allow accounts thereof to be given in; and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuers—Fraser—Rhind. Agent—William Officer, S.S.C.

Counsel for Defenders — M'Laren — Mitchell. Agents—Hagart & Burn Murdoch, W.S.

Tuesday, March 6.

SECOND DIVISION.

PETITION—CHRISTIE.

Trust—Nobile officium—*Provisions to Children.*

A husband bound himself in his marriage-contract to pay his widow an annuity of £100, with a liferent of furniture, &c., and to aliment, entertain, clothe, and educate the children of the marriage suitably to their position in life, until payment of a provision of £2000 to them, payable on majority of sons and on majority or marriage of daughters. By his settlement he gave his wife an annuity of £400 (subsequently increased by "an additional sum of £100 yearly for the upbringing of the family"), together with a liferent of house and furniture; and on a recital of his obligation to aliment his children, he declared that the liferent provisions for his wife were intended for her behoof and of the surviving children, it being his wish that the children should remain in family with their mother, and be maintained and educated out of the said annuity. The whole residue of the estate was to be held for division among the children, and the trustees were empowered to accumulate the surplus income, or to apply it in establishing sons in professions or the daughters in marriage. The trust-estate amounted to £50,000. After her husband's death the widow petitioned the Court to ordain the trustees to pay her £420 in addition to a sum of £500, which she had, for keeping up her house and maintaining and educating her children. They were seven in number, the eldest being fourteen years of age. The Court authorised the trustees to make increased allowances out of the surplus income for the education and support of the children, where special circumstances requiring such occurred, the advances being always made under the declarations of the trust-deed.

This was a petition at the instance of Mrs Jessie Thomson Tod or Christie, residing at Forth Bank, Stirling, widow of John Christie, brick and tile maker, Stirling, to which there were called as parties the trustees acting under her husband's trust-disposition, and the tutors and curators nominated under it to her children, and the next-of-kin of her children. She asked the Court to find that she was entitled to an additional allowance for education and the maintenance out of the income of the trust-estate, and to fix such additional allowance at £420 per annum.

Mr Christie died on 30th April 1876. The petitioner was married to him on 10th September 1861, and there were seven children, three sons and four daughters, of the marriage, all surviving, the eldest being fourteen, and the youngest three years of age. They all resided with the petitioner except George Norman, who was at a boarding-school. At the time of his death Mr Christie was possessed of property and means of the value of at least £50,000, the free annual income whereof exceeded £1700. During his lifetime his annual expenditure for household expenses, and for the clothing, maintenance, and education of himself, the petitioner, and their family, including the education of the family, considerably exceeded £1000 per annum. By antenuptial contract entered into between the petitioner and Mr Christie, dated 5th September 1861, the latter bound himself to pay to the petitioner, if she should survive him, and while she remained his widow, a free alimentary annuity of £100 sterling. He also assigned to the petitioner, in the like event of her surviving him, the liferent use, while she remained his widow, of his whole household furniture, &c., that should belong to him at the time of his decease, and he thereby bound and obliged himself to aliment, entertain, clothe, and educate the child or children of the marriage suitably to their station in life, until the term of payment of the provision thereby made for them, or until they should be otherwise provided for. The provision made for the children was a sum of £1000 in the event of there being only one child, and £2000 in the event of there being two or more children, and each child was entitled to receive payment on attaining majority, or, in the case of daughters, majority or marriage, at which date the share of each child vested. It was however provided that the interest or annual produce of the presumptive or expectant shares of the children should be payable during the suspense of vesting of such shares, after the death of Mr Christie, for the maintenance, benefit, and education of said children, in such manner as the guardians or tutors and curators of the children, whom failing the trustees acting under the trust created by the said antenuptial contract, should deem most expedient. Mr Christie, by said antenuptial contract, also nominated and appointed the petitioner and five gentlemen to be tutors and curators to such of the children to be born of the then intended marriage as should be in pupillarity or minority at the time of his decease. The provisions so made by Mr Christie in favour of the petitioner were thereby accepted by her in full of all legal rights, save what he might choose to add of his own good will only, and the foresaid provision for children was declared to be in full satisfaction of their legal rights, except what the parents might think fit to bestow, and what the children might succeed to as their heirs and executors, in so far as they should not otherwise dispose of their estate.

