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the money cannot be recovered back even if the demand were unfounded; and as it appeared from the respondents' letter to Maxwell Hyslop, that they paid the appellant the L.400, with interest, deliberately and advisedly, and after having laid the whole circumstances of the case before their own attorney; they ought not to be at liberty to recover back from him what they so paid, even if they had not been by law compellable to pay the appellant.

To this it was answered,—

1. That the respondents having, under the circumstances before stated, paid the same sum twice, they are entitled to call it back from one of the parties; and it is clear, upon the facts disclosed in the proceedings, (whatever doubt might originally have been entertained upon the subject), that as this was a fund specially belonging to Mr Maxwell Hyslop, he was entitled to regulate the disposal of it as he saw fit; and the appellant was the party who improperly received that money. And,

2. That the appellant obtained payment of the sum in question upon a misrepresentation of a most important fact, viz. that the debt, to secure which the alleged assignment was made, was still subsisting; whereas, in fact, that account had been satisfied, and the money had been applied in payment of Maxwell Hyslop's draft, with the concurrence of Sir Alexander Gordon, the appellant's attorney.

The House of Lords 'ordered and adjudged, that the interlocutors, so far as complained of, be reversed.

Appellant's Authorities.—(3.)—Brisbane v. Dacres, 5. Taunt.; Gomery v. Bond, 3. Maule and Selwyn, 378.

A. GORDON—ADLINGTON, GREGORY and FAULKNER,—Solicitors.

(Ap. Ca. No. 56.)

No. 43.

ANDREW THOMSON, Esq. and Others, Appellants.—*Campbell—Miller.*

ROBERT FORRESTER, Esq. for the Bank of Scotland, Respondent.—*Cockburn—Walker.*

Cautioner—Bank Agent.—Cautioners having granted bond to the Bank of Scotland to the extent of L.10,000, for the due performance of the duties of joint agents by two

persons, one of whom became a partner of a mercantile Company, which was known to the Bank; and the joint agents having granted large accommodations to that Company, and to that agent individually; and these accommodations having become known to the Bank, who remonstrated against them as extra-official and extravagant, but who did not give any notice thereof to the cautioners, nor dismiss the agents; and having thereafter taken a promissory-note from one of the agents, for the amount of bills which were past due and exigible from both agents, payable three months thereafter, and got an heritable bond in security thereof;—Held, (reversing the judgment of the Court of Session), That the cautioners were not bound to implement their bond of caution.

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2D DIVISION. Lord Pitmilly.

IN 1791, William Marshall was appointed agent at Perth for the Bank of Scotland; and the appellant, Andrew Thomson, together with Oliver Thomson and James Wingate, granted a bond of caution for the due performance of the office. Before entering upon its duties, the following instructions of the directors were communicated to William Marshall, by the secretary of the Bank:

'Sir,—I have to communicate to you, by order of the directors of the Bank of Scotland, the following instructions for your government in carrying on the business of the Bank at Perth.

'1. To make that branch advantageous to the Bank, it will be necessary to pay great attention to the circulation of its notes, so that they may be kept out in the circle. Unless this end be attained, the loans at Perth must be a loss to the Bank, as they will be attended with the expense of the office there.

'2. It is found from experience, that the best method of circulating the bank-notes with advantage to the public and to the Bank, is by discounting bills, and that the best discounts for the Bank are bills at short dates, and for small sums; that the agent's safety is greater with these than with bills at longer dates, and for larger sums; that, nevertheless, when the notes are to go into good circulation, and when the agent's security is sufficient, the extent of sums and of the time to run may be the less regarded: that a new discount should never be granted until the old one is paid, let the security be ever so undoubted; for the payment of the old brings in the notes of other Banks, and the new discount circulates those of this Bank.'

The third clause gives instructions as to the best mode of otherwise circulating the notes of the Bank, and need not be quoted. The fourth clause proceeds thus:—

'4. The balances at the Bank's offices are taken weekly, on Monday, and a state of the week's transactions is sent me by the first post thereafter. You will do the same. In your states, class the different operations under the proper heads, agreeable

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The remaining heads relate to the mode of remitting money,—the rate of buying bills on London and other places,—the mode of drawing,—of remittance,—management of cash-accounts,—and a variety of other particulars, of which the following only relate to the present question:—

'11. Besides the attention above-mentioned to be given to the 'choice of bills, and the circulation of the bank-notes by their 'means, you will further observe, that the Bank's agents are not 'allowed, without shewing sufficient cause to the directors, or 'without having their consent, to be drawer, acceptor, or indor- 'ser of the bills to be bought or discounted by themselves. That 'no bill should be discounted to any person who has allowed his 'bill to remain unpaid for fourteen days after it was due, unless 'for some good cause assigned. It is the opinion of the direc- 'tors, under the like exception, that no bill should be one month 'past due without diligence upon it by horning charged upon. 'For raising such diligence, Alexander Keith, Esq. writer to the 'signet, the Bank's agent here, is recommended to you.'

Under this appointment William Marshall acted as sole agent till 1808, when, at his request, his son John Marshall was made joint agent along with him, under the firm of William and John Marshall. They were thereupon required to find new and additional caution, the former cautioner, Oliver Thomson, being dead, and Wingate being desirous to be discharged of his obligation in future. The appellant, Andrew Thomson, Oliver Gourlay of Craigrothie, (who was now bankrupt, and on whose estate Thomson was trustee), and James Wylie, of Airliewight, agreed to become bound as cautioners, to the extent of L.10,000. A bond was accordingly executed by all the parties in September 1808, which, after narrating the terms of the previous bond, and the reasons for requiring this new one, proceeded in these terms:—'Therefore, without prejudice to the bond before nar- 'rated, but in corroboration and security thereof, et accumulando

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'jura juribus, we, the said William Marshall and John Marshall, 'as individuals; we, the said William and John Marshall, as a 'copartnery, as joint agents foresaid; and we, the said Andrew 'Thomson, Oliver Gourlay, and James Wylie, bind and oblige 'us all, conjunctly and severally, and our respective heirs, exe- 'cutors, and successors whatsoever, that during the time of us, 'the said William and John Marshall, and the survivor of us, con- 'tinuing in the said office and trust of agents for the said Bank 'of Scotland, we and the survivor of us shall honestly, faithfully, 'and diligently discharge the duties thereof, and do and execute 'every thing relative thereto to the best of our judgment, for the 'benefit of the said Governor and Company, and shall fully and 'truly account to the said Governor and Company, or to Robert 'Forrester, their treasurer, or to his successors in office, for be- 'hoof of the said Governor and Company, for all sums of money, 'whether in specie or in bank-notes, bills, promissory-notes, or 'otherwise, with which we, the said William and John Marshall, 'or either of us, or the survivor of us, shall be intrusted by them 'from time to time, or which shall come into our hands or under 'our charge in the management of the said office and trust, or 'into the hands or under the charge of the accountant, cashier, 'clerks, servants, or others employed under us or the survivor 'of us; and that we and the survivor of us shall pay in and 'deliver to the said Governor and Company, or to their trea- 'surer for the time, all sums of money, bills, and promissory- 'notes, and all writings, documents, or other effects belonging 'to them, when required so to do; and whatever damage, loss, 'or expense, the said Governor and Company shall sustain 'by us or either of us, or the survivor of us, or by the account- 'ant, cashier, clerks, or servants, or others employed under us, 'or by the accidents of fire, robbery, theft, or embezzlement, 'or any other accident or misfortune happening to what is 'under our charge, or under the charge of those employed by 'us or under us, during the continuance of us or the survivor 'of us in the said office and trust; we, the said whole obligants 'foresaid, bind and oblige us and our respective foresaids, all 'jointly and severally as said is, to refund and pay the same 'to the said Governor and Company, or to their treasurer for 'the time, for their behoof, and that immediately on their sus- 'taining or incurring the said loss, damage, and expense, with 'interest thereafter during the non-payment, and one-fifth part 'more of the said principal sum of liquidate expenses in case of 'failure. But it is hereby declared, that as all remittances and

