*Tuesday, November* 22.

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FIRST DIVISION.

[Lord Low, Ordinary.

MORTON'S TRUSTEES *v.* WATSON (STEWART ROBERTSON'S JUDICIAL FACTOR).

*Obligation — "Conjunct and Several" — Cautioner—Partnership—Novation.*

In 1879 the three partners of a firm having received a loan for the firm, granted a bond by which they as a firm, as partners of the firm and as individuals, bound themselves conjunctly and severally to repay the debt with interest. One of the partners died in July 1890, but the other partners continued to pay interest on the loan until December 1890, when they suspended payment. The creditors in the loan acceded to a trust-deed executed by these partners, out of their estates recovered a portion of the debt, granted receipts, and then claimed to rank on the estate of the partner who had died in July 1890.

*Held* that their claim was good, as all the partners were bound conjunctly and severally as principal debtors, and as there had been no extinction of the debt by novation, no implied discharge of the deceased partner, and nothing done to prejudice any right of relief his estate might have against those of the other co-obligants.

*Observed* that even if the bond had not been in such explicit terms, the partners would have been held principal debtors in the loan to their firm.

Hugh Morton, who carried on business as an engineer and iron shipbuilder in Leith, died in 1878 leaving a trust-disposition and settlement, by virtue of which Samuel Morton Smart and Hugh Morton Gavin acquired his business at a valuation. Upon 1st January 1879 they entered into partnership with Stewart Robertson, and carried on business under the firm of Samuel & Hugh Morton & Company. From Hugh Morton's trustees, acting under powers conferred by the trust-disposition, they received on tools and machinery a loan of £8500, and upon 15th February 1879 granted a bond in the following terms—"We, the said Samuel & Hugh Morton & Company, as a firm, and we, the said Samuel Morton Smart, Hugh Morton Gavin, and Stewart Robertson, as partners of said company and as individuals, bind and oblige ourselves, and our respective heirs, executors, and successors whomsoever, and the whole partners of said firm, present and future, all conjunctly and severally, and without the necessity of discussion, to repay the said principal sum of £8500," with interest.

In July 1890 Mr Stewart Robertson died, and in December 1890 Mr George E. Watson, C.A., Edinburgh, was appointed judicial factor on his estate under the 164th section of the Bankruptcy (Scotland) Act 1856.

After Mr Stewart Robertson's death Messrs Samuel Morton Smart and Hugh Morton Gavin continued to carry on business under the same firm name, and to pay Hugh Morton's trustees interest upon the loan until December 1890, when they suspended payment. They then granted a trust-deed for behoof of creditors, and paid a composition of 8s. 6d. per pound. Hugh Morton's trustees acceded to this trust-deed, and received £3300 out of £7775 remaining unpaid of their loan of £8500, and granted receipts. For the remainder they claimed to rank upon the estate of the late Mr Stewart Robertson.

The judicial factor upon 11th March 1892 rejected the claim, on the following grounds—"No steps were taken by the claimants to call up the bond at Mr Robertson's death. On the contrary, the credit was continued to the succeeding firm of S. & H. Morton & Company, of which Messrs Smart & Gavin were the only partners, and they were adopted as the debtors, and were applied to for and paid the interest when it fell due. By so doing without notice to Mr Robertson's representatives, the claimants gave up any claim they might have had against Mr Robertson's estate. . . . In said trust-deed, to which the trustees of the said Hugh Morton acceded as creditors, it is expressly provided as follows—That the creditors who acceded thereto, and who should draw dividends out of the bankrupt estates of the said firm of S. & H. Morton & Company, and of Samuel Morton Smart and Hugh Morton Gavin, the individual partners of that firm, should be held to have discharged the said firm and the said individual partners of the whole debts due by them to the creditors so acceding. . . . The said trustees received from th trustee under the said trust-deed dividends upon the amount claimed by them, and granted formal receipts therefor. Had matters remained entire, and had Mr Robertson been called upon to pay the said bond, he would have been entitled to relief from S. & H. Morton & Company. That firm having been released by Morton's trustees, the judicial factor considers that the estate under his charge has also been released."

