

forty years, and I can give no countenance to the present attempt to invert it.

LORD CRAIGHILL not having been present at the debate gave no opinion.

The Court adhered.

Counsel for Pursuers — Asher — Lorimer. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defenders—Solicitor-General (Balfour, Q.C.)—R. Johnstone — Keir. Agents — Hope, Mann, & Kirk, W.S.

Friday, January 21.

FIRST DIVISION.

[Lord Rutherford Clark, Ordinary.]

THE NORTH OF SCOTLAND BANKING COMPANY v. BEHN, MOELLER, & COMPANY.

Agent and Principal—Bill—Mandate to Sign per pro.—Liability.

B. & Co., merchants in Hamburg, opened a branch in Dundee in January 1869, to be managed by an agent, to whom they gave, *inter alia*, power to sign per pro. of their firm. On 1st September 1879 the agency terminated, they being dissatisfied with the conduct of their agent. A bank having discounted some bills of later date than 1st September 1879, drawn by D. & Co., a Dundee firm of which the said agent was a partner, on B. & Co., and accepted by the agent per pro. of them, sued B. & Co. for the amount. It was proved that the bank knew the agency was to terminate on 1st September 1879, though no general notice had been given of the fact in Dundee; and that they had inquired and been misinformed by D. & Co. that the bills were granted in connection with some unconcluded transactions of B. & Co. The bills turned out to have been for the accommodation of the agent, who subsequently absconded, and his partner in D. & Co. Held that the bank being in knowledge of the termination of the agency, could not succeed, and B. & Co. assolizied accordingly.

Question as to the limits of the duty of inquiry, and subsequent liability, of a party discounting bills accepted per pro.

Opinion per Lord Rutherford Clark (Ordinary) that the holder of a mandate to sign per pro. will bind his principal by his actings if within the sphere of that mandate, even though they are fraudulent.

Messrs Behn, Möller, & Co. were merchants in Hamburg. In January 1869 they established a branch house in Dundee. They conferred the management of this branch on Julius Heyde, under an agreement dated 7th January 1869, in which they "at the same time gave him procuration." Heyde was to be paid partly by salary, partly by commission, and was at no time a partner of their firm. By power of attorney of the same date they constituted him "true and lawful attorney for us, and in our name, place,

and stead, to act in all our affairs at Dundee, giving to our said attorney full power and authority (*procura*) to sign all letters, deeds, assignments, acts, indentures, and bills of exchange with our firm, adding to it the words '*per procura*' and his name to oblige our firm in that way, and in every wise to sell and to transfer real property, shares, and mortgages, and to extinguish the latter, to ask, demand, sue for, recover, and receive every sum and any object due to us, to compound with any person, to give good and sufficient releases and discharges, to appear and to plead before every inland or foreign judge and court of justice whatsoever, and to prosecute such actions and suits to judgment and execution, to seize, sequester, and arrest merchandises, claims, or other objects whatsoever, giving and hereby granting unto our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as we might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that our said attorney or his substitutes shall lawfully do or cause to be done by virtue hereof." On 1st September 1879 Behn, Möller, & Co. being dissatisfied with Heyde's conduct, closed their Dundee branch, and his powers as their agent ceased as from that date.

The present action was raised against Behn, Möller, & Co. by the North of Scotland Banking Company, and concluded for payment of the sums contained in each of four bills for the amounts of £89, 4s. 5d., £164, 9s. 2d., £195, 16s. 5d., and £242, 13s. 4d. respectively, of dates 27th September, 30th September, 11th October, and 18th October 1879, drawn by William Dewar & Co., manufacturers, Lochee, upon the defenders, and bearing to be accepted by them per *procuracionem* of Julius Heyde, all payable three months after date.

