Saturday, July 22.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

HARMER & COMPANY *v.* GIBB.

Cautioner—Guarantee—Construction—Extent of Obligation—Whole Debt subject to a Limitation as to Amount of Liability, or Part only—Right of Cautioner to Reduce his Liability by Sharing in Debtor's Assets.

In 1895 G. granted H. & Co. a letter of guarantee for behoof of his nephew M. in the following terms:—"In consideration of your having agreed to sell to John M'Gillivray . . . goods in the way of trade, I, the undersigned James Gibb, . . . do hereby undertake to guarantee to you the due payment of and for all such goods as you may from time to time sell and deliver to him or to his order up to the value of Two hundred pounds." H. & Co. thereafter supplied M. with goods to the value of £7000. In 1907, G. having intimated his intention of withdrawing his security, an arrangement was come to between H. & Co. and G. whereby the latter agreed to continue his guarantee for another year. M. was then in financial difficulties and indebted to H. & Co. for more than £1000. Towards the end of that year M. sold his business, H. & Co. receiving the proceeds of the sale in part payment of their debt. G. was not informed of this transaction.

In an action on the guarantee, G. maintained that the guarantee was one for a limited sum only, and not for M.'s whole indebtedness subject to a limitation as to the amount of his (G.'s) liability, and that, accordingly, he was entitled to deduct from the sum sued for a rateable proportion of the assets recovered. He also maintained that as H. & Co. were aware of M.'s financial position they were not entitled to appropriate his estate in part payment of their debt, and that he (G.) was entitled to the same equities as if there had been a bankruptcy,

Held (1) that the guarantee was one for a limited sum, and not one for the whole debt subject to a limitation as to the amount of the cautioner's liability; but (2) that G. was not entitled to the deduction or equities claimed, M. not having been bankrupt or insolvent at the time his business was sold.

On 21st June 1909, F. W. Harmer & Company, wholesale clothiers, Norwich, brought an action against James Gibb, 14 Traquair Park, Corstorphine, Edinburgh, for payment of £200, being the sum contained in a guarantee granted by the defender for the benefit of his nephew John M'Gillivray, wholesale draper, Colchester.

The guarantee sued on was:—"To Messrs F. W. Harmer & Co. of Norwich. Gentln., —In consideration of your having agreed to sell to John M'Gillivray, draper, of St Paul's Road, Colchester, England, in the county of Essex, goods in the way of trade, I, the undersigned James Gibb, of 93 Nicholson Street, Edinboro, do hereby undertake to guarantee to you the due payment of and for all such goods as you may from time to time sell and deliver to him or to his order up to the value of Two hundred pounds, whether the same be sold on credit or otherwise, notwithstanding I shall not have notice of any neglect or omission which may happen on the part of the said John M'Gillivray in the payment of such goods according to the credit that may be agreed on for the same. Dated this 26th day of Octr. 1895. (Signed) JAMES GIBB. *Witness*, James Soutter, agent, 20 Union Street, Glasgow, N.B."

The defender pleaded, *inter alia*—"(3) The pursuers being in breach of the undertaking implied in the contract, under which the guarantee was continued, that the business should be conducted without interference until the next balance-sheet should be got out, they are not entitled to recover under the guarantee, and the defender should be assoilzied, with expenses. (5) In any event, the defender not being liable to the extent of the sum sued for, decree should only pass for such sum as shall be ascertained to be due in respect of credits properly allowed under the guarantee, under deduction of any sums paid to, and assets and securities realised or held by or on behalf of, the pursuers, or which but for their neglect would have been available to them, so far as the defender is entitled to the benefit thereof."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (GUTHRIE), who on 17th August 1910 dismissed the action.

Opinion—"In 1895 the pursuers, wholesale clothiers in Norwich, agreed to sell goods to John M'Gillivray, then starting business as a retail credit draper and clothier in Colchester, on condition that the defender, an Edinburgh fruiterer, M'Gillivray's uncle by marriage, granted a letter of guarantee in their favour guaranteeing to them the due payment of all goods sold and delivered by them to M'Gillivray, or to his order, in the way of trade, up to the value of £200, whether the same were sold on credit or otherwise. No credit was given by pursuers to M'Gillivray till the guarantee, dated 26th October 1895, was arranged. Pursuers have about 2000 accounts similar to M'Gillivray's. In England credit drapers like M'Gillivray have no shop. They rent a store with an office, and they and their canvassers travel with samples and goods, selling on credit men's and women's clothing, the prices being paid by instalments collected at frequent intervals. The extent of the district travelled depends on the enterprise of the credit draper and the number of his canvassers. It may be so large as to necessitate stores at other places than the headquarters of the business, and some of the canvassers may live at these other places.

