ordains the defender to make payment to the pursuers of the sum of £36, 8s., and decerns: *Quoad ultra* dismisses the appeal, and remits the case to the Sheriff-Substitute."

On 27th June the Sheriff-Substitute pronounced the following interlocutor:—"The Sheriff-Substitute approves of the Auditor's report taxing the pursuers' account of expenses of process at the sum of £34, 9s. 1d., and decerns against the defender for payment to the pursuers of said sum accordingly."

On 4th July the following note of appeal was lodged by the defender's agent:—"I appeal against the judgment of the Sheriff to the First Division of the Court of Session."

The Debts Recovery (Scotland) Act 1867 (30 and 31 Vict. cap. 96), sec. 10, provides that "it shall not in any case be competent to appeal until judgment has been pronounced by the Sheriff finally disposing of the cause, but an appeal when taken shall have the effect of submitting to review all the previous proceedings and interlocutors."

Sec. 11 enacts that, subject to the provisions contained in sec. 10, "where the case has been heard and the judgment has been given by the Sheriff-Substitute, it shall be competent for either party to appeal against such judgment to the Sheriff."

Sec. 12 enacts that, subject to the provisions contained in sec. 10, and where the cause exceeds the value of £25, "where the case has been heard and the judgment pronounced by the Sheriff (and not by the Sheriff-Substitute) in the first instance, it shall be competent for either party to appeal against such judgment to either of the Divisions of the Court of Session,"

Sec. 13. "Where the case has been heard by the Sheriff on appeal and judgment pronounced by him as above provided for, it shall be the duty of the Sheriff-Clerk, immediately on receiving the Sheriff's interlocutor, to transmit a copy thereof through the post-office to the parties or their procurators, and within eight days . . . it shall be competent for either of the parties to appeal against his (the Sheriff's) judgment in the same manner and to the same effect and under the same limitations as provided for in the immediately preceding sections with regard to appeals from judgments of the Sheriff in the first instance."

The pursuers maintained that the appeal was incompetent, and argued—This was an appeal against a judgment of the Sheriff-Substitute. No appeal direct from the Sheriff-Substitute to the Court of Session was provided by the statute. If the defender had desired to appeal he should have appealed in time against the Sheriff's interlocutor of 10th June, which was the interlocutor disposing finally of the merits of the case. An interlocutor merely decerning for expenses was not appealable—*Tennents* v. *Romanes*, June 22, 1881, 8 R. 824; *Thompson & Co.* v. *King*, January 19, 1883, 10 R. 469.

Argued for the defender—The appeal was competent. The defender could not have appealed against the Sheriff's interlocutor of 10th June, for that was not a final judgment, and contained no operative decree for expenses—*Governors of Strichen Endowments* v. *Diverall*, November 13, 1891, 19 R. 79. The Sheriff had done what was incompetent in remitting to the Sheriff-Substitute—*Bennett* v. *Wilson*, June 9, 1888, 15 R. 715; but it would be very hard for the defender to be deprived of his right of appeal by this proceeding on the part of the Sheriff. The Court, in any event, had power under sec. 10 to order the case to be reheard.

At advising—

LORD PRESIDENT—This appeal is incompetent on the plain ground that it is against an interlocutor of a Sheriff-Substitute. The Debts Recovery Act is careful to shut out an appeal to this Court except in those cases in which it is provided; and it is only provided against the judgments of Sheriffs-Principal. We were told with some plausibility that the procedure in the Sheriff Court had been irregular; that the Sheriff-Principal ought not to have remitted to the Sheriff-Substitute; and that the object of the appeal was to submit to our judgment the previous interlocutors. But then, in order to effect this, it is necessary that the last interlocutor which is the immediate subject of appeal shall be competently appealable to us, because the time for appealing against the Sheriff Principal's interlocutor has expired; and, for the reason already given, the interlocutor of the Sheriff-Substitute is not appealable to us. We cannot rectify irregularities in the Court below by ourselves committing the irregularity of entertaining an incompetent appeal.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court dismissed the appeal.

Counsel for the Pursuers—Lees—A. S. D. Thomson. Agent—J. Stewart Gellatly, S.S.C.

Counsel for the Defender—Baxter—T. B. Morison. Agent—P. Morison, S.S.C.

Friday, November 25.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

J. A. SALTON & COMPANY *v.* CLYDESDALE BANK, LIMITED.

HOCKEY *v.* CLYDESDALE BANK, LIMITED.

Cautioner—Representations as to Credit—Unauthorised Communication of Guarantee to Third Party.

Representations as to a trader's credit made or granted by A in answer to inquiries by B, and communicated by B, without A's knowledge or consent,

to C, will not found an action at C's instance against A, but the rule is different if A is informed that the information is desired on behalf of C.

Bell's Comm. (7th ed.), i. 392, *approved.*

Cautioner—Representations as to Credit—Period for which Available.

A representation as to a trader's credit can only be held (unless otherwise expressed) to refer to the trader's credit at the time the representation is made, and will not found a claim for damages in respect of advances made in reliance upon it several months after that date.

Agent and Principal—Scope of Employment—Bank—Bank Agent—Liability of Bank for Representation as to Solvency of Customer Made by Local Agent.

Held (1) that the local agent of a bank has no implied authority from his position as agent to bind the bank by making representations as to the credit of its customers, and (2) (*diss* Lord Moncreiff) that such authority could not be established by proof of the practice of the bank to answer inquiries as to the financial position of its customers.

Observed (by Lord Young) that the giving of guarantees as to credit was not banking business, and that even express authority by the directors of a bank would not make the bank liable for such guarantees.

Agent and Principal—Fraud—Principal's Liability for Agent's Fraud—Bank.

Observed (by Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff) that a principal is liable for the fraud of his agent if acting within the scope of his employment; and that the principal is also liable to the extent he has benefitted, event if the agent is acting outwith the scope of his employment.

Averments of benefit to a bank resulting from the fraud of its agent *held* irrelevant.

In these two cases, which were heard and advised together, the pursuers respectively sued in the first case the Clydesdale Bank alone, and in the second case the Clydesdale Bank and the manager and agent of said bank in Wishaw, for payment of certain sums due and resting-owing upon bills discounted by them as they alleged in consequence of false and fraudulent representations made by Mr Thomson as agent of the bank.

The first case was at the instance of J. A. Salton & Company, bill brokers, London, and James Albert Salton, the only partner of that firm, against the Clydesdale Bank, Limited.

