proceeded originally upon a feudal subtlety as to the fee of heritage not being *in pendente;* that the notions then adopted, and unfortunately applied at last to money provisions, were directly adverse originally to the presumed intention and object of the settlements, the plan of which was thereby defeated, and, that rules of construction were introduced which have been the subject of much regret among lawyers." But I feel bound, by the long and almost unbroken current of authorities, to agree with the interlocutors of the Second Division of the Court, which I therefore think ought to be affirmed.

LORD CRANWORTH.—I ought to say, that I am desired by my noble and learned friend, LORD KINGSDOWN, to state that he is unable to attend here this morning, but that he entirely concurs in the result at which we have arrived.

The *Lord Advocate* asked what was to be done as to the costs.

LORD CHANCELLOR.—The House has considered the question of costs, and is of opinion, that the appeals should be simply dismissed and nothing further said about costs.

Interlocutors affirmed.

Messrs. Deans and Stein, Messrs. Loch and M'Laurin. and Messrs. Maitland and Graham, Solicitors, London.—Messrs. Patrick, M'Ewen, and Carment, W.S., A. and A. Campbell, W.S., and Robert Landale, S.S.C., Agents, Edinburgh.

JULY 25, 1862.

JOHN CULLEN, W.S. *Appellant, v.* THOMAS THOMSON, W.S., and Others (Trustees of the late John Thomson), and CHARLES JAMES KERR, *Respondents.*

Company — Bank — Relevancy — Fraudulent Reports — Fraud by Manager and Secretary — *An action was raised against the manager and secretary of a bank, for damages alleged to have been occasioned to a party by his purchase of shares of the bank, through sales brought about, as averred, by false statements contained in reports of the directors, which they knew to be false.* HELD (reversing judgment), *That the allegations were relevant, for, the defenders and directors being alike servants of the Company, their conspiring to deceive the joint master was actionable, if loss and damage ensued.*

The appellant Cullen raised an action against Sir W. Johnston, a director of the Edinburgh and Glasgow bank, and Mr. Kerr and Thomson, the secretary and manager, conjunctly and severally, to recover back the price of shares which he had bought, relying on their false and fraudulent reports and representations.

The condescendence contained the following allegations:

"COND. 33. Many of the parties who had been thus permitted to overdraw their accounts were, at the date of said report, in bankrupt circumstances, and others in bad or doubtful credit, and most of whom ultimately became bankrupt. That they were in bankrupt circumstances at the time, or in bad and doubtful credit, was a fact well known to the defenders, Sir William Johnston and Mr. Kerr and the late Mr. Thomson; but notwithstanding of this knowledge upon their part, they, along with the other directors, issued a report to the shareholders in February 1850, read at a general meeting where Sir William Johnston acted as chairman, in which these facts were wilfully and fraudulently concealed from the partners of the company,—in which the real state of the affairs of the company was misrepresented, with the intention and purpose of deceiving the pursuer and others,—and by which the pursuer and others were, as the defenders fraudulently intended that they should be, induced to believe, that the affairs of the bank were in a flourishing condition, when they were the reverse.

"COND. 34. The general meeting for the year 1850, took place in the month of February. To that meeting a report required, in terms of the contract, to be submitted of the true position of the bank. The defenders, Sir William Johnston, and Mr. Kerr, and the late Mr. Thomson, knew, and had special grounds for knowing, the position of the bank at that time, in consequence of the investigations of the foresaid committee. These parties, along with the other directors then in office, did prepare and present to two general meetings in February 1850, (one held at Glasgow, and the other at Edinburgh,) a report, in which they stated, *inter alia*, two things, *first*, that during 'the year the bank has done a large and steadily increasing business, and the

[1] See previous reports 23 D. 574: 33 Sc. Jur. 162. S. C. 4 Macq. Ap. 424: 35 Sc. Jur. 728.

