

JOHN CULLEN, . . . . . APPELLANT.  
 THOMSON'S TRUSTEES AND } RESPONDENTS (a).  
 CHARLES JAMES KERR, . . }

1862.  
 July 14th, 15th,  
 17th, 19th, & 29th.

*Managers of Joint Stock Companies—How deemed Servants—Their Responsibilities in cases of Fraud.*—Per the Lord Chancellor (b): The managers of a joint stock company are public officers, and not mere servants of the directors. They are servants of the company at large, *i.e.*, of the shareholders ; p. 431.

Per the Lord Chancellor : But even if the managers were to be regarded as servants of the directors, they ought not to join their masters in the commission of a fraud ; p. 432.

Per the Lord Chancellor : All persons directly concerned in the commission of a fraud are to be treated as principals, and must not be permitted to excuse themselves on the ground that they acted as the agents or servants of others ; 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 fraud ; p. 432.

Per Lord Wensleydale : If a servant combines with his master to tell knowingly a positive untruth to the prejudice of a third person, and such prejudice follows, I cannot see how the servant can by law be exempt ; p. 441.

Per Lord Wensleydale : This case relates to the liability of the managers of a joint stock company, a class of persons who have hitherto not been made responsible for false statements by the directors of such companies ; p. 438.

Per Lord Wensleydale : The managers are not, I think, properly the servants of the directors, but rather the servants of the corporation, the joint stock company ; both

(a) See a full report of this case as decided below, Second Series, vol. 23, p. 574.

(b) Lord Westbury.

owe a duty to that corporation, and both, if the allegation of fraud is proved, violated that duty ; p. 440.

*Issuable Matter.*—Issuable matter for trial may be extracted by judicial diligence from a condescence in which the relevant matter is overlaid and almost hidden by loose, rambling, and irrelevant statements.

THE action was instituted on the 4th October 1859, by Mr. John Cullen, a writer to the signet in Edinburgh, against Sir William Johnston of Kirkhill, Chairman of the directors of the Edinburgh and Glasgow Joint Stock Bank,—against the trustees and executors of John Thomson, deceased, who had been Manager of the Bank,—and against Charles James Kerr, originally Secretary, and afterwards joint Manager thereof.

The summons and condescence averred that the Appellant had been induced to purchase and retain shares in the Edinburgh and Glasgow Bank in consequence of representations made by Sir William Johnston, John Thomson, and Charles James Kerr, in reports published by them and in private communications, describing the said Bank as solvent, prosperous, and flourishing, when it was in point of fact, as they well knew at the time, in a state of insolvency, verging upon ruin. The object of the action was to recover damages for the loss which Mr. Cullen had thus sustained.

Sir William Johnston defended himself upon the ground that he was not responsible for the acts of his co-directors, that he acted in *bonâ fide*, and that the Pursuer's allegations were vague and insufficient to fix him with liability.

The trustees of John Thomson and Charles James Kerr, Respondents to the present Appeal, insisted that Mr. Cullen's averments were irrelevant and wholly

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insufficient to establish the case of fraud upon which he relied (a).

On the 7th July 1860 the *Lord Ordinary* (b) reported the cause to the First Division of the Court of Session, and their Lordships of that division, on the 22nd January 1861, found that the action was relevant as against Sir William Johnston, the chairman of the Bank. The case as against him therefore was sent to trial by jury. But the Court determined that, as regarded the above Respondents, namely, the trustees and executors of John Thomson, the manager of the Bank, and as against Charles James Kerr, originally the secretary and afterwards the joint manager thereof, the action was irrelevant and unsustainable, the Court holding that these functionaries were in the position of servants, though of a high class, who were subject to the orders and control of the directors, and consequently free from liability either as to the preparation of the reports, or as to private communications, which might have been made by them officially with reference to the Bank. The Appeal to the House, therefore, was against the decision so releasing from the action those two servants of the Company, who were both assoilzied by the decree appealed from, with expenses.

Sir *Fitzroy Kelly* and Mr. *Anderson* for the Appellant. This case resembles that of the Royal British Bank, which was tried before Lord Chief Justice *Campbell* and a jury on the 13th February

(a) One of the pleas in law of the trustees was that the liability sought to be established was alleged to arise *ex delicto*, and that it was a liability which did not transmit against the representatives of the alleged delinquent. See on this point *Davidson v. Tulloch*, *suprà*, vol. 3, p. 783.

