that I have not been satisfied by the respondent that the Lord Ordinary is wrong. It is a finding in fact by the Judge who took the evidence, and I am not prepared to differ from it.

The Court adhered.

Counsel for the Reclaimer—Ure—J. Wilson. Agents—F. T. Weir & Robertson, S.S.C.

Counsel for Complainer—H. Johnston—Dundas. Agents—Strathern & Blair, W.S.

Friday, March 9.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

M'MURRAY *v.* M'FARLANE.

Agreement—Guarantee—Relief—Guarantee for Advance to Newspaper Proprietor—Renunciation of Right to Relief in Event of Newspaper being a Failure—Whether Newspaper had Fair Trial.

On 22nd December 1887 the proprietor of the *Scottish Leader* newspaper, who had applied to a friend for pecuniary assistance, received from him a letter whereby he agreed to lend for the purposes of the newspaper a sum of £5000 sterling at "2½ per cent. in the meantime, and till such time as the *Scottish Leader* becomes a paying property, after which you will pay me at the rate of 5 per cent. per annum so long as you have the use of the money, and should the *Scottish Leader* unfortunately turn out a failure I agree to renounce all claim for the repayment of both principal and interest." In August 1888 a sum of £1250 was advanced, the receipt for which bore express reference to the letter which was in subsequent correspondence brought before the lender's view as containing a promise on which the borrower relied. As the lender could not conveniently pay the balance he granted an acceptance for the amount, until upon his own suggestion the transaction ultimately took the form of a guarantee by the lender to a bank for advances to the extent of £5000. Out of this sum the borrower repaid the sum of £1250 formerly advanced, and used the balance of £3750 for the purposes of the newspaper. In 1891, the lender withdrew his guarantee, paid the debt to the bank, obtaining an assignation of the debt to himself, and sued the borrower for the sum advanced, maintaining that the guarantee had superseded the original loan. After the action was raised the nephew sold the paper to a third party for about £8000, and the pursuer further maintained that even if the defender was only liable for repayment on the success of the paper, he was barred from founding on that condition by his sale of it. It was proved that the defender's losses approached the sum of £40,000, while the total losses of the newspaper, including interest, approached £60,000 in the six years of its existence.

Held that the conditions of the letter of 22nd December 1877 applied to the transaction in its ultimate form, and that the guarantee was only a substituted mode for carrying out the original arrangement; and that, as there had been an honest but unsuccessful attempt to make the newspaper a commercial success, the circumstances contemplated by the agreement had occurred and the defender was not liable to repay either principal or interest—*dub.* Lord Rutherfurd Clark as to whether the paper had received a sufficient trial to justify the conclusion that it had proved a failure.

In the beginning of 1887 John M'Farlane, Edinburgh, started a daily newspaper called the *Scottish Leader*. Upon 13th December he wrote to his uncle James M'Murray, of the Royal Paper Mills, Wandsworth, Surrey, asking him to join a company under the Limited Liability Acts with a capital of £25,000, the object of the company being to lend money to the *Leader*, and the inducement held out to intending shareholders being that they should receive one-third of all the profits made, and should incur no responsibility beyond their subscription. M'Murray declined to join the company, but upon 22nd December 1887 he wrote him this letter—"My dear John,—In further reply to your letter of the 13th inst., I shall be very pleased to lend you £5000 — say, five thousand pounds at a moderate rate of interest —say, 2½ per cent. in the meantime, and till such time as the *Scottish Leader* becomes a paying property, after which you will pay me at the rate of 5 per cent. per annum, so long as you have the use of the money, and should the *Scottish Leader* unfortunately turn out a failure, I agree to renounce all claim for the repayment of both principal and interest, and in the event of my decease, this letter will be sufficient to protect you against any claim being made." After repeated requests by M'Farlane, his uncle paid him £1250 sterling. M'Farlane granted this receipt —"14th August, 1888. Received from James M'Murray, Esq., the sum of twelve hundred and fifty pounds, being the first instalment of a loan of five thousand pounds, terms of interest and repayment as per your letter to me of 22nd December 1887." M'Farlane continued to press for the rest of the money and by a letter dated 23rd November 1888, while stating he could send no more money, M'Murray wrote—"However, in order to assist you out of your present difficulty, I am willing to accept for the amount—viz., £3750 at 6 m/d, and I have no doubt Mr Aikman will be quite willing to take my bill for this sum." This offer having been accepted the bill was sent, and it was twice renewed afterwards, the last bill falling due in May or June 1890,

