the mortgage held by the testator over the undertaking belonging to the Paisley Corporation. That mortgage is neither gas shares nor has it been declared to be a statutory representative or equivalent for gas shares. It is nothing more than a security which the testator chose to take.

When she parted with her shares, or rather with the annuity which was the equivalent of these shares, the subject of the legacy perished, and therefore in my opinion the legacy is adeemed.

LORD LEE—The question in this case arises upon a direction in the trust settlement of the late Mrs Mary Barbour or Mitchell "to assign and transfer to my niece Anne Jane Barbour the shares standing in my name in the Paisley Gas Company."

It appears that at the date of her settlement (2nd August 1884) there were no "shares" in the Gas Company standing in the testator's name. The Act of 1870 narrated in the case had extinguished the shares, and substituted certain annuities. These were declared to be conveyed or affected by any deed or will disposing of or affecting such shares. But strictly speaking there was nothing standing in the name of shares in Mrs Mitchell's name. She was merely a creditor in a gas annuity due by the Corporation.

The question is, whether the subsequent redemption of this annuity in January 1886 under another clause of the same statute, and in terms of a circular issued by the Corporation proposing to allow the redemption money to be invested as a loan secured upon "the several rents, charges, and revenues (except the gas guarantee rate) accruing to the Corporation from the lands, property, and works vested in them under the authority of the said Act"—viz., the Act under which the Corporation acquired the gas works and gas undertaking—together with the testator's acceptance of that proposal, so completely extinguished the subject of the bequest that the legacy must be held to have been adeemed.

There is no doubt of the general rule of law that if the subject of the bequest ceases to exist the legacy is at an end by ademption. This may occur even without evidence of intention.

I think that in this case the question of ademption depends upon the intention of the testator. For unless it can be made clear that the subject of the bequest, as viewed by her, was brought to an end there is no ademption.

The testator's position at the time of her bequest was that of a creditor of the Corporation for an annuity security upon the gas undertaking, and that the only change which was effected was that she became in respect of her right to the redemption money a creditor in a loan for the capital value of the annuity secured in the same way.

It was not a change from the position of shareholder into that of creditor. Nor was it from the position of creditor to that of shareholder. And on the whole I think that the continuity of the subject of the bequest was sufficiently preserved to entitle the legatee, in the absence of any indication of intention to the contrary, to claim the testator's interest in the Gas Corporation loan as representing the annuity which was declared to be affectable by any deed or will disposing of the original shares.

I am of opinion therefore that the legacy was not adeemed, and that the Court should answer the first part of the question stated in the case in the affirmative.

The Court pronounced this interlocutor:—

"The Lords are of opinion that the party of the second part is entitled, and that the parties of the first part are bound to assign and transfer to the second party the mortgage for £320."

Counsel for the First Parties—Deas. Agents—Fodd, Simpson, & Marwick, W.S.

Counsel for the Second Party—Young. Agents—Winchester & Nicolson, S.S.C.

Wednesday, July 3.

SECOND DIVISION.

WYLIE & LOCHHEAD *v.* HORNSBY.

Cautionary Obligation — Guarantee — Signature upon Blank Sheet of Paper — Proof — New Firm.

A received a blank sheet of paper with a sixpenny stamp upon it from his son, with the request to sign across the stamp. He did so on the understanding that his son was to fill in simply a guarantee for £500. The son filled in the guarantee for £500 and added an obligation to pay certain premiums of insurance upon his life of which his father knew nothing. *Held* that A having given his son no authority to fill in this obligation was not bound to pay the premiums.

Observations upon sec. 7 of Mercantile Law Amendment Act.

James Hornsby junior, son of James Hornsby, builder, Gatehouse of Fleet, Kirkcudbright, was cashier and clerk to Messrs Wylie & Lochhead, Glasgow. He left that employment in 1873 to become a hotel keeper in Oban, and got advances in cash and furnishings from the firm. In security for these advances his father gave the following letter of guarantee—written by his son and signed by himself—to Messrs Wylie & Lochhead—"*Glasgow*, 14*th May* 1873.—Gentlemen,—We hereby guarantee payment of Six hundred pounds sterling by James Hornsby, Oban. Our liability will be held in equal proportions of that amount, and will cease when his debt will have been reduced at 31st December of any year by the said sum.—Yours respectfully," &c. It was intended that a Mr Robert Bell should also sign, but this was never done.

