SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SMITH, Esq. and others—*Appellants.*
GOVERNOR and COMPANY of the Bank of Scotland. } *Respondents*

June 9, 1813.

FRAUD.—STATUTORY SOLEMNITIES IN EXECUTION OF A BOND OF CAUTION.

APPELLANTS bound to Bank of Scotland in a cautionry bond for one of their agents who fails. Action to reduce the bond on two grounds chiefly. 1st, Fraud or undue concealment on part of the Bank, to prove which various material circumstances offered in evidence, but proof not allowed by Court below. 2d, Bond not in point of fact executed according to statutory solemnities, (though perfect on face of it.) 1st, In witnesses not having seen parties sign. 2d, In the parties having at first signed only on last page, (the bond consisting of a single sheet, in two leaves, book ways.) No decision by Court below on the point of formality. Cause remitted with instructions to the Court of Session, to decide whether (under acts 1681, c. 5. and 1696, c. 15.) the bond was valid notwithstanding the alleged defects in its execution; and if it was, then to permit Appellants to go into evidence on question of fraud.

Appellants bound in bond of caution to the Bank of Scotland, for one of their agents. Agent fails. Suspension and reduction.

THE Appellants had bound themselves in a bond of cautionry to the Bank of Scotland, for one Paterson, the Bank agent at Thurso. Paterson having mismanaged the affairs of the Bank, and become bankrupt, the Respondents proceeded to enforce the bond. The Appellants resisted payment, presented a bill of suspension against a threatened charge, and raised an action of reduction of the bond. In both questions the Court of Session pronounced against the Cautioners, (Appellants,) who thereupon lodged their appeals.

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Grounds on which Appellants relied for setting aside the bond.

The grounds in law on which the Appellants relied for setting aside the deed were these:—

1st, The deed was defective in the solemnities required by the act 1681, c. 5.

2d, It was informal under the act 1696, c. 15, which first allowed that deeds should be written book-ways.

3d, The bond was never properly delivered.

4th, It was obtained by concealment and fraud. Besides direct fraud by Paterson, there was at least such constructive fraud on the part of the Respondents as to debar them in law or in equity from taking advantage of the instrument.

Nature of alleged fraud, and circumstances offered in proof of it.

The fraud or undue concealment alleged by the Appellants consisted in this, that at the time the Bank Company took the bond in question, they were aware of, or had strong reason to suspect, the misconduct and insolvency of Paterson. The circumstances which the Appellants offered to prove, (but of which the proof was rejected by the Court below), in order to make out this proposition were chiefly these:—

1st, That an officer of the Bank having been suddenly sent to Thurso, in September 1803, for the purpose of inspecting the Bank transactions, was for four days baffled in his attempts to be permitted to examine Mr. Paterson's accounts, during which time Paterson was borrowing money, &c. &c. in order to make a show of regularity, and that in point of fact, a suspicion of the truth was at that time conveyed to the Bank. The Respondents were called upon in the Court below, to produce a

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report which was transmitted to them on that occasion by their officer, but they refused.

2d, The reason alleged by the Bank for their requiring additional security was, the *increase* of their business at Thurso; the Appellants offered to prove that their business had *decreased* there, and was decreasing, and that this must have been known to the Bank.

3d, The extreme and unusual anxiety to have the bond executed with dispatch, which appeared in the Bank Secretary's letters, and the surprise expressed among their people that Paterson had procured cautioners, one of them having said that he would as soon have expected that Paris should be transported to Edinburgh.

Bond not properly executed.

In regard to the non-delivery, the bond was at first sent to the Bank in June 1804, but was returned again to Paterson, to get it properly executed; so that this (according to the Appellants) was no delivery. The letter in which the bond was last sent to the Bank was of 11th July 1804, but the Appellants offered to prove that it was not actually dispatched till after Paterson had been suspended from his office on the 13th, when the whole transaction must be considered as stopped, and never finally concluded, so that no proper legal delivery could have taken place, and the instrument was, consequently, by the law of Scotland, a nullity.

Circumstances which constituted the informality.

The bond was alleged to be informally executed in two respects. At the first execution it was signed by the parties only on the last page, whereas (as the Appellants alleged) it ought to have been

also signed on the three first, (the bond being a single sheet, in two leaves, book-ways.) Then at both the first and second execution, none of the parties subscribed in the presence of more than one witness, and some of them subscribed without any witness at all present. The testing clause was likewise incorrect, both as to the times when, and places where, some of the parties subscribed.

