LORD JOHNSTON—I agree. A provision with regard to procedure in vacation has been added to the statutory provision of section 28 of the Act of 1868, and section 28 has to be read as if the words "within six days . . . shall present a reclaiming note" were "within six days, or in vacation on the first box day after the reclaiming days have expired, . . . shall present a reclaiming note." So read you do not, unfortunately for the reclaimer here, get rid of the primary declaration of section 28 that an interlocutor shall be final unless something be done. That something is defined by the statute, read in conjunction with the Act of Sederunt, and so read it still remains that what has to be done is presentation not to the Court, but to a Division of the Court, and you cannot present a note to a Division of the Court except by lodging it with the Clerk to that Division.

Now we have been favoured with a large number of citations, many of them having to do with the old Statute of 1825, the Judicature Act, and I venture to think that the difference is that now it is a case of presenting to a Division of the Court, and in those days it was a case of boxing to the Court. I am under the impression that that difference of nomenclature is really occasioned by the fact that this Court is differently constituted now from what it was then, and that a reclaiming note in those days was not a reclaiming note to the Division but to the Court. Now it is a reclaiming note to the Division that is provided for, and as the statute has used the word "final" I do not see how we can in any way assist the intending reclaimer, although I admit the hardship to him, and it might be desirable that the reclaiming note should still be received under a penalty. But that is not provided, and we have nothing to do but to apply the statute.

LORD MACKENZIE—I agree.

LORD SKERRINGTON—I concur. I express no opinion as to whether there should still be a remedy on the ground of expediency.

The Court sustained the objection and found the reclaiming note incompetent.

Counsel for the Pursuer—Watt, K.C.—W. H. Stevenson. Agents—Arch. Menzies & White, W.S.

Counsel for the Defenders—The Solicitor-General (Morison, K.C.)—A. M. Mackay. Agents—Duncan & Black, W.S.

Wednesday, May 29.

FIRST DIVISION.

[Lord Anderson, Ordinary.

REID *v.* LORD RUTHVEN.

Cautioner—Extent of Obligation—Relief—Construction — Guarantee of Debts of Person Indebted to Another as Individual and as Cautioner for Third Party.

Payment — Cautioner — Assignation — Cautioner for One Person Paying Debt of Another Person Guaranteed by the Former.

A guaranteed due payment to a bank of all sums for which B was or might become liable to the bank. At various times before and after, B guaranteed to the bank the payment of debts due by C. B at his death was due on his own account sums of money to the bank. A paid the bank the money due by B as guarantor for C, and received an assignation from the bank of the debt due by C and guaranteed by B, and the letters of guarantee by B. A thereafter sued C for repayment of the sum paid by him. *Held* (1) that A's guarantee covered and included B's indebtedness as guarantor for C, and (2) in respect that A had paid C's debt he was entitled to decree against C.

James Reid, of Tyneholm, Pencaitland, *pursuer*, brought an action against Walter James Hore Ruthven, Baron Ruthven, *defender*, concluding for payment of £2704, 13s. 1d., with interest thereon from 5th May 1916 until payment at the rate concurrently charged by banks on unsecured overdrafts.

The defender *pleaded, inter alia*—"1. No title to sue. 4. The defender not being due any sum to the pursuer is entitled to absolvitor. 5. The defender is entitled to absolvitor in respect (*a*) that the pursuer's guarantee did not extend to any debt due by the defender to the bank, but applied only to the debt due by Mr Kirk to the bank on his personal account for advances to himself, and (*b*) that the debt of Mr Kirk to the bank guaranteed by the pursuer having been satisfied and paid, the pursuer's obligation as cautioner was extinguished and the assignation founded on by him is ineffectual. 7. On the assumption that the bank professed to assign to the pursuer the defender's obligation to them, the assignation thereof is inept and ineffectual as in a question with the defender in respect (*a*) that the defender was liable only for Mr Kirk's debt to the bank, (*b*) that the bank had no claim of relief against the defender for Mr Kirk's debt, and (*c*) that in the circumstances the bank were not entitled, without the defender's consent, to assign to the pursuer the defender's obligation. 9. The pursuer having in the circumstances condescended on no right of relief against the defender, the defender is entitled to absolvitor."

On 13th November 1917 the Lord Ordinary (ANDERSON) repelled the pleas-in-law stated for the defender.

To his interlocutor was appended the following *opinion*, from which the *facts* of the case appear—"In this petitory action the pursuer sues the defender for payment of £2704, 13s. 1d. with interest thereon from 5th May 1916.

