The deed, although written on six sheets, thus only bore the subscription of the testator on the fifth sheet at the end of the will, and on the sixth sheet at the end of the codicil.

The petitioners prayed the Court to allow them a proof of their averments, and thereafter to find and declare that the will and codicil above mentioned were subscribed by the said George Junior Browne as maker thereof.

No answers were lodged by any party.

The Court allowed a proof, and granted a commission to take evidence in New Zealand. The evidence bore out the statements above narrated, and contained the depositions of the instrumentary witnesses to the will and codicil, who also spoke to the truth of the *facsimile* of the will and codicil produced.

The Titles to Lands Consolidation (Scotland) Act 1868, by sec. 20, provides that a conveyance of heritage shall not, from and after the commencement of the Act, be invalid by reason of the absence of the word "dispone" or other words of *de præsenti* conveyance, "and where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain, with reference to such lands, any word or words which would if used in a will or testament with reference to moveables be sufficient to confer upon the executor of the granter or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writings by the law of Scotland, shall be deemed and taken to be a general disposition of such lands within the meaning of the 19th section hereof, by the granter of such deed or writing in favour of the grantee thereof, or of the legatee of such lands, and shall be held to create, and shall create, in favour of such grantee or legatee, an obligation upon the successors of the granter of such deed or writing to make up title in their own persons to such lands, and to convey the same to such grantee or legatee; and it shall be competent to such grantee or legatee to complete his title," &c.

Argued for petitioners—The deed ought now to be regarded as a probative deed according to Scotch law. Owing to an informality in its execution it was not originally a probative deed, but the defect had now been cured by proof, in accordance with the provision of sec. 39 of the Conveyancing Act 1874. Sec. 20 of the Act of 1868, *supra cit.*, had no direct reference to foreign deeds, and so did not affect the law already in existence as to foreign deeds. It was therefore necessary to proceed under the Conveyancing Act of 1874.

Authorities—*M'Laren* v. *Menzies*, July 20, 1876, 3 R. 1151; *Studd*, Dec. 10, 1880, *ante*, vol. xviii. p. 177, 8 R. 249.

The Court, after hearing counsel, were of opinion that the will being valid according to the law of New Zealand, was effectual to convey Scotch heritage without any process under the Conveyancing Act of 1874, but granted the prayer of the petition, on the ground the petitioners being trustees were entitled to act with extreme caution.

Counsel for Petitioners—Macfarlane. Agents—Morton, Neilson, & Smart, W.S.

Tuesday, November 7.

FIRST DIVISION.

[Lord Adam, Ordinary.

NICOLSON AND NICOLSON & SON *v.* BURT AND PATERSON.

Cautioner—Liberation of Cautioner—Alteration in Agreement.

A person who binds himself as cautioner for the intromissions of a servant, in general terms, remains bound until he intimates withdrawal from the obligation, or until the servant ceases to be in the employer's service.

A cautioner for a traveller who had entered into an agreement with his employers for three years *held* not liberated by mere expiry of the term of three years, but bound as cautioner for a further term of service between the traveller and his employers, in respect the bond of caution did not import by reference or otherwise the terms of the agreement subsisting at its date, and therefore lasted during the period of service or until the cautioner withdrew.

Transaction—Giving Time.

Where a creditor made advances to his debtor to enable him to make good defalcations, and took bills payable at sight for the amount, *held* that he was not barred from recovering from the debtor's cautioner the amount of subsequent defalcations.