The defenders pleaded—" (1) The defenders not being due and resting-owing to the pursuers the amounts of the said several bills, they are entitled to absolutor with expenses. (2) The said Julius Heyde having accepted the said several bills per *procuracionem* of the defenders without authority to do so, the defenders are not liable for the amounts of the said bills. (3) The said Julius Heyde having ceased to represent, and having ceased to have authority to bind, the defenders as their agent or otherwise prior to the dates of the said acceptances, the defenders are entitled to absolutor. (4) The said several bills being accommodation bills, of which the defenders had at the time no knowledge, and in which they had no interest, and this being well known to the pursuers, the defenders are not liable for the amounts of the said bills. (5) Neither the pursuers nor the said William Dewar & Co. having given value for the said several bills, the pursuers are not entitled to insist in this action against the defenders."

From the proof which was led in the case it appeared that between 7th January 1869 and 1st September 1879 Heyde carried on numerous transactions as manager of the Dundee firm. He ordered goods from manufacturers in Dundee and elsewhere, in the defenders' name, which

were invoiced by the manufacturers to them, and accepted bills for the amount, signing these with his own name *per pro.* of the defenders. The defenders from time to time sent remittances to meet these bills as they fell due, to the Commercial Bank at Dundee, in whose hands the power of attorney was placed immediately after its execution, and all along remained. The defenders kept their cash account at that bank, with whom all the said bills were domiciled. The partners of the firm of William Dewar & Co. were Mr W. D. Dewar and Julius Heyde. Heyde was also sole partner in the firm of Julius Heyde & Co., calenderers in Dundee. After Heyde's agency terminated on 1st September 1879 the defenders arranged to purchase goods through or from him, Heyde ordering the goods on his own account and in his own name, the goods being invoiced by the manufacturers to him, and by him thereafter to the defenders. The bills in question were for goods so ordered and invoiced. They were payable at the pursuers' bank, and not at the Commercial Bank. It appeared further that at and prior to 1st September 1879 the pursuers were aware that Heyde's agency was to terminate on that day, and knew of the change of relations thenceforth to subsist between him and the defenders. Their agent in Dundee inquired of Dewar & Co. as to the nature of the consideration of the bills in question, and was misinformed by them to the effect that they were granted in connection with some transactions of Behn, Möller, & Co. which had not then been wound up. Heyde absconded in December 1879, his estates were sequestrated on 22d January 1880, and those of William Dewar & Co. on 11th February 1880.

The Lord Ordinary (RUTHERFURD CLARK) assolized the defender. He added this note:—

“*Note.*—The bills sued on are accepted by Julius Heyde *per procuracion* of the defenders. The Lord Ordinary is satisfied on the evidence that they were not honestly accepted in virtue of the procuracion which, for a certain time at least, Heyde held from the defenders. He thinks that they were accepted for the accommodation of Heyde and his partner Dewar. On the evidence of Dewar the Lord Ordinary can place no reliance.

“The defenders contended that this fact was sufficient to entitle them to absolvitor, on the ground that they could not be liable for any bills accepted by Heyde in violation of his mandate. The Lord Ordinary cannot assent to this view. He thinks that when a person acts within the sphere of his mandate, his acts are, in a question with third parties, binding on his principal, even though they are fraudulent. It was maintained that as the bills bore to be signed *per procuracion*, they disclosed that the person who accepted them was acting under a mandate, and therefore that the pursuers were bound to satisfy themselves that the mandatory truly held the power which he proposed to exercise. So far this is quite true. The procuracion must exist, or the alleged granters of it cannot be bound. But if it does exist, the granters must, it is thought, be responsible for all acts which are apparently within the mandate. To hold otherwise would be to hold that no bank would be safe in discounting a bill signed ‘*per pro.*’ without making inquiry at the principal whether his

agent was entitled to draw or accept that particular bill.

