

deeds were granted for the purpose now indicated.

"The pursuer's record is not well framed with a view to the result which has been now arrived at, but the Lord Ordinary has felt himself entitled, even in the absence of an averment of the existence of the particular trust which he has found to have been the arrangement of the parties, to pronounce a finding to that effect, because the trust which he has held to have been created, though different from, is yet within the more absolute and complete trust alleged. If the case is to be proceeded with, some additions or amendments to the record on the part of the pursuer will be necessary, and it is evident that, especially in the absence of valuation of any kind of the property conveyed, as the basis of the deeds, difficult questions as to the principles of any accounting will arise. The case has in the meantime been continued for farther procedure"

Counsel for the Pursuer—Taylor Innes. Agents—Lindsay, Paterson & Hall, W.S.

Counsel for the Defender—M'Kie. Agents—Wormald & Anderson, W.S.

Friday, March 7.

FIRST DIVISION.

[Sheriff of Lanarkshire.

UNION BANK OF SCOTLAND *v.* MAKIN
& SONS.

Agency—Express and Implied Authority—Fraud—Liability.

An English firm, by written mandate granted authority to their agent in Glasgow to draw, endorse, and discount bills as "their general representative and agent in Scotland." He forged, discounted, and embezzled the proceeds of various bills,—Held that the loss fell, not on the banks where the bills were discounted, but on the agent's own employers.

This was an appeal from the Sheriff-court of Lanarkshire, and the facts of the case were as follows. In the year 1869 the defenders, Messrs Makin & Sons, file and steel makers, Sheffield, appointed Samuel Watson Dempster to be their agent in Glasgow, with full power to draw, endorse, and discount bills in name of the firm. Between the months of March and June 1870 Dempster forged seven bills, which were discounted by the Union Bank, and on 1st July 1870 the Bank raised an action in the Sheriff-court of Lanarkshire against Makin & Sons, concluding for payment of the sums contained in these bills. A proof was led, and on 5th July 1872 the Sheriff-Substitute (Dickson) pronounced the following interlocutor:—"Having heard parties' procurators on the proof and whole cause, and made avizandum, Finds that the defenders are steel and file makers in Sheffield, and that they had an agency in Glasgow, conducted by the late firm of Cathcart & Dempster for about a year before the dissolution of that firm in or about June 1869, when they appointed Samuel Watson Dempster, one of its partners, their sole agent in Scotland; finds that the defenders addressed to the pursuers a letter, dated 26th January 1870, and which was shortly afterwards delivered to the pursuers by Dempster, in which, *inter alia*, they said, 'S. W. Dempster, our manager in Scotland,

has authority to sign, per procuracion of our firm, all bills, cheques, cash orders, and other documents necessary to the conducting of our business, and all vouchers so subscribed will be equally binding as if signed by any member of our firm;' finds that, about the said date, the pursuers, at Dempster's request, after causing inquiries to be made in Sheffield as to the defenders' credit, opened with the defenders a discount account and an account current at their branch in Canning Street, Calton, Glasgow; finds it not proved that this was done without the defenders' knowledge or authority; finds that the pursuers, wishing to obtain from the defenders a more formal authority to Dempster, prepared through their law agents a procuracion or power of attorney on stamped paper, and which having been handed by the pursuers to Dempster for the defenders' signature, was, on 5th May 1870, signed by the defenders before witnesses, and was shortly afterwards returned by Dempster to the pursuers, and duly completed in the testing clause; in which procuracion the defenders say, *inter alia*—'We hereby authorise you, Samuel Watson Dempster, 34 St Enoch Square, Glasgow, our general representative and agent in Scotland, to manage our whole business and affairs in Scotland, to sign for us all documents relating to, or in connection with, our business in Scotland, and specially we authorise you to sign, per procuracion, for us and our behalf, all cheques, orders, and drafts, and to draw, grant, accept, or endorse for us and on our behalf all bills, promissory notes, and negotiable documents, and to discount the same on our credit and responsibility; and we engage to meet and honour all such cheques, orders, drafts, bills, promissory notes, and negotiable documents drawn, granted, accepted, or endorsed, or bearing to be drawn, granted, accepted, or endorsed by you, the said Samuel Watson Dempster, and to keep the parties dealing with you free and skaitless; and we bind ourselves to ratify, homologate, and confirm the actings and doings of you, the said Samuel Watson Dempster, in respect of all such cheques, orders, drafts, bills, promissory notes, and negotiable documents;' finds that between the said months of January and June 1870, inclusive, Dempster operated upon the said accounts, and discounted a number of bills in the pursuers' said branch, which discounts the pursuers allowed on the credit of the defenders, and relying on the said letter and procuracion; finds that, *inter alia*, Dempster so discounted the following bills, purporting to be drawn by the defenders upon, and to be accepted by the parties following, viz.:—(1) for £96, 14s. 7d., by Brigham & Bickerton, machine makers, Berwick, dated 28th March 1870, payable four months after date; (2) for £100, by Howie & Young, engineers, Kirkcaldy, dated 19th April 1870, payable four months after date; (3) for £41, by Nevin & Rintoul, coach builders, Greenock, dated 27th April 1870, payable three months after date; (4) for £44, 10s. 9d., by Robert Russell & Sons, engineers, Carluke, dated 2d May 1870, payable four months after date; (5) for £276, 10s. 9d., by Caird & Company, shipbuilders, Greenock, dated 16th May 1870, and payable four months after date; (6) for £39, 5s. 6d., by James Hatley & Company, contractors, Carstairs, dated 23d May 1870, payable three months after date; (7) for £138, 14s. 9d., by Laing & Melvin, coach builders, Aberdeen, dated 1st June 1870, and payable four months after date; finds that Dempster signed the

