

gusted with the conduct of the pursuer ;" or the publisher might say—"I was unguarded in publishing these letters, but look at my position with so many of the public pressing me. I regret that I yielded, but you must make the damages very small." That surely would be unjust to the pursuer, if the fact be that these various letters were the production of the publisher of the paper himself, and that is the averment here. I am not prepared to say that I would admit this inquiry but for the special averment here, but with that averment, and as the fact may be so, it appears to me we are bound to admit the evidence.

I think the case is distinguishable from the case of *Lowe v. Taylor*, because in that case there was no suggestion that the letters were not letters from *bona fide* third parties. The argument was taken on the footing that they were from *bona fide* third parties, and it was held that as the editor chose to take the responsibility there could be no inquiry behind him. This case is different, because of the averment that the publisher himself was the author.

There remains only the question as to whether there should be a separate issue, and while I agree with your Lordship upon that point, I am of opinion that the issue proposed is quite sufficient. The issue puts it thus—these articles have appeared in the paper, and the question is whether they are of and concerning the pursuer, and calumniously represent what is there stated—that is, whether the publisher has so represented, for practically he takes the position of having published them. In that question it appears to me to be simply a point of more or less damages whether he wrote the letters as well as published them. If he published them only, and published them in circumstances that he got them from *bona fide* third parties, the damages would be smaller in amount than they would be if he wrote the articles himself, but that is merely a case of aggravated circumstances of publication, and I am of opinion that it could be proved in the issue we now have before us. On these grounds I think the diligence is not too sweeping, and I am of opinion that it ought to be granted.

LORD ADAM—In actions of damages for libel I think it is competent by the law of Scotland to inquire into the state of mind of the publisher or writer of the libel as the case may be. I think that is a rule of the law of Scotland. I think in the case of a publisher the pursuer is entitled to show all the surrounding circumstances in which he made the publication. We had an example of that the other day in the case of *Browne v. Macfarlane*, in which the publisher proved that he had received the information through a correspondent in due course, and no doubt he might have gone on, if it had been the fact, to show that he had made due inquiry into the truth of the information as supplied to him. But I think it follows as a necessary consequence that if this is allowed in mitigation of damages, a similar inquiry must be allowed in aggravation of damages. I think the one is just a counterpart of the other, and it will not do for the defender to say—"As I do not propose to inquire into the surrounding circumstances, you, the pursuer, will not be allowed to do so."

Upon these grounds I think it would be wrong to refuse this diligence, for it would lead to this, that the publisher of a newspaper would be put into a more privileged position than any other member of the public. According to this view, he has nothing to do but write any number of anonymous letters, and publish them in his newspaper, and then say—"I am publisher of the newspaper, and you cannot inquire into the circumstances." I am not very much influenced by the fact that this may lead to the disclosure of the names of the actual writers of the libels. I can quite understand, as was the case in *Lowe v. Taylor*, that where the pursuer can show no legitimate interest to have the names of the writers the Court will not assist him. But where, as here, the pursuer has a legitimate interest to know who wrote these letters, then I think we should not stand in the way of his getting the information.

The Court recalled the Lord Ordinary's interlocutor, and remitted the case back to him to grant the diligence as craved.

Counsel for the Pursuer—Guthrie Smith—Wilson. Agent—Andrew Newlands, S.S.C.

Counsel for the Defenders—Comrie Thomson—J. A. Reid. Agent—William Duncan, S.S.C.

Wednesday, February 6.

SECOND DIVISION.

[Sheriff of Lanarkshire.

COUPER'S TRUSTEES v. THE NATIONAL BANK OF SCOTLAND (LIMITED).

Agent and Principal—Bank—Bank Agent—*Liability of Bank for Fraud of its Agent.*

The agent of a branch bank in a country town was appointed factor of a trust-estate, and authorised to draw the dividends effeiring on the trust funds, and to operate on the trustees' account with the branch bank. He received various sums of trust money which he embezzled. He initialed the entries thereof in the bank pass-book of the trust, and on different occasions forged the initials of the bank accountant to such entries. He did not enter these sums in the bank ledger, and he wrote therein docquets showing a balance at the credit of the trust of much smaller amounts than appeared from the bank pass-book.

