AUGUST 7, 1854.

ORR and BARBER and OTHERS, *Appellants*, v. UNION BANK OF SCOTLAND, *Respondents.*

Letter of Credit—Obligation—Mandate—Relevancy—Forgery by a Clerk—*A of Glasgow, obtained a letter of credit from the U. Bank there on a Liverpool Bank in favour of B of Liverpool, and duly posted the letter to B. When the letter reached Liverpool B was absent, and the only clerk in his office forged a cheque in B's name, and obtained payment from the Liverpool Bank, and absconded. The Liverpool Bank having thereafter declined to pay B's draft, B and A raised an action against the U. Bank for repayment, the defence being, that the U. Bank put the Liverpool Bank in funds, but that the latter was imposed on by a forged cheque:*

HELD (reversing judgment), *That this was a relevant ground of action, and that the U. Bank was bound to shew either that the Liverpool Bank had actually paid the draft of B, or that the Liverpool Bank did something which, as between it and B, was equivalent to such payment.*

Letter of Credit—*A letter of credit is not a negotiable instrument, and payment cannot be resisted because the letter is not delivered up.*[1]

This was an appeal against an interlocutor of the Court of Session assoilzieing the defenders, the now respondents, in an action raised against them by the now appellants. The appellants consist of four persons, 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, merchant in Glasgow, their mandatory; and Charles Campbell, 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 follows:—John Gordon Campbell had occasion to remit to Orr and Barber, in the usual course of business, a sum of £460 9*s.*, and for that purpose he, on the 22d Oct. 1844, paid that sum into the bank of the respondents in Glasgow, and obtained from them an order on a bank at Liverpool in these words:—

"No. 15/583, A. A. *Union Bank of Scotland, Glasgow, 22d October* 1844.

"Please to honour the drafts of Messrs. Orr and Barber to the extent of £460 9*s.*, which charge to the bank. I am your obedient Servant,

£460 9*s.* (Signed) JA. WATSON,
Entd. M. G. H. *Cashier.*
To the Manch. and Lpool. District Bank, Liverpool.
Not transferable."

Mr. Campbell, having obtained this letter of credit, sent it on the same day by post, directed to Orr and 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 Oct. to Liverpool. He then applied to the bank there to honour his draft for £460 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 one Smith his clerk, the truth being that the clerk had, on the arrival of the letter which inclosed 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 9*s.*, which, without any authority, he had drawn on them in the names of Orr and Barber, dated 25th Oct. 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 22d. The clerk, as soon as he had obtained the money, absconded, and fled to America.

Orr and Barber and the representative of J. G. Campbell then raised the present action against the Union Bank to recover back the £460 9*s.* The Lord Ordinary (Cunninghame) found that no statement or pleas had been substantiated by the defenders, to bar the pursuers a proof in support of their action, and approved certain issues accordingly. The First Division, however, after ordering cases to be laid before all the other Judges, recalled the interlocutor of the Lord Ordinary, sustained the defences, and assoilzied the defenders. The pursuers then appealed.

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[1] See previous report 14 D. 395; 24 Sc. Jur. 196. S. C. 1 Macq. Ap. 513: 26 Sc. Jur. 632.

The appellants, in their *printed case*, contended that the interlocutors should be reversed, for the following reasons:—" 1. Because it is competent to the person who obtains a letter of credit in favour of another, to countermand payment at any time before the money is actually paid over, or some binding engagement is entered into by the person to whom the letter of credit is addressed, with the person in whose favour it is drawn, so as to give the latter a remedy by action upon such engagement against the former; and it is plain that there was no such payment or engagement in the present case; no payment, because the draft upon the Liverpool Bank was a forgery; no engagement upon which Orr and Barber could sue, because their clerk was not acting by their authority in his dealings with the Liverpool Bank, and they have not ratified his acts, nor could they without ratifying all, including the felonious receipt of the money. 2. Because the amount paid for the letter of credit is recoverable, as upon a failure of consideration. 3. Because the Scotch Bank are in the position of agents employed to pay over money, who have not paid it over, or engaged with the intended payee to pay it over, and are therefore bound to return it on demand. 4. Because the materials before the Court did not justify the decision complained of."

The respondents, in their *printed case*, contended that the interlocutor should be affirmed, for the following reasons:—" 1. Because the pursuers have not shewn any contract which has been broken by the defenders. 2. Because the pursuers have not fulfilled those conditions which ought to have been performed by them, in order to entitle them to maintain the present action."