“But the defenders maintain a further defence, which in the opinion of the Lord Ordinary is well founded. Heyde was the agent for the defenders, and it was in that capacity that he held a procuracion to draw and accept bills. This agency terminated on 1st September 1879. The pursuers knew that Heyde held the defenders' procuracion as agent, and they knew of the termination of the agency, which by implication terminated that procuracion. When bills bearing to be signed ‘*per pro.*’ of the defenders were presented for discount, the manager of the pursuers asked Heyde for an explanation, and was satisfied with the statement that though the agency was terminated, the transaction in connection with it had not been closed. But the bills presented for discount increased to an unusual amount, and the pursuers knew that Dewar who drew them was a partner of Heyde who accepted them. The Lord Ordinary thinks that the circumstances were such as to give rise to grave suspicion of the honesty of Heyde, and to throw on the pursuers the duty of making inquiry. They failed to discharge this duty, and they must, it is thought, suffer the consequences of their failure.”

The pursuers reclaimed, and argued—In discounting the bills the limit of their duty was to inquire whether Heyde had a mandate from the defenders, and whether acceptance of bills *per pro.* of them was an act within the powers conferred by that mandate. On the evidence, the defenders had not given sufficient notice of the termination of the agency, which, further, had in fact not completely come to an end on 1st September. The pursuers had been misled by the actings of the defenders. The defenders having placed Heyde in a position to commit his fraud, should suffer, rather than the pursuers, from its consequences.

The defenders replied—A bank discounting bills accepted *per pro.* did so at their own risk, and the defenders could not be held liable for the consequences of Heyde's fraud, the duty of inquiry resting with the bank. In the circumstances the bank had a special duty of inquiry, which they failed to perform. They were in knowledge of the termination of the agency, which by implication terminated the procuracion, and of other circumstances tending clearly to throw suspicion on Heyde's conduct.

Authorities—*Alexander v. Mackenzie*, 1848, 18 L.J. C.P. 94; *Stagg v. Elliot*, 1862, 31 L.J. C.P. 260; *Smith's Mercantile Law*, 9th ed., 255; *Hamilton v. Dixon*, Oct. 29, 1873, 1 R. 72; *Colvin v. Dixon*, March 15, 1867, 5 Macph. 603; *Union Bank v. Makin*, March 7, 1873, 11 Macph. 499; *Sinclair, Moorhead, & Co. v. Wallace*, June 4, 1880, 7 R. 874; *Swire v. Francis*, 1877, 3 L.R. App. Ca. 106; *Grant v. Norway*, 1851, 20 L.J. C.P. 93; *Storey on Agency*, sec. 73.

At advising—

LORD SHAND—This is an action at the instance of the North of Scotland Banking Company against Messrs Behn, Möller, & Co. as defenders, who although designed as merchants in Dundee, are really merchants in Hamburg, but who carried on business in Dundee for a time; and the claim is one for payment of the amount of four bills,

