Limited, in the motion roll moved the Lord Ordinary in the liquidation to ordain Julius Stern and Alexander Watt, claimants in the liquidation, to sist mandataries. Stern and Watt were both resident in Russia and had lodged claims for sums said to be due in respect of obtaining contracts for the company. These claims had been rejected by the liquidators, and the claimants had lodged answers in support of their claims, to which the liquidators had lodged replies.

The following authorities were cited on behalf of the liquidators—*Ford* v. *King*, June 18, 1844, 6 D. 1163; *Howe Machine Co.* (*Fontaine's* case), L.R., 1889, 41 Ch. Div. 118, *per* North, J., at p. 120; *Pretoria Pietersburg Railway Company*, [1904] 2 Ch. 359, *per* Buckley, J., at p. 362.

For the claimants the following authorities were referred to—*Argo* v. *Pauline*, March 4, 1905, 7 F. 541, 42 S.L.R. 401; *Gordon's Trustees* v. *Forbes*, February 27, 1904, 6 F. 455, 41 S.L.R. 346; *Town and County Bank, Limited* v. *Lilienfield*, October 27, 1900, 8 S.L.T. 227; *North British Railway Company* v. *White*, November 4, 1881, 9 R. 97, 19 S.L.R. 59; *Stow's Trustees* v. *Silvester*, November 27, 1900, 8 S.L.T. 253; *Vanderhaege*, L.R., 1887, 20 Q.B.D. 146; *Percy & Kelly Nichel, &c. Mining Company*, L.R., 1876, 2 Ch. Div. 531.

Lord Skerrington—"The question is whether two claimants resident in Russia, whose claims have been rejected by the liquidators, ought to be ordered to sist a mandatary. Counsel for the liquidators maintained that these claimants were substantially in the position of pursuers, and accordingly fell under the general rule applicable to pursuers. Counsel for the claimants, on the other hand, maintained that the rule that a foreign pursuer must in the absence of some special reason sist a mandatary, has no application, and had not in fact been applied to claimants in a liquidation. No decision exactly in point was quoted one way or the other, the nearest being the case of *Ford* (1844, 6 D. 1163), where a claimant in a Scotch sequestration, domiciled in England, was held bound to sist a mandatary. Reference was also made to decisions in actions of multiplepoinding, which show that the Court is ready to treat claimants in such actions with indulgence—*Elmslie* v. *Pauline*, 1905, 7 F. 541; *Gordon's Trustees* v. *Forbes*, 1904, 6. F. 455.

"A person who merely lodges a claim in a liquidation, sequestration, multiplepoinding, or other process of distribution, does not thereby put himself in the position of a pursuer, or even of a litigant. Assuming, however, that his claim has been rejected or opposed, and that the claimant desires to obtain the decision of the Court upon it, he becomes a litigant, and he is either a pursuer or a defender according to circumstances. Thus a claimant who founds upon a probative writing which his opponent impugns on extrinsic ground is, I think, in the position of a defender. On the other hand, claimants who, as in the present case, are attempting to constitute an illiquid claim, are in the position of pursuers. Although pursuers, however, they are not in precisely the same position as ordinary pursuers, who, as a rule, are entitled to choose their own time and their own tribunal for making good their claim. They may be described as involuntary pursuers, and this consideration, in my opinion, entitles the Court to exercise a wide discretion in the way of dispensing with the necessity for a mandatary. In the present case, however, no special reasons were stated which would make it inequitable or hard to require the claimants to sist a mandatary, whereas the hardship upon the liquidator and creditors is obvious if they have to sue in Russia for recovery of their expenses. Looking to the nature of the claims and to the whole circumstances, I am of opinion that the liquidator's motion should be granted in each of the two cases."

The Court ordained the claimants to sist mandataries.

Counsel for the Liquidator—Sandeman, K.C.—F. C. Thomson. Agents—Davidson & Syme, W.S.

