points to this public road is a source of danger to the horse traffic passing along the road; That the use by the defenders of the existing ranges for rifle-shooting in the manner hitherto practised by them is to the nuisance of the pursuer and of the public using said foreshore for the purpose of recreation, and of passing between Ayr and Prestwick, and of the pursuer and of the public using said Kingcase Road for the purpose of horse traffic: Find in law that the pursuer is entitled to interdict against the defenders using these ranges in the manner hitherto practised by them: Therefore interdict, prohibit, and discharge the defenders [then followed the names of the commanding officers], and the volunteers at present under, or that may be at any time under, their command, or under the command of their successors in office, conjunctly and severally and individually, from shooting from the said firing points and over said ranges in the manner hitherto practised by them, and decern: Find the pursuer entitled to expenses in this and in the Inferior Court, and remit the same to the Auditor to tax and to report."

Counsel for the Pursuer and Respondent —Campbell, Q.C.—Hunter. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Defenders and Appellants —Sol.-Gen. Dickson, Q.C.—Guy. Agents —Irons, Roberts, & Cosens, W.S.

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*Friday, November* 30.

## SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

## BUCHANAN *v.* MAIN.

*Payment — Appropriation of Payments— Bank Account — Overdraft — Separate Accounts—Guaranteed Account of Company Closed and Amount Received from Call Placed in New Account—Bank—Cautioner.*

A limited liability company was incorporated in 1893, its shares being of the value of £1, of which 10s. was called up. In 1894, the company being in need of financial assistance, their bankers allowed an overdraft on receiving a letter of guarantee, by which five directors of the company jointly and severally guaranteed payment of all sums for which the company were or might become liable, the amount not to exceed £12,500.

In January 1896 two of the guarantors intimated to the bank that they withdrew from the guarantee, and the bank closed the account, which stood at that time with a debit balance of over £12,000. Immediately thereafter the directors of the company made a call on the shareholders, payable at the bank, for the unpaid amount of their shares. This brought in over £6000, which was placed by the bank in a new account, headed, "No. II. Call Account," which was a credit account entirely.

In March 1896 the bank opened a new current account with the company. This account contained no entry of the debit balance on the guaranteed account, and no reference to that account.

In May 1896, there being then a debit balance on the new current account of over £2000, the company went into liquidation.

A question being raised as to the amount due by the guarantors to the bank—*held* that the bank at the time when the amount raised as the result of the call on the shareholders for the unpaid portion of their shares was paid to them, were not bound to apply this fund to the extinction of the balance due on the guaranteed account.

*Cautioner — Relief — Joint and Several Liability — Liability of Co-Cautioners inter se—Extent of Liability inter se.*

Five persons jointly and severally guaranteed to a bank payment of all sums for which a company might become liable to the bank. The company thereafter went into liquidation, and the bank called upon two of the five guarantors to pay up the debit balance due to the bank by the company. These two guarantors paid the amount claimed by the bank. *Held* that they were entitled to claim payment of one-third of the amount so paid by them from one of the three other guarantors.

In 1893 a limited liability company was incorporated called the United Gutta Percha and Rubber Company. The shares allotted to the public were 25,000 *A* shares of the nominal value of £1 each, and upon these 10s. per £ was called up. The company not being successful, and money being required, Andrew Buchanan, William Stevenson Brown, John Main, Robert Hutcheson, and Alexander M'Dowall, who were all directors of the company, by letter of guarantee, dated 18th, 26th, and 28th May, and 1st and 22nd June 1894, jointly and severally guaranteed to the Bank of Scotland due payment of all sums for which the company were or might become liable to the bank, the amount for which the guarantors became liable being declared not to exceed £12,500, with interest from the dates or date of advance.

On 28th January 1896 John Main, who had resigned his position as director of the company on 30th October 1895, and Robert Hutcheson, intimated to the bank that they withdrew from the guarantee. The bank thereupon closed the guaranteed account, in which there was a debit balance of £12,283, 5s. 3d. Immediately thereafter a call, payable at the bank, was made upon the shareholders for the amount still remaining due upon the *A* shares, and between 3rd February and 19th May 1896 this produced

£6387, 10s. These calls were entered as received by the bank into a separate account, headed, "United Gutta Percha and Rubber Company, Limited, No. II. Call Account," which was a credit account entirely.

On 30th March 1896 the bank opened a new current account with the company. This account contained no entry of the debit balance in the guaranteed account, and no reference to that account. On 20th May the debit balance due to the bank on this account was £2349, 9s. 6d.

