any of the children at a distance from home, or for such change of residence as may be considered necessary for the health of any member of the family, and decern: Find the expenses incurred in connection with this application payable out of the trust-estate, and remit to the Auditor to tax the same, and to report."

Counsel for Petitioner—Balfour—Robertson. Agent—Webster, Will, & Ritchie, S.S.C.

Counsel for Trustees—Mackintosh.

Thursday, March 8.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

THE CLYDESDALE BANK *v.* PAUL AND HIS TRUSTEE.

(*Ante*, vol. xiii., p. 367.)

Agent and Principal—Fraud—Forgery.

If an agent in the course of his employment commits a fraud, the principal is liable in so far as he receives benefit thereby.

This was the sequel of an action brought by the Clydesdale Bank against the present defenders and the Royal Bank (reported March 11, 1876, vol. xiii., 367, and 3 Rettie 586) in the following circumstances:—Martin, who was a clerk of Paul, presented a crossed cheque at the Royal Bank, purporting to be drawn in Paul's favour by Dixon Brothers on the Clydesdale Bank, and endorsed by Paul. Paul was a customer of the Royal Bank; Dixon Brothers were not. The Royal Bank cashed the cheque, and thereafter presented it to the Clydesdale, who paid the money. Ten days afterwards the Clydesdale discovered that the signatures of Dixon Brothers and Paul were forgeries. This was an action at the instance of the Clydesdale Bank against the Royal Bank and Paul and his trustee for £4800, the amount of the cheque. At the previous stage of the case the Royal Bank were assoilzied, and proof allowed as regarded the case between the pursuers and Paul.

The proof was accordingly taken, and the result appears from the following note of the Lord Ordinary, who decerned against the defender Paul in terms of the conclusions of the libel:—

"*Note.*—The facts in this case are not disputed.

"Mr Paul carried on business in Glasgow as a stockbroker, and was a member of the Stock Exchange. It is proved that no person can transact business on the Exchange except a member, or a person representing a member. The brokers deal with each other as principals.

"For some years Mr Paul had in his employment a clerk named Martin. In consequence of age and infirmity Mr Paul became less able to conduct his business personally, and from April 1875 Martin was allowed to represent him on the Stock Exchange. He entered into many transactions which his employer had not authorised. Though they were regularly entered in what is called the Exchange-book, they were not carried to the contract-book, in which the names of the customer or client of the broker appear. The reason was that they were speculative transactions carried on by Martin, for which he had no order. It is plain enough that Mr Paul had no knowledge of these irregular transactions, though at one time he had suspicions of Martin's fidelity, and might have ascertained the truth by examining his Exchange-book.

"At the settling-day, on 30th November 1875, the balance due by Paul on all the transactions made in his name was upwards of £7000. But apart from the irregular transactions the balance was only a little more than £2000. The money was payable at one o'clock, and Paul provided his clerks with a sum sufficient or nearly sufficient to meet the smaller balance.

"In order to enable him to meet the actual sum which was due on all the transactions, Martin passed a forged cheque on the Clydesdale Bank. It bore to be a cheque drawn by Dixon Brothers in favour of Paul, and endorsed by the latter. Both signatures were forged. Being a crossed cheque it was presented to the Royal Bank, who were the bankers of Paul. It was cashed, and the money, along with that which Paul had himself furnished, was handed to the secretary of the Stock Exchange to meet the debt appearing on Paul's fortnightly balance-sheet. The Royal Bank, in settling with the pursuers, received credit for the contents of the cheque.

"The forgery was discovered on the 9th or 10th of December. Martin then absconded, and has not since been heard of.

"The pursuers maintain, in the first place, that as the cheque was paid on the request of Martin, who held a confidential place in Paul's employment, Paul is liable to repay them. The Lord Ordinary is of opinion that this plea is not well founded.

"But they urge, in the second place, that as Paul received the benefit of the cheque, inasmuch as the money was applied in discharging his liabilities, they are entitled to recover from him.

"The answer of the defenders is this—They admit that Paul was liable for the balance arising on all the transactions; but they say that in a question between him and Martin, the latter was the true debtor on the balance arising on the irregular transactions, that he discharged that debt, and that they have no concern with the source from which the money came, or the means by which it was obtained. They urge that they are in the same position as if Martin had borrowed the money and had applied it in payment of his own debt.

"In the opinion of the Lord Ordinary the pursuers are entitled to decree. The money was raised by Martin as the representative of Paul. It is true that this was done without his authority; and still more that he did not authorise the means which were employed. But the advance was not the less an advance on his account, and if he receives benefit from it he must, it is thought, be dealt with as if he had given previous authority to obtain it. The Lord Ordinary therefore thinks that the pursuers are entitled to decree."

The defenders reclaimed, and argued—Martin, although Paul's agent, was not authorised to commit this fraud; it was no part of his business to do so, nor was Paul a party to the fraud or *lucratus* by it. Nor was it the case that the money thus

fraudulently obtained was applied for Paul's benefit. The transactions which it was employed to pay for were Martin's own, not Paul's, nor authorised by him. Even if the money was applied to extinguish Paul's liabilities, it was so applied by one who was Paul's debtor to a large amount in consequence of his successful embezzlements, and therefore the payment must be looked on as having been made for onerous considerations; if that be so, Paul is not liable.

