decided that it will not exercise to th full the right of salmon fishing which it possesses, or exercise it in the way in which it has hitherto been exercised? I entirely agree in the view of Lord Wellwood in the case of *Ferrier* v. *Assessor for Edinburgh*, July 20, 1892, 19 R. 1074, that where a person puts himself under a restraint so as to preclude him from obtaining the best possible rent from a particular subject, the assessor must just disregard that and must value the subject on the ordinary footing by ascertaining what rent one year with another it could produce if let in its actual state. That is a principle which has been applied in other cases, and I see no reason why it should not be adopted here.

I may add that it seems to me, as at present advised, that if the proprietors of the upper salmon fishings are really increasing the value of their own fishings by bearing a voluntary assessment in order to take the nets off some of the lower reaches of the river, it may well be that they may be entitled to charge that assessment as part of the expense that they have incurred in obtaining the rents which they receive for rod-fishing, just as they are entitled to deduct the wages of persons employed as river watchers, or any other incidental expense which is necessary for maintaining the rents which they draw at their present figure, and much more if it has the effect of increasing the rents. I only throw out that suggestion because it seems to me that there is no inequity in the decision we are pronouncing, and so far as the City Parish of Aberdeen is concerned it is entitled to have those heritable subjects entered at the rent which they might reasonably be expected to draw if the full right of fishing was exercised by the proprietors.

LORD CULLEN—I concur.

The Court were of opinion that the determination of the Valuation Committee was right, and dismissed the appeal.

Counsel for the Appellants—Sandeman, K.C. — A. R. Brown. Agents — Martin, Milligan, & Macdonald, W.S.

Counsel for the Assessor — Moncrieff, K.C.—Lippe. Agents — Gordon, Falconer, & Fairweather, W.S.

COURT OF SESSION.

Thursday, November 26.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

DEVLIN *v.* M'KELVIE.

Contract — Proof — Obligation of Relief — Parole — Competency.

Circumstances in which *held* that an obligation of relief of a guarantee to a bank in security of an overdraft to a limited company was a separable contract from an obligation alleged to have been made at the same time to take over the shares of the company, and could not be constituted by parole evidence.

Thomas Leishman Devlin, steam trawl owner, Newhaven, Leith, and William Considine, Edinburgh, *pursuers*, brought an action against James M'Kelvie, coal merchant, 17 Rutland Square, Edinburgh, *defender*, for payment of the sum of £2422, 10s. 3d. to each of them, being the proportions of a bank overdraft paid by them under a guarantee granted by certain members of the Riggonhead Coal Company, Limited, liability for which, the pursuers maintained, had been taken over by the defender.

The Riggonhead Coal Company, Limited, was incorporated in December 1905 as a private concern with a capital of 25,000 shares of £1 each held by ten persons. To provide for additional working capital, money was borrowed from time to time by way of overdraft from the Commercial Bank of Scotland, on the security of a letter of guarantee for £14,000, dated April 1907. The guarantors were the directors of the company at the time, six in number, and included the pursuers of this action. In December 1907 the defender became a director. In April 1909, further funds being required, income debenture stock was created to the extent of £25,000, of which £15,000 was issued and taken up in varying proportions by eight persons, including the defender, of whom four, including the pursuers, were also guarantors. Under the trust-deed creating the stock, nine-tenths of the profits were to go to the income debenture stockholders, and the voting power in respect of the ordinary shares was cut down to one-tenth. The company went into liquidation on 27th June 1911, and the bank called up the overdraft on 23rd October 1911. The total amount due being £14,535, 1s. 5d. The pursuers averred (cond. 4) that at a meeting of the directors, held on 5th April 1910, the defender stated that he was prepared to sell his income debenture stock to the board at par or to take over the whole of the income debenture stock at par. They averred further—"A question was then raised as to the overdraft to the Commercial Bank, and the defender at once stated that it was part of his offer that he should take over the entire liability for the overdraft." They further averred that at a meeting on 5th May 1910 at which all the income debenture stockholders with the exception of the defender were present, or were represented, the defender's offer was accepted. The defender denied that at the meeting of 5th April he made the offer condescended on, and stated that the offer which he did make was an offer personal to Mr Considine only, and was to buy out Mr Considine's interests in the company, or to sell Mr Considine his own interests, and that nothing was said as to the bank guarantee. It was admitted that the holdings of income debenture stock of the pursuers and of Dr Watson, another stockholder, amounting respectively to £2000, £2000, and £1200, were transferred in May 1910 to the defender in

return for his three several cheques for the par value of the stock, but the defender averred that this was done in implement of an agreement made by him with Mr Considine at a meeting in the Euston Station Hotel on 8th April 1910, whereby he undertook to buy Mr Considine's stock at par, and that Mr Considine then informed him that in addition to the stock standing in his own name he held £2000 standing in the name of Mr Devlin and £1200 standing in the name of Dr Watson. It appeared from the evidence subsequently led that on 5th April 1910 the ordinary shares of the company were in the open market worth nothing and the income debenture stock was worth less than par. The amount of the overdraft at this time was upwards of £12,000.

