

the said pieces or parcels of land and heritages, by reason of the execution of the works of the said Caledonian Railway Company."

On the 9th January the Sheriff pronounced an interlocutor, in which, "in application of the foregoing verdict of the jury," he ordained payment of this sum to the defender, "with interest thereon at the rate of £5 per centum per annum from the 8th day of November 1864, being the date of the statutory notices served by the said Caledonian Railway Company, till paid." The defender averred that, on 27th July 1868, the agent of the pursuers in Aberdeen sent to him for revisal a draft of the disposition, to be executed by him in favour of the pursuers, and in said draft the consideration was stated to be the sum of £4703, 15s., "with the sum of £ sterling, being the interest on said price, at the rate of 5 per cent. per annum, from the 9th day of November 1864." And on 5th August consignment of the sum of £5583, 18s. 7d. (being £4703, 15s. with interest) was made in Glasgow by the pursuers' secretary. They now alleged that he had acted in error, and contrary to directions he had received from their agent in Aberdeen.

They now brought an action of reduction of the Sheriff's interlocutor of 9th January 1868, as being *ultra vires* and illegal in so far as it decerned for interest. But the defender alleged that it was all along the understanding of the parties that interest was to be paid. This the pursuers denied. And they further averred that all the witnesses on both sides gave their evidence on the understanding that the ground was to be conveyed to the company free of ground-annuals or feu-duties, and that the jury capitalised the feu-duty at twenty-five years' purchase, on the understanding that the defender was to continue to pay the ground-annual with which the subjects were burdened.

The company asserted that their Aberdeen agent, in requesting their secretary to make the consignment, acted under error, in supposing (1) that the Sheriff's judgment was in all respects legal and competent; and (2) that the defender, from the restrictions as to selling contained in Adam and Anderson's trust-deed, was not entitled to payment of the price of the lands, but fell to be dealt with as a party under disability, pursuant to the 67th and following sections of the Lands Clauses Act.

LORD-ADVOCATE and JOHNSTONE for the pursuers.

SOLICITOR-GENERAL and WATSON in reply.

At advising—

LORD PRESIDENT—In this case the jury, at the valuation trial on the 9th of January 1868, found a verdict for £4703, 15s., to be paid for the purchase of lands taken by the Company, and for compensation for lands taken or to be taken by the Company. This verdict is unchallenged. But on the same day the Sheriff, applying, or intending to apply, the verdict, pronounced an interlocutor ordaining the Company to make payment of this sum, "with interest thereon, at the rate of £5 per centum per annum, from the 8th day of November 1864, being the date of the statutory notices served by the said Caledonian Railway Company, till paid."

The present action seeks to set aside this verdict, so far as it finds interest due. So far the case presents no difficulty. But then there arise some questions of fact that perplex it. It appears that on 5th August 1868 the Company consigned £5583, 18s. 7d., being the sum fixed on by the jury, with interest as found due by the Sheriff. The consignment receipt bears to be "for the use

of Francis Edmond, Esq., advocate in Aberdeen, as trustee for the creditors of William Adam and Sir Alexander Anderson, advocates in Aberdeen, being the price and compensation for and in respect of certain pieces of land vested in Mr Edmond as trustee foresaid, and required for the purposes of the said Denburn Valley Railway Act, as determined by the verdict of a jury, of date 9th January last (viz., £4703, 15s.), with interest thereon, at the rate of five per cent. per annum, from 8th November 1864, and which sum is now lodged in bank, to be applied, under the authority and control of the Court of Session."

Now, *ex facie* of this consignment receipt, the Railway Company implemented this decree of the Sheriff for £4703, 15s., with interest. This seemed to put the sum of money beyond their own power, and in the hands of the Court. This receipt would be a very difficult obstacle to get rid of. But then they say that their agent consigned this money in ignorance of the powers of the Sheriff; and, next, that he thought this a case for consignment and not payment.

The defender, on the other hand, avers that it was understood the Railway Company were to pay the ground-annual on the subjects. And, therefore, I am for the Railway Company being allowed a proof of their averments. But it must be a conjunct probation. The pursuers must be allowed a proof of the circumstances attending the consignment. They must be allowed to show that there was error; and the defenders, that it was understood by the parties interest was to be allowed, for whatever reason.

The other Judges concurred.

The case was continued till to-day, with the view of allowing the parties to come to an agreement; but none being come to, a conjunct proof was allowed.

Agents for the Pursuers—Hope & Mackay, W.S.  
Agents for the Defender—M'Ewen & Carment, W.S.

Tuesday, November 23.

