

LORD ADAM—I concur with your Lordship.

LORD M'LAREN—I am of the same opinion, and have no observations to make.

LORD KINNEAR—I am also of the same opinion. The 12th section of the Act of 1885, on which the argument of the reclaimer is rested, provides that the expense of printing shall be deemed part of the expenses of making up the roll, and shall be assessed for and levied accordingly. Now, that gives no specific power to assess irrespective of previous enactments, because we are referred back to previous legislation which authorises assessment for the expenses of making up the roll. When we go back to previous legislation we find that in the case where an officer of Inland Revenue, having the survey of the income-tax, is assessor, the expense of making up is not to be levied by assessment, but is to be defrayed by the Treasury. Therefore, when those two statutes are read together, it appears that the argument of the reclaimer involves this, that a reference to an existing rule of assessment implies a power to commissioners of supply, or county councils in their place, to levy an assessment for a purpose for which they were not entitled to levy any such assessment prior to the passing of the Act. It may be that in particular cases a county council may be entitled to levy assessments, as in cases existing, which would cover this expense, but they are certainly not entitled to levy assessments for the purpose of defraying expenses which the Legislature has put upon the Treasury, and that is the purpose for which the reclaimer maintains they ought to have been made. Mr Mackay said there might be circumstances involved in making contracts with printers which would not necessarily or properly fall within the enactment in the statute of 1857, which requires that the expenses attending the making up of the valuation-roll by such officer or officers shall be defrayed by the Commissioners of Inland Revenue or by the Treasury. I cannot say that I was satisfied with the illustrations that Mr Mackay gave us that such questions were likely to arise upon any such contracts as he indicated. It appears to me that it is sufficient for the purposes of this case that we have no such question involved, because the averment of the defenders upon which our judgment is challenged is, that the pursuer, while repudiating liability, paid the sum of £80 in respect of the services rendered by the assessor in printing the roll. Therefore the question that we have to consider in this case, and the only question is, whether the cost of the assessor's services in making up the roll is to fall upon the Treasury or upon the County Council? Upon that I have no doubt whatever, and I agree with your Lordship that the Lord Ordinary is right. The second point that has been put forward is also, I think, untenable for the reasons which your Lordship has indicated.

The Court adhered.

Counsel for Pursuers and Respondents—Guthrie—Dundas. Agents—Bruce & Kerr, W.S.

Counsel for Defender and Reclaimer—Mackay—Young. Agent—Solicitor of Inland Revenue.

Tuesday, March 15.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

C. & A. JOHNSTONE v. DUTHIE.

Cautioner — Liberation — Bill — Giving Time.

A cautioner granted a letter guaranteeing to see J "duly paid for all goods you may supply from and after this date to the order of C." When the account between J and C was closed, a considerable sum remained owing to J, for which the cautioner repudiated liability. J thereafter accepted bills at three months from C for the sum due, and C having become bankrupt before the bills were met, but after a portion of the debt had been satisfied by cash payments, J sued the cautioner for the balance. *Held* that J, by taking the bills and thereby giving time to C, had liberated the cautioner—*diss.* Lord M'Laren, who held that the cautioner having repudiated liability, J was entitled to make the best terms he could with C.

In March 1888 James Duthie, provision merchant in Aberdeen, disposed of his business to his brother-in-law John Reid Cormack, who had previously been his manager, and Cormack thereupon became tenant of Duthie's shop and took up his business. While he was in business, Duthie had been supplied with goods by Messrs C. & A. Johnstone, wholesale merchants in Aberdeen, and at the date when he transferred the business to Cormack he owed them a sum of £50.

On 2nd April 1888 Duthie granted Messrs C. & A. Johnstone the following letter of guarantee—"In addition to the account of £50 pounds due by me to you for goods supplied to my shop at 50 Summerfield Terrace, I hereby guarantee and undertake to see you duly paid for all goods you may supply from and after this date to the order of J. R. Cormack, to whom I have made over my business there." Goods were thereafter supplied to Cormack under this guarantee down to April 1890, when the account was closed.