By an agreement, dated 16th December 1875, between David Nicolson and D. Nicolson & Son, brewers (of which firm the pursuer David Nicolson was sole partner), on one part, and Peter Burt, on the other, Burt agreed to act as traveller for the firm of D. Nicolson & Son, for the sale of their ales, &c., and undertook to find security for his intromissions to the extent of £300. The seventh article of said agreement was as follows:—"This agreement to commence on 1st March 1876, and to hold good for three years thereafter. Either party wishing to terminate it at the end of said three years may do so by giving three months' notice in writing to the other of his intention to do so." Burt offered as cautioner his father-in-law Robert Paterson, who on 25th March 1876 subscribed a bond of caution, which was in the following terms:—"For the due and punctual payment to David Nicolson, brewer, Edinburgh, by Peter Burt, presently of Glasgow, of all sums of money collected by him belonging to the said David Nicolson, but to the extent of £300 only, I, the said Robert Paterson, bind and oblige myself, my heirs and successors, as cautioners and sureties with and for the said Peter Burt, to make good any deficiency which may arise in his intromissions, and that within one month from intimation." On the expiry of the three years' period of service specified in the agreement between Nicolson and Burt, the parties appended a minute to it, dated 17th March 1879, to the effect that the same should continue for three years from 1st March 1879 to 1st March 1882, when it might be terminated in the same manner as the original agreement.

Burt having failed to account to the pursuer for certain sums of money collected by him, this action was raised against him, and against the

cautioner Robert Paterson, concluding for payment of £79, 4s. 1d., being the balance left of a sum of £114, 6s. 6d. not accounted for, after crediting a sum of £35, 2s. 5d., the amount of certain commissions which Burt had earned. The amount sued for was not disputed to be due by Burt (who allowed decree to pass in absence against him), nor the fact that the defalcations were subsequent to 1st November 1880—the only question on which the parties were at issue being the liability of the defenders under the bond of caution.

The defender Paterson pleaded, *inter alia*—"(1) The cautionary obligation founded on having been undertaken with reference to Burt's engagement for three years from 1st March 1876, during which no defalcation occurred, he ought to be assoilzied;" and "(3) The defender is freed and relieved, in respect of the pursuer's actings with regard to the alleged defalcations, of any cautionary obligation undertaken by him."

Paterson died during the dependence of the action, and his trustees, Mrs Jane Gray or Paterson and others, were sisted as defenders.

It appeared from the proof led in the action that in the summer of 1880 Burt confessed to the pursuer that he had become behindhand with his accounts, his defalcations with pursuer's money amounting to about £80. He had also private debts to the amount of £70. The pursuer, in response to his solicitation, gave him a loan of £150 to enable him to pay off these debts and deficiencies, and took two bills payable at sight from him for £75 each for the £150 so lent. There was still £90 of that debt owing to the pursuer at the date of this action. At that time Burt assured the pursuer that Paterson knew of the deficiency, and had refused to lend him money to pay it up. It was proved by the evidence of Burt and his wife and of Mrs Paterson that he had early in 1880 gone to Paterson's house at Holytown to ask his assistance in the matter, and had been refused assistance. In April 1881 the pursuer again found that Burt had been guilty of defalcations in his accounts. After an interview with Burt he called upon Paterson at his house in Holytown, and after explaining the position of affairs stated that he was willing to keep Burt in his employment if Paterson would continue his guarantee for the future. It was arranged that Paterson should, after thinking over the matter, come to Edinburgh the next day, which he did. At their interview on this occasion Burt was present, and high words passed between him and Paterson. Burt then said to Paterson that he (Paterson) had known all about the defalcations months before the pursuer was told of them. Paterson did not then dispute that this was so. It was arranged between the pursuer and Paterson that the pursuer should send the latter a copy of the guarantee, which he did on the same day (30th April 1881) on which this meeting took place. In the letter sending the copy of the guarantee the pursuer enclosed an acknowledgment by Burt of misappropriation of funds to the amount of £194, from which a certain commission had to be deducted. Across the face of this letter of acknowledgment Burt had written—"It is more than a twelvemonth ago since I spoke of this to Mr Paterson." In this letter the pursuer said—"I regret much that you did not tell me a year ago that Mr Burt had confessed to you that he was £100 short in his intromissions with my cash." Neither at the meeting nor in reply to this letter did Paterson dispute his knowledge of this fact.

The Lord Ordinary (ADAM) on 8th June 1882 assoilzied the defenders from the conclusions of the action.

