

sons favoured are persons in the primary sense of the term—the same sense in which the word is used in the 40th section itself.

In this view the Act has not left the scope of the exemption to inference from a *prima facie* probability that the exemption would square (as regards the class affected) with the charge. But I am not sure, when the subject-matter is looked to, that there is any such *prima facie* probability, for it is at least conceivable that the needs or poverty of the individual should be viewed in a different light from the needs and the poverty of a society. And this view is supported by the machinery provided for the individuals of, e.g., a partnership, working out their own relief.

I am unable to think that the present question is affected or elucidated by those provisions which place on the officers of societies the duties in relation to the charge which in the ordinary case fall on the individual to be charged. And (to mention another argument relied on in the Court of Session) the view that the 192nd section which makes "person" read as "persons" seems to prove too much. If it were sound, the charge on the Conservative Association is wrong, and the charge ought to have been made on the individual members of the association. I think the charge was rightly made on the association, and that the true question is whether the association is entitled to the exemption. I think it is not, and therefore I am for allowing the appeal, and I move accordingly.

LORD HALSBURY—I have had an opportunity of reading the judgment which has been delivered by my noble and learned friend Lord Robertson; and my noble and learned friend Lord Lindley, and I, both concur in what he has said, and we desire to add nothing.

Counsel for the respondents here reminded their Lordships that he had in the discussion asked for expenses both of the appeal and in the Court below, and that counsel for the appellants had agreed to the request as it was a test case.

LORD HALSBURY—Well, that the Crown should win and that you should get the costs both here and below strikes me as a very odd thing, but if the parties have agreed to that the House will make the order.

Interlocutor appealed from reversed and costs in the House of Lords and the Courts below granted to the respondents.

Counsel for the Pursuers and Appellants—The Attorney-General (Sir R. Finlay)—The Lord Advocate (Scott Dickson, K.C.)—A. J. Young, Agents—Sir F. C. Gore (Inland Revenue), London—P. J. Hamilton Grierson (Solicitor of Inland Revenue), Edinburgh.

Counsel for the Defenders and Respondents—C. N. Johnston, K.C.—R. S. Horne—H. W. Beveridge, Agents—A. & W. Beveridge, London—Gray & Handyside, S.S.C., Edinburgh—Bishop, Milne, Boyd, & Russell, Glasgow.

COURT OF SESSION.

Friday, November 17.

FIRST DIVISION.

[Lord Low, Ordinary.]

ROBB v. GOW BROTHERS & GEMMELL.

Fraud—Principal and Agent—Stockbroker—Fraud by Stockbroker's Accredited Clerk—Stockbroker not Liable for Certificates of Stock Misappropriated by Clerk nor for Sums of Money Credited to Client in Monthly Account Received by Clerk.

An "accredited" clerk in a stockbrokers' office obtained possession of certificates of stock belonging to a client whose brother-in-law he was, which had been left in the office, and, executing forged transfers, sold the stock and appropriated the proceeds. On another occasion in the fortnightly account rendered to the client he credited him with the amount of a cheque and receipted the account, although the stockbrokers had not received the cheque, which he had appropriated to his own use. It was not proved that he had any authority to grant receipts.

Held (affirming judgment of Lord Ordinary (Low)) that the rule of law established in *Barwick v. English Joint Stock Bank* (L.R. 2 Ex. 259), and *Clydesdale Bank v. Paul* (March 8 1877, 4 R. 626, 14 S.L.R. 403), whereby an innocent principal is only held liable for his agent's fraud where the fraud is committed within the scope of the service and for the principal's benefit, applied, and that the stockbrokers were consequently not liable.

Contract—Breach of Contract—Stockbroker—Purchase of Shares—Certificates not Delivered to Client but Allowed to Remain in Stockbrokers' Office—Failure of Client to Demand Certificates—Negligence—Delay—Liability for Loss.

A instructed a firm of stockbrokers to purchase shares. In his transactions with the firm he invariably dealt with C, a confidential and "accredited" clerk in the firm's employment, and also his brother-in-law. A duly paid for the shares, and became the registered holder, but the certificates sent by the companies to the stockbrokers were not sent on to him but remained in the office, and as he was going on with a series of other transactions A did not ask for them. C executed forged transfers, sold the shares, and pocketed the proceeds.

The first of the transfers in favour of A was dated November 1901, and the last December 1902. C absconded in September 1903. In April 1904 A brought an action for delivery of the certificates (or otherwise for damages).

Held that as A's claim had not been timeously made, the defenders were not liable for the loss.

Opinion (per Lord President) that in ordinary stockbroking transactions the contract with the stockbroker included the delivery to the client of the certificates for the stock purchased.

Payment—Proof—Bearer Cheque—Entry in Fortnightly Account—Forged Entry of Receipt of Cheque—Fraud by Clerk in Employment of Intended Payee—Liability for Loss.

In payment of shares bought for him by a firm of stockbrokers, A drew a bearer cheque for the price, which he either sent by post to the firm or handed to C, a confidential clerk in the firm's employment. C stole the cheque, made a forged entry of the receipt of the money in the fortnightly statement which the firm were in the habit of sending to A, and discharged the account. C had no power to bind the firm for receipt of money. A having brought an action against the firm for delivery of the shares, the firm pleaded that they had not received payment. Held that as A's method of transmitting the money was not a reasonably safe method to adopt, and as C had not *de facto* power to grant receipts on behalf of the firm, the defenders were not liable for the loss.

Opinion (per Lord McLaren) that "to send a cheque which is not only not crossed, but is made payable to bearer, is, according to modern ideas, not a payment in the ordinary course of business."

This was an action at the instance of Andrew Robb, cattle and sheep dealer, residing at Flemington Farm, Newton, Lanarkshire, against Gow Brothers & Gemmell, stock and share brokers, 21 West Nile Street, Glasgow.