Hugh Hill Q.C., for the appellants. This is a question of relevancy, and we are entitled to assume certain facts which we allege and are prepared to prove, if we had the opportunity. The letter of credit here was a mandate granted by the Scotch to the English Bank, directing the latter to pay Orr and Barber, but it did not raise any contract between the English Bank and Orr and Barber—in other words, there was no privity between the latter parties. The letter was not transferable, and no action could be maintained in England by Orr and Barber against the English Bank, till the latter had consented to hold the money for Orr and Barber's use. This had been decided over and over.—*Williams* v. *Everett*, 14 East, 582; *Scott* v. *Porcher*, 3 Meriv. 652; *Baron* v. *Husband*, 4 B. & Ad. 611; *Mackersy* v. *Ramsay*, 9 Cl. & Fin. 818. Now it cannot be said any such assent was ever given by the English Bank to hold the money for Orr and Barber, and so up to that time the Scotch Bank were responsible to Orr and Barber for their agents the English Bank. That the English Bank were merely the agents of the Scotch Bank, to do what the Scotch Bank undertook to do, viz. to pay Orr and Barber, is self-evident. If, then, the agent failed to discharge his duty, the conclusion is obvious, that the principal, *i. e.* the Scotch Bank, must be liable. The question then comes to be—Did the Scotch Bank or its agents fail to do its duty, and what was its duty? We say its duty was to pay Orr and Barber the money. It is said, all that the Scotch Bank undertook was to establish a credit with a solvent English Bank. If this means that Campbell paid his money for the mere chance of the English Bank being pleased to assent to hold the money for Orr and Barber's use, it is too absurd a view to be entertained; as nobody in his senses would ever pay away his money on such a risk. If, however, it means that the English Bank should pay Orr and Barber, and become their debtor, then the contract has not been fulfilled. As principal, the Scotch Bank was liable for more than the mere solvency of its agents, the English Bank—it was responsible for the latter paying the money to Orr and Barber, or Orr and Barber's authorized agent. The English Bank refused to pay Orr and Barber personally, and they have not paid Orr and Barber's authorized agent; for we say Smith was not authorized. The other side allege that he was, or at least that we ratified his acts constructively, *i. e.* by reason of our negligence; therefore, as we deny both these allegations, they are fit subjects for issues. Suppose that Campbell's letter to Orr and Barber had been stolen out of the post office before reaching Orr and Barber, and that the thief had forged a draft and obtained payment, would that affect Orr and Barber? Certainly not, because payment on a forged cheque is no payment at all as against the person whose name is forged.—*Robarts* v. *Tucker*, 16 Q.B. 560; *Hall* v. *Fuller*, 5 B. & Cr. 750; *Johnston* v. *Windle*, 3 Bing. N. C. 225. In the last case it was a clerk who forged the note. There is a case of *Young* v. *Grote*, 4 Bing. 253, where a customer of a bank was bound to bear the loss of a forged cheque, because his own negligence contributed to the forgery; but in the present case the negligence is a question for a jury, and we have been refused a jury by the Court below. Again, it is said the Scotch Bank is bound to pay only on the letter of credit being delivered up, which Orr and Barber have not done. The reason of our not delivering it up, of course, is, that the English Bank has got the letter of credit. But we contend that at common law there is no obligation on the payee to deliver up the letter of credit previous to demanding payment. A letter of credit is not a negotiable instrument, and is no part of the law merchant.—*Hansard* v. *Robinson*, 7 B. & Cr. 90; *Ramus* v. *Crowe*, 1 Exch. 167. Where an instrument is not negotiable, payment cannot be resisted on the ground that the document is not delivered up; such is the case even with a promissory note not negotiable.—*Wain* v. *Baily*, 10 Ad. & E. 616. Therefore the other side cannot import into the letter of credit the usages incident to a bill of exchange, and thereby give a meaning to the instrument which its terms do not warrant. Such is the law also in Scotland.—1 Bell's Com. 371. For the same reason it is futile to say, that Orr and Barber did not within a

reasonable time present the draft, for that is attaching to a letter of credit the incidents of a bill of exchange. It is also said that as between Orr and Barber and Campbell, the sending of the letter of credit operated as payment, especially as these parties had previously dealt in the same way. But it is well known that nothing but the giving of a negotiable instrument operates as a suspension of the remedy. — *James* v. *Williams*, 13 M. & W. 828, and 2 Exch. 798. And, as already stated, a letter of credit is not a negotiable instrument. As to the joining of Campbell with Orr and Barber as co-pursuers, that is in accordance with the practice in Scotland.

