"6. In an accounting between the children of the first marriage and Lady Lamb as her husband's executrix, and also in right of her own provision as his second wife, the amount of Sir Charles' estate must be ascertained as at the dissolution of the first marriage by the death of Lady Montgomerie, and in this must be included every available asset of Sir Charles, however acquired, whether by savings of income, sale of timber, or the like, provided it be an existing and available asset, but not Lady Montgomerie's jewels, or other paraphernal property, which were not acquired by Sir Charles, except by his wife's will, after the dissolution of the marriage. Of his free estate at that time, *deductis debitis*, one-half must, in the first instance, be placed to the credit of the children of the first marriage. Sir Charles, however, continued absolute fiar of the whole estate during his own survivance, subject only to the condition that he should not gratuitously alienate to the prejudice of the children. But no acquisitions by Sir Charles, whether by conquest or succession after the dissolution of the marriage, could, in terms of the marriage-contract, go to increase the amount of the entire estate, to one-half of which the children of the first marriage were entitled; and the debts contracted by Sir Charles between the dissolution of the first marriage and his own death, and also the provisions to the wife of the second marriage, must be charged primarily against the half belonging to Sir Charles of the free estate ascertained at the dissolution of the first marriage, and against his subsequent acquisitions, both of which must be exhausted before any part of such debts or provisions can be charged against the children's half of the free estate ascertained as aforesaid. If the entire estate left by Sir Charles, after paying his other debts, be insufficient to pay both the children of the first marriage and the reasonable provision to the widow of the second marriage in full, these claims must be ranked according to their nature and legal effect, as above explained.

"7. Charles James Lamb, the only child of the marriage between Sir Charles Lamb and Lady Montgomerie, having predeceased his father (though he survived his mother), the right to one-half of Sir Charles' estate, provided by the marriage-contract to the children of the marriage, did not vest in him, and was not transmissible by his will. But the obligation of Sir Charles was not by reason of his only child's death discharged, but subsisted in favour of the issue left by the said Charles James. The said issue are now entitled to claim the succession which would have belonged to their father if he had survived Sir Charles, and the property of which it consists will descend according to its legal character, the heritage to the heir in heritage, and the moveable property to the other children as heirs *in mobilibus*."

Agents for the Parties—Hunter, Blair & Cowan, W.S., and Mackenzie, Innes & Logan, W.S.

Thursday, June 30.

UNION BANK *v.* M'MURRAY.

Agreement—Bankruptcy. M. & Co. being involved in the affairs of a bankrupt firm, purchased for £45,000 certain subjects from the trustee of the firm. To enable them to do so, they borrowed this sum from the Union Bank, and, by an agreement with the Bank, £7500 of the price was to be paid into the trustee's account for behoof of the personal creditors, and the balance of £37,500, less £2500, into a separate account for behoof of the heritable creditors. Thereafter, D. & Co. agreed to purchase the property from M. & Co. for £47,000, the Bank agreeing to advance this sum to D. & Co., and to credit the sum to M. & Co. in part payment of a large debt due by them to the Bank. *Held* that the second agreement had not superseded the first, and that M. & Co. were still indebted to the Bank in the sum of £45,000.

Bill—Principal Debtor—Cautioner—Giving Time. Circumstances in which *held* that a party to a bill was principal debtor in the obligation and not cautioner, and consequently had not been liberated by the fact that time had been given to the other debtor.

The following narrative of this case is taken from the opinion of LORD KINLOCH:—

"There are two separate questions which we are now called on to determine. The one is that presented to us by the defender Mr M'Murray under the reclaiming-note at his instance, and is in substance whether the pursuers, the Union Bank, are entitled to maintain at his debit a sum of £45,000, advanced to him under the minute of 11th November 1856; or whether the arrangement of this minute was superseded, and this charge wiped away, by the effect of the two other minutes of the same date, but of posterior operation.

"The case on this point, when accurately analysed, comes to present itself in a very simple aspect.

"The defender Mr M'Murray had, in the year 1856, become much involved in the affairs of Messrs Cameron & Co., paper-makers. That firm having had their estates sequestrated, the trustee in the sequestration set up to public sale the paper-mill at Springfield, belonging to the company, with the moveable machinery.

"The defender became purchaser at the cost of £45,000. To enable him to pay for this purchase, the pursuers, the Union Bank, agreed to advance to him this sum of £45,000, of which £7500 were to be paid into the trustee's account, as the value of the moveable machinery, for division among the personal creditors; and the balance of £37,500, less a sum of £2500, the value of certain annuities proposed to be continued on the property, into a separate account for behoof of the heritable creditors.

"All this was duly carried out; and there cannot be a moment's doubt that in this transaction, considered by itself, the defender became debtor to the Bank, and bound to reimburse it, for the advance of £45,000 thus made.

"A new transaction then supervened. Messrs Durham & Sons agreed to purchase the mills from the defender at the advanced price of £47,500, besides agreeing to take on themselves the annuities, estimated at £2500 more,—making in whole a profit to the defender of £5000. The Bank agreed to advance this sum of £47,500 as a loan to Messrs Durham, who were to make repayment by instalments. The sum to be so advanced was to be credited by the Bank to the defender in part payment of a large debt owing by him in connection with the affairs of Cameron & Co., being a debt wholly separate from that incurred by him in connection with his purchase of the property. This was accordingly done. The defender had this sum of

£47,500 put to his credit in the books of the Bank, and a corresponding amount of his existing liabilities wiped out. The Bank took Messrs Durham as their exclusive debtors for this sum, except for a portion of it amounting to £5000, for which they agreed to take their bill indorsed by the defender, and ultimately took the joint promissory-note of both. The effect of this transaction was precisely the same as if the Bank had paid over the money into the hands of Messrs Durham, and they had paid it to the defender, who then paid it into his account with the Bank, and obtained credit for the amount.

