it, and on what terms. Caution has been found for the expenses of the appeal, and the appellants also offer caution for their appearance. I shall allow interim liberation upon additional caution to the same amount as found before the Sheriff—that is, £10 for each of the parties. The Sheriff no doubt has considered the question of caution with reference to the circumstances of the appellants, and I shall just take the same standard as he has done."

Counsel for the Appellants—Deas. Agents—Messrs Fodd, Simpson, & Marwick, W.S.

Agents for the Respondent—Bruce & Kerr, W.S.

COURT OF SESSION.

Friday, February 10.

FIRST DIVISION.

[Lord Fraser, Ordinary.

THE DOMINION BANK OF TORONTO AND MANDATORY *v.* WILLIAM ANDERSON & COMPANY.

Bill of Exchange—Bills of Exchange Act 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 63, *sub-sec.* 3—*Inoperative Cancellation.*

The Bills of Exchange Act, 1882, provides by sec. 63, sub-sec. 3, that "a cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative."

The foreign holders of a bill of exchange accepted by a firm of merchants in Grangemouth, and payable at the Bank of Scotland, London, sent the bill for collection to the National Bank of Scotland, London, on 7th May. The bill was dishonoured in consequence of a dispute, and returned to the holders. On 16th May the agent of the Bank of Scotland at Grangemouth, acting on behalf of the acceptors, wrote to the National Bank, who had no branch at Grangemouth, asking them to send the bill for collection if the dispute was adjusted. On 21st May he wrote that if the bill was sent for collection it would in all likelihood be paid, but that the acceptors would not pay the expenses. On 28th May the acceptors wrote to the Grangemouth bank-agent that they would pay the bill if he got a guarantee from the National Bank freeing them of all expenses and interest. This letter was enclosed by the Grangemouth bank-agent to the National Bank, who on 31st May wrote to him that when they got the bill back they would present it at its London domicile for payment. On 7th June, however, they wrote to the Grangemouth bank-agent enclosing the bill for collection and remittance, "Should the acceptors decline to pay protest charge, 12s. 6d., please return protest to us. Acceptors will of course pay the remitting charge." On 9th June the Grangemouth bank-agent wrote to the National Bank, London, enclosing a letter from the acceptors, of the same date, stating that they would pay protest and remitting charges on condition they were held free of further responsibility. No answer was received to this letter. On 13th June the Grangemouth bank-agent took payment of the bill from the acceptors, and the bill was cancelled and given up. An hour afterwards the acceptor handed to the bank-agent a letter in these terms—"Confirming our former respects we hand you payment of this bill on the distinct understanding that we are freed from all responsibility for interest, expenses, &c." This letter was attached by the bank-agent to the draft he had taken in payment, and both documents were sent by him to the National Bank. Along with these he wrote a letter in which he stated that in accordance with the letter of the acceptor's enclosed, so far as that firm was concerned, the "draft is accepted by you in settlement of the transaction without any reservation." In these circumstances the National Bank refused to accept the draft as they had no authority from the holders to accede to the condition attached. The holders then raised an action against the acceptors for payment of the bill, and, in answer to the defenders' plea that the bill was cancelled, founded on the Bills of Exchange Act 1882, sec. 63, sub-sec. 3, above quoted.

Held that as the Grangemouth bank-agent had acted either in error or without authority the cancellation was inoperative, and decree *granted.*

This was an action by the Dominion Bank of Toronto, Canada, the holders for value of a bill for £2939, 9s. 6d. drawn by M'Arthur Brothers Company (Limited), Canada, on, and accepted by, William Anderson & Company, Grangemouth, for payment of the principal sum in the bill, or alternatively for payment of the sum of £2939, 9s. 6d.

The defenders pleaded that the sum contained in the bill had been paid, and the bill itself duly cancelled.

The pursuers founded on the Bills of Exchange Act, 1882, sec. 63, sub-sec. 3, which provides that "a cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority;" and maintained that the cancellation in question was made either by mistake or without the authority of the holder.

