Wednesday, May 26.

SECOND DIVISION.

[Sheriff of Lanarkshire.

KING *v.* GAVAN.

Sheriff Court Act 1876 (39 *and* 40 *Vict. cap.* 70), *sec.* 20—*Decree by Default—Reponing.*

In an action in a Sheriff Court the Sheriff granted decree against the defender in terms of the conclusions of the petition in respect of no appearance by or for the defender at a diet appointed for hearing an appeal by the defender against an interlocutor allowing a proof. The Court, in respect that the default happened through a mistake of the defender's procurator as to the effect of his non-attendance at the debate, reponed him on payment of expenses since the date of the interlocutor allowing a proof.

In an action for delivery of certain articles raised in the Sheriff Court of Lanarkshire at the instance of Ann Gavan against Hugh King, the Sheriff-Principal (CLARK) appointed the 19th April 1880 for hearing parties' procurators on an appeal to him by the defender from an interlocutor of the Sheriff-Substitute (LEES) allowing a proof. On the 19th April no appearance was made for the defender to support his appeal.

The Sheriff Court Act of 1876 (39 and 40 Vict. c. 70) by section 20 enacts as follows:—"Where in any defended action one of the parties fails to appear by himself or his agent at a diet of proof, diet of debate, or other diet of cause, it shall be in the power of the Sheriff to proceed in his absence, and, unless a sufficient reason appear to the contrary, he shall, whether a motion to that effect is made or not, pronounce decree as libelled or of absolvitor, as the case may require, with expenses; or if all parties fail to appear, he shall, unless a sufficient reason appear to the contrary, dismiss the action."

The Sheriff pronounced this interlocutor—"*Glasgow, 19th April* 1880.—On the pursuer's craving, in respect of no appearance being made for the defender, although his agent was repeatedly sent for, Holds him as confessed: Recals the interlocutor appealed against, and decerns and ordains the defender to deliver as craved."

The defender appealed to the Court of Session.

It was explained for him at the bar that the procurator whom he had employed had failed to attend the diet before the Sheriff in the belief that the effect of such failure would merely be the dismissal of the appeal against the order for proof, in which it was no longer desired to insist. The Sheriff, however, had, instead of dismissing the appeal, decerned him to deliver the articles in dispute. The section might be binding on the Sheriff, but this Court would repone on cause shown.—*Anderson* v. *Garson*, 3 R. 254; *M'Gibbon* v. *Thomson*, July 14, 1877, 4 R. 1085.

The Court reponed the defender on payment of the expenses incurred since the interlocutor allowing a proof.

Counsel for Appellant — Brand. Agent — W. Officer, S.S.C.

Counsel for Respondent — Campbell Smith. Agent—John Gill, S.S.C.

Thursday, May 27.

SECOND DIVISION.

[Lord Young, Ordinary.

(Before Seven Judges.)

ROSE *v.* SPAVEN.

Fraud—Agent and Client—Reduction.

A was induced by his law-agent B to sign a bond for £1000 on heritable property belonging to him, allowing B to retain the money when it should be obtained from the lender and place it to A's credit in current account between them. B had for some time acted as agent for A, and had been in the custom of making disbursements on his behalf. B was at the time insolvent and had embezzled a large sum belonging to another client C. To conceal his defalcation by rendering valid a security he had delivered to C over a house already burdened to the full extent, B induced D, another client, to discharge a first bond for £1000 which he held over this house, undertaking to deliver to him a new security for his £1000. He then put on record and delivered to D the bond signed by A. Three months thereafter B became bankrupt and absconded. A, who had never received any value for the bond granted by him, thereupon raised a reduction of it. *Held* on a proof, by a majority of seven judges, that A having put B in a position to commit the fraud, must bear the loss, and bond accordingly sustained—*diss.* Lord President and Lord Justice-Clerk, who were of opinion that what B had done amounted to an attempt to benefit D at the expense of A, and that the bond should therefore be reduced.

Messrs Renton & Gray, S.S.C., carried on business as law-agents in Edinburgh for a considerable period prior to October 1878. In November 1877 Mrs Muir, a client of Renton & Gray, handed to Renton a sum of £1600 to be invested for her. Renton, whose private affairs and the affairs of whose firm of Renton & Gray were at the time deeply involved, embezzled this money, paying it into his private account with the Commercial Bank, which was largely overdrawn. Being pressed by Mrs Muir to deliver to her the security which he had undertaken to procure for her, he handed to her a bond for £1250 dated 19th February 1878, granted by Robert Ferguson glass merchant, Edinburgh, over the villa 8 Granville Terrace, Merchiston, Edinburgh, belonging to him. That property was at the time bonded to the full extent and the bond for £1250 was therefore worthless as a security. It was obtained by Renton under the following circumstances—In December 1875 Mr Spaven, a client of Renton's, had lent to Mr Ferguson, also a client of Renton's, over the house 8 Granville Terrace a sum of £1000. Subsequently Mr Ferguson borrowed on that house, and the house west to it also belonging to him, but not from Spaven, a sum of £500. These bonds remained on the property till February 1878, when Renton informed Ferguson that Mr Spaven was desirous of calling up this

bond for £1000, and induced him to grant a bond for £1250 in favour of Mrs Muir, representing that he could pay off the £1000 together with £250 of the £500 bond. This representation made by Renton was false, Mr Spaven having, as hereafter explained, no intention at that time of calling up the bond. It was this bond for £1250 that, Renton, as above narrated, delivered on the 12th of the same month to Mrs Muir.

In January of the same year (1878), Rose, an accountant in Edinburgh, who was also a client of Messrs Renton & Gray, and with whom they had had large cash transactions, had begun the erection of buildings in Claremont Place Edinburgh. In June he obtained a loan over these buildings through Renton, for the purpose of paying the contractors who were engaged upon them. On 29th July 1878 he called upon Renton as his agent, and was shown by him two bonds ready for signature over the same property. One of these bonds was for £650, and was in favour of James Lindsay, W.S. The other was for £1000 and was in favour of Agnes and Robert Spaven. Previous to that occasion there had been no mention of raising any further loan on the buildings than that which had been contracted on the preceding June. Mr Rose, in the course of the proof in the present action, gave this account of what passed at the signing of these bonds —"When Renton told me to sign I looked over the bonds to see what the amounts were, and over what property they extended, and I made the remark after I saw the amount that I did not require all the money, especially in the meantime. I also said—Besides there is not sufficient value on the ground to carry the amount of the bonds. Renton said—Oh, they will take care. They know all about that; the money will not be received in the meantime. I then signed both bonds." In the month of June previous to this interview between Rose and Renton the latter had called upon and informed him that Mr Ferguson was desirous to pay off the bond on Granville Terrace, but that he had another investment for him in Claremont Place. Renton took Mr Spaven to see the houses in Claremont Place which were being built for Rose, and proposed that he should transfer his loan from Granville Terrace to those houses. To this the Spavens agreed, and on 2d July 1878 handed to Renton a discharge of the bond by Ferguson for £1000, and received from Renton of the same date an acknowledgment of the receipt of the discharge. In the letter acknowledging receipt, which was signed by Renton with the signature of the firm, Renton stated that the sum was to be reinvested in new bonds for £1000 by R. M. Rose in favour of Miss Spaven over subjects in Claremont Place, and which bonds as soon as recorded were to be delivered to him. Renton also in the same letter guaranteed the sufficiency of the new security in every respect. (This letter is given at length in the opinion of Lord Deas.) Renton thereupon had the bond by Rose in favour of the Spavens above referred to written out and signed by Rose. Rose explained in a passage of his evidence, which will be found quoted in the opinions of Lords Ormidale and Gifford, that he intended Renton to retain for him the money when it was paid by Spaven, and it appeared from the evidence that Renton was in the habit of making disbursements to building contractors on behalf of Rose. On 12th August 1878 Renton filled up the testing clause of this bond as though it had been signed on that date, and on 16th August he put a warrant of registration on it in favour of Miss Agnes Spaven and Robert Spaven and the survivor of them, and on 26th August, immediately on receiving it back from the record, he delivered it to the Spavens as their writ.

On 2d October 1878 the City of Glasgow Bank, in which both Renton and his partner Gray held shares, closed its doors, and the insolvency of Renton and of his firm became irretrievable. In the beginning of November the firm granted a trust-deed for creditors. On 8th November Renton absconded. On 14th November the estates of the firm were sequestrated. On 11th November Rose paid to the Spavens a sum of £12, 4s. 2d. as interest on the bond. He had never received from Renton the sum of £1000 contained in the bond, and had been unable to obtain from Renton any statement of the state of accounts between them, notwithstanding frequent attempts to obtain a settlement.

After the departure of Renton Rose applied to Spaven to have the bond taken off the record and re-delivered to him, and on this being refused he raised the present action concluding for reduction of the bond and disposition for £1000, and for repetition of the interest which he had paid thereon, alleging that he had received no value for the bond, that he had left it with Renton for the sole purpose of being delivered to the defenders in exchange for the money, and that his putting it on record and thereafter delivering it to the defenders without their paying any consideration to the pursuer was unauthorised by him, and was a fraud on the part of Renton.

He pleaded, *inter alia*—"(1) The said bond and disposition in security having been fraudulently impetrated from the pursuer, without his receiving the sum for which it bears to be granted, or other good and onerous causes, is invalid and ought to be reduced.

Spaven defended the action.