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By the act 1681, c. 5. it is enacted "That no wit-
"ness shall subscribe as witness to any party's sub-
"scription, unless he then knew that party and
"saw him subscribe, or saw, or heard him give
"warrand to a nottar, or nottars, to subscribe for
"him, and in evidence thereof touch the nottar's
"pen, or that the party did, at the same time of
"the witnesses subscribing, acknowledge his sub-
"scription." And the act concludes in these words:
"And that in all the said cases the witnesses be de-
"signed in the body of the writ, &c. &c. other-
"wise the same shall be null and void, &c."

Brief statement of the law, as applicable to the case on the part of the Appellants. Acts of 1681, cap. 5, and 1696, cap. 15.

The act 1696, cap. 15, declares, "That it shall
"be free hereafter, for any person who hath any
"contract, decreet, disposition, or other security
"above-mentioned to write, to choose whether he
"will have the same written in sheets battered to-
"gether, as formerly, or to have them written by
"way of book, in leaves of paper, either in folio or
"quarto: providing, that if they be written book-
"ways, every *page* be marked by the number, first,
"second, &c., *and signed as the margins were be-*
"*fore*, and that the end of the last page make
"mention how many pages are therein contained,
"in which page only witnesses are to sign, in writs

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"and securities where witnesses are required by "law, and which writs and securities being written "book-ways, marked and signed as said is, his Ma- "jesty with consent founded, declares to be as valid "and formal as if they were written on several "sheets battered together, and signed on the mar- "gin, according to the present custom."

Erskine's Institutes, book 3, tit. 2, sect. 14.

At the time when the Act 1681, cap. 5, was passed, "Where any security was to be executed, "consisting of several sheets of paper, the sheets "were pasted together by the ends, and the grantor "signed on all the joinings." And though this custom of signing at the joinings had received no confirmation from statute, yet the supreme Court thought themselves at liberty to repel the objection, that the grantor had not signed at the joinings, only where all the obligations on the grantor's part were contained in the last sheet, that sheet being signed by him. And the act 1696, clearly recognized this marginal signing as adopted by use into the law. The act 1681, therefore, in enacting that the witness must see the party subscribe, or that the party must, *at the time of the witnesses subscribing*, acknowledge his subscription, must be held to apply equally to the signature of the party on the margin, at the joining of the sheets, wherever by the practice at that time such signature was necessary, as to the signing at the foot of the deed. By the act 1696, the signing each page of a deed written book-ways was substituted for signing the margins as before. But the statutory requisites under the act 1681 remained in full force, applicable in every circumstance to the deed written book-ways, as they

Forbes. Nov. 23, 1708. Sym v. Donaldson.

were formerly to the corresponding circumstances in the deed written on sheets battered together. If therefore by the act 1681, it was necessary that the subscribing witnesses should witness the marginal subscription of the deed then in use; it was now equally necessary that they should witness the paginal subscription of a deed written book-ways. In the present case, in point of fact, the subscription of all the parties to the last page was not witnessed by two witnesses, and that of none of the Appellants to the preceding pages was so witnessed.

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The instrument in question was therefore (the Appellants contended) null on two grounds, independant of the inaccuracy of the testamentary clause. First, The signature of the grantors to the first, second, and third pages, were not duly witnessed by the witnesses subscribing. Secondly, If it should even be held, that this was not necessary under the statute, yet this instrument would still be void, inasmuch as the subscription of all the parties to the *last page* was not duly witnessed by the subscribing witnesses.

It was clearly established by decisions, (they said,) that witnesses not seeing a party subscribe was fatal to a bond.

Home, Nov. 1682. Stevenson v. Stevenson. Fount. 12th Feb. 1684. Blair v. Peddie.

The Respondents, besides denying the equity of the Appellants' case, maintained that the acknowledgement of their subscriptions by the parties was sufficient; that the subscription upon all pages of a single sheet was not necessary *de solemnitate;* that the bond was therefore properly executed and delivered at first, and they relied on *Williamson v. Williamson*, December 21, 1742, (and cases there stated).

Grounds of defence on part of Respondents.

Kilk. v. Writ, No. 9.

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Fac. Coll. May 22, 1790.