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'carriages of money, notes of the Bank of Scotland, or of any other 'bank, bills, and other valuable articles, betwixt the office of 'the said Bank in Edinburgh and their office in Perth, and any 'other place or places appointed by the directors of the said 'Bank, are to be made by us, the said William and John Mar- 'shall, and the survivor of us, conform to the instructions of the 'said directors, so these carriages and remittances shall be sole- 'ly at the risk of the said Governor and Company, provided 'that we, the said William and John Marshall, and the survivor 'of us, shall strictly observe the instructions thus to be given by 'the said directors; and if we, or either, or the survivor of us, 'fail to do so in any particular, we, the said William Marshall 'and John Marshall, and the survivor of us, and we, the other 'co-obligants foresaid, and our respective foresaids, shall be 'jointly and severally liable in the consequences thereof: And 'further, it is hereby provided and declared, without prejudice 'to the generality foresaid, that we, the said whole obligants be- 'fore named, shall not only be accountable for all sums of money 'with which I, the said William Marshall, have been intrusted, 'or which have come into my hands during my said agency, 'but also shall take upon us the whole risk of all bills, promis- 'sory-notes, and other obligations of every kind which have been 'discounted or purchased by me, the said William Marshall, 'and of all other transactions made by me while I have acted as 'agent for the said Governor and Company, and also of all bills, 'promissory-notes, and other obligations of every kind to be 'hereafter discounted or purchased by us the said William and 'John Marshall, or either of us, or the survivor of us, and of all 'bills on London or elsewhere, which we, the said William and 'John Marshall, or either of us, or the survivor of us, shall dis- 'count or purchase in the execution of the above office and trust 'committed to us; so that, in case of any loss arising from sums 'of money either paid or received, or otherwise, or by bad debts, 'bills, or promissory-notes, which have been discounted or pur- 'chased by me the said William Marshall, or upon any other 'obligations whatever to be granted or received by me as agent 'foresaid, or in case of any loss by bad debts, bills, or promis- 'sory-notes to be discounted or purchased by us, the said Wil- 'liam and John Marshall, or either of us, or the survivor of 'us, or on any other obligation to be granted or received, or 'transactions to be done by us, or either of us, or the survivor 'of us, as agents foresaid—all such loss shall fall upon and 'be sustained by us, the said William Marshall and John

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'Marshall, and William and John Marshall, and the sur-
'vivor of us, and on and by us the other co-obligants fore-
'said, and our foresaids only; and in case both of us, the said
'William and John Marshall, or the survivor of us, shall at
'any time be absent from Perth, or shall, by sickness or other-
'wise, be disabled from transacting business, and shall au-
'thorize any person or persons to act for us and for the survivor
'of us, then and in that case we, the said William Marshall and
'John Marshall, and William and John Marshall, and we the
'said other co-obligants, bind and oblige us and our foresaids,
'all jointly and severally as said is, for the whole bills and pro-
'missory-notes which shall be discounted, purchased, or drawn,
'and for all other obligations which shall be granted or received,
'and other transactions whatever that shall be done by the per-
'son or persons so authorized by us, the said William and John
'Marshall, or either of us, or the survivor of us, as fully in all
'respects as if they were done by ourselves or by the survivor of
'us; and as the credits on cash-accounts kept at the office at
'Perth are granted by the court of directors of the said Bank,
'we shall not be answerable for the solvency of the obligants
'therein. But declaring nevertheless, that in case we, the said
'William and John Marshall, or either of us, or the survivor of
'us, shall allow any persons, copartners, societies, corporations, or
'others, holders of the said credits on cash-accounts, to overdraw
'thereon, or to become any way debtors to the said Governor and
'Company beyond the precise sums to which the said credits are
'respectively limited, then and in such case we, the said William
'and John Marshall, and William Marshall and John Marshall,
'and the survivor of us, and we, the said other co-obligants, and
'our foresaids, under the conditions hereafter expressed, shall
'be jointly and severally responsible to the said Governor and
'Company to the amount of the sums so overdrawn, interest
'thereon, and of all the loss, damage and expense which may be
'sustained by the said Governor and Company on that account:
'And in case of the death, bankruptcy, or departure from Scot-
'land of any of the obligants in such cash-accounts, or in case
'any unfavourable alteration should occur in the situation and
'circumstances of such obligants, then we, the said William and
'John Marshall, and the survivor of us, shall be bound, with-
'in one month after such death, bankruptcy, departure, or al-
'teration, to give notice thereof in writing to the said Gover-
'nor and Company; and in case of failure to give such notice
'within the said period, we, the whole obligants foresaid, and

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'our foresaids, shall be jointly and severally liable for all loss, 'damage, and expense, which the said Governor and Company 'may sustain or incur through such failure. And farther, in 'regard it is contrary to the instructions to and duty of the said 'William and John Marshall, as agents for the said Governor 'and Company of the Bank of Scotland, to act or carry on bu- 'siness, either jointly or individually, as bankers, on our own or 'either of our own accounts, or as agent for any other bank, 'banker, or banking company, it is hereby provided, that if, not- 'withstanding thereof, it shall be discovered that we, or either, 'or the survivor of us, shall act or carry on business in any such 'capacity during our or either of our continuance, or the con- 'tinuance of the survivor of us, in the said office of agent for 'the Governor and Company of the Bank of Scotland, we, the 'whole obligants foresaid, and our respective foresaids, shall be 'jointly and severally liable for all loss, damage, and expense 'which the said Governor and Company may sustain and in- 'cur thereby. And it is hereby further provided and declared, 'that we, the said Andrew Thomson, Oliver Gourlay, and 'James Wylie, shall be no further bound and liable, by vir- 'tue of these presents, than to the extent of L.10,000 Ster- 'ling, with the interest thereof from the date of the demand 'which shall be made on us and our foresaids for the pay- 'ment of the same, and for all expenses which the said Go- 'vernor and Company shall incur relative thereto; which de- 'mand and date thereof shall be ascertained by an extract from 'the letter-book of the said Governor and Company; without 'prejudice nevertheless to the said Governor and Company, or 'to their treasurer for the time for their behoof, to have recourse 'against us, the said William Marshall and John Marshall, and 'William and John Marshall, and the survivor of us, and our 'respective heirs, executors, and successors, for the whole loss, 'damage, and expense which the said Governor and Company 'shall sustain by us, or either, or the survivor of us, or by the 'accountant, cashier, clerks, or servants under us, or those ap- 'pointed to act for us, or by the accidents or misfortunes fore- 'said, or otherwise any manner of way. And it is hereby fur- 'ther declared, that we, the said Andrew Thomson, Oliver 'Gourlay, and James Wylie, and our foresaids, shall in no case, 'and in no competition which may arise with the said Governor 'and Company of the Bank of Scotland, or others, be entitled 'to rank, draw, or compete, to the prejudice of the said Gover- 'nor and Company, so long as any part of a loss sustained by

'the said Governor and Company by and through us, the said William and John Marshall, or either, or the survivor of us, or a debt due by us, or either, or the survivor of us, to the said Governor and Company, as their agents or agent foresaid, shall remain unpaid. Provided farther, that in case of the death of any of us, the said Andrew Thomson, Oliver Gourlay, or James Wylie, or that the said Governor and Company shall agree to discharge any one or two of us of the obligation incumbent on us by this present bond, then, and in such cases, it shall be lawful to and in the power of the said Governor and Company, to accept of other obligants in the place of those who shall have died, or shall have been discharged; and to take bonds or other securities from such new obligants, which shall no ways hurt or prejudge these presents, but shall be in further corroboration hereof; and the whole obligations herein contained shall continue in full force and effect against the surviving and existing co-obligants or co-obligant, in the same manner and as fully in all respects as if all and each of us, the said Andrew Thomson, Oliver Gourlay, and James Wylie, had continued to be bound. Provided farther, that if we, the said Andrew Thomson, Oliver Gourlay, and James Wylie, or any of us or our foresaids, shall at any time hereafter desire to withdraw from the obligations herein stipulated, the person or persons entertaining such desire shall intimate the same to the said Governor and Company, at least six calendar months preceding the day at which they desire that their responsibility under these presents shall cease, they and their foresaids being always, in virtue hereof, liable for all transactions up to and including that day. And it is further hereby provided, that a stated account between the said Governor and Company, and us, the said William and John Marshall, or the survivor of us, as their agents or agent at Perth, made out from the books of the said Governor and Company, and signed by their accountant, or his assistant for the time, shall be sufficient, and ascertain a balance against us, the said William Marshall and John Marshall, and William and John Marshall, or the survivor of us; and against us, the said Andrew Thomson, Oliver Gourlay, and James Wylie, and our respective foresaids, and shall sufficiently warrant legal execution against us, whereof no suspension or other legal sist shall pass, but on consignation only of the sums charged for.' June 11. 1824.

There then followed a stipulation, that in the event of the death or removal of the agents, the bills and bank-notes, &c. in

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their hands should not be claimable by them or their representatives, but that the Bank should be at liberty to take immediate possession of them; and there was also a clause for registration and for execution in common form.

John Marshall was at this time a partner in a calico printing company, carrying on business under the firm of Hunter, Burt, Marshall and Company. Mr Burt, one of the partners, was the son-in-law of William, and consequently the brother-in-law of John Marshall; and he was the managing partner in another concern, carried on under the firm of James Inches and Company; and of this company Charles Archer was a partner, and was engaged in another, trading under the firm of Charles Archer and Son.

When these agents commenced to act, the whole accounts and balances of William Marshall had been settled, and were admitted to have been satisfactory and correct. During their administration various instructions were issued by the Bank to them, and in particular a printed paper was transmitted to them in 1809, entitled, 'Bye-laws and Ordinances of the Governor and 'Company of the Bank of Scotland;' by the 16th article of which it was declared, 'that all past due bills, not paid within 'six months after the day of payment, shall be absolutely taken 'up by the agent who discounted the same, and that either by 'payment in cash, or bills approved of by the directors, and 'thereafter all procedure on such past due bills shall be in the 'agent's private name alone, without any mention of the Bank; 'and for that end, if required by the directors, the treasurer 'shall give an assignation of the debt and diligence to the agent 'in his private capacity, and at his private expense; and this 'shall also be the case in the event of any suspension or other 'litigation concerning any bill discounted at the agency.' And by article 17th, 'the Bank's inspecting officers shall take parti-'cular notice whether the bye-laws and ordinances, now hereby 'made, are duly complied with, and shall report accordingly.'