The Lord Ordinary after a proof, during which the facts as above explained were disclosed, repelled the reasons of reduction and assoilzied the defenders, adding this note:—

"I think this case is distinguishable from that of *Anderson and Robertson*,* and I do not see any similarity between it and the case of *Traill*. There is some resemblance to the case of *Anderson and Robertson*, but none to the case of *Traill*. The way in which the case strikes my mind is this —Rose, the pursuer of the action, and also Mr Ferguson, were clients of Renton & Gray. I suppose the intercourse which they had was chiefly with Mr Renton, although he was acting for the firm. Both Mr Rose and Mr Ferguson were engaged in building speculations; and I suppose Renton was engaged in similar speculations. Both parties, the agents and these two clients, were in need of money accommodation, for they were all speculators without capital; and Mr Rose, and Mr Ferguson also, enabled Mr Renton to raise money for them and himself, not only upon their personal security, but also upon the security of their properties. They granted him or his firm accommodation bills, enabling him to raise money on their credit, and it is quite certain that Mr Rose was in the way of granting securities over his property, and handing these to

* This case is not reported.

Mr Renton to make use of to obtain money, not to be immediately handed over to himself, but to keep in his own hands, taking the benefit of it in the meantime, but applying it, according to my understanding, for his (Rose's) behoof by paying the contractor for the buildings from time to time as payments were required. Rose, I must say, told us his case with perfect candour. I quite believe all he said with respect to the two bonds for the £650 and the £1000—the latter being that which is under reduction in the present action; that Mr Renton asked him to sign these, and had them ready for his signature, there being no previous arrangement between him and his agent on the subject at all; that he remonstrated, and said he had no use for so much money, and that, besides, the property would not carry it. Renton, however, said—'Oh, that is all understood, and the money wont be received just at present.' And thereupon Rose signed the bonds, thereby putting Renton in a position to obtain money on the security of the property when he saw fit—in short, when it suited his own convenience.

"Now, it is always a material consideration, sometimes a conclusive one, in the question which of two innocent parties shall suffer from the fraud of a third, which of them put the third party in a position to commit the fraud. I think this mode of dealing, no doubt in the belief that Renton was an honest man and not likely to commit a fraud, was very much calculated to enable him to commit it if so minded. And certainly he was so minded, as the result proved.

"I must take the case, therefore, that he had come in these exceptional circumstances, and in this exceptional manner, to get Mr Rose's authority to receive the £1000 upon the security of his property, not to be instantly handed over to him, but to keep in his hand to be paid out, according to Rose's necessities. He had, in short, authority as Rose's agent to borrow and receive the money on Rose's account.

"Now, Mr Spaven had £1000 invested on the security of Mr Ferguson's house upon a bond, dated in December 1875; and he being a client of Renton, at Renton's request (I am speaking in the singular but I mean both defenders) authorised Renton, his agent, to uplift the £1000 which Ferguson had of his, undertaking to grant a discharge of the bond therefor on presentation; and he also, at Renton's request, authorised him to lend that money which he had thus authority to uplift to the pursuer Rose upon the security of his property. So that Renton was in this position—he had Rose's authority to borrow and receive as his agent and on his account £1000, handing over therefor to the lender the security over Rose's property which Rose had executed. On the other hand, he had Spaven's authority to uplift Spaven's £1000 in Ferguson's hands, and to lend it to Rose on the security of the property over which the bond executed was in Renton's hand. And the transaction was completed on that footing and precisely in accordance with that authority on both sides, with this only difference, that the money did not pass. That arose in this way—It did not suit Renton's convenience with reference to prior proceedings to ask Ferguson to pay the £1000 which he had of Spaven's. It suited him better to induce Ferguson to take a discharge of Spaven's bond, not upon paying a thousand pounds, but upon granting a new bond of £1250; and upon that bond for £1250 being granted Spaven's bond was discharged, and Renton had the £1250 represented by the new bond. It was the money he had got from Mrs Muir, and in her favour accordingly the bond was executed.

"Now, I am of opinion that Renton having Rose's authority to borrow and receive the money, and having Spaven's authority to lend the money, and having induced Spaven to discharge the bond which Ferguson had granted in Spaven's favour, and to uplift the money therein contained, I must give effect to the transaction as it appears upon the face of the deeds, notwithstanding it appears that Renton kept the money in his own hands, which indeed he appears to have done from the time he received it from Mrs Muir.

"There are equities on both sides, but they appear to me to be equally balanced. I think any equity Mr Rose has to be relieved of the bond, he never having received the money, is not superior to that in favour of Mr Spaven, that he shall be allowed to keep the bond, in respect that he authorised the money in Ferguson's hands to be uplifted, and discharged Ferguson's bond which he held therefor.

"Upon the whole matter, I cannot, in the circumstances of this case, in accordance with my view of the law, grant relief by the reduction which is sought by the present action; and I shall therefore repel the reasons of reduction and assoilzie the defenders from the conclusions of the action, and of course with expenses."

Authorities—*Pochin & Co.* v. *Robinow & Marjoribanks*, 11th March 1869, 7 Macph. 622; *Vickers* v. *Hertz*, 20th March 1871, 9 Macph. (H.L.) 65; *Traill* v. *Smith's Trustee*, 2d June 1876, 3 R. 770; *Clydesdale Bank* v. *Paul*, 8th March 1877, 4 R. 626; *Gibbs* v. *British Linen Company* (Outer House), 4 R. 630; *Brown* v. *Marr*, 10th Jan. 1880, 17 Scot. Law Rep. 277; *Young* v. *Grote*, 18th June 1827, 4 Bingham 253; *Bank of Ireland* v. *Ewan's Charities*, 2d July 1855, 5 Clerk's H.L. Cases 389; *Freeman* v. *Cooke*, 11th July 1848, 18 L.J. Ex. 114; *Scholefield* v. *Templer*, 9th March 1859, 28 L.J. Ch. 452; 4 De Gex & Jones 429; *Eyre* v. *Burmester*, 20th May 1862, 10 Clerk's H.L. Cases, 90; *Id* v. *Eundem*, 25th June 1864, 33 L.J., Ch. 652; *Swan* v. *North British Australasian Company*, 15th May 1863, 32 L.J., Ex. 273; *Barwick* v. *English Joint-Stock Bank*, 18th May 1867, L.R., 2 Ex. 259; *Badcock* v. *Lawson*, L.R., 4 Q.B.D. 394.

The Second Division ordered the case to be argued before Seven Judges.

At advising—

Lord Justice-Clerk—The facts of this case, in as far as they are material, are indisputable, and I shall assume them without going into the proof. The present action is brought by the pursuer Rose for the purpose of setting aside a bond and disposition in security in favour of the defender Mr Spaven, bearing to be executed on the 12th August 1878, and recorded on the 16th of August of that year, and to be granted in consideration of £1000 advanced to him by the defender. It had in point of fact been signed on the 29th of July. Mr Renton, of the firm of Renton & Gray,

acted in this matter as agent for both borrower and lender. He had for some time been Rose's agent in some building speculations, and the pursuer says—I do not doubt truly—and there is no evidence to the contrary—that the bond was presented to him already extended, and that although he had not before heard of the intended advance, or in any way authorised the previous negotiations, he executed it on the assurance of Renton that the money was required for the works then in progress.

Rose now brings the present action to reduce this conveyance in security on the ground that he received no consideration for it, and that in taking delivery of it and putting it on record, Renton, acting as Spaven's agent, perpetrated a deliberate fraud. That fraud consisted in this, that Renton was not only aware that no benefit or advantage had been given to Rose by Spaven as the counterpart of the security, but that it was the object, intention, and effect of the transaction to reimburse Spaven at the expense of Rose for the loss of a sum of £1000 of which Renton had previously defrauded him, in a matter with which Rose was in no way concerned. It is not said that Spaven was cognisant of this fraud, or responsible for it, excepting in so far as he now tries to take benefit by it.

In reply it is admitted by Spaven that neither at the date of the bond nor thereafter was any present payment made by Spaven either to Rose or to anyone on his account. But it is said that about fourteen days before this conveyance was granted, Renton had been authorised by Spaven to receive a sum of £1000, which Spaven had lent to a person of the name of Ferguson, and for which he held a security over Ferguson's property; that he was told by Renton that this loan was to be paid up; and that he accordingly on the 12th of July 1878 had executed a discharge of the debt and security, and had delivered it to Renton to be exchanged for the money. He contends that Renton was thus put in funds to make the advance to Rose, and that if as Rose's agent he failed to do so, the loss must fall on the latter.

If Spaven, as part of this contract, had paid a sum of £1000 to Renton in exchange for the bond, his obligation might probably be held to be fulfilled, although Renton failed to account for the money. It is not so clear that a debt, arising out of a prior transaction, due to the lender by his own agent, could be held to be instant value given for the bond. That would depend on the value of the agent's obligation, or on some undertaking by the borrower to accept the agent's liability as sufficient. It now turns out that at this time Renton was hopelessly insolvent—that he was then £40,000 behind the world, without reckoning his liabilities as a shareholder of the City of Glasgow Bank, and he fled the country within three months after this. His obligation at this time was of no value.

The case, however, does not, in my opinion, turn on this question. I have come to be of opinion that this security cannot stand, not only because no value was truly given for it, but because Renton never intended that any value should be given for it, or rather intended that none should be given. It was part of a device to deprive Rose of his property for the benefit of Spaven, to the success of which it was essential that Rose should receive no consideration. A very short summary of the real facts will put this beyond doubt.

At Martinmas 1877 a Mrs Muir entrusted Renton with a sum of £1600 to be invested. Renton did not invest it, but used it for his own purposes, and was never able to replace it, and out of this defalcation arose a series of devices, now at the expense of one client, and now at that of another, to prevent detection.

