Court to prevent this action of poinding the ground being carried any further, and he moves the Court "to restrain the said Scottish Provincial Insurance Company from taking any further proceedings in the said actions of poinding the ground or in any other action, suit, or proceeding against the company having for its object to attach or affect the property of the company." He founds upon the 163d section of the Act of 1862, which provides that "where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up, shall be void to all intents."

Now, it appears that the order for supervision was pronounced by the Court on a petition presented on the same day upon which the summons of poinding of ground was served, and an argument upon this point was addressed to us in the course of the discussion. But I do not think it necessary for the purposes of the present decision to determine that point, or to consider whether in a voluntary liquidation continued under the supervision of the Court the commencement of the winding-up is to be held to be the date of the resolution to wind up voluntarily, because I am clearly of opinion that the proceedings which are here sought to be restrained are not within the scope of the 163d section. An action of poinding of the ground is like an adjudication, or the sale of an estate under the powers of a bond, or an action of maills and duties. These are all diligences which are open to a heritable creditor in order to enable him to give effect to his secured preference, and so far as that security extends he can make it effectual even against a trustee in a sequestration, and all the more against a liquidator in a liquidation.

The security which the heritable creditor holds over the moveables is the same as the security which he holds over the *fundus* of which the moveables are accessories. It may vary, no doubt, from time to time as the moveables vary, but it is secured to him by his infeftment, and accordingly his action of poinding of the ground has not the effect of creating any preference of new, but only of giving effect to a preference already in existence, while in competing actions of poinding of the ground it is priority of infeftment which secures a preference.

It would be an entire misconstruction of the 163d section if it was held to apply to a case such as the present. The object of that section is to prevent anyone in a liquidation under supervision of the Court from acquiring a preference, but as that is not the object of the present action of the respondents I think this note for the liquidator falls to be refused.

LORD SHAND—This is only one of a series of cases which have been recently before this Court in which the heritable creditor has by means of his diligence been successful in carrying off the whole moveables on the land with the result of leaving nothing to meet the claims of the general body of creditors. The property of these companies consists chiefly in their buildings and furnishings, and it has repeatedly occurred that the heritable creditors have stepped in after the liquidation of the company has commenced and carried off the whole of the furniture in the buildings to the loss of the other creditors. This evil I have repeatedly referred to, and it has been remedied so far as bankruptcies are concerned. I can only say that I wish a similar remedy was provided in liquidations.

With this observation I agree entirely in what your Lordship has said as to the present application. A poinding of the ground cannot in any sense be said to be an "attachment, sequestration, distress, or execution" in the sense of section 163, and in that view of the matter I agree with your Lordship that we must refuse the note for the liquidator.

LORD ADAM—I am entirely of the same opinion. The heritable creditor here has not, by means of his poinding of the ground, acquired a preference over the moveables. All that he has done has been to make an existing security available.

LORD MURE was absent.

The Court refused the note.

Counsel for Liquidator—J. P. B. Robertson, Q.C.—Lorimer. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Scottish Provincial Assurance Co. —D.-F. Mackintosh, Q.C.—Jameson. Agents—Auld & Macdonald, W.S.

Saturday, March 20.

SECOND DIVISION.

RITCHIE *v.* CLYDESDALE BANK, LIMITED.

Bank—Banker's Obligation to Customer—Overdraft.

It is not a relevant ground of action for damages against a bank for having dishonoured a cheque which there were not funds to meet, that the bank had been in the practice of frequently allowing the account to be overdrawn, and had thereby incurred by implication an obligation to allow a similar overdraft, or at least not to refuse to honour the cheque without notice.

An action was brought against a bank for having suddenly refused to allow an overdraft, and thereby injured the credit of its customer, the pursuer, and so conduced to his sequestration. No express agreement to allow the overdraft was proved, and the pursuer relied on the previous custom of the bank and on a conversation by which he had been led, as he averred, to believe that the manager would allow a certain overdraft. *Held* (1) that no such obligation could be inferred from the fact that previous overdrafts had been allowed; (2) on the proof, that the pursuer had not been led to believe that it would be allowed, and (3) that, in any view, the overdraft he made was greater than that which he averred he had been led to believe he might have.

Defenders therefore *assoilzied.*

From October 1884 to 28th March 1885 John Sibbald Ritchie, the pursuer of this action, and

R. S. L. Hardie, stockbrokers, carried on business as stockbrokers in Edinburgh under the firm of Ritchie & Hardie, and they kept an account with the Clydesdale Bank, Limited, at the office of the bank in Edinburgh. The firm and the partners of it were sequestrated on 17th April 1885, the firm having previously, as hereinafter explained, been declared defaulters on the Stock Exchange.

This was an action by Mr Ritchie to recover damages from the Clydesdale Bank for an alleged wrong done to him by them in stopping the firm's account and refusing to honour their cheques on 28th March 1885, with the result of bringing out the sequestration of himself and his firm.

