

The right which the statute confers upon the proprietor of a registered design is a right of copyright, and that is defined by statute to be an exclusive right to apply the design to certain articles of manufacture. Now, I think it is a very well-settled rule of international law, as we administer it in this Court, that an exclusive right of this kind does not extend beyond the territory of the sovereign by whom it is granted. And I think that general rule is very clearly recognised in this statute, because there is a provision under which persons may have the benefit of this statute, and under which it is assumed that British subjects may have the benefit of similar provisions abroad in the event of Her Majesty being pleased to make arrangements with the governments of foreign states for mutual protection of inventions and patents. It is not alleged that any such treaty has been made with Portugal, and therefore I am of opinion with all your Lordships that no right conferred by this statute extends to Portugal. Where there is no right there can of course be no infringement. No doubt it may be competent for the Legislature to prohibit British subjects from using inventions registered here, even in countries where no exclusive right would be conferred by our Legislature. The reasons in policy why such legislation should be considered improbable were pressed upon us very strongly by the Dean of Faculty, but the material consideration is that there is no such prohibition in this statute, because, as your Lordship pointed out, the statute does not operate by prohibition *in personam* but by conferring a right *in rem*, and where the right does not extend, the consequent prohibitions against infringement cannot extend either. I am therefore of opinion with your Lordship that the complainers have no exclusive right to use their designs in Portugal which we can protect by interdict against either British subjects or anybody else, and that therefore there is no relevant allegation of infringement.

The Court recalled the interlocutor, sustained the first and third pleas-in-law for the respondents, repelled the reasons of suspension, and refused the note.

Counsel for the Complainers—Graham Murray—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents—D. F. Balfour, Q.C.—Guthrie—Sir L. Grant. Agents—Fraser, Stodart, & Ballingall, W.S.

Friday, January 30.

FIRST DIVISION.

[Lord Trayner, Ordinary.]

COMMERCIAL BANK v. PATTISON'S TRUSTEES AND OTHERS.

Bank—Cash-Credit to Company's Cautioner—Interest—Effect of Voluntary Liquidation of Company Interest.

A company and five of its shareholders granted a cash-credit bond for an account to be operated on by the company. By the terms of the bond they bound themselves to pay to the bank on demand the sum of £1500, or such part thereof as should be due to the bank, with interest at 5 per cent. Subsequently, in consideration of the company being allowed an additional credit of £1000, two of its directors granted a letter of obligation binding the company and themselves to pay the bank the said sum, or whatever smaller sum might be overdrawn on the cash-credit account.

At the bank's annual balance on 31st October 1878, the amount drawn out under the cash-credit was £2468, and there were no operations on the account after that date, but on 31st October of each year the bank accumulated interest with principal, and carried forward the total. In November 1881 the company went into voluntary liquidation. In October 1884 a statement of account was sent to the liquidator of the company showing the sum then due with accumulations of interest to be £3164. On the 15th of the same month the liquidator wrote to the bank to "explain the wishes of the guarantors," informing the bank that the guarantors had great hopes that the properties belonging to the company would soon be sold, and that "they accordingly would desire that your bank should allow this account to remain in the position it is at present," and the bank in their reply agreed "to take no steps for payment in the meantime."

In 1888 the bank claimed from the cautioners under the respective obligation the principal sums of £1500 and £968 drawn out under the cash-credit in October 1878, with the interest annually accumulated thereon down to the balance in 1887, founding this claim upon the liquidator's letter of 15th October 1884 and the bank's reply thereto, and an alleged agreement by the cautioners therein contained, that they would be responsible for the accumulations of interest in consideration of the bank not pressing for immediate payment. Alternatively the bank claimed simple interest from 31st October 1881, the last balance before the company's liquidation.

Held (1) that the letters founded on contained no such agreement as the

bank alleged; (2) that the voluntary liquidation of the company had not the effect of closing the cash-credit account, the company having continued for long after to be a going company; and therefore (3)—following *Reddie v. Williamson*, 1 Macph. 228—that the cautioners were only liable for the principal sums due under their obligations, with interest from the last balance before the action.