directors have much pleasure in declaring the annual dividend of six per cent. free of income tax.' *Second*, that 'the losses during the two years immediately preceding the last have been more than were anticipated at the time by the directors, and they have accordingly written off the sum of £11,457 6*s.* 4*d.* from the reserved surplus fund.' This report was meant by the defenders (including Thomson) to convey, and did convey, to the shareholders the idea, that the amount of bad debts incurred by the bank during the preceding two years was the precise sum of £11,457 6*s.* 4*d.* At the time when this report was made, the following facts were known to the defenders, Johnston, and Kerr, and the late Mr. Thomson :—That in the month of March preceding there had been overdrawn by customers, without security, a total sum of £737,001 7*s.* 1*d.* ; that of this sum no less than £466,465 12*s.* had been received by nine persons or firms, none of whom could meet their obligations to the bank. One of these persons, Mr. Robert Allan, owed the bank, in March 1849, £184,778 13*s.* and he was sequestrated in September 1849, four months before the meetings in February 1850. Another firm, Arbuthnot and Anderson, had overdrawn their account, to the amount of £105,321 16*s.* 6*d.* And before the meeting in 1850, they had become insolvent, and had executed a deed in favour of the bank, conveying their whole property. Before the report was made the bank had actually ranked on Allan's estate for about £150,000, after valuing all their securities. In said report it was also stated, that there was a reserve fund, after deducting bad debts, to the amount of £106,140 11*s.* 9*d.* There was no such reserve fund at all, and even according to the balance sheet prepared by Johnston, Kerr, and the late Mr. Thomson, and the other directors, the reserve fund was only £82,266 10*s.* 6*d.*, while they fraudulently stated it to be £106,140 11*s.* 9*d.*

"In said balance sheet submitted to the partners in February 1850, the 'cash accounts' stand as

A good asset, ...	£845,919	4	4
Bills discounted do.	54,067	13	2
Protested bills do.	17,888	9	0
Together, . . .	£917,875	6	6

in which 'good assets' were included £737,001 7*s.* 1*d.* already overdrawn in March preceding by parties who had only been allowed credit for £88,729, and of which 'good assets' £466,465 12*s.* had been received, up to March 1849, by nine parties, as before explained. The whole sum that was obtained from Allan's estate under the ranking was only £888, and the total loss ultimately sustained on this one account was £224,848 4*s.* 6*d.* The total loss sustained on the account of Arbuthnot and Anderson was £68,020 16*s.* 6*d.* The total loss written off eventually as incurred through said nine parties was £433,767 8*s.* 3*d.*

"COND. 36. At the balance of the company's books reported to the shareholders at said meeting in February 1850, the directors held for behoof of the company 29,927 shares of the company's stock, which they had purchased at the price of £190,929 8*s.* 2*d.*, £10,385 whereof were bought by the defender, Sir William Johnston, unknown to the shareholders, and which sum, notwithstanding the above state of affairs, the defenders, Sir William Johnston, the late Mr. Thomson, and Mr. Kerr, and other directors, included in the balance sheet then submitted as a good asset, at the price which they had cost : Further, during the currency of that year, although they knew that the bank had sustained great losses, and that the greater part of its capital had been advanced to men in bankrupt circumstances, they took these accounts as good assets, and they had, in order to create and support a fictitious value for the stock in the share market, fraudulently purchased on account of the bank 8555 additional shares, for which they paid out of the company's funds £47,079 10*s* 6*d.*, being an average price of £5 10*s.* per share."

The directors' report of October 1850, after referring to some losses, contained the following passage : "It is satisfactory to the committee to find—and Mr. Thomson, the manager at Edinburgh, and Mr. Hunter, the manager at Glasgow, fully concur with them in the opinion—that there still remain ample funds, even after deducting the ascertained bad debts, and notwithstanding the temporary inconvenience arising from the unproductive accounts just referred to, for continuing in an efficient manner the business of the bank as heretofore."

With reference to this passage, the pursuer averred in Cond. 42 (the words in italics having been introduced on adjustment)—

"When the defenders and other directors and the late Mr. Thomson reported to the shareholders as above, they were perfectly aware, that, in reality, the company at that date stood dissolved under the contract by the loss of £130,000 or thereby, beyond the amount required under the contract to effect that dissolution ; and that they had not truly deducted the ascertained bad debts. The statement in the report was false, to the knowledge of the defenders, (*including the late Mr. Thomson*,) and it was put forth by them purposely to mislead and deceive the shareholders, including the pursuer."

On revising and adjusting his condescendence, the pursuer introduced additional statements to the effect, that the fraudulent reports above referred to were prepared and concurred in by the

managers ; that, by the contract, the duty of doing so was laid upon them as well as upon the directors, and that the partners were entitled to rely upon these reports as being their statement as well as that of the directors ; that they fraudulently assisted and connived with the directors in inserting false statements into these reports, and in withholding and concealing from the shareholders the true state of the bank's affairs ; that by verbal assurances made by the late Mr. Thomson and the defender, Kerr, to the pursuer, he was induced to purchase and retain his shares ; and that Kerr had inserted one of the directors' reports in the Scotsman newspaper.