The action, brought in April 1904, concluded for delivery of the certificates of certain shares which the pursuer alleged had been purchased by the defenders on his instructions and on his behalf, and also for a count and reckoning in regard to the shares and the dividends thereon. Alternatively, the pursuer claimed payment of £2500 in respect of the loss sustained through the non-delivery of the shares.

The pursuer pleaded, *inter alia*—“(1) The defenders having purchased the said shares on behalf of the pursuer, and having received payment of the price thereof, the pursuer is entitled to delivery of the necessary share certificates as concluded for. . . (3) In the event of the defenders failing to deliver the certificates for said shares to the pursuer, they are bound to account to the pursuer for the value or proceeds thereof. (4) Alternatively, the pursuer having, through the actings of the defenders, suffered loss and damage to the amount concluded for under the fifth conclusion of the summons, decree should be granted for the sum sued for.”

The defenders pleaded, *inter alia*—“(4)

The pursuer not having suffered loss and damage through the actings of the defenders, the defenders ought to be assolized. . . (6) The pursuer is barred by his actings, as referred to in the defenders' answers and statement of facts, from insisting on his present claim.”

A proof was allowed. The facts are given in the opinions of the Lord Ordinary and the Lord President.

On 23rd February 1905 the Lord Ordinary (Low) assolized the defenders from the conclusions of the summons.

Opinion.—“The pursuer is a cattle dealer and the defenders are stockbrokers in Glasgow. For a number of years prior to September 1903 one William Cook was clerk in the defenders' office. He and the pursuer were intimate, and in March 1901 Cook married the pursuer's sister. Cook asked the pursuer to employ the defenders in Stock Exchange transactions (of which the pursuer seems to have had a great number), giving as his reason that he obtained a commission upon any business which he brought to the defenders. That was not strictly true, because there does not seem to have been any agreement between Cook and the defenders that he should be entitled to a commission upon business introduced by him, but he was given to understand that his services in that way would be recognised, and in the last year during which he was in their service he received from the defenders a bonus or honorarium of £1000.

“The pursuer accordingly did employ the defenders in a number of transactions between September 1901 and February 1903. In September 1903 Cook absconded, and it was then found that he had carried through a series of frauds in regard to stocks and shares which the pursuer had instructed the defenders to purchase for him. The pursuer now seeks to have the defenders made liable for the loss which he has thereby suffered.

“Until Cook absconded no one seems to have suspected that he was dishonest, and he possessed the complete confidence both of the pursuer and the defenders. When the pursuer desired to give instructions for the purchase of stock he appears generally to have gone to the defenders' office, and upon these occasions he invariably saw Cook and gave his instructions to him. The pursuer says that he also sometimes communicated his instructions by telephone to the Stock Exchange. It is, of course, impossible to say who answered his call on these occasions, but it is not proved that anyone ever took instructions from him except Cook. I may here mention that Cook was one of the defenders' accredited clerks upon the Stock Exchange—that is to say, he was authorised to make bargains upon the Stock Exchange which would be binding upon the defenders.

“The summons refers to nine lots of shares, the first four of which are in the same position. These are (1) one hundred shares of the British South African Company, (2) thirty shares in the same Company, (3) thirty shares in the Johannesburg

Investment Company, and (4) thirty shares in the same company.

"In regard to all these shares it is admitted that the pursuer instructed the defenders to purchase them, that the defenders did purchase them, that the pursuer duly paid the price and the defenders' commission, that transfers in favour of the pursuer were obtained, and that the respective companies sent share certificates in favour of the pursuer to the defenders. If the pursuer had obtained possession of the certificates, the transactions, so far as the defenders were concerned, would have been closed and completed. The pursuer, however, says that he never obtained the certificates, and whether he did so or not it is certain that they ultimately came into Cook's possession, because the latter sold the shares through other brokers, pocketed the price, and forged transfers in the pursuer's name. Cook could not have carried out these sales unless he had had possession of the certificates.

"I think that it is established that the certificates were not sent to the pursuer by post in the ordinary way, because in that case the defenders would have got receipts for them, and they have no receipts. It was suggested that Cook might have handed the certificates to the pursuer when he was calling at the office. The pursuer, however, says that Cook did not do so, and, further, if Cook had given the certificates to the pursuer I see no reason why the latter should have handed them back to Cook. The pursuer further says that he asked Cook why he had not received the certificates, and that Cook told him the defenders had them. That answer seems to have satisfied the pursuer, because he says that he thought the certificates would be quite safe in the defenders' keeping.

"The plain inference from the circumstances seems to me to be that when the certificates were sent to the defenders' office Cook took possession of them. I think that he was in a position to do so without exciting suspicion. He evidently held a good position in the office, and I suppose that every one there knew that it was through him that the pursuer had come to employ the defenders, and that he was the person whom the pursuer always saw when he came to the office, and to whom he gave his instructions. If, therefore, Cook said that he would take the certificates and deliver them to the pursuer I do not think that anyone in the office was likely to be surprised or suspicious.

"The question is whether in these circumstances the defenders are liable to indemnify the pursuer for the loss which he has sustained through Cook's fraud?

"I think that the rule of law applicable is that which was laid down in the case of *Barwick v. English Joint Stock Bank* (L.R. 2 Exch. 259). It was there held that 'no sensible distinction can be drawn between the case of fraud and the case of any other wrong,' and that the general rule is 'that the master is answerable for every such wrong of the servant or agent as is com-

mitted in the course of the service and for the master's benefit.' That rule has been repeatedly recognised and acted upon both in this Court and in England.

