Saturday, March 11.

FIRST DIVISION.

[Lord Rutherfurd Clark.

CLYDESDALE BANKING CO. *v.* ROYAL BANK OF SCOTLAND AND OTHERS.

Bank—Crossed Cheque—Forgeries—Liability.

A clerk of P, a customer of the Royal Bank, presented there a crossed cheque drawn in P's favour by D on the Clydesdale Bank, and endorsed by P. D was not a customer of the Royal Bank. The Royal Bank cashed the cheque, and thereafter presented it to the Clydesdale, who paid the money. Ten days after, the Clydesdale discovered D's signature and P's endorsation to be forgeries.—*Held*, in action at instance of the Clydesdale against the Royal Bank, that the Royal Bank had acted merely as agent for getting the money for P, and was not liable, not being *lucratus*, and no *mala fides* being alleged.

This was an action as to which of two banks should bear the loss resulting from a forged cheque. The whole facts appear in the note appended to the following interlocutor of the Lord Ordinary:—

"*Edinburgh, 22d February* 1876.—The Lord Ordinary having considered the cause, Assoilzies the Royal Bank of Scotland from the conclusions of the libel, and decerns: Finds them entitled to expenses: Allows an account thereof to be lodged, and remits the same when lodged to the Auditor to tax and report. And as regards the case between the pursuers and the defender Paul and his trustee, before answer allows the parties a proof of their respective averments, the proof to be led on a day to be afterwards fixed.

"*Note.*—In the opinion of the Lord Ordinary, no relevant case is stated against the Royal Bank.

"A crossed cheque, purporting to be drawn by Dixon Brothers on the Clydesdale Bank in favour of Daniel Paul or bearer, was presented to the Royal Bank. It was, as the pursuers allege, so presented by 'Daniel Paul, or by a clerk or servant for whom he is responsible.' The pursuers did not dispute that Paul was a customer of the Royal Bank. The cheque being crossed, could not according to rule be paid otherwise than through a banker.

"The Royal Bank regarded the cheque as in order, and paid the contents to the person by whom it was presented. It was thereafter presented for payment to the pursuers, on whom it was drawn. It was paid, and the cash was retained by the Royal Bank.

"The Royal Bank were, in the opinion of the Lord Ordinary, the mere agents for recovering payment of the cheque. That they paid in anticipation does not, he thinks, affect the position. They took the risk of the cheque being honoured by the pursuers. But when it was honoured they received the money on account of the person who presented it to them, and having already paid him the money, they are in the same position as if they had first presented the cheque for payment, received the money, and then handed it over to him. There is no allegation that they were not in good faith, or that they are in any way richer by the transaction.

"The question is, On whom the loss shall fall? The Lord Ordinary is of opinion that it cannot fall on the Royal Bank. It was the duty of the pursuers before they paid the cheque to satisfy themselves that it was genuine. They accepted it as genuine, and accordingly paid the money. They cannot recover the loss from the person who, as the Lord Ordinary thinks, was the mere agent for collection.

"It is said that before it was presented to the pursuers the cheque had the name of the Royal Bank impressed on its face. This, in the opinion of the Lord Ordinary, does no more than charge the Bank with the receipt of the money.

"Further, it was admitted that the pursuers did not give notice to the Royal Bank that the cheque was forged till 10th December. The delay in giving notice is, as the Lord Ordinary thinks, sufficient to absolve the Royal Bank.

"It was maintained that a distinction might be taken, inasmuch as the signature of Paul was forged as well as that of Dixon. The Lord Ordinary does not think so. If the Royal Bank had any reason to think that the cheque was irregular, the pursuers would have had something to say. But there is no allegation to that effect.

"The cases referred to were *Cox*, 9 B & C, 902; and *Smith*, 1 Marshall 453, and 6 Taunton 76.

"As regards the other defender, the Lord Ordinary has before answer allowed a proof."

The pursuers reclaimed, and argued—Having paid the money to the Royal Bank for a forged cheque, they were entitled to have recourse against them. The Royal Bank was really *lucratus* by being saved from loss. The Royal Bank ought to have seen that the endorser's signature was a forgery. The Royal Bank ought only to have credited Paul's account with the sum, and not to have paid the money over the counter.

Authorities—*Jones*, Marshall's Reports, p. 157, and *Bruce*, p. 165; *Gurney*, 4 Ellis and Bl. 133, and cases quoted in Lord Ordinary's note.

At advising—

Lord President—This is a question of some importance, and if I had had any doubt I should have wished further argument. But it is, I think, free from difficulty.

The cheque bore to be for £4800, drawn by Dixon Brothers on the Clydesdale Bank in favour of Paul or bearer. The cheque was crossed generally, *i.e.* with the words "& Co.," and, according to the practice of bankers such a cheque can only be paid through a bank—that is, the drawee bank will only pay to another bank. The meaning of that is, that the party holding the cheque must go to his own bankers and get them to get him the money. This arrangement rested at first on the practice of bankers; but in 1856 it was recognised by statute, and it is not unimportant to see the words of the statute. It provides that "in every case where a draft on any banker made payable to bearer, or to order on demand, bears across its face an addition in written or stamped letters of the name of any banker or of the words 'and company,' in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made that the same is to be paid

only to or through some banker, and the same shall be payable only to or through some banker."

