ORR & BARBER, ... APPELLANTS.

UNION BANK OF SCOTLAND, . . . RESPONDENTS.

1854. 12th, 15th, 16th May, and 7th August.

A letter of credit saying, "Please to honour the drafts of A to the extent of 460*l.* 9*s.*, and charge the same to the account of B," is an authority to make the payment, but the possession of it by the person to whom it is addressed does not prove that the payment has been made.

To show that the payment has been made there must be a draft by A.

Payment of a forged draft is no payment as between the person paying and the person whose name is forged.

The person presenting the letter of credit is not necessarily the person entitled to make the draft. Therefore the bankers to whom the letter of credit is addressed ought to see that the signature to the draft is genuine. If they do not, the loss will be their own.

When, for a sum paid down, a banker grants a letter of credit, he must show that it has been complied with, or pay back the money.

In such a case, the banker cannot insist on having the letter of credit brought back to him.

The rules applicable to negotiable securities do not hold with respect to letters of credit.

Semble—that the laws of England and of Scotland on these points correspond.

MR. *Hugh Hill*, Q.C., for the Appellants: The facts of this case are simple. The late John Gordon Campbell, of Glasgow, having occasion to remit 460*l.* 9*s.* to Messrs. Orr & Barber, of Liverpool, paid in that amount to the Union Bank of Scotland, and gave them the usual slip, in the following terms:—

22nd October, 1844.

Wanted credit on Liverpool for 460*l.* 9*s.*, payable to Messrs. Orr & Barber.

For this he obtained from the Union Bank a letter of credit, in the following terms:—

No. 15/583. A. A.

Union Bank of Scotland,
Glasgow, 22*nd October,* 1844.

Please to honour the drafts of Messrs. Orr and Barber to the extent of 460*l.* 9*s.*, which charge to the Bank.

I am your very obedient servant,

(Signed) JA. WATSON, *Cashier.*

460*l.* 9*s.*
Entd. M. G. H.

To the Manch^r and L'pool
District Bank, Liverpool. *Not transferable.*

Mr. Campbell enclosed this letter of credit in another letter, which he forthwith dispatched by the post to Messrs. Orr & Barber. Those gentlemen were absent when the letter arrived. They had, however, left authority with their clerk to open letters, but no authority to draw cheques. The clerk opened the letter from Mr. Campbell, drew a cheque for the 460*l.* 9*s.*, presented it with the letter to the Liverpool Bank, received the full amount, and directly absconded with the money. Mr. Orr returned home on the 31st October, 1844, and found on his table the letter which had contained the letter of credit, but not the letter of credit itself. He went to the Liverpool Bank, and applied to them for payment. They stated that they had already made the payment on a cheque presented to them; but on Mr. Orr's statement that it was a forgery, they requested time to consider what course they should take. Messrs. Orr & Barber, in these circumstances, applied to Mr. Campbell, who admitted his liability to them, but held the Union Bank ultimately responsible. The action was not commenced till November, 1845. The defence of the Union Bank was, that they had come under no other obligation than that there should be funds in the Liverpool Bank when

the letter of credit should be presented; and they averred that the letter of credit, when presented, was duly honoured. The Union Bank, moreover, called upon the Pursuers to produce the letter of credit which they well knew they could not do, as it was in the hands of the Liverpool Bank. The case came before the *Lord Ordinary* (Lord *Dundrennan*), who held that there was nothing to exclude the Pursuers from a proof of their averments; and he approved of certain issues proposed for trial. But upon an appeal to the Inner House, the Lords of the First Division, regarding the question as new and important, ordered that all the Judges should be consulted. And in conformity with the opinions of the majority, they recalled the interlocutor of the *Lord Ordinary*, sustained the defence, and assoilzied the Union Bank.

