Friday, February 27.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

ALLAN AND OTHERS (WALLACE'S TRUSTEES) *v.* TRUSTEES OF PORT-GLASGOW HARBOUR AND OTHERS.

Fraud—Payment upon a Forged Document—Negligence of Party whose Name is Forged.

Payment upon a forged document cannot be recognised as payment between the payer and the party whose name is forged, and in order to free the former from liability to the latter in such a case it must be shown that the payment was due to or distinctly connected with the fault or negligence of the party whose signature was forged.

Circumstances where in a case of forgery by a law-agent it was *held* that there was not sufficient evidence to instruct the amount of negligence necessary to free the party paying upon the forged documents from the consequences of such payment.

James Watson Wallace died on 5th December 1870, and the trustees duly confirmed under his trust-disposition and settlement were James Allan, William Robertson, and James Craig Arnot. Thomas Arnot, writer in Glasgow, was appointed law-agent and factor to the trust. On 15th May 1871 the trustees through him invested £500 of the trust-funds on mortgage with the trustees of Port-Glasgow Harbour for five years at 5 per cent. interest, payable half-yearly. In November 1878 Thomas Arnot absconded, and Mr Wallace's trustees found on inquiry that an assignation or writ of transfer of the above-mentioned mortgage had been granted, of date 14th May 1872, to William Lang, engineer, Gourock, and that the £500 had been paid over and a discharge granted by him to the Harbour Trustees on the expiry of the mortgage on 15th May 1876. The assignation bore to be signed by James Craig Arnot and James Allan, as two and a quorum of Wallace's trustees, and on the narrative that those signatures were forged they raised this action of reduction of the assignation and of the discharge against the Harbour Trustees, William Lang, Thomas Arnot, and the trustees on the sequestrated estate of the last-named party.

The Port-Glasgow Harbour Trustees alone defended the action, and besides denying the alleged forgery they further averred—"(Stat. 8) Further, the pursuers were guilty of negligence, and they failed to exercise proper caution in dealing with the trust-estate under their charge. Had they superintended with due care the termly receipt of income belonging to the trust-estate, and required explanations from their factor why the warrants for the half-yearly payments of interest on this mortgage were not presented to them for signature after Whitsunday 1876, as had been the case at that and the preceding term, or had they even made any inquiries as to the repayment or renewal of the mortgage at Whitsunday 1876, when they knew it was repayable, the fraud, if any, which they now allege was perpetrated by their agent, would have been discovered. (Stat. 9) In consequence of the negligence and want of due care shown by the pursuers, the defenders have been prejudiced, and liability can in no view be now enforced against them. Had the pursuers used ordinary care, they must have discovered the fraud which they now allege at Martinmas 1872, when the half-yearly interest-warrant should have been persented to them for their signatures, as had been the case at the previous half-yearly terms since the investment of the money, or at the latest at Whitsunday 1876, when they knew that the money was repayable. The defenders did not pay the money contained in the mortgage to the transferee William Lang till Whitsunday 1876, four years after the alleged forgery. If the alleged forgery (assuming, but not admitting, that there was a forgery) had been discovered before 1876, as it ought to have been, the defenders would not have parted with the money. Even if it had been discovered after 1876, and before November 1878, and the defenders informed of it, the money said to have been misappropriated could have been recovered."

The pursuers pleaded, *inter alia*—"(1) The pretended subscriptions of the pursuers James Craig Arnot and James Allan to the pretended assignation or writ of transfer not being the subscriptions of the said pursuers, but being false and forged, the pursuers are entitled to decree of reduction as concluded for. (2) The said pretended assignation or writ of transfer should also be reduced, and decree granted as concluded for, in respect the signatures of the attesting witnesses are not genuine, or at least in respect the said witnesses did not see the pursuers James Craig Arnot and James Allan adhibit their subscriptions to the same, nor hear them acknowledge their subscriptions thereto."