"Between June 1906 and June 1915 the defender had received advances from the Bank of Scotland on an overdraft account which was guaranteed by the late Mr William John Kirk, W.S. Mr Kirk was also, at the date of his death on 8th June 1915, indebted to the said bank on current accounts in his own name. On 12th January 1912 the pursuer granted to the said bank a letter of guarantee of the due payment of all sums for which the said William John Kirk 'is or may become liable to you' not exceeding £3000 sterling. The said letter of guarantee provided that it '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.' On the death of Mr Kirk the bank accounts standing in his name and in that of the defender were closed and a balance struck. The bank then held certain shares and life policies of insurance on the life of Mr Kirk in security of his obligations to them. These were realised by the bank and the proceeds credited to Mr Kirk's bank account. Certain shares were realised by being transferred to the pursuer at a certain figure. The defender suggests (*Ans.* 4) that the pursuer profited by this transfer, as the shares subsequently appreciated in value. It is plain that the subsequent history of these shares cannot competently be investigated. It is not said that the bank parted with them at an inadequate value, and the transaction must be treated just as if the bank had sold the stock to a third party for adequate consideration.

"After crediting Mr Kirk's accounts with the sum obtained from the realisation of his securities there was found to be a credit balance in his favour, but this was much more than wiped out by the debit balance against the defender, for which Mr Kirk's representatives were liable under Mr Kirk's guarantees on behalf of the defender. The amount due to the bank in respect of all the accounts, both those of defender and of Mr Kirk, was the sum of £2704, 13s. 1d.

"The pleadings are silent as to what steps the bank took to recover this sum, but I assume that in accordance with the invariable custom of banks a demand for payment was made against the defender as principal debtor, by whom the foresaid sum was due to the bank. The defender being unable to pay said sum to the bank, it was then carried to the debit of the late Mr Kirk's accounts in the books of the bank in respect of the guarantee which Mr Kirk had given on behalf of the defender. The representatives of Mr Kirk were presumably asked by the bank to make payment of said sum, and on their failure to do so the pursuer as cautioner for Mr Kirk was called upon by the bank to pay said sum. On 5th May 1916 he made payment thereof to the bank. On said payment being made the bank granted to the pursuer, on the narrative, *inter alia*, of the letters of guarantee granted by Mr Kirk on behalf of the defender and of the letter of guarantee granted by the pursuer on behalf of Mr Kirk, and that the pursuer had paid to them the foresaid sum of £2704, 13s. 1d., an assignation not only of said sum, but of the said several letters of guarantee and whole contents thereof, with all that had followed or was competent to follow thereupon, and surrogated and substituted the pursuer in the said bank's full right and place of the premises, with full power to the pursuer to ask, crave, and uplift the sum thereby assigned and interest thereon and to grant discharges thereof, and generally to do everything concerning the premises which the said bank might have done before the granting thereof. The said bank also delivered to the pursuer the said several letters of guarantee as his own proper writs and evidents.

"The pursuer now desires to obtain a decree for said sum against the defender, whose indebtedness to the bank the pursuer discharged by said payment. The defender resists the pursuer's claim on a number of legal grounds. The defence is purely technical, because the defender does not dispute (1) that the said sum represents correctly the amount of his debt to the bank, (2) that said sum was paid by the pursuer to the bank, and (3) that the defender must repay said sum to somebody. He contends, however, that his true creditor is not the pursuer but the representatives of Mr Kirk. He does not suggest that it will be of any advantage to him that the decree of Court should be in their favour. His suggestion nevertheless is that the pursuer must first sue Kirk's representatives, who in turn must sue him. I should be sorry if I had to decide that this circuity of procedure was necessary for a proper adjustment of the rights and obligations of parties, and I have reached the conclusion that it is not so, but that the pursuer has adopted the proper procedure in suing the defender directly. Both parties craved a decision without further procedure by proof, and as there is no dispute as to figures or essential facts it seems to me that the case may be so disposed of.

"The points maintained in defence are those which are tabulated in the defender's seventh plea-in-law.

"The first is (*a*) that the pursuer was liable only for Mr Kirk's debt—that is, Mr Kirk's personal debt to the bank.

"This depends on the terms of the pursuer's guarantee. As already pointed out these terms are quite general. They are not limited to balances due by Mr Kirk on his own bank accounts, but extend to all sums for which Mr Kirk might become liable to the bank. The said guarantee accordingly in my opinion extends to Mr Kirk's liability to the bank as the defender's cautioner. Formally the debt which the pursuer paid was that of Mr Kirk, because it was the debit balance of his accounts, but it was in actuality the debt of the defender to the bank.

"The next proposition is (*b*) that the bank had no claim of relief against the defender

for Mr Kirk's debt. This is undoubtedly so, but I am unable to see what conclusion pertinent to the issue can be deduced. The pursuer is not maintaining his claim because he paid a debt of Mr Kirk, but because he disbursed money on behalf of the defender.