The material averments of the pursuer were as follows, viz., that prior to the formation of his firm he had dealt with the Royal Bank, but that his partner, Hardie, having previously dealt with the defenders, and having a security there which was continued to the firm, the defenders' agent, Mr Henderson, had expressed a wish that the firm should deal with the defenders, and promised them facilities such as Hardie had before enjoyed; that notwithstanding the withdrawal of the security the promise that facilities should be given was continued, and in point of fact the only security held by the defenders from 8th January till 28th March 1885 was worth about £250; further, that the practice on the Edinburgh Stock Exchange was that shares were bought and sold for fortnightly settlement, the purchaser sending his broker a cheque for the price the day before the settling-day, and it being that broker's duty on the settling-day to pay over the price to the selling broker in return for the transfer which was then delivered on the seller's behalf; that the 14th and 28th March 1885 were settling-days; that at 14th the firm had overdrawn their amount £1300, or deducting the £250 security, £1050; that during the week ending on 28th Hardie had casual interviews with Henderson at the bank, when the latter asked that the balance might be kept down so that his quarterly return to the head office, then due, might be the more favourable; that Hardie promised to do what he could to this end, though he had a large amount for settlement on 28th. "(Cond. 6) . . . On Friday, 27th March, Mr Hardie went to the bank for the purpose of paying in cheques to the amount of £1805, and while he was in the course of doing so he had another interview with Mr Henderson, who, referring to his former conversation on the subject of the account, asked the state it was then in—meaning after credit had been given for the sum which had just been paid in. Mr Hardie said there was a small balance (£300) at credit, but added that the firm would require an overdraft of as much as they had had at last settlement (£1300), or more. Mr Henderson asked how much more. Mr Hardie replied, £2000 at the outside. This conversation was held in the telling-room. Mr Henderson then took Mr Hardie to his private room, and had further conversation as to the outstanding balances due to the firm. He suggested the firm should press for payment, offering to discount a bill for part of one of the balances mentioned, and which bill was subsequently got. Mr Hardie further stated that his partner Mr Ritchie had never acted in the way of 'squeezing clients,' but he would do what he could to get in moneys due to the firm. Nothing occurred at this interview to induce Mr Hardie to suppose that his firm's cheques would not be cashed on the Saturday, and Mr Henderson well knew that it was his belief and expectation that they would be cashed. (Cond. 7) The said cheques, representing as aforesaid the sum of £1805, were cheques which the firm had received from customers to pay for shares and stocks that had been bought for delivery at the settlement on Saturday 28th March. Mr Henderson knew the purpose for which these cheques had been received. He saw Mr Hardie pay them in. He knew also that they could not be lawfully applied, and were not intended to be applied, in reduction of the pursuer's firm's account with the bank, and that they would not have been paid into the bank at all but for the understanding and expectation that the firm's cheques would be honoured as usual, and that they would have been at once re-claimed or stopped if he had refused Mr Hardie's request to be permitted to overdraw to the extent of £2000 asked, or if the least hint had been given that any change was in comtemplation in the course of dealing which had subsisted between the bank and the firm."

The pursuer then set forth that it had been arranged before this conversation that the defenders should advance £1500 to take up certain Arizona shares upon the joint acceptance of the firm and two clients, which the defenders agreed to discount, a transfer of the shares being taken to trustees for the defenders, and being ready for delivery on the 28th. Further, that having paid in the £1805 on Friday (27th) and having other funds amounting to £1323 ready to lodge on Saturday (28th), the firm drew cheques on the defenders for £3356, the whole sum they required for settlements on the 28th, the effect of which would have been to leave their account practically as it stood before the £1805 was paid in; that the firm was perfectly solvent, and nothing had occurred since Henderson's interview with Hardie to justify a suspension of its credit, but notwithstanding, about 12 o'clock (half-an-hour before the Stock Exchange closed) on Saturday the 28th Henderson sent for Hardie and told him the cheques of the firm would not be cashed; that Hardie told him the £1323 above mentioned would be lodged, that he had a bill for £250 and £50 in notes, and that the securities then in the bank were worth £239, 3s. 3d. but that Henderson said that was not enough without putting the defenders again in advance, which he would not do; that there being only a few minutes to spare, it was impossible to make other arrangements, and the firm's cheques being returned they were declared defaulters and the pursuer irretrievably ruined, and the firm which had been doing a safe business worth £2000 a-year brought to sequestration, whereas if reasonable notice of Henderson's intentions had been given money would have been gathered to meet the firm's engagements and the disaster averted. "(Cond. 12) It is averred that the action of the bank having been in violation of their express agreement to allow the account to be overdrawn, as well as of the course of dealing which hitherto subsisted—a course of dealing which no honourable merchant or banker would have terminated without reasonable and timeous notice—the defenders are legally responsible for all the loss and

injury which have been the consequence. The pursuer has suffered grieviously in health, fortune, and character. . . . This action has become necessary for the vindication of his character, and the restoration of the position and credit which he held before the bank caused his ruin. In name of damages and *solatium* he claims £5000."

