the liquidation. It was admitted that there is no direct authority, but it was urged that there is a strong analogy in the provisions of the Act of Sederunt, 15th July 1904, as to the finding of caution in judicial factories. Section 3 of that Act of Sederunt provides—[*His Lordship read the section*]. It seems to me that the analogy is a true one. But both branches of the section are equally analogous. Accordingly, while I move your Lordships to grant the prayer of the note, it is understood that this is done subject to the fact of the charge being taken into account by the Lord Ordinary when he fixes the remuneration of the liquidator.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court pronounced this interlocutor:—

"The Lords having considered the note for John M. M'Leod, the liquidator, . . . fix £3000 as the amount for which caution shall be found by him, and authorise the clerk to accept a bond for that amount by the National Guarantee and Suretyship Association, Limited: Further authorise the liquidator to charge the premiums payable in respect of such bond against the liquidation, but declaring that such charge shall be taken into account at the fixing of his remuneration as liquidator: Also authorise the expense of said note to be charged against the liquidation. . . ."

Counsel for the Liquidator—Macmillan. Agents—Dove, Lockhart, & Smart, S.S.C.

---

*Saturday, February* 23.

## SECOND DIVISION.

[Lord Salvesen, Ordinary.

## VEITCH *v.* THE NATIONAL BANK OF SCOTLAND, LIMITED.

*Cautioner — Bank and Customer — Cash-Credit Bond—Interpretation—Extent of Cautioner's Liability.*

By a bond of cash credit between a bank and A, B, and C, on the narrative that the bank had agreed to allow A, B, and C a credit on a current account to be operated on by A, "and that to the extent of £1500 sterling," A, B, and C bound themselves to repay to the bank on demand "the foresaid principal sum of £1500, or whatever portion thereof may appear to be due on the foresaid current account," and also all advances which the bank had made or might make in a variety of specified ways to A, or on his account, or in his credit, "such advances and engagements not exceeding in all the said sum of £1500 of principal beyond any balance which may be at the credit of the said A on said current account, . . . and in general to refund to the said bank whatever loss and expense, not exceeding said sum of £1500 of principal, the said bank may sustain or incur through these transactions with the said A, all which sums, losses, and expenses the bank may debit to the said current account without losing any right, remedy, or claim against other obligants, it being the express meaning of these presents that this bond shall, to the extent foresaid, be a covering security to the said bank against any ultimate loss that may arise on the transactions of the said A with said bank."

A at his death was indebted to the bank in the sum of £5855, 8s. 11d., and the bank recovered from his estate the sum of £3903, 17s. 3d., being a composition of 13s. 4d. in the pound.

*Held*, upon a construction of the bond, that the cautioners had guaranteed only a debt of £1500, and not a debt of an indefinite amount, to the extent of £1500, and that accordingly they were only liable to pay £500 to the bank, being the sum of £1500 under deduction of the amount of the composition recovered from A's estate effeiring to that sum.

Archibald Veitch, cattle dealer, Jedburgh, had been charged at the instance of the National Bank of Scotland, Limited, to make payment of the sum of £1500 with interest.

He brought a note of suspension.

The following narrative of facts is taken from the opinion of Lord Low—"In 1902 the complainer and one Robert Hunter became cautioners for the now deceased William Rutherford, cattle dealer in Hawick, in a bond of cash credit for £1500 granted by these parties to the respondents.

"Rutherford was at his death indebted to the respondents in the sum of £5855, 8s. 11d., and they recovered from his estate the sum of £3903, 17s. 3d., being a composition of 13s. 4d. in the pound. The balance of Rutherford's debt therefore still remaining due to the respondents is £1951, 11s. 8d., and accordingly they claim that the complainer as cautioner is bound to pay the full amount of £1500 for which he undertook liability in the bond. The complainer, on the other hand, contends that he is only bound to pay £500 to the respondents, being the sum of £1500 under deduction of the amount of the composition recovered from Rutherford's estate effeiring to that sum."

