

appears that during the most part of the time of the desertion the parties were living separate by agreement, and that being so this does not appear to me to be a case of desertion of the kind contemplated by the statute at all. As to the authorities to which we were referred—the cases of *Muir*, *Winchcombe*, and *Chalmers*—in all of them the action of the defaulting spouses were unequivocal; they had left the country, and in the act of leaving there was clear desertion. I do not think, however, that the judgment in their cases can have any effect in the present circumstances, and I am satisfied that this pursuer is not entitled to the decree which he asks.

LORD PRESIDENT—I am of the same opinion. Wilful and malicious desertion is, there can be no doubt, a flagrant violation of conjugal duty, and such a violation thereof that every form of judicature provides some redress, but the law of Scotland alone provides the remedy of divorce—a remedy which is unknown in the other parts of the United Kingdom of the Queen's dominions, and which must not be stretched beyond its legitimate bounds, seeing that it is a statutory remedy. In order to come up to the requirements of wilful desertion in the name of the statute, it is essential that one of the spouses must withdraw from the other's society without any reasonable cause, and must continue that desertion maliciously. Without attaching too strong a meaning to the words, I may repeat what I had occasion to observe in the case of *Chalmers*, reported in 6 Macph. 547, that nothing but wilful desertion, persisted in notwithstanding remonstrance, is sufficient to found an action of divorce. That being so, I agree with your Lordships in thinking that there is nothing in the present case like wilful desertion in the sense of the statute.

The Lord Ordinary does not appear to me to have put his decision of the case on statutory grounds, for in his note he says—"When the parties met and corresponded they manifested an amount of consideration and courtesy to each other which would have been creditable to persons in a superior state of society. There is no ill temper, no unpleasant language used, but at the same time there is no manifestation of a strong desire for a reconciliation. Whenever an attempt is made by the one spouse towards approximation, the repulsive force always asserts itself on the other side, and nothing comes of these efforts." Here the blame is divided, but as his Lordship goes on he tries to find out who, from the evidence, is most to blame. "I think that the husband, though he may not have had much affection for his wife, was willing that she should live in his house. He was willing to do his duty. Though he may not have had much regard for her, he was willing to do what the law imposed upon him as his conjugal duty—to maintain his wife and child in his own house." It appears to me that the pursuer in not remonstrating with the defender and urging her to return to his house has failed in his obligations; and in the whole circumstances as disclosed by the evidence, I am of opinion that this is not a case within the meaning of the statute, and am therefore for recalling the interlocutor reclaimed against, and for assoilzieing the defender from the conclusions of the action.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender from the conclusions of the summons.

Counsel for Pursuer—J. P. B. Robertson—Moody Stuart. Agent—P. Douglas, S.S.C.

Counsel for Defender—Mackintosh—Watt. Agent—David Milne, S.S.C.

Thursday, November 23.

FIRST DIVISION.

[Sheriff of Forfarshire.

THE NORTH OF SCOTLAND BANKING

COMPANY v. FLEMING.

Cautioner—Bond of Caution—Bank Agent—Over-Drafts—Advances to Bank Agent.

Cautioners for a bank agent undertook liability for all overdrafts on current or deposit accounts. The bank allowed the agent for a considerable period to make overdrafts on an account opened in his own name for behoof of a separate business which he conducted. In an action by the bank against one of the cautioners for losses resulting from this system to the bank—*held* that the terms of the bond of caution imported liability only for advances to customers in the course of business, and that the sums sued for being in reality advances made by the bank to their agent, the cautioner was not liable.

Alexander Gilruth Fleming was appointed in January 1874 by the North of Scotland Bank to act as their agent in Dundee. A bond of caution was thereupon entered into, by which he, as principal obligant, and his brother John Fleming, farmer, Alyth, and John Playfair, farmer, Johnshaven, as cautioners and full debtors, bound themselves "conjunctly and severally, our heirs, executors, and successors whomsoever, that during the time that I, the said Alexander Gilruth Fleming, shall continue in the said trust and office of agent for the said North of Scotland Banking Company, I shall carefully and diligently attend to the said business, and honestly and faithfully discharge the duties and trust thereof to the best of my skill, and in particular that I shall follow out and obey such instructions regarding the mode of conducting the business placed under my charge, or generally in regard to my duties as agent foressaid, as may be prescribed to me by the said banking company, or by their manager for the time being, and subscribed by the said manager, or by the secretary acting under him, and that I shall not act contrary to the said instructions in any particular, either by doing what may be thereby forbidden, or omitting to do what may be thereby enjoined; and further, that I shall well, fully, and truly account to the said North of Scotland Banking Company, or to their manager for the time, for all sums of money, whether in specie or bank notes, whether of the said banking company or other banks, or bankers' drafts on London or Edinburgh or otherwise, and for all bills, promissory-notes, or other vouchers, instructions, and documents of debt with which I shall be entrusted from time to time by the said company or their manager, or which shall come into my hands in the execution of the trust committed to me; and that I shall pay in and deliver to the said banking company, or to their mana-