In an action at the instance of the trustees against the bank, held that although entries in the pass-book were *prima facie* evidence against the defenders, the money had never been paid into bank, and the defenders were not liable to refund the balance in favour of the pursuers as disclosed by the pass-book.

Richard Reid, writer, Kirkintilloch, was agent for the National Bank of Scotland (Limited) in that town. Upon 31st July 1876 he was appointed law-agent and factor upon a trust under the trust-disposition and settlement of the deceased Archibald Couper, manufacturer in Kirkintilloch, and as such was authorised to uplift

the interest upon the various securities held by the trust, and to operate upon the trust bank account. Reid acted in these capacities until about the end of October 1887, when he absconded from Kirkintilloch.

The trustees obtained possession of the bank pass-books which Reid had formerly kept in his own possession, and found that the balance due to the trust according to these books, as at 1st June 1887, was £218, 19s. 11d. The bank, however, declined to accept that balance as the correct state of account between the parties, and indeed claimed that the trust was in debt to them.

The trustees Mrs Helen Dollar or Couper, widow of the said Archibald Couper, and others, therefore brought an action to recover the sum of £86, 2s. 6d., which after examination of the whole transactions they claimed to be the balance due to them as disclosed by the pass-books.

The pursuers averred—"Up to the 1st of June 1887 the sums paid into the bank are regularly and formally entered in the pass-books, and are initialed by the bank agent. Such entries are the recognised acknowledgments by bankers for moneys paid into bank. From an examination of the pass-books, bank interest does not appear to have been allowed, nor charged on the sums standing at the credit or debit of the trust from 1st November 1883. The defenders having declined to complete the pursuers' pass-books, the pursuers have had the interest calculated otherwise to the best of their ability, and giving effect to their calculations they find that, as at 1st November 1887 (the date of the defenders' last annual balance), there is only a balance due to them of £86, 2s. 2d., which is the principal sum sued for. It was from the defenders the pursuers obtained possession of the pass-books, and any docquets made in the bank's ledger were not made by Richard Reid as factor for the pursuers. They were false and fraudulent, and at variance with the pass-books and the facts, and were made by him solely to conceal the manipulations on the account and his defalcations as bank agent. Richard Reid could not, as factor for the trustees, manipulate the bank's ledger so as to render it different from the pass-books. The docquet formed part of the manipulations of the bank's ledger by the said Richard Reid as bank agent."

The defenders averred—"Explained that Richard Reid, as is customary where factors operate on a bank account, had the custody of the pursuers' pass-book. Such a pass-book is not one of the books of the bank, and is never held by the bank, but always by the customer or some-one on his behalf. The entries in a pass-book are made by the customer, and not by the bank. Explained that on 1st June 1887 there was standing at the credit of the account kept for the pursuers in the bank books a sum of £19, 8s. 1d. If the pursuers' pass-book showed a different total at their credit such total was arrived at by means of false, fraudulent, or mistaken entries made by the said Richard Reid to conceal his defalcations as factor for the pursuers. The pass-books do not set forth the true state of the account; it is not the custom for such entries to be initialed by the bank agent. It is unusual for him to initial such entries, which are usually initialed by the teller or the ledger clerk, and

sometimes by both. Explained further, that after crediting pursuers with all money paid into the bank, and with all sums drawn out, the balance at their credit on 1st June 1887 was £19, 8s. 1d. As factor for the pursuers, Reid from time to time docquetted the said account in the defenders' Kirkintilloch ledgers. On 1st November 1886 the said Richard Reid docquetted the said bank ledger in the following terms, viz.:—"The above account examined and found correct, the vouchers delivered up, and the balance, carried to credit in a new account, amounts to £1, 17s.—Richard Reid, factor." The sum of £1, 17s. was carried to the credit of the new account, which was operated on by Reid as factor for the pursuers, with the result that on 1st November 1887 there was a sum of £98, 9s. 5d. at the debit of the account, for which the defenders reserve their claim."