The question is one of relevancy. What was the relation constituted by the letter of credit? That document was not transferable. No action could have been maintained by Orr & Barber till the Liverpool Bank assented to the order. It was open to the Union Bank to countermand. Campbell also could have countermanded. The Judges below have misdescribed the liabilities of the Liverpool Bank. Until they assented to hold the money for the use of Orr & Barber no privity existed between them, *Williams* v. *Everett* (*a*), *Scott* v. *Porcher* (*b*). There was no assent by the Liverpool Bank to hold for Orr & Barber. Till they should so assent, the Union Bank were liable to Campbell. The Liverpool Bank were the agents of the Union Bank. This point was overlooked in Scotland. The Judges there assumed that the only duty of the Union Bank was to guarantee that the Liverpool Bank was solvent.

[The LORD CHANCELLOR (*c*): The learned Judges

(*a*) 14 East, 582. (*b*) 3 Mer. 652.
(*c*) Lord Cranworth.

seem to have treated the case as if a *bill* had been purchased.]

Precisely so. Orr & Barber did not ratify what was done by their clerk. Authorities are not necessary to show that payment of a forged draft or cheque is no payment. However, reference may be had to *Robarts* v. *Tucker* (*a*), *Hall* v. *Fuller* (*b*), *Young* v. *Grote* (*c*), *Johnson* v. *Windle* (*d*). In this last case the instrument was negotiable. Here it is not. The agents of the Union Bank have the letter of credit. The Union Bank themselves have in their hands the sum paid to them by Campbell. They are not entitled to refuse payment till they get back the letter of credit. There is no uniform usage as to whether the agents, on paying, keep or give back a letter of credit. *Hansard* v. *Robinson* (*e*), *Ramuz* v. *Crow* (*f*). These were cases of negotiable securities. But where the document is not negotiable, the rule is different. *Wain* v. *Baillie* (*g*) shows that the law does not apply to such a case as the present. It was there held that "the maker of a Note, *not negotiable,* cannot refuse to pay on the ground that the payee has not got it and cannot produce it for the purpose of delivering it up to the maker on payment."

The Union Bank are in the position of agents employed to pay over money which they have not paid over. In other words, we say there was a direct stipulation by the Scotch Bank, that the English Bank should pay, which they have not done.

Mr. *Bliss,* Q.C., and Mr. *Forsyth,* for the Respondents: This is the first case in which the rights of parties, under a letter of credit, have come into discussion in

(*a*) 16 Q. B. 560.
(*b*) 5 Barn. & Cress. 750.
(*c*) 4 Bing. 253.
(*d*) 3 Bing. N. C. 225.
(*e*) 7 Barn. & C. 90.
(*f*) 1 Excheq. Rep. 167.
(*g*) 10 Ad. & El. 616.

the Courts. The question is therefore important. Orr & Barber's clerk seems to have had an odd sort of authority, enabling him in the absence of his principals to open letters, but not to receive money, or to sign drafts or cheques. They gave eleven months to the Liverpool Bank to consider. Their clerk might well be supposed to have authority. A jury might presume that there was authority, for they suffered their clerk to clothe himself with a symbol of authority. Their laches will warrant the house in holding the Union Bank discharged, *Prescott* v. *Flinn* (*a*). Nothing but a draft or cheque from Orr & Barber, *dishonoured*, could make the Union Bank liable, *Paisley* v. *Rattray* (*b*). *Campbell* v. *French* (*c*).

The establishment of a credit does not imply a guarantee. A draft and presentment were indispensable, and both are wanting. There was a credit, but no guarantee.

[The LORD CHANCELLOR: Mr. Hill did not argue on the doctrine of guarantee. He said the English Bank had not paid, and therefore the Scotch Bank, who had got the money, ought to pay. If the money is not paid, the Scotch Bank is not discharged. That is what I understood Mr. Hill to contend.]

The mandatory must bring back the document before coming on the mandant. That is laid down by Pothier (*d*). The Appellants might have brought trover for the letter of credit, *Evans* v. *Kymer* (*e*). They have given no good reason for not maintaining trover or detinue against the English Bank; but they go directly against the Scotch Bank, thus leaving that establishment exposed to a double demand. The letter of credit, therefore, ought to be produced before

(*a*) 9 Bing. 19. *Hern* v. *Nicholls*, 1 Salk. 288.
(*b*) Morr. 8228.
(*c*) 6 T. R. 200.
(*d*) Contrat de Mandat.
(*e*) 1 Barn. & Ad. 528.

resorting to this action, *Scotland* v. *Commercial Bank of Scotland* (a).

