

[25th February, 1842.]

GEORGE NAPIER & Co. Brewers in Edinburgh, Appellants.

MRS BRUCE, at Portobello, Respondent.

Prin. and Surety.—Terms of bond by surety for an agent, held not to be such as to give the surety notice of, and make him liable for, intrusions with the moneys of the principal previous to the date of the agent's appointment.

ON the 18th February, 1836, George Napier, in behalf of Messrs Napier & Co. addressed the following letter to James Bruce:—“ Sir, Agreeably to my promise to-day, I now state
“ the terms upon which we are prepared to enter into an
“ arrangement with you for the sale of our ales in London.

“ 1st, We agree to furnish you with horses and drays,
“ counting-house, and cellars, and public books, all of which are
“ understood to belong to us.

“ 2d, The ale will be charged to you at the usual prices, viz.
“ 48s. 58s. 68s. and 78s. per barrel, and at such other price or
“ prices under the first as may be considered by us most suitable,
“ to correspond with those charged by the generality of the
“ brewers of Edinburgh.

“ 3d, You are to guarantee the whole debts; and, from the
“ above prices, we agree to allow twenty-five per cent in full of
“ commission, guarantee, five per cent discount to customers,
“ horses' keep, and all other charges whatever after the ale has
“ been put on board at Leith, with the exception of two barrels
“ per hundred, which are allowed for filling up in London; and

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“ which two barrels, or two per cent, is to be considered sufficient in all seasons for this purpose; but it is expressly understood, that the aforesaid twenty-five per cent does not extend to ale returned, or upon which an allowance (agreeably to article sixth) has been made, but you shall be entitled to charge the expenses incurred by you, which shall not exceed 4s. per barrel.

“ 4th, The credit to customers is understood to be twenty-eight days, and it is expected that the payments will be kept as nearly to this period as possible; but in order to give sufficient time for all debts to be collected, we agree to extend the period of credit to ten weeks, after which time we shall be at liberty to draw a bill on you at two months, for such sum or sums as may appear from the books to have exceeded the last-mentioned period of ten weeks, which bill you will be required to accept.

“ 5th, You are also to guarantee the safe return of empty casks within four months; but, as soon as they are shipped, and your letter, (accompanied by a receipt from the captain or wharfinger, when practicable,) advising the conveyance, quantity, and number of casks returned, they will be considered as at our risk. It is hereby therefore understood, that, in case any casks shall be lost, or shall not be returned within four months from the date of invoice, we shall then be at liberty to charge you with the same, at the market price at the time; provided, that in case you shall return in good order, within eight months, any casks already paid for, then you will be entitled to a return or allowance of the amount so paid.

“ 6th, That in case any fault shall be found with any ale, complaint must be made to us by letter (within thirty-five days from the time of its arrival in London, during the period between the first day of November and the first day of June

“ following, or within twenty-one days during the period from
“ the first day of June to the first day of November following,
“ in any year,) specifying the brewing and number of casks so
“ complained of, in which case, it shall be optional for us to
“ have the same returned here, or sold, as we may determine;
“ but in the event of any such ale being sent out, and in the
“ cellars of any customer, it may be necessary that an allowance
“ be made, in preference to their returning the same, in which
“ case, it is also expected and required that such complaint be
“ made to you, conform to delivery-book on this point, and the
“ same conveyed to us forthwith for our determination.

“ 7th, It is also required that you do not sell, or be in any
“ way connected with any other house in the sale of ales; while
“ it is agreed that you may sell whisky; provided that, in doing
“ so, it is not found prejudicial to our interest.

“ 8th, The travellers are to be under your entire direction and
“ control; but, in case of dismissal, it is expected that we be
“ consulted. Therefore it is agreed that all engagements pre-
“ viously entered into with them, shall be binding upon you, the
“ same as if these had originated with you.

“ 9th, Account sales to be transmitted on every Saturday of
“ each week, agreeably to a form already in practice; also a
“ statement of all moneys collected during the period, accom-
“ panied by a remittance for the amount, under deduction of
“ your commission of twenty-five per cent, agreeably to a form
“ also in practice; which last shall contain a statement of any
“ allowances made to customers, or expenses incurred on any
“ ale returned, agreeably to article sixth. Copies of these forms
“ are now forwarded to you.

