

apprehended danger, distinguishable from these ordinary occurrences to which I have referred. Looking at the words of the clause of exceptions in section 1 (2) of the Act and the context in which they occur, I think they do not refer to the danger which will always be present in a pit if it is not looked after, but to some abnormal and exceptionally serious occurrence. The object, accordingly, of the clause (section 1 (2)) is plainly to exclude from the prohibition imposed by the Act the case of men who have finished their eight hours' shift, but who, if they left off work, would leave behind them a condition of things tending to exceptional danger. The section permits them to go and continue working, and make the pit safe where some danger or apprehended danger of a marked kind has supervened. That, of course, is a totally different thing from their being allowed after they have completed their ordinary eight hours' shift, to begin, after an interval of only eight hours, to work another eight hours' spell. That is the very thing the Act was intended to strike at.

It may be, of course, that in carrying out this Act a little extra expense may be put upon the mine-owner. He may have to employ more men for this particular work during the twenty-four hours that follow the Sunday than he would otherwise do, because he cannot use his own repairing squad, who have done their eight hours' work already. He may employ miners to do the work, because we are told that ordinary miners are expected to do such work as is shown by the statement that "if urgent repairs are required on working days after 11 p.m. they are attended to by the night shift of colliers who are at work on these days." He will, however, have to pay them wages, because they are not winning their own coal, and because if he did not they would be thereby losers. That may be his misfortune, but it is one imposed on him by the Act of Parliament, which requires that there shall be provision made for the ordinary repairs of the pit. I must say I do not understand the idea that because arrangements are made whereby it is necessary for certain men to work more than eight hours unless other men are employed to do the work, that is a reason for excluding the operation of the statute.

The only point which Mr Horne made with some shadow of success was on subsection (6), which allows a repairing shift to commence their period of work on Saturday, before twenty-four hours have elapsed since the commencement of their last period of work, in order to avoid doing work on Sunday, but that does not entitle them, so far as I can see, to do it in any other way than that described, namely, by doing an extra shift on Saturday. It is a different thing altogether to transfer that on to a Monday at the beginning of the week, and give the men sixteen hours work out of the twenty-four. If there is to be any amendment of this Act, it must be done, as the Solicitor-General said, by the Legislature; we cannot interfere with

it. For myself I think the Sheriff has made very careful findings indeed, and that on his findings in fact he was justified in coming to the conclusion he did.

LORD DEWAR—I concur.

LORD HUNTER—I agree.

The Court answered the question of law in the affirmative.

Counsel for the Appellants—Horne, K.C.—Leadbetter. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondent—Solicitor-General (Anderson, K.C.)—Candlish Henderson. Agent—Sir Wm. S. Haldane, W.S., Crown Agent.

COURT OF SESSION.

Friday, March 7.

SECOND DIVISION.

[Lord Hunter, Ordinary
on the Bills.]

HAMILTON v. BANK OF SCOTLAND.

Cautioner—Bankruptcy—Discharge of Obligation—Release of Co-cautioner by Creditor—Consent of Trustee in Deceased's Cautioner's Sequestration without Concurrence of Commissioners—Liability of Deceased Cautioner's Estate—Mercantile Law (Scotland) Amendment Act 1856 (19 and 20 Vict. cap. 60), sec. 9—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 176.

Held that a deceased cautioner's estate was not released from liability under a guarantee given to a bank by the fact that the bank had released a co-cautioner with consent of the trustee on the sequestrated estate of the deceased cautioner, but without the consent of the commissioners in the sequestration.

Cautioner—Extinction and Discharge of Obligation—Giving Time.

The executor on the estate of a deceased cautioner claimed that the estate should be relieved from liability under a guarantee granted by the cautioner to a bank, on the ground that the bank had entered into an arrangement by which they undertook to finance the principal debtor, and had thereby debarred themselves from demanding payment of the debt. *Held* that these averments did not amount to an agreement to give time so as to preclude the bank from suing for the debt, and that accordingly the deceased's cautioner's estate remained liable under the guarantee.

Cautioner—Extinction and Discharge of Obligation—Revocation by Cautioner—Construction.

A letter of guarantee provided that the creditor should be entitled to give

time to or compound with the principal debtor without releasing the cautioner, and that the guarantee should remain in force till recalled by the cautioners or their heirs or executors. The executor of a deceased cautioner having revoked the guarantee, *opinion per curiam* that the revocation operated to stop further advances, but did not debar the creditor from *bona fide* granting time to the debtor.

