[6*th July* 1835.]

JOHN SWAN and others, Appellants.—*Sir William Follett—Stuart.*

THE BANK OF SCOTLAND, Respondent.—*Attorney General Campbell.—Lushington.*

Stamp — Settled Account — Cautioner.— Co-obligants or cautioners in a cash credit were charged to pay the balance due on a certified account made out from the books of the bank in the form stipulated by their bond —Held (reversing the judgment of the Court of Session), that they were not liable for any balance arising on drafts drawn and issued, and known to the bank agent to be so, beyond the statutory distance of ten miles; or wrong dated in point of time or of place, and known to the bank agent to be so; although there had been accounts doqueted by the principal obligant, and balances certified in which these drafts were included.

2D DIVISION.

Lord Medwyn.

MR. WILLIAM MARTIN, who resided in the town of Lockerbie in Dumfries-shire, carrying on the business of a writer and discounter of bills, was in the habit of obtaining accommodation from the Bank of Scotland by means of cash accounts through their agent at Dumfries, which is thirteen miles distant from Lockerbie.

These cash credits were arranged and the transactions under them were conducted on the part of the bank by their agent at Dumfries, Mr. John Barker, who carried on an extensive business there on behalf of the bank.

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For the cash credits so obtained Martin granted bonds with co-obligants or cautioners to the bank. The first of these with which any of the appellants was connected was dated in the month of June 1819, and was for 600*l.* sterling; and in that bond, (which was in the form of an ordinary cash credit bond,) Mr. Swan, one of the appellants, was one of the cautioners or obligants for Martin.

This bond was operated upon by Martin wholly or principally by means of drafts from its date in 1819 till the month of September 1826, when all transactions under it terminated, leaving a balance due thereupon, which was adjusted on the 6th April 1830 by a balance of 552*l.* 2*s.* 8*d.* carried to the new account. The transactions under this bond having proved profitable, and Martin wishing for further credit, a new or second bond was granted to the bank in September 1825, in which the appellants became cautioners, and whereby, in consideration of a credit for 10,000*l.* upon a cash account to be kept in name of Martin, they bound and obliged themselves conjunctly and severally to pay to the bank "all such sums, not exceeding " 10,000*l.* sterling, as shall be drawn out from the said " bank by me the said William Martin, or as may be " contained, due, paid, payable, or claimable on any " drafts, orders, bills, promissory notes, receipts, gua- " rantees, letters, obligations, and documents whatever " drawn, accepted, granted, indorsed, or any how signed " by me the said William Martin, or on my procura- " tion, or liable on me by any legal construction, and " whether discounted or paid to me the said William " Martin, or to any other party, or retired by the said " bank, or otherwise taken or holden by or for the said

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" governor and company, all thereby ipso facto to be " due hereon, and chargeable to the said cash account."

By a subsequent clause in this bond it is declared that " any account or certificate signed by the principal " accountant of the said governor and company, or by " their agent and accountant for the office where the " said cash account may then or before be kept, shall " be sufficient to ascertain, specify, and constitute the " sums or balances such as aforesaid said to be due " hereon in principal as aforesaid, and thereon the legal " interest as aforesaid, and shall warrant hereon all " executorials of law against us conjunctly and severally, " and our aforesaids."

The bond thereafter restricted the liability of the co-obligants, other than William Martin, to " 5,000*l.* ster- " ling, and the legal interest from the date of the " demand on any of us, and any costs and charges of " security in obtaining the said 5,000*l.* sterling and " interest, together also with interest as aforesaid on " such costs and charges. But these presents without " limitation shall be available and effectual against me " the said William Martin and my foresaids; providing " likewise hereby, that the cash account aforesaid may " be debited and credited with any sums, bills, or docu- " ments such as aforesaid, together or successively and " repeatedly, whensoever and as often soever by the said " bank, without losing any right or remedy of law on " bills or otherwise; and whatever sum shall be had " hereon by the said governor and company and their " aforesaids may by them be imputed as they may find " best towards any costs, charges, interest or principal, " such as herein written."

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After this last bond was granted a new account was opened between the bank and Martin, upon which very extensive operations took place. Agreeably to the general rule observed, not only by the Bank of Scotland, but by other banks, the account was annually settled, and at each annual settlement it was doqueted, and the vouchers were delivered up.

The account ending 28th February 1831 was doqueted on the 13th April 1831, and the vouchers were mutually exchanged, and the doquet, signed by the authorized mandatory of William Martin, was in the following terms:—"Dumfries, 13th April 1831.— "This account settled, vouchers exchanged, and the "balance of 3,236*l.* 14*s.* 4*d.*, principal and interest, "brought to the debit of new account at 28th February "last.

(Signed) "For William Martin, per mandate,
"Fras. S. Martin."

Which sum was admitted to be due to the bank.

On the 24th October 1831 the balance ascertained by this doquet was reduced by a payment of 10*l.* received through one of the appellants, Mr. Carruthers. On the other hand, Martin was debited with certain bills which he had discounted, and which were not retired; and he was further debited with the sum of 552*l.* 2*s.* 8*d.* ascertained as above mentioned to have been due on the 1st of March 1830 on the account opened in 1819. The result was found to be, that on the 3d of August 1832 the balance against Martin stood as follows, viz.:—

Principal -	£4,378	0	11
Interest - -	326	10	2

Expenses - -	£5	7	2
	£4,709	18	3

This balance was ascertained by a certificate dated 3d August 1832, and signed in terms of the bond by John Barker, the bank's agent, and James Caldow, the bank's accountant, for their branch at Dumfries.

