

claim was that the defender should be held confessed on the statements made by him with reference to the documents, and that copies of them should be held to be equivalent to originals.

Agents for Appellant—Maitland & Lyon, W.S.
Agent for Respondent—Wm. Officer, S.S.C.

Saturday, November 12.

FIRST DIVISION.

DOUGLAS v. THOMSON.

Process—Summar Roll—Debts Recovery Appeal.

This was a case brought originally in the Debts Recovery Roll of the Edinburgh Sheriff-court. It was remitted by the Sheriff to the Ordinary Roll as not suited to summary decision, and there decided. It was appealed to the Court of Session upon a question of expenses.

The case was put out in the Summar Roll, and on its coming before the Court the Lord-President objected to its being in that roll, and said that it had got there on false pretences, and that though it had been remitted to the Sheriff's Ordinary Roll, and decided there, it had been treated as still a Debts Recovery case, and put out in the Summar Roll. Now, when remitted to the Sheriff's Ordinary Roll it became an ordinary case, and appeal to the House of Lords became possible, which was not the case with Debts Recovery cases. It was now in the same position as many poor-law cases, which, from the importance of the question involved, have been remitted to the Ordinary Roll and gone ultimately to the House of Lords. In these circumstances it should have been put out in the Short Roll and not in the Summar Roll in this Court.

Counsel for the Pursuer—Burnet. Agent—J. A. Gillespie, S.S.C.

Counsel for the Defender—Mair. Agent—

Tuesday, November 15.

GRAHAM'S TRUSTEE v. GRAHAMS.

(*Ante*, v. 402, 539.)

Trust—Accounting—Interest—Effect of Family Understanding—Interest on Sums in Trustee's hands Uninvested. Circumstances in which a family understanding, not committed to writing, but clearly acted upon for a period of years, was held to overrule a clause in a written deed, to the effect of preventing parties going back upon and claiming under it. *Held* that in family accountings such understandings must be given effect to by the Court. *Opinion* intimated that a liferent has not the same claim as a fiar to a higher or penal rate of interest, upon funds allowed to lie uninvested in the hands of a trustee or agent.

This multiplepointing was before the Court on two previous occasions, in March and May of 1868 (see *ante*, vol. v, 402 and 539), when the Court disposed of certain legal questions which had arisen between those beneficiaries in the trust estate who were claimants in the action. Mr Ralph Erskine Scott, the accountant, to whom a remit had been made in the case, had meantime issued his first report on March 17, 1868. Objections to this report were lodged for the different parties, and were all disposed of by the Lord Ordinary in June of the

same year, excepting the second objection for Mr Humphrey Graham, on which the Lord Ordinary made a farther remit to the accountant to report. Mr Humphrey Graham reclaimed against the interlocutor of the Lord Ordinary disposing of the objections to the report, and on October 29, 1868, the Court pronounced an interlocutor in the following terms:—"Recall the interlocutor, so far as it repels the first objection stated by Humphrey Graham, and finds that any debts due to the said Humphrey Graham by the late Mrs Isabella Farquhar or Graham, however chargeable against Mrs Graham's own liferent interest, are not chargeable against the fee of the trust estate or any part thereof; and, with reference to the said objection, before farther answer, remit to the accountant to examine the accounts to which the said objection refers, and report in like manner as in regard to the second objection stated by the said Humphrey Graham, and direct the accountant to report to the Court *quam primum*, instead of reporting to the Lord Ordinary," &c.

The two objections for Mr Humphrey Graham referred to in this interlocutor of the Court are as follows:—(1) "That the balance due by the late Mrs Isabella Farquhar or Graham to the claimant (Mr Humphrey Graham) has not been deducted from the fund for division, the said balance amounting to the sum of £4898, 4s. 2d., as specified in the accounts Nos. 93, 94, and 95. (2) That the accountant has not given effect in the accounting to the sums paid by the claimant to the several beneficiaries, or for their behoof, as specified in accounts lodged in process in the conjoined actions of multiplepointing and count and reckoning between the same parties, in reference to the estate of the late George Farquhar. The claimant (Mr Humphrey Graham) accordingly claims that the said sums should be deducted from the whole amounts now payable to the said several beneficiaries, in respect of their shares, both of the estate of the said Colonel and Mrs Graham, and of the estate of the said George Farquhar."