The pursuers pleaded—" (2) The pursuers having paid into the defenders' branch at Kirkintilloch the sums entered in their pass-books, and said payments having been duly acknowledged by the initials of their agent, the defenders are liable for the balance due upon the entries in said pass-books, and the pursuers are entitled to decree as craved, with expenses. (4) The docquets founded on by the defenders not having been made by the said Richard Reid in his capacity of factor, but as part of a series of false and fraudulent manipulations by him, as bank agent, to deceive the defenders, the pursuers are not bound thereby. (5) The entries in the pass-books being the usual acknowledgments given by the banks for moneys paid to their officials, the defenders are bound thereby."

The defenders pleaded—" (2) Any loss the pursuers may have sustained having been caused by the malversations of the said Richard Reid in his character of factor to the pursuers, the defenders should be assolizied. (4) In any view, the said Richard Reid having docquetted the pursuers' bank account on 1st November 1886, they are bound by the terms of that docquet."

At a proof before the Sheriff-Substitute (LEES) it appeared that it was the practice in all banks to require a paid-in slip along with money lodged. In large banks the receipt of money was acknowledged by the initials of the teller and the cheque clerk; in smaller banks by the initials of the official who acted as teller. Reid kept the pass-book of the trust in his own possession. The other bank officials, of whom there were five, were unaware of its existence. All the entries in it were initialed by him, although he seldom acted as teller, and there were no paid-in slips corresponding with these entries. Against two of the entries in the pass-book Reid had forged the initials of the ledger clerk of the bank. He had also from time to time docquetted the bank ledger in terms to those of the docquet mentioned above, in each case showing a different and smaller amount at the credit of the trustees than was shown by the entries in the pass-book.

Upon 30th October 1888 the Sheriff-Substitute pronounced this interlocutor, after finding the facts above narrated—" . . . Finds that the bank did not receive the sums claimed by the pursuers which go to make the balance claimed by them: Finds in law (1) that in the circumstances above set forth the initialing of the bank pass-books by the said Richard Reid was not habile to constitute

a claim in the pursuers' favour in terms of the pass-books; and (2) that the sums claimed by the pursuers not having been paid to the defenders, or to anyone on their behalf, and the defenders not having received the same, they are not liable to make payment to the pursuers of the sums claimed: Therefore assolvizes the defenders from the conclusions of the action, and decerns: Finds the pursuers liable to them in expenses, &c.

“*Note*.—The parties are agreed that the sum in dispute between them is approximately represented by four cheques, which do not appear in the defenders' books. As regards the first few entries the pass-books are correct, and have been properly kept. The sums paid in and the dates of payment are correct, and have been initialed by the accountant of the bank. Thereafter the initialing was by Reid, and it is urged that it was improper for Reid to vouch payments by his initials. I should, however, have been quite prepared to hold that Reid's initials constituted a *prima facie* case against the bank. And if the question had turned solely upon the four inaccurate or false entries by Reid, not improbably the decision must have gone against the defenders. But the result of examination is to show that the pass-books after 1876 ceased to represent with even approximate accuracy the transactions that were being made on behalf of the pursuers. And I am afraid that there is really no room even for doubt that the defenders are right in asserting that after 1876 the pass-books were concocted by Reid merely as a blind to the pursuers in regard to what he was doing, and that his object was not to cheat the bank, but the pursuers. It was his position as the defenders' servant that enabled him to perpetrate the fraud, but if the fraud had been perpetrated on the defenders it would of course have been speedily found out. Now, the pass-books are the only case for the pursuers. It was as their servant, and in virtue of their mandate, that Reid received the moneys, but the mere passage of the moneys into his hands could not constitute responsibility for them against the defenders. I do not for a moment say that if it could be shown that the moneys passed into the coffers of the bank, or into the hands of anyone acting on its behalf, and authorised to do so, it would be materially adverse to the pursuers' case that the payments had not entered the bank ledger and were not accompanied with pay-slips. The ledger and pay-slips exist for the purposes of the bank, and though entries in it or payment made with them might constitute liability against the bank, their absence could not invalidate a claim otherwise good. But where that claim depends solely on manufactured entries in pass-books which were not held by the pursuers, I think they cannot succeed without fortifying these entries by proof of payment of the moneys to the bank. No doubt there were sums received on behalf of the pursuers of approximately the amount specified in the pass-books. But as I have already said, these sums did not pass into the hands of the bank in a manner even resembling the statements made in the pass-books, and I therefore cannot hold that these entries bind, or were even when made intended to bind, the bank in a question with the pursuers. The very fact that Reid forged the initials of the bank accountant shows that he

