MAY 6, 1870.

JOHN SHEPHERD and CO., *Appellants*, *v.* JOHN BARTHOLOMEW and CO., *Respondents.*

Bills of Exchange—Substitution of Debt—Course of Dealing—Proof by Writ or Oath—*A course of dealing existed between three merchants, A. B. and C., whereby, on instructions from C., B. bought cotton from A., and on arrival the cotton was apportioned between B. and C., and bills of exchange were drawn by A., on B. and C. separately, and A. distributed the amounts between B. and C. as he thought proper, the bills drawn on B. being distinct from those drawn on C., and there being no joint liability. There being a large sum due from B. and C. on floating bills, A. at the request of B. and C. redistributed the amounts and drew fresh bills, the old bills not having been delivered up to B. and C. respectively :*

HELD (affirming judgment), *A. after taking fresh bills could not sue on the old bills, as the new bills were a substitution for the old bills.*

HELD FURTHER, *That the course of dealing may be proved* prout de jure, *and that B. was not bound to prove his discharge from the old bills by the writ or oath of A.*[1]

This was an appeal from interlocutors of the Lord Ordinary Jerviswoode and the First Division.

The action was raised by John Shepherd and Co., merchants in Manchester, against John Bartholomew and Co., merchants in Glasgow, and others, respondents, to recover a sum of £4085 1*s.* 9*d.*, being the price of cotton bought by the defenders from the pursuers, and for which bills were drawn by the pursuers and accepted by the defenders, viz. bills for £1706 5*s.* 4*d.*, and for £2378 16*s.* 5*d.* The condescendence and pleadings set forth, that Messrs. Shepherd had had transactions with Messrs. Bartholomew for some years past, and also with Messrs. Cogan of Glasgow. The practice was for Messrs. Bartholomew and Cogan jointly to buy cotton from Messrs. Shepherd, who were empowered to draw for the amount of the purchase money in such sums as they might think proper, distributing the amount due to them between the two firms of Bartholomew and Cogan and discounting the bills. But the bills drawn on Bartholomew were distinct from those drawn upon Cogan.

There was a large sum due in the shape of outstanding bills at March 1865, namely, £14,113, of which Bartholomew had accepted £8258 16*s.* 8*d.*, and Cogan had accepted £5854 7*s.* 9*d.* Some of the bills were then becoming due, and the two firms applied to Shepherd to redistribute the aggregate sum. This was done, and new bills were drawn, those on Bartholomew amounting to £4173, and those on Cogan to £9839 ; and the old bills remained in the hands of Messrs. Shepherd. The two firms afterwards stopped payment, and each settled with its creditors by a composition. The pursuers accepted the composition on £4173, but also held the defenders Bartholomew liable on the residue of the former bills to the extent of £4085 1*s.* 9*d.*

The Lord Ordinary (Jerviswoode) pronounced the following interlocutors :—"11*th December* 1866.—The Lord Ordinary having heard counsel, and made avizandum, and considered the record, before answer allows to both parties a proof of their respective averments, and appoints such proof to proceed before the Lord Ordinary on a day to be hereafter fixed."

"12*th November* 1867.—Finds, that, for some time prior to the raising of the present action, the pursuers, on the one hand, and the defenders, on the other hand, were engaged in a series of transactions, in the course of which the pursuers were in the habit of purchasing cotton on commission for the firms of John Bartholomew and Company, (the defenders,) and of John and Robert Cogan, merchants, Glasgow, of both of which firms Mr. Robert Cogan and Mr. Robert O Cogan were members : Finds, that the said Mr. Robert Cogan took the active management of the finance department of both of the said firms : Finds, that, prior to the year 1865, the orders for the said purchases of cotton were made by, and the cotton so purchased invoiced to, the said firm of John and Robert Cogan, for behoof of their own firm, and also of that of the defenders, to be allocated according to the requirements of the said respective firms for the time : Finds, that the pursuers drew bills from time to time on both of the said firms for the price of the cotton so purchased by them : Finds, that such bills were not so drawn by the pursuers on said firms of John Bartholomew and Company and John and Robert Cogan, with

[1] S. C. 42 Sc. Jur. 398.

special reference or in precise relation to the quantity of cotton which was actually allocated to each firm, but as a matter of mutual convenience, and having regard to the position of their respective pecuniary obligations and transactions at the time: Finds, that, on the above footing, when the bills now sued on fell due, and were not retired by the defenders, the sums contained therein were included in a new bill, drawn by the pursuers upon, and accepted by, the said firm of John and Robert Cogan, for £5571 8*s.* 7*d.*, and bearing date 25th March 1865: And finds, that the pursuers ranked on the bankrupt estate of the said John and Robert Cogan, and accepted composition for the said bill for £5571 8*s.* 7*d.*, including therein the sums now sued for; and, with reference to the foregoing findings, sustains the 3d, 5th, and 6th pleas in law for the defenders: Assoilzies them from the conclusions of the summons, and decerns: Finds the pursuers liable in expenses," etc.

