parties should consider whether it is not in the interest of both to consent that it should be so tried. I also agree, however, with the general view that except in exceptional circumstances we should not interfere with the judgment of the Lord Ordinary as to the proper mode of trial.

The Lord Ordinary has no doubt, and certainly I have none, as to the relevancy of the case. All that it involves is a trial of the facts whether the specified damage to the pursuers' property was occasioned by the defenders' operations on their property adjoining; and if occasioned by those operations, whether the operations were such as the defenders were entitled to execute having regard to the position of their property, and having that regard for their neighbours' rights which every proprietor in such a situation is bound to have; and whether the operations were carried out in such a way as the defenders were entitled to adopt. If the damage was not caused by those operations at all, of course there is an end to the case, or if it was caused by these operations, but the operations were such as the defenders were entitled to carry out in the way in which they were carried out, there would equally be an end of the case. But these are the questions to be tried on this record.

I agree that the issue should be amended as proposed.

LORD TRAYNER—I am not prepared to differ from the view which the Lord Ordinary has taken. It is only in very exceptional circumstances that the discretion of the Lord Ordinary as to the mode of inquiry can or ought to be interfered with.

I think, however, that the pursuers must put fault on the part of the defenders in issue. Actions of damages arise only out of fault—or wrong—which is just fault.

LORD MONCREIFF—I am of the same opinion, and I also sympathise with the suggestion made that parties should consider whether the more suitable way would not be to have the case tried by the Lord Ordinary without a jury. It seems to me to be a case eminently suited for that mode of trial.

The Court recalled the interlocutor reclaimed against, allowed the issue to be amended by adding after "Edinburgh" the words "through the fault of the defenders," and remitted the case to the Lord Ordinary.

Counsel for the Pursuers and Respondents—Solicitor-General (Dickson, K.C.)—Deas. Agents—Traquair, Dickson, & MacLaren, W.S.

Counsel for the Defenders and Reclaimers—Cooper—Graham Stewart. Agents—Davidson & Syme, W.S.

Wednesday, January 7.

FIRST DIVISION.

[Lord Low, Ordinary.

DOIG *v.* LAWRIE.

Cautioner—Letter of Guarantee—Continuing Guarantee—Advances by Bank—Relief of Cautioner—Extinction of Obligation—Method of Obtaining Relief.

In November 1898 D granted a letter of guarantee to a bank, whereby he guaranteed payment of all sums for which L was or might become liable, to the amount of £6500. The letter bore that the guarantee was to remain in force "until recalled . . . in writing."

A sum of £6283 was advanced to L by the bank under the letter of guarantee.

In March 1901 D called upon L to remove his name from the guarantee. L failed to do so, and in August D raised an action of relief against L.

The Court, in the circumstances, *held* that the letter of guarantee implied a right on the part of the cautioner to terminate the guarantee at any time upon reasonable notice, and that reasonable notice having been given here, and time having been allowed by the Court for arranging the matter, the pursuer was now entitled to relief; and *ordained* the defender to free and relieve the pursuer by paying all sums due under the guarantee, and to obtain from the bank and deliver to the pursuer a discharge by the bank of his whole obligations thereunder.

This was an action at the instance of James Keiller Doig, hotelkeeper, Monifieth, against Alexander Douglas Lawrie, Rosenberg, Perth, and also against Sinclair Gunn MacDonald, Perth, for his interest. The pursuer concluded for declarator that the defender Lawrie "is bound to free and relieve the pursuer of all liability undertaken by him, and of all payments that have been or may be demanded from him under and in virtue of a letter of guarantee dated 15th November 1898, granted by the said Sinclair Gunn MacDonald, No. 10 Clarendon Terrace, Dundee, and the pursuer, in favour of the Governor and Company of the Bank of Scotland: And the defender the said Alexander Douglas Lawrie ought and should be decerned and ordained to free and relieve the pursuer accordingly, by making payment to the said Governor and Company of the Bank of Scotland of all sums due under the said guarantee, and to obtain and deliver to the pursuer a discharge by the said Governor and Company of the whole obligations undertaken by him under and in virtue of the said letter of guarantee." There were alternative conclusions for payment to the pursuer of the sum named in the letter of guarantee.

