Wednesday, January 12.

SECOND DIVISION.

[Sheriff of Inverness, Elgin, and Nairn.

BONTHRONE *v.* PATTERSON AND OTHERS.

Cautioner — Cautioner for Employee — Whether Cautioner Discharged on Account of Employer's Conduct.

A commercial traveller was engaged by a brewer, three cautioners becoming bound that the traveller should perform his duties faithfully and render regular accounts of his intromissions, and pay the moneys collected by him. In September 1894 he failed to remit part of some money collected by him. He again failed to remit a sum of 18s. collected by him in October of the same year, and he also failed to remit £23 collected by him in March 1895. It appeared that in September 1894 there was some discussion as to whether the traveller was to be allowed to retain the cost of his season ticket or not. In the early part of 1895 he was ill himself, and at the same time his wife died. He was not immediately pressed to make good his deficiencies, but repeated demands were made upon him during the latter part of 1895. He was not formally dismissed, but the agency was allowed to drop after March 1895. No notice of his being in arrears in his payments was sent to the cautioners until January 1896, when Stubbs, Limited, on the instructions of the employer, wrote to them stating that the traveller had been asked repeatedly to furnish particulars and remit cash recovered, but that no reply could be got from him. In an action at the instance of the employer against the cautioners, the defenders pleaded that they were not liable in respect of the pursuer's failure to give them timeous notice of his irregularities and defalcations. *Held* that there was nothing in the conduct of the employer of such a character as to free the cautioners from their liability under the bond of caution.

Opinion (per Lord Trayner) that failure to give notice to the cautioners is not a relevant defence to such an action.

This was an action brought in the Sheriff Court at Elgin at the instance of Alexander Bonthrone, brewer, Falkland, against John Smith Urquhart, distiller, Elgin; George Paterson, tailor and clothier, Urquhart, near Elgin; and John Cruickshank, solicitor in Elgin. The pursuer craved decree for £45, 7s. 6d. as due to him by the defenders upon a bond of caution granted by them for John Maclachlan, who had been a commercial traveller in the employment of the pursuer.

On 20th May 1892 Maclachlan wrote to the pursuer offering his services and giving references. On 8th June 1892 the pursuer wrote to Maclachlan:—"I have had replies from your references, and consider them satisfactory. The terms on which I would offer you an agency for the sale of my ales in the north of Scotland is as follows:—That you engage to sell to customers of undoubted standing and position only, and to collect accounts arising from such sales. That you allow a discount of 33⅓ per cent. or less to customers off pale ales, and 30 per cent. or less off other ales. That you receive as sole remuneration at the rate of four (4) shillings per barrel, to be paid two (2) shillings on delivery, and two (2) shillings on the cash as collected. No commission to be paid on orders that may become bad debts. Commission to be paid monthly. That you place in my hands approved security to the extent of £100. As you had explained to you by Mr David Bonthrone, I would have preferred to engage you at a percentage. However, on receipt of your approval of these terms, which are as liberal as I can possibly make them, I will send you all details." On 11th June 1892 Maclachlan wrote to the pursuer: — "Your favour to hand, for which I am obliged. Referring to yours of the 8th inst., I am quite satisfied with the terms offered, but would like the first half of my commission paid monthly, on all orders *placed;* in the event of an order or part of such being cancelled, the commission paid to me on such would be deducted at the end of the month when sending my next remittance. I ask this, knowing that I will have to draw pretty heavily on my pocket for some time, and especially in opening up new ground. Please be good enough to get me a ticket as soon as possible from Aberdeen to Inverness, and all branches of the G.N.S. Ry. system. A ticket to Inverness will not cost any more than one to Nairn, and should you think of opening up Inverness, as I hope you will, it will save me expenses later. Trusting you will allow me a little time to pay up my ticket, and that you will accede to the above request. Waiting your reply and instructions." On 13th June 1892 the pursuer wrote to Maclachlan:—"In reply to yours of the 11th, I am sorry I cannot see my way to alter the terms offered you in my letter of the 8th. Meantime I take up with the Railway Company."

The bond of caution, which was dated 13th January and 3rd February 1893, was in the following terms:—"I, John Maclachlan, residing at Chapel House, Land Street, Keith, considering that I have lately been appointed agent in the north for Alexander Bonthrone, Newton Brewery, Falkland, and that it was part of my agreement with the said Alexander Bonthrone that I should find caution for my intromissions to the extent of one hundred pounds; and seeing that John Urquhart, distiller in Elgin, George Patterson, tailor and clothier in Urquhart, and John Cruickshank, solicitor in Elgin, have agreed to become cautioners for me, each to the extent of one-third of the said sum of one hundred

pounds: Therefore I, the said John Maclachlan, as principal, and we, the said John Urquhart, George Patterson, and John Cruickshank, as cautioners for the said John Maclachlan, do hereby bind and oblige us, our heirs, executors, and successors whomsoever, without the necessity of discussing them in their order, but that to the extent only of one-third each of the said sum of one hundred pounds, that I, the said John Maclachlan, shall perform my duties faithfully, and render regular accounts of my intromissions to the said Alexander Bonthrone, and pay the moneys collected by me to him, in terms of my agreement with him: And I, the said John Maclachlan, bind and oblige myself and my fore saids to free and relieve my said cautioners and their foresaids of their cautionary obligations for me in the premises, and of all the consequences thereof."