In accordance with these directions from the Court, the accountant, in June 1870, made his supplementary report, in which he says:—"The objections Nos. 1 and 2 for Mr Humphrey Graham above narrated have involved the examination of the following accounts—

"*Under Objection No. 1.*—The account between the claimant and Mrs Colonel Graham in respect of one-sixth share of the annual produce of the estate of the late Mr Farquhar from Whitsunday 1830 to Whitsunday 1853 inclusive, being £19 half-yearly, and amounting, with interest to 31st Dec. 1865, to £2294, 7s. 8d. Mr Humphrey Graham supported this claim to the one-sixth of the produce of the Farquhar estate during his mother's liferent by reference to the following clause of the mutual trust-disposition and settlement of Colonel and Mrs Graham:—"And I, the said Isabella Graham, in case I shall survive the said Humphrey Graham, my husband, and in case any one or more of our children before named shall marry, do hereby, with advice and consent foresaid, bind and oblige myself to renounce my right of liferent over such share of my said deceased father's estate and effects as I have by these presents appointed to belong to such child or children respectively, so that such child or children so marrying may receive and enjoy such share or shares upon their entering into such marriage, if the same shall be contracted after the decease of the said

Humphrey Graham, or upon his decease if it shall have been previously contracted." This claim on the part of Mr Humphrey Graham raised a legal question, of which the accountant could not dispose; but, at the request of parties, he did not at once crave the instruction of the Court, but completed this interim report, and now raises the question, whether any part of the income of the Farquhar estate, during the period of Mrs Graham's liferent, should be placed to the credit of Mr Graham and his representatives in the present accounting. If the Court sustain Mr Graham's claim for one-sixth of the free produce of the Farquhar estate, and if the other parties object to the amount, as estimated by Mr Graham at £19 half-yearly, it will be necessary for the accountant to separate Mrs Graham's liferent account into two distinct accounts, showing the receipts and disbursements applicable to the Graham and Farquhar estates respectively." Farther, in this claim of Mr Graham's the interest has been calculated and accumulated annually at five per cent.; this the accountant is of opinion ought not to be allowed.

Next, the general accounts of Mr Graham, with the year produce of the two estates.

1. *Farquhar Estate*.—The accountant finds that Mr Graham uplifted, and retained in his own hands from the year 1842, the sum of £3500 of the capital of the estate. The accountant is of opinion that Mr Graham falls to be charged with interest at five per cent. upon this sum from Whitsunday 1842, accumulated half-yearly, under deduction of income tax. He has made up an account accordingly.

2. *Graham Estate*.—Mr Graham uplifted and retained in his hands, from 1849 downwards, various sums belonging to this estate, amounting at that date and subsequently to £5500. The accountant has followed the same principle here as in the former case and charged Mr Graham with interest on this sum at five per cent., accumulated half-yearly. At the same time, the accountant has only debited Mr Graham with interest at five per cent. without accumulation upon the floating balances in his accounts with these estates. He has similarly credited him with interest at the same rate without accumulation, when the balance has been in his favour.

"*Under Objection 2*.—The accountant has carefully examined the accounts between Mr Humphrey Graham and the various beneficiaries under Colonel and Mrs Graham's settlement. The results however, are not material to the present questions before the Court." The report concludes:—"The accountant cannot *hoc statu*, and until the decision of the Court is obtained on the various legal points involved in the accounting between the parties, make up any state showing the bearing of the results of the present accounting on the claims of parties. At a meeting with the agents for the parties of this date (January 10, 1870), it was proposed that the present report by the accountant should be printed, but as it may be materially altered by any decision the Court may pronounce in regard to these legal questions, the accountant was requested to state at the conclusion of the report the questions requiring decision bearing upon the accounting, and to crave the Court to dispose thereof before further procedure. These questions appear to the accountant to be as follows:—(1) Are Mr Humphrey Graham's representatives entitled to one-sixth of the annual produce of the Farquhar estate, from Whitsunday 1830 to