"*Opinion.*—[*After narrating the facts*]—The only question in this case is, whether the defenders are liable for Mr Burt's defalcations under the bond of caution granted by their predecessor Mr Paterson. I am of opinion that they are not.

"Mr Paterson bound himself for the due and punctual payment of all sums collected by Mr Burt belonging to the pursuers, and to make good any deficiency that might arise in his intromissions. The question is, what intromissions are here referred to, and must be held to have been within the contemplation of the parties? Now, a cautionary obligation is a purely ancillary obligation, and must have reference to some principal obligation or contract. In this case it is ancillary, and has reference to the principal contract of service entered into between the pursuers and Mr Burt, the terms and conditions of which are contained in the agreement of 16th December 1875.

"The pursuers contend that the cautionary obligation has no reference to any particular contract—that it is just a general and continuing guarantee of Mr Burt's conduct so long as he should continue in the pursuers' service, and in whatever manner he might be employed—that the bond of caution does not, *in gremio*, refer to the previous agreement, and therefore that it is incompetent to limit its effects by importing into it the conditions of that agreement. That does not appear to me to be a sound view of the case. What the bond of caution says is that Mr Paterson is to be liable for Mr Burt's intromissions. The question immediately arises, what intromissions? That is a question of fact, and the only answer that can be given to it is, his intromissions under his agreement with the pursuers.

"Now, if I am right in this, the question arises whether the intromissions in question took place under that agreement. I do not think they did. The intromissions took place subsequent to 1st November 1880. As the agreement originally stood, the pursuers and Mr Burt would at that time have been bound to each other, so that either could have got free on giving a month's notice. As the agreement between them actually stood at the time, neither could get free from the other, except perhaps on good cause shown. Now, I think that that is a substantial alteration of the agreement in reference to which Mr Paterson guaranteed Mr Burt's intromissions, and being so, it should have been communicated to him if it was proposed to hold him liable under his bond of caution.

"I do not think it is necessary to inquire whether Mr Paterson was in fact prejudiced by the alteration of the original agreement. I think it enough to free him that the agreement was altered. Were it necessary, I should be inclined to say that Mr Paterson was prejudiced. One can quite understand that there is less risk in guaranteeing the conduct of an employee who can be dismissed at a month's notice, than of one who cannot. In the former case an employer may

dismiss an employee in whom he may with good cause have lost confidence, and so prevent a loss occurring, while in the latter case his hands are tied. There might be nothing sufficiently overt in this servant's conduct to justify dismissal for fault, but quite enough to make it desirable that he should be dismissed. Mr Paterson, if he had been asked, might very well have been unwilling to guarantee Mr Burt's conduct for six years certain, but willing enough to do so for three. It appears to me, however, to be irrelevant to speculate as to what Mr Paterson might have done in such circumstances. It is sufficient to say that he was not asked, and that the original agreement with Mr Burt was altered without his knowledge or consent.

"I am therefore of opinion that the defenders Paterson's trustees are entitled to be assoilzied with expenses.

"I was referred to the following cases:—*Stewart* v. *Brown*, 9 Macph. 763; *Forlong* v. *Taylor's Executors*, 3 S. & M'L. 177-210; *Davidson* v. *Magistrates of Anstruther*, 7 D. 342; *North British Insurance Company* v. *Tunnock*, 3 Macph. 1; *Bonnar* v. *Macdonald*, 7 Bell's App. 379."

The pursuers reclaimed, and argued—Cautionary obligations under contracts of service might be divided into three categories—(1) Obligations not having reference to a particular contract; (2) obligations in which the cautioner and principal become bound in the same deed, and in which therefore the terms of the contract of service are not made part of the contract of caution; and (3) obligations which the cautioner undertakes with reference to a particular agreement, but into which the terms of the agreement are not imported. This bond of caution fell under the first class, and therefore an alteration in the original contract between employer and employee did not free the cautioner. But even supposing that it fell under the third class, then the *onus* lay on the cautioner of proving that the alteration was material and to his prejudice, which he had failed to do; and that it was only in cases of the second class that the mere fact of an alteration was sufficient to liberate the cautioner. The cautioner was at liberty to withdraw at any time, and not having done so he was bound so long as the contract of service lasted.