"The third proposition of the defender is (*c*) that the bank was not entitled without the defender's consent to assign to the pursuer the defender's obligation. This is a contention which, as I shall endeavour to show at a later stage, is not in accordance with the law of Scotland.

"The pursuer's counsel based his claim for decree on these contentions—(1) That the pursuer paid to the bank the sum sued for; (2) that he made the payment, formally on behalf of Mr Kirk's representatives, really on behalf of the defender; (3) that he was bound in law to make the said payment; and (4) that he is therefore entitled to recover from the defender the sum which he was so bound to pay on his behalf.

"I am with the pursuer on all of these points, but I think I can reach a conclusion in the pursuer's favour by a shorter route than that traversed by his counsel.

"The foundation of the defence rests upon the terms of the guarantee granted by the pursuer. But suppose no guarantee had been granted. Eliminate from the case the guarantees both of Mr Kirk and of the pursuer. The salient facts would then be that the pursuer ultroneously paid a debt of the defender. What is the legal position of parties in these circumstances?

"In the first place, according to our law the defender's obligation to the bank is discharged. To this effect the law of Scotland follows the civil law as we find it expressed in Just. Inst. iii, 29, pr.—'An obligation is discharged if, with the creditor's consent, payment is made by anyone on behalf of another; and it is immaterial who makes the payment, whether the debtor himself or one on his behalf. The debtor is freed on payment of the debt by another, whether the debtor was or was not aware of the payment, or whether it was made against his wishes'—see *Guthrie*, 1880, 8 R. 107, at p. 111, 18 S.L.R. 75. The law of England seems to be different, as it requires the consent of the debtor to operate this effect of payment at the instance of a third party—see 1 Smith's L.C. 351, where the English authorities are collected.

"The Institutes are silent, and the Digest also, so far as I can discover (the matter is dealt with in Dig. xlvi, 3, *desolutionibus et liberationibus*) as to the legal relationship which is created by such a voluntary payment between the person who makes the payment and the original debtor. But that relationship is determined by principles which are recognised both in the civil law and the law of Scotland. There are two cases to be considered—(1) where the debtor consents to the intervention of the third party, and (2) where the debtor is not aware of such intervention or does not assent thereto. As to the former case, if a creditor is not demanding payment of his debt he is not bound to accept payment thereof when tendered by a third party without the debtor's assent. If, however, the debtor consents the creditor must accept payment and discharge the obligation. Where a third party has acted with the debtor's consent he has acted as the debtor's agent, and he is entitled to be repaid by the debtor *ex mandato* and under the law of agency any disbursements made on the debtor's behalf—Inst. iii, 26; Dig. xvii, 1; Bell's Prin., section 226.

"When a third party intervenes without the debtor's knowledge or consent and payment is accepted by the creditor, the third party's right to recover payment from the debtor seems to me to be based on the principle *negotiorum gestio*—Ersk. iii, 3, 52, 53; Bell's Prin., sections 540, 541. Mr Bell (Prin., section 557) puts the matter thus—'Payment to the effect of extinguishing the obligation may be made not only by the debtor himself but by anyone acting for the debtor, or even by a stranger where the debt is pecuniary, due, and demanded; . . . or where the creditor has no interest in demanding performance by the proper debtor. The debtor cannot prevent any stranger from paying and demanding an assignation if the creditor chooses to grant it.' The last situation figured may, of course, be prevented by the debtor paying the debt, but if he is unable or unwilling to make payment he cannot prevent a change of creditor from taking place in the way suggested.

"On a voluntary payment being made on behalf of another party one of two situations may emerge, the party paying may receive a bare acknowledgment or receipt from the original creditor or he may obtain a formal assignation to all that creditor's rights and securities. The circumstances in which the volunteer may successfully demand such an assignation are considered in the decisions on this branch of the law, *e.g.*, *Smith*, 1844, 6 D. 1164; *Rainnie*, 1822, 1 S. 377, (N.E.) 355; *M'Gillivray*, 1826, 4 S. 697 (N.E.) 703. These authorities seem to imply that the volunteer has, apart from any assignation, a legal right to demand repayment from the original debtor. What clothes him with this right is not an assignation but the fact that payment has been made, with no intention of donating, on behalf of a third party. The legal basis of his claim is the right to be repaid what he has disbursed for another.

"The advantage of obtaining an assignation in the terms of No. 12 of process is nevertheless obvious. By its terms it instructs the fact of payment, and furnishes the volunteer with a title, probative and instantly verifiable, to sue for payment.

"In the present case the original creditor formally transfers to the pursuer all the rights of a creditor against the defender. The defender can only oppose to the pursuer's claim any defence which he might have advanced to an action brought by the bank. To such an action the defender would have had no defence. He has thus no defence to the present action.