The minute of 5th April, as engrossed in the minute-book and signed by the chairman, was as follows:—"Mr M'Kelvie intimated that he was prepared to sell his debentures at par to the Board, or to buy up the whole of the issued debentures at par, and take over the overdraft with the Commercial Bank. The directors resolved to call a special meeting of the income debenture stockholders to consider the offer."

This minute was read and approved of at the meeting of 5th May.

The draft minute of income debenture stockholders of what took place on 5th May in connection with the offer of the defender, which was not engrossed in the minute-book, was in the following terms:—"The meeting took into consideration an offer made by Mr M'Kelvie at a meeting of the directors held on 5th April last to purchase at par the whole of the income debenture stock issued, and to take over the overdraft with the Commercial Bank. The stockholders present, on behalf of themselves, and Mr Considine also on behalf of Dr Watson, and Mr Barr as representing his wife and his brothers Alexander Ure Barr and Alfred Charles Barr, constituting all the holders of the stock apart from Mr M'Kelvie himself, agreed to accept the offer on condition of the guarantors of the overdraft being relieved of their guarantee."

This draft was initialled by the chairman.

On 9th June the minute of 5th May was approved of. It was admitted that the defender was absent from the meeting on 5th May, but was present at the meeting on 9th June, and with regard to the latter meeting the pursuers averred the defender then took exception to the ordinary directors' business, and the acceptance of his offer being included in one minute, and moved that separate minutes of the meetings of directors and debenture stockholders should be prepared, that this was agreed to at the meeting, and that a separate minute accepting the defender's offer was afterwards engrossed by the meeting and signed by the chairman.

The pursuers pleaded—"The defender having undertaken to relieve the pursuers of their obligation for the overdraft by the Commercial Bank of Scotland, Limited, and having failed to do so, the pursuers are entitled to decree for the proportions of the overdraft paid by them, as concluded for."

The defender pleaded—"(2) The alleged obligation on which the pursuers found being of the nature of a guarantee, it must be constituted by the writ of the defender. (3) The averments of the pursuers being only proveable by the writ or oath of the defender, and the alleged minute of 5th April 1910 not being his writ, and in any event not being habile to create the obligation of relief founded on, probation thereof ought to be restricted to his oath accordingly. (4) *Separatim*—The alleged acceptance contained in the alleged minute of 5th May 1910 of the defender's alleged offer being subject to the new condition therein expressed of the defender relieving the pursuers of the overdraft in question, and the said condition never having been agreed to by the defender, the defender is entitled to decree of absolvitor."

The Lord Ordinary (ORMIDALE) on 7th November 1912 allowed the parties a proof *habili modo* of their respective averments, and on 26th November the First Division adhered.

On 9th April 1913 the Lord Ordinary decerned against the defender in terms of the conclusion of the summons.

The defender reclaimed, and argued—The alleged contract to take over the overdraft could only be proved by the defender's writ. It was entirely separate from the contract to purchase the shares, affected different parties, was of approximately equal value, and could not be regarded as ancillary to the latter—Ersk. Inst. iv, 2, 20; *Reid* v. *Proudfoot*, December 6, 1758, M. 12,344; *Maconochie* v. *Stirling*, May 27, 1864, 2 Macph. 1104. No formal writ, however, of the defender existed, and the minutes founded on by the pursuers could not be regarded as equivalent thereto. They had not been approved by him either explicitly or implicitly and no *rei interventus* had followed on them. Even if parole evidence were competent to elucidate them, that evidence did not show anything more than negotiations for the completion of a contract—*Fowler* v. *Mackenzie*, April 17, 1874, 11 S.L.R. 485; *Young* v, *Dougans*, February 23, 1887, 14 R. 490, 24 S.L.R. 363—and there was an entire absence of any *consensus in idem*—*Buchanan* v. *Duke of Hamilton*, March 8, 1878, 5 R. (H.L.) 69, 15 S.L.R. 513.