On 20th May 1896 the company having exhausted its resources, went into liquidation, and its affairs were gradually wound up.

In October 1898 the position of the bank in connection with the company was as follows:—The debit on the guarantee account amounted with interest to £13,021, 13s. 5d., and the debit on the account-current opened on 30th March 1896 amounted with interest to £2647, 13s. 7d., together amounting to £15,669, 7s. From this fell to be deducted the amount standing at the credit of the call account, amounting with interest to £6433, 15s. 6d., leaving £9235, 11s. 6d. After deducting from this sum dividends received by the bank from the company's estate and securities held by them, there remained due to the bank the sum of £4306, 17s. 11d.

The bank made a demand on Andrew Buchanan and W. S. Brown, two of the cautioners under the guarantee for the debit balance brought out above, and each of these cautioners paid to the bank the sum of £800 on 31st March 1898, and the sum of £1353, 9s. on 24th October 1898.

Thereafter Buchanan and Brown made a claim upon John Main for a third of the sum paid by them to the bank, on the ground that he being a co-guarantor with them was bound to relieve them for sums paid under the guarantee to such an extent as would make them and him contribute equally. He refused to pay, whereupon they raised an action against him in the Sheriff Court at Glasgow for £1435, 12s. 8d. with interest on £533, 6s. 8d. from 31st March 1898, and on the balance of £902, 6s. from 24th October 1898.

In their condescendence the pursuers averred that Alexander M'Dowall died in March 1898, and that his estates were insolvent, and that Robert Hutcheson disputed liability under the guarantee and maintained that he was unable to pay if liable.

The defender maintained, *inter alia*, (1) that the £6387, 10s. paid into the bank as the result of the call made upon the shareholders should have been applied to reduce the balance due on the guaranteed account, and (2) that even if he were liable at all, the pursuers were not entitled to recover from him more than one-fifth of the sum due under the letter of guarantee.

After proof had been led, the Sheriff-Substitute (FYFE), on 21st May 1900, pronounced the following interlocutor:—"Finds (1) that pursuers and defender form three of five guarantors who undertook, on behalf of the United Gutta Percha and Rubber Company, Limited, the guarantee obligation expressed in the letter of guarantee; (2) that the ultimate debit balance arising under said guarantee towards payment of which defender is liable as a contributor is £2833, 19s., which was payable to the bank at 24th October 1898; (3) that defender's proportion thereof is one-fifth, or £566, 15s. 9d.; (4) that pursuers have paid the bank's claim under said guarantee: Finds in law that pursuers, having been called upon to pay, and having paid the bank's claim arising under said guarantee, are entitled to relief by defender to the extent of one-fifth thereof: Therefore decerns against the defender for payment to pursuers of said sum of £566, 15s. 9d. sterling, with interest thereon from 24th October 1898."

The grounds on which the Sheriff-Substitute based his judgment included, *inter alia*, the following—(1) that the £6387, 10s. received as the amount of the calls should have been applied to the reduction of the debit balance in the guaranteed account; (2) that the pursuers had not proved that Alexander M'Dowall's estates were insolvent, or that Robert Hutcheson was unable to pay; and (3) that although the five co-obligants as in a question with the bank were liable *singuli in solidum*, their liability *inter se* was *pro rata* only, and that in the absence of proof to the contrary all the five must be assumed to be able to pay.

The pursuers appealed, and argued—(1) There was here no contract, express or implied, which compelled the bank to appropriate to the guaranteed account the amount of the calls on the unpaid capital. The guaranteed account had been closed before the unpaid capital was called up, and the accounts were kept quite separate. The purpose of calling up the unpaid capital was not to reduce the debit on the guaranteed account, but to furnish funds for the carrying on of the company. *In re Sherry*, 1884, 25 Ch. D. 692. (2) The proof showed that the estates of Mr M'Dowall and Mr Hutcheson were insolvent, but whether they were or not the defender was not entitled because the bank had chosen to demand the debt from the pursuers to escape sharing equally with them in the burden. He was bound to pay them a third, and thereafter he like the pursuers would be entitled to seek relief for the difference between the one-third and the one-fifth of the debt from the co-cautioners who had paid nothing.