Authorities—*Sanderson* v. *Aston*, 8 L.R. (Exch.) 73; *North-Western Railway Company* v. *Whinray*, 10 Hurl. & G. 77, 23 L.J. (Exch.) 261; *Skillet* v. *Fletcher*, 1 L.R. (C.P.) 217, *aff.* 2 L.R. (C.P.) 469; *Taylor & Wright* v. *Addie*, July 3, 1818, Hume 114; *Shepherd* v. *Beecher*, 2 P. Williams, 287.

Argued for the defenders—The bond of caution must be construed with reference to the agreement between the master and servant. It was competent to prove by parole evidence that the cautioner knew of the agreement before signing the bond. It was sufficient for the cautioner to show that the alteration on the agreement was material without showing that it was to his prejudice. There was also a separate defence on the ground that by his transactions with Burt, Nicolson had in effect given him time, and therefore freed his cautioner. [The evidence as to these transactions, which are not dealt with by the Lord Ordinary in his opinion, but which are shortly narrated above, is fully quoted in the opinion of the Lord President.]

Authorities—*North British Insurance Company* v. *Tunnock and Fraser*, November 1, 1864, 3 Macph. 1; *Davidson* v. *Magistrates of Anstruther*, January 28, 1845, 7 D. 342; *Bonnar* v. *Macdonald and Others*, July 17, 1847, 9 D. 1537, *aff.* August 9, 1850, 7 Bell's App. 379; cases in Wh. & T. L.C. ii. 999-1002.

At advising—

Lord President—The object of this action is to make the defender Robert Paterson liable as cautioner for the defalcations of Burt as traveller for the pursuers, to the extent of £79, 4s. 1d., which is brought out in the third article of the condescendence for the pursuer, and a list has been produced showing that the sums collected by Burt and not accounted for amount to £114, 6s. 6d.; from this the pursuer gives credit for £35, 2s. 5d., being certain commissions which the defender Burt had earned, leaving £79, 4s. 1d. as the balance. In the list containing the various moneys collected, and which amount to £114, 6s. 6d., nothing is embraced earlier than about the month of September 1880, while the defalcations for which the defender is sought to be made liable occurred after November 1880.

The first question regards the construction and effect of the cautionary obligation, which is expressed in very general terms indeed. The original defender Paterson bound himself as cautioner and surety to make good any deficiency which might arise in Burt's intromissions, which are explained to be with sums of money belonging to David Nicolson, to the extent of £300. Now, there is nothing more in the bond of caution which bears upon the present question other than this, and therefore the obligation is absolute to make good to the extent of £300 any defalcations of Burt as employee of the pursuer. The obligation is not limited in time; it is not said that it is to endure for a certain period, and so long as the cautioner does not withdraw it it is binding upon him, but it must be borne in mind that the cautioner may withdraw at any time. It is hard to see an answer to the demand in the summons if Burt collected the moneys and is owing the sums set forth in his account of intromissions, and sued for in the conclusions of the summons. The defender maintained, and his argument has been given effect to by the Lord Ordinary, that although the bond is expressed in naked and absolute terms, it yet had reference to an agreement entered into between the creditor and principal, and that the cautioner was entitled to rely on the terms of the contract between the parties, and that there would be no innovation on its terms—at least no material innovation—such as would be sufficient to liberate the cautioner unless he consented to the alteration. I cannot agree with the law laid down by the Lord Ordinary. Whenever a cautioner is party to the original agreement—that is to say, when the obligation of the cautioner forms part of the contract between the parties—then the cautioner is entitled to rely on the conditions contained in it, and to see them carried out; he is entitled to have his safeguards preserved and enforced, and not altered or innovated upon to any material effect because they form part, not only of the contract between em-