“ 10th, Two sufficient securities will be required to the
“ amount of L.1000, who will agree to enter into a bond for
“ this purpose, subjecting themselves always to the conditions
“ and stipulations herein contained: and it is understood that

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“ heritable security will be given to that extent, and that one-
 “ half of the expense of the bond or assignation, and the infest-
 “ ment following upon it, be paid by you, and the necessary
 “ deed is to be executed by you and your securities, so soon as it
 “ can be prepared.

“ 11th, Two 'months' notice will be given and required, in the
 “ event of a separation; and, in case of any dispute or difference
 “ arising in any of the aforementioned articles, it is hereby
 “ agreed, that these shall be submitted to men mutually chosen
 “ for this purpose, with power to choose an oversman, whose
 “ award shall be final. I remain, your obedient servant, (Signed)
 “ For self and partner, GEO. NAPIER.”

On the 8th of March, James Bruce accepted of the terms specified in the preceding letter, by letter addressed by him to Messrs Napier and Co. He did not, however, succeed in obtaining security to the amount required, and in consequence he proposed, that, instead of complying with the stipulation for security, his mother should deposit L.1000, in the hands of Messrs Napier & Co. to answer this purpose. Messrs Napier & Co. agreed to this, and the arrangements between them and Mrs Bruce was reduced into a bond, bearing date the 30th March and 2d April, 1836, which was in the following terms: — “ Know all men by
 “ these presents, that we, George Augustus Frederick Cunning-
 “ hame, captain in His Majesty's seventh regiment of Dragoon
 “ Guards, presently at _____, and George Napier, brewer
 “ in Edinburgh, carrying on business as copartners, under the
 “ firm of George Napier and Company, brewers in Edinburgh,
 “ considering that, by holograph letter of date the 18th day of
 “ February last, subscribed by me the said George Napier, for
 “ myself and my said partner, on behalf of the said copartnership
 “ of George Napier and Company, and addressed to James
 “ Duncan Bruce, an arrangement was proposed to him the said
 “ James Duncan Bruce to act as agent for us the said George

“ Napier and Company for the sale of our ales in London, upon
“ the following considerations: — *Primo*, That we should furnish
“ the said James Duncan Bruce with horses and drays, counting-
“ house and cellars, and public books, all of which were under-
“ stood to belong to us. *Secundo*, That the ales to be shipped
“ by us to the said James Duncan Bruce should be charged at
“ the usual prices, viz. 48s. 58s. 68s. and 78s. per barrel, and at
“ such other price or prices under the first, as might be con-
“ sidered by us the said George Napier and Company, as most
“ suitable to correspond with those charged by the generality of
“ the brewers in Edinburgh. *Tertio*, That the said James
“ Duncan Bruce was to guarantee the whole debts, and that,
“ from the above prices, we should allow him twenty-five per
“ cent in full of commission, guarantee, five per cent discount to
“ customers, horses’ keep, and all other charges whatever, after
“ the ales had been put on board at Leith, with the exception of
“ two barrels in the hundred, which should be allowed for filling
“ up in London, and which two barrels were to be considered
“ sufficient in all seasons for that purpose; but that it should be
“ expressly understood, that the aforesaid twenty-five per cent
“ should not extend to ale returned, or upon which an allowance,
“ agreeably to article sixth, should be made, but that the said
“ James Duncan Bruce should be entitled to charge the expenses
“ incurred by him, which should not exceed 4s. per barrel.
“ *Quarto*, That the credit allowed to customers should be
“ twenty-eight days, and that the said James Duncan Bruce
“ should keep their payments as nearly to that period as possible;
“ but, in order to give sufficient time for all debts to be
“ collected, we the said George Napier and Company agreed to
“ extend the period of credit to ten weeks, after which time we
“ should be at liberty to draw a bill on him, the said James
“ Duncan Bruce, at two months’ date, for such sum or sums as
“ might appear from the books to be kept by him to have

