

REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. I.

THIRD EDITION.

TO WHICH, BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED
COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS
ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

RICHMOND:

PUBLISHED BY A. MORRIS.

1854.

Entered according to act of Congress, in the year 1854, by

A. MORRIS,

In the Clerk's Office of the District Court of the United States in and for the
Eastern District of Virginia.

C. H. WYNNE, PRINTER.

HOPKINS v. BLANE.

Saturday, November 3d, 1798.

1. A principal in England, appoints an agent in Virginia to buy *grain*, and gives him power to draw bills on the principal for payment: the agent buys *tobacco*, and gives bills on the principal, who refuses payment. The seller of the tobacco cannot recover the money from the principal.*
2. In such case, if the seller of the tobacco took bills on the credit of the principal, he (the seller) ought to have presented them for acceptance, or given the principal notice of them, at an early date.—(Per PENDLETON, P.)

This was an appeal from a decree of the High Court of Chancery. The bill states, that Blane, a merchant of London, in the year 1789, empowered William Hunter, of Alexandria, in Virginia, to transact business for him in the mercantile line; and especially, by his letter of the 23d of November, 1789, he gave him ample power to purchase grain, and draw on the said Blane, at the discretion of Hunter. That, on the credit of this letter, which was shewn to the plaintiff, he, on the 22d [362] February, 1790, took the bills of Hunter drawn on Blane, for £400 sterling, for value thereof in current money here advanced. That £50 of those bills were paid, and the *residue* protested. That Blane was liable for these bills; and, therefore, the plaintiff prayed an attachment against his effects in the hands of the garnishees.

The answer of Blane states, that the defendant admits he empowered Hunter to transact *some* business for him, as by the letter of the 23d of November, 1789, and another of the 20th of the same month, to which that of the 23d refers. That the defendant does not know whether these letters were shewn to the plaintiff, but if he saw that of the 23d, he ought also to have demanded a sight of that of the 20th; whereby he would have discovered that Hunter's authority was limited to a particular conjuncture of commercial inducements, not expected to last long. That the defendant does not admit, that the plaintiff paid value in current money for the bills; but believes he received them in payment for tobacco sold by the plaintiff to Hunter on the 22d of February, 1790, because the plaintiff's account, rendered to Hunter, shews it to have been so. The answer then refers to copies of two letters from the plaintiff to

* A somewhat similar case, is *Blane v. Proudft*, 3 Call, 207.

The general rule is, that to charge the principal, the agency must be proved to be universal, or, else the dealing must be within the agent's explicit powers. Per Lyons, J., giving opinion of the Court, *Ib.* 215.

Hunter, and states that the defendant does not know what Hunter did with the tobacco. That the bill for £50 was paid; but that was owing to the defendant's having accepted it, on its first presentation, without knowing on what account it was drawn, or that Hunter had exceeded his authority.

The letter of the 20th of November mentions, that a great scarcity of grain prevailed in France as well as Britain, and other parts of Europe, and that supplies must come from America. In consequence of which, Blane had chartered several small vessels of about 140 to 180 tons, which would be despatched, early in the next month, to the address of Hunter, M'Cauly, Patten and Dalrymple, and another Mr. Hunter, of Alexandria, who were to act together, and adopt such measures as would procure the most immediate despatch. The [363] first object being to despatch them before other vessels of a larger size, so as to get sooner to market; and the next, to make two trips before the 1st of July, that being the expiration of the time limited for the *bounty* to continue. And that he wished provision to be made for the despatch of one such vessel immediately, so that there might no detention arise.

The letter of the 23d November, refers to that of the 20th, and adds the reasons which induced him to enter into the business; which were as follows: 1st. His confidence in the activity of his correspondents, and as it would be impossible to guard against every contingency by instructions, he gives them full latitude, according to circumstances, to act as may appear most conducive to his interest; having always in view the general spirit of his intentions. 2d. The scarcity of grain in Europe, and consequently in the West Indies, with the French bounty; supplies for all which, could only come from America. 3d. Freight would be high, and the demand for vessels greater than could be supplied. 4th. The markets in Europe and the West Indies would be so high as to justify the giving high prices by his correspondents in America. 5th. That, if prices should be higher than in the opinion of his correspondents ought to be given, the vessels might then be let to freight. 6th. That the scarcity in Europe and bounty in France, would attract American vessels thither, and might render the West Indies a greater object. And if so, British vessels would be the safest vessels for the British West India Islands, unless those ports should be opened. Of all which his correspondents were to judge. 7th. That the vessels chartered suited any destination, and despatch was, therefore, of unspeakable importance; for which reason, he would rather give the full extent of the prices here, than that any detention should arise.