ger for the time, all sums of money or other funds or effects of every denomination belonging to the said banking company in my custody when required so to do; and whatever loss, damage, skaith, or expense the said North of Scotland Banking Company shall happen to sustain or incur by me, or by my clerks, servants, or other persons acting under me in any capacity, or by fire, robbery, theft, embezzlement, or any other accident or misfortune happening to what is under my charge belonging to the said banking company during my continuance in the said office and trust, provided I am in any way to blame thereanent, or from my personal neglect or delinquency, or by my acting contrary to or neglecting to obey and follow out such instructions as may be prescribed to me, we, the said principal and cautioners foresaid bind and oblige ourselves, conjunctly and severally, and our respective foresaids, to refund, content, and pay to the said banking company, or to their manager for the time, for the use and behoof of the said banking company, and that on demand, with a fifth part more of liquidate penalty in case of failure, by and attour the said damage, loss, skaith, or expense, and together therewith; declaring, however, that I, the said Alexander Gilruth Fleming, shall not be liable for the loss of money, notes, bills, or other property belonging to the said banking company in the course of transmission or conveyance by post or otherwise, except in so far as the said loss or damage may arise from my acting contrary to or neglecting to follow out and obey the instructions prescribed or to be prescribed to me as aforesaid, or may be traced to the fault or delinquency of me or of the clerks, servants, or others acting under me; And farther, it is hereby provided and declared that I, the said Alexander Gilruth Fleming, and the said cautioners for me, shall take upon us the risk, to the extent of one-eighth part, of all bills to be discounted by me, and of all bills on London or elsewhere which I may purchase in conducting the business of the said banking company, and that I and the said cautioners, and our respective foresaids, shall be liable, conjunctly and severally, to the said banking company for all loss that may be sustained by forged bills or by bills not duly protested or negotiated, as also for the regularity of all the vouchers and accounts of my transactions in conducting the said business, and in particular for the regularity of the vouchers of sums drawn out upon cash-credits granted by the directors of the said banking company, and for all sums drawn out upon such credits beyond the sums for which the same have been granted, as well as for all sums drawn out of any current or deposit account beyond the sums which may be at the credit of such accounts, with interest thereof; declaring always that we, the said John Playfair and John Fleming, cautioners foresaid, and our foresaids, shall be liable respectively under these presents only to the extent of £500, to which sum our cautionary obligation above written is hereby restricted, which sum of £500 we bind and oblige ourselves, jointly and severally, and our respective heirs, executors, and successors, to pay to the said banking company, or to their manager for the time for their behoof, and that on demand, with interest from the date of the said demand until payment, and a fifth part more of liquidate penalty in case of failure; and

we consent that all necessary execution may pass, &c., declaring that it shall not be competent for us to plead in suspension of such charge that the state of accounts between the said banking company and their said agent, the principal obligant in this bond, has not been previously intimated or made known to us by the said banking company or their manager, or that the said banking company or their directors or manager have not been sufficiently vigilant in superintending the operations of their agent, or that they have taken any separate security from him, by bills or otherwise, for the amount or any part of the amount due by him, or in general, that any blame is attached to the said banking company or their directors or manager in the premises, it being agreed and covenanted that they shall not be bound to take any superintendence of their said agent, the principal obligant in this bond, on account of us the said cautioners, or to give us any notice of his actings, dealings, or transactions, or of any circumstances likely to render necessary the enforcement of our cautionary obligation, which may occur or come to their knowledge in the course of his agency, reserving, however, our right to demand at any time from the said banking company or their manager a state of the accounts between them and their said agent, and of the sums due by him to the said banking company; declaring also, that it shall not be competent for us to plead in suspension of any charge to be given to us, the said cautioners as aforesaid, that the sums charged for are not due under this bond, or that the said principal obligant in this bond is not indebted to the said banking company to the full amount of the sum charged for, or that his inability, or that of his representatives, to satisfy the demands competent to the said banking company against him or his foresaids has not been ascertained, we, the said cautioners, having renounced, as we hereby renounce, all benefit of discussion or right of suspension in these respects."