"The other question to be determined by us relates to the balance of this bill of £5000, granted by the defender and Messrs Durham & Son in part payment of the advance of £47,500, made to these latter by the Bank. The defender has pleaded that on this bill he was simply cautioner for Messrs Durham, with the fact of his being so fully known to the Bank; and that the Bank having given time to Messrs Durham for payment of this bill, without his, the defender's, consent, have thereby liberated him from his obligation. The Lord Ordinary has sustained this plea of the defender, and on that account has deducted a sum of £1742, 0s. 8d., the balance of this bill, with interest, from the sum otherwise due by the defender."

The Lord Ordinary MURE pronounced this interlocutor and note.—"The Lord Ordinary having heard parties' procurators, and considered the closed record, report of the accountant, and whole process, Finds that the three minutes of agreement founded on by the pursuer, and executed on the 11th November 1856, are valid and probative writings, and that the obligations undertaken by the defender under the first of the said agreements were not superseded or discharged by the second and third of the said agreements: Finds, therefore, that the rights and interests of parties under the present action must be regulated by those agreements, and that the sum due to the pursuer by the defender, as at the 4th of March 1864, amounted to £13,875, 3s. 7d., under deduction of the sum of £1742, 0s. 8d., being the balance of principal and interest claimed by the pursuer as due upon the bill for £5000 granted to them under the second of the said agreements: Appoints the case to be put to the roll, that parties may adjust, with reference to the conclusions of the summons, the amount for which decree is to be pronounced in terms of the above findings, and reserves in the meantime all questions of expenses.

"*Note.*—By the report of the accountant, prepared under the interlocutor of Lord Kinloch, which was adhered to by the Inner House on the 12th of March 1867, alternative states of the accounting have been brought out, showing the sums due by the defender, under the agreements founded on, upon the supposition—1st, that the agreements are all valid and subsisting deeds, and that the views maintained by the pursuers relative to the import and effect of these agreements are well founded; and 2d, that the first of those agreements was superseded by the third, and that the defender has been liberated by the pursuers giving time from liability for the balance claimed on the bill for £5000 granted by Durham & Sons and the defender, under the second clause of the second of the agreements as maintained by the defender.

"A third alternative view of the accounts has also been reported on, proceeding on the assumption that the first agreement was superseded by the third, but that the defender has not been liberated from liability for the balance claimed on the bill for £5000. But the Lord Ordinary has not deemed it necessary to advert more particularly to this view of the accounts, because he is of opinion that the first agreement has not been superseded by the third, and that the defender has been liberated by the pursuers having given time to Durham & Son from liability for the balance claimed in respect of that £5000 bill. And the conclusion he has arrived at on the whole matter is, that the defender is liable for the sum brought out under the first alternative view of the accounts, less the balance of principal and interest claimed as due upon the £5000 bill.

"No objections have been taken to the accuracy of the accountant's report, nor was proof asked by either party on any part of the case. And as the Lord Ordinary concurs with the view indicated by Lord Kinloch in the note to his interlocutor, remitting the case to the accountant, that as the rights and interests of the parties stand settled by probative writings, which are not challenged by reduction, parole evidence cannot be admitted to control or modify those writings, he has proceeded to dispose of the case on the footing on which it was argued before him on the accountant's report—viz., as a concluded cause.

"1. As regards the import and effect of the agreements which bear to have been executed on the same day—viz., on the 11th of November 1856—

"(1) It appears to the Lord Ordinary that the first of these agreements must be construed as having been entered into between the pursuers and defender with reference exclusively to the purchase made by the defender of Springfield Mills and machinery at the sale of that property by the trustee on the sequestrated estate of Cameron & Company on the 1st of October 1856.

"The purchase was effected at the price of £54,000, under an arrangement between the trustee on Cameron & Co.'s estate and the defender, entered into with consent of the pursuers, to whom the defender was under large obligations in connection with Cameron & Co.'s affairs; and as the defender does not appear to have then had at his command money sufficient to pay for the property, an agreement was come to between him and the pursuers for the necessary advance, the terms and conditions of which were embodied in the first of the agreements in question, which bears expressly to have been made 'with relation to the said purchase.'

"By the first head of this agreement, the pursuers undertook to pay into the account of the trustee on Cameron & Co.'s estate £7500, as the value of the moveable machinery in the mills; and into a separate account, for the heritable creditors of Cameron & Co., the balance of the price—viz., £37,500, less £2500, as the estimated value of the annuities payable to Mr Cameron's sisters, which were to continue a burden on the properties. By the *second* head the defender, in respect of the above advances, agreed that the whole subjects should be conveyed by the trustee on Cameron & Co.'s estate directly to the bank, to be held by them in security until liquidation of the advances, and of the interest which might accrue thereon. By the *third* and *fourth* heads the bank undertook, when required, to grant a lease of the premises to the defender, or any party named by him; and upon receiving payment of the sums so advanced,

to make over the whole premises to the defender or his asignees, subject to the burdens exigible therefrom. And by the last article of the agreement it is provided that this minute shall not supersede or interfere with 'Mr M'Murray's existing obligations 'to the Bank in connection with Cameron & Co. or the liquidation thereof.'

