

of affairs which may require to be made up. But this will never make the interest "received in the United Kingdom." The *New Mexican* case was totally different. The money there could only be said not to have been received, if money sent home by bill is not received in this country, or if no colonial interests are received in the United Kingdom which do not reach it in specific form.

In the view which I have stated of the second query, the third query in the case relating to the Scottish Widows' Fund does not arise.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court affirmed the determination of the Commissioners.

Counsel for the Appellant, the Surveyor of Taxes—Lord Advocate, Sir Charles Pearson, Q.C.—Solicitor-General, Murray, Q.C.—A. J. Young. Agent—P. J. H. Grierson, Solicitor for Scotland to Board of Inland Revenue.

Counsel for the Respondents, the Scottish Provident Institution—Balfour, Q.C.—Maconochie. Agent—G. M. Paul, W.S.

Counsel for the Respondents, the Scottish Widows' Fund Society—Balfour, Q.C.—Fleming. Agents—Tods, Murray, & Jamieson, W. S.

Wednesday, December 18.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

BARTSCH v. POOLE & COMPANY.

Bill of Exchange—Protest—Undertaking to Pay at Creditor's Office—Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61), sec. 51, sub-sec. (7).

The creditor in a bill payable on demand at his own office presented the bill there, and payment not having been made by the debtor, protested the bill under deduction of certain sums paid to account. The narrative of the protest bore that "I, J. A., notary-public, presented the said bill at the place where payable to a clerk there, who made answer that no funds had been provided to meet said bill, and payment was refused accordingly." The creditor having charged the debtor on the protest, the debtor raised a suspension of the charge. *Held (rev. judgment of the Lord Ordinary)* that the protest was invalid, on the ground that, the place of payment named in the bill being the creditor's office, all that the protest recorded was the presentation of the bill for payment by the creditor to the creditor; that the creditor was not an agent of the debtor for payment to himself, and that the debtor not having been present at the place where he undertook to make pay-

ment, the protest should have specified the fact, as required in such cases by the Bills of Exchange Act, section 51, sub-section (7) (b), "that the drawee or acceptor could not be found."

Opinion (per Lord Ordinary, Kincairney) that a presentment for payment implies a demand for payment, and that the protest, in stating that the bill was presented, sufficiently complied with the statutory requirement that the protest should state the demand made.

On 14th May 1895 Gustav Herman Bartsch, hotel-keeper, Edinburgh, and R. M. Douglas, S.S.C., in consideration of a loan of £250 granted to Bartsch by Poole & Co., corporate accountants, Edinburgh, accepted a bill for £350 drawn by Poole & Co., bearing to be for value received, and payable on demand at the office of Poole & Co. in Edinburgh.

Of the same date, by a writing signed by the acceptors and addressed to the drawers, the following agreement was entered into between the parties:—"Sirs,—We have this day accepted a bill drawn by you upon us for £350, payment of which you have agreed to receive in weekly instalments of ten pounds sterling, commencing on Monday, 27th May 1895, and continuing till the whole be paid up. But in the event of our failing to call upon you and pay said instalments, you are to be entitled to recover from us, at any time thereafter, the whole sum or balance due on the said bill, with the expenses thereof, as if the same were now payable in full." Sundry further penalties were imposed upon the acceptors by this agreement in the event of such failure.

The instalments of £10 due on 27th May and 3rd June were duly paid; but the instalment falling due on 10th June was not then paid. Accordingly, on 14th June, Poole & Co., after communicating their intention to Bartsch and Douglas by letter, protested the bill. The protest began by reciting the bill, and proceeded—"At Edinburgh, upon the fourteenth day of June, in the year of our Lord, One thousand eight hundred and ninety-five, at request of Poole & Company, corporate accountants, No. 4 North Saint Andrew Street, Edinburgh, drawers and holders of the original bill above copied, I, James Andrews, of the city of Edinburgh, notary-public, presented the said bill at the place where payable to a clerk there, who made answer that no funds had been provided to meet said bill, and payment was refused accordingly. Wherefore I, at request foresaid, do hereby protest the said bill against Gustav Herman Bartsch, 25 Hanover Street, and R. M. Douglas, 5 Annandale Street, all Edinburgh, conjunctly and severally, the acceptors thereof, for non-payment of the contents, and for all interest, damages, and expenses, as accords; but always under deduction of the sum of nineteen pounds, nineteen shillings, sterling, paid to account, before and in presence of John Alexander Robertson, solicitor, Edinburgh, and John Low, clerk to the said Poole & Company, witnesses specially called to the premises. (Signed) *Veritas*

vincit, JAMES ANDREWS, notary-public; 17th June 1895, five pounds further paid to account. (Signed) pro Poole and Company, JAMES WOOD."