The pursuers averred—"(Cond. 1) The pursuers carry on business as bill brokers at 10 George Yard, Lombard Street, London. In September 1896 they were asked to discount two bills amounting together to £1199, which were drawn respectively by the Self Lock Roofing Tile Company, and by John Thorl & Company of Gracechurch Street, London, upon and accepted by John Agnew, coalmaster and brick manufacturer, Carluke, Lanarkshire. (Cond. 2) Before discounting the said bills the pursuers instructed their bankers Messrs Henry S. King & Company of Cornhill, London, to make inquiries of the defenders, as being Mr Agnew's bankers, as to the standing of Mr Agnew, and on or about 21st September 1896 they wrote to the defenders' branch at Wishaw, in accordance with directions given by or on behalf of Mr Agnew, and asked them to wire in reply whether Mr Agnew was good for an obligation of £5000, and a telegram was sent by the defenders in reply in the following terms—"Quite safe for sum named." The pursuers also about said date caused an inquiry as to the standing of Mr Agnew to be made by their bankers, the Manchester and Liverpool District Banking Company, of Cornhill, London, of the defenders. They asked the defenders at their Wishaw branch, where Mr Agnew's account was kept, whether Mr Agnew was good for an obligation of £4000 to £5000; and the defender's agent at Wishaw, Mr William B. Thomson, replied on behalf of the defenders, that he considered Mr Agnew good for that amount. The answers received were communicated to the pursuers, and on the faith of them they discounted the said two bills, which fell due in December following and were met at maturity, but the pursuers aver that the money to retire the said bills was raised by fresh accommodation bills, and was so raised fraudulently. Moreover, the proceeds of the said bills or portions thereof were paid to the defenders into the account of the said John Agnew."

The letter from Messrs Henry S. King & Company was in the following terms:—

"*Private.* 65 Cornhill,
"London, Sept. 21st, 1896.
The Manager,
The Clydesdale Bank, Wishaw, Lanark.

"Dear Sir,—We request the favor of your confidential opinion as to the standing and respectability of Mr John Agnew, manufacturer, and shall be obliged by your stating whether you consider him trustworthy for £5000.—Yours faithfully,

"HENRY S. KING & Co.

"*P.S.*—As this information is urgently needed, kindly reply by telegram, for which we enclose stamped form.

"H. S. K. & Co."

The letter from the Manchester and Liverpool District Banking Company, was as follows:—

"(Form No. 32) The Manchester and Liverpool District Banking
"*Confidential.* Company, Limited,
75 Cornhill,
London, 23rd September 1896.
Clydesdale Bank, Limited,
Wishaw, Lanark.

"Dear Sirs,—I shall be much obliged by the favour of your opinion, in confidence, of the means and standing of Mr John Agnew, manufacturer, Wishaw—£4/5000. Thanking you in anticipation,—I am, dear Sirs, yours faithfully,

"R. MEIKLE, *Sub-Manager.*"

The answer to this letter was as follows:—

"The Clydesdale Bank, Limited,
Wishaw, 24th September 1896.
The Manager,
The Manchester and Liverpool District
Banking Company, Limited,
75 Cornhill, London.

"Dear Sir,—In answer to your inquiry of 23rd inst. I have to report that Mr Agnew has a large interest in a limited company known as The Scottish Terra Cotta and Metallic Brick Company, Limited. He has also an interest in a colliery, and he is the owner of an independent brickwork near Carluke, besides being the owner of considerable heritable property. I would consider him quite good for your figures.—Yours faithfully, W. B. Thomson."

The pursuers further averred—"(Cond. 3) In December 1896 and January 1897 the pursuers were asked to discount two bills, each drawn by the said John Thorl & Company upon and accepted by the said John Agnew, which together amounted to £1325, 3s. 6d., the one being for £889, 16s. 6d., and falling due on 27th April 1897, and the other for £435, 7s., and falling due on 11th May 1897. In reliance upon the very satisfactory reports received so recently from the defenders in September 1896 through the foresaid two firms of bankers, coupled with the fact that the bills for £1199 had been met, the pursuers discounted the said two bills, amounting together to £1325, 3s. 6d., and the proceeds thereof, or some portions thereof, were paid to the defenders into the account of the said John Agnew. It is in accordance with custom and practice that such satisfactory reports received through bankers should be trusted to and acted upon for a period of several months without requiring any fresh report. (Cond. 4) The said two bills were dishonoured at maturity, and both the drawers and the acceptor have since become bankrupt. Mr Agnew's estates were sequestrated in 1897."

It was averred that after allowing for securities held and dividends paid the sum sued for still remained due and resting-owing.

The pursuers also averred—"(Cond. 5) The said John Agnew was a customer of the defenders at their Wishaw branch at the dates when the said inquiries were made on behalf of the pursuers. He kept his bank account there. The agent of the Bank at the said branch is Mr William Brown Thomson, who also carries on business as a solicitor. He was then and had for a considerable period acted as solicitor for Mr Agnew in all his business and private matters, and he was well acquainted with the position of Mr Agnew's affairs." Then followed particulars as to the financial position of Mr Agnew, who was said to have been then deeply involved, to the knowledge of Thomson at the time, in accommodation bill and other transactions with money lenders, and not to have been good to meet an obligation of £4000. "(Cond. 6) At and prior and subsequent to September 1896 Mr Thomson was frequently pressing Mr Agnew to make payments to the said Bank. . . . Mr Thomson was then pressing Mr Agnew for payments, and threatening that unless payments were made to him he would cease to report favourably as to Mr Agnew's credit, and discount no more of his bills. The report made by him on behalf of the said Bank in answer to the inquiry made on behalf of the pursuers was a wilful misrepresentation and was not given honestly. It was fraudulent, and was given by the Bank's said agent in order to keep up the credit of their said customer, and to prevent him from becoming bankrupt, and thus causing serious loss to the defenders. Mr Agnew had overdrawn his bank account at the time, and he had also obtained large advances from the defenders upon bills which he had discounted. He had also advances from the Bank in other forms. The said fraudulent misrepresentation was given by the Bank's agent with the view of benefiting the Bank, and did benefit the Bank. But for that misrepresentation the said bills would not have been discounted by the pursuers, and Mr Agnew would not have got the proceeds nor any part thereof. In point of fact the said bills were accommodation bills, although that was not known to the pursuers at the time, and Mr Agnew obtained the proceeds or a large part thereof, and paid the same into his account with the defenders. (Cond. 7) . . . Information got by bankers from other banks in the way above stated is invariably given to their customers who had asked the inquiries to be made, and the defenders knew of this practice."

The defenders averred—"(Ans. 7) Denied. The defenders' bank follow the custom of other bankers and sometimes furnish information relative to the credit of persons who keep their accounts with the defenders, but only in confidence to other banks."

The pursuer pleaded—"The pursuers having suffered loss and damage to the extent of the sum sued for through the false and fraudulent representations of the defenders or of those for whom they are responsible are entitled to decree as concluded for, with expenses."

The defenders pleaded—"(1) The averments of the pursuers are irrelevant and insufficient to support the conclusions of the action. (4) No representations with regard to the standing of John Agnew having been made by or on behalf of the defenders to or on behalf of the pursuers in December 1896 or January 1897 the defenders should be assoilzied. (5) The pursuers not having relied, or alternatively not having been entitled to rely, upon the alleged representations made in September 1896 in accepting the two bills falling due on 27th April and 11th May 1897 respectively, the defenders should be assoilzied. (6) The alleged representations to the pursuers not having been made by or on behalf of the defenders, and no benefit having been derived by them therefrom the defenders are entitled to absolvitor. (7) *Separatim*—The alleged representations not having been made in writing, and subscribed by the persons

making the same, are, by section 6 of the Act 19 and 20 Vict. cap. 60, of no effect."

The second case was at the instance of Oliver Hockey, provision merchant in London, against the Clydesdale Bank, Limited, and William B. Thomson, solicitor, Wishaw, manager and agent of said bank in Wishaw.