(b) Lord Kinloch.

1858 (a). There his Lordship told the jury that 'there was evidence of purchasing the Bank shares with the Bank's money, which would not be justifiable under any circumstances merely to keep up the price when there was no real purchase.' The delinquencies charged against the Respondents were of the same character as those charged against Cameron, the manager of the Royal British Bank. It is not necessary that the manager and secretary should have signed the reports. Cameron did not do so. He was merely a servant; but from his misrepresentations third parties suffered. His name did not appear in the reports; but at the trial it was proved that the statements contained in these reports were false, and that he who had prepared them knew them to be false. Lord *Campbell* charged the jury that, although Cameron was not a director, and although he had no vote at the board, he was answerable for the mode in which the reports had been made up. Now, unless it can be maintained that a man may be subject to criminal punishment, and yet resist civil liability, it is difficult to understand how there can be any question as to the application and cogency of Cameron's case here. But there is enough in *Pasley v. Freeman* (b), and the authorities collected by Mr. Smith in dealing with that leading case, to support the present action. Then, what says the condescence, article 33? It says, that "a report was read in February 1850 in which the real state of the Company was misrepresented with the intention and purpose of deceiving the Pursuer and others, and by which they were induced to believe

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(a) See Annual Register of 1858, p. 330. See also a book recently published, called "Facts, Failures, and Frauds."

(b) 3 Term Rep. 51; 2 Smith's Leading Cases.

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that the affairs of the Bank were flourishing when they were the reverse."

The LORD CHANCELLOR: Can you point at any *specific* misrepresentation?

We would direct attention to the 37th article of our condescendence, where it is asserted that, "relying on the statements that the shares were a safe investment, the Pursuer was induced not only to retain five shares which he then held, but to buy, and he did buy, stock or shares to the extent of 2,408*l.* 16*s.* 6*d.*" as specifically averred in the pleading.

The LORD CHANCELLOR: Does he retain those shares now?

He does. We aver (a) "that the late Mr. Thomson and Mr. Kerr were partakers in all the fraudulent concealment and misrepresentation of the directors, and were equally aware with them of the falsity of the reports. They were cognizant of the private ledgers and documents which were kept for the purpose of concealing the true position of the Bank from the subordinate officials and from the shareholders; and the defenders from their position were constantly in communication with the Pursuer, and it was by their representations and the reports read to the annual meetings, and otherwise shown to the shareholders, that the Pursuer was induced from year to year not only to retain his shares, but to increase their number." With respect to Kerr, the 84th article of the condescendence is peculiarly specific; for it states that the Pursuer in 1858, having become apprehensive as to the position of the Bank, had several interviews with Kerr, then acting as the joint manager; when he falsely and fraudulently represented it to be in a

(a) Condescendence, art. 83.

flourishing condition, well knowing it to be otherwise. On one of these occasions when the stock was rapidly falling in the market, Kerr read to him a letter which he had then written and was about to despatch, which contained this statement with reference to the Bank. "I can only account for the sudden fall in the price of our stock by the knowledge that the 'Western Bank' (a) is about to wind up and make a call; and from the number of ladies holding its stock, they have frightened their neighbours who are selling; but I doubt not the panic will soon pass away. If the present crisis were past, there would be a fine field before us for an improved business," &c.

The LORD CHANCELLOR: Have you anything *specific* as to Thomson?

Not indeed oral statements by Thomson; but the circular set out in the pleadings was his work as well as Kerr's. That circular, dated 6th May 1858, was addressed to "Ladies and gentlemen, partners of the Edinburgh and Glasgow Bank," and it proceeded thus, "The directors beg to assure you that there is no ground for alarm. The Bank is in a sound condition, the business is going on satisfactorily, and it only requires the cordial support and countenance of the partners themselves to ensure its continued prosperity." This circular was false, as the Defenders well knew; for at that very time the business of the Bank had almost wholly ceased. The capital was lost, and its customers were anxiously and eagerly withdrawing their deposits.

The *Lord Advocate* (b) and the *Solicitor-General* (c), for Thomson's trustees (Respondents), contended that

(a) The "Western Bank," soon after the period referred to in the pleadings, stopped payment, and many of its shareholders were ruined.