The Appellants on the other hand, to show that the acknowledgement of subscription by parties was not sufficient to supply the want of statutory requisites, relied on the the case of *M'Farlane v. Grieve*, with *Edmonston v. Lang*, and cases there cited. The bond, in stating the liability of the Appellants, purported to be "*in supplement* of the first "bond, and included transactions which had been "made by Paterson during the time he acted as "agent." The Appellants however contended, that from the nature of the instrument which was a bond of credit, they were at all events only liable for losses sustained subsequent to the *date* of the bond; while the Respondents insisted that the instrument covered *past* as well as *future* transactions.

Sir S. Romilly and *Mr. Brougham* (for the Appellants.) If the the facts offered in evidence on the question of undue concealment were made out in proof, the principle by the law of England and also by that of Scotland was clear. A case of this kind had lately come before the Court of Chancery.

Fishmongers' Company v. Maltby.

One Maltby had been clerk to the Fishmongers' Company; several of his sureties had died, and he had not been asked to renew them. At length the Company were dissatisfied with his conduct, and directed an inquiry into the state of his accounts, and found that he was indebted to them in a very considerable sum. Before settling accounts with him, however, they required new sureties in place of those who had died, and a bond was executed accordingly; immediately after which Maltby was removed. A bill was filed by the sureties to pre-

vent the enforcing of the bond, and the bill was retained, though liberty was given to sue upon it at law; it being apprehended by the Court that the nature of the defence was such as might be pleaded at law. He had heard nothing further of that case, but concluded that the Fishmongers' Company had thought proper to acquiesce in the opinion intimated by the Chancellor on that occasion, and had refrained from attempting to enforce the bond. This therefore, though it could not be called a decided case, was an opinion intimated by the Court after, in effect, a full hearing, and acquiesced in by the parties. The present case was exactly similar to that of the Fishmongers' Company and Maltby. They ought therefore to be permitted to go into evidence of those facts which they had offered to substantiate.

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But there was an objection also in point of form, and if ever there was a case in which it was proper to take such an objection, it was this: the bond was null and void from the want of the formalities in the execution required by the statutes 1696, cap. 15, and 1681, cap. 5. *(vide ante.)*—But then it was said, that the parties had *admitted* that they had signed the bond, and that therefore the spirit of the act had been complied with; since, where there was a distinct admission, there could be no danger of fraud. This was no answer; the statutes required the proper formalities *de solemnitate*, and unless they were complied with no subsequent admission would cure the defect. Suppose a will of real property executed in the presence of two witnesses, the devisee might say that the spirit of the statute frauds

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was complied with, as two witnesses were sufficient to guard against fraud. Still the heir-at-law would have a right to insist that this was no will, as it was not executed with the prescribed formalities. It would be dangerous, where the law prescribed a special solemnity, to decide, that a compliance with what might be conceived to be the spirit was sufficient. In a deed made up book-ways, the only way to prevent fraud was to have each page signed, and the number mentioned in the last page. But they said there was no danger of fraud where the number was mentioned on the last page, though the rest were not signed. There unquestionably was great danger of fraud. Suppose two sheets put up in four leaves, each written on one side, it might be signed and the number of pages mentioned on the last page; the middle sheet might be taken out and another put in containing matter totally different, and yet the number of pages would exactly correspond with that mentioned on the last page. This was stated *ex abundanti*, for it was enough that the formalities were required by the statutes. The Respondents said it was enough that the spirit of the statute was complied with; and they relied upon the case of *Williamson v. Williamson*, reported by Lord Kilkerran. But there the deed was *holograph*, or wholly written by the grantor; which by the law of Scotland was one of what were called *privileged* deeds, and exempted from the operation of the statutes; and, as to the note of Lord Kilkerran affixed to that case, it was a mere *dictum* of his own, and not material to the question then decided. This argument, if good for any thing, would go the length

21st Dec. 1742. Kilkerran v. Writ.

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of setting aside the necessity of attesting witnesses altogether, which no one ever contended for. To allow the mere fact of admission, to take the case out of the statutes, would be to offer a premium to dishonesty: 1st, then, they submitted, That the circumstances which they offered to prove were material, and if proved, would have formed sufficient ground to reduce the bond on the score of constructive fraud; and that the rejection of this evidence by the Court below called for their Lordships' interference. 2dly, That the bond was never properly executed; and 3dly, That it had never been properly delivered.