The pursuer averred- -"(Cond. 1) In the month of November 1896 the pursuer was asked to discount two bills for £1000 each drawn by John Thorl & Company, London, upon and accepted by John Agnew, coalmaster and brick manufacturer, Carluke. (Cond. 2) Before discounting the bills, the pursuer's solicitor, Mr R. Chapman, wrote to the Clydesbank Bank, Wishaw, with whom Agnew kept his banking account, a letter in the following terms:—

'R. CHAPMAN, 92 London Wall, E.C.
Solicitor. London, Nov. 30, 1896.

'Dear Sir,—I am acting for Mr Oliver Hockey, a merchant of 16 Fish Street Hill, London, with reference to some mortgage transactions with Mr Julius Burckhardt, of 9 Gracechurch Street, London. Mr John Agnew, of the Brick, Tile, Terra Cotta, &c., Company, of Carluke, Lanark, has given, and is to give, his acceptances to about £2000. Mr Agnew is a stranger to myself, and my client desires to know if you consider him in a substantial position and able to meet a sum of £2000 in about six months' time if my client entertains it. I am not personally acquainted with Mr Agnew, and am making these inquiries on behalf of my client Mr Oliver Hockey, and only for the purpose of satisfying him as to the position of the gentleman in question.—Yours faithfully, R. CHAPMAN.

'Manager, Clydesdale Bank, Limited,
Wishaw, Lanark.'

(Cond. 3) In reply to this letter the defender Thomson, Wishaw agent for the Bank, and on its behalf, wrote to Mr Chapman the following letter:—

'*Private.*—WILLIAM B. THOMSON,
Solicitor.

'R. Chapman, Esq., Solicitor,
29 London Wall, London, E.C.
The Clydesdale Bank, Limited,
Wishaw, 1st December 1896.

'Dear Sir,—I am in receipt of your letter of 30th inst. Mr Agnew, the party inquired about by you, I should think is perfectly good for £2000. He is largely interested in a brickwork carried on by a limited company, and has a large brickwork and collieries belonging to himself. He would seem to me to be perfectly good for his engagements.—Yours truly,
'WM. B. THOMSON.'

(Cond. 4) About the same date the pursuer also caused inquiry to be made as to Agnew's financial position through the Union Bank in London. The Union Bank communicated with the Clydesdale Bank in regard thereto. A certified copy of the letter, bearing date 4th December 1896, sent by the Union Bank of London, Limited, and which is addressed to the Clydesdale Bank, Wishaw, is herewith produced, along with the reply thereto, bearing date 5th December 1896, sent by the defender Thomson on behalf of the defenders the Clydesdale Bank. It was within his powers to write the said letter, and it is customary for the agent to answer such communications as that of the Union Bank on behalf of the Bank by which he is employed, where the party inquired about keeps his banking account. The said letters are herein held repeated, *brevitatis causa.*"

These letters were as follows:—

"The Union Bank of London, Limited,
2 Princes St., Mansion-House,
London, E.C., December 4th, 1896.

"Clydesdale Bank, Wishaw, Lanark.

"Gentlemen,—I shall feel much obliged if you will favour me with your opinion as to the respectability and responsibility of Mr John Agnew, Brick Tile Terra Cotta Company, Carluke, for £2000. Thanking you in anticipation, I am, Gentlemen, your obedient servant, W. FENN,
pro Manager."

"The Clydesdale Bank, Limited,
Wishaw, 5th December 1896.

"The Agent, Union Bank of London, Ltd.,
2 Princes Street.

"Dear Sir,—In reply to your favour of 4th inst., J.A. is very respectable, and I am of opinion that he is quite good for your figures.—Yours truly, WM. B. THOMSON."

(Cond. 4, *continued*)—"The statements contained in said reply were false, and were known to the defender Thomson to be so, all as condescended on in condescendence 9 hereof; and the defender Thomson knew that the terms of this letter would be communicated to the pursuer. At the time when the said statements made in the said letter of 5th December 1896, and also the letter of 1st December 1896, mentioned in condescendence 3 hereof, were made, the Clydesdale Bank was advancing large sums of money to the said John Agnew, and was generally financing him, and it was in the interest of the said Bank to keep his credit good to enable him to get his bills discounted, and to assist him in getting advances from third parties. The maintenance of the said John Agnew's credit was desirable in the interests of the Bank at the time, and the Bank did in point of fact derive benefit from the pursuer having been induced to discount said bills. The terms of this letter were communicated to the pursuer, and the Clydesdale Bank knew that this would be done."

The pursuer also averred that relying on these representations he had discounted the bills, that but for them he would not have done so, and that all the parties to the bills were now bankrupt and unable to pay the sums due under them.

The pursuer further averred—"(Cond 8) It is the custom of the said Bank to furnish information as to the credit of individuals with whom they are doing business. The said Bank frequently answers similar inquiries from those advancing money or giving credit to their customers, and it is customary to supply such information. It was within the power and scope of the said William B. Thomson's duty, as agent of said Bank, to supply the said information and to sign the said letter. (Cond. 9) The statements contained in said letter were in

various particulars false, and were made by the defender Thomson on behalf of the other defenders fraudulently, he well knowing the same to be untrue, or at any rate not having any reason to suppose them to be true."—[*Then followed a detailed statement of various facts as to Agnew's financial position said to have been known to Thomson.*]

The defenders (Ans. 4) admitted that the defenders' bank sometimes furnished information in confidence to other banks as to the credit of customers.

The pursuer pleaded—"The pursuer having suffered loss and damage through the false and fraudulent representations of the defenders as condescended on, decree should be pronounced as craved with expenses."

The defenders the Clydesdale Bank, Limited, pleaded—"(1) The averments of the pursuer are irrelevant, and insufficient to support the conclusions of the action. (3) The alleged misrepresentations not having been made by or on behalf of the Clydesdale Bank, and the bank not having derived any benefit therefrom, these defenders are entitled to absolvitor."

Separate defences were lodged by the defender Thomson, and he was represented in the Outer House by separate counsel and agents.

The Mercantile Law Amendment (Scotland) Act 1856 (19 and 20 Vict. c. 60), sec. 6, enacts as follows:—"From and after the passing of this Act all guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorised by him or them, otherwise the same shall have no effect."

On 13th July the Lord Ordinary (KYLLACHY), having heard parties in the procedure roll, pronounced the following interlocutor in the action at the instance of Oliver Hockey:—"Sustains the first-plea-in-law for the defenders the Clydesdale Bank, Limited, and assoilzies them from the conclusions of the action as laid, and decerns: Finds said defenders entitled to expenses so far as not already found due: Allows an account thereof to be lodged, and remits the same to the Auditor to tax and to report: *Quoad ultra*, and with respect to the defender Thomson, before answer allows the pursuer and said defender a proof of their respective averments, and the pursuer a conjunct probation," &c.

Opinion.—"In this case I have considered the argument on the closed record, and I have come to the conclusion that the pursuer has not stated a relevant case against the Bank.