"Now, I doubt very much whether Cook's fraud can be said to have been committed in the course of his service. No doubt it was the fact that he was in the defenders' service, which enabled him to get possession of the certificates, but he had no authority to take possession of the share certificates of any client of the firm, and to do so was entirely outside the scope of his duties. Even, however, if it should be held that Cook was acting within the scope of his employment, that is not enough to impose liability upon the defenders, because it must also be shown that when Cook committed the fraud he was doing something in furtherance of his employment and for his employers' benefit. I think that it is plain that that was not the case here. Cook was not doing anything for the defenders, nor could what he did in any circumstances have been for their benefit. I am therefore of opinion that as regards the first four lots of shares the defenders are not liable to the pursuer.

"The shares referred to in the ninth place in the summons—namely, thirty shares in the East Rand Proprietary Mines—are in exactly the same position as the first four lots with which I have dealt. Cook obtained possession of the share certificate, sold the shares under a forged transfer, and embezzled the price. For the reasons which I have given I do not think that the defenders are responsible.

"The shares which are referred to in the fifth place in the summons are one hundred shares of the Barnato Consolidated Mines. The pursuer on 14th February 1902 instructed the defenders, through Cook, to purchase these shares, and they did so for settlement on the 27th February. On the 24th February, however, Cook informed the defenders that the pursuer desired that the shares should be sold, and accordingly they were sold at a loss of £35, 1s. The pursuer had not instructed Cook to have the shares sold, but intended to take them up. The defenders' books record the sale of the shares on the 24th February, but the pursuer never received a sold note. He did, however, receive an account dated 24th February bringing out a balance of £574, 1s. 6d. as due by him, and which included the price at which the hundred Barnatos had been purchased for him. That account is in Cook's handwriting. On 4th March the pursuer handed to Cook a cheque for the amount of the account (£574, 1s. 6d.), and Cook discharged the account—'For Gow Bros. & Gemmell, W.C.' The cheque was drawn in favour of the defenders, but it was a bearer cheque, and Cook paid it into his own bank account.

"I think that there can be no doubt that Cook intercepted the sold note which in ordinary course of business should have been sent to the pursuer, and which according to the defenders' books was sent to him. Of course, if that sold note had

reached the pursuer, Cook's fraud would have been exposed. There can also be no doubt that the account sent to the pursuer was an account fabricated by Cook to lead the pursuer to believe that the shares had been duly purchased, and to induce him to pay the price. The account appears to have referred to other shares besides the Barnatos, and I do not know what happened in regard to them. They are not, however, included in this action.

"Now, the initial step of this fraud was Cook's representation to the defenders that the pursuer did not intend to take up the shares, but desired that they should be sold. In making that representation it is plain that Cook was not acting in the course of his employment as the defenders' clerk—indeed he was not acting as their clerk at all, but ostensibly as the pursuer's agent. In regard to the subsequent steps by which the fraud was accomplished, Cook was plainly not acting within the scope of his employment when he intercepted the sold note which in ordinary course would have reached the pursuer. Then in making out an account as if for a purchase of the shares, Cook may have been acting within the scope of his employment in this sense, that he may have had authority to make out and render accounts due by clients, but he did not act in any way for the benefit of the defenders. I may here refer to two cases which illustrate very well what is meant by the proposition that to render a master liable for the fraudulent or wrongful act of his servant the latter must be acting for the benefit of the former. In the case of *Clydesdale Bank v. Paul* (4 R. 626) it was held that a stockbroker was liable for money which had been fraudulently obtained by his accredited clerk, because the money was used to pay a debt upon the stock exchange for which the master was in law liable, although it had been fraudulently incurred by the clerk acting in his name.

"The other case is *Dyer v. Munday* (L.R. 1895, 1 Q.B. 742). There the servant of a furniture dealer who had given out an article of furniture upon sale and return, went to recover the article from the customer (who had not implemented the terms of the agreement), and in doing so committed an assault upon him. The latter claimed reparation from the master, and the Court held that the claim was relevant, because when the servant committed the assault he was acting in his master's employment, and was seeking to recover the article of furniture for his master's benefit.

"Now, in rendering the account in question to the pursuer, Cook was not seeking to recover anything or to obtain any benefit for the defenders. That being so, the mere fact that it was Cook's position as the defenders' clerk which made it possible for him to commit the fraud is not enough to render the defenders liable for the loss which the pursuer has sustained.

"The shares referred to in the sixth place in the summons are twenty ordinary shares in Nobel's Dynamite Trust Company. These

shares were purchased by the defenders for the pursuer upon the 16th September 1902 for settlement on the 26th September, but they were sold on the 22nd September. That must have been done upon Cook's representation that the pursuer wished them sold. Here again Cook appears to have prevented the fact of the re-sale coming to the pursuer's knowledge, and upon the settling day he presented an account to the pursuer, which included the price of the shares upon the footing that the purchase had been carried through, and obtained from the pursuer a bearer cheque for the amount (£341, 6s. 8d.), which he appropriated to his own use.

"The circumstances in this instance therefore are practically the same as in the case of the Barnato shares, and for the reasons which I have given in the latter case I am of opinion that the defenders are not liable for the loss which the pursuer has sustained.

"There are two other lots of shares included in the summons, being in both cases twenty shares in Nobel's Dynamite Trust. The defenders had nothing to do with these two lots of shares, and there is no entry relating to them in their books. What happened was this. The pursuer instructed Cook to purchase the shares. Cook did not do so, but without any purchase being made he sent bought notes to the pursuer, then upon settling day he fabricated accounts, obtained bearer cheques from the pursuer, and applied the proceeds to his own purposes.

"It was argued for the pursuer that Cook having been the defenders' accredited clerk, and having accepted the pursuer's instructions to purchase the shares, the defenders thereby became bound to do so, and must either obtain the shares for the pursuer now, or indemnify him for the loss which he has sustained.