## SECOND DIVISION.

### BAYNE v. RUSSELL AND OTHERS.

*Husband and Wife—Præpositura—Obligation to Relieve—Cash-credit Bond—Docquet—Personal Liability—Agent.* A wife, a beneficiary under a trust for behoof of which a cash-credit with a bank was obtained, bound herself along with the other beneficiaries to relieve one of the trustees, a party to the cash-credit bond. Her husband was one of the co-obligants in the bond, but when his wife signed the obligation to relieve he was absent at sea. Held that such an act did not fall under the *præpositura* of the wife, and bound neither herself nor her husband.

Terms of a docquet which held to import a direct personal guarantee of relief against an agent subscribing it.

The late Robert Russell, sometime farmer at Tailabout and Thomaston, in the county of Fife, died on or about the 11th February 1868. By trust-disposition and settlement with relative codicils, executed by him some time prior to his death, he appointed James Elder and others his trustees, and directed them, after payment of his debts and fulfilment of other trust purposes, to divide his

estate among his four sisters—Margaret Russell or Elder, wife of the said James Elder; Agnes Russell or Cook, wife of Thomas Cook, ship-master; Catherine Russell, and Christina Russell. By the non-acceptance and death of some of the trustees, Elder came to be in November 1865 the sole surviving accepting trustee under the said settlement. In that month Elder obtained a cash-credit with the National Bank of Scotland to the extent of £600, in which the pursuer and the said Thomas Cook were, along with Elder, the obligants. The account was to be kept in Elder's name, and operated upon only by him. In the month of December following, Elder assumed the pursuer and Cook as trustees to act along with him in the management of said trust, but Elder continued to be the only trustee who took any active management of the trust affairs until his death, which happened in June 1866. At that date there was a balance due to the bank under the foresaid cash-credit of upwards of £500. The present action was raised by the pursuer (who resigned his office of trustee on 3d August 1867) against the four sisters of the truster above named, as the sole beneficiaries under said trust-settlement, the said Margaret Russell or Elder, as representing her husband (under his settlement), the said Thomas Cook as sole surviving trustee of Robert Russell, and against William Morrison, writer in Cupar, to have it found and declared *inter alia* (1) that the said cash-credit bond had been granted to the parties thereto in their capacity of trustees of Robert Russell; (2) that the whole transactions which took place with the bank under said bond were for behoof of Russell's trust-estate, and that the balance due under the same was a debt due by said trust-estate, and not by the granters of the said bond, and that the pursuer was not liable in payment of any part of said balance; (3) that, whether so declared or not, the said four sisters of the truster should, as next-of-kin of the truster, and the sole parties beneficially interested in said trust-estate, be decerned to free and relieve the pursuer of all liability under said bond; and (4) failing their so relieving the pursuer, they should be decerned to make payment of the balance due under the said bond to the pursuer, in order that he might pay the same, and thus extinguish his liability to the bank. The pursuer also concluded for relief against the defender Morrison, on the ground of an alleged obligation granted by him, afterwards noticed. It appears that after Elder's death the pursuer became desirous of being relieved of his liability under the said bond of credit; and in consequence, with a view to forward that object, the following minute was signed by the four female defenders:—

“Cupar, 1st August 1867.—Mr William Bayne, farmer, Foodie.—Sir,—In consequence of your desire to be relieved from your liability under a cash bond of credit granted by the National Bank of Scotland to the now deceased James Elder, baker, St Catherine Street, Cupar, on which you and Thomas Cook, sea captain, Tayport, are the cautioners, and which bank credit became imperative [*meaning thereby inoperative*] on the death of the said James Elder, we have obtained the consent of the bank that no proceedings will be adopted against you under said bond till 1st October next, when it is expected the said Thomas Cook will have returned to this country, when a new bond will be granted, and you relieved from the obligation; and in order that you may not

suffer loss under the said cash bond, we hereby bind and oblige ourselves to free and relieve you from any loss you may sustain under said bond. This obligation to be binding only till you are relieved from said obligation, and on condition of your now resigning the office of trustee under our late brother Robert Russell's trust-deed of settlement and deed of assumption, by the said James Elder, dated the 7th day of December 1865, assuming you and the said Thomas Cook as trustees to act with him under said trust-deed.—We are, Sir, yours faithfully (signed) MARGARET ELDER, AGNES COOK, CHRISTINA RUSSELL, CATHERINE RUSSELL.”