By cash-credit bond, dated 27th December 1877, the Moel Tryfan Crown Slate Company, Limited, registered under the Companies Acts 1862 and 1867, bound and obliged the said company and the whole members and shareholders thereof, and its whole stock, funds, property, and estate, and George Handasyde Pattison, Thomas Field, James Somerville, Henry Christie, and Daniel Robertson, bound and obliged themselves and their respective heirs, executors, and successors whomsoever, without the necessity of discussing them in their order, each as full debtor, and all conjunctly and severally, to make payment to the Commercial Bank of Scotland at any time when the same should be demanded after three months from the last date thereof, of the sum of £1500 sterling, or such part or parts thereof as should at any time be due to the said bank upon a cash-credit account to be kept in the books of the said bank in name of the said Moel Tryfan Crown Slate Company, Limited, and to be operated upon by the said company, with a fifth part more of the principal sum due of liquidate penalty in case of failure. The clause stipulating for interest was in these terms:—"Together also with interest of the said sum or sums which may be due on said account from the time or times of the respective advances till the same be repaid, and that at the rate of five pounds per centum per annum, or at such other higher rates as may be charged by the bank on cash-credit accounts for the time." It was also specially provided that a stated account made out from the books of the bank should be sufficient to constitute a charge or balance against the guarantors.

An account was opened under the said cash-credit, which was operated upon by the said Moel Tryfan Company. On the 9th and 10th days of May 1878 an obligation was granted by which the said George Handasyde Pattison and the said James Somerville, two of the directors of the said Moel Tryfan Crown Slate Company, Limited, as such directors and as individuals, in consideration of the said Commercial Bank of Scotland having agreed to allow the said Moel Tryfan Crown Slate Company an additional credit of £1000 by way of overdraft upon the cash-credit account, thereby bound and obliged not only the said company, but also themselves as directors and as individuals, and their respective heirs, executors, and successors whomsoever, to pay to the said bank, whenever required, the said sum of £1000, or whatever smaller sum might be overdrawn on the said cash-credit account.

At the annual balance of the Commercial Bank on 31st October 1878 the amount shown in the account to have been drawn out under the cash-credit was £2468, 14s. 7d. The account was not operated upon after that date, but on 31st October of each year the bank accumulated the interest and principal, and carried forward the total to the following year.

At extraordinary general meetings of the shareholders of the Moel Tryfan Company held on October 24th and November 10th 1881, it was resolved that the company should be wound up voluntarily, and Thomas Bennett Clark, C.A., was appointed liquidator.

In 1887 the bank called up the cash-credit account, and differences having arisen between them and the cautioners as to the amount of interest exigible from the latter on the principal sums due under the bond and letter of obligation. On 23rd June 1888 the executors of Pattison (who was dead), and the trustee of Somerville (who had granted a private trust for behoof of his creditors), each consigned a sum of £580, 0s. 11d. in the joint names of themselves and the bank to meet their obligation under the bond, and a similar consignment of £388, 13s. 10d. was made by the trustees of Robertson, who was also dead. In July 1888 Pattison's executors and Somerville's trustee paid the bank respectively sums of £500 and £134, 17s. 5d. in respect of their liability under the letter of obligation.

The present action was raised by the bank in October 1888 against the cautioners, or the representatives of such of them as were dead or under trust. The bank claimed payment of or a ranking for the principal sums drawn out under the bond and letter of obligation respectively in October 1878, with either compound interest thereon to the 31st of November 1887—the date of the last balance before the action—or simple interest from the 31st October 1881, the balance immediately prior to the liquidation of the company.

The pursuers founded upon the cash-credit bond, and the letter of obligation already mentioned, and made the following averment as amended in the Inner House—"After the company went into liquidation, endeavours were made by the liquidator to realise the property of the company to the best advantage, in order, if possible, to save the obligants for the cash-credit account from loss; and accordingly in 1883 the liquidator entered into an agreement with certain parties to let to them the company's slate quarries in Wales, with an option to the lessees to purchase at any time up to 31st December 1886. In order to facilitate these negotiations, and at the request of Mr Bennet Clark, the liquidator of the company, who acted with the authority and on behalf of the whole obligants for the cash-credit account, the bank did not proceed at once to enforce payment of the sums due upon said account. A copy of the account, showing the accumulations of interest as at 31st October 1883, was sent to Mr Bennet Clark

in October 1884. Thereafter an arrangement was made in writing, between the bank and Mr Bennet Clark, by which the former consented to delay making an immediate demand for payment on condition that the obligants acknowledged liability for the accumulations of interest, as shown on the said account, upon the sums of principal for which they were respectively liable, and also for the interest calculated in the same manner, which would thereafter become due during the extended period for which the bank consented to delay enforcing payment. To this condition Mr Bennet Clark, who throughout acted with the authority and on behalf of the whole parties liable for the cash-credit account, assented. The bank only granted the very exceptional delay asked for in reliance on the knowledge which the obligants had of the state of the account, and of their liability for the interest accumulated and accumulating thereon, admitted or undertaken as above mentioned. Subsequently to October 1884 the bank have each year sent to Mr Bennet Clark, at his written request, a copy of the account, showing the accumulations of interest upon it. It was resolved in November 1881 that the Moel Tryfan Company should be voluntarily wound up. At this date the company had not available assets for the payment of its debts and was insolvent."