In the spring of 1878 Mrs Muir pressed for her security. Renton not having the money, had recourse to Ferguson, also a client, and told him that Spaven was to call up his bond, but that he would find another lender. He then went to Spaven, and told him that Ferguson meant to pay up his loan, but that Rose would take the money and give him a security. Rose had not authorised this statement, and knew nothing of it. On this Spaven executed a discharge of Ferguson's bond, and delivered it to Renton; and Ferguson had previously granted a conveyance to Mrs Muir for £1250 of the property over which the discharged bond had extended in security of a supposed advance. Of course Renton advanced no money on Mrs Muir's account, because he had none to advance. It had been all spent before. As little did Ferguson pay up any sum to Renton. He only retained what he had, and transferred the security which Spaven had held to Mrs Muir. The result was that Mrs Muir, who had lost her money, got a security for it without consideration; that Ferguson got a discharge of his debt without paying anything to Spaven; and that Spaven discharged his bond without getting a farthing in exchange. The outcome of all was that on the 12th of July, when Spaven executed his discharge to Ferguson, he had lost £1000. Renton could not pay him, and no one else was bound to him.

In these circumstances, Renton, knowing that Spaven would not long rest content without his money or his security, had to discover some means to keep him from moving. He had not £1000 to give him, and of course had it not to invest. The next step was one entirely for Spaven's behoof, and had for its object to replace the security which Spaven had discharged without requiring Spaven to advance any money. So Renton resorted to his client Rose. He probably thought that Rose's financial affairs were so completely in his hands, that although the day of reckoning was sure to come, it might with him be indefinitely postponed. So he paid off Spaven by getting the security from Rose, and Spaven saved his money by the success of this deliberate and very infamous fraud.

An advantage thus obtained cannot be supported. The man who procured it was Spaven's own agent, who devised this last transaction solely for the benefit of Spaven, and through Spaven for the protection of himself, in the perfect knowledge that Rose would soon receive the money. The fraud was completed by Renton taking delivery of and recording the bond in the character of Spaven's agent, as is sufficiently shown by Spaven having adopted his act and claiming benefit by it. But as the agent committed a fraud by so doing the principal cannot retain the benefit.

Such, in my view, is the whole of this case, nor are there any specialties involved in it worthy of

notice. It is thus seen that there is no room here for the application of some general equities to which courts of law have on occasion been obliged to resort when called on to decide between two innocent persons both the victims of the fraud of a third party. But these are cases in which neither has taken benefit by the fraud, and in which one or other has lost by it. There is no such difficulty here. Spaven could have lost nothing by this fraud. It is a source of pure gain to him. If it were set aside he would be deprived of what he gained by the fraud, and Rose would recover what he lost by it, and that is all. Spaven will be left as he was on the morning of the 29th of July 1878, before the fraud was committed—neither better nor worse—and this of course is the only honest result.

This is all I think it necessary to say on the legal aspect of the case. If both parties stand clear of the wrongdoing, it may be important to ascertain to which of them the wrong is mainly to be imputed; but if the agent of one, for the benefit and to the advantage of his principal, cheats the other, it is in vain for the latter, retaining the advantage thus obtained, to say that his agent was enabled to commit the fraud through the remissness or simplicity of his victim. There is no foundation for such a plea in the facts of this case, for Mr Rose only acted in the ordinary course of dealing when he left the bond with his agent to be exchanged for the money; but as long as Spaven retains the fruits of his agent's fraud it is a plea quite inadmissible as a defence.

I shall not go over the authorities, but simply refer to two cases recently decided in this Division, which bring out in strong relief the distinction to which I have referred. One is the case of *Marr* v. *Brown*, in which certain jewellery had been delivered on approbation, but which the recipient had pawned with pawnbrokers. In that case neither the jewellers nor the pawnbrokers claimed anything for which they had not given value; but we held, among other grounds of judgment, that the jewellers having vested the wrongdoer with the symbol of property, namely, possession, had participated in the fraud, and must stand the loss. The other case was one almost exactly the counterpart of the present. It is that of *Traill* v. *Smith*. There Traill had borrowed £2000 from Ballantyne's trustees, and bound himself to grant a security over his property. Before the security was granted, Scarth & Scott, who acted for all the parties, stated to Traill that the debt had been transferred to Smith's trustees, and sent a bond in their favour for signature, which Traill executed accordingly. All this was a fraud. The debt had not been transferred, but Smith's trustees had given £2000 to Scarth & Scott to invest many months before. Of Traill's remissness there could be no doubt, but we would not permit Smith's trustees to take benefit by their agents' fraud.

Of course I assume in all that I have said that the separate and completed fraud by which Spaven granted the discharge of Ferguson's bond was transacted and finished without the knowledge or participation of Rose before the latter ever heard of the proposed loan. The proof makes it clear that it was so, and although Renton in his letter of the 2d of July tells Spaven that the sum of £1000 is to be re-invested over property belonging to Rose, this was only the bait held out to Spaven to induce him to sign the discharge; it was part of the fraud, and was entirely unauthorised by Rose. Renton, however, for obvious reasons, did not approach Rose on the subject until more than a fortnight had elapsed after the final execution of the discharge.

These are my views in this case. The payment of the interest at Martinmas, before the facts were fully disclosed, is in the circumstances immaterial, and cannot justify the defender in retaining payment of a hopeless debt out of the property of a man who owed him nothing, and to whom he gave nothing in exchange.

Lord Deas—This is one of those hard cases in which the loss resulting from the fraud of a guilty party must be borne by one or other of two third parties who were not participants in the fraud. The two third parties in that position here are admittedly Rose on the one hand and Mr and Miss Spaven on the other.

The action is brought by Rose, an accountant by profession, but actively engaged at the same time in building speculations, to reduce a bond and disposition in security for £1000, dated 12th August 1878, granted by him over subjects belonging to him in Claremont Street, Edinburgh, in favour of Mr and Miss Spaven. The ground of reduction is the fraudulent conduct of James Renton, a solicitor in Edinburgh, who absconded in a state of hopeless bankruptcy in November 1878, and for whose fraud it is sought by Rose to make Mr and Miss Spaven responsible, on the allegation that in obtaining the bond Renton was acting as their agent. Renton was a partner of the firm of Renton & Gray, solicitors in Edinburgh, but it will be convenient to drop Mr Gray's name altogether out of the case, as it is admitted he had nothing personally to do with the transactions out of which the case has originated, or with Renton's fraud in regard to these transactions. Any question of legal liability which may attach to Gray or to the company estate is not involved in this action.

The bond bears to have been granted in consideration of a present advance of £1000, but it is admitted that no money was so advanced. The consideration given for the bond by Mr and Miss Spaven was a discharge by them of a different bond for £1000 which they held over a property in Granville Terrace belonging to a Mr Ferguson, in obtaining which discharge Renton was interested in the way I shall immediately explain.

It is important, however, here to observe that the transaction of 12th August 1878, when the bond sought to be reduced was executed, cannot be regarded as an isolated transaction. To understand the part which Renton played in that transaction, and particularly whether he had in view the benefit of Mr and Miss Spaven at the expense of Rose, it is necessary to begin with the fraud he originally committed, the concealment of which and the desire to avert its consequences from himself (and not the benefit either of Rose or of Mr and Miss Spaven) will be found to have been the object of all his subsequent fraudulent conduct, which otherwise would have appeared to be aimless and unintelligible.

Renton's original fraud, with which the history of this case begins, was a fraud on a client of his

named Mrs Muir, from whom he received £1600 in November 1877, to be invested in her name on bonds of a specific amount and at specified rates of interest, which bonds he bound himself to deliver to her by letter under the signature of his firm dated the 15th of that month, but no part of which sums he ever did so invest, but, on the contrary, appropriated the whole to his own purposes. That of course was by law a criminal act, for which Renton might have been tried and punished. An instance of the enforcement of that law occurred at the last Glasgow Autumn Circuit, where a law-agent was tried for and convicted of a precisely similar offence, and received sentence accordingly. Renton no doubt knew the law on this subject, and it appears obvious enough (whatever may be the legal result of the fact) that the object with which he fraudulently obtained the various deeds of 1878, in so far as they brought him no money, was not the advantage or disadvantage of the parties whose names he used in these deeds, but simply in the first instance to stave off exposure of the fraud he had committed on Mrs Muir, and ultimately to bring the transaction into such a position as hardly to admit any longer of a criminal prosecution, as no pecuniary loss to Mrs Muir resulted from it. In effecting this object Renton had practically succeeded before he absconded on 8th November 1878.

Acting upon this policy, the first thing Renton did when pressed by Mrs Muir in February 1878 for evidence that her money had been invested, was to procure from James Ferguson, merchant in Edinburgh, a bond in her favour for £1250 over subjects belonging to Ferguson in Granville Terrace. For this bond Ferguson received no consideration, and it was well known to Renton to be worthless, as the subjects were previously burdened to their full value. The exhibition of this bond to Mrs Muir's friends would, no doubt, serve the temporary purpose of allaying her suspicions, but in order to secure Renton's ultimate immunity from criminal prosecution it was necessary that he should go further and get the preferable securities over Ferguson's property in Granville Terrace so far discharged as to leave a margin available for his £1250 bond to Mrs Muir.

For this purpose accordingly Renton devised the plan of getting Mr and Miss Spaven to discharge their £1000 bond over Ferguson's property in Granville Terrace, and to accept in place thereof the bond by Rose now under challenge over his subjects in Claremont Street.

I by no means say, however, that Renton's motive in what he did can he held to be conclusive one way or other on the question of liability. But a fact of vital importance affecting that question is this—that although the Spavens signed the discharge of their bond for £1000 over Ferguson's subjects on 2d July 1878, and Rose's bond for a corresponding amount was not delivered to them till September of that year, the signing of the discharge and the delivery of the bond were not separate transactions, but parts of the same transaction, reduced to writing at the time by the obligatory letter of 2d July 1878 granted by Renton under the signature of his firm of Renton & Gray, and delivered to Spaven of the date it bears. The letter is in the following terms:—"Dear Sir—You have now handed to us discharge of Mr James Ferguson's bond to you for £1000, and discharge of John Glasgow's bond to you for £500—These sums to be re-invested in new bonds for £1000 by R. M. Rose in favour of Miss Spaven over subjects in Claremont Place, and for £500 by Messrs Kerr, Miller, & Ferguson over subjects in Blantyre Terrace, and which bond as soon as recorded we will deliver to you. We hereby guarantee the sufficiency of the new securities in every respect. RENTON & GRAY."