8th. That the giving Blane early funds was important, and would have considerable influence on the operations of his correspondents: a circumstance which favored the Falmouth destination. For, as soon as he got Hunter's advice of a cargo, and bills of lading, he could raise funds on them. 9th. That wheat and flour were doubtless the best articles for European markets, but when the difference between them and Indian [364] corn should be great, as might be the case about the spring, it would probably suit to purchase that. 10th. *That in regard to drawing bills, Hunter would, of course, negotiate them on the best terms that circumstances would admit of, and that it might, perhaps, facilitate the operations of Hunter, by making the purchases payable in bills on certain terms.* 11th. Gives addresses, as to certain houses in the West Indies, (who were to be instructed to sell on the spot, and remit to Blane,) and urges the importance of despatch. 12th. Mentions the destruction to shipping in Britain from a storm the month before, which had increased the demand for vessels amongst the colliers; and, although there might be plenty for a while, it could not last long, on account of the great freight that must arise in America for "wheat, flour, corn, lumber, turpentine, tobacco," &c., adding, "*and I must beg that it may never be forgot, that in whatever way a vessel can be quickest despatched is what I shall always prefer; as no consideration can possibly compensate to me for detention and want of time.*"

The account spoken of in the answer, is an account current between Hopkins and Hunter, which states a balance of accounts, settled on the 31st December, 1789, amounting to £47 17s. 3d. due Hopkins. Then, a debit of £496 15s. 9d. for 50 hhds. tobacco on the 22d of February, 1790, and £210 for two bank bills. Then follow charges for interest and protest. This account is credited by some small articles of merchandise on the 22d February, 1790, and bills on Blane for £490 together with some lottery tickets.

The letters of the plaintiff to Hunter are dated the 4th and 24th of March, 1790: That of the 4th states the rate of exchange, and mentions some other subjects not relevant to the present suit. That of the 24th, after speaking of some [365] other matters, not connected with this business, adds, "I am under pressing calls for money, and request you to forward me, at least, the money for the bank notes, and for the former balance due me. The bills on London I do not like to part with at this very low state of exchange, say 16 per cent. Such, however, are my necessities, that unless you sup-

ply me, and that very speedily, I must be obliged to make a sacrifice of them."

There is in the record, another letter from Hopkins to Hunter, of the 30th of March, 1790; which complains, that his former letters had not been answered, and adds, "I have frequently informed you, that the bills on London, which I received of you, have not yet been disposed of, owing to the great fall of exchange; and, it was never my wish to sacrifice them, without the most pressing necessity. With this determination, I have regularly acquainted you; to which, I have received no answer. I now send the bills by Mr. Adams, with a request, that you will be pleased to pay him the money for them; or, return them to me, limiting the price at which I may dispose of them. It is, however, proper to observe, that exchange is now down to 16; nor, can I say with confidence, that there is any prospect of its immediate rise. I have this day drawn on you, in his favor, for the amount of the bank notes, and the balance of my former account; which I left with you."

There is also in the record, a letter from Hopkins to Hunter, of the 4th of May, 1790, which is as follows: "Sir, I enclose you a statement of my account; by which, you will perceive a very considerable balance, in my favor, for money lent and tobacco sold. The situation to which I am reduced, from my funds being in other hands, is truly a most melancholy one; and, without these funds can be drawn forth, to answer my own engagements, the consequences must and will be ruinous to me. When you view the face of my account, you will readily perceive a very considerable sum of money, from which [366] I have derived no advantage; and, which has too long (and much longer than I expected or intended) lain in your hands. It is not only unfriendly, (and I consider it so,) but is cruel and unjust to keep it longer. You will, therefore, send it down to me without delay. It is, I conceive, needless to say I want it. Every man wants his money; and, the principle of detention, cannot be justified, at least, in the present instance. Your bills are still on hand. I have not, nor can I sell them, unless at the present low exchange; respecting which, I have repeatedly written you; but, have not been favored with a word in reply. The bank notes lent, ought at all events to be returned; and, the propriety of this was so clear, that I sent to you for the money, by Mr. Adams. What was the reply? Verbally, *sell the bills and be damned*. I have so often troubled you with letters since I saw you, without an answer to any one of them, that I can hardly expect one on this occasion; but once more, I entreat it."