which taken together come to about £700. These bills were drawn by Messrs William Dewar & Co., manufacturers in Dundee, on Messrs Behn, Möller, & Co. in September and October 1879, and Behn, Möller, & Co. are sued as acceptors, the bank having discounted these bills of William Dewar & Co. The bills are not accepted by Behn, Möller, & Co. but by Julius Heyde *per procuration* of them, and having been discounted by the bank the proceeds were placed to the account of Dewar & Co. It was explained, and I think it appears from the evidence, that besides the four bills which are the subject of this case, there are several others of subsequent dates—I think extending into November and December 1879—which are all in the same position, and the fate of all of which will be determined by the result of this action. It appears that in January 1869 Messrs Behn, Möller, & Co. being desirous of carrying on business through an agency in this country, entered into an agreement with Mr Heyde, by which they arranged that he should act on their behalf in Dundee, taking the management of the agency house which they were then about to open, and that for the purposes of that agency house they gave him a procurator to sign documents on their behalf. Of the same date as the agreement the firm executed a power of attorney giving very large powers to Heyde as their agent to bind the firm. That power of attorney authorises Heyde to sign letters, deeds, assignations, and bills of exchange, but that not by adding the firm's signature of Behn, Möller, & Co., which he had no authority to do, but by signing invariably *per procuration* of that firm. And this power of attorney was limited by this stipulation, that it was only in the affairs of the firm of Behn, Möller, & Co., and in transactions really on their behalf, that he was authorised to sign in that way. This power of attorney was delivered to the Commercial Bank, who were, from the date of its being granted, apparently the bankers of Behn, Möller, & Co. in their ordinary banking transactions, and in that bank the firm apparently kept their cash account, and in that bank also it appears that all drafts on the firm were domiciled. The power of attorney appears never to have been out of the hands of the Commercial Bank, and it is not alleged in this case that it was seen, or that its terms were specially known, by the pursuers. Following on that agreement in January 1869 there appears to have been a large number of transactions for a period of nearly ten years, down to, I think, 1st September 1879. These consisted of the purchase of goods of considerable amount from manufacturers in Dundee and elsewhere in Scotland, in the name of Behn, Möller, & Co., and invoiced to Behn, Möller, & Co., and the mode in which these goods were paid for was by acceptances granted by Behn, Möller, & Co., the signature being adhibited by Julius Heyde invariably by procurator of that firm, and, as I have already explained, these bills were domiciled at the Commercial Bank, and Behn, Möller, & Co. provided the funds from time to time as they fell due and were payable at that bank. By September 1879, however, Messrs Behn, Möller, & Co. seem to have become dissatisfied with Heyde's actings. They were apparently largely in advance to him upon transactions that had taken place, and they resolved to terminate their agency, and all parties are agreed that the agency was terminated at 1st

September, which it will be observed was before the date of the bills now in question. The result of the termination of the agency was that Heyde was no longer authorised to buy goods in name of Behn, Möller, & Co. He had therefore no longer authority to sign acceptances for goods to be supplied to Behn, Möller, & Co., the arrangement after this being that Behn, Möller, & Co. purchased goods through or from Heyde, and Heyde was to take his own means of acquiring the goods which he was to sell to them, and from that date it appears from the books that in point of fact no goods were ever ordered in the name of Behn, Möller, & Co., either from Dewar & Co. or any other merchants they had been in use to deal with in the name of their firm. Heyde appears also to have altered the order form which had been in use, in the name of Behn, Möller, & Co., and all goods thereafter purchased were purchased by him in his own name, invoiced by the manufacturers to him, and thereafter in so far as the defenders became purchasers of goods, these goods were invoiced by Heyde to them. The bills in question were granted substantially as the price of goods in that position—I mean goods which Heyde had ordered in his own name for which he was the debtor, but which it appears were sold by Heyde to, and forwarded to, the defenders, and invoiced by him to them. It is clear, and indeed, I think, was not disputed on behalf of the bank, that in a question between Heyde and Behn, Möller, & Co., Heyde had certainly no authority to sign these bills *per procuration* of Behn, Möller, & Co., and I think it is clear also on the evidence that Dewar & Co., the drawers of these bills, could not have recovered as against Behn, Möller, & Co. the price of these goods as for goods that they had sold to the defenders, nor could they have demanded acceptances for these goods. I think the evidence plainly shows that Dewar & Co. quite understood that the ultimate destination of these goods might be to Behn, Möller, & Co., but they were selling them to Heyde, and to Heyde only, and Heyde alone was responsible to them. I observe in the evidence of Mr Dewar, of the firm of Dewar & Co., he says—"Previous to 1st September all the goods ordered were ordered in name of Behn, Möller, & Co. Subsequent to 1st September every written order we received, save one, was from Heyde & Co. The goods which were ordered by the old firm of Behn, Möller, & Co. were invoiced by us to Heyde & Co. (Shown Nos. 673-679, inclusive)—These are orders we received from Heyde & Co. Some of them are on new forms, printed with Heyde & Co.'s name, and others on the old forms with Behn, Möller, & Co. altered. All the goods which were ordered in the name of Behn, Möller, & Co. prior to 1st September were invoiced by us to Behn, Möller, & Co. All the goods sent to Heyde & Co. after 1st September were invoiced by us to Heyde & Co." And there is the witness Blair, who succeeded Heyde as agent or representative of Behn, Möller, & Co. in Dundee, whose evidence is very clearly to the same effect. But although Heyde was not entitled to accept these bills in name of Behn, Möller, & Co., and although Dewar & Co. were not entitled to obtain acceptances or to require Behn, Möller, & Co. to pay the price of these goods, the question still remains, whether, looking to what has occurred before these bills were