"Now, Cook was only an accredited clerk of the defenders on the Stock Exchange and in regard to Stock Exchange transactions. Otherwise he was in no better position than any other clerk in the office, and it seems to me that if a client of a stockbroker chooses to give his instructions to a clerk in the office, who forgets or neglects to pass them on to his employer, the client has no claim against the stockbroker. But further, I do not think that, in relation to the pursuer, Cook can be regarded as nothing more than a clerk in the defenders' employment. The pursuer admittedly did business with the defenders in order to benefit Cook, to whom he was related, and in whom he had complete confidence, and he employed Cook as his agent to convey his instructions to the defenders. In the case of the last two lots of shares, Cook, instead of conveying to the defenders the instructions with which the pursuer had entrusted him, took advantage of the fact that he had received the instructions to perpetrate a fraud against the pursuer on his own account, and without bringing in the defenders in any way whatever. In such circumstances I think that the defenders have not incurred any liability to the pursuer.

"I am therefore of opinion that, as regards the whole of the shares which form the subject of this action, the pursuer has failed to establish his claim."

The pursuer reclaimed, and argued—The action was laid upon contract and not upon fraud. The conclusions of the action were for delivery conform to contract notes. It was the function of a broker to make an enforceable contract for his client—*Maffett v. Stewart*, March 4, 1887, 14 R. 506, at p. 517, 24 S.L.R. 402. *As to Lots 1, 2, 3, 4 and 9*—It had not been proved that these shares had been delivered. The pursuer was therefore entitled to decree. *Quoad* these shares, Cook was the defenders' and not the pursuer's agent. There was no evidence to show that the pursuer had given the shares to Cook. *Esto* that the pursuer gave his instructions to Cook, that did not make him his agent. Failure to deliver the scrip was due to the defenders' negligence, and they were therefore liable—*Farquharson & Company v. King & Company*, [1901] 2 K.B. 697. The certificate was not, as the respondents contended, a mere voucher; it was a document under the seal of the company, and was equivalent to a property title as between the company and the holder. It was a most important document—*In re Bahia and San Francisco Railway Company*, 1868, L.R. 3 Q.B. 584; *Shaw v. Port Philip Gold Mining Company*, 1884, L.R. 13 Q.B.D. 103; *Dixon v. Kennaway & Company*, [1900] 1 Ch. 833. The cases cited by the respondents were based on section 31 of the Companies Act 1862. The pursuer was not barred by the notices of transfers sent by the various companies, as he never got them. In any event, the pursuer was entitled to proceed against the defenders—*Addison on Torts* (7th ed.), 750; *Swan v. North British Australasian Company*, 1863, 2 H. & C. 175. The pursuer was not barred by delay. Any delay on his part was due to his trust in the defenders. *As to Lots 5 and 6*—The pursuer had paid for these shares. Payment was sufficiently proved. The cheques sent by the pursuer were entered in Gow & Gemmell's account, and that implied payment to them. He had either handed them the cheque in their office or had sent it by post. If Cook got hold of it the defenders were liable. Cook was their servant, and if he was put in a position which entitled him to sign receipts, the defenders were responsible for his conduct. On the question of payment reference was made to *Wilmot v. Smith*, 1828, 3 C. & P. 453 (note); *Barrett v. Deere*, 1828, 1 M. & M. 200. *As to Lots 7 and 8*—These shares were in the same position as lots 5 and 6, although there was no genuine contract note. Contracts made by Cook were binding on the defenders, as he was their agent. In the whole circumstances the pursuer was entitled to delivery of his shares, or alternatively to get his money back.

Argued for respondents—The Lord Ordinary was right. The defenders had all along treated Cook as the pursuer's accredited agent. *As to Lots 1, 2, 3, 4 and 9*—Cook

received the certificates as Robb's agent. The pursuer had been put on the register, and the defenders had therefore fulfilled their obligation to make him owner. Notices of transfers were regularly sent to the pursuer, but he had disregarded them. The pursuer had mistaken his remedy. His remedy was to have the register rectified, as forged transfers could not be recognised, and the pursuer could vindicate his right to the shares against the transferee—*Lindley on Companies* (6th ed.), pp. 667-671; *In re Bahia and San Francisco Railway Company*, *cit. supra*; *Johnston v. Renton*, 1870, L.R., 9 Equity 181; *Balkis Consolidated Company v. Tomkinson*, [1893] A.C. 396; *Sheffield Corporation v. Barclay*, [1903] 1 K.B. 1, 2 K.B. 580, *rev.* 1905, W.N. 118. The pursuer had sustained no damage, for he had not lost his shares—he had merely lost the voucher. He was entitled only to the expense of removing the forged transfers, probably also to damages, but not to the value of the property. Assuming the shares had been deposited with the defenders, they were in the position of a gratuitous bailee, and were not liable for theft—*Giblin v. M'Mullen*, 1868, L.R. 2 P.C. App. 317. The defenders had exercised reasonable care, and they were not bound to do more. The pursuer was guilty of negligence in not looking after his scrip, and he was therefore barred from suing for its recovery. *As to Lots 5 and 6*—Payment had not been proved. It had not been proved that payment was made to the firm, or to Cook in the firm's office. The probability was that Cook was instructed to pay, and if during the transit Cook stole the money, he did so while acting as pursuer's agent, and the defenders were not liable. In any event, a bearer cheque was not equivalent to payment until money had been got for it. *As to Lots 7 and 8*—The same argument applied to this group as to the preceding group. There was no contract note, and no evidence of payment. Cook must have kept the money, as the defenders never got it. There was no evidence that the money was handed to Cook in the defenders' office. The probability was that it was given to him either at Robb's house or his own.

At advising—

LORD PRESIDENT—This is an action in which Mr Robb sues a firm of stockbrokers in Glasgow. The conclusions of the summons are for delivery of the certificates in respect of five different parcels of shares which are numbered in the conclusions of the summons 1, 2, 3, 4, and 9, and for delivery of two other parcels of shares, which are numbered in the summons 5 and 6, and 7 and 8.