The bank was in the habit of furnishing to Mr. Martin a quantity of unstamped printed blank checks or orders, all bearing "Dumfries" as the place of issuing. These printed checks were in the following form:—

"Dumfries, 18 .
"To the agent of the Bank of Scotland, Dumfries.
"Pay the bearer, and charge to
"account of ."

It was by means of these documents that Martin carried on his operations upon the cash account; and in this manner he continued, without any alterations, his operations on the bank account, from the date of the bond in September 1825 until his bankruptcy in July 1831.

He never either carried on or professed to carry on any business in Dumfries. In the bond he was designed "writer in Lockerbie;" and the annual accounts, furnished by the bank during the currency of the bond, were titled "William Martin, Esq., writer, Lockerbie, "in account with the bank of Scotland at the Dumfries "office." All his bank transactions appeared to have taken place at Lockerbie, and the whole of the drafts or orders, by means of which he operated on his bank account at Dumfries, were made and issued at Lockerbie.

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Besides transactions in regard to the discounting of bills, he had a great variety of miscellaneous transactions in the line of his business, for which he required large supplies of money. For these general purposes he also used the bank drafts, sometimes sending these drafts by a clerk or other messenger from Lockerbie to Dumfries, and getting back the proceeds and cash from Mr. Barker in sealed packets directed to himself at Lockerbie, and very often he gave such drafts to third parties for value, who afterwards drew the amount from the bank at Dumfries. These drafts bore the printed word "Dumfries," though made and issued at Lockerbie, and were all post-dated, or dated one or more days subsequent to the day on which they were issued or delivered by Martin.

In most instances the drafts so issued and enclosed in letters addressed by him to Barker, were, in terms of the original form, made simply payable to the bearer, and were only indorsed by Martin; but the drafts issued at Lockerbie, and given there to third parties for value, were made payable to particular individuals named in the draft. These drafts were in this form:—

"Dumfries, 18 .
"To the agent of the Bank of Scotland, Dumfries.
"Pay the bearer, Mr. Robert Hope, Glenlee, the sum
"of and charge to
"account of .

"Dumfries, 18 .
"To the agent of the Bank of Scotland, Dumfries.
"Pay the bearer, Mr. James Martin, writer, Dumfries,
"the sum of and charge to
"account of ."

These particular drafts, as well as the other drafts given to third parties for value, seem also in many instances to have served all the purposes of ordinary bills of exchange, and to have passed, by delivery and indorsation, through different hands, and for many days after their date, and after having been issued by Mr. Martin at Lockerbie, and before being presented to the bank at Dumfries for payment. Many of these drafts seem also to have been discounted at the banks in Edinburgh and in Annan, and received through these channels by the bank at Dumfries.

The Bank of Scotland claimed, and was admitted by the trustee, to rank upon the sequestrated estate of Martin for the whole debt. No objection was offered either by the appellants or by any other creditor of William Martin against the decision of the trustee so ranking the respondent, nor was that decision brought under the review of the Court.

The bank having charged the appellants, as the co-obligants in the bond of 1825, to pay 4,709*l*. 18*s*. 3*d*. as the balance of principal, interest, and expenses due under the bond, conform to the certified account, the appellants brought a suspension before the Court of Session.

The Lord Ordinary having reported the case, the Lords of the Second Division of the Court, on the 5th of February 1835, unanimously pronounced the following interlocutor; "The Lords, on the report of " Lord Medwyn, having advised the cases for the parties, " with the record and whole proceedings, and heard coun- " sel thereon,—in respect that the present charge proceeds " only on the bond of credit dated in 1825, sustain " the reasons of suspension as to that portion of the " debt charged for which had been contracted under

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"the previous bond of credit dated in 1819; suspend "the letters simpliciter to that extent, and decern, "without prejudice to any competent action to be "brought by the chargers for the recovery of the balance "due under that previous bond, as effeirs. Quoad "ultra, as to the debt contracted under the second "bond above alluded to, and in respect of the accounts "doqueted, and balances certified by the proper par-"ties, repel the reasons of suspension, and find the "letters orderly proceeded, and decern: Find the "chargers entitled to the expenses of process, but "subject to modification; allow the account to be given "in, and, when lodged, remit to the auditor to tax and "report."[1]

The Cautioner appealed.

Appellants.—The judgment of the Court below is founded on a misconstruction of the bond in virtue of which the charge is given.