said seven bills as drawer and endorser 'pp.' (that is per procuration of) Wm. Makin & Sons, except the one secondly above described, which was signed 'for Wm. Makin & Sons, D. M'Pherson,' as drawer, and was endorsed by Dempster as above; finds that the signatures, purporting to be those of the acceptors of all the said seven bills, are forged, and that the defenders did not, at the dates thereof, have any claim against any of these parties; finds that the pursuers paid to Dempster the proceeds of all the said bills (deducting bank charges), and that the whole or part of the proceeds of the first six were paid into the said current account, and mixed up with the defenders' other monies therein; finds that the proceeds of the seventh bill (deducting charges) having been £137, 2s. 2d., Dempster drew a cheque at the pursuers' said branch, and purchased therewith, and with £20 drawn from the current account, a draft on Messrs Glyn & Company, bankers, London, for £150 sterling, in favour of the defenders, the balance (£6, 19s. 1d.), after deduction of bank charges, having been paid to him in cash; finds that the said draft for £150 was not transmitted to the defenders, and they did not receive any part of the proceeds thereof; finds that, of the parties appearing as acceptors of the said bills,—Messrs Brigham & Bickerton, Howie & Young, Niven & Rintoul, and Caird & Co., were existing firms, and the three first-mentioned had had business dealings with the defenders, but Messrs Robert Russell & Sons and Messrs James Hatley & Company were non-existent and fictitious; finds that all of the said pretended acceptors appeared to be in lines of business in which dealings with the defenders might have taken place, that Dempster, when applying for discounts of said bills gave explanations which satisfied the pursuers' officers that they were genuine and *bona fide* bills, duly accepted by parties indebted to the defenders, in the ordinary way of their business, and that the pursuers discounted all the said bills, relying on Dempster's explanations, and on the apparent genuineness of the documents; finds it not proved that the pursuers failed to exercise due caution in discounting any of the said bills, or that the signatures thereto were manifest forgeries, or presented a suspicious appearance, which should have put the pursuers on their guard; therefore repels the defences; finds the defenders liable to the pursuers in the amounts of the said bills, being £736, 16s. 4d. (but under deduction of £4, 4s. 11d. as the proportion of discount as libelled on), with interest as libelled; finds the defenders liable in expenses; allows an account thereof to be given in, and remits the same, when lodged, to the auditor of Court to tax and report, and decerns.

"*Note.*—There is no dispute that Dempster was the defenders' agent, under the letter of procuration or power of attorney quoted in the interlocutor; and that the bills in question were discounted on the credit of the defenders as drawers and indorsers, on Dempster's representations that they were genuine, and were for the defenders' business. The defenders' procurator did not pretend at the debate that there is anything in the appearance of the bills calculated to arouse suspicion. On the contrary, the forgeries are skillfully executed, and the names of such of the acceptors as existed, and the designations of them all, are of persons or of firms with whom the pursuers might naturally have dealt.

"The defenders' partner endeavoured to weaken

the effect of the procuration by saying that 'Dempster had no power to deliver it to the pursuers,' and that the defenders understood it was to be laid before the Sheriff as authority to Dempster to sue some debtor of theirs.

"The terms of the document contradict this. It was as inappropriate for that pretended purpose as it was appropriate for the one it was applied to. Accordingly, the defenders' procurator did not attempt to limit its legal effect with reference to that pretended but latent purpose.

"The evidence is contradictory as to whether the current and discount-accounts were opened with the defenders' knowledge or authority.

"The authority in the procuration to sign 'cheques, orders, and drafts,' points to an account on which Dempster was to operate, rather than to his merely signing on payment cheques drawn in defenders' favour by other persons, as Mr Marchinton says he understood it did.

"Moreover, the opening of accounts for the purposes of their business was within Dempster's powers, as the defenders' general agent. Even if his doing so had been unauthorised, the circumstances would not materially affect the present case.

"The real grounds of defence are,—(1st.) That Dempster had not authority to sign for the defenders as drawers or indorsers of forged bills; (2d.) That he had only authority to sign bills relating to or in connection with their business, which those in question are not; (3d.) That the discounting of the bills was the result of negligence on the part of the defenders.

"(1st.) The defenders contended generally, on the authorities afterwards noticed, that a principal is not responsible for the fraudulent acts of his agent,—as for example, the owner of a ship is not liable where a master signs bills of lading for goods not received on board (*Grant v. Norway*, 10 Scott's Reports, 665; *Hubbersty v. Ward*, 1853, 8 Welsly, Hurist, and Good, 330), nor is a wharfinger for receipts signed by his servant falsely admitting delivery of goods (*Coleman v. Riches*, 16 Scott's Reports, 104).

"In the first of these cases, Mr Justice Williams proceeded on the footing that there was no usage of trade proved to show that the owner was responsible for bills of lading for goods not on board; and Mr Justice Crowder observed,—'a party taking a bill of lading must be assumed to take it with notice of such limitation of the master's authority.'

