tors for the debt in respect of which the reclaimer now claims to be a creditor. The reclaimer seems to have guaranteed and subsequently paid that debt, and while the petitioner knew that the reclaimer had guaranteed the debt, it does not appear, and it is not averred, that the petitioner knew that the reclaimer had paid it, and was in respect thereof his creditor (instead of Anderson & Co.) when the petition for *cessio* was presented."

Mr Fleming appealed to the Court of Session, and argued—That *cessio* should be refused, and sequestration granted, as by this means a fuller disclosure would be made of the bankrupt's state of affairs. It was contemplated by the statute that when the liabilities exceed £200 sequestration and not *cessio* should be granted. Here, therefore, there should be a sequestration, as the liabilities amounted to £647, while the assets only reached £501. Besides, in sequestrations *acquirenda* go to the creditors, while in *cessio* they do not.

Argued for the trustee, and for several concurring creditors who compeared by minute—The motion to grant sequestration should be refused, as the process of *cessio* which had been granted by the Sheriff-Substitute was much cheaper. No greater powers were obtained under the one than under the other, and, besides, by the statute founded upon, a discretionary power had been given to the Sheriff, and no good reason had been alleged for interfering with that discretion. There was really no material difference between the two processes.

Lord President—As I do not entertain the smallest doubt that the Sheriff has exercised rightly the discretion with which he has been vested by this statute, I see no reason for interfering, and am therefore for adhering to his interlocutor.

Lords Deas, Mure, and Shand concurred.

The Court refused the appeal.

Counsel for Appellant—Rhind—Watt. Agents—Sutherland & Clapperton, W.S.

Counsel for Respondents — Pearson — Moody Stuart. Agents—Henderson & Clark, W.S.

Friday, March 2.

FIRST DIVISION.

[Sheriff of Lanarkshire.

THE CLYDESDALE BANKING COMPANY *v.* M'LEAN.

Bank — Bank Cheque — Right of Drawer to Countermand.

M. drew a cheque on the Bank of Scotland in favour of C., for his accommodation, to enable him to reduce an overdraft on his account with the Clydesdale Bank. C. paid the cheque into his account the same day, and it was placed to his credit, and the overdraft was *pro tanto* reduced. Two days afterwards M. stopped payment of the cheque at the Bank of Scotland.

Held that having given the cheque for the purpose of being used as cash in reducing C.'s balance with the Clydesdale Bank, he was not entitled in a question with that bank to stop payment of it, and was liable to make good its amount to that bank.

On Saturday the 14th January 1882 John M'Lean, wine and spirit merchant, Main Street, Gorbals, Glasgow, granted a cheque on his account with the Bank of Scotland for £265, 2s. 6d., crossed blank, in favour of D. B. Cotton, bonded storekeeper, West Campbell Street, Glasgow, or his order. The cheque was endorsed by Cotton to the Clydesdale Bank, Limited, the same day (Saturday), and the amount was placed to the credit of his account at the Argyle Street branch of that bank. His account was at the time largely overdrawn, and the cheque was applied in reduction *pro tanto* of the overdraft. On the cheque being presented by the Clydesdale Bank to the Bank of Scotland payment was refused on account of M'Lean's instructions. This was an action in the Sheriff Court of Lanarkshire at Glasgow, at the instance of the Clydesdale Bank against M'Lean, to recover payment of the amount contained in the cheque, on the ground that the bank had suffered loss and damage to the amount thereof.

The defender (as the record stood after an amendment allowed in the Sheriff Court) averred that Mr Hugh Laird, the agent of the pursuers at their Argyle Street branch, was in the habit of allowing Cotton to overdraw his account on the understanding that the account should be squared every Saturday, and that on the occasion in question Mr Laird had fraudulently and in collusion with Cotton represented to him that the overdraft would be allowed to Cotton on the Monday as usual, and had induced him, as an accommodation both to Cotton and Laird himself, who was desirous of squaring the accounts for exhibition at the head office, to grant the cheque in question, which to the extent of £250 was without value. He further averred that on the Monday the promised overdraft was not allowed, but Laird was suspended by the officials of the bank. Further, he averred that the pursuers were not onerous holders of the cheque, since they did not pay the amount of it to Cotton.