Argued for the respondents—The contract to assume liability for the overdraft was not a separate contract but was only incidental to the main contract to purchase the income debenture stock. It was therefore proveable by parole in the same way as the main contract—Dickson on Evidence, sec. 606; Ersk. Inst. iv, 2, 20, Ivory's Note 62; *Bell*, November 13, 1812, F.C.; *Rhind* v. *Mackenzie*, February 20, 1816, F.C.; *MacEwan* v. *Crawford*, February 13, 1816, F.C.; *Clark* v. *Callander*, 1819, 6 Pat. 422. In any event, the minutes founded on had been accepted by the defender and were equivalent to his writ, and the defender's actings subsequent thereto amounted to *rei interventus* and could only be ascribed to the contract.

At advising—

LORD SALVESEN—The conclusions of this action are for payment of two sums of money which the pursuers respectively paid to the Commercial Bank of Scotland, Ltd., in terms of a letter of guarantee granted by them and others in favour of the bank in security of an overdraft to the Riggonhead Coal Co. Ltd. The basis of the claim is that the defender came under an obligation to relieve the pursuers of their liability to the bank. This obligation is said to have been constituted by a verbal offer made by the defender at a meeting of the directors of the Coal Company on 5th April 1910, which offer is said to have been accepted by those to whom it was addressed on 5th May thereafter. No writing under the hand of the defender is produced, or is ever said to have existed, to evidence his alleged offer, but this objection the pursuers contend has been obviated by the defender having approved of a minute in which the acceptance was embodied, and also by his having acted in partial implement of the alleged offer and so validated the informal writings *rei interventu*.

The Lord Ordinary allowed a proof *habili modo* of the pursuers' averments, and his interlocutor was affirmed by the First Division. A long proof was thereafter led, as the result of which the Lord Ordinary decerned against the defender in terms of the conclusions of the summons. At the debate before him at the conclusion of the evidence, the contention of the defender, which is distinctly embodied in his second plea-in-law, that the obligation on which the pursuer founded must be constituted by the writ of the defender, seems to have been lost sight of, and the Lord Ordinary has disposed of the case on the footing that he had merely to adjudicate on the parole evidence. This appears to me to be unfortunate, because the first question which required decision was whether the alleged contract required proof by the defender's writ in order that it might be legally enforceable. I shall accordingly consider this question in the first instance.

The offer on which the pursuers found was made at the conclusion of a meeting of the directors of the Coal Company held on 5th April 1910. The secretary of the company, Mr Aird, made jottings of what had taken place at the time, and prepared a draft minute which was revised by Mr Considine, in whose service Mr Aird had been for many years. The minute regarding the offer, along with the other business transacted, was signed by the chairman, Mr Robert Barr, at a subsequent meeting. The portion of it which relates to the offer in question is in these terms—"Mr M'Kelvie intimated that he was prepared to sell his debentures at par to the board or to buy up the whole of the issued debentures at par, and to take over the overdraft to the Commercial Bank." For the present I shall assume that this was a correct record of what actually took place, and that this offer was duly accepted by those to whom it was addressed within a reasonable time after it was made, and without notice of withdrawal by the defender. I shall also assume that the acceptance was intimated to the defender, and the contract as a parole contract thereby completed. On these assumptions, is such a contract capable of proof by parole, or does it require to be evidenced by some writ of the defender?

It was conceded by parties at the bar that a contract for the purchase of shares or debentures of a limited liability company may be proved by parole, and also that a simple obligation of relief requires to be constituted by writing. The contract here was one for the purchase of debentures, and also involved an obligation of relief, and it so happened that, so far as the obligation of relief was concerned, there were at least two gentlemen present who were not parties to the overdraft. Apart from this specialty, which seems to point to a separation of the two constituent parts of the alleged contract, I am content, for the purpose of disposing of the legal question, to take the case in the most favourable light for the pursuers, and to assume, contrary to the fact, that the debenture-holders were precisely the same persons as those who had guaranteed the overdraft to the Commercial Bank. Is such a contract proveable by parole, notwithstanding that it embodies as one of its terms an obligation of relief of a guarantee originally constituted by writing?

There is singularly little authority on this important question. Erskine (iv, 2. 20), after stating that all contracts and bargains relating to moveable subjects "which have known prestations naturally arising from them, are by our law capable of proof by witnesses to the highest extent," adds that "the testimony of witnesses is rejected in all bargains where writing is either essential to their constitution . . . or where it is commonly used," amongst which latter he instances engagements of relief. The case of *Reid*, 1758, M. 12,344, is cited as an authority, and appears amply to warrant the statement. The rubric of the case is as follows—"Obligation of relief of a written obligation cannot be created by parole evidence." No reasons are reported for the judgment, but it may be presumed to have proceeded on the argument of the successful litigant, who maintained that an obligation of relief could only be created by oath or writ of the party, and added—"This rule is general in the law of Scotland, and no suspicion or presumptions should make courts remove general landmarks." The authority of this case has never been questioned, and so far as it goes it must be held to settle the law. The pursuers, however, appealed to section 606 of Dickson on Evidence, where the writer says that obligations of relief cannot in general be proved by parole, and then proceeds—"When they are undertaken in writing the statutory formalities must be observed, but objections on this head will be obviated by *rei interventus*, and parole will be admitted to prove the obligation when it forms part of a transaction which may be established by that means." The contract here,

the pursuers contend, comes under the exception. They say that the obligation of relief forms part of a transaction, to wit the purchase of debentures, which can be established by parole, and accordingly the obligation of relief can be so proved. The defender challenges the soundness of the proposition thus broadly expressed by Mr Dickson, and it is therefore necessary to consider how far it is consistent with principle and supported by authority.