The pursuers pleaded—" (1) The pursuers are entitled, in terms of the said cash-credit bond, and in virtue of the agreement condescended upon, to decree for the principal sum of £1500, with interest as concluded for, in terms of one or other of the alternative conclusions in the summons. (2) The pursuers are entitled, in terms of the said cash-credit bond, and in virtue of the agreement condescended on, to be ranked upon the estates of the deceased Mr Somerville and the deceased Mr Field for the principal sum of £1500, with interest, in terms of one or other of the alternative conclusions of the summons."

They also stated corresponding pleas with regard to their claim under the letter of obligation.

Defences were lodged for Pattison's executors, Robertson's trustees, and Somerville's trustee. They denied the agreement condescended on by the pursuers; and pleaded—" (2) The pursuers' averments are irrelevant. (3) The pursuers' averments can only be proved by writ or oath. (5) The pursuers having accumulated principal and interest from year to year, they are not entitled to reopen the account in order to separate the amount as finally stated into principal and interest."

On 13th March 1889 the Lord Ordinary (TRAYNER) pronounced this interlocutor—" Finds that the defenders, obligants or representatives of obligants under the cash-credit bond mentioned on record, are bound to make payment to the pursuers of the sum of £1500 sterling, with interest thereon at 5 per cent. from 31st October 1887 until payment or consignment; and Finds that the defenders, representatives of the late George Handasyde Pattison and James

Somerville, are jointly and severally liable to make payment to the pursuers of the sum of £1000 sterling, under the obligation dated 9th and 10th May 1878, with interest thereon at the rate foresaid from 31st October 1887 until payment or consignment: *Quoad ultra*, continues the cause."

On 19th March the Lord Ordinary ordained Pattison's executors, Robertson's trustees, and Somerville's trustee to deliver to the pursuers, duly endorsed, the three deposit-receipts of the Royal Bank of Scotland, dated 23rd June 1888, for the respective sums of £580, 0s. 11d., £388, 13s. 10d., and £580, 0s. 11d., amounting together to the sum of £1546, 15s. 8d., and *quoad ultra* assoilzied all the defenders from the conclusions of the summons so far as regards their liability under the cash-credit bond for £1500: Further, found that the balance due to the pursuers at this date upon the obligation for £1000 mentioned on record was £411, 1s. 10d.: Decerned against Pattison's executors and Somerville's trustee jointly and severally for the said sum of £411, 1s. 10d., with interest at 5 per cent. from the date thereof till paid, &c.

"*Opinion.*—So far as concerns the defenders' obligations under the cash-credit bond, I cannot distinguish this case from *Reddie v. Williamson*, 1 Macph. 228. Applying the principle laid down in that case, I think the defenders are only liable (under the cash-credit bond) for £1500, with interest from 31st October 1887.

"The pursuers do not distinguish this case from *Reddie v. Williamson*, but they maintain that the obligants in the bond are liable for accumulated interest as well as principal, in respect they agreed through their agent to pay it as averred in Cond. 4. Such an averment (if remitted to probation at all) could only be proved by the writ or oath of the obligants, as it amounts to this, that the obligants, whose obligation was defined in writing, had agreed to an extension of or addition to the obligation so defined. But I have not allowed any proof of that averment, because I think it is not sufficiently specific. It is said that the pursuers delayed enforcing payment of their claim because the obligants, through their authorised agent, 'assented to the condition proposed by the pursuers, that in respect of such delay they (the obligants) should acknowledge liability 'for the accumulation of interest upon the sums of principal for which they were respectively liable.' Assuming that the obligants assented to a proposal so expressed, it does not follow that they consented to enlarge their existing obligation. They acknowledged liability for accumulations of interest no doubt; but they were already liable for these as principal, if the pursuers, according to the custom of bankers, accumulated principal and interest each year. It was not an express undertaking that notwithstanding of such accumulation the obligants would be bound for £1500 of principal and interest, although accumulated as well. I allowed the pursuers an opportunity of amending their record, to the effect of averring such an express

undertaking, but they declined to avail themselves of this opportunity, I presume because they cannot make such an averment or cannot prove it.