On 19th November 1890 Cormack became bankrupt, and Messrs C. & A. Johnstone then brought an action against Duthie for payment of £137, 15s., being the balance admittedly due under the account.

The defender averred in answer in his statement of facts—"Cormack, as manager for the defender, had carried on a successful business in the Summerfield Terrace shop prior to March 1888. The grocery

goods for said shop were obtained mainly from the pursuers, on the usual terms between wholesale grocers and small dealers in Aberdeen, namely, that the goods supplied during one month should be paid for at latest before the end of the next month. The retail business conducted at said shop was mainly a cash business. To a few customers credit for periods not exceeding one month was allowed. This custom of dealing mainly in cash, with short credit to a few customers, is general in the retail grocery trade in Aberdeen at such shops as that in question, and this custom was well known to the purchasers, who deal largely with such shops. It is principally because of the existence of this retail custom that wholesale dealers limit their credit to the retail dealers to the period of one month after the month of supply, so that if the retail dealer falls behind in his payments to the wholesale dealer the latter at once knows that the retail dealer will sooner or later become bankrupt. . . . The transactions in respect of which the pursuers now maintain liability against the defender were not of the nature covered by the letter founded on. The pursuers were bound, in terms of the arrangement and undertaking, and the custom of trade before libelled, not to allow Cormack credit exceeding the period of one month beyond the month of supply. They, however, without any communication with the defender, allowed Cormack credit not only beyond the said period, but accorded him unreasonable terms and an excessive period of credit entirely outwith the ordinary conduct of the grocery trade, and particularly of such a trade as Cormack's. . . . The pursuers must have well known that he was not allowing more than one month's credit to his customers, and that his falling behind with the pursuers clearly indicated that sooner or later he would become bankrupt, as before explained. In place, however, of stopping his account or communicating with the defender, as they were bound and ought to have done, the pursuers concealed from the defender the state of Cormack's account with them, and in place of abiding by the usual trade terms, they took bills at currencies of three and six months, and it is believed longer periods, and even renewed these bills when the same fell due. . . . In particular, on 26th September 1890 they renewed two bills, one for £99, 17s. 4d., and the other for £70, 18s. 4d., together £170, 15s. 8d., which are not mentioned in the pursuers' statement, and which are still due to the extent of the sum sued for. Further, the pursuers, without the knowledge or consent of the defender, agreed with Cormack to take payment of said bills by instalments of £10 weekly, and even finally reduced the instalments from £10 to £5 weekly. . . . By taking the bills and renewals of bills before specified, and by agreeing to accept payment of Cormack's debt by instalments, the pursuers precluded themselves from using proper measures to compel payment of the sums

due to them, and for which the credit allowed by the trade had expired, and thereby and by other ways granting time to Cormack in the knowledge that his affairs were insolvent, they materially prejudiced the defender in his recourse against the principal debtor."

In answer to the defender's statement of facts the pursuers denied that there was any fixed rule or custom of trade as to the extent or period of credit given by wholesale merchants to retail grocers in Aberdeen. They admitted that they "occasionally took bills from Cormack at two or three months' date for their own convenience, and on a few occasions they took partial renewals from him for a like period, as they were entitled to do under an open guarantee where no mention was made of dates or payments, and in accordance with the usual practice in such cases. The account annexed to the petition contains the whole of these bills with the exception of the two last bills for £99, 17s. 4d. and £70, 18s. 4d. respectively, which were drawn by them on Cormack on 26th September 1890 in order to constitute and settle the amount then due by him to pursuers, and also to enable the pursuers to have the use of the money by discounting said bills with their bankers as is usual and customary in such cases. The defender, even if unaware of the bills, was in no way prejudiced by the taking of them. They are now past due and unpaid, are in the pursuers' custody, and will be delivered up to the defender on the balance sued for being paid."

The pursuers pleaded—"(1) The defender being bound by the terms of his said letter of guarantee for goods supplied by the pursuers to himself and the said John Reid Cormack, as specified in the account herewith produced, decree should be pronounced as craved. (2) The defender having ratified, approved of, and adopted the course of dealings between the pursuers and Cormack, and the amount due under letter of guarantee, and having agreed that time should be given to Cormack as condescended on, is now barred *personali exceptione* from objecting to the account libelled, or the length and extent of the credit allowed, or the nature of the dealings between the said parties."