"In the first place I am of opinion that the letters complained of were not letters written by the defender Thomson as representing the bank, but were individual communications expressing his personal opinion. I am unable to distinguish the case from that of *Swift* v. *Jewsbury*, L.R., 9 Q.B. 301, referred to at the discussion, and although not bound by that decision I adopt its reasoning. I do not overlook that the second letter, viz., that of the Union Bank, dated 4th December 1896, was addressed to the 'Clydesdale Bank, Wishaw.' That, I consider, was simply a mode of addressing the agent or manager of the bank's Wishaw branch. It is certain that the agent so understood, and answered the letter on that footing.

"In the next place, and separately, I am further disposed to think that the pursuer has made no relevant averment of benefit taken by the bank from the agent's alleged fraud. The benefit alleged is certainly not direct, nor is there anything stated as to its extent or amount. Now, I hold it to be settled by the case of *Addie* v. *Western Bank* (overruling, so far as inconsistent, the previous case of *Barwick* v. *London Joint-Stock Bank*) that a bank or other principal is not liable for the fraud of an agent except to the extent of being bound to restore any benefit obtained by fraud. It may be that as matter of pleading it is competent to impute to the principal the fraud of the agent, and so to recover from the principal such benefit as he may have obtained under what is called in England an action for deceit. That proposition receives countenance from the judgment in the Privy Council in the case of *Mackay* v. *Commercial Bank of New Brunswick*. But I am not aware of any authority, either English or Scottish, in which the doctrine laid down by the House of Lords, and particularly by Lord Cranworth in the case of *Addie*, has yet been impeached. The observations by Lord Selborne in the case of *Houldsworth* v. *City of Glasgow Bank*, 7 R. (H.L.) 653, appear to make this point clear.

"There being, therefore, in my opinion no relevant statement of benefit held by the bank as the result of the agent's alleged fraud, I should not be able to sustain the relevancy of the pursuer's case, even, if contrary to my opinion, it should be held that the agent's fraud was committed by him *qua* agent and on behalf of the bank.

"As to the defender Thomson, I am of opinion that the pursuer has stated a relevant case. There is not, I think, any difficulty under the terms of the Mercantile Law Amendment Act. The written and signed representations were not, it is true, addressed to the pursuer, but in the first letter the inquiry was made expressly on his behalf; and with respect to the second letter, he avers, and, I must assume, sees his way to prove that the defender knew that its terms would be communicated to him (the pursuer). In other words, he avers, and offers to prove, that the Union Bank, in making the inquiry, were acting as his agent, and that appears to be enough. As to the criticism which the defender makes upon the averments otherwise, it is

true that the pursuer is very general in his statements as to what he did on the faith of the letters, or at all events on the faith of the second letter, but I must say that the statements in question, although somewhat general, are relevant, and on the whole I consider that as against the defender Thomson there must be a proof before answer."

Of even date the Lord Ordinary pronounced the following interlocutor in the action at the instance of J. A. Salton & Company:—"Sustains the first plea-in-law for the defenders, and assoilzies them from the conclusions of the action as laid, and decerns," &c.

Opinion.—"This case is rested on communications between the pursuers or the pursuers' agent and Mr Thomson, the Bank's agent at Wishaw—communications of a similar character to those in the other action (*Hockey* v. *The Clydesdale Bank*) But the case being laid exclusively against the Bank, it follows, I think, from my previous judgment, that the case as against the Bank is here also irrelevant, and I shall also sustain the plea of irrelevancy and assoilzie the defenders from the action as laid."

The pursuers in both actions reclaimed.

The defender Thomson did not reclaim, and he was not represented by counsel in the Inner House.

Argued for the pursuers and reclaimers J. A. Salton & Company—The Bank was liable for the false and fraudulent representations of its agent made in the course of his employment, and for the Bank's benefit, that is, with a view to its benefit, whether the Bank actually benefited or not—*Barwick* v. *English Joint-Stock Bank*, 1867, L.R., 2 Ex. 259 (Exchequer Chamber), *per* Willes, J., delivering the judgment of the Court, at p. 265. This case was not overruled by *Western Bank of Scotland* v. *Addie*, May 20, 1867, 5 Macph. (H.L.) 80. See *Houldsworth* v. *City of Glasgow Bank*, March 12, 1880, 7 R. (H.L.) 53; *Mackay* v. *Commercial Bank of New Brunswick*, 1874, L.R., 5 P.C. 394; *Swift* v. *Jewsbury*, 1874, L.R., 9 Q.B. 301 (Exchequer Chamber); *Weir* v. *Bell*, 1878, 3 Ex. D. 238; and *Swire* v. *Francis*, 1877, 3 App. Cas. 106, in all of which cases *Barwick, cit.*, was recognised as an authority. See also Story on Agency (9th ed.), sec. 452. The case of *Addie, cit.*, proceeded on the ground that the pursuer could not get rescission of the contract, as *restitutio in integrum* was impossible, that he could not get damages against a company of which he had become and remained a member, and that he could not get damages against an incorporated company for having been induced to take shares in the company when it was unincorporated. The *dicta* of Lord Chelmsford, L.C., at p. 85, and of Lord Cranworth at p. 90, were *obiter*, and had been commented on in *Mackay, cit.* and in *Houldsworth, cit.*, *per* Lord Selborne at p. 57. Moreover, in *Addie, cit.*, the representation made by the agent was with regard to the position of the company, and with a view to inducing the pursuer to purchase shares. That was clearly something not within the scope of the agent's duties. The ground upon which the agent had been held liable in *Barwick, cit.*, by Willes, J., whose opinion was referred to in all the other cases as authoritative, was simply the well-known principle upon which the master is held liable for the acts of his servant when acting within the scope of his employment. In that view the question whether the Bank had actually taken benefit was quite irrelevant. In none of the ordinary cases in which a master was held liable for the acts of his servant did the master take any benefit. The fraud was in law imputed to the master or principal. It would be no answer to an accusation of fraud against the principal himself that he had taken no benefit by it—*Pasley* v. *Freeman*, 1789, 3 T.R. 51, and 1 R.R. 634; *Foster* v. *Charles*, 1830, 7 Bing. 105; *Corbett* v. *Brown*, 1831, 8 Bing. 33. If the fraud was committed by the agent in the course of his employment, it was in law the fraud of the principal—See *Barwick, cit.* In *Swire, cit.*, the principal took no benefit, as the agent appropriated the money to his own uses. There was no case in which the pursuer's claim had been rejected expressly upon the ground that the principal had taken no actual benefit from the agent's fraud. (2) What the agent did here was done by him as agent, and as part of the business of the Bank. It was so averred, and whether it was so or not could only be determined by proof. The fact that he signed with his own name without the addition of the word agent was not conclusive. (3) It was within the scope of the agent's authority to give such representations as those founded on here, and he was employed, *inter alia*, to give such information. It was so averred. It was averred, and indeed admitted, that it was the custom for banks to do so, not only at their head office but at branches. If it was part of the Bank's business to answer such inquiries—and it was averred that it was—then such inquiries could only be answered by individual agents, for they alone had the necessary information. A company like the Clydesdale Bank could only act at all through its agents, and the acts of its agents, acting within the scope of their employment, were the acts of the Bank. The application for information here was to the Bank, not to the agent as an individual, and it was to be presumed that the inquiry was answered by the person to whom it was made. At least it could not be assumed without proof that it was not so. (4) The case of *Swift* v. *Jewsbury, cit.*, upon which the Lord Ordinary had proceeded, was decided after inquiry. That decision was not binding upon this Court as a decision. The weight of judicial authority upon each side was about equal, the Court of Exchequer Chamber (Lord Coleridge, C.-J., Bramwell, Piggott and Cleasby, BB., and Grove and Denman, JJ.) having reversed the judgment of the Court of Queen's Bench (Cockburn, C.J., and Quain, J.) reported under the name of *Swift* v. *Winterbotham*, 1873, L.R., 8 Q.B. 244. Moreover, what was there decided as matter of law