Counsel for the Claimants—Macmillan—Kirkland. Agents—Norman M. Macpherson, S.S.C., and Boyd, Jameson, & Young, W.S.

Thursday, November 25.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

YOUNG *v.* PATON AND OTHERS.

Writ—Attestation—Evidence—Onus—Discharge—Witnesses who could not have Seen Granter Sign or Heard him Acknowledge Signature, but who Maintained that they never Signed a Deed without Party's Signature or Acknowledgment in their Presence.

In a reduction of a bond and disposition in security which bore to be signed at G. on a certain date in presence of two parties as witnesses, it was proved that the deed had been signed on that date at T., and that the granter was not at G., and neither of the instrumentary witnesses at T. on that date. The instrumentary witnesses deponed that though they did not remember signing the bond in question, they were certain that they never signed a deed as witnesses without first seeing the parties subscribe or hearing them acknowledge their signatures.

Held that on the evidence the *onus* on the pursuer had been discharged, and that the bond was not duly and validly executed.

Mrs Lillias Ballantyne Garroway or Young, with the consent and concurrence of her husband James Young, Braehead, Thorn-

tonhall, Lanarkshire, raised an action against James Paton, James Bone, and Robert Yorston as trustees acting under a deed of declaration of trust executed by them and the deceased John Hogarth, writer, Glasgow, concluding for reduction of a bond and disposition in security for £400 dated 4th June 1907, and recorded on 8th January 1908, granted by the pursuer with the special advice and consent of her husband in favour of the defenders as trustees foresaid over the dwelling-house at Braehead belonging to the pursuer.

The testing clause of the bond was in these terms:—"In witness whereof, these presents, written on this and the two preceding pages by Thomas Reilly, clerk to Yorston and Hogarth, writers, Glasgow, are (together with the inventory of writs annexed hereto) subscribed by us the said James Young and Lillias Ballantyne Garroway or Young, both at Glasgow, upon the fourth day of June Nineteen hundred and seven, before these witnesses, the said Thomas Reilly and Robert Gentles, also clerk to the said Yorston and Hogarth."

The pursuer averred that she did not sign any bond in Glasgow on 4th June 1907 before the above witnesses; that on or about that date she did sign the bond at Thorntonhall but not before witnesses; that the bond was never delivered to the defenders or anyone on their behalf, and that Mr Hogarth, who acted as the agent of both parties, got the bond from her on condition that it should not be delivered to the defenders unless certain existing bonds were discharged; and that this condition was never purified.

The pursuer pleaded—"The alleged bond and disposition in security falls to be reduced in respect that (1) It is not the deed of the pursuer, executed by her as the law requires. (2) It was never delivered by her to the defenders or anyone acting on their behalf, *et separatim*, was only delivered to the defenders, or anyone on their behalf, under a condition which has never been purified. (3) It was obtained from the pursuer by fraud of the defenders' agent."

The defenders pleaded—"(2) The averments of the pursuer being irrelevant and insufficient to support the conclusions of the summons the action ought to be dismissed. . . . (4) The said bond and disposition in security being the deed of the pursuer, and validly executed and delivered, the decree sought should be refused."

On 10th November 1908 the Lord Ordinary (GUTHRIE) allowed to the pursuer a proof of her averments in support of the first head of her plea-in-law, and to the defenders a conjunct probation.

Proof was thereafter led, and it was proved that on 4th June 1907, the day on which the bond bore to be signed, Mr Hogarth came to Thorntonhall from Glasgow, bringing the deed, and got the signatures of the pursuer and her husband; that neither pursuer nor her husband were in Glasgow on that day; neither of the instrumentary witnesses were at Thorntonhall that day; the instrumentary witnesses did not remember the signing of the particular deed, but had never signed any deed as instrumentary witnesses without seeing the granter sign or hearing him acknowledge his signature.

On 27th March 1909 the Lord Ordinary assoilzied the defenders.