"After the guarantee had subsisted for

twelve years, and goods to the value of some £7000 had been supplied without any question arising under the guarantee, the defender, having retired from business, and being in poor health, intimated withdrawal of the guarantee for these reasons, by letter dated 13th February 1907. Correspondence passed between him and pursuers, the import of which will be considered later. Defender was informed that a balance sheet of M'Gillivray's business had been prepared, from which and his books pursuers were 'quite satisfied that he was in a substantial position,' and he agreed not to insist on his withdrawal, but to continue the guarantee until another balance sheet was made up.

"Before the time for another balance sheet, M'Gillivray had sold off his business and left Colchester. The pursuers, who were his only large creditors, say that he was at that time indebted to them for fully £1000, and that after due realisation of his assets a balance of £299, 17s. 2d. (defender says that, arithmetically, the true sum is £297, 17s. 2d.) remains due to them, and they sue defender under his guarantee for £200. M'Gillivray left Colchester in March 1908, and all efforts to trace him have failed. His estates have not been sequestrated.

"Defender maintains that he is entitled to absolvitor, or to have the action dismissed, on these three grounds:—

"*First.* Because pursuers have not proved what sum, if any, is due to them by M'Gillivray.

"*Second.* If any sum is now due to pursuers by M'Gillivray, his indebtedness, in a question between pursuers and defender, must, according to defender, be taken as at 13th February 1907, the date of defender's intimation of withdrawal, because his subsequent cancellation of the withdrawal was induced by pursuers' fraudulent misrepresentation and concealment. If M'Gillivray's indebtedness is taken as at that date, there is no evidence, defender says, of M'Gillivray's inability to meet all his obligations. And

"*Third.* Because the pursuers are said by defender to be in breach of the undertaking implied in the contract, under which the guarantee was continued, namely, that until another balance sheet was made up no material change should be made in the relations between pursuers and M'Gillivray without communication with defender. As at the date of said breach there is no evidence, defender says, of M'Gillivray's inability to meet all his obligations.

"Alternatively, the defender maintains, in any event, that if he is liable in this action under the guarantee he is not due the whole sum of £200."

[*His Lordship having disposed, adversely to the defender, of the grounds first and second above mentioned, proceeded as follows:*—]

"*Third.* Defender says that pursuers cannot claim against him under the guarantee, because they were in breach of the undertaking, implied in the contract for continuance of the guarantee, that until another balance sheet was made up no material change should be made in the relation between pursuers and M'Gillivray with regard to M'Gillivray's business without communication with defender.

"Defender pleads (plea 3)—'The pursuers being in breach of the undertaking implied in the contract under which the guarantee was continued, that the business should be conducted without interference until the next balance sheet should be got out, they are not entitled to recover under the guarantee, and the defender should be assoilzied, with expenses.' I prefer to state defender's right as one to have no material change made in the existing relations between pursuers and M'Gillivray with regard to M'Gillivray's business until another balance sheet was made up without communicating the proposed change to defender.

"Such an undertaking was necessarily implied in the contract for continuance of defender's guarantee. Under the contract another balance sheet was contemplated, Mr Olley, pursuers' manager, says in his evidence, twelve or eighteen months after the date of the contract. If, within that period, anything came to pursuers' knowledge, still more if anything was done by them, which made it reasonably certain that the period for making up another balance sheet would never arrive, they were bound to give defender notice. This was all the more necessary when they saw, from defender's letter of 25th February 1907, that he gathered from pursuers' statements that his nephew's state of affairs were, as he put it, 'in such good condition.' As I read the evidence of Mr Olley, pursuers' manager, the contemplation of both pursuers and defender that till another balance sheet was prepared M'Gillivray's business should continue as before is not denied. Mr Olley said—'We had in view that the second balance sheet should be prepared probably twelve or eighteen months afterwards. (Q) And was your request there that the guarantee should be renewed until such time, probably eighteen months afterwards, as the balance sheet might be brought out?—(A) Simply that he should go on trading as he had been doing throughout. (Q) Wasn't what you had in view, when you wrote this letter to defender, that M'Gillivray should go on for a period of eighteen months until the next balance sheet was brought out, and that you should then see how he stood?—(A) Yes. (Q) Did it seem to you that that would give him plenty of rope to improve his position?—(A) I thought so.'

"Pursuers' conduct in March 1908 confirms this view of their obligations to defender. Condescendence 4 thus deals with this matter—'The pursuers continued to trade with the said John M'Gillivray on the faith of the defender's guarantee. In or about the middle of March 1908 they accidentally learned that Mr M'Gillivray had unexpectedly sold some of his debts and part of his other effects by auction. On learning this the pursuers on 21st March

1908 intimated the fact to the defender—reminded him of his guarantee, and stated that the amount of their unsatisfied debt was then just under £300.'

"Pursuers' correspondence on this point is not candid, neither are their pleadings, nor their evidence-in-chief. In all three the instructions to Cairns (*vide infra*) in 1907 are ignored, and the impression is left as if the first information of Mr M'Gillivray's realisation came to pursuers in connection with the sale of M'Gillivray's book debts and furniture in March 1908.