Mr. Adam and *Mr. Horner* (for the Respondents.) This was a case of great importance, since it was highly requisite on the one hand that the meaning of the statutes as to the execution of bonds should be finally settled, and that on the other hand persons should not be permitted to take advantage of a mere matter of form, to avoid instruments completely admitted by themselves to have been executed. The facts which had been stated as to the merits of the case did not appear in evidence, for the Court below did not permit the proof, as the principle seemed perfectly clear, and the instrument executed in a manner so perfect, as not to be affected by any facts relative to the conduct of the parties. They had been inserted only for the purpose of founding the objection of form, which was the main point.

The first objection in point of form was under the statute of 1696, cap. 15, that each page of the bond, which was made up book-ways, had not been

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signed by the parties; and the second was under the statute of 1681, cap. 5, that the individuals attesting the signatures were not present at the signing by some of the parties, nor heard them acknowledge their signatures. While these objections were under examination, their Lordships would bear in mind that the signatures were in fact admitted by the parties themselves, and that this was not a case as between third parties, so that cases of that description were out of the question.

In regard to the act of 1696, their Lordships, on examining the bearings of that statute, would find that the object of it was to provide a security for the due execution of bonds not pasted together, as the several sheets were when deeds were put up in the shape of rolls, but only fixed together with threads as they generally where when several sheets were joined together book-ways. The design of the statute was, to take care that the parts which were so detached should be so authenticated as to prevent the fraud that might otherwise arise, by the subtraction of one sheet, and the substitution of another which the grantor might never have seen. But there was no neccssity whatever for this precaution of signing on every page, where there was only one sheet as in the present instance. Suppose a sheet of paper in the form of two leaves written on one side, and then the back of it turned and partly written, it would be sufficient to prevent fraud to execute it on the back, and no mischief could in such a case result from not signing it on each page. This was exactly the present case, to which therefore the statute did not apply. In the first practice of con-

veyancing, deeds were made up in the form of rolls, the separate sheets battered (pasted) together, and the law for the purpose of preventing fraud, required that they should be signed at the joinings in order to connect the several parts. By the statute of 1696, it was allowed to write deeds book-ways in folio or quarto; and it was provided, that deeds so written, if the pages were numbered and signed, should be as valid and formal as if written in the old way. The statute did not say that such deed should be null and void unless signed on every page, but that if signed on every page they should have the same effect as if written in the old way. The act was only directory, not mandatory. But what they chiefly relied upon was, that the bond in question was not written book-ways at all, as it consisted only of one sheet, which from the first was signed. It was not within the scope of the danger to be guarded against; and therefore the statute did not bear upon it. Here the case of *Williamson v. Williamson*, reported by Lord Kilkerran in his dictionary under the word *writ*, was material. It was true, the instrument was in that case *holograph* of the grantor; but this was not the sole ground of the decision. There was no exemption in the statute, in regard to holograph instruments. One ground of the decision appeared to be, that the signing on each page was not necessary *de solemnitate*, where the instrument was written on one sheet. The case of *Robertson v.* ————, to the same effect, was also noticed by Lord Kilkerran, in a note under the word *writ* in his dictionary. It was also reported by Lord Elchies, some of whose manu-

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Clerk Home. 261.

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scripts had been lately presented to the faculty of advocates by Sir James Montgomery, and which were found to be so valuable that they were now printed. This case was decided on the 19th January, 1742, a month or two previous to that of *Williamson v. Williamson*, and had been considered in the decision of the latter case. It must therefore be taken as distinctly decided, that the statute did not extend to writings on a single sheet. The case of *Macdonald v. Macdonald*, decided in February 1778, reported in the Faculty Collection was determined on the ground of *Robertson v.* ——.

Macdonald v. Macdonald. Fac. Coll. Feb. 1778. Dict. 16956.

The bond here was therefore perfect upon its first execution, and had been delivered as such; and the mistake of the officer in sending it back again ought not to prejudice that delivery. Some of the grantors themselves, it was to be observed, had transactions with Paterson, as agent for the bank, subsequent to the date of the bond.

