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 prejudge 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-

chants, Dundee, at the price of 3s. 8d. per gallon, being at the rate of 2d. per gallon less than the lowest price at which the pursuers allowed him to sell. When informed of this bargain the pursuers objected to it, but Anderson agreed to forfeit his commission of 1d. per gallon and to pay the other 1d. per gallon himself in order that the bargain might be carried out, and to this the pursuers consented. The transaction was for cash on receipt of invoice, and was duly reported to the pursuers as such. The price of these 2000 gallons constitutes almost the whole of the sum now sued for.

The defender, when called upon after his son had gone off, to pay the amount for which he had become cautioner, refused to do so, on the ground that the pursuers had violated the express conditions of the letter of guarantee in so far as they had not insisted upon their agent making a monthly statement of his business transactions with them as stipulated, and also in as much as they had not informed him, as cautioner, of the transaction with Watson & Co. above mentioned, which he maintained was an irregularity within the meaning of the saving clause in the letter, as not being of the nature of commission agency, which alone was included in the guarantee. Moreover, the transaction being a cash one, and concluded in May 1868, the defender held the pursuers had been guilty of neglect in not insisting upon their agent remitting the price at the expiry of the usual time which they allowed to elapse in cash transactions, viz., thirty days, instead of allowing it to lie over till February 1869, when for the first time they pressed him to recover the amount due. The defender also asserted that he could have in great measure covered his loss had the pursuers informed him previous to their agent's absconding of the manner in which he was behaving.

The Lord Ordinary (Gifford) repelled the defences, found the defender liable under his letter of guarantee, and decerned against him accordingly.

The defender reclaimed.

J. Millar, Q.C., and Burnet for the reclaimer and defender.

Fraser and Lancaster for the respondents and pursuers.

At advising—

Lord Deas—I agree with the Lord Ordinary in his judgment and in the reasons which he assigns for it. It is quite plain that there is here no ground for the objection that the pursuers omitted to get monthly accounts from their agent. The pursuers required their agent to remit instantly whatever monies he collected, never knowingly allowing him to retain any monies, even so long as a month. When the agent reported to the pursuers that he had no money in his hands, or when he sent them a remittance bearing to be all that he had collected, that was accounting in the sense of the letter of guarantee. The defender complained that there was no regular series of monthly accounts. It is sufficient answer that there could be no account when there was nothing to account for. When the agent reported that he had collected nothing, it is plain that there could be no stated account. But the agent was pressed to collect and send in accounts, and this I think was quite enough. The expression in the letter of guarantee is that the agent shall be "required to account."

As regards the alleged irregularity in the transaction with Watson & Co., what is it? The agent sold at a lower rate than he was allowed to; the pursuers refused to recognise the bargain; and the agent offers to pay the difference rather than break off the bargain. There is no irregularity here which required to be communicated to his cautioner—there is nothing which would excite the suspicion of the pursuers as to the honesty of their agent. I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

Lord Ardmillan concurred.

Lord Kinloch—I agree with your Lordships. Undoubtedly the conditions of a guarantee, under which a creditor comes upon a cautioner, must be strictly fulfilled. But there was no failure here. The first condition in this guarantee, viz., that there should be a monthly account of intromissions, clearly means that there should be a monthly settlement for recoveries. It does not mean in this case a monthly account of sales. The employers knew the terms of the transactions at the time that each took place, and so there was no necessity for a monthly statement of the business done. And there is no evidence of more than a month expiring while the agent, within the knowledge of the pursuers, had money of theirs in his hands. As to the transaction with Watson & Co., it is quite an ordinary occurrence. The agent in his zeal sells lower than he is allowed to do, and has to make up the difference. No suspicion of an agent's honesty is raised by such a transaction.

Lord President—I agree with your Lordships: We have here a very limited guarantee. There is only an undertaking that the agent shall account for all monies or bills which he receives on the pursuers' account. The conditions must be read with special reference to the subject of the guarantee. When intromissions are spoken of, it is only intromissions with money or bills that are meant, not with goods. With regard to any irregularity, it must be an irregularity in the matter guaranteed, *i.e.*, money or bills, before it can be of any effect in freeing the cautioner. Now, is there any failure in connection with money or bills here? I confess I cannot find any evidence of that. If there had been an undertaking that there should be a written account monthly it would be a very different matter, but when the agent is only bound to forward money monthly—if he says he has none to forward, what is the principal to do? It is for this very purpose that the principal takes a guarantee, in order that he may be safe as regards the honesty of the agent.

The sale to Watson & Co. was not, I think, an irregularity in the sense of the letter of guarantee; it was only a sale which the agent made at too low a rate. There is no probability of its exciting any suspicion of his honesty.

I am of opinion that the case entirely falls upon a proper construction of the letter of guarantee.

The Lord Ordinary's interlocutor was unanimously adhered to.

Agents for Pursuers—Murray, Beith, & Murray, W.S.

Agents for Defender—J. & J. Milligan, W.S.