The defenders pleaded, *inter alia*—"(1) Even assuming the signatures in question to be forged, the action cannot be maintained, and the defenders are not bound to satisfy the production, in respect that—1st, Mr Thomas Arnot acted with the express or implied authority of the pursuers in the matters in question; 2d, The pursuers adopted, homologated, and received money upon other similar signatures; 3d, The defenders were warranted by the actings and conduct of the pursuers in believing the said signatures to be genuine; and 4th, The pursuers were guilty of gross negligence in not supervising the actings of the said Thomas Arnot in regard to their business, and in consequence of the said negligence he was enabled to do what he did in regard to the matters libelled. (2) The action is excluded by *mora* and taciturnity, and by the fact that the defenders' rights of relief have been cut off, or at all events very seriously prejudiced, by the pursuers' failure to supervise the actings of the said Mr Arnot and apprise the defenders of the alleged forgeries."

Proof was led, from which it appeared that the witnesses whose signatures were on the deed of transfer, and who had both been clerks to Thomas Arnot, had no recollection of having seen the deed signed by the trustees whose names it bore. It further appeared that the cash affairs of the trust had been left almost entirely in Thomas Arnot's

hands, and that until he absconded the trustees were not aware that the period of investment had expired. Sums of money had been entered in Thomas Arnot's cash-book from time to time, down to 1878, as interest received on the mortgage. Two interest-warrants, dated 11th November 1871 and 15th May 1872 respectively, bore to be signed by J. C. Arnot and James Allan. The latter of these was alleged by them to be a forgery.

On 14th November 1879 the Lord Ordinary (RUTHERFURD CLARK) decerned against the defenders in terms of the conclusions of the summons.

The defenders reclaimed.

Authorities—*Duncan* v. *River Clyde Trustees*, Jan. 24, 1851, 13 D. 518; *Orr & Barber* v. *Union Bank*, Jan. 31, 1852, 14 D. 395 (H. of L. 17th Aug. 1854, 1 Macq. 513); *Bank of Ireland* v. *Trustees of Evan's Charities*, July 2, 1855, 5 Clark (H. of L.) 389; *Union Bank* v. *Makin*, March 7, 1873, 11 Macph. 499; *Withington* v. *Tate*, Feb. 1, 1869, 4 L.R. (Chan. App.) 288.

At advising—

LORD MURE—This action has been brought for the reduction, on the ground of forgery, of an assignation bearing to have been executed by two of the pursuers, as trustees of the late Mr Wallace, in favour of William Lang, in May 1872, of a mortgage for £500 granted to the pursuers by the defenders in May 1871. The Lord Ordinary has reduced this deed, and under the reclaiming-note three questions have been submitted to the consideration of the Court—First, Whether it is proved that the signatures of Messrs Allan and Arnot, two of the pursuers, to the assignation sought to be reduced were forged? Secondly, Whether, assuming that to be proved, payment of the amount of the mortgage by the defenders to the party in whose favour that forged assignation was granted can be held to operate as a discharge in favour of the defenders, and to free them from any further demand at the instance of the pursuers? and Thirdly, Whether, upon the assumption that a payment so made on a forged document would not in the ordinary case be sufficient to operate as a discharge, there was anything in the conduct of the pursuers relative to their management and superintendence of the estates committed to their charge which can be held to amount to such fault and negligence on their part as may have led to the forgery of the assignation by their agent, or to the money having been paid to the parties in whose favour the forged assignation bears to have been granted, and so may bar the pursuers from now taking proceedings against the defenders for the recovery of their debt?

Upon the first two of these questions I have not felt the case to be attended with any difficulty. The forgery of the signatures is, I think, clearly proved. With regard to the second question, the law appears to me to have been long settled that payment on a forged document cannot be recognised as payment between the party paying and the person whose name is forged. The rule has been so laid down in a series of cases in relation not only to bills and cheques on a bank, but also to the transfer of stocks and shares, such as the case of *Coles* v. *The Bank of England*, 10 Ad. & Ellis 437, referred to as one of the authorities, though not quoted in the course of the discussion, and the point was not, I think, seriously questioned in the argument for the defenders.