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“ exceeded the last-mentioned period of ten weeks, which bill
“ he, the said James Duncan Bruce, would be required to
“ accept. *Quinto*, That the said James Duncan Bruce was to
“ guarantee the safe returns of empty casks within four months,
“ but as soon as they were shipped, and his letter, accompanied
“ by a receipt from the captain or wharfinger, when practicable,
“ advising the conveyance, quantity, and numbers of casks
“ returned, they should be considered at our risk; and that in
“ case any casks should be lost, or should not be returned within
“ four months from the date of invoice, we, the said George
“ Napier and Company, should then be at liberty to charge the
“ said James Duncan Bruce with the same, at the market price at
“ the time; provided that in case he should return in good order,
“ within eight months, any casks already paid for, then he should
“ be entitled to a return or allowance of the amount so paid.
“ *Sexto*, That in case any fault should be found with any ale, com-
“ plaint must be made to us, by letter, within thirty-five days from
“ the time of its arrival in London, during the period between
“ the first day of November and the first day of June following,
“ or within twenty-one days during the period from the first day
“ of June to the first day of November following in any year,
“ specifying the brewing and numbers of casks so complained of,
“ in which case it should be optional for us to have the same
“ returned or sold, as we might determine; but in the event of
“ any such ale being sent out, and in the cellars of any customer,
“ as it might be necessary that an allowance should be made, in
“ preference to their returning the same, then, and in that case,
“ it was expected and required that such complaint should be
“ made to the said James Duncan Bruce, conform to delivery
“ book on this point, and the same conveyed to us forthwith for
“ our determination. *Septimo*, The said James Duncan Bruce
“ should not sell, or be in any way connected with any other
“ house in the sale of ales; but that he might sell whisky, pro-

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“ vided that in doing so it was not found prejudicial to our
“ interest. *Octavo*, That the travellers are to be under the said
“ James Duncan Bruce’s entire direction and control; but, in
“ case of dismissal, it is expected that we should be consulted,
“ and therefore, all engagements previously entered into with
“ them should be binding upon the said James Duncan Bruce,
“ the same as if these had originated with himself. *Nono*, That
“ account-sales should be transmitted on every Saturday of each
“ week, agreeably to a form already in practice; also a statement
“ of all moneys collected during the like period, accompanied by
“ a remittance for the amount, under deduction of the said James
“ Duncan Bruce’s commission of twenty-five per cent, agreeably
“ to a form also in practice, which last should contain a state-
“ ment of any allowances made to customers, or expenses incurred
“ on any ale returned agreeably to article sixth, and copies of
“ which forms were furnished to the said James Duncan Bruce.
“ *Decimo*, That the said James Duncan Bruce should find two
“ sufficient securities to the amount of L.1000 sterling, who
“ should agree to enter into a bond for that purpose, subjecting
“ themselves always to the conditions and stipulations contained
“ in the said missive letter and above expressed, and that
“ heritable security should be given to that extent, and that one-
“ half of the expense of the bond or assignation, and the infest-
“ ment following upon it, be paid by the said James Duncan
“ Bruce, and that the necessary deed should be executed by him
“ and his securities so soon as it could be prepared. *Undecimo*,
“ That two months’ notice should be given and required in the
“ event of a change or separation, and in case of any dispute
“ or difference arising in any of the aforementioned articles,
“ that the same should be submitted^{to} to men mutually chosen,
“ with power to choose an oversman, whose award should be final;
“ and considering that, by holograph letter, of date the 8th day
“ of March, 1836, addressed to us, the said George Napier and