The circumstances in which the question arose were as follows:—In 1886 William Anderson & Company purchased a cargo of timber from M'Arthur Brothers Company (Limited), Canada, and in payment thereof they accepted the bill in question, dated 28th September, drawn by M'Arthur Brothers, payable 180 days after sight at the Bank of Scotland in London. M'Arthur Brothers endorsed the bill to the Dominion Bank of Toronto, who transmitted it for collection to the National Bank of Scotland (Limited) in London. It fell due on 7th

May 1887, but in consequence of a dispute between the parties as to the timber it was dishonoured.

On 16th May Mr Basil Mackenzie, the agent for the Bank of Scotland at Grangemouth, wrote to the National Bank of Scotland, London, in these terms:—"An acceptance of Messrs Wm. Anderson & Company of this town p. £2939, 9s. 6d. was presented at our London office, and payment refused on account of there being a dispute between the merchants who drew the bill and themselves. If the matter be now adjusted, you might send forward the document for collection."

The National Bank replied to this on 17th May as follows:—"We are in receipt of your favour of 16th inst., and in reply beg to say that the bill referred to was returned to our friends, the Dominion Bank, Toronto, on 10th inst.; but if you remit us the amount and charges we shall have pleasure in recalling the bill by cablegram."

On 21st May Mr Mackenzie wrote to the National Bank of Scotland, London, intimating that if the bill was forwarded to him for collection it would in all likelihood be paid, but not the expenses, as Anderson & Company did not admit any liability for these.

On 28th May Anderson & Company (the defenders) wrote to Mr Mackenzie, intimating that they would be prepared to make immediate payment of the bill provided the National Bank gave a guarantee to hand over the bill on its return from Canada (whither it had been transmitted after it had been dishonoured on 7th May) to the Bank of Scotland; and held them (the defenders) scatheless in event of its miscarriage in any way, freeing them also of all expenses and interest. They also said that on hearing Mr Mackenzie had got this guarantee they would authorise him to make payment.

Mr Mackenzie was examined for the pursuers, and in his evidence he thus described his position in the matter—"*By the Court*—(Q) Were you acting as agent for the National Bank in this transaction?—(A) Not except in this way, that they send forward documents for negotiation and collection through us, and they state their conditions. The National Bank has no branch in Grangemouth." "*Cross*—It is customary among bankers who have bills to collect in a place where they have no agency to employ some bank there to collect the bills for them. They treat those other banks as correspondents at places where they have no agency of their own. When the National Bank sent this bill to me, they employed me to collect it for them, as they had done a hundred times before, and in dealing with that bill I was bound to execute their instructions."

On 28th May Mr Mackenzie forwarded Anderson & Company's letter of that date to the National Bank.

On 31st May 1887 the National Bank wrote to the Bank of Scotland, Grangemouth, as follows:—"As we cabled recal of the bill on 23rd inst. it will probably be here in a few days, and immediat ely on its receipt we shall re-present it at its London domicile for payment.—Yours, &c., James Robertson, Manager."

On 7th June the National Bank wrote as follows to Mr Mackenzie:—

"*London, 7th June* 1887.

"Referring to your letter of 21st ulto., we now enclose for collection and remittance through your London office (bill being accepted payable in London) Anderson £2937, 9s. 6d. Should the acceptors decline to pay protest charges, 12s. 6d., please return protest to us. Acceptors will of course pay the remitting charge. We presented the bill to-day at your London office, but they state that they are still without instructions regarding it.—Thos. Ness, Asst. Manager." The charge of remitting the money to London was 1s. per cent.

To this letter the agent of the Bank of Scotland wrote as follows:—

"*Grangemouth, 9th June* 1887.

