matter, because I cannot conceive that a judicial conveyance, where intention is of no effect, and where technical accuracy is essential, should be more liberally construed and have a wider effect than a voluntary conveyance, where intention is the main thing in view. I think that upon every ground the case of *Ochterlony* prejudges this general question.

But, in the second place, I have come also to think—although I own that my impression at first was the reverse—that the judgment is well-founded, upon very obvious principles. This matter of the Crown's right to gold mines is one of considerable historical interest. That it was part of the annexed property of the Crown, and therefore did not pass, and could not pass, either by a grant of barony or anything else, before the Act of 1592, is proved by the preamble of that Act; and it is proved by the preamble of that Act, and proved historically, that the Crown had been in the custom of making use of that *regalia*—the royal right to gold and silver mines—by granting tacks. I find that in the statistical account of the parish in which the lead hills are situated it is stated that before the Act of 1592, and in the reign of King James VI., there had been tacks given out to various German and Italian miners of gold and silver in the lead hills, and that had given rise to a good deal of jealousy; and in the Advocates' Library there are a variety of papers relating to the petitions of these foreign miners. That that led to the statute of 1592 there can be no doubt. That statute authorises the Crown, instead of letting those minerals in tack, to sett them in feu to the owners of the lands, and them only, on condition of their paying the lordship there expressed, with power to feu to others in the event of the minerals not being worked. Now, all that proves that this was a very peculiar right, and although it was a *jus regale*, it is very difficult to see how the ordinary principles of a separate feudal estate could possibly apply, for as the heritor had a right to the minor minerals, and as gold, silver, and fine lead can only be worked along with the minerals among which those more precious substances are found, it is clear that the right could hardly be susceptible of separate conveyance. The minor minerals belonged to the heritor, and therefore the Crown right was truly a right of lordship, a right of levying upon the persons who worked the mines a certain amount in name of lordship; and therefore I come to the conclusion—and I suppose it was that which guided the Court in the case of *Ochterlony*—that when the landed proprietor, who was alone the party to whom, in the first instance, the feu could be sett, came to receive the Crown right, his right to the minerals became complete, burdened only with the real burden of payment of lordship to the Crown, and from that time forward, at all events, it was a thing accessory to his feudal title. Therefore, upon the whole matter I am for adhering to the Lord Ordinary's interlocutor.

Lord Gifford—Not having heard the argument, I give no opinion.

The Court adhered with additional expenses.

Counsel for the Pursuer (Earl of Breadalbane)—Solicitor-General (Watson), and Kinnear. Agents—Davidson & Syme, W.S.

Counsel for the Defender (Jamieson)—Dean of Faculty (Clark), Q.C., and Balfour. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Wednesday, June 23.

SECOND DIVISION.

[Lord Young, Ordinary.

SMITH *v.* COMMERCIAL BANK OF SCOTLAND.

Bankrupt—Cautioner—Multiplepoinding—Promissory Note.

Circumstances in which the claims of a bank on an estate were to a certain extent *sustained* in a multiplepoinding, and in which *held* that the bank was bound to account to the real raisers for a sum fixed.

This case came up by reclaiming note against an interlocutor pronounced by the Lord Ordinary (Young) as follows:—

"*Edinburgh, 27th March* 1875—The Lord Ordinary, ... sustains the claim of the Commercial Bank of Scotland to the extent of Two thousand seven hundred and thirty-two pounds three shillings and tenpence, and ranks and prefers the said Bank accordingly: And with respect to the amount of the funds belonging to the estate of the late Peter Laing Gordon, deposited in the said Bank (subject to the arrestments at their instance) in the name of Mr A. G. Smith, as Judicial Factor on that estate, and forming part of the fund *in medio* in this process, Finds that the said amount (including interest to this date) is Five thousand five hundred and twenty-five pounds six shillings and ninepence, and that the Bank is bound to account therefor, and to pay the same to the real raiser, as representing the parties entitled to the said estate, under deduction of the foresaid sum of Two thousand seven hundred and thirty-two pounds three shillings and tenpence, for which the claim of the said Bank has been sustained, and of any claims by the Judicial Factor on said fund, which claims are reserved entire, and decerns accordingly; Finds the said Bank entitled to expenses, subject to modification, and remits the Account to the Auditor," &c.

His Lordship delivered the following Opinion *in causa*, in which the circumstances of the case are sufficiently detailed:—

"The question in this case regards the extent to which the Commercial Bank are entitled to enforce payment of a promissory note for L.10,000, granted to them by Mr John Duncan of Aberdeen, and Mr Gordon of Craigmyle, both now deceased, against the estate of the latter.

