Friday, February 5.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

MACKINNON'S TRUSTEE *v.* BANK OF SCOTLAND.

Bankruptcy — Cautioner — Guarantee — Ranking—Payment by Guarantor before Bankruptcy — Claim by Grantee of the Bond for Full Amount of Debt.

A granted a letter of guarantee to a bank guaranteeing "due payment of all sums for which B is or may become liable to you, the amount which I am to be bound to pay under this guarantee not to exceed Two thousand five hundred pounds sterling, and interest from the date or dates of advance: I agree that, without prejudice to your right to demand payment of the whole sums hereby guaranteed, you shall also be entitled to make calls on me from time to time in respect of my said guarantee for such sums as you may fix; . . . and that this guarantee shall apply to and secure any ultimate balance of the sums that shall remain due to you after applying any dividends, compositions, and payments which you may receive: And it is further declared that this guarantee is to remain in force until recalled by me or my heirs or executors in writing, and shall be without prejudice to any other securities or remedies which you have or may acquire for the general obligations, or any particular obligation, of the said B." A desiring to terminate his liability paid to the bank the full amount for which he was liable, and the bank having placed the money to a special suspense account in name of its agent, wrote on the back of the letter of guarantee a receipt, which contained a reservation of its right to claim on the estate of B for the full amount of his indebtedness, and delivered the letter of guarantee to A. A had obtained from B the greater part of the money with which he made the payment. Thereafter a decree of *cessio bonorum* was granted against B. The bank claimed to be ranked for the full amount of the debt due to them by B without deduction of the payment made by A. The trustee in the *cessio bonorum* rejected the bank's claim to the extent of the payment made by A. In an appeal from his deliverance, *held* that the facts that the bank had written a reservation of its claim on the letter of guarantee, and that A had obtained from B the greater part of the money with which he made the payment, did not affect the question, and that looking to the terms of the letter of guarantee, and the fact that the payment by A was made before the bankruptcy of B, the deliverance of the trustee was right.

Harvie's Trustees v. *Bank of Scotland, &c.*, June 19, 1885, 12 R. 1141, 24 S.L.R. 758, *distinguished.*

Process—Proving of Tenor—Casus amissionis.

A granted a letter of guarantee to a bank guaranteeing to a limited amount a debt due to the bank by B. A desiring to terminate his liability paid to the bank the full amount for which he was liable. The bank having written on the back of the letter of guarantee a receipt which contained a reservation of the bank's right to claim on the estate of B for the full amount of B's indebtedness delivered the letter of guarantee to A, who destroyed it. Thereafter decree of *cessio bonorum* was granted against B. In an appeal by the bank against a deliverance of the trustee in the *cessio bonorum* dealing with the amount for which the bank was entitled to rank, *held* that the bank was not entitled to prove the tenor of the letter of guarantee in respect that the circumstances did not constitute a relevant *casus amissionis.*

H. Hume M'Gregor, S.S.C., trustee on the cessioed estate of Archibald Mackinnon, *appellant*, disallowed to the extent of £2806, 14s. 9d. a claim for £3863, 16s. 7d. made by the Bank of Scotland, *respondents.* The Sheriff-Substitute (MARCUS DODS) at Edinburgh having allowed the claim for the whole sum, and the Sheriff (MACONOCHIE) having adhered, the case came before the Second Division of the Court of Session.

The following *narrative* of the *facts* is taken from the opinion of Lord Salvesen, *infra*—"This appeal raises some questions of general interest in the law of ranking on a bankrupt estate. The Bank of Scotland were creditors of Archibald Mackinnon, ship and tug owner in Leith, and they claim to rank for a sum of £3863, 16s. 7d., being the amount brought out in a state of debt. No controversy arises as to the items in this state, but there was a note appended to it to the effect that the Bank held on current account in name of their agent the sum of £2806, 14s. 9d. 'for the obligations of the said Archibald Mackinnon, being the amount of principal and interest received on 26th March 1912 from Louis Zollner, merchant and shipowner, Newcastle-on-Tyne, under his letter of guarantee for £2500 dated 19th August 1907' in favour of the said Bank. Decree of cessio was pronounced against Mr Mackinnon on 1st October 1913, so that this payment had been made more than eighteen months prior to that date. The trustee in his deliverance ranked the Bank for the amount of their claim less the sum mentioned in the note; but the Sheriffs have both held that he was wrong in doing so, and that the Bank is entitled to a ranking for the full amount. The letter of guarantee mentioned in the note was not produced. It turns out now that it was delivered to Mr Zollner in exchange for the payment which he made, and was destroyed by him. As the whole case of the Bank depended on the terms of the guarantee which Mr Zollner had granted in their favour they craved and were allowed a proof of its terms and of the circumstances of its recall by the guarantor