"Dear Sir,—With reference to your letter of 7th inst. I enclose herewith a communication received from W. Anderson & Company, from which you will observe that they would pay the 12s. 6d., together with the remitting charge, *re* the bill, on condition that they were held free of further responsibility. Please favour me with your instructions. *P.S.*—As Mr Anderson is presently living at Callander, and may not be here till Monday morning, we retain the bill till that day if we have not contrary instructions from you.—Yours, &c., "Basil Mackenzie, Agent."

Anderson & Company's enclosure was in these terms:— "*9th June* 1887.

"*M'Arthur Bros. Coy., Ld., Bill p.* £2939, 9s. 6d.

"Dear Sir,—We have yours stating the National Bank, London, will make payment of this bill, but we would like you to get a letter from them freeing us of interest and expenses as asked in ours of 28th ulto. The way we have been treated in the past is our excuse for being somewhat particular now.—Yours truly,

"Wm. Anderson & Co."

After the bill had been presented for payment on 7th May and dishonoured, it was sent back to Canada; but upon the National Bank understanding from Mr Mackenzie's letter to them of 21st May, already referred to, that payment would be made, they cabled to Toronto that the bill should be returned to London, which was done. When the new condition of the letter of indemnity against responsibility for expenses and interest was imposed by the defenders (*i.e.*, the letter of 9th June), the National Bank cabled on the following day (10th June) to Canada, making inquiry whether such a letter of indemnity would be given. No answer was returned.

On the 14th they again cabled to Canada, but up till the 18th of June no reply was received by them authorising them either to accept or refuse the conditions stipulated for by Anderson & Company. While the National Bank were thus awaiting instructions from Canada, Mr Anderson, of Anderson & Company, called upon Mr Mackenzie on the 13th of June, paid the amount of the bill, and cancelled his acceptance. On the same day Mr Anderson handed to Mr Mackenzie this letter:—

"*Grangemouth, 13th June* 1887.

"*M'Arthur Bros. Coy., Bill p.* £2939, 9s. 6d.

"Dear Sir,—Confirming our former respects, we hand you payment of this bill on the distinct understanding that we are freed from all responsibility for interest, expenses, &c.—Yours truly,

"Wm. Anderson & Co."

An account of what took place at this interview was given by Mr Mackenzie in his evidence. He deponed that after writing to the National Bank the letter of 9th June quoted above—"The next step in the matter was that on the 13th of June Mr Anderson called and asked me what were the conditions on which the bill was to be given up. I said, in a jocular way, 'Here is the bill of fare,' referring to the letter of 7th June, and let him judge of it for himself. He said he thought he should not pay the 12s. 6d. of protest charges, because the bank stated that even if he objected to pay the protest charges the bill might be given up, and because he thought the shippers had been at fault. I advised him to pay it, and he accordingly paid the 12s. 6d., the remitting charges, and the principal in notes, which were received by the teller. The bill was then perforated 'paid,' and Mr Anderson lifted it up and put the pen through his signature. This happened about twelve or one o'clock, I have told all that passed as precisely as I recollect. About an hour afterwards he brought up the letter (of 13th June quoted above), which I attached to the bank draft. He remarked that if there had been any interest or expenses he would not have paid them. I said 'There is the National Bank's letter, and it speaks for itself.' There had not been the slightest stipulation about conditions when the money was paid. On the same day I wrote to the National Bank. The letter therewith enclose was the letter I have just spoken to from Mr Anderson of the same date. . . . So far as I was concerned the only conditions assented to were those of the 7th inst. . . . My authority in this matter was contained in the letter of 7th June, and nothing else."

The letter written by Mr Mackenzie to the National Bank, enclosing Anderson & Company's letter, was as follows :—

"*Grangemouth*, 13*th June* 1887.

"Dear Sir,—I beg to enclose draft for £2940, 2s., being amount of W. Anderson & Company's acceptance referred to in your letter of 7th inst., with 12s. 6d. of protest charges. Of course you distinctly understand, in accordance with Messrs Anderson & Company's letter herewith enclosed, that so far as their firm is concerned the draft is accepted by you in settlement of the transaction without any reservation.—Yours, &c.,

"Basil Mackenzie, Agent."

