

[11th May, 1843.]

JAMES RUSSELL and Others, Trustees of the deceased James King, *Appellants*.

PATRICK and WILLIAM CREIGHTON, and Others, *Respondents*.

*Bill of Exchange.* — The addition to a bill of erroneous addresses to the names of indorsers, made after the bill has been drawn, will not vitiate the protest upon it so as to destroy recourse against the indorsers, or preclude the bill from being the foundation of summary diligence.

ON 9th December, 1828, James Harvey granted his promissory note to James Dunlop for L.300. The note was indorsed by Dunlop to Alexander Dunlop; by him to James Hunter; by him to William Hunter; by him to Andrew Dunlop; by him to James King; and finally by him to Messrs Patrick and William Creighton.

The note was dishonoured in the hands of Messrs Creighton. They in consequence protested it, raised diligence, and gave James Hunter, William Hunter, and James King charges of horning for payment of the contents.

The note, when it was passed by King to the chargers, bore simply the names of the different indorsers, without the addition of an address to any of them. Previous to the protest being extended, the note had been so far altered, that an address, more or less erroneous, had been added to the name of each of the indorsers. With these alterations it was copied into the protest, which bore, that the note had been duly protested against “the “above designed” payee and indorsers. The protest in this form was entered upon the record, and set forth in the letters of horning which were raised upon it.

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The Hunters suspended the charge given to them, upon the ground that additions to the note vitiated it, and precluded it from being the ground of summary diligence. That suspension was carried a certain length, and then was allowed to fall asleep.

James King also suspended the charge given to him, and upon the same grounds. The Lord Ordinary sisted proceedings in King's suspension "until steps are taken by the chargers for bringing the aforesaid process with James and William Hunter to a conclusion," as the "chargers are not entitled to insist in diligence against the suspender, the last indorser, if they have, by their own act, disqualified the said bill from being the ground of diligence or action against the prior indorsers, and thus impeded or frustrated the suspender's right of recourse."

The chargers reclaimed against this sist, and the Court, on 11th June, 1839, altered the Lord Ordinary's interlocutor.

The Lord Ordinary, without determining the point of relevancy, remitted the case to the jury roll, and directed, in a note subjoined to this interlocutor, that the issue should be, "generally, whether the suspender is resting owing the sum charged for, which will leave every thing in law, as well as in fact, open at the trial."

The suspender consented to take a verdict "subject to the opinion of the Court upon the questions of law arising out of the facts," and the jury returned a verdict accordingly.

At this stage James King died, and the appellants were sisted in his room.

The Court, on 23d November, 1841, found the verdict ought to be entered up for the defenders, and not for the pursuers, and therefore repelled the reasons of suspension, and found the letters orderly proceeded.

The appeal was taken against the interlocutors of 11th June, 1839, and 23d November, 1841.

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*Mr Kelly and Mr Gordon for the appellants.* — I. The erroneous descriptions annexed to the names of the indorsers vitiated the protest, and made it incapable of being the ground of summary diligence; for the protest must have the bill annexed to it, and being in this form, is then the measure and rule of the diligence in regard to the persons against whom it is to be directed: but in the present instance, it could not serve as any such rule, for the persons against whom the diligence was to be directed was a matter involved in obscurity and uncertainty. Even with the alterations, the bill might have formed the ground of action, but the privilege of summary diligence was lost to it, *Watson v. M'Ara*.

II. The protest being informal, recourse was lost against the prior indorsees, and thereby any right to recur upon the appellant. The Acts 12 Geo. III. cap. 72, and 23 Geo. III. cap. 18, declare, that there shall be no recourse against drawer or indorsees, unless the bill is protested. The protest must be a formal one, and it cannot be so, where it is defective in an essential particular, in the names of the parties against whom the recourse is to be preserved. The bill, in the form in which it exists at the time of its being protested, must be transcribed into the protest *ipsissimis verbis*, — it is not possible for the notary to vary the copy in the protest from the original, and still less is it possible for him to vary the protest after it is once extended. If, therefore, either an erroneous name, or an erroneous designation exists upon the bill, the defect is transcribed to the protest. Here that was not only the case, but the protest bore *in gremio*, that the bill had been protested against “*the above “designed”*” payees and indorsers, and as the designations given do not correspond with those of the parties, recourse against them is thereby lost to the appellant, or if not absolutely lost, is so obscure and hazardous as to be altogether unavailable, and

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therefore, at all events, the liability of the appellant should not have been determined, until that of the prior obligants had been ascertained.