Under the original instructions, it was the duty of the agents to transmit to the Bank weekly states of the balances, and to specify at the same time a list of those bills which were past due; and it appeared that in 1808 and 1809 the Bank had made complaints to the agents of this rule not having been observed. From the states, however, which were transmitted early in 1809, it appeared that advances had been made for the accommodation of John Marshall, between the 2d and 30th of January, to the amount of L. 5704, and that he continued to obtain discounts to

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the extent of about L.1000 weekly. On the 8th of May 1809 Hunter, Burt, Marshall and Company, addressed the following letter to the agents:—'We wish to hold a cash-account with 'the Bank of Scotland for L.1000; and as, besides our joint 'printing trade at Cromwell Park, we are all separately engaged 'in business, we hope the directors will be satisfied with our own 'security. (Signed) HUNTER, BURT, MARSHALL and Company.' Subjoined to this letter (which was transmitted to the Bank) was the following note, written by William Marshall, and subscribed under the name of William and John Marshall:—'The appli-'cants have just begun business, as calico printers, at Cromwell 'Park, near Perth. The Company at present consist of Messrs 'Duncan Hunter of London, James Burt, and John Marshall, 'manufacturers in Perth. Mr Hunter is said to be a very wealthy 'man, worth upwards of L.60,000; Mr Burt, worth upwards of 'L.6000 or L.7000; the other is my eldest son, our John Mar-'shall. Their purchase of goods and materials, and their payments 'of wages, will be considerable, and give rise to a favourable 'circulation of notes, and their returns will be chiefly in London 'paper. Perth, 10th May 1809.' In answer the Bank wrote, that it would be necessary to have two separate securities; and this having been complied with, they granted the cash-account on the 26th of June 1809. By this communication the Bank admitted, that they were made aware that John Marshall, the junior agent, was a partner of this Company; but they stated, that there was no rule of the Bank inconsistent with his being so.

Besides this cash-account, advances were made by the agents to Hunter, Burt, Marshall and Company, by discount, between the 4th of September and 2d October 1809, to the extent of L.6802. Between the 13th of November 1809 and the 12th February 1810, to the amount of L.35,621. Of this the Bank were informed by the weekly states, and by the reports of their itinerant inspectors. They therefore, in the month of February 1810, sent their principal accountant to investigate and report, and he on the 12th of that month reported, that accommodations had been given as follows:—

'To Hunter, Burt, Marshall and Company,	L.29,752	0	0
'— J. Inches and Company, - -	17,306	0	0
'— Thomas Chalmers and Company, -	17,062	0	0
'— John Marshall, - - -	8,550	0	0
	L.72,670	0	0

June 11. 1824. In consequence of this report, the Bank, on the 20th of the same month, wrote to the agents, that 'the directors of the Bank of 'Scotland are of opinion, that the accommodation by dis- 'count, given by you as their agents at Perth, to Hunter, Burt, 'Marshall and Company, James Inches and Company, and 'Thomas Chalmers and Company, and John Marshall, manu- 'facturer in Perth, is greatly too high, and that the improper 'extent of it increases the money lent by the Bank of Scotland 'at Perth much beyond its due proportion, and in a very partial 'mode of distribution. You are therefore directed to use every 'prudent exertion for the certain reduction of the accommoda- 'tion to these parties, and in future to divide the loans in your 'district more impartially.' In answer, the agents on the 24th stated, that 'we have spoken to Hunter, Burt and Company, 'and to James Inches and Company, with some of the partners 'in which concerns we are closely connected, intimating to them, 'that in future it will not be in our power to discount for them so 'largely as heretofore; and though it is not reckoned very becom- 'ing in this place for a respectable house to do business with 'more than one bank, yet they are willing to divide theirs, and 'for that purpose to open an account with another bank, or to 'withdraw it altogether, as shall be most agreeable to the direc- 'tors. We have declined discounting to Thomas Chalmers 'and Company since the receipt of your letter of the 20th, and 'shall continue to do so for some time to come, until a proportion 'of their bills are run off; and John Marshall, who is just now 'in England, will, we have no doubt, be ready to conform to the 'wishes of the directors. We have only to add, that we sup- 'posed Hunter, Burt and Company's business would particularly 'suit the Bank, as almost the whole bills discounted for them 'are on London; and farther, that although the Bank's advance 'here has been considerable, yet no person in the district will 'accuse us of the smallest partiality in the distribution.' To this the Bank, on the 28th, replied, that 'the directors still consider 'the accommodation at Perth to be disproportionate. They 'observe, that twenty parties only have accommodation to the 'extent of above L.130,000, and of this the four parties above- 'mentioned have above L.72,000, being considerably more than 'the half. Considering the extent, population, and enterprise 'of your district, it is not easy to consider this distribution 'impartial.

'From the circumstance of John Marshall being one of the 'Bank's agents, and of your and his close connexion with

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'Hunter, Burt, Marshall and Company, and James Inches and Company, it becomes in a particular manner your duty, as the Bank's agents, to guard against the appearance of making those funds which the Bank destines for the equal and impartial accommodation of a large district, subservient almost exclusively to your own extra-official speculations, and those of your intimate and close connexions.

'Accordingly the directors have learned, and without surprise, on viewing the distribution of discounts at the Bank's office, that a new Banking Company is to be established at Perth, supported chiefly by the agricultural interest of the county. In this event it must be expected that a very considerable part of the money lodged at the Bank's office will be withdrawn, as a great part of it belongs to the farmers of the district; that the Bank's circulation will be contracted, an additional channel for the return of its notes opened, and its general business injured.

'Of these injuries the directors, judging from the mode of distribution of your discounts, cannot altogether acquit you. You mention that it is not considered becoming in Perth for a respectable house, such as Hunter, Burt, Marshall and Company, to do business with more than one bank. The directors hold it to have been your paramount duty, as their agents, to have considered, not what would have been becoming for Hunter, Burt, Marshall and Company, but what would have been at once most safe and beneficial to the Bank, and most equitable and impartial to the country. The directors do not themselves see, nor do they think you could have seen in this light, the disproportionate accommodation which is the subject of this letter.

'With regard to Hunter, Burt, Marshall and Company, James Inches and Company, and John Marshall, the accommodation to them must certainly be reduced considerably, although the precise extent and mode of the reduction must no doubt be left much to your judgment, and your conception of your duty as the Bank's agents. You mentioned having declined discounting to Thomas Chalmers and Company since receipt of my letter of the 20th, and that you will continue to do so until a proportion of their bills are run off. The directors trust that you will act prudently in this respect, as you seem to distinguish between this company and the other parties. The directors do not desire any sudden or dangerous check. The reduction should be certain, but may be gradual.'

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A great deal of correspondence subsequently took place between the Bank and the agents in regard to this matter; but no notice was given to the cautioners, nor were the agents removed from their office. On the 15th of October the total discounts by the agency amounted to L.176,000; and in consequence of a requisition from the Bank, the agents transmitted a state of the existing discounts granted to the parties who were connected with John Marshall and to himself. From this specification it appeared that at this time they stood thus:—

'Hunter, Burt, Marshall and Company,	L. 20,914	6	3
'John Marshall, - - -	5017	7	1
'Charles Archer and Son, - -	4773	3	6
'J. Inches and Company, - - -	9311	0	1
'John Barland, - - - -	2154	18	2
	L. 42,170	15	1

In consequence of this the Bank wrote to the agents, on the 13th of November, that 'the directors consider these accommo-'dations, particularly those to Messrs Hunter, Burt, Marshall 'and Company, James Inches and Company, and John Mar-'shall, to be still high and disproportionate to the extent of the 'district. They recommend gradual reduction thereof rateably 'and proportionally, with the restriction directed on the 28th 'September last; although this restriction should certainly be 'effected with as much prudence and caution as possible, yet, 'on the other hand, it must not be forgotten, that it is a part of 'a general measure, considered necessary at present, and that 'each office must contribute its proportion in order to effect the 'whole restriction with as little delay as possible.' Notwithstanding these orders, however, it appeared from a report of the principal accountant of the 5th of December, that the accommodation granted to

'Hunter, Burt, Marshall and Company, was	L. 24,660	0	0
'John Marshall, - - -	12,450	0	0
'J. Inches and Company, - -	15,000	0	0
'Charles Archer and Son, - -	9030	0	0
'John Barland, - - -	2507	0	0
	L. 63,647	0	0

The Bank, in consequence of this report, wrote to the agents censuring their conduct, and stated, that 'as the directors, in

'arranging the securities for your official transactions, as the 'Bank's agent, could not foresee this disproportionate accommo- 'dation, and disregard to their instructions for reduction thereof, 'they feel it their duty to require you to state what additional 'joint security the obligants in question, and you as the guaran- 'tee of their bills, can give for the amount thereof. June 11. 1824.