"The note being in common form, the Bank, as the holders, are of course entitled to enforce payment in full against Mr Gordon's estate—he being an admitted obligant on the face of it—unless it shall appear that their right is limited by some writing habile for the purpose, or by the contract, duly established, on which they received it or continued to hold it.

"The parties took the precaution of putting their contract into writing, and it is to be found in the letter of 12th January 1864, (quoted on page 50 of the Record), which was prepared by the Bank, and signed by Duncan and Gordon, the obligants on the note. It is remarkable that this document is not subscribed by the party whose right is thereby limited, but by the parties in whose favour it is limited. It is, however, admitted by both parties that the letter contains the contract on which the Bank received the note, and that it must have effect accordingly, except in so far as it may have been subsequently altered; and it was in fact subsequently altered.

"The parties differ as to the construction of this letter, and on this point two questions were raised, and elaborately and ably argued. The *first* was, whether the promissory note was pledged to the Bank as a security for L.10,000, if so much should be due by Duncan after the 650 shares of the Deeside Railway Company were realized and placed to his credit (as the Bank contend), or whether the note and the railway shares *together* were pledged as a security for L.10,000, the note being enforceable for only so much of the secured L.10,000 as the proceeds of the shares when realized should be insufficient to meet (as contended for by Gordon's factor). The *second* was, whether the security was confined to Duncan's debt on current account, or extended to the debt which he might owe to the Bank in any manner of way.

"1. On the first question, my opinion is against the Bank, and in favour of Gordon's factor. I think the note was, according to the terms of the letter, only pledged as a guarantee that the railway shares (being a very speculative property) should prove a good security for L.10,000, and that recourse upon it could only be had to cover a deficiency on realization of these shares. The note was not given as a security for L.10,000, in addition to such sum as the shares should prove good for. On the contrary, the security was for L.10,000 in all; although two pledges were given, with the condition that the one (the railway shares) should be realized and imputed in payment of the secured sum before recourse was had on the other (the promissory note).

"2. On the *second* question, my opinion is in favour of the Bank, and against Gordon's factor, for I find it impossible to disregard, or by construction to put another than the plain and natural meaning on the words, 'any debts due or to be due by the said John Duncan in any manner of way whatsoever.'

"3. But the contract, as constituted by this letter of 12th January 1864, was not allowed to stand unchanged. For by letters to the Bank, of date16th and 17th December 1864, Mr Gordon consented that the 650 Deeside Railway shares should be transferred "to another party," on "behalf of Mr Duncan," who was then carrying out some "financial arrangements," into the particulars of which it is, in my view of the case, unnecessary to enter. The shares were accordingly transferred by the Bank, who, in respect thereof, and as part of Mr Duncan's "financial arrangements" at that time, received the sum of L.7281, 6s. 3d., which was duly placed to his credit. This of course operated, with Mr Gordon's consent, a change in the position of matters. The Bank continued to hold the promissory note under the letter of 12th January 1864, as a security for Mr Duncan's debt to the extent of L.10,000, but they no longer held the railway shares, in terms of that letter, as a security to be primarily used in relief of that constituted by the promissory note. It is contended by Gordon's factor that Gordon was immediately entitled to the benefit of the sum of L.7281, 6s. 3d., which the Bank received for the transfer of these shares in December 1864, to the effect of reducing the amount for which his promissory note was pledged from L.10,000 to L.2718, 13s. 9d. But his letters consenting to the transfer of the shares contain no such condition, and I am unable to imply it. Whether or not the Bank would, if asked, have agreed to such a condition, I cannot say; but they certainly did not agree to it, and I can see very good reasons why they should have refused. But looking to the amount of the debt claimed by the Bank (L.2804, 15s. 8d.), success on this point, contrary to my opinion, would be of trifling advantage to Gordon's estate, unless accompanied by success in the points remaining to be noticed.

"4. The shares in question, being obtained from the Bank, were, along with other shares, pledged by Duncan to Sir David Baxter and Mr Gordon of Cairnfield, in security of loans obtained from these gentlemen, Mr Gordon of Craigmyle being a party along with him, ostensibly as a principal, but really only as a cautioner, to the deeds by which the loans were effected. These loans were repaid by means of partial payments from time to time, from the produce of the shares held by the lenders in security, and otherwise, but not to any extent by Mr Gordon of Craigmyle, or with his funds. When the repayment was complete, there remained a balance of the proceeds of the shares, amounting in round numbers to L.3000, which the Bank, as Duncan's creditor, arrested. Mr Gordon of Craigmyle being then dead, his executor disputed the Bank's right to the money, and claimed it as due to him by the terms of the deeds of security to which Mr Gordon was a party. The money was eventually paid to the Bank upon an arrangement, that the question of right should remain open for subsequent determination. It has now to be determined, the contention of the Bank being that the money is only to be credited generally (as they have credited it) in Mr Duncan's account, while Gordon's factor contends that it must all be imputed in diminution or extinction of Mr Gordon's cautionary obligation.