"In the case of *Coleman v. Riches*, the wharfinger's servant was in use to give receipts for delivery of goods at his master's wharf as for shipment; and upon production of these by the vendor of the goods the purchaser used to pay the price. The servant fraudulently having given receipts for goods not delivered, upon which the apparent purchaser paid, it was held, in an action at the instance of the latter against the wharfinger, that the wharfinger was not liable. Mr Justice Jervis observed, 'when a servant gave a receipt for wheat which had never been delivered at the wharf, he was not acting within the scope of his authority; he was not acting for his master, but contrary to his duty, and against his master's interest.' That observation comes pretty close in principle to the present case. But all the Judges carefully pointed out that the wharfinger was not proved to have agreed that the money should be paid on his servant's receipt. In particular, Mr Justice Williams

observed, 'If there had been evidence of an agreement between the plaintiff and defendant that the latter should furnish the vendors with receipts on the delivery of the corn, upon the faith of which receipts the former should pay the price, I must confess I should have felt great difficulty in saying that the defendant would not be liable for the fraud of an agent entrusted by him with the business of the wharf, by means of which the plaintiff had been induced to part with his money on the faith of such delivery having actually taken place.'

"The present case approaches the one thus distinguished, rather than the case of *Coleman v. Riches* itself.

"In *Udell v. Anderson*, 1861, 30 Law Journal, Ex. Ch. 337, in an 'action of deceit' against a principal, the Court was equally divided on the point whether the latter was not liable for fraudulent representations by his agent in selling certain timber. But the question depended in some measure on specialities connected with the form of action, which is unknown to our Courts.

"The case of *Colvin v. Dixon*, 1867, 5 Macph. 603, was also cited, of which the rubric is, 'A raised an action of damages against B, an iron master, for failing to implement the following written obligation, bearing to be signed for him by C, his salesman. "I hold to the credit of A 1000 tons pig-iron, and will deliver the same on demand." (Signed) "B for C." The pursuer averred that he had bought the iron from D, a third party, and had got from him the delivery order in the ordinary course of business, and that C was the defender's manager, and had an authority, and was in use to grant such obligations. Action dismissed as irrelevant, in respect that the pursuer's averment regarding C's authority could only be read as alleging authority to grant such obligation for onerous causes, while the pursuer had set forth no onerous cause for granting the obligation libelled.'

"This case was decided on the relevancy of the pursuer's averments, which appeared to be purposely vague, and did not show that the pursuer held the document under an onerous transaction. Besides, the decision proceeded in a great measure on the document not being negotiable, and consequently on the right to sue on it being not transferred by mere delivery. These cases, therefore, do not establish the general doctrine for which the defender's procurator contended.

"The case of *Barwick v. English Joint Stock Bank* (1867, Law Reports, 2 Exch. 259) is inconsistent with it. There a bank was held liable for its manager's fraud, in having given a guarantee to a party that the cheque of a certain person should be cashed in priority to other payments, except to the bank, but not having disclosed that the person owed the bank £1200, which made the guarantee of no use.

"The Court sent the case to a jury as one of fraud. Mr Justice Willes observed, 'It is true the principal has not authorised the particular act; but he has put the agent in his place to do that class of acts; and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.'

"Again, in *Fuller, &c. v. Smith*, 1 Car. and Payne, 197, it was held that if a banker of a supposed acceptor of a forged bill discount it for the agent of one of the indorsers, on the discovery of

the forgery the banker so discounting may recover back the money he paid on the bill, notwithstanding he was the banker of the supposed acceptor, and therefore might be taken to know his handwriting. Chief-Justice Abbott observed in giving judgment, 'With respect to the argument that the plaintiff ought to have known the handwriting of the acceptors, I am of opinion that a banker is bound to know the handwriting of those who draw on him, as far as regards paying bills so drawn, but not when discounting a bill, for his attention is not called to it then.'

"On the authority of this case (which is in point and *a fortiori* to the present) Mr Thomson (2d ed. pp. 271-2) lays down the doctrine—'Bankers are not bound, however much it may be for their interest, to ascertain the genuineness of an acceptance before discounting a bill; but if the bill should turn out to be forged, are entitled to recover its amount from the party to whom they discounted it, by virtue of his endorsement.

"The Sheriff-Substitute considers the question is settled by these authorities. Moreover, the opposite doctrine (for which the defender contends) would be almost fatal to discount operations by agents; for if bankers were bound to satisfy themselves as to the genuineness, not merely of the agent's signature, but also of the signatures of the other apparent parties to the bill, they would have to investigate these fully before discounting. In a large number of cases, including all foreign acceptances, this would be impracticable, and either the agent's attempts to negotiate bills would be abortive, or the banker would charge a premium to cover the extra risk. It is not to be presumed that the authority to an agent to discount bills would be clogged with a condition thus rendering it in a great measure ineffectual.

"On the other hand, as the principal selects and can watch the operations of his agent, he may justly be held to have undertaken the risk incident to the agency being effectual for its intended object. Any question of this general nature, however, is unnecessary, on account of the terms of the defender's letter of January 1870, which, after saying that Dempster had authority to sign, per procuracy, all bills, &c., 'necessary for the conduct of our business,' adds, 'and all vouchers so subscribed will be equally binding on us as if signed by any member of our firm.'

"The obligatory words include all vouchers (*i.e.*, bills, cheques, cash orders, &c.), signed by Dempster, per procuracy; and they are not qualified by the condition that the vouchers should relate to the defenders' business.

"Again, the more formal procuracy authorises Dempster to sign 'all bills, cheques,' &c., without qualification as to their being required for the defenders' business; and it engages the defenders to meet and honour all such cheques, orders, drafts, and bills drawn, or bearing to be drawn, granted, or accepted by Dempster.