Action was reserved for re-delivery of the cheques for £1805 paid in on 27th, the pursuer averring that the application of them to the debit balance was an attempt to use for that purpose cheques of the firm's customers entrusted to them for a specific purpose.

The pursuer pleaded—"(1) The defenders having, in breach of their undertaking to honour the drafts of the pursuer's firm, wrongfully failed so to do, are liable in damages. (2) The said £1805 cheques having been paid in by the pursuer's firm, in the belief and expectation induced by the defenders that they would be permitted to draw to the extent intimated, the defenders are precluded from denying that they were under a promise and engagement to the effect alleged. (3) In no event were the defenders entitled to close the pursuer's firm's account without timeous notice, and the defenders are liable in damages as concluded for."

The defenders denied that the firm were allowed unsecured overdrafts when desired, but only temporarily and by special arrangement. They also denied the accuracy of the pursuer's statement as to the conversations between Henderson and Hardie. They pleaded that the pursuer's statements were irrelevant, and that in the circumstances they were entitled to dishonour the cheques of the pursuer's firm.

The action was intimated to the pursuer's trustee, who did not appear.

The Lord Ordinary (Fraser) allowed a proof.

The pursuer examined Mr Henderson. He deponed that the account of the firm on the 26th March was overdrawn £1482, that on the 27th Hardie paid in £1805, a great part of which was in cheques [these were the cheques of the firm's customers for settling the price of the shares they were buying]; that seeing him in the bank he spoke to Hardie on this occasion to remind him of a previous promise to pay up the overdraft; that Hardie said he had just been paying in money; that he (Henderson) told him (Hardie) overdrafts would not be repeated; that he asked him what he had to pay out and get in on the next day (Saturday 28th), and from his answer it appeared that he would need a good deal of money then but not how much; that on £1000 to £2000 being spoken of as what might be required he told him they would not get it; that on 28th the cheques drawn by the firm for their settlement that day came in from the various banks to which the sellers of stocks had paid them in about 11·30; that he saw them to be far above what Hardie spoke of the day before; that he sent several times for Hardie, and on his arriving and proving to have insufficient money—what he had and what he offered being, after taking into account all at his credit, as margin on a security, insufficient to meet the cheques that came in—still refused to cash the cheques, when Hardie went away to get help from a friend whom he expected to aid him; that he then deferred action till there was just time to send back the cheques to the other banks as dishonoured, at 12·30; that it was usual before stopping an overdraft to give notice to the customer, according to the circumstances of the case, that he considered his conversation on the Friday, taken with previous conversations, good notice; that Ritchie & Hardie had had overdrafts on previous occasions; that he did not know till after the stoppage of the cheques that the £1805 paid in on the Friday consisted of customer's cheques, Hardie having himself represented it as intended to reduce the overdraft.

On the other hand, Hardie, whom the pursuer also examined, deponed that the £1805 was paid in in customer's cheques to meet the settlement, not to pay off the overdraft; that he had told Henderson on the 27th they would require about £2000 of an overdraft on 28th, and Henderson never said a word about refusing overdrafts and stopping the account, and that the result of the conversation was that it was agreed that they were to be allowed to overdraw at least up to £1800; that on the 28th he went to the bank and showed Henderson that if the cheques were honoured the account would stand just as it did before the £1805 was paid in, but that Henderson told him he had only a few minutes to provide the money, otherwise the cheques would be dishonoured; that he left the bank, and while consulting with a gentleman, who was already his cautioner on the Exchange, saw a porter come in from the National Bank with one of the dishonoured cheques, which therefore must have been sent off as soon as he left Henderson; that the firm had been overdrawing frequently for some time, and had no warning up till 28th of the course Henderson was to pursue.

The pursuer led evidence to show that with warning he could have produced sufficient money on the 28th to avoid what had occurred.

It appeared from the evidence of the cheque-clerk in the defender's bank that on the 27th, immediately after seeing Hardie, Henderson ordered that overdrafts should not be allowed, telling the witness the account was now put on the right side and there were to be no more overdrafts.

The Lord Ordinary assoilzied the defenders, finding no expenses due.

"*Opinion.*—The pursuer's firm of Ritchie & Hardie opened an account with the defenders at their branch office in George Street, Edinburgh, on the 13th of November 1884—which account consisted of payments of sums of money by Ritchie & Hardie, and the drawing from the defenders (who are money-lenders) of such money as they needed in their daily business. Upon the 28th of March 1885 the defenders, through their assistant manager in Edinburgh, Mr Henderson, abruptly closed the account, and refused to honour the cheques which Ritchie & Hardie had passed upon that day. The result was that the credit of the firm of Ritchie & Hardie, and of the pursuer as one of the members of that firm, was destroyed, and sequestration of the estates of both the partners shortly afterwards followed.