There is the deposition of a witness, which proves that it appears, by Hunter's books, the bills were drawn for the payment of the tobacco purchased by him, of Hopkins; that he lived with Hunter at that time; recollects the disposal of the tobacco, and that no part thereof was shipped to Blane; but, that the same was shipped to Fanny and Forrest of Havre de Grace, for an advance made by them here, to Hunter: Which was applied as Hunter's *business required; whether for the purchase of produce, or the payment of his debts.* That Hunter shewed Blane's letter in some instances, when he wanted to sell bills on Blane; but, does not know whether he shewed it to the plaintiff; that these were the first bills, drawn by Hunter on Blane, after the receipt of the letter of the 23d of November, 1789.

Another deposition states, that the witness had, in the beginning of the year 1790, heard Hunter say, he had a right [367] to draw on Blane; and, that he afterwards heard the plaintiff say, he had bills from Hunter on Blane; and, that Hunter had shewn him Blane's letter.

The High Court of Chancery dismissed the bill with costs. And Hopkins appealed to this Court.

MARSHALL, for the appellant.

That Hopkins made advances for the bills, and that he took the bills upon the authority of Blane's letter, is clearly collectable from the circumstances of the case. The question, therefore, is, whether Blane, upon that authority, is bound to pay the bills?

The mode of negotiating the bills, was left by Blane to the discretion of his agent; and, the instructions were, to negotiate them in the best manner in his power. Of course, the agent was not limited by his instructions; and, therefore, whether he appropriated them rightly or not, the bill-holder could not be affected by it, since he had no control over him; and, consequently, was not responsible for his conduct.

It does not matter whether the bills were negotiated for tobacco or money, because the agent might as well have misapplied money as tobacco: and, yet it was essential to his agency, that he should be able to change them into one, or the other. For, it might not suit the merchant or planter here, to take bills for his grain; and, therefore, the agent would be obliged to give them something which they would take; and this, he had no other means of raising, but by the bills. Either, therefore, he must have sold the bills for money, or if that

could not be done, for tobacco; which he might change into money, in order to make grain purchases with.

The principles of this case, have been already decided by this Court in *Hooe v. Oxley*, 1 Wash. 19. But, the case at bar is not so strong as that; for, upon examining the record, in that case, it will be found that the authority of Ponsonby, was much more limited there, than that of Hunter was [368] here. In other respects, the cases perfectly resemble each other in principle. For, the bills there, were drawn for other objects, than the principals intended, as well as here.

The powers given in the latter were ample enough, to authorise Hunter to purchase tobacco itself and ship it to Blane. For, it enumerates tobacco amongst the articles of commerce; and begs, that despatch may be used at all events, in any of the enumerated ways; as nothing could compensate the injury of delay. By which it may be fairly argued, that the purchase of tobacco was authorised.

WICKHAM, *contra.*

It is clear, that Blane never has received value for the bills; and, that he did not even know of the plaintiff's contract with Hunter. It is also clear, that the bills were not drawn upon the credit of Blane's letter; but, that the plaintiff trusted Hunter only. Their letters shew an explicit reciprocal confidence in each other. Therefore, the argument that the plaintiff proceeded upon the authority of Blane's letter, cannot be maintained. There is no proof that he ever saw it; and, the circumstances repel such an inference. It was wholly unlikely, that Hunter would have shewn it, or that he, from his confidence in Hunter, would have required a sight of it.

If the plaintiff bought the bills of Hunter, they must have been paid for, either in the bank notes or tobacco. The letters prove it was not the first; because, they treat the bank notes as a loan.

And, as to the tobacco; the inference is, that it was tobacco which the plaintiff lodged with Hunter, to sell for him; and, that it was not an original contract of sale for tobacco, to be paid for in bills; but, that the bills were deposited with the plaintiff, to be sold for Hunter: Which is manifested, by the difference of exchange, at which they were to be settled. The plaintiff, therefore, should not have sent the bills to London, and had them protested; but, should have returned [369] them to Hunter.