1. The bond is just an ordinary bond of caution for a cash account, being an instrument perfectly understood in banking transactions. The deed is so framed as to make the whole parties thereto, principal as well as cautioners, co-obligants to the bank, so as to give the bank a joint and several claim against the whole obligants, and prevent them from pleading, as in a question with the bank, the beneficium ordinis, or septennial limitation. Although the form of the instrument thus contrived has the effect of giving the creditor right to claim the whole debt directly from the

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[1] 13 S. D. & B. p. 403.

cautioners, without first discussing the principal, the cautioners' situation and general rights and privileges are no otherwise affected, more especially in so far as regards questions touching the powers or liabilities of the principal. The bond in the present case clearly reveals the true nature of the obligation, and the bank, being in the perfect knowledge of the fact, that the bond was truly a bond of caution, are net in bona fides to maintain the opposite. Even though this had not been fully revealed upon the face of the instrument, it would have been quite competent to have explained the bond and the real nature of the obligation by facts and circumstances, or other extraneous proof. Thus, in the case of Smollett[1], it was found " competent to prove, by facts " and circumstances, that one of two joint obligants in " a bond is only cautioner for the other, so as to entitle " him to a total relief out of the bankrupt estate of the " co-obligant." Again, in a more modern case[2], which occurred upon a bond of credit to a bank in precise terms with the present, the argument now used was raised by the assignee of the bank, in answer to a plea of release urged by the cautioner, proceeding on the assumption that he was entitled to the privileges of a cautioner. The Court held, that, notwithstanding the terms of the bond, the party co-obligant was truly cautioner, and entitled to maintain his plea as such, which plea was sustained accordingly. Still later a bond, precisely similar to that now in question, was held, on an appeal from Scotland, and after the point was fully considered by the House, to be truly a bond of caution, and it was there observed, " that a person bound as full

[1] 21st Feb. 1793, Mor. 12354. [2] Hume, 12 Jan. 1830, 8 S. & D. 295.

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" debtor for another in a bond for a cash account for " that other, is a surety, and entitled to all the equities as " such, except that he loses the benefit of discussion."[1]

But this argument of the bank, even though well founded, would not have supported their case. On the contrary, the construction put upon the bond by them seems to be subversive of their general argument. The proposition, that the act of a principal is operative against a cautioner, can only be plausibly stated on the notion that the principal represents the cautioner in every thing connected with the obligation, and that the rights of the cautioner are dependent on the acts of the principal. But viewing the parties as co-obligants, they come, from their relative situations, to be independent of each other, and there is no ground for maintaining that their relative situation empowers the one to bind or transact for the others.

Any such alleged authority must be shewn to exist in the bond, and considering that it is to have the effect of creating obligation on the appellants, as cautioners and parties to the bond, the authority must appear, either in express words or by fair construction. But on turning to the bond, there is evidently no authority, either express or implied, empowering Martin to waive discharge, or renounce any legal plea or defence which might be competent to the appellants as the cautioners in the obligation. The general authority which is conferred upon Martin by the bond was intended for a totally different purpose, and is fully explained and limited by the terms of the deed itself. As the credit was obtained from the bank for the accommodation of Martin, so he was neces-

[1] Mack. 23 Sept. 1831.

sarily authorized to operate upon the bond by drawing out monies (but of course always in a legal form) from the bank. Beyond this, the bond contains no power or authority to Martin whatever. The parties never treated in regard to conferring upon Martin a power of transacting or discharging for the cautioners, either by annual doqueting of the accounts or otherwise, and accordingly the bond contains no stipulation, directly or indirectly, on this subject. Such a stipulation is most important in itself; and if it had been proposed to the cautioners, either by Martin or the bank, it would have been rejected. It is impossible to suppose that the appellants would, by anticipation, have given any such authority to Martin; yet the Court below have, by implication, found such a stipulation in the bond, and decided the case against the appellants, almost entirely upon that view. The judgment appealed from clearly assumes a general authority in Martin to act or transact for the cautioners in regard to the account or claim of the bank. According to the view on which the case was decided, Martin did, by doqueting the accounts and recognizing the claim, not only discharge the objection of illegality founded on the Stamp Acts, but the settlement of the account would have had the effect of discharging all other objections or defences which might previously have been competent against the claim of the bank, as exhibited in the account. It is impossible to maintain this proposition by any fair construction of the bond, and unless it can be maintained the view upon which the judgment of the Court below proceeds cannot be supported.

But, 2. The judgment of the Court below is founded on a misconstruction of the Stamp Acts.

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The bank having transacted business with Mr. Martin since 1819, they were perfectly well acquainted with him at the time when the latter bond was obtained in 1825, and they were quite aware that the bond was required by Mr. Martin in order to enable him to carry on his discounting and other business at Lockerbie, by means of monies drawn from Dumfries. Mr. Martin is specially and correctly designed in this last bond as writer in Lockerbie. He was fully and intimately acquainted with Mr. John Barker, the public and known agent for the bank at Dumfries. Mr. Martin had dealt with Mr. Barker and the bank largely under the previous bond, from 1819 to 1825, a period of not less than six years. Mr. Barker arranged both the cash credits so obtained by Mr. Martin, and it was quite understood and agreed to that Mr. Martin's whole operations should take place through Mr. Barker, and with the branch at Dumfries.

