JAMES KER and HENRY JOHNSTON (for the Leith Bank), Appellant.—*Lord Advocate (Jeffrey)—John Miller—Anderson.* No. 52.

JOHN BELL, &c., Respondents.—*Dr. Lushington—Sandford.*

Cautioner—Circumstances in which held, (affirming the judgment of the Court of Session,) that the cautioners of a bank agent were released from their obligation by the conduct of the bank, in permitting him to carry on an illegal trade, to violate his instructions, to incur unusual hazard and loss, to become deeply involved, and to commit important irregularities, without the cautioners being apprized.

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1ST DIVISION.
Ld. Corehouse.

THE Leith Banking Company, in Spring 1822, appointed Scot to be their agent at Langholm in Dumfries-shire, on which occasion he granted a bond of caution to the bank, in which George Scott Elliot, William Curll, John Bell, and the late Walter Jardine bound themselves, along with him, for 5,000*l.*, for his faithful management of the agency. At the same time, the bank directors framed a paper of instructions for Scot's guidance, containing, among others, the following clauses:—(1.) That Scot should commence in a moderate way, and in bills for small sums, not having more than three months to run;—there should always be two undoubted separate securities on each bill. (2.) That such cash accounts as it might be thought proper for the bank to grant, as well as any deposit current accounts which might be opened, should be kept in their books at Leith; and that these accounts should be regularly entered in Scot's books, and the drafts checked before being paid. (3.) The transactions for the week to be stated in a clear and distinct manner, and a state thereof to be regularly sent to the bank once a week; the balance to be detailed at length, specifying the amount of notes, bills current and past due, each bill stated at length; and if past due, the reason why it is not paid; and the latter, should there be any, to be regularly sued for payment, but not in the bank's name: and (4.) As the business proceeds, several other things may occur from time to time, as to render it necessary for the bank to alter the aforesaid instructions, in whole or in part, as they may see proper; and the bank therefore reserve to themselves the power of doing so, should they deem such alterations upon, or additions to the instructions requisite; and should they

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find that their instructions are departed from, the agency will undoubtedly be withdrawn altogether. This paper of instructions was subscribed by the bank managers and by the cautioners.

In April 1824, James Bryden, Curll, Jardine, and Bell, granted a supplementary bond of caution for 5,000*l.* in nearly the same terms as the former, and signed the instructions. At this time the balance against Scot was above 5,000*l.* according to the allegation of the cautioners, and above 4,600*l.* as admitted by the bank, but the latter alleged that the whole of this arrear was afterwards recovered, except about 400*l.*

In the course of the same month, as the bank were desirous to establish an agency under Scot at Carlisle, and were afraid that, as they consisted of more than six partners, their doing so for the purpose of circulating their notes payable on demand would be an infringement of the statutory privileges of the Bank of England, they took the opinions of English counsel (Sir N. C. Tindal and Mr. Abercromby) on the subject. Both counsel concurred in opinion that such an establishment would be illegal. After some pause on the part of the bank, they resolved to run the risk of attempting such an agency; and accordingly, in the end of 1824, or the earlier part of 1825, an office was opened by Scot at Carlisle, where he subsequently issued the company's notes, and transacted their business to a much larger extent than at Langholm. In the mean time, with their sanction, he took out a license as a private banker there, and eventually incurred the chief part of his ultimate arrears. He was afterwards allowed a salary of 1,250*l.* by the bank; and his former commission was withdrawn, to deprive him, as they alleged, of all temptation to incur unnecessary risks. They did not intimate to the cautioners the opening of the branch at Carlisle, nor the change in the mode of paying Scot.

At the time when there was no agency office except at Langholm, Scot had been in the practice of attending English fairs, where, with the knowledge of the bank, he pushed business to a considerable extent. After the opening of the Carlisle office, this traffic was much increased; and it was admitted by the bank that at one fair (Broughill, in Oct. 1825,) an extra remittance had been made to him of 40,625*l.*, and that his transactions and issues of notes at some of these fairs were from 30,000*l.* to 40,000*l.* In carrying on his extensive business through the

Carlisle office, and also, though to a subordinate extent, through the Langholm office, Scot persevered, as before, in renewing bills, without attending to the rule required by the instructions, and in allowing past due bills to lie over unprosecuted. Most, if not all, of these irregularities were sometimes combined in his mode of dealing with single firms or individuals. He also allowed large over-drafts of accounts, and transacted much business with individuals, (said to be cattle-dealers, and others of no visible property,) whose first connexion with him arose by an order or note for money, while they had no cash or deposit account in the bank. In all this he persisted until the termination of his agency, notwithstanding the frequently repeated censures and prohibitions of the bank, and he did so by means of the large amount of notes with which they continued to furnish him. Oct. 1, 1831.