ployer and employee, but also of the contract between the cautioner and the employer. But where there is a simple cautionary obligation, separate in itself, and not making reference to any specific agreement, then the same rule of law does not apply. It is said, however, that the cautioner knew of the contract between the employer and the employee, or, in other words, that he had notice of it. Now, if what is meant is that he had knowledge to the effect of enabling him to make answer to the demand of this summons, I do not think that the fact has been proved. I think it has been disproved. All the knowledge he had of the agreement was that he accidentally came to know that it was to last for three years, and beyond this he had no knowledge. The terms of the contract between the master and servant were entirely unknown to him. And this one fact that the duration of the contract was three years, even if it had been contained in the bond of caution itself, would not have helped him here. If there had been a stipulation that the bond of caution should come to an end in three years without notice, in that case it might have been material, but in such a bond as the present the obligation of the cautioner is quite unqualified, and lasts just as long as he chooses it shall last. Now, here the cautioner did not withdraw until after the date of the defalcations, and I do not see what answer he has to the demand now made.

But there is another defence which has not been given effect to by the Lord Ordinary, but which was stated to us in argument, and is contained in the defender's third plea-in-law, viz.—"The defender is freed and relieved, in respect of the pursuer's actings with regard to the alleged defalcations, of any cautionary obligation undertaken by him." Now, as I understand it, the defender under this plea maintains that the creditor in the bond of caution did what was practically equivalent to giving time to the debtor, his traveller Burt, and that as he did not immediately enforce the obligations which lay on the cautioner to make good any defalcations he is now excluded from doing so. But, in the first place, the defalcations to which this plea refers are not sought to be recovered in this action; they were all incurred prior to June 1880, and the thing that was then done is thus clearly explained by Mr Nicolson, the pursuer, in his evidence —"The first I heard of anything being wrong in his accounts was in May or June 1880, when he came to me one afternoon and told me he had lost some money—that he had either had it taken from him or left it in the railway-carriage, that he had been at great expense with his family, and so on, and that he was behind. I said I would require to communicate with his father-in-law and tell him how matters stood. (Q) Did he tell you what had passed between him and Mr Paterson on this question?—(A) He said—'You don't need to do that, for he knows all about it. I was there some months ago and asked him to give me a hundred pounds to square it up, and he refused to do anything for me.' He gave me a list of accounts which he owed, as well as a list of sums which he had recovered for me and not accounted for. I think his defalcations were about £80, and his private debts about £70—in all, £150. He asked me to give him a loan of £150 to pay off these debts and defalcations, promising to behave himself in the future, and making a strong appeal on behalf of his wife and family. Prior to 1876 Burt had been travelling in connection with my brewery, but under engagement with my Glasgow agents. In consequence of his appeal to me I agreed to lend him £150, and No. 86 is the cheque I granted to him at the time, dated 15th June 1880. Nos. 87 and 88 are two bills for £75 each, dated 14th June 1880, which Burt granted to me. With the money so lent to him he cleared off his intromissions. The loan was to be repaid in small sums of £5 at a time. There is still a balance of about £90 due to me upon that loan. That balance is not included in the sum sued for in this action." He goes on to say this, that after he was satisfied with Burt's conduct until the month of April 1881, when the further defalcations now sued for were discovered.

