Redesdale. This question arose upon a bill of exchange for a sum of 1492*l.* 14*s.* 9*d.* dated January 22, 1810, signed Mason, Baird, and Co., and the bill was in these terms:—"Three months "after date pay to us, or order, &c. value in cloths "to Quebec, of George Lockwood and Co." This bill was directed to, and accepted by, Robertson and Co. and was indorsed in this way:—Mason, Baird, and Co. indorsed it to George Lockwood and Co., and then Mason, B. and Co. indorsed it to Andrew Davidson *per* procuration G. Lockwood and Co., A. Davidson indorsed it to Robert Davidson, R. D. to Alexander Walker, A. W. to John Thomson, for behoof of the Bank of Scotland, and Thomson indorsed it back again to Robert Davidson, without recourse, on Walker, or Thomson, or the Bank of Scotland. It was immaterial to consider the circumstances of the indorsements subsequent to that of A. to R. Davidson, as the effect of the reindorsation was to bring the bill back again to that. This bill was not paid by the acceptors; and a protest was taken, and charge given, to the acceptors and in-

July 4, 1815. Judgment.

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dorsers, for each of whom suspensions were offered; and Robertson, who had accepted the bill, in his suspension stated that he had accepted the bill, which was held by Davidson, and was ready to pay it, but that he had received a charge on another bill on the same account, and that one or other of the bills must be a fabrication; that he was liable only for one of them, and therefore raised his suspension, leaving it to the holders to make out which of them had the genuine bill. Carlier, another person sued, stated in his suspension that he was not a partner in the firm of Robertson and Co. and was not at all connected with the company, and never heard of the bill in question before. Lockwood and Co. in their suspension stated that Mason, Baird, and Co. had no authority to indorse for them. Then a process of multiplepoinding was raised by Robertson, Carlier and Baird, the acceptors of the bill, and partners in the joint adventure, stating the purchase and claim on the two bills, and concluding for being found liable only in once and single payment. Their Lordships would observe that it was perfectly immaterial to the holder whether there was a claim on another bill or not, if he had a right to sue on the first bill as a bill of exchange. But the Lord Ordinary had pronounced these interlocutors in the several suspensions *(vide ante)*—And finally in the multiplepoinding "that the Pursuers were liable in only "once and single payments." This interlocutor was not appealed from; and the consequence was that their Lordships could not discuss whether it was liable to the objection that this was not a subject of multiplepoinding; and the only question was whe-

Immaterial to the holder of a bill that there was another bill for the same matter.

ther the parties were liable for payment of this (Davidson's) bill. The Petitioner gave in a representation against the interlocutors; and, after answers, the Lord Ordinary appointed the parties to be heard as to whether the several processes of suspension and multiplepoinding ought to be conjoined, and he afterwards conjoined these processes. And in respect it was alleged that Mason, Baird, and Co. were not only agents of Lockwood and Co. in selling goods, but, with their knowledge and approbation, had been in use of drawing, receipting, indorsing, and discounting bills per procuration for them, he ordained the Representer to give in a special condescendance of what he would undertake to prove on that head, and Lockwood and Co. to answer the same. A condescendance was accordingly given in, stating circumstances to show that M. B. and Co. had a right to indorse *per* procuration, and L. and Co. gave in one of a different tendency. The Lord Ordinary then, on June 13, 1811, pronounced this interlocutor *(vide ante)*, "*finds real* "*evidence in the terms of this last indorsation, that* "*R. Davidson paid no value for it to the preceding* "*Indorsee, &c.*" That seemed to have arisen from a total mistake; for when the bill became payable, the last indorsee had a right to call on the preceding indorser, and as Robert Davidson was bound to pay the subsequent Indorsees, he paid accordingly, and took a reindorsement to himself. And that the interlocutor proceeded *(vide ante)*. Now their Lordships perceived that this interlocutor proceeded on the ground that there was no evidence of the existence of the procuration; and no evidence as to

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that fact had been gone into on the condescendances of the parties. Then the Lord Ordinary held that the other bill, as to which there was no evidence, was that which ought to be paid, and allowed L. and Co. to state, in a condescendance, if they thought proper, what they would undertake to prove to show that Carlier was bound. Then a relaiming petition was presented to the Court by the Appellant, who contended, that a proof ought to have been allowed as to the authority to indorse by procuration. The Court, however, adhered to the interlocutor; and a second reclaiming petition having been given in, the Court ordered a condescendance of what the Appellant averred and offered to prove as to the powers of M. B. and Co. to sign bills for L. and Co., and a condescendance was given in accordingly, upon advising which with answers the Court refused the prayer of the petition, and adhered. All these proceedings in the Court of Session, subsequent to the interlocutor in the multiplepoinding, finding Robertson and Co. liable in only once and single payment, were appealed from, but there was no appeal from the multiplepoinding. The consequence of not appealing from the interlocutor of November 29, 1810, finding R. and Co. liable only in once and single payment, or from that of February 22, 1812, and on the contrary, submitting to that of February 26 and 28, conjoining the processes, was that their Lordships could not say whether the multiplepoinding was well raised or not. But with respect to Carlier, the proceedings in the multiplepoinding were in direct contradiction to the suspension; for in the multiplepoinding, he represented himself as

Interlocutor in the multiplepoinding not appealed from. Consequences of that.