Mr. Martin neither being resident in Dumfries nor carrying on his business there, he neither could, nor was he expected by the bank or their agent to issue his drafts or orders at Dumfries. From the known residence of Mr. Martin being at Lockerbie, as well as the avowed purpose of the credit being to enable him to carry on business at Lockerbie, the bank and their agent were perfectly aware that he behoved to issue his drafts or orders on the account kept at Dumfries truly at Lockerbie. But then it was foreseen that the proposed arrangements between Mr. Martin and the bank would be greatly obstructed by the provisions in the Stamp Acts. The 55 Geo. 3. c. 184., part I. p. 66, imposes a particular duty on all bills, promissory notes, orders drafts, or other documents, under, however, the fol-

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lowing exception: "All drafts or orders for the pay-
"ment of any sum of money to the bearer on demand,
"and drawn upon any banker or bankers, or any person
"or persons acting as banker, who shall reside or
"transact the business of a banker within ten miles of
"the place where such drafts or orders shall be issued,
"provided such place shall be specified in such drafts
"or orders, and provided the same shall bear date on
"or before the day on which the same shall be issued,
"and provided the same do not direct the payment to
"be made by bills or promissory notes."

The 13th sec. p. 15, farther provides,—"And for the
"more effectually preventing of frauds and evasions of
"the duties hereby granted on the bills of exchange,
"drafts, or orders for the payment of money, under
"colour of exemption in favour of drafts or orders upon
"bankers, or persons acting as bankers, contained in
"the schedule hereunto annexed; be it farther enacted,
"that if any person or persons shall, after the 31st
"day of August 1815, make and issue, or cause to be
"made and issued, any bill, draft, or order for the pay-
"ment of money to the bearer on demand, upon any
"banker or bankers, or any person or persons acting as
"a banker or bankers, which shall be dated on any
"day subsequent to the day on which it shall be issued,
"or which shall not truly specify and express the place
"where it shall be issued, or which shall not in every
"respect fall within the said exemption, unless the same
"shall be duly stamped as a bill of exchange, according
"to this act,—the person or persons so offending shall,
"for every such bill, draft, or order, forfeit the sum of
"100*l.*; and if any person or persons shall knowingly
"receive or take any such bill, draft, or order in pay-
"ment of or as a security for the sum therein men-

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"tioned, he, she, or they shall, for every such bill, draft, "or order, forfeit the sum of 20*l.*; and if any banker "or bankers, or any person or persons acting as a "banker, upon whom any such bill, draft, or order "shall be drawn, shall pay, or cause or permit to be "paid, the sum of money therein expressed, or any "part thereof, knowing the same to be post-dated, or "knowing that the place where it was issued is not "truly specified and set forth therein, or knowing that "the same does not in any other respect fall within the "said exemption, then the banker or bankers, or person "or persons so offending, shall, for every such bill, "draft, or order, forfeit the sum of 100*l.*; and more-"over shall not be allowed the money so paid, or any "part thereof, in account against the person or persons "by or for whom such bill, draft, or order shall be "drawn, or his, her, or their executors or administrators, "or his or her or their assignees or creditors in case "of bankruptcy or insolvency, or any other person or "persons claiming under her, him, or them."

Now, as Lockerbie is more than ten miles distant from Dumfries, it is undoubted that the drafts required to be stamped; which they were not, and thus the Stamp Acts have been directly violated by a tacit arrangement. The bank have for a period of years been enabled, with impunity, to conduct the whole banking business of a large district, extending far beyond the distance referred to in the exception in the Stamp Acts, and have entered into and completed transactions, to the extent of some hundred thousand pounds, all in manifest evasion of them.

It is impossible to contend that the provisions of a public statute, or the provisions of an enactment intended for a public purpose, can be waived or excluded

by any private paction or arrangement, even in a question between the parties to the agreement; and, indeed, that even Martin could have stated the objection after having doqueted the accounts, and recognized the claim of the bank. But this is a question between the bank and third parties not present at and no way cognizant of the transaction by which Martin is said to have settled the account, and waived the objections on the Stamp Acts. The case, as determined by the Court below, exhibits this anomalous and somewhat extraordinary result, that the bank and Martin, the two guilty parties, both contraveners of the statutes, have, by a private arrangement between themselves, not only wiped away the effects of their own illegal act, but have rendered it legal and binding on third parties, and have excluded the appellants from maintaining the objection in the statute, which would otherwise have been competent to them.

That the objection would have been competent, had it not been for the doqueting of the accounts, seems beyond controversy. The words of the provision which denies to the creditor the rights of stating the proceeds of the illegal drafts in his account are very comprehensive, and are clearly intended to embrace and do embrace an exclusion of the creditor's right to claim the money from all or any person whatsoever, whether debtors in their own right, or under any right derived from or connected with the proper debtor. The monies paid upon the illegal drafts were drawn in virtue of the very bond to which the appellants were parties, and accordingly the claim of the bank is now made against the appellants for the sums paid under these drafts, and in virtue of that bond.

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The reason which seemed mainly to prevail with the Court below was, that the claim of the bank was not now made upon the illegal drafts, but solely upon the doqueted accounts, which was said to be sufficient evidence to support the claim, and required no stamp. This is an erroneous view of the case; and there appear to be various solid answers to it. 1. The doqueting of the account being, as already observed, the act, not of the appellants, but the private act of Martin and the bank, it is not obligatory upon the appellants, either as an obligation, acknowledgment of the debt, or otherwise. As instructing a claim against Martin, the doqueted account may or may not be sufficient, or he may or may not be entitled to dispute the claim. But the appellants are in a very different situation, and deny the doquet as being, quoad them, res inter alios acta. This casts the respondents back upon the original account, which they cannot pretend to prove save by the original drafts; which directly brings those drafts into view, and subjects them to the appellants objection. 2. The settled account, which is said to constitute an acknowledgment of the debt, does not remove the illegality in the original contraction. On this subject, Mr. Coventry, when treating of acknowledgment, says, "The acknowledgment of a debt or duty "merely prevents the operation of the statutes of limitation, the original evidence of the obligation remains "unaffected, any defect in which the bare admission of "a debt cannot cure."[1] Again, "And it is farther "observable, as above hinted, that an acknowledgment "will not make that good which was bad originally. At

[1] Coventry on Stamps. p. 155.