In the evidence of Joseph Galloway, teller in the Bank of Scotland branch at Grangemouth, he gave the following account of the interview between Mr Anderson and Mr Mackenzie on 13th June :—"I am a teller in the Bank of Scotland's agency at Grangemouth, and I was so on 13th June this year when Mr Anderson got up the acceptance to which this action relates. Before he paid the money he said, Was he to understand that there would be no further charges on the bill? I said I did not think such a guarantee could be given. Mr Anderson then paid the money. Mr Mackenzie came forward and corroborated what I said, that no guarantee could be given such as Mr Anderson asked. He showed Mr Anderson the letter of 7th June, and said, 'This is the bill of fare.' He said these were the only conditions on which we could give up the bill. I think Mr Anderson said nothing more. I perforated the bill with the word 'paid,' and handed it across the counter to Mr Anderson, who deleted his signature, and took the bill away with him. About an hour afterwards he returned and handed in a letter bearing that date, which was forwarded to the National Bank in London by Mr Mackenzie the same day. I have seen the conditions expressed by Mr Anderson in that letter. If he had put those conditions to me at the time he paid the money, I would not have taken the money and given up the bill. There was no authority in our bank, so far as I knew, to take the money and give up the bill on those conditions."

On the 18th of June the National Bank wrote to the Bank of Scotland at Grangemouth, intimating that as they were not authorised to take payment of the acceptance on the conditions tendered, they returned Anderson & Company's draft, and requested that the bill, with the protest attached, should be returned to them.

The bill, which was marked "paid," and with the acceptance cancelled, was obtained from Anderson & Company by Mr Mackenzie, who transmitted it to London, and handed the bank draft for £2940, 2s. to Anderson & Company, who obtained cash therefor.

As to the circumstances in which the cancellation of the bill took place, Mr Mackenzie deponed as follows—"I say distinctly that the bill was not cancelled in error. (Q) Why?—(A) When he paid the money the bill was cancelled as is usually done, and Mr Anderson put the pen through his signature. At that time he had not imposed his conditions. (Q) Then is it your view that at the time the bill was cancelled Mr Anderson intended an unconditional payment?—(A) I certainly understood that if I had said to him 'There is £15 or £20 of interest and so much for telegrams,' he would not have paid the bill. I understood it was a payment of the bill under the conditions of the letter of 7th June. . . . The bank told me to give up the bill on the conditions expressed in their letter of 7th June, and he took it up on those conditions. (Q) Is it your view that Mr Anderson sought to impose fresh conditions afterwards?—(A) An hour afterwards, when he gave me the letter I have referred to. So far as I know, he has never agreed to dispense with those conditions, and to treat the payment as one free of those conditions. (Q) You only forwarded on the payment subject to the condition expressed by Mr Anderson?—(A) Yes; when he came up an hour after the bill had been paid and perforated, I attached his letter to the bank draft. (Q) You never made or tendered an unconditional payment of the money to the bank?—(A) Certainly not; I only went by their letter of 7th June. . . . *Cross*—There was no understanding between Mr Anderson and me that he would give me back the bill and I would give him back the money. He got the bill up as any ordinary customer would get a bill up when it was paid. The payment of this bill was carried through in the ordinary course of business, and when he left the bank it was my understanding, and his too, that the transaction was closed. The bank acknowledged receipt of the draft on the 14th, and the first intimation I had of any difference of view was communicated to me in their letter of the 18th, when they returned the draft and asked the bill to be sent back to them. I thought that