The Mercantile Law Amendment (Scotland) Act 1856 (19 and 20 Vict. cap. 60), sec. 9, enacts—"From and after the passing of this Act, where two or more persons shall become bound as cautioners for any debtor, any discharge granted by the creditor in such debt or obligation to any one of such cautioners without the consent of the other cautioners shall be deemed and taken to be a discharge granted to all the cautioners. . . ."

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 176, enacts—"The trustee may, with consent of the commissioners, compound and transact or refer to arbitration any questions which may arise in the course of the sequestration regarding the estate, or any demand or claim made thereon, and the compromise, transaction, or decree-arbitral shall be binding on the creditors and the bankrupt."

John Mackay Hunter Hamilton, executor-dative of the deceased James Hamilton, farmer, Nether Wellwood, Muirkirk, *appellant*, appealed to the Lord Ordinary on the Bills (HUNTER) against a deliverance of Thomas Patrick Laird, trustee on the sequestrated estate of James Hamilton, ranking the Bank of Scotland, *respondents*, for a sum of £14,002, 9s. 6d. under a letter of guarantee dated 19th and 20th May 1903, granted by Mr Hamilton and five other guarantors.

The letter of guarantee was, *inter alia*, in the following terms—"We agree that, without prejudice to your right to demand payment from us or any of us of the whole sums hereby guaranteed, you shall also be entitled to make calls on us or any of us from time to time, in respect of our said guarantee, for such sums as you may fix: And we further declare that you may at any time or times at your discretion grant to the said Lanemark Coal Company, Limited, or to any drawers, acceptors, or indorsers of bills of exchange or promissory notes, received by you from them or on which they may be liable to you, any time or other indulgence, and compound with them or with the said drawers, acceptors, or indorsers respectively, without discharging or satisfying the liability of us or any of us; 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 us, or our 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 Lanemark Coal Company, Limited."

The appellant averred—" (Cond. 5) In the . . . letter of 1st October 1907 the Bank . . . intimated that until they received a satisfactory proposal from the company they were not in a position to release the late Mr Hamilton's obligation. The Bank were largely interested in the said Lanemark Company as shareholders therein; and during 1907 and 1908 the Lanemark Company had ample liquid assets to meet its creditors and pay off the Bank's indebtedness, which amounted to from £20,000 to £30,000. But if the company had then been wound up nothing would have remained for the shareholders of the company. In order, therefore, to protect their interests as shareholders the Bank, through their treasurer and their agent at Ayr, on the one hand, and Mr R. A. Murray, on behalf of the company, negotiated to make a new satisfactory arrangement as mentioned in said letter, and arrangements were definitely made to the Bank's satisfaction, and the obligation of the late Mr Hamilton was thereby released. In particular, a new arrangement was made in October 1908, under which the Bank advanced a further sum of £1000 for carrying on the company. And on the 13th October 1908 Mr Murray telegraphed the treasurer of the Bank—"Referring our meeting will you kindly wire Ayr confirming arrangement advance on open account £1000"; and the Bank replied giving the instructions desired. Further, during 1907 and 1908 the Bank controlled the whole business of the company and carried it on in their own interests as shareholders and to the prejudice of the interests of the said guarantors. The directors of the company were under the control of the Bank. The shares held by the Bank were sufficient to enable them to control the business of the company, and they did in fact control and carry on the business during these years. They appointed a new secretary and law agent. In January 1908 an offer of £30,000—a sum sufficient to pay the company's whole debts—was made by Messrs John Watson, Limited, but the Bank succeeded in getting this offer rejected on 24th January 1908, and carried a resolution that the business of the company was not to be sold except at a price which would yield the shareholders 10s. per £1. The Bank thereafter financed and continued the said company's business, and in consequence of its actings the company incurred further trading losses and went into liquidation on 27th January 1909. The said liquidation was caused entirely by the actings of the Bank. But for the financial advances made by the Bank, the company could not have continued its business, nor would it have incurred the trading losses which ultimately compelled liquidation. The Bank seriously prejudiced the position of said guarantors, as the company was then only able to pay to its creditors a dividend of about 10s. per £1. The whole of these proceedings were carried on by the Bank without the appellant's knowledge or consent. . . ."