but during the currency of those bills M'Murray made a suggestion in a letter of 21st May 1889, thus—"You will require to re-draw the bill due the 4th prox., as all my spare cash is invested; or would it not be better if I were to become security to the bank for the amount? I should like this mode of dealing with the matter better than by bill." In May 1890 M'Farlane returned to the subject of a security to the bank, and in a letter to M'Murray mentioned his former suggestion of continuing the loan in that way. As the result of that, the bill then current was no longer renewed, but an arrangement was made with the bank whereby the £5000 was to be advanced by them to Macfarlane, M'Murray guaranteeing repayment. M'Murray also stipulated that he should have repayment, out of the money advanced by the bank, of the £1250 which he had advanced to M'Farlane in August 1888, and M'Farlane was to have the benefit of the balance of £3750 for the purposes of the paper. This was carried out and M'Murray granted this receipt—"31st May 1890. Received from Mr John M'Farlane the sum of £1250, being sum received by him from me Aug. 16/88, also £13, 0s. 6d., being interest up to this, this loan being commuted into one from the Commercial Bank on my personal security."

Following upon this arrangement M'Farlane drew £5000 from the Commercial Bank. In September 1891 M'Murray intimated to the bank that he recalled the guarantee. In May 1892 the bank called upon M'Murray to pay the sum due under his guarantee, and accordingly he paid the sum due and obtained an assignation of M'Farlane's debt to the bank.

Upon 27th May 1892 M'Murray brought an action against M'Farlane for the amount of the sum he had paid to the bank.

After the record had been closed the defender sold and transferred the *Scottish Leader* to Thomas Carlaw Martin, and from the date of the sale he ceased to have any right or interest in the newspaper.

The record was thereafter opened up, and the pursuer added the following averments—"(Cond. 7) The pursuer believes and avers that Mr Martin had not of himself the means either to purchase or to carry on said paper, and it is believed and averred that a number of persons interested in the political views advocated by the *Scottish Leader* provided the said purchase money. The said persons were at first induced to come forward with their money in order to avert the stoppage of the leading Scotch Gladstonian newspaper on the eve of or during the progress of the general election in the end of June and beginning of July 1892. It is believed and averred that in one week alone a sum of not less than £10,000 was subscribed by the aforesaid parties and others for this purpose. The *Scottish Leader*, with such generous voluntary contributions to its funds, at once became a paying concern, and continued to be so until the sale thereof on 20th August 1892. (Cond. 8) The defender is called upon to produce in process the contract or agreement between him and Mr Martin, by which he sold or bore to sell the *Scottish Leader* to Mr Martin. The pursuer believes and avers that the defender so sold or bore to sell the newspaper in consideration of a very large sum of money (provided as aforesaid) as the price of the said newspaper. The pursuer believes and avers that the defender has thus received payment from Mr Martin of sums far exceeding the said sum of £5000, for which the pursuer had become responsible on behalf of the defender, and which was invested by the defender in said paper. It was the defender's duty to apply these sums *primo loco* towards reimbursing the pursuer for the moneys advanced on the defender's behalf. The defender, however, refuses or delays to do so. In any view, the defender has, as the pursuer now believes and avers, alienated his whole interest in the *Scottish Leader*, and all control over or management of the same, and the condition upon which the defender alleges repayment by him of the loan could be demanded by the pursuer, has thus been purified, or must be held to be so, or at all events has been, by the defender's own actings, eliminated from the contract."

The defender averred—"(Stat. 7) By the pursuer's said letter of 22nd December 1887 the said loan is made 'till such time as the *Scottish Leader* becomes a paying property.' The loan was accepted, and has been continued throughout, on the same terms. Said condition was not purified up to the time when the defender sold the paper. Had it been so, the loan would have been repaid. By the said letter the pursuer also agreed, in the event of the said *Scottish Leader* turning out a failure, to renounce all claim for the repayment of both principal and interest of the said loan. The defender incurred heavy loss in carrying on the *Scottish Leader* while it remained his property, and he was obliged to part with it at a sum entirely insufficient to recoup him for his loss, in order to avoid further loss, and the paper was thus a failure in his hands."

These statements were denied by the pursuer.

The pursuer pleaded—"5. Assuming that repayment of the said loan was, as maintained by the defender, conditional upon the *Scottish Leader* becoming a paying property, said condition is now of no effect as a defence to the present action, in respect—(1) That the *Scottish Leader* did by reason of voluntary contributions to its support and progress, taken along with its ordinary revenue, become a paying property before the defender parted with it, and at all events it is now so. (2) That the condition was for behoof of, and personal to, the defender, and that he, having voluntarily parted with his whole connection with and interest in the said newspaper, cannot now maintain or insist upon the said condition. (3) That the defender having received from Mr Martin a price for the *Scottish Leader* exceeding the amount which the pursuer became liable

for, and has now paid on the defender's behalf, and which was invested in the *Scottish Leader*, is not entitled to plead the alleged condition against the pursuer to any effect. (4) The said condition was imposed *in intuitu* that the *Scottish Leader* should throughout remain the property of and be under the control of the defender, and should, under said control and management, become a paying property, and the defender having by his own act rendered such an event impossible, said condition must in a question with him be held as purified."