The first question for our consideration as to this part of the case is, whether this arrangement between the employer and his employee, in so far as it concerned the existing defalcations, was made known to the cautioner. Nicolson states that he was informed by Burt that the cautioner knew of it, and Burt swears that he communicated to Paterson in the beginning of 1880 that he was behind with his accounts, and that in February or March of that year he asked him for assistance, and Nicolson afterwards tells us of a meeting which subsequently took place—"Mr Paterson then seemed to get very angry, and lost all control over himself, and asked me to send for the police and hand Burt over to the authorities. Burt was very angry also, and told Paterson that of course he knew all about him having been behind months before he told me. Paterson did not contradict this." Then further, having got the letter of 30th April 1881 from Burt, enclosing a list of his collections and defalcations, across the face of which was written, "It is more than a year ago since I spoke of this to Mr Paterson"—Mr Nicolson writes on the same day to Mr Paterson, and after examining the amount of the defalcations he concludes thus:—"I regret that you did not tell me a year ago that Mr Burt had confessed to you that he was £100 short in his intromissions with my cash." There was no answer to this, and Paterson never contradicts the statement that he had been made aware that Burt was £100 short. I think it is sufficient to show that the defalcations dealt with by Nicolson in evidence were known to the cautioner, and that he was not ignorant of their existence. The cautioner would have been answerable for the earlier defalcations but for the fact that Nicolson made an advance to Burt to enable him to wipe off his defalcations, and took bills from him for the amount. Taking bills is not necessarily equivalent to giving time; these bills were at sight, and could therefore have been enforced the day after they were granted, so that the creditor's hands were in no wise tied, and the law requires that the hands of the creditor shall be tied in order that the transaction may amount to giving time. There is, however, this difficulty, that Nicolson by his actings innovated the original debt, and by taking a fresh obligation from Burt he gave up his claim against the cautioner for the amount of these defalcations. But these are not sued for here, and the question is whether the generous assistance which he gave to his employee in helping him out of difficulties which he for-

gave is to tie his hand against recovering the amount of future defalcations from the cautioner. I know no law for that. The cautioner was at liberty, when he came to know early in 1880 of what had occurred, to give up and say that he would no longer be bound, but instead of that he goes on and allows alterations on the original agreement to subsist, and I cannot think that what happened in June 1880 can bar the pursuer from recovering under the cautioner's obligation. Generally, I am against the whole defences, including that which was stated to us but not disposed of by the Lord Ordinary. I am therefore for recalling the interlocutor reclaimed against.

Lord Mure—I take the same view, and on the grounds which have been so fully and distinctly stated by your Lordship. The bond which contains the cautionary obligation is perfectly general in its terms, and makes no reference to the terms of the agreement between the pursuer and Burt, nor to the existence of such an agreement. It is in evidence that the cautioner never saw the agreement until the bond of caution was signed; that is proved by Burt and by Paterson's wife. In these circumstances I do not see how the agreement between Burt and Nicolson can be imported into the cautionary obligation as the agreement in reference to which that obligation was granted. The terms of the obligation are simply—"For the due and punctual payment to David Nicolson, brewer, Edinburgh, by Peter Burt, presently of Glasgow, of all sums of money collected by him belonging to the said David Nicolson, but to the extent of £300 only, I, the said Robert Paterson, bind and oblige myself, my heirs and successors, as cautioners and sureties with and for the said Peter Burt, to make good any deficiency which may arise in his intromissions, and that within one month from intimation." It is the ordinary cautionary obligation for the faithful discharge by an employee of his duties to his employer, and I therefore agree in the judgment, on the broad general principle that such an obligation continues for the time during which the servant may be in the service of the master to whom the bond is granted. The bond subsists until the obligation is withdrawn, and in this case it never was withdrawn during the lifetime of Paterson. The defence stated by the cautioner, and which has been given effect to by the Lord Ordinary, is that the difference in time between the old and the new agreement was such an alteration as to free him from his obligation. Now, although there was no communication between Burt and his father-in-law, or between Paterson and Nicolson, on this subject, yet it is clear on the evidence that Paterson knew that his son-in-law continued in Nicolson's employ after the three years, and having regard to his position as Paterson's son-in-law, this must have been known. The evidence of Burt is plain on this point—"In the beginning of 1880 I found I was behind with my accounts. When I found that out I wrote to Paterson, I believe from Maybole, and then I called upon him at Holytown on a Sunday night about February or March 1880, to try to get him to assist me with a little money to help me out of my difficulties. I stayed a night in his house, and next morning I told him of my difficulties. I mentioned that £100 or something like that would put me right in my accounts with Mr Nicolson, and asked him to help me to that extent. He refused me." And the state of Paterson's knowledge is also spoken to by Mrs Paterson—"He wrote from Maybole in the spring of 1880 asking a loan of £60. He did not say he was in difficulties. He wrote that we were not to let his wife know about it. I don't know why that was. He afterwards came through and saw us. He saw my husband alone. He saw me also, and asked me for money. I said he was better off than I was." Burt was then in receipt of a salary of £200, and Paterson knew that he was continuing to act as traveller for some time after the three years. I do not think that the alteration in time is of such a kind as to free the cautioner. The original agreement was for three years; then at the end of the three years the parties were to be on three months' notice. I do not think that the alteration was of such a nature as to be material, seeing that the cautioner's obligation did not specifically refer to the agreement between Nicolson and Burt. On the point which was not disposed of by the Lord Ordinary, I am of opinion with your Lordship that the third plea-in-law for the defender is not supported by the facts which are proved.

