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.

Mr Bell's observations as to the discharge of a right of lien—Comm. ii. 114 (7th ed. 109)—*approved per* Lord President (Inglis).

Agent and Client—Lien over Title-Deeds—Where Business Charges were for Benefit of Agent himself.

Where some of the charges made by a law-agent were incurred for his own benefit, to the effect of giving him a greater security against his client for payment of his account, *held* that these charges, being good against the client, were covered by the agent's right of lien over certain title-deeds.

In 1876 Robert Hyman executed a disposition of certain buildings in Edinburgh to John Pascoe, who on 20th May 1879 disponed them to Charles Mark Palmer, M.P., carrying on business in South Shields under the name of the Tyne Plate-Glass Company, who was the pursuer in this action. Hyman was sequestrated on 30th October 1878, Thomas Dall, C.A., Edinburgh, being confirmed trustee on his sequestrated estate, and the purpose of the action, which was brought with Dall's concurrence, was to have J. B. W. Lee, Hyman's agent, ordained to deliver up the title-deeds of the subjects which had been disponed. Lee refused, pleading, *inter alia*—"The titles and documents referred to being hypothecated to the defender for his business accounts, and bills granted therefor, he cannot be ordained to part with them till due satisfaction be made."

The amount of the account as stated by Lee was £278, 11s. 3d., and the following statement in regard to it was made by the pursuer upon record:—

"The amount of the account now claimed by the defender, which commences on 20th January 1876 and ends on 14th January 1879, is £278 11 3

. . . All accounts due by Hyman to the defender prior to 8th August 1878 were settled. The amount of the business account to the said 8th August 1878 is 238 6 10

Leaving . . . £40 4 5

Mr Hyman was sequestrated on 30th October 1878, and the items in the account claimed between 8th August and that date amount to . . . 31 11 11

Leaving amount incurred subsequent to sequestration . £8 12 6

Nearly all the charges between 8th August and 30th October relate to matters originated by the defender for his own security, and the greater part of which were never carried out. For these and the items incurred subsequent to the sequestration, relating chiefly to correspondence, &c., in connection with actions raised against the defender and the Commercial Bank, in which the pursuer was successful, the defender, if he has a claim, should rank therefor on the estate, but he has no hypothec over the titles in question therefor. If the titles are at once delivered up, the pursuer will pay the account of £6, 1s. 4d."

Leaving out of view the alleged debt of £238, 6s. 10d., for which it appeared that bills had at various times been granted which it was averred had not been paid, it was further stated that a balance of £57, 10s. 5d. was still undischarged. It appeared that in payment of that last sum Hyman had granted a bill to Lee, the receipt for which was in these terms:—

"*Edinbr.*, 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."

There was also the following entry in Lee's business account to Hyman:—

"14*th Aug.* 1878.—Received from you your bill *pro* £55, 16s., in payment of balance on cash account and business account to be rendered—feu-duties remaining unpaid."

Lee discounted the bill with the Commercial Bank.

The pursuer, *inter alia*, pleaded—"(2) The defender having accepted a bill for the balance of his account as at August 1878, and discounted the same with the Commercial Bank, who are claiming therefor on the sequestrated estate of the said Robert Hyman, the defender must be held to have waived any right of hypothec which might otherwise have been competent to him."

Another question related to the sum of £31, 11s. 11d., as set forth in the above statement by the pursuer, who averred that in any case so much of that sum as was incurred by the defender for his own security ought not to be covered by his right of hypothec. The facts on this point are sufficiently set forth by the Sheriff-Substitute (Hallard) *infra*.

On 30th July 1879 the Sheriff-Substitute pronounced this interlocutor— . . . "Finds that the accounts upon which the defence of retention is founded have been all discharged down to 8th August 1878, leaving a balance due of £40, 4s. 5d., part of which was incurred prior, and part subsequently, to Hyman's sequestration on 30th October 1878: Finds that as to the portion incurred subsequent to the sequestration, and amounting to £8, 12s. 6d., no plea of retention on the defender's part is maintainable: Finds that there is no question between the parties as to the account for £6, 1s. 4d., the pursuers conceding that the defender's plea of retention is valid so far as that account is concerned: Finds as to £31, 11s. 11d., being the portion of the balance of £40, 4s. 5d., which was incurred between 8th August 1878 and Hyman's sequestration, that the same affords no valid plea of retention to the defender, so far as the same was incurred by and through steps taken by the defender to protect his own interests: Therefore, before further answer, remits the defender's said account of £31, 11s. 11d. to the Auditor of the Court of Session for taxation and report, with a request to said Auditor to state what portion, if any, of said account incurred between 8th August 1878 and 30th October 1878 was so incurred through steps taken by the defender for his own protection against Hyman's impending bankruptcy, and to state generally the nature of the business charged for by the defender in the said account; meantime continues the cause.