The defender pleaded—"(4) The sum sued for being that embraced in the transaction of loan mentioned in the defences, the pursuer is not entitled to maintain the present action, in respect that the condition upon which alone repayment was to be made has not been purified, and the action should accordingly be dismissed, with expenses. (5) The *Scottish Leader* having turned out a failure in the defender's hands, the pursuer is barred from claiming or enforcing repayment of the loan and interest, and the defender should be assoilzied, with expenses."

The Lord Ordinary allowed a proof, a great part of which was directed to the question whether the grant of the letter of guarantee by the pursuer to the bank constituted a different arrangement from that entered into by his letter of 22nd December 1887.

The result of the evidence was to establish that the conditions in that letter applied to the ultimate form which the transaction took.

The purchaser of the *Scottish Leader*, Thomas Carlaw Martin, deponed—"*Cross.*—With reference to the statement in Cond. 8—'The defender has thus received payment from Mr Martin of sums far exceeding the said sum of £5000,'—that is absolutely untrue. The sum of £2500 in the assignation represents the whole sum paid by me to the defender."

The defender deponed—"I am a wire-cloth manufacturer. I had been engaged in that business for some years prior to the time when I started the *Scottish Leader* newspaper in the beginning of January 1887. In starting the *Leader* I put £20,000 into the concern at the beginning. I very soon perceived that additional capital would be necessary. I set to work to consider how that could best be raised. I thought at first that the party in London would take it up—using the word party as the political party whose views my paper was to advocate. After a little, finding various difficulties, I proposed to raise money amongst my personal friends and to establish a limited company. The object of the limited company was not to work the paper, but simply to provide capital . . . By the month of August 1892 I found it necessary to sell the *Leader*. I found it was being carried on by me at a heavy loss which I was unable to continue to provide for. The necessity was before me of either stopping the paper or selling it, and accordingly I sold it to Mr Martin at the price of £2500. That left me a very heavy loser. If I include interest, I lost in round figures about £40,000. That is what I individually put in, and excluding what was advanced by the company. (Q) So you parted with the paper in order to avoid further loss, and the paper became a failure, and was a failure in your hands?—(A) Yes. The statement in Cond. 8 that 'the defender has thus received payment from Mr Martin of sums far exceeding the said sum of £5000' is quite wrong. The averment 'that the *Scottish Leader* is and was at and long prior to the pursuer's recall of his said guarantee a paying property,' is quite untrue. The statement 'that the *Scottish Leader*, with such generous voluntary contributions to its funds as are set forth in Cond. 7, at once became a paying concern, and continued to be so till the sale thereof on 20th August 1892,' is quite absurd. . . . I had made up my mind that in the earlier years I would drop a good deal of money. In the first year the loss was £10,000; in the second £9000; and in the third £4500, which I thought was exceedingly good—it looked like turning the corner—but after that the amount of loss rebounded up. Mr J. A. Robertson has had an opportunity of going fully into the books of the *Scottish Leader*. The books available to him contain the whole material, truly stated, showing the financial condition of the paper." . . . *Cross*—"I cannot exactly give you the date when I changed my view as to the *Leader* becoming a success, but I began to have doubts after the Baring disaster in 1890. (Q) Did you ever communicate these doubts to pursuer in 1890?—(A) We were always talking when I was in London. (Q) Did you ever communicate to him that you thought the *Leader* was going to be a failure?—(A) I would not likely use these words. I would not have been talking about it to my friends as if I thought it was going to be a failure. (Q) Did you ever suggest, or if you did, when did you first suggest, to pursuer that the *Leader* was not going to be a success?—(A) I had been very little in communication with him, and therefore I could not communicate it to him. I had not made up my mind in 1891 that the *Leader* was to be a failure. The letter of 14th October 1891 was about the last time that I was in agreeable correspondence with him. I was still hopeful then that a good turn would come, and if any of those plans I had in my mind had been given effect to I think it would have been all right. I may say it was the raising of this action which caused me very considerable difficulty in the matter. . . . (Q) What was to happen, according to your view, if the *Leader* was sold by you?—(A) Pursuer would repay the £5000. (Q) Where is there anything in this letter to suggest that?—(A) This was simply a continuation of our arrangement. (Q) Can you point to a single syllable in this letter to suggest to pursuer that he was to repay the £5000 if you sold the *Leader*, which you could do next day?—(A) If I had sold the *Leader* at a profit, and such a profit