'The directors desire the attendance of one of your number at 'their ordinary court at Edinburgh, on Monday first, the 17th 'December current, bringing with him the whole of the bills in 'and for which the above parties are obligants, and states there- 'of, classed so as to shew each man's engagements; and they ex- 'pect that a proposal of security will then be exhibited to them.'

The agents immediately answered, that they would make a considerable reduction, and offered to indorse, as a collateral security, a bill by Hunter, Burt, Marshall and Company, on Hunter, Rennie and Company, for L. 10,000, at twelve months, which the Bank agreed to receive, but without prejudice to the previous securities. In the month of January 1811, Hunter, Burt, Marshall and Company, became insolvent; and this having been intimated to the Bank, they sent their accountant to Perth to ascertain the existing state of the discounts. This officer reported that they were,—

'To Hunter, Burt, Marshall and Company,	L. 36,171	12	0
'— John Marshall, - - -	3,676	2	0
'— J. Inches and Company, - - -	13,820	2	0
'— Charles Archer and Son, - -	9,050	5	6
	L. 62,718	1	6

A proposal was then made by the agents, that the Bank should receive instalment bills for 8s. per pound from Hunter, Burt, Marshall and Company, and Hunter, Rennie and Company, and should hold the original bills, in order to proceed thereupon against third parties. After requiring, on the 5th March, a specification of these bills, and receiving it, the Bank, on the 30th of April, wrote to the agents, that 'in respect of your inability 'to retire these bills by payment in cash, and of your proposal 'of 28th February last, that the Bank, without prejudice to any 'security held by it, should draw from third parties other than 'Hunter, Burt, Marshall and Company, and Hunter, Rennie 'and Company, of London, who were to give instalment bills in 'security, as there proposed, and that the Bank should retain 'the original grounds of debt, or take new bills, the directors,

June 11. 1824. 'without departure in any respect from your guarantee or other 'security held by the Bank, order the bills above specified, and 'procedure thereon, to be transmitted from this office to Messrs 'Thomas Coutts and Company, the Bank's correspondents in 'London, with instructions to do the needful against third par-'ties foresaid; and they intimate to you, that unless the terms 'proposed in your said letter of 28th February, as acceded to by 'my letter of 5th March last, are fulfilled within 14 days hence, 'they will not hold themselves bound to delay taking steps against 'all the obligants, and for the different bills above specified.' It further appeared, that subsequent to this the agents inquired at the Bank, whether they might discount to Hunter, Burt, Marshall and Company, with guarantee, to the extent of L.300 weekly, and it was admitted that the Bank did not object to this being done.

In the month of August it was ascertained, that the bills which were past due in the hands of the agents, and for which they were responsible, amounted to L.39,593. 11s. 11d. William Marshall having then been required by the directors to come to Edinburgh, a conference took place, the result of which was, that on the 31st of August he granted the following promissory-note:— 'L.39,593. 11s. 11d. Perth, 31st August 1811. In corro-'boration and security to the Governor and Company of the 'Bank of Scotland, of bills discounted or purchased at the 'office of the said Bank in Perth, by me and John Marshall, 'my son, as the said Governor and Company's agents there, 'and now past due, extending of principal at the date thereof, 'conform to state thereof subscribed by us the said agents, to 'the sum under specified, for which, by our bond dated the '17th and 29th days of September 1808 years, we are liable to 'the said Governor and Company; and without prejudice to the 'said bond, or to any other security held by the said Governor 'and Company for the said bills, I, William Marshall, of 'Grange, hereby promise to pay to Robert Forrester, Esq. as 'treasurer of the Bank of Scotland, and to his successors in 'office, for behoof of the said Governor and Company, or their 'order, the sum of L.39,593. 11s. 11d. sterling of principal, 'against Martinmas next; value as established by the said bond. '(Signed) WILLIAM MARSHALL.' At the same time the directors obtained from him a bond and disposition in security over his landed property, for payment of the above sum, and on which infeftment was taken. Still, however, no notice of these circumstances and proceedings was given to

the cautioners, and William and John Marshall were allowed to act as agents for eight months thereafter. On the 27th of April 1812, the Bank ascertained that the bills which were then past due amounted to L.47,220, and they therefore resolved to supersede the agents from and after the 11th May. Notice to that effect was immediately given to the cautioners, and that, as the money and other securities belonging to the Bank was to be delivered over to one of the officers of the Bank on the 11th, if the cautioners wished to be present, they might then attend; and that it was highly probable they would be called on for implement of their bond. The agents having been removed, and William Marshall having been again appointed sole agent, under new caution, the Bank caused separate letters to be sent to each of the cautioners, in the following terms, to be subscribed by them respectively:—'30th September 1812.—Sir, 'As joint obligant with Oliver Gourlay of Craigrothie, and James 'Wylie of Airliewight, Esquires, to the Bank of Scotland, in 'a bond for L.10,000, dated 17th and 29th September 1808, as 'a collateral guarantee of the transactions of William and John 'Marshalls, the Bank's late agents at Perth, I hereby consent 'and agree, so far as I am concerned, that the whole outstanding 'debts due to the said Bank, contracted under the agency of the 'said William and John Marshall, be wound up, and the divi-'dends received from the different debtors, for behoof of the said 'Bank, by William Marshall of Grange, now the Bank's sole 'agent at Perth; and whatever step shall be taken, by or with 'the consent of the said William Marshall, in regard to such 'debts, shall not infer any departure from the said bond, which 'shall remain in full force against me and the other obligants 'therein, in the same manner as if I had been previously con-'sulted, and had specially consented to each step or measure 'taken in regard to the said debts. I am,' &c. Each of the cautioners accordingly signed separate letters, in the above terms. On the termination of the sole agency of William Marshall, which took place in 1813, the Bank wrote to each of the cautioners a letter, in which they stated, that 'Mr William Marshall is not 'now agent of the Bank of Scotland, his official capacity having 'terminated on the 27th April 1813. The directors of the Bank 'of Scotland do not think it consistent with the statutory carry-'ing on of the Bank, that Mr William Marshall, not being an 'officer of the Bank, should now act in the Bank's name, or 'recover debts due to the Bank. And although the directors 'will willingly receive any information from Mr William Mar-

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'shall, they do not think it consistent with their public duty that, 'in the management of any part of their public trust, they should 'be precluded from acting otherwise than by or with the consent 'of Mr William Marshall.

'They therefore trust that you will see it for the interest of 'all concerned, to transmit to the treasurer of the Bank of Scot-'land a letter from you in the terms prefixed hereto.'

The letter here alluded to was thus expressed:—'To the 'Treasurer of the Bank of Scotland.—Sir, As joint obligant 'with Oliver Gourlay, Esq. of Craigrothie, and Andrew Thom-'son, Esq. of Kinloch, in a bond to the Governor and Company 'of the Bank of Scotland, dated the 17th and 29th days of Sep-'tember 1808, whereby we, conjointly and severally, but under 'the limitation therein mentioned, guarantee to the said Gover-'nor and Company all bills, promissory-notes, and other obli-'gations discounted or purchased, and other transactions enter-'ed into by or through, or during the official charge and trust 'of William Marshall, as agent, or of William and John Mar-'shall, or either of them, as agents of the said Governor and 'Company at Perth; and by which bond the said Governor and 'Company are declared to be at liberty to dispose of the said 'bills and others at their pleasure, without prejudice to their 'right of recourse on the said bills and others against us, in 'terms of the said bond, I hereby consent that the directors of 'the Bank of Scotland may take such steps as they shall deem 'expedient, for recovery to the said Governor and Company of 'the sums due by the said bills and others, and may compound 'the same, or enter into submissions with any of the obligants 'therein, or may grant to such obligants such delay, or take 'from them such securities as the said directors may judge neces-'sary and eligible, and that without consulting any of the obli-'gants in the bond foresaid, and without prejudice thereto in 'any manner of way.'

The cautioners, however, refused to sign this letter, and the Bank having threatened to give a charge of horning on the bond, they presented a bill of suspension, which was passed. In support of it, they maintained generally, *first*, That the bond was of a nature which could not legally be enforced; *secondly*, That the Bank had been guilty of improper conduct in giving any sanction to the accommodations which had been so extensively granted to one of the joint agents, and to companies in which he was interested; and, *thirdly*, That by taking the bill of the 31st August 1811, and thereby postponing the term of pay-

ment of bills which were then exigible, not only from the obligants, but from the agents, till Martinmas, the Bank had given time without the consent of the cautioners, who were thereby liberated from their obligation.