"I have fixed the date from which interest is to run as from 31st October 1887, because that was the last balance of the account in which interest and principal were accumulated before the action was raised. I was referred to the case of *Gilmour*, 7 R. 734 as an authority for holding that interest should be allowed from 31st October 1881, being the balance immediately preceding the date when the Moel Tryfan Company went into liquidation. In *Gilmour's* case interest was allowed from the balance preceding the date of the principal debtor's insolvency, because on the occurrence of that event 'the account became inoperative.' The same reason does not apply here. There was no insolvency, or bankruptcy, or anything else to render the account in question inoperative. The company went into liquidation, not because it was insolvent (it is not, so far as I know, insolvent now), but because it was not successful. The liquidation was merely a winding up of a business, and there was nothing in that fact such as is afforded by bankruptcy, to prevent further operations on the account. The appointment of a liquidator was the act of the company itself, who might have appointed one of their own number to wind up the business if they had pleased. It was not a liquidation under the authority or supervision of the Court.

"As regards the additional obligation for £1000 granted by Messrs Pattison & Somerville, I am of opinion that this obligation was really an addendum to the cash-credit bond, binding the granters of it to make payment of the debt under that bond to the extent of £1000. One account was kept for the advances made both on the bond and obligation, and I treat them as practically one, and therefore allow interest on this £1000 from 31st October 1887."

The pursuers reclaimed, and after parties had been heard, the pursuers were allowed to amend their record, and thereafter were allowed a proof of their amended averments in Cond. 4 as above quoted.

The material results of the proof were as follows:—On 8th October 1884 the bank intimated to Clark, the trustee in the liquidation, that they thought of calling up the cash-credit account, and on 9th October they sent him a statement of the account for the three years prior to 31st October 1883, showing the amount due in the account with accumulations of interest to be £3146, 9s. 2d.

The "writing" by which the agreement was said to have been made consisted of a letter by Clark to the bank of date 15th October 1884, and the bank's answer of date 16th October 1884.

In his letter Mr Bennet Clark said that he wrote to explain the present position of the affairs of the company and the wishes of the guarantors of the account with the bank. He stated that efforts had been

made to reconstruct the company and to sell the properties, and that the company had entered into an agreement of lease for three years from 1st March last with Messrs Leeming & Wilson, with an option to these gentlemen to purchase the whole properties at the end of any one year at the prices named in the agreement, a copy of which he sends; that the quarries were being energetically worked, that a large sum of money had been laid out in working the place, and that a joint-stock company was being arranged to take over the properties.

The letter continued in these terms:—
"If this be eventually carried out, the price received will be almost if not quite sufficient to meet all liabilities. The guarantors have every hope that it will be carried out, looking to the money that has already been spent by the lessees on the place, and they accordingly would desire that your bank should allow this account to remain in the position it is at present until the result of this agreement of lease and sale is settled. If the sale is not carried out, then the property would require to be sold at the earliest opportunity, and the guarantors would require to make up any deficiency in the price."

The bank's reply was in these terms:—
"We are favoured with your letter of yesterday. The position of the account is not such as we care about, but as we regard ourselves as fully secured, the various obligants for the debt may hold, unless anything shall emerge rendering in our opinion the adoption of a different course necessary, that we will accede to their request to take no steps for payment in the meantime, nor until the result of the agreement of lease and sale to Messrs Leeming & Wilson is seen. This should be not later than 30th Sep. 1886. Of course it is understood that if nothing comes out of that agreement we are not to be bound to wait until a sale is effected before getting payment of the amount due to us. We presume the representatives of the late Mr Daniel Robertson are fully cognisant of their liability in this matter, and that they and all the others are agreeable to the proposed delay. You will of course advise us whenever anything definite transpires under the agreement of lease and sale referred to."

There was some evidence to show that in negotiating with the bank the liquidator was acting with the cognisance and approval of at least some of the guarantors.

The result of the evidence bearing on the question of the company's solvency at the date of the liquidation was shortly this—The company had been unsuccessful and went into liquidation from lack of funds and difficulty of meeting its current expenses, but primarily with the object of carrying through a scheme of reconstruction. If the company had been called upon at once to realise its assets and pay its debts there might have been a deficiency, but it continued for years to be a going company, and it was not expected at that time that there would be any ultimate deficiency.