Carlier.

one of the partners, and that being inconsistent with the suspension, and as the multiplepoinding must be sustained, the Appellant ought to be assoilzied in the suspension. As far as concerned Robertson's suspension, as the Appellant had not appealed from the multiplepoinding, he had no demand, except subject to the question whether Lockwood's bill ought to be paid in preference. There was no evidence to support the judgement in favour of that bill as preferable. On the contrary, the Pursuers admitted that the first bill had been accepted by Robertson and Co. and that it was in payment of the goods purchased for the joint adventure, and in the suspension Robertson treats the other bill as a fabrication. The Court, therefore, had proceeded without proof as to that part, and in the other part the law on the subject was mistaken. He submitted, therefore, that these interlocutors should be reversed, and that the cause should be remitted to the Court to receive such evidence as might be produced as to these bills respectively; and as to the authority of M. B. and Co. to indorse by procuration, either to make Lockwood liable, or to enable them, M. B. and Co., to transfer the bill to A. Davidson without the indorsement to Lockwood; for it appeared that Mason, B. and Co. dealt with these bills as they thought fit, and generally remitted the amount of the goods sold, not in these bills, but in bills of the Bank of Scotland; and the specific bills were not remitted for another reason, which was that Mason, B. and Co. received a commission of $7\frac{1}{2}$ per cent. and would deduct that out of the sums recovered.

Lord Eldon (C.) Having seen what the noble

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Lord proposed to submit to their Lordships, he thought it the best proceeding that could be adopted in the very awkward circumstances in which this case stood. The case was no more than this:—Here were two bills on the same account, and supposé for the same sums. They who were to pay them had a right to complain that there were two, and yet they were bound to pay both, if the bills were in the hands of *bonâ fide* holders, and accepted by them, or by others for them, having authority so to accept. It might be a fraud in A. to send them both into the world, but it was no fraud in B. and C. if they were *bonâ fide* holders for valuable consideration, to demand payment, though this might be hard upon D. who would be bound to pay them. But here the parties who would be so liable to pay had raised a process of multiplepoinding, saying, "Here are two bills against us; we are liable to pay "only one of them, and tell us which." The answer should have been, "I have nothing to do with "your multiplepoinding, nor is it material whether "there may or may not be another bill, for that "will not affect my bill." To say that this was a case for multiplepoinding was altering the nature of the proceeding entirely. If B. had a bill in hand, and A. and C. were claiming the amount when it should be paid, that would be a case for multiplepoinding. But such a proceeding on two bills was quite inextricable. It seemed, however, to have been taken for granted that Robertson and Co. were liable for one, though certainly not for both, and the Judges below having it in their heads that no demand could be maintained except for one

If both bills got into the hands of *bonâ fide* holders for val. con. both must be paid, though each was for the same article, and the whole price of it.

This no case for a multiplepoinding.

only, they thought the most questionable should be considered as a nullity, in order to favour the other, with respect to which they had no proof. But here a greater error occurred than he ever remembered to have met with, if the commercial law was the same in Scotland as in England. In the first interlocutor there was one finding which was indisputably true, and it was almost the only one which was correct, viz. "That Mason, Baird, and Co. either "had a procuration from Lockwood and Co. or "they had not." These were truisms which no one would dispute. And then there was a finding "that "an indorsation *per* procuration requires a special "mandate." His opinion was that no such thing was absolutely necessary; for if from the general nature of the acts permitted to be done the law would infer an authority, the law would say that such an authority might exist without a special mandate, and that an indorsement *per* procuration might be good, though there were no such mandate. The next interlocutor found "that, whatever "may be the case in a proper partnership, one "person concerned in a joint adventure is not enti-"tled by subscribing a firm to bind the other."—Why, a joint adventure was as proper a partnership as any other, and one of the adventurers would be bound by the indorsement and acceptance of the other. A very remarkable case had come before their Lordships two or three years ago, in which it appeared that the business of about half a dozen different firms was carried on under the same general name; and their Lordships had held that, unless they could fix the man who held any of their bills

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A special mandate not necessary to constitute a power to indorse *per* procuration; but the law may infer an authority from the general nature of certain acts permitted to be done, &c.

Partnership.