The defender pleaded—"(1) The pursuers having given time to Cormack for payment of his accounts beyond the usual period allowed in the trade, and in breach of the understanding between the parties, the defender was thereby liberated from liability under his guarantee. (2) *Separatim*—The pursuers having allowed Cormack unreasonable terms and an excessive period of credit, outwith the ordinary custom and conduct of trade, and without communication to the defender, he is not liable under the guarantee."

Proof was led. It appeared that a month was the customary period of credit in Aberdeen between wholesale grocers and retail dealers, the accounts for one month being rendered at the beginning of the next month, and paid at the beginning of the

month following that on which they were rendered. Occasionally bills for two or even three months were taken, and in Cormack's case this had been done outwith the defender's knowledge, and the bills had sometimes been renewed for a further period, as is fully set out in the Sheriff-Substitute's note. The monthly dealings between the pursuers and Cormack varied from about £50 to £100, his total indebtedness rising from £105 in August 1888 to £290 in February 1890. On May 13th 1890 the defender wrote to the pursuers intimating that he had learnt that they held him responsible for Cormack's debt, and denying liability, on the ground that he had only guaranteed payment of the £50 worth of goods which had been supplied to himself and taken over by Cormack along with the business. On 19th May, Cormack's debt amounting at that date to £285, the pursuers made an arrangement with him that he was to pay £10 a-week to account of his debt, and also to pay cash for all future supplies of goods. This arrangement was communicated to the defender, and in answer he reiterated his denial of liability for Cormack's debt. On 13th August, Cormack having failed to pay the £10 per week, it was arranged that the weekly instalment payable by him should be reduced to £5. On 26th September the pursuers took two bills from Cormack for £70, 18s. 4d. and £90, 17s. 4d. at three months, their object being, as stated in answer to the defender's statement of facts, to constitute their debt, and enable them to have the use of their money. The bills were not met, and on 19th November, when Cormack became bankrupt, a sum of £137, 15s. was still due.

On 27th October 1891 the Sheriff-Substitute (GRIERSON) pronounced this interlocutor:—"Finds, under reference to the annexed note, (1) that the defender granted the letter of guarantee; (2) that the pursuers supplied goods to Cormack; (3) that their ordinary period of credit allowed by the pursuers in the ordinary course of business with persons such as Cormack was about three months, and that there was nothing in Cormack's position to operate any change in their ordinary practice; (4) that they allowed Cormack credit to such extents as five, seven, and twelve months, and that such extensions were granted in respect of the sums now alleged to be due to the pursuers by Cormack; and (5) that the defender was in ignorance of these extensions of Cormack's credit: Finds in law that by their extending Cormack's credit far beyond the period usual in their ordinary business in the circumstances of Cormack, and in the trade in which they were engaged, the pursuers have liberated the defender from his obligations under the letter of guarantee: Therefore assoilzies the defender from the conclusions contained in the prayer of the petition, and decerns: Finds the defender entitled to expenses, &c.

"Note.—The pursuers began to supply Cormack with goods in April 1888. Cormack was allowed the same period of credit