The bond was in the following terms—"We, William Rutherford, cattle dealer and meat salesman, Hawick, Archibald Veitch, cattle dealer, Jedburgh, and Robert Hunter, farmer, Chapelhill, Hawick, considering that the National Bank of Scotland, Limited, have agreed to allow us credit on a current account, to be kept in the books of said bank in name of me, the said William Rutherford, and to be operated on by me or by anyone duly authorised by me, and that to the extent of £1500 sterling, on these presents being granted, have there-

fore bound and obliged, like as we, the said William Rutherford, Archibald Veitch, and Robert Hunter, hereby bind and oblige ourselves, conjunctly and severally, each as full debtor, and our respective heirs, executors, and representatives whomsoever, without the benefit of discussion, to repay to the National Bank of Scotland, Limited, aforesaid, or assignees thereof, on demand, the foresaid principal sum of £1500, or whatever portion thereof may appear to be due to said bank on the foresaid current account, and also whatever moneys the said bank have advanced or may advance, or have or may become engaged for, on account of the said William Rutherford, or on the faith of his name, or that of any company firm of which he is or may hereafter become a partner, on or by bills or promissory-notes, letters of credit, guarantees, or other obligations, or in any other way whatever, such advances and engagements not exceeding in all the said sum of £1500 of principal beyond any balance which may be at the credit of the said William Rutherford in said current account, and, in general, to refund to the said bank whatever loss and expense not exceeding said sum of £1500 of principal the said bank may sustain or incur through their transactions with the said William Rutherford, all which sums, losses, and expenses, the bank may debit to the said current account without losing any right, remedy, or claim competent against other obligants, it being the express meaning of these presents that this bond shall, to the extent foresaid, be a covering security to said bank against any ultimate loss that may arise on the transactions of the said William Rutherford with said bank. And, in addition, we bind and oblige ourselves to pay the said bank interest at the rate of five per centum per annum, or at such higher rate as the said bank may for the time be in use to charge on cash-credit accounts, on all such moneys, from the time of advance or becoming due thereof till repayment, the said bank being hereby allowed to fix such rate of interest from time to time without any notice thereof to any of us or our foresaids, and also any charge for commission on the amount of the foresaid credit or the transactions in said account, as the said bank may be in use to charge on all such credits, and a fifth part more of said principal sum of £1500, or of any lesser sum that may be due, of liquidate penalty in case of failure in punctual payment. . . ."

The complainer pleaded, *inter alia*—"On a sound construction of said cash-credit bond, the complainer's guarantee is a guarantee for payment by William Rutherford to the respondents of a sum limited to £1500, and not for payment of the whole debt which might be due by him to them."

The respondents pleaded, *inter alia*—"On a sound construction of the bond of cash credit, the complainer is liable thereunder for any sum (not exceeding £1500 of principal and interest thereon) remaining due by William Rutherford to the respondents after crediting Rutherford's account with sums received by the respondents by way of dividend or otherwise on their total claim against Rutherford's estate."

The Lord Ordinary (SALVESEN) on 10th January 1906 pronounced the following interlocutor:—"Finds (1) that on a sound construction of the cash-credit bond, dated 26th and 28th April and 1st May 1902, the complainer is not liable to make payment of any sum in excess of the difference between the sum of £1500 contained in the bond and the composition received by the respondents from the estate of the late William Rutherford."

*Opinion.*—"This is a suspension of a charge given by the respondents to the complainer for payment of the sum of £1500 and interest. The complainer along with a Mr Robert Hunter, who has brought a suspension of a similar charge, were cautioners to the extent of £1500 of the late Mr William Rutherford, who at one time carried on a large business in Hawick as a cattle dealer and salesman. Mr Rutherford obtained large advances beyond the £1500 from the respondents as his bankers, and when he was ultimately obliged to suspend payment and grant a trust deed for behoof of his creditors, he was due the bank a sum of £5855, 8s. 11d., including the amount guaranteed by the complainer and his co-cautioner. The bank ranked on his estate and received a composition at the rate of 13s. 4d. in the pound, or £1000 in respect of the £1500 with which the complainer was alone concerned. He not unnaturally contends that in these circumstances his maximum liability does not exceed £500, which I was informed had already been tendered by his co-cautioner Mr Hunter. On the other hand, the bank say that the total deficiency on the amount of their claim against Mr Rutherford's estate amounts to £1951, 11s. 8d., and that they are entitled under the terms of the bond to hold the cautioners bound for this loss to the extent of £1500, the admitted maximum liability.