The protest was duly recorded in the Sheriff Court books of the county of Edinburgh, and on 20th June a charge was given upon it to Bartsch and Douglas, who immediately presented a note of suspension of the charge. In addition to the main facts above narrated, they averred payments to account of the sum in the bill made by them to Poole & Co. on 17th, 20th, 24th, and 26th June, bringing up the sum paid by them to £50. They further averred, with reference to the protest—" (Cond. 5.) The said James Andrews did not present said bill, and neither did the pretended witnesses. It was not presented to either of the complainers, or at their dwelling-places or places of business, and payment was never asked by the notary-public, who purports to have protested said bill, from either of said complainers, before protesting it for non-payment. The said Poole & Company knew the addresses of both the complainers, and that they would have paid the bill if it had been presented to them, as the said Poole & Company were bound to do. Said protest is null and void in respect it does not comply with the provisions of section 51, sub-section 7, of the Bills of Exchange Act 1882."

The complainers pleaded—" (1) Summary diligence on the said bill of exchange being incompetent and illegal, the proceedings complained of ought to be suspended. (2) The said protest being irregular and inept is null and void *ab initio*, and the proceedings following thereon ought to be suspended. (3) The respondents having, as at 24th June 1895, received from the complainers the whole instalments payable under the said agreement, are barred *personali exceptione* from enforcing payment of the bill by summary diligence."

The respondents admitted that £50 had been paid to account of the sum in the bill, but averred that in charging the complainers they had given them credit for the whole sums then paid by them to account, and that at the date of extracting the protest the complainers were £15 in arrear of the instalments payable by them under the agreement. They founded on the agreement, and maintained that the protest contained a correct narrative of what occurred at the presentation of the bill for payment.

The respondents pleaded, *inter alia*—" (3) The complainers being in arrear with the instalments due by them at the time the proceedings complained of were taken, and the diligence used by the respondents having been regular and proper, the note should be refused."

The Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61), sec. 6, sub-sec. 7, enacts—" A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify (a) the person at whose request the bill is protested; (b) the place and date of protest, the cause or reason for protesting the bill, the demand made, and

the answer given, if any, or the fact that the drawee or acceptor could not be found."

The Lord Ordinary in the Bill Chamber having sisted execution of the charge and passed the note, the Lord Ordinary (KINCAIRNEY) on 30th November 1895 pronounced an interlocutor repelling the reasons of suspension and refusing the prayer of the note.

Note.— . . . "It was argued that the protest on which the charge proceeded was irregular in two particulars—first, because it did not state the demand made on presentation; and secondly, because, if it did, it stated that the demand was made for more than was due.

"The first of these objections is founded on section 51, sub-section 7, of the Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61), which provides *inter alia* that a protest must specify 'the demand made.' The protest in this case bears that the bill was 'presented,' and it does not say expressly what demand was made, if any. The bill is copied at the beginning of the protest in the usual way, and appears *ex facie* of the copy to be an accepted bill, and I think it is a legitimate inference, that when it was presented it was presented for payment. Section 45 of the Act provides that 'a bill is duly presented for payment which is presented in accordance with the following rules.' None of these rules requires the making of any demand other than what is implied by the presentment. I am of opinion that a presentment for payment is a demand for payment, and that the protest in stating that the bill was presented sufficiently complies with the requirement of the statute that the protest shall state the demand made.

"But, in the second place, it is objected that, if this was so, then the demand must have been for more than was due; namely, for the whole sum in the bill, whereas at the time £20 or £19, 19s. had been paid to account, and I think that this is so. But, then, I have not been able to find any authority for the position that a protest is invalid and not a ground for diligence, which states that the demand was made in excess, if the protest itself is (as in this case) only for the sum in the bill crediting payments to account. There is no provision in the Bills of Exchange Act to that effect. No decision on the point was quoted, and I was not informed that there was any settled practice in the matter. I confess to some doubt and difficulty on this point, but I have come to think that the bill was dishonoured when payment of what was due on it was not provided or made, and that being dishonoured it might be protested."

