Counsel for Complainer (Respondent)—Mackintosh—A. J. Young. Agent—Alexander Morison, S.S.C.

Counsel for Respondents (Reclaimers)—Kinnear—Asher—Pearson. Agents—Davidson & Syme, W.S.

Friday, March 19.

SECOND DIVISION.

[Lord Young, Ordinary.

GILMOUR *v.* BANK OF SCOTLAND.

Cautioner—Cash-Credit Bond—Terms of Bond in regard to Obligation to Pay Interest—Period from which Interest to Run.

Four persons granted a cash-credit bond to a bank for £600 on an account to be operated on by T., one of their number. All four bound themselves "to pay on demand all such sums not exceeding £600 as are and shall be due to the said governor and company from me, the said T. . . . with interest on such sums severally at the rate of five per cent." *Held (rev.* Lord Young, Ordinary) that this imported an obligation on each cautioner to pay £600 and interest thereon.

T., the principal in a cash-credit bond with a bank, became bankrupt in November 1878. At the last balance struck previously, on 31st December 1877, he was due the bank over £700. On 7th January 1879 the bank wrote one of the cautioners with a note of the indebtedness, amounting to £635, 13s. 8d. The cautioner offered to pay £600 and interest from the date of that intimation, holding that interest and principal had been accumulated at that date. The bank claimed interest from 31st December 1877, the date of the last balance struck before the principal debtor's bankruptcy, and it was *held (rev.* Lord Young, Ordinary) that they were entitled to payment of the principal sum of £600 and interest from that date.

Observations on the case of *Reddie* v. *Williamson*, Jan. 9, 1873, 1 Macph. 228.

This was a suspension raised by Andrew Gilmour, farmer, Neilston, against the Bank of Scotland, of a charge to pay £653, 14s. 9d., under deduction of £622, 14s. already paid by him. The complainer, along with David Tweedley and two other parties, had obtained credit from the bank of £600 in name of Tweedley, and by a cash-credit bond the four bound themselves as follows:—"We . . . having obtained a credit of £600 with the Bank of Scotland on cash account, in name of me, the said David Tweedley, do therefore hereby bind and oblige ourselves, our heirs, executors, and successors whatever, all conjunctly and severally, to pay to the governor and company of the Bank of Scotland, or to their assignees, on demand, all such sums not exceeding £600 as are or shall be due to the said governor and company from me, the said David Tweedley, whether drawn out on said cash-account by me, or liable on me by any drafts, orders, bills, promissory-notes, endorsements, receipts, bonds, letters, procurations, guarantees, documents, or legal construction whatever, with interest on such sums severally at the rate of five per cent." The bond also contained the following clause:—"And any account or certificate signed by the cashier of the said bank, or by any accountant in the said bank, or by the manager or sub-manager or agent or accountant for the office where the said cash-account may then or before be kept, shall ascertain, specify, and constitute the sums or balances of principal and interest to be due hereon as aforesaid, and shall warrant hereon all executorials of law for such sums or balances and interest, and for the liquidate penalty aforesaid, whereof no suspension shall pass but on consignation only." In November 1878 Tweedley became insolvent, and in January 1879 a state of the operations on his cash-account was sent to the complainer, bringing out a balance of £635, 13s. 8d. against Tweedley. In January 1878 the balance against Tweedley had been £700, 13s. 10d. There were various operations on the account down to 5th September 1878, when the balance stood at £603, 5s. 11d., exclusive of interest from the beginning of the year. The bank thereafter on 24th October 1879 charged the complainer to make payment of £653, 14s. 9d., being the principal sum of £600 with interest from 1st January 1878, the last date at which the bank alleged that interest was accumulated with principal. The complainer, as already mentioned, paid £622, 14s., being the principal sum in the bond and interest from 31st December 1878, he alleging that the bank had accumulated interest at that date in terms of the state of Tweedley's account sent him on 7th January 1879. He further alleged that this accumulation of interest with principal had taken place each year during the currency of the account, and was the usual practice of the Bank of Scotland and other Scotch banks. He produced the following state of the account rendered to him on 7th January 1879:—

DAVID TWEEDLEY, Grocer, Barrhead, in A/c with the BANK OF SCOTLAND.