"The question accordingly depends entirely on the construction of the bond to which the complainer became a party. The earlier part of it is in the form of an ordinary cash-credit bond, and proceeds on the narrative that the bank had agreed to allow the three parties named (the principal debtor and his two cautioners) a credit on a current account to the extent of £1500. The parties then bind themselves, conjunctly and severally, each as full debtor, to repay to the bank 'the foresaid principal sum of £1500, or whatever portion thereof may appear to be due to said bank on the foresaid current account.' Pausing here for a moment, it is plain that what is contemplated is that, after the account has been operated upon for some time, the bank may close it, and call upon the principal debtor and his cautioners to repay the amount of the advances appearing in the current account as still unpaid. The bond then proceeds, 'and also whatever monies the said bank have advanced, or may advance, or have or may become engaged for, on account of the said William Rutherford, or on the faith of his name, or that of any company firm of which he is or

may hereafter become a partner, on or by bills or promissory-notes, letters of credit, guarantees or other obligations, or in any other way whatever, such advances and engagements not exceeding in all the said sum of £1500 of principal beyond any balance which may be at the credit of the said William Rutherford in said current account.' This clause which I have quoted fully seems to provide for the case of the bank having undertaken obligations on the faith of the cash-credit bond, either for the principal debtor or for any company of which he was a partner, and to secure that the bank shall be indemnified against such obligations by the cautioners to the full amount which they guarantee. It does not, as I read it, extend the liabilities of the co-cautioners, but only provides for the bank not being prejudiced by the sums advanced, or obligations undertaken by them not being entered in the current account, and relieves them from the necessity of getting William Rutherford to draw the money out of the current account and transfer it to some other account in security of obligations which he might ask the bank to undertake on his behalf. So far, therefore, the bond is an ordinary cash-credit bond, payment of the amount due thereunder entitling the cautioners to an assignation to the bank's claims against the principal debtor, and so to recover any dividend paid by his estate for their own behoof.

"But then it is said that the following words convert what is a cash-credit bond in form into a general guarantee against all loss which the bank might sustain through any transactions which they chose to enter into with William Rutherford, the only limit being that the total amount of the loss should not exceed £1500. The words are—'and in general to refund to the said bank whatever loss and expense, not exceeding said sum of £1500 of principal, the said bank may sustain or incur through their transactions with the said William Rutherford, all which sums, losses, and expenses the bank may debit to the said current account without losing any right, remedy, or claim competent against other obligants, it being the express meaning of these presents that this bond shall to the extent foresaid be a covering security to said bank against any ultimate loss that may arise on the transactions of the said William Rutherford with said bank.'

"In my opinion the bank's construction of this clause is inadmissible. If it were sound the carefully worded clauses which precede are wholly unnecessary, all that was required was to have a guarantee expressed in a couple of lines similar to the one which was the subject of construction in *Harvie's Trustees*, 12 R. 1144. *Prima facie* this is not likely, and I think the complainer is well founded, on the authority of Lord Blackburn in the case of *Ellis*, 1 Exch. Div. 157, in his contention that the guarantee as between the surety and the creditor is to be construed as applicable to that part only of the debt due by the principal debtor which is co-extensive with the amount of the guarantee. I think Lord Blackburn's dicta also *prima facie* apply to the present case when he says that it is inequitable in the creditor who is at liberty to increase the balance or not to increase it at the expense of the surety. These general principles would of course not avail the complainer if the language of the bond were clear and not open to construction, but I think that on a close consideration of the bond as a whole it sufficiently appears that the true meaning of the obligation is that it is limited to such transactions as might result in the bank advancing money to the extent of £1500, or undertaking obligations on behalf of the principal debtor to the same amount. It does not contemplate the bank making advances beyond £1500 on the credit of the cautioners, and the word 'transactions' on which so much reliance was placed by the respondents does not, I think, mean transactions after the limit of £1500 has been passed, with which the cautioners have no concern and which the bank make on their own responsibility, but only transactions which were contemplated as following the granting of the cash-credit bond itself. The general clause is not in itself meaningless, because it provides for the bank debiting expenses which they might incur in connection with engagements on behalf of the principal debtor and permits them to charge these against the cautioners. But the sums, losses, and expenses are expressly stated as being such as the bank might properly debit to the current account, and I cannot conceive that after the cash credit has been exhausted by the whole amount being advanced, the cautioners were to be liable for losses which occurred in connection with other transactions of which they had no knowledge and over which they could have no control. This construction is further strengthened by the interest clause which follows, and which, as I read it, can only be applicable to the £1500 advanced under the cash-credit bond. Again, in the next clause, by which the cautioners are taken bound to pay 'any charge for commission on the amount of the foresaid credit, or the transactions in said account as the said bank may be in use to charge on all such credits,' it is plain that their liability is again limited to the sum which alone they gave the bank a mandate to advance to the principal debtor on their credit.

