continued till May 1818, when he gave up residing at Auchengraymont. Until that, it seems, that no sole domicile could be considered as established in London; nor could the continuance in the house in Margaret Street up to November 1820, without any additional circumstances, have the effect of creating a sole domicile in England from May 1818 till November 1820, especially when it is borne in mind, though he quitted Auchengraymont, he left his furniture in Scotland, which is some evidence of his intention to resume a Scotch residence, which he did soon after, when he came into possession of Ross. It is not improbable, that if he meant to make London his home at any time, he meant it to be so only until he should become entitled to his ancestral house at Ross, but a residence for a definite time, though of uncertain duration, would not, I conceive, confer a domicile. It is essential, in all the definitions given of the meaning of this term, that it should not be for a limited time. That he did not afterwards, when he came into possession, remain there till death, arose from other circumstances—probably the reluctance of his wife to live in Scotland, and the reluctance of his acquaintances to visit his wife and his once illegitimate family.

On the whole, though not without some doubt, I concur in the advice given to your Lordships, that there is no clear proof of an English domicile in November 1820, and therefore no sufficient reason to disturb the decision of the Court of Session in this case.

LORD CHANCELLOR.—My Lords, I am desired by my noble and learned friend, LORD BROUGHAM, who heard the whole of the argument in this case, to say, that he entirely concurs in the conclusion, that the interlocutors appealed against ought to be affirmed.

Interlocutors affirmed, with costs.

For Appellant, John Robertson Aikman (Appellant in Person), Solicitor, London; Dundas and Wilson, C.S., Edinburgh.—*For Respondents*, Maitland and Graham, Solicitors, Westminster; Hamilton and Kinnear, W.S., Edinburgh.

MARCH 19, 1861.

THE BRITISH LINEN CO., *Appellants*, *v.* THE CALEDONIAN INSURANCE CO., *Respondents.*

Forgery—Fraud—Bank Cheque—Letter of Credit—Payment on Forged Signature—Discharge—16 and 17 Vict. c. 59, § 19—*H. the country agent of C. an insurance company, forged a proposal for an insurance on the life of A B, combined with a loan in his favour. A bond was also forged by H., and sent to the head office. The C. company on advancing the loan obtained a letter of credit, in favour of A B, and sent it to H. to be delivered to A B; but H. himself cashed the cheque, on a forged indorsation of A B, with H.'s own indorsation subjoined. This occurred before the passing of the act* 16 *and* 17 *Vict. c.* 59. *H. having absconded, the C. Company sued the bank for the contents of the letter of credit, on the ground that the bank had not paid it to the payee.*

HELD (affirming judgment), *That the payment by the bank on the forged signature did not form any valid defence against the action for payment at the instance of the C. insurance company.*[1]

William Harvie, writer in Dalry, was the agent for the pursuers (the Caledonian Insurance Co.) there in 1853. On the 22d June 1853, Mr. Harvie transmitted to H. D. Dickie, the manager of the Insurance Company in Edinburgh, the following documents, viz., 1. Proposal for an insurance for £800 on the life of Andrew King, farmer, Brachenhills, bearing to be subscribed by King, with queries answered by the agent annexed, signed by Harvie; 2. Medical officer's report signed by Archibald Blair, surgeon; 3. Private friend's report, bearing to be signed by John Allan, Langmuir; and 4. Certificate of A. King's baptism, bearing to be signed by William Duff, session clerk. The signatures of "Andrew King" to the proposals, and of "John Allan" to the friend's report, were not genuine; the signatures of Mr. Harvie and the surgeon were genuine.

Mr. Harvie, in his letter transmitting these documents, requested that, if the order for assurance was approved of, a policy should be sent immediately; he also stated, that the applicant proposed to borrow £450 upon the policy, when issued, and offered for security three gentlemen named, and that the security was first class. In answer to a letter from Mr. Moinet, of the head office, asking a reference as to the responsibility of the sureties offered, Mr. Harvie

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[1] See previous reports 21 D. 1197 : 31 Sc. Jur. 653. S. C. 4 Macq. Ap. 107 : 33 Sc. Jur. 392.