presented for discount, the bank were entitled to discount these bills on the faith of Heyde's signature *per procuracion*, so as to bind the defenders? On that question, besides what occurred after 1st September 1879, the material facts relied on by the pursuers appear to be these—in the first place, the existence of the procuratory or power of attorney to which I have already referred, which has never been formally recalled; in the next place, the extensive actings which followed upon that procuratory—large transactions by way of purchases of goods—and a very large number of bills which had passed through the Commercial Bank having been discounted by the sellers of these goods, and having the signatures of Behn, Möller, & Co. and Heyde; and third, the fact of there having been no special notice in Dundee that the agency had terminated, and that Heyde no longer had power to sign bills. A question has been raised by the defenders as to their legal obligation under a signature by Heyde *per procuracion*, and as to whether it is binding on them even if the mandate they had granted authorising them to accept bills had been admittedly subsisting, seeing that the signature he was authorised to affix was *per procuracion* only, and not the signature of the firm. It has been maintained that with a mandate of this description, and a signature of this description, the defenders would not be bound in any transaction which did not fall expressly within the terms of the mandate, but could only be bound in any transaction of their own, which this plainly was not. We were referred to a good deal of authority in English cases to support the view that when such a mandate as this, in which a party is authorised only to bind his constituents for transactions entered into on their behalf, and to bind them only by signature *per procuracion* of their firm, a party discounting such a bill must satisfy himself that the particular transaction falls within the mandate, that it was a transaction for behoof of the party granting the mandate, and that he must take the risk of this upon his own inquiries. The Lord Ordinary has expressed an opinion adverse to that view, but in the view I take of the case it appears to me that it is unnecessary to decide that question, and I do not mean to express a final opinion on it. I shall only say that the cases which have been referred to, and which have probably governed mercantile transactions for a number of years, must receive very serious consideration, and that the principles laid down in the cases will be applied in every question arising hereafter for the determination of the Court. But in the present case I think that there is enough in the facts that are disclosed in this proof to prevent bankers, like the pursuers in this case, founding successfully on the mandate which authorised Heyde to sign acceptances *per procuracion* of his firm. The facts which appeared to me to be sufficient to show that the pursuers are not entitled to succeed are these,—In the first place, and mainly, that on the 1st of September 1879, before these bills were granted, the agency of Heyde on behalf of Behn, Möller, & Co. had not only been recalled, but that the bank knew that that was so. There is no doubt about this being the case. The agent for the bank in Dundee expressly admits it, and we find the fact recorded in letters to the head-office two or three