Perhaps it will be said, that he took them as a pledge; but, it never could have been intended, that such a power should

have been within the limits of Hunter's agency. Such a construction would ruin trade.

Blane's name was never mentioned in the correspondence; and, therefore, the presumption is, that the plaintiff did not rely upon him.

The agency of Hunter was limited and confined to the purchase of grain, during a scarcity which prevailed abroad. This was the primary object; despatch was subordinate to it; although, that was important through fear that the market might be lost: But, freight was entirely secondary; and, only to be taken in case the other failed. The agent, therefore, had no authority to meddle with any thing else, whilst grain could be got.

Blane never contemplated the purchase of tobacco, or any other article but grain: he, only went on the idea, that people would put them on board, on freight. For, he says nothing of the places, to which they were to be sent. Therefore, Hunter must be taken to have bought the tobacco on his own account; and, not upon that of Blane.

Hooe v. Oxley, 1 Wash. 19, differs from this case. Ponsonby there, was in the character of an agent merely, and not of merchant. Of course, when he drew a bill, the presumption was, that he drew it in his authorised character of agent; but here, Hunter was acknowledgedly a general merchant; and, therefore, not to be presumed to have acted as agent, except where the circumstances evidently shew it.

If in the case of *Hooe v. Oxley*, the bills had been drawn for the purchase of grain, the principals of Ponsonby would not have been bound. That case would then in fact have resembled this; but, at present it does not.

[370] An exception is made in that case, which, according to legal inferences, will apply here. It is there said by the Court, that the general principles which they laid down, "excluded the idea of collusion between the bill-holder and the agent, to abuse the powers confided by the principal. Such a circumstance would defeat the bill-holder, in his attempt to charge the principal." If, then, the plaintiff did see the letter of Blane, he necessarily saw that his powers were confined, and, therefore, having entered into a contract with him, out of the limits of his instructions, the law will interpret it a collusion; which will defeat his attempt to charge the principal. However, I do not charge the plaintiff with an actual collusion; I only insist upon the inference which the law would make, had he actually seen the letter. For, as Blane evidently never intended his bills to be applied to the purchase of tobacco;

such a contract founded on a view of the letter, would fall within the exception above-mentioned.

RANDOLPH, on the same side. The bills have been endorsed over by Hopkins; and, he does not shew his right to hold them again: which, we might fairly insist, he was bound to do, if it were necessary to support our cause.

But, Hunter could not buy tobacco with the bills; for, he was expressly limited to the purchase of grain. The enumeration of commercial articles, did not authorise the purchase of tobacco; for, it was not one of them. Grain was the great object; and the others were merely secondary.

Either the plaintiff saw the letter of Blane or he did not. If the last, then there is no room to argue that he relied upon the credit of Blane. But, if the former, then he falls within the exception mentioned in *Hooe v. Oxley*.

If the bills were merely pawned as a security for payment for the tobacco, then the plaintiff's claim cannot be maintained; because, a factor cannot pledge the property of his principal as a security for his own debt. *Paterson v. Tash*, 2 [371] Stra. 1178.

The plaintiff's delay in calling on Blane, shews he did not think him liable; and, that he was probably endeavoring to get it of Hunter; whose credit he knew was declining.

Upon principle, if the plaintiff saw Blane's letter, he took the bills subject to the conditions and restrictions which it contained. [*Mason v. Hunt et al.*] Dougl. 297.

MARSHALL, in reply.

The authority of *Hooe v. Oxley*, as applied to this case, remains unimpeached. For, although Blane did not receive value for his bills in this case, no more did Oxley & Hancock for their's, in that.

Whether the principal receives value or not is unimportant, provided the agent has power to draw. The plaintiff clearly took the bills on the credit of Blane. It is, at first sight, presumable that the payee sees the authority, before he takes the bill; to omit it would be such a gross act of indiscretion, as few men would be guilty of. The conclusion, therefore, is, that the plaintiff saw the power, and having seen it, he was not bound to enquire further, whether the principal actually received value for the bills or not.

But, whether the plaintiff saw the power or not, he was bound by it; because, he ought to have seen it: and if he did not, it was a folly, which would not avail him. For, by con-

tracting under it, he, in judgment of law, undertook to know it, and, therefore, was bound by its contents. But if he is bound by it, he should, on the other hand, have all the benefits of it.