and the cause of its alleged destruction. It was at one time maintained by the trustee that a separate action of proving the tenor ought to have been instituted in the Court of Session; and that it was not competent to have an equivalent process as incidental to a Sheriff Court action. The trustee, however, was content in the appeal before us to waive this point and to restrict his objections to the single one that no *casus amissionis* had been proved which would have entitled the pursuers in an action of proving the tenor to decree in their favour—assuming that such an action had been competently brought in the Court of Session, and that the point had arisen for decision on the same evidence as that which was led in the Sheriff Court. The import of this evidence is shortly as follows—The maximum sum which Mr Zollner guaranteed to the Bank as cautioner for Mackinnon was £2500 and interest, which amounted at the date of the settlement to a sum of £306, 14s. 9d. Mr Zollner desired to terminate his liability to the Bank, and gave instructions to his agents to have the matter settled up. They accordingly tendered the full sum of principal and interest for which he was liable on the footing that the letter of guarantee was delivered up to them on Mr Zollner's behalf. The Bank agreed to do this subject only to their writing on the back of the guarantee a receipt which contained this reservation—'This payment is accepted under reservation of and without prejudice to our right to claim on the estate of the said Archibald Mackinnon for the full amount of his indebtedness.' While the Bank attached much importance to the terms of the receipt Mr Zollner apparently did not do so, for he destroyed the letter of guarantee on which it was endorsed as soon as he received it; and although he was some £408 out of pocket he has made no claim whatever on the bankrupt estate."

In order to keep Mr Zollner *indemnis* Mr Mackinnon had granted certain mortgages over his steamer shares, and it was the funds of these which Mr Zollner used in satisfying his obligations under the guarantee and obtaining his discharge.

The *letter of guarantee* was in the following terms—

"To the Governor and Company of
The Bank of Scotland.

"Gentlemen—I, Louis Zollner, merchant and shipowner, Newcastle-on-Tyne, hereby guarantee you due payment of all sums for which Archibald Mackinnon, steam tug owner, Leith, is or may become liable to you; the amount which I am to be bound to pay under this guarantee not to exceed two thousand five hundred pounds sterling, and interest from the date or dates of advance: I agree that, without prejudice to your right to demand payment of the whole sums hereby guaranteed, you shall also be entitled to make calls on me from time to time in respect of my said guarantee for such sums as you may fix: And I further declare that this guarantee shall apply to and secure any ultimate balance of the sums that shall remain due to you after applying any dividends, compositions, and payments which you may receive: And it is further declared that this guarantee is to remain in force until recalled by me, or my heirs or executors, in writing, and shall be without prejudice to any other securities or remedies which you have or may acquire for the general obligations or any particular obligation of the said Archibald Mackinnon.—In witness whereof, these presents, written, in so far as not printed, by , clerk in the head office of the Bank of Scotland, Edinburgh, are, under the declaration that the last printed line hereof is deleted before subscription subscribed by me the said Louis Zollner at Newcastle-on-Tyne, on the nineteenth day of August nineteen hundred and seven, before these witnesses Henry Mosely, bank manager, and Bertie Pocock, manager's assistant, both of Barclay's bank, Newcastle-on-Tyne.

"LOUIS ZOLLNER.

"Henry Mosely, *witness.*

"Bertie Pocock, *witness.*"

Argued for the appellant—(1) It was incompetent for the respondents to prove the tenor of the guarantee, in respect that they could not and did not aver a relevant *casus amissionis.* The evidence showed that the document had been intentionally destroyed, and that was not a relevant *casus amissionis*—Mackay's Manual, pp. 513-14. Unless the Bank could prove a particular form of guarantee they were bound to deduct from their claim in the ranking the payment made by Zollner. (2) Assuming that it was competent to prove the tenor of the document, the appellant was ready to admit that its terms were as alleged, but the evidence showed that its destruction was an ending of all contractual relations between the respondents and Zollner, and that the payment was just a payment to account which the respondents were bound to impute. Except to the extent of £408 the payment was really made with the bankrupt's money, and it was just a payment to account of the principal debt. This was evidenced by the fact that the respondents applied the interest accruing on it to set off the interest due to them by the bankrupt. A payment made by a guarantor before sequestration fell to be deducted from the creditor's claim in the ranking—*Hamilton* v. *Cuthbertson*, February 6, 1841, 3 D. 494; Goudie on Bankruptcy, 3rd. ed., p. 617. *Harvie's Trustees* v. *Bank of Scotland, &c.*, June 19, 1885, 12 R. 1141, 22 S.L.R. 758, was distinguishable, because there the payment was made after sequestration. *Veitch* v. *National Bank of Scotland*, 1907 S.C. 554, 44 S.L.R. 394, was also distinguishable, because that was the case of a guarantee limited to payment of a specific advance.