"This is an action of damages at the instance of John Sibbald Ritchie, the senior partner of the firm, against the Clydesdale Bank (Limited) for the abrupt closure of the account and the consequent ruin of the pursuer. The defence of

the bank is, that they had a right to close the account at any time they pleased, and this defence is perfectly sound in law, unless there was an agreement, express or implied, that the cheques of the firm of Ritchie & Hardie should continue to be honoured. Express agreement is not alleged upon the record, but it it said that something tantamount to an express agreement has been proved.

"On the 27th of March 1885 the firm of Ritchie & Hardie had overdrawn their account to the amount of £1482, 0s. 2d. On that day, however, they had paid into their account the sum of £1805 which turned the balance in their favour to the amount of £322, 19s. 10d. On this day they drew out £16, 5s., which reduced the balance at their credit to £306, 14s. 10d. These £1805 were contained in cheques of customers of Ritchie & Hardie, given to them for payment of stocks which the customers had purchased, and which were to be delivered on the following day, the 28th of March. The money was therefore really the moneys of the customers of the firm, and Mr Henderson, the assistant manager for the defenders, in the George Street Branch in Edinburgh, who saw the payment made of the £1805 to the teller of the bank knew this perfectly well. Still the payment was made as for Ritchie & Hardie.

"On the 28th March Ritchie & Hardie drew cheques upon their account which were presented to the amount of £2800, which would have exhausted the small balance then at their credit, and left a very large sum overdrawn if the cheques had been honoured.

"The cheques so presented were dishonoured by the bank upon the 28th of March. This was immediately intimated upon the Stock Exchange and to the other banks, and the result was the collapse of Ritchie & Hardie.

"It is proved that the firm (taking into account the £1805 which was paid on the 27th of March), tendered or had at their command funds sufficient to meet the whole cheques which were drawn, so far as these cheques increased the overdraft beyond the sum that had been overdrawn before the £1805 was paid in. In short, if the bank had honoured the cheques presented to them on the 28th of March they would have been in the same position as they were in on the morning of the 27th, that is to say, with a sum overdrawn to the amount of £1482.

"The bank were in the habit of allowing the firm to overdraw their account. It was indeed in consequence of the solicitations of Mr Henderson, their assistant manager, that the firm opened their account with the bank at all. No sort of unpleasantness occurred between the firm and Mr Henderson until a week before the end of March, when Mr Henderson became uneasy at the state of the account. He had heard of the loss which the firm had made through a defaulting debtor, Ligertwood, of Aberdeen, to the amount of £600. This induced Mr Henderson to require the firm to keep down these overdrafts, which Mr Hardie for his firm promised to do. On the 27th of March (which was a Friday, and was the day preceding the settling-day on the Stock Exchange), Mr Hardie, after having paid into the bank the £1805, had a conversation with Mr Henderson at the latter's request in the telling-room, and afterwards in Mr Henderson's private room, the subject of the conversation being as to how much money Hardie would need for next day's settlement, and about the propriety of keeping down the overdrafts. Henderson says that Hardie intimated that he would need £1500. Hardie says that he intimated he would need £2000 of overdraft. The amount is of no consequence. If the Lord Ordinary could hold it to be proved that Henderson had agreed to give either £1500 or £2000 he would sustain this action of damages. But he cannot find it to be so proved. There can be on the evidence no doubt that Hardie left the bank that day after his conversation with Henderson in the firm and assured belief that Henderson would accommodate him on the morrow, as he had accommodated him on previous days, with an advance of money sufficient for his needs, and there can be no doubt that Henderson knew that Hardie had left him under that belief, and he did not disabuse him, as he ought to have done, of the delusion and mistake under which he was labouring. On the contrary, the moment Hardie was out of the bank Henderson stepped over to the cheque-clerk and said to him that the account was now put on the right side (the £1805 having been paid in), and to stop all further overdrafts. Hardie in simple confidence goes to his office, and he shows what the conclusion he drew from the conversation with Henderson was by not saying one word to his partner, the pursuer, of the peril in which the firm stood. He could not have so acted if Henderson had informed him, as he said he did, that the cheques would not be honoured on the morrow. The Lord Ordinary does not believe that Henderson said this to Hardie.

"The cheques were presented on Saturday the 28th, and payment was refused notwithstanding that Hardie showed Henderson that he had money sufficient, if the cheques were honoured, to leave the account only with the sum due as it was on the morning of the 27th. The whole thing was roughly done; it was contrary to the usual custom of banks. To give twenty minutes' notice that the account was to be closed, and that upwards of £2000 must be raised within these twenty minutes, is so contrary to all the established ways of dealing with a customer that it is very difficult to defend it, but still the Lord Ordinary is unable to spell out of the facts and occurrence an agreement to honour the cheques presented upon the 28th of March 1885.

"The mere fact that the pursuer and his firm had been allowed to overdraw their account on former occasions of Stock Exchange settlements does not operate so as to bar the money-lender from stopping his advances. His business is of somewhat critical a character, depending upon the varying credit of his customers, and he cannot be tied down in reference to this action today by his action last week. Some consideration no doubt is due to a customer before his account is closed. Some notice is given (which was not done here) by every bank which wishes to retain and encourage its business, before such an abrupt termination shall be brought to a customer's credit. Mr Henderson here brought two men to the ground who might but for him have been in the enjoyment still of their income of £2000. But for such a result the law cannot in the circumstances of this case give any redress in the way of damages."