The other objection in point of form was founded on the act of 1681, cap. 5. The act set out with an acknowledgement of the principle, that instruments properly executed "were probative of them-"selves," like instruments in England of a certain age. It was important that this principle of the law of Scotland should not be disturbed. The present bond was perfect and probative of itself. But then it was said, that the attesting witnesses had not, in fact, seen all the parties sign or acknowledge their subscriptions in terms of the act; as the bond however was probative of itself, they ought not to be allowed to give evidence of that fact. The cases of *Edmonston v. Lang*, and *M'Farlane v. Grieve*,

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mentioned on the other side were not applicable. In both these cases the instruments were imperfect on the face of them: in the one case there was a defect in the point of subscribing witnesses, in the other the writer had not been designed. But the bond here was *ex facie* perfect, and not to be impugned by evidence *dehors*. Independant of that, however, upon looking at the act it would be found that a very different effect was given to the want of designation of the writer and witnesses, from what was given to the false attestation of witnesses, as to their seeing the party subscribe or acknowledge his subscription. In the former case the bond was declared to be null and void; in the latter case, the witness was to be punished as accessary to forgery, but there was no declaration of the nullity of the bond. Even if it were proved, therefore, that the subscribing witnesses did not see the parties sign or acknowledge their signatures, there was no statutory nullity. The witness was liable to punishment as an accessary to forgery; but the instrument being perfect on the face of it was conclusive against the grantor. He ought not to be allowed to take advantage of his own fraud or negligence, to avoid his own deed. Their Lordships would shake the security of all property, if they permitted deeds perfect *ex facie* to be questioned on such grounds.

In regard to the proceedings of the Bank in this transaction, there was no evidence of bad faith on their part. The circumstance of their taking no steps in the business so long after their agent, Mr. Marshall, had inspected Paterson's accounts, was itself a proof that they were not aware of his miscon-

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duct; and their demand of additional security was accounted for by the increasing business. The Bank, however, had been charged with unconscientiousness and want of faith in these transactions; and, in order to make something of this, the case of the Fishmongers' Company and Maltby had been relied on. But it was not known what had become of that case, which had been sent to be tried at law. Sir S. Romilly, with all his knowledge of equity, had been able to produce nothing better than this fragment of an abortive case in favour of his argument, relative to the equitable relief which he conceived due to the Appellants. Three circumstances had been alleged as importing fraud on the part of the Respondent: 1st, The sudden appearance of the inspector at Thurso; 2dly, The refusal of the Bank to produce the report of their agent on the state of Faterson's account; 3dly, The anxiety of the Bank officer to get the bond executed for the additional security. But this sort of occasional inspection was not extraordinary; it was in the common course of the Bank's proceedings. Mr. Marshall had visited Thurso in September 1803; but if any fraud on the part of Paterson had been discovered, it was strange that the Bank should have rested satisfied for ten months without evincing the least suspicion on that head. From the increasing state of business, they found it necessary to require more security from all their agents, and from Paterson among the rest. But they allowed him time to provide this additional security, and acted in every respect as if they had the most complete confidence in him. As to producing the report, the Appellants had no right to

have it. They had no claim to be allowed to fish for evidence from the private transactions of the Bank.

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Lord Redesdale. Supposing the report shewed that Paterson was no longer trust-worthy, and the Bank had trusted him notwithstanding, upon decided cases the prior security would be discharged from all the consequences of subsequent transactions, as contrary to the faith of the contract. And then it might be a question what bearing this circumstance might have on the new sureties.

Adam The point which his Lordship had stated as decided *for In-* in England, was also settled by the law of Scotland; *other* but what they alleged was, that the Appellants had no right to scrutinize the Bank documents. It would have been very well here, where they might file a bill of discovery; but it was repugnant to the principles of the law of Scotland. The Appellants might have had the oath of the party if they had chosen to proceed in that way. As to the anxiety of the Bank agent, it was natural for him to wish to have the bond executed without delay, as he himself might have been liable to the Bank. The Appellants therefore had made out no *prima facie* case to entitle them to be allowed to give the circumstances in evidence; and it was therefore submitted that the interlocutors ought to be suffered to stand.

Sir S. Romilly (in reply) again insisted that even if the bond were properly executed, it had been obtained under such a suppression of facts as made it fraudulent, and therefore void. The Court, by the law of Scotland, ought, upon the least appearance of relevancy, to allow the proof. It was not al-