"At the date of this agreement the defender's existing obligation to the Bank in connection with Cameron & Co., for whom he had for long been cautioner, amounted to upwards of £79,500, as is shown by the state, which is the basis of, and embodied in, the third agreement. So that if the second and third agreement had never been entered into, the defender's obligation to the pursuers would, as the Lord Ordinary reads the transactions between them, have amounted to the £42,500, which the pursuers undertook, by the first article of the first agreement, to pay into separate accounts for the creditors of Cameron & Co., and the £79,500 of obligations otherwise incurred, less the value of any securities held by the Bank as creditors of Cameron & Co., and which are duly credited to the defender in the states appended to the accountant's report.

"That these sums of £7500 and £35,000, or £42,500 in all, were paid into the trustee's account by the pursuers in implement of their part of the agreement, was not, as the Lord Ordinary understood, disputed by the defender. The fact that they were so paid is reported by the accountant, and seems to be satisfactorily instructed *inter alia* by the disposition and assignation executed in October 1857 by the trustee on Cameron & Co.'s estate in favour of the Bank, with concurrence of the defender, which proceeds upon the narrative (quoted at p. 23 of the accountant's report) that those sums had been duly paid.

"In these circumstances the main question raised for consideration in the present case is the extent to which those obligations, amounting in all to about £122,000, have been wiped off or discharged by the other agreements.

"(2.) The second agreement, as the Lord Ordinary reads it, does not in any respect interfere with or discharge the obligation of the defender relative to the purchase-money of the Springfield mills and machinery, which was paid over to the trustee on Cameron & Co.'s estate by the pursuers in implement of the agreement undertaken by them to that effect, but deals exclusively with matters which were either not embraced in, or excepted from, the first agreement.

"It was entered into in order to make provision for an arrangement between the defender and Messrs Durham & Sons, papermakers in Edinburgh, which was effected before the first agreement was executed, and by which Springfield mills and machinery were sold by the defender to Durham & Sons at a profit of £5000; and as the price which Durham & Sons were to pay for the property, viz., £47,500, was to be advanced by the pursuers, they became parties to the arrangement.

"The *first* head of this agreement accordingly provides that the above sum was to be paid to the Bank in liquidation *pro tanto* 'of Mr M'Murray's obligations granted in connection with the firm of Cameron and Co.' As a security for this sum, which was to be borrowed from the Bank by Messrs Durham & Sons, the *second* head of the agreement, *inter alia*, provides that for £5000 of the price the Messrs Durham shall grant their promissory note to the defender, 'who shall indorse it to the Bank, and that Messrs Durham shall grant their promissory note directly to the Bank for the remaining £42,500,' and shall liquidate both of these notes by half-yearly instalments of two thousand five hundred pounds, '£1250 of which instalments, when so paid, shall be placed annually towards liquidation of the note for £5000.' The *third* head provides for the manner in which the price was to be advanced by the Bank—viz., by their 'writing off, as at Martinmas 1856, £47,500 from Mr M'Murray's said obligations to them, his liquidation of the remainder of those obligations being provided by a separate agreement.' And as an additional security for those promissory notes, the *fourth* head of this agreement provides that the Bank shall hold the Springfield mills under the conveyance to be granted to them by the trustee on Cameron & Co.'s estate, with concurrence of the defender.

"All these things, with the exception of the regular payment of the instalments by Durham & Sons, appear to have been duly carried out. The promissory notes were granted; the £47,500 was written off the defender's 'said obligation,' and in October 1857 the trustee on Cameron & Co.'s estate executed the stipulated conveyance in favour of the Bank. And it is, in the opinion of the Lord Ordinary, very important to observe that the obligations which were thus written off are not said to be those arising out of the £42,500 advanced to enable the defender to effect his purchase of Springfield mills, but those which had been 'granted in connection with the firm of Cameron & Company,' and which are referred to in the first agreement, and excepted therefrom as separate and distinct obligations existing at the date when that agreement was signed.

"(3) The £47,000 advanced to Durham & Sons to enable them to effect the purchase of Springfield mills from the defender having thus been written off his obligation to the pursuers, the question still remains for consideration, under this branch of the case, 'whether under the third agreement the defender's liability to account for the £42,500 advanced under the first to enable the defender to purchase Springfield Mills, which under the second agreement he sold at a profit of £5000, was also discharged?'