The pursuer reclaimed, and argued—There was an agreement averred and proved by the bank through their manager to honour the pursuer's cheques, or at anyrate there had been conduct such as led the pursuer to believe his cheques would be honoured—*Smith* v. *Hughes*, June 6, 1871, L.R. 6 Q.B. 597, opinion of Lord Blackburn, 607; Bell's Prin., sec. 231; *Collinson* v. *Lister*, Dec. 3, 1855,; 7 De Jex, Macn. & Gordon, 634. But it might be stated as a proposition applicable to this state of facts, that once the relation was established of banker and creditor, it was the duty of the banker (on arriving at that determination) to intimate at once to the customer that his cheques are not to be honoured. When once the banker had intimated his willingness to honour the customer's overdrafts he was not entitled to stop this without giving notice—*Smith* v. *Hughes*, Lord Blackburn's opinion, *supra; Marzetti* v. *Williams and Others*, Nov. 18, 1830, 1 B. & A. 415. The Lord Ordinary had found the facts in the pursuer's favour, but had shrunk from deducing the sound legal inference from these facts.

The defenders replied—Unless it was proved that such an agreement had been made, then the agent could not by his refusal to honour the overdrafts render the bank liable in damages. Such an agreement, which was just a gratuitous promise, could only be proved *scripto*. No such proof of an express agreement had been offered. The implied agreement said to have been disclosed by Hardie's leaving the office in the belief that his cheques were to be honoured failed also, because it was proved that he did not leave the office with this idea.

At advising—

Lord Young—This is an action by a customer of a bank against that bank for damages, the ground of action being that on a certain occasion and under certain circumstances which are set forth on the record, the bank declined to honour his overdrafts. It is admitted that if the bank had honoured the drafts, for not honouring which he seeks to make them liable in damages, his account would have been overdrawn to the amount of £2500. I shall explain exactly how I reach that sum immediately.

The action is unique, altogether unprecedented. The parties could refer us to no case in this country or in England at all resembling it—an action of damages against a bank for not permitting an account to be overdrawn. One therefore naturally looks somewhat carefully to the statement on which an altogether unprecedented action is presented to the Court. I have examined the averments very carefully, and without going into them in detail—which in the view I take of the case would be unprofitable—I think I accurately represent them generally thus.

The pursuer Mr Ritchie says he had been a customer of the bank for some time. It was not a long time—I think it could be measured by months — still he had been a customer of the bank for some time. He also says that he had been permitted to overdraw his account upon previous occasions, and that he had reasonable grounds for believing that the accommodation—the favour—which had been extended to him on former occasions, would be repeated on this occasion in question; but that as it was not repeated as he had expected, he has suffered a legal wrong, for which he is entitled to compensation in the shape of damages. He says further—and that is the only other way in which the case is put—that immediately before the overdrafts were refused to be honoured he had an accidental—not a premeditated but an accidental—interview with the manager of the bank, who, if he did not promise that the overdrafts would be honoured, at all events spoke to him in a way that encouraged him to believe that they would.

In these words I think I have stated the grounds of this unique, unprecedented action quite accurately as they are presented on this record. I confess that if the case had come before me originally upon such a record I should without hesitation have dismissed it without inquiry. I do not understand the proposition otherwise than as an altogether extravagant proposition—the proposition, namely, that any bank or banker is under a legal obligation to permit a customer to overdraw his account. It is ridiculous upon the statement of it, and it becomes a shade less absurd —hardly appreciably less absurd—if you say that the bank or banker had been pleased to allow the customer to overdraw upon previous occasions. But to infer a legal obligation from that circumstance so that the bank should be liable in damages if the favours which had been previously given—there being no obligation in the world to grant them at all—were not continued,—I say that is a proposition only a shade, if indeed it be a shade, less extravagant than the other.

I suppose it is a familiar fact that the customers of banks are permitted to overdraw their accounts. If a cheque for more than the amount at his credit is presented, the bank apparently honours it according to the amount of the cheque, and the banker's opinion of the customer. I daresay the occasions would be numerous enough in which a customer would be very angry and feel himself very ill-used if a cheque of his beyond the amount of his account, but still within a reasonable amount, were dishonoured. But even in such a case, his remedy would not be an action of damages against the bank, who was in no way bound to advance money by overdraft, but in discontinuing to bank with a disobliging and unaccommodating banker. I cannot conceive any other remedy which he would have. Customers of banks, and the banks themselves, may be very fairly allowed to take charge of their respective interests in that respect. It is repetition, and therefore superfluous, to say that as a customer would have no action of damages against a bank for invading or withholding any right of his, or doing any legal wrong in refusing to honour a first overdraft, a legal wrong and legal remedy would not arise on a bank refusing the second or the third time, or for that matter the hundredth time, to honour an overdraft. There never is any legal obligation in such circumstances. It is for the consideration of the bank on each occasion whether they will honour an overdraft or not. I therefore attach no significance to the fact, as it is averred, that the pursuer had been permitted upon previous occasions to overdraw his account—that is to say, that his overdrafts had been honoured; and as for evidence, I should not have allowed evidence upon it, and am therefore unwilling to examine the evidence at all. But then the pursuer says that the manager of the bank in Edin-

