unopposed, would very soon be covered by the additional advantage obtained by investing this money in securities instead of in land.

On the whole matter, while expressing the view that this is a very desirable proposal if we had the power to sanction it, which I fear we have not, I think we must dismiss the petition.

LORD DUNDAS—I agree. I think the words of the trust deed are so clear and specific that we have not the power to authorise the petitioners to invest the balance of the funds which they hope to receive in ordinary trust securities. I am afraid they are tied up to investment in land. I share your Lordship's regret in the matter, because it seems clear from the petition and the report that the sale to the North of Scotland College of Agriculture would be a good and proper transaction for the trustees to carry through; and one would think that what they desire to do with the balance of the price is very sensible, but I am afraid we have no power to sanction it. I am glad, however, to think that the petitioners can probably get what they want by another method.

LORD SALVESEN—I am of the same opinion. The footing upon which this proceeding is brought is that the trustees are under obligation, in terms of the truster's direction, if they sell Crabestone, as they are authorised to do, immediately to invest the proceeds in another landed property in the county of Aberdeen or the adjacent counties, and on the footing that it will be a more beneficial investment than if they should continue to hold Crabestone, they ask us to relieve them of that obligation imposed upon them by the truster.

If this case rested entirely upon the trust-disposition and settlement I think it would be incompetent for us to grant the application in the circumstances averred merely for the purpose of increasing the income of the trust, and not because the trust has in any respect become unworkable. It seems to me to be still more difficult when we find that there have been two Acts of Parliament by which this trust-disposition has been modified in important respects, but has not been affected as regards the point which is now before us. That looks very like an incorporation by Act of Parliament of the trust purposes which are not in terms affected by the Acts. I agree with both your lordships in thinking that what the trustees propose to do under present conditions is eminently sensible; but as they have got two Acts of Parliament in regard to this trust already I do not see why they should not obtain a third, looking to the extreme improbability of there being any opposition.

LORD GUTHRIE—I am of the same opinion. The petition at first sight does not seem to raise the question which is really before us. It is titled a petition for authority to sell heritage, but it turns out that the trustees are not in any difficulty as to the sale of the heritage. The real question arises under that part of the prayer of the petition in which the trustees ask authority to invest the proceeds of the sale of the heritage in approved trust investments. It seems to me that the question is really one arising on the terms of the trust-deed, as Lord Dundas put it, because as I read the Acts of Parliament, especially the one quoted on page 3 of the petition, I think that, while introducing certain alterations, they say in effect that *quoad ultra* the trust-deed is to remain in full force. I concur in thinking that, whatever the truster's unexpressed intention may have been, the intention of the words of the trust-deed is unusually clear and comes to this, that for all time coming the estate of Crabestone was to remain as it was, or if it were sold the proceeds were to be permanently invested in landed property.

The Court refused the prayer of the petition.

Counsel for the Petitioners—Fleming, K.C.—Lippe. Agents—Mackenzie & Kermack, W.S.

Thursday, December 5.

FIRST DIVISION.

[Lord Ormidale Ordinary.

BOWIE'S TRUSTEES *v.* GOUDIE AND OTHERS.

Fraud—Agent and Client—Property—Innocent Third Party—Fraudulent Discharge of Bond by Agent—Delivery of Bond to Purchaser of Subjects—Right of Purchaser to Retain Bond as against the True Owner.

The purchaser of a property who had paid a full price therefor, including the sum contained in a bond with which it was burdened, received along with the disposition a forged discharge of the bond and the bond itself—the seller's agent, who also acted for the bondholders and so had custody of the bond, embezzling the sum contained therein. In an action by the creditors for delivery of the bond the purchaser maintained that she was entitled to retain it on the grounds (1) that it was one of the titles to the property, and (2) that the agent had the creditors' implied authority to discharge it.

Held that the pursuers were entitled to delivery of the bond, they not being in any way to blame for their agent's fraud, and he having no mandate to discharge it.

On 11th April 1911 Walter Bowie, farmer, Paisley, and others, testamentary trustees of the late William Bowie, farmer, Blackbyres, Paisley, *pursuers*, brought an action against (1) William Goudie, New Jersey, U.S.A., and (2) Mrs E. H. Watson, wife of Thomas Watson, Craignair, Bridge of Weir, and the said Thomas Watson as

her curator and administrator-in-law, *defenders*, for reduction of a pretended discharge of a bond and disposition in security in which they (the pursuers) were creditors, and for delivery of the *corpus* of the bond, then in the possession of the defender Mrs Watson, the purchaser of the subjects comprised in the bond.