(b) Mr. Moncreiff.

(c) Sir Roundell Palmer.

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the drawing up a report for the directors could not well be described as a fraud on the shareholders. The proposition of the other side that civil reparation necessarily follows criminal liability is not self-evident. No authority has been cited to establish it. There may well be criminal punishment, and yet no civil liability. But here the delinquency consisted in the publication of the report; and that was the act of the directors, in other words, the act of the masters, not of the servants. If this be so, the short view taken of this case in the Court below is satisfactory, and the judgment complained of must be affirmed.

Mr. *Rolt*, with Mr. *Neish*, for the Respondent Kerr. It is the shareholders themselves who have created the office of manager and the office of secretary. Both the functionaries who held these offices were bound to secrecy. Even if they knew that the statements published were false, they had no power, and it was no duty of theirs to correct them. In short, this is a case not of misfeasance or delinquency, but of obedience. Third parties ought not to rely on the statements of servants, because they merely tell what they are desired to tell. But here the shareholder has abjured all claim against the servant whom he has himself placed under the exclusive management and control of the directors. Where is this sort of liability to stop? The boy who carries a parcel may be turned into an auxiliary in a fraud if the reasoning on which this claim rests is sustained.

On the motion for judgment, the following opinions were delivered by the Law Peers:—

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The LORD CHANCELLOR (*a*):

My Lords, the action in which the present Appeal has been presented was brought against one of the

(*a*) Lord Westbury.

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.

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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 exer-



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tions 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 inconsiderable 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 of the directors 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 fraud.

Assuming, therefore, that a clear case of complicity in a fraud is alleged by this condescendence 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 enter-

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tained, 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 (a). These articles contain averments which, if proved in fact, would in my opinion involve as a consequence the legal liability of the Messrs. Kerr and Thomson.

(a) Cond. XXXII. In June 1849, a special committee of directors appointed for the purpose made a report on the Bank's affairs, which is engrossed in a private minute book. This report was laid before the directors, and showed, *inter alia*, that on 31st March 1849 there was overdrawn by sundry parties "on cash accounts" opened with the Bank - - £737,001 7 1  
And that there was overdrawn at same date by  
sundry parties who had opened "deposit  
accounts" with the Bank - - - 27,164 8 11  

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Together - - - £764,165 16 0  

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The sum thus overdrawn being nearly four-fifths of the whole paid-up capital of the Bank. Further, said report showed that the credit actually allowed under the board's minutes, to the parties who had obtained the above 737,001*l.* 7*s.* 1*d.*, amounted only to 88,729*l.*; in other words, that these parties had been allowed by the directors, manager, and secretary, to draw 648,000*l.* more than the contract or the board's minutes authorized them to draw.

Cond. XXXIII. 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 mis-

Having regard to the future proceedings in the cause, I abstain from dwelling more in detail upon

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represented 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. XXXIV. 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 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*l.* 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*l.* 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*l.* 7*s.* 1*d.*; that of this sum no less than 466,465*l.* 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*l.* 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*l.* 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*l.* after valuing all their securities. In said report it was also stated that there was a reserve fund after

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the particular issuable matter contained in the allegations. Upon the whole, I must advise your Lordships

deducting bad debts, to the amount of 106,140*l.* 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*l.* 10*s.* 6*d.*, while they fraudulently stated it to be 106,140*l.* 11*s.* 9*d.*

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

	£	s.	d.
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*l.* 7*s.* 1*d.* already overdrawn in March preceding by parties who had only been allowed credit for 88,729*l.*, and of which "good assets" 466,465*l.* 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*l.* and the total loss ultimately sustained on this one account was 224,848*l.* 4*s.* 6*d.* The total loss sustained on the account of Arbuthnot and Anderson was 68,020*l.* 16*s.* 6*d.* The total loss written off eventually as incurred through said nine parties was 433,767*l.* 8*s.* 3*d.*

Cond. XXXV. The report above referred to submitted to the meeting of February 1850, also makes the following communication:—"The partners are aware that Mr. Bonar recently resigned his situation as manager of the Bank in Edinburgh, and that the directors have appointed to the vacancy Mr. Thomson, a gentleman of high standing and of great experience—an appointment which the directors are glad to find has met with general approval. In conclusion, the directors would congratulate the proprietors on the present position and future prospects of the commercial and manufacturing interests of the country, and which must tend more and more to promote the prosperity of all banking establishments." The Pursuer has reason to believe, and avers, that Mr. Bonar's retirement was caused by the dissatisfaction of the Defender, Sir William Johnston, and the other directors for the time, with the state of the Bank while under his management, with which in said report,—connived in by the late Mr. Thomson and Mr. Kerr—they, notwithstanding, falsely represented themselves as fully satisfied.