"I shall therefore grant decree as concluded for."

The defender reclaimed, and argued—The Lord Ordinary was wrong. The pursuer had not paid the defender's debt; he had

paid the debt of Mr Kirk who no doubt was liable for the defender's debt. Further, the pursuer had no assignation of Mr Kirk's right as against the defender. If his assignation purported to be an assignation of Mr Kirk's right as against the defender it was *ultra vires*, because the only contract between the pursuer and Mr Kirk was that the pursuer should guarantee Mr Kirk's debt not the debt of anyone else.

Counsel for the pursuer were not called on.

LORD PRESIDENT—I cannot say the defence to this action is unstateable, because it has been very clearly stated by Mr Brown, but I do say that it is almost unarguable. I see no other result to the action than that which has been reached by the Lord Ordinary. I move your Lordships accordingly that we should affirm his judgment.

LORD JOHNSTON—There is a verbal criticism that can be made on the assignation, but I do not think it is one of any substance. The real situation is that Lord Ruthven's debt has been paid by the pursuer, and that the pursuer is entitled to recover.

LORD SKERRINGTON—I concur. The defence here is not merely technical, but devoid of all substance.

LORD MACKENZIE was absent.

The Court adhered.

Counsel for the Pursuer (Respondent)—Sandeman, K.C.—M. P. Fraser. Agents—Tait & Crichton, W.S.

Counsel for the Defender (Reclaimer)—Wilson, K.C.—C. H. Brown. Agents—Hope, Todd, & Kirk, W.S.

Thursday, June 6.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

M'LEAN AND OTHERS *v.* GLASGOW CORPORATION.

Reparation — Negligence — Contributory Negligence—Tramway—Street—Foot-Passenger Run Down by Tramway Car—Duties of Driver of Car and of Foot-Passenger Crossing Street on Slant.

On a dark wet night in December a woman started to cross a busy street in Glasgow on the slant; before leaving the pavement she looked and saw a tramway car which was proceeding in the same direction as herself. On reaching the rails she did not look again to ascertain the position of the tramway car. If she had done so she would have observed that it was dangerous to proceed. She was knocked down by the tramway car and died as the result of her injuries. In an action for damages at the instance of her husband and children, *held* (*dub.* Lord Skerrington) that assuming there was negligence on the part of the defenders' servant, the driver of the car, damages could not be recovered as the accident was due to contributory negligence on the part of the woman in respect that she had failed to look to see the position of the car when she reached the rails on which it was approaching.

Observed per Lord Mackenzie that a person who crosses a street on a slant, going in the same direction as an approaching tramway car, takes an unnecessary risk, as calculation of the margin of safety and observation of the position of the car were both rendered more difficult by that mode of crossing the street.

Joseph M'Lean and others, the husband and children of Mrs Mary M'Lean, *pursuers*, brought an action against the Corporation of Glasgow, *defenders*, concluding for decree for payment of £250 to Joseph M'Lean and £100 to each of the children of Joseph M'Lean and Mrs M'Lean in name of damages for the death of Mrs M'Lean, who was knocked down by a tramway car driven by the defenders' servant and died from the injuries so received.

The defenders *pleaded*, *inter alia*—"3. The accident to the deceased Mary M'Kellar or M'Lean having been caused or materially contributed to by her own fault and negligence, the defenders are entitled to absolvitor."

On 17th November 1917 the Lord Ordinary (ORMIDALE), after a proof, assoilzied the defenders.

Opinion, from which the *facts* of the case appear—"This is an action at the instance of the husband and children of a Mrs M'Lean, who was knocked down by a tramway car belonging to the defenders on Saturday 30th December 1916, and so injured that she died half-an-hour afterwards.

"The accident took place about 9 p.m. as Mrs M'Lean was crossing Argyle Street (in Glasgow) from the east corner of Perth Street on the north side to a dairy on the south side.

"It was very dark at the time and place of the accident. The lighting restrictions were in force. The street lamps were lighted only on the north side of Argyle Street—the nearest lamp in front of the car being 70 yards distant—and the illumination from these was of a very subdued character. It was a 'right dirty wet night.'

"The offending car showed no light ahead except that proceeding from a lamp fixed on the middle of the dash about two feet from the ground. The lower half of that again was obscured.

"The witnesses Phillips and Jackson were in every way satisfactory. Their evidence was given with moderation and intelligence, and I have no doubt that they gave a perfectly truthful account of what, to the best of their observation and recollection, happened to Mrs M'Lean.

"According to these witnesses Mrs M'Lean left the north side of the street to cross over, when the car would be about twenty yards away to the west of her. She proceeded in a slanting direction, that is, with her back