"Prima," belonging to the Flensburg Steam Shipping Company.

The issue sent to the jury in the first case, viz., that in which Mr Seligmann, the owner of the "Flora," was pursuer, and the Flensburg Steam Shipping Company the defenders, was as follows: "Whether, on or about the 15th day of December 1870, in the Firth of Forth, the said steam ship 'Prima' came into collision with the said steam ship 'Flora,' whereby the 'Flora' was injured, through the fault of the defenders, to the loss, injury, and damage of the pursuer."

Damages laid at £15,000.

In the second action, viz., that in which the Flensburg Steam Shipping Company were pursuers, and Mr Seligmann defender, was in the same terms, transposing the names of the ships. Damages laid at £2000.

The jury found for the pursuer on the issue in the first case, and, in accordance with the direction of the Court, which was not objected to by the defenders at the time, assessed the damages at £4360, the full amount of the limit allowed by the Merchant Shipping Amendment Act, 1862, viz., at the rate of £8 per ton of the tonnage of the "Prima." On the issue in the second case they found for the defender.

The defenders in the first case obtained a rule to show cause why a new trial should not be granted; not so much upon the ground that the verdict was contrary to evidence, as that in giving their verdict the jury had not qualified it, as they should have done, in such a way as to show that the sum of damages awarded was apportionable between the pursuer, the owner of the vessel, and the owners of the cargo, whoever they might be, and was not all due to the pursuer individually. To leave the verdict as it was, they argued, was to leave them in a position of having a verdict standing against them for an amount of damages which they were not due to the pursuer.

The Court granted the rule.

WATSON and ASHER to show cause.

SHAND and MACLEAN in reply.

At advising—

LORD PRESIDENT—I think the objection made to the verdict by the defenders, the Flensburg Steam Shipping Company, is unfounded. It is not disputed that the verdict is in accordance with the evidence in so far as it ascribes fault to the defenders' vessel, the "Prima." It results from this that the defenders are liable in damages up to the limit fixed by the statute 25 and 26 Vict., c. 63, § 54, at £8 per ton of the tonnage of the vessel doing the damage. The full amount has been assessed by the jury. The original statute of 1854, § 514, makes provision for the appearance of other parties suffering damage, and for the apportionment of this sum of damages; but if no other claimant appears the pursuer is entitled to the whole of it. No other claimant has appeared, at least as yet, but that does not affect the present question, which is as to the existing verdict. I can see no reason for disturbing that verdict. Of course, if the party against whom it has been given conceives himself in danger, he will consider whether he will take the statutory remedy.

Agent for Mr Seligmann — James Webster, S.S.C.

Agents for the Flensburg Steam Shipping Company—Duncan & Mann, S.S.C.

Wednesday, May 24.

SECOND DIVISION.

BROWN *v.* STEWART, MOIR & MUIR.

Cautioner—Letter of Guarantee—Giving Time. A granted a letter of guarantee to B & Co. by which he became security to the amount of £50 for "all goods supplied by them to C & Co." The previous course of dealing between C & Co. and B & Co. was to settle accounts monthly, under discount at 6½ per cent. for prompt payment and 2½ per cent. discount for payment within a month. *Held* that A was not released from his obligation by the fact of B & Co. having accepted the bills of C & Co. at one month's date in payment of accounts due to them.

This was an action at the instance of Stewart, Moir & Muir, muslin manufacturers, Glasgow, for the price of goods sold by them to J. Nelson Ramsay & Co., Glasgow, and for which the defender, John Brown, grocer, Glasgow, was liable under a letter of guarantee granted by him to the pursuers.

The letter of guarantee was in the following terms:—"I hereby become security to you for all goods supplied by you to Messrs J. Nelson Ramsay & Co., 11 West Nile Street, between the sum of twenty-five and seventy-five pounds sterling; that is to say, when their account exceeds twenty-five pounds I will be responsible for the difference between that and seventy-five pounds, you assuming the responsibility of the first twenty-five pounds. JOHN BROWN."