*Mr Solicitor General and Mr Anderson for the respondents* were not called upon.

LORD CAMPBELL. — My Lords, It does not seem to me to be necessary to call upon the respondents' counsel to support the judgment below. The question is, whether Creighton and Company were entitled to summary diligence against James King on this promissory note. Now King indorsed the promissory note to Creighton and Company. It lay on King, therefore, to shew why he was not liable. The objection which King made was, that some of the prior indorsers are discharged by what had been done by Creighton and Company. Now, if King had not his remedy over against the prior indorsers, he should not be liable to his indorsee; but it seems to me that there is no ground at all for the appellants' argument, because I think Mr Kelly very properly admitted,—as a gentleman of his great learning and eminence would not at all contend for that which is contrary to what all who are acquainted with the subject are perfectly well aware of,—that the addition to such an instrument, of words which in no respect interfere with the legal operation of the instrument, will not vitiate the instrument. Well, then, the first ground which Mr Gordon suggested cannot possibly be sustained, the bill is not vitiated by adding the place of abode of one of the indorsers, whether that place of abode be correctly stated or not.

But great reliance has been placed upon the place of abode of the indorser being introduced into the protest, and that the protest therefore is insufficient. If the bill is not vitiated by the words which are added, how can the protest be? The bill sets

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forth the indorsers, and likewise gives in addition the place of abode of the indorsers, but if that addition be wholly immaterial, it cannot affect the bill. The protest is a protest of this promissory note. Introducing words into the protest that are immaterial, cannot vitiate the protest. The protest is against those who have made the promissory note, and those who have indorsed it, altogether irrespective of their places of abode. The law of Scotland requires, that a promissory note should be protested, and that an inland bill of exchange should be protested; but here is a regular protest, and the only objection made to the protest is, that the place of abode of an indorser is introduced into the protest. That cannot at all lead to any doubt as to the identity of the instrument which is described in the protest, nor to any doubt as to the person who indorsed the promissory note, and against whom recourse must be had on its dishonour.

Then there was a third objection, on which Mr Kelly has not insisted; namely, that in the diligence there has been introduced the place of the abode of an indorser who is dead. But again the same answer occurs: if this is wholly immaterial and does not interfere with the operation of the instrument, introducing it into the diligence cannot vitiate the diligence any more than introducing it into the protest can vitiate the protest. It seems to me, therefore, that the judgment of the Court below was correct, and that it ought to be affirmed with costs.

*Lord Cottenham.* — My Lords, I am of the same opinion. It appears that additions have been made to the bill, but those additions do not vitiate the instrument itself, it appearing that those additions were made after King indorsed the bill. Then, if the additions do not vitiate the bill, (and that is not disputed,) and if the act of Parliament does not require a protest, the bill would not be affected by the additions. It turns entirely on the question, whether the act of Parliament requiring the protest, makes

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that void, which, independently of the necessity of the protest, it would not have made void? I find nothing in the act of Parliament which at all alters the liability of the parties, except so far as it requires that the bill should be protested. Now, if the bill itself is not vitiated by those additions, (and nothing has been stated to induce me to come to the conclusion that the protesting of that good bill is of necessity material,) does the protesting of that good bill make it necessary that the protest should bear on the bill as it stands, or that that which is necessary on the face of the bill is unnecessary on the face of the protest? In my opinion, there is nothing in the act of Parliament which leads to the conclusion that the protest must necessarily be exactly the same as the bill, if the additions are immaterial. For these reasons, I think the judgment of the Court below was right.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors, so far as therein complained of, be affirmed with costs.

CROSBY and COMPTON — DEANS, DUNLOP, and HOPE, Agents.