as would have left me a clear surplus of £5000, I would certainly have undertaken to pay that. (Q) Can you point to anything in this letter to suggest to pursuer that he was to pay the £5000 in the event of your selling the *Leader*?—(A) I did not think it required to be mentioned. (Q) Is it your suggestion that it was pursuer who was to repay this £5000 to the bank, and not you?—(A) Certainly, if the paper was a failure. (Q) But you do not say so here?—(A) I say in the very next page that this is commuted into a loan from the Commercial Bank, and pursuer signs that. (Q) You drafted it?—(A) He was ill at the time and could not write very well, and I drafted it for him and sent it to him. I think it follows from the agreement of 22nd December that he was to repay that loan to the bank. (Q) Why did you not refer to that agreement in this letter?—(A) It was not called for. . . . (Q) If pursuer was in that position, do not you think it would have been right to take him along with you in this sale of the paper and consult him about it when the consequences were that he was to be liable in this sum to the bank?—(A) No, I think the shareholders in the company were the people to be consulted, and after them three other parties. The shareholders of the company were the Scottish Syndicate Company who lent me the money. (Q) If they should be consulted, why should pursuer be left out?—(A) Because he would not join the company; if he had joined the company and paid his money he would have been consulted along with the other members of the company. At the time the paper was sold I was not on speaking terms with the pursuer, and besides we had much nearer interests than his—preference interests I should call them—for about twelve months before the stoppage of the paper. I myself put in a sum of £3333; Lord Overtoun put in an equal sum; and Mr Thomas Glen Coats put in £1000—amounting to £7666. These men, I held, were preference shareholders, and the company decided to give them a preference if they would advance money to keep the *Leader* going after the company themselves had given their last funds to it. (Q) But did you not think it would be a right thing, taking the view of the matter that you did, to consult pursuer, who had become liable for £5000, as to your selling the *Leader*?—(A) The loss was so large that it would have been no use. (Q) Was that why you did not consult him?—(A) He had raised this action against me, and I was not on speaking terms with him. I suppose that was the reason why I did not consult him as to the sale of the paper. . . . (Q) I show you certain balance-sheets, from which it appears that at 20th August 1892 there is a sum at your credit, after deducting losses, of £7981. Was that sum at your credit since, and have you got anything?—(A) I have told you what I got. I am not a creditor of Mr Martin in any sum, but I have the collection of the accounts in my own hands, and these are not all collected yet. There will not be anything like sufficient to pay the preference claims of £7666 of which I spoke. I should think that about one-half of the £7981 consists of assets and accounts to be collected, but the accounts are very bad, not yielding anything like what we expected."

J. A. Robertson, accountant, Edinburgh, who had examined the books of the *Scottish Leader*, under a remit from the Lord Ordinary, deponed—"I adhere to the view I then stated, that as at 27th May 1892 the newspaper was not at that date, or at any date prior thereto, a paying property; and also to the view that however the accounts might be stated, the loss was so considerable that it would be impossible for the pursuer or anyone to succeed in having them stated in such a manner as to leave any room for doubt in the matter. . . . Average annual loss for each of the five years to 31st December 1891 fully £7800. Excluding the first year as exceptional, the average annual loss for each of the four succeeding years is £7111, 9s. Taking the same proportion for the whole year to 31st December 1892, as for the period to 20th August, the loss is £7856, 11s. 8d. I have prepared a statement showing the capital put into the *Leader*, and progressive interest thereon. The total capital put in down to 20th August 1892 is £58,250, exclusive of interest. No interest was paid on that sum, or any part of it. My state shows the different sums of capital put in between November 1886 and August 1892, and the dates when they were put in. In the books the defender is credited with having paid these sums. The periodical interest on these sums, at 5 per cent. to 20th August 1892 is £10,113, 8s. 2d. If the interest had been entered in the books, and assuming the sum of £58,250 was a debt due by the *Leader*, it would make the total loss £54,415, 12s. 9½d., which is the addition of the interest to the summation of the loss each year. . . . Taking into the calculation all these different items, and adding interest, it makes the total loss from the starting of the paper to 20th August 1892 £60,382, exclusive of anything for defender's services or for depreciation on machinery. Excluding interest on capital, and taking the loss through the sale to Mr Martin into account, the loss is £59,268 during the five years and nine months. With regard to the sum of £7981 brought out in the final state, I take the £58,250 as entirely lost with the exception of that £7981, which is the difference between the £50,268 and the £58,250. *Cross.*—Interest is not charged upon capital in the books. There appears from the books a surplus of £7981 of assets over liabilities. *Re-examined.*—That is the sum which I have just explained is the difference between the total of £58,250 and the actual amount lost, excluding interest. If there are preference creditors, the only amount available for them from the assets of the newspaper is that amount of £7981."