Inter alia, the defender pleaded — "(1) The document founded on is not holograph of the defender, and is not tested properly. It is not stamped. It therefore constitutes no valid obligation on the defender. (5) The pursuers took bills or promissory notes from J. Nelson Ramsay & Co. for the amount of the account in question, and discharged the said account, or otherwise they, without the defender's knowledge or consent, gave to the said J. Nelson Ramsay & Co. time and indulgence beyond the ordinary period of credit, and they, by one or other of these acts, freed and liberated the defender from his liability, if it ever existed."

The Sheriff-substitute (DICKSON) held that the defender had been freed from his obligation, and issued an interlocutor to the following effect:—"Finds that prior to the granting of the said letter of guarantee the pursuers had supplied to the said J. N. Ramsay & Co. goods as in the account libelled on, and that upon the footing of the usual credit in the trade, which was that the accounts should be made up and rendered monthly—on the 20th of each month—and paid cash, under deduction of certain discount, at the expiry of that month, or on an early day in the following month; and that it was not consistent with the practice of the trade, or the usual course of dealing between the parties prior to the said letter being granted, to settle the said accounts by bill: Finds that the pursuers did, on 1st June, settle the amount due by J. N. Ramsay & Co. on that date by taking from the said firm two bills at one month's date, for £45, and £39, 11s. 7d. respectively, drawn by the pursuers on and accepted by the said firm; but finds it not proved that the account sued on was therefore

discharged. Finds that in thus accepting a settlement by bill the pursuers deviated from the custom of the trade, and from the usual course of trading between them and the said firm; and that it is not proved that they did so with the knowledge or consent of the defender: Finds that by so doing the pursuers have liberated the defender from his obligation under the said letter of guarantee, and sustains the defence on that ground accordingly, and assoilzies the defender."

The pursuers appealed; and the Sheriff-Depute (GLASSFORD BELL) recalled the interlocutor of the Sheriff-Substitute in so far as it assoilzied the defender.

He remarked in his Note—"The guarantee founded on is open and general. It makes no reference to any terms of settlement or course of dealing or custom of trade. It is simply a guarantee of payment to a certain amount of goods to be furnished on credit. It is true that there had been a previous course of dealing between the pursuers and Ramsay & Co., the parties guaranteed, under which they (the pursuers) were in use to render their accounts monthly on the 20th of each month, and if they were paid on the first Monday or Friday of the following month they were subject to a discount of 6½ per cent., and if not paid till the expiry of a month from the date of rendering, to a discount of 2½ per cent.; but there is no evidence that these were the invariable and exclusive terms either of the trade at large, or of the pursuers; it being, on the contrary, shown that the pursuers had on one occasion taken a bill from Ramsay & Co. at a short date, and then partially renewed it for another short date. It appears also that it was with the very view of getting the period of credit extended when required that Ramsay & Co. offered caution. The witness John Nelson Ramsay depones—'I agreed to find personal guarantee to get the account extended by way of a longer credit in supply of goods.' It farther appears that when the defender granted his cautionary obligation he made no inquiries, and did not know what the terms of settlement were. Being examined as a witness, he says—'I made no inquiry when granting the guarantee as to the state of Ramsay & Co.'s account. I had no personal communication or correspondence with the pursuers at the time. No statement or account was shown to me then of the position in which Ramsay & Co. stood with the pursuers.' His letter simply binds him to see paid to the extent of £50 'all goods supplied,' which must mean supplied on reasonable and ordinary credit; for if the payments were to have been cash there would have been no need of security. Now, although the pursuers were desirous of having prompt payment, for which they gave 6½ per cent. discount, and if they did not get that, preferred as the next best, payment within a month, for which they gave 2½ per cent. discount; this did not deprive them of the discretion of settling at a longer credit with no discount, and their taking bills at one month was merely exercising their discretion, as they had done before. The Sheriff is very much fortified in these views by the authority of the case of *Bowe and Christe*, 19 March 1868, which seems to be nearly on all fours with the present."

The defender appealed.

BURNET for him.

CAMPBELL SMITH in answer.