After a proof had been led, the Sheriff-Substitute (Lees), on 14th July 1882, pronounced this interlocutor:—"Finds that on Saturday, 14th January last, the defender granted to the witness W. B. Cotton a crossed cheque drawn in his favour on the Bank of Scotland for the sum of £265, 2s. 6d., said cheque being to the extent of £250 an accommodation to Cotton, granted to enable him to reduce the balance at his debit with the pursuers, and in the expectation that, on the following Monday, Cotton would be allowed, as he frequently had been, to overdraw his account, and with the overdraft repay the defender and other friends who had accommodated him with cheques on the Saturday: Finds that Cotton, on receipt of the defender's cheque, endorsed it to the pursuers, and gave it to them as cash, and the contents being put to his credit, the balance at his debit was thereby reduced to £28, 15s. 5d.: Finds that on Monday forenoon the pursuers passed the cheque through the clearing-house—that is to say, one of their clerks, in conjunction with a clerk of the Bank of Scotland, ascertained

the difference in amount between the values of the cheques payable between the two banks, and placed the difference to the credit of the bank having the preponderance in value: Finds that on Monday afternoon the defender, having learned from Cotton that the pursuers' agent with whom he dealt had intimated that the overdrawing could no longer go on, directed the Bank of Scotland not to honour the cheque, and that in consequence the pursuers were not credited by the Bank of Scotland with the amount contained in it: Finds that the pursuers have thus suffered loss to the amount of the value of the cheque by the act of the defender in stopping payment of it: Finds in law, that the pursuers having become in good faith onerous endorsees of the cheque in question before the defender stopped payment of it, cannot thereby have their rights against him for payment of it prejudiced: Therefore repels the defences; and decerns against the defender in terms of the prayer of the petition: Finds him liable to them in their expenses; allows an account thereof to be given in; and remits," &c.

"*Note.*—. . . . I think if a drawer could stop payment of his cheque, no matter into whose hands it had come, or through how many it had passed in reliance on his name, the result on mercantile transactions would be seriously prejudicial.

"But it is inexpedient for me to offer my humble opinion on a point in regard to which every business detail and every relative legal principle has been most carefully considered by the Courts of Exchequer and of Appeal in England. The case of *Currie* v. *Misa*, 1875, 10 L.R. Exch. 153, is directly in point. There the defender granted a cheque to Lizardi, who gave it to his bankers—the pursuers—and they having put it to his credit against heavy advances, passed it through the clearing-house. The same afternoon the defender, finding that Lizardi was insolvent, stopped payment of the cheque, and his (the defender's) bankers cancelled timeously the credit they had given to the pursuers in the clearing-house. In these circumstances seven out of the eight Judges before whom the case was successively debated held that the pursuers could claim the contents of the cheque from the defender. The rubric of the case bears that 'the title of a creditor to a negotiable security given to him on account of a pre-existing debt, and received by him *bona fide*, and without notice of any infirmity of title on the part of the debtor, is indefeasible, whether the security be payable on a future day or on demand.' That case therefore rules the present one.

"It is no doubt true that I am not necessarily bound to follow the decision of an English Court. But where our own Supreme Court has expressed no opinion on the point, I think it my duty, alike out of deference to the eminent Judges who have decided the point in England, and to the obvious inexpediency of attempting to set up a different rule in Scotland, to follow the decision given in *Currie's* case."

On appeal the Sheriff (CLARK), on 17th October 1882, adhered.

The defender appealed to the Court of Session, and argued—The cheque in question was crossed, and therefore the Clydesdale Bank was in the same position as their customer; the drawer was entitled to stop payment in a question between him and the payee, and therefore he was entitled to stop payment in a question with the bank—*Currie* v. *Misa*, 10 L.R. Excheq. 153, *aff.* 1 L.R. App. Ca. 554; *Paul* v. *Thain*, March 11, 1876, 3 R. 586; *Waterston* v. *City of Glasgow Bank*, Feb. 6, 1874, 1 R. 470; *Macdonald* v. *Union Bank*, March 29, 1864, 2 Macph. 963; *Shearer* v. *Alexander*, Feb. 23, 1875, 12 Scot. Law Rep. 333; *De la Chaumette* v. *The Bank of England*, 9 B. and Cr. 208.