The First Division adhered.

The pursuers now appealed against the above interlocutors.

Anderson Q.C., *Mellish* Q.C., and *Jordan*, for the appellants.—The Court below ought not to have allowed a proof of their respective averments, for the appellants were entitled to decree on the bills sued upon, unless the presumption in their favour could have been redargued by the writ or oath of the appellants. It was clearly established in the law of Scotland, that no other evidence was competent except the writ or oath—Thomson on Bills (last edition), 233; Dickson on Evidence, 606; *Sandeman* v. *Thomson*, 10 S. 4.; *Burns* v. *Burns*, 3 D. 1273. Moreover, the whole circumstances shew, that the object of granting the new bills was merely to get time, but not to operate as a satisfaction of the prior bills—*Bishop* v. *Rowe*, 3 M. & S. 362; *Ex parte Barclay*, 7 Ves. 597. When a second bill is granted for the same debt, the second bill is presumed to be intended merely to gain time—*Kendrick* v. *Lomax*, 2 Cr. & J. 405; *Lumley* v. *Musgrave*, 4 Bing. N. C. 9. The fact of Messrs. Shepherd being allowed to retain the old bills confirms the same view of the intention of the parties.

The *Lord Advocate* (Young), and *Pearson*, Q.C., for the respondents, were not called upon.

LORD CHANCELLOR HATHERLEY.—My Lords, the appellants in this case complain of two interlocutors of the Lord Ordinary, each of which was affirmed by a decision of the Court of Session, in respect of their suit against the defenders, who are the component members of the firm of Bartholomew and Company, who carried on business as manufacturers of cotton in Glasgow. The interlocutors complained of are those which in the first place deal with the question as to the mode of proof which was to be led in the case, and secondly with reference to the merits of the case.

The question between the parties is this:—The appellants, the firm of Shepherd and Company of Manchester, had dealings to a large extent with two firms in Scotland, through the medium of one of these firms. The firm with which they dealt directly was the firm of Cogan and Co., and the gentleman who conducted the negotiation between Mr. Shepherd, who had his own firm in Manchester, and the firm of Cogan and Co., was one of that firm, Mr. Cogan, who also happened to be a partner in the firm of Bartholomew and Co. Mr. Cogan, in conducting his business with Mr. Shepherd, ordered large supplies of cotton from time to time. And the course of dealings seems to have been this, that he informed Shepherd and Co. of Manchester, that he in requiring these supplies and in dealing directly for these supplies, which were invoiced to the firm of Cogan and Co., was doing what was intended for the two firms, afterwards apportioning the goods so supplied between his own firm of Cogan and Co. and the firm of Bartholomew and Co. And that being so, he said you may draw upon the two firms, and you may apportion your drawings, as you think best from time to time, or as you shall receive directions from us. In the first instance the transactions appear to have been conducted on the latter principle. And he said, these drawings will also be further supplemented by certain drawings by which we are to be accommodated from time to time by you in respect of our transactions with your Manchester firm. These accommodation transactions (for such they seem to have been) shall be carried on on what they called the circle, viz. there shall be kept up a sort of circulating credit. It appears to have been originally £10,000, and afterwards considerably more.

Accordingly, bills were drawn by the Glasgow firm of Cogan and Co. on the Manchester firm of Shepherd and Co. Shepherd accepted those bills. They were then remitted to Glasgow, and the proceeds were received by the Glasgow firm, and were transmitted in payment of goods received to the Manchester firm from time to time. That was one set of transactions. The other set of transactions were of this nature, and they seem to have been all real transactions—cases in which goods were really ordered and intended to be paid for. Shepherd in these cases drew on the Glasgow firms bills which they accepted, which bills were to be payable in London. And of that class are those bills with which we have to deal on this occasion.