which had been allowed to the defender, *i.e.*, if goods were supplied in April he paid them in June, a small balance being carried over. This balance, however, grew larger and larger until in September 1889 the account was squared up to the end of July by payment of £60 in cash and by taking two bills, together amounting to £111, 3s. 2d. for the balance. In this way a credit of five months was given for part of the July goods. The August account was squared in October, the September account in November, and the October account in December, the bills for £111, 3s. 2d. being partly paid up and partly renewed by the taking on November 11th of two bills for £50 each, one at a two months' and the other at a three months' currency. The credit for the July goods was thus extended in one case to seven, in the other case to eight months. These bills were met by Cormack, and are therefore out of the case—*Bingham v. Corbitt*, 34 L.J. (N.S.) Q.B. 37. But they are worthy of consideration, as explaining the subsequent course of events. The November account was squared in January by £50 cash and a bill for £15 at two months, and the December account was squared in February by £30 cash and a bill for £65 at two months, the credit for the November and December goods being thus extended to five months to the extent of the bills. The January account was squared in March by £50 cash and a bill for £18 at two months, and the bill for £15 was retired. The February account was squared in April by £50 cash, £1, 3s. 7d. allowed for returns, and a bill for £90, 8s. 11d., and in April £20 was paid to account of the £65 bill, the bill being renewed for the balance. The credit is thus extended to five months in respect of part of the January and February account, and to seven months in respect to part of the December account. These bill transactions were all outwith the knowledge of the defender. In May the defender wrote to the pursuers denying liability under the guarantee, and in September the pursuers drew two bills at three months on Cormack, one for £90, 17s. 4d., and the other for £70, 18s. 4d. They allege that these bills were taken merely to constitute their debt, but they discounted them, and the result was simply further to increase the term of credit. Now, the defender will be liable under the guarantee unless he can show that there was something unreasonable in the terms allowed by the pursuers. An examination of the case of *Calder & Company v. Cruickshank's Trustees*, 1889, 17 R. 74, shows that the following circumstances must be taken into account in dealing with the question of what is reasonable—(1) The course of dealing usually followed by the dealer (*i.e.*, the pursuers) in his business; (2) the trade in which the parties are engaged; and (3) the circumstances in which the parties stand to each other. Now, the defender had been a customer of the pursuers' firm for a considerable time. He had enjoyed a credit averaging nearly three months. He was punctual in his payments, and he never engaged in bill transactions. When

the pursuers agreed with Cormack to supply him with goods upon the defender's guarantee, nothing was said about length of credit. The pursuers admit that they regarded Cormack's business and the defender's business as similar, if not identical in character. They knew Cormack's financial position, his credit, his failings, the amount of his stock, and the kind of people who were his customers. I think it is impossible in these circumstances to say that in bargaining with Cormack it was in contemplation to give him a credit more extended than that accorded to the defender, and accordingly I take as the measure of the rule laid down by Lord Shand in *Calder's case*—'that where there is no limitation or restriction in the guarantee itself, the guarantor must be held to have undertaken to guarantee the actual transaction as arranged between the principal parties'—the period of credit allowed by the pursuers to the defender. Has, then, this period been unreasonably exceeded? I am of opinion there can be but one answer to that question. If the trade in which the parties are engaged in is looked to, no such period is known. If the circumstances of the case are looked to, there was every reason why the ordinary period should be adhered to. If the course usually followed by the pursuers, *e.g.*, in the defender's case, is looked to, it is plain that their ordinary course of business was not, and could not have been, to grant such extended credit—credit extending in the case of part of the December goods to a year at least—*Samuel v. Howarth*, 3 Merivale, 272; *Polak v. Everett*, L.R., 1 Q.B.D. 674; *Clarke v. Birtley*, L.R., 41 Ch. D. 434; *Coombe v. Woolf*, 8 Bing. 156; *Croydon Gas Company v. Dickenson*, L.R., 1 C.P.D. 707; *Forsyth v. Wishart*, 1859, 21 D. 449; *Warne & Company*, 1867, 6 Macph. 283; *Caledonian Banking Company v. Kennedy's Trustees*, 1870, 8 Macph. 862; *Bowe and Christie v. Hutchinson*, 1868, 6 Macph. 642; *Stewart, Moir, & Muir v. Brown*, 1871, 9 Macph. 763, and the authorities cited in the last case. In these circumstances it appears to me that the pursuers are not entitled to succeed in any part of their claim."