Argued for the respondents—(1) The Bank had sufficiently averred a *casus amissionis* so as to entitle them to prove the tenor of the guarantee—*Young* v. *Thomson*, 1909 S.C. 520, 46 S.L.R. 143. (2) The Bank accepted the payment by Zollner on condition that its rights against the bankrupt were reserved, and by taking the receipt with the reservation written on it Zollner agreed to this. There was a substantial inducement to Zollner to agree to this condition, viz.,

the receipt with the reservation written on it which Zollner thus obtained entitled him to recover from the Bank what he had paid in the event of the Bank itself recovering 20s. in the £ from the principal debtor, or the difference between what the Bank recovered from the bankrupt plus the money paid by Zollner and the actual amount of the debt. That was the reason why the Bank kept the payment by Zollner in a special suspense account. After Zollner settled with the Bank, if he had sued the principal debtor for the £408 and produced the guarantee as evidence of his claim, the Bank could have interdicted him. The Bank did not know the source from which the payment was made, and it was irrelevant to consider where Zollner got the money with which he paid the Bank, provided that he did not pay it on behalf of the debtor, and that was not the case. The guarantee in the present case was a guarantee of the whole debt although the liability was limited, and until the Bank had been paid 20s. in the £ Zollner was not entitled to an assignation of the Bank's rights—*In re Sass*, [1896] 2 Q.B. 12; *Veitch* v. *National Bank of Scotland*, *cit.*, *per* Lord Stormonth Darling at 1907 S.C. 557, 44 S.L.R. 397; *Ewart* v. *Latta*, May 5, 1865, 3 Macph. (H.L.) 36, *per* Lord Chancellor (Westbury) at 41; *Harvie's Trustees* v. *Bank of Scotland*, *&c.*, *cit.*; *Commercial Bank of Australia* v. *Official Assignee of the Estate of Wilson & Company*, [1893] A.C. 181; *University of Glasgow* v. *Yuill's Trustee*, February 10, 1882, 9 R. 643, *per* Lord Shand at 654, 19 S.L.R. 429, at 434; Gloag and Irvine on Rights in Security, p. 834, and cases there cited. *Doig* v. *Lawrie*, January 7, 1903, 5 F. 295, 40 S.L.R. 247, was irrelevant, it turned on a question of notice. *Royal Bank of Scotland* v. *Millar & Company's Trustee*, February 28, 1882, 9 R. 679, 19 S.L.R. 455, was also referred to.

At advising—

LORD SALVESEN—[*After narrative of the facts*]—In my opinion there was nothing in the terms of the settlement between Mr Zollner and the Bank which in any way disentitled him from dealing with the letter of guarantee and the receipt endorsed upon it in the manner in which he did. There was no agreement that Mr Zollner should hold the letter of guarantee on behalf of the Bank, and no condition was attached to the discharge which the Bank granted to him. His sole object appears to have been to ascertain at the date of settlement the amount which the Bank could claim against him under the letter of guarantee, and he had apparently no intention of making any claim against the bankrupt. Assuming Mr Mackinnon to be still solvent at that time, I do not doubt that Mr Zollner had a good claim against him to the extent of £408, but this was a claim which Mr Zollner might waive if he chose, and there could be no better evidence of his having done so than his destruction of the document on which his claim would naturally be founded. Supposing that at a later date he had changed his mind and had found it necessary to prove the tenor of the destroyed guarantee in order to make such a claim, would his own deliberate destruction of the document have been treated as a *casus amissionis* entitling him to such proof? I am of opinion that it would not. It would have been a different matter if the document had been destroyed by mistake, as, for instance, if he had destroyed it intending to destroy some other document, but there is nothing of this kind here. Mr Zollner knew exactly the terms of the guarantee and of the receipt on it, and whether or not he adverted to the circumstance that it might aid him in establishing a claim against Mackinnon—assuming that gentleman to remain solvent as he ostensibly was at the date of settlement—he did not consider it necessary to preserve it for any such purpose. I think the fair inference from Mr Zollner's actings is that he intended to make no claim, but was content to have his liability ascertained and paid and to be done with the whole transaction.