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“ Company, by the said James Duncan Bruce, he, the said
“ James Duncan Bruce, fully agreed to the whole of the above-
“ recited conditions and stipulations, and, in consequence thereof,
“ has since commenced to act as our agent in London: And
“ farther, considering that it being inconvenient for the said
“ James Duncan Bruce at present to grant or to find the heri-
“ table security stipulated for by article tenth of the above-
“ recited agreement, and that his mother, Mrs Ann Bruce, relict
“ of Alexander Bruce, Esq., late collector of excise in Argyle,
“ presently residing in Buccleuch Place, Edinburgh, who had
“ agreed to become one of his sureties, has undertaken to place
“ in our hands the sum of L.1000 sterling, in lieu of such secu-
“ rity, on our granting these presents in manner underwritten,
“ and that we have agreed to receive and to hold the same, in
“ the place and stead of such security which was to have been
“ granted to us; and now, seeing that the said Mrs Ann Bruce
“ has paid over to us, the said George Napier and Company,
“ the aforesaid sum of L.1000 sterling, whereof we, the saids
“ George Augustus Frederick Cunninghame, and George Napier,
“ as a company, and as individuals, do hereby acknowledge the
“ receipt, renouncing all objections to the contrary; which sum
“ of L.1000 sterling, we the said George Augustus Frederick
“ Cunninghame, and George Napier, co-partners, under the
“ said firm of George Napier and Company, bind and oblige
“ ourselves, jointly and severally, and our heirs, executors, and
“ successors whomsoever, as well as the said copartnership of
“ George Napier and Company, to repay, with and under the
“ conditions and provisions after written, to the said Mrs Ann
“ Bruce, and to her heirs, executors, and assignees, at the term
“ of Martinmas next, with a fifth part more of said principal
“ sum of liquidate penalty in case of failure, and the interest of
“ the said principal sum, at the rate of four and a half per centum,
“ per annum, from the date of these presents to the aforesaid

“ term of payment, and thereafter during the non-payment
“ thereof, and that at two terms in the year, Martinmas and
“ Whitsundy, beginning the first payment of the said interest at
“ the said term of Martinmas next, for the proportion thereof
“ which shall be due at that term, and the next payment of the
“ same at the term of Whitsunday 1837, for the half-year im-
“ mediately preceding, and so forth by equal portions, at the
“ said two terms, yearly, termly, and continually thereafter, so
“ long as the said principal sum shall remain unpaid: But
“ providing and declaring, as it is hereby specially provided and
“ declared, that, notwithstanding the obligation before written,
“ the said Mrs Ann Bruce shall have no right to demand pay-
“ ment of the aforesaid principal sum of L.1000 sterling, at the
“ aforesaid terms, unless the whole conditions and stipulations of
“ the above-recited agreement with the said James Duncan
“ Bruce shall have been fulfilled, while the said agreement shall
“ subsist and be in operation, and which stipulations and agree-
“ ments she becomes bound and obliged, as by acceptance hereof
“ she binds and obliges herself, and her heirs, executors, and
“ successors, to see fulfilled, and that so long only as the said
“ agreement shall subsist and be in operation; and, in particular,
“ the said Mrs Ann Bruce is bound and obliged, as by accep-
“ tance hereof she binds and obliges herself, and her foresaids,
“ that, during the whole time the said James Duncan Bruce
“ shall continue to act as agent foresaid, in consequence of the
“ above-recited agreement, he shall well and truly account for
“ and pay to us all sums of money received by him on our
“ account, and likewise account for and pay to us the value of
“ all ales sold by him for us, and the value of all barrels sent to
“ him in terms of his said agreement with us, and whatever loss,
“ damage, or expense shall be sustained or incurred by us through
“ the intromissions of the said James Duncan Bruce, the said
“ Mrs Ann Bruce, by acceptance hereof, binds and obliges her-