The pursuers appealed, and argued—The letter of guarantee made no reference to the usage of the trade in Aberdeen, but was unlimited in its terms, and the question was whether the credit given was so unreasonable—*i.e.*, so far beyond the contemplation of parties as to free the cautioner. Taking bills at three months was not an unreasonable credit to give—*Calder & Company v. Cruickshank's Trustee*, November 15, 1889, 17 R. 74. Further, no fixed period of credit had been proved as the usage of the trade in question, though custom of trade was capable of precise proof. At all events, down to the date at which the account was closed nothing had occurred which could be said to liberate the cautioner—*Bingham v. Corbitt*, 1864, 34 L.J., Q.B. 37; *Croydon Commercial Gas Company v. Dickenson*, 1876, L.R., 1 C.P. Div. 707, *aff.* 2 C.P. Div. 46. After that

date, the defender having repudiated liability, the pursuers were entitled to take the best means they could in order to get payment of their debt, and it was to the interest of the cautioner that they should do so. This was their object in taking the two bills in September 1890, and in point of fact the debt had been considerably reduced after that date. The cautioner must also show that he had been prejudiced by the debtor's action, and the defender had failed to do so.

Argued for the defender—Where, as here, no term of credit was mentioned in the guarantee the custom of trade must be read into the contract. This was implied by the words "duly paid." The pursuers therefore must prove that they had not given the debtor more than "the utmost credit allowed in ordinary circumstances"—*MacLagan & Company v. Macfarlane*, November 19, 1813, 17 F.C. 451; *Cook v. Moffat & Couston*, June 7, 1827, 5 S. 774, *per* Lord Balgray, 775; *Warne & Company v. Lillie*, January 16, 1867, 5 Macph. 283, and 39 Scot. Jur. 127; *Stewart, Moir, & Muir v. Brown*, May 24, 1871, 9 Macph. 763, and 43 Scot. Jur. 417; *Samuel v. Howarth*, 1817, 3 Merivale, 272; *Coombe v. Woolf*, 1832, 8 Bing. 156. The result of the proof was to show that the ordinary credit in the trade in question was, where a customer was not known, three months. The pursuers had given far more than that, because even admitting that the taking of bills at three months was not an unreasonable extension of the usual credit, the renewal of these bills certainly was. The cases of *Bingham* and the *Croydon Gas Company* were distinguished by the fact that in each of these cases the transactions which were the subject of the guarantee were held to be separable. Whether the defender was or was not freed by the pursuers' action prior to the closing of the account, he was certainly released by the taking of the bills in September outwith his knowledge, as he was thereby prevented from taking action against the principal debtor. It was not necessary that he should prove prejudice—*Petty v. Cooke*, 1871, L.R., 6 Q.B. Div. 790, *per* Lord Blackburn, 795. There was no doubt an Irish case—*Dowden v. Lewis*, 1884, Ir. Rep. 14 Q.B.D. 307—which was against the defender's contention, but the ground of judgment there appeared to be that the position of the cautioner was not wholly altered by the action of the creditor in taking bills from the principal debtor.

At advising—

LORD ADAM—The pursuers are wholesale merchants in Aberdeen, and the defender is a retail grocer there to whom they were in use to supply goods. He had two shops in Aberdeen, and on April 1888 he sold his business in one of them to his brother-in-law, Cormack, who had been his manager in that shop.

In order to start Cormack in business, on 2nd April 1888 the defender granted to the pursuers a letter of guarantee in the following terms:—"Gentlemen—In addition to the account of £50 due by me to you for goods

supplied to my shop at 50 Summerfield Terrace, I hereby guarantee and undertake to see you duly paid for all goods you may supply from and after this date to the order of J. R. Cormack, to whom I have made over my business there."

The pursuers supplied goods to Cormack under this letter of guarantee until the end of April 1890.

The usual course of dealing was that the account for supplies was rendered monthly, at the beginning of the next month, and squared at the beginning of the next succeeding month by a payment in cash, the balance being carried forward to the next month's account—thus, for example, the account for goods supplied in May was rendered in June and settled as I have stated in July—Cormack thus in all cases getting a month's credit. Sometimes, however, bills, generally at two months' date, but occasionally at three, were taken for the monthly balance due, and these bills were sometimes renewed, thus extending the credit to five or six months.

It appears that Cormack had become unsteady, and at the end of April 1890, all supplies to him under the letter of guarantee came to an end. The account was closed and the defender was under no further liability under the guarantee except for the balance due and unpaid upon that account.