If I am right so far, it appears to me that the Bank was in no better position. No doubt if Mr Zollner was in any sense a trustee for them in holding the document in question, or was under any obligation to make it forthcoming on their demand, his unauthorised destruction of the document would be a proper *casus amissionis* which would entitle them to a proof of its contents. I cannot, however, view the transaction in this light. As between the parties to the guarantee it was treated as at an end, and the only document of debt which the Bank held was delivered up to the guarantor on his satisfying their full claim against him. When Mr Zollner received it he was entitled to deal with it as he pleased. Whatever reservations the Bank made in their receipt did not concern him. It was indeed suggested that the reservation was necessary in his interest, because if the Bank successfully claimed for the full amount of his debt in the subsequent sequestration of Mr Mackinnon and recovered more than 20s. in the £1 after crediting Mr Zollner's contribution, they would be liable to account to him for the surplus. This may be so, but the Bank was under no obligation as in a question with Mr Zollner to make any such claim, and he could not have complained if they had applied the sum at once in reduction of Mr Mackinnon's debt to them. The payment so far as Mr Zollner was concerned was unconditional, and the fact of that payment did not constitute the Bank a trustee for Mr Zollner. A settlement by Mr Mackinnon of the balance due on his account would have ended the matter, and Zollner could have made no claim through the Bank for the £408 that he had disbursed even if he had not deliberately destroyed the guarantee with the intention, as I think may be inferred from his evidence, of giving up any claim that he might otherwise have had.

The matters with which I have been dealing necessarily to some extent enter into the merits of the dispute, but if my view is well founded it was incompetent for the Bank to prove the tenor of the guarantee in question. If so there is an end of the case, because, apart from the terms of the guarantee itself,

all we know about the transaction is that Mr Zollner, as cautioner for Archibald Mackinnon, paid the Bank a sum of £2806 to account of Mackinnon's debt. Admittedly everything depends on the exact terms of the obligation, for if Mr Zollner had been cautioner only for a part of the debt as between the principal creditor and the debtor, the right of the cautioner (to use the language of Vaughan Williams, J., in *in re Sass*, [1896] 2 Q.B. at p. 12) "arises merely by payment of the part, because that part, as between him and the principal creditor, is the whole." In such a case the principal creditor can only rank for the balance while the cautioner ranks in his own right. As, apart from the production of the guarantee or competent proof of its tenor, it could not be affirmed that Mr Zollner did not hold that position, the claim for the Bank would necessarily fail.