Opinion.—"The document the validity of which is challenged in this case is a bond and disposition in security bearing to be 'subscribed by us, the said James Young and Lillias Ballantyne Garroway or Young, both at Glasgow, upon the fourth day of June 1907, before these witnesses, the said Thomas Reilly and Robert Gentles, also clerk to the said Yorston and Hogarth.' Mrs Young and her husband admit that they signed the deed on 4th June 1907, but they assert that this took place in their own house at Thorntonhall, and not in Glasgow, and they challenge its validity on the ground that they neither signed in the presence of Reilly and Gentles, nor did they ever acknowledge their signatures to Reilly and Gentles. Proof was disallowed of the other grounds of challenge.

"The *onus* admittedly lies on the pursuer. The cases show that the statements of the persons interested, unsupported by unbiassed evidence, will not suffice, if the witnesses, although unable to recal the particular transaction, depone, so that the Court believe they are speaking honestly, that they never on any occasion signed as witnesses without first seeing the parties sign or hearing them acknowledge their subscriptions.

"In this case the only evidence led by the pursuer requiring attention consists of that of the pursuer, her husband James Young, Mrs Elizabeth Steen, the pursuer's sister-in-law Mrs Susan Steen, Mrs Elizabeth Steen's daughter-in-law, Stephen Young, Mr Young's brother, and John Cran, who is in Mr Young's employment. On the other hand the subscribing witnesses Gentles and Reilly (Reilly wrote the testing clause containing the statements as to the deed having been signed at Glasgow before himself and Gentles) are clear that they never signed any deed as witnesses without first seeing the parties subscribe or hearing them acknowledge their subscriptions, and that they have no doubt they followed their invariable practice on this occasion. I saw no reason to disbelieve their evidence, and I can have no doubt that if Hogarth, their master, had for some reason of his own induced Reilly to put two statements into the testing clause which he Reilly must have known to be untrue, he could not have forgotten this, nor could he and Gentles have forgotten their being told to subscribe a deed as witnesses when they had neither seen the parties subscribe nor heard them acknowledge their subscriptions. Gentles says—'If Mr Hogarth asked me to put my name to a deed when I had not seen it signed by the parties, I would not have done it.'

"Had it appeared that Hogarth had any motive to induce him to omit one of the legal requisites, and had such omission not

involved the co-operation of Reilly and Gentles, I should have been easily convinced that such omission had taken place. But it was to Hogarth's interest to have the deed unchallengeable, and I accept the evidence of Reilly and Gentles that they never on any occasion were parties to such a proceeding as that alleged in this case.

"The defenders also maintained under their fourth plea that even if the pursuer's averments in condescendence 3 were established, they were still entitled to absolvitor. The pursuer deponed—'When I signed the paper I knew I was signing something which bound me, and that it was to be acted upon.' Proof of the pursuer's averments of non-delivery, or conditional delivery, and of fraud, having been disallowed, it must be taken, the deed having been recorded, that it was delivered, and it must be taken that the omission in the deed of receipt of £400 was correct. They referred to *Baird's Trustee* v. *Murray*, 11 R. 153, 158 to 160. I think the defenders are right, but in the view I take of the evidence I do not need to decide the case on that ground."

The pursuer reclaimed, and argued—It was clear on the evidence that the pursuer and her husband were not in Glasgow on the day the bond bore to be signed, nor had they been brought together with the instrumentary witnesses anywhere on that day. That being established, the evidence of the instrumentary witnesses, while no doubt perfectly honest, could not be relied on. The pursuer had therefore discharged the *onus* which lay upon her, and it was for the defenders to explain how the signatures of the witnesses came to be on the bond. The bond was thus not validly executed—*Young* v. *Ritchie*, 1761, Mor. 17,047; *Cleland* v. *Cleland*, December 15, 1838, 1 D. 254 (*per* Lord Mackenzie, at p. 260); *Forrests* v. *Low's Trustees*, 1907 S.C. 1240, 44 S.L.R. 925 (*per* Lord Kinnear at p. 1252, p. 932). In any event the pursuer was entitled to proof of the other grounds of challenge.