"*Note.*— . . . . . The main point at the discussion was whether a law-agent's right of retention of his client's titles is ex-

tinguished when the payment of the account is not in cash but by bill. It is thought that when an absolute discharge is given, as in the present instance, without any reservation of the right to retain the titles, that right inevitably falls. It is not a question of waiver. The claim to which the right is ancillary being extinguished, the right is extinguished along with it."

The Sheriff (DAVIDSON) adhered.

After the Auditor (Mr Baxter) had reported, the Sheriff-Substitute on 17th November found "that on payment or consignation of £18, 11s. 9d. the pursuer will be entitled to decree of delivery as craved; continues the cause in order that such payment or consignation may be made."

"*Note.*— . . . . By taxation this sum [*i.e.*, £31, 11s. 11d.] has been reduced to £26, 4s. 11d., and the question now to be determined, with the assistance derived from Mr Baxter's report, is how much of that £26, 4s. 11d. was incurred through steps taken by the defender for his own protection as a co-obligant with Hyman to the Commercial Bank.

"The Auditor takes £13, 14s. 6d. out of it as subject to observation on that score. With regard to all but £9, 0s. 8d. of that sum, the Auditor seems to have no doubt that the items charged were for the defender's own protection. And after hearing parties in the debate roll, the Sheriff-Substitute is of opinion that the charges amounting to £9, 0s. 8d. fall under the same category. They relate to a conveyance by Hyman to the bank, and a relative agreement to which the bank, the defender, and Hyman were parties. The situation was this—The defender drew on Hyman the bills of which a list is appended to the agreement. These bills the defender discounted with the bank. A disposition *ex facie* absolute is granted by Hyman to the bank in security of these bills. It seems too clear for argument that by securing the bank the transaction was a security to the defender as a co-obligant. He was no longer in the independent professional position to which the privilege of retention or hypothec claimed by him properly belongs." . . .

The pursuer made consignation in terms of the above interlocutor, and decree ordaining delivery was thereafter pronounced accordingly.

The defender appealed, and argued—To accept a bill of exchange in payment of the law-agent's right of hypothec did not operate as a waiver of that right. Even if by taking the bill, or granting a receipt such as the one here, the right of hypothec was affected, yet the right revived on the bill being dishonoured.

Authorities—Bell's Comm. ii. (5th ed.) 114; *Hamilton*, Aug. 9, 1781, M. 6253: *Gairdner* v. *Milne*, Feb. 13, 1858, 20 D. 564; *Stevenson* v. *Blakeloch*, 1 Maule and Selwyn, 535.

Argued for the pursuer—An absolute discharge of the account had been given, and consequently the right to retain the titles fell.

Authorities — Bell's Prin., sec. 1418; *Cowell* v. *Simpson*, 16 Vesey 280; *Balde* v. *Symes*, 1 Turner and Russell, 87.

At advising—

LORD PRESIDENT—I think we must take this case on the footing that the petitioner is the singular successor of Hyman, the bankrupt, by an onerous transaction, the precise nature of which has not been explained, but the case has been argued quite rightly on the assumption that the petitioner was the purchaser of the estate. That being so, he asks for delivery of the title-deeds of the property, but the agent of the bankrupt, in whose possession they are, pleads his right of lien over them for an unpaid business account. Now, it is said that a portion of this account, amounting to £55, 16s., has already been paid, and a discharge granted, and if that be made out the lien must be restricted to such part of the account as remains unpaid; but this alleged payment and discharge is in a somewhat peculiar position, and I think the Sheriff and the Sheriff-Substitute have gone in rather a hasty manner into the question, which was of necessity of a delicate nature. The Sheriff-Substitute says —"The main point at the discussion was whether a law-agent's right of retention of his client's titles is extinguished when the payment of the account is not in cash but by bill. It is thought that when an absolute discharge is given, as in the present instance, without any reservation of the right to retain the titles, that right inevitably falls. It is not a question of waiver." Now, if what the Sheriff-Substitute assumes were clear as a matter of fact, no question could arise here at all. If the account is not actually due, but has been paid and discharged, there could be no question of lien for that account. The question is not what the Sheriff-Substitute says it is, but it is—Whether the payment which was made was of such a nature as to extinguish the account to the extent of £55, 16s., and whether for that payment there was an absolute discharge granted? Now, I am of opinion that this is not the state of the facts.

There was a business account due to Mr Lee in August 1878. Mr Hyman, his client, who was obviously labouring in difficulties, was not in a position to make immediate payment, but he gave Lee a bill at three months for the balance due on the account, although it is to be observed that the amount of the bill is not so much as what was due on the account, the bill being for £55, 16s., and the balance being £57, 10s. 5d. That bill at three months was a negotiable document, which Lee took to the bank and discounted. It enabled him to get money, and thereby to forbear pressing his client for immediate payment. At the same time Mr Lee granted this receipt—"*Edinbr.*, 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 question then comes to be, whether, according to authority and to the principles of law applicable to lien, that was a discharge of the lien because it was a discharge of the debt secured by the lien? Now, I think that the law on this point is extremely well stated by Mr Bell in his Commentaries at page 114 of the second volume (7th ed., p. 109), where he says—"(1) If the security be not inconsistent with the lien, the principle of novation may be applied (as where a bill or note payable on demand or one day after date is given for the debt), and the presumption then is for the preservation of the security. (2) If time be given, as by a bond or bill at a distant day, it will require some strong indication of an intention to preserve the lien in