By the letter of guarantee in question the defender MacDonald and the pursuer jointly and severally guaranteed to the bank full payment of all sums for which the

defender Lawrie "is or may become liable to" the bank, "the amount which we are to be bound to pay under this guarantee not to exceed £6500." It was also declared in the letter "that this guarantee is to remain in force until recalled by us or our heirs or executors in writing, and shall be without prejudice to any other securities which" the bank "have or may acquire for the general obligations or any particular obligation of" the defender Lawrie. The duration of the cautionary obligation was not otherwise limited.

By letter dated 4th March 1901 the pursuer called upon Lawrie to have his name "removed from the cash-credit bond" in question. On 17th May Lawrie wrote that he was "rearranging the matter referred to," and asked for a week or two's grace.

Further correspondence followed, and on 27th July Lawrie offered to reduce the amount of the guarantee, and to pay £1200 on account thereof. This proposal was declined by the pursuer, and on 30th August he raised the present action.

The pursuer averred that the bank had made advances to the defender Lawrie under the letter of guarantee amounting to £6283, 8s. 2d., for which the pursuer was now liable in payment to the bank.

The pursuer pleaded—"(1) The obligations contained in the said letter of guarantee having been undertaken by the pursuer as cautioner for the defender the said Alexander Douglas Lawrie, and for his accommodation, the pursuer is entitled to be relieved thereof. (2) The said defender having failed to relieve the pursuer of the said obligations, the pursuer is entitled to decree for payment in terms of the conclusions of the summons."

The defender Lawrie lodged defences, in which he admitted the amount of the advances. He averred that as a consideration for the pursuer becoming bound under the guarantee he had agreed to relieve him of certain shares.

The defender Lawrie further averred—"The pursuer has made no payment to the said bank under his obligations contained in the said guarantee, the bank have made no demand for payment against him in respect thereof, nor have they threatened to do so. This defender is quite solvent."

The defender Lawrie pleaded—"(2) The action is incompetent. (4) The pursuer not having made any payment under the said letter of guarantee, and no claim for payment having been made or threatened against him by the said bank the action ought to be dismissed. (5) This defender being solvent is entitled to absolvitor with expenses."

On 25th January 1902 the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds that the defender Lawrie is bound to free and relieve the pursuer of the liability undertaken by him mentioned on record, and sists procedure for one month in order that the said defender may have an opportunity of doing so in such way as he may find most advisable: Reserves the question of expenses, and grants leave to reclaim."

Opinion.—"The pursuer along with the defender MacDonald granted a letter to the Bank of Scotland in 1898, whereby they guaranteed payment to the bank of all sums for which the defender Lawrie was or might become liable to the amount of £6500.

"The bank have made advances to Lawrie to the amount of £6283, and Lawrie was also, when this action was brought, due to the bank £205 of interest.

"The pursuer now desires to be freed from his cautionary obligation, and as Lawrie has not given effect to a request which he made that he should be relieved thereof, he has raised the present action.

"MacDonald has not lodged defences, but Lawrie has done so. The latter has in his defences made a somewhat vague averment of the fact that the pursuer gave his guarantee to the bank in consideration of Lawrie's relieving him of certain shares. That ground of defence, however, is not now insisted in. The defence otherwise consists of a statement (which is not disputed) that the pursuer has not paid, or has not been called upon to pay, any sum to the bank, and that the defender is quite solvent.

"It must therefore be taken that the obligation undertaken by the pursuer was gratuitous, and its duration was indefinite and unlimited. I do not think that the pursuer is in such circumstances bound to continue his obligation longer than it is convenient for him to do so, but it does not follow that he is entitled to obtain his discharge by the method formulated in the summons. The pursuer asked that Lawrie should be ordained either to pay to the bank all sums due under the guarantee, or to put him (the pursuer) in funds to make such payment. Now, Lawrie may be perfectly solvent, and yet it might be very embarrassing for him to be ordained to pay so large a sum as over £6000. So long as the pursuer is relieved of his obligation, and obtains his discharge from the bank, he cannot ask anything more, and I think that Lawrie is entitled to have the matter carried out in the way least burdensome to himself. I think also that he is entitled to a reasonable time to do so, because the object of the guarantee being, I suppose, to enable him to carry on his business, I have no doubt that it was contemplated by all the parties that it should continue for a considerable time.

"I shall therefore find that Lawrie is bound to free and relieve the pursuer of the liability undertaken by him, and I shall sist procedure for one month in order that the former may have an opportunity of doing so in such a way as he may find most advisable."

