have arrived, which is, that the letter is capable of being understood in a libellous sense, and that therefore it is for the jury to determine whether there is a libel or not. For these reasons I move that the judgment be affirmed, and the appeal dismissed with costs.

LORD WATSON — I entirely concur. I desire to express no opinion as to whether these letters are libellous. All that my judgment implies is that there is a question which a jury and not the Court ought to try.

LORD BRAMWELL, LORD MACNAGHTEN, LORD MORRIS, and LORD HANNEN concurred.

Their Lordships dismissed the appeal with costs.

Counsel for the Appellants—Sir Henry James, Q.C.—Cooper. Agents—Neish & Howell, for Henderson & Clark, W.S.

Counsel for the Respondent—Sir Charles Russell, Q.C.—Shaw. Agents—Waddy & Waddy, for R. Ainslie Brown, S.S.C.

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*Tuesday, June 9.*

(Before the Earl of Selborne, and Lords Watson, Bramwell, and Herschell.)

## BANK OF SCOTLAND *v.* DOMINION BANK, TORONTO.

(*Ante*, vol. xxvi. p. 753, and 16 R. 1081.)

*Bill of Exchange—Payment and Discharge — Cancellation Without Authority — Agent—Liability of Agent Employed to Collect Bill.*

A bill having been protested for non-payment was afterwards forwarded to a bank agent who offered to try and obtain payment of it. The acceptors expressed their willingness to pay the amount of the bill and the protest charges on condition that they were freed from any claim for interest and expenses, and this condition was communicated to the holders. Without waiting for their reply the bank agent took payment of the amount of the bill and the protest charges, marked the bill "paid," and handed it over to the acceptors, who deleted their signatures. The holders refused to agree to the condition mentioned, returned the money tendered to them in payment of the bill, and received back the cancelled bill. They then raised an action against the acceptors, in which they obtained decree for the amount of the bill and interest thereon, and for the expenses of the action. Before this decree could be enforced by summary diligence the acceptors were sequestrated.

In an action by the holders against the bank whose agent had cancelled the bill, for payment of the bill, the interest thereon, and the expenses of the action against the acceptors, the House of Lords *held* (*aff.* the decision of the First Division) that the defenders were liable, as the evidence showed that if the bill had not been cancelled without authority through the error of their agent, the holders might have recovered payment by summary diligence before the acceptors were sequestrated, and further ordered the pursuers to assign to the defenders any remedy they might have against the drawers of the bill.

This case is reported *ante*, vol. xxvi. p. 753, and 16 R. 1081.

The Bank of Scotland appealed.

At delivering judgment—

EARL OF SELBORNE—My Lords, I confess it is with some regret—because I think the case is rather a hard one upon the Bank of Scotland—that I feel myself compelled to come to the conclusion that the judgment in this case is right, though I think it should be amended without prejudice to the costs of the appeal by introducing words which will require effect to be given in the offer which was made in the Inner House to subrogate the appellants to any right and remedy which may remain upon the bill against the drawers.

My Lords, in the view which I take of the case it may be put thus—First of all, has there been a loss sustained? It appears to me clear that there has been a loss, arising no doubt immediately out of the bankruptcy of the judgment debtor; and for this purpose I cannot but think myself that this case should be dealt with upon the footing of the right of the holder of the bill against the acceptor, and without drawing in any question as to whether an action against the drawers in Canada might have been successful or not, or to what extent; but that there has been an actual loss arising immediately from the bankruptcy of the judgment debtor, and that the measure of that loss *primâ facie* is that which the Court below have assumed, namely, the whole debt *minus* the interest, appears to me to be unquestionably clear.

Then, my Lords, what was the cause of that loss? I think myself, upon the evidence (differing here from Lord Mure, but agreeing with the rest of the Court), that the cause of the loss was the delay of the remedy—I mean the summary remedy which would have existed if the bill had not been on the face of it cancelled. I cannot think that more evidence as to the possibility of having made that summary remedy effectual, if it existed, than that which was given, can be required. The debtor was a man engaged in business, carrying on business, paying his way and paying considerably larger sums, according to the evidence, than that in question until some considerable time after the action was brought, and it appears that on the 12th of July 1887 (a matter which is not noticed by Lord Mure in his judgment) a positive offer was made to pay down immediately—that is, the next day—the whole principal sum due upon the bill on the condition of the waiver of the right to the interest.