The pursuers argued—*First Claim*—The

agreement made by the liquidator on behalf of the guarantors, with the bank, was established, and the case was thereby taken out of the rule of *Reddie v. Williamson*, January 9, 1863, 1 Macph. 228, and 35 Jur. 170; and the guarantors were accordingly liable for the accumulations of interest from October 1878. The second agreement presented for Robertson's trustees was sufficiently met by this, that there was no obligation on the bank to release or give time to the principal debtor so as to prejudice the cautioners—*Muir v. Crawford*, May 4, 1875, 2 R. (H. of L.) 148. *Second Claim*—It was because the company could not pay its way, or get money to carry on, that it went into liquidation. It was therefore insolvent at the date of the liquidation—*Commercial Bank v. Lanark Oil Company*, December 2, 1886, 14 R. 147; *Macnab v. Clarke*, March 16, 1889, 16 R. 610; Companies Act 1862, secs. 131-133. That liquidation closed the account, and from its date the bank was entitled to interest on the amount drawn out—*Reddie's case, supra*; *Gilmour v. Bank of Scotland*, March 19, 1880, 7 R. 734.

Argued for Pattison's executors, and Somerville's trustee—(1) The pursuer's first claim failed as they had not succeeded in establishing the agreement alleged by them in support of it, for neither would the letters founded on bear the meaning which the bank attempted to put in them, nor had the bank proved that the liquidator ever got authority from the guarantors to make them responsible for the accumulations of interest. (2) If Robertson's trustees proved that they were not bound as not having authorised or adopted the agreement embodied in the liquidator's letters, then these defenders must also be released from that agreement—*Mercantile Amendment Act* (19 and 20 Vict. cap. 60), sec. 9. (3) The pursuer's second claim failed also. The liquidation here was not analogous to the death of the principal debtor in *Reddie*, or to his insolvency in *Gilmour*. The liquidation was voluntarily entered into with the object of effecting a reconstruction. The company continued for long to be a going company, and was for long reputed to be solvent, and therefore the liquidation had not the effect of closing the account as the pursuers maintained, and the pursuers themselves had not treated it as closed—*Bell's Comm.* (7th ed.) 695; *ex parte Colborne*, 1871, 11 Eq. 478.

Argued for Robertson's trustees—(1) Whatever might be the meaning of the liquidator's letter—and these defenders concurred with the other defenders' argument that it did not impute an obligation by the guarantors to be responsible for the accumulations of interest—Robertson died before the date of that letter, and had never authorised the liquidator to enter into an agreement binding him to pay the accumulations of interest. To bind a cautioner by such an agreement it was necessary that he should have either concluded it himself, or duly authorised, *i.e.* given an antecedent authorisation—someone to enter into

it on his behalf—*Mercantile Law Amendment Act*, sec. 6. Further, Robertson's trustees had never afterwards adopted the alleged agreement. (2) Time having been given to the principal debtor without the consent of one of the cautioners, Robertson, he was released from his obligation. (3) These defenders adopted the argument already stated for the other defenders, to the effect that the liquidation did not close the account.

At advising—

LORD ADAM—The only question submitted for our consideration under this reclaiming-note was the amount of interest which should be charged upon a principal sum of £1500, for which all the defenders are liable conjunctly and severally, and upon a principal sum of £1000, for which the representatives of the late George Handasyde Pattison and James Somerville are alone liable.

The facts which raise the question are these—On 27th December 1877 the Moel Tryfan Crown Slate Company (Limited), and George Handasyde Pattison, Thomas Field, James Somerville, Henry Christie, and Daniel Robertson granted a cash-credit bond to the pursuers, the Commercial Bank, by which, on the narrative that the bank had allowed them a standing credit to the extent of £1500 sterling upon a cash-credit account to be kept in the books of the bank in the name of the Moel Tryfan Company, and to be operated upon by that company or by any person having their written authority, they bound themselves and their successors, each as full debtors and conjunctly and severally, to pay to the bank the said sum of £1500 or such part thereof as should at any time be due to the bank on said cash-credit account, with interest at 5 per cent. or at bank rates. It was further stipulated, in the usual way, that a stated account made out from the books of the bank should be sufficient to constitute a charge or balance against the granters.