For some time previous to his being appointed to this agency Alexander Fleming had resided at the farm of Bruce-ton, near Alyth, and he had an account with the Royal Bank there for the advances necessary to carry on the farm. After his appointment to Dundee he closed an account which he formerly had with the Royal Bank at Alyth, in which he was indebted to that bank in £381, 12s. 2d., and opened one with the North of Scotland branch at Dundee, under the title "Alexander Gilruth Fleming, Bruce-ton farm, near Alyth." The first item in this account was a debit entry of £381, 12s. 2d., and the account bore to have been opened on the 6th June 1874. By the middle of September the balance against Alexander Fleming had by repeated additional overdrafts increased to £1192, 15s. 6d. In order to prepare this account for the eyes of the directors of the bank, and for the annual balance, a number of bill transactions took place between Alexander Fleming and his brother John Fleming, who was manager of Bruce-ton farm, but no money except one small sum was ever paid into the account, and any balance which ever appeared on the right side was only brought out by the discounting of bills. The result of these transactions was that when Alexander Fleming, having become insolvent, executed a trust-deed for behoof of his creditors, and left the ser-

vice of the bank, there was a balance due by him on the account of £6030, 5s. 10d.

This was an action by the bank against John Fleming, as cautioner, to recover from him the amount for which he had bound himself under his bond of caution. This sum amounted to £500, but as dividends had been paid to the bank on the bankrupt estates of the principal debtor and Playfair, the other cautioner, to the extent of £166, 19s. 4d., the sum sued for was limited to £333, 0s. 8d. The bank maintained that by the terms of the bond of caution the cautioners were made liable for overdrafts granted by the principal obligant, and that as Alexander Fleming had advanced these sums for behoof of the Bruceton farm, of which the defender was manager, the cautioner must make good these advances to the limit of his liability, this being the kind of transaction which the bond of caution was intended to cover.

The defender maintained that from beginning to end this account was known to and sanctioned by the bank officials, and that an overdraft of this kind was not one which the bond of caution was ever intended to cover, and that although by its terms the bond provided that the defender could not competently plead want of vigilance on the part of the bank officials in not superintending the operations of their agent, yet that could not free them from the responsibility of exercising reasonable watchfulness over his actings.

The defender's second plea-in-law was in these terms—" (2) The pursuers having acquiesced in and drawn a dividend from the insolvent estate of the defender's co-cautioner without intimation thereof, the defender is liberated from his cautionary obligation."

On the 18th October 1881 the Sheriff-Substitute issued the following interlocutor and note:—"Repels the defender's second plea-in-law, and before answer as to the other pleas *hinc inde* allows to both parties a proof in support of their respective averments, and to the defender a conjunct probation."

"Note.— . . . A new question of some importance and interest arises out of the pursuers' plea that the defender is barred from maintaining his defences founded on their alleged failure duly to superintend their agent by the terms of the provision quoted in their answer to his statement of facts. With regard to this plea, the defender's contention is that the provision on which it is based is so repugnant to the nature of the contract, and so unreasonable and iniquitous in itself, that a court of law will refuse to give effect to it. In support of his contention the defender's agent cited a passage in Professor A. M. Bell's Lectures on Conveyancing (2d. ed., pp. 284-5), in which it is laid down by the learned author that however comprehensively bonds of caution for bank-agents are framed, the granters cannot screen themselves from the necessity of due and reasonable watchfulness over their agents, but that the cautioners are entitled to expect, and the law will secure to them, notwithstanding the most stringent clauses to the contrary, a fair regard to their interests. I find, too, that Professor Menzies (Lectures on Conveyancing, 2d ed. p. 227), speaking of the very provision which we have here, indicates a doubt whether it would be treated as legitimate and effectual. So far, however, as actual decision goes, the point would seem