"Now, *ex facie* of the state upon which this agreement proceeds, there was unquestionably no such discharge. That state contains a variety of transactions with reference to which the defender had incurred liability for Cameron & Co., beginning on 31st of December 1855 and ending on the 11th November 1856, amounting in all to upwards of £79,500. From these obligations £47,500 was written off as the state bears; but among them there is no mention of the price of Springfield Mills, which is now proved to have been advanced for behoof of the defender in the manner stipulated in the first agreement. And the reason why this sum was not entered appears to the Lord Ordinary to have been plainly this, that the obligation to account for that sum of £42,500 was not considered one which had been granted by the defender in connection with the firm of Cameron & Company in the sense in which that expression is used in the agreements. It was an obligation incurred by the defender himself on his individual account, to which Cameron & Co., who had by that time been sequestrated, were not parties; whereas those described in the agreements as obligations of the

defender in connection with Cameron & Co. appear to the Lord Ordinary to be those only which were granted by him for Cameron & Co. before their sequestration; and it is to those alone, as he conceives, which are expressly excepted from the first agreement, that the state dealt with in the third agreement relates. And while the state itself is thus prepared with reference to transactions quite separate and distinct from those in regard to the purchase of the mills, the Lord Ordinary has been unable to find anything in the substantive provisions of this agreement which can be held, as contended for by the defender, to operate a discharge of his liability to account for the money advanced by the pursuers to enable him to make that purchase.

"On these grounds the Lord Ordinary has come to the conclusion that on this branch of the case the defender has failed to establish his defence.

"A separate point was raised by the defender at the debate, to the effect that, as the machinery in Springfield Mills, in payment of which the £7500 had been advanced by the pursuers, had been found to belong to them in a question with the trustee on Durham & Sons' sequestrated estate (3 M., p. 765), the value of that machinery should have been brought into account. The Lord Ordinary was at first disposed to think there might be some room for this claim; but, upon examining into the matter, he is satisfied that there is no good foundation for it, because under the second agreement the defender received full value for the machinery from Durham & Sons; and the £7500, at which it was estimated, was credited to him as part of the £47,500 written off his obligations. So that when the right to this machinery came to be tried upon the bankruptcy of Durham & Sons, the question resolved itself into one between the general creditors of Durham & Sons, represented by the trustee, and the pursuers, who maintained, and were found to have established, a preferable claim over the machinery as creditors of Durham & Sons. It was one, therefore, with which the defender had plainly no concern; and as he had received a full price for the machinery on the sale of the mills to Durham & Sons, he has not, it is thought, any claim now to have its value brought to his credit a second time in account with the pursuers.

"2. Upon the questions raised as to the defender's liability for the balance of the £5000 bill, granted with reference to the second head of the second agreement, it appears to the Lord Ordinary that the defence is well founded.

"That time was given to Durham & Sons by the pursuers relative to the payment of the stipulated instalments, was not, as the Lord Ordinary understood, disputed; and the fact is, in his opinion, sufficiently instructed by the correspondence in process referred to in the accountant's report. It was, however, contended that, as the defender was a joint-obligant with Durham & Sons, and not a cautioner merely, the pursuers were entitled to give time without asking the consent of the defender, and that the latter was therefore liable for the balance due upon the bill. But the circumstance that the defender was apparently a joint-obligant on the bill is not, in the opinion of the Lord Ordinary, of itself conclusive of this question. Because the bill must, it is thought, be read with reference to the written obligation in fulfilment of which it was granted; and if that obligation is substantially a cautionary undertaking on the part of the defender, the fact that he may in one view appear to be bound as a co-obligant, will not, in the opinion of the Lord Ordinary, deprive him of the ordinary requisites of a cautioner. This was so settled, with reference to a cash-credit bond, in the case of *Mackenzie*, September 23, 1831, 5 W. & S., p. 504.

"Now the arrangement made under the second head of the second agreement with reference to the bill in question, was not that Durham & Sons and the defender should grant their joint acceptance for the amount, but that Durham & Sons should grant their note for £5000 to the defender, who was to endorse it to the Bank. Again, the agreement as to the liquidation of the note was not that that should be done through payments made jointly by Durham & Sons and the defender, but by instalments of £2500 paid half-yearly by Durham & Sons, £1250, or one-fourth, of which was, when so paid, to be placed to the liquidation of the note. So that it was only upon failure of Durham & Sons to pay off the note by instalments that proceedings could be taken against the defender. The bill, moreover, was to be granted for payment, *pro tanto*, of a sum advanced by the pursuer to Durham & Sons, who were thus the principal debtors in a transaction for payment of part of which the pursuers seem to have stipulated for additional security—viz., the endorsation of the defender. The obligation therefore was, in the opinion of the Lord Ordinary, substantially an accessory obligation on the part of the defender, who was entitled to rely that payment of the instalments would be duly exacted; and as the pursuers appear to have given considerable indulgence to Durham & Sons without the consent of the defender, he has, it is thought, been thereby freed from all claim at their instance for the balance now due upon the bill."

The defender reclaimed.

SOLICITOR-GENERAL and ADAM for him.

GORDON, Q.C., and MARSHALL in answer.

At advising—

LORD KINLOCH—After narrating the facts as given above, proceeded:—It appears to be very clear that this second transaction cannot, either in a legal or rational sense, be said to have set aside the first. The first transaction is no more set aside by the second than is a purchase of a property by A set aside by a second purchase of the property from A by B. The two transactions remain entire, and the first is in fact necessary to the second. The confusion arises from the fact that the Bank, who are lenders of money to all the world, lent the necessary money both to the first purchaser and to the second. But the separate transactions stand clear and distinct. The Bank first lent to the defender £45,000 to purchase the property, and paid the sum so lent. They thereby became creditors of the defender for the amount of this advance. The defender sold the property, bought by means of this loan, to Messrs Durham at a profit of £5000; and the Bank lent to Messrs Durham the sum necessary to pay for their purchase, Messrs Durham becoming their debtors for the amount. The two debts against these separate parties subsist respectively till payment by the different debtors,—the defender of his loan, and the Messrs Durham separately of theirs. On what conceivable ground is the defender to be relieved from payment to the Bank of the sum of £45,000, by the advance of which he was enabled to buy the property and to sell it again to a profit, and actually to put into his pocket (which is the substance of what he did) a