"On these grounds I have formed the opinion, on a strict reading of the bond itself, that it will not bear the construction put upon it by the respondents, contrary, as I think, to the good faith of the whole transaction."

The respondents, the National Bank of Scotland, reclaimed, and argued—On a true construction of the bond the debt guaranteed by the cautioners was a debt of any amount which the bank might choose to advance to the principal debtor, limited only in this respect that the cautioners could not be called upon to pay more than £1500 in respect of any such debt. The bond, it was true, had it stopped at the words "the credit of the said William

Rutherford in said current account," would have been an ordinary cash-credit bond for £1500, but its whole character was changed by the succeeding clauses. The Lord Ordinary's reading had the effect of giving no reasonable meaning to the latter part of the bond, and was further radically unsound in that it did not regard the bond as a whole but divided it into two, regarding the first part of it as the essential and ruling part, and the latter merely as an exegetical excrescence. The words "a covering security to said bank against any ultimate loss" were in themselves conclusive. The case was analogous to *Harvie's Trustees* v. *Bank of Scotland, &c.*, June 19, 1885, 12 R. 1141, 22 S.L.R. 758, where it was held that a cautioner was not entitled to a ranking on the estate of the principal debtor while the full amount due to the party to whom he had given the bond of caution was unpaid, so as to interfere with the right of the creditor to rank for the full amount of his debt—see also *Maxton* v. *M'Intosh's Creditors*, January 17, 1777, M., *voce* "Cautioner," App. I, p. 1; *Balfour & Gibson* v. *Borthwick*, Fac. Coll., January 29, 1819, and March 27, 1822, 1 Shaw's Appeals, 131; *Midland Banking Company* v. *Chambers*, 1869, L.R., 4 Ch. 398. The case of *Ellis* v. *Emmanuel*, L.R., 1 Ex. D. 157, relied on by the complainer, was distinguishable, and in any event the principles there laid down had never been applied to Scotland.

Argued for the complainer and respondent—The only question in the case was what was the meaning of the particular bond in question, and the Lord Ordinary was right in holding that its effect was to limit the cash credit, and not merely the cautioner's liability, to £1500. The citation of authorities was accordingly unnecessary and useless. The cases, however, of *Harvie's Trustees*, *Maxton*, *Balfour* v. *Borthwick*, relied on by the appellants, were all distinguishable in their circumstances (see *infra* the opinions of Lords Stormonth Darling and Low). The general principles of law applicable to the case were, if authority was required, laid down correctly by Lord Blackburn in *Ellis* v. *Emmanuel*, *cit. supra*. The appellants' construction of the bond involved the breaking of a cardinal rule of construction, viz., that the effect of a prior particular clause cannot be destroyed by a subsequent general clause. Thus in the first half of the present bond the cash credit was clearly limited to £1500, and yet the appellants' argument was that it was made indefinite by the subsequent half of the bond introduced by the words "and in general." "Covering security" merely meant a covering security for all transactions up to £1500, and was meant to bring within the scope of the bond any debt of Rutherford's which might not fall precisely within any of the enumerated cases.