Maclachlan began operations early in 1893. He did very well for some time. In September 1894 he failed to remit a sum of £18, 2s. which he had collected, as intimated in a statement sent in by him for the week ending 22nd September 1894. Of this sum £6, 2s. was subsequently remitted, leaving a sum of £12 still due, which was never remitted. On 27th October Maclachlan sent in a statement shewing that he had collected £8, 18s., but he only remitted £8, leaving 18s. still due, which was never remitted. On 30th March he sent a statement shewing that he had collected £33, 8s. 6d., but sent no cash along with it. From this sum £9, 9s. of commission due to Maclachlan had to be deducted, leaving £23, 19s. 6d. still due. Since that time no cash was received by the pursuer from Maclachlan. Thereafter his agency was allowed to drop, but he was never formally dismissed. His last order was intimated in June 1895.

In February 1896 the pursuer's son, who had charge of the department of the business in connection with which Maclachlan was employed, went round the customers, and from them, and also from Maclachlan's books, which were not recovered by the pursuer till May 1896, it was discovered that in 1893 Maclachlan had collected various sums, amounting in all to £8, 10s., which he had not remitted, and with regard to which he had never even sent any statement.

In the first year of Maclachlan's agency the pursuer gave him a season ticket. The second year Maclachlan deducted the cost of his ticket from one of his remittances, and the pursuer assented to his doing so. On 1st October 1894, in reply to a question as to his failure to remit the sums collected by him, as shewn in his statement of 22nd September, he said that he had kept it to pay his season ticket, but the pursuer replied that the business done by Maclachlan would not warrant this expenditure.

In the early part of 1895 Maclachlan was ill for two months with scarlet fever, and about the same time his wife died. He wrote asking to be allowed to retain some of the money mentioned in the statement dated 30th March 1895, on account of the expense and loss he had been put to through illness and domestic bereavement. The pursuer did not consent to this, but it appeared that owing to Maclachlan's misfortune he was not immediately pressed for the money. Later on in 1895, however, he was repeatedly asked to make good the deficiency.

Prior to September 1894 the pursuer was not aware that there were any deficiencies in Maclachlan's remittances. Up to the end of 1895 the pursuer had never informed the cautioners that Maclachlan had failed to account for all the money collected by him. In the beginning of 1896, however, he instructed Stubbs Limited, Aberdeen, to communicate with them, and accordingly Stubbs Limited wrote a letter in the following terms to each of the cautioners:—"Dear Sir,—We understand that you are cautioner for Mr John Maclachlan, 71 King Street, Aberdeen, to our subscriber, Mr J. Bonthrone, of Falkland. Mr Maclachlan has been asked repeatedly to furnish particulars and remit cash recovered, but no reply can be got from him. We shall thank you to assist us, as our subscriber is anxious to know how the a/c stands. Relying on your assistance." This was the only information as to Maclachlan's position which was given to the cautioners by the pursuer prior to the time when the present action was about to be brought. Having been unable to obtain payment of the various sums which Maclachlan had failed to remit, amounting in all to £45, 7s. 6d., the pursuer brought the present action against the cautioners, who subscribed the bond of caution quoted above. He sought decree against them conjunctly and severally for that sum, or otherwise for a decree or decrees ordaining the defenders to make payment to the pursuer of £33, 6s. 8d. each, or of so much of their respective proportions of the sums guaranteed by them as would be required for payment to the pursuer of the sum of £45, 7s. 6d.

The defenders pleaded, *inter alia*—"(2) The pursuer having failed timeously to give any notice or intimation to the defenders of the alleged defalcations by Maclachlan, or of his negligence in the performance of his duties, the action should be dismissed and the defenders assoilzied with expenses."

By interlocutor, dated 18th February 1897, the Sheriff-Substitute (RAMPINI) allowed a proof, which was led on 3rd May.

Both the pursuer and his son, and also Maclachlan himself, deponed that Maclachlan was bound to make weekly statements and weekly payments, and that he had failed to do so, but it was explained by the pursuer's son, and also by Maclachlan, that the amount of business done did not necessitate weekly statements, as there were weeks when he had no drawings to report.