"I am of opinion that the contention of Gordon's factor is not well founded. The shares which produced the money were not Mr Gordon's but Mr Duncan's. The former never had any right or title to them. He was no doubt a party to the deeds by which Duncan, the owner, pledged them to his creditors, Sir David Baxter and Mr Gordon of Cairnfield, but he was in truth only a cautioner. Had he been called on to pay the debts in whole or in part, he might have demanded a transfer of the shares from the creditors, in order to operate his relief of what he had paid to them as Duncan's cautioner, but he never paid or was called on to pay any part of these debts. I must therefore hold that the balance of the price remaining after paying the debts belonged to Mr Duncan, who was the owner of them; and that, whether well attached by the Bank's diligence or not, it is applicable to the reduction of his debt generally, without any right on the part of Gordon or his estate to have it otherwise applied.

"5. The next question in the case relates to certain shares in the Bank of Otago, which Duncan transferred to the Bank in February 1866 as a security for his debt on account current. There is no question that the proceeds or value of these shares must be credited to Duncan's account, and that they have been so. But Gordon's representative maintains that the whole amount ought to be imputed in diminution or extinction of the security afforded by the promissory note, and for this contention I see no ground whatever. Nothing short of a bargain with the Bank (express or implied) could limit to their prejudice the security afforded by the promissory note under the letter of 12th

January 1864; and there is, in my opinion, no evidence of such bargain with reference to the shares of the Otago Bank. These are therefore to be regarded and dealt with as additional security to the Bank, and not as a security substituted to that extent for the security of the promissory note, which, so far as I see, remained unaffected.

"6. The only other question in the case relates to the sum of L.490, paid by Mr Duncan to the Bank on 5th April 1867, for a transfer of shares to that value of the Otago Bank, then held by the Bank in security of Duncan's account, as already noticed. The facts relative to this matter, as gathered from, and I think established by, the correspondence (pages 37, 38, 39 of the print), appear to be, that the money (supplied by Gordon's executor) was on 5th April 1867 paid by Duncan on behalf of Gordon's executor to the Bank for a transfer of the shares to be held as an investment of the executry funds; and that the Bank, although they agreed to make the transfer, and retained the money, have never made it. The money was placed to the credit of Duncan's account, as it was intended it should be, and of course to that extent diminishes the balance due upon it; and it seems clear that Gordon's estate is entitled to the Otago shares of which it was the price, or their value—for the Bank cannot have the shares and the price also. It does not appear why the shares were not transferred to Gordon's executors, who in effect bought them through Duncan; but the admitted fact is, that the bank retained and subsequently realised them along with the other shares which they held in security of Duncan's account, and that the whole proceeds have been credited in bringing out the balance now claimed. Gordon's factor does not ask damages for being disappointed of the shares for which L.490 was paid out of the estate, but only contends that their value (assumed to be L.490) ought to be deducted from the amount for which he would otherwise be liable on the promissory note, and I think the contention is well founded. But the contention will practically affect his liability for the amount claimed by the Bank, or not, according as he shall prevail or not on the other points of his case. Should it be held, contrary to the opinion which I have expressed, that his liability on the note is diminished by the sums obtained by the Bank for Deeside Railway and Otago Bank shares (other than those which ought to have been transferred to Gordon's executor) to an amount less than the balance now due on Duncan's account, he will of course benefit by the present contention—for his liability, already (according to this assumption) below the sum claimed by the Bank, will be still further reduced by L.490, and may even be thereby altogether extinguished. But if, as I think, this sum of L.490 is the only reduction of his liability to which he is entitled, he will take no benefit, for in this view he is liable for Duncan's debt to the amount of L.10,000 *minus* L.490, while the actual amount of the debt, and consequently of the claim against him on his obligation, is under L.3000. In bringing out the amount of the debt claimed from him he is of course entitled to see that all the sums realised by the Bank from their securities are properly credited. But no question is raised on this head, and indeed it is admitted that they are all credited. The value of the Otago shares immediately in question is, in fact, twice credited, as was proper in the circumstances, according to the opinion which I have expressed; for the Bank, however irregularly, got their value twice over, viz., first, from Duncan when he paid the L.490, and again on the subsequent sale of them by the Bank. To rectify the irregularity, it would be necessary to strike one of the values so received from the credit side of Duncan's account, thereby increasing the balance by that amount, and to credit Gordon's factor with the precise amount by which the debt for which he is liable was thus increased. But as this would obviously not affect the result, it would be idle to order the operation to be performed. There is, besides, this difficulty in the way, that it is impossible to ascertain the exact number of shares to which Gordon's executor was entitled in return for the L.490, and I am unable to deal with the matter more exactly than it was dealt with by the parties, viz., that the question regards Otago shares of the assumed value of L.490. I think it clear that Gordon's estate must be credited with this amount as a deduction from the obligation on the promissory note, but, as I have explained, this result is practically attained by the value of the shares in question (assumed to be L.490) being twice credited before striking the balance claimed from that estate by the Bank, the balance itself being greatly within the amount of the obligation on which the claim is made.