Cond. XXXVI. At the balance of the Company's books re-

to reverse the Interlocutor complained of, and to declare that there is issuable matter in the record as

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ported 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*l.* 8*s.* 2*d.*, 10,385*l.* 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, 8,555 additional shares, for which they paid out of the Company's funds 47,079*l.* 10*s.* 6*d.*, being an average price of 5*l.* 10*s.* per share.

Cond. XXXVII. Acting and relying upon the statements contained in the report above referred to, and believing that the Company was in a sound financial condition, and that the shares thereof were a safe investment for money, the Pursuer was induced not only to retain five shares of 5*l.* each of the aforesaid capital stock, which he then held, but to buy, and did buy stock or shares to the extent following:—

(1.) On or about the 25th day of February 1850,	£	s.	d.
he bought 170 shares of 5 <i>l.</i> each of the foresaid capital stock, at the price of	-	1,031	10 0
(2.) On or about the 17th day of July 1850, he bought 150 shares of 5 <i>l.</i> each of the fore- said capital stock, at the price of	-	791	14 0
(3.) On or about the 27th day of the said month of July, he bought 50 shares of 5 <i>l.</i> each of the foresaid capital stock, at the price of		252	10 0
(4.) On or about the 23rd day of August 1850, he bought 65 shares of 5 <i>l.</i> each of the foresaid capital stock, at the price of	-	333	2 6
		<hr/>	
	£	2,408	16 6
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Cond. XXXVIII. On 26th June 1850, the late John Thomson, having the affairs and condition of the Bank before him, addressed the following letter to the Defender, Sir William Johnston:—  
“My dear Lord Provost,—There are several things in this establish-  
ment that I confess occasion me great anxiety, and, to which I

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against the present Respondents ; and with that declaration to remit the cause 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 in the summons and revised condescendence, with sufficient fulness and precision a cause of action on the part of the Appellant against the Defenders Thomson and Kerr, officers

feel it my duty to call your early and serious attention ; 1st, there is the number and amount of bad and doubtful debts standing in the Company's books unprovided for ; 2nd, the investments in bank and railway stocks ; 3rd, the large advances to shareholders or credits secured by our own stock ; and lastly, there is the total ignorance of the directors and office-bearers of the actual state of matters in the Glasgow office. Will you excuse for asking you to get a committee to examine into and report on the matter. And believe me, my dear Lord Provost, your much obliged and faithful servant, (signed) JOHN THOMSON." The Defender, Sir William Johnston, received the said letter, and on 12th July 1850, he answered in the following terms :—" John Thomson, Esq., My dear sir,—I have your letter calling my attention to certain matters of great importance connected with the Bank, and I very much regret that it is not in my power to be at the board to-day, as I intended to have asked for a small committee to join me in considering the contents of that letter. Perhaps the directors may be good enough to name Messrs. Hunter, Phillip, and Grainger for the purpose, with powers only to report to the board.—My dear sir, very truly yours, (signed) W. JOHNSTON." Accordingly, on 12th July 1850, a committee was appointed by the board of ordinary directors to investigate the affairs of the Bank, at the head office and at the branches. Of that committee the Defender, Sir William Johnston, was a member and chairman, and he, as well as the late Mr. Thomson, and the Defender, Mr. Kerr, drew up and concurred in a report which was made by that committee, and laid before the ordinary directors, adopted by them, and submitted to a special general meeting of the partners of the Company held on 31st October 1850, at which meeting Sir William Johnston presided as chairman.

of a joint stock company, both or either, which may be put into a 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 condescence 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 condescence 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 a 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

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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 their 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; not 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.

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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, the printer of the alleged false statement, who may know 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. They have to be selected from a mass of matter loosely and insufficiently alleged as against the Defendants, Messrs. Thomson's trustees and Mr. Kerr.