(Cond. 6) In December 1906 the Bank, without the consent of the late Mr James Hamilton, agreed to increase the overdraft allowed to the Lanemark Coal Company, Limited, from £20,000 to £30,000. In security of this additional overdraft of £10,000, the Bank obtained . . . supplementary guarantees for £5000. . . The Bank, however, made it a condition-*precedent* to their granting the increased overdraft that they should be allowed to appoint a new manager with control over the management of the company, and also an additional director. The Bank shortly thereafter exercised this power, and appointed a new manager and nominated a new director. The manager appointed by the Bank subsequently became also the managing director of the company. (Cond. 7) The wealthiest of the said guarantors was the said John Leslie Hunter. After the Bank saw that the result of their intrusions with the company's business had resulted in serious loss and led inevitably to its liquidation, the Bank in the autumn of 1908 made a claim upon Mr Hunter. The Bank thereafter induced the said Mr Hunter to grant a trust deed in favour of their nominees Mr Laird and his partner Mr Dalziel. This trust deed is dated on or about 25th January 1909, and prior to the liquidation of the company. In order to attempt to preserve their recourse against Mr Hunter's co-guarantors, the Bank professed not to accede to the said trust deed. The precise terms of the deed are not known to the appellant, but it contained a clause entitling Mr Hunter to be discharged. In point of fact, however, the said trust deed was arranged and instigated by the Bank. On 14th January 1909 Mr Hunter's agent attended at the Bank and read over the draft trust deed to the treasurer, who approved of its terms. Prior to this the Bank had arranged what proportion of Mr Hunter's estate should be paid to them as in full satisfaction of their claim under the guarantee. Mr Hunter then executed the trust deed on 25th January 1909. (Cond. 8) In order to prevent questions being raised, and at the same time give their proceedings a colour of regularity, the Bank professed to state a claim upon Mr Hunter's estate for £13,168, although in the oath produced they maintain their full claim under the guarantee was £23,518. On 22nd December 1909 the Bank received the agreed-on sum from the trustees under the trust deed, viz. £4745, 19s. 4d., and granted on that date a discharge in which they narrated that in consideration of said payment, 'We (*i.e.* the Bank) for our interest concur in the said trustees granting to the said John Leslie Hunter a full and complete discharge of the whole debts and obligations due by him at the date of the said trust deed.' Following on this discharge, Mr Hunter was granted a complete discharge of his whole obligations on 29th December following. These arrangements were made and carried out by the Bank without the knowledge and authority of the appellant or anyone representing the

deceased Mr Hamilton, and in face of a written intimation given to the Bank on 24th March 1909 that the appellant declined to give his consent to any such arrangements, as he maintained that the guarantee was not then binding on Mr Hamilton's estate. (Cond. 9) With the view of compounding with Mr Hunter against the wish of the appellant, the Bank devised the scheme of obtaining the appointment as the trustee on Mr Hamilton's estate of a nominee of their own pledged beforehand to give them the consent which they desired. In fulfilment of this scheme they entered into an arrangement with Mr Laird, under which they undertook to see him appointed trustee on Mr Hamilton's estate, and Mr Laird on his part undertook in return to grant the consent which the Bank desired, but which had been refused by the appellant. This arrangement, which is illegal and corrupt, is set forth in a letter from the Bank to Mr Laird, dated 16th December 1909, which is prior to the date of Mr Laird's act and warrant of confirmation as trustee. The estates of Mr Hamilton were sequestrated on the petition of the Bank in December 1909, and Mr Laird was appointed trustee thereon. The appellant concurred in the Bank's petition in entire ignorance of the arrangement with Mr Laird, and he only became aware of it long after Mr Laird's appointment, in the course of the action mentioned in article 13 hereof. Mr Laird, at the request of the Bank, in implement of his arrangement with them on 17th December 1909, the date of the act and warrant in his favour, and before he had made any investigations as trustee on Mr Hamilton's sequestrated estates, granted his consent to Mr Hunter's discharge, although he was fully aware of the appellant's refusal and of his repudiation of liability under the letter of guarantee. The said discharge, in so far as it purports to record the consent of the creditors of the late Mr Hamilton and the appellant, is of no force and effect. The whole arrangements made by the Bank for carrying on the company's business and compromising with Mr Hunter were unknown to the appellant until long after December 1909."

The appellant pleaded—“(1) The Bank of Scotland having by their actings freed and relieved the late Mr James Hamilton and his estate of all liability under the said letter of guarantee founded on by them, the present appeal should be sustained. . . (3) The trustee's deliverance ought to be recalled in respect . . . (b) The Bank have discharged the late Mr Hamilton of his obligations under the said guarantee. (c) That the Bank have given time to the debtor since the obligation under the guarantee was recalled. (d) That the Bank have illegally discharged Mr Hamilton's co-cautioners. . . .”

The respondents pleaded—“(1) The appellant's averments being irrelevant, the appeal should be dismissed.”

The remaining *facts* of the case so far as material appear from the opinion of the

Lord Ordinary, who on 21st December 1912 sustained the first plea-in-law for the respondents and dismissed the appeal.