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“ self, and her foresaids, to content and pay to us the said George
“ Napier, and Company, to the extent of the foresaid sum of
“ L.1000 sterling, or to allow us to retain the same out of the
“ aforesaid sum of L.1000 sterling, which has been deposited in
“ our hands for the express purpose as aforesaid ; and upon the
“ said loss or damage being ascertained and fixed in manner
“ specified in the said agreement, we the said George Napier and
“ Company shall only be bound and obliged to make payment
“ to the said Mrs Ann Bruce of the balance remaining due of
“ the aforesaid sum of L.1000 sterling, after satisfying and pay-
“ ing the amount of such loss or damage ; and the said Mrs Ann
“ Bruce, on receiving payment of such balance, shall be bound
“ and obliged to grant a valid and sufficient discharge to us of
“ the bond and obligation above written, and of the whole terms
“ thereof, it being expressly understood and declared, that the
“ aforesaid sum of L.1000 sterling, is placed in our hands as a
“ security for the intromissions of the said James Duncan Bruce,
“ in virtue of his said agreement, and to indemnify us against all
“ loss or damage that may be sustained by us in consequence
“ thereof: But it is likewise hereby specially provided and
“ declared, that we shall be bound and obliged, as we hereby
“ bind and oblige ourselves, and our foresaids, and our said
“ copartnership, to repay the aforesaid sum of L.1000 sterling,
“ with such interest, at the rate of four and a half per cent., as
“ may be due thereon at the time to the said Mrs Ann Bruce
“ and her foresaids, on receiving two months’ previous notice in
“ writing from her or them to that effect, and on satisfactory
“ heritable or other sufficient security to the extent foresaid being
“ found to us, in terms of the tenth article of the above-recited
“ agreement with the said James Duncan Bruce: And we
“ consent,” &c.

James Bruce left Scotland for London, and entered upon the agency on the 1st April 1836, but continued in it only until

the month of September following, Messers Napier & Co. becoming so dissatisfied with his conduct, that they summarily dismissed him, and took possession of all the books and papers of the agency.

Messrs Napier and Co. then brought action against Mrs Bruce, setting forth the bond which had been granted by her to them, that James Bruce was indebted to them in L.284, 14s. 7d. over and above the £1,000 deposited with them by Mrs Bruce, and concluding, that it should be found that she had not any right to demand payment of that sum, that they were entitled to retain it in extinction *pro tanto* of James Bruce's debt to them, and that Mrs Bruce ought to be decreed to grant a discharge of their bond. And with the view of avoiding a defence, that they had not discussed the principal debtor, they subsequently brought action against James Bruce, setting forth, that he was indebted to them in L.1360, 13s. 10d. conform to account current, and concluding, that the two actions should be conjoined, and that James Bruce should be decreed to pay to them the sum of L.1368, 13s. 10d. with the interest of L.1264, 15s. from the 19th day of October 1837.

The debt thus alleged to be owing by James Bruce, was brought out by debiting him with the price of, and charges relating to, ale, which had been sent to London, and was in the cellars previous to, and at the time of his entering upon the agency, and which, by the authority of Napier and Co., had been sold for prices greatly under those specified in the art. 2d of the arrangement, the proceeds amounting in all to L.411, 12s. and by farther debiting him with a sum of L.210, 17s. as the price of ale which had been sold previously to his entering upon the agency, but which had been received by him.

The actions having been conjoined, the Lord Ordinary (14th November, 1839) found that Mrs Bruce, under the conditions of the bond, was "not liable for the value of the ale which was in

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“ London prior to the commencement of her son’s agency, but
“ that she was liable for the prices of such parts thereof as were
“ actually received by him after his agency commenced, and that
“ she was not liable for the debts due to the company prior to
“ the commencement of her son’s agency, except in so far as
“ they were recovered by him after his agency commenced.”

The Court, on reclaiming note, (11th February, 1840,) altered the Lord Ordinary’s interlocutor, and found, that Mrs Bruce, as cautioner, “ was not liable for the prices of any ales which were
“ in the cellars of the pursuers, in London, prior to the com-
“ mencement of the agency, though received by James Bruce
“ after its commencement.”

Messrs Napier and Co. appealed from both interlocutors.

Mr Kelly and *Mr Willmore*, for the appellants. — The respondents, in support of their case, founded on the 2d and 4th articles of the letter, as transcribed into the bond, as overriding the whole, and shewing that the surety could not be intended to be, or be liable for the price of ales which had been sent to London previous to the agreement. But these articles are only two of several distinct heads of agreement, and by no means control the meaning of the others, unless there is something to shew that this must necessarily be so. But on the contrary, the introductory part of the letter articulately refers to the sale of ales “ in London,” and if the construction contended for were allowed, what would become of article 3? would not the agent, in case he had sold ale already in London, have been entitled to the per centage stipulated by that article, or would he have been without any claim in that respect? Again, if any of the ale already on hand had become faulty, or been complained of, would the agent not have been bound to comply as to it with the terms of article 6? or would he have been at liberty wholly to disregard the protection of the

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principals which that article was intended to secure? or, if the agent had sold any of the ale on hand, would he have been bound to account for the price under the terms of article 9th? or would he have been at liberty to account for this at his own time and pleasure?