Authorities—*Union Bank* v. *Makin*, March 7, 1873, 11 Macph. 499; *Wardlaw* v. *Mackenzie*, June 10, 1859, 21 D. 940; *Scholefield* v. *Templer*, 4 De Gex and Jones 429; *Eyre* v. *Burmestre*, 4 De Gex, Jones, and Smith, 435; *Colvin* v. *Dickson*, March 15, 1867, 5 Macph. 603; *Allan* v. *London and South-Western Railway Co.*, Law Reps., 2 Q. B. 65.

The pursuers argued—Paul made the fraudulent act of Martin his own by having got benefit from it; he was liable for the balance due to the Exchange, for Martin had no position of his own there, and therefore the money was spent in discharging Paul's debts. In all the authorities it was held that an agent made his principal liable for his fraud if the principal thereby received benefit to the extent of that fraud.

Authorities—*Traill* v. *Smith's Trustees*, June 3, 1876, 3 Rettie 770; *Barwick*, 2 Law Reps., Exch. 259; *Mackay* v. *Commercial Bank of New Brunswick*, 5 L. R., Privy Council App. 394.

Lord Deas, in respect that he was a shareholder of the Royal Bank, proposed a declinature. It was unanimously repelled, on the ground that the Royal Bank was not and never could be a party to this branch of the action.

At advising—

Lord President—The case is now very fully before us, and it seems to me that the Lord Ordinary's interlocutor is quite sound.

The circumstances of the case are very simple in so far as they afford grounds for judgment. Mr Paul was a member of the Stock Exchange in Glasgow, and carried on business as a stockbroker there. He was an old man, and entrusted the charge of his business to Martin, who was his cashier and manager. There is no room for doubt that Martin did almost all his business on the Stock Exchange, and did so by his authority; he was plainly entitled to buy and sell stocks for him, and to bind Mr Paul for the fulfilment of bargains concluded by him. Whether these bargains had been authorised by Paul was, I apprehend, of no importance, for he was generally accredited by Paul to represent him on the Stock Exchange. There is also no doubt that on 30th November 1875 Paul was liable to make good a balance of £7000 standing against him on the Stock Exchange, although a great part of that sum was for fraudulent transactions of Martin's, unauthorised by him. Paul was by the rules of the Stock Exchange bound to make payment of that balance by one o'clock on that day. Martin, on the other hand, found himself in great embarrassment, for of course if he had gone to Paul for the money the whole of his frauds would have been discovered. Accordingly he forged this cheque on the Clydesdale Bank, which was cashed by the Royal Bank, Mr Paul's bankers. He forged the drawer's name, and Mr Paul's name as endorser; the cheque was presented to the Royal Bank, and they cashed it; the Clydesdale Bank relieved them, and now sue Mr Paul and his trustees on the ground that the money was obtained from the Bank by the tortious proceedings of an agent and representative of Paul's, and that the money so obtained was expressly applied for the benefit of Paul. It is on the combination of these two facts that Paul's liability is to be established.

Now, of course it is plain that neither Martin nor any other agent is authorised by his principal to commit a wrong; but if in the course of his business as agent he does wrong, and his principal benefits thereby, the principal will be liable to the extent of the benefit he has received. These are the plain grounds for deciding this case; it is plainly a case under the law of principal and agent, and the rule of law is one that has been recognised by all the authorities from Paley downwards, and has been applied again and again, as in two recent cases which bring out the principle very clearly—one decided in Scotland, the other in England. These were the cases cited to us, viz., the case of *Traill* in this Court, and of *Barwick* in the English Courts.

My opinion is that we should adhere to the Lord Ordinary's interlocutor. I think the Bank is entitled to recover against Paul and his trustee.

Lord Deas and Lord Mure concurred, on the ground that a principal, if benefited by the fraud of his agent in the course of his business, is liable therefor, and that Paul here, being bound to discharge the liabilities incurred for him, however fraudulently incurred, by Martin, did actually receive the benefit of the forgery.

Lord Shand—I agree with your Lordship in thinking that the interlocutor of the Lord Ordinary should be adhered to. The principle of law applicable here, by which this case must be decided, is thus expressed by Lord Chancellor Campbell, with the approval of the Lords Justices Knight Bruce and Turner, in the case of *Scholefield* v. *Templer*:—"I consider it to be an established principle that a person cannot avail himself of what has been obtained by the fraud of another unless he not only is innocent of the fraud, but has given some valuable consideration." This principle is not, in my opinion, limited to cases where the relation of employer and clerk or manager, or principal and agent, has subsisted between the parties. No doubt in many of the cases that have arisen such a relation has existed, but the rule is not limited to these circumstances. A familiar illustration of this is to be found in the cases of reduction of settlements. These are frequently set aside *in toto* if they can be shown to have been obtained by the fraud of a single individual, though there may be large provisions in favour of third parties, on the broad ground that the settlement has been obtained by fraud, and that the third parties have not given any valuable consideration. *Scholefield's* case was not a case of principal and agent, and the same broad rule was laid down in the case of *Eyre* v. *Burmestre*. As a matter of fact, I think that Paul got a direct benefit from the sum of money produced by the forged cheque; it is also clear that Paul was perfectly innocent of the fraud, but the question is, whether any valuable consideration