Hugh Morton's trustees brought the matter by way of note of objections before the Junior Lord Ordinary (Low), who upon 2nd August 1892 pronounced the following interlocutor:— . . . "Sustains the objections, recals the said deliverance, and remits to the factor to rank the said trustees as ordinary creditors. . . .

"*Opinion.*—On 1st January 1879 Samuel Morton Smart, Hugh Morton Gavin, and Stewart Robertson entered into partnership as engineers and iron shipbuilders under the firm of Samuel and Hugh Morton & Company.

"The business had previously been carried on by the deceased Hugh Morton as sole partner, and on 15th February 1879 the bond and assignation in security upon which the claim now under consideration is founded was granted in favour of Hugh Morton's trustees.

"The bond and assignation is granted by Samuel and Hugh Morton & Company, and by Mr Smart, Mr Gavin, and Mr Robertson as partners of the firm and as individuals. The bond narrates that under his trust-disposition and settlement the deceased Hugh Morton had directed his trustees to offer the business at a valuation to Mr Smart and Mr Gavin; that the trustees had done so; that Messrs Smart and Gavin had accepted the offer; that they had arranged to take over the business as at 1st January 1879, and to carry it on under the firm of Samuel and Hugh Morton & Company, and had taken Mr Robertson into the partnership.

"The bond further narrated that by a codicil Hugh Morton had authorised his trustees, in order that Messrs Smart and Gavin might be enabled to accept the business, 'to grant in loan to us the said Hugh Morton Gavin and Samuel Morton Smart, or the survivor of us, such sum or sums as his said trustees might in their judgment and discretion think reasonable and proper." It was further narrated that the trustees were directed to take a bond or bill for the amount which they might advance, with interest at 5 per cent., but that they were not to call up the loan so long as they were satisfied that the business was in a satisfactory condition. It was then narrated that it had been arranged between the trustees and Messrs Smart and Gavin that the trustees 'should advance to us the said Samuel and Hugh Morton & Company, and to us the said Samuel Morton Smart, Hugh Morton Gavin, and Stewart Robertson, the individual partners of the firm, in loan to enable us to carry on the said business, the sum of £8500.'

"The firm and the individual partners then acknowledge that they have received from the trustees tools and machinery to the value of £8500, and then the bond proceeds—'Therefore we, the said Samuel and Hugh Morton & Company as a firm, and we the said Samuel Morton Smart, Hugh Morton Gavin, and Stewart Robertson, as partners of said company and as individuals, bind and oblige ourselves, and our respective heirs, executors, and successors whomsoever, and the whole partners of said firm, present and future, all conjunctly and severally, and without the necessity of discussion,' to repay the sum of £8500 with interest. Then, in security of the above personal obligation, Mr Smart and Mr Gavin assign to the trustees certain beneficial interests which they had under Hugh Morton's settlement.

"The partnership continued until July 1890, when Mr Robertson died. During that period I understand that the interest upon the £8500 had been regularly paid to the trustees. After Mr Robertson's death Mr Smart and Mr Gavin continued to carry on the business under the same firm name until December 1890, when they suspended payment. Between the date of Mr Robertson's death and their suspension, Messrs Smart & Gavin, or the firm of S. & H. Morton & Company as then constituted, paid to the trustees, and the trustees accepted payment of certain interest which became due on the £8500.

S. & H. Morton & Company, and Messrs Smart & Gavin as the partners thereof, then granted a trust-deed for behoof of creditors, and Hugh Morton's trustees acceded to the trust, and made a claim in respect of the £8500, and received a dividend of 8s. 6d. per pound.

"The present claim is made by Hugh Morton's trustees against the estate of Stewart Robertson (which is in the charge of a judicial factor appointed under the 164th section of the Bankruptcy Act) for the balance still due under the bond and assignation in security.