Opinion.—“... Mr Hamilton died on 10th September 1907. On 30th September 1907 the appellant's agents wrote withdrawing the obligation of Mr Hamilton's estate under the letter of guarantee. Acknowledgment of receipt of this letter was made on 1st October 1907 by the Bank, who intimated that ‘until a proposal to the satisfaction of the directors is forthcoming we cannot, as you are aware, release the obligation of Mr Hamilton, and in order to protect the Bank's interests we have instructed the Ayr agent to make the account inoperative.’

“On 27th January 1909 the Lanemark Company went into liquidation, and on 29th January 1909 the Bank claimed in that liquidation. On 3rd December 1909 the estates of the late Mr Hamilton were sequestrated on a petition presented by the Bank of Scotland. As appears from the correspondence, the appellant himself had applied for sequestration, but his application had been refused as incompetent by the Sheriff. Thereupon his agents requested the Bank of Scotland to petition, and the appellant's agents acted in the petition on behalf of the Bank.

“In the sequestration the Bank claimed for £20,000 of principal and £1865, 9s. 6d. interest to the date of the sequestration, being a total of £21,865, 9s. 6d. The trustee, however, before ranking the claim deducted two sums, *i.e.*, £2116, 12s. 9d., being a surplus from other securities received prior to the sequestration, and £5746, 7s. 3d., a dividend of 5s. per £1 from the Lanemark Coal Company, which, although not actually paid, had been declared prior to the sequestration. To his deliverance he has appended a note in the following terms—‘The trustee ranks the claimants accordingly, but before drawing a dividend the claimants are required to satisfy the trustee that the sums they have received from all sources since 3rd December 1909 will not, with the dividend to be paid from this estate, exceed twenty shillings per pound on the total amount due to them with interest at 5 per cent.’ . . .

“The real case for the appellant, if he has a case at all, is that the cautionary obligation is, in the circumstances, not binding on the estate of the bankrupt. On this matter I find myself brought face to face with a large number of complicated averments and a varied assortment of pleas-in-law. It is not always easy to say whether the averments are intended to bear on one or more of the pleas-in-law. On this ground the appellant seemed to suggest that the most advisable course for me to adopt would be to allow a proof without any limitations and without determining any point. The Bank, however, argued that although they did not dispute the appellant's title to challenge the deliverance, it was to be kept in view that he had desired the sequestration, and that any pecuniary interest in the estate which he had was dependent upon the

creditors being paid in full and a reversion remaining over. The declared dividend is 3d. per £. They therefore maintained that the relevance of the appellant's averments, which, if allowed, without limitation, to go to proof, would result in a long, costly, and intricate inquiry, ought to be carefully examined, not only generally, but in detail. I think this is a case where that course ought to be followed; and I should allow a proof, if at all, only upon specific averments, which, in my opinion, would, if proved, lead to my sustaining a plea-in-law in the appellant's favour.

“In considering the appellant's averments I think that they may be conveniently treated under the three heads—(1) Whether time was given to the debtor by the creditor and the cautioner thereby released; (2) whether in view of the actings of the creditor the situation was so altered or the position of the cautioner so prejudiced as to release him from his obligation; (3) whether one of the late Mr Hamilton's co-cautioners was released without the consent of the appellant.

“The averments relative to giving time to the debtor were, according to the argument submitted to me, said to be contained in cond. 6, though plea 3 (c) appears rather to refer to the actings of the Bank subsequent to the cautioner's death. I do not, however, find that the appellant makes any specific averment that the Bank came under a positive obligation not to sue the debtor which prejudiced or might have prejudiced the cautioner's position. The principle upon which giving time to the debtor releases the cautioner is laid down in *Oakeley v. Pasheller*, 10 Bligh, N.S. 548, as being that if you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because if you sue the surety you immediately turn him upon the principal, and therefore you act in breach of the agreement into which you have entered with the principal. (See *Lord Hatherley in Oriental Financial Corporation v. Overend, Gurney, & Company*, 1871, L.R., 7 Ch. 142, at pp. 150 and 152.) In the latter case the Lord Chancellor indicated that it is competent to the creditors to reserve all their rights against the surety, in which case the latter is not discharged.

“In *Rouse v. Bradford Banking Company*, [1894] A.C. 586, Lord Herschell at p. 594, after discussing the rule as to giving time to the debtor freeing the cautioner, points out that time is only given within the meaning of the rule if there is a binding agreement arrived at for good consideration.

“It has also to be kept in view that the cautionary obligation expressly provides—‘And we further declare that you may at any time or times at your discretion grant to the said Lanemark Coal Company, Limited, or to any drawers, acceptors, or endorsers of bills of exchange or promissory-notes received by you from them or on which they may be liable to you, any time or other indulgence, and compound with them or with the said

drawers, acceptors, or indorsers respectively, without discharging or satisfying the liability of us or any of us; 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.' In face of that express provision I do not think that any averments are made which, if established, would warrant my sustaining the plea founded upon giving time to the debtor.