In the month of June 1825, Bell, Jardine, Bryden, and Curll granted a new bond of caution for 10,000*l.*, which proceeded on the narrative of the bond for 5,000*l.* having been granted in 1822 for the agency business at Langholm; and that, "in consequence of the extension of the agency business," a new bond for 5,000*l.* was granted in 1824; that Mr. Scott Elliot wished to withdraw his name from the first bond, (the only one signed by him,) and the Leith Bank had agreed to cancel the two former bonds; therefore the other four above-mentioned cautioners granted bond, conjunctly and severally, for 10,000*l.* The caution was to cover the past as well as the future transactions of Scot, from the commencement to the conclusion of his agency. It was specially declared that Scot should have "full "power and liberty to transact and carry on the business of the "said agency in Langholm, Carlisle, or in any other towns or "places," &c. The bond contained a similar clause to that already quoted from the first bond, relative to the right of the cautioners to inspect the agency books, accounts, &c. It did not appear that the cautioners were again required to subscribe the paper of instructions, which all of them had read before; but the following clause was appended to the bond, and signed by the cautioners:

"From the extension of the business of Mr. Archibald Scot's "agency for the Leith Banking Company, the directors and "managers thereof have found it expedient to alter from time "to time the instructions given to Mr. Scot at the commence-"ment of the said agency business, (as therein reserved,) of all

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" which we hereby approve; and also that the said directors and " managers shall reserve to themselves the same power and right " of altering the same, in whole or in part, at any time they may " see proper, and that without any notice or intimation being " previously or subsequently made to us thereof."

This bond was signed at intervals in the month of June 1825. On the 11th of that month, the balance against Scot was 56,530*l.*; but the bank averred it to have been reduced, before the bond received its last signature, to 36,612*l.* By the cautioners it was alleged, that, of this sum, 19,000*l.* consisted of arrears; and the bank admitted that 9,972*l.* arose on over-drafts of two accounts alone, as exhibited to them by Scot. They averred, however, that almost the whole arrear of past due bills or over-drafts then existing was eventually recovered, or at least recoverable. The cautioners did not insist on an inspection of the agency accounts, and no notice was given to them of the existence of this arrear, or of Scot's deviations from the paper of instructions, nor was any hint of distrust or dissatisfaction expressed by the bank. The bank stated that no distrust was felt; and that as the balance against Scot subsequently varied from 20,000*l.* up to 90,000*l.*, this was a proof of the unlimited confidence which they themselves then reposed in him.

On the 4th of August 1825, the bank caused Mr. Scot to find additional caution to the extent of 5,000*l.*, under a bond in which Robert Elliot of Cooms was sole cautioner; and it was alleged by the cautioners, that the correspondence with Elliot for this bond was begun at the date of taking the one for 10,000*l.* Elliot's bond stipulated that the bank should have no claim against him until they had first discussed the present cautioners. No intimation of this bond was made to them.

In July 1826, the bank sent one of their tellers to inspect and superintend the Carlisle agency; and in consequence of his report, (which intimated, inter alia, a suspicion that Scot kept double books,) the manager of the bank and their law agent went to Carlisle in August, and summarily took possession of the whole books and accounts; but Scot was allowed to continue ostensibly agent for the bank.

In September, the bank arranged with Scot that he might open a cash-credit with them to the extent of 4,000*l.*, if he found proper security. Seven gentlemen then signed a bond, each for

500*l.*, several of these being cautioners under the former bond. This cash-credit was operated on to the extent of 3,246*l.* 11*s.* 1*d.* The bank admitted that the purpose of this credit was to enable Scot, inter alia, to pay up an arrear of cash due to themselves, amounting to 1,363*l.* Oct. 1, 1831.

No notice was given to the cautioners at the time of the bank's taking possession of the books; but a letter, dated about the time of granting the cash-credit bond, was sent to them by the bank manager from Carlisle, stating, that "I am presently here in-"specting the state of the agency, and, at Mr. Scot's desire, "arranging and securing payment of outstanding accounts; and "further, I beg leave to intimate that I am quite ready to give "you every necessary information on the state of the agency "which you may require in terms of the bond of caution." None of the cautioners, however, asked for this information.