wrote, referring to Mr. Faulds in Beith; and Mr. Faulds having been communicated with, returned a satisfactory answer. The proposal for the loan was accordingly approved of, and the bond and policy were prepared. The bond was in name of Andrew King, James Cochran of Barcosh, Hugh Barr of Dikehead, and Robert Kerr of Wathston. It was transmitted to Mr. Harvie, on 4th July, for subscription; and it was returned by Mr. Harvie to the head office, bearing to be subscribed by the granters, but none of the subscriptions were genuine. On the bond being received at the head office, the manager, by letter of 7th July, transmitted to Mr. Harvie a letter of credit for £436 7*s.* 5*d.*, in favour of Mr. Andrew King, by the British Linen Company at Edinburgh, to the bank's agent at Irvine, for which the pursuers paid value to the defenders. The letter of credit was produced by Harvie to the joint agent of the bank at Irvine with the signature "Andrew King" on the back of it, and Mr. Harvey having also added his own name, the money was paid to him on 8th July. The signature or indorsation "Andrew King" on the back of the letter of credit was not genuine. Harvie remitted to the head office of the pursuers the premium on the policy and the interest on the bond falling due on 29th December and 11th November 1853 respectively. In July 1854 he absconded, and the pursuers discovered the system of deception to which they had been exposed.

They accordingly raised the present action to recover from the bank the contents of the letter of credit, on the ground that the bank had failed to pay the same to the party named in the credit, and to whom they had undertaken to pay it. The bank denied liability. The facts above specified were not all set forth in the record, but they appeared from the documents in process, and from the report of a proof allowed by the Court on 15th December 1857, "before answer, under reservation of all pleas in law to both parties."

The Court of Session held, that the defenders, the British Linen Co., were liable for £436 7*s.* 5*d.*, less the premium paid on 5th Jan. 1854.

The British Linen Co. appealed, maintaining in their *printed case*, that the judgment of the Court of Session should be reversed—"1. Because the rule that a banker who pays upon a forged cheque, pays at his own risk and responsibility, is not applicable to the present case. *Robarts* v. *Tucker*, 16 Q. B. 560; *Hall* v. *Fuller*, 5 B. & C. 750; *Johnson* v. *Windell*, 3 Bing. N. C. 225; *Scholey* v. *Ramsbottom*, 2 Camp. 485; *Smith* v. *Mercer*, 6 Taunt. 76; Byles on Bills of Exchange, 7th Ed. 291; Chitty on Bills, 425; Bayley on Bills, 312, 313-316; Story on Promissory Notes, § 379, p. 464; Thomson on Bills, 258. 2. Because the loss which has been sustained was occasioned not in consequence of the appellants paying the letter of credit upon a forged indorsation, but in consequence of the antecedent scheme of fraud successively carried out by the respondents' own agent. 3. Because the respondents themselves are entirely to blame for the forgery which has been committed. The loss has been occasioned solely by the laches or fault of the respondents. *Young* v. *Grote*, 4 Bing. 253. 4. Because the whole transaction which gave rise to the remittance having been fictitious, and Andrew King never having had any right to the money, the appellants committed no wrong in paying the money to Harvie, who alone had procured the remittance to be made. 5. Because the respondents are barred by *mora* from requiring payment a second time of the letter of credit from the appellants, no notice of the fraud having been given to the appellants for two years, and the appellants having been prevented by the fault of the respondents from operating their relief. 6. Because the respondents are liable for, and must themselves sustain, the loss occasioned by the fraud committed against themselves by their own agent; and it is impossible to distinguish or to separate the payment of the money by the appellants from the fraud practised by Harvie upon the respondents themselves, of which that payment was only a part."

The letter of credit referred to was in the following terms:—

"*To the Agent for the British Linen Company at Irvine.*
"*British Linen Company Bank, Edinburgh,*
"*7th July* 1853.

"No. 270.

"Sir,—Please to honour the drafts of Mr. Andrew King on account of this company, four hundred and thirty-six pounds 7*s.* 5*d.* on advice.—I am, Sir, your most obedient servant,

"£436: 7: 5 stg. ARCHD. NIMMO, *Manager.*"

"Entd. B. S. M'H."

The 19th section of 16 and 17 Vict. c. 59, (passed on 4th August 1853, after the transaction here in question,) enacts as follows:—"Provided always, that any draft order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be endorsed by the person to whom the same shall be drawn payable, shall be sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof: and it shall not be incumbent on such banker to prove, that such endorsement, or any subsequent endorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any endorser thereof."