was given? My answer is that there was not. The money was paid into Paul's account at the Stock Exchange, and no consideration was given for it at all. The argument submitted to us on behalf of Paul sought to bring up something like a valuable consideration. The Lord Ordinary states the defenders' first contention thus:—"The defenders admit that Paul was liable for the balance arising on all the transactions; but they say that in a question between him and Martin, the latter was the true debtor on the balance arising on the irregular transactions, that he discharged that debt, and that they have no concern with the source from which the money came, or the means by which it was obtained. They urge that they are in the same position as if Martin, had borrowed the money and had applied it in payment of his own debt." That argument is unsound, for Martin was not the debtor in the sums we find brought out against him in the Stock Exchange statement for the week; that clearly shows Paul's obligation. .It may be that if parties had known what was going on Martin might have had to relieve Paul, but he was in no sense the debtor to the Stock Exchange. Another ground on which it is said that a valuable consideration was given is this:—That now it appears that at that date Martin, having embezzled £9000, did by this payment discharge in part what was a debt due by him. But that was not the real nature of the transaction. Paul did not know he was creditor at all, and it is impossible by subsequent investigation to rear up a debt of this sort. On the whole matter I am of opinion that no valuable consideration was given, and that therefore we should adhere to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for Pursuer—J. Guthrie Smith—Readman. Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for Defenders — Burnet — Alison. Agents—J. W. & J. Mackenzie, W.S.

Saturday, March 10.

FIRST DIVISION.

PETITION—WATT, PHILIP, & COMPANY.

Bankruptcy—Sequestration—Error in Notice—19 *and* 20 *Vict. cap.* 79.

The Sheriff awarding sequestration under the Bankruptcy Act, appointed a meeting of creditors to be held on a certain specified day for the purpose of electing a trustee and commissioners. The day fixed by the Sheriff, however, did not leave sufficient time to insert the statutory notice of meeting in the *Gazette*, and thereafter to allow the statutory interval to elapse before holding the meeting. On an application by the bankrupts and certain of their creditors, praying the Court to fix another day, the Court granted the prayer of the petition *periculo petentis*.

Counsel for Petitioners — Alison. Agents — Webster, Will, & Ritchie, S.S.C.

Saturday, March 10.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MACKENZIE *v.* KIRKPATRICK AND OTHERS.

GORDON AND OTHERS (SHARPE'S TRUSTEES) *v.* MACKENZIE AND OTHERS.

Succession — Trust—Destination—Revocation—Deed of Restriction—Construction.

A proprietor who held an estate under an entail which had been declared ineffectual against alienations, disponed his estates to trustees in favour of his brother A. in liferent allenarly and the heirs whomsoever of his body in fee, whom failing to his brother W. in liferent and the heirs whomsoever of his body in fee, whom failing to the heirs whomsoever of the body of a deceased sister, whom failing to his sister G. and the heirs whomsoever of her body, whom failing to "my nearest heirs and assignees whomsoever, the eldest heir-female secluding heirs-portioners and succeeding always without division throughout the whole course of succession." The truster subsequently executed a deed of restriction whereby he revoked, cancelled, and annulled "the said destination and order of succession in so far as regards the persons called and appointed to succeed after my brothers therein named, and the heirs of their bodies, declaring it to be my will and intention that the destination and order of succession in the said trust-disposition and settlement shall not take effect beyond my said brothers and the heirs of their bodies, and that the person or persons further called to the succession shall have no right or claim to the same, but shall be entirely excluded therefrom, and are hereby excluded accordingly; reserving to myself full power to call and appoint (or name) a new series of heirs to my said estates after my said brothers and the heirs of their bodies, by any writing under my hand, which shall have the same force and effect as if contained in the said trust-disposition and settlement: And I hereby declare that the foresaid trust-disposition and settlement, in so far as not hereby restricted, shall remain in full force and effect."—*Held*, upon the terms of the deed of restriction, and also in view of the circumstances under which it was executed, that the ultimate destination to "heirs and assignees whomsoever" was not recalled.

Succession—Property—Trust—Fee and Liferent.

M. conveyed his landed estates to trustees in favour of his brother A. in liferent allenarly and the heirs whomsoever of his body in fee. A. having died without issue —*held* (1) that M.'s trust-deed having contained no effectual disposition of the fee, the estates passed to his heir as at the date of his death; (2) that the conveyance in M.'s trust-deed to A. in liferent allenarly did not prevent A. from taking the estates as heir of M.; and (3) that the estates were effectually conveyed by A.'s *mortis causa* trust-deed.