The defenders, denying that they had been guilty of any fraudulent misrepresentations or concealment, pleaded, *inter alia*, that the pursuer had set forth no relevant statements to infer liability, and, that, in the question of relevancy, he was not entitled to found upon any grounds of action introduced for the first time upon revisal or adjustment.

The Court of Session held, that the allegations were not relevant against the manager and secretary, but allowed an issue for trial as to fraudulent representations by the directors.

The *pursuer appealed*, maintaining in his case, that the judgment of the Court of Session should be reversed, for the following reasons :—1. Because Thomson and Kerr, the manager and secretary of the bank, were themselves guilty of the falsehood and fraud by which the appellant was deceived and injured. It constituted no defence against the action that they were the servants of the directors, and that the reports were presented in name of the directors. Even supposing that they were servants of the directors, their duty as such did not oblige them to commit a fraud ; and it was no justification, that their alleged masters ordered them to do so. 2. Because Thomson and Kerr not merely prepared or concurred in the preparation of the false and fraudulent reports presented to the shareholders, but personally made statements which were false and fraudulent, by which the appellant was deceived and injured. Smith's Leading Cases, vol. i. p. 142, 4 Ed. ; *Crasshay* v. *Thompson*, *per* Cresswell, J., 4 M. & Gr. 387.

Thomson's trustees, in their case, supported the judgment on the following grounds:—1. The facts as averred were irrelevant and insufficient to entitle the appellant to judgment under any of the conclusions of the summons. 2. The appellant was not entitled to found on grounds of action introduced into the record on revisal or adjustment, and not covered by the summons and original condescendence. 3. The representations on which the appellant alleged, that he acted and relied in purchasing or in retaining the shares, were not relevantly alleged to have been the representations of the late Mr. Thomson. 4. Any alleged concealment of the affairs of the bank was not in itself a relevant ground of action ; and, besides, the late Mr. Thomson was not under an obligation to make any communication to the appellant or the other shareholders in regard to these affairs. He was, by the contract of copartnery, and by the duty of his office, bound to strict secrecy. 5. The appellant had not relevantly alleged, that any damage had been sustained by him in consequence of retaining the shares.

Kerr, in his case, supported the judgment on the following grounds :—1. The appellant's action being laid on fraudulent misrepresentation and concealment, by which he alleged he was deceived, his case against the respondent was not relevant, as he had not set forth, in unambiguous averments, that the misrepresentation and concealment complained of were practised by the respondent. 2. The reports and abstracts of the affairs of the company, founded on by the appellant as the means by which the alleged fraudulent misrepresentation and concealment were practised, being, in fact, by the constitution of the company, and according to the appellant's own averments, the reports and abstracts which were presented to the shareholders by the directors alone, and the respondent not having been a director, the misrepresentations and concealment libelled were not the misrepresentation and concealment of the respondent. 3. Neither assistance in the preparation nor approval of reports and abstracts, when prepared, rendered the statements in these documents representations by other parties than the directors, who were the sole body recognized by the constitution of the company as the authors of these documents, and the only parties who were known to and trusted by the public, and particularly by the appellant as such. 4. The appellant did not allege, that the reports and abstracts were published by the respondent, or that he received any of the statements in these documents on which he founds, as representations of the respondent. 5. Misrepresentation and concealment being the sole grounds of the action, statements of alleged mismanagement of the affairs of the bank, of which in great measure his record was made up, were not relevant in the case. 6. The grounds of action not being supported by consistent and unambiguous statements, that the fraudulent misrepresentation and concealment, by which the appellant alleged he was induced to purchase and retain the shares, were fraudulent misrepresentation and concealment of the respondent, his case as laid against the respondent was irrelevant, and the respondent was rightly assoilzied. 7. The averments of the appellant in support of the grounds of action libelled, were not only inconsistent with the provisions of the contract of copartnery, which he had made a part of his case, but were inconsistent and conflicting with one another ; and he had not set forth, with reasonable precision and clearness of statement, that the alleged fraudulent misrepresentations of which he complained, were misrepresentations of the respondent, or were received and relied on by the appellant as his.