The position which the defender took up at this time as to his liability under the guarantee is material, and is to be found in the correspondence between him and the pursuers, from which it appears clear that the defender at this time denied his liability under the guarantee, although upon a different ground from that now insisted in, and left it to the pursuers to take their own course for recovery of the amount. So far as I see he never departed from this position.

What followed was that Cormack paid for some time £10 a-week, and afterwards £5 a week towards reduction of the amount until 10th November 1890, leaving a balance then due of £137, 15s., which is the sum sued for.

On the 26th of September, however, the pursuers took from Cormack two bills at three months' date for £99, 17s. 4d. and £70, 18s. 4d. respectively, in order, as they say on record, to constitute and settle the amount then due by him to the pursuers, and also to enable the pursuers to have the use of the money by discounting said bills with their bankers.

That that was so there is no doubt, because Mr Alexander Johnstone, one of the pursuers says—"The payments went on till November 1890, when Cormack became bankrupt. The amount due by the defender is £137, 15s. At the date of Cormack's failure we had a claim for £12, 9s. 4d. for goods supplied after the arrangement had been made. There are two bills dated 26th September 1890 for £170 odds. These were taken to square up the account, and to make the account operative, so that we could have the use of our money from the bank by discounting the bills."

It is in these circumstances that the

present action has arisen. The defender denies liability on the ground that it was an implied condition of the agreement that the pursuers should not allow Cormack credit exceeding one month beyond the month of supply in accordance with custom in the grocery trade, but had allowed him an unreasonable and excessive period of credit outwith the ordinary conduct of that trade.

The Sheriff has in effect sustained that contention and assoilzied the defender. He finds in point of fact that the ordinary period of credit allowed by the pursuers in the ordinary course of business with persons such as Cormack was about three months, and that they allowed him credit to such extents as five, seven, and twelve months, and he finds in point of law that by extending Cormack's credit far beyond the period usual in their ordinary business they have liberated the defender from his obligations under the letter of guarantee.

It appears to me that the ground of judgment thus adopted by the Sheriff raises questions of doubt and difficulty, and while I do not say that I differ from him I would prefer to rest the judgment on another, and I think a clearer ground of judgment also pleaded by the defender.

As I have already pointed out, all transactions under the letter of guarantee came to an end in April 1890. The account was closed and the amount alleged to be due by the defender then ascertained. It is true that the pursuers agreed that Cormack should make certain cash payments to account of the balance due. Whether this was with or without the consent of the defender does not appear to be material, because so far as I can see they did not thereby bar themselves from proceeding at any time to recover the amount due. But the case is different with regard to the two bills at three months' date taken by them on 26th September 1890 for the balance of the debt then due. They could not have sued Cormack, the principal debtor, during the currency of these bills, and so they gave him time. It is not averred, and is not the fact, that the defender consented to their taking these bills. He all along denied liability under the guarantee and left the pursuers to take their own course.

But it is quite settled law that if the creditor gives time to the principal debtor the cautioner is free. Neither is it necessary for the cautioner to show that he has been thereby *de facto* prejudiced. The case of *Samuel v. Howarth*, 1817, 3 Merivale, 272, is an example of that. It is suggested, however, that where, as in this case, the cautioner denies liability, the creditor is free to take what steps he thinks best for recovery of his debt from the principal debtor and may give him time without releasing the cautioner. I know no authority for that proposition. The creditor can only enforce the obligation he has received from the cautioner. I do not see that the fact that the debtor in an obligation denies liability can at all alter or affect the extent of his obligation, what-

ever that may be. I am of opinion, therefore, that the pursuers by taking the two bills of 26th September 1890 freed the cautioner from his obligation under the letter of guarantee, and that he should be assoilzied.

LORD M'LAREN—I take a different view of the case, and the ground of my difference admits of being very briefly stated.