"The whole clause, especially the part last quoted, is plainly intended for fixing liability on the defenders for all bills, &c., provided only they are signed by Dempster as the defenders' agent.

"2d, 'The defenders' third plea in law, that they are not liable because the bills were 'not in the ordinary course of their business, or necessary for the conduct thereof,' is equally, if not more, inconsistent with their letter and formal procuracy, and with the nature and object of the credit which they

opened. The inquiries under such a limited liability would embrace both the customer's and Dempster's accounts with the defenders, and even the state of defenders' affairs generally, at the time causing delay and labour quite inconsistent with the object of such a credit, and from the nature of the case they would often be inconclusive. No principal wishing his agency to be effectual would propose, and no banker in his senses would agree, to such a condition.

"3d, The defenders' plea as to the pursuers' negligence, applied chiefly to the two bills bearing to be accepted by non-existing firms. No inquiries seem to have been made except at Dempster as to one of these. As to the other (James Hatley & Co.'s), the pursuers made inquiries whether there was any such firm at Carstairs, their address on the bill, and were answered in the negative. On this being mentioned to Dempster, he explained that as they were railway contractors, only engaged there temporarily, they might not be known in the district. This satisfied the pursuers' officers, who discounted the bill, which was a renewal of a previous one purporting to be by the same parties.

"From the point of view of the transaction being safe for the pursuers, it may be said that their officers should not have been so easily deceived by Dempster. But the question is, whether they owed to the defenders the duty of protecting them against frauds by their agent, acting ostensibly within his powers and for their interest? No doubt cases might occur of such gross carelessness and departure from the ordinary course of business that the party deceived by the agent would have to bear the burden of his own folly. But it is proved by Girdwood, Affleck, and Dempster (whose evidence is not contradicted), that in discounting on the credit and representations of their own customer, the pursuers' officers followed the usual course of business, and that his explanations, which were plausible, were considered satisfactory. Dempster says on this point, 'I could see no carelessness or looseness in his (the pursuers' agents) doing business with me. If I had done anything which was irregular, he would at once have made inquiries about it. I therefore tried to do everything as if it was regular, and prevent suspicion.' He says, on cross-examination, that there was a slight degree of carelessness in his discounting the bill on Hatley & Co.

"In the face of such evidence, it is impossible to hold that the pursuers departed from the usual course of banking business, and displayed negligence in the matter in question.

"The defenders, however, showed great carelessness in never having inquired at the pursuers what Dempster had done under the wide powers he held from them.

"The Sheriff-Substitute has to-day issued an interlocutor similar in effect in the case of the Clydesdale Bank against the same defender."

Makin & Sons appealed to the Sheriff, who on 5th November 1872 pronounced the following interlocutor:—"Having heard parties' procurators on the defenders' appeal, and considered the proof, productions, and whole process, adheres, under reference to the annexed note, to the interlocutor appealed against; dismisses the appeal and decerns.

"Note.—There is one general principle which regulates all questions in the law of principal and agent—viz., that the principal is bound by every act of his agent within the scope of the authority

which he has held him out to possess, and is not bound by any act which is beyond that scope, and from which he has derived no benefit. It follows from this, that, on the one hand, when an agent fraudulently abuses his position by doing an act beyond either his express or implied powers, the loss arising from such act falls on those dealing with him, on the ground that they should have made themselves acquainted with the extent of his authority before trusting him, and if they failed to do so, it was at their own peril and not at the principal's; and, on the other hand, that when the power to do an act, such as to accept a bill, or conclude a charter-party, is conceded, the misapplication of it to improper purposes, or the accomplishment of it by improper means, of which the third party dealing with the agent has no notice, will not make the act done any the less the principal's *proprium negotium* than if it had been done for an honest purpose, or by means lawful and specially authorised by the principal (See Parsons on the Law of Contracts, vol. i. p. 41, fifth edition; Storey on Agency, sec. 73; and M'Laren's Note, in his edition of Bell's Commentaries, vol. i. p. 510). The distinction above indicated is well brought out by comparing the decisions in the cases of *Grant, Hubbersty, and Coleman*, referred to by the Sheriff-Substitute, with that of *Barwick*, also referred to. In the former cases the principals were held not to have incurred any responsibility to third parties, who suffered through the fraudulent acts of agents, in respect that under the implied terms of the agents' employment, as recognised by the custom of trade, they were entrusted by the principals with only a limited power.—in one instance, to grant bills of lading, and in another, warehouse receipts for goods actually received,—and that it was not within the scope of their employment to give bills or receipts for goods not received. In *Grant's* case, Chief-Justice Jervis said,—'If, then, from the usage of trade and the general practice of shipmasters, it is generally known that the master derives no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority; and in that case, undoubtedly he could not claim to bind the owner by a bill of lading signed when the goods therein mentioned were never shipped. It would resemble the case of goods or money taken up by the master under pretence that they were wanted for the ship, when in fact they were not; or a bill of exchange accepted or endorsed, *per procuracionem*, when no such agency existed.' On the other hand, in *Barwick*, a principal was held responsible for the fraudulent act of his agent acting in the course of his business. In pronouncing the judgment of the Court, Justice Willes said,—'The general rule is, "That the master is answerable for any such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master be proved. . . ." In all these cases it may be said, as it was said here, that the master has not authorised the act. It is true he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.' The same doctrine is distinctly stated in Smith's Mercantile Law, 4th ed., p. 116. in these words,—'In solving all questions on this subject

the general rule is that the extent of the agent's authority is, as between his principal and third parties, to be measured by the extent of his usual employment, for he who accredits another by employing him must abide by the effects of that credit, and will be bound by contracts made with innocent third persons in the seeming course of that employment, and on the faith of that credit, whether the employer intended to authorise them or not; since, where one or two innocent persons must suffer by the fraud of a third, he who enabled that third person to commit the fraud should be the sufferer.'