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leged that the Bank could be compelled to produce the report; but their refusal was evidence, that if produced it would have proved fraud. As to the allegation of their remaining satisfied so long after that report, they did not remain satisfied, for they endeavoured to get additional security; and they thought it their interest not to take any further steps in regard to Paterson, till he had procured that security. The Bank, no doubt, formed a most respectable body. Some of the Judges below were themselves directors; but when a body executed a kind of public trust, they were often led, even by a sense of duty, to act in a manner in which they would not have acted, if their own interests alone had been concerned. Paterson, like Maltby, was removed the moment the security was obtained. Maltby's case had been called an abortion; but it had been solemnly argued, and the grantees of the bond there were so well satisfied, that either law, or equity, or both were so much against them, that they had not further attempted to enforce their bond, and were losers to the amount of several thousand pounds. Another view of the case, suggested by one of their Lordships, (Redesdale,) was very important. If the Bank knew of the fraud of their agent, even the former sureties were discharged from all consequences of the transactions subsequent to their obtaining that knowledge, so that the new sureties could not get a contribution *pro tanto* from the former sureties. He had before stated the case too weakly for his client; for the Appellants, by the improper concealment of the Bank, had become sureties, not only for a debt incurred, but for a debt of which it was impossible

they could have known the extent. With respect to the other ground, the want of formality, the object of the Act of 1696 was not merely to prevent fraud by the insertion of leaves, but also to prevent the fraud that might arise from the insertion of additional lines. For this purpose, it was necessary before not only to sign every sheet in the roll, but to sign each at the joining; and with the same view, when deeds were made up book-ways, it was necessary they should be signed not only on every page, but at the bottom of every page. The signing of each page was therefore not only necessary *de solemnitate*, but also for the very object which the statute had directly in view; viz. the prevention of fraud. But then they said that this was not a bond written book-ways, because it was only a single sheet. He did not know whether that was the fact; the bond ought to have been produced. But supposing it to be so, the distinction was a very extraordinary one. There had been a question whether a song, written on a single sheet, was a book, and it was decided that it was. The real distinction was between paper, or parchment, made up in the manner of a roll, and in the manner of a book. That the present bond, whether consisting of one or many sheets, was written book-ways, and not in the manner of a roll, there could be no question. Then it was said, that the act was only directory, and did not declare the instrument void, although the formalities should be neglected. This was a distinction which he had never heard of before. When an act directed a thing to be done, he had always understood that it was necessary it should be

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done. Unless this was the effect, the act was wholly nugatory.

Then as to the Act of 1681, cap. 5, it was argued, that the clause relating to the subscription in the presence of witnesses, did not make the instrument void where this was neglected, but only rendered the attesting witnesses liable to punishment as accessary to forgery. In other words, the party forging was to be punished, but the forged instrument was valid! But there was another decisive answer; there was no occasion to say in direct terms that the instrument should be void, for it was so under the law as it stood before. The Act of 1540, cap. 117, required upon pain of nullity, that the deed should be executed in the presence of witnesses; the Act of 1681 only added to this the punishment of witnesses falsely attesting the due execution. It had been said, there was no exception in the act, even of *holograph* instruments. The answer to which was, that holograph writings were privileged, and that therefore the statute did not apply.

Judicial observations, and judgment.

Lord Eldon (Chancellor,) stated the form of the proceeding in the Court below, as above set forth, and then observed that the grounds of these proceedings by suspension and reduction were several; and among these *frauds* was one, though that expression appeared to be considered as rather too harsh, and it was sometimes called, a concealment of material circumstances. A difference of opinion appeared to have prevailed among the judges.

The points in question stated.

The 1st question was, whether the instrument had been well executed. 2d, Whether, if well exe-

cuted, it had been properly delivered. 3d, Whether, if the instrument could be impeached on neither of these grounds, the cautioners ought to be allowed a proof of certain facts and circumstances which if proved, they contended, would afford an equitable ground of relief.

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On the one hand, it had been argued, that under certain statutes of 1681 and 1696, the bond was void, because it had not been executed in proper form, and with proper solemnities, which by the enactments of these statutes were indispensable. On the other side it was contended, that as the instrument had been admitted by the parties to have been executed by them, there was no room for the objection for want of form. He had then expressed a wish to see the grounds upon which the Court below had decided; and he had since obtained some notes of the opinions of the judges, but they gave no light on this particular point.

Court below had not decided the question of formality under the statutes 1681, and 1696.

The Court below, however, had attended to the objection with respect to the delivery of the deed. They seemed to have considered it properly delivered, and he did not think there was sufficient ground to quarrel with their decision on that head.

Bond well delivered.

Another question was, whether the bond was to its amount to be considered as in its nature an instrument to indemnify the Bank against *past*, as well as *future* loss to them, from the transactions of Paterson as their agent. If such was the nature of the bond, it would be necessary to look with great attention at the circumstances, under which it had been given and taken.

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Question of fraud, or undue concealment.

If a principal, suspecting the fidelity of his agent, requires security in a way which holds him out as a trust-worthy person, the cautioner not liable.