weeks before the agency in point of fact terminated. In the next place, it appears that the bank through its agent was also aware that Heyde had no longer authority to buy goods in the name of Behn, Möller, & Co. for which they were to be responsible, and that in pursuance of an arrangement to that effect Heyde was to buy goods in his own name and to take the creditors into his own hands, and that he was to supply goods to Behn, Möller, & Co. And beyond this we find that the banking transactions between Heyde and the North of Scotland Banking Co. were changed in conformity with the facts. A material change occurred, for while Heyde had all along had an account with the North of Scotland Banking Co. in his own name, which was of the character or nature of a wages account, while small amounts were deposited from time to time, and on which he made drafts for the wages of his workers, after September this account was entirely changed. It was no longer a wages account, but an account of very much larger transactions. Heyde was still connected with Behn, Möller, & Co.'s firm in the way of supplying them with goods, and it is not to be thrown out of view that all the bills previous to September 1879, as I have already mentioned, had been domiciled at the Commercial Bank, the bank where Behn, Möller, & Co. had their account, and where those bills were made payable, whilst those bills now in question were not so domiciled. Now, taking all these circumstances together, along with the fact that Heyde had no authority to sign the name of the firm in a question between him and those who were his constituents, it appears to me that the bank must fail in this action. The termination of the power to purchase goods on behalf of Behn, Möller, & Co., and in their name, necessarily terminated the right to grant acceptances as for goods, and the bank knew that, and yet these are acceptances as for goods. The bank agent explains that in the knowledge of the circumstances I have now mentioned he made some inquiry—that is, inquiry at Dewar & Co. and at Heyde—with reference to what was the consideration for which these bills had been granted, and all that can be said is that these persons seem to have misunderstood him as to what was the consideration for these bills. The bank agent explains that Heyde told him that these bills had some connection with transactions of Behn, Möller, & Co. which had not been wound up, and he thought fit to take that explanation as sufficient. If he did so, it appears to me that the bank must take the consequences of that. They were misled, but I think that in the circumstances in which they were placed—distinct knowledge of the termination of the agency, clear knowledge that Heyde was no longer entitled to bind Behn, Möller, & Co. for goods purchased by way of acceptances—they themselves took the risk of discounting such acceptances as were presented. And there is a circumstance which is material upon this branch of the case—I mean as to whether the bank had been misled by the defenders in this matter. It appears that Dewar and Heyde were themselves partners in another business—a calendaring business—which had gone on for some time. They were in the closest relations, and nothing appears more likely than that they should grant accommodation to each other—and in point

of fact it seems that they were passing bills from one to the other; and taking all these circumstances into account, I agree with the Lord Ordinary in thinking that in the circumstances in which they were placed the pursuers were not entitled to rely upon the signatures as sufficient, and that the insufficient inquiries they made had been the cause of the loss which I think they must sustain.

Counsel for the pursuers very properly brought under the notice of the Court some circumstances to which I have not as yet adverted, but which I must notice in order to show that I have accorded them due consideration. It was said that although the agency was terminated there were two classes of documents that Heyde had been allowed to sign *per procurationem* of Behn, Möller, & Co. The first of these were bills purchased by Behn, Möller, & Co. abroad, and sent home as remittances to account of their obligations to Heyde & Co. in this country. These bills were purchased in name of Behn, Möller, & Co., and in place of Behn, Möller, & Co. endorsing them before sending them to this country they sent them unendorsed, and allowed Heyde to sign *per procurationem* of their firm and thus collect the money. It perhaps was—I do not say it was not—a loose way of doing business to allow that system to continue, but it must be observed that these bills were in a totally different position from the bills now sued on, in this respect, that the only purpose for Heyde's signature of the firm was to enable him to cash these documents, and so make the money available for the payment of Behn, Möller, & Co.'s obligations. It was quite unlike an acceptance of a bill creating a new obligation. It was simply an endorsement, something like an endorsement that one would make on the back of a letter of credit or the back of an order to enable a person to receive the money, and therefore I do not think that documents of that class are at all material in this question, or that it can be said that a person who was no longer the agent of Behn, Möller, & Co., in the sense of being allowed to purchase goods and grant acceptances for them, should not still be allowed to sign documents of that kind without a special mandate.

The other circumstance alluded to by the counsel for the pursuers was as to certain cheques that Heyde was allowed to draw upon bankers in London, and which were honoured by the defenders. They were not numerous, being three in number. Whether there was any special arrangement about this or not I cannot very well tell. There appears, however, to have been special authority, because Blair in his evidence speaks of special authority to sign these cheques. This circumstance, even taken with the fact that these cheques have been honoured, is not, I think, sufficient to take off the effect of the broad fact that the agency had terminated, and that Heyde had no longer power to purchase goods for Behn, Möller, & Co., and to bind them for the prices thereof.