The respondents, in their *printed case*, supported the judgment on the following grounds:—"1. Because it being established by the written documents and other evidence adduced, that the

appellants did not pay to Andrew King the sum in the letter of credit, in pursuance of the obligation undertaken by them to the respondents, they were therefore bound to make payment thereof to the respondents. 2. Because, while the failure of the appellants to fulfil the obligation undertaken by them to the respondents by the letter of credit in question, rendered them liable to the respondents in payment of the amount, there was nothing in the circumstances of the case, as established by the evidence, which entitled them to plead, that the respondents were barred from enforcing that liability, or that the appellants should be relieved from the effects of their own negligence."

The *Attorney General* (Bethell), and *Anderson* Q.C., for the appellants.—This was a case of fraud on the part of the respondents' own agent, and the respondents now seek to make the appellants responsible for that fraud. The acts of their agent, Harvie, must be taken to have bound the respondents, and therefore, at the moment they paid in the money to the bank in Edinburgh, they were fully aware there was no such person as Andrew King, farmer, the grantee of the letter of credit. That fraud estops them from now claiming back the money.

[LORD CHELMSFORD.—Ought Harvie's fraud on his principal not rather to be taken to have dissolved the relation of principal and agent? He was not the respondents' agent in getting the money on the forged letter of credit.]

Harvie might be taken to be the agent of the borrower, and the bank was discharged by paying him. At all events, the case ought to be decided on a view of the preponderance of negligence. Here the respondents put it in the power of their agent to commit the fraud; and on the principle, that a party who is negligent in filling up a cheque, and thereby gives rise to a fraud by some third party, bears the loss, this loss should fall on the respondents, and not on the appellants, who were guilty of no negligence—*Young* v. *Grote*, 4 Bing. 253. This view is countenanced by LORD CRANWORTH, in *Orr* v. *Union Bank*, 1 Macq. Ap. 532, *ante*, p. 411.

Pattison, for the respondents, was not called upon.

LORD CHANCELLOR CAMPBELL.—My Lords, I must say, that this appears to me to be a very clear case, lying within a very short compass. I do not understand this to be an action, as has been suggested by the Attorney General, whereby the pursuers seek to be indemnified for a wrong done by the defenders. It is an action brought to recover a sum of money which the pursuers deposited with the defenders for a certain purpose. Now it is quite clear to me, that if the fraud upon the pursuers, which Harvie concocted, had been discovered at any time before the payment was made by the defenders, the pursuers would have been entitled to recover the money which they had deposited. The question is, whether this payment by the defenders upon the forged signature of Andrew King discharges them? I think it certainly does not discharge them. This is the ordinary case of bankers paying money upon a forged cheque. It is a hard case, very much to be regretted, in respect of which there is an enactment in 16 and 17 Vict. c. 59, § 19, discharging them from liability upon a cheque payable to bearer where there is a forgery, but there has been no enactment to save their liability in such a case as this. Here the bank has paid upon the forged signature of Andrew King, and that is no payment at all. Therefore things are in the same situation as if the money were still in the till of the bankers. An attempt was ingeniously made by Mr. Anderson to shew, that Harvie, in presenting the letter of credit and receiving the money, was the agent of the borrower, and that the payment of the money to the agent of the person in whose favour the letter of credit was given must be regarded as payment to himself. But that is utterly untenable, because, according to the course of the transaction, there would have been no payment of the borrower until the letter of credit had actually been endorsed by him or a draft drawn by him for the amount. Then this seems to me to come under the case of money deposited for a particular purpose, which purpose has not been answered, and the money must be considered as being still in the hands of those with whom it was deposited, and they must pay it to the parties to whom it belongs. The very lucid reasoning of LORD CRANWORTH, LORD CHANCELLOR, in the case of *Orr and Barber* v. *The Union Bank of Scotland*, lays down principles which seem to me to apply entirely to the present case. I must therefore advise your Lordships to affirm the interlocutor of the Court of Session, and to dismiss this appeal with costs.