sum of £47,500? If this advance of £45,000 is wiped from his debit, the result will simply be that he has purchased the property without paying anything for it, and pockets the whole £47,500 which he received on the re-sale. On the other hand, if the sum of £45,000 is kept at his debit, and the sum of £47,500 at his credit, he is advantaged in the sum of £2500, which, together with the sum of similar amount stated as the value of the annuities taken by Messrs Durham on themselves, represents the exact sum of £5000 which formed the profit on the transaction. To preserve therefore the sum of £45,000 at his debit is the only true mode of giving effect to the actual transaction.

When this conclusion is reached, the whole of this first question is solved. For, assuming that the sum of £45,000 is not to be struck from the defender's debit, I perceive no ground for holding that the accounts have not been accurately made up, or that the balance brought out by the accountant is any other than the true balance due. On this first point I therefore think that the interlocutor of the Lord Ordinary should be affirmed.

There can be no doubt of the legal doctrine, that time given by the creditor to the principal debtor, without the consent of the cautioner, will liberate the cautioner; and that, generally speaking, the form of the obligation will be immaterial, provided the fact of the party being only cautioner is known to the creditor, and presumably in his contemplation throughout. In the case, for instance, of a bond for a bank credit, in which the parties are bound jointly and severally, but where, from the nature of the transaction, the one is to the entire knowledge of the Bank only cautioner for the other, it has been held in more than one case that the cautioner will be relieved by time being given to the principal debtor. It is trite that, in legal construction, time is not given merely by the creditor refraining to prosecute his claim: he must enter into a distinct agreement by which he ties up his hands for a certain period, greater or less. It may not be necessary that a precise day should be specified as the postponed day of payment. An indulgence granted indefinitely for two or three months, or two or three weeks, may be equally within the legal rule. But the delay must be granted (1) by distinct agreement; and (2) so as for a period, longer or shorter, to tie up the creditor, as by force of contract, from prosecuting his claim.

It must, however, be made out, as the first and essential requisite of any plea of liberation on this ground, that the creditor entered into the contract on the distinct footing and understanding that the party was, in any question with himself, to hold the position of a cautioner, and to be treated and dealt with as such. It may quite conceivably happen that the party may have relief against the other obligant, and yet that in any question with the creditor he may not hold the character nor be entitled to the equities of a cautioner. A great many cases occur in the transactions of daily life in which partners, or joint purchasers, or others connected in joint transactions, stand in such a relation that the one has partial or entire relief against the other, and yet that the common creditor has both so completely bound to him as principal debtors as to give to neither the equities of a cautioner against him. The mere circumstance of relief lying at the instance of one against another will not solve the question. The circumstances of the case must be looked to. There is nothing to prevent its being arranged by express agreement that the equities of a cautioner shall not belong to either one or other. The same result may follow from the circumstances being such as to imply that this, and no other, was the footing on which the transaction was engaged in.

I am of opinion that in the present case the transaction must be held to have been engaged in on the footing of the defender's standing towards the Bank in the position exclusively of principal debtor, and having no right to a cautioner's equities. The bill for £5000 was no doubt granted in part payment of a sum of £47,500 advanced by the Bank to Messrs Durham; and it may not be susceptible of dispute that the defender, if compelled to pay the bill to the Bank, had a valid claim of relief against Messrs Durham. But the defender was connected with this advance in another and very different relation from that of cautioner for Messrs Durham. The advance was stipulated to be applied in liquidation *pro tanto* of the defender's obligations to the Bank connected with the firm of Cameron & Co. And it accordingly was so applied by an equivalent amount being written off to the defender's credit in the books of the Bank. The transaction was therefore one having, amongst others, the purpose and effect of raising a sum of money for the benefit of the defender. It is not wonderful that for a part of this sum the Bank should take the defender as well as Messrs Durham directly liable for reimbursement. The sum of £5000 fixed on is accounted for by the circumstance that this formed the amount of the defender's profit on the re-sale, and might therefore fairly represent his own proper and peculiar benefit. Be this as it may, the nature of the transaction is, that the Bank only agreed to advance £47,500 for the purchase of the mills by Messrs Durham, and at the same time for the satisfaction *pro tanto* of the defender's debt to themselves, on the express condition that for £5000 of the amount the defender should, as well as Messrs Durham, become their direct obligant. I cannot for a moment doubt that the object and understanding of all concerned was that the two parties should stand towards the Bank in the equal position of principal debtors, and without any recognised relation of principal and cautioner. It appears to me that the exclusion of all rights belonging to a cautioner in the person of the defender is as undoubted as if the writing which passed had expressed in so many words that none of a cautioner's rights should belong to the defender in any question with the Bank. The practical conclusion is, that the defender cannot now demand liberation in respect of the Bank giving time to Messrs Durham; because this is one of the equities of a cautioner which the nature of the transaction excluded the defender from claiming.