"Gordon's representative referred to various letters addressed from time to time to Duncan by the officers of the Bank, expressing limits which the Bank had resolved to put to his credit, urging the necessity of new arrangements with further securities, and pressing for reduction of his debt. I have been unable to see the bearing of these letters on any part of the present controversy, for they afford no evidence of any contract or undertaking by the Bank in favour of Mr Gordon of Craigmyle, which imposed on them a special duty to him as a cautioner for Duncan's debt, and by a breach of which they forfeited his security or diminished its value. Indeed, it was not contended that there was in fact any such contract or undertaking.

"Having stated my opinion on the several questions which were specially argued, I have to observe, in conclusion, that common prudence and the reasonable safety of business transactions require that a man who pledges his personal security in the familiar and very available form of a promissory note to a bank for advances made, and to be made, to a speculating friend, shall see to it that any limitation upon his obligation as it appears *ex facie* of the document which he has granted shall be distinctly expressed in some writing expressly or obviously referable to the transaction. The late Mr Gordon certainly so pledged his security for Mr Duncan, a solicitor in Aberdeen, who speculated extensively in railway and other shares, and for this reason required bank accommodation. The only limit to his obligation as debtor in the promissory note which he granted to the bank is that which is expressed in the letter of 12th January 1864, on the meaning and effect of which I have stated my opinion. This arrangement was subsequently altered by Mr Gordon's unconditional consent, given in December 1864, to a transfer of the 650 Deeside shares, which, by the letter of January, stood between him and liability on his note. He was thereafter absolutely bound for L.10,000, if Duncan should owe so much to the Bank on "his account-current

with the said Bank,' or 'any debts due, or to be due, by the said John Duncan in any manner of way whatsoever." This is the plain import, and, indeed, language, of the only document relative to Gordon's obligation by his promissory note, and made for the purpose of qualifying or limiting it. His representative now puts before the Court many hundreds of documents passing between other parties and extending over a period of years, and contends that these, when taken altogether, furnish evidence that further limitations were agreed to. I have read the documents without finding such evidence in any of them, or in all of them taken together. But I venture to doubt the possibility of thus limiting an obligation by promissory note, or of extending or varying the limitation expressed in a relative document made for the purpose.

"I am therefore of opinion that the Bank have a good claim on the promissory note against Gordon's estate for the amount of Duncan's debt, which is greatly within the sum thereby secured, and I sustain their claim accordingly. I will not, however, pronounce an interlocutor to this effect until the objections to the Bank's account have been disposed of, and the amount has been exactly ascertained."

The trustees of Mr Gordon reclaimed.