By trust-disposition and settlement, dated 8th February 1867, Mr Christie conveyed and made over his whole estate to and in favour of the petitioner and four gentlemen, all residing in Stirling, and the acceptors and survivors as trustees for certain purposes. After giving the usual direction for payment of debts, and directing the performance of the whole stipulations and provisions in favour of the petitioner and the children in the antenuptial contract, Mr Christie, by the third purpose of his settlement, directed and ap-

pointed his trustees, "out of the annual income or proceeds of the trust-estate and effects hereby conveyed, to pay to my said wife, in the event of her surviving me as aforesaid, such additional free yearly sum as shall, along with the annuity provided to her in the event foresaid by my said contract of marriage, make up to her a free yearly annuity of £300 while she remains a widow;" and after directing that she should have the liferent use and possession during her survivance and widowhood of the household furniture and other effects, which was secured to her by the antenuptial contract, there were the following directions, viz.—"And in the event that the free trust-funds and estate hereby conveyed shall be insufficient, after defraying all necessary expenses and repairs on my properties, to pay the said free annuity of £300, then I direct and appoint my said trustees not to diminish the capital of the said trust-estate and effects, but to pay to my said widow such free annuity only as my said trust-estate and effects shall for the time be capable of yielding, . . . without diminishing the capital thereof, which it is my wish to preserve for the benefit of my children."

After directing interim aliment to be paid to the petitioner at the rate of £300 per annum, the said third purpose concluded as follows:—"And whereas by my said contract of marriage I bound and obliged myself to aliment, entertain, clothe, and educate the child or children of the marriage suitably to their station in life until the term of payment of the provisions to them therein written, or until they should be otherwise provided for, I hereby declare that the liferent provisions hereinbefore conceived in favour of my said wife in the event foresaid are intended for the behoof of herself and my whole surviving children, it being my wish and intention that my said children shall remain in family with their said mother so long as she continues unmarried, and be maintained and educated out of the said annuity." The fifth purpose was in the following terms,—"On the decease of my said wife, in the event of her surviving me as aforesaid, the whole trust-funds and estate then in the possession of my trustees, or in or to which they shall have right in virtue of these presents, shall be held and applied by them (subject to the declarations and conditions after mentioned) for behoof of my surviving child or children: . . . Declaring that the share of each child shall be payable to him or her at the first term of Whitsunday or Martinmas occurring after the decease of both me and my said wife in the event of her survivance as aforesaid, and after such child, being a son, shall have attained majority, or, being a daughter, shall have attained majority or be married, until which term of payment the share of each child shall not vest in him or her: But declaring that in the event of my said wife surviving me as aforesaid, the free annual proceeds of the said trust-funds and estate hereinbefore provided and to be liferented by her, shall, in the first place, be imputed towards payment and satisfaction of the annuity hereinabove provided by me in her favour; and if the free annual proceeds of the said trust-funds and estate shall exceed the amount of the said annuity (or restricted annuity), then the surplus shall be held and applied by my trustees for behoof of my said child or children, and the survivors or survivor of them, and the issue of the deceasers as aforesaid: It being hereby declared that my trustees shall have power, as they are hereby authorised and empowered, either to accumulate said surplus from year to year with, and merge it along with, the interest accruing thereon in the capital of the trust-funds, and to pay the same to my said child or children and their foresaids in similar shares or proportions, and subject to the same conditions and restrictions and at the same terms of payment as the rest of the trust-funds or in the option of my trustees; and if they, in the exercise of their discretion shall see fit to apply the said surplus, or any part thereof, to the outfit or establishment of such of them as shall be sons in business or professions, and such of them as shall be daughters in marriage, but of the expediency as well as time and manner of exercising this discretionary power my trustees shall be the sole and exclusive judges: Declaring always that the sum or sums to be applied or advanced for behoof of any child shall be held or imputed as a payment to account of his or her share of the trust-funds and estate; and failing any surviving issue of my said marriage, then the said surplus shall be held and applied for behoof of my heirs and assignees, to whom my trustees may in that event, after retaining in their hands such a portion of the said trust-funds as may be sufficient to yield an annual income equal to the said annuity, pay over the balance to my said heirs and assignees: And in the event of my said wife being the survivor, and of their being no issue of the said marriage, then the said trust-funds and estate, or such portion thereof as shall be required to meet the annuity of £300 (restrictable as aforesaid) hereinbefore provided in her favour, shall be held and applied by the said trustees and their foresaids for my said wife's liferent use of the annual proceeds thereof as aforesaid; and at her decease my trustees shall pay over the said trust-funds and estate, or any portiou thereof then under their management, to my said heirs, executors, and assignees."