a most extraordinary thing. They knew that I had discharged my duty as a banker on their conditions. On the 22nd they telegraphed for a copy of their letter of 7th June. I was very courteous, and sent them a copy. (Q) When they got that they seem to have tried to get you to say that the bill had been cancelled in error; did that strike you as an odd application?—(A) I thought it very peculiar, and a thing I would not fall in with. The bill had not been cancelled in error; it had been paid in the ordinary course of business. I refused to give them any statement to that effect, and gave them a certificate that it was merely cancelled on Anderson & Company paying the bill. After that, when they insisted upon getting it, I applied to Anderson to give me the bill, and he did so, saying that they should consider their position, because the bill had been perforated and obliterated, and I should warn them of the consequences. . . . *Re-examined* — (Q) If you were wrong in supposing that the bank had assented to the conditions expressed in your letter of the 9th, then you gave up the bill in error? — (A) No, I cannot admit that; I must say the bill was not given up in error. If I had known that the bank did not agree to the conditions expressed in my letter of the 9th, I would certainly not have given up the bill."

By interlocutor of 14th December 1887 the Lord Ordinary (FRASER) decerned against the defenders in terms of the first conclusion of the summons.

"*Opinion.*—A bill for £2939, 9s. 6d., dated 28th September 1886, was drawn by the M'Arthur Brothers Company (Limited) of Toronto, upon the defenders William Anderson & Company, merchants, Grangemouth, payable at 180 days after sight at the Bank of Scotland in London. The drawers of the bill endorsed it to the Dominion Bank of Toronto, Canada, who transmitted it for collection to the National Bank of Scotland (Limited) in London. It fell due on the 7th of May 1887, and was dishonoured.

"The National Bank of Scotland in London, not obtaining payment at the place of payment mentioned in the bill, sent it on 7th June 1887 for collection to the Bank of Scotland at Grangemouth (where the defenders carry on business) by a letter in the following terms (*quoted above*). By this letter the Bank of Scotland at Grangemouth were authorised to deliver up the bill to the acceptors upon payment of the protest charges, and the charge of remitting the money to London, which was 1s. per cent. The agent for the Bank of Scotland at Grangemouth, in answer to this letter, wrote to the National Bank of Scotland, London, a letter on the 9th of June, which is in the following terms—'With reference to your letter of 7th inst., I enclose herewith a communication received from Messrs Anderson & Company, from which you will observe that they would pay the 12s. 6d. together with the remitting charge, *re* the bill, on condition that they were held free of further responsibility. Please favour me with your instructions. *P.S.*—As Mr Anderson is presently living at Callander, and may not be here till Monday morning, we retain the bill till that day if we have not contrary instructions from you.' The last sentence of this letter implies that they were to keep the bill till Monday, unless instructions were sent to return it to London, and the letter from the defenders (also dated 9th June), which accompanied the bank-agent's letter is as follows—'We have yours stating the National Bank, London, will take payment of this bill, but we would like you to get from them a letter freeing us of interest and expenses, as asked in ours of 28th ulto. The way we have been treated in the past is our excuse for being somewhat particular now.' This was a new condition attached by the acceptors to payment of their bill. They wanted a letter of indemnity from the holders freeing them from liability for interest and expenses, and the Grangemouth bank-agent stated that he waited for instructions. Now, the National Bank were not themselves the holders of the bill, but were merely the agents of the holders, the Dominion Bank of Toronto, and as considerable expenses had been incurred in consequence of the dishonour of the bill, they considered that they had no power to grant such a letter of indemnity without the authority of their principals. In consequence of the dishonour of the bill it had been sent back to Canada, and the National Bank having obtained an assurance that the bill would be paid, cabled to Toronto that the bill should be returned to London, which was done. When the new condition of the letter of indemnity against responsibility for expenses and interest was imposed by the defenders, the National Bank cabled on the 10th of June to Canada making inquiry whether such a letter of indemnity could be given, and, having got no answer, they cabled again on the 14th, and on the 18th of June they wrote to the Bank of Scotland at Grangemouth to the effect that 'our friends have not authorised us to take payment of the acceptance on the conditions tendered.'