The first authority relied upon by the pursuers was the case of *Bell*, November 13, 1812, F.C. The action was one to recover the price of cattle sold to John Johnston as principal and Thomas Bell as cautioner under a verbal contract. Bell pleaded that a cautionary obligation had often been considered as a *literarum obligatio*, and that, at all events, it could only be proved by the writ or oath of the party. Lord Meadowbank, in the course of the only opinion reported, said that in his view a cautionary obligation was not a *literarum obligatio*, and it was for the public interest that cautionary obligations might be contracted along with a contract of sale and entered into as incidents of it, and that it should be competent to prove them by parole evidence. The same decision was given under precisely similar circumstances in *Rhind* v. *Mackenzie* (20th February 1816, F.C.) The action was for the price of grain, and was directed against the purchaser and a person who at the time of the bargain had verbally become cautioner for the price. The ground of judgment was that the cautionary obligation had been interposed at the time of the sale and was an incident to it, and could therefore be proved *prout de jure*. On the other hand, in *MacEwan* v. *Crawford* (13th February 1816, F.C.), it was decided that a cautionary obligation for future transactions cannot be proved by parole evidence. One of the judges in the course of his opinion observed that the reason for excluding parole evidence was the risk of the witnesses mistaking a *nuda emissio verborum*. In the last case cited, that of *Clark* (9th March 1819, F.C.) the rubric bears that a conveyance of a written obligation with regard to moveables and an obligation of relief of such an obligation cannot be proved by witnesses. The circumstances there were peculiar. The written obligation referred to was to deliver 1000 bolls of wheat each year for ten years at the price of 10s. per boll. At a subsequent date the seller entered into an agreement with Clark verbally, but in the presence of certain witnesses, to take the bargain off his hands and to pay him £40. It was attempted to assimilate the transaction to those which had formed the subjects of decision in the cases of *Bell* and *Reid* as being merely a sale of a moveable interest, but this argument was rejected. The case is of high authority, as it was affirmed in the House of Lords (6 Pat. 422). In my opinion these decisions do not support the pursuers' contention. They are limited to the one case of a guarantee for the price of goods, entered into at the very time when the sale was concluded, and as an incident of the sale. They afford no ground for holding that a contract embracing two entirely separable transactions, such as the alleged contract between the parties here, can both be proved by parole because one of them was capable of proof in that way. It is difficult to regard the obligation of relief which the defender is said to have entered into as being part of the consideration for the price of the debentures, for three of the debenture-holders were not parties to the guarantee to the bank, and two of the guarantors who were said to have been relieved were not holders of debentures at all. If the obligation of relief were considered as part of the consideration for the transfer of the shares, then certain of the debenture-holders, including the pursuers, were obtaining a higher price than others. Nor can I hold the obligation of relief an incident of the sale of the debentures—to use the language in *Reid's* case. The bank overdraft at the time amounted to £11,000, which was not far short of the total price of the debentures. It is true that at the time all parties must have considered the assets of the company more than sufficient to meet the overdraft, otherwise the debentures instead of being worth par would have been of no value at all, but, as matters have turned out, so far as the two pursuers were concerned, the obligation of relief on which they are now suing was of equal value with the price of the debentures of which they have obtained payment. I am unable to stretch the decisions in the cases of *Bell* and *Reid* so as to make them applicable to such a case, even apart from the specialties to which I have already referred. Nor do I see any ground for doing so in principle. The present case is an excellent illustration of the mistakes which may arise with regard to a contract which is rested on a *nuda emissio verborum*, for the parties in this case are entirely at variance both as to what was said by the defender when the offer of 5th April was made, as to whom it was addressed, and as to what the offer covered. All these doubts would have been resolved if the contract had been reduced to writing, for such a writing would, no doubt, have given precise expression to the defender's intention, which he says has been entirely misapprehended by the pursuers.