to be still an open one, and that being so it must be decided on principle. Now, the principle to which the defender appeals is one with which we are familiar in questions of proprietary rights in land, in regard to which the general rule is that at common law conditions or limitations in a property title which are repugnant to the common legal notion of property and proprietary rights are held to be invalid. 'Thus'—to quote Lord Young in *Earl of Zetland v. Hislop*, March 18, 1881, 8 R. 681—"conditions against selling and alienating, burdening with debt and altering the succession, are all bad (*i.e.* at common law), for these are common law incidents of property, and at common law inseparable from it." Can it be said that it is an inseparable incident of such a contract as we are dealing with here that the grantees are to exercise a reasonable amount of superintendence and watchfulness over their agents? That is really the question to be determined, and much may I think be said on both sides. At present, however, I do not intend to decide the point, partly because before deciding it I should like to have further argument on it and more time to consider it, and partly because, assuming the provision to be a legitimate and enforceable one, I think that it is beyond all doubt one which must be very strictly construed against the pursuers, and that till all the facts are ascertained it cannot be satisfactorily determined whether the pursuers are or are not protected by it. Entertaining these views I have allowed a proof before answer."

The proof allowed by this interlocutor was led on the 8th of December 1881, and the result of it appears from the findings in fact of the Sheriff-Substitute, and from the passages quoted in the opinion of the Lord President.

On the 1st February 1882 the Sheriff-Substitute issued this interlocutor:—"Finds in fact (1) that the defender has failed to prove that the pursuers have discharged Mr Alexander G. Fleming, his brother, and the principal obligant in the bond mentioned on record; (2) that the defender was from the first well aware that his said brother was getting advances from the pursuers to carry on Bruceton Farm, and that the farm account was at times heavily overdrawn; (3) that the greater part of the drafts on said account were made by cheques or bills signed by the defender, who acted as manager of the farm, and in some instances there is reason to believe that the drafts were not for the debts or purposes of the farm, but to meet the defender's obligations in connection with a commission business which he carried on on his own account; and (4) that the defender's attention was called to the state of the farm account in October 1876, by a letter addressed to him by one of the bank officials, but he nevertheless allowed matters to go on just as before: Finds in law, as the result of the foregoing findings and the admissions on record, that the remaining defences must be repelled, and decree pronounced in the pursuers' favour for the sum sued for, with interest, as libelled: Therefore decerns against the defender for payment to the pursuers of the sum of £333, 0s. 8d. sterling, with interest thereon at the rate of 5 per centum per annum from the 29th day of July 1880 years until paid: Finds the pursuers entitled to their expenses," &c.

"Note.—On further consideration I can see

no sufficient ground for the doubts expressed by Professors Menzies and Bell as to the validity of the clause in the bond specially referred to in the note to the interlocutor of 18th October, which I hardly think can be held to be *contra bonos mores*, or inconsistent with public policy; but I do not require to determine the point, for now that the facts of the case are fully before me I am clearly and decidedly of opinion that, even taking the clause in question *pro non scripto*, it is impossible to reach a conclusion favourable to the defender, and it will be agreed that a judgment rested on the merits of the case is more satisfactory for all parties."

On appeal the Sheriff (TRAYNER) adhered.

The defender appealed to the Court of Session, and argued—The guarantee undertaken by the cautioners under this bond of caution was for the faithful discharge of his duties by the principal obligant as bank agent, and the overdrafts for which they were to be held liable were overdrafts made by the agent to customers of the bank in the ordinary course of business and not for advances made by the bank to their own agent. These advances were made entirely with the consent of the bank officials, who from the monthly returns were kept aware of the state of the account. Alternatively, even supposing the cautioners might under ordinary circumstances have been liable, they are entitled to be freed in the present case, owing to the negligence of the bank officials. Notwithstanding the clause in the bond of caution, it was competent for the cautioners to plead that the bank officials had not exercised a sufficient supervision over their agent.

Authorities—*Thomson v. Bank of Scotland*, June 11, 1824, 2 Sh. App. 317; *Forrester v. Walker*, June 27, 1815, F.C.; *Leith Banking Co. v. Bell*, May 12, 1830, 8 Sh. 721; *Gilmour v. Pinnie*, July 8, 1831, 9 Sh., 907; Bell's Lect. on Convey., i. 266 and 284; Menzies' Lect. on Convey., 226 and 232; Bell's Comm., i. 382.

During the discussion the following additional plea-in-law was stated for him:—On a sound construction of the bond of caution, the cautioners did not undertake liability for the overdrafts or advances in respect of which the defender is now sought to be made liable."