The circumstances out of which the transactions arose were these. The pursuer is a cattle dealer, and seems to have had a taste for Stock Exchange speculations. In March 1901 his sister married a Mr Cook, who at that time was a clerk in the defenders' employment. Cook was not then, and never became, a partner of the defenders' firm, but he was what was

called an accredited clerk. Now, although the proof upon this matter is not, perhaps, quite so full as it might have been, still I think the meaning of an accredited clerk is this, that he is a person who on the Stock Exchange has right to bind his firm; further than that I do not think the proof goes. But Mr Cook undoubtedly brought to the defenders as much business as he could in a way which is quite familiar, and to anyone who knows the proceedings of the Stock Exchange not in the least unusual. He does not seem to have been paid by any actual covenanted commission; in particular, he was not on what is called the half-commission arrangement—a well-known arrangement—but at the same time he did get a certain amount of gratuity or acknowledgment from his employers in respect of the business he brought, and the business he brought must have been considerable, as shewn by the fact that in one year he seems to have got no less than £1000 by way of commission, his regular salary being £200 a-year. The sum of all that comes to this, that Cook's position was that of an accredited clerk, that it was a confidential relationship, that he did a large amount of business for his employers, but that he never was a partner.

Now, Cook having become the brother-in-law of the pursuer, naturally enough suggested to the pursuer that he should leave the brokers whom he had hitherto employed in the conduct of his Stock Exchange speculations, and should transfer his business to the firm of which he (Cook) was an accredited clerk. That was natural, because of course Cook would get the benefit of the business he thus introduced. Accordingly the pursuer did so, and he entered upon a long series of Stock Exchange speculations which he carried through by means of the defenders' firm. The pursuer seems to have been a man of some means, making money in his own business of cattle dealing, and accordingly his transactions were of what may be called a mixed character. He sometimes took up his shares and sometimes he did not, but merely paid on differences in the ordinary way. Cook was trusted by everybody, and in particular, as far as the pursuer was concerned, Cook seems to have been the man that he always saw. The pursuer sometimes gave his instructions by going to the office, in which case Cook was generally the person that met him. He sometimes gave them by telephone, in which case, though not invariably, Cook's was the voice that he heard. But it was, I think, quite clearly recognised, both by the pursuer on the one hand, and by the defenders' firm on the other, that Cook was the person in the defenders' office who attended to the pursuer's business.

Now, as I have said, Cook was a trusted man, but in September 1903, that is to say, about two and a half years after he had become the pursuer's brother-in-law, Cook absconded. It was then discovered that he had committed a number of frauds upon

his employers, and it is owing to Cook's absconding that the trouble has arisen which caused the present action.

As I have already indicated, the shares in question fall into three separate batches, the first of which, viz., lots 1, 2, 3, 4, and 9, specified in the summons, are all in this position. There is no doubt that Robb ordered the buying of them, there is no doubt that they were bought, there is no doubt that the price was paid, and there is no doubt that the shares themselves were duly delivered, because in each and all of them there was a transfer duly executed by the transferor, and by Robb, the pursuer, as the transferee, and, accordingly, Robb became the registered holder of these various shares. The certificates of the shares were duly sent by the companies in which the particular shares were to the stock-brokers, and of course in ordinary circumstances those certificates would have been sent on to the pursuer, but as a matter of fact he never got them, in the sense, at least, of taking them away from the stock-brokers' office, the consequence of which was that these certificates being left in the brokers' office, Cook in some way or other got hold of them, executed forged transfers, sold the shares on the Stock Exchange to innocent buyers on his own behalf, and pocketed the proceeds.

Now, the Lord Ordinary has dealt with this group of the shares in this manner. After a narration of the facts, which for all practical purposes is identical with the view that I have indicated, his Lordship treats the matter as depending upon the rules of law which are laid down in the well-known cases of *Barwick v. English Joint Stock Bank* (L.R. 2 Ex. 259), and *Clydesdale Bank v. Paul* (4 R. 626), which are cases dealing with the question how far an innocent principal may be made liable for his agent's fraud. The Lord Ordinary thinks that that is the law applicable to this case, because, after pointing out that Cook had got hold of these certificates and used them for fraudulent purposes by means of fraudulent transfers, he then inquires whether these principals are liable for Cook's fraud, and applying the law laid down in those cases he arrives at the conclusion that they are not.

In that aspect of the case I think the Lord Ordinary is perfectly right, and if that were the whole case I should entirely agree with his Lordship in the law which he has applied, and in the results which that law leads to. But when the case came to the Inner House it was argued upon another ground, which I am bound to say is outside the Lord Ordinary's judgment. As far as I can see, his Lordship was not asked to determine this matter, because what I am now going to say does not in any way displace the Lord Ordinary's judgment, but is simply another view of the case which is outside of and does not touch or controvert his Lordship's judgment in any way.

That view of the case is this, that the action is not really laid upon fraud at all, but that it is simply an action based upon breach of contract, being an action for de-

livery. Now, of course if we are to look at it in that way the first point is, what is the contract? The contract here was the ordinary contract which a man makes with his stockbroker when he instructs him to buy shares. If any question were going to be raised as to this, I think that here again the proof is somewhat defective, because although persons from the Stock Exchange were examined, very little attention was directed to the rules of the particular Stock Exchange in which these transactions took place, or as to the general practice of the Stock Exchange, so that your Lordships were left to decide what after all is really a commercial matter merely on your own experience and without any direct evidence of commercial men.