Sir F. Kelly Q.C., and *Anderson* Q.C., for appellants.—The interlocutors of the Court below were erroneous, for they proceeded on the assumption, that there could be no relevant allegation of a cause of action against a manager or secretary of a bank on the ground of deceit, for this reason, that they were servants of the directors, and did not, in fact, sign the reports presented to the shareholders, and so hold themselves out as personally responsible for the correctness of those reports.

[LORD WENSLEYDALE.—The Lord Ordinary seems to hold, that there must have been some personal warranty, on the part of Thomson and Kerr, in order to make them responsible.]

No doubt, but that is a mistake. There is no necessity whatever for the manager and secretary to sign the report, or openly avow the part they took in it; it is enough, that they supplied the material allegations, knowing that these were false and were to be used by the directors for purposes of deceit. It is no justification of a deceitful representation, that the party making it was a servant, and was acting under the instructions or orders of his master, and for the obvious reason, that the contract between master and servant does not, in any way, authorize or justify the doing of a wrong to a third party even at the command of the master. If a servant, in such circumstances, concur with his master, both are jointly liable for the wrong.

[LORD CHANCELLOR.—Assuming, that there are sufficient allegations to make the respondents liable if they were not servants, what authority is there, that they are liable *qua* servants?]

There is no very direct authority except the general principle; it rather lies on the other side to shew there is authority the other way. In the prosecution of the British Bank directors, Cameron, the manager, was included, and it was never suggested, that he was not liable because he was a manager only, and not a director. (See *R.* v. *Esdaile and Cameron*, 1 F. & F. 213.)

[LORD CHANCELLOR.—It may be said there, that it was a criminal prosecution for conspiracy, in which, of course, all who took part would be indictable, but here it is the civil liability only that is in question.]

If there is criminal responsibility, it would follow, that there would be also civil responsibility. The fact of the servant directly aiding in an act which is injurious to a third party, and knowing and intending such injury, makes him liable. It is quite immaterial that he did not sign the fraudulent report with his own name. He knew the materials were to be used for fraud; and therefore, though the report was not signed by the manager and secretary, it was in reality the report of them as well as of the directors. The mere fact of a party being a servant does not the less prevent him from being liable to a third party—Story on Agency, § 309; *Lane* v. *Cotton*, 12 Mod. 488; *Sands* v. *Child*, 3 Lev. 352; *Perkins* v. *Smith*, Say. 40; *Michael* v. *Allstree*, 2 Lev. 172; *Stephens* v. *Ellwell*, 4 M. & S. 259; *Cranch* v. *White*, 1 Bing. N.C. 414; *Powell* v. *Hoyland*, 6 Exch. 67; *Evans* v. *Edmunds*, 13 C.B. 777; *Thom* v. *Bigland*, 8 Exch. 725; *Foster* v. *Charles*, 6 Bing. 396; *Corbet* v. *Brown*, 8 Bing. 33; Stair, i. 9, 5; Ersk. iii. 1, 12; Bell's Prin. § 2031; *Linwood* v. *Hathorne*, 14th May 1817, F.C. Here all the elements of a cause of action exist. There is the fraudulent knowledge—the intention to deceive—the actual deceit—and the injury suffered. Whoever combines these elements in his conduct is liable to the party wronged.

[LORD CHANCELLOR.—It might be said the servant acted merely ministerially in doing what he did; as for example, if I order my clerk to write down a letter to my dictation which is false, and he knows it to be false, and I afterwards sign it with my own name, and put it into the post office, and a third party who receives it is deceived, is the clerk liable for any damage caused by such false letter?]

Yes; the clerk would be liable, because *ex hypothesi* he knew the falsehood, and that it was to be used to deceive a third party. It might be otherwise, if he did not know the falsehood or the use it was to be put to. Thus, for example, where Farina, the maker of Eau de Cologne, found a printer in this country had printed a number of labels bearing his name for the purpose of being put upon bottles containing some spurious imitation of his Eau de Cologne, and the printer had known these labels were printed for a person who was not the real Farina, the printer was held liable in an action for the wrong—*Farina* v. *Silverlock* at *Nisi Prius*. (See *Farina* v. *Silverlock*, 6 De G. M. & G. 214.) The averments in the condescendence in this case, though no doubt redundant, contain enough of issuable matter for a jury; and, therefore, the interlocutor ought to be reversed.

