

The other Judges concurred.
 Appeal dismissed.
 Agents for Defender and Appellant—Wother-
 spoon & Mack, S.S.C.
 Agents for Pursuers and Respondents—Campbell
 & Smith, S.S.C.

Tuesday, October 18.

HOWARD v. MUIR.

Bona Fide Possession, Interruption of. Where possession had begun in *bona fides*, and no interruption of *bona fides* occurred till the production of certain documents in an action of ejectment against the possessor—*Held*, in a subsequent action of damages, that he was not bound to submit until he had taken the final judgment of the Court upon these documents, and that his *mala fides* could only be counted from the date of that judgment, not from that of the production.

This was an appeal from the Sheriff-court of Lanarkshire. The petitioner had obtained a lease for seven years, from Whitsunday 1862, of a spirit shop in Stobcross Street, Glasgow, and continued in possession up till Whitsunday 1867. He then sold the lease and good-will of the shop, together with the stock-in-trade, to Douglas Gow, conform to missive letters of date May 6th 1867. As part of the price, Gow accepted three bills, and gave a back letter of date May 15th 1867, acknowledging that, until these bills were paid by him, he remained Howard's tenant in the premises. Gow entered upon and continued the business till October 1867, when he sold his lease, business, and stock to the defender, who thereupon took possession. Gow's bills remained unprovided for. Howard thereupon brought an action of ejectment against Muir in January 1868, which was not concluded until after Whitsunday 1869, when Howard's right had expired. After a variety of procedure, Howard's right to the premises was sustained by the Sheriff, though too late to be effectual. Howard did not produce either to Muir or to the Court Gow's back letter to him, on which his right rested, until required to do so by the Sheriff in the process of ejectment in January 1869. Howard thereafter brought the present action of damages against Muir for wrongous possession, concluding for £150. The Sheriff assaizled the defender from the conclusions of the action, holding his possession *bona fide*, at any rate up to 14th April 1869, and considering that there was no evidence whereon he could assess any material damage between that date and Whitsunday 1869.

The pursuer appealed.

BRAND for him.

WATSON and MACKINTOSH for the respondent.

LORD PRESIDENT—There can be no doubt of Muir's *bona fides* at the out set. When he took the shop from Gow he must have seen the missives of May 6th 1867,—these were Gow's title to sub-let, and, as such, *ex facie* absolute. There is nothing to interrupt Muir's *bona fides* until Howard produced the letter of 15th May 1867 qualifying Gow's right. But the production was not made by Howard till required by the Sheriff in January 1869. Farther, when produced there was need of additional evidence to connect the back letter of Gow with the bills founded on. Being therefore in *bona fide* when the action was raised, I cannot think that

Muir was bound to depart from his defence the minute these documents were put in. I think the result of the action was quite right, that Howard should be found entitled to get back possession, but I do not think that there was any legal interruption of Muir's *bona fides* until the action came to an end. I therefore agree with the Sheriff.

LORD DEAS—The document which Gow had to show was *ex facie* absolute, and I do not see that Muir was bound to go and inquire if it was otherwise qualified. It would have been different had there been anything of a qualificatory nature in Gow's document, or anything even to cause suspicion. But there was not, and I can see nothing to discredit the *bona fides* of Muir until the action of ejectment was brought to a final conclusion.

LORDS ARDMILLAN and KINLOCH concurred.

Appeal dismissed.

Agent for Appellant—A. Kirk Mackie, S.S.C.

Agents for Respondent—J. & R. MacAndrew,
 W.S.

Thursday, October 20.

SECOND DIVISION.

MORRISON v. HARKNESS.

Cautioner—Direct Obligation—Discussion—Mercantile Law Amendment Act—19 and 20 Vict., c. 60, § 8. A law-agent granted a holograph obligation in the following terms:—"I will see the above account settled when taxed, reserving Mr Gun's plea.—Chr. Harkness." *Held* that this document constituted a direct and primary obligation against him, which was enforceable by action without the necessity of constituting the debt against the principal debtor, or of discussion.

Observed, that if it was to be held to be a cautionary obligation, the result would have been the same.

This was an action for the amount of a business account, due by the appellants Mrs Morrison and her sister to Mr Wilson, solicitor in Dumfries, in the following circumstances:—The appellants, who were creditors in two bonds and dispositions in security over certain property in Dumfries, employed Mr Wilson to call up the said bonds, and if necessary to sell the subjects to pay the amounts contained in them. The respondent Mr Harkness was agent for the trustee on the sequestrated estate of one of the debtors, while Mr Gun was trustee on the estate of the other debtor.

On 17th May 1869 the agent of the appellants, Mr Wilson, met with the respondent, and received from him the amount of the debt, with interest; he tendered at the same time his business account. Mr Harkness, the respondent, thereupon granted an obligation in the following terms:—"I will see the above account settled when taxed, reserving Mr Gun's plea.—CHR. HARKNESS."

The appellants accordingly brought an action in the Sheriff-court of Dumfries against Mr Harkness for the amount of the account.

Harkness pleaded—"The account being disputed by one of the principals, viz., Mr Gun, trustee for John Henderson, it was necessary, in the first instance, to constitute the debt against the principals along with the defender, the cautioner, and it is incompetent to prosecute the defender alone, in respect, in the cautionary obligation libelled, the plea of Mr Gun was specially reserved—that con-