Upon 2nd December 1893 the Lord Ordinary assoilzied the defender from the conclusions of the summons.

"*Opinion.*—[*After stating the facts*]—The shape which the transaction ulti-

mately took was not a direct loan by the pursuer to the defender, but a guarantee by the pursuer to the Commercial Bank on advances to the extent of £5000, and the first question in the case is whether the terms and conditions of the letter of 22nd December 1887 applied to the transaction in its actual form.

"On that point I confess I have no doubt at all.

[*His Lordship further stated the facts and proceeded*]—"That being so, I have no hesitation in holding that the conditions of the letter of December 1887 applied to the transaction in its ultimate form. I do not think that the pursuer in his evidence successfully combats that view. He makes the bald assertion that the one thing superseded the other, but when he is pressed upon that point in cross-examination he fails to show any reason why it should, and in particular he fails altogether to account for his silence when the defender again and again brought under his notice that the guarantee was merely a substituted mode of carrying out the original arrangement.

"The only other question in the case is whether, assuming that the money was to be repayable, if and when the newspaper became a commercial success, and not otherwise, the defender has debarred himself from enforcing that condition by voluntarily selling the paper. The sale took place in August 1892, after the action was raised. Accordingly the record was opened up and new pleas were stated for the pursuer to meet the altered circumstances. He now appeals to a well-known rule of law to the effect that if the debtor in a condition renders the fulfilment of the condition impossible, the condition is held to be fulfilled. That is a doctrine borrowed from the Roman law and firmly fixed in ours, but I do not think that it has any bearing on the present question, because the real question is on this branch of the case, what was the condition under which the defender was bound? By the terms of the letter he was bound to repay the money unless the *Scottish Leader* should turn out a failure, and the question is, what is the meaning of these words? The letter itself supplies a gloss upon them, because in the first part of it, where it is dealing with the payment of interest, it provides that the lower rate of interest is only to endure until the paper becomes a paying property, and that, I think, shows pretty plainly that what was meant by 'turning out a failure' was the paper not becoming a paying property. The pursuer's construction comes to this, that the defender truly bound himself to carry on the concern until all his funds should be exhausted and he should become a bankrupt. That would have been hanging a mill-stone about his neck with a vengeance, and it is a stipulation which I cannot imagine the defender would ever have agreed to, or that the pursuer himself ever intended. I think the reasonable construction of the expression is that the paper was to get a fair trial, and if after that the defender could not make it pay, he was not to be liable in repayment of the loan.

"The kind of trial which the parties contemplated should be given to the paper is pretty well indicated by the defender's letter of 13th December 1887, in which he said that if £25,000 were raised, and if the paper were carefully worked for the next two or three years, he expected it would turn out a profitable investment. That undoubtedly must have suggested to the pursuer's mind that what was in contemplation was at least a trial of two or three years and an expenditure of something like £25,000. In point of fact the paper was worked for more than two or three years. It was worked very nearly five years after December 1887, and a great deal more than £25,000 was lost in it. The concern has turned out, so far as the defender is concerned, not merely a failure, but a disastrous failure. It is in evidence that his own losses have approached the sum of £40,000, and that the total losses of the newspaper, if interest be included, have been something like £60,000 in the six years of its existence. Therefore it cannot be said that the concern did not have a fair trial, and that is really all which I think the defender bound himself to give it. If immediately after the letter of December 1887, or within a year of the date of that letter, he had stopped or sold the paper, I think that would not have been giving it a fair trial, and indeed might have been described as a fraud on the contract. But no case of that kind can be made. It is clear that the defender, with his own large interest in the concern, had every motive to give, and did give, the fairest trial to the concern, and there is no suggestion that he did not put forth every effort to make it a financial success. The pursuer had confided the managing of the paper entirely to him. He had made no stipulation that he should ever be consulted in the question whether it should be carried on or whether it should be wound up or sold. He cannot therefore complain that he was not consulted on that question. There having been, in my view, a *bona fide* effort to make the paper a financial success, and that effort having failed, I am of opinion that the state of things contemplated by the agreement is in existence, and that the defender is no longer liable to repay to the pursuer either principal or interest. He is therefore entitled to absolvitor with expenses."