Argued for the defender—The Sheriff-Substitute's judgment was right. (1) The amount received from the calls should have been used to write off the debit balance on the guaranteed account. The mere fact that the bank chose in following out their mode of accounting to enter the calls in a separate account should not be held to prejudice the defender. The bank was bound to apply all moneys paid in primarily to extinguish the debit under the guaranteed account—*Cuthill* v. *Strachan*, February 16, 1894, 21 R. 549; *Clayton's* case, 1816, 1 Merivale 572; *Kinnaird* v. *Webster*, 1878, 10 Ch. D. 189. (2) In any event the defender was only bound to pay one-fifth of the total

amount paid to the bank by the pursuers. Where one out of several cautioners had paid a debt, he was only entitled to decree against each of his co-cautioners for that cautioner's own individual share—*Anderson* v. *Dayton*, June 26, 1884, 21 S.L.R. 787. In the present case the pursuers had not proved that they were unable to recover from Robert Hutcheson and the estates of Alexander M'Dowall the one-fifth parts due under the guarantee.

At advising—

LORD TRAYNER — [*After dealing with another point in the case, to which it is unnecessary for the purposes of this report to refer*] — There remain two questions to be determined which arise under the appeal of the pursuers against the interlocutor of the Sheriff-Substitute, of date 21st May 1900. These questions are—(1) What is the amount for which the pursuers, defender, and two others were liable to the Bank of Scotland under their guarantee dated 18th May 1894; and (2) what is the proportion of the amount which the defender is bound to pay the pursuers. The facts are not disputed, and admit of being shortly stated. The United Gutta Percha and Rubber Company being in need of financial assistance was allowed an overdraft by the Bank of Scotland on the guarantee I have referred to being granted. The guarantors were the parties to this action, and two others, all directors of the company, and their guarantee was limited to the sum of £12,500. On or about 28th January 1896 the defender and another of the guarantors intimated to the bank that they withdrew from the guarantee, and thereupon the bank closed the account on which the overdraft had been allowed. When that account was so closed there was due to the bank something over £12,000—the exact figure is not material. Immediately thereafter the creditors of the company made a call on the shareholders, which they were requested to pay into the Bank of Scotland, and this call realised a sum of over £6000. The sum so received by the bank was entered in a new account, and against this sum the company operated by drafts which were entered in another account still. There were thus three accounts on the bank's books—(1) the guaranteed account closed in January 1896, (2) the call account which was entirely at the credit of the company, and (3) a new account-current between the company and the bank, which contained no entry of the debit balance on the guaranteed account or any reference to that account. The company went into liquidation in May 1896, at which time a large balance was due to the bank. It is unnecessary to follow out the accounting (given in great detail by the Sheriff-Substitute), but it is enough to say that the pursuers have been called on to pay, and have paid, to the bank under the said guarantee the sum of £4306, 17s. 11d. The defender denies his liability for any part of this sum, because on a just accounting any balance due on the guaranteed account has been discharged. The defence is based upon the view that the £6000 paid into bank on the call account should have been placed, as it was paid in, to the credit of the guaranteed account. If that had had been done, and all the other sums for which the bank gives credit had been added to it, then the balance on the guaranteed account would have been wiped out. I think this defence cannot be sustained. I accept the principle, frequently laid down, that when you have an account-current the payments on the credit side of that account (there being no specific appropriation of such payments) are held to extinguish the items on the debit side of the account in the order of their date. But that principle is, in my opinion, inapplicable here. The amounts paid into the bank by the shareholders of the company under call made by the directors were not paid in to the guaranteed account at all, and it was not intended either by the shareholders who paid the call nor by the company that they should be. That account was closed before the calls were received, and stood so closed until the liquidation. Further, the calls were not paid into the bank as payments to account of the company's debt, nor as a payment towards any balance then due on any account-current, but as deposits to lie subject to the company's orders. It lay therefore with the company, in the first place, to appropriate the sums thus deposited for its behoof, and they did so, not by paying the same into the guaranteed account which had been closed, so as to extinguish *pro tanto* the balance due on that account, but appropriated it as a fund towards the present necessities of the company, against which they operated by way of draft as occasion required. The directors who so appropriated the call fund, in appropriating it as they did to the then present necessities of the company, did the defender no wrong. They were plainly using the call fund for the very purpose for which it had been paid. I am therefore of opinion that the defence fails in so far as it is founded on the defender's alleged right to have the call fund appropriated to the extinction of the balance due on the guaranteed account. This view seems to be in accordance with the decision in the case of *in re Sherry* to which we were referred.

The pursuers have paid to the bank the whole balance due on the guaranteed account. What portion of that are they entitled to claim from the defender? The pursuers claim a third—the defender maintains he is only liable for one-fifth. There were five guarantors all jointly and severally liable. Two of these guarantors, as the pursuers say, and, as I think, have fairly established, are insolvent, in which case the defender must bear with the pursuers the whole claim under the guarantee. But whether the other two guarantors are insolvent or not, I think the same result follows. The pursuers are no more liable than the defender; he must therefore share their burden, with the same rights and the same risk as the pursuers of obtaining relief from the other two guarantors of the amount due by them.