If this view is well founded, it is enough for the disposal of the case, so far as this point is concerned. But I think it right to add, for the exhaustion of the case before us, that even if the defender had been, as I think he was not, possessed of the character of a cautioner in a question with the Bank, there are other grounds on which, in my opinion, the plea of liberation would still be untenable. It is undoubted that the cautioner cannot found a defence on any giving of time by the creditor to which he has interposed his consent. This requires no establishment. In the present case there were undoubtedly occasions on which time was given by the Bank with the express

assent of the defender; there were others in regard to which no distinct assent is traceable. But it forms, in my apprehension, a jury question on the evidence, whether the defender was not fully cognisant of all the proceedings, and in reality assented to all the indulgences obtained by Messrs Durham, and substantially at the same time by himself. I cannot peruse the correspondence without coming on this point to an affirmative conclusion; and, on the ground of this knowledge and assent, I am of opinion that the defender has precluded himself from now maintaining this plea.

One proceeding in particular has forcibly struck my mind; and this is a proceeding which took place some months after Messrs Durham had, in January 1862, intimated their suspension of payments; and when the defender's notice was especially called to the state of his liabilities. In July of that year an account was made up and transmitted to the defender by the Bank, shewing the existing condition of his account, and especially the position of the bill of £5000 in question, on which a balance of £1640, 6s. 7d. was stated to be due. He was thus made exactly aware of the extent to which the Bank had given indulgence to Messrs Durham—because payment was to be made by instalments, and the balance remaining due shewed how the instalments had been suffered to run into arrears. The defender docquetted this account as correct. It was proposed that he should grant a bill for the entire balance brought out, which was £19,736, 4s. 8d. This does not seem to have been done by him; but, on the footing of this account being correct, he asked and got renewed indulgence for paying the balance, and made repeated payments to account. I cannot help thinking that this proceeding precludes all plea rested on any previous giving of time. The groundwork of the plea is an assumption that by the giving of time the cautioner has been precluded from taking steps for his relief against the principal debtor, and has presumably been injured. Here the cautioner, after all the time has elapsed, and all the consequences have arisen and become known to him, takes deliberately to the debt, and by implication renews his obligation. I do not think it a sufficient answer to say that he did not know that the indulgence was not a mere delay to exact, but an express agreement to postpone, and so was not aware of the foundation of his legal plea. I consider the transaction to import a waiver of all pleas whatever, actual or possible, arising out of the previous transactions, and a legal homologation of his obligation, on the footing of which, and not otherwise, the creditor must be held thenceforward to have proceeded. I conceive that, after this, the cautioner cannot go back to pleas which might otherwise have been competent and effectual.

I am of opinion that on this second point the interlocutor of the Lord Ordinary is erroneous and ought to be altered.

Lord Ardmillan—It is quite unnecessary for me to recapitulate the facts and circumstances of this case, which have been very clearly explained by Lord Kinloch. The first—and in a pecuniary point of view the largest—question in this case has, I think, been rightly decided by the Lord Ordinary in favour of the Union Bank. On that point I have nothing to add to what has been already stated except to express my concurrence.

The second question, in regard to the bill or note for £5000 granted by Durham & Son and the defender, is in my view attended with more difficulty.

The rule of law—founded on a well recognised principle of equity—which the defender pleads, is quite settled, and is most important. If a creditor does, by an agreement tying his hands, give time to the principal debtor, he liberates the cautioner. Of that there is no doubt. But, still further, if a person, though bound as a joint obligant, is truly not a principal, but only a cautioner, and is known by the creditor to be only a cautioner, then he may, on such a state of facts being admitted or proved, and in a question with that creditor, be entitled to some of the equities of a cautioner. One of these equities, and one to which a person who is, and is known to be, only a cautioner, may become thus entitled, is, that he is liberated if the creditor has by agreement given time to the principal debtor.

In the present case the Bank did agree to give time to Durham & Son; and if, in point of fact, the defender M'Murray was, and was known to be, truly and only a cautioner, though bound on the writ as a co-obligant, and if he did not assent to the giving of time, then I think that in point of law he was liberated, because time was given by agreement, and for a certain period the creditor's hands were tied.

But looking to the whole course of these transactions, and to the great interest which the defender had in realising and applying to payment of his own debt the purchase money of the mills sold to Durham & Son, I am not able to arrive at the conclusion that the defender, being bound as a joint obligant, was truly and solely a cautioner, and known by the Bank to be only a cautioner. The general rule is, that the relation of parties to a written obligation must be taken as it appears on the writ. That relation must be presumed till the contrary is proved. Any variance in that apparent relation must be instructed by the party alleging such variance. Here the defender is co-obligant on a promissory-note, bound as a principal debtor, and it was, in my opinion, natural and reasonable under the circumstances that to the Bank he should be a co-obligant and principal debtor. He had been deeply involved with Cameron & Co. First his purchase of the mills, and then his sale of the mills to Durham & Son, was for his own benefit, and in order to free himself of very heavy liabilities. He had sold the mills to Durham & Son, and he had a great interest in getting the price applied to payment of his debt to the Bank; and the £5000 contained in the promissory-note was just the amount of the profit which he had made on the sale, or, in other words, was the bonus which he got for handing over his purchase to Durham & Son. That he should be bound to the Bank for that sum as, along with Durham & Son, a co-obligant in the promissory-note, was most natural, since he was largely indebted to the Bank, and since the whole sum of £47,500,—being the £42,500 on Durham's bill, and £5000 on the joint promissory-note of Durham and the defender,—was put to the defender's credit in liquidation *pro tanto* of his obligations to the Bank.