If that letter can be held to have been granted by Renton in the capacity of agent for Rose, it is, I apprehend, conclusive of the case.

Now, it appears to me that that letter must be held to have been granted by Renton in the capacity of Rose's agent, and that as in a question between Rose and Spaven the facts were sufficient to entitle the Spavens to hold that Renton was acting by Rose's authority.

What might have been the consequence if Renton's letter had not been acted upon and implemented by Rose it is needless to inquire, because the letter undoubtedly was acted on and implemented in its terms by Rose executing the bond under reduction on 12th August 1878, and placing it so executed in the hands of Renton as his agent, in which capacity Renton must be presumed to have had authority to deliver it to Spaven, in terms of the express obligation in the letter so to deliver it as soon as recorded. Accordingly it was ultimately delivered to Miss Spaven, who would no doubt have had it registered if she had not found it registered to her hand.

It was natural and legitimate for the Spavens to conclude from Rose's bond being delivered to them that Rose had received and was satisfied with the stipulated discharge of Ferguson's bond as the counterpart for that delivery, and which would enable Rose to uplift and appropriate the contents of Ferguson's bond as an equivalent for the sum in his own bond. If Rose allowed his bond to be delivered to the Spavens without satisfying himself how the transaction had been arranged by his own agent Renton, it appears to me that the maxim *sibi imputet* is clearly applicable.

Nor is what Rose admits to have taken place between him and Renton on the occasion of his signing the bond without great significance with reference to a view expressed by the Lord Ordinary, that "it is always a material consideration, sometimes a conclusive one, in the question which of two innocent parties shall suffer from the fraud of a third, which of them put the third party in a position to commit the fraud." Rose says in his evidence that when he called on Renton on the 29th July 1878 "Renton had two bonds lying on his desk extended, which he asked me to sign, and which he proposed should be granted over the property in the course of erection—one for £650 in favour of James Lindsay, W.S., and one for £1000 in favour of Agnes and Robert Spaven. Previous to that time he had not even mentioned the matter of granting a bond in favour of the Spavens, and even then he did not mention the name of Spaven, but put down the bonds and asked me to sign." "When Renton told me to sign, I looked over the bonds to see what the amounts were, and over what property they extended, and I made the remark, after I saw the amount, that I did not require all the money, especially in the meantime. I also said—Besides, there is not sufficient value on the ground

to carry the amount of the bonds. Renton said—Oh! they will take care; they know all about that; the money will not be received in the meantime. I then signed both bonds."

I agree with the Lord Ordinary that this mode of dealing, although not so intended by Rose, was very much calculated to enable Renton to commit a fraud if so minded. Nothing indeed could have more distinctly indicated to Renton that he had in Rose an easy victim to deal with: and consequently he proceeded to carry out that purpose with the greatest possible boldness and deliberation.

Another fact of importance is that Renton was at this time, and had been from the beginning of 1876, Rose's agent in all his pecuniary and business transactions. He himself says in his evidence—"Renton & Gray acted as my agents from about the beginning of 1876." He further says—"My money transactions with Renton in connection with the Claremont Place property began in the spring of 1878, but before that I granted him three or four accommodation bills which were current. The first, which was for £95, I think was granted on 2d August 1877."

As to the consideration given for the £1000 bond under challenge, Rose does not dispute that, whether the money was to be got direct from Spaven or by using Spaven's discharge of Ferguson's bond, Renton had his authority to get possession of that money, and to retain and use it for Rose's building purposes, trusting to the sole credit of Renton; the result of which seems necessarily to be that whatever should be so got by Renton might become, as it has done, a dead loss to Rose.

While such was the position of money dealings and agency between Renton and Rose, it does not appear that Renton had ever previously acted as Spaven's agent at all, or that there had been any money transactions of any kind whatever between them. Nor do I discover that, even to the end, apart from the question for whom Renton is to be held to have acted in preparing the bond under reduction, Renton can be said to have acted in anything as agent for the Spavens, unless it be in preparing the discharge of Ferguson's bond, and that not because of any actual employment by the Spavens to prepare that discharge, but technically merely from its being the right of the creditor's agent to prepare the deed and to be paid for it by the debtor. I cannot regard the recording of Rose's bond by Renton as of any moment in this question of agency, because that was a mere ultroneous act by Renton to carry out his own personal object of getting out of the meshes of the criminal law, which was obviously, as I have said, at the bottom of all Renton's otherwise inexplicable acts subsequent to his fraud upon Mrs Muir, as is substantially admitted by Rose in his condescendence, where he says that Renton's "whole purpose in procuring the pursuer's signature to the said bond was fraudulent, his purpose being to cover his own act of embezzlement." No doubt it is added—"and shift on to the pursuer the loss which the defenders had already sustained through their having granted the foresaid discharge of the said bond and disposition in security in their favour without any consideration having been paid in exchange therefor." But of this additional motive or object on the part of Renton I see no evidence whatever. I do not think Renton cared upon whom the loss should fall if he himself escaped criminal prosecution, which was of course a vital object so long as he retained the hope, like a true speculator, that the tide would turn, which the failure of the City of Glasgow Bank on 2d October converted into the alternative of either absconding or remaining to face a disgraceful bankruptcy, if not something worse.

Every question such as we have now to decide must necessarily be, to a great extent, a question of circumstances. Adding together the various elements of judgment I have pointed out, I do not find any sufficient grounds for changing the *status quo* and shifting the loss from the pursuer to the defenders. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Ormidale—The question to be determined in this case is, whether the bond and disposition in security for £1000 by the pursuer in favour of the defenders, and now held by them, is to be cut down on the ground that it was obtained without consideration through the fraud of James Renton?

In considering this question I shall assume that the pursuer did not authorise or employ Renton to commit a fraud, it being enough that the fraud was committed while Renton was acting as the pursuer's agent, or in his employment, and was within the scope of that agency or employment.

So far I did not understand there was any dispute between the parties in point of law. But it was contended on the part of the pursuer—1st, that no consideration was received by him, and that none was given by the defenders, for the bond; 2d, that the fraud was not committed by Renton when he was acting as agent for and in the employment of the pursuer, but when he was acting as the agent for and in the employment of the defenders; and 3dly, that the defenders cannot be allowed to benefit by the fraud of Renton, even supposing that in committing it he was acting as the agent and in the employment of the pursuer.

(1) If the first of these contentions had been true in point of fact—if, in other words, the pursuer had shown that neither the £1000 nor any other consideration had been received by him or given by the defenders for the bond in question—the controversy would fall to be decided in his favour. But it must be borne in mind that the bond, which is dated 12th August 1878, and to the regularity of which in point of form no objection has been suggested, expressly bears that the pursuers had borrowed and received from the defenders the sum of £1000. The *onus*, therefore, of showing clearly and irrevocably that this is a false statement undoubtedly lies upon the pursuer, and until he relieves himself of that *onus* he can have no case. Now, in the first place, the proof appears to me to establish that although no money passed at the time when the bond was executed and left by the pursuer in the hands of Renton, money or money's worth was received for the bond by him, or by Renton as his agent and in his knowledge, without objection on his part. When examined as a witness for himself he states, not only that Renton told him in October that he had received the amount of the bond, but that Mr Macmillan, the defenders'

agent, told him the same thing. Accordingly, when asked—"At that time were you under the belief that Renton had received the full amount of the bond?" he answers—"After what Macmillan had said to me, and after what Renton said at the top of the stair, I was in the belief that money had been got for the bond, and on that footing I paid the interest;" and the receipt which he obtained for that payment has been recovered. It seems to be true, however, that the pursuer had not personally received payment from the defenders of the £1000, but the reason of this is satisfactorily explained by the pursuer himself in the course of his evidence. He says at the outset of his examination that "Renton & Gray acted as my agents from about the beginning of 1876." And when asked—"What did you expect to be done with the £1000 contained in the bond which is the subject of this action if they got the money?" he answers—"They were to retain it and pay the contractor,"—that is, the contractor for erecting some buildings on the pursuer's account. That the £1000 was therefore in point of fact received, if not by the pursuer personally, by his agents Renton & Gray, is clear enough on the pursuer's evidence. And indeed this appears to me to be also the import and effect of the pursuer's statements in the record, and especially his statements in his condescendence, where he says that the bond on being signed by him was left by him in Renton's hands in order that he might receive the money from the lenders and apply it as aforesaid on his behalf in completing the said tenement.

But then it was argued, that supposing it to be so, the defenders' case is incomplete unless he can further show that he had paid the money or its equivalent to Renton as acting for the pursuer, in reliance on the bond which the pursuer had executed and left in the hands of Renton. The point here attempted to be made by the pursuer arises out of what is said in his condescendence, and in the defenders' statement of facts, to the effect that Renton in place of getting £1000 in cash from the defenders, merely obtained from them a discharge of the bond for a similar amount held by them over property of a person of the name of Ferguson, and which enabled Renton to get from that person the money which ought to have been paid to the pursuer in return for his bond. That this was so, and that the defenders were led to believe, and acted in the belief, that the £1000 belonging to them uplifted from Ferguson was to be re-invested on a new bond by the pursuer, and over property belonging to him, is made quite clear by the letter or receipt which the defenders, or rather their father as acting for them, took from Renton & Gray on 2d July 1878, to the effect that he had of that date handed to them a discharge of Ferguson's bond for £1000, and of another bond for £500, "to be re-invested in new bonds by R. M. Rose (the pursuer) in favour of Miss Spaven over subjects in Claremont Place, and for £500 by Messrs Kerr, Miller, & Ferguson over subjects, 6 Blantyre Terrace, and which bond as soon as recorded we will deliver to you." Accordingly Renton & Gray did, in accordance with their undertaking as expressed in this letter or receipt, obtain from the pursuer the bond and disposition in security now in question, and caused it to be recorded on 16th August 1878. Whether and how far Renton & Gray acted in the transaction as agents of the pursuer or of the defenders is a matter which I shall afterwards speak to, but at present I have to remark that from what I have already stated there can be no question or doubt that the defenders did advance and pay £1000 for the bond in question. That the money never reached the pursuer is quite a different thing, which, as well as the question how far that can help the pursuer in the present controversy with the defenders, will be afterwards adverted to.