31st March 1864, and if he be found so entitled, are the other married children of Colonel and Mrs Graham entitled to the like sum during the joint existence of their marriage, and of Mrs Colonel Graham's liferent? (2) In the event of their being so entitled, are the alimentary payments, etc., to them, alluded to before, to be charged against the sum so found due to them, or are these payments to be considered as free gifts to them by Mrs Colonel Graham out of her liferent? (4) Is Mr Humphrey Graham entitled to set off such balances as may be found due to him on the several accounts between him and the other beneficiaries against the capital sums of the Graham and Farquhar estates uplifted by him, and remaining in his hands? Or, is the accountant correct in accumulating interest on these capital sums, and only allowing interest without accumulation on the fluctuating balances on the accounts-current? (6) In the event of it being ultimately found that, in place of there being a balance of liferent due to Mrs Colonel Graham's representatives as brought out by the accountant, there should be a balance due to the representatives of Mr Humphrey Graham, as contended for by them, is such balance chargeable against the capital of either estate, or any part thereof?" For the explanation of the present point at issue, it only remains to notice a letter from Mrs Graham to her son Humphrey, the bearing of which upon the said question is most important. Its terms are as follows:—
 'Feb. 5, 1835.—MY DEAR HUMPHREY,—I have for sometime felt very uncomfortable under a sense of retaining what (by your father's settlement, signed also by me) does not belong to me. I allude to the clause where it is mentioned that such of our children as marry are then to receive each their share of the six equal portions allotted to them of my father's property left in liferent to me. Three are married, and, of course, three shares are due—to yourself, to Frederic, and to Bella, one each. This clause your father intended to alter, thinking it unjust that, if all our family married, I should be deprived of all my father left me, and reduced to a much smaller income than they intended I should possess; but that is of no consequence, as no alteration took place. Nor do I regret its not doing so, only as depriving me of any opportunity to show my free goodwill in time of need; for I dislike responsibility, and wish no more for myself than is necessary to keep me a little comfortable for the short period it is likely I may now require it. I have been thinking, if just enough for that purpose could be properly settled for me, I should wish to give up the rest to those who may have more occasion for it at present, and to whom it will ultimately belong, only I would be afraid that some of them might not just at this time be able to manage their share very prudently. However, I wish you to consider, and give your advice as to this matter. At all events, I am determined to relinquish the three shares above mentioned, and request, if you do not approve of the other plan, you will set about arranging that one. The present aspect of political affairs seems favourable for seeking military justice. If my pension could be gotten, it would be useful amongst us.—I ever am, my dear Humphrey, your affect. mother. (Initialed) J. G. It grieves me beyond measure that I have no way in the least adequate, or that you would accept, of testifying my grateful sense of your dear Johnnie's hospitable kindness to all of us. The unwearied attention we receive, I

can assure you, is justly appreciated, and nothing could afford me more unspeakable satisfaction than being able in any way to assist or benefit yourselves or your dear children. To such a heart as yours, I know, being serviceable to your only dearest and nearest relations is rich gratification; and I trust you will yet be rewarded, even in this world, for all your goodness, with health, peace, and ready-money in plenty. I know not how far Bella's marriage-contract allows of her concern in the arrangement I have mentioned of the three shares."

MILLAR, Q.C., and KINNEAR, for Humphrey Graham's Representatives, argued that their clients were entitled, as in right of Mr Humphrey Graham, to be credited in the accounting with one sixth of the free produce of the Farquhar estate during Mrs Graham's life term of it. And that the other children of Mrs Graham must be charged with the sums paid them during her lifetime, even though alimentary, which ought not to be looked upon as free gifts when the clause in the settlement dealing with her life term is considered. They further contended that their clients were hardly dealt with by the accountant, in as much as Mr Humphrey Graham was charged with 5 per cent. accumulated interest upon the sums uplifted by him and retained in his hands. This interest should only have been at four per cent., and should not have been accumulated; there should also have been set off against it the large sums which he was paying to Mrs Graham and the beneficiaries, both with and without Mrs Graham's order. The payments to Mrs Graham must be looked upon as the annual produce of these funds. The accountant does not set these sums year by year against the interest with which Mr Graham is charged, on the contrary, he charges him in an account apart with interest, and with interest upon interest on these sums, while he deals with Mr Graham's intrusions with the life term and with the beneficiaries separately, and treats him in the matter of interest on quite a different footing, allowing of no accumulations. The proper view to take is to consider Mr Graham during this period as the family banker, and charge him with the due rate of interest, but give him credit in each year for any set-off there may be, and this without any accumulation of interest upon interest. They referred to *Russell v. Mackie's Trustees*, 20 Nov. 1869, 7 Law Reporter, 99.

The SOLICITOR-GENERAL and GEORGE WEBSTER, for Mr W. H. Graham, argued that had Mr Humphrey Graham been entitled to claim a share in the annual produce of the Farquhar estate he should have retained it out of that produce as it passed through his hands. He neither did so nor acted as though he had right to do so. He or his representatives now come forward and plead that they have a *condictio indebiti*, and are entitled to reclaim this share. That cannot be; for, first, it is open to argue that the supposed provision of one-sixth of the life term of the Farquhar estate was recalled. The deed containing this provision was executed in 1815, and contained most ample powers of revocation. The deed which properly disposed of the Farquhar estate is dated 1817, and contains no reference to this renunciation of Mrs Graham's life term. We know from other sources that Colonel Graham contemplated altering that provision, and it is open to say that it was tacitly recalled by the subsequent deed. Mrs Graham may have been unaware of this, but it was her son's duty to inform her of it on receiving the letter of 1835.