The defenders originally alleged and endeavoured to prove that the pursuer had entered into a compromise with Maclachlan by which the pursuer undertook to give him certain delay and other opportunities in paying up the deficiencies, and that this was done without the knowledge, consent, or authority of the defenders, but this defence was not maintained in the Court of Session.

On 22nd May 1897 the Sheriff-Substitute issued an interlocutor in which he found in fact, *inter alia*, that until the raising of the present action the pursuer had failed to communicate to the defenders as cautioners foresaid that the said John Maclachlan was negligent in the performance of his duties, and that he was failing to account for the sums of money collected by him while acting as agent for the pursuer, and found in law that the pursuer was not entitled to recover from the defenders as cautioners the sum sued for, and therefore assoilzied the defenders from the conclusions of the action.

The pursuer appealed to the Sheriff (IVORY), who on 15th September 1897 issued the following interlocutor—"Recals the interlocutor appealed against: Finds that in about the beginning of 1893 the pursuer engaged John Maclachlan, commission agent, Keith, to act as his travelling agent, the terms of their agreement being contained in letters dated 8th and 11th June 1892, copies of which are produced in process: Finds that by bond of caution the defenders bound themselves, each to the extent of one-third of the sum of £100, that the said John Maclachlan should pay to the pursuer the moneys collected by him as travelling agent foresaid, in terms of the said agreement: Finds that the said John Maclachlan, as travelling agent foresaid, collected accounts for the pursuer from the beginning of 1893 down to 31st March 1895, and that he has failed to account for sums so collected by him to the extent of £45, 7s. 6d.: Finds that the defenders have failed to prove that the pursuer entered into any agreement with the said John Maclachlan giving him time to pay the said sums, or acted otherwise in such a way as to liberate the defenders from their liability as cautioners foresaid: Finds in law that the defenders are liable to pay to the pursuer the said sum of £45, 7s. 6d. each to the extent of one-third thereof: Repels the defences, and decerns against each of the defenders separately to make payment to the pursuer of the sum of £15, 2s. 6d. (being one-third of the said sum of £45, 7s. 6d.), with interest from the date of citation: Finds the defenders conjunctly and severally liable in expenses."

The defenders Patterson and Cruickshank appealed, and argued—An employer was bound to communicate to a cautioner for his employee any misconduct on the part of the employee known to him at the time when the cautionary obligation was entered into, and if the employer failed to do so the cautioner was released from liability under the contract—*French* v. *Cameron*, July 14, 1893, 20 R. 966, following *Smith* v. *Bank of Scotland*, January 14, 1829, 7 S. 244. The same rule applied where the misconduct was discovered during the continuance of the cautionary contract—*Phillips* v. *Foxall* (1872), L.R., 7 Q.B. 666, and *Burgess* v. *Eve* (1872), L.R., 13 Eq. 450, *per* Malins, V.-C., at page 457, the ground being that if the cautioner had known that the employee was misconducting himself he might and would have revoked the bond, and that he had been prevented from doing so by the failure of the employer to give the information. In such cases the cautioner was freed upon the same principle which was the basis of the rule applicable to the case of the creditor giving time to the debtor for whom a cautioner was bound.—See *per* Lord Kinnear in *C. & A. Johnstone* v. *Duthie*, March 15, 1892, 19 R. 624, at p. 629. Here the employer had failed to give timeous notice, and the cautioners were consequently not liable. Further, here it was a condition of the contract that the employee should send in weekly statements and remit cash weekly. He had failed to do so, and his failure to do so had been acquiesced in by the employer, without any notice being given to the cautioners, and on this ground also the cautioners were freed from liability under the bond—*Haworth & Company* v. *Sickness and Accident Assurance Association, Limited*, February 26, 1891, 18 R. 563. The case of *Nicolsons* v. *Burt*, November 7, 1882, 10 R. 121, was distinguished from the present, for in that case there was no reference to the obligations of the employee in the bond of caution.

Argued for the respondent—There was nothing in the letters which embodied the contract of employment regarding weekly statements or weekly cash payments. But even if there had been, that could not have availed the defenders unless the stipulation had been embodied in the bond of caution, which it was not —*Nicolsons* v. *Burt*, *cit.* Moreover, even if it was originally stipulated that there should be weekly statements and payments, that was a provision from which the parties were entitled to depart if they had reasonable ground for doing so (as was the case here in respect of the small amount of business done), without the result of freeing the cautioners from their obligations under the bond. Apart from these considerations, however, nothing more than delay, and at most negligence in enforcing his rights against the employee, had been established against the employer. The mere fact of delay having been given was not of itself sufficient to free the cautioners. It was a question of circumstances whether it would do so or not, and here the circumstances were such as to justify delay being given. The employer had no reason to suspect dishonesty on the part of the employee until after the end of March 1895, the pursuer's deficiencies prior to that date being either then unknown to the pursuer, or to some extent explainable. Mere negligence on the part of the employer did not bar him from suing the cautioner, and he was not bound at once to give the cautioner notice of a mere failure on the part of the employee to make prompt payments unless there was reason for suspecting dishonesty —*M'Taggart* v. *Watson*, April 16, 1835, 1 S. & Macl. 553, *per* Lord Brougham L.C. at page 591; *Creighton* v. *Rankin*, May 26, 1840, 1 Rob. 99, *per* Lord Cottenham L.C. at page 132; *Biggar* v. *Wright*, November

19, 1846, 9 D. 78 (whole Court); and *Mayor, &c., of Durham* v. *Fowler* (1889), 22 Q.B.D. 394.