It is, I think, common knowledge that a stockbroker who is acting for a buyer, after having got the transfer from the transferor, and sent it to his buyer to execute as transferee, gets back the transfer and procures from the company a certificate for the shares. Undoubtedly we know that this was done on this occasion, because there is no dispute that the certificates of these shares were duly sent by the secretaries of the various companies to the defenders. I am bound to say I should be prepared to hold, without further evidence, that it is part of the stockbroker's bargain—part, I mean, of the duties which he undertakes to do for a commission which he charges and which he is paid—to see the transaction to its end; and the end of the transaction is when he duly forwards the certificate of the shares to his buying client. Accordingly I am not surprised that one of the stockbrokers, who is one of the defenders, says, no doubt casually and incidentally, without perhaps realising what the full strength of what he was saying was, but yet undoubtedly quite plainly does say, that "delivery of the certificate closes the transaction." Therefore when I consider the contract I do think the defenders here did bind themselves to deliver the certificates of these various shares to the pursuer. That of course lays upon them the onus of howing that they have fulfilled their contract. I confess that if this matter had been recent I should have held that it was for the defenders to show that they had done so, and that it would have been no excuse on their part to say, "Oh, well we do not know, but we suppose that Cook in our office must have stolen the certificates." I do not think it would be an excuse for the non-performance of a contract to deliver an article to say, "Oh, I cannot perform it, for somebody stole the article before I delivered it," any more than it would be for a shopkeeper from whom you had bought a thing in a shop, and who had undertaken to send it home by his own message boy, to say that he could not deliver it because the message boy had run away with it. I confess at one time I was somewhat impressed with that view of the case, but upon more mature consideration I have come to be of opinion that I cannot take that view here because of the dates. The shares of which I have been speaking, namely, lots 1, 2, 3, 4

and 9, were all bought some time ago. The transfer of No. 1 was on 8th November 1901; of No. 2, 21st January 1902; of No. 3, 14th February 1902; of No. 4, 2nd February 1902; and of No. 9, 16th December 1902. Cook did not abscond until September 1903, and the summons in this action is dated April 1904. That being so, it seems to me that looking at the whole evidence of what took place—and here I may say I have looked very carefully at the proof—it is perfectly clear that the pursuer knew, or might have known that he could have got these certificates; but he simply chose to leave them in the stockbrokers' office, because he was going on with a series of transactions, and because he trusted Cook. To shew how this matter stands I would ask your Lordships' particular attention to one small passage in the evidence of the pursuer himself. As I have already said, this gentleman sometimes took up his shares, and sometimes he just went on with his speculative transactions. On one occasion, however, he seems to have been a little pressed for money, and not being able either to take up the shares, or to provide the stockbrokers with a proper margin to keep them safe, some sort of arrangement had to be made. I read now from the pursuer's evidence. He says—"Cook mentioned to me that South African shares were dropping in value, and that the defenders were requiring a bigger margin. (Q) Did that mean that the bank wanted more security, and you had to give more to Gow Brothers & Gemmell?—(A) That is what I understood. I did that by taking in scrip for other shares which I bought through the defenders. I saw Cook about this in the office. It was suggested that I should hand back those shares. (Q) The scrip you had already got?—(A) Yes, and it would be transferred to the bank. I was to sign transfers. I understood they were to be placed along with the others with Gow Brothers & Gemmell's bank. I had never done anything of this kind myself before. (Q) Did you rely entirely upon the defenders carrying the transaction through for you?—(A) That is so. I had no meetings at this time about this matter except with Cook. I called afterwards at the defenders' office with scrip. I saw Cook and gave him the scrip. He told me to sign some transfers, and he produced the transfers. I do not think they were filled up. They described what the stock was. I signed them. (Q) Did he say what this was for?—(A) Yes, to convey the stock to the bank. It must have been about two months after I had bought the stock—August 1902. I cannot exactly say what scrip I had left. I have no note of it. There were Charterreds. I cannot say what the value of them was. I should say it was roughly about £2000. I saw Cook after I had given him this scrip and signed the transfers, and he said Gow Brothers & Gemmell had arranged the matter for me. He told me that in Mr Gow's office." I am not reading that evidence as proving in any way exactly that these particular shares were transferred to the bank for what is a

very ordinary security transaction, but I am reading it as shewing what was the course of business that was going on at this moment between the pursuer and Cook. It is perfectly clear that he was leaving the general management of his affairs with Cook, because to his knowledge transfers were being signed from time to time, and scrip was being left with the defenders, no doubt being retransferred as soon as the course of the speculation permitted, and it was no longer necessary to borrow money from the bank. In the face of that it seems to me impossible to allow the pursuer to lie by for a period of three or four years, and then to say, "You have never delivered these certificates," which I quite agree under the contract they were bound to deliver at first.

Accordingly, in regard to this first parcel of shares, I do not think this new argument makes any difference, because I do not think that in such circumstances Cook's absconding with the shares can be treated as a failure to deliver. I think the practical effect of the evidence is to shew that there was delivery to the pursuer in this sense, that it was entirely with the pursuer's assent that the particular scrip was left in the office of the defenders. That being so, if Cook got hold of it, he got hold of it in one or other of two ways, either with the absolute knowledge and connivance of the pursuer himself, in which case he acted for the moment as his agent, or if he did not, then he got hold of it fraudulently, and then the Lord Ordinary's law comes in, as I think perfectly correctly. Accordingly upon the first batch of shares I arrive at the same conclusion as the Lord Ordinary.