In the following year, 1874, James Hornsby junior removed to a hotel at Gairloch, and agreed to obtain from his father a letter of guarantee for £500 in favour of Wylie & Lochhead, who had made further advances, in lieu of the previous letter of guarantee which was cancelled. He accordingly handed to Wylie & Lochhead the following:—"*Gatehouse*, 31*st January* 1874.—Gentlemen,—I hereby guarantee payment of £500 stg. by my son James Hornsby, of the Gairloch Hotel, and

the payment of premiums of insurance on his policies with the Scottish Widows Fund and Scottish Amicable Societies, assigned to your firm. But my liability under this guarantee will be reduced according to the amount of security furnished by Mr Robert Bell, brick-builder, or any other party you may accept in his stead. —I am, yours obediently, JAMES HORNSBY."

Upon 3rd February 1874 James Hornsby junior granted an *ex facie* absolute assignation to John Wylie, sole partner of Wylie & Lochhead, of two policies on his life, one with the Scottish Widows Fund, and the other with the Scottish Amicable Society.

James Hornsby senior paid the sum of £500 for his son, but never paid any of the premiums of the policies of insurance.

By agreement dated 13th August 1883 John Wylie assigned all the property, assets, and goodwill of the firm of Wylie & Lochhead to the company of Wylie & Lochhead, Limited. This assignation contained no mention of James Hornsby senior's letter of guarantee, but on 28th July 1887 John Wylie specially assigned to the new company the two policies of insurance upon the life of James Hornsby junior.

In July 1887 Messrs Wylie & Lochhead raised an action in the Sheriff Court at Kirkcudbright against James Hornsby senior, to have him ordained to pay to the pursuers the sum of £47, 7s. 11d. stg., the premiums of the policies of insurance for the years 1886 and 1887 with interest, and further, to free and relieve the pursuers in all time coming of the payment of the periodical premiums to become due on the two policies of insurance for which the defender was liable.

The defender averred that "James Hornsby junior sent to the defender a blank letter stamped with a sixpenny stamp, and requested him to sign same, stating that he (the son) would see it properly filled up. Believing that the blank letter would be filled up in the same terms or to the same effect as the letter founded on by pursuers [of 14th May 1873, *supra*] the defender signed the same, and sent it to his son. It was a considerable time thereafter that defender got to know that above his signature had been inserted an obligation to pay premiums on some policies of insurance on his son's life."

The defender pleaded—"(1) The letter of guarantee in question was not granted to pursuers, nor transferred to them with defender's consent, and they cannot found thereon. (2) The alleged obligation for premiums is subsidiary to payment of the sum of £500, and that sum being paid, the obligation falls therewith. (3) The letter, so far as consisting of an obligation to pay insurance premiums, is not the act of defender, and does not bind him."

Section 7 of the Mercantile Law Amendment Act (19 and 20 Vict. c. 60) provides that "no guarantee, security, cautionary obligation, or assurance, granted or made after the passing of this Act to or for a company or firm . . . or to or for a single person trading under the name of a firm, shall be binding on the granter or maker of the same in respect of anything done or omitted to be done, after a change shall have taken place in any one or more of the partners of the company or firm to which the same has been granted or made . . . unless the intention of the parties that such guarantee, security, cautionary obligation . . . shall continue to be binding notwithstanding such change shall appear either by . . . express stipulation, or by necessary implication from the nature of the firm or otherwise."

The Sheriff-Substitute (DICKSON) assoilzied the defender on the ground that there had admittedly been a change in the firm of Wylie & Lochhead, and that the letter of guarantee was not enforceable by the new firm in consequence of section 7 of the Mercantile Law Amendment Act.

The Sheriff (MACPHERSON) adhered.

The pursuers appealed to the Court of Session, which ordered a proof before the Sheriff-Substitute.