burgh either promised on the day before his overdrafts were refused, or spoke so encouragingly to him as to create the belief in his mind, or encouraged him to retain the belief or expectation, that his drafts would be honoured on the following day; and that his expectation so encouraged being disappointed, a legal wrong was done to him for which he is entitled to the remedy of damages. I think this is just as extravagant a proposition as the other. It was explained to us very frankly that if this conversation with the manager had not occurred the pursuer would have maintained the present action all the same—that it was an accidental conversation not premeditated by the pursuer, who by his partner was accidentally in the bank for another purpose, when he was, unexpectedly to himself, addressed by the manager. And to say that this was a paction, an obligation for the breach of which damages may be recovered upon parole evidence of the import of the conversation, is, I repeat, a proposition which I cannot give countenance to for a moment. Even if you take the pursuer's averments upon it, which in refusing proof as I should have done I would be obliged to do, it is a *nudum pactum*—so distinctly a *nudum pactum* that I could not wish a better to instance as an example of a *nudum pactum ex quo non oritur actio;* it is as naked as anything could be which is capable of being represented as a *pactum*—an accidental conversation followed by nothing!

Therefore I should altogether have declined to send this case to proof, and thrown out unhesitatingly this admittedly unique and altogether unprecedented action, upon the statement which showed it to be unique and unprecedented.

But inquiry was allowed; and I refer to the proof only for the purpose of doing the manager of the bank the justice to which I consider he is entitled, of saying that in my opinion—which is as clear and distinct as any opinion I am capable of forming upon such a matter can be—his conduct was in no respect blameworthy. I entirely believe every word he says; and I altogether approve of his conduct in the matter, and dissent from any expression which may be construed into a reflection upon his conduct. The pursuer's case against him is that he was desirous of making this over-advance to him—that he, the bank manager, ultroneously and gratuitously came forward and gave him the assurance that he would have it, either in express terms or by using words which encouraged that expectation, and that then he turned round to the cashier and said, "Now, see that that man's cheques are no further honoured, and that there is no overdraft of his account." If he had so acted he would certainly have acted in a most censurable manner. He would have acted in violation of his duty to his employers, and have been doing a most uncalled for and inexplicable injury to the pursuer. But what he himself says he did is exactly what one would have expected from a gentleman in his position. That he should remonstrate against past overdrafts upon this account, and that he should say it could not be permitted to be continued, was his duty to his employer, and was his only safe course for himself. But the statement is made, nevertheless, that he came forward to the pursuer, who was in the bank for another purpose, and gratuitously addressed him with words to encourage the belief that his cheques would be honoured on the following day, or even assured him that they would. I asked more than once if any motive could be suggested in explanation of Mr Henderson acting in a manner contrary to his duty to his employers, and contrary to his duty to himself, and doing the most ultroneous injury that could be suggested to the pursuer. None in the world was suggested, and yet we are asked to disbelieve the account which he gives himself—an account in accordance with his duty, and in accordance with good sense, and to believe another which would impute a violation of his duty to him, as well really as an injury to himself and to the pursuer, without any cause whatever.

Something was at one time attempted to be made of the fact that the pursuer had upon that occasion—upon the Friday—reduced the then overdraft upon his account by paying in certain cheques which he had received. But this was done before any conversation with the manager, and without intending that there should be any conversation with the manager, either at the time or subsequently, upon the subject. And so far as I can judge the pursuer could do nothing else. We know enough of the ordinary course of business to know that these cheques which the pursuer paid in would be crossed cheques, and could only be got through his bank, and could not be got by the banker until they became due, which they did not until after this catastrophe on the following day, in respect of which the action is brought. He could have made nothing of these cheques except by paying them into the Clydesdale Bank. He might, indeed, have tried the adventure. It would have been a very risky one—of opening an account with another bank, and paying in these cheques to his account there. Suppose he had gone to the Bank of Scotland or the Royal Bank with that end in view, they would have said, "Very well, if you open an account here we will pay these to your credit when they are paid." They could not, however, be paid in time to prevent the catastrophe on the Saturday. His only chance was to pay them into the Clydesdale Bank and take his chance of the manager being good-natured enough to permit the overdraft on the Saturday. But, as I have indicated, this paying in was altogether unconnected with the conversation. This is practically Mr Henderson's account of that conversation—"I saw him in the bank and went up to him and asked if he had squared his account, which I had complained of as being overdrawn, and he said he had just done it, and I ascertained that he had paid in those cheques, and I then told him that any overdrafts on the following day would not be honoured unless he brought securities, and I told the cashier the same thing." Now, I say that is exactly what was to be expected of Mr Henderson in the discharge of his duty to his employers and to himself. To say that he gratuitously told the pursuer that he would get his cheques honoured, and then said to the cashier, "Don't honour them," is an imputation for which I think there is no ground whatever.