"But in July 1907, eight or nine months before the letter of 21st March 1908, pursuers agreed with M'Gillivray that his book debts should be realised by Mr Cairns, auctioneer and accountant, London, for their benefit. The ledgers were sent to Mr Cairns on 12th August 1907; the circular is dated 22nd August, and the Sudbury Round was offered for sale at Colchester Hotel on 24th October. M'Gillivray wrote to Cairns on 22nd October to pay the proceeds of the sale to pursuers. The actual sale of the main part of the business to Trew was on 29th or 30th November 1907, just when pursuers stopped supply of goods to M'Gillivray on credit. The debts referred to in condescendence 4 were the mere refuse which Cairns had been unable to dispose of. Mr Olley says—'To the best of my knowledge the only debts which were still available for sale in March 1908 were these small debts which Mr Cairns says would bring a very small price indeed.' If it was proper for pursuers to intimate their 'accidental discovery' of M'Gillivray's 'unexpected' sale of these, much more should they have taken defender along with them in their arrangements for the realisation of M'Gillivray's business in the previous July. I say the realisation of his business, for the sale of the book debts carried with it an introduction of the purchaser to the customers for future business. Of the three partners in pursuers' firm, Mr Bertrand Harmer had interviews with M'Gillivray. He was not examined; but Mr Olley was present at all meetings. He says—'As soon as we learned that M'Gillivray was making away with his estate, we thought it was right to let his cautioner know, and accordingly the same day that we learned that he was making away with his estate we wrote the letter of 21st March 1908. We thought that was the proper course.' Mr Olley afterwards referred to M'Gillivray's letter to pursuers dated 20th August 1907, in which he says that if he is unable to find a purchaser for the business he will offer the whole thing by auction about the first week of September; and he was asked, 'From that time onwards did not you know perfectly well that Mr M'Gillivray was disposing of his whole business?—(A) We knew that he wished to do so.' He was later referred to a letter dated 29th August 1907 from M'Gillivray to pursuers—'We got a circular from M'Gillivray as to the disposal of his business. (Q) After you got that circular you were perfectly well aware that Mr M'Gillivray was disposing of his business in connection with Colchester, Sudbury, and Ipswich—in short of his whole business?—(A) Yes. (Q) Had you at that time a clear understanding from M'Gillivray that the proceeds of the business was to be paid to you?—(A) I am not sure at what period he gave an undertaking that they should be so paid, but he arranged with Mr Cairns that whatever was realised from the sale should come to us, but I cannot tell you the precise date. (Q) Had you a clear understanding from the first moment the question of disposing of the business was mooted that whatever was realised should be paid to you?—(A) We were told there were no other trade creditors, and he said that whatever he realised from the book debts should be paid over to us. . . . (Q) Why did you not communicate with the defender when you knew the debtor was realising his whole business?—(A) Because we had no knowledge of what the definite result of the sale would be; we hoped all through that there would be sufficient from the sale of the book debts to more than cover the liability. It did not occur to us that the disposal of the business was a matter in which the defender was interested. The earliest date at which we knew that M'Gillivray was proposing to sell his business was about the time he consulted Mr Cairns.' He was then asked as to the position of matters in November 1907, when further supplies of goods were stopped—'It was perfectly obvious that the price realised for the debts, together with any other assets that there might be, so far as known to us, would not quite yield 20s. in the £. . . . We saw that we should not get the whole of our debt. . . . In November 1907 we feared that M'Gillivray was insolvent. . . . (Q) Why did you think it proper when the fag end of the assets were sold in 1908 to communicate at once with the defender, and yet not to communicate during the time when the substantial part of the assets was to be sold; have you any explanation to offer of that?—(A) I cannot say.'

"If such an undertaking was implied, I think it was broken in two particulars—*first*, by pursuers' refusal in November 1907, not communicated to defender, to supply more goods to M'Gillivray on credit; M'Gillivray, being a credit draper, required credit from the wholesale house with which he dealt. When pursuers refused to supply him further on credit, they must have known that for the same reasons other wholesale houses would take the same course, and that the business must be sold or disappear. Eight months before the stoppage of goods, namely, on 14th March 1907, pursuers sold a safe to M'Gillivray; and by letter of 29th June 1908 to defender's agent they thus explain this transaction—'he not being in a position to obtain credit himself, as we can prove by the correspondence which we hold.' If in March M'Gillivray could not obtain credit for £13, 10s., his credit was certainly not better in November. And four months before the stoppage of goods, namely, on