Further, by a letter of obligation dated 9th and 10th May 1878, Mr Pattison and Mr Somerville, in consideration of the bank having agreed to allow the Moel Tryfan Company an additional credit of £1000 by way of overdraft on the cash-credit account kept in name of the company with the bank, bound not only the company but themselves as directors and as individuals to pay the bank the said sum of £1000, or whatever smaller sum might be overdrawn on said cash-credit account.

A cash-credit account was opened in the books of the bank in name of the Moel Tryfan Company, and was operated upon by that company. A copy of that account as appearing in the books of the bank has been produced and, so far as I can see, it has been kept in the usual way. It is balanced on the 31st October of each year. The interest is periodically added to the principal, and the accumulated sum appears as the balance due on next year's account, with the result that it discloses a balance of £3856, 11s. 9d. of principal due by the

Moel Tryfan Company at its close on 31st October 1887.

Applying the principles recognised in the case of *Reddie v. Williamson*, as the Lord Ordinary has done, the result is, that those defenders who represent obligants under the cash-credit bond are liable for £1500 of that sum, and the defenders who represent the grantors of the letter of obligation are liable for £1000, with interest on these sums respectively from the date of closing the account.

The pursuers do not dispute that the Lord Ordinary is right if the case of *Reddie v. Williamson* applies, but they aver a special agreement, which they say renders that case inapplicable. When the case was before the Lord Ordinary he refused to allow a proof of this alleged agreement, thinking that the pursuer's averments were not sufficiently specific, but when the case was before the Inner House the pursuers were allowed to amend the record in this respect, and a proof was allowed, and the case is now to be disposed of on the concluded proof.

It appears from the cash-credit account that the balance due thereon at 31st October 1878 was £2468, 14s. 7d., and that the account was not further operated on, except that there was annually added by the bank the accruing interest. Upon the 10th November 1881 the company went into voluntary liquidation and Mr Bennet Clark was appointed liquidator.

On 9th October 1884 the bank sent to Mr Bennet Clark, at his request, a statement of the account to 31st October 1883, showing the sum then due by the company to be £3164, 9s. 2d. "Thereafter," it is said (and this is the special agreement averred), "an arrangement was made in writing between the bank and Mr Bennet Clark, by which the former consented to delay making an immediate demand for payment on condition that the obligants acknowledged liability for the accumulations of interest, as shown on the said account, upon the sums of principal for which they were respectively liable, and also for the interest calculated in the same manner which would thereafter become due during the extended period for which the bank consented to delay enforcing payment. To this condition Mr Bennet Clark, who throughout acted with the authority and on behalf of the whole parties liable for the cash-credit account, assented."

The "writing" by which this agreement is said to have been made consists of a letter by Mr Bennet Clark to the bank of date 15th October 1884, and the bank's answer of date 16th October 1884.

In his letter Mr Bennet Clark says that he writes to explain the present position of the affairs of the company and the wishes of the guarantors of the account with the bank. He then states that efforts had been made to reconstruct the company and to sell the properties, and that the company had entered into an agreement of lease for three years from 1st March last with Messrs Leeming & Wilson, with an option to these gentlemen to purchase the whole

properties at the end of any one year at the prices named in the agreement, a copy of which he sends; that the quarries were being energetically worked, that a large sum of money had been laid out in working the place, and that a joint-stock company was being arranged to take over the properties.

Then he writes as follows—"If this be eventually carried out, the price received will be almost if not quite sufficient to meet all liabilities. The guarantors have every hope that it will be carried out, looking to the money that has already been spent by the lessees on the place, and they accordingly would desire that your bank should allow this account to remain in the position it is at present until the result of this agreement of lease and sale is settled. If the sale is not carried out, then the property would require to be sold at the earliest opportunity, and the guarantors would require to make up any deficiency in the price."

Now, this letter appears to me to express nothing more than a request that the bank would allow the account to remain in the position it then was—that is, that they should not enforce payment of it—and to set forth the reasons why that request was made. It sets forth no terms or conditions on which the guarantors were willing to purchase the delay requested. It says nothing about their agreeing to become liable for accumulations of interest, for which up to that time they were not liable. No doubt it says, but only narrative, and as a reason for requesting delay, that if the sale to the lessees was not carried out the properties would require to be sold, and the guarantors would require to make up any deficiency in the price. But it does not say that in the event of the delay desired being granted they would bind themselves to make up any deficiency in the price beyond the amount of their existing liabilities, and this no doubt would have been said if any such obligation had been intended.