In *Hooe v. Oxley*, it was not proved that all the letters were shewn to the sellers; but Ponsonby held them; and, therefore, it was decided that Hooe & Harrison might avail themselves of them, because they would have been bound by them.

The intimacy between the plaintiff and Hunter, forms no objection; it would equally have held in *Hooe v. Oxley*: [372] But it was considered as unimportant.

If the plaintiff had trusted Hunter only, he would have taken his note or bond; but, omitting to do so, he must be held to have relied on Blane: Who, having trusted an improper man, should bear the loss when the trust has been abused, and not an innocent man, who, through him, confided in Blane.

The plaintiff's letters do not shew, that the bills were paid for in tobacco, more than money. For, he was only remonstrating with Hunter, whether he would suffer the bills to be sacrificed: But this did not destroy Blane's obligation to pay the bills, which were properly issued.

The bills were not taken as a pledge; for, the plaintiff took them as a payment, and had an immediate right to sell them.

The argument that Hunter was an agent for a particular purpose only, proves nothing. For, if he was a particular agent, it was to draw bills within a certain limited time, and he has done it within that time. He was not circumscribed by Blane, as to the mode of negotiating the bills; and, therefore, the payee was not bound to make enquiry relative thereto.

As to the argument, founded on the exception to the general principles laid down by the Court with regard to agency in *Hooe v. Oxley*, the answer is, that there is nothing to bring the case within it. That exception means a fraudulent combination between the bill-holder and the agent, to defraud the principal; as, for instance, to get payment of an old debt, or for some other corrupt purpose; but it was not intended to apply to the case of a fair bargain, for an article as current as money, and capable of being turned into it at any moment. Such a transaction, instead of being collusive, was actually putting funds into the hands of the agent, to enable him to exercise his functions.

[373] But, all the principles contended for on the other side, were overruled in the case of *Hooe v. Oxley*; which is stronger than this for another reason, beside that, which I mentioned before; namely, that here was an express

authority given the agent, which the Court thought could only be implied there.

In that case, Ponsonby had no right to substitute himself for the planters; yet, the Court held the principals bound by the substitution.

That Hunter was a merchant, makes no difference; or, if any, it is against Blane. Because, if Ponsonby was not a general merchant, it was more manifest that he acted as agent; and, therefore, the bill-holder was the more bound to exact a stricter conformity to his agency, and to take care that he did not exceed his powers in the transaction.

The plaintiff's not sending the bills immediately, does not alter the case; because no loss is proved to have been sustained in consequence of it; and, being amongst the first that were drawn, they could have created neither caution nor suspicion in Blane: who would have concluded that they were drawn for the purposes of the agency. Besides, it was held in this Court, in the case of *Stott v. Alexander*, 1 Wash. 331, that eighteen months was a reasonable time for negotiating bills of exchange drawn here.

Both agent and principal were liable, if the plaintiff chose to consider them so; and he might pursue them one after the other, if he thought proper.

In short, upon principle, as well as upon the authority of *Hoe v. Oxley*, (which, in all its parts, comes completely up to the present case,) I contend that the decree is erroneous, and ought to be reversed.

PENDLETON, President. On this occasion we are referred to the case of *Hoe & Harrison v. Oxley & Hancock*, 1 Wash. 19, as a case where the principles are established which direct the present decision. We have revised that case, [374] and approve, as well of the general principles laid down, as of the application of them to that case,* and if those principles apply equally to the present case, the same decree will be made, which makes it necessary to compare the circumstances of the two cases.

Both powers are of the second class mentioned in that case; *limited as to the object*, or the business to be done, and the agent *left at large* as to the *mode* of transacting it. In that case the business of Ponsonby was to procure consignments of tobacco to Oxley & Co. shipped on board their vessels; to

[* In *Blane v. Proudfit*, 3 Call, 214, Lyons, J. delivering the opinion of the Court, said, "That case carried the principle of responsibility far enough, and we are not disposed to push it any further."]