By codicil, dated 31st March 1871, Mr Christie gave his wife an additional liferent annuity of £100, and his trustees were therein directed to hold the truster's two properties of Forthbank and Goosecroft during the petitioner's widowhood, and in security to her for her annuity; and the third purpose was as follows:—"Subject to the foregoing direction, I appoint my trustees to hold and retain the whole trust-estate vested in them by the foregoing trust-disposition and settlement, until the youngest surviving child of my said marriage shall attain the years of majority; but each of my said children after attaining majority shall be entitled to receive an equal share or proportion of the free revenue of my trust-estate, or such lesser annual sum as my trustees shall see fit to allow, after retaining a sufficient sum to meet all obligations and expenses connected with the trust, including the before-mentioned aggregate annuity of £400, so far as not secured by my said properties of Forthbank and Goosecroft." And the fourth purpose of said codicil proceeded as follows:—"On my decease, and the decease or second marriage of my said wife, and the majority of the youngest surviving child of my said marriage, I direct and appoint my trustees to divide the capital of my said trust-estate between and among my said

children, in terms of the instructions contained in the foregoing trust-disposition and settlement."

The truster executed a second codicil to his said trust-disposition and settlement in the following terms:—"*Stirling, 26th day of May* 1875.—I hereby instruct my trustees, in addition to the sums already stated in this deed, to pay to Jessie Thomson Tod, my spouse, an additional sum of £100 yearly for the upbringing of my family."

The petitioner and the other trustees nominated by the said trust-disposition and settlement had all accepted office, and the petitioner and the gentlemen named in the said antenuptial contract of marriage as tutors and curators to petitioner's children had also all done so. In accordance with the intention of her husband, as indicated by his first codicil, the petitioner continued after his death to occupy the house of Forthbank and offices, and to maintain the seven children of the marriage in family with her, and to educate them, but she found that the provision made by her husband for the maintenance and education of the children was altogether inadequate to enable her to continue to occupy the house and maintain the children and educate them in accordance with the liberal views on the subject of education which were entertained by the truster, or even to enable her to maintain and educate her children according to their station in life. She therefore felt it to be her duty to them to make the present application for an increased allowance for their maintenance and education.

The petitioner stated her total income from all sources, including the interest of the £2000 provided to the children by the marriage-contract, was £580, and she asked the additional £420 to make up a total of £1000 a-year.

Answers were lodged by a majority of Mr Christie's trustees, and the surviving tutors and curators of the petitioner's children. They stated that the petitioner had not yet intimated to the trustees whether she accepted the provisions in the settlement and codicils. In the event of her accepting the provisions, it appeared to the respondents that the income enjoyed by the petitioner was adequate, at least at present, for the requirements of the family. It amounted in all to £820. The proposed increase would be contrary to the intentions of the truster, who had further made it a condition of the annuity of £500 provided to the petitioner, that she should undertake the maintenance and education of the children. If she declined to do so, she should betake herself to her legal rights, and leave the trustees to provide for the children by making such allowances as they should think fit.

Argued for petitioner—The estate really belonged to the children, as the suspension of vesting in the original settlement had been recalled by the codicils of 1871. The trustees had full discretion to deal with surplus proceeds. There was an obligation on the truster to provide suitable aliment.