In the whole circumstances I cannot help saying that there was some looseness on the part of Behn, Möller, & Co. in not giving some more general notice that this power had ceased; still in the whole circumstances I agree with the Lord Ordinary that the pursuers cannot succeed. The question of absence of notice is very much affected by the fact that it is admitted by the bank agent

that he really knew all that Heyde knew as to the termination of the agency and the position in which Heyde was placed after 1st September 1879. I am therefore for adhering to the interlocutor of the Lord Ordinary.

LORD MURE—I concur with the Lord Ordinary and with the judgment pronounced by Lord Shand. There are two questions in this case, as the Lord Ordinary has explained in his note—the first as to the terms of the authority granted to Heyde, and the law relative thereto, which it is not necessary to dispose of in the view which has been taken of the case, but, for my own part, I confess I am inclined to be of the Lord Ordinary's opinion upon it. On the second question also, after anxious consideration of the evidence, I come to the same conclusion with his Lordship. The transactions were undoubtedly somewhat loose from a business point of view, but still it is clear on the evidence that the bank were well aware by the 1st of September, and even before that, as is proved by the terms of their own letters dated prior to that day, that the agency was to come to an end and Heyde was to do business on his own account from that date. Inquiry no doubt was necessitated. By the terms of the power of attorney, as shown in the translation before us, it is plain that the power to sign *per pro.* of their firm was given by Behn, Möller, & Co. to Heyde as their agent in a certain concern, for in the first head of the agreement, as we have it translated in English, they “confer on him the management of the branch house which they are to open on the 15th January of this year in Dundee, under the same firm, and at the same time give him procuration”—procuracion, that is, in regard to the management of the branch house. The procuracion was clearly given to Heyde *qua* agent in that concern. If the bank had asked then to see that document, and made the inquiries which they ought to have made, they would have ascertained that the nature of the business to be carried on by Heyde after the 1st September would not warrant him in accepting bills *per pro.* of the firm. As they did not make those inquiries, it is plain on the evidence that they are not warranted in the demand they now make. It was quite well known that Heyde had such a power from Behn, Möller, & Co., and it was equally notorious in Dundee that his agency ceased as from 1st September. I am clearly of opinion that the bank did not take such action as they ought to have taken, and are therefore not entitled to recover the amount of their loss from the defenders.

LORD PRESIDENT—The special facts of this case have been so fully and accurately stated by Lord Shand that it is quite unnecessary to go over them again. I think the case may be decided upon a fair view of the evidence without the necessity of deciding any new or delicate questions of law at all. The bills which are sued on by the pursuers were drawn by Dewar & Co., and were accepted by Heyde *per procuracionem* of Behn, Möller, & Co. The acceptance was certainly not honestly made, nor was it made in the service of Behn, Möller, & Co., but was really an acceptance given for the joint accommodation of Dewar & Co. and Heyde, and therefore in a question between Dewar & Co. or Heyde and the defenders there can be no