Argued for respondent—This account must fall within the provisions of the bond of caution unless it can be shown to be specially excepted, and the mere fact that the account is in the agents' name will not diminish the cautioner's liability. It could not be pleaded that the cautioner had not notice of what was going on, because as manager of the farm of Bruceton he was aware of the advances which were being made to carry it on—he in fact was getting the benefit of the overdrafts. There was nothing illegal in that clause of the bond of caution which freed the bank from the necessity of superintending their agent, and it excluded the plea of negligence urged by the defender. The cautioner has failed to show that if the bank had acted otherwise he would have been in any better position. The advances were made to Bruceton farm as if it had been a customer of the bank; therefore it could not be said that this was an advance by the bank to its own agent.

Authorities—*M. Taggart v. Wilson*, April 16,

1835, 1 Sh. and M.L. 553; *Creighton v. Rankin*, May 26, 1840, 1 Rob. App. 99.

At advising—

LORD PRESIDENT—It appears that the defender's brother Alexander Gilruth Fleming was in 1874 appointed to be agent at Dundee for the pursuers' bank. Previous to that date he had had an account with the Royal Bank at Alyth and had received advances to enable him to carry on a farm to which he had succeeded at the death of his father about the year 1868. When the pursuers in 1874 appointed him as their agent in Dundee he had found caution in the usual way, and the parties who consented to act as his cautioners were John Playfair and John Fleming, the defender of the present action. Immediately on his appointment to the Dundee agency, Alexander Gilruth Fleming closed his account with the Royal Bank at Alyth, and transferred a debit balance of £381, 12s. 2d. to an account which he opened with the pursuers' bank under the title of "Alexander Gilruth Fleming, for Bruceton Farm, near Alyth." Now the debit balance with which this account begins was apparently reduced by the end of 1874 to about £20, but only apparently, because the reduction was accomplished by means of bills drawn by Alexander Fleming upon his brother John Fleming, the defender. This state of matters went on increasing until in 1879 the amount advanced to this Bruceton farm account stood at £6030, 5s. 10d. The bank now proposes to recover a sum of £500, which was the limit of the cautioners' liability as fixed by the terms of the bond of caution. Had the case stood now as it did when it was under the consideration of the Sheriff-Substitute, I think that I should have agreed with him in the conclusion at which he has arrived. That the bank managers were very careless in the supervision of their agent cannot be questioned, both from the amount which he has been allowed to overdraw, and also from the period over which this process has been allowed to extend. But a new plea-in-law has been added by the defender, and the question which we have now to consider is, whether the advances were overdrafts made by Alexander Fleming as agent to a customer of the bank, and whether they were not really advances by the bank to their own agent. If the latter be the correct view to entertain of these transactions, then it appears to me that it will be very difficult indeed to bring them within the meaning of the liability undertaken by the cautioners in their bond of caution. This account was opened in the name of Mr Alexander Fleming, and he was also directly and personally interested in it, for it was by means of the advances thus obtained that he was enabled to carry on the Bruceton farm. But John Fleming, the defender, seems to have been manager of this farm, and in this way he was directly benefited by the overdrafts from the bank. If this had been an inquiry as to how far John Fleming was liable for the money thus advanced to enable him to carry on the management of the farm, that would have been a very different matter, but the present question relates solely to his liability under the bond of caution, and, put shortly, is really this, whether John Fleming as cautioner is liable for what Alexander Fleming did as agent in making these large advances to himself. If these advances could have been shown to have