I think therefore the interlocutor appealed against should be recalled and decree pronounced as concluded for.

LORD JUSTICE-CLERK — That is the opinion of the Court.

LORD MONCREIFF was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff-Substitute of 21st May 1900: Find in fact that by letter of guarantee dated 18th, 26th, and 28th May, and 1st and 22nd June 1894 the pursuers and the defender along with Andrew M'Dowall and Robert Hutcheson, jointly and severally guaranteed to the Bank of Scotland the payment of all sums for which the United Gutta Percha and Rubber Company might become liable to the said bank not exceeding £12,500, with interest from the date or dates of advance; that on 28th January 1896 the defender and Robert Hutcheson intimated to the bank that they withdrew from the guarantee, and the bank then closed the account, which stood with interest at £13,021, 13s. 5d.; that the company went into liquidation on 20th May 1896; that after crediting all dividends received from the company's estate and securities held by them there remained due to the bank upon the said guaranteed account the sum of £4306, 17s. 11d.; that upon demand made by the bank the pursuers each paid to the bank (1) the sum of £800 on 31st March 1898, and (2) the sum of £1353, 9s. on 24th October 1898: Find in law that the pursuers are entitled to payment from the defender of one-third of the sums so paid by them with interest from the respective dates of payment aforesaid: Therefore decern against the defender in terms of the conclusions of the petition.'

Counsel for the Pursuers — Ure, Q.C. — Younger. Agent—Campbell Faill, S.S.C.

Counsel for the Defender—Salvesen, Q.C. — Cooper. Agents — Millar, Robson, & M'Lean, W.S.

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*Friday, November* 30.

## FIRST DIVISION.

## M'CAULL'S TRUSTEES *v.* M'CAULL.

*Succession—Conditions—Clause of Forfeiture—Effect of Parent's Repudiation of Liferent on Children's Fee—Election—Legitim.*

A truster directed his trustees to divide his estate into six equal shares, and to hold one share for behoof of his son J. in liferent allenarly and his children, or other next-of-kin, in fee. The trust-deed contained the following clause — "I do hereby provide and declare that in case any of my said children shall repudiate this settlement or question or impugn the same and claim their legal provisions, or shall by any means prevent this settlement from taking effect in whole or in part, then such child or children shall forfeit all right to any share or shares of that part of my estate and effects, heritable and moveable, that I may freely dispose of by law, and they shall have right only to their legal provisions, and the share or shares of such child or children shall in that event accresce and belong or be held for behoof of my other children equally who shall abide by this settlement and accept of the provisions herein contained." J. repudiated the provisions in his favour and claimed legitim.

*Held* (*dub.* Lord M'Laren), on a construction of the word "share" as used by the testator throughout the settlement, that J.'s "share" included not merely the liferent given to him, but also the fee given to his issue or other next-of-kin, and that consequently J. by his repudiation forfeited not only his own right but also that of his issue or other next-of-kin.

By his trust-disposition and settlement, dated 18th November 1884, James M'Caull, who died on 20th November 1884, conveyed his whole means and estate, heritable and moveable, to trustees, directing them, *inter alia*, to divide the free residue and remainder of his means and estate into six equal shares, and to dispose of said shares as follows, viz., one share to be paid to each of his three children, Peter, Mary Ann, and James, under deduction of certain specified sums advanced by the truster during his life on account of their respective claims for legitim and shares in his estate; one share to be held by the trustees for behoof of each of his sons Alexander and Duncan, and the remaining share for behoof of his son John, and the lawful children or their lawful issue, whom failing, the other next-of-kin or representatives of each as thereinafter directed, under deduction of certain specified sums advanced by the truster to them respectively during his life to account of their claims for legitim and shares in his estate.

The sixth purpose was in the following terms:—"And with regard to the shares which my trustees are by the two immediately preceding clauses fourth and fifth directed to hold and apply for behoof of my son John and his foresaids, including the portion of any share which may accrue through any child predeceasing me without leaving lawful issue, and also the portion of any share accruing through any child repudiating this settlement, and claiming his or her legal provisions, it is hereby provided and declared that my said son John is to be entitled to receive only the free annual income and revenue thereof, and that for his liferent use allenarly; and my trustees are directed to pay the said free annual income and revenue to him accordingly at such times and in such portions as they may think fit, but my said son is to have