"The judicial factor has rejected the claim upon two grounds. In the first place, he holds that the trustees accepted the firm of S. & H. Morton (as constituted after the death of Stewart Robertson) as their debtors, and thereby discharged any claim which they might otherwise have had against Mr Robertson's estate. In the second place, he holds that Mr Robertson was only a cautioner under the bond and assignation, and that no claim can be made against his estate by the trustees after having accepted a dividend from the estate of S. & H. Morton & Company.

"I am of opinion that the deliverance of the judicial factor is not well-founded.

"The only ground for saying that the trustees accepted the new firm of S. & H. Morton after Mr Robertson's death as the sole debtors is, that they accepted payment of interest when it fell due from that firm. I think that it would have been extraordinary in the circumstances if the trustees had done anything else, and I am of opinion that it is plain that the acceptance by them of the interest when it became due, and was tendered to them cannot be held to import an abandonment by them of any rights which they had under the bond and assignation.

"In regard to the respective positions of the parties to the bond, it was contended that as the sum for which the personal obligation was given represented the tools and machinery used in the business, and as the power of the trustees was limited to advancing money for the purpose of carrying on the business, the firm must be held to be the principal debtors, the individual partners being merely cautioners. I am unable to adopt that view. No doubt if it is clear from the transaction set forth in the deed that certain of the parties are truly cautioners although subscribing as co-obligants, they will be entitled to the equities of cautioners. But I do not think that anything of the sort is clear from the transaction disclosed in the deed under consideration. It is true that the money or the money's worth was given for the purpose of enabling the firm to carry on the business, and that the firm is in law a separate person from the individual partners. But each of the partners as an individual had a direct personal interest in the matter, and was in a very different position from a cautioner in a bond of cash-credit to which the present bond was sought to be assimi-

lated. The bond seems to me to be carefully framed with the view of taking all the parties to it—the firm and the partners as such, and as individuals—bound, not only in form but in fact, as principal debtors, and I do not think that there is anything in the nature of the transaction disclosed which justifies the rights and obligations of the parties being determined upon any other footing.

"I shall therefore recal the deliverance of the factor, and appoint him to give the trustees a ranking."

The judicial factor reclaimed, and argued —(1) Notwithstanding the form of the bond the real position of parties must be looked at. The partners, including Stewart Robertson, were truly cautioners for the firm, which was a separate *persona*, and the true debtor. If Stewart Robertson was in fact a cautioner, he was entitled to the equities of a cautioner—*Paterson* v. *Bonar*, March 9, 1844, 6 D. 987; *Scottish Provincial Assurance Company* v. *Pringle*, January 28, 1858, 20 D. 465. Accordingly he had been discharged by the partnership coming to an end at his death, or by the discharge of the principal debtor, and of the co-cautioners by virtue of the accession to the trust-deed and the receipt granted, for thereby his right of relief had been cut off—Bell's Prin. 62; Bell's Comm., 7th ed. 362. (2) The old obligation under which Stewart Robertson was bound was extinguished by delegation, for Morton's trustees had, after December 1890, taken the new firm as their debtor, and had received interest from it—Bell's Prin., sec. 578; *Buchanan* v. *Somerville* (1779), M. 3402; *Ker* v. *M'Kechnie*, February 23, 1745, 7 D. 494.

Argued for respondents—(1) Stewart Robertson was a principal debtor not only as one of the firm for whose benefit the advance was made but under the bond, which could not have been more explicitly worded. The creditors had not lost their right of proceeding for the balance of the debt against Stewart Robertson's estate, because they had exercised their undoubted right of getting payment first from the other two co-obligants. But neither had Stewart Robertson's right of relief been in any way prejudiced. (2) There had been no delegation, which was not to be presumed—Bell's Prin., sec. 578. In *M'Intosh* v. *Ainslie*, January 10, 1872, 10 Macph. 304 —a much stronger case than this—it was held there had been no delegation.