My Lords, I will consider hereafter whether the refusal of that offer has any effect upon the pursuers' right; but I think that in that state of circumstances your Lordships must come to the conclusion that so far as appears there would be every reason to assume that payment would have been made but for the question which was raised as to the interest, and if the summary remedy had been available at that time it cannot be doubted from the correspondence which then took place that it would have been immediately resorted to, and, as I understand it, the law of Scotland is, that if a party is let in to defend in such a case it must be upon the terms of consigning the amount claimed, or at least giving good security for it. Therefore I cannot but think that *prima facie* the loss is proved, and is due to the delay of the remedy, because it is not suggested that the action was not proceeded with as rapidly as it could have been, or that there was any default of any sort or kind in prosecuting it on the part of the pursuers.

My Lords, that brings us to the question, what was the cause of the loss of that summary remedy? If we find that it was due to a wrongful act on the part of the defenders, I cannot but think that the loss was the direct consequence of that wrongful act. The cause was beyond all doubt the cancellation of the bill—that is to say, the perforation of it as paid, which was the act of the defenders by their agent Mr Mackenzie, and also the simultaneous erasure of the signature by the acceptor. Then the sole question, as it strikes my mind, is, whether that was a wrongful act or not? If it was a wrongful act when it was done, I am afraid the consequence is that the defenders must be liable for the loss occasioned.

Now, my Lords, in determining whether it was a wrongful act or not, I think that we must look to what took place upon the 13th of June 1887, and not at what might or might not possibly have taken place if action had been taken upon letters which passed at an earlier date. And what did take place on the 13th of June? This, that the principal money and the amount of certain small charges were paid to Mr Mackenzie, the agent of the Bank of Scotland, on a certain condition. That condition was that there should be an express renunciation or waiver of any further claim for that which was not paid—in other words, that payment of part of the debt should be accepted and the rest discharged, and that positively with an actual engagement. Both Mr Mackenzie, representing the Bank of Scotland, and Mr Anderson, who made the payment, knew perfectly well that there was no authority to accept payment upon those terms, because the letters written contemporaneously, which in my opinion must be taken to represent the true effect of the actual transaction (and I should think so even independently of a circumstance not altogether immaterial, namely, that the Bank of Scotland were also the bankers of Anderson the debtor), show that the true effect is that it was a conditional payment made upon those conditions, and whatever other condition the preceding correspondence might possibly have authorised such a payment to be received upon, it did not authorise the acceptance of the payment upon those conditions. The letters prove it distinctly, the whole sequel of the correspondence proves it, and Anderson's letters previous to that date show that the thing was deliberate, and that he never would have paid upon any other terms, and the letter of Mr Mackenzie proves that he knew perfectly well that there was no previous authority to accept payment upon those terms, and that if those terms were not accepted the payment could not in good faith, or in point of law either, I should say, be retained. Consequently, the terms not being accepted, the payment is returned, and re-delivery of the bill asked for.

Now, the question to my mind is, could it possibly be justifiable under those circumstances, and upon such a conditional payment being made, *instanter* to cancel the bill, to perforate it as paid, and to stand by while the signature of the acceptor is erased by him and leave it so in his hands. To me it is perfectly plain that until the terms were accepted and the condition assented to, it could not be consistent with the duty of the bank to part with the bill or to permit it to be tampered with. It might have been put *in medio* under some reasonable arrangement, leaving it in a condition in which it might be returned as it was before when the money was returned if the condition was not accepted. That, however, was not done, and I cannot think it is any answer to the case so made to say that a somewhat ambiguous letter, but which for the purpose I will assume to be clear, as it seems to me to be, had been written upon the 7th of June, the effect of which, especially when taken in connection with Mr Gordon's evidence, seems to show that the National Bank, the agents of the creditor, would have been willing to accept payment of the same amount upon other terms, upon the terms either of something being done expressly to save the right to claim and recover the interest due and not paid, with any other charges which might lawfully be made, or at least to leave that question untouched by any express waiver or agreement or renunciation. I do not think it necessary to go into the question what the true construction and effect of that letter would have been if it had been treated at the time as an authority to deliver up the bill upon payment of that sum, because the transaction did not follow upon it. There may have been perhaps some difference of view between the National Bank of Scotland and Mr Mackenzie as to the effect of that letter. Whichever was right or whichever was wrong, one thing is to my mind quite clear from all that followed, namely, that the National Bank of Scotland did not mean to renounce that upon the renunciation of which Mr Anderson distinctly insisted, and on the other hand, that Mr Anderson would not and did not make any payment

except upon the terms of that renunciation, which was never agreed to, and was never intended to be agreed to.

