

to complete the right and vest the *ius quaesitum*, is inapplicable to the case of money simply transferred to an account for debenture-holders unnamed and undefined. Even if the deposit-receipt had borne to be for the whole debenture-holders, that could not have prevented any one of them whose debt was due at the time using the diligence of the law to obtain a preference, or following out such diligence already commenced.

"It was suggested that the National Bank might have applied the whole proceeds to their own debt but for the arrangement made by the company. That does not appear to the Lord Ordinary to be strictly correct. The company were free to resolve or not resolve to make a call, and in making a call payable at the National Bank they were free to attach conditions. But however this may be, the Lord Ordinary is of opinion that the company could not, and that the bank did not, by the procedure which was adopted, exclude the diligence of the real raiser from operating effectually upon the sum set apart for debenture-holders."

The other claimants reclaimed.

At advising—

LORD PRESIDENT—I do not suppose your Lordships entertain any doubt about this case. Miss Macqueen raised an action against the Edinburgh and Glasgow Heritable Investment Company, and obtained decree dated 18th May 1880. On the dependence of that action she used arrestments in the hands of the National Bank on the 20th April 1880, and there is no doubt that there were funds of the common debtor in the hands of the arrestee at that date. The *nexus* was therefore complete. But afterwards an arrangement was made between the bank and the common debtor, to the effect that the funds in the hands of the bank should be employed in a different manner; but it is quite plain that no arrangement of that kind can affect the arresting creditor. The arrestment remained unloosed down to the date of the present action, which is equivalent to a furthcoming. No doubt the bank paid themselves out of the funds, and the remainder of the sums arrested they placed on deposit-receipt in the terms mentioned on record; but that makes it all the more clear that the sum placed on deposit was part of the sum arrested. The Lord Ordinary has held that the arrestment is effectual, and I have no doubt that his judgment should be affirmed.

The other point relates to the effect of the 164th section of the Companies Act, but that section seems to me to have no application to the present question at all. It is said that a voluntary winding-up is equivalent to an act of bankruptcy, and that the arrestment here was used within sixty days of bankruptcy; but the relevancy of that argument I must confess I do not understand. If it had been proposed to equalise all diligences within the sixty days, I could then understand what was intended. But there is no such proposal, because there is only one diligence which creates a preference. Notour bankruptcy following on diligence at any time within sixty days has the effect of equalising that diligence with all others within that period, but it does not cut down diligence. The whole fallacy proceeds on the assumption that an act of bankruptcy cuts down diligence.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court adhered.

Counsel for Miss Macqueen—Darling. Agents—Waddel & M'Intosh, W.S.

Counsel for Reclaimers—Trayner—R. Johnstone. Agents—J. & J. Galletly, S.S.C.

Wednesday, July 13.

FIRST DIVISION.

[Lord Curriehill, Ordinary.]

DUNDEE AND NEWCASTLE STEAM SHIPPING COMPANY (LIMITED) v. THE NATIONAL GUARANTEE AND SURETYSHIP ASSOCIATION (LIMITED).

Caution—Where Failure to Check Accounts.

Guarantee association *assoziziata* from a claim made against them by employers for losses sustained by default of an agent, on the ground that no proper system of checking the agent's accounts such as the defenders were entitled to expect, had ever been carried out by his employers.

This was an action by the Dundee and Newcastle Steam Shipping Company (Limited) against the National Guarantee and Suretyship Association (Limited) to enforce their guarantee of £500 for the fidelity of W. D. Doeg, the pursuer's agent. The pursuers had vessels trading between Dundee, Newcastle, and Middlesborough, and from about the year 1861 till the 23d December 1879 Doeg acted as their agent in the two last-mentioned towns, his principal duty being to collect the freights payable to the pursuers by their customers in and around those places. Monthly statements of the freights to be collected were sent by the pursuers to Doeg as they became due. Whenever these were forwarded to him, the amount of them was entered in the pursuers' books in Dundee to his debit. After deducting his disbursements he remitted to the pursuers the balance of the sum at his debit so far as collected by him. He was not bound to make good any portion of the debit which he failed to recover, unless the failure was owing to his own default, nor was he bound to remit the amount of freights collected until the end of the second month after the month to which they were applicable. For example, the freights for January, so far as collected by him, were payable to the pursuers in the end of March, and those for February in the end of April. Any part which he was unable to recover within the period stated he was in use to remit as soon as received. It was thus usual for him to have in hand sums of money of varying amount belonging to the pursuers between the dates when the freights collected by him were paid by the parties and the time agreed upon for his remitting the same to the pursuers. Towards the end of 1878 the pursuers resolved to require Doeg to furnish them with caution for his intromissions on their account. Doeg offered the pursuers the cautionary obligation or guarantee of the defen-