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" the foot of a draft drawn upon A., but which was not " admissible in evidence for want of a stamp, there was " an acknowledgment by A. that a third person had " paid the amount for him. In an action of assumpsit " against A. by such third person it was held that the " latter could not produce the acknowledgment in evi- " dence, for it could not be made available without " giving effect to the draft."[1] The original defect in the consideration, or in the evidence, cannot from this be cured by the doqueted account, more especially in a question with the appellants. 3. As the settled account specially refers to the drafts, this subjects them again to inquiry, and raises the objection on the Stamp Acts. The quotation from Mr. Coventry's work supports this. Mr. Chitty writes nearly to the same effect:—" Where " the written instrument cannot be read in evidence, yet " it frequently happens that other evidence may be re- " sorted to; but that evidence must have no reference " to the rejected instrument, or at least be sufficient " without calling it in aid."[2] 4. Or, to take a more unfavourable view for the appellants;—suppose that the docqueted account may be regarded as primâ facie evidence of a legal debt, still there is, with deference, nothing to prevent the appellants from disproving that debt by showing that the original consideration was illegal. This they are perfectly ready to undertake; and they cannot discover, either in the arguments of their opponents, or in the opinions of the learned judges who decided the case, any reason for denying them an opportunity of entering upon this counter proof.

[1] Coventry, p. 158, citing Castleman v. Ray, 2 Bos. & P. 383.

[2] Chitty on Stamp Laws, p. 47.

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Respondents. — 1. Independently of the objection founded on the Stamp Laws, there is no ground for maintaining that the interlocutor appealed from, in so far as it is favourable to the respondents, is erroneous. The present charge is in all respects regular and formal, and warranted by the terms of the bond charged upon. That bond most expressly declares that an account or certificate, signed either by the bank's principal accountant, or by the agent and accountant for the office where the cash account is kept, shall be sufficient to ascertain and constitute the balance, and to "warrant "all executorials of the law" against the co-obligants. As it cannot be denied that the balance now charged for is thus ascertained, there is evidently no room for objecting to the formality or regularity of the present charge. The appellants have totally failed to point out any defect in the formality or regularity of the present charge; neither have they attempted to show that any part of the debt for which it finds them liable was not truly advanced by the respondents to Martin on the faith of the bond. On the contrary, it is specially stated, that "the whole balance now charged for is "composed of money paid by the chargers, or "Mr. Barker their agent," on drafts which are alleged to have violated the Stamp Laws in the different particulars therein mentioned.

2. Under the circumstances of the present case, there is no ground for maintaining that any part of the debt charged for is liable to any objection under the Stamp Laws, and the proof offered by the appellants is at once incompetent and irrelevant.

It is only necessary for the respondents, in defending the interlocutor appealed from, to notice the 15th sec-

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tion of the statute, 9 Geo. 4. cap. 49., whereby the exemption previously conferred upon drafts or orders drawn upon bankers residing within ten miles of the place of issue was extended to such drafts or orders upon bankers residing within fifteen miles of the place of issue. Lockerbie, being "within fifteen miles of the town of Dumfries," it follows that, ever since the passing of the Act 9th Geo. 4. cap. 49., it has been quite lawful to pay at Dumfries unstamped drafts or orders issued at Lockerbie; and consequently, even supposing that Martin might have been tempted previously to conceal the true place and date of issuing his drafts, there could have been no temptation for him to do so after that period.

The conclusive answer to all the allegations of the appellants is, that in support of the present charge the respondents have no occasion to found upon the drafts or orders of Martin at all. Independently of the certified account which, it is not denied, sets forth only the sums truly advanced by the respondents, the present charge is fully supported by the annual doquets under the hand of Martin himself, or of his authorized mandatory, on which occasions the drafts and other vouchers were given up, as being no longer of any use. In particular, the doquet subjoined to the account ending in 1831 is in the following terms:—

"Dumfries, 13th April 1831.

"This account settled, vouchers exchanged, and the "balance of 3,236*l.* 14*s.* 4*d.*, principal and interest, "brought to the debit of new account at 28th February last.

"(Signed) For WILLIAM MARTIN, per mandate,
"FRAS. S. MARTIN."

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It is in vain to attempt to get rid of this deliberate acknowledgment by offering proof as to alleged defects in the documents by which it was preceded, but which, as already stated, were given up as useless when the doquet itself was signed.