(2) Having now shown that full consideration was in point of fact given by the defenders for the bond in question, the next inquiry is, whether supposing the pursuer did not receive the £1000, this was caused by the misconduct or fraud of Renton acting as agent for him and in his employment, or acting as agent for and in the employment of the defenders. This is a most important—as it appears to me in some aspects of it the nicest and most difficult—question in the case. That a fraud was committed by Renton upon the pursuer in order to protect himself from the consequences of a previous fraud upon a Mrs Muir cannot be and was not disputed. With the previous fraud, however, upon Mrs Muir, it does not appear to me that we are much concerned in the present case. The important question here is, whether the pursuer delivered the bond to or left it in the hands of Renton as his own agent or as the agent of the defenders? for if it had not been delivered or left, the mischief which followed—that is to say, the loss which is the foundation of this action against the defenders, and without which the action would never have been brought—would not have been sustained by the pursuer. Now, it appears to me that there is quite enough in the pursuer's own statements on record and in his testimony as a witness to enable the Court to dispose of this question. Take the defender's own statements in his condescendence, where he expressly says in reference to the bond in question, and another with which it is important to observe the defenders had nothing to do, that after they were signed they were left by him in "Renton's hands in order that he might receive the money from the lenders and apply it as aforesaid on his behalf in the completion of the said tenement." I cannot read this statement, and I do not think it can be read, as anything else than not only an admission but a positive averment to the effect that the bond was delivered to and left by the pursuer in the hands of Renton as his agent and acting for him. To hold that the statement means that the bond in question, and the other bond with which the defenders had nothing to do, were delivered to and left by the pursuer in the hands of Renton as agent for the defenders, appears to me to be preposterous and absurd, for the simple and obvious reason that according to the express terms of the statement the bonds were delivered to and left in the hands of Renton "in order that he might receive the money from the lenders"—that is, the defenders—and apply it for his (the pursuer's) behoof in his building speculation. To suppose that the pursuer would have left the bond in question in the hands of Renton as the defenders' agent to receive the money from them and apply it for his behoof is much the same thing as supposing that he delivered it to and left it in the hands of the defenders themselves. But not only is the pursuer's statement on the record to an opposite effect, but his statements as a witness

are also so. And certainly nowhere that I can see does he say that he delivered the bond or left it in the hands of Renton as the agent of the defenders.

It is true that while Renton acted as agent of the pursuer he was also the agent of the defenders, and hence the necessity of discriminating between his acts as agent for the parties respectively. That the bond was delivered to and left in his hands as agent for the pursuer I cannot, for the reasons I have stated, entertain any doubt. And that, having so got possession of the bond, he afterwards acted a fraudulent part in recording and delivering it to the defenders without paying or accounting to the pursuer for its amount, is, in my opinion, beside the question the Court has to determine, for it has been over and over again laid down by the highest authorities that of two innocent parties he who gives or furnishes the means for a fraud being committed must alone suffer the consequences. This principle was given effect by this Court in the recent case of *Brown* v. *Marr and Others*, 10th July 1880, 17 Scot. Law Rep. 277, where the English authorities will be found referred to, and particularly the case of *Badcock* v. *Lawson*, L.R., 4 Q.B. Div. 394.

(3) It was contended, however—and this is the last of the pursuer's contentions which appear to me to require notice—that the defenders cannot be permitted to take any benefit from what they admit was a fraud. If it be meant, as perhaps it was, although this was not I think quite clear at the debate, that no one is entitled to take benefit from a fraud to which he himself was directly a party, or indirectly by his agent, the proposition is indisputable. But in the present case it is not even averred—and assuredly it has not been proved—that the defenders by themselves directly, or by their agent or agents indirectly, were parties to the fraud of Renton or Renton & Gray. In saying so I of course proceed upon the assumption that Renton in committing the fraud did not act as the defenders' agent, and that they were entirely ignorant of such fraud being committed; and having already stated the grounds of this assumption, I need not here repeat them.

Having now gone over the various pleas or contentions of the pursuer, the result is that in my opinion they are one and all untenable, and that the Lord Ordinary's interlocutor reclaimed against ought therefore to be adhered to.

Lord Mure—I concur with Lord Deas and Lord Ormidale in thinking that the interlocutor of the Lord Ordinary should be adhered to, and substantially on the ground explained in the opinion of the Lord Ordinary, namely, that where one of two innocent persons must suffer through the fraud of another, the person who has put that third party in a position which enabled him to commit the fraud must be the sufferer. That is a rule which has been laid down in various cases, both in this country and in England; and upon the evidence I agree with the Lord Ordinary in holding that that is what the pursuer here deliberately did.

It is not necessary to go into the evidence in detail, as that has already been done. In substance it appears to me to come shortly to this—Renton, who was agent for Ferguson, and had apparently acted for the defenders in the loan they made to Ferguson in 1875, had also been agent for the pursuer since the beginning of 1876, and in that capacity had had an almost uncontrolled charge of the pursuer's money and of its application. Such being the relative position of the parties in 1878, Renton informed the defenders that Mr Ferguson's bond was to be paid-up and discharged, but that he could arrange to place the money on a bond over the pursuer's property if the defenders approved. To this the defenders agreed, and the bond now under reduction was executed on the 12th of August 1878 and duly recorded. It was thereafter delivered to the defenders, and the interest was paid at the November term. Prior to the execution of this bond, the one held by the defenders over Ferguson's property was discharged, as arranged in Renton's letter of the 2d of July 1878, which was written when Renton was agent for the pursuer.

Now, it is clear upon the evidence that after signing the bond under reduction in Renton's office the pursuer made no further inquiry about the bond, or about the receipt and application of the money, for a considerable time, but left Renton to deal with that part of the business as he thought right, under the arrangements existing between them as to the way in which the pursuer's money was to be applied; and so the matter rested till after Renton absconded and the present action was raised. In these circumstances I agree with the Lord Ordinary that Renton was enabled to commit the fraud on the pursuer by the peculiarity of the relations which the latter had established between himself and Renton as to the way in which his business, and his money matters in particular, were to be conducted, and I am of opinion that the defenders ought to be assoilzied.

Lord Gifford—This is a difficult case, and, as the Lord Ordinary has remarked, there are equities on both sides which appear to be nearly equally balanced. Both the pursuer and the defenders in a moral point are equally innocent, and innocently and reasonably trusted Mr Renton, and they are both naturally and properly struggling to escape a loss which has been occasioned without their fault by Mr Renton's fraudulent conduct. Mr Renton absconded in or about November 1878.

The question is, On whom shall fall the loss which Renton's fraud has occasioned—shall the pursuer or the defender lose the sum of £1000 which Renton has fraudulently embezzled and applied to his own purposes? The action takes the form of an action of reduction at the instance of the pursuer Mr Rose against the defenders Mr and Miss Spaven to reduce and set aside a bond and disposition in security for £1000 which the pursuer executed in the defenders' favour on 12th August 1878, and for repayment of £12, 4s. 2d., being interest which the pursuer paid to the defenders on said bond up to and as at Martinmas 1878; and the real question is, whether the pursuer shall be held bound under his bond for £1000 to the defenders, leaving the pursuer to seek his relief against Renton, who has fraudulently failed to account for the sum therein, or whether the bond shall be held null and the pursuer not indebted to the defenders at all, leaving the defenders to seek their relief against Renton for not having duly invested the sum of £1000 with which the defenders entrusted him. As the claim of relief

against Renton is worth nothing, the real issue is, whether the pursuer or the defenders are to lose the £1000?

The facts are important, and they draw back to a period anterior to the immediate transaction affecting the pursuer and the defenders.

James Renton, S.S.C., carried on partnership in business with Mr Gray under the firm of Renton & Gray, but as Renton alone acted in the matters here involved he may be considered as the sole agent. Gray had nothing personally to do with any of the transactions. Renton & Gray, or confining the story to Renton alone, Renton, had four clients—Mrs Muir, Edinburgh, James Ferguson, glass merchant, Edinburgh, the pursuer Rose, and the defender Robert Spaven, acting for himself and his daughter, the other defender. For all these parties Renton was sole agent—I may say confidential agent—and they all reposed in him great confidence. In the transactions to be immediately referred to Renton acted alone as agent for all parties, no other agent being employed. Renton as agent for Ferguson, and also as agent for the pursuer, was engaged in a great variety of transactions, relating chiefly to building speculations, in the course of which large sums of money were raised in various ways and passed through Renton's hands. These moneys Renton paid into and drew from his own bank account kept in name of the firm as he had occasion. He kept no bank account in name of any of his individual clients. Renton's transactions with his other two clients—that is, Mrs Muir and the defenders—were isolated, or, as may be said, single transactions confined to the matters now to be mentioned. This distinction is not immaterial, and will be referred to again.

