place with the Bridges and Roads Commissioners, who, I formerly said, and I still continue to hold, acted in this matter in the interest and for behoof of the public at large. It is plain that these accounts were carefully scrutinised by persons acting on their behalf. The accounts are certified to them by Mr Telford, and upon the footing of that expenditure having been actually made, the Commissioners entered into a contract with the Duke to the effect of expending, out of the funds of the county, the one-half of the expense still remaining to be laid out on the bridge. I hold that this is quite complete proof—it is so at least to my mind—that on this 16th July 1806 the Duke had actually expended a sum of at least £14,770. If I were determining this case according to my own lights, I would consider that the Duke was not entitled to charge more than was expended prior to this date of 16th July 1806, for I still think, as I did formerly, that it was an essential condition of the contract betwixt him and the Roads and Bridges Commissioners, that he should expend the remaining sum necessary to complete the bridge to the extent of one-half out of his own pocket without any charge against the pontage. But I stood alone in that opinion, and your Lordships were all of a different view. Perhaps you will excuse me for still retaining my opinion, but I must now hold that I was wrong—I must, at least, hold myself wrong in the present discussion, and therefore the question remains whether there is evidence of the balance between this sum of £14,770, and the total sum of £18,000 having been expended subsequently to this date of July 1806. I think of this, also, there is clear evidence. There is a great deal of evidence in these same contemporary documents of which I have already spoken—documents passing amongst the officials connected with this matter, no doubt passing on behalf of the Duke, but still documents which, if not disputed to be authentic, have a certain measure of weight on this question. It was admitted that these people, if still alive, could be examined as witnesses, but surely a *bona fide* document which passed betwixt them at the time is evidence much more authoritative than any recollection in the year 1870 of what passed in the year 1804 or 1805 could by any possibility be. But we have also here the intervention of the Roads and Bridges Commissioners, although in a somewhat different form, perhaps not so conclusive a form, as that which we see exhibited in the contract of 1807. It was made part of that contract that the one-half which the Commissioners were to pay was not to be paid unless evidence was afforded, and the evidence was the certificate of Mr Telford, that an equal amount had been expended by the Duke himself. It is true we have not the certificates of Mr Telford to that effect, but we have the fact that the Commissioners of Roads and Bridges did pay the amount which they had become bound to pay, but only upon that condition, and I think it is fairly to be assumed that they had proceeded upon the evidence which the contract contemplated. Whether or not, it is undoubted that they paid the sum which they became bound to pay upon distinct proof, satisfactory to themselves, that the amount which was said by the Duke to have been expended, really was so expended. Now, I hold with regard to that other part of the sum,—the part that belongs to the second of the two periods which I have taken,—I hold that here also we have sufficient evidence, and must come to the conclusion that the expenditure was made. This exhausts the case so far as the first point is concerned.

Upon the second point I have scarcely a word to add. It is plain that the Duke was entitled to have reimbursed to him the expense of procuring the Act, for the Act says so. It is also plain that it cannot be got out of the £18,000, and there is no other fund out of which it can be got except the revenue. Accordingly, I think that by the 8th clause of the statute he gets it out of the revenue by virtue of the general provision that the whole of these tolls and pontages should go to the extinction of the expenditure on the bridge and the expense of obtaining the Act. On this point, therefore, I think the Lord Ordinary has come to a right conclusion.

Agents for Pursuer — Wotherspoon & Black, S.S.C.

Agents for Defender—Tods, Murray, & Jamieson, W.S.

Friday June 3, 1870.

SECOND DIVISION.

FRASER *v* HENDERSON AND COMPANY

Letter of Guarantee—Advance on Credit—Action to Recover. A gave a letter of guarantee to a firm, offering himself as security to the extent of £50, on condition that they should advance to B goods to the extent of £400. Goods to the value of nearly £300 were supplied, but B did not ask for more. The firm, after repeated demands for payment, raised an action against B, and used arrestments on the dependence. They afterwards brought an action against A under the letter of guarantee. In answer A pleaded that the condition of the letter of guarantee was that £400 of goods should be supplied on credit, which condition has not been implemented, and that by raising action against B the respondents had destroyed his credit, and thereby prevented him from paying the sums due by him. The firm *held* entitled to recover under the letter of guarantee; and further *held* that the firm were justified in doing diligence against B.