"Now, in the present case the defenders accredited their agent Dempster in the broadest possible manner to the pursuer by the two documents Nos. 8/8 and 8/9, to sign, per procuration, 'all bills, cheques, cash orders, and other documents necessary to the conducting of their (the defenders) business,' and they also expressly declare that "all vouchers so subscribed will be equally binding as if signed by any member of our firm;" and still farther bind themselves to meet and honour all such cheques, bills, &c., drawn, granted, accepted, or endorsed, or bearing to be drawn, granted, accepted, or endorsed, by Dempster, and to keep the parties dealing with him free and scathless, and to ratify, homologate, and confirm his actings and doings in respect of all such negotiable documents. In the exercise of the powers so conferred upon him, Dempster drew and endorsed, and the pursuers discounted, numerous bills, many of them genuine, which all bore to be signed per procuration of the defenders. He also opened and operated on a current account in the defenders' name, into which the proceeds of the forged bills went. It is contended for the defenders that forged bills are not in *pari passu* with genuine bills, because they were not necessary to the conducting of their business, and that therefore their issue was not a fraud within the scope of Dempster's employment. But this argument is successfully met by the fact that the defenders gave the pursuers an absolute guarantee to be bound by all Dempster's actings, as long as they were *ex facie* entered into on their (the defenders) account, and that they at the same time armed Dempster with full authority to draw bills which were to be equally binding as if signed by any member of their own firm. They might have inserted in the documents a qualifying condition saving their liability for any fraudulent actings of Dempster, in which case the pursuers might have been bound to satisfy themselves of the *bona fide* character of each transaction; but this not having been done, the consequence of Dempster's fraud must be borne by the parties who authorised the pursuers to place such unlimited confidence in him. This also meets another plea stated in defence, that, in respect the pursuers failed to exercise sufficient caution in dealing with the forged bills, they must bear the loss caused by their own negligence; the answer being, that the pursuers were not bound to exercise any more caution in dealing with Dempster than they would have been in dealing with the defenders themselves; and it is clear that if the latter had prevailed on the former to discount forged acceptances, it would have been no defence against a claim of relief that they should have ascertained the genuineness of the signatures before discounting. But, farther, and *separatim*, upon this part of the case it has, in point of fact, not been shown that there was any undue want of caution on the part of the pursuers

in negotiating the forged instruments, they having made inquiries regarding them, and being in the *bona fide* belief that they were genuine. On the whole, therefore, the Sheriff arrives at the same conclusion as that to which the Sheriff-Substitute came, and holds that Dempster, having been the general and accredited manager, agent, and representative of the defenders, and the seven bills in question having been drawn and endorsed by him while acting within the line and scope of his employment, and of the defenders' business, they are liable in payment to the pursuers who discounted them."

Makin & Sons appealed.

Argued for them—That none of the money which Dempster obtained by his frauds was applied to the purposes of the defenders. It was not drawn in the prosecution of their business, nor were they in any way *lucrati* by it. The maxim of *respondent superior* does not apply when the agent goes beyond the scope of his authority. His master only authorises him to do a certain class of actions. It is quite a different case when the agent merely clothes with an appearance of authority acts which are really outwith his duty and power. No act can be within the scope of an employment which that employment does not contemplate. The master is not bound by the wrong or fraud of his servant, unless it is done in the course of the master's work, or he is a party to or *lucratus* by the fraud or wrong. So long as Dempster was dealing with the bills and such documents belonging to the firm, he might have endorsed them away, even fraudulently, and the firm would be bound, but when he manufactures bills for his own use and advantage, from which the firm derive no benefit, he is outside the scope of his employment.

Authorities—*Grant v. Norway*, Feb. 20, 1851, 10 Scott's Com. Bench Rep. 688; *Coleman v. Riches*, 1855, 16 Scott, 104; *Udell v. Anderson*, 1861, 30 L. J. Exch. 337; *Hubberstey and Ward*, 22 L. J. Exch. 113; *Colvin v. Dickson*, March 15, 1867, 5 Macph. 603; *Maclean & Hope v. Munck*, June 14, 1867, 5 Macph. 893; *Maclean & Hope v. Fleming*, Mar 27, 1871, 9 Macph. 38; *Barwick v. English Joint Stock Bank*, 1867, 2 L. R. Exch. 259, Willes, J., opinion, 266; *Fuller v. Smith*, 1 Carrington and Payne, 97; *Barber v. Meyerstein*, 2 L. R. C. P. 38, Exch. Ch. 661; *Parsons on Contracts*, i., pp. 44, 45, 5th ed.

Argued for the Union Bank—Makin & Sons, by the unlimited authority which they gave their agent, made themselves warrant the genuineness of every acceptance presented by him for discount. There was no negligence on the part of the Bank—all they were bound to look at was the indorsation, and that was all right. The transactions were within the apparent scope of Dempster's authority, and the defenders represented to the Bank that he had authority to bind them. The primary question always is, to what extent the party dealing with the agent is entitled to believe in his authority to bind his principal? In a question which of two innocent people is to suffer, it ought to be the one who has enabled the wrongdoer to do the wrong. The very object of a general procuration was to avoid the necessity of the Bank applying to the principals every time the agent presented a bill for discount.