I think therefore that this letter simply contained a request, unaccompanied with any conditions, that the bank would allow the account to remain in the position in which it then was.

It seems to me that the letter of the bank carries the matter no further. What the bank says is this—"We are favoured with your letter of yesterday. The position of the account is not such as we care about, but as we regard ourselves as fully secured, the various obligants for the debt to us may hold, unless anything shall emerge rendering in our opinion the adoption of a different course necessary, that we will accede to their request to take no steps for payment in the meantime, nor until the result of the agreement of lease and sale to Messrs Leeming & Wilson is seen."

I think that the bank thereby simply granted Mr Bennet Clark's request for delay. They couple their consent with no conditions except that they reserve power to act if circumstances should change.

I am therefore clearly of opinion that the

pursuers have failed to prove the special agreement libelled.

Assuming that Mr Bennet Clark had entered into the agreement libelled, the defenders deny that he was authorised by them to do so. In the view I take of the case it is unnecessary to determine that question. I have only to say that I can find no evidence that the guarantors gave Mr Bennet Clark any authority to commit them to any further liability than they were already under.

The pursuers have further amended their record by averring that it was resolved in November 1881 that the company should be voluntarily wound up, that at this date the company had not available assets for the payment of its debts, and was insolvent. That the effect of the winding-up, coupled with insolvency, was to stop the running of interest against the company as at the date of the winding-up upon all debts due by the company. From this they argue that the cash-credit account became at that date a closed account, and that consequently they are entitled to interest on the principal sums due from the date of the immediately preceding balance, 31st October 1881, till payment.

I do not think that the liquidation, seeing that it was a voluntary liquidation for the purpose of winding-up and reconstruction, would have any effect *per se* in closing the cash-credit account. As regards the alleged insolvency, the company was in this position, that it had difficulty in meeting its current expenses, and that if it had been called upon to meet at once to realise all its properties by a forced sale and to pay all its debts, its funds might possibly have proved insufficient for the purpose. But it continued for years afterwards to be a going company, and nobody appears to have then thought that its assets if realised would be insufficient to pay its debts. In that state of matters it does not occur to me that there was anything necessarily to close the cash-credit account.

In any view, I think the bank would have great difficulty in successfully maintaining this plea. They did not in point of fact close the account at the date of the liquidation. They continued to treat it as an open account down to October 31st 1887, and periodically accumulated interest thereon, as it was for their advantage in the event of the company having a surplus of assets, and they are in this action claiming payment of such interest from the defenders.

I do not think, accordingly, that this contention of the bank is well founded, and on the whole matter I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD KINNEAR—I am of the same opinion. I think the cautioners are liable for the amount of the principal sum standing at the debit of the cash-credit account as shown by the books of the bank at the date of the last balance on 31st October 1887, and for interest from that date, and not, as the bank contends, from November

1881, when the company went into liquidation.

The material consideration appears to me to be that it was matter of agreement between the parties that there was to be a single account as against all the co-obligants, for which they were all to be jointly and severally liable, and there is a special provision in the agreement that "a stated account, made up from the books of the bank, and signed by its accountant, shall be sufficient to constitute a charge or balance against us, and each of us, and our foresaids, whereof no suspension shall at any time pass or be presented at the instance of us, or any of us, except on consignment only of the sum appearing to be due thereon." Of course that does not mean that the account may be kept in any way that the bank may think fit. It must be kept in the ordinary way, and if there were any doubt as to what that was before the case of *Reddie v. Williamson*, there can be none since that decision. The account must be kept by the bank in the usual way in which a cash-credit account is kept—the interest upon the debit balance being always added at the close of each year, and so converted into principal. That is a mode of stating his account which may be in favour of the bank if the principal debtor remains solvent. If he becomes insolvent, it will be in favour of the bank only so long as the whole amount of the debit balance is within the limit of the cash-credit. There is a difference of liability only in this respect, that the obligant who operates on the account will be liable to the whole extent of his operations; the obligants who do not operate only to the extent of their obligations under the cash-credit bond. But within the limits of the stipulated credit they are all liable jointly and severally, and there can be only one account stated in one way against all.