It seems that in December 1864 a very large amount of cotton had been purchased by the Glasgow firm or firms. The amount was about £18,000 worth. Of that, part was paid in cash, and £14,000 and a fraction remained to be provided for by bills. Accordingly bills were drawn; and the bills as originally drawn stood thus. There seems to have been a bill for £4173, which was accepted by Bartholomew and Co. Another bill also accepted by Bartholomew and Co. for

£1706 5*s.* and another bill for £3708. Then there were two bills accepted by Cogan and Co., making together an amount accepted by Cogan and Co. of £5854, leaving, therefore, about £8000 accepted by Bartholomew and Co., and making together the £14,000 odd.

The course of the transactions being of this character, one thing to be remarked in the outset is, that it was no part of the transaction between the parties, that the two firms should ever become jointly liable for any part of the transaction. The payment for the cotton ordered was distributed between the two firms; but whatever sum Bartholonew and Co. made themselves liable for, Cogan and Co. were not liable for; and whatever Cogan and Co. made themselves liable for Bartholomew and Co. were not liable for. That was the state of things in the original transactions.

However, these bills, which had been accepted, some of them on the 22d December 1864 and others in January 1865, were approaching maturity. Both the Glasgow firms appear to have found themselves in difficulties, which were attributed to the state of things in America, the civil war then going on in that country. And accordingly, as the bills of December and January were becoming due, they found it necessary to enter into some arrangement with Shepherd with regard to the taking up of these bills. And this seems to have been carried on mainly by correspondence. I say "mainly," because one of the letters, that of the 28th March, speaks of something which Mr. Cogan said or told to Shepherd, the appellant, at Manchester. But we have no narrative of anything that occurred verbally between the parties, and the whole case therefore rests upon writing only.

That being so, having reached this part of the narrative, I pause here for one moment to dispose of the first point in the appeal, namely, that which insists, that the Lord Ordinary and the Judges of the Court of Session were in error in allowing any proof to be led in this case, it being said, that the demand was on a bill of exchange, accepted by Bartholomew and Co., and that their only discharge in respect of that acceptance of theirs must be simply by what they could establish by the writ or oath of their creditor, who was entitled to sue them on the bill. I do not enter into detail on that part of the case, because it is sufficient to say, that if writing be necessary, writing exists here on the part of the creditors, for we shall find, that in respect of these bills now sued on certain other bills were given. In what mode and in what character they were given is part of the question in the cause, but those bills were drawn by the creditor, the present appellant, and the history of those bills and the ground of their being given, and on what conditions and for what purpose they were given, must be a matter to be established by evidence. It was therefore of course necessary, that evidence should be given in the cause, for we have in the first instance this writing of the appellants, which shews clearly, that the transaction was not a plain and simple transaction upon the bills, but that there was a history connected with it evidenced by the handwriting of the creditor himself, the appellant, which of itself required explanations to be given in the cause, which could be given only by evidence.

Now I resume the narrative with regard to the bills. I have stated, that the Glasgow firms found a difficulty in meeting them when due, and that consequently a negotiation had to be entered upon, which was conducted by letter. The material letters upon this point are but two, the letter of the 15th March and the letter of the 28th March written by Cogan to Shepherd. Mr. Cogan, on behalf of the Glasgow firm, writes thus:—"The following bill falls due next in London on 22d, £4174." That is one of the bills of Bartholomew and Co. in respect of £14,000, and it is a bill that is not now in question in this cause. I therefore pass that by, simply observing, that it is one of the bills constituting the £14,000 debt. The second bill is on 25th, £1706. That is another of Bartholomew's bills; one of the two bills in question in this cause. Then they mention further another bill, also on the 25th, for £3865. That is one of the bills given by Cogan and Co., forming part of the £14,000 odd. The writer then proceeds to say, "We shall feel obliged if you will draw for them on both firms in such proportions as may be suitable, and remit the necessary amount to London for the respective dates."

Then what is here stated? "These bills are becoming due: we are not in a state in which we ourselves can meet the bills; we desire you therefore to find the money for these bills, to meet them in London at their respective dates, and then you may draw upon us, Cogan and Co. and Bartholomew and Co., in such proportion as may be suitable."