Jardine, one of the four co-cautioners, died; and his trustees, being desirous to get his children relieved of the obligation, caused a communication to be made to the bank to that effect. The law agent of the bank wrote, on the 1st of December 1826, that Scot was doing all he could to procure security to the bank, in order to relieve Jardine's heirs; and added, "Under "such circumstances, and for very obvious reasons, I would sug-"gest the prudence of not communicating the result of my states, "until it was known whether Mr. Scot had succeeded in pro-"curing new security." It was stated generally that the bank were quite ready to communicate the state of the agency; "only, "should any thing arise from the communication, so as to retard "or prevent Mr. Scot from obtaining new security, the trustees "will blame themselves."

In the course of the same month, the bank having notified their intention to remove Scot, he resigned; and, on the 28th, the bank addressed a letter to the cautioners, intimating this event. As two of the co-cautioners were by this time bankrupt, a subsequent demand was made against John Bell and the heirs of Walter Jardine for the sum of 10,000*l.* under their bond of caution,—a balance of 35,145*l.* 2*s.* 1*d.* being finally stated as due by Scot. The bank, by a state more hastily made up, had calculated this balance at 53,382*l.* 18*s.*

A charge was then given to Bell, and an action was brought against the heirs of Jardine. Bell suspended; and the trustees

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The Bank, on the other hand, maintained, that the cautioners had bound themselves for all loss and damage that might be sustained by the bank through any of Scot's transactions, as

their agent, and also for the faithful and honest discharge of the duties entrusted to him, and were liable for the loss occasioned by him to the extent of the bond. The cautioners were not liberated from their obligation in consequence of the transactions entered into by Scot in England; and, at all events, the Bank of England statutes being passed solely for the protection of the Bank of England, it was jus tertii in the cautioners to found upon them. They were quite aware that Scot was carrying on business in England, and having bound themselves to guarantee any loss which might arise from his transactions, they were bound to relieve the bank from that loss, notwithstanding the alleged illegality. At all events, the alleged illegality of some of the transactions could not prevent the bank from claiming upon others, to which no such illegality attaches. The cautioners were bound by their bond to look to the transactions of Scot themselves, and were not entitled to devolve exclusively upon the bank the responsibility of guarding against the improper practices of the agent; and nothing short of fraud, or of such gross negligence as is in legal construction equivalent to fraud, on the part of the bank, could relieve the cautioners from their obligation. Oct. 1, 1831.

The Court (12th May 1830), in the suspension, suspended the letters simpliciter, and decerned, and, in the ordinary action, sustained the defences, assoilzied the defenders from the conclusions of the action, and decerned with expenses.*

The Bank appealed.

Appellant. The cautioners being bound, conjunctly and severally, with Mr. Scot, not only for all loss and damage of

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* 8 Shaw & Dunlop, p. 721. About this time the Lord Chancellor, in a suit at the instance of Hobson's assignees *v.* Scot (29th July 1830), pronounced this order: "I do order that so much of the debt of the said Archibald Scot (if any), the consideration of which consisted of notes of the Leith Banking Company, delivered at Carlisle by the said Archibald Scot as agent of that bank, be expunged from the proceedings had and taken under the said commission; and I order that it be referred to the said commissioners to inquire and state what were the circumstances attending the remainder of the said debt so proved by the said Archibald Scot, and how such debt was constituted, with liberty for the said commissioners to state any special circumstances, as to the whole debt of the said Archibald Scot, or any part thereof, at the request of either party."

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every description that might be sustained by the bank through any of his transactions as their agent at Langholm, Carlisle, or elsewhere, but for all loss that might arise from his failing carefully and diligently to attend to the business of the agency, and faithfully and honestly to discharge the duties intrusted to him, are liable, in terms of the obligation contained in the bond, for the loss which has been sustained during his management of the agency to the extent of 10,000*l.*

The cautioners are not liberated from their obligation in consequence of any alleged illegality in the transactions entered into by Mr. Scot in England. The business, as carried on by him there, is not declared illegal by the Bank of England statutes. At all events, these statutes were passed solely for the protection of the Bank of England, and it is jus tertii to the cautioners to found upon them. They cannot plead that the exclusive privileges of the Bank of England have been infringed, because they have no interest to maintain that plea.