The next question related to the materiality and effect of the circumstances, offered to be given in evidence in regard to this bond. If an agent had been guilty of embezzlement, or other improper conduct unknown to his employer, the cautioner would be liable. But if a man found that his agent had betrayed his trust, that he owed him a sum of money, or that it was likely he was in his debt; if under such circumstances, he required sureties for his fidelity, holding him out as a trust-worthy person, knowing, or having ground to believe, that he was not so; then it was agreeable to the doctrines of equity, at least in England, that no one should be permitted to take advantage of such conduct, even with a view to security against future transactions of the agent. The cautioners here said, that they were taught by the Bank to believe that Paterson was a good man, when the Bank knew, or had reason to believe, that he was not so, and they offered to prove, that the Bank did, at the time of requiring this additional security, know of Paterson's misconduct, or had good reason to believe that he had misconducted himself. Now he understood the Court of Session to say, that though they proved all this they proved nothing.

The letter, they alleged, requiring additional security, was written in December, 1803. Marshall, one of the Bank inspectors, had been at Thurso in the September preceding, and they said, that he had to wait four days before Paterson would state his accounts, though he (Paterson) ought to have been prepared to do so at a moment's warning. Marshall had, as they alleged, made a report at the

time to the Bank, and they called upon the Bank to produce that report. They had not the power in Scotland to compel a discovery, as in our Courts of Equity; but if it could be shown that Paterson had been guilty of such a gross breach of duty, as to baffle the Bank inspector for four days, till he could fabricate an account, and that the Bank was apprised of that circumstance, though the cautioners could not compel the production of the report, they might examine Marshall as a witness, and if he stated that he had made such discoveries to the Bank, in regard to Paterson and his affairs, as put the Bank *in mala fide* with respect to the cautioners, that would surely be very material evidence in the cause.

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Though the cautioners could not compel the production of the report, they might examine the inspector as a witness.

The reason alleged by the Bank for requiring the additional security was, that the business at Thurso had increased. Now the cautioners affirmed, that it had not increased, and that the ostensible ground on which the Bank demanded the additional security was contrary to the fact; and they offered to prove, that the state of the business was such, that 500*l.*, the amount of the former security, was fully sufficient to cover it. And they alleged, that the additional bond was, therefore, really intended as a security, not against future misconduct, but for the payment of a debt known by the Bank to have been previously incurred. And though the bond should be considered as having been given to protect the Bank, partly against past transactions, as well as future; yet, if the Bank applied it solely to the past, and immediately dismissed the agent, so as to prevent any possibility of its being applicable to the future, then that was a fact to be given in evidence

Views of the case in which the circumstances offered in evidence might, if established by proof, be material.

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in attempting to show that the real intent of the Bank was to procure security for the payment of a debt already known to them to exist, but concealed from the cautioners.

Much had been attempted to be made of the circumstance of the Bank sending Sim, another of their agents, by stealth, as it had been alleged, to Thurso. This was a circumstance to be looked after, though at present it did not appear to be very material. But if Sim had communicated any important information to the Bank on the subject, he might be examined as a witness.

Another fact was stated, viz. that when the same persons connected with the Bank heard that Paterson had provided the desired security, one of them exclaimed, that he would as soon have expected that Paris should come to Edinburgh, as that Paterson had got security. Why then, this was evidence to show that it was at least known to persons about the Bank, that Paterson's situation had been such, that no prudent man, if he had known it, would have become security for him; and this was a material circumstance for a Court of Equity to consider.

Fishmonger's company v. Maltby.

One case, similar to the present, had come before himself, (Maltby's case.) A clerk to the Fishmonger's company had incurred a considerable debt. The *deficit* had been increasing from year to year, and was at length carried beyond what the Company were likely to recover. They demanded additional security, which he procured. The case had come before him only upon motion, but he had thought a good deal upon it, and the light in which it appeared to him was this:—if he knew himself to be cheated by an agent, and concealing that fact,

Doctrine of equity as applied to Maltby's case.

applied for security in such a manner, and under such circumstances, as held him out to others as one whom he considered as a trust-worthy person, and any one, acting under the impression that the agent was so considered by his employer, had become bound for him; it appeared to him that he could not conscientiously hold that security. He was then of opinion that the Fishmongers' Company could not hold their security. He did not know what had become of the case afterwards, but he believed that his opinion was submitted to, and that no further proceedings were had. He had since considered the matter, and still retained his former opinion, and would act upon it judicially, if occasion offered. He therefore thought, that an opportunity ought to be afforded to these cautioners, to prove the facts which they alleged, and offered to substantiate by evidence.