At advising—

LORD JUSTICE-CLERK—I am of opinion that the judgment of the Sheriff is right, and ought to be adhered to.

The general doctrine in which the cautioner rests his case, and to which the Sheriff-Substitute gave effect, is well established. When one becomes cautioner for another in a specific transaction or obligation, the terms and conditions of the principal obligation are also the terms and conditions of the cautionary obligation; and if the creditor, without the consent of the cautioner, alter these terms, to the prejudice of the cautioner, the latter will be free. Thus, if the obligation guaranteed has a term annexed to it within which the debtor is to perform it, and the creditor prolongs the term without the cautioner's consent, the cautioner is liberated, because time has been given to the debtor.

It is different, however, when the guarantee regards not a specific obligation, but a course of dealing for the future. In such a case the cautioner, if there be nothing to the contrary expressed in his obligation, is not presumed to grant it on the faith of any specific conditions, but rather to have contemplated the general usage of trade, and the ordinary credit given among merchants. Where one guarantees all goods which may be furnished to a trader, or all bills which may be discounted by a banker, as a cautioner, he necessarily, by the generality of the obligation, leaves the principal debtor and creditor free to arrange the details of their transactions as they think fit, provided these are not at variance with the ordinary custom of merchants. This is the principle of a general guarantee, and it has been frequently applied. The cases of *Griffith* and of *Prest, Brown & Co.*, mentioned in the Sheriff's note, and reported by Mr Hume (pp. 96–97), proceed on this principle; and the case of *Brown*, reported immediately before the latter, is also an illustration of the doctrine. I would also refer the parties to the case—a stronger one than the present—of *Cook* v. *Moffat*, 5 S. 774, where the cautioner in a general guarantee was held bound, although the creditor, after taking a bill at three months for the price of goods, and afterwards having allowed the bill to lie over, took a second bill for the sum. In the present case the facts relied on are unusually slender. Even Mr Moir's own statement of the arrangement as to credit is vague enough; but he admits it was by no means uniformly adhered to; and in point of fact six weeks was the whole amount of credit given, which in no view can be construed into giving time to the debtor. The only unusual feature in the case, and one which, had the delay been longer, might have been of some weight, is the way in which the transaction was settled up; discount being allowed as if payment had been promptly made, and then the bill granted for the amount, minus discount, with a month's interest added. But within the actual limit I think this immaterial; and, indeed, consider it to be ruled by the case of *Bowe*, in the other Division, to the Sheriff's commentary on which I have nothing to add.

LORD COWAN—I am of opinion that the Sheriff has taken the right view of this case, both as regards its facts, and the law applicable to it.

There can be no doubt as to the soundness of the principle which ruled the decisions referred to by the counsel for the appellant. When a person becomes cautioner for a debt specifically payable

at a given time, and the creditor gives a longer period for payment, without concurrence of the cautioner, he is liberated from the cautionary obligation—the act of the creditor having in effect altered the contract to which the cautioner's obligation applied. No such case is presented for decision upon the facts established by the evidence in this case. The guarantee is general, to secure payment of goods, to be furnished in a course of dealing, to an extent not exceeding the sum of £50 beyond the sum of £25; and was in its nature continuous, and applicable to whatever transactions the principal parties might enter into, in the way of sale and purchase of goods. It is not alleged, far less established, that this guarantee was given upon any intimation to the cautioner, or with any knowledge on his part that a settlement of accounts should take place at a certain specified time. He might be entitled to rely that no more credit should be given than is usual in such business transactions. And had a period of six, or even of three, months elapsed without the account being paid; and the creditor had then tied up his hands against enforcing payment by taking bills for a longer period of credit,—there might have been room for the plea that time had been given to the debtor. Here the credit given altogether was for a period within two months of the contraction of the debt; and although when the goods were not paid for in cash at the date when the full discount would have been got by the debtor, the creditor consented to take two bills—the one for £45, and the other for £39, 11s. 7d. at one month's date,—this did not innovate upon the contract to which the cautioner was a party when he granted his letter of guarantee. That contract had no specific reference to a payment of the debt at a fixed and certain period. The course of dealing between the principal parties may have been that a settlement of accounts in cash should take place on or about a month after the furnishing of the goods; but this was not necessarily the limit of credit which the purchaser might have had, supposing him to disregard the large discount which would have been secured by cash payment; and accordingly, on one previous occasion, at least, in March 1869, bills had been taken for goods furnished, payable at a short date, still within the period of credit usual in such transactions. On the whole, therefore, I cannot see any sufficient ground for the plea that time was given to the debtor, in the legal sense of that phrase, in respect of which the cautioner's obligation has been discharged. It would in my apprehension be productive of very injurious effects upon mercantile dealings to hold a general continuous guarantee of the nature here in question to be rendered invalid on such grounds as those maintained by the appellant. These views receive ample support from the authorities referred to in the note to the Sheriff's interlocutor, and also from the decision in *Cook* v. *Moffat*, 7 June 1827, 5 S. 774.