Argued for trustees—The statements in their answers were well founded. If the petitioner found that she could not provide for her children with the means at her disposal, her course was to reject the provisions provided to her by the settlement and codicils, and betake herself to her legal rights, leaving the respondents to look after the maintenance and education of the children, by making such suitable allowance for that purpose as the circumstances seem to them to justify. In the case of *Baird*, Feb. 24, 1872, 10 Macph. 482, the truster expressed no intention as to amount, as was found here. In the case of *Mundell*, Jan. 14, 1862, 24 D. 142, the petition was refused on the ground that the funds were not vested, and that case was in point.

At advising—

Lord Justice-Clerk—[*After stating the object of the application*]—It appears that Mr Christie by success in business considerably raised his position in life, and ultimately realised an estate of more than £50,000, which he left to his trustees, and of which the annual income is at least £1750. There are seven children, the eldest of them fourteen years of age, who are now living with the widow, and for the support of herself and them in a suitable home all that she receives from the trustees is £820 a-year. She says that with that sum she cannot possibly support them in the position of life in which their father left them. There are two boys who have reached an age at which they might properly be sent to a school suitable for their social position, and the health of the second daughter has rendered necessary a residence at Bournemouth. The petition accordingly asks us to find that the trustees are entitled to pay an additional allowance to the widow for the maintenance and education of her children.

The terms of the trust-deed are peculiar. The truster provides his widow with an annuity which I do not say is illiberal in the circumstances, but he lays on her the burden, or at least expresses the wish or intention that the family should remain with her—[*reads clause*]. This idea, that the children should live with their mother, also runs through the codicils which followed. Then with regard to the provisions for the children, the settlement provides—[*reads clause giving estate and free annual proceeds to children*]. That is a strong clause, because the whole surplus belongs to the children. Then occurs the declaration relative to the application of the surplus proceeds—[*reads*]. Now, with regard to the first declaration which I read from the settlement, I am of opinion that it must be taken in a restricted sense; it applies only while the children are of comparatively tender years, for no man of common sense could suppose that the truster intended that his widow should be obliged to keep her family at home any longer than was proper for their educational and other interests. But, apart from that, the truster undertook in his marriage-contract to entertain, aliment, and educate his children in a suitable manner. The children have therefore a right to aliment apart from the settlement, and the time has come when it is inconvenient to carry out the truster's wish that they should reside with their mother. Now, as regards the power of the trustees (who are bound by the marriage-contract) to deal with the surplus income, they are entrusted with a large discretionary power; but it is said that two alternative applications are specified—accumulation and advances for outfit—and that these exhaust the power of the trustees. Now,

as the whole estate, principal as well as interest, is vested in the trustees for behoof of the children, I think that these are only illustrations of what the trustees may do. The trustees are quite entitled to meet an emergency such as has now occurred, and to provide for the suitable education of the children. I don't think that this should take the form of an increased allowance to the widow, but that the trustees may in the exercise of their discretion grant an additional allowance for the education and aliment of the children.

Lord Ormidale concurred.

Lord Gifford—The difficulty in this case arises from the terms of the trust-disposition and settlement and codicils of the late Mr John Christie, the petitioner's husband.

It was contended on the part of Mr Christie's trustees (the argument being stated in the discharge of their duty, and in order fully to bring the case before the Court) that according to the sound reading and construction of the trust-deed and codicils the testator's intention was that the sum of £500 sterling per annum provided to Mrs Christie by her husband was, and indeed is, expressly provided by him to be the full allowance for behoof both of the petitioner herself and of the whole surviving children, the deed bearing, "it being my wish and intention that my said children shall remain n family with their said mother so long as she continues unmarried, and be maintained and educated out of the said annuity." The trustees farther contended that they are expressly ordered to retain any surplus of the free annual income of the trust-estate, and to accumulate it, and that the only two purposes to which such surplus income can be applied are, in the discretion of the trustees, first, for the outfit or establishment of sons in business or professions, or second, in payment to daughters on their marriage; and the trustees further urge that these provisions are made the more emphatic as the vesting is expressly suspended, and no sum whatever vests in any of the children at least until after the death of the widow and until majority or marriage.