I have thought it my duty to say so much in justice to Mr Henderson, of whom I have no knowledge at all. I do not remember even to have heard of him before. But he is in the position of manager of this bank in Edinburgh, and an imputation upon his character would be

very serious. I do therefore consider it my duty to say there are no grounds for that imputation in this case.

Upon these grounds, which I have entered upon somewhat fully, perhaps too fully for an altogether unprecedented action, I propose that we sustain the defences. The interlocutor of the Lord Ordinary assoilzies, and it is only necessary perhaps to affirm. It will be seen from what I have said that I should have arrived at the same conclusion independently of the evidence altogether.

LORD CRAIGHILL—I entirely agree in the judgment your Lordship has proposed, and in every word your Lordship has uttered in explanation of your opinion.

The reclaimer Mr Ritchie was a partner of the firm of Ritchie & Hardie, stockbrokers in Edinburgh, whose estates were sequestrated in April 1885, and the defenders are the Clydesdale Bank, Limited, with whom the firm of Ritchie & Hardie kept their bank account. The action is one for damages on account of alleged breach of engagement to honour the drafts of the pursuer which might be presented to the bank on the 28th of the preceding month of March, provided these were not to an extent greater than £2000. The cheques drawn by Ritchie & Hardie which were presented were considerably in excess of the £2000, and all were dishonoured. There can be no doubt that if there was an understanding such as is alleged by the pursuer, his firm suffered serious injury, for its credit was at once overthrown, and the sequestration of their estates in the following month was, in their circumstances, the necessary result.

The Lord Ordinary has come to the conclusion that the alleged undertaking or agreement has not been established, and consequently he has assoilzied the defenders. The question is whether cause has been shown for recalling the absolvitor and allowing a proof, or remitting the cause to a jury, that the damages to which the pursuer is entitled may be assessed?

It is not easy, from the terms of the record, to ascertain what precisely is the ground of action; but according to the interpretation of the several expressions used in the record given by the pursuer's counsel in the course of the debate it appears that the *first* ground is an agreement or undertaking that cheques to the specified amount of the firm of Ritchie & Hardie should be honoured on the 28th March; and *secondly*, that whether there was an express agreement or not to this effect, the course of dealing between Ritchie & Hardie and the bank was such as entitled Ritchie & Hardie to draw the cheques which were dishonoured, notice to the contrary not having been given by the bank.

I have read and considered the record and the proof, and the conclusion to which I have come is that the Lord Ordinary has done right in pronouncing the interlocutor against which the pursuer has reclaimed.

At one period in the course of the discussion there was a probability that Mr Henderson, the assistant manager's power to make such an agreement as that alleged by the pursuer might be called into question, and had it been so an important point would have arisen for determination, but later on the Court were made aware that the bank had no desire to bring Mr Henderson's powers on this occasion into question. They are content that the case shall be dealt with as it would have been if Mr Henderson himself, in place of the bank, had been the party pursued. And this resolution is only what was in the circumstances to be expected. The legal question last referred to, therefore, has not been presented for decision.

The first ground on which I think the defenders are entitled to be assoilzied is, that even if the agreement alleged by the pursuer had been entered into, the cheques which were presented on the following day were far in excess of the £2000, which was the utmost for which, on his own showing, the pursuer was entitled to expect that an overdraft would be allowed. Cheques to the extent of £3300 odds were sent into the bank, and giving Ritchie & Hardie credit for the £300 odds which were at their credit on the morning of March 28, and for moneys put to their credit in the course of that day, there would have remained a sum of about £2500 as an overdraft, had the cheques in question been honoured. The bank were not entitled to select; they behoved to honour all or to honour none; and the result necessarily was that if an overdraft to a greater extent than that to which the pursuer says he was entitled was not to be allowed, there was no overdraft to which the pursuer's firm could lay claim under his alleged contract. The pursuer, no doubt, says that in the course of the day, or on an early day, the £2500 would have been reduced to the amount of the overdraft which existed on the 27th of March before the £1805 were paid in, but this gave Ritchie & Hardie no right, even if all else was as they allege, to expect that such an increase in the overdraft would for any time whatever be allowed. There was an increase in the risk, and this the bank were not called upon to encounter. If this view be correct, nothing more is required as a ground for the Lord Ordinary's interlocutor. But apart from this consideration, I am of opinion that the alleged agreement has not been proved. And I may say more, that neither that which is set forth in article 6 of the condescendence, nor Mr Hardie's evidence as to what occurred at the interview on the 27th, comes up to an agreement or undertaking on the part of Mr Henderson. "He asked me how I was getting on, and I said I had paid in towards the settlement this sum of money, and told him roughly the state of the account. He asked me what the firm would require to carry us over the settlement, and I said £2000. He asked me to keep it down as much as possible. I said we were doing that, and he said to push for money when it was out-lying due to us, and I said that was being done. That was about the whole gist of the conversation. I gave him distinctly to understand that we would require to overdraw the account next day, possibly to the extent of £2000. (Q) Did he tell you that he would not honour these drafts—that he would not allow you to overdraw?—(A) He never said a word with regard to stopping the account. If he had refused to allow us to overdraw, I would have demanded back the cheques for £1805, which I had just paid in; and if he had refused them, I would have had them stopped. I had paid them in in the belief that we would be allowed to overdraw as formerly." The most that