Qr. Fleming v. M'Nair, Dom. Proc. July 16, 1812. Where several different firms carried on business under one general

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name, the holder of any of their bills, unless it could be proved that he knew it to be the paper of one of the particular firms, was held to be entitled to come against them all.

with the knowledge that it was the bill of A. and Co. or any other of the separate firms, he had got paper which gave him recourse upon them all.— Then the third Interlocutor found, "that the sus- "penders (Lockwood and Co.), being creditors for "the price of the woollens sold by them to Mason, "Baird, and Co., cannot, by a circuit of indorsations, "which it does not appear they authorized, &c. be "subjected in payment of a bill, in which they are "substantially not debtors, but creditors;" and he agreed that, if Mason, Baird, and Co. were not legally authorized to indorse *per* procuration, Lockwood and Co. were not liable; but if it appeared that they were legally authorized, it did not signify a farthing to a *bonâ fide* holder for valuable consideration, whether they were debtors or creditors. Then came the Interlocutor in the multiplepoinding, finding Robertson and Co. liable in only once and single payment, and this was not appealed from. If it had been appealed from, he should say that this was no case of multiplepoinding, but that the parties ought to go on upon each of these pieces of paper, called bills of exchange, having not the same but different demands in respect of them. If the holder proceeded on the bill as to which they had here no proof, if it was a good bill, that demand must be made effectual. If Davidson proceeded on his bill, all they could say was, "Show us that it "was regularly transmitted to you;" and he might say, "I do so: Mason, Baird, and Co. indorsed it "*per* procuration of Lockwood and Co. to Andrew "Davidson, who indorsed it to me:" and then the single question would be whether Mason, Baird, and

Co. had any such authority. It might be a fraud to draw two bills in this way, on those who were to pay, but what signified that to a third person? Both, if they were good bills, must be paid, and there was no ground for a multiplepoinding. Then, without any proof as to the second bill, they did go into an examination respecting this first bill indorsed by procuration, and another interlocutor was pronounced, which, for the sake of the general law of the country, he must notice; and it would be disrespectful, even to the Court below itself, to pass it without observation. It stated that, on January 22, 1810, a bill at three months date, drawn by Mason, Baird, and Co. and addressed to Robertson and Co. was accepted by Robertson, &c. indorsed thus—first, 'Pay George Lockwood and Co.'—next, 'Pay Andrew Davidson;' and then Andrew Davidson said, 'Pay Robert Davidson;' and R. Davidson said, 'Pay Walker;' and Walker said, 'Pay Thomson, for behoof of the Bank of Scotland;' and Thomson said, 'Pay Robert Davidson, without recourse on Walker or me, or the Bank of Scotland.' That brought back the bill to Davidson, but providing for the non-liability of Walker and Thomson and the Bank. Then the Lord Ordinary found "that, on February 12, 1810, "Mason, Baird, and Co. drew a bill, seemingly rela- "tive to the same transaction," &c., and then he gave the particulars of it. And then the Lord Ordinary found, with respect to the first bill, "that "Andrew Davidson, the agent of Mason, Baird, and "Co. having got a blank indorsation from them, "took upon him to make a new indorsatior to his

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" brother, Robert Davidson," &c.; and an after indorsation, " Pay R. Davidson, without recourse on " Walker or me, or the Bank of Scotland;" finds real evidence in the terms of this last indorsation, " that Robert Davidson paid no value to the pre- " ceding indorsee;" and on that finding he decerned. Now see what was the transaction. Robert Davidson indorsed to Walker, and Walker to Thomson, for the behoof of the Bank, and Thomson reindorsed to Robert Davidson, but saying, " You shall " not have recourse on me, or on the person who is " between us." Here were a great many words to little purpose; for the result of law would be that Thomson would have his action against Walker, and Walker against Davidson; and what possible proof of fraud could there be in a man doing that which he might be compelled by law to do, unless he did it without such compulsion? Then the matter went on through a great many interlocutors; and the question on the condescendance must have been whether, supposing the facts stated to have been proved, it would follow that the law would infer that he or they who had been allowed to do such acts had an authority to indorse; and it seemed to him to have appeared too clear to the Court of Session that the facts would not amount to such an authority. It might turn out that Davidson had a right to recover, and it might turn out that the holder of the other bill had likewise a right to recover; and what was to be done in that case? For the Court had decided, in the multiplepoinding, that Robertson and Co. were liable for one only. Then, if it turned out that both had a right to re-

cover, that person must see more clearly than he could, who could see the way out of the difficulty; and therefore it would be more satisfactory if the parties would consider whether they could settle this without further litigation; and if Davidson suffered by this, he must recollect that he had not put it in their Lordships' power to relieve him. July 4, 1815. BILLS OF EXCHANGE.—PARTNERS.

Interlocutors appealed from *reversed*, and the cause remitted, with instructions to receive such evidence as might be properly offered with respect to the two bills, and particularly of the facts alleged as to the procuration, or the power of Mason, B. and Co. to transfer the first bill to Andrew Davidson, without the indorsement to Lockwood, or by striking it out, or otherwise, without making the Lockwoods liable as indorsers.

Agent for Appellant, MUNDELL.
Agents for Respondents, DUTHIE; RICHARDSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION. (2d. DIV.)

BAYNE,—*Appellant.*
WALKER,—*Respondent.*

WHERE a farm-house was burnt by accident, it was held by the House of Lords, reversing a judgment of the Court of Session, that the landlord was NOT bound to rebuild. Feb. 27, Mar. 22, May 12, July 3, 1815.

The Lord Chancellor seemed to doubt whether the having a bed with a wooden frame, and with straw in the bottom, LANDLORD AND TENANT.