order to keep it in force." Now, that depends on a very obvious principle, because where, as in one case which was referred to, the bills were for two years, it would be utterly unreasonable that the deeds should remain in the hands of the agent during all that period. But then Mr Bell goes on to state that the lien will be kept in force where there is "either an express reservation, or at least a plain purpose of accommodating the client without weakening the security, by enabling the agent to raise money at market, and to forbear from insisting on immediate payment." Now, these words seem to me exactly to suit the case before us. I think Mr Lee took this bill in order that he might raise money, and thus forbear from pressing his client for immediate payment, and that, as Mr Bell says, is not indicative of an intention to waive the right of lien. Further, Mr Bell proceeds—"(3) In a doubtful case, or where there seems ground to imply a waiver of the lien, if the papers have been allowed to remain with the agent until the client fail, the agent will still be held to preserve his lien"—a rule which is also plainly applicable to the present case. I am here satisfied that the agent had no intention to extinguish his right of lien, and that there was no absolute extinction of the debt. On the contrary, the extinction of the debt was conditional on the bill being honoured at maturity, or otherwise the debt was to subsist as if the bill had never been granted. I am therefore of opinion that the lien is good to the extent of £55, 16s.

The only other matter relates to the account, which is admittedly unpaid, but which the Sheriffs have held not to be covered by the lien to the extent to which the charges in it were intended to benefit the agent Mr Lee himself. But if it was intended to benefit Mr Lee by giving him a security, it does not appear to me that he is not entitled to charge his client with the expense of obtaining that security, and if he is entitled so to charge his client, is not that a good charge in the account? It is not sought to charge the petitioner, but if it is a good charge against Hyman it is covered by the lien.

These are the two points on which I think the Sheriff-Substitute and the Sheriff have gone wrong, and therefore I am of opinion that their judgments must be altered.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of Sheriff-Substitute dated 30th July 1879, and all the subsequent interlocutors: Find that the defender and appellant has a right of hypothec over the writs, title-deeds, and other writings mentioned in the prayer of the petition for business accounts amounting to the sum of £88, 2s. 3d.: Ordain the defender on receiving payment of that sum to deliver to the pursuers the said writs, title-deeds, and other writings, and also the bill or acceptance dated 4th August 1878, drawn by the defender upon and accepted by Robert Hyman for the sum of £55, 16s., endorsed by the defender without recourse, and decern." . . .

Counsel for Pursuer (Respondent)—Lorimer. Agents—H. & H. Tod, W.S.

Counsel for Defender (Appellant) — Rhind. Agent—J. B. W. Lee, S.S.C.

Friday, February 27.

FIRST DIVISION.

[Lord Adam, Bill Chamber.

UNION BANK OF SCOTLAND *v.* JAMES AND OTHERS (PIM'S TRUSTEES) AND MACADAM.

Bankrupt — Discharge — Gazette Notice — Where Bills granted in Payment of Liabilities and Dishonoured—Foreign—Partnership.

P. and M. were the partners of the Scotch firm of S. & Co., P. being also sole partner of the Irish firm of D. Brothers. S. & Co. got into difficulties, and at a meeting of creditors it was agreed that there should be a dissolution of the firm, on the footing that the acceptances of D. Brothers should be taken in payment of the debts of S. & Co., and that the business of the latter firm should be carried on under the superintendence of a committee of its creditors. Thereafter a notice was inserted in the *Gazette*, intimating that the firm of S. & Co. had been dissolved by mutual consent, and that the business would in future be carried on by P. alone under style of S. & Co. This notice was signed by P. and M. only, and the committee of shareholders continued, in terms of the agreement, to take an active part in the management of the business. Before the bills which P. had granted became due D. Brothers also went into liquidation, P. being rendered bankrupt in Ireland as "P., shipowner and timber-merchant, trading in Ireland under the style and firm of D. Brothers, and at Maryhill, Glasgow, in Scotland, as A. S. & Co., and sole partner in both firms." *Held* (1) that the Irish bankruptcy proceedings were no bar to the sequestration of the firm of S. & Co. in Scotland; and (2) that that firm had not been discharged of its liabilities by anything that the creditors had done.

Bankrupt — Sequestration — Notour Bankruptcy — Imprisonment — Flight from Diligence — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 7.

Sec. 7 of the Bankruptcy (Scotland) Act 1856 provides that notour bankruptcy shall be constituted by insolvency concurring "with a duly executed charge for payment, followed, where imprisonment is competent, by imprisonment or formal and regular apprehension of the debtor, or by his flight and absconding from diligence or retreat to the sanctuary, or forcible defending of his person against diligence, or where imprisonment is incompetent or impossible, by," &c. Where an insolvent debtor was duly charged, and was in flight from the diligence of his creditors, and subsequently obtained an