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The cautioners ought to have an opportunity of proving the circumstances which they offered to substantiate.

Lord Redesdale. The material questions, as he with difficulty collected them from the confusion of the pleadings in the case, appeared to be these;—1st, The validity of the instrument in respect of execution and delivery. 2d, The construction of the instrument. 3d, The effect of the particular circumstances under which the bond was given and taken.

As to the execution of the bond, that point did not appear to have been at all considered by the Judges in the Court below. In regard to the question of delivery, there appeared to have been great difference of opinion among the judges, but that was not now of much consequence, as Paterson seemed to have

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acted as the agent of the Bank in the transaction, and delivery to him might be considered as delivery to the Bank; though that fact might possibly be material with a view to the third point.

As to the construction of the instrument, he thought it must be taken as extending to *past*, as well as *future* transactions.

As to the question of fraud, Lord Redesdale states a case, resembling the present, which had come before him in Ireland.

With respect to the third question, a case though not exactly similar to the present, yet bearing a considerable resemblance to it, had come before him in Ireland. A Banking Company at Dublin had trusted their clerk too far, and had not called him to account in the ordinary regular manner. He became indebted to them in a large sum, which he was unable to pay, and they called upon his sureties. When the case came before him, the sureties contended, that the Bank had not acted fairly by them, in not calling upon the clerk to account in the ordinary regular manner, which if they had done, the *deficit* would have been much smaller, and perhaps the misconduct would never have occurred. He remarked at that time, that the principal ought to call upon the agent to account in the ordinary regular course of business; and that it certainly was not acting altogether fairly by the surety, to be negligent in this respect. One of the partners of the Bank was in Court at the time, and was so strongly impressed with the view which had been taken of the case, that he acknowledged it was not dealing fairly by the surety, and so the matter ended, without any decision. He mentioned this merely to show, that the surety had a right to expect from

The surety has a right to

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expect from the principal that he shall not trust the agent beyond the ordinary bounds of prudence.

Circumstances under which the bond was given.

the principal, that there should be no negligence on his part; and that he should not trust the agent beyond the ordinary bounds of prudence.

If then Paterson was the agent of the Bank in taking the bond, it remained to consider the circumstances under which it was given, and certainly those stated by the Noble Lord (*Eldon*) were highly important and material. If a person had some doubts as to the circumstances of his agent, and therefore required fresh sureties, stating his doubts at the same time to these sureties, they would have no right then to complain, though called upon to pay to the amount of their engagement. But if he suggested no doubt, but, on the contrary, required additional security upon an alleged increase of business, solely concealing his doubts as to the misconduct of the agent, this was a species of proceeding which placed the person adopting it *in mala fide* in regard to the surety. If then it could be proved that the Bank knew that Paterson was not trustworthy, or had good reason to believe so, and did not inform the sureties of their knowledge or suspicions on that head, but required security upon a ground which could not lead the proposed sureties to suspect that any thing was wrong, and that ground too could be proved to have had no existence in fact, all these circumstances would unquestionably be material evidence; and he therefore concurred in the opinion expressed by the Noble Lord on the woolsack.

The judgment in the question of reduction (which

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in effect disposed of the question of suspension) was in the following form:

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The Lords find, that the deed in question, if not impeachable on other grounds, is to be considered as a delivered deed: and find, that the Appellants ought to be allowed to make proofs of the circumstances by them alleged as grounds for reducing the deed as unduly obtained by concealment or deception, if the deed is valid according to the statutes of 1681 and 1696; and it is therefore ordered and adjudged, that the cause be remitted back to the Court of Session, to re-consider the same as to the validity of the deed, as the same may be affected by the said statutes, having regard to the nature of the deed, and that the Court do proceed in re-considering the same as to them shall seem meet; and it is further ordered, that in case the said Court shall, upon such re-consideration, adjudge that the said deed is valid, if duly obtained, that the petitioners be allowed all proof of the circumstances by them alleged as affording grounds for reducing it, as unduly obtained as aforesaid; and it is further ordered, that with these findings and directions, the said Court do review the interlocutors complained of, and proceed upon such review as to the Court seem just.

Agent for Appellants, A. GRANT.

Agent for Respondents, CHALMER.