I am fully sensible of the weight and importance of the argument urged on behalf of the trustees, and it is not without considerable difficulty that I refuse to give it full effect. There are no doubt strong indications in the trust-deed and codicil that the testator contemplated, at least in the first instance, that the £500 allowed to his widow should include the maintenance and education of his children, it being kept in view that the rent or yearly value of the house, &c., at Forth Bank, the proceeds of the widow's separate estate, and the income of the marriage-contract fund, raises the total income of the widow to about £820.

But while always disposed to give the greatest possible weight to the expressed intentions of a testator, even in cases where I might think that his views were unreasonably narrow or limited, I am of opinion that in the present case the trustees are not absolutely debarred from applying any part of the large annual surplus in their hands (a surplus the annual amount of which is £800 or £900), so as to provide for the greater advantage of the children of the marriage, or of such of them as may be found to require additional allowance—and that even during the survivance of the widow, and before anything has absolutely vested in any of the children.

I think that the testator in fixing the allowance of £500 a-year contemplated that all the children should reside in family with their mother, and should be educated at home, and the £500 was intended, with the addition of the other sums referred to, as the expense of one establishment, for the maintenance and education of the whole family. But if it becomes necessary or expedient (and it is stated in the petition that this expediency has arisen) that some of the children should be placed at boarding schools or at public schools, I do not think it was or can be held to have been the intention of the testator that the expense of this—an expense which may be very considerable—should be defrayed by the widow out of her small allowance of £500. In like manner, if any other unforeseen contingency should arise, such as the necessity of a foreign residence on account of the health of the family or any of them, or in the event of some similar emergency, I think the trustees have power to make a further advance out of the free surplus income in their hands to meet such contingencies or such extra expenses.

For I do not read the two special modes in which the trustees are authorised to expend the free surplus income as excluding every other application of that fund. On the contrary, I think the general direction of the trust-deed overrides and controls the two special instances or powers which the truster mentions. The general declaration is that the free surplus income "shall be held and applied by my trustees for behoof of my said child or children and the survivors or survivor of them, and the issue of the deceasers as aforesaid," and it is only by way of explanation or example that the truster then proceeds to declare that the trustees shall have power to accumulate the surplus and merge it in the general capital of the trust-funds, or to apply it in the outfit of sons in business, or the establishment of daughters in marriage. The deed does not say that the surplus is to be applied only in these two ways; but the general provision is that it shall be held and applied for behoof of the children, and the special enumeration of these two applications does not, I think, applying the canons of a liberal interpretation, derogate from the general power.

Upon the whole, therefore, and while admitting that the case is one of some delicacy and difficulty, I think we may authorise the trustees to advance from the surplus income in their hands such sums as may be necessary to meet the expense of the education of such of the family as are educated out of their mother's family and in separate establishments, and also such special expense as may be occasioned by the state of the health of any of the children, such advances being always made under the declarations contained in the trust-deed.

The Court pronounced the following interlocutor:—

> "Find that the trustees under the trust-settlement of the late John Christie are entitled out of the surplus income of the trust-estate to make such advances as they may think desirable either for the education of

any of the children at a distance from home, or for such change of residence as may be considered necessary for the health of any member of the family, and decern: Find the expenses incurred in connection with this application payable out of the trust-estate, and remit to the Auditor to tax the same, and to report."

Counsel for Petitioner—Balfour—Robertson. Agent—Webster, Will, & Ritchie, S.S.C.

Counsel for Trustees—Mackintosh.

Thursday, March 8.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

THE CLYDESDALE BANK *v.* PAUL AND HIS TRUSTEE.

(*Ante*, vol. xiii., p. 367.)

Agent and Principal—Fraud—Forgery.

If an agent in the course of his employment commits a fraud, the principal is liable in so far as he receives benefit thereby.