At that time there can be no doubt whatever, that the Glasgow firm thought, that the bills were running; they were not aware of what appears now from the evidence to have been the fact, that the bills were in the possession of Shepherd, the appellant. Shepherd says (though I do not know whether it is distinctly proved, and it is not very material whether it be so or not,) that he had all along kept these bills, that he had not negotiated them, but that they had all along been in his custody and possession. But it is quite clear from this letter, and it is still more plain by the next letter which I shall read, that the Glasgow firm had no notion whatever, that such was the case. They supposed them to be running bills, and to be coming due on a certain day, and they were desirous that the bills should be met on that day, and that in order to meet them new bills should be drawn by Mr. Shepherd, so that funds might be raised for that purpose, and that he should distribute those bills which he should so draw between the two

firms in such manner as he should think fit. There is not one word said about Shepherd's retaining the old bills, still less is there a word said about his doing that which had never yet been done in the course of the business, viz. drawing on one of the firms for the same sum as that for which he held a security from the other firm. Never up to this time in the course of this business had Bartholomew and Co. been answerable for the same debt, for which Cogan and Co. were answerable, but the debt, whatever it was, that was due as between the two firms, was distributed between the two firms, each becoming liable for a certain portion of the value of the cotton bought, but neither of the two firms in any way giving its security for any portion of that with which the other firm was charged, as being its portion of the sum payable in respect of the cotton.

But however plainly that appears from the first letter, it is still more plain from the next letter, which had reference to two other bills which were coming due a little later. These two bills were one of Bartholomew and Co. for £2378 16*s.* 5*d.*, and one of Cogan and Co. for £1989 4*s.* 6*d.*, constituting part of the £14,000. In other words, the bill for £4174, as I have said, is to be put out of consideration altogether, and there remain four other bills, two of Cogan and Co. and two of Bartholomew and Co., for the amount I have specified, which go to make up the balance of £14,000. It is with regard to one bill of Cogan and Co.'s and one of Bartholomew and Co. that this next letter is written on the 28th March. "As I mentioned to you when in Manchester, our payments during this month and April have now and will be very heavy indeed. This has arisen from the quantity of cotton purchased in December and January, and the total stagnation of business here; and, as then also mentioned, I shall feel much obliged if you will help us. The help due in London on 5th April, £2378 16*s.* 5*d.*, and £1989 4*s.* 6*d.*, I beg you will pay, and redraw for, and allow us to draw upon you again for these falling due here on the 5th and 8th. What cotton we require during the month will be paid in cash, and unless the works are altogether to be stopped we shall be needing shortly."

There, again, it is quite clear from that letter, that what was anticipated by the writer was, that, as the bills fell due in London, they would be in circulation, and that means would be found by Shepherd of acceding to his request by new bills being drawn and distributed as Shepherd might think fit between the two firms for the purpose of taking up and retiring those bills which were so falling due. Then what Shepherd does is this: He does redistribute the debt. He leaves Bartholomew to bear as they had borne the £4174 bill, which is not in question in the cause. He then draws two bills, adding in each case the amount of one of the bills of Bartholomew and Co. to one of the bills of Cogan and Co., and so making up the total debt by redistributing it and charging more to Cogan and Co. than had formerly been charged, and less to Bartholomew and Co. For instance, he takes the bills of Bartholomew and Co. for £2378 and adds it to the bills of Cogan and Co. for £3865, and then draws a bill for £5571 upon Cogan and Co. in respect of that matter, and then draws another bill on Cogan and Co. for £4368, and that being so, the amount secured by these two bills of £9939, with the other debt of £4174 which remained charged to Bartholomew and Co., made up the total of £14,113.

Now, in that state of things, what is there appearing in any part of this correspondence to authorize the pursuers, Shepherd and Co., to do that which they never before had been authorized to do, viz. not only to redistribute the debt, but to hold the bills of Cogan and Co. as security for part of the debt of Bartholomew and Co., or, *vice versâ*, to hold the bills of Cogan and Co. as security for the debt of Bartholomew and Co.? There is certainly nothing in the correspondence which authorizes anything of this kind. Cogan and Co. were led to believe still further, by the course of procedure on the part of Shepherd and Co., that the real state of the case was that which they imagined it to be, viz. that the bills were running and were coming due, and that the moneys which they desired to have raised by the new bills that were to be drawn would be applied in taking up those running bills, and that in fact they had been so applied, because in a subsequent account from Shepherd they charge in the account commission for retiring those very bills, and supposed that the bills had been retired. Therefore Cogan and Co. naturally supposed, that the bills which they supposed to have been in circulation had been retired and satisfied in the manner directed by that letter. They imagined that what they had directed had been done, and not that anything had been done which they had not directed, viz. that there had been a retaining of the bills of Bartholomew and Co. on the part of Shepherd and Co. by way of additional security for the bills which they had drawn on Cogan and Co. in the process of redistribution. In other words, Shepherd, being asked to do as he had done before, and to redistribute the debt as he thought best, says—Over and above that, I think myself authorized to hold the bills which I was desired to retire, and to retain them as an additional security for the debt in addition to the new bills which I have drawn in consequence of the letter which had been addressed to me. But there is nothing of the kind in the letter. Nothing can be clearer than that the person who gives a new security is the person who is entitled, in the first instance, to say how that additional security which he proposes to give shall be appropriated. And it appears to me that this letter of Mr. Cogan's plainly states, that it was to be appropriated according to the ordinary course of business as it had proceeded before, and that it gives no