"In the next place, the actings of the Bank subsequent to the death of the debtor are said to be such as to preclude them from suing on the guarantee. These averments are to be found in the 5th article of the condescendence. It is said in the first place that a new satisfactory arrangement such as was referred to in the Bank's letter of 1st October 1907 was come to in 1908, and the obligation of the late Mr Hamilton released. This averment proceeds, I think, upon a wrong construction of the letter referred to. What is there alluded to is a satisfactory proposal as to releasing the cautioner; and I do not find any averment that such a proposal was submitted to, far less approved of by, the Bank. The other points of complaint against the Bank in article 5 of the condescendence are that the Bank held certain shares in the company; that they acquired control over the management and refused or procured the refusal of an offer of £30,000 for the company assets, a sum sufficient to pay the company's whole debts. It is admitted in answer that the Bank were registered holders of £4700 belonging to customers of the Bank, the total capital of the company being £60,000. For the purposes of the argument I assume that the Bank, in virtue of this holding and otherwise, influenced the action of the company. In so acting they are said to have acted in their interests as shareholders and to have sacrificed the rights of the cautioners. I do not know what duty, according to the appellant's argument, the Bank owed to the cautioners or in what respect they failed in the fulfilment of that duty. They were entitled to be shareholders, and so far as I can see they and the other shareholders who constituted the company were entitled to refuse an offer for the assets and to hold out for a sum that would yield a return of 10s. per share to the shareholders—as it is suggested they did—in their opinion it was in their interests to do so. That was not, if I may so express it, a dealing by the creditors with the debtor, but solely the act and policy of the shareholders, *i.e.*, the company. The position of the cautioner was not affected thereby. It did not preclude him from suing the Lanemark Company as principal debtor for relief of the cautionary obligation—*Doig*, 5 F. 295—or from making payment directly to the creditor and getting an assignment which he might have made effectual against the debtor.

"It would not, I think, serve any good

purpose for me to refer in detail to any of the cases which were cited to me by the appellant (*e.g.*, *Hamilton*, 4 Bell Ap. 67; *Bonar*, 7 Bell Ap. 379, and other cases). It is sufficient for me to say that nothing contained in the judgments delivered in them appears to me to support the proposition that a creditor in such an obligation as the present is in breach of duty to a cautioner by actings such as are founded on by the appellant.

"The last, and to my mind the most difficult part of the case, arises out of the averments relative to the discharge of Mr Hunter, one of the co-cautioners of Mr Hamilton in the letter of guarantee. These averments are contained in articles 7, 8, and 9 of the condescendence.

"It appears that on 25th January 1908 Mr Hunter, who is alleged to have been the wealthiest of the guarantors, granted a trust deed in favour of Mr Laird (the trustee upon Mr Hamilton's estate) and his partner Mr Dalziel. The Bank made a claim upon Mr Hunter's estate for the amount guaranteed by Mr Hunter, and interest thereon. The trustee intimated that the estate was sufficient to pay 7s. 2½d. per £. In calculating the amount of the Bank's claim certain deductions appear to me to have been quite properly made from the total amount due to them. It is not disputed that if the Bank had compromised with Mr Hunter and discharged his estate without the consent of the other cautioners they would thereby have been, in respect of the provisions of section 9 of the Mercantile Law Amendment Act 1856, relieved of their cautionary obligation. The co-cautioners other than the appellant, as representing his father's estate, appear to have consented to the proposed compromise. An examination of the figures satisfies me that the amount paid was, in a question with the co-cautioners, a great deal more than Mr Hunter's share of the debt guaranteed. The whole amount of Mr Hamilton's estate in the hands of the trustee is a great deal less than his proper share, assuming him to be liable. From the copy correspondence it appears that the appellant and the representative of the late Mr Hamilton refused their consent to the proposed compromise with Mr Hunter as they did not admit liability under the guarantee. They endeavoured without success to compromise the Bank's claim by payment of a proportion of the estimated surplus of Mr Hamilton's estate. The Bank accordingly called upon the representatives by letters dated 27th April and 7th May 1909 to implement Mr Hamilton's obligation under the guarantee. As a result of these letters the appellant's agents wrote on 8th May 1909 to the Bank intimating that they 'have advised Mr Hamilton as executor to apply for sequestration of the estate in which your claim would fall to be dealt with by the trustee.' I have already indicated that this application was not successful and that sequestration was granted on the Bank's application on 3rd December 1909. At a meeting of creditors on 15th December 1909

Mr Laird was appointed trustee. On 16th December 1909 the Bank wrote to him a letter, in which they say—'So soon as your appointment has been confirmed we shall be glad to have as arranged your consent to the discharge of Mr J. L. Hunter and to the disposal of the heritable property over which the Bank hold a security.' On 17th December 1909 Mr Laird replied to the secretary of the Bank—'I have received your letter of 16th inst., and I have been advised from Ayr to-day that my confirmation as trustee in the above sequestration has now been obtained. I am accordingly in a position to give the consents asked for by you. I approve of your granting a discharge to Mr John L. Hunter on receiving the dividend from his estate, and I also approve of your disposing for £2000 the heritable property over which you hold a security.'