facilitate which, he was empowered to make advances to the shippers, and for that purpose, to draw bills of exchange on Oxley & Co. which they promised should be duly honored. In this respect, that case is misstated in the outset, that he was authorised to purchase tobacco; but the mistake is corrected in the opinion of the Court. The bills in that case were drawn for the tobacco purchased to load the Lady Johnson, and shipped on board her by Ponsonby himself, consigned to Oxley & Co. when other consignments were not to be procured for her loading; so that the principal purposes were answered; namely, that of loading their vessel, and entitling them to commissions for the sale of the tobacco. The only difference was, that in case the tobacco did not produce the amount of the advance, he would become their debtor for the difference, instead of many correspondents; and they left the opportunity of *engaging* such correspondents in future: Which being of an inferior nature to the other, it was doubted whether Ponsonby was not within the strict limits of his agency, so as to entitle him to his damages against Oxley, for having protested his bills, if the case had come on as between them; especially, as by their letter of November the 30th, 1784, with full information before them of what he had done, they seemed to confirm it, but forbid its being repeated.

[375] In this case, if the cause had come on between Hunter and Blane, it would not admit of a moment's doubt. The bills were drawn for the purchase of tobacco, not authorised by the power, nor applied to the use of Blane, either as a remittance, or for the despatch of his vessels: it is consigned to merchants at Havre de Grace, not named in the power, and the proceeds advanced to Mr. Hunter here, and applied in the purchase of produce and payment of his debts. The produce not stated to be that of grain sent to Mr. Blane, was to bring it, by a circuitous operation, within the power.

We then compare the case of the bill-holders. Ponsonby had been from May, 1783, in the exercise of his power of loading Oxley's vessels, and in the habit of drawing bills for advances to the shippers, and his power communicated in a circular letter, written to engage correspondents. However, in the infancy, his power to draw was not so *notorious*; and an endorser was in some instances required. Mr. Smith endorsed one of his bills; of which Mr. Smith informs Oxley by letter in September, 1783, taking notice, that Ponsonby had applied to him to endorse his bills on them, to get money to advance to the shippers; and that he had endorsed one. In answer to this letter, they thank Smith for his assistance to

Ponsonby, whose bills on them they say *will meet due honor*: A general expression, not confined to that particular bill, but to Ponsonby's bill generally, which continued to be frequently drawn, and as constantly paid; until those in dispute were drawn, circumstanced as before stated, in fall, 1784, and were protested.

In the present case, the bills were drawn in the commencement of the agency, when the agent's power to draw had gained no accession from his habit of drawing, and Blane's of paying; and, therefore, must depend on the power itself, and the circumstances under which Mr. Hopkins received the bills; that is to say, whether he took them upon the credit of Hunter himself, or was induced to take them on the credit of [376] Blane, from a well-founded opinion that he was bound to pay them? It was laid down by the appellant's counsel, that bills of exchange are purchased upon the credit of the person on whom they are drawn; but this as a general position is not correct: they are generally taken on credit of the *drawer*, which, if doubted, is fortified by an endorser, the drawee not being bound until his acceptance; and then the drawer is not discharged till actual payment, unless by delay the holder gives credit to the acceptor, and so loses the other resort.

We suppose the counsel only meant the case of a bill drawn by an agent on his principal, pursuant to his power given to draw, and to such bills the observation applies. That these bills were not within the letter or spirit of the power, has been stated; and whether Mr. Hopkins was induced to take them, on a supposition that they were drawn to procure money to fulfil the purposes of the agency, by circuitous operation, depends upon the circumstances attending the negotiation.

That Hunter shewed these letters to some persons to whom he wished to sell bills, as a proof of his power to draw, is proved, but this would seem to be after these bills were drawn; which Scott proves to have been the first drawn by Hunter, after the receipt of the letters. That they were shewn to Mr. Hopkins at the time, is not otherwise proved than by his own declaration to Watson; when made, does not appear, nor is it material, since, whatever credit may be privately due to the assertions of that gentleman, they are not here to be taken for proof. It might be, that Hunter found it unnecessary to shew those letters; since his bills might pass to Mr. Hopkins upon his *own credit as a merchant*, with whom Mr. Hopkins had had former dealings, and been in intimacy. The accounts between them, with Mr. Hopkins's subsequent letters, make a strong

impression that this was really the case, and the bills, taken [377] upon Hunter's *credit*; the powers from Blane being only now resorted to, when Hunter's insolvency would otherwise occasion a loss of the money.