The Lord Ordinary, on advising memorials, issued an interlocutor, stating, that he was 'of opinion that the objections to 'the legality of the bond, pleaded by the suspenders, are not well 'founded, and that the existence of the debt is sufficiently in- 'structed in the manner, and by the documents referred to in 'the bond;' but, at the same time, with a view to the preparation of the cause, ordered the cautioners to lodge a condescendence of their averments. After some intermediate proceedings, his Lordship repelled the reasons of suspension, 'in respect of the 'terms of the bond in which the suspenders became obligants; 'and in respect the extent of the discounts and other matters in 'the management of the Perth agency, which are complained of 'by the suspenders, were not owing to any fault or omission on 'the part of the directors, but entirely to the agents themselves, 'for whom the suspenders are responsible; and in respect it is 'not established, after all the investigation which has taken place, 'that the directors of the Bank, after the agency of William and 'John Marshall at Perth had ceased, took any steps which can 'injure the suspenders' right of relief, or which could be held to 'free the suspenders from their obligation, or which were not 'sanctioned and authorized by the bond granted by the suspen- 'ders and the former agents at Perth.' The cautioners then represented, and prayed to be allowed a farther investigation, but his Lordship refused the representation. The cautioners then reclaimed to the Court, and, on advising their petition with answers,—

Lord Robertson observed, The objections to the legality of the bond, which seem to rest on the circumstance of its being gratuitous, are unfounded. On the merits it appears to me, that the Bank were entitled and bound to exercise that controul over their agents, which any prudent man will do in regard to his own affairs. The cautioners must therefore allege that the Bank have not done so, or that they violated some clause in the bond. There is, however, no evidence before us to that effect, and, on the contrary, we have evidence that the Bank repeatedly remonstrated with the agents in very strong terms as to their conduct. The very object of the bond was to secure the Bank against the improper conduct of the agents. There is no special mode pointed out in the bond of managing the business, to which the Bank

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was bound to adhere. In the case of Nisbet there was an express clause as to the mode of controul, which was neglected to be exercised by the creditor. On this part of the case, therefore, I think the interlocutor right; but I have very considerable doubts as to the effect of sanctioning extensive accommodations to John Marshall, the joint agent. It appears that Marshall was a partner of a company, and that, after the joint agency was constituted, very extensive accommodation was given, both to him and to that company. I do not inquire at present how far it was proper on the part of the Bank to allow such accommodation; but, at all events, they were bound to exercise a very severe controul. In regard to this part of the case, however, I do not think that we have sufficient materials before us, and therefore I should wish to have a farther investigation.

Lord Craigie.—This is a case of importance and difficulty. In the *first* place, I think that it was the duty of the Bank to communicate fully to the cautioners the whole of the correspondence with the agents, and that we ought to have a fuller production of it than has yet been made. On the merits, I do not think that any plea can be drawn in favour of the cautioners from the instructions which were given after the joint employment. They were mere directions to the agents, which the Bank might enforce or not, as they might think fit; but I am not so sure as to those in 1791. These formed a sort of declaration of what were the duties and obligations of the agents; and which the cautioners were entitled to assume would be enforced by the Bank, and, of course, to rely upon them in entering into their obligation. I think, however, that the Bank has conducted itself in the whole of this matter with gross inattention to the interests of the cautioners. Accommodations to the joint agent, and to companies in which he was engaged, were known to be daily given; and yet this system was allowed to be persevered in, without giving any notice to the cautioners, and notwithstanding that the Bank remonstrated with the agents on the footing of its being a violation of their duty. Then, after the insolvency of one of these companies, in which one of the agents was a partner, was made known to the Bank, no notice was given to the cautioners. I rather think that they were called on to give that notice; but on this, and on other parts of the case, I have not sufficiently made up my mind, in consequence of a deficiency of materials, so as to enable me to sustain the objections to the bond, and therefore I would wish farther investigation.

Lord Justice-Clerk.—This is certainly a case of importance;

but I have come prepared to decide it. It is no doubt stated in the petition, that the cautioners are entitled to a further production, but there is no such prayer; and the case is argued with a view to get the interlocutor altered on the merits. I consider it one of importance, because it will have a general effect in regulating the conduct of all banks. The bond is so formed as to make all the parties co-obligants; but it is admitted that, as to the suspenders, it is a cautionary obligation. The question, therefore, is, Whether they are in a situation to demand liberation from that obligation. By the bond they are rendered responsible for the faithful execution of the agency, to the extent of L.10,000. If, therefore, the agents are not faithful, the cautioners must be liable; and they are also cautioners to the above extent, for a true accounting at the conclusion. It is somewhat difficult to make out, from the petition of the cautioners, what are the specific grounds on which they rest their case; but I think the general issue has been well stated from the Bar to be, whether they have got fair play. I have endeavoured to reduce the specific objections under three heads; and these are, *first*, That the bond ought to be denied effect, because no value was paid to the cautioners, and because it imposes an obligation of great hazard; *second*, That the Bank, by its misconduct, has lost its claim; and, *third*, That by giving time, the cautioners have been liberated. In regard to the first of these objections, it is plainly not well founded. The obligation is certainly of a hazardous nature, but there is nothing illegal in it. The second objection is rested on the circumstance of the agents having grossly deviated from their duty; but the Bank did every thing in their power to keep the agents to it, by repeatedly remonstrating, and desiring them to be upon their guard. I therefore cannot enter into the idea that the Bank had been guilty of such laches as to liberate the cautioners; and I do not see any such specific allegation on this subject, as entitles us to admit further investigation. If parties choose to enter into a risk of this nature, then the rule of law is, that it is the duty of those who undertake it, to make inquiries as to the conduct of the agents. It is not the duty of the Bank to intimate to the cautioners the various and fluctuating accommodations which may occur in the course of the agency. When the Bank discovered the extent of the accommodation, and particularly to certain favoured companies, they immediately interfered, and ordered the agents to reduce the discounts. If they had caused an immediate stop to take place, the consequence would have been, that both the agents and the companies would

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have been rendered bankrupt; so that the conduct of the Bank was perfectly prudent. If it had been alleged, that there had been any criminal connivance between the Bank and the agents in regard to these accommodations, I could understand the propriety of having a further investigation; but there is no such allegation. The third and last objection is, That time was given to the agents, without the consent of the cautioners; and no doubt, if this be true, the cautioners will be liberated. But in truth there has been no such giving of time here; for it is not alleged that there was any renewal of the bills which were past due, and the promissory-note, after the termination of the agency, and the Bank had entered into possession, was merely a constitution of the debt against the agents, and the disposition in security a provision for payment, both which the Bank were entitled to take. Therefore I think that the interlocutor is right.

Lord Glenlee.—I certainly read the papers under the impression that no further investigation was to take place. In doing so, what I looked chiefly to, was the allegation as to time having been given. But the promissory-note is not of that nature. It was merely a liquidation of the debt, with a view to supersede the necessity of obtaining a decree of constitution. I am therefore disposed to adhere, and, if any thing more specific can be stated, the cautioners may come to us in a reclaiming petition.

Lord Robertson.—I was aware that there was no special prayer for farther investigation; but, on looking into the farther proceedings, I now see that there was a prayer to that effect to the Lord Ordinary, which was refused, and that this part of the judgment has been acquiesced in. As we must therefore decide the case as it stands, I am for adhering.

Accordingly, on the 29th of January 1822,* the Court adhered, and found expenses due.

The cautioners then entered an appeal, and maintained that the judgments ought to be reversed,—

1. Because a bond for the good behaviour of an agent cannot be made effectual in a court of equity, where the conduct of the agent, through which the loss has ensued, has become known to and been recognized by the principal; which had been the case here, and the Bank had not exercised that due care and diligence which they were bound to do on behalf of the cautioners.

2. Because as time was granted by the Bank to parties by or for whom bills had been discounted; and the Bank had also

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* See 1. Shaw and Ballantine, No. 319.

entered into a new arrangement, giving time to one of the principals for the payment of the debt, without the knowledge or consent of the cautioners, they were discharged from their liability. June 11. 1824.

3. Because they did not receive due notice of any of the transactions from which the loss sued for had arisen.

On the other hand, it was maintained by the Bank that the judgments were well founded,—

1. Because the appellants, after having been allowed an uncommon latitude of investigation, had utterly failed to shew that the directors of the Bank did not exercise due care and diligence in watching over the conduct of the agents for whom the appellants were responsible; and it was quite irrelevant to allege, that notwithstanding such care and diligence on the part of the directors, the proceedings of the agents were in some respects imprudent or improper. That it was precisely because the directors could not so completely controul their agents as to prevent the consequences of their imprudence or dishonesty, that bonds of the nature of that charged on were required.

2. Because, neither during the subsistence of the joint agency, nor after its termination, did the directors sanction any act calculated to weaken any right of relief to which the appellants were justly entitled: And the taking of the note and relative security from William Marshall in August 1811, was an act beneficial to the appellants, as well as to the Bank.

3. Because the bond contained no proviso that the directors should be bound, either to consult the co-obligants respecting the administration of the Bank's affairs, or to intimate to them any proceeding on the part of the agents which may be deemed improper: that the directors never refused to give the appellants any information for which they applied; and when it was resolved to put an end to the joint agency, notice was given to the appellants in the manner which is customary on such occasions. And,

4. Because, by their several letters addressed to the treasurer of the Bank, on the 30th September 1813, after the joint agency had terminated, the appellants declared, that whatever steps should be taken for recovery of the outstanding debts, 'by or 'with the consent of the said William Marshall,' should be binding upon them. And in the same letter, each of the appellants described himself as being a 'joint obligant' in the bond, and used other expressions, implying that it was still in full force against them.