ders, and a proposal for guarantee was signed by Doeg and the pursuers on 10th December 1878 and submitted to the defenders. The proposal was a printed form containing several questions to be answered by the employer and employed, and in the completed bond of guarantee the proposal containing these questions and answers was expressly declared to be the basis of the contract between the pursuers and defenders. The important questions contained in the proposal and answers were as follows:—“(5) Amount of salary at which the applicant is to be engaged, and other allowances, if any?—(A) £100 salary per annum and two per cent. commission on gross freights earned by the company. (6) If such salary or allowance is subject to any deductions on account of bad debts or otherwise, state the nature and amount of them.—(A) No. (7) Nature of applicant's duties and responsibility generally. If there is a written agreement with employer, produce a copy.—(A) Agent for the company in Newcastle and Middlesbro', and responsible for the collection of freights payable in these places. (8) State the largest sum at any time likely to be held in hand, and for how long a time.—(A) £500. (9) How often will the employers balance the applicant's accounts, and what checks will he use to secure accuracy? (A) The accounts are balanced monthly. (11) Are his accounts correct and his balances ascertained and settled to date of this proposal?—(A) Yes.” On receipt of the proposal and answers, Mr Chiene, the defenders' manager, wrote to Mr Plenderleath, the pursuers' manager, on 11th December 1878, requiring further information, which was given by Mr Plenderleath on 13th December. Mr Chiene asked him to say—“(2) What your arrangements with him are for remittances of money received by him on your behalf? Does he remit whenever he has a certain sum in hand, or how? I observe he may have £500 in hand, but you do not say for how long.” The answer was—“The arrangements for remittances are that Messrs Doeg & Company remit the debit at the end of any one month by the end of second month thereafter, so that in this way they might have £500 in hand if the freights payable in the intermediate months were heavy. (3) Are the accounts checked by you monthly as rendered, and does the agent then pay over the balance due by him on the account?—(A) I check the accounts rendered by them. Monthly balances are payable as above. (5) I observe your agent is responsible for the collection of freights in Newcastle and Middlesbro'. Please say if I am correct in understanding that he is liable to make good the freights in these places whether he is able to collect them or not, or, in other words, if he is liable for bad debts arising therefrom?—(A) Our agents are not responsible for *bona fide* bad debts; unless they may have been neglected, and so lost to the company, we would not hold them liable for them.” Upon these statements the bond of guarantee was granted by the defenders for the sum of £500, to take effect as from 17th December 1878.

Towards the end of December 1879 Doeg got into difficulties and resigned his employment, and it was then ascertained that he had uplifted and failed to account for a large number of freights due to the pursuers—the deficiency exceeding £500—and the present action was raised to enforce the guarantee against the defenders.

The defenders pleaded, *inter alia*—“(1) The agreement being void in respect of an erroneous statement by the pursuers in the proposal, the defenders are entitled to absolvitor. (3) The precautions for securing accuracy of account and limiting the amount of moneys intrusted to Doeg not having been observed by the pursuers, the defenders are entitled to absolvitor.”

The Lord Ordinary (CURRIEHILL) assolized the defenders on the grounds—“(1) that on 10th December, the date of the proposal, there was an unaccounted-for balance of over £100 due by Doeg to the pursuers, and that in consequence their answer to question 11 above was inaccurate; and (2) that ‘I am satisfied upon the evidence that no monthly balance-sheets were ever rendered, and that no proper checks were ever employed to ascertain the true position of Doeg's accounts. The only balances ever rendered by Doeg were monthly statements of the gross amount of freights debited to him per ship's manifest for the month, and the amount of his disbursements on ship's account, and any cash remittances that he might have made during that month. That system had prevailed prior to the guarantee, but it was not explained to the defenders that that was the kind of balancing and checking practised by the pursuers. The defenders were therefore entitled to assume (1) that proper monthly accounts were rendered by Doeg to the pursuers, showing the precise position in which the one party stood to the other, and bringing out the balance due to or by Doeg; and (2) that due means were taken to check these accounts and ascertain the true balance. But nothing of the kind was ever done. It is admitted that nothing of the kind ever took place prior to the proposal, and it appears from the correspondence, and it was indeed very frankly stated by Plenderleath in the witness-box, that after the guarantee was entered into the pursuers were always pressing Doeg to frame proper balance-sheets according to forms supplied to him by the pursuers for the purpose, but that they never once succeeded in getting from him any such balance. And I am of opinion that the failure of the pursuers to establish and maintain an efficient system of checking the pursuers' accounts is of itself sufficient to liberate the defenders from liability under their guarantee.”

The Court declined to express any opinion on the first of these points, but affirmed the Lord Ordinary's judgment on the second.

Counsel for Pursuers (Reclaimers) — D.-F. Kinnear, Q. C.—Guthrie. Agents—Macandrew & Wright, W. S.

Counsel for Defenders (Respondents) — Mackintosh—W. C. Smith. Agents — Hope, Mann, & Kirk, W. S.