At advising—

LORD JUSTICE-CLERK—The terms of the document on which the first of the two points in this case turns are these:—"Considering that we have granted our joint promissory note to the Commercial Bank of Scotland, dated the 24th November 1863, for £10,000 sterling, payable on demand, and that the said Bank is the registered proprietor of 650 shares of £10 each in the Deeside Railway Company, we hereby explain that the said promissory note and shares are to be held by the said Commercial Bank of Scotland in security of any advances already made or to be made to the said John Duncan by draft on his account current with the said Bank, or of any debts due or to be due by the said John Duncan in any manner of way whatsoever, not exceeding the sum of £10,000, and that payment of the said promissory note is not to be called for until the said shares are realised and placed to the credit of said account." Now the question that arises is whether that obligation is limited to such advances as may appear upon the account current in the name of Duncan, or whether it extends to debts which do not appear in the account? and it is contended on the part of Mr Gordon that his obligation is limited to those debts that have been brought to the debit of the account current. I entirely concur with the Lord Ordinary in holding that the words of this document are conclusive on that matter, for the expressions here are not only "advances already made and to be made by draft on his account current with the Bank," and fall under the cautionary obligation, but, "any debts due or to be due by the said John Duncan to the said Bank in any manner of way whatsoever." It is said that the correspondence both before and after the granting of this missive obligation modified or qualified the obligation to the effect of showing that an additional account for £4500 ought not to be brought under the terms of the obligation. I think the allegation irrelevant, for we have here a proper document which is quite clear in itself. In the second place, the argument proceeded upon an entire misapprehension. It is not the first time that words of this kind have come to be construed. The case of *Liddell* v. *Sir W. Forbes & Co.*, July 1820, referred to in Bell's Commentaries, (M'Laren's edition, i. 386,) raised almost the identical question that has been raised here. The question there was whether two bills which had been granted (there being two other obligants on the bills, but which had not come to maturity when the parties in whose favour the credit was became bankrupt) could be written to the debit of the account after the bankruptcy? And the very same argument was used in this case, and there was there as here a collateral security. The Court held that, inasmuch as the customer to whom the credit was given could have entered any one of these sums himself by way of debt to the current account, the bank were entitled to do that which the customer could have done; and that therefore all sums which might have passed through this account current, and which were due by the customer to the bank, fell under the words of the obligation. In that case the words of the obligation were more specific than they are here, for there was an enumeration in the cash credit bond of the kind of debts that might be set against the accounts current; but I do not think that makes any difference, because the interpretation of the general words in this letter of obligation is quite as wide as in the bond in that case. It will be noticed that Mr Bell rather demurs to the doctrine, but says that it is now conclusively fixed. I find by looking at the Session Papers that Mr Bell himself was counsel in that case. Upon the first point therefore I am clearly of opinion with the Lord Ordinary.

On the second point I hold a very strong opinion the other way, although I find that the majority of your Lordships concur with the Lord Ordinary. My view of the position of parties and the nature of the transaction is simply this. This was a security of certain Deeside shares in favour of Gordon as cautioner, deposited with the Bank, and Gordon had stipulated that his promissory note should be qualified by the stipulation that the whole value of these Deeside shares should be realised before he was called upon to pay anything. The result was, as the Lord Ordinary holds, that he guaranteed the balance, and that his guarantee did not extend, and never was intended to extend, beyond that. It afterwards came to be for the convenience of Duncan that he should get up this security from the Bank, and in order to do that he must satisfy both the Bank itself and his cautioner Gordon, and he satisfies them both. They both consent to the proposed arrangement on the condition that £7400, which is to be advanced upon a bond to be granted by Duncan and Gordon of Craigmyle to Sir David Baxter and Gordon of Cairnfield, on the security of these shares, shall be paid to the Bank, and, as I think, paid to the Bank in extinction of the obligation, and as coming in place of the security which the cautioner Gordon granted. It is said that is not the case, and that the cautioner consented to this arrangement without any consideration for his right of relief from these shares. Anything more inequitable than to suppose that the Bank were to take this money, which represented the security of the cautioner, without the cautioner getting the benefit

of this payment to the reduction of his liability, I cannot conceive. But as your Lordships are opposed to me on this point, I need not go further into it. And therefore, on the whole matter, I suppose your Lordships will adhere to the Lord Ordinary's interlocutor.

Lord Neaves—I have arrived at the opinion in this case that the Lord Ordinary's interlocutor ought to be adhered to. His Lordship has taken a great deal of pains with the case, and turned his attention to all the important and salient points in it, and I am unable to differ from him on any of these on which he has proceeded. I need not say much on the point on which your Lordship concurs with the rest of the Court. Upon the point as to which your Lordship differs, I am far from disputing that it is a point involving some difficulty, and is certainly somewhat repugnant in its operation to strong feelings of equity that are naturally suggested; but at the same time I cannot arrive at the conclusion that this was so completely a realising of the security by the Bank as to put it in the position which the realisation of the shares in terms of the letter of obligation would have done. They did not get the market price of these shares. They were asked to make the transfer by Duncan, and did not do it at their own hand. They did what they were asked for Duncan's purposes, and with the consent of his cautioner, who seems to have been a man of benevolent heart, and very soft so far as money matters are concerned. The view of the Lord Ordinary is perhaps a harsh one, but I am unable to differ from him. I cannot compliment the parties engaged in this correspondence on their clearness of views, precision of language, or on the successful attempt to get rid of difficulties and to make things clear and explicit; but upon the whole I can come to no other conclusion than that to which the Lord Ordinary has arrived, and which is successful to the Bank upon this point. That is sufficient for the disposal of the case, for the debt now claimed is much less than the £10,000, for which, n my opinion, he is liable. My views are in conformity with the deliverance of the Lord Ordinary.