"The appellant argued to me that the consent given by the trustee was *ex facie* bad, as it did not bear to have been granted with the approval of the commissioners upon the bankrupt estate, and upon this ground it was maintained that I ought without inquiry to reverse the deliverance pronounced by the trustee. Section 176 of the Bankruptcy Act, upon which this argument is founded, provides—'The trustee may, with consent of the commissioners, compound and transact or refer to arbitration any questions which may arise in the course of the sequestration regarding the estate, or any demand or claim made thereon; and the compromise, transaction, or decree-arbitral shall be binding on the creditors and the bankrupt.' In my opinion this section does not apply. The Bank had already made a contract with Mr Hunter, and what occurred was not a compounding or transaction of a claim or demand in the sequestration within the meaning of the language used in the section. Further, the appellant has made no averment and founded no plea upon the absence of the commissioners' consent to the course pursued by the trustee. I was informed at the bar that the commissioners had in fact approved what was done. Had I, therefore, taken a different view of the scope of the section referred to, I should not have disposed of this part of the case without an amendment of the record and proof or admission of the facts bearing upon the question of consent or absence of consent of the commissioners.

"There are more serious averments of the appellant as to the trustee's consent which remain to be considered. They aver that the Bank induced Mr Hunter to grant the trust deed in favour of their nominee Mr Laird, and that Mr Laird arranged to give his consent to the discharge of Mr Hunter in return for his being appointed trustee upon the sequestrated estate of Mr Hamilton. They say that the consent of Mr Laird, which was given *ab ante*, was *ultra vires* and illegal, and that the arrangement between him and the Bank was corrupt. It was pointed out for the Bank that no averment was made that Mr Laird had acted fraudulently or dis-

honestly in the matter, and that no attempt had been made to reduce the written consent of the trustee. If, however, the case had amounted in substance to a charge against Mr Laird of dishonestly giving his consent to the discharge of Mr Hunter against the interests of the appellant I should have found difficulty in disposing of the case without inquiry. Improbable as such a case might have appeared, in view of the correspondence which passed between the appellant's agents and the Bank's agents prior to the trustee's appointment, I should not have been indisposed to allow such an amendment of the appellant's averments and pleas as would in my opinion have been necessary to make a relevant case. But the appellant's counsel in arguing his case stated that he did not suggest that Mr Laird had been guilty of fraud or personal dishonesty. In the light of that admission I consider that the use of the word 'corrupt' in the record is meaningless, and that the whole complicated averments about the actings of the Bank and Mr Laird become a disconnected series of suggestions and insinuations that ought not to be remitted to probation.

"Upon the whole matter I sustain the first plea for the respondents and dismiss the appeal."

The appellant reclaimed, and argued—
(1) The late Mr Hamilton's estate was released from liability under the guarantee by the discharge of a co-cautioner—Mercantile Law (Scotland) Amendment Act 1856 (19 and 20 Vict. cap. 60), section 9—and there was no relevant averment of consent by the executor or the trustee in bankruptcy. So far as the trustee was concerned, consent could only be given by a formal minute signed by the commissioners which would have been appealable—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sections 169 and 176; *Edgar v. Kennedy & Hutton's Trustees*, Jan. 18, 1905, 7 F. 452, *per* Lord M'Laren at p. 455, 42 S.L.R. 324; *Mercantile Bank of Sydney v. Taylor*, [1893] A.C. 317; Goudie on Bankruptcy, 3rd ed., p. 218. (2) Mr Hamilton's estate was further released from the guarantee because the bank had given time to the principal debtor. If any arrangement were made between the creditor and the debtor whereby the creditor put himself in the position of not being able to sue for the guaranteed sum, that amounted to giving time—*Polak v. Everett*, 1876, 1 Q.B.D. 669, *per* Blackburn, J., at p. 673, foot; *C. & A. Johnstone v. Duthie*, Mar. 15, 1892, 19 R. 624, 29 S.L.R. 501. In the present case appellant had established a *prima facie* agreement by the Bank to refrain from proceedings with a view to the reconstruction of the company. Further, the guarantee was revoked by the death of Hamilton and by the executor's letter of withdrawal, the result of which was that the situation was stereotyped and the obligation of Hamilton's estate definitely ascertained. The clause as to giving time and compounding was only good while the guarantee was still in existence—*Doig v.*

Lawrie, Jan. 7, 1903, 5 F. 295, 40 S.L.R. 247; *Coulthart v. Clementson*, 1879, 5 Q.B.D. 42; *Harriss v. Fawcett*, 1873, L.R., 8 Ch. 866; *In re Silvester*, [1895] 1 Ch. 573.