The defenders Mr and Mrs Watson, who alone entered appearance, pleaded, *inter alia* — "(3) The defender Mrs Watson having paid the said sum of £650 conditionally upon receiving a valid disposition to Craignair, and in addition the said bond and disposition in security and a discharge thereof, and having received said deeds in good faith, is entitled to retain the said bond and disposition in security and discharge until repaid the said sum of £500. (4) *Separatim*, the pursuers having entrusted the custody of said bond and disposition in security to the said William Bowie, are barred from obtaining redelivery thereof from these defenders, who received the same *bona fide* and for value, until they repay to the pursuers the said sum of £500."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (ORMIDALE), who on 11th January 1912 decerned against the defender Mrs Watson for delivery of the bond.

Opinion—"The pursuers of this action are testamentary trustees. In the course of administering their trust they lent at Whitsunday 1904 the sum of £500 to the defender William Goudie, receiving in security of their loan a bond and disposition in security over certain heritable property.

"William Bowie, a writer in Paisley, was agent for both parties in the transaction.

"The pursuers aver—and the argument proceeded on the footing—that William Bowie was the agent in the trust, and that the bond and disposition in security, with the other trust papers, were retained by him in that capacity. The interest on the loan was regularly accounted for by him to the pursuers down to Whitsunday 1910.

"Mr Bowie died in September 1910.

"At Whitsunday 1909 the defender William Goudie sold and disponed the property which formed the subject of the security to the defender Mrs Watson for £650, William Bowie acting as his agent in the matter. Mrs Watson employed another agent to represent her, and through him paid the £650 to William Bowie. Along with the disposition of the property Mrs Watson received, and now has in her possession, a discharge of the bond bearing to be signed by the pursuers, and the bond itself.

"It is not now disputed that the signatures of the pursuers to the discharge are forged, and that the whole of the £500 was embezzled by William Bowie.

"The pursuers have raised the present action for reduction of the discharge and for the delivery to them of the bond and disposition in security. Defences have been lodged by Mrs Watson and her husband, who state that they are willing to hand over the bond on receiving in exchange therefor £500.

"No defences were lodged for William Goudie.

"By interlocutor dated 13th June 1911 the Lord Ordinary, on the motion of the pursuers, the compearing defenders not opposing, decerned against them in terms of the reductive conclusions of the summons.

"I have now to decide by which of two perfectly innocent parties the loss brought about by the fraudulent conduct of William Bowie is to be borne.

"The law agent of the pursuers, William Bowie, had no implied authority either to call up the bond or to accept repayment of the loan, and it is not averred that they had given him any special authority to do either the one or the other—I am unable, therefore, to say that they were in any sense blameworthy or negligent in allowing William Bowie to retain possession of the bond — *Peden* v. *Graham*, 1907, 15 S.L.T. 143.

"And, on the other hand, I cannot see how the purchaser of the property could have carried through the sale in any other way than she did. It is not suggested that William Bowie was otherwise than a reputable agent at the time of the transaction. Mrs Watson paid a full price for the subjects, and she was entitled to obtain a clear title. She took the usual steps for doing so, and she only paid the price on obtaining what purported to be a clear title.

"But the discharge which was handed to her, and which bears that the amount of the loan had been received from her by the creditors in the bond, has been reduced, the deed being admittedly a nullity. She has not, in fact, paid the creditors anything, and they have not, in fact, granted to her any discharge of the bond. What she did do was to pay to William Bowie, as agent for William Goudie, the seller of the property, £650, and William Bowie embezzled £500 of that sum, took the bond from the repositories of the pursuers in his office, and along with what purported to be a discharge of the bond, but which was no discharge, handed it to the purchaser. He had no authority to deal with the bond in connection with the sale of the security subjects, and it seems to me that the legal position as in a question with the purchaser was just the same as if he had picked the bond from the pocket of the pursuers. He had no right or title to hand it to the purchaser, and in my judgment the purchaser has, now that the signatures to the discharge have been ascertained to be forged, no right or title to retain it—*Wallace's Trustees* v. *Port Glasgow Harbour Trustees*, 1880, 7 R. 645. She received it in absolute good faith, having, as she honestly thought, paid full value for it to the creditors in it; but none the less was the delivery to her of the bond tainted with fraud, just as the discharge which was handed to her along with the bond was tainted with the vice of forgery.