The result in this case would thus be perfectly clear if it were not for the alleged agreement between the bank and the liquidator of the company, by which it is said to have been arranged in October 1884 that the accounts should after that date be otherwise stated. I agree with Lord Adam, for the reasons he has given, that there is no evidence of such an agreement. It is material in reading the correspondence to keep in view that the agreement alleged by the bank against the principal debtors is a contract restricting their claims, so that after the date of the agreement interest could no longer be accumulated as against them for however long a time the debt might be unpaid. Now, in stating the account against them the bank still continued to accumulate interest in the ordinary way; and if the company had remained solvent it would have been for the interest of the bank to maintain that this was the proper way of stating the account. If that had happened, and the company had been charged for payment of the principal and accumulation, they could not in my opinion have resisted the demand. I see no ground for maintaining that the bank had given up their right to accumulate interest

with principal. They had agreed to nothing except that they would delay making an immediate demand for payment, and leave the account in the meantime in its actual position. The account was accordingly treated as an open account down to October 1887.

For the reasons already given, I think it clear that if the bank were entitled to state the account in this way against the company, they are bound to state it in the same way against the defenders.

On all the other points I agree with Lord Adam, and have nothing to add.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court found that the pursuers had failed to establish the agreement between themselves and Mr Bennet Clark, alleged upon record as amended; therefore found and decreed in terms of the interlocutors of 13th and 19th March 1889.

Counsel for the Pursuers—Asher, Q.C.—C. K. Mackenzie. Agents—Melville & Lindsay, W.S.

Counsel for Pattison's Executors and Somerville's Trustee—Graham Murray—C. S. Dickson. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for Robertson's Trustees—Comrie Thomson—Rhind. Agent—William Officer, S.S.C.

Thursday, February 5.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

M'QUAKER v. GOVERNORS OF BALLANTRAE EDUCATIONAL TRUST AND OTHERS.

College—Bursary—Qualification of Candidates—Pupil of School—Scheme of Education Endowment Commissioners.

By section 25 of a scheme framed by the Commissioners under the Educational Endowments Act 1882, it was provided that the governors should apply a certain annual sum in establishing a bursary for university or technical education, to be awarded by competitive examination "among those who have been pupils in public or State-aided schools in the parish of B for at least six months before the date of examination, and whose parents or guardians require aid for giving them higher education."

In 1889, after an examination, the Governors awarded the bursary to W, and placed M second.

In an action at the instance of M's father, the Court held—(1) that M having been enrolled as a pupil of a school in the parish of B during the six months preceding the examination, was not disqualified as a candidate by the fact

that he had been absent from school with leave during part of that time, and therefore found that the pursuer had a good title to sue; and (2)—*diss.* Lord M'Laren, and *rev.* Lord Wellwood—*reduced* the award of the bursary to W, in respect that he had not been a pupil of any school in the parish during the six months preceding the examination, and with the consent of the defenders *awarded* the bursary to M.

Observed that the Court would have been slow to interfere with the governors' award on the ground that the successful candidate's parents did not require aid in giving him higher education, that being a matter largely for their discretion.

Under a scheme framed by the Commissioners appointed under the Educational Endowments (Scotland) Act 1882 for the administration of the educational endowments in the parish of Ballantrae, a governing body was appointed by the name of "The Governors of Ballantrae Educational Trust," and by section 25 of the scheme it was provided as follows—"The Governors shall apply the annual sum of not less than £20, nor more than £25, in establishing a bursary for university or technical education, which shall be called the Caddall Bursary. This bursary shall be awarded by competitive examination among those who have been pupils in public or State-aided schools in the parish of Ballantrae for at least six months before the date of examination, and whose parents or guardians require aid for giving them higher education: it shall be tenable for such period, not exceeding four years, as the Governors may determine, at a university or school for higher or technical or professional education, to be approved of by the Governors."

By direction of the Governors, a competitive examination was held on 25th April 1889, for the purpose of determining who should be the bursar or holder of the said Caddall Bursary for the period of four years thereafter. Several competitors appeared, and among them Hugh Wason and John M'Quaker. As the result of the examination, the Governors awarded the bursary to Hugh Wason, and placed John M'Quaker second.

The present action was raised by William M'Quaker, crofter, the father of John M'Quaker, who was in pupillarity, against the Governors of Ballantrae Educational Trust, Hugh Wason, and James Wason his father, for reduction of the award of the bursary to Hugh Wason, to have it found that the Governors ought to have awarded the bursary to the pursuer John M'Quaker, to have them interdicted from paying it to Hugh Wason, and ordained to award and pay it to John M'Quaker.

The pursuers founded on the 25th section of the scheme above quoted, and objected to the award of the bursary to Hugh Wason on the grounds (1) that he had not been a pupil of any public school in Ballantrae parish during the six months pre-