In construing the contract, the object and intention of the parties is to be collected from their situation and the subject of the contract. The parties must be taken to have been acquainted with that about which they were dealing, and in the nature of things, it must necessarily have been, that at any given period of a business such as that of the appellants', there would be stock on hand and debts outstanding; could it have been the intention of the parties, that these should be left wholly without protection, or that the principals must themselves have come to London, or employed another agent, or made a separate arrangement with the agent they were appointing in regard to them?

[*Lord Chancellor.* — What is there to shew, that the surety, whatever may have passed between, or been known to the other parties, was aware of the state of matters previously, either as to stock on hand or outstanding debts?]

The very nature of this business must have given her knowledge of this. Besides, the 18th article speaks of travellers as already in employment, and the 9th, of “forms in practice,” and the 4th shews, that credit was given to customers by the course of the business, and would be running as to sales previous to the appointment.

[*Lord Chancellor.* — How was the surety to know that there had not been any interval between the appointment of her son, and the removal of the former agent, and that old scores had not been cleared off?]

Unless the surety was to be liable for the outstanding debts received by the agent, no meaning can be attached to those words in the obligatory part of the bond, that the agent should

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account for all sums “received by him on our account;” this could only refer to the outstanding debts and ale on hand, previous to the arrangement, as the subsequent words were alone applicable to transactions under the arrangement; and it is a rule of construction, that no part of a contract is to be made of no effect if it is possible to avoid doing so.

[*Lord Chancellor.* — Suppose the agent should have sold ale under the price fixed by article 2, he would have been bound, under the words, “received on our account,” to account for the prices so received, but under the words of the next clause he would also have been bound, over and above that, to account for the value of the ale.]

That case would come under the clause of indemnification. The prices fixed by article 2 might not be the actual value: on the whole, we submit that the obligatory parts of the bond are to be taken as explanatory of any thing which is vague in the terms of the letter, as engrossed in the bond.

With regard to the stock in hand at the date of the agent entering, the introductory paragraph of the letter is sufficient to shew, that this was embraced by the arrangement.

[*Lord Chancellor.* — Is there any thing to shew that the surety was aware this was not a new speculation?]

Yes. The terms of articles 8 and 9, to which I have already alluded.

[*Lord Chancellor.* — It is remarkable, that in article 2 there is no mention of any ales already in London, or of any prices to be affixed to them.

Lord Brougham. — It is quite consistent with the articles, that there may have been an interval between the appointment of the agent and his predecessor leaving.

Lord Chancellor. — We can't say what may have passed between the principal and the agent, but the surety is bound only by her written contract. The words, “to be shipped,” are not

in article 2d of the letter, but are in the letter as engrossed in the bond. The surety may have bargained for this. Is there any thing to extend the meaning of the words “to be shipped?”]

We submit that this is only one part of the agreement, not overriding the whole; the introductory part is for the sale of ales “in London.”

[*Lord Chancellor.* — That is general enough to be sure, but the 2d article fixes it to ales “to be shipped.”

Lord Brougham. — And the 6th article speaks of 35 days from arrival in London.]

We say only two articles, 2d and 6th, speak of future shipments, but that the rest of the agreement may refer to the general arrangement of such a business, and to the stock already in London.

[*Lord Abinger.* — The question is, what information did the bond give the surety?]

If the surety chose, she might become responsible for ale already in London, and the bond embraces such a case. Instruments are to be construed strictly against those who make them.

Counsel for respondents not called upon.

LORD CHANCELLOR. — We are all of opinion, that the construction of the Court below is the correct construction, and that the interlocutors ought to be affirmed.

Ordered and Adjudged, that the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

ARCH. GRAHAME — G. and T. WEBSTER, Agents.