This was an appeal from interlocutors pronounced in an action raised in the Sheriff-court of Glasgow, at the instance of the respondents against the appellant, the material facts in connection with which were as follows: In December 1867 the respondents were applied to by W. Buchanan for goods on credit, but as he had shortly before that time compounded with his creditors. the respondents, before giving him any goods, required some guarantee that the price thereof would be paid. Three different persons accordingly became guarantee each to the extent of £50, for the price of goods to be supplied to Buchanan, and of these the appellant was one. The letter of guarantee granted by the appellant was as follows:—

"45 *Union Street,*
Glasgow, 2d Dec. 1867.

"Messrs Henderson & Co.,
Tea-merchants, Glasgow.

"Gentlemen,—I hereby guarantee payment to you of Mr Archibald Buchanan's account for teas, to be furnished to him by you on credit, to the extent of £50 sterling. This guarantee is granted

on the understanding that you are to give him credit to the extent of not less than £400 sterling; and this guarantee shall stand until recalled.—I am, your obed. servt.—JOHN T. FRASER."

On the back of the foregoing letter the following letter was endorsed.

"Gentlemen,—As requested by Mr Buchanan, I send you the enclosed guarantee. I grant the guarantee only on the understanding that Mr Buchanan is to be benefited by the credit; and he cannot possibly be benefited unless he gets credit to the extent named in my letter.—I am, your obed. servt.—JOHN T. FRASER."

The respondents accordingly supplied Buchanan with teas to the extent of £289 odds, which to the extent of £147, 13s. 6d. was supplied after the date of the appellant's guarantee and on the faith thereof. The present action was for recovery of the £50 guaranteed by the appellant.

It appeared from the proof that the last supply of tea given by the respondents to Buchanan was in January 1868, after which date he had not applied to the respondents for any further supply. In February and March the respondents applied to Buchanan for payment of what was then due by him, when he stated that he was unable to pay anything, and that he was giving up his tea business and looking out for a situation. He repeated this statement to the respondents' agents when they demanded payment in the end of March or beginning of April. On 17th April 1868 the respondents raised an action against Buchanan for the amount of their account, (in which they ultimately obtained decree), and on the dependence used several arrestments. The appellant pleaded that he was not liable under his guarantee, but had been freed from obligation thereunder, (1) because it had been granted conditionally on Buchanan receiving credit to the extent of £400, which had not been given; and (2) because the respondents by their action and arrestments had destroyed Buchanan's credit and prevented him carrying on his business and paying the amount due, as he could have done but for the respondents' diligence. The respondents answered (1) that they had always been ready to afford credit to the extent of £400 if it had been asked, and that they had never refused to fulfil any order given to them by Buchanan; and (2) that they were entitled to use the diligence they had used as Buchanan's affairs were hopelessly embarrassed, and he had in point of fact given up business and could not further operate on the credit stipulated for by the appellant. Besides, the appellant knew of the arrestments being used, and approved of the respondents' proceedings.