regarded his own entries as not being made by him on the bank's behalf or as binding it. It is not everything that a bank agent writes that will bind his bank. There must be some basis for what he is doing, and this of course is only the more true in the case of a running account as compared with a fitted account or a formal receipt. I therefore come to think with some regret that in this question as to where the loss is to fall the pursuers must bear it. And it is more satisfactory to place the decision of the case, I think, on the grounds above stated than on the docket signed by Reid in the bank ledger as if for the pursuers; probably that docket would not protect the defenders if it was their only defence, but the pursuers' case seems to me to fail otherwise.”

The pursuers appealed, and argued—(1) The question is, was the money of the trust duly received by the bank? The evidence showed that the usual course was followed in this case; the pass-book was initialed by the agent, who on these occasions acted as the teller; that was *prima facie* evidence that the money was paid into the bank, and embezzled by their agent, and therefore the bank was liable for the loss occasioned by the fraud—*Craw v. The Commercial Bank*, December 9, 1840, 3 D. 193; *Rhind v. The Commercial Bank*, February 24, 1857, 19 D. 519, and February 10, 1860, 22 D. (H. of L.) 2. The docket founded on by the defenders could not bind the trustees in any way in their dealings with the bank. It was a gratuitous discharge by Reid of money which was owing to them as shown by the pass-book. Reid had no mandate from the trustees to sign such a docket; it was a private matter between him and the bank—*Fell v. Rattray*, January 28, 1869, 41 Jur. 236.

Counsel for the defenders was not called upon.

At advising—

LORD YOUNG—This case is of some interest, and it is a satisfaction to us that we have had the argument which was so fully and ably stated by Mr Balfour. I indicated in the course of the debate the questions upon which, I think, our decision must turn. That is, whether as a matter of fact the bank received the money which the pursuers seek to have paid to them? The entries in the pass-book are no doubt *prima facie* evidence that it did so receive the money, but they are not conclusive evidence against the bank, and we must determine upon consideration of the whole facts of the case whether the bank did really receive it. I have no doubt that here the entries in the pass-book are *prima facie* evidence against the bank, even as regards those items to which only the initials of the agent are attached. I think the public would be distressed and alarmed if it was held to be the law that when a customer paid money to the agent of a bank personally, and received an acknowledgment from him by his initialing the entry in the pass-book, that that was not *prima facie* evidence against the bank. I think the usual custom is that there should be two signatures to the entry—first, the initials of the teller who received the money, and then the initials of the cheque clerk. If the teller alone, or the agent alone, acknowledges the receipt of the money, he does so by affixing his initials to the entry. Such acknow-