LORD STORMONTH DARLING—I agree with the Lord Ordinary that this case turns entirely on the construction of the bond of cash credit dated in April and May 1902, and that his construction of it is the right one. The bank's contention is that the debt guaranteed by the cautioners was a debt of any amount which it might choose to advance to the principal debtor, limited only by the sum (£1500) which the cautioners might be called upon to pay. The cautioners, on the other hand, maintain that the limit of the cash credit, and not merely of his and his co-cautioner's liability, was £1500, and that the moment the bank exceeded that limit it did so on its own responsibility. If the latter contention be right, the practical importance of it is that in that case the cautioners have paid up the full amount of the debt which they guaranteed, and not merely the full amount (short of that debt) for which they could be made liable, and so are entitled to rank on the estate of the principal debtor in competition *pro tanto* with the bank.

Lord Hatherley in the case of *Hobson* v. *Barr*, (1871) 6 Ch. App. at p. 794, puts the question raised by those opposing contentions in a nutshell, thus—"If a person guarantees a limited portion of a debt, all the authorities show that, if he pays that portion, he has in respect of it all the rights of a creditor. The question is whether the guarantor means 'I will be liable for £250 of the amount which A B shall owe you,' or 'I will be liable for the amount which A B shall owe you, subject to this limitation, that I shall not be called upon to pay more than £250'"; so the question depends entirely on the terms of the bond.

The preamble of the bond is quite definite in reciting that the bank had agreed to allow the granters credit on a current account to be kept in the books of the bank in name of the principal debtor, and to be operated on by him, and that to the extent of £1500; and so is the clause of obligation, binding and obliging the granters, conjunctly and severally, each as full debtor, and their respective heirs and representatives, to repay to the bank on demand the foresaid principal sum of £1500 or whatever portion thereof may appear to be due on the foresaid current account. Then the bond proceeds to sweep in whatever moneys the bank may advance or become engaged for, on account of the principal debtor or on the faith of his name, or by bills or promissory-notes, letters of credit, guarantees, or other obligations, or in any other way whatever; but such advances and engagements are all controlled by the words "not exceeding in all the said sum of £1500 of principal beyond any balance which may be at the credit of the said William Rutherford in said current account." So far I agree with the Lord Ordinary that the bond is an ordinary cash-credit bond, and does not extend the liabilities of the co-cautioners beyond a debt not exceeding £1500.

But then comes a clause which is said to convert a limited guarantee into a general one covering all loss which the bank may sustain through any transaction which it chooses to enter into with Rutherford, the only limit being that the total amount of the loss which the cautioners might be called upon to pay should not exceed £1500.

The words are, "and in general to refund to the said bank whatever loss and expense, not exceeding said sum of £1500 of principal, the said bank may sustain or incur through their transactions with the said William Rutherford; all which sums, losses, and expenses the bank may debit to the said current account without losing any right, remedy, or claim competent against other obligants; it being the express meaning of these presents that this bond shall, to the extent foresaid, be a covering security to said bank against any ultimate loss that may arise on the transactions of the said William Rutherford with said bank."

Now, I think the true meaning of this clause is fairly plain. When it speaks of "all which sums, losses and expenses," and gives the bank the right to debit these to the current account, it has in view that without such a right the bank might lose its remedy against co-obligants, *e.g.*, on bills and promissory-notes; and when it uses language (which is obviously exegetical) about its "being the express meaning of these presents that this bond shall, to the extent foresaid, be a covering security to said bank against any ultimate loss that may arise on the transactions of the said William Rutherford with said bank," it refers back to the right just given to debit certain losses and expenses to the account current, and declares that the obligation of the cautioners shall cover these up to £1500. But it is *not* meant, in my view, to go further, or to enlarge the debt guaranteed by the cautioners beyond the sum to which the prior clauses of the bond have so carefully restricted it.