At advising—

LORD YOUNG—This is an action against cautioners upon their cautionary obligation to make good the obligations of a traveller employed by the pursuer. The Sheriff-Substitute has assoilzied the defenders from the conclusions of the action, his finding in law proceeding on this finding in fact—"that until the raising of this action the pursuer has failed to communicate to the defenders, as cautioners foresaid, that the said John Maclachlan was negligent in the performance of his duties, and that he was failing to account for the sums of money collected by him while acting as agent for the pursuer." The Sheriff negatives that, for he finds in fact that there was no negligence practically averred, and that the proof does not establish such negligence on the part of the pursuer in regard to the cautioners. He also negatives the idea that the pursuer had entered into an agreement with Maclachlan, giving him time to pay the sums he was due. Now, I am of opinion, with the Sheriff, that there are no facts proved showing negligence on the part of the pursuer to attend to his own legitimate interest and to the legitimate interest of the cautioners—that no negligence of that kind has been established—and that therefore there is no ground here for relieving the cautioners of their obligations.

I am also of opinion with the Sheriff that it has not been established that there was any agreement to give the traveller time. I think there is no ground for that at all; and upon the whole matter my opinion is that, although the pursuer was was not hard to press upon the traveller and bring him to account, there was no such laxity on his part as to relieve the cautioner of his obligation; and I am also clearly of opinion that it is not established that there was any agreement to give him time which would have deprived the cautioners of their right to relief from the principal debtor.

The result is that I agree with the opinion of the Sheriff, and think that the appeal against it ought to be refused, and with expenses in both Courts.

LORD TRAYNER—The Sheriff in this case has decided in favour of the pursuer on the ground that the defenders have failed to prove that the pursuer entered into any agreement with his debtor Maclachlan, giving him time to pay the sums due by him, or had acted otherwise so as to liberate the defenders from their liability as cautioners. I think that decision is well founded both in fact and law. There is really no case presented in the evidence (although it is averred on record) of the pursuers having given or agreed to give the debtor time to pay his debt, under such circumstances as would have led to the cautioners being relieved of their obligation. The case maintained by the defenders as established was that the pursuers, in the knowledge that the debtor was not fulfilling the terms of his obligation, fulfilment of which was guaranteed by them, neglected to give them notice of such failure. Now, even if that defence had been made out, I should not have been prepared to sustain it as a relevant defence. It appears to me to have been settled by a series of decisions (several of which were cited at the bar) that any such neglect on the part of the creditor would not liberate the cautioners. But then I think the defence fails also in fact. The notice which was sent to the defender by "Stubbs Limited" on behalf of the pursuer in January 1896, very shortly after the pursuer became aware of the debtor's defalcations, was sufficiently clear and distinct to have put the cautioners on their inquiry, and to have led them to take any measures they could for their own protection. I am therefore of opinion that the defence fails both on fact and law, and that the appeal should be dismissed.

The LORD JUSTICE-CLERK concurred.

LORD MONCREIFF was absent.

The Court pronounced the following interlocutor:—

"Dismiss the appeal and affirm the interlocutor appealed against: Find in fact and in law in terms of the findings in fact and in law in the said (*i.e.*, the Sheriff's) interlocutor: Therefore of new repel the defences and decern against each of the defenders separately for the sum of £15, 2s. 6d., with interest thereon at the rate of £5 per centum per annum from the date of citation: Find the defenders George Patterson and John Cruickshank liable in expenses in this Court," &c.

Counsel for the Pursuer and Respondent—W. Campbell—A. M. Anderson. Agents—Fraser, Stoddart, & Ballingall, W.S.

Counsel for the Defenders and Appellants—Baxter—J. C. Watt. Agent—William Geddes, Solicitor.

Saturday, January 15.

SECOND DIVISION.

[Sheriff-Substitute at Dumbarton.

CAMERON *v.* WALKER.

Reparation — Master and Servant — Unfenced Machinery.

A boy of fourteen years of age, with consent of his father, raised an action against a baker for damages at common law and under the Employers Liability Act 1880. The pursuer averred that while in the employment of the defender he was engaged driving a dough-rolling machine by turning a handle connected with two cog-wheels, which were not guarded in any way;