5th June 1907, M'Gillivray wrote to pursuers—'I dare not venture to draw a cheque for more than £15 at present.' And yet when Mr Olley was asked—'When did you first come to know that his (M'Gillivray's) credit was not good?' he replied, 'I should say after he sold his furniture and that sort of thing'—that is to say, not till a year after pursuers knew that M'Gillivray was unable to obtain credit for £13, 10s., and not till nine months after he had told them that he dared not venture to draw a cheque for more than £15. Cairns depones that from his first communication with M'Gillivray in July 1907 it was clear he was disposing of his business. And referring to a letter of 14th January 1908 he said—'By that time I should say it was perfectly obvious that what was going to be realised would not enable M'Gillivray to meet his debts.' In my opinion, on coming to the resolution (no doubt a proper resolution) not to supply further goods to M'Gillivray, pursuers were bound to inform defender. The effect of their action was thus described by Mr Cairns in his letter to them, dated 14th January 1908—'The books turned out very disappointing, there being scores of customers who stopped payment last July, more especially in the rounds of the two collectors, and I think the main reason would be the stoppage of goods and probably some indifference on the part of the men.'

"The implied undertaking was broken, *second*, by pursuers' arrangement with M'Gillivray that Cairns should realise M'Gillivray's business for pursuers' benefit. Their interest was not identical with defenders. Having defender as guarantor for £200, it did not matter to them even if the realisation came short of the liabilities by that sum. Pursuers took an active concern in the realisation. They guaranteed and ultimately paid Cairns' charges; they prevented a sale to Carruthers; they were parties to the ultimate sale to Trew, and they asked Larking, the Norwich accountant, to call on them and arrange about the proposed balance sheet.

"This breach of contract is substantial, and not merely nominal. Pursuers admit that if the realisation had taken place earlier a better price would have been got. Mr Olley deponed—'If the business had been sold while it was still being vigorously looked after, it would certainly have brought a better figure than it ultimately did.' In my opinion pursuers were bound to have communicated with defender, even although they thought, as they say in their letter to Cairns, dated 30th October 1907, 'if he (M'Gillivray) can reduce his business to a size that he can manage, we think he ought to get through.' Yet although large portions of M'Gillivray's book debts and stock-in-trade were sold with pursuer's knowledge, if not at their direct instigation, during 1907 and the early part of 1908 (bills for the prices realised being handed to the pursuers), no intimation was made by them to defender till March 1908. No doubt M'Gillivray says in his letter of 24th January 1908 that he had seen his uncle, the defender, but there is no evidence, supposing the meeting ever took place, that he told him either of pursuers' stoppage of goods, or, before it occurred, of the realisation.

"Even if this breach by pursuers of their undertaking should be held not to bar them from making a claim under the guarantee, it would be sufficient, in my opinion, to negative their claim in this action, because the question of liability under the guarantee would fall to be determined either as in July 1907, when arrangements were made for realisation, or as in November 1907, when supplies of goods on credit were stopped, and there is no evidence, as at either of these dates, that M'Gillivray would have been due any sum, or if any, what sum to pursuers.

"I shall therefore dismiss the action, being of opinion, in accordance with defender's answer 3—'Although the said letters of the pursuers amounted to an invitation to the defender to continue his guarantee to the period of M'Gillivray's next annual balance-sheet, the pursuers so acted as to render impossible the continuance of the business.' I am aware that the defender stated in cross-examination that he considered his withdrawal had never been cancelled, conditionally or unconditionally. But the defender, who is not in good health, was evidently confused about this part of the case. His letters at the time make it clear that the guarantee was continued, but on the condition above dealt with, and he himself says in his examination-in-chief—'I wrote the letter of 25th February 1907, which speaks for itself, agreeing to continue.'

"But suppose that defender is wrong in all these three contentions, and is not entitled to absolvitor, or to have the action dismissed, he maintains that he is not liable for the full sum in the guarantee. He takes four points, which it is right that I should consider—(1) That on a sound construction of the guarantee he is only responsible in connection with goods supplied for M'Gillivray's Colchester trade. He proposes to exclude from the accounting the value of the goods supplied for the 'Ipswich Round,' amounting to £64, 14s. 1d., and the 'Sudbury Round,' amounting to £1, 2s. 2d.; (2) that the proceeds of M'Gillivray's assets, realised by or for pursuers, must be apportioned as between pursuers and defender; (3) that the surrender value of a policy of insurance on M'Gillivray's life, handed to pursuers by M'Gillivray in security, but to which they neglected to obtain an assignment, must be credited, as in a question with defender, to M'Gillivray, as if it had been actually realised; and (4) that from the debit side of the account between pursuer and defender must be deducted (*a*) the interest charged in pursuers' account against M'Gillivray on all accounts unpaid for more than six months; (*b*) the premiums

payable on said policy of insurance; and (*c*) £13, 10s., the price of a safe supplied by pursuers to M'Gillivray.

