

ject itself. The two properties belonging to the parties were originally dwelling-houses of large dimension on the south side of St Andrew Square. Both of them were conveyed to their present owners by the magistrates of the city in the shape of private houses. The one party got the house originally erected by Mr Fordyce of Aytoun, the other the house of David Hume. Now, looking to the site of these houses, which are situated at the corner of St Andrew Square and St David Street, it is not, I think, a wonderful thing that the persons who originally owned both should not have divided the area and cellarage in the line of the gable wall of the houses. The reason for this is clearly because the corner house has necessarily much larger sunk area and cellarage than the house adjoining to it. It has both the area in St Andrew Square, and in St David Street.

In these considerations I think that we have sufficient reasons for a fair and liberal interpretation of the pursuers' title. The description in the title contains a measurement of the subject, not only in its length and breadth, but also in its depth or extent towards the Meuse Lane behind, but these measurements do not appear to me to be taxative. The fair presumption is that they were not introduced to confine the party's right to the precise measurements. But further, on the principle recognised in the cases of *Ure and Fleming*, since we have here bounds which can even now be ascertained, the general rule that such measurements are to be regarded as descriptive merely, and not as taxative, will apply. I think, therefore, that the title is sufficient in law to include the staircase in question.

In deciding this question, I proceed on the ground on which the Dean of Guild went in his interlocutor of 3d August—"The petitioners having been in possession of the staircase in question for more than seven years, upon a title of property which is capable of comprehending the said staircase, they are entitled to execute the alterations thereon for which warrant is craved, and the defence that the defenders are the true proprietors of the said staircase cannot be inquired into in this process." If the defenders had been serious in maintaining their right to these subjects, we gave them an opportunity to sist the action and clear their title by raising an action of declarator, but they declined to institute that action, and preferred to stand on a plea that the defenders' title was not one capable of comprehending and establishing a right to the subjects in dispute.

The other Judges concurred.

Their Lordships therefore refused the advocacy, and found the advocator liable in expenses.

Agents for the Advocators—Hunter, Blair, & Cowan, W.S.

Agents for the Respondents—Morton, Whitehead, & Greig, W.S.

Friday, Jan. 11.

## FIRST DIVISION.

WALLACE v. HENDERSON.

*Reparation—Breach of Agreement—Relevancy.* (1)

Held that an allegation that a creditor in a bond and disposition in security had verbally agreed not to call it up until a certain time was irrelevant; and (2) Averments that damage had been suffered by a person's failure to make advances to another, not exceeding £200, which held irrelevant. Opinions, that a creditor in a cash credit bond is entitled to stop short in making advances if he sees good cause.

This is an action at the instance of Robert Wallace, lately hotel-keeper in Lybster, now residing in Edinburgh, against James Henderson, of the firm of James Henderson & Co., distillers, Pulteneytown, Wick. The summons concluded for payment of £2000 of damages, and also for count and reckoning in regard to the defender's intrusions with the rents of certain heritable subjects in Lybster, of which the pursuer was heritable proprietor. The question before the Court had reference only to the relevancy of the pursuer's averments to entitle him to claim damages. The material averments were—

"Cond. 2. In the said year 1859, the pursuer was desirous of enlarging his premises, and of adding to his business some dealings in the coal trade, for which there was at that time an excellent opening. He mentioned the matter to the defender, who agreed to make advances to him to the amount of £200 or thereby, on condition that there should be assigned to him a bond and disposition in security over the said subjects for £350, bearing date the 16th March 1853, granted by the pursuer and his said wife in favour of Mr Robert Sutherland, residing in the village of Latheronwheel. It was understood and agreed, however, as a part of the arrangement, that this security should not be called up or enforced without implement by the defender of his agreement to make advances.

"Cond. 3. Acting in reliance upon this agreement by the defender, the pursuer arranged with Mr Sutherland for a transfer to the defender of the said bond and disposition in security for £350. Accordingly it was assigned to him on 21st November 1859. This assignation was obtained by the defender on the faith of the foresaid agreement, and on the footing that the debt was not to be called up, or the security enforced without implement by the defender of his foresaid agreement.