The House of Lords 'ordered and adjudged, that the interlo-

June 11. 1824. 'cutors complained of be reversed, and that the letters be sus-
'pended simpliciter.'

LORD GIFFORD.—My Lords, There is a case to which I will now call your Lordships' attention—the case of Thomson *v.* Forrester. The interlocutor of the Court of Session arises out of these circumstances:—In the year 1808 a bond was executed by the appellants, and by Mr William Marshall and Mr John Marshall, the effect of which was, that the appellants became bound to the Bank of Scotland in the sum of L.10,000, as cautioners and sureties for William and John Marshall, who were at that time appointed joint agents for the management of that branch of the Bank which is established at Perth. Upon this bond the Bank, in 1815, raised diligence against the cautioners in the Court of Session in Scotland; and certain judicial proceedings having taken place, they obtained a final judgment in January 1822, the effect of which was to declare the bond to be valid, and that the cautioners were liable in the whole amount for which they had become security. It is with a view to review that decision that the question is brought before your Lordships. My Lords, the bond entered into by the appellants, and Mr William Marshall and Mr John Marshall, in the year 1808, contains a great variety of provisions on behalf of those cautioners, and on behalf of the persons for whom they are sureties. It recites a bond of 1791, entered into by Mr William Marshall, as principal, and the appellant, Andrew Thomson, and also Mr Oliver Gourlay and Mr James Wingate, as cautioners and sureties, by which they bound and obliged themselves, conjunctly and severally, and their heirs, executors, and successors, that during the term of Mr Marshall continuing in the office and trust of agent for the Bank of Scotland, he should faithfully discharge the duties thereof as stipulated in the bond; and reciting that Mr Marshall had ever since acted in the capacity of agent; that Mr Oliver Gourlay died on the 16th of November 1806; and that Mr Wingate was desirous that he should not remain bound under the bond for any transaction posterior to the last date thereof; and also reciting that Mr William Marshall was desirous that Mr John Marshall, his son, should be appointed joint agent for the Bank of Scotland, which was agreed to; that in the year 1808, his son being joined with him as joint agent, this new security was entered into, in which the appellants became bound as cautioners and sureties for Mr William Marshall and Mr John Marshall. After reciting the bond of 1791 very shortly, it goes on, 'Therefore, without prejudice to the 'bond before narrated, but in corroboration and security thereof, we, 'the said William Marshall and John Marsball, as individuals, we, the 'said William and John Marshall, as a copartnery or joint agents fore-'said, and we, the said Andrew Thomson, Oliver Gourlay, and James 'Wylie, bind and oblige us all, conjunctly and severally, and our re-'spective heirs, executors, and successors whatsoever, that during the 'time of us, the said William and John Marshall, and the survivor of

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'us, continuing in the said office and trust of agents for the said Bank 'of Scotland, we, and the survivor of us, shall honestly, faithfully, and 'diligently discharge the duties thereof, and do and execute every 'thing relative thereto to the best of our judgment, for the benefit of 'the said Governor and Company; and shall fully and truly account 'to the Governor and Company, or to Robert Forrester, their trea-'surer, or to his successors in office, for behoof of the Governor and 'Company, for all sums of money, whether in specie or in bank-notes, 'bills, promissory-notes, or otherwise, with which we, the said William 'and John Marshall, or either of us, or the survivor of us, shall be 'intrusted by them from time to time, or which shall come into our 'hands, or under our charge, in the management of the office and 'trust, or into the hands or under the charge of the accountant, 'cashier, clerks, servants, or others employed under us, or the survivor 'of us; and that we, and the survivor of us, shall pay in and deliver to 'the Governor and Company, or to their treasurer for the time, all 'sums of money, bills, and promissory-notes, and all writings, docu-'ments, or other effects belonging to them, when required so to do; and 'whatever damage, loss, or expense, the Governor and Company shall 'sustain,' or any accident, or so forth, that it shall be made good to the Bank.

Then it was declared, 'that as all the remittances and carriages of 'money, notes of the Bank of Scotland or any other bank, bills, and 'other valuable articles, betwixt the office of the Bank in Edinburgh 'and their office in Perth, and any other place appointed by the direc-'tors of the Bank, were to be made by Messrs William and John 'Marshall, and the survivor of them, conform to the instructions of the 'directors, so the carriages and remittances should be solely at the 'risk of the Governor and Company, provided that William and John 'Marshall, and the survivor of them, shall strictly observe the instruc-'tions thus to be given by the directors.' Then it says, 'And if we, 'or either, or the survivor of us, fail to do in any particular, we, the 'said William Marshall and John Marshall, and the survivor of us, and 'we, the other co-obligants foresaid, and our respective foresaids, 'shall be, jointly and severally, liable in the consequences thereof.' Then it goes on to state, that they shall take upon themselves the whole risk of all bills, promissory-notes, and other obligations of every kind which had been discounted or purchased by William Marshall, and of all other transactions made by him while he acted as agent for the Governor and Company, and also of all bills, promissory-notes, and other obligations of every kind thereafter discounted or purchased by William and John Marshall, or either of them, or the survivor of them; and of all bills on London or elsewhere, which they should discount or purchase in the execution of the office and trust committed to them. Then, my Lords, it goes on in a variety of other provisions, binding those persons to the strict performance of the duty which those two

June 11. 1824. gentlemen of the name of Marshall had then taken upon themselves as agents for this Bank.

My Lords,—It appears that a very short time after this bond had been entered into, Mr Marshall, the son, who was one of the agents for the Bank, entered into partnership with persons of the names of Duncan Hunter and James Burt; and it appears, that on the 9th of May 1809 they addressed a letter, signed Hunter, Burt, Marshall and Company, of which firm John Marshall was one, to William and John Marshall, the agents for the Bank of Scotland, desiring to have a cash-account with the Bank of Scotland for L.1000. For this loan there was an application in the hand-writing of William Marshall, the senior agent, in these terms:—'The applicants have just commenced business as 'calico printers, at Cromwell-park, near Perth. The Company at pre- 'sent consist of Messrs Duncan Hunter, of London, James Burt and 'John Marshall, manufacturers in Perth. Mr Hunter is said to be a 'very wealthy man, worth upwards of L.60,000; Mr Burt worth up- 'wards of L.6000 or L.7000; the other is our John Marshall. Their 'purchase of goods and materials, and their payments of wages, will 'be considerable, and give rise to a favourable circulation of notes; 'and their returns will be chiefly in London paper.' This is the note to the Bank of Scotland.

My Lords,—To this letter the directors returned an answer by their secretary, stating, 'that he had laid before the directors the applica- 'tion for a credit of L.1000; and begged to inform them, that the rules 'of the Bank required two separate securities besides the holder of the 'account.' To this the joint-agents replied in these terms:—'We 'wrote you yesterday, and we have now to mention, that Hunter, Burt, 'Marshall and Company, propose as securities for their cash-account 'of L.1000, Messrs Charles Archer and Robert Hepburn, both mer- 'chants here.' So that your Lordships perceive by the letter I have read, the Bank were apprised that John Marshall, one of the agents, had embarked in this copartnership with Mr Hunter and Mr Burt.

My Lords,—It appears that, after this, discounts to a large amount were transacted between this firm and the agents of the Bank, to the amount of many thousand pounds. I will not detain your Lordships by stating the various advances; but it appears that, in the month of February 1810, the accommodation at that time given to this and three other houses were:—'To Hunter, Burt, Marshall and Company, 'L.29,572,—J. Inches and Company, L.17,306,—Thomas Chalmers 'and Company, L.17,062,—and to John Marshall himself, L.8550.' This account having been reported to the Bank, they wrote on the 20th February 1810 to their agents, as follows:—'The directors 'of the Bank of Scotland are of opinion, that the accommodation by 'discount given by you, as their agents at Perth, to Hunter, Burt, 'Marshall and Company, James Inches and Company, Thomas Chal- 'mers and Company, and John Marshall, manufacturer in Perth, is 'greatly too high; and that the improper extent of it increases the

'money lent by the Bank of Scotland at Perth much beyond its due 'proportion, and in a partial mode of distribution. You are therefore 'directed to use every prudent exertion for the certain reduction of 'the accommodation to these parties, and in future to divide the loans 'in your district more impartially.' June 11. 1824.

To this an answer was written on 24th February by William Marshall, in name of William and John Marshall, in these terms:—'We 'are favoured with your private letters of the 20th and 21st current; 'and in reply to the first we have spoken to Hunter, Burt and Com- 'pany, and to James Inches and Company, with some of the partners 'in which concerns we are closely connected, intimating to them, that 'in future it will not be in our power to discount for them so largely 'as heretofore; and though it is not reckoned very becoming in this 'place for a respectable house to do business with more than one bank, 'yet they are willing to divide theirs, and for that purpose to open an 'account with another bank, or to withdraw it altogether, as shall be 'most agreeable to the directors. We have declined discounting to 'Thomas Chalmers and Company since the receipt of your letter of 'the 20th, and shall continue to do so for some time until a propor- 'tion of their bills are run off; and John Marshall, who is just now in 'England, will, we have no doubt, be ready to conform to the wishes 'of the directors. We have only to add, that we supposed Hunter, 'Burt and Company's business would particularly suit the Bank, as 'almost the whole bills discounted for them are on London; and far- 'ther, that although the Bank's advance here has been considerable, 'yet no person in this district will accuse us of the smallest partiality 'in the distribution.'