I pass now to the second and third groups of shares. The second batch, consisting of lots 5 and 6, are in this position. There is no doubt as to the order to purchase having been given, for the pursuer bought the shares, and there is no doubt that these shares themselves—observe I am using the word "shares" and not "certificates"—were never transferred to the pursuer, because in this case there are no transfers extant in his favour. As a matter of fact, I think the shares were bought, but were afterwards sold by Cook before the transfer was ever made to the pursuer. The answer of the defenders here is that they were never paid for them. Now that matter depends upon this. The pursuer believed honestly that he did pay for them, and there is no doubt about this, that he drew a cheque intending to pay for them. The cheque which he signed, however, was a cheque payable to bearer. What he did with the cheque is a little uncertain. I should say that I think the pursuer throughout this matter has been perfectly straightforward in his evidence. He deponed—and I think it is greatly to his credit that he did so—that he really could not tell what he did with the cheque. "But," he says, "from my course of dealing I am sure I did one of two things—I either handed it to Cook, which I think exceedingly likely, or, if I did not hand it to Cook, I put it in an envelope and addressed it to the de-

fenders." No one can tell which of these two things happened, but practically it does not much matter in the result, because if Cook did not get the cheque handed to him, he doubtless knew his brother-in-law's handwriting, and he must have opened the letter addressed to the firm and taken the cheque out, because it is quite certain that these cheques, which were bearer cheques, were cashed by Cook at his own bank, and that the proceeds went into Cook's pocket and not into the firm's.

The question that first of all arises is—was this payment by the pursuer to the defenders' firm? Counsel for the pursuer argued very strenuously that it was, and cited a class of cases in which it has been held that where you have to give notice to a person, it is enough if you prove that the notice was posted. The pursuer's argument is this—either the defenders got the cheque through the post, in which case, if one of their clerks stole it, that is not the pursuer's affair, or else they allowed Cook to be the proper recipient of their cheques, in which case they virtually sanctioned his getting it, and they pray in aid of that last proposition a class of cases of which there have been several, in which it has been held that if a person goes into a shop and pays his money across the counter, it will not do for the shopkeeper to turn round afterwards and say he was never paid for the article sold because his servant stole it—the reason being that it is enough for the buyer to show that he paid his money in the ordinary way at the ordinary place of business. I am not throwing any doubt upon this branch of law, which is really based upon a common-sense view of the ordinary course of business. It would be impossible to carry out ordinary ready-money transactions which take place in a shop if you were to be afterwards told that the money was never paid. So, too, with regard to the present arrangements of the Post Office, if one can show that a letter has really been posted, then certainly the onus is upon the person who says he never got it to show that it was not delivered.

But that does not seem to me to solve this question. I do not propose to try, by way of definition, to state precisely what payment consists in, because I think it always must be a question of circumstances. There is no doubt that in the conduct of modern business comparatively few payments nowadays are made in hard cash—they are very often made by cheque. At the same time it must always be remembered that a cheque is not legal tender—it is only a way of paying money; but without going into the question of what might have been the result if this cheque had been sent in a way that procured its being safe, namely, by being drawn to order and crossed, I may say that I do not consider that it is a proper way of sending money, or a way which would entitle you to charge an intended recipient, who *de facto* has never got it, with its receipt, when all that you do is to send him a bearer cheque in an envelope. A bearer cheque is no more than

payment in bank notes, and it seems to me if one is going to send money in a form which makes it so extremely easy of appropriation, he must take it upon himself to see that it gets properly to the hand for which he designed it, either that of the payee himself or of some recognised person who is there for taking payment, such, for instance, as a cashier, part of whose regular duty it is to receive money on behalf of his principals. Accordingly, it seems to me that, as the defenders here never really got the money, the pursuer cannot say that they must be held to have got it simply because he posted a bearer cheque or handed that cheque to a clerk, not a partner, whether that was inside or outside the office.

But the matter does not quite end there, because there is something more than the mere question of the cheque as regards some of the shares. In accordance with the ordinary practice of stockbrokers when dealing with a person who is carrying through a number of transactions, the defenders were in the habit of sending to the pursuer fortnightly statements as to how the accounts stood, and accordingly I take by way of illustration one that relates to the fifth batch of shares. That is an ordinary fortnightly statement for settlement, and bears to be "Andrew Robb, in account with Gow Brothers & Gemmell, for settlement 27th inst." It is in ordinary form. On the debtor side there are 200 Charteredds, 50 Oceanas, and 100 Barneys, and on the other side there is—By 200 Charteredds. This, of course, shows that that is a carrying-over transaction so far as the Charteredds are concerned. Then there is a balance of £570, and there is another entry, "By cheque £574, 1s. 6d.," and that represents the figures on one of those cheques which were sent. Therefore the pursuer argues that, even although he might not be able to prove the receipt of the money by the mere fact of sending a cheque, at least he has proved the receipt of money, because here in the stated account between him and the stockbrokers they acknowledge to have received the proceeds of the cheque. I need scarcely say this account is just Cook again, because it is written in Cook's handwriting, and indeed it is signed by Cook, who simply puts—"For Gow Brothers & Gemmell, W. C."

Therefore it really does not represent anything the defenders have done except in so far as they are bound by Cook. I confess I had some doubt on this part of the case, because, as I have said, Cook was obviously in a confidential relation and was allowed to do business for the defenders' firm; but I have come to be of opinion that, if this is to be treated as a receipt, then I think it is incumbent on the person who got the receipt to show that he got it from persons who are empowered to bind the firm. It is going very far to say that the firm would be bound where the signature which is alleged to bind them is neither that of a partner nor that of a person who has an admitted right to bind the firm for the receipt of money. This document is not, in the true sense of the word, a receipt at all. It is not a receipt duly authenti-

cated with a receipt stamp. It is really an item in a statement of account. It might be a complete mistake, and supposing it were a complete mistake, I cannot suppose that it would be a bar to an action, in the way that a regular receipt would be a bar, in order to get rid of which an action of reduction would be necessary. Therefore, as this entry is not in itself, in the true sense of the term, a receipt, and still more because if it were to be read as a receipt, it would have to be clearly proved that the person who granted it was authorised to bind the firm, I do not think it can be held to charge the defenders with the receipt of money which *de facto* they admittedly really never got.