At advising—

LORD M'LAREN—The facts, which are fully stated in the Lord Ordinary's judgment, may be summarised as follows. In 1879 Samuel Morton Smart, Hugh Morton Gavin, and Stewart Robertson entered into partnership as engineers and iron shipbuilders under the firm of Samuel & Hugh Morton & Company, taking over the business which had previously been carried on by the deceased Hugh Morton. In pursuance of a power contained in Mr Hugh Morton's testamentary trust-deed, his trustees lent to the new company the capital sum of £8500, the subjects advanced being tools and machinery of that value, and the obligation of the debtors being to repay the sum of £8500 with interest. The partnership was terminated by the death of Mr Stewart Robertson in July 1890, and according to the contract of copartnery (article 7th) the surviving partners were entitled to carry on the business, and were liable to pay to the representatives of Mr Stewart Robertson his share of the company funds and effects in three half-yearly instalments. The business was carried on after Mr Robertson's death by Mr Smart and Mr Gavin, but Mr Robertson's representatives have not received their share of the company funds, and in December 1890 the firm suspended payment.

Samuel & Hugh Morton & Company, and Messrs Smart and Gavin, the individual partners, granted a trust-deed in favour of creditors. Hugh Morton's trustees acceded to this trust, and received out of the insolvent estate a dividend of 8s. 6d. per pound on their claim for the £8500 advanced to the firm. The present claim is made by Hugh Morton's trustees against the estate of Stewart Robertson for the balance remaining due under the bond. The claim was in the first instance considered by the judicial factor who has the management of Stewart Robertson's estate under the 164th section of the Bankruptcy Act, and was by him rejected. An appeal against his deliverance was taken to the Court of Session, and was heard by the Lord Ordinary on the Bills, who by the judgment under review sustains the objection, recals the deliverance of the judicial factor, and remits to him to rank the appellants as ordinary creditors for the sum of £4675, 19s. 3d., being the balance outstanding of the sums secured by the said bond.

The obligation in the bond is undertaken by the firm of Samuel & Hugh Morton & Company, and all the partners, and they in terms "bind and oblige ourselves, and our respective heirs, executors, and successors whomsoever, and the whole partners of said firm, present and future, all conjunctly and severally, and without the necessity of discussion," to repay the sum of £8500 with interest.

In the argument addressed to us it was maintained (1) that Mr Stewart Robertson was only a cautioner for the payment of the sums secured by the bond, and (2) that his representatives were discharged in consequence of Mr Hugh Morton's trustees having taken payment of a dividend out of the insolvent estate of Samuel & Hugh Morton & Company, and thereby (as alleged) prejudiced or cut off the claim of relief otherwise competent to these representatives against the estate of Samuel & Hugh Morton & Company.

On the first point I agree with the Lord Ordinary in thinking that there is no evidence that Mr Stewart Robertson's position was that of a cautioner. The original advance of £8500 was an advance to the firm of which Mr Robertson was a partner, and it must be taken that he in conjunction with his copartners received

value for the obligation in the bond. It is not possible to separate the interests of the partners from these of the firm in such a question. Nor is Mr Robertson's position different from that of the other partners. It is true that when his interest in the business of the firm was terminated by death, Mr Robertson's representatives had claims against the surviving partners which I shall assume included a right to be relieved of this obligation. But a claim of this nature emerging after the constitution of the obligation could not alter the character of the obligation undertaken to the creditor, or impair the powers of the creditor when it became necessary to enforce the bond according to its terms.