On 20th March 1902, Lawrie having failed to obtain a discharge of the pursuer from the bank, the Lord Ordinary pronounced the following interlocutor:—"Finds, decerns, and declares against the compearing defender in terms of the first and second conclusions of the summons, and *quoad* the said defender dismisses the remaining alternative conclusions of the summons, and decerns: Finds the said defender liable in expenses," &c.

The defender reclaimed, and argued—There had been no change in the circumstances, and the pursuer had accordingly no right to sue the defender. The pursuer had not paid or been called upon to pay any sum to the bank, and the defender was quite solvent. There were only three sets of circumstances under which a cautioner might take proceedings against the principal debtor to protect himself without having paid or been sued for payment. These were (1) when the debtor was expressly bound to deliver to the cautioner his obligation cancelled; (2) when the debtor was *vergens ad inopiam;* and (3) when the date of payment was shifted by the debtor from day to day—Ersk. Inst. iii. 3, 65. None of these circumstances occurred here; the pursuer had not paid and had not been threatened with distress. He ought first to have himself demanded a discharge or relief from the bank—*Spence* v. *Brownlee*, December 13, 1834, 13 S. 199; *Murray* v. *Hogarth*, February 12, 1835, 13 S. 453. There was certainly no ground for the pursuer obtaining such an order as he asked for.

Counsel for the respondent were not called upon.

LORD PRESIDENT—It does not appear to me that there can be any doubt that the judgment of the Lord Ordinary is right.

The pursuer became, under a letter of guarantee dated 15th November 1898, a guarantor to the Bank of Scotland for payment of all sums for which the defenders might become liable to the bank up to the amount of £6500. The letter contains no stipulation that the guarantee is to remain in force for any specified period. On the contrary, the letter bears that "this guarantee is to remain in force until recalled by us or our heirs or executors in writing." I think that implies a right to terminate the guarantee at any time, or at anyrate at any time upon reasonable notice. The sum of money covered by the guarantee was practically drawn out by the 7th August 1901. Even before that date the pursuer appears to have desired that his liability should be terminated, and his solicitor on 4th March 1901 wrote to the defender that he desired that his name should be removed from the cash-credit bond by 15th May then next. It is not, however, necessary to decide whether this was too short a notice, but however this may be, it appears to me that by the end of August 1901 it could not be said that the revocation was unreasonably soon. Fifteen or sixteen months have since elapsed without the defender having done anything to release the pursuer from his liability. It appears to me that, looking to the terms of the letter of guarantee and to the time that has elapsed especially since the demand for relief from liability under it was made, the pursuer is entitled to the decree which the Lord Ordinary has pronounced.

LORD KINNEAR—Mr Dewar, as I understood, conceded that the pursuer is now entitled to terminate his obligation as cautioner, and that being entitled to bring it to an end he is also entitled to be relieved of the liability already attaching to it, but he maintained that the pursuer is not entitled to be relieved in the way proposed. I think that there might have been very considerable force in that argument at an earlier stage of the proceedings, and that the Lord Ordinary was right in giving the defender time. But that put on the defender the duty of procuring a discharge of the pursuer from the bank under any arrangement he could make with which the bank might be satisfied. He has failed, however, to make any such arrangement, and accordingly the pursuer now says, "If you don't relieve me in any other way, you must procure a discharge from the bank by paying the debt; but at all events you must procure a discharge." I agree that in these circumstances the judgment of the Lord Ordinary should be affirmed.

LORD ADAM concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer — Campbell, K.C. — Sandeman. Agents — Galloway & Davidson, S.S.C.

Counsel for the Defender — Salvesen, K.C.—Dewar. Agents — Menzies, Bruce-Low, & Thomson, W.S.

Thursday, January 8.

FIRST DIVISION.

[Lord Low, Ordinary.

AITCHISON & SONS, LIMITED *v.* M'EWAN.

Process — Diligence for Recovery of Documents — Action by Company against Shareholders — Jury Trial — Slander — Books of Company.

A company raised an action of damages against certain of its shareholders for alleged slanders contained in a petition for judicial liquidation of the company, in which the defenders had averred that the company "was hopelessly insolvent." The pursuers obtained an issue. There was no counter issue of *veritas*. The defenders moved for a diligence for recovery of, *inter alia*, the books of the pursuers. The Court *granted* the diligence, on the ground that the books might be material in respect to the question of the amount of damages, but intimated that they were not to be used for any other purpose.

An action was raised by Aitchison & Sons, Limited, Queen Street, Edinburgh, against John M'Ewan and others, shareholders of the company, concluding for payment of £5000 as damages.