ledgments constitute *prima facie* evidence against the bank. I think it is not doubtful that if a customer of the bank should pay money into the bank agent's hands, and that he instead of paying it into the bank puts it into his own pocket, he is a thief from the bank, and the bank is responsible for the money so paid in. In this case Mr Reid was agent and factor for these trustees, and he received trust funds and embezzled a certain portion of them. With respect to the items there seemed to be a certain confusion, but the parties have now reduced the sum to about £80. The question is, whether Reid embezzled this money as factor, or as agent for the bank? He filled both capacities, but he could not embezzle in both capacities; the money could not be embezzled twice; he must have embezzled it in one capacity or the other. If he embezzled it as a factor for the trustees, then the money was never paid into the bank, but the suggestion of the pursuers is that he passed it from himself as factor to himself as agent for the bank, and then embezzled it, so that the money was in the bank's hands, and they are now liable to repay it. Now, looking at it as a matter of fact, I do not think that that view has much to recommend it. I think the money had never been paid into the bank before it was embezzled, and therefore it never came into Reid's hands as bank agent. And I think the facts as they were told us as regards the latter two items which have two sets of initials to them point in the same direction, for while initialing the items himself he forged the initials of another official of the bank. If the sums of money had come into his hands as bank agent there would have been no necessity for his forging the name of the other official. When he made up his pass-book no one can tell, for he kept it in his own possession, and probably no eyes but his own ever saw it, but I think the conclusion to which the forgery points is that he never paid the money into the bank. The doquets in the bank ledger also are evidence that the money was never paid. I therefore agree with the finding of the Sheriff-Substitute, and hold it proved as matter of fact that the bank never received the sums claimed by the pursuers. That being so the *prima facie* evidence of the pass-book has been displaced by satisfactory evidence that the money was not paid in, and I would suggest to your Lordships that we should dismiss the appeal with expenses.

LORD RUTHERFURD CLARK and LORD LEE concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor:—

“Find in fact that on 1st November 1886 the balance due by the defenders on the cash account with Richard Reid as agent and factor for the pursuers was £1, 17s., and that on 1st November 1887 there was a balance due to the defenders on said account, and that no sum is now due by the defenders to the pursuers: Therefore dismiss the appeal, and affirm the interlocutor of the Sheriff-Substitute appealed against: Find the defender entitled to expenses,” &c.

Counsel for the Pursuers—Balfour, Q.C.—Murray. Agent—Donald Mackenzie, W.S.

Counsel for the Defenders—Low. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, February 6.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MURDOCH & COMPANY, LIMITED *v.* GREIG.

Possession—Sale—Suspensive Condition—Hiring Agreement—Reputed Ownership.

A customer obtained a harmonium from a firm of music-sellers under a contract whereby she undertook “to pay to them a deposit of 30s. on delivery of the harmonium, and a further sum of £1 every four weeks thereafter as hire, until the full price shall have been paid, when the goods shall be the property of the hirer, without any further payment whatever.” It was further stipulated that until the full sum was paid “the hirer should have no property in the goods otherwise than as a hirer.”

The sum stipulated was deposited on delivery, and one instalment of 20s. was paid; thereafter the customer left the country, and on her instructions her furniture, including the harmonium, was sold by public roup.

In an action by the music-sellers against the purchaser of the harmonium—held that the pursuers were entitled to delivery thereof, on the ground that the transaction between them and their customer was a sale under a suspensive condition, and that as she had not paid the full price, no right of property had passed to her, and therefore she was not in a position to give a good title to the defender.

On 11th December 1886 Mrs Taylor, 4 Bellgrove Street, Glasgow, obtained from John G. Murdoch & Company, Limited, pianoforte and harmonium dealers, 83 and 85 Union Street, Glasgow, a harmonium in terms of a signed agreement whereby she undertook, *inter alia*, “to pay to the owners the sum of 30s. on delivery of the said harmonium, as deposit, and a further sum of 20s. every four weeks thereafter as hire until the full amount of £15, 15s. (including the deposit) shall have been paid, when the goods shall be the property of the hirer without any further payment whatever; and she further undertook ‘to keep the goods in the hirer's own custody;’ further, that the hirer should ‘have no property in the goods otherwise than as a hirer thereof only;’ and said contract or agreement provided further, that ‘should the hirer through change of circumstances be unable to continue such payments he may transfer his interests in the goods under this agreement to any responsible person (to be approved of by the owners in writing) who shall continue the payments in the stead of the hirer.’” The agreement contained, *inter alia*, the following condition—“2. The hirer agrees that until the said full sum be paid the hirer shall have no property in the goods otherwise than as a hirer thereof only, and that if the hirer