sanction to the bill of Bartholomew and Co. being retained instead of being paid, in order that it might be kept as an additional security.

Now what do we find Shepherd himself saying as to the mode in which he conceived himself entitled to hold this additional security? He tells us he held it as an additional security. He says, "I acted upon the understanding I had at the time, and drew the bills in the proportions that now appear. When Bartholomew's bills for £2378 became due, I drew a new bill on J. and R. Cogan for a sum including the £2378, and Cogan's bill for £1900 within a few pence. This added to Cogan's bill, and took away from Bartholomew's. I drew these two bills on J. and R. Cogan as an additional security. (Q.) Did you take into consideration the question what was most suitable in the way of proportions for the different firms when you put the £2378 into Cogan's new bill?—(A.) Yes, that is what appeared to me at the time to be most suitable, and it was so done in consequence of the letter of 15th March. (Q.) So that the instructions in that letter operated in regard to the £2378 bill as well as the £1706 bill?—(A.) Very probably, but I might have drawn them in that way without that letter. It was upon my own authority that I took increased bills from Cogan as an additional security for Bartholomew's bills. I was never authorized by Messrs. Cogan to do so. I did not inform Messrs. Cogan at the time I sent the bill for acceptance, that if accepted they were to be so applied by me."

Now it is important to observe, that in speaking of what he has done, he says he has done what he has conceived he had a right to do, without any intimation or authority on the part of Cogan and Co. He acted upon what he conceived to be a right which he was entitled to exercise, and which he justifies on general principles in this manner: He says the law is this, if you hold a bill, you being the original holder of the bill, and continuing to retain it in your custody, and another person gives you a bill for the purpose of retiring that bill, or rather for the purpose of what in English phraseology is called simply renewing the bill, then the mere fact, that the person who gives you the additional bill does not ask you to hand over to him the bill in your possession, is a sufficient indication, that the new bill now given is not given by way of ordinary satisfaction of the original bill, but is given simply in order to extend the time. And the only effect of the new bill being given to you is this, that you are not entitled to sue during the currency of the new bill, but as soon as that bill is at maturity, and has been dishonoured, your right to sue upon the old bill revives. As you were not asked to give up the old bill, he says it was understood that you were entitled to return it, and that the new bill was not to be taken in satisfaction of the old one, but simply as an extension of the time for the payment of the security originally given to you and left in my possession.

Now the authorities no doubt go to that extent with reference to a bill which is simply left in the possession of the person entitled to demand payment at the time when the new security is given, nothing more being said or done. But it was justly observed in the course of the argument, that the circumstance of the retaining of the bill is a circumstance which is to be considered, like all others, with reference to the evidence in the case. If there be no explanation of it, the reasonable explanation is, that it was retained because both parties agreed that it should be retained. But when we have evidence before us of all that passed, when we have the fact before us, the fact that this distribution of the debt, in respect of the cotton, always took place in such a manner that one firm took its share without being liable for any part of the debt of the other firm in respect of its share, and that being the state of things, that all that is done with reference to these bills is a letter sent to say, we are anxious to have the old bills taken up which we believe to be circulating, and in order to do that you may draw new bills, redistributing the debt as you think fit, nothing being said as to the manner of redistributing the debt, but the writer saying simply, "make the amount of the redistribution such as you think proper under the circumstances;" and when you have in the correspondence a charge made for retiring the bills, and when you have the fact that that was what he was asked to do, and that it is fair to assume, that he acted upon the instructions that he received, that he neither went beyond them nor fell short of them,—I say, taking the whole transaction as it stands upon the evidence, that appears to me to be the plain and simple explanation of what took place. And as to the fact of Shepherd retaining the bill, that is only in accordance with what took place with regard to the Glasgow firm, who took up bills which had Shepherd's name, and never remitted them back to Shepherd, but retained them in their custody, both parties apparently trusting each other in that respect. Therefore, nothing appears to me to arise from the mere circumstance of the bills being *de facto* retained, which can countervail the evidence that we have before us.

