Friday, March 20.

FIRST DIVISION.

[Sheriff of Lanarkshire.

SELKIRK (STEVENSON'S TRUSTEE) *v.* CAMPBELL & SONS.

Cautioner—Proof—Liability, whether Primary or Cautionary.

Evidence upon which it was *held*, on the principle of *Birkmyr* v. *Darnell* (1 Smith's Leading Cases, 10th ed. 287), that an obligation for the price of goods was primary and not cautionary.

Thomas B. Campbell & Sons, metal merchants, Glasgow, lodged a claim with James Landells Selkirk, C.A., Glasgow, trustee on the sequestrated estate of the deceased James Wilson Stevenson, to be ranked as creditors for £192, 12s. 7d., and to draw a dividend from said estate.

The trustee having pronounced a deliverance rejecting the said claim, Messrs Campbell & Sons appealed to the Sheriff of Lanarkshire.

The appellants averred that the deceased Mr Stevenson, the bankrupt, was the senior partner of the firm of Stevenson & Lauder, house-factors; that he and his firm "financed" William Stark and his firm, builders in Shawlands; that the said William Stark was in 1892 and 1893 engaged in the erection of dwelling-houses in Shawlands; that the said Mr Stevenson and his firm gave the said William Stark and his firm sufficient money to pay the workmen engaged at said property; and made the other disbursements required for said erections and drew the advances from the superior.

The appellants further averred that William Stark had been under sequestration and obtained his discharge in 1892; that the appellants had sold lead and ironmongery goods to the said William Stark and the bankrupt's firm previous to the sale of the goods for which they now claimed to rank; that the said goods were paid for by Stevenson & Lauder; and that between January and August 1893 the appellants delivered to William Stark goods to the net value of £192, 6s. 7d. "The said goods were sold and delivered on the order and on the credit of William Stark, William Stark & Son, and Stevenson & Lauder, and the appellants looked, and in virtue of the said orders and previous course of dealing were entitled to look, to the said Stevenson & Lauder for payment, as well as the said William Stark & Son."

The appellants went on to aver that in June 1893, in pursuance of the previous practice, they drew on William Stark & Sons for £84, 13s. 2d. on account of the then current account between the appellants and the bankrupt; that the said bill was duly endorsed by Stevenson & Lauder, who thus made themselves liable as obligants for the amount of said bill; that the bill was not met at maturity, though the appellants had continued to supply goods in reliance on Stevenson & Lauder; and that the total claim of the appellants, including fees of noting the bill, was £192, 12s. 7d.

The appellants pleaded—"(1) The appellants having sold and delivered the goods mentioned on the order and credit of the bankrupt's said firm, they are entitled to be ranked for the sum claimed."

The trustee in bankruptcy denied that the said goods were sold and delivered on the order and on the credit of Stevenson & Lauder, and that the appellants were entitled to look to that firm for payment thereof.

The trustee pleaded—"(2) The account for the said goods not having been incurred or guaranteed by the bankrupt's said firm, the trustee's deliverance should be sustained, with expenses."

The appellants produced detailed accounts of the goods supplied by them, from which it appeared that orders for items to the extent of £22, 1s. 10d. were initialed by Stevenson & Lauder.

A proof before answer was allowed, of which the following is a summary:—

Thomas Macfarlane Wallace, cashier to the appellants—". . . I told Mr Stevenson that we were not fond of giving Stark goods unless we had some security for the money. Mr Stevenson told me that Stark was doing work entirely for him. Mr Stevenson was a property speculator. It did not suit him to have the account in J. W. Stevenson's name, but he said his firm of Stevenson & Lauder would bind and oblige themselves to see us paid. . . . It was arranged that Mr Stark was to order the goods, and that we should render the accounts and draw on Stark, and Stevenson should endorse the bills. I looked to J. W. Stevenson as the party ordering the goods. . . . The endorsation, Stevenson & Lauder, was put on the bill founded on with the view of being an obligation to us for that account. . . . The bill was always in that form. The bills were always paid by Stevenson. Mr Stevenson died before the £84 bill became due. But for his death the open portion of the account would have been drawn in the same way. . . . We stopped Stark's account immediately we knew that Stevenson was dead. . . . *Cross-examined*—. . . Mr Stevenson told me that he would see me paid for what Stark ordered."

Ebenezer Gilchrist, a partner of the dissolved firm of Stevenson & Lauder—"My firm acted as financial agents in connection with certain properties in Langside and Shawlands. Stark was carrying on the building operations in connection with these transactions. My firm drew all the advances in connection with the buildings, and paid Stark's wages and the material in connection with the work. . . . I had general instructions from Mr Stevenson that if Mr Stark presented the appellants any orders I was to sign or initial them. (Q) Did you not understand that Mr Stevenson had agreed to pay the material got from the appellants; was that not the footing on which you were dealing with them? —(A) It practically amounts to that."