was that the signature of the agent was not sufficient to bind the bank, which was apparently the case in terms of the English Act there founded on, but that was not so in Scotland under the Mercantile Law Amendment Act, sec. 6. As to anything else which was decided, it was simply a judgment on the particular facts of that case which could not be authoritative in any other case. Further, that case was expressly distinguished by Lord Coleridge, C.J., at p. 312, from a case in which the agent, "in conducting the business of a joint-stock company, does something" "by which they profit or by which they may profit." Here it was averred that the agent made the representation in the course of conducting the business of the Bank, and for its profit, and further, with the result that it did in fact profit. It was to be observed that in the case of *Jewsbury* the bank could take no benefit, actual or possible, from the action of the agent. *British Mutual Banking Company* v. *Charnwood Forest Railway Company*, (1887), 18 Q.B.D. 714, which was relied upon by the defenders, was decided upon the ground that the agent was acting for his own private ends, and not in the course of conducting the business of the company. *Weir* v. *Bell*, *cit.*, also cited by the defenders, turned upon questions as to the scope of the agent's authority and as to whether the relation of principal and agent existed between the defendant and the person guilty of the fraud. (5) If it were necessary to aver and prove actual benefit to the Bank resulting from the agent's fraud, then benefit to the Bank was here relevantly averred. In *Clydesdale Bank, Limited* v. *Paton*, May 12, 1896, 23 R. (H.L.) 22, the question was not whether it was relevantly averred that benefit had accrued to the bank, but whether the averment relevantly set forth that a promise on the part of the agent to continue giving credit had been broken. The question whether the account had been closed immediately after the sum obtained in consequence of the action of the agent had been paid in to the coffers of the bank, though quite relevant in a case such as *Paton*, *cit.*, was quite irrelevant here, because whatever happened afterwards, the benefit accrued once for all when the money was paid in, and the Bank's ultimate loss was so far reduced. (6) No question such as arose and was decided in *Paton*, *cit.*, with regard to the Mercantile Law Amendment Act 1856 (19 and 20 Vict. cap. 60), section 6, could arise here, because the representation founded upon was in writing. The case of *Paton* was really decided upon the Mercantile Law Amendment Act. (7) It was no doubt the case that the pursuer's name was not mentioned in the letters of inquiry, but it was averred that the information was obtained at the request of the pursuers, and for the purpose of being communicated to them, and also that such information as the agent gave was invariably communicated to customers, and that the Bank knew of this practice. In such circumstances the customer was entitled to sue upon the representation made to the bankers whom he had requested to make inquiries as to a person's solvency—*Swift* v. *Winterbotham*, *cit.* The judgment of the Court of Queen's Bench upon this point was not overruled in the Exchequer Chamber. It was also no doubt the case that the first bills were paid, and that it was only the subsequent bills which were not met, but it was averred that such representations as were given here were in practice understood to be reliable for several months after their date.

Argued for the reclaimers in the action at the instance of Hockey—They adopted the argument in the action at the instance of J. A. Salton & Company, and in addition pointed out (1) that as regards the letter sent in reply to the inquiries of Mr Chapman no objection could be taken on the ground that the representation was not given to the pursuer, because the letter in answer to which this representation was given stated that the information was requested on behalf of the pursuer, who was mentioned by name; and (2) that in this case the credit was given immediately after the representation was made.

Argued for the respondents—(1) As regards the replies to the letters in the action at the instance of J. A. Salton & Company, and the reply to the letter from the Union Bank of London, Limited, in the action at the instance of Hockey, the Bank was not responsible to either of the pursuers, in respect that no representation was given to *them*. The only person who could sue upon such a representation was the person to whom it was given. The person to whom such a representation was given was an important consideration, for reliance was necessarily placed upon his prudence and discretion, and consequently the granter might grant a representation to one person and not to another. Bell's Commentaries (7th ed) 392 (5th ed) 374—*C. & J. Philip* v. *Melville*, February 21, 1809, F.C. Here J. A. Salton & Company had shown great indiscretion and imprudence if they relied on the representation as an assurance of solvency seven or eight months after its date. (2) This last-mentioned circumstance was by itself conclusive against J. & A. Salton. Whatever might be the effect of this representation, it was not a continuing guarantee, and could not involve liability for bills accepted three and four months, and payable seven and eight months after its date. The averment of custom put forward to meet this defence was irrelevant. There could be no such custom, for if such an understanding existed at all, it was only a prevalent mistake as to the law, which was entitled to no consideration from the Court—*Anderson* v. *M'Call*, June 1, 1866, 4 Macph. 765, *per* L. J.-C. Inglis at page 769. It was in the nature of things impossible to give a representation as to the future. A man's future solvency might be guaranteed, but it could not be represented. Moreover, it was not averred that this custom was known to the defenders. (3) Apart from these considerations which did not apply to the first letter in the action at the instance of Hockey, the