doubt that these bills cannot be enforced. But they were discounted with the pursuers' banking establishment; and the question is, whether they were justified in discounting them in reliance on the procurator of Heyde for Behn, Möller, & Co.? That the power of accepting bills *per procurator* of Behn, Möller, & Co. was at one time held by Heyde there can be no doubt. In January 1869 the defenders opened a branch of their business in Dundee, and they granted a very full power of attorney to Heyde as their agent, and at the same time entered into an agreement specifying the conditions upon which he was to transact their business. That procurator or power of attorney was lodged with the Commercial Bank, and the whole of the legitimate business of the agency was transacted through that bank. In 1879 the agency came to an end, the precise date at which it was terminated being 1st September of that year, and it was quite well known that the agency was brought to an end, or was to be brought to an end, at that date, and among others it was quite well known to the pursuers. Any power of attorney containing this power to draw and accept bills *per procurator* of the defenders was granted exclusively in connection with the branch business or agency which the defenders had established, and of course the proper inference that anybody would draw was that when the agency came to an end the power to draw and accept bills *per procurator* of the defenders came to an end also, the object of granting that procurator having been terminated. If the matter stopped there, the conclusion would be inevitable that the North of Scotland Banking Company became aware that Heyde's representation of the defenders had come to an end, and that he was no longer entitled to act for them at all as their agent, and that being so they were clearly not justified in relying upon the procurator, which had been granted only for the purposes of that agency. But they say that while Heyde informed them that the agency had come to an end, he told them at the same time that he would continue to accept bills *per procurator* of the defenders for the purpose of winding-up transactions connected with the agency, and they chose to rely upon that representation. Were they justified in so doing? I think clearly not. There had been no business of this kind transacted with their banking establishment previously. The banking business of the defenders had been done with the Commercial Bank, in whose hands the power of attorney was lodged. And the very first bills that were negotiated at the pursuers' bank were the bills that are now sought to be enforced. It seems to me that upon these facts they were not entitled to rely upon the procurator or to hold that the acceptance of Heyde would be binding upon the defenders after he had ceased to be their agent, and upon that single ground I think it is clear that they are not entitled to enforce payment of these bills against the defenders. The cases relied upon by the pursuers as creating a kind of specialty that this power of signing *per procurator* still existed have been sufficiently noticed by Lord Shand, and I do not think they are sufficient to remove the general impression created by the evidence, that the pursuers had no right to rely upon this procurator as an existing procurator. I therefore agree with your Lordships that the

interlocutor of the Lord Ordinary ought to be adhered to.

LORD DEAS was absent.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Trayner—Jameson. Agents — Carment, Wedderburn, & Watson, W.S.

Counsel for Defenders (Respondents)—Johnstone—Asher—Macfarlane. Agent—J. Smith Clark, S.S.C.

Saturday, January 22.

FIRST DIVISION.

[Sheriff of Lanarkshire.

WHYTE v. MILLAR & YOUNG AND DEVAUX
FRERES ET CIE.

Contract—Deposit—Duration of Contract where no Stipulation as to Time.

Held that a depositary for hire who has made no stipulation as to the period for which the deposit is to endure is not entitled to terminate the contract and insist upon the removal of the deposited goods except for a reasonable cause.

Circumstances in which a petition by a depositary for warrant to sell goods deposited with him for hire, on the refusal of the depositor to remove them, *refused*.

The following were the averments of the pursuer in this case:—"The defenders Millar & Young, in or about the month of August last, consigned, in name and for behoof of Devaux Frères & Cie., in the warehouse of the pursuer James Whyte, 13,021 pounds of yarn. Arrestments were on the 25th and 31st days of August last laid upon the said goods in the hands of the pursuer, in connection with an action at the instance of the defenders Millar & Young against the defenders Devaux Frères & Cie. The pursuer has frequently applied to each of the defenders to remove the goods from his custody and pay the store rent thereon. Said applications having always been refused, the present action has become necessary."

The prayer of the action was for the Sheriff "to grant warrant of sale of 13,021 pounds of yarn, lodged in the pursuer's warehouse by the said Millar & Young, for behoof of the said Devaux Frères & Cie., in or about the month of August last, and that by public roup or otherwise, as the Court may ordain; the proceeds of sale, under deduction of warehouse rent, and all other claims incurred or to be incurred by the pursuer on account of the said goods, and of the expenses of this process, to be consigned in the hands of the Clerk of Court or otherwise."

Devaux Frères & Cie. admitted that the yarn was stored in their name, but they denied that this was done on their behalf. They explained that they had no interest in the yarn, and stated that they were about to raise an action against Millar & Young for the price. But neither they nor Millar & Young objected to the yarn being