[The LORD CHANCELLOR: Suppose the letter of credit stolen? Is the Union Bank to be for ever absolved?]

That is a difficulty, no doubt; but the Union Bank would have to pay twice over.

[The LORD CHANCELLOR: No; because the Union Bank would not be liable to the Liverpool Bank for paying a forged cheque.]

Mr. *Hill*, in reply: Presentment of the letter of credit was not necessary. It might have been sent to the Liverpool Bank by post. It was merely to authorise the payment; but they must have the draft or cheque of Orr & Barber to show that they have complied. The letter of credit is no evidence of the payment, although it shows that they had authority to make it.

[The LORD CHANCELLOR: The letter might perhaps be evidence for the jury of the payment.]

The LORD CHANCELLOR:

16th May.

My Lords, this is a question of very considerable importance, and it has been said to be one of some novelty. I doubt whether there is, in truth, any novelty in the case, because I am not at present satisfied that there is any distinction between a letter of credit and any other authority; but the point is one on which I should desire to look into the cases, more especially as the question has been very much argued below, in the Court of Session, and very learned and elaborate opinions given by all the Judges. Under these circumstances, I think your Lordships will be inclined to consider a little before you give your final decision.

Lord BROUGHAM: I am inclined to think that there is no very great novelty or peculiarity in letters of

(a) Sec. Ser. vol. iv. p. 468.

credit, to take them out of the general law applicable to mandates. I am not aware that there is anything in the mercantile law, or the custom of merchants, to distinguish letters of credit from any other authority to pay money; but I entirely agree with my noble and learned friend that we ought to consider the case for some days; more especially as I find very great difficulty, as at present advised, in going along with the decision of the learned Judges below.

The cause was put in the paper with a view to judgment on the 7th of August; when the following opinions were delivered:

The Lord Chancellor:

7th August.

Lord Chancellor's opinion.

The Appellants consist of four persons, namely, William Orr and Alfred Barber, traders, carrying on business in partnership at Liverpool and also at Buenos Ayres, Orr being resident and managing the affairs of the firm at Liverpool, and Barber at Buenos Ayres; James Tassie, their mandatory in Glasgow; and Charles Campbell, the executor of John Gordon Campbell, deceased, who, at the date of the occurrences in question, was a merchant in Glasgow.

The transactions which gave rise to the action were as follow.

John Gordon Campbell had occasion to remit to Orr & Barber, in the usual course of business, the sum of 460*l.* 9*s.*, and for that purpose he, on the 22nd of October, 1844, paid that sum into the Union Bank at Glasgow, and obtained from them an order on a Bank at Liverpool, in the terms to which your Lordships' attention has been directed (*a*).

Mr. Campbell, having obtained this letter of credit, sent it on the same day by post, directed to Messrs.

(*a*) *Suprà*, p. 514.

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Lord Chancellor's opinion.

Orr & Barber at Liverpool, with a letter advising them that he had done so. At the time when the letter reached Liverpool the Appellant Barber was at Buenos Ayres, and the Appellant Orr was in Ireland. But Orr returned on the 31st of October to Liverpool. He then applied to the Bank there to honour his draft for 460*l.* 9*s.*, but they refused to do so. The ground on which they rested their refusal was, that before Orr had returned to Liverpool they had paid the money on a cheque drawn on them by his clerk. The truth being, that the clerk had, on arrival of the letter which enclosed the order, and which must have reached Liverpool on the 23rd or 24th, opened it and presented it at the Liverpool Bank together with a cheque for 460*l.* 9*s.*, which, without any authority, he had drawn on them in the names of Orr & Barber, dated the 25th October, 1844. This cheque was, in truth, a forgery; but the Bank, supposing it to be genuine, paid it, taking as their authority the Glasgow letter of credit of the 22nd. The clerk, as soon as he had obtained the money, absconded and fled to America.