Supposing that the present question had arisen directly between the respondents and Martin, it would have been in vain for him, in the face of his own doquet, to have founded on the allegations now brought forward by the appellants. Whether or not, if knowledge of the alleged defects of the drafts could have been brought home to the respondents at the time of their paying the money upon them, they, as well as Martin himself, might have been liable to the statutory penalties, is a totally different question. So, also, if any part of the transactions had been allowed to rest upon such a draft, there might have been a question, whether the respondents were entitled to found upon it as a legal voucher, or whether they could be allowed the money paid upon it "in account" with Martin. But after having deliberately granted the doquet above quoted, expressly acknowledging the balance of 3,236*l.* 14*s.* 4*d.* to be due by him "in account" with the bank, it would be utterly impossible for Martin to found upon legal objections alleged to be applicable to the previous vouchers. When the account was settled by the doquet dated 13th April 1831, the drafts and other vouchers previously granted by Martin were given up, and the balance due by him was sufficiently vouched by the doquet affixed to the account.[1]

[1] Barnes v. Hedley, 2 Taunton, p. 184; Napier v. Carson, 7 Feb. 1828 (Shaw, vol. vi. p. 500); Ewing v. Wallace, 3 Feb. 1831 (Shaw, vol. ix. p.

Even if the appellants were entitled to assume the character of cautioners, there is here no ground for making any distinction between them and the principal debtor. It is not even alleged that the doquets were collusively arranged between the respondents and Martin, or that he was disabled from granting them by reason of bankruptcy or otherwise. Under such circumstances there is no room for maintaining that the appellants are not bound by these doquets equally as by any other operation upon the cash account. The annual settlement of the account being a matter of established and ordinary practice in all the Edinburgh banks, there was no occasion to call upon the appellants to be present at the annual settlement. Accordingly the appellants have not alleged that it is the practice of the Royal Bank, or British Linen Company, or any other bank whatsoever, to call upon the cautioners in their cash accounts to be present at the annual settlements with the parties in whose favour these accounts are granted. Indeed, it is well known that the practice of Scotch banks is quite otherwise. It ought to be particularly observed, that by the bond charged upon the cash account "is appointed to be kept in name of "me the said William Martin;" and the co-obligants bind themselves for all such sums, not exceeding 5,000*l.*, "as shall be drawn out from the said bank by me the "said William Martin, or as may be contained, due, "paid, payable, or claimable on any drafts, orders, "bills, promissory notes, receipts, guarantees, letters, "obligations, and documents whatever, drawn, ac-

385); affirmed in the House of Lords, 13 Aug. 1832; (1 Wilson & Courtenay, 222), in which it was held that the case of Robertson v. Strachan, 29th June 1826, (4 S. & D. p. 772,) was ill decided.

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" cepted, granted, indorsed, or any how signed by me " the said William Martin, or on my procuration, or " liable on me by any legal construction." Excepting Martin himself, there is no other individual entitled to operate upon the cash account. The appellants consented to be bound by his operations, and therefore he bound them by his annual doquets equally as by any other operation under the cash account. The subscribing of the annual doquets was a matter of ordinary practice, as much as the subscribing of any order or draft by which the cash account was affected, and there was no occasion why the appellants should be present at the one operation more than at the other. The appellants are not entitled to plead that, in granting these acknowledgments of the balance confessedly due upon the cash account, Martin did them any injury. In signing the annual doquets, after duly examining the account to which they referred, Martin acted merely as it was his duty to do. He could not, as an honest man, have acted otherwise; and the appellants are not entitled to plead that it was incumbent on Martin to refuse to acknowledge the balance which he knew to arise from money actually advanced to him under the cash account. If such a doctrine were to be countenanced, it would put an end to that principle of confidence and good faith without which such cash credits cannot safely be granted or operated on at all. If the party accommodated is bound, with a view to the supposed interests of his cautioners, to deny, upon any ground whatsoever, the balance which he knows to be just, or to deny the receipt of money which he has truly received, he is equally bound to do so on every other occasion. Sup-

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pose that by mere error a wrong voucher had been sent to the bank one day, was Martin bound, for the sake of the cautioners, to refuse to grant a rectified voucher when applied for next day? Suppose that by accident he had got money from the bank into his hands without granting any voucher at all, was he bound, for the sake of the cautioners, to decline, when applied for, to grant a voucher for the sum received? It is in vain to draw a distinction between these cases and the present. The balance acknowledged in the doquets being confessedly the true balance due upon money actually advanced under the credit, these doquets bind the appellants equally as they bind Martin himself.

It may be further observed, that a sufficient answer to any objection as to the amount of the debt due under the bond charged for is afforded by the fact, that the respondents have been duly ranked on the sequestrated estate of Martin for the amount of the sum for which the letters have been found orderly proceeded by the interlocutor appealed from. In the case of Dickson and Clark v. Barbour and Mitchell, 27th May 1826[1], and in other cases, it has been held that cautioners for a composition under a sequestration are not entitled to dispute the validity of debts ranked on the estate; and the respondents are at a loss to discover upon what principle, while the decree of ranking in their favour remains unreduced and unchallenged, the appellants, as the cautioners of Martin, can competently maintain that the debt for which the respondents have been ranked on Martin's sequestered estate is not truly due.

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[1] Shaw, vol. vi. p. 156.

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LORD BROUGHAM.—The Scottish banks, both public and private, have for more than a century past been in the practice of granting accommodation to their customers by way of what is called cash credits — a mode of conducting business which may almost be said to have become classical from the description and commendation given of it by Mr. Hume in one of his most celebrated political essays. It consists in the opening an account to a certain limited amount with the customer on his finding good security for any balance which may at any time of settlement be found due. Upon this credit he operates by drafts on the bank, and these are honoured up to the specified amount during the whole period of the party's occasion for this accommodation. Interest is charged on the sums drawn, and thus the party only pays for what he actually uses, while he runs no risk of keeping money by him beyond the occasions of the day; and the bank runs little or no risk, because, beside the surety's liability, it has constant means of knowing the nature of the customer's dealings, and of inferring from thence the state of his circumstances.