"But matters had proceeded at Grangemouth in such a way that the whole situation was changed. Without waiting for instructions from the National Bank, the Bank of Scotland's agent at Grangemouth, on the 13th of June, saw Mr Anderson, the defender, in the bank office, and had there a conversation with him as to the payment of the bill. Mr Anderson then reiterated his determination not to pay the bill unless upon the condition stated, that he should not be liable for interest and expenses. Now, plainly the bank-agent had no authority from the letter of the 7th of June, which accompanied the bill for collection, to agree to any such conditions. It was his plain duty to await instructions. He knew that the National Bank were merely the agents of the onerous holders, and he knew, or ought to have known, that that bank required before agreeing to this new condition to cable to their constituents in Canada. But he did not wait for any communication, and took payment from Anderson on the 13th of June upon the footing that the conditions were agreed to. The bill was marked paid, and handed to Anderson, who scored out his own signature as acceptor, and it is now a cancelled document. To make matters more distinct, Anderson, an hour after he had paid the bill and got possession of it, wrote the following note to the bank-agent at Grangemouth —'Confirming our former respects, we hand you payment of this bill on the distinct understanding that we are freed from all responsibility for nterest and expenses,' &c. This note was sent

on to the National Bank along with a letter from the bank-agent, and a bank draft for £2940, 2s. The National Bank not being authorised to agree to the conditions, demanded from the bank-agent at Grangemouth a return of the bill, and at the same time sent back the bank draft for £2940, 2s., which they had not negotiated. The bill was got back from Anderson by the bank-agent, who on the 23d of June 1887 sent it to London, and he handed the bank draft for £2940, 2s. to Mr Anderson, who obtained cash therefor. The bill thus remains unpaid, and the defenders have got possession of the timber for which the bill was granted, and they refuse now to pay the bill because, as they say, it is cancelled. This defence is founded upon the 63d section of the Bills of Exchange Act 1882, which is divided into three sections. The first section declares that where a bill 'is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.' This is not the section applicable to the circumstances that here appear. It is the third section, which is as follows:—"A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative.' The cancellation here was made intentionally, but the Lord Ordinary holds that it was made without the authority of the holder. The bank-agent at Grangemouth had no authority to agree to conditions proposed by Mr Anderson and accepted by him, and consequently the bill is not inoperative, and the pursuers are entitled to decree in their favour."

The defenders reclaimed, and argued—The party to whom payment of the bill was made was the party entitled to recover the money, and no want of authority on the part of the agent could be pleaded. The cancellation of the bill was regular, and there was no error or mistake in the cancellation. The evidence of the agent was clear upon this matter. The pursuers could not sue the defenders upon a debt; they were not creditors of the defenders. The Bills of Exchange Act did not apply, as the cancellation here was not made unintentionally, or under a mistake, or without the authority of the holder. It was therefore a valid cancellation.

Argued for the respondents—The position of the pursuers was that of onerous indorsees and holders of this bill, and their instructions to their agent was to take payment of three things —(1) The bill, (2) charges of protest, (3) charges of remitting. Mr Mackenzie was in error if he led the defenders to believe that the conditions which they imposed on making payment were accepted. If the bill was cancelled under these conditions, then it was cancelled under error, and the cancellation was thus inoperative. The defenders had received back their money, and had enjoyed the benefit of the cargo for more than a year. Parties ought to be put back into the position they were in before the bill was cancelled. The pursuers' agent was acting without their authority; he had no right to cancel the bill, and so the cancellation was inoperative.