The pursuers replied—The defender having granted a cheque, which is a negotiable instrument, he is bound to pay the amount to the pursuers, who are holders for value—*Misa, supra cit.*; *Watson* v. *Russel*, 3 Best & Smith, 35; 31 L.J., Q.B. 304; *Poirier* v. *Morris*, 2 E. & B. 89; *Whistler* v. *Forster*, 32 L.J., C.P. 161.

At advising—

LORD PRESIDENT—The view that I take of this case is a very short and simple one, and the facts on which it rests may be stated in a few words.

There was a certain person named William Binnie Cotton, a bonded store-keeper in Glasgow, who kept an account with the pursuers' bank at their branch in Argyle Street, where Mr Hugh Laird was their agent. Cotton was in the habit of overdrawing his account, and it was overdrawn at the close of the week ending on Saturday the 14th January 1882. He had before that received a broad hint from the officials at the Argyle Street branch that he must make some payment to reduce the amount of the overdraft, and to enable him to do this he went to several of his friends, and amongst others to the defender M'Lean, and asked them for accommodation, explaining at the same time that the object he had in view was to reduce the overdraft on his account at the pursuers' branch bank.

Mr M'Lean, the defender, being in the full knowledge of the object of Cotton's request, gave him a cheque for £265, 2s. 6d. It appears that M'Lean was Cotton's debtor to the extent of £15, 2s. 6d., but to the extent of £250 the cheque was granted for Cotton's accommodation; and M'Lean knew that the cheque was to be given by Cotton to the pursuers for the purpose of reducing his debit balance, or, in other words, that it was to be used as cash by the bank. He assented to that arrangement, and gave the cheque with the intention and for the purpose of being so used. In point of fact, this along with some other cheques which had been obtained by Cotton were handed in on Saturday the 14th of January, the amount being placed to the credit of Cotton, and the balance so reduced. After this, M'Lean, on the Monday following, stopped payment of the cheque, which was payable at his own bank, the Bank of Scotland, and in consequence the pursuers failed to obtain the amount. They now sue M'Lean for the sum contained in the cheque, which they say was the damage sustained by them through the wrongful conduct of the defender. The Sheriff and the Sheriff-Substitute have given decree for the amount, and I think that they are right. M'Lean came under an agreement with Cotton that the cheque should be treated as cash, or that the cheque should be cashed as in a question with Cotton's bankers, and having come under such an agreement I do not think he was entitled to stop the cheque. No doubt he had the power

to stop the cheque at the Bank of Scotland, for the Bank of Scotland was bound to follow his instructions, but I think that in stopping the cheque he was doing a legal wrong and acting in violation of his agreement. If the defender had been able to instruct by evidence the averments he has placed on record, the case would be very different, for he says that he was induced to grant the cheque by the fraudulent representations on the part of Cotton and Laird, the agent at the Argyle Street branch, that this was a mere form to enable Laird to present the accounts of the branch to the head office in a sufficiently favourable state to escape notice, and that the overdraft which existed would be restored on the Monday morning, and that therefore the cheque would then be given back or the amount repaid. I agree with the Sheriff-Substitute and the Sheriff that these allegations are not only not proved but are disproved. There is no ground for saying that such representations were ever made, or that there was ever any undertaking on the part of the bank that the overdraft would be continued the next week.

On this simple ground I think that M'Lean is liable for the amount of the cheque, and that he was not entitled to stop payment of it.

Lords Deas and Mure concurred.

Lord Shand—I am also of opinion that the judgment of the Sheriff and Sheriff-Substitute ought to be affirmed.