"COND. 4. Shortly thereafter, the defender, professing to act in pursuance of the said agreement, prevailed upon the pursuer and his wife to execute in his favour a bond and disposition in security which was prepared by the defender's agent, whereby, on the narrative that they were already indebted to him in a sum of £70 sterling, or thereby, for cash advanced and goods furnished to them by the defender's company, and that he had also agreed to credit the pursuer from time to time for cash and goods to be advanced and furnished, and that they were desirous of giving him security for the same, they bound and obliged themselves, and their heirs, executors, and representatives, whomsoever, to make payment to the defender, the said James Henderson, and his heirs and assignees whomsoever, of the sum of £200, or such part thereof as might be found in manner thereafter mentioned to be due by the pursuer, the said Robert Wallace, to the said James Henderson & Company, or the said James Henderson, for cash and furnishings already advanced or made, or which might thereafter be advanced or made, by the said James Henderson & Company, or James Henderson, to the said Robert Wallace, or for which the said James Henderson & Company or James Henderson might be engaged or liable on his account in any manner of way, and that within three months after the date at which payment of the same should have been demanded, with the due and lawful interest thereof from the respective dates of advance till repayment, and a fifth part more of the said sum of liquidate penalty in case of failure in punctual payment, and so proportionally for any less sum that may be due. And in further security of the personal obligation before written, the said Robert Wallace and the said

Marjory Miller or Wallace, disposed to and in favour of the said James Henderson and his fore-saids, heritably but releasably, as thereafter mentioned, yet irredeemably in the event of a sale by virtue thereof, the foresaid subjects; and that in real security to the said James Henderson and his fore-saids of the whole sums of money and advances above written, principal, interest, and penalties.

"Cond. 6. In breach of the verbal agreement entered into by him as aforesaid, and also in violation of the agreement expressed in the bond above recited, the defender most wrongfully and injuriously failed and refused to make advances in cash to the pursuer to the amount stipulated, and he also failed and refused most wrongfully and injuriously to furnish him with goods on credit to the amount stipulated. He refused to make any advances. He insisted on receiving, and by threats and intimidation induced the pursuer (who is a person entirely unskilled in law business) to give various payments to account of the sum of £70, stated in the foresaid bond to be due for goods, and in all his subsequent dealings with the pursuer he required, and by the same means obtained present payments for all goods furnished by him. The pursuer frequently desired and required the defender to make advances to him in cash and goods to the amount of £200 or thereby, in terms of the agreement, but the defender most wrongfully and injuriously refused to make any advance, and in farther breach of his agreement proceeded, on or about 4th May 1861, to call up the foresaid bond for £350, under a threat that if not paid within three months, he would, without further intimation or other process of law, proceed to sell the subjects conveyed in security, and which formed the only property and means of livelihood possessed by the pursuer."

The pursuer also alleged that he had been thus concussed by the defender into ceding possession of the subjects to him, and that he had sustained serious loss and damage by reason of the defender's actings.

The defender denied the pursuer's averments, and pleaded that they were irrelevant. He explained that he had received the assignation to the bond for £350 from Sutherland, on paying to him £367, 19s. 7d., as principal and interest due thereon, and £4, 16s. 5d. of expenses.

The pursuer proposed the following issues:—

"1. Whether, in or about November 1859, or during the preceding months of said year, the defender undertook and agreed to make advances to the pursuer in cash and goods to the amount of £200 or thereby, and whether the defender, in breach of the said agreement, failed to make advances to the said amount—to the loss, injury, and damage of the pursuer?"

Damages £1000.

"2. Whether, in or about November 1859, or during the preceding months of said year, the defender undertook and agreed to make advances to the pursuer in cash and goods to the amount of £200 or thereby, and obtained, on the faith of such agreement, and as a security not to be put in force without implement of the same, the bond and disposition in security, No. 12 of process, and an assignation to a prior bond and disposition in security for £350 over the same; and whether, in or about May 1861, the defender, without having implemented the said agreement, wrongfully called up the sum contained in

the earlier bond and disposition in security, and caused the pursuer to give up possession of the said subjects—to the loss, injury, and damage of the pursuer?"