The Sheriff-Substitute (DICKSON), pronounced the following interlocutor:—

"*Glasgow, 2d December* 1869.—Having heard parties' prors. and made avizandum: Finds that the defender, by letter dated 2d December 1867, addressed to the pursuers, guaranteed payment to them, to the extent of £50, of teas to be furnished by them to Archibald Buchanan, formerly tea merchant, Glasgow, then carrying on business under the firm of A. Buchanan & Co., and that it was a condition of the said guarantee that the pursuers should give the said A. Buchanan credit to the extent of not less than £400: Finds that after the said letter was granted the pursuers furnished to the said A. Buchanan teas to the amount of £137, 19s., being the items from and after the 4th December in the account sued on, and that the price thereof is still unpaid to an extent considerably exceeding the said sum of £50: Finds that the said A. Buchanan did not apply to the pursuers for, and that the pursuers did not refuse to furnish to him, teas beyond the foresaid amount: Finds it not proved that the foresaid condition of the guarantee has not been implemented: Therefore repels the defender's second plea-in-law: Finds it not proved that the pursuers have acted illegally in any way, and thereby destroyed the said A. Buchanan's credit: Therefore repels the defender's third plea-in-law: With regard to the defender's fourth plea, Finds that the pursuers used arrestments in the hands of certain debtors of the said A. Buchanan, and recovered thereby sums not exceeding in all £10; Finds that the pursuers have also received £100 under two guarantees of £50 each for the said A. Buchanan by Messrs Alexander Dobbie and Mr Annand: But finds that the pursuers allege that these said guarantees were granted before the first entry in the account appended to the summons, and that there is no proof to the contrary; and finds that after credit has been given, as in the said account, for the said sum of £100, there remains a balance due by the said A. Buchanan of £189, 17s. 1d.: Finds it not proved that the pursuers have received any further sums in payment of the said account: Finds, in point of law, that the pursuers were entitled to impute the said £100 towards payment of the account generally: Therefore repels the defender's fourth plea: With regard to the defender's fifth plea, Finds it not proved that the pursuers have intromitted with the said A. Buchanan's estate: Finds that they raised action against the said A. Buchanan for payment of their account: But finds it not proved that they did so without consulting the defender: Therefore, and also in respect that the raising of the said action did not in point of law relieve the defender of his guarantee, repels the said fifth plea: Finds that the defender did not insist in the first plea, and that the same is not well founded: Therefore repels the same: Finds the defender liable to the pursuer in the sum of £50, with interest as libelled, and in expenses: Allows an account thereof to be given in, and remits the same when lodged to the auditor to tax and report, and decerns.

"*Note.*—There is no doubt about the granting of the guarantee or its conditions; and the supply of teas under it in the account sued on is proved, except that there is some discrepancy as to one pound of tea, amounting, with duty, to 2s. 1d., which has not been cleared up. (Evidence of witness Ferguson.)

"The real questions between the parties are:—1st, Whether the pursuers complied with the condition as to the amount of the credit they were to allow Buchanan? and 2d, Whether by their proceedings against him they destroyed his credit, and so freed the defender?

"On the first point, it is proved by the evidence of the pursuer, his cashier, and Buchanan, that the latter did not apply for any teas beyond those stated in the account, and that the pursuers never refused to extend his credit to the stipulated sum.

"There was thus no failure on their part to implement the condition.

"On the second head, it appears that the pursuers, on 17th April 1868, raised action against Buchanan & Co. for payment of the account, and afterwards obtained interim decree therein for £194, 18s. 7d., and £94, 18s. 6d. respectively (Nos. 5-2 and 5-3 of process.)

"This they were fully entitled to do; and their doing so could not relieve the defender of his liability, although perhaps an opposite line of conduct on their part might have done so.

"There is not the least ground for supposing that the raising of the action impaired Buchanan's credit. His evidence, altogether unsatisfactory as it is, shows that he had no credit which could have been so affected, and that his affairs were in complete confusion.

"Besides, the result of the action disproves the defender's contention that it was raised improperly, and even though it might have affected Buchanan's credit, it was a step the pursuers were legally entitled to take.

"The same may be said of the arrestments used on the dependence of the action.

"The defence on these heads proceeds on the fallway, that because the pursuers agreed to allow Buchanan goods on credit up to £400, they were not to use legal proceedings for payment of their claim within that amount when it was due. This, it need hardly be observed, is quite erroneous.

"The Sheriff-Substitute has not gone into the evidence, parole and on correspondence, regarding the defender's applications for time and promises to pay. He only observes that these supported the views above stated on the essential facts and the law of the case."