The pursuer reclaimed, and argued—It was proved that the guarantee to the bank was a new arrangement, and had nothing to do with the letter of 22nd December 1887. If this guarantee was to be subject to the letter, the pursuer was denied the usual right of a cautioner—the right of relief. Further, the defender had sold the paper, and so had put it out of his power to fulfil the obligation of repaying the £5000 with interest at five per cent. A newspaper was not a property which could be made to succeed at once, it was necessary that a fair trial should be given it, and the defender bound himself to give this fair trial

—*Dick & Stevenson* v. *Mackay*, May 21, 1880, 7 R. 778; affirmed *Mackay* v. *Dick & Stevenson*, March 7, 1881, 8 R. (H. L.) 37; *Pirie* v. *Pirie*, July 19, 1873, 11 Macph. 941; *M'Intyre* v. *Belcher*, June 5, 1863, 14 C.B. (N.S.) 654; Addison on Contracts, 54, 9th ed.; *Stirling* v. *Maitland & Boyd*, November 15, 1864, 5 Bert. & Smith 840: *Stevens* v. *Benning*, December 7, 1854, 1 Kay & Johnstone, 168. Assuming that the pursuer was not entitled to be paid if the newspaper turned out a failure, that result had not happened. Failure meant either stoppage of the paper or bankruptcy, and neither of these two events had happened. The paper had been sold to another person, and was still being carried on, and at the time of the sale there was, as shown by the accountant's report, a surplus of £7981 of assets over liabilities—*Ross* v. *M'Farlane*, January 19, 1894, *ante*, p. 305.

The respondent argued — The whole correspondence and evidence showed that the stipulations in the letter of 22nd December 1887 were carried into and became part of the bargain by which the pursuer granted a letter of guarantee of £5000 to the Commercial Bank in favour of the defender, and the Lord Ordinary had rightly so held. If the defender's actings had rendered impossible the fulfilment of an obligation which he was bound to carry out, the obligation must hold good against him, but that rule did not apply. The stipulation was that the money was to be repaid unless the paper turned out a failure. The defender admitted that in such a property as a newspaper some time must elapse before it could be said to be a failure or success. This paper had been carried on since 1887 till the sale in June 1892, the defender had lost £40,000, and all he got back was less than £8000. In these circumstances it could not be said that the paper had not turned out a failure so far as the defender's pecuniary interests in it were concerned, and it was absurd to say that when the defender said the paper was turning out a ruinous loss, he was not entitled to sell it for what he could get, at the risk of being called upon to repay this £5000, and that what he must do was to carry it on until he had exhausted all his remaining funds, or bring the paper to a stop, thus losing what little recoupment he could get from the sale.

At advising—

LORD YOUNG—The case presented by the pursuer is an exceedingly simple one. He avers that on 16th May 1890 he granted a letter of guarantee to the Commercial Bank, under which he became liable for any advances made by the bank to the defender up to the sum of £5000, and that in the same month of May the defender obtained an advance from the bank to the amount of £5000. He further avers that in September 1891 he wished to be relieved of the guarantee, and he intimated to the bank that he wished to recall it. The bank then demanded payment of the amount due, and on 24th May he repaid the amount to the bank. He raised the present action upon 27th May, and it concludes for payment upon the very familiar ground that the pursuer as cautioner had paid the advance which the defender had got from the bank, and that he was entitled to decree against the defender for that sum.

The case seems to me to be as relevant as could be imagined, and absolutely true. There is no doubt the pursuer granted the letter of guarantee to the bank, there is no doubt that the defender got the advance of £5000 from the bank on faith of the letter, and there is no doubt that the pursuer paid up the amount. Therefore it was with some surprise I read the first two pleas-in-law for the defender. The first is "no relevant case," and the second "no title to sue." A more relevant case cannot be conceived, and there is absolutely no objection to the pursuer's title to sue.

The case is peculiar and presents serious questions for the consideration of the Court on the defence which is set up, and the interest of the case and the difficulty in deciding it arise upon the relevancy and truth of the defence. The defence is that the advance by the bank to the defender in 1890, which the pursuer under his letter of guarantee repaid to the bank in 1892, was in truth a loan by the pursuer to the defender under and in terms of an obligation he undertook in a letter he wrote to the defender on 22nd December 1887, which the Lord Ordinary characterises as a vital document in the case. If it be the legal result of that obligation that the advance made by the bank to the defender was in truth and justice, and therefore in law, a loan by the pursuer to the defender under that letter, then it appears to me to begin with that the defence is good.