The question is whether, in these circumstances, the Union Bank of Scotland are responsible for the money either to Orr & Barber, or to Campbell, from whom they received it. The *Lord Ordinary* considered the claim of the Appellants to be relevant, and admitted it to proof. But a great majority of the Judges of the Court of Session held that they were not so responsible.

With all deference to that high authority, I confess I have arrived at the conclusion that the *Lord Ordinary* was right. What the Union Bank undertook when they received the money from Campbell was, that the Liverpool Bank would honour the draft of Orr & Barber for 460*l.* 9*s.* Campbell complains that this engagement of the Union Bank has never been performed, and so that he has never received any

benefit from the payment which he made to the Defendants. That the Liverpool Bank has in fact refused to honour the draft of Orr & Barber, is not disputed, and most unquestionably *primâ facie* this gives to Campbell a right of action against the Union Bank; for he paid his money to them upon their undertaking that the Liverpool Bank should do what in fact they have never done, and on the contrary refuse to do, namely, honour the draft of Orr & Barber for 460*l.* 9*s.* The question is whether this *primâ facie* case against the Union Bank is effectually displaced by the defence set up by them. The substance of that defence is, that they, the Union Bank, put the Liverpool Bank in funds so as to enable them to meet the draft of Orr & Barber, and that the Liverpool Bank was imposed upon by a forged cheque, which they paid, supposing it to be genuine, and now decline to make any further payment upon the letter of credit. But this, without more, clearly affords no valid defence.

The Union Bank must show either that the Liverpool Bank actually paid the draft of Orr & Barber when called on to do so, pursuant to the letter of credit, or else that they did something which as between them and Orr & Barber they are entitled to treat as equivalent to payment. It is certain that they did not pay the draft of Orr & Barber, and the only question therefore is on the other alternative, whether the payment which they made on the forged cheque is a payment which they are entitled to consider as valid between themselves and Orr & Barber. If it is, then Campbell would be entitled to treat Orr & Barber as having received the 460*l.* 9*s.*, and so would be entitled in account with them to have credit for that amount. The Liverpool Bank would rightfully debit the Union Bank for that sum as paid on their account, and neither Campbell nor Orr & Barber could have any claim on

Lord Chancellor's opinion.

the Union Bank. But if the payment on the forged cheque was not a valid payment as between the Liverpool Bank and Orr & Barber, then Orr & Barber have not received anything from Campbell. He is still liable to them. The Liverpool Bank has no right to debit the Union Bank for money paid on their account, no such payment having been made, and the money paid by Campbell into the Union Bank still remains in their hands. It is plain from this short statement that the Union Bank are answerable to Campbell unless they can make out that the payment on the forged cheque was a valid discharge to the Liverpool Bank as between themselves and Orr & Barber. The learned Judges of the Court of Session seem to have supposed that on this subject there is some peculiarity in the law of England—some difference at all events between the law of England and that of Scotland. But I do not think that any such difference exists. Payment on a forged cheque or order is not of itself any payment at all as between the party paying and the person whose name is forged. This is, I apprehend, the law both of England and Scotland. Cases may perhaps exist in which such payment may be made valid by reason of collateral matters. Where, for instance, a forgery has been successfully accomplished by reason of the want of due caution on the part of the person whose name is forged. It was on this ground that the Court of Common Pleas decided *Young* v. *Grote* (a). There the customer of a bank signed a cheque in blank, to be filled up by his wife, with whom he left it, and she filled it up with a sum of fifty pounds written so inartificially, that a servant was able to insert the words "three hundred and"—before the word—fifty, so as to deceive the bankers without blame on their part. The Court held that the bankers having paid 350*l.* on this

(a) 4 Bing. 253.

cheque, were entitled to credit with their customer for that amount. The decision went on the ground that it was by the fault of the customer the bank had been deceived. Whether the conclusion in point of fact was in that case well warranted, is not important to consider. The principle is a sound one, that where the customer's neglect of due caution has caused his bankers to make a payment on a forged order, he shall not set up against them the invalidity of a document which he has induced them to act on as genuine.