A proof was taken, at which the defender deponed that before 1879 he had paid off the £500; that it was not until that year that he knew his son's life had been insured, and that he never paid anything towards the premiums of insurance. He also deponed that shortly after the beginning of 1874 he received from his son a sheet of blank paper with a sixpenny stamp upon it, and a slip asking him to sign his name through the stamp; that his daughter had not wished him to sign, but that his wife (now dead) had said, "Just sign it, for James would never do anything that would injure him," and that he had signed. His daughter corroborated him as to the signing of the blank paper. His son was not called as a witness, and there was no contradictory evidence.

The Sheriff-Substitute pronounced the following interlocutor:—"Finds that James Hornsby senior by his letter of guarantee of 31st January 1874 guaranteed to the then existing firm of Wylie & Lochhead 'payment of £500 by his son, and the payment of premiums of insurance on his policies with the Scottish Widows' Fund and Scottish Amicable Societies assigned to your firm': Finds that by assignation the said James Hornsby junior assigned on 3rd February 1874 to John Wylie, sole partner of the said then existing firm of Wylie & Lochhead, the said two policies of assurance, and all bonuses which had been or might be declared upon them: Finds that the said John Wylie by deed of assignation dated 28th July 1887 assigned to Wylie & Lochhead (Limited) the said two policies of assurance, as they had been assigned to him by the said James Hornsby junior: Finds that James Hornsby junior came under no obligation to pay the premiums that should fall due after the date of the assignation to John Wylie: Finds that their being no obligation upon James Hornsby junior to pay these premiums, there is no principal obligation to which the letter of guarantee, so far as regards the payment of premiums, can apply, and that therefore no cautionary obligation was entered into by James Hornsby senior for payment of the premiums: Therefore assoilzies the defender from the conclusion of the action: Finds the pursuer liable in expenses of process, &c.

"*Note.*—This action is brought against James Hornsby senior as cautioner under his letter of guarantee. There are some singular circumstances attending the case. The letter of guarantee proceeds upon the narrative that the policies had been assigned, but the date of the assignation is three days subsequent to the letter. The defender says that he never knew that the

policies of assurance were in existence, and could have had no intention of guaranteeing the payment of the premiums. He says that he signed the paper upon which the letter of guarantee has been written before anything was written upon it. But by signing it blank as he did, he put himself in the power of the person who filled it up, and I do not think that his ignorance of the policies, or of the cautionary obligation which was introduced regarding payment of premiums, could have protected him against the present action if James Hornsby junior had obliged himself to continue the payment of the premiums. But he came under no such obligation; and the defender can only be held to have guaranteed that obligation if it existed."

The Sheriff (VARY CAMPBELL) on appeal adhered.

The pursuers appealed to the Court of Session, and argued—The Sheriffs were wrong in viewing this as a cautionary and subsidiary obligation. It was a primary obligation—*Tait* v. *Wilson*, 8th December 1836, 15 S. 221, 1 Robinson's App. 136. The case of *Jackson* v. *M'Iver* was not in point. There were here virtually two letters of guarantee in one; one guaranteeing the sum of £500, and the other the keeping up of the premiums on the policies. This guarantee was an asset of the old firm, assignable and assigned in virtue of the assignation of 1883 to the new company, and enforceable by them.

The respondent argued—(1) This was a cautionary obligation, subsidiary to the son being bound, but the pursuers had failed to take the son bound to keep up the policies, and therefore their claim against the father fell—Bell's Prin. 251; *Jackson* v. *M'Iver*, 6th July 1875, 2 R. 882. (2) The pursuers had no title to sue. Even if the guarantee had been assigned to them, which it was not, they could not have enforced it. It was not assignable. There was *delectus personæ* as regards John Wylie. The new company was a different *persona*—*Thomson's Trustees* v. *Thomson*, 22d February 1889, 16 R. 517. Their position was bad even at common law; it was certainly so under the Mercantile Law Amendment Act.