	Dr.			*Cr.*	
1877.			1878.		
Dec. 31. To balance,	£700	13 10	Feby. 2. By cash,	£6	16 3
1878.			4. ,, ,,	7	12 6
,, 31. To int.,	32	7 9	5. ,, ,,	4	15 0
			6. ,, ,,	50	0 0
			Mch. 28. ,, ,,	11	0 0
			Aug. 22. ,, ,,	13	4 2
			Sept. 5. ,, ,,	4	0 0
			Dec. 31. Balance,	635	13 8
	£733	1 7		£733	1 7

The bank denied that they had accumulated interest after 1st January 1878, and produced a state of the account in support of this contention; they also denied that the account rendered on 7th January 1879 was a proper state of the account, alleging that it was merely a statement by a bank clerk of the balance due at that date, and that no balance was struck in the bank books after 31st December 1877. The sum in dispute between the parties was therefore the interest on the principal sum of £600 for 1878. The respondents alleged that it was a standing regulation with bankers not to accumulate interest with the principal of an account the holder of which had become insolvent or when the account had become irregular.

The complainer's pleas-in-law were, *inter alia*—

"(1) The complainer having been liable under the bond only for £600, and interest thereon from 31st December 1878, which he has paid, the charge is without warrant. (2) The chargers are bound by their account as stated to the complainer on 7th January 1879, and they are thereby barred from their present claim. (3) The account of 7th January 1879 having been stated in accordance with the uniform previous practice, the chargers are barred from their present claim. (4) *Separatim*—The chargers' claim to re-state the debit side of their account as from 31st December 1877 involves the application of all payments on the credit side proportionately to the £600 as well as to the overdraft, and the chargers, in that view, have been overpaid."

The Lord Ordinary (YOUNG), in an interlocutor dated 7th January 1880, sustained the reasons of suspension and suspended the decree and charge, adding the following note:—

"*Note.*—The complainer is in popular and I think accurate language cautioner to the extent of £600 for David Tweedley's debt to the Bank of Scotland on current account. Tweedley became insolvent in November 1878, and although the fact is not averred on record, I infer from the correspondence that his estates were sequestrated. The precise date of his insolvency is not stated, and neither is the amount of his debt to the bank at that period, but at 31st December following (the time of the bank's actual balance) it amounted with interest to £635, 13s. 8d. This was intimated to the complainer on 7th January, when a copy of the year's account bringing out that balance was forwarded to him. He admitted liability to the amount of £600, which he accordingly paid on 20th October, with interest to that date, amounting to £22, 14s., making the total payment £622, 14s. The bank claim from him a further sum of £31, 0s. 9d., being interest on £600 during the year 1878, and thereafter till the date of their charge on 24th October given to try the question, which they say is of general importance, whether they are entitled to it.

"It is matter of regret that the terms of credit-bonds to bankers should be so various and of such uncertain import as to give rise to important questions which a great bank may find it expedient to try in a litigation with a farmer who has lent his credit to a village grocer. Of this variety of form and uncertainty of import we have illustration in the present case and in that of *Reddie* v. *Williamson* (1 Macph. 228), for the bonds are very different in the two cases, although no doubt both aimed at the same end, and it is possible, perhaps probable, that the variety now presented to the Court may give rise to as much difference of opinion as that which occurred in the case of *Reddie*.