Assuming, then, that the contract cannot be constituted purely by parole evidence, is there any writ of the defender? The offer, as the pursuers understood it, was considered at a meeting of stockholders on 5th May, and was accepted, the acceptance being recorded in a minute initialled by the chairman, to the exact terms of which I shall afterwards have occasion to refer. This acceptance was not communicated to the defender, who was abroad at the time, nor was it even communicated in writing to his manager Mr Smith, who had charge of his office in Edinburgh. Whether it was verbally communicated to Mr Smith, as the pursuers allege, is not of much moment, for he was entirely ignorant of the transaction, and had no authority from the defender to act on his behalf. It was, however, brought

to the defender's notice at a meeting of directors of the coal company which he attended on the 9th of June. The pursuers say on record that the defender then took objection to the ordinary directors' business and the acceptance of his offer being included in one minute, and moved that separate minutes of the meetings of directors and debenture stockholders should be prepared. This was agreed to by the meeting, and a separate minute accepting the defender's offer was afterwards engrossed by the secretary and signed by Mr Barr. The inference sought to be conveyed is that the defender took no objection (except the formal one) to his offer and acceptance as recorded in the minute I have referred to, and the contention was that they thereby became his writ. The parole proof goes somewhat further so far as Mr Aird and Mr Considine are concerned. The former says—"Neither the defender nor anybody else questioned the accuracy of the minute;" and Mr Considine says—"I remember that the minutes of 5th April and 5th May were read at this meeting on the 9th of June in Mr M'Kelvie's presence and hearing—that is to say, both his offer and acceptance were minuted as read. The defender did not take any exception to anything contained in the minutes." In cross-examination he was asked—"(Q) Did he express approval of that minute of 5th May on the 9th June?—(A) I cannot say." The other pursuer, Mr Devlin, was not present at the meeting on 9th June. On the other hand, Mr Learmonth and Mr Barr, both of whom were adduced as witnesses by the pursuers, support the defender when he says that at the meeting on the 9th of June he repudiated the construction that has been put on his offer as recorded in the minute of 5th April. Mr Learmonth says—"Mr M'Kelvie at that meeting certainly objected to the statement that he had agreed to purchase these debentures on the undertaking that he was taking over the overdraft. As far as I recollect, at that meeting he raised the question that he had purchased the stock from Mr Considine in London." Mr Barr gave evidence to the same effect. Mr Walker, another director of the coal company who was present at the meeting on 9th June, says—"The defender was present at that meeting on the 9th June. He took exception to the minute, and said he was not a party to that. He was quite distinct about that. I cannot state the exact words he used, but the impression is that he objected." Now these three witnesses have no interest in the subject-matter of the present case, and in face of their evidence I think it is impossible to hold that the defender approved of the minutes of 5th April and 5th May so as to make them in any sense his writ. The suggestion which was made by Mr Chree for the pursuers that the evidence must be taken as referring to a later meeting has no support from the evidence. No other document was referred to as constituting the defender's writ, and the result is that the alleged contract which he made is supported only by parole evidence of recollection.—[*His Lordship then examined the parole evidence in detail and found the alleged offer not proved.*]

I am therefore for recalling the Lord Ordinary's interlocutor, and for assoilzieing the defender from the conclusions of the action.

LORD GUTHRIE—[*After a narrative of the facts*]—The pursuers' case was argued to us under three alternatives. They said, in the first place, that they were entitled to prove their alleged contract of relief by parole. No such case is made on record, and had that been the pursuers' case I do not think it would have been sent to proof. But assuming that such a case is before us, I think the contention is unsound in law. It is not disputed that in the ordinary case an obligation to relieve requires to be proved by writing (Ersk. iv, 2, 20). But it was argued that where an obligation of relief is a mere subsidiary incident of a bargain about moveables proveable by parole the rule does not apply, and it was maintained that in this case the obligation to relieve of the bank overdraft was in this position in relation to an alleged contract by the defender to take over the income debenture stock of the company. The cases cited in support of the pursuers' position have no application. The alleged obligation of relief was not subsidiary, because it was almost as valuable as the alleged obligation to take over the income stock at par (£14,000 as against £15,000). And it was not, and could not be, an incident of an offer to take over the income stock, because the income stockholders and the guarantors were not identical.

The pursuers' other alternatives were these. Admitting that they could produce no writing under the defender's hand embodying a contract or an offer in regard either to the income stock or the bank overdraft, they founded on certain minutes of the directors of the company, either as equivalent to the defender's writ, or, alternatively, as sufficient if validated by the *rei interventus* alleged by them.

The case thus presented by them of writings equivalent to the defender's writ although not under his hand, was based on the minutes of the meetings of the directors of the company held on 5th April, 5th May, and 9th June 1910, which were alleged to embody the contract founded on by the pursuers, and which were said to have been approved of by the defender as a correct record of what passed at these meetings. The pursuers' case involved proof of their averments in regard to five essential matters. In my opinion their proof failed in regard to all these except perhaps the third, which standing alone cannot avail them, for it only amounts to proof of an acceptance of an offer which it is not proved was ever made.