But the third question is attended with some nicety, and depends mainly upon this—whether it is clear upon the evidence that the forgery was committed, or that the payment upon the forged document was made, owing to the fault or want of proper caution on the part of the pursuers, because where a document is forged and uttered, or otherwise made use of as a genuine document in order to obtain payment of money, owing to the negligence of the party whose signature is forged, the ordinary rule that a payment made upon a forged signature cannot be held to be a good payment does not, I conceive, apply, and cannot be pleaded to the prejudice of the party who has been induced to pay by means of that forged document. The law to this effect is, I think, pretty clearly laid down in the case of *Young & Grote*, in 1827, 4 Bingham 253, and was approved of by Lord Cranworth in disposing of the case of *Orr & Barber* v. *The Union Bank*, in the House of Lords in 1854, on appeal from this Court, 1 Macq. 513. It was also, I think, assumed to be law in the case of *The Bank of Ireland* v. *Trustees of Evan's Charities*, 5 Clark (H. of L.) 389, referred to during the discussion, although the facts as proved in that case were held not to bring it within the operation of the rule; and it was not disputed in the case of *The British Linen Company* v. *The Caledonian Insurance Company*, either in this Court in July 1859, 21 D. 1197, or in the House of Lords, as reported in 4 Macq. 107, although it was there also held that the circumstances of that case did not admit of the application of the rule. In that case of *The Bank of Ireland*, which went to the House of Lords in 1855, the opinions of the whole Judges were taken, and the result that they came to is thus expressed—"We all concur in opinion that the evidence given, which was only of a supposed negligent custody of their corporation seal by the trustees, in leaving it in the hands of Mr Grace, whereby he was enabled to commit the forgeries, is not sufficient evidence of that species of negligence which alone would warrant a jury in finding that the plaintiffs were disentitled to insist on the transfer being void. We concur . . . . in thinking that the negligence which would deprive the plaintiff of his right to insist that the transfer was invalid, must be negligence in or immediately connected with the transfer itself." And Lord Cranworth in delivering the judgment of the House of Lords again reverts to the cases that I have referred to,—the case of *Grote* and others—and explains distinctly that it is not every species of omission which can be held to bring a case within the operation of the rule laid down in *Grote*, but that there must be some distinct connection between the omission and the actual forgery. The question, therefore, for consideration on the evidence is, whether the pursuers have ever been so negligent in their management of their estates, and their superintendence of their agent, as to put it in his power to perpetrate successfully the forgery and the fraud which have led to this loss. Now, the circumstances relied on are generally as set out in statements 8 and 9

for the defence—that from the year 1871 or 1872, after the trust came into operation, the trustees gave up in reality as trustees the superintendence and management of the trust-estate to their agent Mr Arnot, who had been appointed agent; and it is alleged in statement 8 that "Had they superintended with due care the termly receipt of income belonging to the trust-estate, and required explanations from their factor why the warrants for the half-yearly payments of interest on this mortgage were not presented to them for signature after Whitsunday 1876, as had been the case at that and the preceding term, or had they even made any inquiries as to the repayment or renewal of the mortgage at Whitsunday 1876, when they knew it was repayable, the fraud, if any, which they now allege was perpetrated by their agent, would have been discovered." And a similar statement is made in statement 9, where it is said that if they had used ordinary care relative to this matter in 1872 the forgery could not have been committed. Now, I think that these are relevant statements, and the question is whether the proof supports them?