This was the sequel of an action brought by the Clydesdale Bank against the present defenders and the Royal Bank (reported March 11, 1876, vol. xiii., 367, and 3 Rettie 586) in the following circumstances:—Martin, who was a clerk of Paul, presented a crossed cheque at the Royal Bank, purporting to be drawn in Paul's favour by Dixon Brothers on the Clydesdale Bank, and endorsed by Paul. Paul was a customer of the Royal Bank; Dixon Brothers were not. The Royal Bank cashed the cheque, and thereafter presented it to the Clydesdale, who paid the money. Ten days afterwards the Clydesdale discovered that the signatures of Dixon Brothers and Paul were forgeries. This was an action at the instance of the Clydesdale Bank against the Royal Bank and Paul and his trustee for £4800, the amount of the cheque. At the previous stage of the case the Royal Bank were assoilzied, and proof allowed as regarded the case between the pursuers and Paul.

The proof was accordingly taken, and the result appears from the following note of the Lord Ordinary, who decerned against the defender Paul in terms of the conclusions of the libel:—

"*Note.*—The facts in this case are not disputed.

"Mr Paul carried on business in Glasgow as a stockbroker, and was a member of the Stock Exchange. It is proved that no person can transact business on the Exchange except a member, or a person representing a member. The brokers deal with each other as principals.

"For some years Mr Paul had in his employment a clerk named Martin. In consequence of age and infirmity Mr Paul became less able to conduct his business personally, and from April 1875 Martin was allowed to represent him on the Stock Exchange. He entered into many transactions which his employer had not authorised. Though they were regularly entered in what is called the Exchange-book, they were not carried to the contract-book, in which the names of the customer or client of the broker appear. The reason was that they were speculative transactions carried on by Martin, for which he had no order. It is plain enough that Mr Paul had no knowledge of these irregular transactions, though at one time he had suspicions of Martin's fidelity, and might have ascertained the truth by examining his Exchange-book.

"At the settling-day, on 30th November 1875, the balance due by Paul on all the transactions made in his name was upwards of £7000. But apart from the irregular transactions the balance was only a little more than £2000. The money was payable at one o'clock, and Paul provided his clerks with a sum sufficient or nearly sufficient to meet the smaller balance.

"In order to enable him to meet the actual sum which was due on all the transactions, Martin passed a forged cheque on the Clydesdale Bank. It bore to be a cheque drawn by Dixon Brothers in favour of Paul, and endorsed by the latter. Both signatures were forged. Being a crossed cheque it was presented to the Royal Bank, who were the bankers of Paul. It was cashed, and the money, along with that which Paul had himself furnished, was handed to the secretary of the Stock Exchange to meet the debt appearing on Paul's fortnightly balance-sheet. The Royal Bank, in settling with the pursuers, received credit for the contents of the cheque.

"The forgery was discovered on the 9th or 10th of December. Martin then absconded, and has not since been heard of.

"The pursuers maintain, in the first place, that as the cheque was paid on the request of Martin, who held a confidential place in Paul's employment, Paul is liable to repay them. The Lord Ordinary is of opinion that this plea is not well founded.

"But they urge, in the second place, that as Paul received the benefit of the cheque, inasmuch as the money was applied in discharging his liabilities, they are entitled to recover from him.

"The answer of the defenders is this—They admit that Paul was liable for the balance arising on all the transactions; but they say that in a question between him and Martin, the latter was the true debtor on the balance arising on the irregular transactions, that he discharged that debt, and that they have no concern with the source from which the money came, or the means by which it was obtained. They urge that they are in the same position as if Martin had borrowed the money and had applied it in payment of his own debt.

"In the opinion of the Lord Ordinary the pursuers are entitled to decree. The money was raised by Martin as the representative of Paul. It is true that this was done without his authority; and still more that he did not authorise the means which were employed. But the advance was not the less an advance on his account, and if he receives benefit from it he must, it is thought, be dealt with as if he had given previous authority to obtain it. The Lord Ordinary therefore thinks that the pursuers are entitled to decree."

The defenders reclaimed, and argued—Martin, although Paul's agent, was not authorised to commit this fraud; it was no part of his business to do so, nor was Paul a party to the fraud or *lucratus* by it. Nor was it the case that the money thus