Damages, £1000.

The Lord Ordinary (Kinloch) reported the case with the following

"*Note.*—The defender objects that the action is not relevantly laid, and that, therefore, the pursuer is not entitled to any issue.

"The action is laid on an allegation that the defender agreed to lend a certain sum or sums to the pursuer, and failed to do so, in consequence of which it is said that the pursuer suffered loss in his business. It is also alleged that the defender agreed not to call up the sum in a bond held by him over the pursuer's property till the stipulated advances were made, and, in violation of the agreement, put the bond in force, to the pursuer's further damage.

"The leaning of the Lord Ordinary's mind is to concur with the defender in considering the action ill laid.

"It is possible to conceive a case in which a person agrees to advance a sum for the purpose of effecting a particular object, as for instance the payment of a pressing debt due on a particular day, and in which failure to advance the money may infer a liability for some special and direct damage arising in consequence. But no case of the kind appears set forth in the present action. The alleged agreement is 'to credit the pursuer from time to time for cash and goods to be advanced and furnished.' This can scarcely be held an absolute obligation, prestable in all circumstances, but rather the intimation of a purpose which the proposed lender could carry out or stop fulfilling as he might find expedient. Besides, a mere allegation of general damage to business and circumstances does not infer that direct and special consequence which would be necessary to support such a claim.

"There is equally little ground laid for claiming damages against a creditor who enforced a just debt after the term of payment. Indeed, this branch of the case is made to hang wholly on the other. The pursuer only represents the enforcement of the debt to be culpable, because it took place without previous fulfilment of the alleged obligation to make additional advances.

"W. P."

LEE (LORD ADVOCATE and W. F. HUNTER with him) was heard for the pursuer.

RUTHERFURD CLARK and MACDONALD, for the defender, were not called on.

THE LORD PRESIDENT—I don't require to hear the defender's counsel. In the first place, as to the bond for £350, I think the claim of damages is out of the question. The bond was assigned by a creditor to whom the defender paid the money. It is said he is not entitled to call up that bond because of some verbal arrangement. That will not do. Then the question arises as to the advances agreed to be made to the extent of £200. That agreement stands in a different situation. In regard to it there is produced a bond which bears that goods had been furnished and advances made to the extent of £70, and that the defender had agreed to credit the pursuer to the extent of £200. A security is taken over the property for these advances, and the allegation is that the defender failed to implement this alleged agreement by making advances to the extent of £200. That raises the question whether this defender was entitled to stop short in making his advances at any

stage. I think all that the bond instructs is that there was to be a limit to the defender's advances, and I cannot say he was bound to go on, whatever might be his own circumstances or those of the pursuer. On the whole, looking to the time which had elapsed before the defender took steps under the bond—from 1859 to 1861—I think there is no ground for saying that there was a premature proceeding on his part. But, besides, it was a proceeding under the £350 bond, which had been regularly assigned to the defender. I think, therefore, that this action, which is not raised till 1866, cannot be maintained.

Lord CURRIEHILL—I am quite clearly of the same opinion. As to the £200 bond, it is an ordinary cash credit bond exactly such as is daily acted on by every bank in the country; and though a bank binds itself to make advances under such a bond within a certain limit, it is not thereby bound to go on advancing if it sees good reason to stop. Farther, the damages are claimed in respect of the pursuer's removal from the property; but be removed voluntarily.