First, the pursuers averred an offer by the defender at a meeting of the directors on 5th April 1914, applicable to the debenture stock of the company and to the £14,000 overdraft (then between £11,000 and £12,000). In condescendence 4, dealing with the income debenture stock, they aver that the defender stated that he was "prepared to

sell his income debenture stock to the board at par, or to take up the whole of the remaining issued income debenture stock at par." In regard to the overdraft to the bank, their averment is that "the defender at once stated that it was part of his offer that he should take over the entire liability for the overdraft."

The pursuers' case starts badly. The business was inappropriate for insertion in a record of a directors' meeting. The transaction was to be completed at a meeting of stockholders, and no such meeting was ever called or held. But when the terms of the minute are considered along with the evidence it appears that Mr Considine and his cashier Mr Aird stand alone in deponing to the correctness of the minute, which according to them is an echo of the words used by the defender. They say that the defender undertook to take over the whole debenture stock and the whole obligations of the guarantors. Therefore until acceptance by the whole stockholders and the whole guarantors of this offer there was no concluded bargain. The Lord Ordinary says that Mr Devlin, the other pursuer, also spoke of the minute as "absolutely in accordance with what took place." But according to Mr Devlin the defender's offer was not dependent on the concurrence of all the stockholders and guarantors. So far as he at least was concerned the bargain for the purchase of his shares and for relief from his share of the overdraft (which in certain circumstances might have involved the defender in liability for the whole amount) was in his view of the defender's offer completed at the meeting of 5th April. But the independent witnesses present on the occasion, namely, Mr Barr, Mr Learmonth, and Mr Walker (the interest of Barr and Learmonth, so far as they have any interest, being as guarantors to make the defender liable for the whole guarantee) present a third view, namely, that whatever was said about the stock no offer was made by the defender to take over the overdraft. The difference between their evidence and what is stated in the 5th of April minute is inadequately represented by the Lord Ordinary, who puts it that "it was not in exact accord with the written record of what took place." And of these three witnesses Mr Learmonth and Mr Barr were called by the pursuer to prove the correctness of the statements in the minute. Mr Learmonth says — "Mr M'Kelvie used words to the effect that that could be arranged, or that that would be all right." Mr Barr says—"Mr M'Kelvie said that could be arranged for or something to that effect—that could, no doubt, be arranged." Mr Walker says—"Mr M'Kelvie said that was a matter that might be arranged, or something to that effect." As to the defender himself, he stated on record (Ans. 4)—"Nothing was said about the obligation to the bank"; and in his evidence he says he does not remember of anything being said at all about the overdraft. In reference to the stock, he says that the only offer made by him was to Mr Considine.

Thus the result of the evidence is not, as the Lord Ordinary says, that the only evidence contradictory of the minute is that of the defender. So far as the stock was concerned, all are agreed that an offer was made by the defender. The defender says it was a personal offer to Mr Considine, and there is evidence of resentment against Mr Considine which lends plausibility to this evidence. Mr Devlin says it was an offer open to be accepted by any of the stockholders present, and that he in point of fact accepted it on the spot. The other witnesses, including Mr Considine, think it was an offer to the stockholders as a whole, which all required to accept in order to constitute a binding contract. As to the overdraft, while the pursuers and Aird maintain a definite offer by the defender to take over the whole of it, Learmonth, Barr, and Walker only say that the defender intimated his willingness to negotiate about it, and his expectation that in one form or another the matter could be satisfactorily arranged.

It would be sufficient to hold, accepting the evidence of all the witnesses as honestly given, that there was no *consensus in idem*, a result which seems to me necessarily to follow from the evidence, and that not unnaturally looking to the circumstances under which the matter came up. Indeed if, as the Lord Ordinary thinks, the defender and Mr Considine misunderstood each other on the 8th April in the Euston Hotel, it is not difficult to reach a similar result in relation to what passed when the meeting of 5th April was breaking up. But if it be necessary to make up one's mind as to what was actually said by the defender, I am prepared to reject the evidence of the interested parties, namely, on the one hand the pursuers and Mr Considine's cashier, and on the other hand the defender, and to accept the evidence of the independent witnesses Barr, Learmonth, and Walker, coinciding as it does with what one would expect from the relation of parties and from the circumstances in which, at the end of a meeting, the alleged offer was made. The vague words proved to have been used by the defender only indicated a willingness to treat; they were nothing more than what Lord Selborne called an "instrument of negotiation," but they might not unnaturally have been worked out as involving the offer recorded in the minute, especially if it were forgotten that neither Dobbie's trustees nor Wilson, although guarantors, held any stock. Indeed it may fairly be said that the pursuers never seem to have realised the difficulty of their case arising from the fact that there were guarantors (Dobbie's trustees and Wilson) who were not stockholders, and stockholders (M'Kelvie, Walker, and Alexander Ure Barr) who were not guarantors, and that the directors of the company did not include either all the guarantors or all the stockholders. This failure on their part appears, among other ways, in the statement in the minute of 5th April that the meeting for acceptance of the offer was to be a meeting only of stockholders, while the offer as recorded in the minute could not be accepted with-