That leads me to examine the letter. It is in these terms—[*His Lordship read the letter.*] Of the authenticity of that letter there is no doubt. It is admitted. Now, we have not to consider whether that was a letter of such a gratuitous character that it might not have been withdrawn before it was acted on, because it was acted on. It was explained in the argument how the pursuer came to grant that letter to the defender. The chief motive I have no doubt was kindly feeling from the uncle towards his nephew, but there was another feeling as well. In my opinion he was interested in the newspaper recently started, which his nephew had started and of which he was in charge. The uncle seems to have been of the same political party as the nephew and was desirous of assisting in keeping it alive—keeping it going—a motive which we know leads many people to give of their funds in order to carry on newspapers, they being interested in the political views which the newspapers are started to promote. After that letter was acted on, I think it became onerous if the defender acted in such a manner as would prejudice the uncle if they came not to agree. It was acted on on both sides.

[*His Lordship then examined the correspondence between the parties.*]

Now, I think these are all the documents

—I do not refer at all to the verbal evidence—upon which is founded the defence to the *prima facie* good claim by the pursuer under the letter of guarantee, and it merely comes to this that the whole transaction was a loan by the pursuer to the defender under the conditions in the letter of 22nd December 1887. Now, that being so, it appears to me that the defence so far is well founded and comes to this, viz., that the loan for which the pursuer bound himself under the letter of 1887 was at the pursuer's own request and for his own convenience commuted into an advance by the bank to the defender under the pursuer's guarantee.

It was maintained by the pursuer that what was done was really an agreement to cancel the arrangement come to under the letter of 1887 and substitute something else, viz., a mere advance by the bank under the pursuer's guarantee, so that whether the paper was a failure or not he was entitled to demand repayment in full. I cannot assent to that. There is no doubt that, although it was within the power of both parties to make an arrangement by which the pursuer was to be relieved of the obligation he had entered into, it was not in the power of the pursuer to make any such arrangement without the consent of the defender. My opinion upon the evidence is that it was not according to the intention of either party that the pursuer should be relieved from his obligation with respect to the amount of interest while the paper was not a paying concern, or with respect to his disability to demand repayment of his defence if it turned out to be a failure. It is too clear for argument, I think, that it was not the intention of the defender to release him of his liability, and without his consent the release could not be effected, but I think it would be doing a grave injustice to the pursuer himself, judging him from his own acts and letters, to say that he desired to be released. I think that, if the pursuer intended not to be bound by the letter of 1887 in the arrangement come to about the guarantee, he ought to have intimated that intention to the defender; and, if he had, I can have no doubt what would have been the defender's reply as he himself says in the correspondence that he considered the guarantee merely a commutation of the loan granted under the letter of 22nd December 1887. Therefore I am of opinion that the defence is well founded up to this point, and that we must reject the pursuer's contention.

There is, however, another objection to the defence, which is, that it does not appear that the *Leader* turned out a failure. The action, as I have said, was brought upon the 27th May 1892, and at that time the paper was the property of the defender. He had been carrying it on from January 1887 down to the date of the action, *i.e.*, about five years and a-half, and it had never been a paying concern. He had lost between £20,000 and £40,000 upon it. He advanced £20,000 at first, and lost it all; the defender I think said that his loss was a great deal more, and that a great many other people had lost money upon it. As a property it was a failure, and it was admitted that during these five and a-half years it never was a paying property, and after that trial of five and a-half years by the defender the question is, whether at the time this action was brought the *Leader* had turned out a failure. Now, it is very difficult to use precise language with respect to dates in a matter of this kind. The circumstances do not admit of it. There is no period specified for the endurance of the loan to be granted under the letter. We must just use such reasonable and intelligible language as the circumstances will admit of, and as will apparently express the true meaning of the parties.

I should think that the letter contemplates this, and we must impute it to both parties as their true meaning and intention, that a fair trial should be given to the paper, and that if after that fair trial the paper should prove a success, and the pursuer had advanced money to carry it on, he should be entitled to repayment. The success meant is, of course, the success of the paper as a property—a mercantile success—it would be ridiculous to consider that the parties had any other kind of success in their minds in such a contract as we are dealing with. On the other hand, if after a fair trial in the hands of his nephew the latter finds that he has lost all he can afford to lose without coming to absolute ruin, and without getting any return from the paper, he is not to be liable to repay the money lent by his uncle. This is the state of affairs in which the action is brought, and the question is, whether or not when the pursuer brought his action the condition in the letter was fulfilled—that the *Leader* had turned out a failure. I think the answer to this action for repayment, if the paper had not been sold, is that the paper has turned out a failure, and that the pursuer could not have decree for his money. It turned out such a failure the defender could not carry it on any longer, but he got a purchaser. There were offices, there was plant, and there were people interested as the pursuer had been, and as the defender had certainly shown himself to be, in the continued existence of the paper, and who were willing to carry on this failing property at great sacrifices. The sale was on August 20th 1892, and the pursuer gives this account of it in Cond. 7—[*Here his Lordship read the condescendence*]. Why should these persons have come forward to avert the stoppage of the paper if at that time it was not a failure. I could not wish more distinct testimony than the pursuer himself bears that at the time the defender parted with the paper it was an absolute failure, and therefore I think that the defence on that ground is not answered by the pursuer's argument that the defender ought to have gone on conducting the paper at his own expense until he was utterly ruined. I do not think that is the true meaning of the letter, I think that is a nonsensical meaning to put upon it, and I do not think that the defender would have accepted the advance if he thought that was the meaning

to be put upon the letter. On the whole matter, I am of opinion this defence is well founded.