Lord Ormidale—The case is now narrowed to two questions—First, what is the meaning of the original obligation of 12th January 1864, and, secondly, what is the effect of the alteration made on that agreement in December following? Now, we had a great deal of argument in regard to the meaning of the obligation or agreement as it originally stood; but after all I do not think it was disputed — it was not seriously disputed — that if that obligation were looked at in itself it could only have one meaning—the meaning which the Lord Ordinary has given to it. But then a great deal of argument was addressed to us to the effect that we were entitled not only to look at the correspondence and negotiations of the parties previous to the agreement, but also to all letters which passed afterwards between the parties and their agents, in order to ascertain what was truly the meaning of the agreement. This appears to me to be a very dangerous and ill-founded doctrine. A written agreement such as we have here is as formal as any tested deed, and in order to admit anything extrinsic of that document to explain its meaning, it must first be established that the language of the agreement itself is ambiguous. When there is no ambiguity in the document itself it would be a perilous proceeding, and contrary to established law, to back upon prior correspondence to discover its meaning, because the principle is undoubted that parties negotiating may enter into as much correspondence as they please prior to coming to a regular agreement, but what is finally resolved upon is to be ascertained from the final agreement itself. I have therefore no hesitation in holding that it is quite incompetent to go into the previous correspondence —the correspondence preceding the agreement. The question is perhaps a little more difficult, whether we are not entitled to look at what subsequently took place in the correspondence between the parties? because the actings of parties after an agreement are frequently of the greatest importance, as showing what was their object and intention in the agreement itself. But I am not aware that we can go into the subsequent conduct of the parties in correspondence or otherwise for the purposing of controlling or altering an agreement that is perfectly clear in itself, unless indeed an alteration had been subsequently agreed to. In this very case there was, in the December following, an alteration of the agreement, and that is the second point we have to decide. But I do not think that it is competent to look at the subsequent correspondence at all for the meaning of an agreement which is in itself perfectly clear and plain. In regard to the first point, therefore, I am without difficulty of opinion that the Lord Ordinary has taken the correct view. On the second point, I confess that I participate much in the view suggested by your Lordship in the chair as to the hardship on Mr Gordon, and now upon his representatives, Mr Gordon being a cautioner. The Court is always disposed to lean towards and be favourable to the position of a cautioner —he being entitled necessarily from his position to some equities recognised by the law. Notwithstanding, however, of this feeling in favour of a cautioner, I find it impossible to come to any other conclusion than that the Lord Ordinary is right in the view which he has taken of this matter. I have been unable, notwithstanding my desire, and perhaps anxiety, to discover a loophole by which we can escape from the conclusion at which the Lord Ordinary has arrived. In December 1864 Mr Duncan proposed to enter into a transaction with the Commercial Bank of Scotland. He gets his friend Mr Gordon, his cautioner, to consent to withdraw from his original position; and then, without any communication, so far as I can see, or any new negotiation between the Commercial Bank and Mr Gordon, Mr Gordon, at the instance and instigation of Mr Duncan, writes to the effect—I consent to the seventy Deeside shares (and afterwards the whole of them) being transferred, so far as I am concerned. And he states no stipulation or condition for this concession on his part. His consent is simple and unconditional. In effect he says—"You may transfer them in any way Mr Duncan desires, for the shares belong to Mr Duncan; let them be taken out of the original obligation, and when they are taken out then my obligation stands good, just as from the beginning, for £10,000." That seems to be the result, and I cannot see any ground whatever for the Court going into subsequent transactions at all between the Bank and Mr

Duncan in regard to these Deeside shares,—the Bank being at liberty to enter into any other transaction, independent of Mr Gordon, that they pleased in regard to them. But the Bank does not neglect his interests, for I find that they stipulated that while Mr Duncan was in virtue of these shares to obtain a considerable loan, which he got from Sir David Baxter and Mr Gordon, he was to pay about £7400 into his account in the Commercial Bank, that account at the time being about £12,000. The result is that Mr Gordon and his representatives now get benefit to the extent of more than £2000 from this payment into the Bank. If there had been £12,000 got to pay in, and no other debt whatever was now due to the Bank by Mr Duncan, then the liability for £10,000 would have been cleared off, and of course Mr Duncan would not have been liable, and neither would the cautioner, but it so happens that that is not the case. There is still a debt due, and for that debt I think Mr Gordon is liable, on the grounds stated by the Lord Ordinary.