Lord Blackburn's judgment in *Ellis* v. *Emmanuel*, in which Lord Cairns and Brett, J. (afterwards Lord Esher), concurred, is of course a judgment of high authority, and so far as it states a general presumption of law it supports the view of the Lord Ordinary, but confessedly it only dealt with the *prima facie* construction of a guarantee in some respects differing from the present. Again, the judgment in *Harvie's Trustees* (12 R. 1141) proceeded entirely on the ground that by the express words of the guarantee the cautioner had given up the right to demand an assignation so long as the principal debtor was indebted to the bank in any sum whatever. I do not therefore think that either case (certainly not *Harvie's Trustees*) affords much aid in the construction of this particular instrument, which must be decided on its own intention and meaning. I have also looked at the cases of *Maxton* (in 1777), M. *voce* Cautioner, App. No. 1, and *Balfour* v. *Borthwick* (in 1822), 1 Shaw's App. 131, founded on by the bank, and I find that they both applied to guarantees for the faithful discharge of an office, and were distinguished on that ground, apart from a specialty created in *Maxton's* case by a letter which the particular cautioner had written expressing his understanding of the obligation which he had undertaken.

But the Dean of Faculty for the bank made one concession which I think aids the view of the cautioners. The clause which immediately follows that about the "covering security" makes the cautioners liable to pay interest at 5 per cent. on "all such moneys from the time of advance or becoming due thereof till repayment . . . and also any charge of commission on the amount of the foresaid credit or the transactions in said account as the said bank may be in use to charge on all such credits." Now, what are the "such monies" on which the bank is to be entitled to charge interest at 5 per cent.? The Dean admits that they must be limited to the advances up to £1500. Similiarly he admits that the charge for commission can only be made on the same amount, as being "the amount of the foresaid credit or the transactions in said account." These admissions seem to me plainly to imply that if the bank chooses to advance or to become engaged for more than £1500, it does so on its own responsibility, and that not merely because £1500 is all that the cautioners can be called upon to pay but because it is the limit of the debt which they guaranteed.

The Lord Ordinary has merely pronounced findings giving effect to his construction of the bond of cash credit. If we simply adhere, the case would require to go back to the Outer House for further procedure, but the parties may desire to have it finally disposed of here, and in that case they will tell us what form of judgment they propose.

LORD LOW—[*After the narrative of facts already given*]—The decision of the case seems to me to depend upon what precisely was the obligation undertaken by the cautioners in the bond. I think that the following propositions are warranted both by principle and authority. If the cautioners undertook to pay all sums in which Rutherford might be indebted to the respondents with merely a limitation of the extent of their liability to £1500, then the respondents are entitled to payment of the full sum of £1500. If upon the other hand the cautioners' liability was to pay a debt which was not to exceed £1500 in a question with them, then if they pay that amount they pay the debt which they guaranteed in full and are entitled to rank in relief upon Rutherford's estate.

It was argued for the respondents, although I do not think very strenuously, that these propositions were founded entirely upon English decisions and had never been applied in Scotland, and reference was made to the cases of *Maxton* v. *M'Intosh's Creditors*, M. *voce* "Cautioner," App. I, and *Balfour* v. *Borthwick*, 29th January 1819, F.C., and 1 S. App., p. 131.

In both of these cases the question arose with cautioners for a bank agent, and in both cases the cautioners were found not to be entitled to relief against the estate of the principal debtor. No opinions are given in the reports, but I think that it is plain enough that the question was regarded as depending upon the precise terms of the obligation. It is worthy of observation, however, that in *Balfour* v. *Borthwick* both parties referred in argument to the position of a cautioner in a cash credit

The defenders (the cautioners) maintained that they were in the same position as a cautioner in a cash credit, and the pursuers (the bank) while maintaining that the defenders were not entitled to participate in the dividend paid by the debtor's estate, admitted that "this is quite different from a cautionary obligation interposed to a cash credit limited in amount. There the creditor has it in his power to limit the advance to the sum specified, and it is implied or expressed that the cautioner does not intend to interpose his credit for any further advance." That I think a very material consideration.

There is therefore nothing in these cases which conflicts with the proposition that if the contract is that the cautioner shall pay a debt of a certain amount and no more, and if he pays that amount, he is entitled to rank in relief of what he has paid; and I think that the principles laid down in the leading English case of *Ellis* v. *Emmanuel* (L.R., 1 Exch. D. 157) are as applicable to Scotland as to England.