Without a discharge or other evidence of repayment to the creditors, the purchaser had no right to take the bond, and obviously she would have declined to accept the mere possession of the writ as of itself equivalent along with the disposition of the property as a clear title. It appears to me that the bond in this case is in the same position as the cow in the case of *Morrison—Morrison* v. *Robertson*, 1908 S.C. 332.

"The defender Mrs Watson maintained that the forgery of the discharge was something entirely independent of her contract with William Goudie for the purchase of the property, and that the security writ having been handed to her in implement of that transaction, which it is not proposed to set aside, and which was not in any way tainted with fraud, she is entitled to retain it. She is not, she says, concerned with the forged discharge, and is not seeking to take any advantage or benefit from it. She is simply claiming a right to retain possession, for what it is worth, of a writ which in due course came into her hands in fulfilment of the contract of sale and purchase. In my opinion she is taking advantage from the forged document, for she received the bond simply and solely because the bond was falsely said to be discharged by the receipt of her money, not by William Goudie the seller, but by the pursuers.

"The position which was brought about by the fraud of William Bowie here seems to me to be entirely different to that disclosed in the case of *Brocklesby* v. *Temperance Building Society*, A.C. 1895, 183, on which the defender based her contention.

"That case was decided on the ground that the pursuer, though himself innocent of fraud, had put it in the power of another to commit the fraud by clothing him with authority to intromit with certain deeds, with the result that these deeds came to be in the possession of the defenders on a perfectly good title irrespective altogether of any forged documents. The forgery of further documents, executed in order to serve ulterior purposes of the fraudulent agent, was not in any way necessary to establish the defenders' right to hold the deeds. In Brocklesby's case the forgery was not ancillary to the main transaction; in the present case it is.

"It is a very hard case for the defender Mrs Watson, but in my opinion the loss occasioned by the fraudulent conduct of William Bowie must be borne by her.

"I shall decern against her for the delivery of the bond and disposition in security to the pursuers."

The defenders reclaimed, and argued—(1) The defender was entitled to the bond in virtue of the assignation of writs in the disposition of the subjects, the bond being one of the titles to the property; (2) the pursuer's agent (Bowie) had implied authority to discharge the bond in return for a full price, and that being so the defender was entitled to retain it—*Robinson* v. *Montgomeryshire Brewery Company*, [1896] 2 Ch. 841; *Bourton* v. *Williams*, (1870) L.R., 5 Ch. App. 655. If the pursuers' agent embezzled the money his clients ought to bear the loss and not the defender, who had paid the full sum in the bond and had not done anything to facilitate the fraud—*Gordon* v. *James*, (1885) L.R., 30 Ch.D. 249; *Brocklesby* v. *Temperance Building Society*, [1895] A.C. 173. The case of *Morrison* v. *Robertson*, 1908 S.C. 332, 45 S.L.R. 264, was distinguishable, for in that case there was no agency at all.

Counsel for the respondents were not called on to reply.

LORD PRESIDENT—The pursuers in this action are a set of trustees who were in right of a bond and disposition in security which had been granted by a certain William Goudie over a villa in Bridge of Weir for £500. Their agent was a Mr William Bowie, and in accordance with what is almost universal custom that agent had possession of their security writ, namely, their bond and disposition in security. William Bowie was also agent for Goudie, the proprietor of the subjects over which the bond was granted. Goudie arranged through his agent a sale of the villa to the defender Mrs Watson. Mrs Watson wished that the property should be conveyed to her clear of encumbrances, and having no independent agent she arranged with Goudie, through Bowie, that that should be done. Accordingly, having paid a full price, she was handed a disposition of the property, and at the same time was handed the bond over the property, and also a discharge of the bond. After Mr Bowie's death it was discovered that the discharge of the bond was a forgery, but that Bowie had lulled the pursuers into security by going on paying the interest to them as if nothing had happened.

The pursuers now bring the action for, first of all, reduction of the discharge as a forgery, and, secondly, for delivery of the *corpus* of the bond. Mrs Watson admits the forgery, and therefore has no defence admittedly to the reductive conclusions, but she seeks to retain the *corpus* of the bond until she is paid the sum of money which she parted with in respect of it.

The Lord Ordinary has decerned in terms of the conclusions of the summons, and I am of opinion that he is quite right. The forgery being admitted, the discharge goes for nothing, and *primâ facie* therefore the bond belongs to the persons who are designated as creditors in the bond. Now what right can Mrs Watson have to retain it? She must in some way connect herself with it by some form of title flowing from the pursuers. But that is just what she cannot do. It seems to me that to succeed she would have to establish this proposition, that the mere leaving of a bond and disposition in security with your agent is equivalent to a mandate to that agent to deal with it. That is a perfectly impossible proposition, and it is shown to be an impossible proposition by the fact that the agent could not deal with the bond without forging a new deed. So far as I can see, even in England, where one is allowed to pledge title-deeds, the mere

depositation of a deed with one's agent does not give any mandate to raise money upon it. But in our law, where the pledging of titles is unavailing to create a security, it is an impossible proposition.