But without pressing this point, Mr Humphrey Graham should either have made his claim at that date, or must be held to have waived his right. He did not suggest any claim, but continued to pay over to his mother, &c., the rents and profits of the estate for eighteen years subsequently. We are entitled to presume that Mr Graham knew of his father's intention to alter, and that even if he did not consider that he had actually done so, he was willing to give effect to his father's intention, and voluntarily relinquished any claim which he might otherwise have had. Without shewing essential error, his representatives cannot have this *condictio indebiti*.

On the second question, that of accounting with the several beneficiaries, they contended that the accountant was right in holding that this must be done separately with each. They were all in different positions, and particularly their client Mr W. H. Graham, who had only succeeded to his father's share. The trust accounts should first be made up as proper trust accounts, including with the Graham estate the income only of the Farquhar estate. And when this is done, and the share of each beneficiary ascertained, Mr Humphrey Graham may prefer his claims against each of them separately.

LEE, for Frederick Graham's trustees, stated that his interest in the question was the same as that of Mr W. H. Graham.

MACDONALD, for Misses A. and M. Graham's executors, contended that there was much danger of confusion arising from this mixing up the Farquhar estate in the Graham multiplepointing, whereas it was only the annual proceeds of that estate which were to be accounted for in this action. Even if Mr Humphrey Graham is successful in obtaining an alteration in the basis of the accounting as against W. H. and Frederick Graham, in respect of his advances to them, a different principle must be applied in dealing with his clients, viz., the one on which the accountant had proceeded, for to them no advances had been made.

At advising—

The LORD-PRESIDENT—The accountant seems to have experienced considerable difficulty in making up his state of accounts under the remit in this action in such a way as to ascertain the amount of the divisible fund in the multiplepointing. It is not at all surprising that he should. The whole history of these funds is rather special. From 1830 to 1853, and down even to a much later period, down I may say to the date of raising this action, there have been a great many irregular things done in connection with them, some not very well accounted for, but others the result of family arrangements. So intricate and difficult indeed is this history, that I am disposed to think that we are far from being in a position as regards information, either directly or exhaustively, to answer all the questions proposed to us.

We will endeavour however to give the accountant as much assistance as is in our power, and I think we can dispose at any rate of the first question without any qualification. It is a question of right and equity, arising out of the circumstances of the case as disclosed in the accountant's supplementary report. The question is as follows—"Are Mr Humphrey Graham's representatives entitled to one-sixth of the annual produce of the Farquhar estate, from Whitsunday 1830 to 31st March 1864, and if they be found so entitled, are the other married children of Colonel and Mrs Graham en-

titled to the like sum during the joint-existence of their marriage and of Mrs Colonel Graham's life-
rent?" In short, the question is whether the married children are or are not entitled to go back upon a certain interpretation of one of the clauses in Colonel and Mrs Graham's mutual settlement, by which she makes a certain renunciation of her life-
rent in their favour. We must therefore attend to the clause itself in the mutual settlement upon which the question depends. By her father's will Mrs Colonel Graham was entitled to a life-
rent of his estate, and the fee of it was given to her children *nominatim*. This, in the present action, goes under the name of the Farquhar estate. She, in her own and her husband's mutual settlement, and in exercise of a power of division given her by her father, settled the fee of this estate equally among her six children; and then she proceeds to deal with her own life-
rent of the said Farquhar estate in the following terms, "and I, the said Isabella Graham, in case I shall survive the said Humphrey Graham, my husband, and in case any one or more of our children before-named shall marry, do hereby, with advice and consent foresaid, bind and oblige myself to renounce my right of life-
rent over such share of my deceased father's estate and effects as I have by these presents appointed to belong to such child or children respectively, so that such child or children so marrying may receive and enjoy such share or shares upon their entering into such marriage, if the same shall be contracted after the decease of the said Humphrey Graham, or upon his decease if it shall have been previously contracted." The question is then, whether, on the marriage of any of the children, the widow's life-
rent was not *eo ipso* reduced *pro tanto* and transferred to the child so married or marrying. Now the interests of the several children under these settlements are generally throughout this action assumed not to have been vested interests during their mother's life-
time; but the case of those marrying may, under the clause I have just read, be on quite a different footing. This depends very much upon the question, whether the enjoyment of the share mentioned in this clause by Mrs Graham means the enjoyment of one-sixth of the fee or only of one-sixth of the life-
rent. I do not feel that I am called upon to decide this, and all that I will say on this head is, that under the terms of this clause a child marrying and making a marriage settlement would most certainly claim the fee if he intended to insist upon his rights under his mother's settlement, and he would do so very colourably. Now, keeping this in view in our farther consideration of the case, I think that there is no doubt that not one of the family ever received payment of his share of the income of the estate, nor is there even a trace of their claiming it. There must surely have been some reason for this, and I think we can ascertain that reason, not at all doubtfully from what has taken place in the family, and particularly from that important letter of Mrs Graham to her son Humphrey, of date 5th February 1835, in which she says—"I have for some time felt very uncomfortable under a sense of retaining what (by your father's settlement, signed also by me) does not belong to me. I allude to the clause where it is mentioned that such of our children as marry are then to receive each their share of the six equal portions allotted to them of my father's property left in life-
rent to me. Three are married, and, of course, three shares are due—to yourself,