Lord DEAS—I am of the same opinion. As regards the £350 bond, it is a bond and disposition in security in the usual form, with power of sale. The defender gets an assignation to that bond. There is nothing on the face of either the bond or the assignation to limit the legal rights of the creditor. The allegation is that there was a verbal agreement that the money was not to be called up until the defender had made certain advances to the pursuer. I am very clearly of opinion that an allegation of that kind is altogether inadmissible and irrelevant. Then as to the other bond, it mentions that at its date, in November 1859, advances had been made to the extent of £70. There is no breach alleged until May 1861. It is not said that there had been no transactions between 1859 and 1861; on the contrary, it is set forth that there were intermediate transactions. A series of transactions is stated by the pursuer himself to have taken place, and the ground of action put in issue is that, in breach of the agreement, the defender failed to make advances to the amount of £200. But goods had been furnished for a year and a half. This is not therefore the case of an agreement to make advances followed by nothing. I am not aware of any case where a bank has been held liable in damages for not making advances under a cash credit bond if it sees cause not to make them. Such a claim may be competent, and I say nothing as to such a case except that it does not arise here.

Lord ARDMILLAN concurred.

The Court therefore found that there were no relevant averments to support the claim of damages, and remitted to the Lord Ordinary to dispose of the conclusions for count and reckoning. The defender was found entitled to expenses since the closing of the record.

Agents for Pursuer—Hamilton & Kinnear, W.S.  
Agents for Defender—Horne, Horne, & Lyell, W.S.

Friday, Jan. 11.

### FIRST DIVISION.

ROUTLEDGE v. SOMERVILLE AND SON.

*Expenses—Taxation—Counsel's Fees.* Circumstances in which—(1) the expense of three counsel at a trial allowed, but at previous steps of the cause disallowed; and (2) fees of forty-

five guineas to the senior and thirty guineas to each junior, allowed, for a trial which was compromised after the examination of the first witness for the pursuer.

The Auditor of Court in reporting his taxation of the pursuer's account of expenses, reserved for the consideration of the Court the two points referred to in the following special report by him:—

“The Auditor has reserved two points for the consideration of the Court—1st, The liability of the defenders for the expenses incurred in the employment of a third counsel on the part of the pursuer at various stages of the case, subsequent to the conclusion of the debate on the closed record; and 2d, The amount of fees paid to the pursuer's counsel for the trial chargeable against the defenders.

I. In regard to the first point, the Auditor has only to state that it was admitted by the defenders' agent at the audit that throughout the case his clients had taken the assistance of three counsel. It appears from the process and account that the case was one of importance, and involving considerable detail, the documents produced and recovered being numerous. If the Court shall decide against the liability of the defenders for the expenses of a third counsel, there will fall to be deducted from the amount above reported the sum of £68, 18s. 6d., being the amount of these expenses as taxed.

II. The Auditor has had some difficulty in forming an opinion on the second point, and he is desirous to have the directions of the Court in regard to it for his guidance in other cases. The fees paid by the pursuer for the trial are stated in the account at fifty guineas for the senior counsel, and thirty guineas for each of the juniors. In taxing the account, the Auditor has allowed forty-five guineas for the senior counsel, and thirty guineas for each of the juniors. In allowing the sums, he has had in view the cases of Cooper and Wood v. North British Railway Company, 19th Dec. 1863, Session Cases, 3d Series, vol. ii. p. 346, and Hubback v. North British Railway Company, 25th June 1864, Session Cases, 3d Series, vol. ii. p. 1291. Had the trial in this case lasted three days, the fees allowed would not have exceeded the amount indicated by the Court in the cases referred to as proper fees to be stated against the losing party. The peculiarity of the present case is, that the trial lasted only a few hours of one day, the defenders having consented, after the examination of the pursuer's first witness (the pursuer himself), to a settlement of the case, but without a verdict in his favour. The Auditor has no doubt that had the trial lasted for three days, fees for the second and third days would have been paid by the pursuer to his counsel in addition to those charged in the account. But the question remains, whether, when a trial is brought to a termination unexpectedly by the surrender of one of the parties, the other is not entitled to recover from him fees actually paid, at least to the extent of reasonable fees, for the whole trial. Although it be the present practice in jury causes, where a trial cannot be brought to a close at one sitting, to remunerate counsel by continuation fees day after day, it is to be presumed that before the commencement of the trial counsel have prepared themselves upon the whole case. The Auditor believes that the earlier practice in the Jury Court was to instruct counsel by a single fee for the whole trial, and not by continuation fees. Cases of course did occur where a