"(1) M'Gillivray's headquarters remained throughout at Colchester, and the whole business was worked from there as a centre, although after 1904 a proportion of the goods were sent by pursuers direct to Ipswich and Sudbury. After 1904 he extended the area of his business, and employed more canvassers or travellers, and for convenience he had depots at Ipswich and Sudbury. On the construction of the guarantee I do not see any ground for limiting its scope, as proposed by defender, or I should rather say by defender's counsel, for defender in his evidence did not take this point. The object of the guarantee was to enable M'Gillivray to start business. The goods supplied by pursuers continued to be invoiced to Colchester, and the extent of the district round which they were sold was no concern either of pursuers or defender.

"(2) In July 1907 M'Gillivray instructed Mr Cairns, an accountant in London, to sell his book debts, and he authorised Cairns to pay the proceeds to pursuers. Defender contends that those proceeds must be attributed *pro rata* towards extinguishing any liability resting on him under the guarantee, which would wipe out the defender's alleged indebtedness to pursuers. He contends that the case must be treated as if M'Gillivray had been sequestrated, and he founded on the following admissions in Mr Olley's cross-examination—'(Q) Can you suggest any greater advantage that you would have had on realising the business, or any more control you would have had over it, had a receiver in bankruptcy been appointed, than you did have in point of fact through Mr Cairns?—(A) I don't think the debts would have fetched nearly so much in bankruptcy. (Q) Can you suggest any more control you would have had over the estate had there been a receiver than you did have in the actual event which did occur?—(A) We should have had no more control certainly.' I reject this contention, first, because M'Gillivray never was sequestrated, and for aught that appears, may, since his disappearance, have made a fortune, and, second, because I construe defender's obligation as a guarantee of the whole debt, with a limitation on his liability. On both grounds the following cases, which were cited, do not apply—*Ellis* v. *Emmanuel*, 1876, 1 Ex. Div. 157; *Harvie's Trustee* v. *Bank of Scotland*, 1885, 12 R. 1141; and *Veitch* v. *National Bank of Scotland*, 1907 S.C. 554 (Trust-Deed for Creditors).

"(3) Defender next maintained that in a question with him, M'Gillivray's estate must be treated as if it included the surrender value of a policy of insurance on M'Gillivray's life, which he handed to pursuers in security of his indebtedness about 5th March 1907, but which he never formally assigned to them . . . [*This was admitted in the Inner House*] . . .

"(4) Defender proposes to deduct from the amount of M'Gillivray's indebtedness to pursuers as in a question with him, the guarantor, (*a*) the interest at 5 per cent. charged against M'Gillivray on amounts not paid within the usual term of credit, namely, six months. The charge in question, amounting to £149, 13s. 11d., is proved to have been made in accordance with custom of trade, to have been agreed upon between M'Gillivray and pursuers, and, when regularly debited by pursuers in the statements periodically sent to M'Gillivray, to have been allowed by M'Gillivray. On the one hand, he was debited with this interest, and on the other hand, he was credited with a bonus, which pursuers' firm allow when a customer's annual purchases amount to over a certain sum. In these circumstances it seems to me a proper charge not only against M'Gillivray, but also as on a question with the defender, M'Gillivray's guarantor. Defender also proposes to deduct (*b*) the premiums payable on the policy of insurance. If the defender were to get the benefit of the policy of insurance, he could not fairly object to this charge, so far as payment of premium is concerned, up to the date when, if an assignment had been duly got, the surrender value would have been obtained. The last deduction proposed by defender is (*c*) the sum of £13, 10s., being the price of a safe sold by pursuers to M'Gillivray on 14th March 1907. I think this item cannot enter into the accounting between pursuers and M'Gillivray, for the balance on which, up to £200, the defender is liable. That accounting has to do with goods supplied to M'Gillivray in the way of trade. Such an article as a safe cannot have been in contemplation of parties at the date of the guarantee, any more than office fittings, or any other articles necessary for carrying on any trade, as distinguished from special articles necessary for the particular trade."

The pursuers reclaimed.

[The defender having died on 26th August 1910 his trustees were on 14th March 1911 sisted as defenders and respondents.]

Counsel for the reclaimers having opened the case and read the evidence the Court called on counsel for the respondents.

Argued for respondents—(1) The pursuers must prove the debt apart from the admission of the principal debtor—De Colyar's Guarantees (3rd ed.), 207; *ex parte Young*, (1881) L.R., 17 C.D. 668. This the pursuers had failed to do. (2) The pursuers' actings had discharged the cautioner, for a creditor was not entitled after having taken the management and realisation of his debtor's estate into his own hands to call on the cautioner under the guarantee—Story's Equity Jurisprudence, 325; *Polak* v. *Everett*, (1876) L.R., 1 Q.B.D. 669; *Ward* v. *National Bank of New Zealand*, (1883) L.R., 8 A.C. 755, at pp. 765-6; *Brown & Company* v. *Brown*, (1876) 35 L.T., 4 S. 54; *Murray* v. *Lee*, July 5, 1882, 9 R. 1040, 19 S.L.R. 778. (3) *Esto*, however, that the defender was liable under his guarantee, he was not liable for the whole sum guaranteed.