"The first observation which I have to make—and I make it as preliminary to a consideration of the bond now in question—is, that the bond is always immaterial to the principal debtor and the bank's claim against him. He is liable for the money he draws, with customary interest, irrespective of the bond, which in no way affects his position as the bank's debtor or the position of the bank as his creditor. With the cautioners the case is quite otherwise—for they are under no liability other than the bond imposes on them. It seems to be thought that some virtue attends the association in the bond of the principal debtor with the cautioners, and that it is desirable to render them as indistinguishable as possible. There is no such virtue, and it is as impossible as it is undesirable to conceal who is the principal debtor. The object in view is to get people to pledge their personal security for the debt of another. That is the reality of the matter, and no ingenuity in the framing of bonds can make it other than it is. But a man so pledging his security naturally desires to know the limit of his liability, and if his bond (prepared by the creditor) *prima facie* professes to declare it at a specified sum, and is reasonably capable of a construction which will limit it to the sum declared, I should, for my part, greatly favour that construction. The limit is entirely in the creditor's power, and I confess that I strongly lean to the view that he ought so to declare it that the surety may certainly know it, and therefore that the bond if reasonably capable of importing such declaration shall be so construed. According to the opinion of the minority of the Judges in *Reddie* v. *Williamson*, the liability of a cautioner might be indefinitely extended beyond the limit *prima facie* declared by his bond, on what Lord Benholme termed taking 'to pieces,' and resolving 'into its elements,' an account extending over a quarter of a century or more. I agree with the majority of the Judges in thinking that this is 'erroneous in principle,' and 'involves great injustice.'

"In this case the bond bound the cautioners (as usual along with the principal debtor) to pay 'on demand all such sums not exceeding £600 as are or shall be due' to the bank by the principal debtor in any way, 'with interest on said sums severally' at a certain rate subject to variation. The question is, does the limit declared apply to principal and interest taken together without distinction, or to principal only exclusive of interest, for which there is liability without regard to that limit? and I am of opinion that it applies to both. I think any ordinary man (say a farmer like the complainer) signing such a bond, after reading it intelligently, would understand and believe that he was bound 'on demand' to pay his friend's debt, principal and interest, without distinction, to the amount of £600 and no more, and would not contemplate the possibility of his liability being increased by taking an account 'to pieces' and resolving it 'into its elements,' and this is, in my opinion, the legal import of the instrument, although I do not fail to understand the argument for another construction whereby (modified in deference to the judgment in the case of *Reddie* v. *Williamson*) the limit declared would be increased by the addition of a year's interest.

"I need hardly say that I should have exactly followed the decision in the case of *Reddie* had the bond here been substantially in the same terms as the bond in that case, and the circumstances otherwise similar, not only because it is binding on me as an authority, but because I think it right.

"I must add that I fail to see the importance of this case to bankers, at least with reference to future bonds, for they may themselves fix the limit of liability in each case at such sum as they please, adding a year's interest to the round sum if they see fit. Even with respect to current bonds the importance can in no case extend be-

yond a year's interest on the limit declared. The question tried in *Reddie* v. *Williamson* was of real importance. The question here is comparatively insignificant.

"I have taken no account of interest on the sum limited (£600) between the date of the principal debtor's bankruptcy and the end of the year—1st, because neither party could give me the date, and the counsel for the respondents stated that they were indifferent to so small a matter, and only desired a decision of the general question; and 2d, because I am of opinion that under this bond interest on the sum due by a cautioner runs only from the date of demand, and no demand is alleged or disclosed prior to 7th January, when the account, balanced as at 31st December preceding, was transmitted to the complainer's agent. I think the bank ought to have been content with the sum paid to them, and I therefore suspend their charge, with expenses."

The complainer reclaimed.

Authority—*Reddie* v. *Williamson*, Jan. 9, 1863, 1 Macph. 228.

At advising—

Lord Gifford—This case, although involving only a small sum, has been argued as a question of principle, and it has been said that it affects the construction of numerous cash-credit bonds expressed in the same terms as the bond now before us. The questions raised are not without some nicety, but after full consideration I have come, and ultimately without much difficulty, to think that the Lord Ordinary's interlocutor should be recalled and the claim of the bank should be sustained.