In November 1877 Mrs Muir handed to Renton £1600 to invest for her on the security of house property, and Renton undertook to do so. Renton not having the security ready, paid the money into his current account with the Commercial Bank, on which account he and his firm were largely indebted to the bank. Renton, who knew that his client Ferguson was in want of money and required to borrow it, took a bond and disposition from Ferguson in favour of Mrs Muir dated 19th February 1878 for £1250, being avowedly part of the £1600 which had been received from her. This bond, after considerable pressure, Renton delivered to Mrs Muir. It was, however, only a second bond over Ferguson's property, there being a former bond over the same property for £1000 in favour of Mr and Miss Spaven, and the value of the property was not sufficient to secure both sums. It became Renton's duty then to get the Spavens' first bond for £1000 discharged in order to make the second bond for £1250 in favour of Mrs Muir a valid and sufficient security. The Spavens, the holders of the first bond, happening also to be Renton's clients, he told them that Ferguson wanted to pay off their bond for £1000, but that he (Renton) would get another security for it over other property equally good belonging to another client of his, Rose, the present pursuer, and he took Spaven to see Rose's property in Claremont Place, over which the £1000 which Ferguson was to pay would be re-invested. Spaven was satisfied, and agreed to transfer the security, and on 2d July 1878 Renton took from Spaven a discharge for the £1000 bond in favour of Ferguson, and Spaven delivered the discharge to Renton in order that Renton might get the money from Ferguson and re-invest it on a bond by Rose. This Renton undertook to do by letter addressed to Mr Spaven 2d July 1878, in which he acknowledged receipt of the signed discharge and undertook to obtain and deliver the new bond by Mr Rose.

Rose was also a client of Renton's and needed to borrow money, and on 29th July 1878 Renton presented to Mr Rose two bonds which he wished him to sign, one of them being a bond for £1000 in favour of the Spavens. Rose knowing that he required or would require the money soon, signed the bonds and left them with Renton that he might get the money. Rose's bond to the Spavens for £1000 is dated 12th August 1878, although it appears it was signed on 29th July. It was delivered to the Spavens by being registered on 16th August 1878, and was actually sent to the Spavens as soon as it was got back from the register. So matters stood till the failure of the City of Glasgow Bank on 2d October 1878. This stoppage had the effect of increasing or bringing to a crisis the embarrassments of Renton and of his firm Renton & Gray, but they still continued to carry on business, and large sums passed through their hands until Renton absconded sometime in the beginning of November 1878, when his estates and those of his firm were sequestrated on 14th November 1878. On 11th November 1878 the present pursuer, who knew that he had granted the bond in favour of the defenders, paid interest thereon from 12th August, the date of bond, to 11th November 1878—£12, 4s. 2d.—and he now concludes, besides his conclusion for reducing the bond, for repayment of that sum. Renton and his firm were hopelessly bankrupt (their assets £9000, their liabilities, including calls on City of Glasgow Bank shares, £107,000), but to the very end—that is, till Renton actually absconded, a few days before his sequestration—large transactions passed through his hands. Thus between 14th May and 12th August 1878 Renton & Gray lodged on current-account with the Commercial Bank £44,653, while they drew out during the same period . . . £43,968 0 0

Surplus of lodgments . £685 0 0

Renton & Gray were not notour bankrupt till immediately before their sequestration in November 1878.

Such being the material facts, the question arises—Is the bond granted by the pursuer to the defenders on 29th July, but dated 12th August 1878, and duly recorded—that is, duly delivered—valid and effectual, or is it liable to be reduced and set aside as in a question with the defenders as holders thereof? I am of opinion that the bond is valid and effectual to the defenders, and that the reasons of reduction thereof should be repelled.

In explaining as shortly as I can my reasons for coming to this conclusion, I think it will be well to examine minutely the conduct of the present parties respectively in order to see whether any and which of them is chargeable with any fault, or even with any imprudence or neglect or remissness, or with over confidence in Renton, or with undue delay in calling him to account, and also to see which of the parties at the date of the sequestration was trusting solely

to personal obligation or the personal honesty of Renton and his firm.

Now, first, as to the Spavens, or rather as to Mr Spaven acting for himself and daughter—I must confess that I am at a loss to see how Mr Spaven can in the slightest degree be blamed or held guilty of either fault or imprudence—keeping in view that Renton was reputed a trustworthy and highly respectable agent, enjoying a rather high character and trusted by a large body of clients. Spaven was a first bondholder over Ferguson's property for £1000, and the security was ample. It does not appear whether this loan had been originally effected through Renton or not, but he knew Renton, and knew he was Ferguson's agent, and when Renton told him that Ferguson wanted to pay up the £1000, had he any conceivable reason for doubting Renton's word. And when Renton added that he could transfer the money to another security—took him and showed him the new house upon the security of which the re-investment was to be made—was Spaven, who was satisfied with the new security, in the slightest degree to blame for agreeing, and for employing Renton to carry through the transaction? I think not. Nobody can say there was any fault or remissness or even looseness here. Next, when on 2d July 1878 Renton presented the discharge of the £1000 to Spaven to sign, Spaven did quite right to sign it, and he did quite right to entrust the signed discharge to Renton that Renton might get the money for it, and having got it lend it on a new bond to Rose. This was put in writing, and Spaven in exchange for the signed discharge got Renton's obligation to obtain and deliver the new bond. This was perfectly accurate and right—What else could Spaven do? Somebody must be trusted, and loans are always effected and transferred through an agent or broker, and there must necessarily be confidence in agents and brokers (at all events for a short time), else business would cease. There was no exuberant trust—the agent was entrusted with the discharge of one bond to lend out the money on another. His duty to Spaven was to bring him, in exchange for the discharge of Ferguson's bond, a new bond by Rose, and so he granted a letter to Spaven of 2d July 1878 binding himself to do so. If Spaven was to blame for entrusting Mr Renton to do this, then blame must be incurred in the very fact of employing an agent. Nor was there any undue or unreasonable delay in carrying out the transaction. The discharge was signed 2d July; the new bond was signed the same month—29th July—recorded 16th August, and sent to Mr Spaven as soon as got back from the record. There was no room for complaint. And then everything is clinched, for when the next term of Martinmas comes, Spaven, who has the recorded bond in his possession, applies for and gets from Rose payment of the term's interest due at Martinmas 1878. What more could Spaven do? He had nobody to call to account—he had no accounts to square with Renton—he had got from Renton everything that he could ask, and everything that Renton was bound to give him. The transaction was concluded and finally closed. Even Renton's business accounts, whatever they were, fell to be paid by the borrowers and not by the lender. If, then, it be relevant to the question, I hold without any hesitation that no fault, no imprudence, or no delay or neglect, is imputable to the Spavens.

Now, turn to the case of Mr Rose, and this is in some respects different, though I do not say that any fault or imprudence is attributable to him either. But he certainly reposed a far more exuberant confidence in Mr Renton. Rose was engaged in a building speculation, and Renton acted not only as his law-agent, but as his banker, and he raised and expended money in connection with the property. The account produced, running from 2d August 1877 to November 1878, shows very large current transactions between Rose and Renton. Renton was entrusted with the whole funds, and with the duty of paying them out to the contractors as the buildings advanced. Whatever funds Renton did not need to pay he retained till called for, just as a banker does. And so it was with the bond in question. On turning to Rose's deposition, when he is asked—What was Renton to do with the £1000? he says—He was to retain it and pay the contractors. And when pressed by the Court—Did you mean to accommodate him with it? he answers—"No, he would have the balance of it in hand, no doubt. (Q) And the accommodation he would thus have?—(A) Yes. (Q) And you intended that?—(A) I intended him to retain it." In short, Rose reposed an exuberant trust in Renton. He made Renton his banker, and he trusted to Renton's personal credit to account. Renton might put the money into his (Renton's) own bank-account. He could scarcely do else with it till it was needed, and there was simply to be a count and reckoning between Renton and Rose at the end. Now, I do not blame Rose for all this. He believed Renton to be an honest man, and he trusted him as such, but his position with Renton was very different from Spaven's. Spaven employed Renton to do one specific act—to exchange one bond for another. Rose employed Renton to manage his funds—many thousands of pounds—and to conduct his building speculation, with only an obligation to count and reckon at its close.

Now, pausing here for one moment, and supposing the case rested here—If Renton proves unfaithful, who is to lose—Spaven, who only employed Renton to get a new bond, and has actually got it, or Rose, who has gone into several hundred transactions and entrusted Renton with funds, uplifted every month for two years, with only an obligation to account—an obligation which has not been implemented?

This leads me next to notice what the narrative already given implies—that Renton's obligation to Spaven was a specific one, which long before bankruptcy was specifically implemented, whereas Renton's obligation to Rose was not specific at all, but simply an obligation to account for intromissions, of which obligation implement was never asked at all down to the date of sequestration, which was three months after the new bond by Rose had been delivered to Spaven, and the transaction, so far as Spaven was concerned, closed. *In pari casu, melior est conditio possidentis*—He who has got implement is in a better condition than he who has not. Spaven three months before the bankruptcy got specific implement; Rose at the date of the bankruptcy had only a claim of accounting. After 16th August 1878 there was nothing which Spaven could compel Renton to

do, but it was always in the power of Rose to demand an accounting if at any time he had chosen to do so. It is hardly therefore in the mouth of Rose to say—because I did not choose to call Renton to account, and therefore did not know what he was doing, therefore now that he is bankrupt I will fall back on Spaven, who no doubt did *tempestive* call him to account and get all that he could demand of him. Here again the principle implied in the brocard *melior est conditio possidentis* would, in the absence of any more potent principle, and in the absence of any overpowering equity, be sufficient to decide the case in favour of the defenders.