to Frederic, and to Bella, one each. This clause your father intended to alter, thinking it unjust that, if all our family married, I should be deprived of all my father left me, and reduced to a much smaller income than they intended I should possess; but that is of no consequence, as no alteration took place." It is certain that when she wrote that letter she had been for four years drawing the income of the whole estate. It is equally certain that some of the children were married. There is evinced an uncomfortable feeling on her part that she is enjoying that which she ought not. She calls her son's attention to this, and suggests two alternatives—"I have been thinking, if just enough for that purpose could be properly settled for me, I should wish to give up the rest to those who may have more occasion for it at present, and to whom it will ultimately belong, only I would be afraid that some of them might not just at this time be able to manage their share very prudently. However, I wish you to consider, and give your advice as to this matter. At all events, I am determined to relinquish the three shares above-mentioned, and request, if you do not approve of the other plan, you will set about arranging that one." She alludes, as I have shown, to the fact that her husband, Colonel Graham, had intended to make an alteration in the provision for the relinquishment of her life-
rent. It has been suggested at the bar that an alteration did in fact take place by deed dated 1817. I cannot adopt that argument. But then she proceeds farther to say that she does not regret that such alteration was not made, except as it deprived her of an opportunity of showing her good will in time of need. In conclusion she alludes with great tenderness to the kindly relation subsisting between herself and her son.

This letter, which I have thus analysed, is evidence of the most proper feeling between Mrs Graham and her son Humphrey. That we have no answer to this letter is not, I think, surprising. No doubt much personal consultation on the subject ensued between mother and son, and that personal communications led to some family arrangement which we shall find parties acting upon. We are quite entitled to judge of the matter thus. We often have to judge of understandings in families which have never been reduced to writing, but yet have been acted on during a series of years; and in family accountings such as this these mutual understandings must be given effect to as ruling agreements.

Now, let us see what did follow upon these communications between mother and son. Mrs Graham remained in possession of her full income. No payment was made to any of the children of their shares either of fee or life-
rent. Whether she received full payment of her life-
rent is a question of accounting. But she clearly did receive all payments without any interference on the part of any of her children. That being so, is it possible for Mr Humphrey Graham, or the whole of the children then married, to go back to the year 1835, or rather to the year 1880, and insist that the whole income of the Farquhar estate should be accounted for in any particular way. I think assuredly not.

On the other hand, I extract from these proceedings another important result, and one not affecting the accountant's first question. And it is this—Mrs Graham, while left in possession of her undiminished life-
rent under this family agreement, was not in a condition to insist upon

anything more than the actual income of the estate, notwithstanding the irregularities which occurred. If she could not then, just as little can her representatives do so now. If it were not so, I should experience the greatest difficulty in point of law, even if the question came up in the purest form possible, in determining the different interests of liferenter and fiar. But as it is, the result I have come to is—That while Mr Humphrey Graham cannot make good his claim to one-sixth of the liferent of the Farquhar estate from 1835 downwards, so neither can the widow's representatives insist in any accounting with him, except on the same footing that she could—the footing, namely, that she received all she intended to claim or could have claimed. The account between Mr Humphrey Graham and his mother must therefore be made up to her death in 1853, without allowing him credit for any share of her liferent of this estate, and, on the other hand, of his simply accounting to her for the produce of the estate as in his hands at simple interest at four per cent. I say four per cent. for that was what the funds were yielding before they were realised. But independently of this family understanding, which I hold existed, I consider that the accountant did wrong in charging interest at five per cent. He has dealt with this question between the truster and the liferenter as though she were fiar—I think without authority. Penal interest is inflicted upon the trustee or agent in the case of a fiar, because of his risk in the loss of good security. In the case of the liferenter this does not apply nearly so strongly. There does not seem to remain any difficulty in the way of making up an account of the trust-funds up to 1853, at least I am not aware of any. The account will itself be one of the Graham estate proper, including in it any arrears of Mrs Graham's liferent.