Accordingly, although I think it is a very hard case for this lady, I think it is clear that the pursuers, who were in no way to blame, are entitled to possession of their bond.

LORD MACKENZIE—I am of the same opinion. The only conclusion of the action with which we are now concerned is that in which the creditor in the bond asks that his bond be delivered to him. Now the defender cannot produce any discharge, because, admittedly, the discharge was forged and therefore is a nullity. The bond is now in the hands of the purchaser of the property over which it was granted, she having obtained it from Bowie, the seller's agent, who, as the agent of the creditor, had custody of the bond. That agent was the forger, and the question is—Which of two innocent parties is to suffer by his forgery?

The argument addressed to us rested on two grounds, the first of which was that the defender was entitled in virtue of the assignation of writs in the disposition of the property to retain this bond as one of the writs. I think the conclusive answer to that is that the bond is not one of the titles to the property. It is a burden upon the property. The purchaser was not entitled to receive it, and the seller had no right to grant any assignation which covered it.

Mr Morison admitted that he could not succeed unless he was able to associate the bond with the contract of sale. But you cannot associate a bond with a contract of sale between the person who is the debtor in the bond and the buyer. The consent of the creditor was needed, and admittedly it never was got, and if it never was got then Bowie had no more right to deal with the bond in this case than he had right to include under the sale of Goudie's villa land adjoining that villa which belonged to a third party the titles to which happened to be in his custody for the time being.

The second ground upon which the case was argued was that in some way the creditor had armed Mr William Bowie, the fraudulent agent, with the means of committing this fraud. Now I quite admit that if Bowie had in some way been clothed with authority to deal with the bond in the way of receiving payment and granting a discharge—if he had got that authority from the creditor, then, even if he had fraudulently discharged it, it might have been that the creditor who was his client would have had to suffer, and not the innocent buyer who provided the money to enable the bond to be discharged.

But there is nothing of that kind here—there is no suggestion that there was any authority, either written or verbal, given by the creditor to his agent Bowie to become a party in any way to the transaction that was carried out. I therefore think that the conclusion which the Lord Ordinary has reached is right.

LORD CULLEN—I entirely concur.

LORD KINNEAR and LORD JOHNSTON were absent.

The Court adhered.

Counsel for Pursuers—Constable, K.C.—Russell. Agents—Martin, Milligan, & Macdonald, W.S.

Counsel for Defenders—Morison, K.C.—M'Robert. Agent—W. M. Murray, S.S.C.

Thursday, December 5.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

WILSON *v.* SHEPHERD.

Interdict—Property—Relevancy—Aerated Water Bottles—Unauthorised Use.

An aerated water manufacturer brought an action against a drysalter to interdict him by himself or others acting for him or under his instructions putting paraffin oil or other liquid into bottles sent out by the pursuer to his customers and embossed or otherwise marked with his name and known by the defender to be the property of the pursuer. *Averments* that the bottles were given out to customers on payment of a deposit to be repaid on return of the bottles, and that the defender was in the habit of filling such bottles with paraffin oil in the knowledge that they were the property of the pursuer, and although he had been warned not to do so, *held* relevant and proof *allowed.*

James Wilson, aerated water manufacturer, Edinburgh, *pursuer*, brought an action in the Sheriff Court at Edinburgh against John Shepherd, drysalter, Edinburgh, *defender*, in which, by amendment in the Inner House altering the original crave of his initial writ, he prayed the Court to interdict the defender "by himself or by others acting for him or under his instructions putting paraffin oil or other liquid into bottles sent out by the pursuer to his customers and embossed or otherwise marked 'James Wilson, Edinburgh,' and known by the defender to be the property of the pursuer."

The pursuer averred—"(Cond. 2) The pursuer in carrying on his . . . business is in the habit, in conformity with the universal custom of the trade among aerated water manufacturers in Edinburgh and throughout Scotland, of lending his bottles containing aerated waters manufactured by him to his various customers on the understanding that said bottles are, when empty, to be returned to the pursuer, whose property they remain, and that no other use is to be made of them. This practice is well known to the defender. To facilitate the recovery of his bottles the pursuer uses bottles embossed, moulded,