But let me next consider shortly the ground or grounds upon which the pursuer demands reduction of the bond in question. The pursuer admits that he executed the bond. It bears his true signature, adhibited before witnesses, and is in all respects in legal and proper form. The pursuer also admits that he delivered the bond so duly executed to his agent Renton, in order that the agent might obtain the money for him, and might retain that money in his own hands, and apply it as wanted in meeting the demands of the contractors for the pursuer's buildings. It is further admitted—and cannot be denied—that the bond so entrusted to Renton was delivered by him to Spaven as a valid and onerous obligation, and was acted upon as such. Now, why should this bond be reduced? I think the only ground stated by the pursuer—indeed the only ground he can state—is that he (the pursuer) did not get value therefor. But what does this mean? It can only mean that Renton, who was empowered to retain the proceeds of the bond, and to expend them for the pursuer, did not pay away on the pursuer's behalf the full amount of the sum contained in the bond. But what is that to the purpose if Renton, the pursuer's agent, received value for the bond. Renton had power to receive the value in the bond. It was for that very purpose that the executed bond was left with him by the pursuer, and if Renton got value, then that is value to the pursuer. With the accounting between the pursuer and his own agent Spaven, the defender, has nothing to do. And this brings us to what is really the only question—Did Renton receive value from the defender Spaven for the bond which Renton by recording delivered to the defender? In other words, did Spaven give value or full value for the bond—did he give the money or the money's worth for it? I say most undoubtedly, "Yes, he did." Spaven gave full value—every pound of it—and gave it to Renton as the pursuer's agent. I confess I was surprised to hear it maintained in argument that Spaven, the defender had given no value for the bond by Rose, and I have never been able, even in imagination, to place myself in the position in which this statement would appear even plausible. No doubt Spaven did not hand over to Renton as agent for Rose, the borrower, one thousand sovereigns in gold, but that was not the least necessary. He gave an absolute equivalent in value. He gave a discharge for a first bond for £1000 over Ferguson's property. That discharge while undelivered was as good as a thousand sovereigns in gold. It was worth that to Spaven, who was perfectly content with his security, and would be content with it yet. Spaven's original security was undoubtedly worth £1000, and the only reason for discharging it was Renton's having come under an obligation to Mrs Muir to validate and make effectual her postponed bond for £1250 by getting the first bond for £1000 discharged. The test as to whether or not Spaven has given value may be put thus—If he has given no value—if his discharge is worth nothing—cancel it, take it off the record, and put him back in the place where he was before he gave that discharge in exchange for Rose's new bond. But that cannot be done. The pursuer does not offer to do so; and yet the pursuer maintains that Spaven gave no value. If Spaven gave no value, how is it that he must lose £1000 if the pursuer succeeds in the present action, whereas in July 1878 he had a good bond for £1000. If the pursuer succeeds here now Spaven will have no bond at all—Is not that value, and full value. It is, in short, exact value. Discharge of the old bond for £1000, with unquestionable security in exchange for the new bond for £1000; more exact value could not be imagined. The transaction can scarcely be named without showing that it was for value. Do not both parties describe it as an attempt at least to substitute one security for another. But if that was done—and undoubtedly that was done, both in form and in reality—then the one security is the value for the other. It is as onerous as if sovereigns had been counted and weighed. Value may be given in many different ways. Suppose that instead of a discharge Spaven had handed Renton an endorsed deposit-receipt for £1000 by a solvent bank, that would not be cash either, but it would be value. The discharge of the bond was better value than any deposit-receipt, for being heritably secured, the sum was safer than the mere obligation of some banks. The case may be put in a single sentence so far as value is concerned. Spaven got the new bond in exchange for the old one. He cannot, so far as mere value is concerned, be required to give up the new bond without getting back the old one.

Nor is it of the slightest consequence that the value given for Rose's bond did not pass at the same moment that the bond was executed, or at the same moment that the bond was delivered. If value really passed—*quid pro quo*—discrepancy in time is of no moment. Value is given for a thing purchased, provided the price is paid, whether before or after delivery, no legal bar intervening. If Spaven had given Renton 1000 sovereigns instead of the discharge on the 2d of July, would it have mattered one straw though the bond was not executed till the 29th of July, provided it was delivered before any bar occurred by bankruptcy or otherwise. Indeed, there must almost always elapse some interval between the giving of value and the receipt of the counterpart, and it does not signify whether that interval is longer or shorter—a few hours or a few weeks—provided nothing occurs in the interval to change the position of parties. And so brokers and agents are often put in funds some days or even weeks before the settling-day. The sole ground of reduction relied on by the pursuer—want of value—thus fails in point of fact, and this necessarily leads to absolvitor in the reduction.

It was said, however, that Renton and his firm were insolvent long before their sequestration or notour bankruptcy, and that Renton really defrauded Spaven on 2d July 1878, when he took from him the signed discharge of the first bond

without giving him money in exchange therefor across the table. But this is not so. An agent or broker may be insolvent for years, and may yet quite honestly and quite properly carry out thousands of transactions in which he is entrusted with money and honestly applies it in the manner directed; and all these transactions will stand perfectly good notwithstanding the agent's latent insolvency, which may not develope into bankruptcy for years, and may perhaps never develope into bankruptcy at all. It is of no consequence that the money passes through the agent's bank account. It is exactly the same as if he had kept it in a money chest. Mere latent insolvency is never a ground for reducing onerous transactions, unless in special cases under the Bankrupt Acts where bankruptcy supervenes within a fixed statutory period, and where the transaction is of certain special kinds. In the present case none of the provisions of the Bankrupt Acts are applicable, and bankruptcy did not supervene for far more than sixty days after Spaven's security was complete.

The same conclusion may be reached by considering in what capacity or as whose agent Renton acted in the transaction in question. He was agent for all parties, but still he did certain acts as the agent of Spaven, and certain other acts as the agent of Rose. As agent of Rose he got Rose to sign the bond in question, and from Rose and as Rose's agent he got authority to deliver it to Spaven. In point of fact he did deliver to Spaven, and in the act of delivering it to Spaven he acted, not as Spaven's agent, but as Rose's agent. Here it is necessary to distinguish between the actual delivery and the act of recording the bond. Technically it was as Spaven's agent that Renton recorded the bond, but then previous to the recording, Renton as agent for Rose delivered the bond to himself as agent for Spaven, and he was warranted in doing this, for this was the very purpose for which Rose had left the executed bond in his hands. No doubt he was to deliver it for value, but I have already shown he had got value, and full value, and therefore the delivery must be effectual to Spaven. The delivery to Spaven is Rose's own act, quite as much as if Rose had delivered the bond to Spaven with his own hands. In this view also there is a complete answer to Rose's demand for reduction.

And then, lastly—for I am perhaps dwelling too much on details—there is the lapse of time and the homologation of the bond by the pursuer Mr Rose himself. The bond was recorded on 16th August 1878; that is in law the complete delivery to Spaven—public delivery. Spaven possesses the bond publicly and peaceably for nearly three months, getting the bond itself whenever it is engrossed in the record. All this time Rose knew, or might have known, and his agent knew, that his property was publicly bonded to Spaven, and he took no exception or objection. If he had done so anytime these three months, the matter would have been put right, for Renton was carrying on business, and thousands were passing through his hands every week. The reason that no objection was taken was that Rose had trusted Renton—trusted his personal credit—to get the money and to apply it, and that Rose had never called Renton to account. Spaven could not call Renton to account, for Spaven had got from Renton all he had a right to ask, that is, complete delivery of the new bond. Well, then, Martinmas term comes 11th November 1878—three months after the bond had been delivered—and Spaven demands from Rose three months' interest due at Martinmas. Rose, perfectly conscious that he has granted the bond to Spaven, and that the interest is due, pays the three months' interest, and that also is settled, and it is not till three days after this payment that the estates of Renton & Gray are sequestrated on 14th November 1878. Now, after this delay, and after this recognition of the bond, is it possible to allow Mr Rose to reduce it and set it aside and to demand repayment of the interest which he deliberately paid to the just creditor who has given value for the obligation to Mr Rose's own agent, and who has acted throughout *in optima fide*. I think not. Mr Rose has trusted Renton—has trusted him with the very money contained in this bond. He trusted him relying solely on his personal obligation to account. Renton has failed to account, but that is Rose's own misfortune, and must be his own loss. He cannot throw the loss upon Mr Spaven, who is not in any way to blame therefor.

Lord Shand—The grounds on which the pursuer rests his claim to reduce and set aside the security for £1000 which forms the subject of this action, are—(1) That the defenders did not advance the sum of £1000 in respect of which the security bears to have been granted; (2) That at least he (the pursuer) neither got this sum nor any value for the security; and (3) That the deed was obtained from him through the fraud of Renton, who acted as the defenders' agent in the matter, and of whose fraud therefore the defenders cannot take benefit.

I am of opinion with the Lord Ordinary and the majority of your Lordships that the pursuer has failed to establish his grounds of action, and that in the circumstances disclosed in the action the security is effectual in favour of the defenders. For I think it is proved—(1) That the defenders gave a valuable consideration for the security, although Renton, the pursuer's agent, failed to give the pursuer the benefit of this; (2) I do not think that Renton acted in the capacity of the defenders' agent in committing the fraud of which the pursuer complains; and (3) Even if Renton did act in the transaction as agent for the defenders, he was also agent of the pursuer; and in the question, which of the two innocent parties must suffer the loss, I hold the loss must fall on the pursuer, who armed his agent with the means of inducing the defenders to give the consideration they did justifiably in return for the security they got. First, as to the consideration given by the defenders. On 2d July they at Renton's request discharged a security for £1000 over another property, in return for a written undertaking by Renton or his firm to give them as a substitute a security by the pursuer for the same sum in the terms of the deed now sought to be set aside. If the defenders on 2d July, in exchange for Renton's undertaking to procure and deliver to them the security now sought to be reduced, had given £1000 in cash, there can be no doubt they would have given a valuable consideration. A bond by the pursuer in their favour then delivered to them in exchange for the advance of £1000, or a bond delivered a few days thereafter in return for the advance in terms of the under-

taking, could not have been reduced on the ground of want of valuable consideration given by the defenders, although Renton as the pursuer's agent had thereafter embezzled the money—whatever other ground might have been set up in support of a claim of restitution. It would, I think, be obviously immaterial whether the bond was at once delivered in exchange for the money, or delivered after an interval of time, in implement of an obligation which Renton or his firm gave in exchange for the money. In both cases alike the defenders would have given valuable consideration for the security they got.