At the date of the said letter Thomas Cook, husband of the defender Agnes Cook, was absent at sea, and in consequence there was some difficulty in carrying out the relief proposed to be granted to the pursuer. Thereupon the defender Morrison appended to the foresaid letter of obligation the following docket:—

“As the parties to the foregoing obligation have requested me to act in the place of Mr Bayne in managing and taking charge of the farms of Tailabout and Thomaston, I shall make arrangements to have the foregoing obligation carried into effect, and Mr Bayne relieved from his cautionary obligation, by the 1st October next.—WM. MORRISON.”

The parties being dissatisfied with Bayne's management of the trust, he resigned on 3d August 1867, having received from the beneficiaries the following letter:—“Sir,—Having satisfied ourselves as to your intrusions in the management of the farms of Tailabout and Thomaston during the time you have acted as a trustee under our late brother's trust-deed and settlement to the 3d current, when you resigned, we hereby discharge you of your intrusions. Yours truly, (Signed) MARGARET ELDER, AGNES COOK, CHRISTINA RUSSELL, CATHERINE RUSSELL.”

Mr Bayne, however, not having been relieved of said obligation to the bank, raised the present action, and after a proof, the Lord Ordinary (JERVISWOODE) pronounced the following interlocutor:—“The Lord Ordinary having heard counsel, and considered the debate, with the proof, productions, and whole process, including the joint minute, No. 340, Refuses the motion of the pursuer to open up the sealed packet, No. 69 of process: Finds that the bond of cash credit for the sum of £600, to which the first four conclusions of the summons have reference, and which was granted by the said deceased James Elder, baker, Thomas Cook, and the pursuer, was so granted by the parties as trustees on the trust-estate of the deceased Robert Russell, who was tenant and farmer in the farm of Tailabout, as stated on the record, and who died on or about the 11th February 1858: Finds that the object and purpose for which the said bond was granted was that the sum to which it related might be applied towards the purposes of the said trust-estate, including those connected with the farm of Tailabout above mentioned: Finds that, subsequent to the death of the said James Elder, which took place on or about the 19th June 1866, the pursuer became desirous to be relieved of his liability under the said bond of credit, and that in consequence, and with a view to forward that object, the letter, dated Cupar, 1st August 1867, and which is signed by the four female defenders, as set forth in the 7th article of the condescendence, was granted to the pursuer: Finds that, at the date of the said

letter (1st August 1867), the said Thomas Cook, husband of the defender Agnes Cook, was absent at sea in the course of his employment as a seaman, and that, in consequence of this, some difficulty arose in carrying out in an effectual form the relief proposed to be granted to the pursuer: Finds that the defender Morrison thereupon, or shortly thereafter, wrote the document appended to the foresaid letter of obligation in the terms which are set forth in the said 7th article of the condescendence: Finds that, according to the true intent and meaning of the said document, the defender, the grantor thereof, did not thereby undertake any direct personal obligation to the pursuer to relieve him of the cautionary obligation under which he was liable, but undertook merely to make arrangements under and in the course of his management of the farms therein mentioned with a view to that object, by the 1st October then next, at or previous to which date it was in the expectation of parties that the said Thomas Cook might have returned from sea: Finds, *separatim* that the defender Mrs Cook acted during the absence of her husband the defender Thomas Cook, on his behalf, and as *præposita* in his affairs; and with reference to the preceding several findings, finds, declares, and decerns in terms of the first four conclusions of the summons, as against the defenders Mr and Mrs Cook: Assolizies the defender Morrison from the conclusions of the action; and supersedes consideration of the remaining conclusions in *hoc statu*: Finds the pursuer entitled to his expenses, so far as hitherto incurred, as against the said defender Mrs Cook, and against the defender Thomas Cook, her husband, for his interest; and finds the pursuer liable to the defender Morrison in expenses: Appoints accounts to be given in, and remits the same when lodged to the Auditor to tax and report.

Both the pursuers and Cook reclaimed.

GIFFORD and TRAYNER, for Mr and Mrs Cook, argued—That the interlocutor, so far as concerned these reclaimers, was ill founded. It had not been proved the cash credit bond was granted for trust purposes, and it certainly was not granted by the granters as trustees, for the pursuer and Cook were not assumed as trustees after the bond was executed. The bond bore to be granted by them as individuals, and the application of the funds obtained under it for behoof of the trust was not proved. But, granting that the debt due to the bank was a trust debt, the beneficiaries were not bound to relieve the pursuer, as they had not been benefitted by the trust estate, which was not even sufficient to meet its debts. The defender Thomas Cook was not liable under the obligation of 1st August 1867, founded on by pursuer, because it was not granted nor authorised nor homologated by him, and his wife who signed it could not bind him without express authority to do so, which she had not. It did not even bind Mrs Cook, who as a married woman was incapable of binding herself without her husband's consent. Lastly, that Thomas Cook as a obligant in the bond, was willing to bear his proportion of the debt due under the same, but was not liable in relief to any greater extent.