representations founded upon could not support an action against the Bank, in respect that they were not subscribed by the Bank or by any "person duly authorised" by them, and consequently they had no effect as against the Bank—Mercantile Law Amendment Act (Scotland) 1856 (19 and 20 Vict. cap. 60), section 6. It was plain that the letters were not subscribed by the Bank. "Duly authorised" meant authorised *ad hoc*. No such authority to grant these letters was averred. It was never held to be within the scope of an agent's implied authority to give such representations. What was proposed here was to prove a contractual relation between the pursuers and the bank by parole proof to the effect that although the agent signed with his own name only, without the addition of the word "agent," and said "*I* should think," "he would seem to *me*," "*I* am of opinion," "*I* have to report," "*I* would consider," that nevertheless he meant "We the bank think," and so forth. This was an attempt to contradict the plain meaning of the writings founded upon, by parole evidence, or at least to instruct the true nature of the contract by such evidence. Both of these courses were incompetent under the statute: Bell's Commentaries (7th ed) 405; *Swift* v. *Jewsbury*, *cit.*, *per* Bramwell, B., at page 316. (4) Apart from this, however, the averments of authorised agency were irrelevant. It was not alleged that banks authorised their agents to give such representations on behalf of and in name of the bank, or that this was part of the business of banking. No such averments could possibly have been made. None of the agents at the head office or elsewhere, nor even the directors themselves, could give such representations as part of the business of the Bank, and so as to make it liable. What was truly the fact, and all that was averred here, was that the banks allowed their agents to give such information for the convenience of trade, but it was the agent's opinion that was sought and given, not the Bank's. The knowledge of which the inquirer desired to have the benefit was the knowledge of the agent, not of the bank. For such expressions of opinion given by their agents the banks were not liable—*Swift* v. *Jewsbury*, *cit.* (second ground of judgment). Everything which was averred by the pursuers here as to the agent's act being within the scope of his employment and so forth, was found proved by the jury in that case. Yet that was found by the Court to be insufficient to infer liability against the bank. Moreover, this case was *a fortiori* of *Swift* v. *Jewsbury*, because (*a*) there the agent signed as agent, and (*b*) here the bank agent was also Agnew's private agent, and much of the knowledge which he was said to possess was acquired in that capacity. The Bank was not liable upon documents signed by agents without the addition of the word agent to their signature—*Bank of Scotland* v. *Watson*, March 15, 1813, 1 Dow 40. (5) The Bank was not liable for the fraud of its agent except to the extent to which it had benefited by such fraud. There were no doubt conflicting *dicta* upon this subject, but it had never been decided that an innocent principal was liable for the fraud of his agent, when he had taken no benefit thereby. The opinions of Lord Chelmsford, L.C., and Lord Cranworth, in *Addie* v. *Western Bank*, *cit.*, were not mere *obiter dicta*. It appeared from the report in L.R. 1 H.L., Sc. 145, at page 151, that the Lords took time to consider the case with a view to the laying down of some general rules. The statements of their Lordships therefore, though perhaps not necessary for the decision of the case, were not intended to be mere general observations, but as general rules for the decision of future cases of this kind. These general rules had never been discredited. They were approved in *Houldsworth* v. *City of Glasgow Bank*, *cit.*, *per* Lord Selborne at p. 58; and in *Weir* v. *Bell*, *cit.*, they formed the ground upon which Cockburn, C.J., and Brett, L.J., decided the case. In *Weir* v. *Bell*, Bramwell, L.J., at p. 244, while recognising the authority of *Barwick* v. *English Joint-Stock Bank*, criticised the grounds upon which Willes, J., based his opinion. In the latter case the principal *de facto* took the whole benefit derived from the agent's fraud. So also in *Mackay* v. *Commercial Bank of New Brunswick*, *cit.*, the general question was expressly reserved, and the case was decided upon the ground that the plaintiffs had suffered damage, and the defendants had commensurately profited by the fraud of the agent acting within the scope of his authority. See p. 416 of report. In *Swire* v. *Francis*, *cit.*, the principal benefited by the fraud of the agent, because the sum which was originally stolen by the agent from the principal was replaced in the principal's coffers by the sum obtained by fraud from the plaintiff, and the principal was thus saved the loss which he would otherwise have sustained. See also *British Mutual Banking Company, Limited* v. *Charnwood Forest Railway Company*, *cit.* The expression "in the course of the service and for the master's benefit" was derived by Willes, J., in *Barwick*, *cit.*, from *Huzzey* v. *Field*, 1835, 2 C., M. & R. 432, at p. 440, *per* Lord Abinger, C.B. (who read an opinion prepared by Lord Wensleydale—See *Limpus* v. *London General Omnibus Company, Limited*, 1862, 32 L.J. (Ex.) 34, *per* Willes J., at p. 40, 1 H. & C. 526). In *Huzzey* the master undoubtedly took the benefit of the wrong if any wrong was committed. The result of the decisions, although there were *dicta* to the contrary, was that fraud, which was a wilful act, could not be imputed to a master or principal like negligence. The liability of the master or principal arose not from imputed wrongdoing, but from the rule that no one is entitled to benefit by his agent's fraud. There was no case in which it had been held that the principal was liable in damages generally for his agent's fraud. In every case in which the principal had been found liable he had actually taken benefit by the fraud complained of. The liability was only as for innocent misrepresentation. See *Redgrave* v. *Hurd*,

1881, 20 Ch. D. 1, *per* Jessel, M.R., at p. 12. (6) There were here no relevant averments of benefit to the Bank resulting from the representations founded upon. It was not enough to say that money was paid into the bank in consequence of the representation, unless it was also averred that the account was immediately thereafter closed, and the amount paid in retained by the bank—*Clydesdale Bank, Limited* v. *Paton, cit.*

At advising—

In the action at the instance of J. A. Salton & Company—

LORD JUSTICE-CLERK—In the case of Salton two letters were written by two banking companies in September 1896 to Wishaw, the one addressed to the "Manager of the Clydesdale Bank," the other to "Clydesdale Bank, Limited." The letters asked for information as to the trustworthiness of a Mr John Agnew for £5000. To these letters Mr Thomson, the Clydesdale Bank agent, replied, stating that he considered Mr Agnew good for the amount. The pursuers Messrs Salton & Company aver that on the strength of these letters, which were communicated to them, they discounted some bills of Mr Agnew's at that time; that these were retired at maturity, but that in January 1897 they again, relying on these letters, discounted certain other bills for Agnew, which were dishonoured, and that they have lost thereby. They therefore sue the Clydesdale Bank for the amount lost by them.

In this case of Salton I do not consider it necessary to dispose of some of the pleas which are stated in defence, as it appears to me that the case may be disposed of on two very simple grounds. The first is that the communications by Thomson were not made to the pursuers, who were in no way disclosed in the correspondence. They were written in answer to confidential inquiries made by other parties, and indeed in both of the cases the inquiry in express words asks for a reply "in confidence." In the one case it is "your confidential opinion" that is asked for, and in the other "your opinion in confidence." It does not appear to me that the defenders can be held liable to Salton & Company for a representation made, not to them, but to some-one else.

But further, I am unable to hold that, assuming that the pursuers would be entitled to found upon representations made as they were in this case, they can found on representations made in September 1896 as entitling them to make a claim for loss in regard to transactions occurring in January 1897. Such a representation is necessarily from the very nature of it a representation for the immediate time only. A man may be in excellent credit at one date, and a month or two afterwards may be hopelessly insolvent. To make such a representation bind the person representing for several months ahead would be most unjust. His opinion is an opinion for the past and immediate present. It cannot be a guarantee binding on him that the person he speaks of will continue in the same financial position for such a period as is represented by the difference in dates here.

These grounds seem to me to be sufficient for the disposal of the case, the result being that in my opinion the judgment by which the defenders have been assoilzied is right and ought to be adhered to.

LORD YOUNG—I concur, and I do not think it necessary to add anything except to express my opinion generally in this single sentence, that I think there is no relevant case whatever for damages, no relevant ground of action whatever against the bank set forth in this record.

LORD TRAYNER—In this case the pursuers plead that the defenders are liable to them in loss and damage sustained through the false and fraudulent representations of the defenders, or those for whom they are responsible. The circumstances out of which this claim arises, and the pursuers' grounds of action are set forth on the record, and need not be repeated. I am of opinion with the Lord Ordinary that the pursuers have failed to aver a relevant case, and that for several reasons which I shall do little more than indicate.

1. The letter on which the false and fraudulent representations are said to have been made is written by a Mr Thomson, the agent in charge of the defenders' branch office at Wishaw; it is addressed, not to the pursuers, but to the Manager of the Manchester and Liverpool District Banking Company in London, and is a reply to an inquiry made by that Banking Company to be informed "in confidence" as to the means and standing of Mr Agnew, a gentleman who had a bank account at the defenders' Wishaw branch. I think the pursuers cannot found on anything contained in that letter, as the representations therein contained were not made to them. It is obvious that if the pursuers could found on that letter, so might any customer of the Manchester and Liverpool District Bank, to whom the Bank had communicated its contents, and there might very well be persons among them to whom (had they applied for information as to Mr Agnew's standing and credit) the writer of the letter might have declined to give any information at all. I take the law to be, as stated by Professor Bell, that "guarantees and letters of credit are limited to the persons to whom they are addressed, in whose discretion the writer is presumed to have peculiar confidence." If this were otherwise, such inquiries addressed by one bank to another, or by one merchant to another, would be impossible, and trade might then be largely hindered.