Whether the bills were at first taken absolutely, or on trust, to be sold for Hunter, and whether the exchange was fixed or left to depend upon what they would sell for, seems quite immaterial to Blane, and, therefore, need not be considered. One circumstance drawn from the correspondence, though, seems of weight. If Mr. Hopkins took these bills upon the credit of Blane, it was certainly his duty, upon the general principle of negotiation, to have presented them to Blane, or given him early notice of them, to enable him to regulate his conduct as to the agency of Hunter; for want of which, he might have paid other bills which he would have refused, if he had known himself bound to pay these bills: or finding his agent abusing his confidence, he might have put an end to his powers at an earlier period.* But these bills, received the 22d of February, remained in Mr. Hopkins's hands, for reasons disclosed in the correspondence with Hunter, at least till May the 4th, the date of Mr. Hopkins's last letter, and probably longer, since by the note at the foot of the bill, they do not appear to be presented till the 31st of August; and that is the first notice which Blane had of their being drawn. There seems to be the same reason for diligence in the application to Mr. Blane, if he was chargeable in this case, as there is for the like diligence to charge the *drawer*, when he is to be made liable for want of acceptance and payment. The form of the bill, too, directs the money to be charged to the *account of Hunter*, instead of directing it to be placed to account of grain purchased for your use by me as your agent; a circumstance which ought in these cases to be observed; in order to show on whose credit the bills were drawn, and to avoid disputes of the present nature. But, as this is not always attended to, and was not observed in Oxley's case, it would not alone have weight; yet it has some, when added to the other circumstances. The accounts shew that the plaintiff and Hunter [378] had dealings together *as ordinary merchants*; an account of which was settled in December, 1789. The balance begins the account, in which are added sundry articles of debit and credit, undoubtedly of a *private nature*; and with these are intermixed a debit for the tobacco and the credit for the

[* For the general rule as to the period of presentment, see *Muilman v. De Eugino*, 2 H. Bl. 565; *Goupy et al. v. Harden et al.* 7 Taunt. 159; *Fry v. Hill*, 7 Taunt. 397.]

bills, differing in amount; and, although that difference is only £6, 15s. 9d., it is yet a circumstance to shew that those articles were not a *separate* independent dealing.

The correspondence confirms the idea of the bills having been taken from Hunter in his *private capacity*, and not in his agency; since not a word or hint is given of Blane's having any concern in them, in any of the letters.

When we return to the accounts, there are two which agree; the first annexed to Blane's answer, the other I suppose introduced by Mr. Hopkins, making a balance of £248, 4s. 9d. due to him. There is a third account with the same articles, and making the same balance; which being made an article of debit, this article is added: "to bills of exchange on Thomas Blane, returned protested with costs £560, 6s. 9d., making £808, 11s. 6d.:" and this account, so far, has the name of Mr. Hopkins, October 9, 1790, the same date of the other two. Then follow several credits, amounting to £375, 11s. 7d., which would leave a balance of £432, 19s. 10½d. only due from Hunter, shewing £127, 6s. 10½d. to have been paid him in part of the bills; and this would evince further, that Mr. Hopkins, after the protest, considered Hunter as his debtor. But at the foot is a certificate of Mr. Scott's, that "the above is a true statement of John Hopkins's account as it stands on the books of the late William Hunter;" which creates a doubt whether the debit of the protested bills, as well as the latter credits, were not taken from Hunter's books, so as to do away the influence of Mr. Hopkins's having made it a debit in his account; and that circumstance is disregarded.

But another circumstance has considerable weight; [379] namely, that although these bills were protested on the 2d of November, 1790, Mr. Hopkins does not appear to have made any application to Mr. Blane until May, 1793; when he commenced this suit: which evinces, that during that time he relied on Mr. Hunter; thus depriving Mr. Blane of an opportunity of pursuing a remedy against Hunter, as he might have done, if a demand had been made at an earlier period by Mr. Hopkins. Upon the whole circumstances, then, we are of opinion, that Mr. Hopkins took these bills upon the credit of Mr. Hunter, (*unconnected* with his agency for Blane,) and not upon the credit of Blane in consequence of that agency. Therefore, upon general principles, as well as in conformity to the decision in Oxley's case, we are unanimously for affirming the Chancellor's decree, dismissing the bill.