can be made out of that is, that Mr Henderson did not inform the pursuer that an overdraft would not be allowed. Even assuming that there was this omission, the result of the interview did not amount to the agreement alleged. But it is not necessary to say more upon this point, because I am not prepared to hold that the account of the interview given by Mr Hardie must be accepted. Everything of any importance is contradicted by Mr Henderson, and there seems to me to be no reason why the latter is to be disbelieved and the former to be credited. Were I to decide between them, my inclination almost certainly would be to take Mr Henderson's account, and not to take that which has been given by Mr Hardie. The probability is, I think, strong that the facts are as related by Mr Henderson. I do not propose, however, to proceed upon that ground. The burden of proof is on the pursuer. He must prove his ground of action, and that will not be done so long as there is an uncertainty as to the truth of the case which the pursuer says he has established.

There is another ground of action remaining to be considered. The pursuer says, even if the special agreement which is said to have been made should not be held to be proven, his firm was entitled, by reason of the previous course of dealing, to the accommodation which they sought when they drew the cheques which were presented to the bank on the forenoon of the 28th of March. There are two answers, both of which seem to me to be sufficient. In the first place, the honouring of the cheques on the Saturday would have resulted in an overdraft greater than ever before had been asked or granted. This, to say the least, Ritchie & Hardie were not entitled to expect. They had been pressed a week before to clear the overdraft which at that time existed, and which was far less than £2500, and there was absolutely nothing in favour of, while there was everything against, the supposition that accommodation beyond anything which had been previously allowed would be afforded on this occasion. The second answer is that previous course of dealing was no warrant whatever for the alleged expectation. Overdrafts without security had only been recently allowed, and the occasions on which they were allowed were comparatively few. For most of these, moreover, there had been a special application. Besides, the mere urgency of Mr Henderson to have the overdraft which was wiped out on the 27th March extinguished, almost of itself amounted to an intimation that accommodation without security, even to the same extent as in recent overdrafts, was not to be calculated on by the debtors.

These are my views, stated in the most general way, of the grounds of action, and of the evidence which has been adduced by the parties. They have been formed after anxious consideration of the record and proof, and of the argument; and without any hesitation I have come to the conclusion to which effect has been given by the interlocutor of the Lord Ordinary.

Lord Young—Perhaps your Lordships will permit me to say what I intended but omitted to deal with. I said at the outset of my opinion that I should show how I brought out the sum of £2500. It is in this way. Cheques which would have made that overdraft were presented to the bank on the Saturday. According to the evidence there was some difficulty in bringing the pursuer to the bank at all. It is a question whether three messengers had not been sent. He came almost at the last moment, at all events, and brought securities which would have reduced the overdraft to a little under £2000. But if the cheques which were presented had been honoured when they were presented, and these securities not tendered when the pursuer came, after being summoned so often, the overdraft would have amounted to £2500. It is that to which Lord Craighill referred, and which reminded me of my omission. Another remark which I omitted I have also here to make. The Lord Ordinary finds neither party entitled to expenses. I am of opinion that the defenders are entitled to full expenses.

Lord Rutherfurd Clark—I am also of the same opinion, and I confess without any difficulty at all. I think the pursuer has failed to prove that there was any contract under which the bank bound themselves to honour these overdrafts. In the next place, I think it is perfectly plain that any expectations which the pursuer had thought himself entitled to form that an overdraft would be allowed are limited, on his own showing, to a sum of £2000. But although he told Mr Henderson that he would require no more than about £2000, he actually passed cheques against the bank to the amount of £2800, which would make an overdraft of £2500. That was an irregularity so great that I cannot conceive a bank manager taking any step except at once to dishonour the cheques. And further, I must say that in my opinion Mr Hardie had no intention whatever of presenting himself at the bank on that Saturday afternoon. I think his firm were in difficulties. That is obvious enough; and I think he was taking his chance that, although cheques for an overdraft of £2500 were sent in, the bank would not take such a strong step as to dishonour these cheques. In that he was mistaken. I think the bank acted perfectly rightly and properly in doing what they did.

Lord Young—I am authorised to say that the Lord Justice-Clerk concurs in this judgment, which will be to affirm the interlocutor of the Lord Ordinary, except in so far as he finds no expenses due to either party. We find the defenders entitled to expenses.

The Court adhered, finding the defenders entitled to expenses.

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