William Stark, builder—"I understood

by my arrangement with Mr Stevenson that it was on his behalf that I was ordering that material. . . . *Cross-examined*— . . . I got my wages, and the stuff was guaranteed by Stevenson & Lauder. . . . The goods supplied by the appellants was not on my own account; it was for the properties I was completing. I had no credit, and Mr Stevenson was security."

On 5th February 1896 the Sheriff-Substitute (ERSKINE MURRAY) recalled the deliverance of the trustee, and appointed him to rank the appellants to the extent of £107, 1s.

Note.—"The evidence shews that the firm of Stevenson & Lauder were acting as financial agents between the proprietor of lands and the firm of Stark & Son, who were building thereon. Stark being impecunious received no more of the moneys except a good wage and the hope of a reversion. Stevenson & Lauder, as Stark could not get credit, he being bankrupt, endorsed the bills granted by his firm to T. B. Campbell & Sons for the necessary goods got from the appellants, and sometimes initialed orders for goods, the object being, as is admitted by the surviving partner of Stevenson & Lauder, to make themselves liable for the bills and for the orders. Stark's evidence is to the same effect.

"At Stevenson's death the £84, 19s. 2d. bill was current with the endorsation of his firm thereon. An account for £192 was due for goods, among which items to the extent of £22, 1s. 10d. were initialed by Stevenson & Lauder. The endorsations and initialings therefore under the evidence, being intended to shew that the bankrupts (or at least the bankrupt Stevenson—for the appellants only claim against his personal estate) were to be liable in the light of a security, the Sheriff-Substitute considers that he is bound to hold that to the above extent the estate of Stevenson is liable. The bill being £84, 19s. 2d., the initialed orders amounting to £22, 1s. 10d., the total amount is £107, 1s., for which a ranking is given.

"The appellants contend that they are entitled to the whole £192 forming Stark's account, on the ground that Stevenson was really the debtor. But this is not proved; all that is proved is that the endorsation and initialings were given to infer the liability of a security, and the Sheriff-Substitute cannot go beyond the indications thus given." . . .

The trustee appealed to the Court of Session.

Argued for the appellant—Stark alone gave the orders for goods, and the accounts were rendered to him. At the most Stevenson was a cautioner for Stark, and such an obligation could not be proved by parole. *Esto* that Stevenson gave a verbal guarantee, the trustee could not give effect to a claim which might not have been enforceable. The mere fact that the orders were initialed did not infer cautionary obligation. [With regard to the bill, the appellant also submitted an argument based on section 100 of the Bills of Exchange Act 1882, and the case of *Walker's Trustees* v. *M'Kinlay*, June 14, 1880, 7 R. (H.L.) 85.]

Argued for the respondents—Stevenson had in effect said "I will see you paid," and that constituted a primary and not a cautionary obligation—*Morrison* v. *Harkness*, October 20, 1870, 9 Macph. 35. The respondents were therefore entitled to rank on the bankrupt estate.

At advising—

LORD PRESIDENT—I am unable to take the Sheriff-Substitute's view of this case. To my thinking the true question is, were the goods, admitted to have been delivered to William Stark, so delivered under a contract of sale with the bankrupt, or was the agreement between T. B. Campbell & Sons and the bankrupt merely that he should be cautioner for Stark? On this question I adopt the former alternative, and I am therefore for recalling the Sheriff-Substitute's interlocutor and also the deliverance of the trustee, and am for remitting to the trustee to rank T. B. Campbell & Sons for £192, 6s, 7d., being the full amount of their claim, *minus* 6s. for noting a bill.

The question which I have stated is to be determined on the evidence as a whole. The bankrupt was a building speculator. He found Stark in labouring circumstances with a contract on hand which he had not the means to execute. Thinking there was money in the contract, the bankrupt is said to have "financed" Stark. What this exactly means, so far as concerns the ultimate adjustment of accounts between the bankrupt and Stark, I do not know, for the parties were unable to explain. It is enough to know that the bankrupt had a material interest to get the work finished, and so far as the present question is concerned, we are required to see what he did rather than why he did it. Now, his partner says quite plainly, "My firm drew all the advances in connection with the buildings, and paid Stark wages and the material in connection with the buildings." If this be so, then the case of T. B. Campbell & Sons is simply an instance of the system, for their account is for material in connection with the buildings. When it is read as a whole I think that the evidence comes to this, that the execution of the contract was undertaken by the bankrupt, Stark being reduced to the position of a servant on wages, and that this was the footing on which T. B. Campbell & Sons supplied the material in question.