This was not a guarantee for the whole debt with a limitation of the cautioner's liability to £200, but a guarantee of part of the debt only—*Hobson* v. *Bass*, (1871) L.R., 6 Ch. App. 792. Where the meaning of a guarantee was doubtful it should be construed in favour of the cautioner—*Ellis* v. *Emmanuel*, (1876) L.R., 1 Ex. Div. 157; *Baird* v. *Corbett*, November 21, 1835, 14 S. 41. So construing it the defender was entitled to a *pro rata* share of the assets realised by the pursuers. The evidence showed that the pursuers had disposed at their own hand of all the debtor's effects at a time when they knew him to be insolvent. That being so they were bound to give the cautioner the equities he would have got on insolvency, for they were in the position of trustees for the whole body of creditors—Bell's Com., ii, 226; *Crawford* v. *Black*, December 2, 1829, 8 S. 158; *Sligo* v. *Menzies*, July 18, 1840, 2 D. 1478; *Hamilton* v. *Watson*, March 11, 1845, 4 Bell's App. 67, at p. 103; *Harvie's Trustees* v. *Bank of Scotland*, June 19, 1885, 12 R. 1141, 22 S.L.R. 758; *Veitch* v. *National Bank of Scotland*, 1907 S.C. 554, 44 S.L.R. 394; *Smart & Company* v. *Stewart*, March 10, 1911, 48 S.L.R. 595; *Ellis* (*cit. sup.*); *in re Sass*, [1896] 2 Q.B. 12; *ex parte Rushforth*, (1805) 10 Vesey 409; *Watts* v. *Shuttleworth*, (1860) 29 L.J. Ex. 229. (4) The pursuers had failed to perfect the security given them, viz., the policy of insurance, and that being so it ought to be credited to the assets available. [Counsel for the reclaimers admitted the defender's right to a *pro rata* share of the surrender value of the policy.]

Argued for reclaimers—[The Court having called for a reply as to the construction of the guarantee and the equities claimed]—(1) The guarantee was one of the whole debt limited to £200, and not a guarantee of part of the debt. That being so, the creditor was entitled to full payment of his debt before the cautioner could receive any share of the debtor's assets. (2) The pursuers were not entitled to the equities claimed, for there was no bankruptcy. Neither was there insolvency or even a trust deed for creditors. Even assuming the debtor was insolvent, the pursuers were entitled in law to act as they did, for a creditor was entitled to do diligence for his debt. The evidence showed that the pursuers had not taken the management of the debtor's estates or realised them at their own hand.

At advising—

LORD MACKENZIE — This is an action upon a guarantee at the instance of F. W. Harmer & Company, wholesale clothiers, Norwich, against James Gibb, designed as residing at 14 Traquair Park, Corstorphine. The defender died during the course of the proceedings, and his trustees have been sisted as parties.

The guarantee is dated 26th October 1895, and was for the benefit of the defender's nephew John M'Gillivray, a draper in Colchester. Its terms are as follows [*quoted supra*]. The pursuers thereafter supplied M'Gillivray with goods to the value of several thousand pounds. On 13th February 1907 the defender intimated to the pursuers his decision to withdraw the security. Letters then passed between the pursuers and the defender, the result of which was that the defender agreed to continue the guarantee.

The Lord Ordinary has dismissed the action, on the ground that the letters which passed at this time gave the defender a right to have no material change made in the existing relations between the pursuers and M'Gillivray, with regard to M'Gillivray's business, until another balance-sheet was made up, without communicating the proposed change to the defender. The first question is whether the correspondence contains any such undertaking on the part of the pursuers. The Lord Ordinary's view was that such an undertaking was necessarily implied in the contract for the continuance of the defender's guarantee. I am unable so to construe the letters. The reply of the pursuers to the defender's letter of 13th February was dated the 22nd. In it they inform the defender that they had discussed the matter with M'Gillivray, that his payments to them were considerably behind hand, and that at their suggestion he had consulted a chartered accountant in Norwich in order that he might have a proper balance-sheet got out. They added that they had seen the books and the balance-sheet, and were quite satisfied that Mr M'Gillivray was in a substantial position at that time. The letter ended as follows —"Should you, after this letter, decide to call in your guarantee, we shall have no alternative but to ask you to send us a cheque for £200 to pay part of the overdue account, but if on consideration you should decide to continue the guarantee until the next balance-sheet is got out we are of opinion that Mr M'Gillivray ought to have by that time very much improved his position." The defender wrote on the 25th he was pleased to know that the pursuers were under the impression that Mr M'Gillivray's affairs were in a good condition, and said—"In the circumstances I shall wait until the next balance-sheet is made up." On 1st March the pursuers wrote to the defender that they were glad to know he had decided to continue his guarantee of £200 to Mr M'Gillivray until further notice.