At advising—

LORD YOUNG—This is an action at the instance of Wylie & Lochhead, and is based upon a document which purports to "guarantee payment of £500 sterling by my son James Hornsby of the Gairloch Hotel, and the payment of premiums of insurance on his policies with the Scottish Widows' Fund and Scottish Amicable Societies assigned to your firm," and to be signed by James Hornsby senior. The action concludes for payment of the sum of £47, 7s. 11d., with interest thereon from the time the same became due as regards the past, and as regards the future "to free and relieve the pursuers in all time coming of the payment of the periodical premiums to become due" on the two policies of insurance. We find from the account produced that the premiums immediately sued for are those for the years 1886 and 1887. We know nothing of those for the years 1874 to 1886 except only that none of them were ever paid by James Hornsby senior, the person here sued as defender.

The pursuers aver that in February 1874 the firm of Wylie & Lochhead as then existing, for it was a different firm from that which now exists, obtained from James Hornsby junior an assignation of two policies of insurance on his life. It is a simple absolute assignation by Hornsby to John Wylie, then sole partner of Wylie & Lochhead. It contains no qualification and no statement that it is in security of a debt, but it is familiar law that if a creditor obtains such an assignation absolute in its terms, and with no reference to any debt, although granted in security of a debt, he may use such an assignation, if that was the honest meaning of the arrangement between the parties, as a security not only for the debt existing at the date of the assignation but also for debts subsequently incurred, and the pursuers' case is that John Wylie obtained this assignation from Hornsby as a security for debt of an indefinite amount then existing or that might thereafter be incurred.

When the case first came up in the Sheriff Court the fact was noted that the pursuers were a limited company, and it was pleaded that the guarantee sued on was not available to them as being a cautionary obligation given to a different firm, and the Sheriffs gave effect to that plea. It appears that in 1883 John Wylie transferred his whole business with the assets and goodwill to the present registered company now suing, but without any special mention of the policies of insurance assigned to him by Hornsby in 1874. It appears distinctly enough, however, that the pursuers are relying on the assignation in 1874 by Hornsby to Wylie, and that not only for the debt then due to John Wylie, but for any debt due to them or him, for they maintain that all Wylie's debts have been transferred to them, the limited company, as creditors therein. They point also to a special assignation of the policies by Wylie to them, dated 28th July 1887. Their case therefore is that as creditors in the debt originally due to John Wylie and not yet paid, and also as assignees of the policies, they are entitled to make them available for their security.

Now, I think that is a sound view in law, and entirely excludes that on which the Sheriffs originally decided the case. We recalled the Sheriff's interlocutor and allowed a proof, which we have now before us, and which we must consider.

Assuming that the statutory difficulty is out of the pursuers' way, I have to point out that the document at the base of the action is the letter of guarantee I have already quoted. That document is not alleged to be holograph, and it is certainly not probative. It requires therefore to be proved, and we must necessarily attend to the proof. There is here some conflicting evidence, or, perhaps I should say, there are conflicting considerations upon the evidence.

James Hornsby senior is *ex facie* of the document the obligant, but he distinctly says in his testimony that it was a blank sheet stamped which was sent to him by his son, Wylie & Lochhead's debtor. He says that his daughter advised him not to sign it, but his wife said, "Just sign it, for James would never do anything that would injure him," and that he signed it. His wife is dead, but his daughter corroborates him, and is equally distinct in her evidence. Now, if that evidence is true, undoubtedly this document, which is the ground of this action, was signed

blank. These are the only two living witnesses, and if their evidence is not true it is deliberately false, because it cannot be the result of error; but I am satisfied of the truth of their evidence, and the result consequently is that the document was signed blank, and that it was not written when the signature was adhibited.

That would be sufficient for its reduction had it been a tested instrument, but it was not, and it was not necessary it should be, and so I proceed to inquire whether the writing over the signature was authorised by the defender.

There are certain cases in which authority to write an obligation above a blank signature is implied. The most familiar case is that of a party putting his name across a bill stamp which authorises the person getting his signature to fill in any amount which the bill stamp will carry, and that will be conclusive in favour of a *bona fide*—that is, an onerous holder of the bill. We need not consider the ground on which that is the law, but it is fairly established. But I know of no authority entitling a man to fill in an obligation above a signature on an ordinary sixpenny stamp, and the person taking such a document, neither holograph nor probative, must at all events prove not only the genuineness of the signature, but also that it was adhibited to the document as it stands, or that authority was given to write over the signature what is written over it. Here the policies were about to be assigned by the son. Was there any authority for him to write a guarantee on his father's part to pay the premiums? The evidence is all one way. Hornsby senior says that he gave no such authority, that he was in ignorance about the policies altogether, and he must have been ignorant of any transfer of these policies to Wylie & Lochhead, for at the date of the supposed guarantee, which is 31st January 1874, there had been no such assignation.