Then that being, as it appears to me, the whole substance of the case, I cannot but say that I am unable to follow the argument founded on the fact that on the 13th of June, and at a later date on the 12th of July, payment of part was offered on condition that the rest was remitted or renounced. I cannot see how if at the time that those proposals were made there was no obligation to accept them, the fact of the ultimate loss can be affected or that loss reduced by reason of those proposals. If they ought to have been accepted, it would be quite a different thing, but can anyone seriously say that either in a question with the agent to collect, or in a question with the principal debtor, the principal debtor has a right to reduce the amount of the debt, or that the agent to collect has a right to keep the amount of the debt as reduced by an offer to pay less than the whole? Though the amount of the difference may not be very large, yet if the tender was not such a tender as should have been accepted, and such as there was an obligation to accept, I am at a loss to see how it can affect the ultimate result.

My Lords, on these grounds—and I think it unnecessary to say more—I have come to the conclusion that the Court of Session was right, and that your Lordships should affirm their judgment, and that with costs, altering the interlocutor only by adding the words which will be necessary to make it part of the judgment that there is to be an assignation to the appellants of any remedy on the part of the respondents against the drawers of the bill of exchange, and I move your Lordships accordingly.

LORD WATSON—My Lords, I am of the same opinion upon all of the points which have been dealt with by the noble and learned Lord on the woolsack.

The letters containing the authority or instructions sent by the National Bank in London to the agent of the Bank of Scotland at Grangemouth are certainly expressed in terms somewhat loose, and if, following out the authority given by these letters, Mr Mackenzie had *bona fide*, as the authorised agent of the National Bank, entered into a final and binding arrangement with Mr Anderson which could by some reasonable construction of these letters have been justified, I should not have been prepared to construe the letters very strictly against Mr Mackenzie or the bank which he represented. I think that they would have admitted of very considerable latitude. But what Mr Mackenzie actually did do on the 13th of June 1887 was not anything of that kind. He then made an arrangement which he knew he had not power to make finally; he made that which was known to him to be a provisional arrangement, because a condition insisted upon as essential by Mr Anderson, and without the concession of which Mr Anderson would make no arrangement at all, was known to Mr Mackenzie to be one to which the National Bank had given him no authority to consent, and accordingly in reporting the arrangement he called the attention of the bank to that fact and points out that it is made a *sine qua non* by Mr Anderson.

Now, the subsequent letters show that it was quite within Mr Mackenzie's view that the arrangement was provisional, and that it was within the competency of the Dominion Bank or their agents in London to assent to it or not, and that its completion entirely depended upon their giving their assent. That was all very right and proper, and I think to that extent no fault can be found with Mr Mackenzie's action. But the matter in which he did exceed his powers and commit a legal wrong was in relation to the mutilation of the bill. He had no right to alter that document, to perforate the signature, or to permit any other person to interfere with the document—a document which was the property of the Dominion Bank, and remained so. I say he had no right to allow anybody to do that so long as the bank had not intimated their assent to the arrangement under which alone either Mr Mackenzie or any other person had the right to mark it as discharged.

My Lords, I do not see any reason whatever to doubt that in that view of the case the result which followed was the direct and necessary result of that wrongful act. I think the judgment of the Court below is right and ought to be affirmed, with the variation suggested by the noble and learned Lord on the woolsack.

LORD BRAMWELL—My Lords, I am of the same opinion. I am very much inclined to think that the construction put by the appellants upon the letter of June the 7th is the right one, and if nothing else had happended except that, and Mackenzie had been content to take the principal without interest, I am very much inclined to think that he would have been justified in giving up the bill to be cancelled, and in point of fact I believe that was the agreement which he originally made with Anderson. But whether from a feeling of good will to Anderson, who was a customer of the bank, or from any other consideration, he told the National Bank that that was not all that took place between them, because he in effect told them that Anderson's letter was a truthful one, and that he had taken the money upon the footing that the Dominion Bank was to have no further claim in respect of the bill. It is very ingeniously argued that that really did not add to what would have been said expressly about the Dominion Bank having no further claim in respect of the bill. I am sure I do not know about that, but it took away from the Dominion Bank the power of trying whether they had such further right, and it therefore, if it really had been agreed to, was an excess of authority on the part of Mackenzie, and I think that he is precluded from saying that that was not really agreed to, although in fact I doubt

extremely whether it was, for I doubt whether Mr Galloway's evidence is not right.