These credits are used not only by traders, but by persons in any other occupation or profession requiring supplies of money to a moderate amount, as cattle dealers, agents, and writers, and sometimes even by private individuals living on their means.

William Martin, writer, of Lockerbie, obtained a credit of this description with the bank of Scotland in June 1819, and gave a bond for securing the latter, in which he was joined by Mr. Swan, the present appellant, and others, formally and nominally as principal co-obligors, but in reality as his sureties. In September 1825

this was extended to 10,000*l.*, and the sureties joined in a second bond, whereby they became liable in the same manner with William Martin, but to the extent of 5,000*l.*, for "all such money as should be drawn out "from the said bank, or its agency office at Dumfries, "or as may be resting over, due, paid, payable, or "claimable, on any drafts, orders, bills, notes, receipts, "guarantees, letters, documents, or obligations what-"ever, drawn, accepted, granted, indorsed, or any "how signed by William Martin, or by procuration, or "liable on him by any legal construction, and charge-"able to the said account." And it was further stipulated by the bank, that any "account or certificate "signed by their principal accountant, or by their "agent at Dumfries, should be sufficient to ascertain, "specify, and constitute the sums or balance to be due "on principal and interest, and should warrant all "execution of law against the obligors, jointly and "severally, for such sums and balances."

Martin continued to operate upon this credit until he became insolvent, and his estate was sequestrated, when a balance of 4,378*l.* 0*s.* 11*d.* principal, and 326*l.* 10*s.* 2*d.* interest, was due upon the account. The sureties or cautioners were sued upon the bond, and it was stated in the defence that the manner of drawing had been chiefly in two ways. Martin had sometimes sent letters from Lockerbie, where he resided, to the bank agent at Dumfries, directing him to send him money to a specified amount by the bearer, and sometimes he had discounted bills, and entered into other transactions with various persons at Lockerbie, and given them drafts on the bank or bank agent. In order to save the stamp, it is alleged, he made them payable to

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bearer; but as Lockerbie is said to be beyond the distance of ten miles, then specified by the Stamp Act, he dated the cheques at Dumfries, and generally post-dated them, as if drawn the day when the holders might present them for payment at the bank office.

Doquets and balances certified by both the accountant and agent were regularly made and produced, and the cause was reported upon cases by the Lord Ordinary to the Lords of the Second Division, who directed a hearing in presence, and then decided that the suit being brought only on the second bond, that of 1825, the pursuer could not recover on the bond of 1819 in this action; but their lordships decreed in his favour upon the former instrument.

Nothing here turns upon the form of the action, which was a suspension of a charge given by the bank on the bond. The matters before stated as to the transaction were averred, and the facts alleged by the parties being in many, indeed in most particulars, denied on either side, nothing is to be taken for concluded or ascertained by the proceedings; but the respondents, the chargers, were sufficiently confident in their grounds of law to let the case be determined upon the footing of admitting, for argument's sake, the allegations of the appellants, the suspenders; and as it was on this assumption that the Court decided, so it is upon this that the appeal is brought, and that your lordships are called upon to determine here.

It is to be regretted that some steps had not been taken to ascertain the facts, the more especially as the matter of law was, in the estimation of the Court below, sufficiently difficult to require cases and a hearing in presence. It does not seem that any difficulty could

have attended this settlement of the facts, for nothing material was in dispute except the fact of the drafts having been such as the appellants contend they were— namely, payable at Dumfries, and drawn at Lockerbie; of their having been issued to parties whom Martin was paying money to; of Lockerbie being beyond the legal distance; and of the bank agents being aware of all this — facts in all likelihood only denied for form's sake, and which probably would have been admitted, or at least, if denied, easily substantiated. What part of the balance was made up of money obtained on such drafts, and what part of money obtained on letters sent for cash to be transmitted from Dumfries by W. Martin's messenger, could probably have been ascertained with equal ease, and these are the only facts in the case. The consequence of settling these things would have been that, should the point of law be decided against the respondents, the cause would have been at an end; whereas if your lordships reverse this decision, a new litigation will be necessary in case the chargers deny the suspender's allegations. However, we have to deal with the case as it is now before us, and I regret to find that I cannot come to the conclusion at which the learned judges below have arrived. On the contrary, I really hold it to be, without any reasonable doubt, clear, that upon the facts which the case for the respondents assumes to be those of the cause the bank could not recover upon this bond.

The whole question arises out of and turns upon the Stamp Act 55 G. 3. c. 184. s. 13.; and we may at once lay out of view all that portion of the alleged balance or debt which arose from letters or orders, such as those set forth in the cases, namely, directions given at Lock-

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erbie in writing to the bank agent to send Martin sums of money. I do not consider that these are drafts or orders for the payment of money at all. They are directions to send money to the party who either has it in the bank, or takes it on credit from the bank; they are not negotiable instruments, and they are not issued; therefore they do not come within the description of instruments requiring a stamp, and they do not fall in any way within the provisions of the 13th section. But we are to consider the point argued and decided below —Whether or not, upon a balance arising out of sums paid by the bank to the bearers of unstamped cheques issued at Lockerbie beyond the privileged distance, the agent who honoured those cheques being conusant of the distance and place of issue, the co-obligors or sureties in Martin's bond of 1825 were liable to make good Martin's deficiency, in other words, to pay the debt found due and arising out of such dealing?