It is however desirable, as the evidence discloses the terms of the guarantee which Mr Zollner undertook, that we should also deal with the case on that footing. It turns out that the guarantee was precisely in the terms of that which came under the notice of the Court in *Harvie's Trustees*, 12 R. 1141, and was a guarantee, not for part of Mackinnon's indebtedness to the Bank, but for payment of all sums for which he might become liable to them, the amount not to exceed £2500 and interest. Now under such a guarantee it was held that the guarantor was not entitled to interfere with the Bank operating payment of its debt by a ranking for the entire amount. There is, however, this essential difference between the two cases, that the sum paid by the guarantor in *Harvie's* case was not paid until after sequestration had taken place. The position accordingly was that the debtor was due the full sum to the bank at the date of sequestration, and that nothing had in fact been paid by the guarantor at that time. The bank was therefore not bound to deduct in ranking on the bankrupt's estate the claim which it had under the letter of guarantee. Neither of the Sheriffs, however, seems to have adverted to the distinction between the facts of the case and that of *Harvie's Trustees*. The distinction is well brought out in the case of *Hamilton*, 3 D. 494, where it was held that a creditor claiming in the principal debtor's sequestration was bound to deduct the dividends which he had received from the insolvent estates of co-obligants before the date of the sequestration. The argument for the unsuccessful creditor proceeded on the doctrine that a party who had several co-obligants bound to him conjunctly and severally was a creditor of each for his full debt, and was entitled to claim his full debt from the estate of each as if he were the sole debtor. This point was conceded; but the decision turned on the payments of the co-obligants having been made before sequestration, and such payments it was held extinguished the debt *pro tanto*, and precluded the creditor from ranking for more than the balance. Lord Mackenzie said—"I think it was never intended that a party should acquire right by sequestration to claim for more than the actually existing debt; and I do not think that in this case it can be truly stated that the whole original debt was due at the date of the sequestration, when partial payments, which must *pro tanto* have extinguished it, had been made. In the event of there being no bankruptcy or sequestration, it is obvious that the creditor who had previously received partial payments could not have demanded the full debt from the principal debtor, but must have imputed these payments *pro tanto* in extinction of it, and so it appears to me that in the sequestration process he could only rank for the balance due after deducting prior payments and draw a dividend on such balance, which dividend is payable solely on the debt as it exists at the date of the sequestration." Lord Fullerton after commenting on the prior decisions said—"These authorities afford no sanction to the general proposition that a party is entitled to claim for the full amount of his debt and is not bound to deduct partial payments received from co-obligants prior to the date of the sequestration. Such a pretension seems to be inconsistent with general principle, and was expressly rejected in the case referred to in these papers—the ranking of Edderline, 14th January 1801. Considering, then, the general principle, the authorities on the subject, and the distinction expressly taken in the only cases in which the general principle has been modified, I must hold that partial payments made from other sources before the sequestration are to be deducted, and that the balance forms the true amount of the debt for which the creditor was entitled to claim." It is true that in that case the question did not arise with cautioners, but with parties to a bill who were liable as endorsers to the holder, but no distinction was taken on this head, and indeed the Lord Ordinary, whose judgment was reversed, did not distinguish between the case of sureties and that of ordinary co-obligants. It is also clear that if there had been no payments by the co-obligants prior to the sequestration, but payments before the claim was made from their estates, these would not have fallen to be deducted in ranking on the estate of the principal debtor. The right of the creditors to rank for the amount due at the date of the sequestration would therefore have been exactly the same as the right of the bank in *Harvie's Trustees*. *Prima facie*, therefore, it would seem that the bank here ought to have no higher right. In other words, the payments made before sequestration go to reduce the debt for which the creditor may rank, whatever may have been the terms of the guarantee under which the payments were made. The bankrupt was no party to the guarantee, and the rights of his other creditors cannot be thereby affected.

Counsel for the Bank were unable to say that there was any authority in Scotland which supported their contention, but they referred us to the case of the *Commercial Bank of Australia*, [1893] A.C. 181. The facts of that case were very special. A

bankrupt and others had become guarantors to the appellant bank of a principal debtor's liability for a sum of £6250. Three of the sureties entered into an agreement with the bank that there should be substituted for their obligation a deposit of £3000 in the bank to be carried to a suspense account. The agreement conferred power on the bank to appropriate that sum whenever they thought fit in discharge *pro tanto* of the principal debt. It was held that such a deposit did not until appropriation operate as payment, and that the bank was entitled to prove for the full amount of their debt against the estate of a bankrupt co-surety who was not a party to the agreement. The judgment, as I read it, proceeded entirely on the terms of the agreement, which recited that three of the sureties had proposed to pay the bank £3000 in discharge of their several liabilities, and that the bank "had declined to receive the said moneys in reduction of the said account." It then went on to say that the bank had agreed with the three sureties that it would not look to them for more than £1000 each "on condition that the said sums or their equivalent shall be deposited to a separate account with the said bank, to be appropriated by the said bank in satisfaction in part or in whole of the said debt . . . when and so soon as the said bank may deem prudent, the receipt of said sums being entirely without prejudice to the bank's right to sue or look to the other guarantors for the full amount of the said guarantees, it being understood that such money shall be and remain as a security to the bank for the due payment of the said respective sums of £1000 each credited to a special suspense account with the said bank accordingly." I think the conclusion was irresistible that prior to the appropriation the deposit of £3000 did not operate as payment of the debt. The deposit of the £3000 merely came in place of the personal liability of the sureties, and, as the Lord Chancellor (Herschell) pointed out, the bank would neither have been justified in saying nor bound to say that £3000 of the amount had been already paid if the debtor had tendered the entire amount due. It was exactly the same as if the sureties had deposited with the bank a security for £3000 instead of the cash itself, they having stipulated that as between them and the bank the deposit of this security should operate a discharge of their liability under the guarantee. The essential points of distinction between the present case and that are that the bank had refused to accept a payment to account of the debt and had made an agreement with the sureties under which it would have been liable in the event of the principal debtor having paid his full debt to refund to the sureties the amount of their security, whereas in the present case the cautioner made no condition and the Bank undertook no obligation to him. "The fallacy" (as the Lord Chancellor said) "which lurks in the argument of the respondent is this, that it is suggested that the comparison is to be between the creditors of Wilson if no such agreement had been entered into and the position of the creditors of Wilson if they can claim the benefit of this sum as a payment." This is as I humbly think exactly the fallacy, *mutatis mutandis*, that underlies the Bank's argument here. It is claiming on the bankrupt estate on the same footing as if it had agreed with the cautioner that his money was to be deposited merely as a security for the bankrupt's indebtedness, whereas no such agreement was made. How the Bank dealt with the money is of little consequence. In point of fact it was put not to a suspense account in name of the cautioner but into a special account in name of the Bank's own manager, and the interest on the money paid was treated as extinguishing *pro tanto* the interest on the principal debt. As in a question with the principal debtor, I think the Bank was bound, if he had tendered the balance of the amount due on his account, to have given him a full discharge. In short, having received a payment from the cautioner towards the principal debt, the Bank proposes to treat it for its own purposes as if it were merely a security held for an existing obligation of the cautioner. In my opinion the Bank is not entitled to do so.