Is there then a guarantee good in law to Wylie & Lochhead that the premiums would be paid upon the policies of insurance assigned to them on 3rd February 1874, and held as a general security for an indefinite amount of debt past or future? I am of opinion there is not. They have not proved there was any authority given—indeed it is proved there was no authority given by the defender to his son to write this guarantee over his signature. The son, who might have been able to give evidence, is not a witness, and there is nothing to show he had any authority whatever to give such a guarantee.

This is not such a document as an ordinary man of business would have founded upon, and I am not sorry we cannot make out of it a guarantee to pay the premiums of the policies of insurance which the pursuers hold.

It is further noteworthy that during fifteen years James Hornsby senior has declined to pay any of the premiums, and has consistently maintained the position he now takes up. I may also note that although there was an assignation in 1883 from John Wylie to the new firm of Wylie & Lochhead of all the stock, the goodwill, &c., there was no assignation of this document, which had been repudiated. There was indeed an assignation to the new company in 1887 of the policies, but we should have expected an assignation of this alleged guarantee if it was intended to belong to and be enforced by the new company.

Upon the whole matter I am prepared to find, in point of fact, that this paper was signed blank, and that the defender did not guarantee the payment of the premiums of the policies, and that therefore he must be assoilzied from the conclusions of the action, with expenses in both Courts.

I wish to add, however, that I do not concur in the views of the Sheriff and Sheriff-Substitute, for had I been of opinion that authority was given to fill up the guarantee I should have entertained no doubt that the guarantee was good and should not have held that there being no principal obligation there could be no cautionary obligation because there was nothing to guarantee.

Lord Rutherfurd Clark concurred.

Lord Lee—I agree in the opinion of Lord Young entirely, but I should have been disposed to go even further, and to proceed upon a construction of the document different from that relied on by the defender. It appears to me to refer to an existing debt and not to any general indebtedness in respect of advances made or to be made. It contains, so far as I see, nothing to warn the defender that his liability was to continue though the existing debt should be paid if the Messrs Wylie & Lochhead should go on to make further advances to the defender's son.

In this view of the guarantee for £500 my opinion is that the guarantee for payment of premiums of insurance on the policies is limited to securing the then subsisting debt, and came to an end when it was paid.

It is true that the policies are mentioned as "assigned to your firm," and that the assignation as between the principal debtor and his creditors was *ex facie* absolute, and therefore enabled them as against him to hold the policies and pay the premiums in security, not only of the subsisting debt but of further advances. The defender, however, is not affected in my opinion by the form of the assignation, for he was no party to it, and was not bound to know that it was other than an assignation in security of the subsisting debt. Indeed it appears that the assignation was not granted till four days later.

I am unable therefore to read the guarantee as continuing to bind the defender to pay premiums of insurance so long as any balance of £500 should remain due by the defender's son to Wylie & Lochhead, although as appears from the account the subsisting debt was extinguished by payments in cash.

The Lord Justice-Clerk concurred.

The Court pronounced this interlocutor:—

"Find in fact that the document founded on by the pursuers is neither holograph nor tested, and was blank when signed by the defender, and that the defender did not authorise the insertion thereon of an obligation to pay the premiums of insurance upon the policies assigned by James Hornsby junior to John Wylie: Find in law that the defender is not liable in payment to the pursuers of the premiums of insurance specified

in the account libelled: Therefore sustain the appeal," &c.

Counsel for the Pursuers—M'Kechnie—C. N. Johnston. Agents—T. & W. A. M'Laren, W.S.

Counsel for the Defender—Jameson—M'Lennan. Agents—J. & F. Adam, W.S.

HIGH COURT OF JUSTICIARY.

Thursday, June 20.

(Before the Lord Justice-Clerk.)

WILSON *v.* M'GUIRE.

Justiciary Cases—Rape—Bail.