At advising—

Lord President—This is an action at the instance of the Dominion Bank, Toronto, Canada, who are the holders for value of a bill of exchange for £2939, 9s. 6d., and the peculiarity of the case is that the signature of the acceptor has been cancelled. Now, the Bills of Exchange Act 1882, sec. 63, by sub-sec. 3 provides as follows—[*His Lordship here read the section quoted above*]. The allegation which the pursuers make is, that this cancellation was made by mistake and without their authority, and they have undertaken to satisfy us upon this matter. The question therefore comes to be, whether they have shown that this bill was cancelled without their authority? The bill, which was accepted by the defenders in payment of a cargo of timber, was discounted or acquired for value by the Toronto Bank. It was on the 7th of May 1887 presented at the place of payment, the Bank of Scotland in London, but payment was refused, whereupon the pursuers, as they were unable to recover anything from the acceptors, returned the dishonoured bill to Canada.

About this time the defenders appear to have consulted Mr Mackenzie, the agent of the Bank of Scotland at Grangemouth, about the bill, and it is apparent that he and Mr Anderson were upon very confidential terms. Up till the 7th of June 1887 Mr Mackenzie had no authority to collect this bill; he was acting in the matter entirely on behalf of the defender and in his interest. The first letter which we have bearing on the matter is dated 16th May 1887, and is by Mr Mackenzie to the London office of the National Bank of Scotland—"Dear Sir,—An acceptance of Messrs Wm. Anderson & Company of this town, p. £2939, 9s. 6d. was presented at our London office, and payment refused on account of there being a dispute between the merchants who drew the bill and themselves. If the matter be now adjusted you might send forward the document for collection." And the answer to this letter establishes Mr Mackenzie's position as acting up to this time in the defender's interest. The letter of 21st May from Mr Mackenzie to the National Bank if possible makes this clearer, and intimates also that a condition is to be attached to the payment of the bill. It is in these terms—"Dear Sir, —"With reference to my letter of 16th inst., if the bill p. £2939, 9s. 6d. be sent on here for collection, it will in all likelihood be paid, but not the expenses, as the fault was not on Messrs W. Anderson & Company's side—at least so they say."

The next letter, which is dated 28th May, and is from Anderson & Company, the defenders, to Mr Mackenzie, is as follows:—"*M'Arthur Bros. Coy. Bill p. £2939, 9s. 6d.*—Dear Sir,—Confirming our former instructions to you, it just now occurs to us that immediate payment might be made provided the National Bank, London, gave a guarantee to hand over the bill to you on its return, and hold us scatheless in event of its miscarriage in any way whatever, also freeing us of all expenses and interest. On hearing you have received such guarantee, we will instruct you to pay."

Now, this is undoubtedly the letter of a client to his agent authorising him to make payment upon certain specified conditions. On the same day Mr Mackenzie writes to the National Bank of Scotland, London, enclosing for their perusal the defenders' letter of that date to him, and the answer to it came upon the 31st May, and is in these terms—"As we cabled recal of the bill

on 23rd inst. it will probably be here in a few days, and immediately on its receipt we shall represent it at its London domicile for payment." Now, this was not an intimation by the National Bank to Mr Mackenzie to collect for them, it was, on the contrary, an expression of their intention to collect the bill themselves. Between the 31st of May and the 7th of June, however, a change came over the relation of parties, for on the 7th of June the London agent of the National Bank of Scotland wrote to Mr Mackenzie as follows:—"Referring to your letter of 21st ulto., we now enclose for collection and remittance through your London office (bill being accepted payable in London) Anderson £2939, 9s. 6d. Should the acceptors decline to pay protest charges, 12s. 6d., please return protest to us. Acceptors will of course pay the remitting charge. We presented the bill to-day at your London office, but they state that they are still without instructions regarding it."

The change which had thus taken place was just this, that from this time onward Mr Mackenzie was to act for both parties. He did not give up acting for Mr Anderson, but he proceeded also to act for the National Bank, and in this position he goes on to correspond with the National Bank, and on 9th June 1887 writes to them thus:—"Dear Sir,—With reference to your letter of 7th inst., I enclose herewith a communication received from W. Anderson & Company, from which you will observe that they would pay the 12s. 6d., together with the remitting charge, *re* the bill, on condition that they were held free of further responsibility. Please favour me with your instructions. *P.S.*—As Mr Anderson is presently living at Callander, and may not be here till Monday morning, we retain the bill till that day if we have not contrary instructions from you."