The defender granted the cheque or draft on his bank account for £265, 2s. 6d. in favour of Mr Cotton or his order, to the extent of £250 without any consideration, as a favour and accommodation to Mr Cotton, for the purpose of enabling him temporarily to reduce the amount standing at his debit in his current account with the pursuers the Clydesdale Banking Company. The cheque having been so granted to the extent of £250 gratuitously, and not for any onerous consideration, the defender was in my opinion entitled to recal it, or to stop payment of it to that extent, so long as it continued in Mr Cotton's hands or subject to his control. But as soon as it was endorsed and delivered by Mr Cotton to his banker or to any third party for onerous causes, the defender's right to stop payment of it ceased. It is proved that on the day on which it was granted, viz., Saturday the 14th January 1882, the cheque was endorsed and delivered to the pursuers by Cotton, to be placed to the credit of his account-current with them, which was at that time overdrawn to the extent of about £1000, and that the amount was on that day placed to his credit accordingly. The defender in these circumstances was not entitled, in a question with the pursuers, the holders of the cheque, to stop payment of it, as he did, on Monday the 16th of January, and as his bankers by his instructions refused payment he must now pay the amount with interest.

It was maintained that as the pursuers made no advance to Cotton on the faith of or in return for the cheque endorsed and delivered to them by him, they were in no better or higher position than Cotton himself, and that the defender was therefore entitled to stop payment of the cheque when he did so, even in a question with them. But this view is unsound. It was in my opinion enough to make the transaction onerous that Cotton was largely indebted to the pursuers; and the pursuers having received the cheque in reduction of the balance due to them, became not gratuitous but onerous holders of it. This is, I think, clearly established by the judgment of the Court in the case of *Misa* v. *Currie* in the Exchequer Chamber and House of Lords. The Exchequer Chamber there held that a creditor to whom a negotiable security is given on account of a pre-existing debt, holds it by an indefeasible title, whether it be one payable at a future time or on demand; and although the learned Judges in the House of Lords found an additional ground of judgment, opinions in accordance with the view of the Exchequer were expressed. The same argument was presented in another form when it was maintained for the defender, on the authority of the case of *The Clydesdale Bank* v. *The Royal Bank*, 3 R. 587, that the pursuers in presenting the defender's cheque to his bankers for payment were merely Cotton's agents, and that as payment of the cheque might be stopped as against Cotton, so payment might also be stopped as against his agents, the pursuers. I have already stated the answer to this argument, which appears to me to be conclusive. The pursuers became themselves onerous holders of the cheque when they accepted it to be placed to the credit of their debtor's account, and credited it accordingly. Had the balance on Cotton's account-current been in his favour, or had his account been squared when he delivered the endorsed cheque to the pursuers through their agent, then I think the pursuers would have been his agents only for the collection of the amount of the cheque, and in that case I do not doubt that the defender, having the right to stop payment of the cheque as against Cotton, would also have had the same right as against the pursuers as Cotton's agents. But if the pursuers had advanced money on or in return for the cheque, and so acquired it for value, they could no longer in my opinion be regarded as agents only for Cotton. They would in that case have become themselves onerous holders or purchasers of the cheque; and so also in the actual case, as disclosed in the proof, the pursuers were not agents for Cotton, but onerous holders for themselves, having received the cheque in reduction of Cotton's debt to them, and I shall only add on this point, that if it can be represented successfully that the case of *The Clydesdale Bank* v. *The Royal Bank* conflicts with this view, I am humbly of opinion that its authority may be regarded as questionable, particularly with reference to the grounds of decision, both in the Exchequer Chamber and the House of Lords, of the case of *Currie* v. *Misa*, which does not appear to have been cited in the argument, and was decided on the appeal in the House of Lords some months after the case of *The Clydesdale Bank* had been disposed of in this Court.

I need scarcely say that I agree in thinking there is no evidence to support the defender's averment of an undertaking by the pursuers through their agent to honour Cotton's draft on the 16th to the extent of his payments on the 14th of January, or of any fraudulent representation on that subject. I feel bound to say, however, that even if the agent Laird had given any such undertaking or made any such representation, it would not, in my opinion, have availed the defender to the effect of enabling him to

escape liability for the present claim, or affected the bank, for on the defender's own account of the matter he became a party to a scheme for deceiving the officials at the head office of the bank as to the state of Cotton's account; and in such circumstances the bank would not be bound by their agent's undertaking or representation.

For these reasons I think the judgment should be affirmed.

The Court found that the pursuers had suffered loss to the amount of the value of the cheque by the act of the defender in stopping payment of it, and refused the appeal.

Counsel for Pursuers — Trayner — Readman. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defender — Campbell Smith — Rhind. Agent—William Officer, S.S.C.