The form which the transaction took may perhaps be explained by the circumstance that all but £408 of the amount paid by the cautioner was derived from the bankrupt's own estate. In order to keep the cautioner *indemnis* he granted certain mortgages over his steamer shares, and it was the proceeds of these which the cautioner used in satisfying his obligations under the guarantee and obtaining his discharge. The Bank boldly asserted that these mortgages had become the property of the cautioner. No doubt his title was absolute, but he held the mortgages in trust for the true owner from whom he had received them until he actually discharged obligations of the bankrupt to an equal amount. Had Mr Mackinnon relieved him of his guarantee by obtaining another cautioner to take his place with consent of the Bank, or had he himself discharged the cautioner's actual indebtedness and obtained delivery of the guarantee, Mr Zollner would have been bound to redeliver the mortgages or account for the proceeds if he had realised them. It appears to me to make no difference that Mr Zollner obtained the funds from the bankrupt, and with these funds discharged his obligations to the Bank under the guarantee. If it were otherwise the result would be that Mackinnon having already paid the Bank £2500 his estate was to be liable for the full debt without deduction of the amount already repaid. It is said that the Bank did not know the source from which the payments were made, but this seems to me to be immaterial. Had the Bank proposed such an agreement to Mr Zollner as was actually made in the case of the *Commercial Bank of Australia* he could not have honestly entered into it except to the extent of the £408 that he actually disbursed out of his own funds. That Mr Zollner had no intention of keeping up any claim for this sum is shown by his subsequent actings to which I have already re-

ferred. *Quoad* the payment of all but the £408 he was really acting as agent for the debtor, and the result of holding otherwise would be in effect to give the Bank a ranking on the bankrupt estate for a sum that the bankrupt had already paid. The absurdity of such a contention would be apparent if the bankrupt's estate had been sufficient to yield a dividend of 10s. or upwards in the £1. The dividend plus the payment made by Mr Zollner would together in such a case have been more than sufficient to pay the Bank's entire claim. To whom would the surplus fall to be repaid? Certainly not to Mr Zollner, who *quoad* the greater part of the sum paid through him had no right to receive a sixpence, and who *quoad* the £408 had deprived himself of any right to receive it. The alternative is that it should be repaid to the bankrupt estate, but this possibility is excluded by the laws applicable to bankruptcy, for a creditor can never claim from a bankrupt estate more than is sufficient to satisfy his full debt.

There is another aspect of the case which seems to me to point in the same direction. When Zollner settled with the Bank I see nothing to have prevented him, had he been so minded, to have sued Mackinnon for the £408 which he disbursed out of his own funds, producing the discharged guarantee with the Bank's receipt upon it as evidence of his claim—*Lawrie*, 5 F. 295. It was suggested that under the terms of the guarantee the Bank could in some way have interdicted such a proceeding, but I can see no grounds for this. It may be that if by these proceedings Zollner had forced Mackinnon into bankruptcy he could not have lodged a claim for the £408 in competition with the Bank; but, on the other hand, if the debtor had paid the amount, what conceivable ground would the Bank have for claiming more than the balance of their account against the bankrupt estate? Instead of enforcing payment Zollner impliedly waived or discharged his claim against Mackinnon, just as he might have done by express agreement; and the result *quoad* the Bank is precisely the same. On all these grounds, therefore, I am of opinion that the trustee's deliverance was right and that the Sheriffs have erred in recalling it.