Further, the cautioners, being fully aware that Scot was carrying on business in England, and having bound themselves to guarantee any loss which might arise from his transactions there, are bound to relieve the bank from that loss, notwithstanding any alleged illegality.

At all events, the loss sustained from transactions entered into in Scotland exceeds 10,000*l.*, and the alleged illegality of some of the transactions cannot prevent the bank from claiming upon others to which no such illegality attaches.

The cautioners, being sureties for Mr. Scot's faithfulness and honesty in the management of the agency, were not entitled to devolve on the bank the whole duty and responsibility of guarding against any improper practices committed by him. They were bound to look to the affairs of the agency themselves. Nothing short of fraud, or of such gross negligence as is in legal construction equivalent to fraud, on the part of the bank, can relieve the cautioners from their obligation.

No such circumstances can be established in the present case with reference to the granting of the bond, the management of the agency, or the conduct of the bank, subsequent to August 1826, as amount to fraud, either actual or legal, on the part of the bank, or as are relevant to release the cautioners from their obligation.

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The cautioners are barred personali exceptione from objecting to any irregularity in Mr. Scot's mode of conducting the business of the agency, of which they themselves were in the full knowledge, and which they sanctioned by their own transactions with him.

The Court of Session, before pronouncing any final judgment on the merits of the cause, ought to have remitted it to an accountant, in the first place, to fix and ascertain the particular debts contained in the stated account, of which the consideration consisted of notes of the Leith Banking Company, delivered at Carlisle by Scot as their agent; and, in the second place, to separate the transactions entered into by Scot in his character of agent, from those which were carried on by him on his own private account, without the knowledge of the bank.

The judgment of the Court of Session proceeded chiefly on the ground, that the sureties were discharged by the laches and gross negligence of the appellants, while the material facts on which the alleged laches and negligence are founded were not only not established by evidence, but the bank explicitly and pointedly denied them on the record, and were ready to produce evidence to disprove them.

Respondents.—The respondents were released from all claim under the bond of June, 1825, in respect of the gross deceit and concealment of material facts then practised upon them by the bank, and by the material alteration which was effected on the contract, and the great increase of risk which was imposed upon them as prior cautioners by the taking of, and still more by the peculiar terms of Elliot's bond.

The deceit practised by the bank, and the gross negligence committed by them subsequent to the date of the last bond, and whereby the whole loss was created which has latterly arisen upon Scot's accounts, had the same effect.

They were also released from all liability in respect of the farther deceit or undue concealment practised towards them subsequent to the death of Mr. Jardine, or, at least, subsequent to the alleged discoveries of the bank in August 1826, and whereby the respondents were necessarily prevented from taking timeous steps against Mr. Scot, for their own relief or security.

And the appellants cannot maintain action for any part of the

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To this the allegation of acquiescence or homologation affords no relevant answer.

Lord Chancellor.—My Lords, upon a full consideration of the case upon the grounds on which it was dealt with and decided in the Court below, I feel it to be my duty humbly to advise your Lordships that the judgment be affirmed.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

MONCRIEFF, WEBSTER, and THOMSON—M'CRAE,—Solicitors.

No. 53. JOHN DICK, Appellant.—*Lord Advocate (Jeffrey)—Burge.*

DONALD CUTHBERTSON, Respondent.—*Serjeant Spankie—Rutherfurd.*

Sale—Expenses.—Held (affirming the judgment of the Court of Session), 1. That the purchaser of a property at public sale, who had successfully suspended a charge for payment on the ground of a defect in the title offered, and had frequently insisted for fulfilment, but who had never proposed to abandon the bargain, was not entitled, on a good title being offered after a lapse of eleven years, to refuse it on the pretext of being free altogether. 2. Held competent to award the prior expenses to a party, who was successful in a former appeal.

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2D DIVISION. Lds. Cringletie and Fullerton.

WHEN this case was formerly before the House of Lords on appeal* their Lordships (Dec. 12, 1826) ordered and adjudged, "That so much of the said interlocutor of 11th March 1818, as "finds that the respondent is not bound, at the expense of the "bankrupt's estate, to make any addition to the title offered by "him, but that he is bound, at the risk and expense of the "representer (appellant), to concur in any supplementary title "he may wish to have executed, be, and the same is hereby "reversed; and it is declared that the respondent is bound to "make to the representer a good and valid title, and that the

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* 2 Wilson & Shaw, 522.