Accordingly, I am of opinion that the defender, being thus a co-obligant on the face of the document, and also having an interest making his co-obligation as a principal natural and reasonable, is—having regard to the true meaning and intent of the transaction—liable as a principal

debtor, and is not entitled to insist on the Bank dealing with him on the footing of his being truly a cautioner only; and I do not think he can escape from his obligation by pleading the peculiar equities by which a cautioner is protected. He who appeals to equity must maintain equity; and I think that the relief of the defender from this obligation would be contrary to equity.

It is on this ground that I chiefly rest my opinion, and it is sufficient for decision of the case.

But I am also disposed to concur in much that has been said by Lord Kinloch in regard to the proof of cognisance on the part of the defender of the Bank's proceedings, and assent on the part of the defender to the giving of time to Durham & Son. The defender had a great interest in supporting Durham & Son, and it was his strongly expressed wish to do so. He did on more than one occasion expressly assent to the granting of indulgence to them, and not only so, but he even requested as a favour to him by the Bank that such indulgence to Durham & Son might be granted. This, however, was not on the particular occasions which are founded on as the giving of time. He himself asked and obtained indulgence in regard to his own obligations to the Bank. He received and docquetted accounts, on which, with the relative letters, the date and terms of the obligation, and the time of paying instalments, and consequently the fact of indulgence, were apparent. From all these facts, taken together and considered in combination with his position as a joint obligant and his long and close connection with the whole business, it is urged with great force that the assent of the defender to the indulgence given by the Bank to Durham & Son clearly appears.

The assent of the defender, whether given at the date of the indulgence or afterwards, is, if proved in point of fact, a conclusive answer to the plea of liberation by giving time; the question of the evidence of assent in regard to the acts of indulgence founded on must be met, and is attended with difficulty. It would have been very satisfactory to me if the evidence on that point had been more complete; at the same time, there is evidence deserving serious consideration, and I do not mean to express any difference of opinion from what Lord Kinloch has stated in regard to the proof of such assent. At the same time, the question in regard to proof of assent is difficult. But the opinion which I have formed rests more especially on the first view which I have mentioned, viz., the ascertained position of the defender, who, being a co-obligant on the writing, and also being a principal party according to the truth and reality of these transactions, is not entitled to the peculiar equities of a cautioner. In regard to this £5000 bill, I am of opinion that the Lord Ordinary's interlocutor should be altered.

Lord Deas—There has been a great deal of litigation between these parties concerning the matters involved in this case, so that we have repeatedly had occasion, or the necessity rather, to make ourselves acquainted with all the circumstances, and it would be unpardonable in me, after what has been so distinctly expressed, to repeat these circumstances. I had occasion to state them pretty fully in the case between the Bank, and the trustee in the estates of Durham & Sons. I shall only say that, in the first and larger point now in dispute, I have no hesitation in being of the same opinion as the Lord Ordinary. On the second and smaller question, I mean with reference to the £5000, and as to whether Mr M'Murray is or is not entitled to the equities of a cautioner, I think that point is not quite so clear, and accordingly on that point the Lord Ordinary has come to a different conclusion from that which has been expressed by Lord Kinloch and Lord Ardmillan. But after attending to all the circumstances which is essential, and after full consideration, I have come to be of the same opinion as that expressed by Lord Kinloch. I think, in the first place, that Mr M'Murray never was in the position towards the Bank of a cautioner at all. From the time when Cameron was out of the concern, M'Murray was the man whom the Bank were accommodating, and the introduction of Durham & Sons was merely incidental, and does not change the position in which he stood to the Bank, which was principal debtor in the whole concern. The way in which the transaction was gone about as to the £5000, and the way in which the note was taken, was just intended to make it clear that there was no change in the position of M'Murray with reference to that, any more than the rest of the transaction. I think he was the principal party whom they accommodated; and secondly, that supposing he had been in the position of a cautioner, the way in which he acted in the whole matter, and went along with the Bank in all they did, was a waiver of any equities he might otherwise have had. Thirdly, I think that at the end of the matter he again waived any objection competent to him in that capacity; and therefore on these grounds I come to the same conclusion as Lord Kinloch, and I may say that I substantially adopt that opinion.

Lord President—I agree with all your Lordships, and with the Lord Ordinary, that the obligation of the defender under the first of the three agreements was not superseded by the second and third; and consequently, that the debt constituted by the first agreement remained undischarged, viz., the original debt of £45,000, arising from the advance of the Bank to M'Murray, to enable him to purchase the Mills of Springfield. As to that question there is no reasonable doubt.