been made entirely without the bank's knowledge, then that would have been embezzlement, and undoubtedly the cautioner would have been liable under the terms of the bond of caution, but it appears to me, on the contrary, that these advances were made with the bank's full knowledge, if not approval. Perhaps the bank officials were not at first aware of the commencement of this account with a debit balance; upon this point Alexander Fleming in his evidence says:—"For some time after my father's death these advances were got through the Royal Bank, Alyth, where the farm account was kept, but on my becoming the agent for the pursuers at Dundee I opened an account with them in my own name for Bruceton Farm. No. 70 of process, which I have examined before to-day, is a correct statement of the account as it stands in the bank's books. Before opening the account I went to Aberdeen and saw the then secretary, and now joint manager, Mr Fiddes, to whom I explained the whole matter, including the existence of the account at the Royal Bank, Alyth, and it was with his authority that the new account was opened." If this account be true, then the bank was aware of this transaction from the commencement, and the advances in question were plainly not advances made by a bank agent to a customer, but were truly advances by the bank to their own agent. But then Fleming is contradicted by Mr Fiddes, who says:—"The first intimation of the opening of the account for Bruceton Farm, of which No. 70 is a statement, was when the monthly return for May 1874 came in from the agent Mr Alexander G. Fleming." Now we know that return came in on the 6th June 1874; if therefore Mr Fiddes had not been previously aware that Alexander Fleming had opened an account with the bank commencing with a debit entry, he along with the other officials of the bank became aware of it at that date. About this there can be no doubt, for Mr Fiddes in his evidence frankly admits it. He says:—"A new account—a current account, not an advance account—was opened, but the figures disclosed in the balance shewed that £381, 12s. 2d. were drawn. The agent reported that this was undoubtedly, the stocking, &c., worth from £3000 to £4000. The account continued with moderate balances up till August 1875, the report of the agent all along being that there was stock from £3000 to £4000 on the farm to meet such debt. Overdrafts are considered, when moderate and temporary, legitimate, but not otherwise. The account therefore up to that date passed without much remonstrance, if any. In August, September, and October the balance rose rapidly to upwards of £4000. The report by the agent stated an increased value in the stocking, and also said that the account would now be gradually reduced. This was not considered satisfactory. Personal interviews with Mr Fleming, the agent at Dundee, caused me to say that as agent for the bank he had no right to draw such sums. He gave me a personal promise to dispendish the farm in May 1876. . . . (Q) Did you know that overdrafts on the account were made to appear less by Alexander Fleming drawing on John Fleming, and putting the balance in the bank's drawer?—(A) We certainly did know of it in regard to a bill for £1200, and one for £7000, but that was early in the history of the account, when

we had lost faith in Mr Fleming's reports as to the value of the stock and farm. (Q) When did you lose faith in Fleming's reports?—(A) We began to doubt them when he had not dispendished the farm, but we never did expect such a hollow state of affairs as was disclosed by him." Now, if we turn to the evidence of Mr Mollison, the present secretary of the bank, who was at the time of this transaction an inspector of branches, we find that he says:—"I cannot tell you when I first became aware of the opening of the Bruceton Farm account by Mr Fleming, but I must have become aware of it through his returns not very long after it was opened. I certainly was not aware that such an account was to be opened. The first intimation I got of the opening was from his returns. I had frequent conversations about this account, not with the directors, for while I was inspector of branches I had no direct communication with the board, but with some of the officials at head-office. So far as I ever understood, the bank had no security for the Bruceton account except Mr Fleming himself. My full inspection of the Dundee branch in 1876 was made, I think, in the month of November, but I cannot recall in what month of 1875 my inspection took place. I rather think that it was within less than a year of the inspection of November 1876. The first knowledge I had of the bill transactions between defender and his brother, the effect of which was apparently to reduce the balance due on the farm account, would be obtained at my first inspection after these transactions." And this is corroborated by Mr Lumsden, who acts as joint manager along with Mr Fiddes:—"So far as my recollection serves me, Fleming's explanation to me about the opening of the account was to this effect, that he had been obliged on becoming our agent to pay up an overdrawn account that he had with the Royal Bank at Alyth, and that it was to pay off this account that he had drawn from us. That being his explanation, I do not think it likely that I would in the circumstances press him at once to pay off the overdraft. My chief annoyance in regard to the matter was that he had not applied to me, and I think it likely that I would say to him that if he had applied to me probably he would have got the advance he wanted." Now, in this state of the evidence the question comes to be, whether the amount of the debit balance having become known to the bank officials within a month after the account was opened, they did not adopt and allow the balance to stand as a going account. From that day onwards this account was really one between the bank and their agent, and any sums advanced on this account became really overdrafts which were allowed by the bank to their agent. The mere fact that other parties had an interest in the Bruceton farm, and were accordingly benefited by these advances, does not in my opinion make any difference in the present question. Alexander Fleming is the sole party whose name appears on this account, and it was upon his credit, and his alone, that the bank permitted these advances.

Now, the result of all this appears to be that this is not an account in which advances have been allowed by a bank agent to a customer, but that the advances are truly advances by the bank to their agent as an individual. Is then the cautioner liable?