The meaning of this is, that he has laid a proposal before them, and he asks them if they will entertain it. To this letter he received no instructions in answer, nor was that to be wondered at, for the demand was a curious one to make, and one to which the National Bank could not assent to without the authority of the Toronto Bank.

On the 13th of June matters came to a crisis. The contents of the bill were paid by the defenders and received by Mr Mackenzie, and intimation was sent to the National Bank of what he had done on their behalf. Now, looking to the position which Mr Mackenzie held between Mr Anderson and the Bank, one cannot but say that this was a somewhat serious transaction. Only one hour elapsed after the cancelling of his signature when Mr Anderson brought the bill with this note attached—"*M'Arthur Bros. Coy., Bill p.* £2939, 9*s.* 6*d.*—"Dear Sir,—Confirming our former respects we hand you payment of this bill on the distinct understanding that we are freed from all responsibility for interest, expenses, &c." That note being attached to the draft by Mr Mackenzie connected the two things, and made the conditions contained in the note binding on the National Bank if they accepted payment. In order, however, to make things clearer, Mr Mackenzie wrote on the 13th of June to the National Bank in these terms—"Dear Sir,—I beg to enclose draft for £2940, 2s., being amount of W. Anderson & Company's acceptance referred to in your letter of 7th inst., with 12s. 6d. of protest charges. Of course you distinctly understand, in accordance with Messrs Anderson & Company's letter herewith enclosed, that so far as that firm is concerned the draft is accepted by you in settlement of the transaction without any reservation." No doubt this letter is somewhat vague if taken by itself, but the expression in the defenders' note attached to the bill, "that we are freed from all responsibility for interest and expenses," puts all doubt at an end as to Mr Mackenzie's meaning. He, acting for both parties, sends the draft with the defenders' note attached to the National Bank, and encloses these documents with his own letter, in which he stipulates that the draft must be accepted subject to the conditions attached to it by the defenders or not at all. In these circumstances the National Bank refused to accept the draft. Now, one thing is quite clear from beginning to end of this transaction, and that is, that no one representing the pursuers ever consented to these conditions. In consenting to such conditions on behalf of the Toronto Bank Mr Mackenzie was undoubtedly in error, and in spite of the clever way in which he has given his evidence he has, I think, admitted quite sufficient to show that the Bank had not agreed to these conditions. There is this passage in his evidence—"(Q) If you were wrong in supposing that the bank had assented to the conditions expressed in your letter of the 9th, then you gave up the bill in error?—(A) No, I cannot admit that; I must say the bill was not given up in error. If I had known that the bank did not agree to the conditions expressed in my letter of the 9th, I would certainly not have given up the bill." From this it is clear that Mr Mackenzie acted throughout either in gross error or without authority, and that being so, it is manifest that under the statute this cancellation cannot receive effect, and the pursuers having proved that this cancellation took place in one or other of these ways, are entitled to succeed. I am therefore for adhering, and taking the view I do, and have just expressed, it is unnecessary to deal with the other conclusion of the summons.

Lord Mure and Lord Adam concurred.

Lord Shand was absent from illness.

The Court adhered.

Counsel for the Pursuers — Balfour, Q.C. —Ure. Agents—J. & J. Ross, W.S.

Counsel for the Defenders — Asher, Q.C.— Burnet. Agent—W. B. Rainnie, S.S.C.

Saturday, February 11.

SECOND DIVISION.

MILNE, PETITIONER.

Trust—Aliment—Nobile Officium.

Circumstances in which the Court *authorised* a mother to take repayment by yearly instalments, out of the capital of funds held by her as tutor for her pupil children, of the amount of advances made by her from her own funds, and applied for their maintenance and education; and to make an annual payment