DEAN OF FACULTY (GORDON) and J. CAMPBELL SMITH, for pursuer—The debt of which the pursuer claims to be relieved was a trust debt, and the defender Thomas Cook, as sole surviving trustee, was bound to relieve the pursuer as concluded for. of the trust-estate was insufficient to pay its debts, this arose from the defenders' mismanagement.

Besides, the obligation of 1st August 1867 was never in terms repudiated by him, and he must be presumed to have been aware of its existence, although the proof did not show that it had been expressly communicated to him. As to the defender Morrison, the pursuer contended that the interlocutor of the Lord Ordinary should be recalled, as Morrison's obligation was in effect that he would see done what the beneficiaries had engaged to do. That obligation had been followed by *rei interven-tus*, as on the faith of it the pursuer had resigned his office as trustee.

SOLICITOR-GENERAL (CLARK) and BLACK, for Morrison—The addition made by this defender to the obligation by the beneficiaries was not an obligation binding him in performance of what the beneficiaries had engaged to do, but merely that he would make arrangements for carrying out the agreement come to between the beneficiaries and the pursuer. The terms of the defender's letter were to be strictly construed, and it did not bear the construction put upon it by the pursuer. The defender Morrison had done all he could to have the agreement carried into effect, and it was through no fault of his that this had not been done. If Morrison had meant to undertake the obligation now contended for by the pursuer, he would have signed the letter which the beneficiaries granted, but as he had granted a separate letter or writing, it was to be presumed that he was granting an obligation of a different kind from that which the beneficiaries undertook.

At advising—

LORD-JUSTICE CLERK—It is not now disputed that the cash credit bond from which the pursuer seeks to be relieved was granted for, and the money obtained under it applied towards, the purposes of the trust of the late Robert Russell. It seems to me therefore that decree may be pronounced substantially in terms of the first two conclusions of the summons. The third conclusion, which seeks to have the whole defenders (except Mr Morrison) decerned to relieve the pursuer of his whole obligations under the bond, stands in a different position. That conclusion is directed against the defenders as next of kin of the truster, and as the sole parties beneficially interested in his estate; but in point of fact, as argued before us, that conclusion is founded upon the letter of obligation of 1st August 1867, upon receipt of which the pursuer resigned his office of trustee. I am of opinion that that letter constitutes a good obligation as against Mrs Elder and her two sisters who granted it; but as regards the defender Mrs Cook, I think that letter constitutes no obligation at all. As regards her it is the obligation of a married woman, and can only be regarded as a nullity and wholly inoperative. The Lord Ordinary has sustained that letter as a good obligation as binding Mrs Cook and her husband, on the ground that Mrs Cook granted it as *præposita* in her husband's affairs. The statement on the part of the pursuer is that Mrs Cook was *præposita omnibus negotiis*, and had her husband's mandate for what she did. There is nothing in this case to lead me to that view. There are no doubt cases where a husband has been held liable for the acts and obligations incurred by his wife which were not *in rebus domesticis*. But supposing there were grounds for holding that Mrs Cook in her husband's absence at sea had some authority to act for him beyond the ordinary *præpositura* of a wife, such an obligation as that which we are considering could not be safely held to fall within such autho-

urity; such a document would require express authority to make it binding. On the face of the document itself there does not appear any attempt to bind the defender Cook, for Mrs Cook thereby binds herself personally; and it is not suggested in the document that she acts for her husband or by his authority in so doing. If the pursuer could have shown (as he has averred) that Cook on his return home homologated or ratified the act of his wife, this would have made him liable. But this the pursuer has not done. It is very doubtful if Captain Cook ever knew of the obligation of 1st August. No notice of it is taken in the correspondence with Cook regarding the bank debt, and it is certainly not proved that the terms of that obligation were ever communicated to him, or that he in any way approved of or homologated it. So far therefore as that obligation is concerned, I think Captain and Mrs Cook should be assolized. The defender Cook, however, was one of the co-obligants in the bond, along with the pursuer and Mr Elder, and as the latter is now dead and his representative is bankrupt, Cook must, in my opinion, relieve the pursuer of one half of the debt due under that bond to the bank, and this is a liability which Cook does not dispute. To that extent, and on that ground, decree must be pronounced against the defender Cook. With regard to the defender Morrison, the case is by no means a clear one, and I have considered it with considerable anxiety. His obligation is in these terms—(*reads*). This *notandum* at the end of the obligatory letter of 1st August, it is to be noticed, is addressed by Mr Morrison to the pursuer and not to the beneficiaries. It certainly contains words of undertaking, and, addressed as it is, undertaking to the pursuer. Whatever the arrangement or agreement in that letter was, the defender Morrison undertook to see it carried out. This has not been done; and on the whole I am of opinion that Morrison must see the pursuer relieved of his obligation under the bond, reserving to him his right of relief against the other parties who were primarily liable to relieve the pursuer.