Now, with regard to the period subsequent to 1853, there may be many difficulties, and I do not see my way at present towards clearing away these difficulties, for I may say I do not even know what they are. I am therefore not in a position to deal with the matter one way or another. I can only say this much, at that date the whole estate became free for distribution. There then arose a question between Mr Humphrey Graham and each of the beneficiaries. The claim is now one of payment, and not merely regarding trust management. A settlement of accounts must therefore take place between Mr Humphrey Graham and each of the beneficiaries as at the death of Mrs Graham in 1853. It may be that to arrive at a settlement with any one of these beneficiaries the accountant may find it necessary to make up a state of accounts at some other period. But that is a question for him to judge of. I simply look at it as a question of debtor and creditor between Humphrey Graham and each of them as at 1853, and do not wish to prejudice any questions that may arise.

I have only to add that I do not feel myself in a position to determine any of the other points raised by the accountant. Our instructions to him should only be as to the way in which his account is to be made up to 1853,—excluding, on the one hand, Mr Humphrey Graham's claim to one-sixth of his mother's liferent of the Farquhar estate, and, on the other hand, any claim of the other beneficiaries against him to more than simple interest at four per cent. upon the sums that were lying in his hands.

LORDS DEAS, ARDMILLAN, and KINLOCH intimated their concurrence in the course proposed by his Lordship.

Agents for Humphrey Graham's Representatives—A. & A. Campbell, W.S.

Agents for Mr W. H. Graham—Messrs Gibson-Craig, Dalziel, & Brodies, W.S.

Agents for Frederick Graham's Trustees—Maconochie & Hare, W.S.

Agents for the Executors of Amelia and Margaret Graham and Others—Thomson, Dickson, & Shaw, W.S.

Tuesday, November 15.

THE LOCHRUAN DISTILLERY COY. v. JAMES BLACKWOOD ANDERSON.

Cautioner—Letter of Guarantee—Saving Clause. Circumstances in which, an agent having absconded, his employers were found entitled to come upon his cautioner to the amount of his guarantee, although he pleaded that they had violated the express conditions of the letter of guarantee.

This was an action raised by the Lochruan Distillery Company in Campbeltown, and the individual partners thereof, against James Blackwood Anderson, commission agent in Dundee, who was cautioner for his son Allan E. Anderson, who acted as agent for the said company in Dundee and neighbourhood. The summons concluded for £300, being the amount contained in a letter of guarantee granted by the defender to the pursuers in the following terms:—"Gentlemen, you having proposed to appoint my son, Allan E. Anderson, your agent for Dundee and neighbourhood, I undertake that he shall faithfully and promptly account to you for all monies or bills which he may receive on your account—it being understood that my liability is limited to £300 sterling, and that he shall be required to account to you monthly for his intromissions, or oftener where practicable; and that should any irregularity occur, you will be bound to give me early notice thereof for my guidance and protection.—Yours," &c.

The nature of the agency was, that Allan Anderson should take orders for whisky, to be executed by the pursuers direct from their stores, collect accounts as they fell due, and remit the amounts thereof when paid to the pursuers, he getting a commission. He had a discretionary power to sell either for cash—*i.e.*, for payment on delivery or within thirty days of the fulfillment of the order, or on credit at three, four, or six months. The said Allan Anderson acted as the pursuers' agent from April 1867 till April 1869, when he left Dundee, leaving considerable sums due to the pursuers and other parties. At the time of his absconding he was owing to the pursuers the sum of £345, 1s. 6d., and the pursuers accordingly brought the present action against the cautioner for recovery of £300, the amount contained in his letter of guarantee. While Allan Anderson was acting as agent for the pursuers he frequently remitted sums of money to them, but though he was called upon by the pursuers to render an annual account of all his transactions for them, at no time did they make him give up a monthly statement of the business he had done on their behalf.

Among other transactions he sold 2000 gallons of whisky to Messrs James Watson & Co., wine mer-