Supposing, for the sake of the argument, that Mr Robertson was a cautioner in a question with his co-obligants, and that this was his position when the bond was granted, it does not follow that the creditor was precluded from accepting a dividend from the estates of the other co-obligants. It is well known that a person who interposes his credit for the benefit of his friends may be bound as a principal, and in such a case the rights of the creditor are determined by the quality of the obligation undertaken. In the present case all the obligants are bound in identical terms to repay the advance conjunctly and severally without discussion, and this is equivalent to an agreement that the creditor may claim payment of the debt from any obligant in one sum, or from the several obligants in such sums or proportions as he pleases. In the case of a proper cautionary obligation, the surety only undertakes to pay in case of the failure or default of the principal debtor, and although by statute the discussion of the principal debtor is no longer necessary, the other equities of a cautioner remain. One of these is, that if the principal debtor be discharged, the benefit of the discharge accrues to the cautioner, for this obvious reason, that there can be no guarantee of a principal obligation which has ceased to exist. But this principle is inapplicable to the case of a person who interposes his credit by granting an independent obligation, or, which is the same in legal effect, by becoming a party to a conjunct and several obligation. In such a case a discharge granted by the creditor in respect of a partial payment in general means no more than that he will not make any further claim upon this particular obligant, but will take his chance of recovering the balance of the debt from the other persons bound to him. Such a discharge may possibly be injurious to the creditor himself in the event of the other obligants becoming insolvent, but cannot affect the interests of the other obligants prejudicially; because their claims of contribution against each other do not depend upon the terms of the bond, but on the agreement amongst themselves, express or implied, according to which an obligant who has paid more than his rateable share becomes a creditor of the other obligants to the extent of his overpayments.

In order that a discharge granted to a co-obligant should have the effect of releasing the other obligants, it must amount to an unqualified discharge of the joint and several obligation, or (which is the same thing in legal effect) an agreement that in respect of the partial payment the debtor shall not only be discharged in a question with his creditor, but shall also be discharged of his liability to contribute in a question with other co-obligants. No co-obligant has the right to demand a discharge in such terms, and no creditor who was alive to his own rights would grant it. Such an agreement could not be implied from a discharge or receipt for partial payment in the usual terms, because in such a case the creditor only uses his right to select his debtors, and takes from one what he is able to pay without professing to exert any influence on the liabilities of the obligants *inter se*.

I may add that in my opinion this is a very unfavourable case for raising the point which the judicial factor has taken; because I observe that the trust-deed granted by Samuel & Hugh Morton & Company contains a clause reserving to creditors "their claims against any other person or persons who may be bound along with us or otherwise." Now, according to the decisions, such a clause would certainly bar the trustee for Samuel & Hugh Morton's creditors from setting up the discharge granted to him as a defence to a claim of contribution; because in fair construction the clause means that all rights are to be reserved notwithstanding the accession of a creditor to the trust and his acceptance of a dividend.

If your Lordships agree with me, our judgment will be to adhere to the Lord Ordinary's interlocutor.

LORD ADAM—This case relates to a bond under which "we, Samuel & Hugh Morton & Company, as a firm, and we, Samuel Morton Smart, Hugh Morton Gavin, and Stewart Robertson, as partners of said company and as individuals, bind and oblige ourselves, and our respective heirs, executors, and successors whomsoever, and the whole partners of said firm . . . all conjunctly and severally, and without the necessity of discussion, to repay the said principal sum of £8500." . . .

Now, I agree with Lord M'Laren, and can see nothing to suggest that Stewart Robertson was in a different position from the other two debtors in the bond, namely, that he was only a cautioner. I think all were bound in fact, as in words, "conjunctly and severally" to repay the debt. If so—if debtors are bound conjunctly and severally—each is bound for the whole debt at the option of the creditor. But in that case, as Mr Bell says in sec. 62 of his Principles, "the person who shall pay the portion of another will be entitled to relief to that extent without an assignation." That is to say, co-obligants bound jointly and severally have at common law a right of relief *inter se*, and that right cannot be prejudiced by the creditor electing to go

against one of the co-obligants for payment of the whole. If so, what took place here was simply this—The creditor selected two of the debtors, viz., Samuel Morton Smart and Hugh Morton Gavin, and from their estates he recovered £3100, and granted a discharge. But that did not impair his right to recover from the representatives of Stewart Robertson what remained unpaid, assuming that he, the remaining debtor, was bound jointly and severally; nor does the discharge the creditor is said to have granted impair the right of relief which the representatives of Stewart Robertson have against the other two debtors for recovery of anything paid over and above Stewart Robertson's proper share.