When a creditor supplies goods or (as in the case of a bank credit) advances money on a continuing guarantee, and the account is eventually closed, the creditor is neither bound to proceed according to the order of discussion nor to make immediate intimation of his claim to the guarantor. If after the account is closed, and before intimation is made to the guarantor, the creditor grants indulgence, as by taking a bill from the debtor, this is held to be a proceeding contrary to the good faith of the contract of indemnity, and in respect of such breach of faith the guarantor is discharged.

But if the creditor, while matters are entire, intimates his claim to the guarantor, and the guarantor either repudiates his obligation or refuses or delays to make payment, then I think that the creditor may make the best terms he can with his debtor, and by doing so does not lose his recourse against the guarantor. This exception, I think, results from the consideration that the defence founded on indulgence given to the debtor is not the effect of a condition of the contract of indemnity, but is a purely equitable defence, and one which, I think, cannot be maintained by a co-obligant who is refusing to perform his obligation. For these reasons my opinion is, that the pursuer by taking a bill has not discharged his claim under the guarantee.

LORD KINNEAR—I agree with Lord Adam. I think it is settled law that a creditor who gives his debtor time without reserving his right against the cautioner, thereby discharges the latter. I do not think it is necessary to consider in the present case whether the cautioner was discharged by anything which occurred in the relations between the creditor and debtor prior to 26th September 1890, because I am of opinion that by taking the bills he did on that date, the creditor gave time which discharged the debtor. I agree with Lord Adam in thinking that a cautioner cannot be deprived of his right to found upon such a defence merely because he has been reluctant to admit liability under his guarantee or has refused to pay when called upon. The reason why the giving of time discharges the cautioner is because he is thereby deprived of the chance of considering whether he will have recourse to his remedy against the principal debtor or not, and because it is then out of his power in point of fact to operate the same remedy against him as he would have had under the original contract. This right in the cautioner is one which in its origin perhaps may be founded upon equity, but I think it is strictly legal in its effect, and it is as clearly and effectually

a condition of the contract of guarantee, as if it was expressed in terms. I am unable to see why the cautioner should be subjected to a different liability from that which he contracted. If he had done anything to deprive himself of his strict legal rights, the case might be different. But all he did here was to repudiate liability, and that upon a ground on which your Lordships have not, I think, finally decided against him. But whether that ground is good or bad, the effect of the denial of liability is merely to leave the creditor in the same position in which he was before he intimated his claim against the cautioner. The letter has done nothing to prevent the creditor enforcing the claim. The only result which would follow from the denial of liability is that when the creditor comes to enforce his claim the cautioner would have to submit to the consequences of putting the creditor to the expense of bringing an action. I am not aware of any ground by which, because of the refusal to admit the claim, he should be subjected to any different kind of liability from that for which he contracted.

The **LORD PRESIDENT** concurred with **LORDS ADAM** and **KINNEAR**.

The Court pronounced the following interlocutor:—

“Sustain the appeal: Recal the interlocutor of the Sheriff, dated 27th October 1891: Find that the defender, of date 22nd April 1888, granted to the pursuers the letter of guarantee by which he undertook to see them duly paid for all goods they might supply from and after that date to the order of J. R. Cormack: Find that the pursuers supplied goods to Cormack under the said letter of guarantee until the end of April 1891: Find that at that date all dealings under the guarantee came to an end leaving a balance on account due by Cormack to the pursuers: Find that Cormack made to the pursuers various payments on account of said balance due by him until the 10th of November 1890, at which date there remained a balance due by him of £137, 15s. which is now sued for: Find that on the 26th of September preceding the pursuers took from Cormack two bills at three months each for £70, 18s. 4d. and £99, 17s. 4d. respectively for balance of the account then due by him to them: Find in law that by doing so the pursuers barred themselves from enforcing payment of the debt due to them by Cormack during the currency of the said bills: Find that the pursuers thereby discharged the defender from his obligations under the said letter of guarantee, and therefore assoilzied him from the conclusions of the action, and decern.”

Counsel for the Pursuers—Comrie Thomson—Shaw. Agent—James Marshall, S.S.C.

Counsel for the Defenders—Guthrie—Crabb Watt. Agents—Wishart & Macnaughton, W.S.