Argued for the defenders (respondents)—The granter of an *ex facie* probative deed who alleged that it had not been signed in the presence of witnesses undertook a very heavy *onus*—*Baird's Trustee* v. *Murray*, November 21, 1883, 11 R. 153, 21 S.L.R. 109 (*per* Inglis, L.P., at p. 156, p. 112, Lord Shand at p. 164, p. 116); *Smith* v. *Bank of Scotland*, 1824, 2 Sh. App. 265 (*per* Lord Gifford, at p. 286). The pursuer here had not discharged that *onus*. The evidence of the pursuer and her husband was uncorroborated, and that was not sufficient, especially in view of the evidence of the instrumentary witnesses—*Forrests* v. *Low's Trustees*, *cit.* In any event, even if the pursuer had discharged the *onus* that lay upon her, that was not sufficient to reduce the deed.

LORD LOW—There is no doubt that when the granter of a probative instrument seeks to have it set aside on the ground that the instrumentary witnesses neither saw him sign nor heard him acknowledge his signature, the burden of proof is upon him, and in the present case the Lord Ordinary, although he does not suggest any doubt as to the credibility of the pursuer and her husband, has held that they have not discharged the *onus* which rests upon them. He reaches this conclusion because the gentlemen whose names appear on the bond as instrumentary witnesses both say that although they cannot remember witnessing this particular bond, they are quite certain that they never signed a deed as witnesses unless they had seen the granter sign or heard him acknowledge his signature.

In the view which I take, the evidence of the instrumentary witnesses is not sufficient to prevent the pursuer succeeding upon the only branch of the case with which we are now dealing. It is not necessary to go over the evidence in detail, but in my opinion it is proved beyond doubt that on 4th June 1907, the day on which the bond bears to have been signed, Mr Hogarth came to Thorntonhall from Glasgow bringing the deed with him and got the signatures of the pursuer and her husband; that neither the pursuer nor her husband was in Glasgow on that day; and that neither of the instrumentary witnesses were at Thorntonhall on that day. But if that be proved, as I think it is, by entirely credible evidence, the pursuers have discharged the *onus* which rested upon them, and I do not think that we can refuse to give effect to the evidence because the pursuer and her husband are unable to explain how the signatures, or the supposed signatures, of the witnesses came to be substituted. To hold that unless they could do so they could not prove their case would be to put an impossible burden upon them.

I do not doubt the honesty of the instrumentary witnesses. No one knows, probably no one will ever know, how it was that their signatures appeared on the deed, but it is to be remembered that Mr Hogarth the law agent, appears to have been carrying out a series of frauds on his clients, and there is reason to suppose that he required the bond in question to conceal certain defalcations. If that were so, he might be able to find means to get the signatures, or what purport to be the signatures, of instrumentary witnesses. I think therefore that the pursuer has made out her case on the execution of the bond, and that to that extent the interlocutor of the Lord Ordinary must be recalled.

That, however, only disposes of a part of the case. The pursuer is, in my opinion, entitled to a finding that the witnesses neither saw her nor her husband upon the bond, nor heard them acknowledge their signatures. It does not, however, follow that the pursuer is entitled to have the bond reduced. If it turns out that the pursuer, as the defenders aver, delivered the bond for onerous causes, she will not be entitled to have it set aside on the ground of informality of execution. The pursuer, however, avers that the bond was never delivered by her to the defenders or any

one on their behalf, and that Mr Hogarth, who was the defenders' agent as well as the pursuer's, got the bond from her on the condition that it should not be used unless certain existing bonds upon the property were discharged—a condition which was not purified. These are matters in regard to which there has been no inquiry. The proof which has been taken was limited to the pursuer's averments in support of the first head of her plea-in-law. The Lord Ordinary says in his opinion that "proof of the pursuer's averments of non-delivery or conditional delivery and of fraud was disallowed." According to the interlocutor of 10th November 1908, that was not so, because the proof thus allowed was, as I have said, limited to the averments in support of the first head of the pursuer's plea-in-law—that is, the averments relating to the execution of the bond—but the second and third heads of the plea, which raise the question of delivery and fraud, were not disposed of in any way. I therefore think that the pursuer is entitled to be heard upon those questions, and, if necessary, to be allowed an opportunity of proving his averments in regard thereto.