To this interlocutor the Sheriff (BELL) adhered; whereupon the appellant appealed to the Second Division of the Court of Session.

REID for the appellant,

TRAYNER in answer.

At advising the Court adhered to the interlocutor of the Sheriff and Sheriff-Substitute. It was clear on the proof that the respondents had never refused to give Buchanan credit to the full extent of £400, and that such credit had never been asked. The respondents were not bound to give Buchanan goods to the extent of £400 whether he wanted them or not, so as to make their claim good against the appellant. The appellant's argument amounted to this, that until £400 worth had been given he was not liable under his guarantee; but this was obviously untenable. The condition of the guarantee, so far as binding on the respondents, had been fulfilled, and they were now entitled to decree. On the second branch of the appellant's argument, the Court was of opinion that the respondents in the circumstances were entitled to adopt the proceedings they had adopted for recovery of their account. The debtor was plainly insolvent, and in their own interests, as well as in the interest of the appellant, the respondents were quite justified in doing diligence. There was nothing to show that that diligence had in any way affected the credit of Buchanan.

Appeal dismissed with expenses.

Agent for Appellant—M. Lawson, S.S.C.

Agent for Respondents—W. Officer, S.S.C.

Friday, June 3.

CONSTABLE AND OTHERS *v.* MONCREIFF AND OTHERS.

Procedure — Proving of Tenor. Tenor of a deed *held* proved, which had been amissing for about fifteen years. The writer of it was dead, and neither the witnesses nor the heirs of the granters could be found; but the deed had been seen by several agents, the completed draft of it was produced, several deeds referred to it, and three were granted, before its loss, in virtue of the procuratory of resignation it contained.

This was a proving of the tenor at the instance of certain parties infeft in property at Silvermills in Edinburgh of a disposition granted to their authors in 1834. None of the parties called as defenders appeared. The disponee was never infeft, but possessed on a personal title till his sequestration in 1845. His trustee did not take infeftment, but, after an unsuccessful attempt to sell the property by public roup, sold it by private bargain to certain trustees, who took infeftment, and conveyed it to the pursuers. The deed lost was last seen about fifteen years ago, and its absence being observed, the family agent made careful search for it, and after his death his papers were again searched for it, fruitlessly. The party, also, who last had held the disposition and other titles, examined his repositories, and neither then nor after his death, in 1862, was it found. The deed had been seen by several parties, and was mentioned in various inventories by the agents in the various transmissions of the property. It was also mentioned in several deeds, and three of them were granted in virtue of the procuratory of resignation it contained. The draft of it was produced, with the testing clause filled in, and signatures of the granters and witnesses copied in by the writer of the deed. The writer of the deed and draft was dead, but the handwriting was sworn to by one who was a fellow-apprentice with him. Of the witnesses, one was in the West Indies, and of the other nothing was known. Nor could any traces of the heirs of the granters be discovered. The granters of the disposition had in 1828 granted a bond over the property. Of this bond the disponee paid part, and granted a bond of corroboration, which was produced, to the assignees of the creditor in the bond. Two feus had also been granted off the property before the deed was lost, and the tenor of it was now sought to be proved for the sake of further feuing.

LEES for the pursuers.

The Court sustained the adminicles as sufficient for allowing a proof of the tenor and *casus amissionis* of the deed libelled on, and a proof having been taken, held the tenor proved.

Agents for Pursuers—Gillespie & Bell, W.S.

Tuesday, June 7.

ADDISON AND OTHERS *v.* WHYTE.

Trust—Title to Sue—Disposition and Settlement—Disponee—Executor. A appointed certain trustees and executors, who accepted, for the purpose of carrying out charitable bequests in favour of certain poor women. The executors were empowered to nominate the recipients of the bounty, and the pursuers were, in point of fact, nominated as forming a class entitled to participate in it. At the opening of A's repositories the defender attended with an agent, and produced a deed of later date, by which A revoked all former settlements, and left her whole estate, heritable and moveable, to the defender. An action of reduction of this deed was brought by the pursuers.