Argued for the respondents—The consent of the commissioner was not required under the Act to enable the trustee to discharge a co-cautioner. There were certain specific acts specified in the statute to which the commissioner's consent was required, but release of a co-cautioner was not one of them. Such action was not transacting or compounding in the sense of section 176 of the Act. Further, under the terms of the guarantee the creditor was entitled to give time to the debtor. The guarantee was not wiped out by bringing it to an end. The amount of the liability was, no doubt, fixed, but it remained a guarantee still with all the original conditions, including the right to give time. The only effect of recall was to revoke the continuing character of the guarantee. In any event "giving time," to infer release of a co-cautioner, must be equivalent to coming under an agreement not to sue for a period, and there was no such agreement here.

At advising—

LORD SALVESEN—The most important question in this appeal is whether the late Mr Hamilton was freed from his obligation as a cautioner by a discharge granted by the Bank to his co-cautioner Mr Hunter. It is conceded that if this discharge was granted without the consent of the trustee on Mr Hamilton's sequestrated estate this would be the legal result. The discharge itself is produced, and it is therefore incumbent upon the Bank to show that it was granted with such consent. The appellant contended in the first place that no relevant averment of such consent was set forth in answer 9, which is the part of the Bank's record which deals with this matter, and alternatively that, assuming that the letter of 17th December 1909 founded on is according to its terms a sufficient consent to the discharge in question, it was invalidated by the circumstances under which it was granted, as averred in cond. 9. Of these averments the appellant asks a proof.

[His Lordship here dealt with the first objection.]

The second objection raises a point of law. The appellant contended that as the letter does not bear to have been granted with the consent of the commissioners, and it being admitted that there is no minute signed by them authorising the trustee to consent, no consent binding on the bankrupt's estate has in fact been given. This argument was based on section 176 of the Bankruptcy Act 1856, which provides that "the trustees may, with consent of the commissioners, compound and transact or refer to arbitration any questions which may arise in the course of the sequestration regarding the estate, or any demand or claim made thereon." I agree with the Lord Ordinary that this section does not apply. I think the words "compound and transact" are

really equivalent to "compromise." To hold otherwise would be in effect to decide that the trustee cannot transact any business in connection with the bankrupt estate without the consent of the commissioners. Their duties are defined by section 85, and while under that section it is imperative that they shall concur with the trustee in submissions and transactions, and while upon them is laid the duty of deciding as to the paying or postponing payment of a dividend, there is no indication that their concurrence in other acts of management by the trustee is essential to their validity. One of the most important duties of a trustee is to adjudicate on claims lodged on the estate, and the deliverance of the trustee himself in a general sense is as much a "transaction" as the granting of a consent to the discharge of a co-cautioner. The fallacy underlying the appellant's argument is that, dissociating the word "transact" from the word "compound" with which it is connected in section 176, he erroneously treats it as equivalent to "act." I am therefore for repelling this objection.

[His Lordship here dealt with another point with which this report is not concerned.]

The next contention which it is necessary to notice is that the Bank gave time to the principal debtor without the consent of the cautioners, and thereby released the latter from their obligation. The averments on this head are said to be contained in cond. 5 and the letters there referred to. In my opinion they fall short of what is necessary in order to sustain such a plea. It is noteworthy that while there is a quite definite plea on this head, the words "giving time" or any equivalent form of expression do not occur in the condescendence. It has been often held that mere delay on the part of a creditor in enforcing his demand against the principal debtor will not discharge the cautioner. A creditor whose claim is sufficiently guaranteed has no motive to press the principal debtor for payment. If the cautioner considers that the payment ought to be exacted he can either pay up the amount due to the creditor and proceed to enforce the debt as his assignee, or he can, as in the case of *Doig* (5 F. 295), without taking this course call upon the principal debtor to free and relieve him of the liability he has undertaken. Either of these remedies would be barred by the creditor having postponed his right to exact payment by an arrangement with the debtor, but the appellant makes no sufficient averment of such an arrangement. It may well be that it would have been inconsistent with the attitude taken up by the Bank in continuing to finance the principal debtor that they should have instantly demanded payment of his debt, but the appellant must in effect aver that they had disabled themselves from doing so in order that the plea of giving time can be relevantly proposed. This he has nowhere done.