It is therefore necessary to examine the bond and see what precisely were the obligations undertaken.

The bond is so far a bond of cash credit in the ordinary form. It proceeds upon the narrative that the respondents have agreed to allow the three obligants a credit on a current account to be kept and operated upon by Rutherford, "and that to the extent of £1500 sterling." The obligants then bind themselves to repay to the respondents "on demand the foresaid principal sum of £1500, or whatever portion thereof may appear to be due to said bank on the foresaid current account, and also" all advances which the respondents have made or may make in any way (and a variety of ways are specified) to Rutherford, or on his account, or in his credit, "such advances and engagements, not exceeding in all the said sum of £1500 of principal beyond any balance which may be at the credit of the said William Rutherford in said current account."

So far the bond is in terms usual in bonds of cash credit, and I think that it is plain that the amount of credit, payment of which the cautioners guarantee, is limited to £1500, and that therefore any advances which the respondents might make to Rutherford beyond £1500 were unsecured so far as the cautionary obligation in the bond was concerned.

The bond, however, proceeds—"and in general" (the obligants bind and oblige themselves) "to refund to the said bank whatever loss and expense, not exceeding said sum of £1500 of principal, the said bank may sustain or incur through these transactions with the said William Rutherford, all which sums, losses, and expenses" (an enumeration which I read as embracing all that has gone before) "the bank may debit to the said current account without losing any right, remedy, or claim against other obligants."

In that clause also it seems to me that the amount of indebtedness which the respondents are entitled, in a question with the cautioners, to allow Rutherford to incur, is limited to £1500.

There remains, however, for consideration another clause, which is that upon which the contention of the respondents is mainly, if not wholly, founded. It is in these terms—"It being the express meaning of these presents that this bond shall, to the extent foresaid, be a covering security to the said bank against any ultimate loss that may arise on the transactions of the said William Rutherford with said bank."

I am of opinion that that clause was not intended to add, and did not add, anything to the obligations undertaken in the preceding clauses of the bond. The latter clauses had enumerated a great variety of ways in which Rutherford might become indebted to the respondents, and I read the clause under consideration as a general clause intended to bring within the scope of the bond any debt of Rutherford's which might not fall precisely within any of the enumerated cases. That, I think, is all that is meant by the expression "covering security," upon which the respondents laid great weight. The bond was to cover Rutherford's indebtedness, however incurred, but the extent of the indebtedness which the cautioners guaranteed was still limited to £1500.

I am therefore of opinion that the complainer would, if he had paid £1500 to the respondents, have paid in full the debt which they had guaranteed, and would therefore have been entitled to come in the respondents' place as regarded all the remedies open to them for recovery of the debt. As, however, the respondents have already recovered payment of the composition yielded by Rutherford's estate upon their whole debt, the same end will be reached if the complainer pays to them the difference between £1500 and a composition of 13s. 4d. in the £ upon that amount.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD JUSTICE-CLERK—The opinion which has been expressed by your Lordship is that which I held very strongly at the close of the debate, and I have never seen any reason to change it. It seems to me to give the language of the obligation its natural and reasonable reading. The clause protecting the bank from loss of its claims against other obligants has that protection for its purpose, and, as I think, nothing else can be implied from it, certainly not an extending of the obligation of Messrs Veitch and Hunter beyond that which they had already undertaken in the previous part of the bond. I am satisfied also that the subsequent clause beginning with the words "it being the express meaning" does not increase the liability. That was not its purpose, and its words do not cover it. The cautioners here did *not* undertake to pay the debt to the extent of more than £1500 for the principal debtor if he failed. I am unable to see how the exact terms of the obligation here shall preclude the cautioners from having their

claim for a dividend from any funds of the bankrupt which may be available to his creditors.

The Court adhered.

Counsel for the Reclaimers — Dean of Faculty (Campbell, K.C.) — Constable. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Respondent—M'Lennan, K.C. — C. D. Murray. Agents — Murray Lawson & Darling, S.S.C.

---

*Wednesday, February 27.*

FIRST DIVISION.

[Lord Salvesen, Ordinary.

BROWN *v.* HARVEY.