In my opinion the case which actually occurred is not in substance different from that I have supposed. The defenders did not on 2d July 1878 give £1000 in cash in exchange for the bond, or for Renton's undertaking to deliver the bond, but they gave what was equivalent to cash, for they renounced and discharged an existing security over the property of Ferguson, another client of Renton's. So far as the defenders were concerned, this discharge of a debt of £1000 and the relative security was simply the act of parting with that sum to Renton, who accordingly became debtor for the amount and undertook to have it "re-invested" in terms of the deed now sought to be reduced. The security for £1000 over Ferguson's property might have been assigned to another creditor, in which case it would have realised £1000. The discharge of the security was equivalent to this, and though Renton's object really was, by recording the discharge without getting any payment from Ferguson, to enhance to the extent of £1000 the value of a subsequent security on Ferguson's property in favour of another client Mrs Muir, yet the result of the transaction as between the defenders and Renton was that the defenders gave Renton £1000, or what was equivalent, the discharge of a security for that amount, in return for his obligation to give the bond now in question, and in fulfilment of which the deed was put on record on the 16th of August thereafter. It cannot, I think, be successfully maintained in these circumstances that when the defenders got delivery of the bond on 26th September, or rather when the bond was recorded on the 16th of August, which was equivalent to delivery, that they had thereby obtained a gratuitous benefit. They had given full consideration by delivery of the discharge of Ferguson's security on 2d July.

But assuming, what is I think clear, that the defenders thus gave a full valuable consideration for the deed which is the subject of this action, the pursuer further maintained that he is entitled to succeed because the deed was obtained through the fraud of Renton acting as the defenders' agent, and the defenders cannot retain a benefit so gained, even although they gave a consideration to Renton, and were themselves innocent of fraud.

To this argument it appears to me there are two conclusive answers. In the first place, I do not think that in the proved state of the facts Renton was in any proper sense the defenders' agent in procuring the deed in question. The case was not one in which a client had instructed an agent to look out for a security, in return for which he would, after a suitable investment was found, advance £1000. By the transaction of 2d July Renton had received £1000 from the defenders, or at least, as I have already shown, an equivalent. He thereby became the defenders' debtor in that amount, and by his letter of that date he not only acknowledged the debt but undertook to procure this particular security. The defenders became creditors of Renton or his firm for the security which by his letter of 2d July he undertook to deliver to them. In obtaining that security it appears to me that Renton was acting for himself in order to enable him to fulfil his own obligation, and not in any proper sense as agent for the defenders, his creditors under the undertaking he had granted. Renton might have failed to procure the security. If in that case he had by fraudulent representations obtained £1000 in cash from the pursuers or some other client, and with the sum so obtained had discharged his obligation to the defenders by paying them the money, I cannot see any ground for holding that his fraud in obtaining the money to enable him to discharge his own debt was a fraud while acting as the defenders' agent. In support of this view I refer to the case of *Gibbs* v. *The British Linen Company*, 4 R. 630, and cases there cited, and particularly the second case of *Eyre* v. *Burmester*. I think it makes no difference that Renton procured the security, and not money, to enable him to fulfil his firm's obligation. His fraud was therefore not the fraud of an agent acting for the defenders in procuring the deed, though they were to receive the deed ultimately, and did receive it, in fulfilment of the agent's undertaking.

But even if this were otherwise, and it could be held that the fraud committed in completing the security without specially appropriating a sum of £1000 to the pursuer's use was that of the defenders' agent, it is abundantly clear that the fraud was at least that of a common agent—of the agent of both parties, for if Renton was the defenders' agent in receiving the security, he was the agent of the pursuer in the granting of it. The question remains, which of the two parties innocent of the fraud shall suffer? and on that question my opinion is clearly adverse to the pursuer. The defenders gave value to Renton for the bond they got, and I cannot point to a single circumstance in which their conduct was different from that of persons ordinarily transacting such business. Having discharged one security, they obtained in ordinary course a substituted security under the pursuer's hand, and relied on the security for some months before any challenge was intimated. On the other hand, the pursuer gave Renton the uncontrolled power of pledging his personal security and the security of his property, and that by means of a formal deed under his own hand in favour of the defenders by name. His purpose was to raise money, which was to lie in the hands of Renton as his debtor, and to be paid only from time to time as it was required, and the deed he granted, and which Renton had power to deliver, was framed so as to induce the pursuer to act on it. They did act on it, not only by giving a valuable consideration, but by what has always seemed to me to be a very important circumstance in the case in weighing the considerations of equity in favour of the parties respectively, by placing reliance on their security from the time when it was recorded on 14th August until a challenge was intimated some months thereafter, only after Renton had ab-

sconded. It seems to me that even taking the case as one in which the only question is which of two parties innocent of the fraud of the common agent must suffer, the loss should fall on the pursuer (1) because he gave a peculiar facility for the committal of the fraud in signing a deed expressly in favour of the defenders; and (2) because he left that deed in the hands of Renton for a considerable time without insisting on being informed as to the particular use which had been made of it. While, on the other hand, the deed granted was one on which the defenders were entitled to rely, having given valuable consideration for it, and on which they must be held to have relied for a considerable time before any challenge was made to their serious prejudice if the deed were now set aside; for if the deed had been challenged even in the end of August, I see no reason to doubt they would by an immediate claim against Renton have averted any loss. On these grounds I am of opinion that the pursuer's action fails.

LORD PRESIDENT—I had the advantage of perusing several days ago the opinion which has been delivered by the Lord Justice-Clerk, and I concur in every word of that opinion.

The Court adhered.

Counsel for Pursuers — Kinnear — Strachan. Agent—D. Milne, S.S.C.

Counsel for Defenders—Moncreiff—Campbell Smith. Agent—John M'Millan, S.S.C.

Friday, May 28.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

CROSBIE'S TRUSTEES *v.* WRIGHT.

Bank — Deposit-Receipt — Succession — Donation mortis causa—Legacy—Presumption.

A deposit-receipt in names of R.C., A.W., and Mrs C.W., his wife, for £3500, "to be paid to any or survivor or survivors of them," was taken by R.C., who repeatedly told the said A.W. and C.W. (his sister and her husband) that its contents were to be for their benefit, he being for some time in knowledge that he was ill of a mortal disease. Some weeks after his death the receipt was accidentally discovered by Mrs W. in her house, in the leaves of a book which lay in a drawer seldom used. In an action raised by the trustees under R.C.'s trust-settlement against Mr and Mrs W.—*held* (1) (following *Cuthill* v. *Burns*, March 20, 1852, 24 D. 849, and subsequent decisions) that a deposit-receipt cannot of itself operate as a testamentary bequest; but (2) that the facts proved amounted to an effectual donation *mortis causa* of the contents of the receipt to Mr and Mrs W.

Observed that such a gift can be completed without proof of actual delivery.

Mr Robert Crosbie, contractor, Gilmerton, died on 26th June 1879, aged sixty-six, leaving a trust-disposition and settlement, under which the pursuers in this action were the trustees, original and assumed. By this deed Mr Crosbie, after various bequests, left the residue of his means and estate to be converted into cash for the benefit of the poor of the parishes of Liberton and Gilmerton. The defenders who appeared in the action were Mrs Wright, a sister of Mr Crosbie, and her husband Mr Alexander Wright. Mr Crosbie's estate consisted of heritable property to the value of £223 per annum or thereby, and personalty to the amount of about £1485. There was also a sum of £3500 contained in a deposit-receipt, which was the subject of the present action. This deposit-receipt was in the following terms:—

"£3500 stg. "*Newington Branch*,
"*British Linen Company Bank*,
"*Edinburgh, 21st June* 1878.

"Received from Mr Robert Crosbie, Gilmerton, Mr Alexander Wright and Mrs Christina Wright, 32 E. Preston St., Three thousand five hundred pounds stg., to be paid to any or survivor or survivors of them, which is this day placed to the credit of their deposit account with the British Linen Company.

(Signed) "J. W. URQUHART, Agent.
(Endorsed) "ALEXANDER WRIGHT.
"CHRISTINA WRIGHT."

It was the last of a series of similar deposit-receipts dating from 1872 onwards, which Mr Crosbie had taken from the British Linen Bank, his custom being to renew his receipt each year and draw the interest which had accrued.

The conclusion of the summons in the present action was for declarator that the sum contained in this receipt formed part of Mr Crosbie's trust-estate, the defenders Mr and Mrs Wright maintaining that it had passed to them as a *mortis causa* donation. The ministers for the respective parishes of Liberton and Gilmerton were also called as defenders, but no appearance was made for them. Proof was led, from which it appeared that for a considerable time before his death Mr Crosbie was labouring under a mortal disease, and knew that he was dying; that he had repeatedly told the defenders, with whom he was on terms of great intimacy and affection, that he intended the contents of the deposit-receipt which he was from time to time renewing to be for them; that the receipt itself was accidentally discovered on 4th August 1879 by Mrs Wright in the leaves of a book which lay in a drawer in her house, and which had not been used for a considerable time; and that Mr Crosbie's last visit to her house had been about six weeks before his death, on which occasion he was known to have been in the room where the drawer was.

The pursuers pleaded—"(1) The sum of money deposited in terms of the deposit-receipt condescended on having been the property of the said Robert Crosbie at the time of his death, must be held to form part of the trust-estate conveyed to the pursuers."

The defenders pleaded—"(1) The deceased Robert Crosbie having made an effectual gift of the deposit-receipt and the contents thereof to the defenders, the same thereby became their property. (2) Alternatively, the deceased by placing the deposit-receipt where it was found, made an effectual donation of the said receipt and the contents thereof to the defenders *mortis causa*, and the same became irrevocable upon his death."