Lord Shand—This case is not without difficulty, and I am not surprised that the Lord Ordinary took the view that he did, though I am clearly of opinion that it is wrong, for it will be seen that there is room for great difference of opinion when one refers to the utter want of precision in the language of the bond of caution, and I must say that the loose way in which it is expressed has given rise to the questions between the parties.

Apart from the question whether Nicolson released the cautioner by giving the debtor time, the case turns simply on this, What is the meaning of the bond of caution? Does it expressly or by implication refer to the agreement under which Burt agreed to act as traveller for Nicolson for the period of three years, or does it, without reference to the said agreement, bind the cautioner for Burt's intromissions so long as he is in the service of the pursuer. If, with the Lord Ordinary, I thought that the deed by implication imported the terms of the agreement between Burt and Nicolson, I should think the Lord Ordinary right, as the original agreement between Burt and Nicolson came to an end after three years on giving three months' notice. And if for this there was substituted an engagement for three years certain, then that was a new agreement, and the bond of caution did not apply. The question is, whether the deed is to be read as the defenders wish—whether the obligation being to make good any deficiency which may arise in the obligations of Peter Burt, you are to add the words "which may arise under an agreement between David Nicolson and D. Nicolson & Son and Peter Burt, dated 16th December 1875," or are not to take these general words in their ordinary and fair meaning? It is settled that cautionary obligations are to be strictly construed, but their language must have its fair and reasonable meaning; and looking at the general language, and the whole terms of the bond, in the absence of any allusion to an existing agreement, I am of opinion that it means that the cautioner was to become bound to the extent of £300 for his principal so long as the relation of master and ser-

vant should subsist—that so long as Nicolson should trust Burt, so long should Paterson remain bound; but it was in his power at any time to intimate his withdrawal.

That being the view I take of the deed, the ground of the Lord Ordinary's judgment disappears. The Lord Ordinary says—"What the bond of caution says is, that Mr Paterson is to be liable for Mr Burt's intromissions. The question immediately arises, what intromissions? That is a question of fact, and the only answer that can be given to it is—his intromissions under his agreement with the pursuers." As I read the deed, which does not refer to the agreement, the obligation was to subsist so long as Burt remained in Nicolson's service.

Something has been said to the effect that Mr Paterson knew of the fact that the agreement was to last for three years. Take it to be so, it does not affect the case. Under this obligation the cautioner became bound for the time during which the contract of service lasted, whether three or four years, or whatever the time might be. Another point for the defender was founded on the transactions between the master and servant, to which your Lordship has fully referred. If it had appeared that the transactions were not known to the cautioner, or that Mr Nicolson had given time to the debtor, I should have held this defence fatal, for Nicolson kept Burt in his service though knowing of his defalcations, and the cautioner, if he had not had notice, would have been released. But the cautioner had notice. Nicolson did not give the debtor time, and therefore he did not tie up his hands from pursuing this action, and this defence fails. The cautioner was made aware that the moneys were due, and had to be provided, and I do not see how he was prejudiced. The claim is not made in reference to the earlier defalcations, for the debt due in respect of these was probably novated, and I do not see how that fact affords a defence to a claim arising on subsequent intromissions.