The third group of shares is in the same position, except that here there was no contract at all. That, of course, really does not much matter, because I do not think it makes any difference. If it did make a difference, it would be, *a fortiori*, against the pursuer.

Therefore upon the whole matter I have come to the conclusion that the Lord Ordinary came to a right decision. It is, of course, as I had occasion to say in a recent case, one of those cases where we have to perform the unpleasant duty of saying on which of two innocent parties the loss is to fall. The pursuer here has been perfectly upright all through, and it is, no doubt, hard that he does not get his shares which he truly bought and which he truly paid for. At the same time the perpetrator of the fraud, who has got the money in his pocket, is not Messrs Gow Brothers & Gemmell, but is Cook, who has absconded. For these reasons I do not think the pursuer can charge the defenders with the loss which has fallen upon him.

I would therefore advise your Lordships to adhere to the Lord Ordinary's interlocutor and to refuse the appeal.

LORD ADAM—I am of the same opinion.

LORD M'LAREN—I entirely agree with your Lordship in the exposition of the law of the case, and I shall confine myself to one or two general observations. I agree with the Solicitor-General that the primary duty of the stockbroker is to obtain an enforceable contract of sale for his client, and that this duty would be fulfilled by his obtaining a transfer duly signed. It is in evidence that it is also the duty of the broker to obtain a certificate of the shares. It is admitted by the defenders that this is part of their business, and that the transaction is not closed until the certificate has been obtained. I therefore think, agreeing with your Lordship, that if, within a reasonable time after the transfer had been signed, the pursuer had written desiring that his certificates should be sent to him it would have been no defence to his demand to say that the certificates were misappropriated by the defenders' clerk. But in this case two years were allowed to elapse—two years did elapse before the fraud was discovered—and the pursuer has no better explanation to offer than that he thought

the certificates were in safe keeping in the defenders' office. It is not alleged that there was any special contract made with the defenders under which they were to have the safe keeping of these certificates; their contract was merely the ordinary contract of brokers. A person who wishes to establish responsibility for loss sustained through the negligence of another, must be able to show that he has observed the ordinary rules of business in his relations with that person. I do not think it would be fair that a party who has allowed two years to elapse without looking after his certificates, should be enabled to throw the loss upon persons in no way responsible for that negligence. With regard to lots Nos. 5 and 6 I also agree with your Lordship, and upon the same grounds. As regards lot No. 5, what actually happened was this, that while the pursuer had given instructions to purchase the shares, intending, as he now says, to take them up as an investment, Cook, who was on friendly terms with both parties, informed the defenders that the pursuer meant to sell them. The shares were sold through a broker upon that false representation, and Cook appropriated the money, and we know that by sending a certain account he obtained the price of the shares without delivering them. No doubt the pursuer might have said that as a matter of fact no transfer was sent to him, and that he was entitled to restoration of the money which he had paid in error. In my opinion he would have been within his rights if the payment had been made in the ordinary course of business. It is not necessary to determine whether and in what circumstances all possible precautions should be taken for the safe transmission of money where the course of dealing between the parties is not payment by legal tender; but this I take to be clear, that if the recipient of money directs that payment shall be made only in a certain way, and the sender does not follow that direction, the loss, in the event of the money going amissing, will fall upon the sender. We know that many houses put upon their invoices cheques to be crossed with the name of a bank indicated. If the sender does not cross the cheque for payment through the bank named, and a clerk of the payee purloins the money, I think the sender would stand a very poor chance of succeeding in an action for repayment. But here no specific instructions were given as to the mode in which payment through the medium of bankers was to be made, and therefore we must consider whether reasonable precautions were taken to secure safe transmission. Perhaps the safest way of payment is by means of a bank order. But a cheque made payable to the creditor who is to receive it, by name, or to order and crossed, is accepted by all commercial men as a good payment, for if the letter is stolen or lost the bank will not pay the cheque unless to the party to whom it is made payable. But to send a cheque which is not only not crossed, but is made payable to bearer, is, I think, according to modern

ideas, not a payment in the ordinary course of business. The result is that it was by the pursuer's negligence that Cook was enabled to perpetrate the fraud by paying these bearer cheques into his own bank account, and, as the loss is due to the pursuer's negligence, then, in accordance with the rule that it is the person whose negligence enables another to commit a fraud who should suffer, the pursuer ought to bear the consequences of that fraud.

I also agree with your Lordship with regard to the Nobel's shares. They are in the same position, subject to this additional observation, that as the order for the purchase of the shares was never executed, there was no contract, and therefore the pursuer could not in any case recover any profit that might be made on the transaction; and it is not said that any profit was made. I think they must be dealt with as being exactly in the same position as the other shares. For these reasons I agree with your Lordship in your fuller statement of the case, and I think the Lord Ordinary is right.

LORD KINNEAR—I agree with your Lordships.

The Court adhered.

Counsel for Pursuer and Reclaimer—Solicitor-General (Clyde, K.C.)—R. S. Horne. Agents—Patrick & James, S.S.C.

Counsel for Defenders and Respondents—Ure, K.C.—Hunter. Agents—Miller, Robson, & McLean, W.S.

Wednesday, December 6.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

TIGUE v. COLVILLE & SONS,
LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 1 (3), and First Schedule, 12—Compensation—Agreement—Arbitration—Competency of Arbitration where Subsisting Unrecorded Agreement—Agreement to Pay Compensation during Incapacity—Termination of Incapacity—Refusal of Farther Payments—Arbitration at Instance of Workman.

A workman, who had been injured in his employment in August 1903, entered into an agreement with his employers under which they bound themselves to pay him 12s. 5d. weekly during the period of his incapacity as compensation under the Workmen's Compensation Act 1897. The agreement was not recorded. The employers continued the weekly payments down to 14th December 1903, when his incapacity ceased; but from that date they refused further payments.