*Reparation—Seduction—Relevancy of Averments.*

Averments *held relevant* to go to proof before answer in an action of damages for seduction brought by a barmaid against her recent employer.

*Gray* v. *Miller*, December 17, 1901, 39 S.L.R. 256, *approved.*

On 10th November 1906 Annie Brown, 27 Castle Street, Edinburgh, brought an action against Edward Harvey, Lochgelly, in which she sought to recover (1) £500 as damages for seduction, (2) £3, 3s. as inlying expenses, and (3) £12 a-year for fourteen years from 14th October 1906, as aliment for an illegitimate child.

The defender was a publican. The pursuer, a barmaid, entered his service on 20th January 1906 to act as barmaid, and as his housekeeper in the house of which the bar formed part. She left his service at the end of February, and gave birth to a female illegitimate child on 14th October 1906.

The pursuer averred—"(Cond. 1) . . . The pursuer . . . is twenty years old. She is an orphan, and has neither brother nor sister nor other near relative. (Cond. 3) . . . She found, contrary to what defender had led her to understand, that she was, after the bar was shut, to be the sole occupant of the house with defender, and she was accommodated with a bedroom in the attic of the house, which has two storeys. The defender's bedroom was on the ground floor in a small room, where the parties also took their meals. (Cond. 4) On the night of 20th January 1906, after the pursuer had retired, the defender called her downstairs on the pretence of giving her the key of her room. On her going to his room she found him in bed, and he asked her to come near him and give him a kiss. The pursuer refused, but on her approaching him to get the key he seized her and tried to pull her into the bed. The pursuer was disgusted, pulled herself free, and told him she would leave his service, upon which he informed her that the key was on the top of a chest of drawers. The pursuer then went to her room and locked herself in it. (Cond. 5) On the next night, and on every night of the week that followed ,defender attempted to kiss pursuer and to embrace her, and made lewd and improper suggestions to her with the object of corrupting her, but the pursuer always refused to allow him to be familiar with her. The pursuer was afraid of defender, who was a tall, strongly-built, masterful, and domineering man of about forty, and when he attempted familiarities in this way she was accustomed to retire upstairs out of his way. . . . (Cond. 6) On the 9th of February 1906 the defender went to a dance, and when he went out he ordered pursuer to sleep downstairs in his bed in order that she might be able to hear him on his return and to let him in without delay. As the door had neither knocker nor bell she did as he ordered, and went to bed partially undressed. He came home at six next morning, and pursuer, having put on some additional clothing, let him in. As soon as he came in he told her to fetch him some claret hot from the bar, which pursuer did. When pursuer returned to his room with the claret he was in bed, and on her approaching him he seized her and drew her into bed with him. She struggled with him, but found that she could not free herself from his hold. (Cond. 7) He then entreated her to allow him to have connection with her, and at the same time used indecent familiarities to her. The pursuer asked him to let her go. He then, in order to pacify her and to obtain his object, told her that anything he might do would not harm her, and that she need not be afraid. The pursuer eventually gave way to the defender's solicitations, and she herself being entirely innocent, and believing what defender said, allowed him to have connection with her. (Cond. 8) The pursuer was very much distressed at and ashamed of the defender's conduct. She told defender so, and that she would leave his service, but at his request, entreaty, and promises of good behaviour she stayed on. He, however, on the morning of the 17th of February following, called her to his room, and on pretence of giving her an order caught hold of her, laid her on his bed, and then by persuasions and promises similar to those narrated in the previous article, again overcame her and had intercourse with her. (Cond. 9) . . . The pursuer believes and avers that the defender is a man of loose and immoral character, and that he is the father of several illegitimate children which former employees had to him. In particular, a Miss Margaret Fraser, a former employee, in September last raised an action against him in the Sheriff Court of Fife at Kirkcaldy, concluding for damages for seduction and aliment of an illegitimate child. The defender admitted in that process that he 'was the father of two illegitimate children borne him by two of his former employees several years ago.' (Cond. 10) The pursuer was seduced by defender in consequence of the persuasions and promises above set forth, and the fact that he used his position of employer, and the ascendancy and influence he had over pursuer as his servant, and the dependent relation in which the