out the concurrence also of the whole guarantors, two of whom (Dobbie's trustees and Wilson) held no income stock. "The trend of negotiations," to use Mr Considine's phrase, might point in the direction of the method for arranging the overdraft stated in the minute, namely, that it should be taken over by the defender. But there were other ways in which the guarantee might have been arranged, and I cannot therefore hold that the statement in the minute, a gloss as I think of what the defender really said, truly represented anything which fell from the defender. As to the defender's denial on record and his statement in evidence of want of recollection, if what was said by him about the overdraft was so casual and vague as Learmonth, Barr, and Walker say it was, he might well have forgotten all about it, while a formal offer, involving possible liability for £14,000, could scarcely have escaped his recollection. The conduct of Messrs Learmonth, Barr, and Walker, in allowing the terms of the minute of 5th April to pass without challenge, would present a serious difficulty, were it not common knowledge that the reading of minutes at board meetings is very often treated by the reader and by those present as a mere formality.

Second, the pursuers averred an approval at the time by the defender of the minute of the meeting of 5th April 1910, in which the defender's offer is thus recorded—"Mr M'Kelvie intimated that he was prepared to sell his debentures at par to the board, or to buy up the whole of the issued debentures at par, and to take over the overdraft with the Commercial Bank."

No attempt was made to prove this crucial averment. The incident did not happen "at" the meeting, as stated on record, nor in the middle of other business as narrated in the minute, nor did the defender make his statement, as Mr Devlin puts it in his evidence, as soon as he entered the meeting. The directors' meeting was over, and whatever was said by the defender was said as the directors were preparing to leave the room. He was not present at the subsequent talk among the directors, when, I suspect, there was difference of opinion and discussion as to what the defender's statement really amounted to. They may have honestly thought that the defender had expressed an intention or inclination to relieve the guarantors of their obligation under the overdraft, but the whole evidence suggests that they were not clear, and not agreed, as to whether he had come under any binding obligation, and, if so, what it was. Neither draft nor copy of the minute was sent to him.

Third, the pursuers averred an acceptance, at a meeting of directors at which the defender was not present, held on 5th May 1910, of the offer made by the defender in terms of the minute of 5th April. The acceptance of 5th May, taken by itself, does not meet the alleged offer of 5th April. The offer is said to have included the whole obligations under the overdraft, as well as the whole income stock. But the minute of 5th May, which, as it appears in the minute-book, is not signed, and which is, therefore, not authenticated as the official record of what passed at the meeting, contains no acceptance on the part of Dobbie's trustees and Wilson, who were among the guarantors to the bank. Mr Considine stated in his re-examination—"Neither Mr Wilson nor Major Dobbie was a stockholder, so that the bargain alleged to be made by offer of 5th April and acceptance of 5th May did not affect them." There is no evidence that the condition at the end of that minute was ever purified.

Fourth, the pursuers averred an intimation of the acceptance to Mr James Steel Smith, the defender's representative during the defender's absence abroad, made immediately after the meeting of 5th May. According to Mr Considine, the minutes of 5th April and 5th May were handed to Mr Smith on 6th May, and accepted by him as correctly embodying the obligations undertaken by the defenders in regard to the stock and the overdraft. I think the Lord Ordinary is right in holding that the pursuers have failed to prove any such intimation. In any case there is no evidence that Mr Smith had any authority to act for the defender in this matter. The correspondence between Mr Smith and the defender suggests a knowledge on Smith's part that the pursuers were endeavouring to involve the defender in obligations to which he had never consented. It does not involve any admission that the defender was liable for these obligations. Mr Smith's knowledge of what was going on, as shown in his letter to the defender of 7th May 1910, is sufficiently explained by his reference in that letter to a call by Walker and Learmonth.