My Lords, if that is so, Mr Mackenzie added a term to the agreement with Anderson which he had no authority to add, and therefore he acted without authority in giving up the bill in pursuance of an agreement which he had no authority to make. That, my Lords, is the first position.

I have had a misgiving, I own, whether the damage arising from the inability of the Dominion Bank to have recourse to the summary procedure, and the intervening bankruptcy of Anderson, was damage naturally arising out of the wrong thing which Mackenzie did. But I cannot but think that some damages arose from it, and although it can hardly be said to be a natural consequence of the wrong that Mackenzie did, and of the mistake which he made, yet the insolvency of Anderson and the necessary delay in the procedure together undoubtedly caused a loss of money—at least I think upon the evidence (with all submission to Lord Mure) that it would have been recovered if there had been the possibility of summary procedure. I had a strong opinion that the pursuers had not made out their damages, because they had left it in uncertainty what they would recover, if anything, from the drawers of the bill, but that difficulty is got over by what I understand can be done in the decree which can be pronounced now. But I should just like to make this suggestion. The bill may be handed over to the appellants, but ought there not to be some provision by which they should be enabled to prove notice of dishonour to the drawers of this bill, which no doubt was given by the Dominion Bank in Canada? I should think there ought to be some provision or arrangement by which the Dominion Bank should undertake to enable the present appellants to prove all that the Dominion Bank could have proved to enable themselves to recover. Whether that can in any way be done or not, I am sure I do not know. I merely make the suggestion that in some way or other it ought to be done or agreed to.

Lord Herschell—My Lords, I am of the same opinion. I do not propose to trouble your Lordships with any observations as to the effect of the letter of the 7th of June. I think it quite possible that under the terms of that letter the Bank of Scotland would have been entitled to receive from Anderson the principal and the small charges without commission or interest, and to take them from him, possibly (I do not wish to determine that point at all) without making any reservation whatever, nothing being said on either side if Anderson had been content to make the payment on these terms. But it is clear to my mind that Anderson never was content to make the payment on these terms. Whether he shared a common mistake with the National Bank or not, it seems to me manifest that he always insisted that he would only make payment of the principal if there were a distinct and express renunciation by the holders of the bill of their remedy in respect of anything further. I do not see any ground for thinking that he ever receded from that position. He had taken it from the outset, he took it on the 9th of June, and I cannot myself see any ground for supposing that he did not take it on the 13th, inasmuch as it was embodied in the letter which he wrote on that day.

Now, my Lords, as I have said, I will assume that if Mr Mackenzie had handed over the bill after he got the letter of the 7th June, and had received the principal and the 12s. 6d., the other small charges, no complaint could have been made. But that did not take place. Anderson was not willing that it should take place, because Anderson said—"I am not content with that; I want an express renunciation." Then on the 13th I think it must be taken as against Mackenzie (and I have no doubt myself that it was the fact, but even if it was not the fact it must be so taken as against Mackenzie) that that was the transaction, because it is upon those terms alone that he sends up the draft to London.

Now, the ground upon which I base my judgment in the case is this, that where a banker is employed to receive payment of a bill from the acceptor, and receives payment from him clogged with a condition, without assent to which the holder is not entitled to retain the money paid, I think the banker cannot be entitled to treat such conditional payment as if it were an absolute payment, and to cancel the bill as paid before he has received the assent to the condition. It seems to me that where he has transmitted the money to his principal upon the distinct terms that that principal cannot be justified in keeping it absolutely and in all events, but can only keep it properly if he assents to a condition imposed by the letter remitting it, then he was bound to hold in his own hands, untouched and untampered with, the acceptance sent him for collection until he had ascertained whether his principal was willing to assent to the condition or not. Not having done so in this case, it seems to me that he has committed a breach of duty, from which the damage sued for has resulted.

The interlocutor of the Inner House was varied by adding thereto, after the words "refuse the reclaiming-note," the following words—"and the pursuers having undertaken to assign to the defenders any remedy which they may have against the drawers of the bill of exchange of the 28th of September 1886, order such assignation to be duly made, and the said bill of exchange to be delivered up to the defenders for the purposes thereof upon payment by the defenders to the pursuers of the amount decerned in this action." Subject to such variation, interlocutors appealed from affirmed with costs.

Counsel for the Appellants—Finlay, Q.C. —Graham Murray. Agents—Loch & Good-

hart, for Tods, Murray, & Jamieson, W.S.