I am accordingly of opinion that a finding should be pronounced in the terms which I have indicated, and that the cause should be remitted to the Lord Ordinary to dispose of the questions which still remain.

LORD DUNDAS and LORD MACKENZIE concurred.

The LORD JUSTICE-CLERK was presiding at a trial in the Justiciary Court.

LORD ARDWALL was presiding at a jury trial.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Find that the bond and disposition in security, dated 4th June 1907, granted by the pursuer Mrs Lillias Ballantyne Garroway or Young, and described in the summons, was not signed by the pursuer and her husband James Young in presence of the instrumentary witnesses Thomas Reilly and Robert Gentles, and that they did not acknowledge their signatures to said witnesses: Therefore find that the said bond and disposition in security was not duly and validly executed by the pursuer and her husband: With these findings remit to the said Lord Ordinary to proceed further with the cause," &c.

Counsel for the Pursuer (Reclaimer)—Johnston, K.C.—Kirkland. Agents—Oliphant & Murray, W.S.

Counsel for the Defenders (Respondents)—Morison, K.C.—Chree. Agents—Macintosh & Boyd, W.S.

Saturday, November 20.

FIRST DIVISION.

(Before Seven Judges.)

EDINBURGH TOWN COUNCIL *v.* EDINBURGH DISTRESS COMMITTEE.

Burgh—Unemployed Workmen Act 1905 (5 *Edw. VII, cap.* 18)—*Rate Contribution to Distress Committee — Right of Town Council to Object to Application of Rate Money.*

The Unemployed Workmen Act 1905, as applied to Scotland, authorises distress committees to defray their expenses partly by voluntary contributions and partly by contributions "made on the demand of the distress committee by the town council and paid as part of the expenses of the council." It is provided, however, that a separate account shall be kept of all sums supplied by the town councils, and only certain specified expenses paid out of that account. The Distress Committee for the City of Edinburgh having made a demand on the Town Council for certain sums which they proposed to apply in defraying certain specified expenses, *held* (by a majority—*diss.* the Lord Justice-Clerk and Lords Ardwall and Dundas) that the Town Council was *in titulo* to object to the demand and to question the proposed application of the money.

Local Government — Audit — Objection to Accounts as Audited under the Direction of Local Government Board—Competency —Unemployed Workmen Act 1905 (5 *Edw. VII, cap.* 18), *sec.* 4 (3) *g—Local Government (Scotland) Act* 1889 (52 *and* 53 *Vict. cap.* 50), *secs.* 68 *to* 70.

Under the Unemployed Workmen Act 1905, sec. 4 (3) *g*, the Local Government Board for Scotland were authorised to make regulations for the audit of accounts of any distress committee. In virtue of this power the Board issued regulations applying secs. 68 to 70 of the Local Government (Scotland) Act 1889 to such accounts; and they directed with regard to the accounts of the Distress Committee of the City of Edinburgh that certain expenses should be charged to the contributions made by the Town Council. The Town Council objected to the charge against their rate contribution, as contrary to the allocation of such money made by the Act. *Held* (by a majority—*diss.* the Lord Justice-Clerk and Lords Ardwall and Dundas) that the statutory allocation of the expenses of the Distress Committee could not be affected by the provisions for audit made by the Local Government Board, and that the Town Council was not precluded from objecting to the charge against their contribution.