LORD COWAN concurred.

LORD BENHOLME—I concur with your Lordship as to the judgment now to be pronounced in so far as regards Mr and Mrs Cook. With regard to the defender Morrison, the case has presented itself as one of great difficulty to my mind, and at first I was disposed to agree with the Lord Ordinary. I have no doubt that Mr Morrison did not intend to bind himself to do more than to do his best to see the letter of 1st August carried into effect. But then I do not think the pursuer so understood Morrison's obligation. It was Morrison's duty to make his own meaning and intention clear to the pursuer, and if he failed to do so he must bear the consequences. It is a rule of law, and a good rule, that every obligation is to be construed *contra proferentem*, and on that ground and that alone, I have come to agree with your Lordship in deciding this case against the defender Morrison.

LORD NEAVES concurred.

Agents for Pursuer—Murdoch Boyd & Co., S.S.C.  
Agent for Mr and Mrs Cook—D. Milne, S.S.C.  
Agent for Morrison—D. Curror, S.S.C.

Wednesday, November 24.

## FIRST DIVISION.

### FLOCKHART V. KIRK-SESSION OF ABER- DOUR.

*Poor—Expenses—Heritors—Kirk-Session.* Circumstances in which held (*dub.* Lord President) that certain funds given for “the poor of the parish,” had been administered jointly by the heritors and kirk-session, and that therefore they fell to be transferred to the parochial board under section 52 of the Poor Law Act. No expenses were allowed to either party.

The question at issue in this case was, whether two sums of £323, 12s., and £45, were to be held for behoof of the legal poor of the parish of Aberdour, or of the casual poor. Till 1848 the funds for the support of the poor were provided out of the church door collections, bequests, sums paid for mortcloths and marriages, and the like sources; but in that year a compulsory assessment was introduced. A dispute thereon arose as to whether the above two sums were to be held by the Parochial Board or by the Kirk-Session, who had hitherto held them. On inquiry into their history, it was found that from time to time the surplus funds, after supporting the poor of the parish, were invested in various securities. On 2d March 1735 the Kirk-Session invested a sum of 1550 merks (£86, 2s. 2½d.) in the purchase of certain houses from one Andrew Moyes, and the disposition of the subjects executed by him bore to be “to and in favours of Mr John Liston, minister, and the remanent elders and members of the Kirk-Session of Aberdour, and their successors in office, ministers and elders of the said Kirk-Session (for the use of the poor and indigent of the said parochin of Aberdour).” In May 1800 the Earl of Moray bought these houses from the Kirk-Session, and on 2d June, in further implement of the said transaction, executed and delivered a bond by which he bound himself, his heirs, executors, and successors, to content and pay to the said Mr William Bryce, and his successors in office, ministers of the said parish, for themselves, and in name of the remanent members of the Kirk-Session of the said parish, for the use of the poor of the said parish, the said sum of £323, 12s.

On 15th December 1823 Mr Douglas Morrison, merchant, Kirkcaldy, bequeathed a sum of £50 to the minister and Kirk-Session of Aberdour, directing them to maintain the principal sum entire for ever, and to apply the interest towards the relief of the poor of the parish. This sum, after deduction of legacy duty, was lent to the Earl of Moray, and the acknowledgment of the loan by his factor, and the receipts for interest paid by him, bore to be for behoof of the poor of the parish of Aberdour.

The minutes of the meetings of the Kirk-Session were printed at great length, and it appeared from them that the heritors frequently consulted along with the Kirk-Session in regard to “the poor of the parish.” On various occasions the Kirk-Session appealed to the heritors for assistance. On 1st January 1773, *e.g.*, they stated the amount of their funds, and the manner in which their outlay had been made, and “represent that the indigent householders are numerous, and the funds in the session's hands not sufficient for their relief.” They also gave in on other occasions lists of the pensioners and poor families, and the heritors assessed themselves for sums to assist the Kirk-Session, which