LORD HUNTER—I agree with Lord Salvesen that the appeal should be sustained. In taking oath as to the indebtedness of the bankrupt to the respondents the Bank of Scotland, their cashier deponed to an amount of £3863, 16s. 7d. as at the date of the decree granting cessio, conform to a state of debt signed by the deponent as relative to the debt. He also deponed that no part of the debt had been paid or compensated to the Bank except the payment specified in the note appended to the said state. The note referred to is in the following terms—"The said Governor and Company hold on current account at their aforesaid branch the sum of £2806, 14s. 9d. in name of their agent there for the obligations of the said Archibald Mackinnon, being the amount of principal and interest received on 26th March 1912 from Louis Zollner, merchant and shipowner, Newcastle-on-Tyne, under his letter of guarantee for £2500, dated 19th August 1907, in favour of the said Governor and Company."

In adjudicating on the respondents' claim the appellant, as trustee in the cessio, admitted the claim to a ranking for £1057, 1s. 10d. To this adjudication the agent for the respondents objected on grounds stated in a letter to the appellant dated 25th March 1914. They alleged that Mr Zollner, who had made the payment referred to in the oath and state of debt, had by letter of guarantee dated 19th August 1907 guaranteed to the Bank due payment of all sums for which the bankrupt was or might become liable to the Bank, but limited the amount he was to be bound to pay under the guarantee to a sum not exceeding £2500 and interest from the date or dates of advance. They also stated that on Mr Zollner lodging with the Bank the said sum of £2806, 14s. 9d. the letter of guarantee was "delivered to the agents for the said Louis Zollner, upon which letter of guarantee there was endorsed the following receipt —'Bank of Scotland, Leith, 26th March 1912. We acknowledge to have received from the within named and designed Louis Zollner, the principal sum of two thousand five hundred pounds, with interest to date amounting to three hundred and six pounds, fourteen shillings and ninepence, due by him under the within guarantee. The payment is accepted under reservation of and without prejudice to our right to claim on the estate of the within Archibald Mackinnon for the full amount of his indebtedness to us.'"

The respondents did not produce the letter of guarantee, but averred that the agents for Mr Zollner had informed them that it had been destroyed.

After certain procedure in an appeal by the respondents against the appellant's deliverance, the Sheriff-Substitute, on 20th May 1914, allowed to the Bank a proof of the terms of the letter of guarantee founded on by them, of the circumstances of its recall by the guarantor, and of the cause of its alleged destruction. To this interlocutor the Sheriff on 29th June 1914 adhered, finding the trustee liable in the expenses of the appeal.

In my opinion the Sheriffs were wrong in allowing a proof. The Bank had made no relevant averment of the *casus amissionis* entitling them to prove the tenor of the missing letter of guarantee granted by Zollner to them. In the case of *Winchester* v. *Smith*, (1863) 1 Macph. 685, Lord President M'Neill, at p. 689, said that the *casus amissionis* "means not only that the writing has been actually destroyed or lost, but that its destruction or loss took place in such a manner as implied no extinction of the right of which it was the evident." His Lordship adds—"Such *casus amissionis* requires to be supported by much stronger evidence in some cases than in others. For example, if the writing be a disposition of land of which the tenor is satisfactorily established, and which was followed by infeftment and long and uninterrupted possession, and the instrument of sasine on

which is produced, a comparative slight proof of the *casus amissionis* may be sufficient. But if it be such a writing as is usually cancelled or destroyed when it has served its purpose—as, for example, a bill of exchange or promissory-note or a personal bond—and if it has been destroyed, or has been found in the hands or in the repositories of the granter actually cancelled, the presumption is that the right of which it had originally been the evident no longer subsists, and very clear evidence is requisite to overcome the presumption."

