

The respondents' counsel were not called upon.

In moving the judgment of the House

The LORD CHANCELLOR said he had come to the conclusion that the judgment in this case was correct. There were two points on which it had been called in question—one as to warrandice, and the other as to fraud or improper concealment. As regards the objection founded on the clause of warrandice, it was only necessary to examine one by one the parts of that clause to see that none of those parts referred to the present circumstances. The appellant had got possession of all the subjects which had been sold or were intended to be conveyed to him; and as he had not been evicted or lost any of the subjects, he could find no claim on any such obligation of the vendors as he now set up. The utmost he could say was that he had been called on to pay something which the words of the deeds and titles might have led him to expect he was not to pay, but it would be an alarming doctrine if it were to be laid down that when a purchaser of an estate had the estate duly conveyed, and possession given, that the vendors should agree to bind themselves that each and every part of the titles would be borne out in future should certain future claims be made against it. It would be impossible to hold such a claim as that now made to be valid unless something were imported into the clause relating to warrandice which the words did not according to their ordinary meaning express. The objection founded on warrandice in this case therefore entirely failed. As regards the objection founded on misrepresentation and fraud, no authorities had been cited at the bar which supported such a claim on that ground. The moment that titles were produced, and the purchaser had the opportunity of examining them, the maxim *caveat emptor* applied. Here the agent of the vendors said there was no valid claim against the estate though a claim had been made. He acted under the *bona fide* belief that that claim so made by the mid-superior was not well founded. If he was wrong, that did not amount to fraudulent representation. If the purchaser wished to protect himself against the contingency of being sued for this casualty, he ought to have had a special warrant to that effect inserted in the conveyance, for the usual clause of warrandice and the usual duties of the vendor's agent did not protect it on the present occasion. There was thus no ground for the appeal, and it ought to be dismissed with costs.

LORD HATHERLEY concurred.

LORD BLACKBURN also concurred, and said that it would be quite mischievous to alter the meaning of a clause so well understood, and so constantly acted on in one sense. That sense did not include the protection which the appellant now sought to derive from it. As to the fraud, the vendor's agent acted *bona fide*, and told all that he required to tell. If an unfounded claim had been made against the estate, he was not bound to mention it unless he knew it was well founded. He may have had the means of discovering that it was well founded, but that was a different thing from fraudulent concealment. There was no authority cited to support the appellant's demand, and the judgment of the Court below was perfectly right.

LORD WATSON said the first question was one of Scotch conveyancing, and there could be no doubt that the usual clause of warrandice only applied in case of eviction, and there was no eviction here, nor was there even the threat of eviction. As to the objection of fraud, Mr Carment, the vendor's agent, did nothing wrong in not showing evidence of a claim which he believed to be unfounded, and as to which at most he could have only a speculative opinion. The judgment was right on both points.

The House affirmed the judgment of the Court of Session, with costs.

Counsel for Appellant—Lord Advocate (M'Laren) — Davey, Q.C. — M'Clymont. Agent—John Martin, W.S.

Counsel for Respondents—Kay, Q.C.—Asher. Agent—John Carment, S.S.C.

Monday, June 14.

(Before Lord Chancellor Selborne, Lord Hatherley, Lord Blackburn, and Lord Watson.)

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

(*Ante*, July 1, 1879, vol. xvi. p. 647, 6 R. 1132.)

Bill of Exchange—Indorsation—Acceptance—Collateral Obligation—Mercantile Law Amendment Act 1856 (19 and 20 Vict. cap. 60), sec. 6.

Held (aff. judgment of the Court of Session) that the mere signature of a party, not the drawer or drawee of a bill, upon the back thereof, there being no words of acceptance prefixed and no evidence of an intention to become an acceptor, was insufficient, according to the provisions of the 6th section of the Mercantile Law Amendment Act, to infer an undertaking by the person so signing to be answerable for the amount of the bill.

This was an appeal from the judgment of Seven Judges of the Court of Session, whose decision is reported of date July 1, 1879, *ante*, vol. xvi. 647, 6 R. 1132. The documents on which the case depended and the course of transactions which the parties are there narrated.

The pursuers (Steele and others) appealed.

In moving the judgment of the House

LORD BLACKBURN said that he had come to the same conclusion as the majority of the Judges, but not on the same grounds. He did not infer from the facts, as some of the Judges in the Court below did, that Walker drew the bill and sent it to James M'Kinlay to accept, or ever treated his signature as an acceptance. The utmost that could be properly inferred was that James M'Kinlay said that if the proposed mortgage went off then he would see the bill paid. But such an engagement could not be proved except by statutory evidence. Since the Act of 19 and 20 Vict. cap. 60, sec. 6, the law of Scotland is as the law of England was before—namely, that no undertaking to answer for a debt of a third person is enforceable unless there is a writing signed as the statute requires. The