But how does this doctrine apply to the present case? How can it be said that the Liverpool Bank was induced to pay the forged cheque in consequence of any negligence or misconduct of Orr & Barber? It can hardly be attributed as blame to them that their clerk purloined the letter of credit. Besides, a letter of credit is not a negotiable instrument. The letter of credit merely gave authority to the bank to honour the cheque of Orr & Barber. The circumstance that the letter of credit was in the hands of the clerk did not necessarily or naturally import that he was the person entitled to draw for the amount mentioned in it. The bank ought to have made inquiry as to who were the drawers of the cheque, and they ought to have satisfied themselves as to the genuineness of the signature. The fact that it was presented by a person who held and gave up the letter of credit raised a presumption that it had been drawn by the proper party. But it was only a presumption; and if the bank chose to act on such a presumption without further inquiry, they must abide the consequence. If, then, the Liverpool Bank cannot set up the payment which they made on the forged cheque, it follows of necessity that the present claim of the Appellants is well founded; for they can have no possible remedy against the Liverpool Bank, between whom and them there is no privity whatever. The Union

Bank have given to Orr & Barber a credit on the Liverpool Bank; but that bank will not honour their draft, so that the parties are necessarily thrown back on those with whom the money was originally lodged, and whose contract has not been performed. The Union Bank will have their remedy against the Liverpool Bank by disallowing in account any sum alleged to have been paid on the letter of credit; but with that the Appellants have no concern.

It remains only to notice a point raised in argument, but not much insisted on. I allude to the joinder of Orr & Barber with Campbell as co-Pursuers. This was, however, as I conceive, quite right. We are not dealing with an English action at law where such a union would have been bad. But when Campbell paid the money to the Union Bank, both he and Orr & Barber became interested in the due fulfilment of the obligation into which the Union Bank had entered, and both therefore properly joined in the action.

In these observations I have assumed that there are no circumstances which would make the payment by the Liverpool Bank on the forged cheque a valid payment as against Orr & Barber—but I am aware that this is a matter not admitted—the argument was in truth an argument on relevancy, and all that can now be done is to decide the question of relevancy. The *Lord Ordinary*, by his interlocutor of the 20th June, 1848, decided in favour of the Appellants, *i. e.*, that they were entitled to go to proof. His interlocutor was recalled by the great majority of all the Judges, as appears by their interlocutor of the 31st of January, 1852; and the course which I now advise your Lordships to take is to reverse that interlocutor, and remit the case back to the Court of Session, in order that the parties may go to proof, according to the interlocutor of the *Lord Ordinary*, unless the Union Bank should

consider that it would be useless to them to go into such proof.

The Lord Brougham:

Lord Brougham's opinion.

My Lords, I entirely agree with my noble and learned friend; and I am sorry to be under the necessity, in agreeing with him, of disagreeing with the great majority of the learned Judges in the Court below who differed from the *Lord Ordinary*.

I hope and trust that the suggestion made by my noble and learned friend at the close of his statement will not be thrown away on the parties, but that, however they should be advised, they will not proceed further; for I should consider that this litigation, in consequence of what has passed here, may be said to have reached its natural conclusion, and that there will be no necessity, certainly no expediency, in the parties proceeding further under the remit to the Court below, reversing the finding which altered the interlocutor of the *Lord Ordinary*, and authorising the proceeding, under the *Lord Ordinary's* interlocutor, to go on to trial.

I apprehend that the facts of the case are really not in dispute. The facts, from the nature of the case, which depends almost entirely upon documentary evidence, have been before us, and I confidently hope that the parties below will rest satisfied with what has been done here, and that they will not pursue further the litigation.

Judgment below reversed, and cause remitted.

Sharpe, Field, & Jackson.—Norris & Allen.