Fifth, the pursuers averred acquiescence by the defender at a meeting of the directors on 9th June 1910 in the accuracy of the statements in the offer and acceptance as stated in the minutes of 5th April and 5th May. Here again I accept the evidence of the independent witnesses Barr and Learmonth, cited for the pursuers, and Walker, cited for the defender. According to them, at this first meeting of directors after 5th April at which he was present he then took up the attitude which he now maintains. Although the Lord Ordinary at one part of his opinion says that no one challenged the terms of the 5th of May minute when it was read at the meeting of 9th June, this must be an oversight, for his Lordship in a subsequent passage finds that "at the meeting of 9th June he (the defender) denied that he had made the offer as minuted." The pursuers have attributed to the subsequent meeting of 26th July what is proved to have taken place at the meeting on 9th June. I accept the evidence of the independent witnesses Barr and Learmonth that at this meeting the only previous minute read was that of 5th May.

The pursuers finally maintained that if they were not entitled to prove the contract alleged by them by parole, and if the writings founded on by them did not amount to

the defender's writ, the writings were at least sufficient foundation for *rei interventus* and that there was sufficient evidence of *rei interventus* in this case. They rely on the taking over by the defender early in 1910 of the stock of Mr Considine, Mr Devlin, and Dr Watson at par, amounting to £5200. But it is admitted that if the defender's action in taking over this income stock is to be held as *rei interventus* validating the contract of 5th April and 5th May, it must be unequivocally referable to it. I cannot draw any such inference in view of the evidence as to the meeting between the defender and Mr Considine in the Euston Hotel on 5th April. I cannot hold that the transaction in stock which the pursuers found upon is more referable to the meeting of 5th April than to that meeting. In addition, as already indicated I think the two alleged obligations by the defender in reference to the income stock and the overdraft were so separate that implement or part implement in the one case would not fail to validate an informal agreement relating to the latter.

[*His Lordship then dealt with other questions.*]

LORD JUSTICE-CLERK — I have had an opportunity of perusing the opinions which your Lordships have prepared, and, apart from all questions as to the competency of parole evidence to establish the pursuers' case (as to which I again entirely agree with what your Lordships have said), the law seems to me to be quite clear. Even if parole evidence were competent, I come to the conclusion that there has not been a true understanding between the parties as to what the defender undertook to do. They were not agreed. There was, I think, no true *consensus*, and assuming parole evidence to be competent, it must be evidence conclusively proving that such a *consensus* existed. I am unable to find any such evidence in the proof, and I therefore concur with your Lordships in thinking that the interlocutor of the Lord Ordinary must be recalled.

LORD DUNDAS was sitting in the Extra Division.

The Court recalled the interlocutor reclaimed against and assoilzied the defender.

Counsel for the Pursuers and Respondents—Lord Advocate (Munro, K.C.)—Chree, K.C.—Carmont. Agents—W. & H. Considine, W.S.

Counsel for the Defender and Reclaimer—Clyde, K.C.—Sandeman, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Thursday, December 17.

SECOND DIVISION.

[Sheriff Court at Glasgow.

IRVING *v.* BURNS.

Cautioner — Fraud — Reparation — Company—Guarantee—Misrepresentation by Secretary as to Financial Strength of Company — Proof — Mercantile Law Amendment Act (Scotland) 1856 (19 *and* 20 *Vict., cap.* 60), *sec.* 6.

The secretary of a cinema company entered into a contract with a plumber to execute certain plumbing work for the company. The company had no assets and was unable to pay for the work, and the plumber brought an action against the secretary for payment, in which he averred that he had been induced to enter into the contract by statements made to him by the defender to the following effect—(1) That the pursuer's money would be all right, (2) that the company had plenty of money, (3) that £3000 of the capital of the company had been subscribed, and (4) that the directors of the company would provide additional security, and that the defender knew that statements (1), (2), and (3) were false. The pursuer admitted that he could not prove statements (1), (2), and (3) by writ subscribed by the defender.

The Court *assoilzied* the defender, *holding* (*a*) that in the absence of writ, in virtue of the Mercantile Law Amendment Act (Scotland) 1856, section 6, statements (1), (2), and (3) were of no effect, and (*b*) that statement (4) was irrelevant in respect that the pursuer did not aver that the defender knew it to be false.

Agent and Principal—Warranty of Authority — Reparation — Liability of Agent—Damages.

The secretary of a cinema company entered into a contract with a plumber to execute certain plumbing work for the company. The company had no assets and was unable to pay for the work. The plumber brought an action against the secretary for payment, in which he averred that the defender had no authority to make the contract although he fraudulently represented that he had authority.

The Court *assoilzied* the defender, *holding* that the averment was irrelevant in respect that since the company was unable to pay anything the damage arising from the alleged breach of warranty of authority was *nil.*

The Mercantile Law Amendment Act (Scotland) 1856 (19 and 20 Vict. cap. 60), section 6, enacts—" . . . All representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods . . . shall be in