question was, whether there was an obligation, under the custom of merchants as modified in Scotland, incurred on this bill by J. M'Kinlay to Mr Walker? Mr Bell in his Commentaries had been in error when he said that such a signature as this might according to English law be evidence of a collateral undertaking. It was not so in England. All the Judges below in this case held that this signature could not operate as an acceptance. Lord Shand showed that the cases quoted in Scotland did not support the view that that was ever the law of Scotland even before 1856. Other four Judges held that before 1856 this might have been a valid acceptance. But the statute of 1878 showed that the Common Pleas wrongly construed the statute of 1856, and that it would have been, and is now, a valid acceptance to sign the name across a bill without any words preceding it. James M'Kinlay, however, never intended to be an acceptor; and even if it was intended, which however was not clearly made out, that James M'Kinlay was to bind himself as a surety for his sons to Walker, and wrote his name on the back of the bill with that intention, he did not carry out his intention. He cannot be treated as a guarantor, because the law of England extends to Scotland, and there must be a writing signed to make a guarantee effectual—and there was no such writing proved.

LORD HATHERLEY concurred.

LORD WATSON said he also was unable to agree with the grounds on which the majority of the Judges in the Court of Session decided this case. The tenor of the bill sufficiently showed that James M'Kinlay was not an acceptor of the bill. But that was not because he did not use words before his signature. On the contrary, the Mercantile Amendment Act of 1878 showed that it was a mistake of the Court of Common Pleas to have supposed that an acceptor would not sufficiently bind himself by merely signing his name without more even while the statute of 1856 stood alone. And after the Act of 1878, which was a declaratory Act, the mere signature would now amount to a valid acceptance. It was plain however from the facts that James M'Kinlay did not sign as a party to the bill, but merely gave his signature without exactly knowing what the effect of that would be. And there was no sufficient evidence that James M'Kinlay had made himself a guarantor of the bill. The judgment of the Court was therefore right.

The LORD CHANCELLOR said that after reading the opinions of Lord Blackburn and Lord Watson he would not have added anything of his own, being satisfied with their reasons. But as the question was one of general importance, and turned on the construction of the two Mercantile Amendment Acts of 1856 and 1878, he was of opinion that the Act of 1878 was a declaratory Act, and showed that the construction of the Act of 1856 had been misapprehended. It was, and now is, quite enough to bind an acceptor that he merely sign his name across the bill without any words preceding the signature. But in this case it was sufficiently apparent that he did not sign his name as an acceptor, and his liability could only be established by evidence in writing signed by him that he was a guarantor, and here there was

no such evidence; therefore the decision of the Court below should be affirmed and the appeal be dismissed.

The House affirmed the judgment of the Court of Session, with costs.

Counsel for Appellants—Benjamin, Q.C.—Romer. Agents—Simson & Wakeford and Ronald & Ritchie, S.S.C.

Counsel for Respondent—Pearson, Q.C.—Scott—Roger. Agents—Holmes, Anton, & Greig, and Morton, Neilson, & Smart, W.S.

Thursday, July 8.

(Before Lord Chancellor Selborne, Lord Hatherley, and Lord Blackburn.)

CAMPBELL v. CAMPBELL.

(*Ante*, Dec. 11, 1878, vol. xvi., p. 280, 6 R. 310.)

Succession—General Disposition—Special Destination.

Where a person who held certain lands in fee-simple under a special destination executed a general disposition of his estates in favour of a different series of heirs, held (*aff. Court of Session*), in accordance with *Thoms v. Thoms*, March 30, 1868, 6 Macph. 704, that, in the absence of any indication of a contrary intention, the special destination had been evacuated.

This was an appeal from a decision of the Second Division of the Court of Session, the circumstances of which are reported Dec. 11, 1878, *ante*, vol. xvi., p. 280, and 6 R. 310.

At delivering judgment—

LORD CHANCELLOR—My Lords, the question in this case is, Whether by the law of Scotland general words of disposition in a *mortis causa* deed are, in the absence of any proof of a contrary intention, sufficient to pass heritable property vested at the date of the deed in the disponent with a special destination to heirs-substitute? The interlocutors appealed from, which in effect affirm that general proposition, were founded upon the case of *Thoms*, decided in the Court of Session in 1868, after much consideration, by a large majority of all the Judges, and it was admitted at the bar that if that case was rightly determined the present appeal must fail.

It may be useful, before referring to authorities, to consider how this question would appear to stand upon principle in the absence of authority. It is difficult, on any principle, to understand why words in a testamentary instrument descriptive of a man's whole estate, present and future (the law permitting all the present and future estate, moveable and immoveable, to be so disposed of), should, in the absence of a controlling context, be held to pass less than what they properly describe. There can be no question as to the meaning of such words—no possible extrinsic evidence can make them equivocal. Their use, *prima facie*, excludes the supposition that the disposition was intended to be limited to some particular subjects. No reason can be suggested why a testator should be presumed