Lord Advocate (Moncreiff), *Solicitor General* (Palmer), *Rolt* Q.C., and *Neish*, for the respondents.—This record contains no proper allegations of liability. The reports were not the reports of the manager and secretary, but were openly avowed and adopted by the directors as those of the directors alone. In *Cameron's case*, the information was for conspiracy, but here it is a civil liability founded on the mere conduct of a servant in his ministerial capacity. No case ever went the length of the doctrine now contended for by the appellants. The authorities shew a contrary doctrine—Rolle's Abrid. 35; 1 Com. Dig. 354, "Action on Case for Deceit, B." The allegations in the condescendence are loose and insufficient, but even assuming they are sufficient, they only shew, that the respondents prepared parts of the reports, but not that they presented them to the world, or avowed them. Even assuming they were criminally responsible for conspiracy, it does not follow that they are civilly liable.

[LORD WENSLEYDALE.—Would it not follow, that they would be liable to an action, if there was a conspiracy proved, and a damage resulting therefrom to a third party?]

That may be so in certain circumstances, but here no case of conspiracy is set out in the record.

[LORD CHANCELLOR.—In the case of indictment for a conspiracy, no damage to third parties need be proved. In a civil action, the damage must be proved. Here the act done was the presenting of a report to the public, but it may be said the presenting of it was the act of the directors.]

[LORD WENSLEYDALE.—Still the servants knew of the fraud in the report, and concurred in it. They intended the fraud to go forth and injure the public. Why should the servants not be liable for that?]

There is no evidence, that the parties injured knew or could know of any particular knowledge or privity on the part of the servants of the directors as to these reports. All that appeared to the public was a report signed by the directors alone, and no others can be made liable for the reports.

Anderson replied.

Cur. adv. vult.

LORD CHANCELLOR WESTBURY.—My Lords, the action in which the present appeal has been presented was brought against one of the directors and two of the officers, viz. the manager and assistant manager of a joint stock banking company. It is founded on false and fraudulent representations contained in reports presented by the directors of the company to its shareholders, and which reports were afterwards published to the world.

The summons and relative condescendence have been decided to be relevant and sufficient against Sir William Johnston—that is, they have been held to contain a sufficient cause of action against the directors, but to be insufficient and irrelevant against the manager and assistant manager.

This decision appears to rest upon two grounds—one, (in which the Judges of the Court of Session generally seem to concur,) that the manager and official manager were the servants of the directors, and must be treated as having acted under their direction and control; the other, that the reports, that is, the fraudulent representations, were made by the directors alone, to whom exclusively credit must be taken to have been given by the public, who were ignorant of any acts done by the managers, and could not therefore have relied on their authority. Both these positions appear to me not to be well founded either in fact or in law. It is, as I submit to your Lordships, an error in point of fact to say, that, in this case, the directors and the managers stood in the relative position of master and servant. The directors and managers are officers, and all in a legal sense are servants of the company, that is, of the shareholders, but their respective positions and duties are clearly defined by the contract of partnership. It is true, that the business is to be carried on under the superintendence and control of the directors, but it is obvious, that in a joint stock banking company, the officers on whose judgment, skill, integrity, and exertions the success of the undertaking would mainly depend, must be the managers. The condition of the affairs of the bank must, if the conduct of it be just and honest, appear from the books kept by the managers, and the reports of the directors would, *primâ facie*, be accepted by all persons acquainted with the subject as the results of the accounts and statements of the managers.

Again, the managers of a joint stock bank are well known public officers, whose due selection is more important than that of the directors themselves, for it may be taken as a fact, of which we cannot be judicially ignorant, that the credit of a banking establishment depends, in no inconsi lerable degree, on the opinion entertained of the knowledge, ability, and character of the manager.

I cannot, therefore, agree with the conclusion either that, on this contract or deed of settlement, the managers are the mere servants of the directors, or that the reports must be taken to have been accepted by the shareholders and the public without any reference to the managers, and solely on the faith and credit given to the directors alone. On the contrary, I think it is clear, from the constitution and the prescribed mode of transacting its business, that the shareholders would have a right to regard the general reports, though in form the reports of the directors, as founded on the statements and accounts of the managers, and that the public would look on them in the same light. But let us assume, that the managers are properly to be regarded as the servants of the directors. Can it be maintained, as a proposition of law, that a servant, who knowingly joins with and assists his master in the commission of a fraud, is not civilly responsible for the consequences? All persons directly concerned in the commission of a fraud are to be treated as principals. No party can be permitted to excuse himself on the ground, that he acted as the agent or as the servant of another, and the reason is plain, for the contract of agency or of service cannot impose any obligation on the agent or servant to commit or assist in the committing of a fraud.