Counsel for the Respondents—Sir Richard Webster, Att.-Gen. — D.-F. Balfour, Q.C. — Tindal — Atkinson. Agents — Murray, Hutchins, & Sterling, for Mackenzie, Innes, & Logan, W.S.

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*Tuesday, June* 16.

(Before the Earl of Selborne, and Lords Watson, Bramwell, and Morris.)

## WHYTE *v.* NORTHERN HERITABLE SECURITIES INVESTMENT COMPANY AND OTHERS.

(*Ante*, vol. xxvi. p. 91, and 16 R. 100.)

*Bankruptcy—Nobile Officium — Discharge of Trustee and Bankrupt—Appointment of New Trustee.*

A bankrupt was discharged without composition, and his trustee was also discharged. Certain creditors presented a petition for a remit to the Lord Ordinary on the Bills to order a meeting of creditors for the election of a new trustee, as certain assets had not been ingathered, and the petitioners' debts had not been paid in full. The bankrupt objected that the trustee had abandoned all claim to these assets.

The First Division repelled the objection and granted the petition, and the House of Lords *affirmed* this decision and dismissed the appeal.

This case is reported *ante*, vol. xxvi. p. 91, and 16 R. 100.

George Whyte appealed.

Counsel for the respondents were not called upon.

At delivering judgment—

EARL OF SELBORNE—This appears to be an extremely clear case, so far as the question of the competency of the Court of Session was concerned, to make an order in a sequestration for the appointment of a new trustee. For the last thirty years there has been such a practice in the case of funds which have not been got in or distributed at the time of the discharge of the trustee in bankruptcy. No doubt a practice which has continued so long may be wrong, but it is needless to say the presumption is the other way. The case rests upon this proposition, that when a trustee has been discharged, all funds not at that time distributed vest by law in the bankrupt for his own benefit, although the creditors have not been paid 20s. in the pound. I confess I had great difficulty in following that argument, having regard to the express provisions of the Act, as well as for the general purpose for which it was passed. The general purpose was to enable a debtor who could not pay his way to get his discharge upon the footing of giving up the whole of his property for the benefit of the creditors. From the beginning to the end of the Act there is nothing to cut down the right given to the creditors, in accordance with the general purposes of the Act, to have all the funds which vested in the trustees divided among them. But it was argued that the trustee in this case having been discharged, a fund which ought to have gone to the creditors reverted to the bankrupt. I cannot accept that proposition. For my part I look upon the reappointment of a trustee as a mere machinery for giving effect to the rights given by the Act, and I would go the length of saying it was necessarily implied in the Act. It would be very difficult to imagine a clearer case than this, and I move that the appeal be dismissed, but without costs, as the appellant sued *in forma pauperis*.

LORD WATSON, LORD BRAMWELL, and LORD MORRIS concurred.

Their Lordships dismissed the appeal.

Counsel for the Appellant—Haldane, Q.C. — Kemp—A. S. D. Thomson. Agents—Savidge & Southern, for Andrew Urquhart, S.S.C.

Counsel for the Respondents — Graham Murray — Le Breton. Agent — Andrew Beveridge, for Alex. Morison, S.S.C.

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*Monday, July* 27.

(Before the Earl of Selborne, and Lords Watson, Macnaghten, and Morris.)

## CLARKE *v.* CARFIN COAL COMPANY.

*Reparation—Parent and Child—Action for Damages for Death of Illegitimate Child—Title to Sue.*

A woman sued a company for damages for the loss, by the fault of the defenders, of her illegitimate son, who was fourteen years of age. The respondents, founding on the illegitimacy of the son, pleaded no title to sue.

*Held* (*aff.* the decision of the Second Division) that the pursuer had no title to sue.

The appellant in this case, Mrs Susan Clarke, was the pursuer of an action of damages raised in the Sheriff Court of Lanarkshire, in which she claimed from the respondents £500 in respect of her son's death through their fault. The son, fourteen years of age, was illegitimate, and the respondents (who did not otherwise dispute the relevancy of her case) pleaded that she had no title to sue. This plea was sustained by the Sheriff-Substitute, and his judgment was on appeal adhered to by the Second Division of the Court of Session. Their Lordships gave no opinions, as the point had previously been decided by them in the case of *Weir* v. *The Coltness Iron Company, Limited*, March 16, 1889, 16 R. 614.

The pursuer appealed.

The question before their Lordships was simply this—Is a mother entitled (by the