The Court recalled the Lord Ordinary's interlocutor and gave decree in terms of the conclusions of the summons.

Counsel for Pursuers (Reclaimers)—Mackintosh—Darling. Agent—J. Young Guthrie, S.S.C.

Counsel for Defenders (Respondents)—J. P. B. Robertson—Lang. Agents—Macbrair & Keith, S.S.C.

Tuesday, November 7.

FIRST DIVISION.

WELSH *v.* BROWN AND OTHERS.

Superior and Vassal—Feu-Contract—Property—Clause of Irritancy—Separate Subjects Conveyed by One Dispositive Clause.

A superior in one disposition gave off to a vassal as separate tenements, and at different feu-duties, two separate parcels of feuing ground. The various stipulations as to each parcel of ground were constituted real burdens by the disposition, which also contained an irritant clause declaring, *inter alia*, that in the event of failure within a certain period to erect buildings of the kind required by the contract "this feu-right" should, in the option of the superior, become null and void, and the lands revert to the superior. One of the parcels of land came into the hands of a singular successor of the vassal. Buildings of the kind required by the feu-contract had been duly erected upon it. The other parcel remained in the hands of the original vassal, who became bankrupt and failed to erect the stipulated buildings upon it. In a declarator of irritancy at the instance of the superior against the original vassal, and against his singular successor in the parcel of ground sold by him,—*held*, as to right of the latter, that the parcels of ground forming different tenements, his right in that parcel which belonged to him was not liable to be irritated in consequence of the failure of the original vassal to erect the stipulated buildings on the other parcel of ground which he had retained.

By feu-contract, dated 16th and 17th July 1880, John Welsh, S.S.C., Edinburgh, heritable proprietor of the areas of ground after referred to, disponed to John Brown and James Brown, individual partners of and trustees for the firm of J. & J. Brown, cab proprietors, Edinburgh, but under the reservations and irritancies mentioned in the deed, certain areas of building ground in and facing Easter Road, and lying in the parish of South Leith. The ground thus disponed consisted (first) of two areas marked Nos. 17 and 18 upon the feuing plan, upon which, by the terms of the feu-contract, the vassals were taken bound to erect within one year of the term of entry, and to maintain, a range of stables and coach-houses, conform to a plan to be approved of by the superior, while the feu-duty for these two areas was to be £30, 16s. 8d. per annum. (Second) The other parcel of the ground disponed consisted of a feuing stance marked No. 1 on the feuing plan, and facing Easter Road, on which the vassals were taken bound, within eighteen months from the term of entry, to erect dwelling-houses of a style and elevation to be approved of by the superior, with a pend or entrance by which access might be obtained through the building on this parcel of ground to the stables and coach-houses to be erected on the first parcel. The feu-duty payable for this area was £47, 12s. 6d.

The disposition contained the following clause of irritancy:—"Declaring always, as it is hereby provided and declared, that in the event of John Brown and James Brown, trustees foresaid, and their foresaids, failing to erect within the period before specified buildings of the description foresaid, or in the event of their allowing the same to fall out of good condition and repair, or in the event of their failing in the case of fire to rebuild as aforesaid the said stables and coach-houses or tenement of dwelling-houses, or the part or parts thereof destroyed by fire, then, and in any of these events, this feu-right, and all that has followed thereon, shall, in the option of the said John Welsh, become null and void, and the pieces of ground hereby feued, and the buildings thereon, shall revert and return to the said John Welsh or his foresaids, freed from all burdens and encumbrances thereon, saving and excepting securities and burdens *bona fide* contracted or laid upon the said subjects by the said John Brown and James Brown, trustees foresaid, and their foresaids."

The Browns' title was recorded on the 19th of