I confess that even if I had not felt as clearly as I do feel, that the whole evidence results in the conclusion, that it never was intended that anything more should be done upon this occasion than to make a simple redistribution of the whole debt, I should have had considerable hesitation in recommending your Lordships to reverse a well considered decision upon a question of fact. But I feel much more satisfaction in saying, that my own mind goes with that decision entirely on the merits. And I shall therefore ask your Lordships to concur in the determination, that the interlocutors complained of be affirmed, and that the appeal be dismissed with costs.

LORD WESTBURY.—My Lords, as soon as the circumstances of this case are ascertained, I think there can be no reasonable doubt as to the manner in which it ought to be decided. In fact, the conclusion is afforded by the *evidentia rei*. Now the facts of the case taken in the abstract are very simple. Two cotton manufacturing firms in Glasgow of the name of Bartholomew and Co. and Cogan and Co. jointly agreed to make joint purchases of cotton from Shepherd and Co. who are merchants at Manchester. Accordingly, it appears that joint purchases to a very considerable amount were made, and Shepherd and Co. were directed or empowered to draw for the amount of the purchase money in such sums as they might think proper, distributing the amount due to them between the two firms of Bartholomew and Co. and Cogan and Co. in such a manner as they might find convenient in the market for discounting the bills, but what was drawn for on Bartholomew and Co. was a distinct thing from what was drawn for on Cogan and Co., and there is no trace of Shepherd and Co. ever being empowered to make, or of the purchaser even for a moment imagining that they were to make, one set of bills for the amount drawn upon Bartholomew and Co., and another set of bills for the same amount drawn also upon Cogan and Co. The sums were distributed, which form of expression implies, that they were divided into portions of unequal amount, and one portion was attributed to one firm and another portion was attributed to the other.

Now this being the state of things between the parties, in the month of March 1865, what was done was this: There were bills outstanding to the amount of £14,113, and of these bills, taking the appellants' statement of the figures, it appears that the acceptance of Bartholomew and Co. amounted to £8258 16*s.* 8*d.*, and the acceptances of Cogan and Co. to £5854 7*s.* 9*d.* That was the distribution which at that time had been made by Shepherd and Co. in pursuance of the authority they had received. At that time when these bills were some of them becoming due in the latter end of March, and two of them on the 3d and 5th of April, an application is made by the firms of Bartholomew and Co. and Cogan and Co. to Shepherd and Co. to make a redistribution of the aggregate sum of £14,113. They are requested to redraw the bills in such proportion as may be suitable. There is therefore a new division to be made, and it is left entirely to Shepherd and Co., consulting the state of the market, to appropriate that amount of liability in such proportion as they may think proper to the firm of Bartholomew and Co. and the firm of Cogan and Co. Accordingly they exercised that authority in a most remarkable way, and whereas the liability of Bartholomew and Co. was under the old distribution £8258, under the new distribution they reduce that liability to £4173, and they increased the liability of Cogan and Co. from £5854 to £9839.

Now it is impossible for any man to imagine, that after that altered distribution of the nominal liability, as expressed by the bills, the old set of bills were still to remain in continuance? It is quite at variance with the plain conclusion derivable from the facts of the case. It is perfectly clear, that the two firms at Glasgow in effect said to Shepherd and Co.: "Now make a new set of bills, and a new allotment of the debt, appropriating new amounts to the one Company and to the other."