Lord Gifford—I have come to be of the opinion expressed by the majority. The obligation in this case of the cautioner Mr Gordon of Craigmyle, was a promissory note granted by him and Mr Duncan jointly to the Bank—the most absolute and pure obligation which a debtor can incur to a creditor—a promissory note to pay £10,000. But it was qualified by what I may describe as a back letter—the letter of 12th January 1864, which explains the footing on which it was granted, and the express conditions which were to be attached to the obligation. I think that the fair reading of that letter is that Mr Gordon of Craigmyle became liable to the Bank for whatever advances they should make to Duncan, or had made to him, for it had a retrospective as well as a prospective effect to the extent of £10,000. But then the Bank, at the date of the letter, held a security for Mr Duncan over 650 railway shares, and it was quite proper to make stipulations in reference to that security. I think the fair reading of the letter is that the security should be available not only to the Bank, but for the cautioner's benefit also, so that he should be entitled to say—"My obligation was not to the extent of the full £10,000, and I shall be entitled to deduction of whatever the railway shares produce on realisation—that is to say, whatever the railway shares may be worth as security made effectual by the Bank shall be deducted from £10,000 before my liability is enforced." That is the view the Lord Ordinary has taken, and I think that is a fair and equitable view of the case. If the question had arisen on the obligation as it originally stood, the Bank must have given a deduction of the value of the shares to the cautioner before claiming from him the amount of his promissory note. They were limited in two ways, first, their claim from him cannot be more than the sum Duncan is due within £10,000, and, in the second place, from what Duncan is due they must deduct the value realised for the 650 shares. But the obligation was not allowed to rest on this original footing. At the instance of Mr Duncan and the cautioner themselves an alteration was made upon the agreement, and accordingly the question before us to-day has been, what was the effect of that alteration? Now the alteration is expressed in two letters, addressed by the cautioner Gordon to the Bank. The first is dated 16th December 1864, and is to the cautioner's agent. He says "Mr Duncan is carrying out some financial negotiations." That is a very vague expression, but in the language with which we are accustomed to deal in such cases, it means that Mr Duncan is borrowing money. And these "render it necessary that he should get" (that is Mr Duncan) "70 shares of his Deeside railway stock in the hands of your bank as security for his cash credit there transferred to another party." That plainly means that Mr Duncan wants to be allowed to do what he likes with 70 of these shares, which originally were pledged along with Gordon for the £10,000 cash credit. They were transferred to another party. I read that as meaning to another party to be named by Mr Duncan, with whom he may arrange in the course of his financial negotiations. The Bank get no notice of what the arrangements are. All they are told is that Mr Duncan wants to get back in order to dispose of at his pleasure 70 of the shares which the Bank held in security of their advances to him, along with Mr Gordon of Craigmyle as cautioner, he being cautioner in the same obligation. That being what Duncan wants, the cautioner says—"I consent to such transfer being made in so far as I am concerned." He consents to the Bank giving over the shares to anybody whom Duncan might name with or without consignation, with or without value—in short on any terms the Bank liked, and he consented to that so far as he was concerned. And that is quite natural, for the Bank had to be consulted. They held these shares as security, and they might make any stipulation they like, but so far as the cautioner was concerned the shares were to be given to Mr Duncan, that he might sell them and spend the proceeds, or do what he likes with them. Mr Gordon does not object to Duncan doing what he likes with them. Then comes the letter of 17th December—"In addition to the 70 shares of the Deeside Railway Company which I have authorised you to transfer on behalf of Mr Duncan, I authorise you to transfer 580 shares." This is the exact balance, and makes 650 shares altogether. He does not add there "so far as I am concerned," because it is plainly the same letter, and these words are implied. Now, the question is, what is the meaning of the consent? I think it just means this, that whereas I, the cautioner, Gordon of Craigmyle, had 650 shares in relief of my obligation for Duncan's cash credit for £10,000, I, the cautioner, authorise you to give up to Duncan these shares, and then I shall be the sole cautioner for the cash credit for £10.000." I cannot read it otherwise. It means that he gave up all relief he was entitled to from the railway shares, and agreed to remain liable without having any relief at all. The cautioner simply consents that the Bank shall give up the real security. No doubt he could not compel the Bank to give up their collateral and real security. The Bank held two securities, and they could not be asked to give up one except upon what terms they choose—in short, payment of their debt. The Bank actually gave over to Duncan the whole of these shares. Now I do not think we need to concern ourselves on what terms. It seems they gave them upon payment of