2. Any letter such as that on which the pursuers found (according to the sixth section of the Mercantile Law Amendment (Scotland) Act 1856) is of no effect unless subscribed by the person making the representation, or some person duly authorised by him. The letter is not subscribed by the defenders, but by "W. B. Thomson." It is not averred that Mr Thomson was authorised to subscribe the letter in ques-

tion on behalf of the defenders. There being no such averment on record, it is unnecessary to consider the question raised in the course of the argument before us, whether such authority, if averred, could be proved by parole, or only by writ. Nor is it necessary to decide whether the granting of such a letter as that founded on was within the scope of Mr Thomson's authority as the defenders' agent. It is not averred that it was. The letter founded on, therefore, not being subscribed by the defenders, nor said to be signed with their authority, affords no relevant ground of action against the defenders; it is of "no effect."

3. It was said that the defenders were liable for the representation made by Mr Thomson, because the defenders had profited by them. Here again I think there is no relevant statement. What is said on this subject is too vague and general to be submitted to probation. On this point reference may be made to the decision in the House of Lords in *Paton's* case.

4. Even had the pursuers' averments been more relevant than they are in regard to the several matters I have already alluded to, I should have hesitated to hold that a relevant case had been made against the defenders. The letter founded on was written on 24th September 1896. The pursuers aver that in reliance on it they discounted bills in the same month which were duly retired. But in December 1896 and January 1897 they again discounted bills for Mr Agnew which were dishonoured, and for the amount of which the defenders are now sought to be made liable. These last-mentioned discounts are also said to have been made in reliance upon the representations contained in the letter of 24th September 1896. I doubt if this is correct, and am inclined to believe that the second discounts were made because the first discounted bills had been duly retired. But assuming, as at present I am bound to do, the truth of the pursuers' averments, I do not think that they present relevant grounds of action against the defenders. Representations of a trader's credit can only be held (unless otherwise expressed) to refer to the trader's credit at the time the representations are made. A perfectly solvent man in September may be insolvent by the December or January following, and in my opinion it is not a relevant ground of action for such a claim as the present, to aver that by acting on certain representations as to a trader's credit some months after the representations were made, a loss was incurred or damage sustained.

I think the Lord Ordinary's interlocutor ought to be affirmed.

LORD MONCREIFF—It seems sufficient for the decision of this case (1) that the names of the pursuers were not disclosed as the persons who desired to obtain information from the Bank in regard to the financial position of John Agnew—1 Bell's Comm. 392; and (2) that the representation was given by the Bank's manager in September 1896, whereas the advances made on the faith of it which have not been repaid were not made until December of that year. On these grounds I think the defenders should be assoilzied.

In the case at the instance of Oliver Hockey—

LORD TRAYNER—This case is different in some respects from the case of *Salton* which has just been decided.

The pursuer founds his claim against the defenders upon false representations made by Mr Thomson, the defenders' agent at their Wishaw branch, in two letters written by him in answer to letters sent to him, one by Mr Chapman, the pursuer's solicitor, and the other by the Union Bank of London. So far as the latter is concerned, I think, for the reasons given by me in *Salton's* case, that the pursuer cannot found upon it. With regard to the other, I think he may, for Mr Chapman, in making his inquiry at Mr Thomson, expressly stated that he was doing so on behalf of the pursuer and for the purpose of satisfying him as to the position of Mr Agnew. To all intents the inquiry was the inquiry of the pursuer, and the reply, although addressed to Mr Chapman, was a reply to the pursuer.

But taking this letter as one addressed to the pursuer is not enough for the pursuer's case. The important question remains, Is it the letter of the defenders or the letter of Mr Thomson. It is certainly not subscribed by the defenders, and it will not bind them unless Mr Thomson was duly authorised by them to subscribe it. At this point there arises another difference between this case and Salton's, for in the present case it is averred that Mr Thomson in writing the letter in question was acting "within his powers," and that "it is customary for the agent" to write such letters "on behalf of the bank by which he is employed." Now, I think this averment of custom is not to the point. It may be customary (I shall assume that it is) for one bank to answer another's inquiries as to the financial position of one of its customers, or even to answer such an inquiry made by a trader who has been referred to the bank by its customer. But the custom can only authorise a truthful answer to the inquiry, and not such an answer as will involve practically a guarantee. Further, the averment that Mr Thomson was acting "within his powers" is, in my opinion, irrelevant because vague and wanting in specification. If Mr Thomson was acting upon an authority or powers specially conferred on him, that should have been stated. On the other hand, if Mr Thomson had no power other than is implied in his position as agent at a branch of the Bank, I think he was not acting within his powers. An agent for a bank has no implied authority to bind his principal by granting guarantees or making such representations and assurances as amount to guarantee and involve liability. The scope of a bank agent's authority in such a matter as that before us is well stated by Bramwell, B., in the case of *Swift* v. *Jewsbury*, and I adopt what that learned Judge said without repeating it. I am therefore of opinion

that the letter founded on must be taken to be the letter of the writer and not of the defenders, and that therefore there is no relevant averment of liability on the part of the defenders.

I cannot go the length of saying with the Lord Ordinary that the case of *Barwick* has been to any extent overruled by the case of *Addie*, and it is difficult to say so when the opinion of Lord Selborne in *Houldsworth's* case is kept in view. But it does not appear to me to be at all necessary to dispute the principle on which *Barwick's* case was decided. That principle is, that a master or principal is responsible for the acts of his servant or agent "committed in the course of his service and for his master's benefit." That I take to mean that the act shall have been committed in the course of the service for which the servant was engaged—in other words, within the scope of his delegated authority. There is no room for dispute about the principle. There may be great room for dispute as to the extent of the authority expressed or implied, and as to whether the act committed was within it. But while I admit the principle on which *Barwick's* case was decided, I also think it sound to say that a master is not bound by the wrongful and unauthorised act of his servant unless he has taken benefit thereby, and only to the extent to which he has benefited. This was the view of Lord Cranworth in *Addie's* case. Holding that view of the law, I agree with the Lord Ordinary in thinking that there is here no relevant averment of the defenders being benefited by Thomson's act. A decidedly fuller and more precise averment of benefit than we have here was held irrelevant in the case of *Paton*.

On the whole, I am of opinion that the judgment of the Lord Ordinary should be affirmed.