Assuming, therefore, that a clear case of complicity in a fraud is alleged by this pleading against the manager and assistant manager of the bank, I am of opinion, that the fact, if it be one, of their being the servants of the directors, and having been parties to the fraud under their orders would be no answer or defence to an action for damages occasioned by the fraud. Neither morally nor legally would it be a justification.

The other question of law remains, namely, whether the remedy for false and fraudulent representations made to the public is limited to the persons who have avowedly made those representations, or whether persons who have joined in preparing and manufacturing such false representations, are liable to the parties injured, although their names did not appear, and were unknown to such parties. Upon principle, I think it right, that in cases of fraud, the remedy should be co-extensive with the injury, and that a right of action should be given to the party injured by the fraud against all persons who joined in committing it, although the concurrence of some of those persons might be unknown to the party injured at the time of the injury. And such I consider, upon the decided cases, to be the actual rule of law.

It remains to inquire whether the condescendence contains issuable matter against the respondents. Upon this I think no doubt could have been entertained but for the loose, rambling, and irrelevant statements in this condescendence, by which the relevant matter is overlaid and almost hidden. I would particularly refer to the averments contained in the articles of the condescendence from 32 to 38, both inclusive. These articles contain averments which, if proved in fact, would, in my opinion, involve as a consequence the legal liability of Messrs. Kerr and Thomson. Having regard to the future proceedings in the cause, I abstain from dwelling more in detail upon the particular issuable matter contained in the allegations. Upon the whole, I must advise your Lordships to reverse the interlocutor complained of, and to declare, that there is issuable matter in the record, as against the present respondents, and with that declaration, to remit the case to the Court of Session.

LORD WENSLEYDALE.—My Lords, this case is of very considerable importance, as it relates to the liability of a class of persons connected with joint stock companies, who have hitherto not been made responsible for false statements made by the directors of such companies. The question is, whether there is set forth, with sufficient fulness and precision, a cause of action on the part of the appellant against the defenders, Thomson and Kerr, officers of a joint stock company, both or either, which may be put into course of trial. After much consideration, I must advise your Lordships that there is.

I may make the preliminary remark, that it is in my opinion unnecessary to consider a point which was made the subject of some discussion in the Court below, namely, whether, in revising the condescendence, some new matter alleged to amount to a new cause of action was lawfully introduced. Supposing it had been introduced, which, however, I do not think is the case, in any of the parts of the condescendence which contain the allegations which appear to me to be material, I apprehend the proper remedy for that irregularity would have been to apply to the Lord Ordinary to strike it out. The question, I conceive, is, whether, as the record stands, there is stated, with reasonable particularity for the information of the defenders, a sufficient cause of action against the above named defenders, or either of them. The charge meant to be insisted upon is, that they, knowingly and fraudulently, made false representations of the state of the joint partnership, with the real intent to cause the pursuer to act on that representation, or under such circumstances as the defenders must have supposed would probably induce a person in the situation of the pursuer to act upon it, and to buy shares in the partnership concern; and that the pursuer in consequence did purchase, and sustained loss thereby. There being fraud, and consequential loss arising from that fraud, there is a complete cause of action against the party guilty of that fraud. The action does not appear to be confined to a breach of their duty as officers of the joint stock company, but to be founded on positive fraud. And though there may be a doubt whether there is a sufficient allegation of the duty of the defenders, or either of them, as officers, to make them responsible for the breach of it in not properly preparing the reports, it seems to me, that there is a sufficient allegation of positive fraud by both of them—a fraud which, if not actually intended by them to cause the members of the joint stock company to increase the number of their shares, yet they must, as reasonable men, have thought very likely to produce that result which it is averred with sufficient particularity to have done. If the fraud is proved, we need not inquire into the motive, though a motive may be suggested, namely, the continuance of the lucrative employment which would be lost if the company became bankrupt. The defenders were not, I think, properly the servants of the directors, though appointed by them, and acting under their orders. Both they and the directors themselves were rather the servants of the corporation—the joint stock company. Both owed a duty to that corporation, and both, if the allegation of fraud is proved, violated that duty. The case is not precisely that to which it was assimilated in the course of the argument at the bar, and in the opinions of some of the Judges, of a servant obeying his master's orders, and, by virtue of those orders, committing a fraud on a third person. It is more like the case of two servants conspiring with each other to deceive their joint master, and effecting that object, so as to produce damage to him. The case suggested is