The effect of these letters, as it appears to me, was that Mr Gibb withdrew his letter of the 13th of February—that is to say, that he withdrew his withdrawal of his security. The contract between the parties continued to be regulated by the terms of the guarantee itself. No new term was introduced into it by the correspondence. I am therefore unable to agree with the Lord Ordinary's judgment.

It appears from the Lord Ordinary's opinion that an argument was submitted in the Outer House that the cancellation of the withdrawal was induced by the pursuers' fraudulent misrepresentation and concealment. This point was, however, not opened upon the reclaiming note.

What was pressed by the defender's counsel in the debate in the Inner House was a view of the case which involves two points, the first of which arises on the proper construction to be put upon the guarantee. According to the defender's contention, it means that Gibb was to be liable for £200 of the amount which M'Gillivray should owe Harmer & Company—not that Gibb was to be liable for the amount which M'Gillivray should owe Harmer & Company, subject to the limitation that he was not to be called upon to pay more than £200. If the defender is right in regard to this, the second point arises. The defender's argument upon it is that Gibb, having guaranteed only a limited portion of the debt, if he pays that portion he has in respect of it all the rights of a creditor. He then goes on to maintain that Harmer & Company after March 1907, in the knowledge that M'Gillivray was insolvent, effected what was a complete realisation of his estate, and that therefore, although there was not actual bankruptcy, Gibb is entitled to the same equities as if there had been bankruptcy. This would mean that the defender is entitled to a rateable proportion of what Harmer & Company had been paid in respect of the whole debt. First, as regards the construction of the guarantee, I am of opinion that the defender is right. What is guaranteed is payment of and for all such goods, *i.e.*, goods sold in the way of trade, as Harmer & Company may from time to time sell and deliver to M'Gillivray or to his order up to the value of £200. The natural antecedent of the word "value" is the immediately preceding word "goods," which points to a guarantee for a supply of goods of that value and no more. The language does not seem to me to be appropriate to cover a guarantee for the whole debt subject to a limitation in the amount. If that had been what was meant, one would have expected some such expression as "amount" to be used instead of "value," which would have referred back, not to the immediate antecedent "goods," but to the word "payment" which precedes. Such a document should be construed *contra preferentem*. The matter is no doubt very much one of impression, and the Lord Ordinary has arrived at a different conclusion in regard to it. The question is one which depends on the construction of the particular guarantee, but the terms of the guarantee in the case of *Hobson* v. *Bass*, L.R., 2 Ch. App. 792, were so similar to the present that the judgment of the Lord Chancellor (Hatherley) is authority for the view now taken.

Although the defender succeeds as regards the first step he has to take, I am of opinion that he fails as regards the second. As the Lord Ordinary points out on this branch of the case, there was here no bankruptcy. The facts upon which the defender founds as producing a state of matters which he says should be regarded as equivalent to bankruptcy are as follows: He says that the pursuers knew, at anyrate in the beginning of 1907, that M'Gillivray was insolvent; that he had been in arrear with his payments for a considerable time and that the guarantor wished to withdraw; that Harmer & Company knew he was neglecting his business, and that his credit was so low with the bank that by June he could not draw a cheque for more than £15; that in July he was summoned by one of the partners of Harmer & Company to attend a meeting in regard to his indebtedness to them, which appears to have been over £1000; that during August and September M'Gillivray was constantly in touch with Harmer & Company with regard to the disposal of his business; and that this resulted in an arrangement by which his book debts were to be realised by auction by Mr Cairns, an auctioneer and accountant in London who was in the way of realising the assets of such a business as M'Gillivray had. The business was sold in November to a Mr Frew, who was, as the pursuers explained to Mr Cairns in one of their letters, a very good customer of theirs, and that they would be pleased to accept his bills without guarantee. On 29th November Mr Cairns wrote to the pursuers that he had Mr M'Gillivray's instructions in a letter dated 22nd October to pay over the proceeds of the sale to them, and that no money or bills would be passed through his hands without their instructions. From the letter of 28th January 1908 it appears that the pursuers were willing to allow the purchaser a long period of credit, and were willing to take his bills on this footing. The defender contended that the pursuers were thus in as advantageous a position as if there had been bankruptcy. He therefore argued that the principle contained in such cases as *Crawford* v. *Black*, 8 S. 158, should be applied, and that under it he is entitled to rely on his rights as an ordinary creditor to share in the estate of an insolvent which had been taken possession of by certain of the creditors. He also founded on his right as guarantor to the benefit of the proceeds of every portion of the estate realised out of the ordinary course of business on the principle laid down in *Ellis* v. *Emmanuel*, 1876, 1 Ex. Div. 157.