Friday, March 2.

SECOND DIVISION.

[Sheriff of Renfrew and Bute.

M'GREGOR *v.* ROSS & MARSHALL.

Reparation—Negligence—Machinery Left in a Public Place—Injury to Infant—Contributory Negligence.

A punching and clipping machine was brought to a dock quay to be used in repairing a vessel lying there. Being found, early in the day on which it was brought, to be out of gear and of no use for the purpose for which it had been brought there, it was left standing on the quay, but was securely tied with a rope, in such a way as to prevent the machinery being moved. After dark, on the evening of the same day, and after the rope had been removed by some person unknown, several boys were engaged playing with the machine by turning the handle and setting the wheels in motion. The youngest, a child of four years old, had his arm severely injured by being caught between two of the wheels. In an action of damages by the boy's father against the owners of the machine, founded on alleged negligence on their part in not sufficiently guarding and securing the machine—*held* (*diss.* Lord Craighill) that the defenders had secured the machine in such a way as to make it reasonably safe against accidents unless the fastenings were deliberately interfered with, and were therefore not liable.

Observations (*per* Lord Justice-Clerk) on the distinction between the circumstances of the case and those of the case of *Campbell* v. *Ord & Maddison* (Nov. 25, 1873, 1 R. 149).

John M'Gregor, rivetter in Greenock, raised this action against Ross & Marshall, forwarding and shipping agents there, for £1000 as damages on account of an accident to his son Duncan M'Gregor, a boy of four years old, by having his arm caught between the wheels of a punching and clipping machine belonging to the defenders, and so injured that it had to be amputated between the elbow and the wrist. He alleged that this injury had been sustained by his son in consequence of the fault of the defenders in leaving the machine in question on a public quay without sufficient precautions for the protection of young people who might be injured by touching it.

The defenders averred that they had sufficiently tied the machine, and that the pursuer's son or some one else had cut the fastenings. They pleaded that having duly and sufficiently tied it, they were entitled to absolvitor; and also pleaded contributory negligence on the boy's part, and on that of the pursuer in allowing him to be at play at the place in question.

The material facts of the case, as ascertained at the proof, were as follows:—On the morning of 12th January 1882—the day on which the accident happened—the machine in question was brought down to a quay in the West Harbour of Greenock, to be used in the course of some repairs which the defenders were then making on a lighter lying there belonging to them. It was placed about seven or eight feet from the edge of the quay. It was, however, found, early in the forenoon, that the punching and clipping apparatus were out of gear, and it was left standing in the same place unused throughout the day. In its then condition it was described by a partner of the defenders' firm in his evidence as "just equivalent to an ordinary crab-winch." A witness who was employed as a carpenter on board the lighter, deponed that, in consequence of having seen children playing about the machine during that day, he, just before leaving his work at five o'clock p.m., secured it with a rope.—"I tied the rope as follows:—A clove hitch and a half hitch round the pinion-wheel—two coils; twice round the stand of the pinion-wheel and a half hitch; and then fastened the rope to the wheel, lower down, with a clove hitch and a half hitch. That was a very secure fastening—as secure as could be tied. The rope, which I got on the deck of the lighter, was an inch and a half in circumference. I tied the machine as tight as ever I could." He was corroborated in this by two other witnesses. The place where the machine was standing was one which children very frequently used as a playground. It was quite open to the public, and was 50 yards from the foot of the stair leading to the pursuer's house. Shortly after six o'clock the boy Duncan M'Gregor left the house (as his parents believed) to play on the stairhead, but without his parents' knowledge he went out with some other and older boys on to the quay. In about a quarter of an hour later he was brought home with his hand crushed. Two workmen passing along the quay about that time heard children screaming about the machine, and on coming up to it found the child with his hand caught between the cog-wheel and pinion-wheel of the machine, when they assisted to extricate him and take him home to his parents. Three boys, one an elder brother of the child hurt aged eight, another aged ten, and a third aged seven and a-half, deponed to having gone to the machine at that time. One of them —the youngest of the three—admitted having seen a rope on the machine when they came to it, but did not see anyone take it off. The other two did not see any rope. All three agreed that when they began to play with the machine the wheels were free; and they amused themselves by "ca'ing" round