I think the interlocutor of the Lord Ordinary is right.

Lord Kinnear—I agree with the Lord Ordinary on both points.

The parties to the bond are bound jointly and severally as partners and as individuals. Partners are not merely cautioners for their firm, although the firm is the primary debtor. They are themselves the firm, and if they borrow money to be used in their common business, each must be held to have equally received the whole. Each of the partners would, therefore, have been liable *in solatium* even if their separate liability had not been expressed in terms. But the partners in the present case bound themselves jointly with the firm and with each other, and also severally; and by the terms of their obligation, as well as by their relation to one another, they are all principal debtors. A partner who undertakes an obligation in these terms may be precluded from maintaining that the firm must be sued, in the first place, before an action can be brought against him as an individual for a copartnery debt. But in other respects his liability is exactly the same as if the debt had been contracted by the firm in the ordinary course of business.

As to the second point, there can be no doubt that a creditor who discharges one of several co-debtors will debar himself from enforcing his claim against the others if he has thereby defeated their right of relief. But the claimants had done nothing which can be construed as a discharge of the debt when they lodged their claim on the estate in the hands of the judicial factor. A creditor does not discharge one of several partners by taking dividends from the insolvent estate of the others or of the firm.

Lord President—I agree.

The Court adhered.

Counsel for Claimants and Respondents—Dickson—C. D. Murray. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Reclaimer—Jameson—Crole. Agents—Boyd, Jameson, & Kelly, W.S.

*Wednesday, November 23.*

## FIRST DIVISION.

[Sheriff of Inverness, &c.

## MILNE *v.* SMITHS.

*Reparation—Slander—Husband and Wife—Malice—Privilege—Master and Servant—Relevancy.*

In two conjoined actions of damages for slander brought against the wife of the rector of a boarding-school and her husband as her administrator-at-law, and for his own right and interest, the pursuer averred, in the first action, that the female defender in the presence of her domestic servants used certain libellous expressions regarding him; and in the second action, that she falsely and calumniously accused him of circulating defamatory stories reflecting upon her character, and of being the author or writer of a lewd inscription regarding her. It was not averred that the husband authorised or approved of the alleged slanders. The defence of privilege was stated to the first action on the ground that the female defender was entitled and bound to warn her servant against receiving the attentions of a man of the pursuer's known character.

At the adjustment of issues, *held* (1) (following *Barr* v. *Neilson*) that the husband was not liable for slander by his wife, there being no averment of complicity on his part; (2) that where the pursuer's record did not disclose a case of privilege, the words "maliciously and without probable cause" should not go into the issue; (3) that the expression "a low scamp" might stand as part of an issue in context with words unquestionably actionable; (4) that the second action fell to be *dismissed* as irrelevant.

*Question* (*per* Lord Kinnear) whether the privilege of a master or mistress goes so far as to give the right to defame a third party for the instruction of a servant?

Andrew Milne, draper, Fochabers, brought two actions in the Sheriff Court at Elgin against "Mrs Jane Garrow or Smith, wife of and residing with William Smith, rector, Milne's Institution, Fochabers, and the said William Smith, administrator-at-law for his said wife, and for his own right and interest," craving decree in each case for £500 damages for alleged slander.

In the first action the pursuer averred that "on Monday 7th December 1891 the female defender, in the kitchen or other part of Milne's Institution buildings, falsely and calumniously stated, in the presence and hearing of Nellie Angus" and three other persons, all domestic servants at the Institution, "that the pursuer was a noted blackguard," "a low scamp," and "that he went after every good-looking girl for the purpose of seducing them."