The trust came into operation at the end of 1870. It was a trust which would in all probability endure for a considerable period, as the payment of the jointure to the truster's widow and the payments towards the maintenance and education of the children were to be made out of the income of the trust-estate, and the trustees were the tutors and curators of the children. The capital was to be held for the children. It was therefore a trust which in its essence was to be of considerable duration, and where the trustees appear immediately after the death of the truster to have taken steps for investing the estate, amounting to about £3000, in different securities; they employed Mr Arnot as their agent, and he was left in charge of the legal business of the trust. The interest-warrant for the first half-year's interest was signed by two of the trustees in the usual way. The interest-warrant for the second half-year's interest was not laid before any of the trustees for signature, but it was paid to Mr Arnot, and the pursuers say that their signatures to that document are forged. Upon that matter there is no corroboration of the pursuers themselves, but I assume that they are correct in their statement. It bears to have been signed by two of them, and looking at the signatures, a person not knowing them would find it very difficult to say whether they are a forgery or not. The two periods of time at which it is said the agent was enabled through the negligence of the pursuers to commit this forgery are 1872 and 1876, the latter being the period at which the mortgage expired, and when the money in ordinary circumstances would fall to be re-invested. Now, there were meetings of trustees held in December 1870, in September 1871, and in October 1871; it does not appear that after October 1871 there was any meeting of trustees, but we have it in the evidence of Mr Arnot, the brother of the agent, and also in the evidence of Mr Allan, that they both occasionally called and ascertained from Arnot the position of the trust matters. Mr Arnot says that he looked at the documents that were in the office, and into the books, and that he asked for explanations; that he knew *aliunde* that the widow and children were regularly supplied with money; and that from what he saw in the books it appeared that the interest had been received and placed to the credit of the trust-estate. He admits that he was aware that the money was lent in the first instance for only five years, and that he never inquired about the re-investment of it, because, seeing that the interest was regularly paid and credited to the estate, he supposed that the investment had been continued for a further period of time, and that the matter was allowed to go on in that way. That is his explanation of it. Mr Allan says that he left the management of the trust a good deal to Mr James Arnot, who seems to have employed Thomas Arnot as their own private agent conversant with their own business affairs; and Allan distinctly says he inquired whether the interest of the money had been regularly paid to the widow and children, and was informed that it had; and there does not seem to have been any doubt about that.

Now, up to May 1872, which is the date of the forged assignation, I think there does not seem to have been any serious omission at all on the part of these trustees of what they were required to do in the management of the estate, or of what any ordinary individual would do in the management of his own estate; and I am of opinion that if they had asked about the dividend-warrant after the date of the alleged forgery of their names to the second warrant, and after the date of the forgery of their names to the assignation, that would not have led to the discovery of what had been done, because it appears that at each half-yearly period the receipt of the interest is regularly entered in the cash-book, and a man like Thomas Arnot, who was evidently a skilful man in working a trust of this sort, would just have produced the book showing that the money had been paid without the pursuers having signed the dividend-warrant, and at that period I have no doubt that that explanation would have been accepted. I do not think there was any omission or neglect of duty on the part of the pursuers in taking that statement from an agent in whom they had confidence. Therefore at the date of the execution of the forgery in 1872 I think there is no negligence proved on the part of the pursuers which can be said to warrant us in holding that it was through their want of care and want of caution that it was committed.

But then it is said that from that date till Arnot left Glasgow suddenly in 1878 there was no meeting of trustees, and no proper superintendence kept of the trust affairs. Upon the facts it is clear that there was no regular meeting, but Arnot and Allan both say that they made inquiry of the agent about the state of the trust matters, and that they were informed that everything was right, and as they knew that the family were receiving their money, and the documents shown to James Arnot were not of a nature calculated to raise suspicion, I do not see that if they had probed the matter at any period of time between 1872 and 1876, or even 1878, they would necessarily have found out that the agent had committed this fraud, because they would have been referred always to the cash-book kept for Wallace's trust, in which there was for every year down to 1878, when Arnot suddenly left Glasgow, a regularly entered and accurate account of the affairs of the trust, showing that he got the money half-yearly as usual, and applied it in favour of the truster's family. That being the position of matters, and the accounts having been so kept by the agent, in whom they appear to have

had confidence, I think that the probing of the matter would not have led to the discovery of the fraud. There is no sufficient evidence to show that it was owing to the neglect of duty on the part of the trustees, or to their fault, that these continued payments were made in that way to the wrong party—that is, to the holder of the assignation,—and upon the whole I think there is not sufficient evidence to instruct that amount of negligence which is required to free the party paying upon these forged documents from the ordinary consequences and results of such payment. I therefore concur in the result at which the Lord Ordinary has arrived.

Lord Deas concurred.