I rely, therefore, *in limine*, chiefly on this, that there was in truth a request to substitute a new allotment, and a new distribution, of the debt for the old allotment and the existing distribution and that that was acceded to. It was a new distribution of the liability, and the bills which resulted from that new distribution were a new set of bills, and they cannot with any regard to truth or accuracy of language be represented as merely bills in substitution separately and individually for the antecedent debts. But when and under what antecedent set of circumstances was this new distribution of the debt requested to be made? Why, the request was this: "Make a new allotment of the debt—draw new bills on us—take those bills into the market, and with the proceeds of them retire, that is, pay off and discharge the bills that are about to become due in London." That seems to have been done with the whole of the first bills constituting the amount of £14,113. Shepherd and Co., acting as agents in behalf of the two Glasgow firms, did that for them at their request. It is plain that the firms in Glasgow must have considered that the bills were paid out and out. That is what they requested to be done, and it is plain that Shepherd and Co. considered that they had done so. That is proved by the fact of their charging a commission on retiring the bills, which would be consistent only with their representing to the persons giving them the order or making the request that the bills had, in conformity with their request, been retired, that is, taken altogether out of the market and out of the character of negotiable securities.

I think, therefore, there can be no doubt at all that this proceeding on the part of Shepherd and Co. (I do not mean to speak in dispraise of it all) is an ingenious afterthought, resulting from the accidental circumstance of their having been left in possession of these bills, which may in fact have been the result of omission or of the careless security which the one party allowed to the other. On that accidental circumstance the ingenuity of lawyers has founded this claim to a double security. There is no double security, no double debt, no double contract, but the second contract was entirely a substitution and satisfaction of the original.

No difficulty arises on the procedure with respect to the question of proof by what is commonly

denominated "writ or oath." The one debt to Shepherd and Co. is substituted for the other. Therefore the former debt is in fact discharged by the second debt. The second debt was intended to usurp the place of the preceding, that is, to be a discharge of the preceding one. And this being so, I have no hesitation in arriving at the conclusion which the circumstances of the case plainly point out as the true conclusion of the matter, viz. that the first debt is gone, and that the attempt to prove upon it must be defeated. I think, therefore, this appeal must be dismissed, and dismissed with costs.

LORD COLONSAY.—My Lords, I am of the same opinion. It appears to me, that this double claim, if I may so call it, which is made here, is not consistent with the original arrangement between the parties; and if it had been intended by Shepherd and Co. to retain this security, I think it was their duty, when corresponding with the Glasgow houses, to tell them that in the state of matters which then had arisen they intended to do so. But they did not make any explanation of that sort; and therefore I think it is quite clear, that the bills which are now the subject of claim were understood to be superseded, or discharged, by the retirement of those bills, by means of the proceeds of the new bills.

As to the point which has been raised by Mr. Anderson to-day upon the question whether any proof was competent except by "writ or oath," I certainly have no doubt upon it. If this had been a mere claim upon the bills without any appearance of prior transactions, or dealings between the parties, the case would have been quite clear, but upon the statement of the pursuer on the record, which is met by the statement of the defenders, it appears very clearly that there were dealings between the parties, and that there was a character of agency between them. And the question really comes to this, whether under the circumstances under which these bills were in the hands of Shepherd and Co., they were to be regarded as bills retired, or as a security which they were entitled to retain in their hands. That is not to be determined by a reference to "writ or oath." It is a matter of proof, and from the evidence before us I think there is no doubt as to the real state of the case; and that therefore this appeal ought to be dismissed with costs.

LORD CAIRNS.—My Lords, I also concur in what has been stated by my noble and learned friends. There is no occasion to examine any of the general principles of law upon this subject, which were referred to in the argument at the bar, and which are beyond all doubt. The whole question turns on the particular facts and circumstances of this case. I do not propose, after what has fallen from my noble and learned friends, to trouble your Lordships again with those facts. It appears to me perfectly clear from the correspondence and from the account in this case, what the intention and understanding of all the parties was. The operation which Shepherd and Co. were asked to perform by means of funds to be by them provided in London, was to withdraw from circulation those bills which were supposed to be in circulation in London, to put an end to them as bills constituting a claim against any one whatever, and in return for that operation the two Glasgow houses were to furnish Shepherd and Co. with new bills to be accepted by one or other of the two firms on the footing that the old bills were withdrawn, and in pursuance of that arrangement the new bills were drawn. It appears to me, that it was entirely an afterthought which has prompted the house of Shepherd and Co. to think that they were at liberty to hold the old bills for the purpose of constituting a second claim. It was not the transaction between the parties. I therefore think the claim ought to fail.

Interlocutors affirmed, and appeal dismissed with costs.

Appellants' Agents, Murray, Beith, and Murray, W.S.; John Graham, Westminster.—*Respondents' Agents*, Maconochie and Hare, W.S.; Loch and Maclaurin, Westminster.