The complainer reclaimed, and argued—The diligence was bad, and must be suspended for two reasons—(1) the protest was invalid because it failed to comply with the requirements of the Bills of Exchange Act, and in cases where summary diligence was involved the language of the code must be strictly interpreted—*M'Pherson v Wright*, May 19, 1885, 12 R. 942. The statute required the protest to specify "the demand made." Here, as a matter of

fact, no demand for payment ever had been made, and there could be no failure to pay till payment had been demanded—*Bon v. Rollo*, July 20, 1850, 12 D. 1310 (*per* Lord Wood, Ordinary). At all events, the protest did not specify the demand made on presentation, and, for aught that appeared, the demand might have been for the whole sum in the bill without any deductions, and such a demand the reclaimers would have been entitled to disregard. The words in the actual protest “under deduction of” the sums paid to account could not be read into the narrative. (2) The bill had lost all efficacy as a warrant for summary diligence owing to the dealings between the parties recorded in the agreement.

Argued for the respondents—The diligence was good. By the agreement the respondents were entitled to recover payment of the whole sum in the bill upon the reclaimers’ failure to pay any of the instalments, and such failure had occurred. It was perfectly clear from the protest what the demand had been, and though the statute must be strictly interpreted, diligence would not be suspended on account of trifling errors so long as it was what the document meant—*Crichton v. Watt*, November 25, 1830, 9 S. 68; *Gordon v. Sloss*, June 3, 1848, 10 D. 1129. The protest here was in the usual form—Juridical Styles, last edition, ii., 20. The reclaimers were bound to be present at the office of Poole & Company when the bill was presented, or to provide money to meet it, for they knew that they had failed to pay one of the instalments; having failed to appear or to provide the money, they must take the consequences, and could not be heard to say that no demand had been made. As regards the place of payment named in the bill, the reclaimers had consented to it, and as a matter of practice nothing was commoner than for a bank to be named as the place of payment in a bill drawn by the banker and accepted by one of the banker’s customers. The cases were precisely analagous. With reference to the contention that the protest was invalid because there might have been *pluris petitio* on presentation, an analogy was to be found in adjudications, where, though too much might be sought, the adjudication was good if the decree was taken for no more than the sum due—*Maxwell*, M. 110; *Mackinnell*, M. 312.

At advising—

LORD PRESIDENT—The objections to this protest, which are discussed by the Lord Ordinary in detail, are of a critical character, and should they arise again, I do not know that anything we have occasion to decide in this case will prejudice these questions. But it appears to me that this protest, against which it is pleaded that it is irregular and inept, discloses a more radical objection than those discussed by the Lord Ordinary. The bill provides that payment is to be made to Poole & Company on demand within their own office. Now, that is an undertaking on the part of

the debtors to be there at the office with the money and pay it to Poole. If they had paid it to Poole the protest would plainly have been incompetent, and what is set out on the face of this protest is that Poole & Company make a demand upon themselves, because they say that the notary presented the bill to a clerk there, who made answer that no funds had been provided to meet said bill, &c. Payment therefore was refused by the debtor to the creditor. Now, according to the fair reading of the bill, the debtor was bound to come to Poole’s office, and be there with the money, and the Act of Parliament provides that if the debtor fails to come, that is to be noted in the protest; the statute contemplates as alternatives either that the debtor or some one authorised by him is there, or that the debtor may not be found at all. In this present case no one was there but the creditor, the debtor was absent, and accordingly the proper form of protest was to record the fact that the drawee or acceptor could not be found. It is quite familiar practice that bills are sometimes made payable at a bank, and there, of course, the banker and his clerks are the agents of the debtor; there is no occasion to look round for the personal presence of the debtor when he has accredited the bank to represent him and pay, and in that case I have no doubt that the common form of protest would rightly record the fact. But in this case it is preposterous to say that the creditor is accredited by the debtor to pay himself, and what is recorded on the face of this protest is that the wholly inept proceeding of demanding payment from the creditor was all that was done. Upon that ground, and that ground only, I think the diligence must be suspended.

LORD M’LAREN—It is a familiar provision in bills of exchange that they should be payable at a bank, or in the case of a foreign debtor, that they should be payable at the office of an agent in the country where payment is to be made. In all such cases the reasonable presumption is that the person whose place of business is prescribed as the place of payment is the debtor’s agent for payment. In this case, as has been pointed out, the proper form of protest is that the notary should state that the bill was presented at the proper place to some party authorised to act as the debtor’s representative, and that payment was refused. But where the bill is made payable at the debtor’s residence or at a public place, such as the Stock Exchange or the like, and there is no agent indicated, it is equally clear that the debtor must attend at the place prescribed in the bill with his money, and be ready to make payment. That is the duty of the debtor, and accordingly if he does not come, the creditor can protest the bill, under the words of the code to which your Lordship has referred, the protest in that case containing the statement that the debtor could not be found. A stipulation for payment at the creditor’s office is not very

usual, but according to my opinion it falls under the second of the categories to which I have referred, because I am unable to understand how the creditor in a bill can be the agent of the debtor for payment to himself. The duty of the debtor is to attend with the money. It is not a matter of technicality, but the fair meaning of the words of the bill is that the debtor undertakes to come and make payment. On this view of the case I agree that the diligence must fall, because the protest does not state that the debtor was not found at the place of payment.