Now it must first of all be observed, that it seems mainly though not exclusively to be the ground upon which the respondents rest their case, and the Court below their judgment, that the bondsmen had bound themselves by the certificate of the accountant or agent of the bank, and that whatever balance those persons should certify was to be regarded as the true balance for which they were liable to the bank. This argument seems to admit that, but for such a special provision between the parties, the want of a stamp would be fatal. But certainly something has been said of a more general nature respecting the difference between enactments for protecting the revenue and other statutory provisions. We shall therefore begin by considering the question in its more general shape, and then inquire if the special

obligation just adverted to makes any difference in the present case.

1. There seems no reason at all to doubt that if, for the purpose of protecting the revenue, any thing is forbidden to be done under a penalty, this does not necessarily make void the thing done, or prevent a right of action from arising out of it: thus, if dealing in tobacco without a licence, as in Johnson v. Hudson, 11 East, 180, is prohibited under a penalty, this will not prevent the person who so deals from maintaining an action for goods sold and delivered in such dealing, although the unlicensed dealer will be liable to the statutory penalty. But how would it have been if the legislature had, besides the penalty, provided that all dealing of the forbidden kind should be absolutely void? It is clear that in this case no action could arise from such void dealing, not because the law forbade the transaction for revenue purposes, but because it deprived the transaction of all legal force and effect by making it void; and even if it had only been forbidden, with or without penalty, provided the prohibition was for other than revenue purposes, no action could arise. Where there was no provision avoiding the transaction, but a prohibition framed to protect the buyer, an action was held not to lie when that prohibition was disobeyed. Law v. Hodgson, 11 East, 300. So no action was held maintainable for printer's work where the act requiring the printer's name to be given had not been complied with —the not following a direction being held equivalent to disobeying a prohibition. Bensley v. Bignold, 5 B. & A., 335.

But a provision making void the transaction is quite as clear a ground of nullity, and quite as strong to defeat

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all legal remedy, as any such prohibition. Be it so, that the provision is to protect the revenue, still if it operates not by penalty, nor yet by mere prohibition, but by declaring void what is prohibited, surely this is as immediate and direct a defeasance of all legal remedy as can be conceived. It is not, as in Law v. Hodgson, a consequence drawn by argument from the statutory enactment, but it is the very enactment itself. It stands in the place of penalty. It is in truth the penalty denounced. The wrong-doer, the person breaking the law, forfeits 100*l.*, and forfeits also the validity of his contract. He incurs two penalties, the fine and the nullity.

Now what does the Stamp Act provide with reference to the present case? The 13th section is precise. "And for the more effectually preventing of frauds "and evasions of the duties hereby granted on the bills "of exchange, drafts, or orders for the payment of money "under colour of exemption in favour of drafts or orders "upon bankers, or persons acting as bankers, contained "in the schedule hereunto annexed; be it further en- "acted, that if any person or persons shall, after the "31st day of August 1815, make and issue, or cause "to be made and issued, any bill, draft, or order for "the payment of money to the bearer on demand upon "any banker or bankers, or any person or persons act- "ing as a banker or bankers, which shall be dated on "any day subsequent to the day on which it shall be "issued, or which shall not truly specify and express "the place where it shall be issued, or which shall not "in every respect fall within the said exemption, unless "the same shall be duly stamped as a bill of exchange "according to this act, the person or persons so offend-

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" ing shall, for every such bill, draft, or order, forfeit
" the sum of 100*l*. And if any person or persons shall
" knowingly receive or take any such bill, draft, or
" order in payment of or as a security for the sum
" therein mentioned, he, she, or they shall, for every
" such bill, draft, or order, forfeit the sum of 20*l*. And
" if any banker or bankers, or any person or persons
" acting as a banker, upon whom such bill, draft, or
" order shall be drawn, shall pay, or cause or permit
" to be paid, the sum of money therein expressed, or any
" part thereof, knowing the same to be post-dated, or
" knowing that the place where it was issued is not
" truly specified and set forth therein, or knowing that
" the same does not in any other respect fall within the
" said exemption, then the banker or bankers, or per-
" son or persons so offending, shall for every such bill,
" draft, or order, forfeit the sum of 100*l*." Thus far all
is description and penalty and statement of the purpose,
viz. to prevent frauds and evasion of the duties. But
there follows a clear declaration of nullity or avoidance,
for it goes on to provide that "moreover," that is, over
and above forfeiting the penalty, the banker or other
person shall "not be allowed the money so paid, or any
" other part thereof, in account against the person or
" persons by or from whom such bill, draft, or order
" shall be drawn, or his, her, or their executors or ad-
" ministrators, or his or her or their assignees or cre-
" ditors in case of bankruptcy or insolvency, or any
" other person or persons claiming under her, him, or
" them." To say that a party shall not be allowed in
account any money paid in a particular way, is equiva-
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