On the 28th of February the Bank replied thus:—'I have laid 'before the directors of the Bank of Scotland your letter of 24th 'February 1810, relative to the accommodation given at the Bank's 'office at Perth to Hunter, Burt, Marshall and Company, James 'Inches and Company, and John Marshall. The directors still con- 'sider the accommodation at Perth to be disproportionate. They 'observe, that twenty parties only have accommodation to the extent 'of above L. 130,000, and of this the four parties above-mentioned 'have above L. 72,000, being considerably more than the half. Con- 'sidering the extent, population, and enterprise of your district, it is 'not easy to consider this distribution impartial. From the circum- 'stance,'—I beg your Lordships' attention to this paragraph which I am about to state to you, because it will shew your Lordships in what way the Bank considered this transaction,—'From the circumstance 'of John Marshall being one of the Bank's agents, and of your and his 'close connexion with Hunter, Burt, Marshall and Company, it be- 'comes in a particular manner your duty, as the Bank's agents, to 'guard against the appearance of making those funds which the Bank 'destines for the equal and impartial accommodation of a large district, 'subservient almost exclusively to your own extra-official speculations,

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'and those of your intimate and close connexions.' Now, my Lords, I refer your Lordships to this to shew that the Bank themselves considered that the accommodation which these agents were granting to one of themselves was an extra-official accommodation, and not such as ought to take place on the part of those agents; and that therefore they very properly make this observation, but they do no more except that. In the subsequent correspondence they require that this accommodation may be restricted; but they still go on continuing those persons as their agents from this time till the year 1811; and your Lordships will find, notwithstanding undoubtedly they wrote several times to desire that those discounts should be reduced, they got up again. Your Lordships will find, that on the 6th of November the discounts for those houses were as follows:—Hunter, Burt, Marshall and Company, L.20,914. 6s. 3d.—John Marshall, L.5017. 7s. 1d.; the other houses, Charles Archer and Son, L.4773. 3s. 6d.—James Inches and Company, L.9311. 1d.—John Barland, L.2154. 18s. 2d.

On the 13th of November 1810, however, the directors wrote to the agents: 'The directors of the Bank of Scotland have considered your 'letter of 6th November current, with state of the following accom- 'modation at the Bank of Scotland's office at Perth, (alluding to the 'discounts immediately before-mentioned). The directors consider 'these accommodations, particularly those to Messrs Hunter, Burt, 'Marshall and Company, and James Inches and Company, and John 'Marshall, to be still high and disproportionate to the extent of the 'district. They recommend gradual reduction thereof, rateably and 'proportionally, with the restriction directed on the 28th September 'last. Although this restriction should certainly be effected with as 'much prudence and caution as possible, yet, on the other hand, it 'must not be forgotten, that it is a part of a general measure consider- 'ed necessary at present, and that each office must contribute its pro- 'portion in order to effect the whole restriction with as little delay as 'possible.' On the 5th of December 1810 the accommodation granted to Hunter, Burt, Marshall and Company, was L.24,660—John Marshall, L.12,450—James Inches and Company, L.15,000—Charles Archer and Son, L.9030—John Barland, L.2507.

The secretary to the Bank, on the 10th December 1810, wrote to the joint agents as follows:—'The directors of the Bank of Scotland 'observe, that the engagements of the following parties at the Bank's 'office at Perth, under your official administration as the Bank's 'agents, are, at 6th December, as follows,'—giving the state of the accounts. 'The directors censured the extent of accommodation to 'these parties, and required reduction by my letter of the 20th Feb- 'ruary last, and again by 28th February, and again by letter 30th 'November last. Notwithstanding thereof, and of the general order 'of restriction communicated in my letter of 28th September last, the 'amount of the engagements of the above parties, which was at 6th 'November last L.42,170. 15s. has been extended, in one month, to

'the above sum of L.63,647, at 6th December current. As the 'directors, in arranging the securities for your official transactions as 'the Bank's agents, could not foresee this disproportionate accommo- 'dation, and disregard to their instructions for reduction thereof, they 'feel it their duty to require you to state what additional joint secu- 'rity the obligants in question, and you as the guarantee of their bills, 'can give for the amount thereof.' Then they wrote back for answer, on the 13th December 1810, that they engaged to make considerable reduction before the 1st of February 1811, and offered to indorse to the Bank, in collateral security, a bill by Hunter, Burt, Marshall and Company, on Hunter, Rennie and Company, for L.10,000, at twelve months from 1st December 1810. The Bank then wrote, on the 18th December, regarding this L.10,000 bill, that they considered it as their duty to require this indorsation; but it was not to pledge them to admit of any delay in the restriction enjoined and promised, and that they expected, till farther notice, a weekly state of the accommodation to Hunter, Burt, Marshall and Company, John Marshall, Charles Archer and Son, and James Inches and Company, shewing the total accommodation to each party at the date of the same, but without specifying particular bills, unless specially required. On the 26th December the Bank intimated to the agents, that the collateral security of this bill was taken without prejudice to the previous securities for the official transactions of the agents.

Your Lordships will find, that in the following month of January, Messrs Hunter, Burt, Marshall and Company, were intimated to the directors to be insolvent; and it appears that at that time the discounts which they had received from the Bank, and outstanding against them, were thirty-six thousand odd hundred pounds—against John Marshall three thousand odd hundred pounds—James Inches and Company thirteen thousand eight hundred odd pounds—and against Charles Archer and Son L.9050—making a total of L.62,718. 1s. 6d. My Lords, in consequence of this insolvency, in the following month of August 1811 the Bank came to an arrangement with William Marshall; and upon that occasion the bills which were over due amounted to the sum of L.39,593. 11s. 11d. for which they were considered responsible; and upon that occasion he gave a promissory-note, dated the 31st of August 1811, for the L.39,593. 11s. 11d. It is in these terms:—'In corroboration and security to the Governor 'and Company of the Bank of Scotland, of bills discounted or pur- 'chased at the office of the Bank in Perth, by me and John Marshall, 'my son, as the said Governor and Company's agents there, and now 'past due, extending of principal at the date thereof, conform to 'state thereof subscribed by us, the said agents, to the sum under 'specified, for which by our bond, dated the 17th and 29th of 'September 1808, we are liable to the Governors and Company; and 'without prejudice to the said bond, or to any other security held by 'the Governor and Company for the said bills, I, William Marshall

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'of Grange, hereby promise to pay to Robert Forrester, Esq. as 'treasurer of the Bank of Scotland, and to his successors in office, 'for behoof of the Governor and Company, or their order, the sum of 'L. 39,593. 11s. 11d. Sterling, against Martinmas next.' This note, your Lordships will perceive, is given in August, and is payable at Martinmas next; and he gave a bond and disposition in security over the whole of his estate for this sum of L. 39,593 and a fraction, payable also at the following Martinmas. My Lords, it appears, however, that they still continued Mr John Marshall as their agent; and at the time of this arrangement with Mr William Marshall, no arrangement took place, which the sureties were informed of, with Mr William Marshall—no notice whatever was given to them, or any communication had with them upon the subject: and although your Lordships find, that at that time the sum due from those persons, for which they were liable under the bond, was so large a sum as L.39,000; though Hunter and Company, of which firm John Marshall was one, had become insolvent; they continued this gentleman, without any communication with the sureties, until some time in the following year, when I think Mr John Marshall was allowed to retire from the agency, and Mr William Marshall was allowed to continue the sole agent.

My Lords,—In the following year 1812, there was a communication made to the appellants by the Bank on the subject of their demands against these agents, the Bank considering they were liable to the amount of L.10,000; and the answer from them at that time, while they were ignorant of any of the circumstances of the case, was, that they considered themselves bound under their obligation. Afterwards, however, when they gave their attention to the facts, they resisted any payment under the bond, contending, that the negligence of the Bank in their dealings with those persons, in suffering them to act in the character of agents for their own personal advantage, and that at all events the transaction with William Marshall in the year 1811, by which time had been given him for the payment of this debt without their consent, operated in point of law as a discharge against them as cautioners.