LORD KINNEAR concurred.

LORD ADAM was absent.

The Court recalled the interlocutor of the Lord Ordinary, suspended the charge, and found the complainers entitled to expenses in the Outer House.

Counsel for the Complainers—Sym—T. B. Morison. Agent—George T. Welsh, Solicitor.

Counsel for the Respondents—Cook. Agent—John A. Robertson, Solicitor.

Friday, December 20.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

BYRES' TRUSTEES v. GEMMELLS AND OTHERS.

Trust—Trust-Disposition—Revocability—Trust for Administration—Testamentary Provisions—Delivery.

By trust-disposition a truster appointed certain persons to be "my trustees and managers of my affairs, and that absolutely," and conveyed to them her whole heritable and moveable property. She directed her trustees (1) to take possession of her property for the purposes after mentioned; (2) to give her the free income of her estates during her lifetime, she undertaking not to interfere with the trustees in any manner of way; (3) to dispose of her estates at her death to the persons named in the deed. The trust concluded by recalling and cancelling all prior settlements executed by the truster.

The deed was delivered by the truster to the trustees, who at once entered into possession of the trust-estate. At a date subsequent to the granting of the deed, and shortly before her death, the truster executed a revocation thereof.

Held (rev. judgment of Lord Kincairney) that the trust-disposition was of a testamentary nature, and was therefore revocable.

Murray v. Macfarlane's Trustees, 22 R. 927, distinguished.

Observed (per Lord Kinnear) that the question of the effect of delivery is 'always one of intention, and that to ascertain the intention with which delivery has been made, the deed itself must in the first place be referred to.

On 14th February 1894 Mrs Mary Henry or Byres, residing at Stranraer, executed a trust-disposition, whereby she appointed David Logan, Stranraer, and others, "my trustees and managers of my affairs, and that absolutely." The trust-disposition proceeded:—"And for that purpose I assign, dispone, and make over to them, and the acceptors and survivors of them, my whole heritable and moveable property, of whatever nature and description the same may be, wheresoever situated, together with all the title-deeds, vouchers, evidences and instructions thereof, and all as more particularly described in the title-deeds and documents in regard thereto: And I direct my said trustees as follows:—(First) My said trustees shall take possession of my estates foresaid, as I hereby authorise them to do for the purposes after mentioned: (Second) My said trustees will give me the free income of my said estates during my lifetime, and I undertake not to interfere with them in any manner of way: (Third) At my death I direct my said trustees to dispose of my estates after making payment of the legacies after mentioned: (Fourth) In the event of Mrs Catherine Byres or Gemmell, wife of John Dick Gemmell, veterinary surgeon, Ayr, surviving me and having lawful issue, two-thirds of my estates, and of the free income of said estates, will be given to her and to her children equally, share and share alike, thereafter; but in the event of no issue of the marriage, she, the said Catherine Byres or Gemmell, will have her liferent use allanarly of the said two-thirds of the free income of my estates, and the said John Dick Gemmell, her husband, will have the property purchased in the name of the said Catherine Byres or Gemmell, and be his property, and in that event the legacy after mentioned in his favour will lapse: (Fifth) In the event of the said John Dick Gemmell not succeeding to the said property purchased by me in the name of the said Mrs Catherine Byres or Gemmell, I leave him a sum of £500, and in that case he shall have the option of claiming the said property in lieu of said sum: (Sixth) The remaining one-third of my estates I direct to be divided, in the discretion of my said trustees, among my relatives, viz., the family of the late William Henry, crofter, Broadstone, Stranraer: (Seventh) Failing any issue of the marriage of the said Catherine Byres or Gemmell, with exception of the said property purchased by me in name of the said Catherine Byres or Gemmell, the whole of my estates will be equally divided among the family of the said William Henry: (Eighth) I direct my trustees to pay at my death to Archibald Drummond, Union Bank agent, Glasgow, the sum of £950 sterling, or such sum as my trustees find available, to make him and the said John Dick Gemmell equal as my