The second question is one of more importance; but there, in common with your Lordships, I cannot agree with the Lord Ordinary. His Lordship says—"But the circumstance that the defender was apparently a joint-obligant on the bill is not, in the opinion of the Lord Ordinary, of itself conclusive of this question. Because the bill must, it is thought, be read with reference to the written obligation in fulfilment of which it was granted; and if that obligation is substantially a cautionary undertaking on the part of the defender, the fact that he may in one view appear to be bound as a co-obligant, will not, in the opinion of the Lord Ordinary, deprive him of the ordinary requisites of a cautioner." And in support of that he refers to the case of *Mackenzie*. To all the general doctrine here stated I have no objection, and I quite recognise the principle of that case. That was the case of a cautioner in a cash credit bond, in which it had appeared plainly on the face of the bond itself, and was otherwise known to the Bank, that the cash credit was for one of the parties only, and that the other had himself no interest in the cash credit, and was to have no pecuniary profit at all, but interposed his credit merely for the benefit of the other party. He was taken bound as cautioner and

full debtor, his character being thus disclosed on the face of the bond itself. But here we must look not merely to the joint promissory note by the two parties, but also to the written obligation in fulfilment of which it was granted. And I think it is clear from that transaction that this £5000 due to the Bank, in consequence of the account there embodied, was, as in a question with the Bank, the proper debt of M'Murray as much as of Durham & Sons. No doubt ultimately M'Murray was entitled to relief against Durham & Sons; but it by no means follows that, because a right of relief arises to one against the other of two co-obligants, therefore the one having that right has the right of a cautioner in the obligation. On the contrary, such a right arises every day where the character of a cautioner does not enter at all. But although Durham & Sons were bound to relieve M'Murray, I am clear that, in a question with the Bank, M'Murray owed the Bank £5000 under this promissory note, as his own proper debt, for which he had received full value. I therefore come to an opposite conclusion from the Lord Ordinary as to the claim of the defender to have a deduction from the sum due under the note.

I must add, however, that if I had been of an opposite opinion as to the nature of the obligation by M'Murray to the Bank as to this £5000, I should have hesitated to say that I concurred with your Lordships in holding that M'Murray had not been liberated by what took place. There was undoubtedly a giving of time on more than one occasion. There was so once or twice with the express consent of M'Murray, and there was so also without his consent having been obtained or asked. I do not say that the case in this branch is not one of considerable difficulty on the evidence; but I do not see that, if M'Murray is entitled to the equities of a cautioner, there is not enough to liberate him. But, holding as I do that he is not entitled to these equities, I arrive at the same result with your Lordships

Agents for Pursuer—Bell & M'Lean, W.S.
Agents for Defenders—A. & A. Campbell, W.S.

Friday, July 1.

SECOND DIVISION.

MUNRO *v.* STILL.

Parent and Child—Filiation—Evidence of Paternity. Circumstances in which *held* that the paternity of a child had been established against a person who admitted frequent connection with the pursuer, but denied being the father or having had opportunities of access as would infer paternity.

In this action of filiation and aliment the defender admitted frequent connection with the pursuer, who was a young girl in service at Banff, during the months of May, June, and July 1864. He left Banff for Inverness in July 1864, and his allegation was that he did not return until the 10th January 1865; and he admitted renewed intercourse thereafter up to May 1865, when he left Scotland, and did not return until 1868. The child was born on 26th August 1865, and there was evidence of its being rather premature.

The Sheriff-Substitute (GORDON) assoilzied the defender.

The Sheriff-Depute (BELL), on appeal, altered and decerned against the defender. He added the following note to his judgment:—"Frequent, habitual, long continued intercourse is admitted by the defender, and there is no indication of the pursuer having had intercourse with any other man.

"After continuing for months in 1864, the defender admits that this connection was renewed early in January 1865 at a period quite capable of resulting in the birth of a viable and healthy child. And it is proved that opportunity of renewed connection occurred a week or two earlier than its renewal was admitted.

"In order to obtain absolvitor in such a case it would be necessary to prove not merely that the child is living, and like to live, which frequently happens with children born in the eighth month; but farther, that the child was in point, not of conjecture but of actual fact, born after the usual period of gestation.

"In the general case there may be some slight presumption in favour of a party so alleging; but it is extremely uncertain, and quite insufficient to overturn the conclusions which must otherwise be admitted in the circumstances of the present case.

"And as to the proof of maturity, the Sheriff cannot hold that there is any sufficient evidence, more especially when it is considered that the child which surprised the mother in the harvest field was evidently unexpected, 'was a sober weakly looking child,' and 'had scarcely any nails on its fingers and toes.'"

The defender appealed.

R. V. CAMPBELL for him.

BUNTINE in answer.

The Court were of opinion that it did not appear that the child might not be the fruit of intercourse upon the 26th of December. There was no evidence that the defender was not in Banff at that time. In that case the child was born in the beginning of the ninth month, consequently there would not be strong physical appearances of immaturity. The circumstance of the mother having been working in the fields on the day of the birth, and that the child was small and weakly, were in support of this theory. The defender admitted continued intercourse before and after December, but averred that it was impossible for him to be the father of the child. It was incumbent on him to substantiate the fact of his absence, and he had failed to do so. It was not alleged that the woman had been intimate with any other man, her character seemed unexceptionable, and consequently the appeal must be dismissed.

Agent for Appellant—D. Cook, S.S.C.
Agent for Respondent—J. Barclay, S.S.C.

Friday, July 1.

HINSHAW & CO. *v.* ADAM & SON.

Artificer—Injury to Goods—Prima facie *Liability*—Onus—Culpa. *Held* that an artificer, in whose hands goods sustain damage, is *prima facie* liable for the damage, and has the *onus* thrown upon him of showing that the damage accrued from imperfection in the goods, or neglect or fault on the part of the owner by whom they were sent.

Circumstances in which *held* that such *onus* had not been discharged.

This was an appeal from the Sheriff-court of Lanarkshire in an action in which John Hinshaw