In my judgment the present case is in substance and very nearly exactly that stated by the Court in *Birkmyr* v. *Darnell*, 1 Smith's Leading Cases, 10th ed. 287—"If two come to a shop and one buys and the other . . . says, 'Let him have the goods, I will be your paymaster' . . . this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant."

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court recalled the interlocutor of the Sheriff-Substitute, and remitted to the trustee to rank the respondent for £192, 6s. 7d.

Counsel for Appellant—H. Johnston—Dundas. Agent—David Turnbull, W.S.

Counsel for Respondents—Lees—A. S. D. Thomson. Agent—J. Stewart Gellatly, S.S.C.

Friday, March 20.

FIRST DIVISION.

BLACKBURN'S TRUSTEES *v.* BLACKBURN AND OTHERS.

Marriage-Contract—Vesting of Provisions to Children—Whether at Dissolution of Marriage or Term of Payment—Survivorship Clause—Power of Appointment.

By antenuptial contract of marriage a husband bound himself to make payment to the child or children of the marriage of a certain sum of money, varying according to their number, "to be payable at the first term of Whitsunday or Martinmas after the death of the longest liver of the spouses." The provision was to be divisible among the children, if more than one, in such proportions as the husband should appoint by writing under his hand at any time of his life, "and failing such appointment, to be divided equally among the survivors of them and the issue of such as may have predeceased leaving issue, such issue succeeding only to the shares to which their parents would have been entitled had they been in life."

By a subsequent deed the husband apportioned certain sums to each of the four children then surviving, "and the survivors and survivor of them, and the issue of such as may have predeceased *the term of payment* leaving issue, equally between and among them, such issue succeeding always only to the shares to which their parents would have been entitled had they been in life,"—this clause differing from the survivorship clause in the marriage-contract by the addition of the words in italics.

In a competition between a son's widow and two surviving children of the marriage, *held* (1) that the words of survivorship in the marriage-contract referred, in accordance with the general rule, to the period of payment, and that consequently the provisions to children did not vest till after the death of the longest liver of the spouses; and (2) that the deed of appointment, which merely carried out the provisions as to survivorship of the marriage-contract, and confined the provisions to the same persons, was valid.

By antenuptial contract of marriage dated 4th June 1850 Andrew Blackburn bound and obliged himself to make payment to the child or children of his marriage with Mrs Elizabeth Blackburn of the following sums of money, viz., "if one child Five thousand pounds, if two children Six thousand pounds, and if more than two Eight thousand pounds, to be payable at the first term of Whitsunday or Martinmas after the death of the longest liver of him and the said Elizabeth Mary Buchanan, with interest during the non-payment thereof, which sum, in the event of there being more children than one, shall be divisible in such proportions as the said Andrew Blackburn shall appoint, by a writing under his hand at any time of his life, and, failing such appointment, to be divided equally amongst the survivors of them and the issue of such as may have predeceased leaving issue, such issue succeeding always only to the shares to which their parents would have been entitled had they been in life." He further bound himself to make payment to trustees of the sum of £5000, to be applied after his death in paying an annuity to his widow, and after her death to form part of the provisions in favour of the children, "failing whom the same shall upon the death of the said Elizabeth Mary Buchanan be paid over to the heirs and assignees of the said Andrew Blackburn." On 5th March 1885 Mr Blackburn executed a deed of apportionment in which, on the narrative of the marriage-contract, and in consideration that there were then four children of the marriage surviving, viz., John Blackburn, Andrew Buchanan Blackburn, David William Ramsay Blackburn, and Mrs Euphemia Mary Ramsay Blackburn or Fergusson, he apportioned the provisions as follows:—"Therefore I do hereby apportion out of the said sums of Six thousand pounds or Eight thousand pounds as the case may be, to the said David William Ramsay Blackburn, whom failing by his predeceasing the term of payment, his issue, Two hundred pounds: And I apportion the remainder of the said sums of Six thousand pounds or Eight thousand pounds as the case may be to and between and among the said John Blackburn, Andrew Buchanan Blackburn, and Euphemia Blackburn or Fergusson, and the survivors and survivor of them, and the issue of such as may have predeceased the term of payment leaving issue, equally between and among them, such issue succeeding always only to the shares to which their parents would have been entitled had they been in life."

Mr Blackburn died in 1885 survived by Mrs Blackburn (who is still alive) and the four children mentioned above. David William Ramsay Blackburn died in October 1888 unmarried and intestate, and Andrew Buchanan Blackburn died on 6th August 1895 survived by a widow (Mrs Elizabeth Blackburn) but without issue. The said Andrew Buchanan Blackburn by testamentary writing bequeathed his whole estate to his widow, and appointed her his sole executrix.

Questions having arisen as to their re-