Bliss Q.C., and *Forsyth*, for respondents.—We object to the joinder of Campbell as pursuer in this action, but as the effect of the objection would probably only cause delay, we waive it. The other side rely on one of two positions, either—1. That the Scotch Bank gave an absolute guarantee that the English Bank would pay Orr and Barber, and that payment to Orr and Barber alone would be satisfaction ; or, 2. That the letter of credit was a mere mandate, capable of being countermanded next day, and the mandatory failing to pay, the principal was liable to pay back the money. We contend, however, that the contract on our part was, that for money paid at Glasgow we would establish a credit at Liverpool, provided the letter of credit should be presented there by the payee, and the payee should draw drafts on the English Bank. We admit that the Scotch Bank guaranteed that money should be paid at Liverpool, though not absolutely, but depending on conditions to be performed by the appellants. These conditions were, first, that the letter of credit should be presented by Orr and Barber; for unless this was done, how could the Liverpool Bank know of the credit, as it was not our duty to advise them, and no such allegation of duty is contained in the summons? It was not a mere mandate, therefore, which could be revoked next day, for the contract was indissoluble as soon as the letter of credit was obtained, and the payee could not obtain the money except by drawing drafts on the English Bank. That was the plain result of the contract. Hence, in order to maintain an action against us, nothing less than a presentment of the letter and a dishonoured draft must be proved, and these cannot be dispensed with. — *Bowes* v. *Howe*, 5 Taunt. 29; *Campbell* v. *French*, 6 T. R. 200. A letter of credit is also strictly construed in Scotland, and the same conditions are implied. —*Paisley* v. *Rattray*, Mor. 8228. Independently, however, of the law merchant, there was no guarantee by us that the letter of credit would be paid. All we guaranteed was that there was a *bonâ fide* debt, and that the English Bank would be willing to pay on the draft being presented. It is a rule of the civil law and of universal law, that on the sale of a debt there is no implied guarantee that the debtor is solvent. Pardessus, de la vente des creances, Part 6, c. 3, tit. 1. This is like the sale of a bill of exchange, the only difference being, that instead of cash the payee must draw a draft.

[LORD CHANCELLOR.—I don't think the other side put the question as one of guarantee at all, but of direct stipulation. When stripped of the law merchant, the letter don't imply any guarantee. It is merely an authority by you to somebody else to pay the money, and if that somebody don't pay, you must.]

Then that puts it on the footing of mandate at once, and it is not so put in the Court below. We say the money was never given to us to hold for Orr and Barber, but merely in order that we might give Campbell a letter of credit in exchange for it; and, at all events, we cannot be compelled to pay back the money until the letter is delivered up. It is said the letter is in the hands of another party; then they can bring an action of trover for it.— *Evans* v. *Kymer*, 1 B. & Ad. 528; *Treuttel* v. *Brandon*, 8 Taunt. 100;—or an action of *detinue* might lie.—*Peters* v. *Haywood*, Cro. Jac. 682; *Phillips* v. *Jones*, 15 Q. B. 859. The instrument should have been delivered up, and there should, perhaps, have been also a protest for non-payment.—3 Chitty Com. Law, 337.

[LORD CHANCELLOR.—Have you any authority, either in the law of England or Scotland, to shew that a letter of credit comes under the law merchant?]

There is little authority in either law on the subject. But in *Struthers* v. *Commercial Bank*, 4 D. 460, the Court of Session seemed to treat it as part of the law merchant, holding it transferable, and that it must be produced before payment could be demanded.

[LORD CHANCELLOR.—Then, if the letter is stolen or lost, is the bank to keep the money? I don't see how it can be essential to the validity of the instrument that it be presented.]