LORD CRANWORTH.—My Lords, I will only add a word to what has been said by my noble and learned friend. I should be very sorry, that what fell from me in the case of *Orr and Barber* v. *Union Bank of Scotland*, which has been referred to by Mr. Anderson, should be misunderstood. When I said, that there might be circumstances of fraud or negligence, that would vary the case, what I meant was, that there might be negligence in the circumstances, that were the immediate cause of the payment by the bank, as in the case decided in the Court of Common Pleas, where a cheque had been drawn payable to bearer "Fifty pounds," and it had been so badly written, or there had been so large a blank left on the left hand side of the "Fifty," that the person who got hold of it was enabled to put in "Three hundred;" and the Court of Common Pleas held, that, as that negligence on the part of the drawer had afforded the opportunity for that fraud which the bank could not have discovered by ordinary diligence, they might be absolved from the ordinary liability attaching to the payment of a forged cheque. But in this

case I must say, that to suppose, that this fraud, which had been in some measure concocted, and in some measure perfected against the insurance company, had anything to do with this payment of the forged cheque, would, I think, be preposterous. I entirely agree with the observation of Lord Benholme, that it had nothing to do with it. The Caledonian Insurance Company took such precautions, that unless there was forgery, they were safe. The truth is, that although King's name was forged, the bank paid the cheque upon the authority of Mr. Harvie. The agent says he knew Mr. Harvie very well, and therefore he of course trusted to him, that it was a genuine signature.

LORD WENSLEYDALE.—My Lords, I am entirely of the same opinion. I think the case is a very plain and clear one. I never had the least doubt about it. It is the case of money paid into the hands of the defenders for the purpose of being paid out upon Andrew King's draft. But the true draft of Andrew King was never given. Consequently, the money remained in the hands of the defenders for the use of the pursuers, the moment they chose to demand it. It is the simple case of money had and received. The machinery of the letter of credit is merely for the purpose of having the money paid at Irvine instead of being paid at Edinburgh. Still it admits the liability to pay the sum of money to the order of Andrew King. It is only machinery for the purpose of ordering the agent of the bank at Irvine to pay a sum of money to their customer, which has been paid into the bank at Edinburgh, and also of communicating to Andrew King, that he has authority to receive it. It does not vary the position of the parties in the least. The money was paid by the pursuers to the bank for a special purpose, and that purpose was not answered, therefore they have a right to demand it back again.

LORD CHELMSFORD.—My Lords, I agree with my noble and learned friends, and I can add nothing to the reasons which they have given for their opinion.

LORD KINGSDOWN assented.

Interlocutor affirmed, with costs.

For Appellants, Gordon and Wilkins, Solicitors, London; Hunter, Blair, and Cowan, S.S.C., Edinburgh.—*For Respondents*, Connell and Hope, Solicitors, Westminster; John A. Campbell, C.S., Edinburgh.

APRIL 11, 1861.

JOHN EWART and Others (Trustees of the late James Ewart), *Appellants*, *v.* WILLIAM and JOHN COCHRANE, *Respondents*.

Servitude—Grant—Drain—Right to Repair—Presumption—*For nearly sixty years the surplus water of a tan yard was carried by a drain into lower ground, being a neighbouring garden, belonging to the proprietor of the tan yard at the time the drain was originally formed in* 1799. *In* 1819 *the tan yard had been sold separately, and conveyed in terms of a disposition which created no servitude in regard to the drain.*

Held (affirming judgment), *That a grant was to be implied of servitude in favour of the tan yard, and that the proprietor of it was entitled to have reasonable access to his neighbour's ground for the purpose of repairing the drain in its passage.*[1]

The pursuers, who are tanners and curriers, are proprietors of property in the town of Newton Stewart, in which they carry on their business, their tan work having been formed about 1779 by Anthony M'Caa, to whom belonged, as one subject, the premises owned by the pursuers, and also the adjacent property belonging to the defender. The ground occupied as the tan work slopes to the north-east, and at that extremity a drain was formed for the purpose of carrying off surplus water. The drain, for some time open, but afterwards closed, ran into M'Caa's adjacent property, which is now the defender's garden, where the water was received into a covered cesspool or tank, and then absorbed in the soil.

The tan yard, as well as the property belonging to the defender, continued to be held by M'Caa till 1806, when both subjects were sold to Peter Murray, the then tenant of the tan yard. In 1819 the tan yard was acquired separately from Murray by the pursuers' author, John Drynan, in terms of a conveyance which contained no reference to the drain. In 1853 the defender Ewart, now in right of the adjacent property, built up the drain at its entrance to his property, and so prevented the water flowing from the tan yard.

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[1] See previous reports 22 D. 358; 32 Sc. Jur. 160. S. C. 4 Macq. Ap. 117; 33 Sc. Jur. 435.