Authorities—*Bell's Com. ii.* 611, 5th ed.; *Smith's Mercantile Law*, 7th ed. p. 124, 8th ed. p. 120; *Willett v. Taylor*, 2 Cowper, 817; *Galloway v. Grant*,

June 20, 1857, 19 D. 865, Dec. 5, 1857, 20 D. 230; Addison's Wrongs and their Remedies, p. 846, 3d ed.; Storey on Agency, § 73.

At advising—

LORD PRESIDENT—In this case the Union Bank of Scotland sues William Makin & Sons for payment of certain bills alleged to have been discounted by the defenders' agent Samuel Dempster at various times between March and June 1870; and the defence is, not that Dempster was not the defenders' agent, but that he exceeded his powers in discounting bills. The consideration on which the case depends is the nature and extent of Dempster's authority, and that depends on the terms of the written documents by which that authority was conferred. These are two in number—one is dated Jan. 26, 1870, and the other, 5th May following, but some of the bills were discounted in the interval. The first of the documents is addressed to the Bank itself, and is not so much an authority to Dempster as a guarantee to the Bank. It is in the following terms:—

"Attercliffe and Clifton Steel Works, Sheffield, January 26th, 1870. To the Union Banking Company, Glasgow. Gentlemen,—Mr Samuel Watson Dempster, our manager in Scotland, whose signature is subjoined, has authority to sign, per procreation of our firm, all bills, cheques, cash orders, and other documents necessary to the conducting of our business, and all vouchers so subscribed will be equally binding as if signed by any member of our firm."

Now, as far as discounting bills is concerned, this is a very wide and comprehensive authority. It puts the Bank in this position, that in dealing with Dempster they are as safe as if they were dealing with a member of the firm, and that member authorised to make and sign documents of this description. The other writing is different, and is a proper procuratory or mandate addressed to Dempster. In the first place, it authorises him to manage their whole business and affairs in Scotland, and then follow the various special powers—"To sign for us all documents relating to, or in connection with, our business in Scotland; and specially we authorise you to sign, per procreation, for us and on our behalf, all cheques, orders, and drafts, and to draw, grant, accept, or endorse for us, and on our behalf, all bills, promissory notes, and negotiable documents, and to discount the same on our credit and responsibility; and we engage to meet and honour all such cheques, drafts, bills, promissory notes, and negotiable documents drawn, granted, accepted, or endorsed, or bearing to be drawn, granted, accepted, or endorsed, by you, the said Samuel Watson Dempster, and to keep the parties dealing with you free and skaitless. And we bind ourselves to ratify, homologate, and confirm the actings and doings of you, the said Samuel Watson Dempster, in respect of all such cheques, orders, drafts, bills, promissory, and negotiable documents. For all which powers these presents shall be held full and ample authority. And we declare that the authority and power hereby granted shall subsist notwithstanding any change in our firm, and until the same be expressly recalled in writing."

Now, it appears to me that, on the one hand, the latter document is as wide in the obligation which it imposes on the defenders regarding the drawing, endorsing, and discounting bills, as the previous

one. No partner could enjoy larger powers; and so here, also, it seems that the Bank is in the same position as if the bills to be drawn, endorsed, or accepted by Dempster, had been drawn, endorsed, or accepted by the firm. But further, in the second document there is a peculiar addition. Not merely is authority granted to Dempster, but further, the Company bind themselves to ratify, homologate, and confirm his actings and doings. That must mean something more than a general authority, for if Dempster was acting under authority, his actings required no such ratification, and I think this is to remove all doubt that Makin & Sons were not to take exception to any paper subscribed by Dempster. In this respect it seems to me that the written authority is unusually wide and comprehensive. Now, let us see what Dempster did. There are seven bills in all, but not all in quite the same position. The first is for £96 on Brigham & Bickerton, machine makers, Berwick; the second, for £100 on Howie & Young, engineers, Kirkcaldy; the third, for £41 on Niven & Rintoul, coach builders, Greenock; and the seventh, for £138 on Laing & Melvin, coachbuilders, Aberdeen. All these parties were customers of the defenders, and so it was quite natural that bills should be drawn on them by Dempster as defenders' agent. The next bill, the fourth in order of time, for £44, was drawn on Russell & Son, engineers, Carluke; and the sixth, for £39 on James Hatley & Co., contractors, Carstairs. Now, no such firms were in existence; and the only remaining one, for £276 was on Caird & Co., shipbuilders, Greenock, a real firm, but not a customer of the defenders. Such was the nature of Dempster's drafts—four on customers of the defenders, two on firms having no real existence, one on a real firm which was not a customer of the defenders. As regards the drafts on real firms, the acceptance in each case was forged, and as regards those on fictitious firms, the acceptances were also forged in a certain sense. These were all discounted by the Bank, and there seems to be nothing remarkable in what took place in connection therewith—there were some inquiries on the part of the Bank as to the drawees, which were answered by Dempster, and not the slightest suspicion seems ever to have been aroused. There is one of the bills which is in a peculiar position. It was drawn by a clerk employed in Dempster's office, but as Dempster himself endorsed and discounted the bill, that is of very little consequence, and, in fact, created no difficulty with the Bank. Now, it turns out that the money realised by discounting these bills was, as regards six of them, paid into the defenders' account, and as regards the seventh, it was converted into a letter of credit on London for £150, the amount of the bill being £138, and the balance being made up by Dempster; but in the result no part of the money came into the defenders' hands. Dempster applied it all to his own use. Having been guilty of forgery, he added embezzlement, and the question here is, on whom is the loss to fall. We have had a great number of authorities quoted on the general question of agency, but I cannot say I have derived much instruction therefrom—they do not seem to vary the general principle of the civil law of mandate; the only difficulty lies in its application to the circumstances. Here, however, the application is easy—all I inquire is, whether what Dempster did was done on the authority of the letters? No doubt, in a question between the mandant and the mandatory,