LORD RUTHERFURD CLARK—I have felt a good deal of difficulty with this case. It is in evidence that an adventure of this kind cannot succeed for a long time, and can only succeed after considerable expense and loss at first. The defender by the sale of the paper had disabled himself from carrying it on, and I have considerable doubts whether at the time of the sale we are justified in saying that the paper had proved a failure. But they are only doubts, and I am not prepared to dissent.

LORD TRAYNER—I agree with the views of the Lord Ordinary, and have nothing to add.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for the Reclaimer — Dundas — C. K. Mackenzie. Agents—Mackenzie & Black, W.S.

Counsel for the Respondent — Comrie Thomson—Guthrie. Agents—Millar, Robson, & M'Lean, W.S.

Friday, March 9.

FIRST DIVISION.

SMITH'S TRUSTEES AND OTHERS.

Trust — Succession — Vesting — Declaration as to Period of Vesting — Repugnancy — Advances—Declaration that Advances should be Deducted from Shares—Effect of Discharge in Bankruptcy of Person to whom Advance had been made.

A testator left one-half of the residue of his whole means and estate to his sons equally among them, and directed that two-thirds of their respective shares should be paid to them on their attaining the age of twenty-five years, declaring "that the said half of the said residue of my said means and estate left to my sons shall vest from and after my death, and bear interest thereafter at four per cent. per annum during the not-payment; and I direct my trustees to retain the remaining one-third of the respective shares of the half of said residue of my said means and estate left to my said sons for their behoof until the winding-up of the trust-estate; and I direct and appoint my trustees to hold the other half of the residue of my said means and estate, heritable and moveable, real and personal, before conveyed in trust for behoof of my several daughters, . . . to the extent of one share each in liferent for their respective liferent use only, and their respective children or descendants equally *per stirpes* and not *per capita* in fee, and the fee of the said several shares shall be payable to the respective children of my said daughters on their mother's death, when the same shall vest, and on their respectively attaining the age of twenty-three years, the annual proceeds thereof being applied for their use and benefit until the last of said events shall take place, declaring that if any of my sons shall die either before or after me, leaving lawful issue, his or their shares of the residue of my said means and estate before conveyed shall fall and belong to such issue equally, and if any of my sons and daughters shall die either before or after me without leaving lawful issue, the respective shares of my said means and estate left to them in fee or in liferent as aforesaid shall belong to the survivors and the issue of any deceaser of my sons and daughters *per stirpes* equally, the portion or portions thereof falling to my daughters being left to them in liferent for their liferent use only, and their children or descendants equally *per stirpes* in fee: Declaring that . . . all advances which I have made or may hereafter make to my respective sons-in-law shall be deducted from the respective shares of the fee of the half of the said residue liferented by my said several daughters, their wives."

Held (1) that the entire half of the estate destined to sons vested *a morte testatoris* notwithstanding the repugnancy caused by the survivorship clause, which in terms contemplated the event of sons dying before or after the testator; and (2) that the balance of loans made to a son-in-law, for which the testator had subsequently ranked under a composition arrangement by which the son-in-law was discharged of all debts due by him, remained an advance in the sense of the trust-disposition and settlement, and fell to be deducted from the share liferented by that son-in-law's wife but without interest.

Alexander Smith of Auchentroig, Buchlyvie, died 7th December 1891, leaving a trust-disposition and settlement dated 28th April 1883, which contained the following provisions—"I leave one-half of the residue of my said whole means and estate . . . to and among my sons equally among them . . . and my trustees shall as soon as practicable after my death . . . make payment to my three eldest sons of two-thirds of their respective shares of the half of said residue of my said means and estate . . . and on my remaining sons . . . and any other son who may be procreated of my body attaining the age of twenty-five years, my said trustees shall make payment to them of two-thirds of their respective shares of the said half of the residue of my said means and estate: Declaring that the said half of the said residue of my said means and estate left to my sons shall vest from and after my death, and bear interest thereafter at four per cent. per annum