a portion of the sums which Sir David Baxter and Mr Gordon of Cairnfield had lent on the security of these shares, being 10 or 20 per cent. under their market value. The cautioner consented that the Bank should give them up so far as he was concerned. It seems to be an absolute consent that the Bank should give up the security over these shares, and that the cautioner should remain bound as if the shares had never been in question. That is the fair reading, and I cannot read it in any other way. The whole history of the case leads to that reading. The question is, what undertaking did the Bank make—what obligation did they undertake to the cautioner? Now, with the Lord Ordinary, I think he makes no stipulation whatever. He says —"So far as I am concerned, give these shares back to their owner Mr Duncan," and not "So far as I am concerned give these shares back, provided you give me credit for them by reducing my cautionary obligation." Now, suppose a case—that instead of shares and one cautioner there had been two cautioners. That is just the same case, and one of the two co-cautioners asks to be discharged. The other says to the creditor, "You may consider my fellow-cautioner to be free; I authorise you to discharge him so far as I am concerned." No doubt the Bank might say, "We wont let any of you off." But if the Bank does discharge one of them the consenting cautioner would remain by virtual consent the sole cautioner for the full amount under which he bound himself under the original obligation. That is sufficient for the determination of the case, because Mr Gordon of Craigmyle remained cautioner to the Bank for £10,000, or any less sum than £10,000 which Mr Duncan might be indebted to the Bank, and Mr Gordon must pay the amount so incurred. I do not think there is any want of equity in it. It is perfectly just. Mr Gordon wanted Mr Duncan to have these shares, and he consented to give up the right which he as cautioner had to the equitable relief against the debtor's security which the debtor had given to the creditor, and the result is that these shares have been dealt with in another form—used for other debts—and the result is that this obligation must stand upon the terms on which it was placed when the alteration was made in the Bank's security with Mr Gordon's consent in December 1864. In short, I may say that on this case it has become clear to my mind that the cautioner cannot be relieved from this absolute and pure obligation under the promissory note to the extent of £10,000, and the debt now claimed is much below that sum. This is sufficient for the disposal of the whole case.

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Counsel for Commercial Bank (Respondents) —Mackay. Agents—Melville & Lindesay, W.S.

Tuesday, July 6.

SECOND DIVISION.

[Sheriff of Aberdeenshire.

GIBB *v.* CROMBIE.

Reparation—Damages—Statutes 7 and 8 Vict. c. 15 (Factory Act, 1844) secs. 65, 21; 13 and 14 Vict. c. 54, sec. 1; and 19 and 20 Vict. c. 38 (Factory Act, 1856), sec. 4—Minor—Contributory Negligence.

A lad, seventeen and a-half years of age, while in the course of employment at night work in a factory, was injured by the belt of the teaser at which he worked slipping off the drum and catching his arm. The body of the machine was all boxed in. In an action of damages by the lad against his employers, they alleged in defence that the pursuer had misled them as to his age, and that the accident must have arisen from his own negligence.—*Held* (1) that the defenders had not taken every precaution to ascertain pursuer's age; (2) that in employing pursuer at night work the defenders were disregarding a statutory duty; (3) that the machinery was not properly fenced in accordance with the provisions of the Factory Acts; and (4) therefore the defenders were liable in damages.

This was an action of damages at the instance of William Gibb, against J. & J. Crombie, manufacturers, Woodside, for injuries sustained by the pursuer in the factory of the defenders while in their employment. The facts are fully stated in the following interlocutor of the Sheriff-Substitute (J. Dove Wilson):—

"*Aberdeen, 4th December* 1874.—Having considered the cause—Finds that the time the injury libelled was sustained the pursuer was a young person within the meaning of the Factory Acts, and was employed, in breach of their provisions, by the defenders at night work, and at unfenced machinery: Finds that the injury happened in consequence of his being so employed: Finds that the defenders have failed to prove that the pursuer was so employed through his own fault, or that his own negligence contributed to the accident: Finds therefore that the pursuers are liable in damages; modifies the same to the sum of £100 sterling, and decerns for said sum against the defenders: Finds the defenders liable in expenses: Allows an account to be given in, and when lodged remits the same to the Auditor of Court to tax and report.

"*Note.*—I do not think that any ground is made out at common law for attaching liability to the defenders. Under the decision of Lord Chancellor Cairns in the case of *Weir or Wilson* v. *Merry & Cunninghame*, 29th May 1868, 6 Macph. (H.L.) 85, the law as to the liability of a master for accidents happening to the servant is placed on the broad and intelligible ground that the master is not liable unless it can be shewn that he was negligent in the performance of some duty which he had undertaken to the servant to perform. In the present case it is apparent that the defenders did not undertake personally to superintend the details of the machinery. It would have been impossible for them to do so. All that their servants could expect would be that the defenders should provide