there was a gross breach of duty, and the defenders might say that he was going beyond the scope of his authority in a question with the customers of the Bank. For instance, if Dempster, under Makin & Sons' mandate, had proposed to deal with parties for the sale of cotton, those dealing with him must have known that he was exceeding his authority, and he would not have bound his principals; but though it might be necessary for customers of the defenders to make inquiries, the position of the Bank was quite different. They were not bound to ask if he was engaged in transactions for the sale of Makin & Sons' goods. What they authorised him to do with the Bank was not to sell goods, but to make bills, and they have guaranteed the Bank against any loss in the course of his doing so. It is in conducting the bill department of their business that Dempster comes in contact with the Bank, and binds his principals. The defence is irrelevant. The only question is, whether in drawing, endorsing, and discounting bills he was not engaged in his proper line of business.

LORD ARDMILLAN—I have given to this case the attentive consideration which its great importance deserves. We have had an able argument and an ample citation of authorities. Both parties have been deceived, and both are innocent, and each is contending *de damno vitando*. The question therefore in regard to the incidence of the loss caused by the dishonesty and forgery of Dempster, the agent of the defenders, is very serious. Such cases must, I fear, be viewed as occurring occasionally, and the decision in this case may have a somewhat wide application.

I have formed a clear opinion in accordance with the judgment of the Sheriffs, and I concur in the exposition of law given by your Lordship. I shall not explain in detail the grounds of my opinion. The agency of Dempster was of the widest and most comprehensive character. He was manager in Scotland for the defenders. He acted for them, and represented them, and they bound themselves to ratify and confirm his acts. This very wide power and authority, by which the defenders accredited Dempster as acting for them and binding them, is distinct, and apart from the special and particular authority to sign per procurator bills, cheques, cash orders, and other documents in conducting their business. We have here two distinct and ample letters of authority—one addressed to the Bank, the other addressed to Dempster, and handed or communicated to the Bank. These letters could scarcely be more clear or more comprehensive. I entertain no doubt that the Bank, acting, in their banking business, with Dempster as the defenders' manager—discounting the bills and notes, and honouring the drafts of Dempster for the defenders,—were in entire good faith, and in the usual and natural course of their business. Holding these letters, they did not suspect, and had no reason to suspect, Dempster; and they were not, in my opinion, under any obligation to make special inquiry in regard to persons whose names were on bills drawn by Dempster. The Bank failed in no duty, and neglected no precaution incumbent on them. The bills were drawn by Dempster for Makin & Sons, and the acceptances were forged by him. They were discounted by the Bank. Dempster has been convicted of forgery.

We have no case here of implied authority. We

have very clear and ample authority expressly conferred. On that authority, given by the defenders to their manager, their "general representative and agent in Scotland," the Bank were entitled to rely.

So far as the Bank did know, or could know, the business in the course of which these bills were discounted was the business of the defenders. There was nothing here to awaken even a suspicion on the part of the Bank. The power to deceive and defraud the Bank was given to Dempster by the defenders. He used that power and deceived and defrauded the Bank. Some one must be a loser by the deceit. He who armed the deceiver with the power of deceiving ought to suffer rather than he who was deceived. Makin & Sons were cheated by Dempster, but they of their own accord trusted and authorised Dempster. The Bank only trusted Dempster because Makin & Sons authorised and accredited him to the Bank. No authority has been adduced to shake the clear principle of equity in respect of which liability for the loss attaches to the defenders, who gave to Dempster the power and authority under which he, acting for the defenders, defrauded the Bank.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"8th March.—Find that the defenders (appellants) are steel and file makers in Sheffield, and that they had an agency in Glasgow, conducted by the late firm of Cathcart & Dempster for about a year before the dissolution of that firm in or about June 1869, when they appointed Samuel Watson Dempster, one of its partners, their sole agent in Scotland; find that the defenders addressed to the pursuers (respondents) a letter, dated 26th January 1870, and which was shortly afterwards delivered to the pursuers by Dempster, in which, *inter alia*, they said, 'S. W. Dempster, our manager in Scotland, has authority to sign, per procurator of our firm, all bills, cheques, cash orders, and other documents necessary to the conducting of our business, and all vouchers so subscribed will be equally binding as if signed by any member of our Firm;' find that, about the said date, the pursuers, at Dempster's request, after causing inquiries to be made in Sheffield as to the defenders' credit, opened with the defenders a discount account and an account current at their branch in Canning Street, Calton, Glasgow; find it not proved that this was done without the defenders' knowledge or authority; find that the pursuers, wishing to obtain from the defenders a more formal authority to Dempster, prepared through their law agents a procurator or power of attorney on stamped paper, and which having been handed by the pursuers to Dempster for the defenders' signature, was, on 5th May 1870, signed by the defenders before witnesses, and was shortly afterwards returned by Dempster to the pursuers, and duly completed in the testing clause; in which procurator the defenders say, *inter alia*—'We hereby authorise you, Samuel Watson Dempster, 34 St Enoch Square, Glasgow, our general representative and agent in Scotland, to manage our whole business and affairs in Scotland, to