that of an active fraud, telling a positive untruth, and the concealment of material circumstances which in many cases it would be a duty incumbent on a person to disclose, but which in this case the defenders, from the nature of their employment, were bound to keep secret. If one servant combines with another to tell knowingly a positive untruth to the prejudice of his master, and it result in that prejudice, I think an action will lie; and if he combines with his master to do the same thing to the prejudice of a third person, and such consequence follows, I must say, that I cannot see how the servant can be by law exempt. In some cases a man may innocently assist in a transaction which is a fraud on some one. Of course, such a person cannot be responsible criminally or civilly. Or he may be a partaker in the fraud to a limited extent, as, for instance, in the supposed case, adverted to in the course of the argument, of the printer of the alleged false statement, who may have known it to be false, and yet may not have intended or known sufficiently the fraudulent purpose to which it was meant to be applied, to make him responsible for the injurious consequences of it. I will now advert to those parts of the condescendence which contain, as I think, sufficient allegations of positive fraud to enable the Court to frame the issue to be tried, and they have to be selected from a mass of matter loosely and insufficiently alleged as against the defenders, Thomson's Trustees and Mr. Kerr. In a part of the 30th article of the condescendence it is alleged that Thomson and Kerr were cognizant of and active participants in the framing of the false and fraudulent reports after mentioned, which were presented to the shareholders at their annual meetings, and by means of which the pursuer was deceived and defrauded. When it is said that they were cognizant, it must be intended that they knew of that falsehood. In the 33d article is a charge of wilful and fraudulent concealment, as to which I say nothing as respects Thomson and Kerr, as they ought not generally to disclose anything; and it is unnecessary to consider whether, in some cases, a concealment of some circumstances may not have the effect of a positive misrepresentation, for there is also a charge against them of knowingly misrepresenting the affairs of the company, with the intention and purpose of deceiving the pursuer and others, and by which the pursuer was deceived, as the defenders fraudulently intended, that he should be induced to believe, that the affairs of the bank were in a flourishing condition, when they were the reverse. The 34th article contains a special allegation of fraud in preparing and presenting a report in February 1850, representing the losses by bad debts in such a way as to induce a belief that they were only £11,457, when the defenders knew in effect that they greatly exceeded that sum. In order to support this charge, it will not be enough to prove mere connivance. It must be proved, that both of them took such an active part as to make the report their own act. It is alleged that they represented certain things; and that allegation must be proved, and the use of the term *connived* in a subsequent article cannot qualify or alter that statement. The 39th article charges the defenders with wilfully and fraudulently misrepresenting the state of the company's affairs, in fraudulently over-estimating the securities beyond their real value as known to themselves. Again, the 42d article contains issuable matter with a view to shew Thomson to have concurred in making a wilfully false statement of the sufficiency of the funds of the company. Article 84 sets forth a verbal statement of the defender, Kerr, falsely and fraudulently made, which induced the pursuer to buy more shares, and also to keep what he had got. But the latter cause of action is, I understand, and I think properly, abandoned.

On the whole, I think there is issuable matter sufficiently stated to support some of the charges; those, for instance, before mentioned, which must form the subject of proper issues to be settled by the Court. I will add, that, concurring as I do entirely with the Lord Ordinary, Lord Kinloch, in most of the able and satisfactory observations which he makes in his interlocutor in this case, I do not feel the difficulty which he suggests, that it is not sufficiently alleged, that the pursuer was induced to make his purchases, relying on the personal representations of Messrs. Thomson and Kerr; that the case ought to be the same as if the representations had been made by them in direct personal communications; that there must be a special and direct allegation, that the pursuer proceeded on the personal warranty of Messrs. Thomson and Kerr. If they have been guilty parties to a fraud which was intended, as I have explained before, to cause loss to the pursuer, and the loss has resulted, they are responsible, though their names were unknown to the pursuer prior to the loss. It is, I conceive, enough to trace the loss to the fraud committed by the defenders, though the names of the parties to that fraud were not known at the time of the loss. Though the pursuer may not have known the name of the author of the false representation, if he can prove his damage to have been the result of it, he is entitled to recover. I concur, therefore, with my noble and learned friend, that the cause ought to be remitted to the Court below with the declaration which he has suggested.