In an appeal by a procurator-fiscal against the decision of a Sheriff-Substitute admitting to bail a person accused of rape, it was stated on behalf of the Lord Advocate that the case was an ordinary case of rape, and that his investigations disclosed no facts tending to show that it ought to be dealt with as exceptional.

Held that persons accused of rape ought not to be admitted to bail unless under very exceptional circumstances, and that the Court ought to refuse bail upon the objection of the Lord Advocate, supported by his statement, upon his responsibility, that the case was not exceptional.

This was an appeal by Robert Wilson, Procurator-Fiscal of the Sheriff Court of Lanarkshire at Hamilton, against a deliverance of the Sheriff-Substitute of Lanarkshire at Hamilton (BIRNIE) admitting John M'Guire, charged with the crime of rape, to bail, and fixing the amount thereof at £50 sterling.

Argued for the Procurator-Fiscal—This was a case in which no bail at all should have been granted. The rape charged was one of a most brutal character. It was alleged to have been committed upon a deformed imbecile of between thirty and forty years of age, able only to utter inarticulate sounds. The amount fixed was insufficient to secure the appearance of the accused for trial. The charge was one upon which, if a conviction were obtained, a sentence must follow altogether out of proportion to the amount of bail fixed.

Argued for the panel—The question whether bail should be allowed or not had been properly decided by the Sheriff-Substitute in granting bail. The Advocate-Depute had no right to assume that the precognitions disclosed the facts that would be proved against the accused. As to the amount of the bail, the sum was ample in every respect to secure the attendance of the accused. In point of fact the accused was quite unable to raise the amount and obtain any benefit or assistance in the preparation of his defence.

At advising—

LORD JUSTICE-CLERK—I am of opinion that bail should not be allowed in any case where the public prosecutor charges the prisoner with the crime of rape unless there be very exceptional circumstances, and certainly not where the Lord Advocate objects to its being granted, and states on his responsibility that his investigation of the case does not disclose any facts tending to show that it should be dealt with as exceptional. If in any such case there were exceptional circumstances the Lord Advocate could himself take these into consideration and consent to bail, but I should regret its being established as a precedent in principle that bail is to be allowed in ordinary cases of rape. In this case I am of opinion that the sum of bail fixed by the Sheriff-Substitute was quite inadequate, and the public prosecutor has by this appeal from the deliverance of the Sheriff-Substitute raised the question not only of the amount of the bail fixed, but whether bail should have been granted at all; he says it should not have been granted, and repeats that the case is a very serious one. As there do not seem to me to be any circumstances to justify the Sheriff-Substitute in granting bail I shall reverse his deliverance and refuse bail.

The Court reversed the decision of the Sheriff-Substitute and refused bail.

Counsel for the Lord Advocate—Duncan Robertson. Agent—Crown Agent.

Counsel for the Panel—Law. Agent—William Chalmers, W.S.

Thursday, July 4.

(Before the Lord Justice-Clerk, Lord M'Laren, and Lord Kinnear.)

WYLIE *v.* THOM.

Justiciary Cases—Public-Houses (Scotland) Acts Amendment Act 1862 (25 *and* 26 *Vict. cap.* 35), *sec.* 17—*Complaint—Deviation from Statutory Form—Certificate "in that behalf."*

Section 17 of the Public-Houses (Scotland) Acts Amendment Act 1862 provides that "Every person trafficking in any spirits or other exciseable liquors in any place or premises without having obtained a certificate in that behalf in terms of this Act, shall be guilty of an offence."

A person was charged with trafficking in liquors "without having a certificate authorising and empowering him to keep premises for the sale of exciseable liquors therein," and was convicted. In a suspension it appeared that the accused held no certificate for the premises, but that there was a subsisting certificate in the hands of a person who prior to the date of the conviction had granted a trust-deed for behoof of his creditors. It was alleged by the complainer that he had been entrusted by this person with the management of the premises, and was so managing for him when convicted. *Held* that as the charge contained in the complaint was in effect that of trafficking without having obtained a personal certificate, and that it had not been open to the accused to plead his employer's certificate, there had been a deviation from the statutory forms which had prevented substantial justice from being done, and the conviction *suspended.*