My Lords,—The appellants having been threatened with a charge on the bond at the instance of the Bank in the year 1815, raised a bill of suspension, which was passed upon caution, upon which letters of suspension were afterwards expede, bearing date the 19th of May 1815. The action having come before Lord Pitmilly as Ordinary, appearance was made on behalf of the Bank by their treasurer; and his Lordship having ordered the case to be stated in mutual memorials, without a previous hearing, on the 21st of November 1816 pronounced the following interlocutor, which is the first appealed from here: 'The Lord Ordinary having considered the mutual memorials for the 'parties in this cause, with the whole process, is of opinion that the 'objections to the legality of the bond pleaded by the suspenders are

'not well founded.' My Lords, they took an objection, which undoubtedly appears not to be well founded, to the nature of the bond—that it is a security which, from its nature, cannot be enforced. However, the Lord Ordinary was of opinion it was a good security, 'and 'that the subsistence of the debt is sufficiently instructed in the manner and by the documents referred to in the bond,' and ordered a condescendence to be given in. In compliance with this order the condescendence was lodged, on advising which the Lord Ordinary, on the 7th June 1817, allowed the parties to be heard at the Bar upon the whole cause; after hearing which, on the 18th November 1817, he pronounced the following interlocutor:—'The Lord Ordinary having 'heard parties' procurators in terms of the interlocutor of 7th June last, 'allows the suspenders to put in a minute stating the precise object of 'the diligence now craved by them at the Bar, and allows the chargers 'to see and answer the minute; and thereafter, before answer, appoints 'the suspenders to give in a pointed condescendence, in terms of the 'Act of Sederunt, of the facts they aver and offer to prove in support 'of their reasons of suspension.' A minute was accordingly given in, craving diligence for recovery of certain writings; and on the 6th of June 1818 the Lord Ordinary pronounced the following interlocutor:—'The Lord Ordinary having considered the minute for the suspenders, 'answers thereto for the chargers, replies and duplies,' and so on. I shall not trouble your Lordships at length with this interlocutor; the next is the most material one. June 11. 1824.

The cause came on to be considered on the 28th January 1820, when the Lord Ordinary made this interlocutor:—'Having considered 'the condescendence for the suspenders, with the answer for the 'chargers, and having also again considered the memorials for the 'parties, with the whole process, and particularly the written pleadings and productions made since the memorials were formerly advised; 'in respect of the terms of the bond in which the suspenders became 'obligants, and in respect the extent of the discounts and other matters in the management of the Perth agency, which are complained 'of by the suspenders, were not owing to any fault or omission on the 'part of the directors, but entirely to the agents themselves, for 'whom the suspenders are responsible; and in respect it is not established, after all the investigation which has taken place, that the 'directors of the Bank, after the agency of William and John Marshall at Perth had ceased, took any steps which can injure the suspenders' right of relief, or which could be held to free the suspenders 'from their obligation, or which were not sanctioned and authorized 'by the bond granted by the suspenders and the former agents at 'Perth; repels the reasons of suspension, finds the letters orderly proceeded, and decerns.'

My Lords,—A short representation was refused by the Lord Ordinary. The whole cause was then submitted to the review of his

June 11. 1824. Lordship in a representation, and on the 28th of November he pronounced an interlocutor, by which he refused the desire of the representation, and adhered to the interlocutor represented against. The appellants having presented a petition to the Second Division of the Court of Session against this interlocutor, and their petition having been appointed to be answered, their Lordships, upon consideration thereof, on the 29th January 1822, pronounced the following judgment:—'Having advised this petition, with answers thereto, adhere to 'the interlocutor reclaimed against, and refuse the desire of the peti-'tion.' The result, therefore, of the interlocutor is, that the Court of Session consider that these cautioners are still liable upon this bond.

My Lords,—I have considered this case with all the attention I am capable of, frequently since it was discussed at your Lordships' Bar; and, my Lords, however painful it is to me at any time to differ in opinion with the Court of Session, I must confess that, in discharging my duty to your Lordships, I cannot refrain from stating, that I consider the opinion to which the Court have come in the present instance as incorrect. My Lords, in the first place it appears, that the Bank, after they were fully aware of the conduct of these agents, in not discharging their duty as agents, but making large advances for the private accommodation of a firm in which one of the agents was himself a partner; they themselves stated that they considered that conduct on the part of their agents extra-official. My Lords, it was part of their duty, it was their bounden duty to the cautioners, to have put an end to those proceedings the moment they were aware of them; or at all events, to have advised the cautioners of the proceedings, so that they might judge how far those agents were worthy of the trust reposed in them. Their obligation was, that they would be answerable for the due discharge of the duties of those gentlemen as agents for the Bank; but I say, the moment those agents, or one of them, which is the same thing, departed from that duty, and was making use of the funds of the Bank for his own private accommodation, that was what was not in the contemplation of those parties when this stipulation was made—that they were to be answerable not only for the transactions of these gentlemen as agents to the Bank, but for their private transactions with Hunter and Company. According, however, to the decree of the Court of Session, it comes to that,—that they are to be answerable to that extent, and that they are to be answerable for the discounts which John Marshall, the son, had obtained from the Bank at the time of those transactions. But even supposing that this did not relieve those cautioners from this security, I took the liberty, when this case was argued at the Bar, of putting it to the respondents' Counsel, whether time had not been given to Marshall when he executed the security in August 1811? I think it is impossible to read the note, and deny that that was the effect of it; for with respect to this L. 39,000 he says, I will not only give you a note, but will cover all

my real property with a security for the payment of it against Martinmas next; and whether it was a year or seven days makes no difference in the principle. The principle of law established in Scotland, as well as in this country, is, that if a party chuses to give time to a principal, without communication with his surety, his doing so exonerates his surety; and for the plainest of all possible reasons, that if they went against the principal for this L.39,000 before the term of Martinmas arrived, the principal would have a right to turn round and say, Don't call upon me, I have made a contract with the Bank that they shall not call upon me till Martinmas.

But, then, it is said, that this security is taken without prejudice to the securities. My Lords, I apprehend that will not protect parties in a case of this sort. We do not find that the Bank wrote to the sureties, saying, With respect to this large sum of L.39,000, for which these agents are liable, and for which you are ultimately liable if they do not pay, we think it right to make this arrangement; we suppose you will not dissent from it, for it will be a benefit to you, because we take a security over the whole of this property. My Lords, if the cautioners had been consulted, there would have been no difficulty; but the Bank came to this arrangement without any communication with them. I put it to the gentleman who argued this case with great ability, on the part of the respondents, and he had great difficulty in answering, whether Marshall could have been sued in the mean time? At that time I desired to see a statement of the account subsequent to the period of August 1811, which has been furnished to me very properly by the agents on both sides; and the one side contended, that notwithstanding this security, it was competent for the Bank in the mean time to proceed to execution during the intervening period. I cannot, however, help thinking, if they had taken any step before Martinmas arrived to enforce their contract, it would have been certainly a breach of contract against this gentleman; and I doubt very much whether they could have enforced their contract against him. Then, my Lords, with respect to the question of a claim under these circumstances against the sureties, there is a case I should have cited to your Lordships were it not that the principle is well established. It is a case in Vesey, in which the former cases were referred to. In this country that principle is perfectly established. I observe the Lord Ordinary and the Court of Session have laid down the principle, that if nothing is done after the agent has ceased to act as such, by way of prejudicing the right of the sureties, they are liable. Now, if that be the view of the Court of Scotland, I apprehend it is not conformable to the law of this country or of that country. They say, that nothing was done after the agency of William and John Marshall at Perth had ceased, which could injure the suspenders' right of relief. The question is not merely with respect to what was done after the agency, for if they did any thing which had that effect during the agency, it discharges the sureties as much as if they did it afterwards. If the Court of Session meant to say, that, if

June 11. 1824. this took place after the agency ceased, it would discharge them, I am not aware of any such distinction in the law either of Scotland or England. In this case, therefore, my Lords, I am under the necessity of saying, that I cannot concur in the interlocutors which have been pronounced by the Court of Session. Those who hold such securities are not to relax all diligence on their part with respect to the principal, who is their servant. They are bound to use all due diligence; and I say in this case, when, almost immediately after the bond given in 1809, they found that one of these persons in breach of his duty was making use of their funds most improperly to support a trade, of which, from the extent to which they carried on, there could be but one termination, namely, the insolvency and bankruptcy which took place in two years; it does appear to me, it was their bounden duty to put a stop to such proceedings, or if they could not put a stop to them, to dismiss these persons as their agents; or if they did not think fit to do that, I think they have no right to call on these cautioners to indemnify them for those sums which were not bona fide intrusted to these individuals as their agents; and supposing even that was not the case, this extension of time given under the security in 1811, does appear to me to have amounted to a release of the sureties. My Lords, I must confess that, in my view of the case, although it is with great regret that at any time I differ in opinion with the Court of Session, I am compelled to do so on the present occasion. It was argued at the Bar, whether, although this interlocutor might be reversed, and the suspension sustained as far as with regard to the L.39,000,—whether, if any debt has subsequently accrued from these agents, the cautioners might not be liable? but, after considering that question, and examining the circumstances of the case, it appears to me that what took place in 1811 not only exonerated the sureties in respect of the large debt, but also exonerated them from any future debt these agents might incur. Under all the circumstances, I must humbly propose to your Lordships to reverse these interlocutors.

Appellants' Authorities.—Smith, 1. Dow, 296.; Rees, 2. Vesey, Jun. 540.; Samuel, 3. Meriv. 272.; 5. T. R. 513.; 18. Vesey, 20.; 2. Taunt. 206.

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(Ap. Ca. No. 57.)