LORD CHANCELLOR.—My Lords, I am desired by my noble and learned friend, LORD CRANWORTH, who heard the whole of the argument, to say, that he entirely concurs in the conclusion at which your Lordships have arrived.

Mr. Anderson.—Will your Lordships allow me to mention the matter of costs in the Court of Session? We paid the other party, under their diligence, the costs which the Court ordered us to pay. We shall get them back by your Lordships' judgment. And I submit, that we ought

also to have the expense of the discussion of the question of relevancy ; that would be the expense incurred subsequently to the closing of the record, because, if they had not driven us to a discussion upon that question, we should have tried the issue at once. And, therefore, that expense has been entirely thrown away.

LORD CHANCELLOR.—The expenses which the appellant has been ordered to pay will, undoubtedly, be returned to him under the authority of the Court of Session. I observe, that, by the interlocutor of that Court, expenses were given to the respondents ; but that was in consequence of the respondents being, by that interlocutor, assoilzied altogether from the action. I do not think, my Lords, that it will be necessary, upon this question of relevancy, to give any direction as to the expenses of the discussion of that question. I apprehend that they will form part of the expenses of the action, and I think they ought to be reserved.

Interlocutor reversed, and cause remitted with a declaration.

Agent for Appellant, J. F. Elmslie, Solicitor, London.—*Agents for Respondents, Thomson's Trustees*, Loch and Maclaurin, Solicitors, Westminster.—*Agents for Charles James Kerr*, Dodds and Greig, Solicitors, Westminster.

FEBRUARY 23, 1863.

ANDREW GEMMILL, *Appellant*, *v.* JAMES M'ALISTER, *Respondent.*

Bill of Exchange—Summary Diligence—Evidence—Agent and Client—Writ or Oath—Parole—Conjunction—Process.

HELD (affirming judgment), *In a suspension of a charge given for payment of a bill of exchange* —(1) *That the usual rule, limiting the proof of the suspender's plea of non-liability in payment to the writ or oath of the charger, was not applicable, and that he was entitled to an issue on the facts, as the debtor was a client of the charger, and the liability depended on complicated transactions between them ; and* (2) *That parole proof was admissible to explain the circumstances under which an agreement reduced to writing had been entered into, as the relation of agent and client existed, and the charger had agreed to secure his client the suspender against liability under that agreement.*

Appeal—Competency—Interlocutor of Lord Ordinary.—*If an interlocutor of the Lord Ordinary has not been reclaimed against to the Inner House, the House of Lords will not reverse it, unless the reversal of some subsequent interlocutor make it necessary to do so.*[1]

In February 1859 James M'Alister, glass merchant, Glasgow, presented a note of suspension against Andrew Gemmill, writer there, setting forth—"That the complainer has been charged at the instance of the said Andrew Gemmill to make payment of the sum of £272 sterling, and the legal interest thereof since due and till paid, contained in and due by a bill, dated the 8th day of May last, drawn by the complainer upon and accepted by Messrs. John Dickie and Company, mill sawyers, Rock Villa, Craighall Road, Glasgow, and payable four months after date ; which bill was indorsed thus—'Jas. M'Alister ;' and which bill was duly protested for non-payment of the contents, etc., and that to the said Andrew Gemmill within six days next after the date of the charge, under the pain of poinding and imprisonment, most wrongously and unjustly, as will appear," etc.

The Lord Ordinary (Kinloch) having heard parties, passed the note on 23d February on consignation by the suspender of the sum of £100, which was the amount of liability acknowledged by him in his statement of facts. The record in the process was not made up till 21st January 1860. On 14th November 1860, the suspender brought an ordinary action against the respondent Gemmill for payment of £128, being the amount of a bill, dated 22d April 1858, drawn by the pursuer on Messrs. John Dickie and Company, dishonoured by them, and ultimately taken up and retired by the pursuer, with interest from 27th August 1858, the date of payment. A record in this action was also made up, and, on 29th May 1861, the Lord Ordinary pronounced an interlocutor conjoining the two processes and appointing the suspender (the pursuer) to lodge issues, in which interlocutor he gave the following account of the origin of the cause :

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[1] See previous reports, 24 D. 956: 34 Sc. Jur. 475. S. C. 4 Macq. Ap. 449; 1 Macph. H. L. 1. ; 35 Sc. Jur. 263.