LORDS BENHOLME and NEAVES concurred.

Agent for Pursuer—Wm. Officer, S.S.C.
Agent for Defenders—L. M. Macara, W.S.

Wednesday, May 24.

AITKEN *v.* HUNTER.

Trust — Agency — Trustee acting as Paid Factor. Held that a trustee who had acted as factor was not entitled to charge for his personal services in connection with the trust-estate prior to 1841, in respect that he was sole trustee, and that, consequently, the authority of *Home* v. *Pringle* (H. of L., 22d June 1841) did not apply.

The facts in this case appear sufficiently from the following extract from the interlocutor of the Lord Ordinary (JERVISWOODE):—"Finds as matter of fact—(1) That the truster, Mr James Roughead, died on 15th February 1824, leaving the trust-disposition and settlement which is set forth on the record, and which is dated 17th January 1821; (2) that by the said deed the truster conveyed in trust, to the trustees therein named (with power of assumption of additional trustees, one or more), his whole estate, heritable and moveable, which should belong and be owing to him at the time of his death, and that the deed also contains a nomination of his trustees to be his executors; (3) that by the first purpose of the trust it is provided 'that my said trustees shall, out of the first and readiest of my means and estate, pay all my just and lawful debts, deathbed and funeral charges, and the necessary expenses of executing the present trust;' (4) that by the third purpose of the trust the truster appointed his trustees to pay to his daughter Mrs Elizabeth Roughead, for the maintenance of herself, and also of her children, Elizabeth Tod (the female pursuer of the present action) 'during the period after mentioned, the interest of my means and estate, after deduction of all just and lawful debts, and to pay to each of the said Elizabeth Todd and Janet Todd, my grandchildren, on their respective marriages, or their respectively attaining the age of twenty-five years complete, whichever of these events shall first happen, the sum of £300 sterling; declaring that on payment of that sum her or their claim to be maintained by their mother as aforesaid shall henceforth cease, and the whole interest, minus the sum or sums paid to her or them, shall be payable to their mother during her lifetime;' (5) that by the fourth purpose of the trust it was provided that 'on the decease of my said daughter, Elizabeth Roughead or Tod, I do hereby appoint my said trustees to divide the free residue of my means and estate of every description between the said Elizabeth and Janet Tod, my grandchildren, if they shall have arrived at the age of twenty-five complete;' (6) that the said trust-disposition and settlement also contains a declaration 'that my said trustees shall not be liable for omissions, or for neglect of management, nor *singuli in solidum*, but each for his own actual intromissions;' (7) that the truster was survived by his daughter, the said Mrs Elizabeth Roughead or Tod, and by her daughters, the said Elizabeth and Janet Tod: and that it is stated on record by the pursuer, and not denied, that the said Mrs Elizabeth Roughead or Tod died on 27th September 1863, predeceased by her daughter, the said Janet Tod, who, as it appears, had been married, but who died without issue; (8) that the said Elizabeth Tod, now Mrs Elizabeth Tod or Aitken, one of the pursuers of the present action, attained the age of twenty-five years on or about 28th November 1836, the period named for payment of a