Story on Bills, § 459, seems to treat it as requiring presentment. In *Eddison* v. *Collingridge*, 9 C.B. 570, the words "credit with the sum" were translated into "pay," and the letter held to be a bill of exchange. It is said that the appellants can sue on the ground of failure of consideration, but that cannot be so, for they had the full benefit of the contract at the time by obtaining the letter of credit.—*Rothschild* v. *Hennings*, 9 B & Cr. 470. And if a party has got the benefit of part of the contract, he cannot sue on the ground of failure of consideration, and recover back the money.—*Taylor* v. *Hare*, 1 Bos. & P.N.R. 260. Besides, the ground of action alleged is not failure of consideration, but breach of contract. Again, it was said there had never been payment to Orr and Barber, but the appellants must go further, and say that Smith had no authority. It is not enough to say that the credit was not honoured, for Smith's peculiar position and former transactions may have implied such authority.—*Prescott* v. *Flinn*, 9 Bing. 19. There was, at

least, enough of negligence on the part of Orr and Barber to discharge us, and estop them from saying they had not received payment. It is more reasonable that the person employing and putting trust in Smith should suffer, than that we should, who were strangers.—*Hern* v. *Nicholls*, 1 Salk. 289; *Young* v. *Grote*, 4 Bing. 253. Moreover, Orr and Barber shewed great negligence in lying by for a year before sending us notice of the forgery.

H. Hill replied.—*Struthers* v. *The Commercial Bank* was an anomalous case, and perhaps cannot be supported; yet even there Lord Fullerton said that a letter of credit was a mandate, and could be recalled if not acted on by the other party. The respondents rely on certain conditions precedent, which they say were necessary to be performed before we could bring this action, such as presenting the letter of credit and drawing drafts. But there is nothing about conditions precedent on the face of the instrument, and unless they can shew that a letter of credit is part of the law merchant, they cannot import into it the incidents of negotiable instruments. The Court below proceeded mainly on this erroneous analogy. They treated a letter of credit as a voucher of actual payment.

[LORD BROUGHAM.—They treated the constitution of the power as evidence of the power; but an authority to pay won't prove actual payment.]

[LORD CHANCELLOR.—It might, no doubt, be evidence to go to a jury—as, for instance, that the letter of credit was in the hands of the party by whom it ought to have been paid—but it would be weak evidence.]

Yes. Then it is said that it is a hardship on the English Bank to be called on to bear the risk of the signature; but that is the ordinary duty of bankers; and the Judges, in *Robarts* v. *Tucker*, said that if the bank had doubts about the genuineness of a signature, the law will give them time to make inquiry.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—The question is—Whether, in the circumstances, the Union Bank of Scotland are responsible for the money, either to Orr and 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 and Barber for £460 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 and Barber is not disputed; and most unquestionably, *primâ facie*, this gives to Campbell a right of action against the respondents, 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 and Barber for £460 9*s*.

The question is—Whether this *primâ facie* case against the respondents is effectually displaced by the defence set up by the respondents? The substance of that defence is, that they, the respondents, put the Liverpool Bank in funds, so as to enable them to meet the draft of Orr and 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 respondents must shew, either that the Liverpool Bank actually paid the draft of Orr and 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 and Barber, they are entitled to treat as equivalent to payment. It is certain that they did not actually pay the draft of Orr and 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 and Barber? If it is, then Campbell would be entitled to treat Orr and Barber as having received the £460 9*s*., and so would be entitled in account with them to have credit for that amount. The Liverpool Bank would rightfully debit the respondents for that sum as paid on their account, and neither Campbell nor Orr and Barber could have any claim on the respondents. But if the payment on the forged cheque was not a valid payment, as between the Liverpool Bank and Orr and Barber, then Orr and Barber have not received anything from Campbell. He is still liable to them. The Liverpool Bank has no right to debit the respondents for money paid on their account, no such payment having been made; and the money paid by Campbell into the Bank of the respondents still remains in their hands.

It is plain from this short statement, that the respondents 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 and 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*, 4 Bing. 253. 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 on this 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 and 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 and 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 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 respondents have given to Orr and 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 respondents 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 and 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 bank of the respondents, both he and Orr and Barber became interested in the due fulfilment of the obligation into which the respondents 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 and Barber; but I am aware that this is a matter not admitted. The argument was in truth an argument on the relevancy, and all which can now be done is to decide the question of relevancy. The Lord Ordinary, by his interlocutor of 20th June 1848, decided in favour of the appellants—that is, that they were entitled to go to proof. That interlocutor was recalled by the great majority of all the Judges, as appears by their interlocutor of 31st 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 respondents should consider that it would be useless to them to go into such proof.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend, and I am sorry to be under the necessity 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 farther; for I should consider that this litigation, in consequence of what has passed here, may be said to have reached its natural conclusion. 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.

Interlocutor reversed, and case remitted.

Sharpe, Field and Jackson, *Appellants' Solicitors.*—Norris and Allen, *Respondents' Solicitors.*