Now, that must depend upon the terms of the bond of caution, which seems to be a curious and in some respects very stringent document. The obligations undertaken are—1st, that the principal obligant shall faithfully discharge his duties as bank agent, and follow out all instructions given to him; 2d, that he will account for all moneys entrusted to him as agent; 3d, liability for losses through fire or robbery; 4th, a liability of one-eighth per cent for all bills discounted; and 5th, a liability for overdrafts. Now, the liability incurred under this 5th head appears to be the only one which comes at all near to the present question, and it is expressed in these terms:—"And that I and the said cautioners, and our respective foresaids, shall be liable, conjunctly and severally, to the said banking company for all loss that may be sustained by forged bills, or by bills not duly protested or negotiated, as also for the regularity of all the vouchers and accounts of my transactions in conducting the said business, and in particular for the regularity of the vouchers of sums drawn out upon cash-credits granted by the directors of the said banking company, and for all sums drawn out upon such credits beyond the sums for which the same have been granted, as well as for all sums drawn out of any current or deposit account beyond the sums which may be at the credit of such accounts, with interest thereof." Now, clearly the kind of risk which was intended to be covered by this clause was that of overdrafts allowed by the agent to customers without the bank's consent. But the present case is very different; it consists of a series of increasing advances by the bank to their agent on his own account as an individual. On that ground it appears to me that the pursuers cannot succeed in the present action, which is laid entirely on the bond of caution. I am therefore for recalling the interlocutor of the Sheriff, and for assailing the defender.

LORD MURE—I am entirely of the same opinion. This is an action laid solely on the bond of caution, in which the cautioner undertakes to make good defalcations, and that the agent will faithfully discharge his duties as such. If this had been a bond for a cash-credit, it would have been an entirely different matter. It was clearly the intention of the bank by this bond to prevent the agent allowing customers to overdraw too heavily, to the detriment of the bank; but there is no provision in it that I can see involving the cautioner in liability for overdrafts by the agent himself, and sanctioned by the bank. On these grounds I think the pursuers cannot succeed.

LORD SHAND—I am clearly of the opinion expressed by your Lordships. There can be no doubt that this is a bond of caution by a bank agent for the faithful discharge of his duties. The clauses of the bond to which your Lordship has referred make that, I think, sufficiently clear. The cautioners were to be cautioners for faithful acts, but not in any sense for cash-credits involving, as the latter would, the solvency of the principal obligant. If that be clearly kept in view, then no difficulty arises in dealing with the case. The sum sought to be recovered is the balance of the £500 which the cautioners fixed as the limit of their individual liability, and in any event the bank must be a heavy loser. But Alexander

Fleming says that he had the bank's authority to open this account; the officials, indeed, deny this, but there can be no doubt that its existence came to be known to them very soon after its commencement. Bills were drawn and operated upon, and the advances went on increasing. It appears that the officials grumbled a little, but they seem to have taken no active steps to put an end to the transaction. Had Alexander Fleming continued his overdrafts after the bank officials had prohibited him from doing so, then the cautioner would undoubtedly have been made responsible, but so far from their prohibiting, I have come clearly to be of opinion that the bank officials all along sanctioned this account, and that the overdrafts proceeded upon that footing. In these circumstances, taken along with the fact that this is not a bond for a cash-credit, or granted as a guarantee for the solvency of the agent, I consider that this transaction does not fall under the risks undertaken by the cautioners. In saying this I wish it to be understood that the only question which I am considering is whether or not these advances referred to fall under the terms of the bond of caution. There may be many ways in which the pursuers may be able to make good their claim against the defender, but the advances which we are here dealing with being in my opinion advances by a bank to its own agent, cannot, I think, be covered by the terms of a bond for the faithful discharge of duty.

LORD DEAS was absent.

The Court recalled the interlocutor of the Sheriff, and assailed the defender from the conclusions of the action, but in respect that the ground of defence on which he had been successful was for the first time stated during the debate on the appeal, found no expenses due.

Counsel for Pursuers (Respondents)—Mackintosh—Darling. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Defender (Appellant)—Rhind. Agent—Alexander Wardrop, L.A.

Friday, November 24.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

LEE V. GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY AND ALEXANDER.

Property—Fou—General Conveyance—Ambiguity in Terms—Competency of Reference to Prior Agreement—Superiority.

Where a conveyance is ambiguous but contains a distinct reference to a prior agreement between the disponent and disponent, which has been committed to writing, it is competent to refer to that agreement for the purpose of explaining the ambiguity.

There being in a general conveyance of superiorities an ambiguity as to whether the superiority of the lands of A was intended to be included, *held* competent to read, with the view of explaining the ambiguity, a missive