In a part of the 30th article of the condescendence (*a*)

(*a*) Cond. XXX. In the discharge of the duties which devolved upon the Defender, Sir William Johnston, and the other directors of the company, and which are set forth in the preceding articles, the late Mr. Thomson and the Defender, Mr. Kerr, were associated in virtue of their respective offices, and they were bound in the performance of those duties to act in terms of the provisions of the contract, and for the protection of the interests of the part-

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it is alleged that Thomson and Kerr were cognizant of, and active and 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 of the false reports, it must be reasonably contended that they knew of that falsehood.

ners of the company. In particular, they were bound to keep the books required by the contract, and to manage the business of the bank, under the superintendence of the directors, faithfully and honestly. They were bound to furnish correct information to the directors as to the position and state of the business done by them. They were bound to see that the reports and abstracts of the affairs of the bank, read to the shareholders annually, were true, and gave a correct statement of the financial position of the bank. None of these duties did they faithfully discharge. They were cognizant of and active and participant in the framing of the false and fraudulent reports and abstracts herein-after mentioned, which were presented to the shareholders at the annual meetings, and through and by means of which the Pursuer was deceived and defrauded. Farther, the late Mr. Thomson, during the time that he acted as manager, in conjunction with the Defender, Mr. Kerr, while he continued secretary, and both these persons, when they were joint managers, in violation of the duties intrusted to them, gave credit and made advances to persons utterly insolvent, known by them to be insolvent, or whom they might, upon making any reasonable inquiry, have ascertained to be in insolvent circumstances. These advances were made by them, in some cases with authority, but in many cases without any previous authority from the board of directors. In these last-mentioned cases, Mr. Thomson and Mr. Kerr gave credits and made advances of the bank's money at their will and pleasure, and without control, and these facts were fraudulently misrepresented in the annual reports to the shareholders, and in so far as they were not so misrepresented, they were fraudulently concealed. The directors, and particularly the said Sir William Johnston, acted falsely and fraudulently towards the shareholders, in recognizing and sanctioning the improper proceedings of the manager and secretary, and they, as well as Mr. Kerr and the late Mr. Thomson, acted fraudulently in concealing the same from the shareholders. They continued this improper and fraudulent system from 1849 down to the close of the bank.

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In the 33rd article (a) 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, and induced to believe that the affairs of the bank were in a flourishing condition, when they were the reverse.

The 34th article (a) 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*l.* 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 *stated* 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 (b) charges the Defenders with wil-

(a) *Suprà*, p. 435.

(b) Cond. XXXIX. The Defenders, Sir William Johnston and Mr. Kerr and the late Mr. Thomson, and the directors, at the time when this report was laid before the company, knew the true state of the company's affairs, and they professed in that report to give the partners full and true information of the bank's condition, as regarded the state of the accounts, the state of the securities, and the amount of the losses; but while professing to do so, they wilfully and fraudulently misrepresented the state of the com-

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fully 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 42nd article (a) contains issuable matter, with a view to show Thomson to have concurred in making a wilfully false statement of the sufficiency of the funds of the Company. Article 84 (b) 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.

pany's affairs—concealed to a large extent the amount of the losses which had been sustained, which were known to them, and while they falsely pretended to be revealing to the company in full—misrepresented the state of their debtors as to solvency—and fraudulently over-estimated securities beyond their real value as known to themselves.

(a) Cond. XLII. Notwithstanding that the Defender, Sir William Johnston, and other directors, and the manager, Mr. Thomson, and the secretary, Mr. Kerr, were fully aware of the above facts, they, in the said report to the shareholders (in the preparation of which they were all participant), *inter alia*, made the following statement:—"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." 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*l.*, 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.

(b) See *suprà*, p. 427.

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.

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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 (*b*), 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.

The LORD CHANCELLOR: My Lords, I am desired by my noble and learned friend, Lord *Cranworth*, who

(a) See 23 Sec. Ser. 574.

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heard the whole of the argument, to say that he entirely concurs in the conclusion at which your Lordships have arrived.

JUDGMENT.

*Ordered and Adjudged*, That the said Interlocutors complained of in the said Appeal be, and the same are hereby reversed: And it is *Declared*, That there is issuable matter in the record as against the present Respondents: And it is further *Ordered*, That the cause be, and is hereby remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this judgment and declaration.

J. F. ELMSLIE—LOCH & MACLAURIN—DODDS  
& GREIG.'