Lord Shand—I am of the same opinion. I agree entirely with Lord Mure in holding that the forgery in this case has been clearly proved, and I shall not say more upon the facts in regard to that matter. But assuming the forgery to be proved, it is contended that the pursuers have so acted as to be practically responsible for the payment which the defenders made of that debenture. But I do not think that a case has been made out on the facts upon that matter, and I very much doubt whether any relevant case was stated on the record. The case that is maintained is one of alleged negligence on the part of these trustees. There is no act of the pursuers founded upon such as the filling up of a cheque so carelessly or in such an unusual form that the sum might be easily altered or a sum inserted in a blank which is usually filled up; nor do I think there is any act of negligence to which it can be said that the payment of the mortgage can be directly traced.

The two points made as against the pursuers were, in the first place, that although some of the trustees had signed the first dividend-warrant for the interest payable upon the debenture, they did not sign any of the other dividend-warrants over a period of four and a-half years; and, in the next place, that at the expiry of the period of five years for which the debenture was current they did not take care to see that the money was got up or some new security obtained for it. In regard to the first of these points, and indeed in regard to both of them, the answer made upon the question of fact as to any negligence is that the trustees were aware that the interest upon this trust money was being regularly paid half-yearly to the person entitled to receive it, viz., the widow of the truster; and the case appears to me to be one in which all that can be really said is that the pursuers thoroughly trusted their law-agent'—as I take it anyone is fairly entitled to do—there having been no reason to suppose that Mr Arnot was a person who would have committed any such act as led to this loss. I do not think that because a body of trustees or an individual in the ordinary course of business thoroughly trusts his agent in reference to investments, and allow him to act in regard to investments, that is a negligence which would impose such a liability as is here sought to be imposed upon these trustees. There is nothing more common, I suppose, than that such trust should be reposed—in fact it must be in many cases. Take the case of ladies entirely unacquainted with business—they must rely entirely on their agent, and having chosen an agent of character they are entitled to rely upon him, and are not to be expected in a question with creditors to be exercising a special supervision to see that frauds are not being committed. I say the same of military men—a number of them must trust entirely to their agents as to the kind of investments to be made or the time for which they shall lie, and if they receive their income regularly I am not aware of any duty which they as individuals owe to the debtors under the securities which they hold. And I should say the same thing with regard to gentlemen not connected with business or retired from business, and there are many such.

I do not think any other principle is to be applied to a body of trustees in a question with a debtor on a security of this kind than is applied in such cases as I have now mentioned, and as it appears to me that both on the record and on the proof the case comes to this, that there was trust reposed—I do not think a trust which the pursuers were not entitled to repose—I see no ground for holding that the results of this forgery, which have unhappily fallen upon the debtors under this debenture, are to be shifted from them to the creditors, the present pursuers.

Lord President—I entirely concur in Lord Mure's opinion.

The Court adhered.

Counsel for Pursuers (Respondents)—Kinnear—Harper. Agents—Adamson & Gulland, W.S.

Counsel for Defenders (Reclaimers)—Balfour—J. P. B. Robertson. Agents—Morton, Neilson, & Smart, W.S.

Friday, February 27.

FIRST DIVISION.

[Sheriff of Midlothian.

PALMER *v.* LEE.

Agent and Client—Reservation of Lien over Title-Deeds—Where Bill Granted in Payment of Business Account.

An agent granted a receipt to his client in these terms:—"*Edinr.* 14*th Aug.* 1878.—Received from R. Hyman, Esqre., his bill for £55, 16s. in payment of balance on cash account and business account, to be rendered as per my letter to him of the 12th—the feu-duties remaining unpaid—any mistakes to be corrected." The bill so granted was cashed, but at maturity, the client having failed, it was dishonoured. Previous to his failure the client sold certain house property, the title-deeds of which remained in possession of his agent, and on the purchaser demanding that they should be made over to him, the agent pleaded his right of lien for the balance of the business account for which he had granted the above receipt. *Held* that the right of lien still subsisted, as there was nothing to show that the agent intended to give it up in the event of the bill being dishonoured.