In this view it is unnecessary to consider

what is the effect of the clause in the original letter of guarantee, under which it was expressly agreed that the Bank might at their discretion grant to the principal debtor any time or other indulgence without discharging the liability of any of the cautioners. It was argued on behalf of the appellant that so soon as he revoked the guarantee this condition became inoperative. I was at first much impressed with the argument presented on this subject, and I think that circumstances may easily be figured where, if the creditor, notwithstanding the protest of a particular cautioner who had revoked the guarantee, disabled himself from suing the debtor, he could not plead the clause in the original letter of guarantee as entitling him to hold the cautioner still bound. But there is nothing of the kind in the present case, and the so-called revocation by itself primarily operates so as to stop further advances to the principal debtor on the credit of the revoking cautioner. In these circumstances, I am of opinion that the conditions on which the original guarantee was granted remained operative, and if the Bank in good faith granted time to the debtor their so doing would not necessarily free the cautioner from his liability.

[His Lordship then dealt with another question with which this report is not concerned.]

* The LORD JUSTICE-CLERK, LORD DUNDAS, and LORD GUTHRIE concurred.

The Court adhered.

Counsel for the Appellant—Morison, K.C.—Crurie Stewart. Agents—Mackay & Young, W.S.

Counsel for the Respondents—Clyde, K.C.—C. H. Brown. Agents—Tods, Murray, & Jamieson, W.S.

Friday, March 7.

FIRST DIVISION.

SCOTTISH INSURANCE COMMISSIONERS v. ROYAL INFIRMARY OF EDINBURGH.

Master and Servant—Insurance—Health Insurance—“Employed Contributors”—“Contract of Service”—Medical Staff of Public Infirmary—National Insurance Act 1911 (1 and 2 Geo. V, cap. 55), secs. 1 (1) and (2), and First Schedule, Part I (a).

The National Insurance Act 1911, section 1, enacts—“(1) Subject to the provisions of this Act, all persons of the age of sixteen and upwards who are employed within the meaning of this part of this Act shall be . . . insured in manner provided in this part of this Act. . . . (2) The persons employed within the meaning of this part of this Act (in this Act referred to as ‘employed contributors’) shall include all persons . . . who are engaged in any of the

employments specified in Part I of the First Schedule to this Act.”

First Schedule, Part I—“*Employments within the Meaning of Part I of this Act relating to Health Insurance.*—(a) Employment in the United Kingdom under any contract of service or apprenticeship, written or oral, whether expressed or implied, and whether the employed person is paid by the employer or some other person, and whether under one or more employers, and whether paid by time or by the piece, or partly by time and partly by the piece, or otherwise, or, except in the case of a contract of apprenticeship without any money payment.”

In a petition by the Scottish Insurance Commissioners to have it determined whether the employment of certain classes of members of the medical staff of a public infirmary, viz., (a) resident physicians and resident surgeons, (b) non-resident house physicians, non-resident house surgeons, and clinical assistants, and (c) supervisors of the administration of anaesthetics, was employment within the meaning of Part I of the Act—held that the managers of the Infirmary having no control over the medical staff in their treatment of the patients, the employment in question was not employment under a contract of service, and consequently was not employment within the meaning of Part I.

The National Insurance Act 1911 (1 and 2 Geo. V, cap. 55), secs. 1 (1) and (2), and First Sched., Part I (a), are quoted *supra* in rubric.

The Scottish Insurance Commissioners, petitioners, presented a petition under section 66 (iii) of the Act in which they prayed the Court “to decide whether the various classes of employment hereinafter mentioned, or any or which of them, are or are not employments within the meaning of Part I of the said Act, namely, (a) employment of resident physicians and resident surgeons, (b) employment of non-resident house physicians, non-resident house surgeons, and clinical assistants, and (c) employment of supervisors of the administration of anaesthetics, all at the Royal Infirmary of Edinburgh.”

The Royal Infirmary of Edinburgh, respondents, lodged answers maintaining that the members of the medical staff in question were not employed within the meaning of Part I of the Act.

The facts as to the employment of the various classes were admitted to be as follows:—

“(a) *Resident Physicians and Resident Surgeons.*

“Resident physicians and resident surgeons at the Royal Infirmary of Edinburgh are appointed by the Board of Managers on the recommendation of the respective members of the honorary medical and surgical staff to whom they are to be attached. They reside within the Infirmary, and the duties which they are