That certainly does not mean that the banker who obtains payment is to be in right of the cheque, but rather in right of his customer. This is just what occurred here. A cheque was presented by Paul or by a servant of Paul's, and the Royal Bank cashed it at once. This only showed that the Royal Bank felt safe in trusting to Paul to satisfy them if the Clydesdale did not produce funds to meet the draft. But their having advanced money to Paul does not alter their position in regard to the Clydesdale Bank; for when they go to the Clydesdale Bank, they go as the agent of Paul, having themselves no right except as the hand of Paul. The Clydesdale Bank, on the other hand, on the cheque being presented, pay the money in the belief of course that it is the genuine draft of Dixon Brothers. It turns out that it is not so, and the question is, Who is to bear the loss? It appears to me that when the Clydesdale Bank pay money on the draft of a customer, they are bound to satisfy themselves that the signature is genuine. The Royal Bank, which brings the cheque, has no knowledge of the signature of Dixon Brothers, but the Clydesdale necessarily has of their own customers, whose signature they every day examine. It seems to me, therefore, as in a question between the two banks, that the Clydesdale is answerable, and that the Royal Bank having taken no benefit from the transaction, and having acted merely as the agent of Paul, incurred no responsibility. Paul, of course, is not at present before us. I am therefore for adhering to the interlocutor of the Lord Ordinary.

Lord Ardmillan—I think the Lord Ordinary put the case very tersely in his interlocutor. The Royal Bank received a cheque from a party who was their customer, but drawn by a party who was not their customer, and they were under no obligation to assure themselves of the genuineness of the signature of Dixon Brothers. They were only the medium whereby the money was obtained.

Lord Mure—I concur. I think the case is ruled by the doctrine in the case of the *Caledonian Insurance Co.*, 21 D. 1197, and 23 D. (H. L.) 3.

Lord Deas declined as a Director of the Royal Bank.

The Court adhered.

Counsel for Pursuers—Readman. Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for Defenders — Fraser. Agents—Dundas & Wilson, W.S.

Tuesday, March 14.

SECOND DIVISION.

[Lord Curriehill.

MACKIE *v.* GLADSTONE AND OTHERS (MACKIE'S TRUSTEES).

Trust-Disposition — Residue — Vesting — Suspensive Condition.

A truster directed his trustees to pay over the residue of his estate equally between two sons "when the younger of them shall attain twenty-five years of age," with a clause of survivorship in case of the death of either "before the succession opens to him." — *Held* that on the death of the younger before he had attained twenty-five, the elder brother was entitled to immediate payment of the whole residue, on the ground that the suspensive condition had been purified.

This was an action at the instance of John Gladstone Mackie of Auchencairn, Kirkcudbrightshire, against the trustees and executors under the will of his father (the deceased Ivie Mackie), and also against the beneficiaries under that will, who did not, however, lodge defences. The summons concluded for declarator that the trustees should, under burden of certain provisions in his father's trust-disposition and settlement—(1) denude of and make over to the pursuer, as the surviving residuary legatee, the whole residue and remainder of the heritable and moveable, real and personal, estates of the deceased Ivie Mackie, at present standing in their names; or otherwise (2) that the trustees should denude of and make over to the pursuer, as surviving residuary legatee, the one-half or share of the whole residue and remainder of the said estates which Stuart Mackie, now deceased, would, under the said trust-disposition and settlement, have been entitled to receive on his attaining twenty-five years of age; and to denude of and make over to the pursuer, on his attaining twenty-five years of age, the other half or share of the whole residue; or otherwise (3) that the trustees should denude of and make over to the pursuer, as surviving residuary legatee, on his attaining twenty-five years of age, the said whole residue.

The late Ivie Mackie, the pursuer's father, died 23d February 1873, leaving a trust-disposition and settlement dated 11th May 1871, and recorded 6th March 1873. The defenders were under this deed appointed trustees and executors, and after the truster's death they paid the legacies and made the investments directed by the deed. The residue of the estate standing in the name of the trustees consisted of—*First*, The estates of Auchencairn, Rascarrel, and Netherlaw, which were burdened with an annuity of £2500 to the deceased's widow, and subject to her liferent right to Auchencairn House and others; and *second*, of personal property amounting to about £95,000, in addition to the share of the trust in a business carried on in Manchester under the firm of Findlater & Mackie. The annual income of the residue amounted, after the deduction of the annuity to the widow and expenses, to about £11,000.

Under the deed the residuary legatees were the pursuer, born 20th July 1854, and his brother Stuart Mackie, born 2d April 1856, and drowned 18th August 1875. Stuart died unmarried, and the succession to the residue had not opened to him.

The leading provisions in the clause referring to the residue in the trust-deed were as follows—"*Seventh*, I direct and appoint my trustees, after payment of my debts, deathbed and funeral expenses, and after payment and delivery of the foresaid provisions, to pay, assign, and dispone . . . to my sons, John Gladstone Mackie and Stuart Mackie, equally between them, share