Lord Young—What I said in the case of Salton may be taken as applicable to this case also. I think there is no relevant case whatever stated against the Bank. The Clydesdale Bank, Limited, is a banking company with a registered contract of partnership, and I do not think such a letter as this, answering a question as to the opinion of an officer of the Bank—because it can never be any more—as to whether a particular individual is in good circumstances, and fit for the inquirer to advance money to, I do not think that is banking at all. And if at a meeting of the directors of the Bank they had granted authority to this or any other agent to answer such questions, I think that would not have been banking, and would have had no effect on shareholders whatever. The opinion which I have expressed involves a dissent from the view that whether this is banking may depend upon proof as to custom. I do not think so. I think we are in a position to say that is not banking, and that it would not be a proper course to send the question, whether it was banking or not, to a jury or to an individual judge to decide upon the evidence as to the practice of banks in individual cases. I take it for granted that it is not at all uncommon for bank agents to be applied to by their friends or by any other bank agents as to what they think of so and so, and to give a confidential answer, just as I take it for granted that it is not uncommon for a partner of a company or a managing clerk of a company to be approached by a friend, a managing clerk of another company or a partner of another company, who asks, "You have had dealings with so and so; what do you think of him?" But I do not think that is company's business, or that if a managing clerk or a partner answered such a question, that would be within the scope of the company's business, so that the partnership would be bound by it. I intended to express all that generally in the sentence which I used in my opinion in Salton's case, that there is no relevant case whatever stated by the pursuer on record against the Bank.

Lord Moncreiff—The case of Hockey is in a different position from that of Salton. The claim of the pursuer is not open to the objections which I think should be sustained in the case of Salton. The name of the pursuer was disclosed at the time; and the representation as to Mr Agnew's credit which was given on 1st December 1896 was acted on at once, the bills accepted by Agnew having been discounted immediately thereafter.

This action is directed not only against the Clydesdale Bank, but against their manager at Wishaw, Mr William Thomson. The case must go to trial, at anyrate against Thomson; and the course which I should have preferred, looking to the difficulty of the questions raised in regard to the Bank's liability, would have been to send it to trial also as against the Bank, but before answer and without deciding as to relevancy.

Your Lordships, however, have decided to dismiss the action as against the Bank on the ground of irrelevancy. With all deference, I am of opinion that the pursuer has stated a case for inquiry. He makes sufficiently specific averments as to the custom of banks to give information as to the credit of their customers, and its existence with a qualification is frankly admitted by the defenders (Cond. 8 and Answer.) The extent and effect of that custom cannot, I think, be satisfactorily determined without proof, and I am certainly not prepared to decide in the absence of proof that such a custom as is alleged by the pursuer is inconsistent with banking business, or that the abuse of it will not involve liability on the part of a bank where, acting upon it, their manager makes representations (not for his own purposes but for the benefit of the Bank) which are false and fraudulent, and result in loss to the person deceived.

Assuming that the information as to a customer's credit is given by an official who is authorised to bind the bank while acting within the scope and in the course of his employment, and for the bank's benefit, I do not see why the ordinary rule of law

by which a principal is liable for his agent's fraud should not apply. If the custom is abused for the purpose of deceiving the inquirer and benefiting the bank, the fact that the information is given *ex gratia* is immaterial.

The Lord Ordinary's judgment is rested on two grounds—first, that the letters complained of were not written by the defender Thomson as representing the Bank, but were individual communications expressing his personal opinion; and secondly, that the pursuer has made no relevant averment of benefit taken by the Bank.

(1) In regard to the first point, I do not so read the pursuer's statements, and the letters upon which he founds. Assuming that the Bank could be bound by a communication of the kind, I am prepared to hold that the letters written by Thomson, when read in connection with those addressed to him, express not merely his individual view as to Agnew's solvency, but the Clydesdale Bank's reply to the inquiry. The Lord Ordinary refers to the case of *Swift* v. *Jewsbury*, L.R., 9 Q.B. 301, and adopts the reasoning of Lord Coleridge and Lord Bramwell in that case. I confess that I am not convinced by the opinions to which the Lord Ordinary refers, and for myself I prefer the view of Chief-Justice Cockburn, who tried the case, and Justice Quain, who concurred with him, in subsequently discharging the rule for a new trial. See L.R., 8 Q.B., pp. 244-251. I would only add on this point that in two well-known cases—those of *Barwick* and *Mackay*—the bank was held liable in respect of representations made by their manager at his own hand.

(2) On the second point noted by the Lord Ordinary, I am of opinion that if it were necessary to aver that benefit actually accrued to the Bank, the pursuer's averments are not sufficiently specific. But I am also of opinion that in order to render a principal liable for the fraud of his agent it is not necessary to aver or prove that the fraud resulted in benefit to the principal, and that it makes no difference that the principal is a corporation and not an individual. It is sufficient if the fraud was committed by the agent within the scope and in the course of his employment, and with the view of benefiting the principal. This is in accordance with the principles on which the case of *Barwick* was decided (L.R., 2 Excheq. 265, *per* Willes, J.)—"But with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved."

In such cases as those which Willes, J., gives as analogous illustrations, it would be no answer to a claim of damages to say that the principal derived no benefit from his agent's wrongdoing; and if fraud is in *pari casu* with other fault, the same rule must apply. I read the case of *Barwick* as deciding, first, that where the principal is an individual, he is equally liable for fraud as for any other wrong committed by his agent; and secondly, that in this matter there is no distinction between an individual and a corporation. The Lord Ordinary holds that on this point the case of *Barwick* was overruled by *Addie* v. *Western Bank*, 5 Macph. (H. of L.) 80, and L.R. 1, H.L., Sc. 145. I am not of the same opinion. The opinion of Willes, J., in the case of *Barwick*, has, I think, always been regarded as good law, particularly in *Mackay* v. *Commercial Bank of New Brunswick*, L.R., 5 P.C. 394; and *Houldsworth* v. *The City of Glasgow Bank*, 7 R. (H. of L.) 53, at pp. 57 and 58, and pp. 65 and 66. On the other hand, the *dicta* of Lord Chelmsford and Lord Cranworth in *Addie's* case, which, taken in their widest sense, were not necessary for the decision of that case, have in subsequent cases been considered as confined to the subject-matter of the case, and although they contain expressions which seem to indicate that they were intended to be of general application, they certainly have not been subsequently applied in their full breadth. There the pursuer was held to have made his claim too late. Not only had the constitution of the company with which he originally contracted been altered from that of an unincorporated to that of an incorporated company, but the incorporated company was in liquidation. The question therefore was, whether the pursuer, being still bound as a member of the incorporated company, and not entitled to rescind the contract and obtain restitution, could recover damages from the company through which he was originally induced to take shares. It was held that his position as still a member of the company presented an insuperable obstacle to his doing so. But I do not think that the observations of the noble and learned Lords have as yet been held to apply to a case where a third party, having no subsisting contract relation with a company, has been defrauded through the representations of its agent acting with its authority and for its benefit. I so understand the explanations of the *dicta* in question which are given by Lord Selborne and Lord Blackburn in the course of their opinions in *Houldsworth*.

On the whole matter I think the case should go to proof against both defenders.

LORD JUSTICE-CLERK—I concur with Lord Trayner.

In both cases the Court adhered.

Counsel for the Pursuers J. A. Salton & Company—Balfour, Q.C.—Salvesen. Agents—Gill & Pringle, W.S.

Counsel for the Pursuer Hockey—W. Thomson. Agents—Sturrock & Sturrock, S.S.C.

Counsel for the Defenders the Clydesdale Bank, Limited—Ure, Q.C.—King. Agents—Ronald & Ritchie, S.S.C.