In my opinion the defender's case here fails upon the facts. The sale was arranged by M'Gillivray with Cairns without the intervention of the pursuers. It appears to have been the best thing that could have been done in the circumstances, and was therefore in the interests of the defender as well as of the pursuers. If the pursuers had chosen to do diligence and recover their debt in this way the debtor could have done nothing to stop them. If the debtor chose voluntarily to realise his effects it appears to me the pursuers were entitled to accept payment of their debt out of the proceeds of their sale without ulterior consequences as regards the guarantor. The Lord Ordinary animadverts, probably with good reason, on the want of candour in the pursuers' correspondence and in their pleadings. It is not necessary, however, to discuss the grounds of that opinion. There is no doubt that they did not communicate with the guarantor until

March 1908, the reason then being that they learned M'Gillivray was making away with some of his effects, the proceeds of which were apparently not to be paid to them. In the circumstances I am unable to see that there was any obligation upon Harmer & Company to communicate with Mr Gibb. What was done was not equivalent to a distribution of the estate in bankruptcy, and the pursuers had no security which they realised. If they had held a security for the debt guaranteed, then on realisation the guarantor would be entitled to the equities thence arising. There is, however, no such case here. The principles, therefore, laid down by Blackburn, J., in *Ellis* v. *Emmanuel* have no application. I am therefore of opinion that this ground of defence fails.

The amount of the debt now remaining due according to the pursuer's evidence is £299, 17s. 2d. The defender says that the pursuers have not proved what sum, if any, is due to them by M'Gillivray. Mr Christie's argument was that it had been proved that cheques for upwards of £400 had been received during the period covered by the account, and that the pursuers had failed to prove the debit entries which these cheques were applied to extinguish. This point appears to me to be purely technical, and to be sufficiently met by the evidence of Mr Olley, the pursuers' manager, and of Mr Fowler, one of their bookkeepers. If the defender's counsel had intended to make a substantial point of this it would have been necessary to have carried the matter much further by an examination of the pursuers' ledgers.

Another point argued by the defender was that the interest debited against M'Gillivray on amounts not paid within the usual period of credit should be struck out as in a question with the guarantor. The Lord Ordinary has disposed of this matter adversely to the defender, and to what is said in his opinion I have nothing to add.

The remaining matter relates to the policy of insurance on M'Gillivray's life which was held by the pursuers, who, however, had neglected to perfect the security. It was conceded by the pursuers' counsel that in accounting with the defender they must be treated as if the security had been completed. The result of this is that the surrender value, which was stated to amount to some £116, is held by the pursuers as security for their whole debt of £299, 17s. 2d. The defender is entitled to the proportionate value of the policy which £200 bears to the total amount of the debt.

An interlocutor will be pronounced with a finding giving effect to this view, after which decree will be pronounced for the amount brought out.

LORD PRESIDENT—I concur.

LORD KINNEAR—I also agree.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

"Recal said interlocutor: Find that under the guarantee sued upon the defender is bound to pay to the pursuers for goods supplied by them in the way of trade to John M'Gillivray up to the value of £200, under deduction of the proportion of the value of the policy of insurance on the life of John M'Gillivray held by the pursuers which £200 bears to the total amount of the debt due by the said John M'Gillivray to the pursuers: Remit to the Lord Ordinary to proceed as accords: Find the pursuers entitled to expenses in the Outer House, and to expenses modified to one half in the Inner House, and remit," &c.

Counsel for Pursuers (Reclaimers) — Munro, K.C. — Dallas. Agents — Auld & Macdonald, W.S.

Counsel for Defender (Respondent) — Constable, K.C. — J. R. Christie—J. B. Young. Agent—Charles Munro, S.S.C.

Saturday, July 22.

FIRST DIVISION.

[Sheriff Court at Glasgow.

WILKIE *v.* KING.

Trade Union—Trade Union Act 1871 (34 *and* 35 *Vict. cap.* 31), *sec.* 4—*Action for Refund of Accident Bonus Benefit Paid to Member—Competency.*

The rules of a trade union provided that any member permanently disabled by accident should receive an accident bonus benefit, which he should be obliged to refund in the event of his resuming work at his trade. It was further provided that at the time of receiving the benefit he should sign an agreement binding himself to refund.

Held (*diss.* Lord Johnston) that an action by a trade union to recover from a workman accident bonus benefit was competent and did not come within sec. 4 of the Trade Union Act of 1871.

Baker v. *Ingall*, [1911] 2 K.B. 132, *approved.*

The Trades Union Act 1871 (34 and 35 Vict. cap. 17) enacts—Section 3—"The purposes of any trade union shall not by reason merely that they are in restraint of trade be unlawful so as to render void or voidable any agreement or trust." Section 4—"Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely—1. Any agreement between members of a trade union as such concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed. 2. Any agreement for the payment by any person of any subscription or penalty to a trade union. 3. Any agreement for the application of the funds