I am sorry that I cannot read the words of the bond of credit in the way which the Lord Ordinary has done. I think the mode in which the bond is expressed, construed strictly and grammatically, leads to the conclusion that the cautioners, and the suspender as one of them, are bound to pay principal sums not exceeding £600, and also to pay interest on such principal sums. I call the suspender and all the obligants except Tweedley cautioners, because that was their real position, although in the bond and in a question with the banks all are bound jointly and severally as principals. The limitation of liability expressed by the words "not exceeding £600" is a limitation which is not applied to the whole sentence or to the whole obligation, but only to the principal sums which the parties bind themselves to pay, and I think this construction necessarily follows from the place where the limitation is inserted in the sentence. The obligation is to pay on demand "all such sums (not exceeding £600)" as are or shall be due to the bank, whether drawn out by Tweedley, the principal, or whether he is liable therefor by drafts, orders, bills, notes, or otherwise; and then the sentence proceeds, "with interest on such sums severally" at such and such a rate. If it had been intended to limit the whole liability both for principal and interest to £600, then the words "not exceeding £600" should have been introduced at the end of the sentence and after both principal and interest had been mentioned. Grammatically the restriction has quite a different effect when it is introduced after the mention of the principal sum only and before the obligation to pay interest at all, from what it would have had if it had been introduced at the end of the sentence and after the obligation to pay both principal and interest. I cannot read a limitation which is introduced and applied only to the first member of the sentence as applying also to the second member, for I think the reason why the limitation is inserted where it is was that it might be applicable only to what went before, and not to what followed it.

It may be true that a person in the position of the complainer, who is a farmer, might on reading the bond hastily suppose that the limitation applied both to principal and interest, but if he did so, I think this would arise from a hasty and inaccurate perusal of the words; but when the question arises in a court of law as to what do the words really import, I cannot give them a construction according to what might be the farmer's hasty impression, but must read them according to what appears to me to be their true, necessary, and grammatical import. I cannot doubt that the conveyancer who framed them understood he was making the cautioners liable not only for principal sums drawn out or held to be drawn out, but also for interest thereon, and that the limitation of liability was only to apply to the principal sums and not to the interest. I think this is the true meaning of the words, and according to this meaning I think the bond must be enforced.

The only other question is, Whether the bank are bound to accumulate the interest—that is, to convert it into principal—at any date later than 31st December 1877, being the last balance prior to the date when David Tweedley granted the trust-deed for behoof of his creditors. The trust-deed was granted on 11th November 1878, and according to the practice of the bank the annual balance was struck on 31st December of each year. Now, applying the principles given effect to in *Reddie* v. *Williamson*, 9th January 1863, 1 Macph. 228, I think that the bank were not bound to accumulate the interest or to make any new balance after 31st December 1877. The trust-deed for behoof of creditors was virtually and actually a stoppage of the account. It was then that the liability of the cautioners was fixed, and the last balance made then was that at the end of the year 1877. *Reddie* v. *Williamson* prevents the bank from going further back in order to calculate interest against a cautioner, but I think the same case also fixes that the bank are entitled to go back to the last balance and to calculate interest since that date, in terms of the bond. The bank have proceeded on this principle—they do not seek to go beyond the last balance; and I think the objection to their charge is ill-founded. The only circumstance which raised some difficulty on this question arises from the fact that the bank when requested by the cautioner to send him "a statement showing how the bank account stands," sent him what they called a "state of operations on the account for the year ending 31st December 1878," and the bank clerk in the copy account sent struck the balance as at 31st December 1878. No balance, however, was struck in the bank books, and the object of sending the account was to show the operations merely; the balance brought out by the bank clerk did not show, and was not intended to show, the sum claimed from the cautioners.

On the whole, therefore, I think that the Lord Ordinary's interlocutor should be altered and the suspension refused.

Lord Ormidale—It is of great importance that the decisions of the Court should be uniform and consistent in the class of cases of which this is one. I make this observation because, if I am not much mistaken, the case of *Reddie* v. *Williamson*, referred to by the Lord Ordinary in the note to his interlocutor, must be taken as all but conclusive of the present.

By the judgment in that case it may be taken as settled that although according to one and perhaps the strict reading of the bond there, as here, the cautioner is liable for all drafts of principal up to the sum he engaged for, with interest on each and all of these drafts from their respective dates till payment; that a balance must, in conformity with the practice which has long prevailed in such matters, be held as annually struck; that at each such balance the interest arising for the preceding year is added to the principal, just as if a cheque or draft had been passed for the amount; that on the sum of principal and interest thus accumulated, interest runs to the next annual balance, and so on till the amount is finally closed. So far the parties seemed to be agreed at the debate, and so far also the Lord Ordinary's judgment is in conformity.