The evidence in the present case satisfies me that the Bank's failure to make a relevant averment of the *casus amissionis* arose from the circumstances of its being impossible for them to do so. Mr Zollner, the cautioner, paid to the Bank every penny which he could in any event have been called upon to pay under his guarantee. He seems never to have given any particular attention to the terms of the guarantee, and, as he says himself, on receiving the document after payment the only thing he saw was his name at the bottom, and he tore the document up immediately upon getting it. The agent for the Bank says—"I handed it (*i.e.*, the letter of guarantee) over on payment of the amount due by Mr Zollner. That discharged his obligation completely. The guarantee was at an end immediately he paid the money so far as that sum and Mr Zollner were concerned."

If the Bank are unable to set up any particular form of guarantee by the cautioner, I think that the payment made by him before the bankruptcy of the debtor must be deducted from their claim in the cessio. The case of *Hamilton* v. *Cuthbertson* (1841) 3 D. 494, is an authority for this proposition.

The view which I have expressed is, if sound, sufficient for the disposal of the case. I am, however, by no means satisfied that the Bank, on the assumption that they competently proved a guarantee in the terms alleged by them, were entitled to the ranking allowed to them by the Sheriffs.

It is no doubt true that where a cautioner has guaranteed to a creditor the whole indebtedness of a debtor, but has limited his liability to payment of a specified sum, the creditor is entitled in a sequestration of the debtor to rank for the whole debt although the cautioner has made payment after the sequestration of the amount for which he is liable. The cautioner in terms of his obligation cannot in any way interfere with the creditor operating payment of his debt by a full ranking for the entire amount—*Harvie's Trustees* v. *Bank of Scotland, &c.*, (1885) 12 R. 1141. Apart from a case of sequestration of the debtor, the cautioner in such a guarantee can only get relief by the debtor paying the whole debt which is due, and not merely the amount which he, the cautioner, is liable to pay. The cautioner, however, is entitled to a discharge on recalling his guarantee and paying to the creditor the full amount of his liability; but he cannot claim as of right an assignation from the creditor of any portion of the debt unless the whole is paid. On the other hand, there is nothing to prevent the debtor providing the cautioner with funds to discharge the cautioner's liability or from repaying the cautioner what the latter has paid to get a discharge. If either of these events has occurred I have difficulty in seeing that the creditor—it may be after a lapse of a considerable period of time—can in a sequestration rank for the debt without in effect receiving a preference over the other creditors to which he is not entitled.

The respondents maintain that they were entitled to substitute the money paid in by Mr Zollner and put in a special account as security in lieu of that gentleman's personal liability without thereby affecting their right to sue the debtor for the full amount. They found upon the decision in the *Commercial Bank of Australia* v. *Official Assignee of the Estate of Wilson & Company*, L.R., [1893] A.C. 181. In that case the Bank had six guarantors of the principal debtor's liability for the sum of £6250. They entered into an agreement with three of the guarantors that their liability should be limited in this way, that there should be substituted for it a deposit of £3000 in the bank to be carried to a suspense account, with power to the Bank to appropriate that sum whenever they thought fit in discharge *pro tanto* of the principal debt. The Bank were held entitled to prove for the full amount of their debt against the estate of a bankrupt co-surety who was not a party to the agreement, as the deposit did not until appropriation operate as payment. The argument that the co-surety having become bankrupt, and the question being one affecting his creditors, the agreement must be regarded in their favour as a payment, and that otherwise it would be an evasion of the bankruptcy law, was rejected. In dealing with this question the Lord Chancellor said—"How can a transaction which does not prejudice the position of the creditors," *i.e.*, the creditors of the bankrupt co-surety, "but which leaves their position exactly what it would have been if there had been no such agreement, be said to be an evasion of the bankruptcy law?" I do not think that reasoning applies to the present case, as it appears to me that the creditors of the bankrupt have been prejudiced by the alleged arrangement between Zollner and the Bank—at all events to the extent to which money of the bankrupt is proved to have been paid into the special account by the creation of which the cautioner procured his discharge.

LORD JUSTICE-CLERK—I entirely agree with your Lordships.

The Court sustained the appeal, recalled the interlocutors of the Sheriff and Sheriff-Substitute, found that the Bank of Scotland was only entitled to a ranking for a balance of £1057, 1s. 10d. as admitted in the adjudication by the trustee, and sustained the adjudication of the trustee in the ranking.

Counsel for the Appellant (Trustee)—Constable, K.C.—Anderson, K.C.—D. Jamieson. Agent—A. J. Simpson, S.S.C.

Counsel for the Respondents (Objectors)—Clyde, K.C.—D. P. Fleming. Agents—Tods, Murray, & Jamieson, W.S.