sign for us all documents relating to, or in connection with, our business in Scotland, and specially we authorise you to sign, per pro-curation, for us and our behalf, all cheques, orders, and drafts, and to draw, grant, accept, or endorse for us and on our behalf all bills, promissory notes, and negotiable documents, and to discount the same on our credit and responsibility; and we engage to meet and honour all such cheques, orders, drafts, bills, promissory notes, and negotiable documents drawn, granted, accepted, or endorsed, or bearing to be drawn, granted, accepted, or endorsed by you, the said Samuel Watson Dempster, and to keep the parties dealing with you free and skaitless; and we bind ourselves to ratify, homologate, and confirm the actings and doings of you, the said Samuel Watson Dempster, in respect of all such cheques, orders, drafts, bills, promissory notes, and negotiable documents; Find that between the said months of January and June 1870, inclusive, Dempster operated upon the said accounts, and discounted a number of bills in the pursuers' said branch, which discounts the pursuers allowed on the credit of the defenders, and relying on the said letter and pro-curation; find that, *inter alia*, Dempster so discounted the following bills, purporting to be drawn by the defenders upon, and to be accepted by, the parties following, viz.:—(1) for £96, 14s. 7d., by Brigham & Bickerton, machine makers, Berwick, dated 28th March 1870, payable four months after date; (2) for £100, by Howie & Young, engineers, Kirkcaldy, dated 19th April 1870, payable four months after date; (3) for £41, by Nevin & Rintoul, coach builders, Greenock, dated 27th April 1870, payable three months after date; (4) for £44, 10s. 9d., by Robert Russell & Sons, engineers, Carlisle, dated 2d May 1870, payable four months after date; (5) for £276, 10s. 9d., by Caird & Company, shipbuilders, Greenock, dated 16th May 1870, and payable four months after date; (6) for £39, 5s. 6d., by James Hatley & Company, contractors, Carstairs, dated 23d May 1870, payable three months after date; (7) for £138, 14s. 9d., by Laing & Melvin, coach builders, Aberdeen, dated 1st June 1870, and payable four months after date; find that Dempster signed the said seven bills as drawer and endorser 'pp.' (that is per pro-curation of) Wm. Makin & Sons, except the one secondly above described, which was signed 'for Wm. Makin & Sons, D. M'Pherson,' as drawer, and was endorsed by Dempster as above; find that the signatures, purporting to be those of the acceptors of all the said seven bills, are forged, and that the defenders did not, at the dates thereof, have any claim against any of these parties; Find that the pursuers paid to Dempster the proceeds of all the said bills (deducting bank charges), and that the whole or part of the proceeds of the first six were paid into the said current account, and mixed up with the defenders' other monies therein; find that the proceeds of the seventh bill (deducting charges) having been £137, 2s. 2d., Dempster drew a cheque at the pursuers' said branch, and purchased there-with, and with £20 drawn from the current

account, a draft on Messrs Glyn & Company, bankers, London, for £150 sterling, in favour of the defenders, the balance (£6, 19s. 1d.), after deduction of bank charges, having been paid to him in cash; Find that the said draft for £150 was not transmitted to the defenders, and they did not receive any part of the proceeds thereof; find that, of the parties appearing as acceptors of the said bills,—Messrs Brigham & Bickerton, Howie & Young, Niven & Rintoul, and Caird & Co., were existing firms, and the three first-mentioned had had business dealings with the defenders, but Messrs Robert Russell & Sons and Messrs James Hatley & Company were non-existent and fictitious; find that all of the said pretended acceptors appeared to be in lines of business in which dealings with the defenders might have taken place, that Dempster, when applying for discounts of said bills gave explanations which satisfied the pursuers' officers that they were genuine and *bona fide* bills, duly accepted by parties indebted to the defenders, in the ordinary way of their business, and that the pursuers discounted all the said bills, relying on Dempster's explanations, and on the apparent genuineness of the documents; Find it not proved that the pursuers failed to exercise due caution in discounting any of the said bills, or that the signatures thereto were manifest forgeries, or presented a suspicious appearance, which should have put the pursuers on their guard; therefore refuse the appeal, and decern; Find the appellants liable in expenses; Allow an account thereof to be given in, and remit the same, when lodged, to the Auditor of Court to tax and report, and decern."

Counsel for Makin & Sons—Watson and Balfour. Agents—J. & R. D. Ross, W.S.

Counsel for Union Bank—Solicitor-General (Clark) and Marshall. Agents—J. & F. Anderson, W.S.

CLYDESDALE BANK *v.* MAKIN & SON.

This was an action of precisely the same nature as that of the Union Bank, against the same defenders, and it was arranged by Counsel that the same argument should be held to apply to both cases, and that the same judgment should determine them.

Thursday, March 6.

FIRST DIVISION.

[Lord Ormisdale, Ordinary.]

BATHIE *v.* WHARNCLIFFE.

Lease—Constitution of Lease—Draft—*Rei interventus*.

Circumstances held sufficient to instruct *rei interventus* to the effect of making an adjusted draft lease, although not extended or subscribed, binding upon the parties.

This action was brought by Margaret Bathie, tenant in the farm of Gateside of Newtyle, Forfarshire, against Lord Wharncliffe, her landlord, and