But a further question arises in this case which can scarcely be said to have been decided in the case of *Reddie* v. *Williamson*. It is, whether the bank is entitled to go back to the balance of 31st December 1877 in ascertaining the indebtedness of the complainer as cautioner, in place of taking the amount as it stood on 11th November 1878, when the principal obligant became avowedly insolvent in the knowledge of the bank, and executed a trust-deed for behoof of his creditors, or at 31st December 1878, being the ordinary date of striking a balance next thereafter recurring, and when the bank, according to their letter to the complainer of 7th January 1879, may be said to have demanded payment of what was then due by him under the bond. The complainer contends that one or other of the two latter dates was the right one, and admitted his liability for £600 of principal as being due by him at either of them, with interest thereon till payment. But it is maintained for the bank that they are entitled to go back to the balance of 31st December 1877, and to charge the complainer with £600 of principal as due by him at that date, with interest till payment. The pecuniary difference between the parties thus arising is only £31, 0s. 9d.

In considering whether the bank is entitled to revert to the 31st December 1877 for ascertaining the indebtedness to them of the complainer, or must take the 11th of November or 31st December 1878 for that purpose, it has to be borne in mind that the account in question ceased to be operative on the former of these dates, when, in the knowledge of the bank, the principal obligant was avowedly insolvent and executed a trust-disposition for behoof of his creditors. Accordingly, it has been argued that in order to ascertain the indebtedness of the complainer it was necessary to revert to the 31st of December 1877, which was the last annual balance which had been struck before the account became inoperative.

After careful consideration I have come to be satisfied, although not altogether without difficulty, that this must be so, as well from the reason of the thing as from the import of the judgment in the case of *Reddie* v. *Williamson*, for although the precise point was not decided in that case, it was, I think, practically adopted as forming the basis in part of the judgment which was pronounced.

I am therefore, on these grounds, of opinion with Lord Gifford that the interlocutor of the Lord Ordinary ought to be altered to the effect of repelling in place of sustaining the reasons of suspension.

The Lord Justice-Clerk concurred.

The Court therefore recalled the Lord Ordinary's interlocutor and repelled the reasons of suspension.

Counsel for Complainer (Reclaimer)—Murray. Agents—Tods, Murray, & Jamieson, W.S,

Counsel for Respondent—R. V. Campbell. Agent—A. Kirk Mackie, S.S.C.

Friday, March 19.

SECOND DIVISION.

SPECIAL CASE — FORBES AND OTHERS (ANGUS' TRUSTEES) *v.* FORBES OR ANGUS AND OTHERS.

Provisions to Wives and Children—Marriage-Contract—Suspensive Condition—Vesting.

An antenuptial marriage-contract contained a clause directing that after the death of the wife, in case she should survive her intended husband, and if there should be a child or children of the intended marriage then alive, the trustees should pay over the trust-funds to the child or children of the marriage, subject to a power of appointment by the father, whom failing by the mother. The provisions were to be payable "on their respectively attaining majority." In the event of the wife predeceasing the husband the trust was to come to an end; the children were to renounce their legal rights in respect of these provisions. The husband having predeceased, *held* that the condition was not suspensive of vesting, and that the trust-funds vested in the children of the marriage at their father's death.

Opinion — per the Lord Justice-Clerk (Moncreiff)—that the *conditio si sine liberis* does not apply to the case of provisions under a marriage settlement.

Held that postnuptial assignations of insurance policies completed for the purpose of securing provisions under a marriage-contract were testamentary and revocable in so far as they exceeded the amount of the provisions which they were executed to secure.

Where an antenuptial marriage-contract provided an annuity of a certain sum for the wife, and the trustees under it held securities which were assigned to them for that purpose, *held* that she was not entitled to payment of more than the fixed annuity, although the securities were found to be more than were sufficient to yield the sum in question.