Orr v. *Mitchell*, 1893, 20 R. (H.L.) 27, 30 S.L.R. 591, which seems to be in point, although the document under construction in that case was a disposition, and not a contract of sale. He there said (pp. 30 and 592)—"If there were nothing else in the deed to expound their meaning, the words 'all the lands' would include not only the surface, but all the strata below it *usque ad centrum*."

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Christie, K.C.—Gentles. Agent—James G. Bryson, Solicitor.

Counsel for the Defender (Respondent)—A. M. Mackay. Agent—Alex. Bowie, S.S.C.

Thursday, October 18.

SECOND DIVISION.

[Lord Hunter, Ordinary.

FORTUNE *v.* YOUNG.

Cautioner—Guarantee—Representation as to Credit—Mercantile Law Amendment (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 60), *sec.* 6.

A letter guaranteed the financial position of a man who was seeking a farm. The writer had signed his firm's name although it was outwith the firm's business. The letter was not addressed to anyone, but the writer was aware that it was to be shown to the factor or landlord of the farm. On the faith of the letter the factor gave credit. *Held* that the writer of the letter was liable under the guarantee, which was valid although not signed in his own name and not addressed to the factor.

The Mercantile Law Amendment (Scotland) Act 1856 (19 and 20 Vict. cap. 60), sec. 6, enacts—". . . All guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to 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, or postponement of payment of debt or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorised by him or them, otherwise the same shall have no effect."

George Robert Fortune, Colinsburgh, Fifeshire, *pursuer*, brought an action against Robert Young, Penicuik, *defender*, for payment, firstly, of the sum of £380, 8s. 4d. with interest, which sum represented the loss incurred by him through having given credit to a Mr George Renton Fortune on the faith of an alleged letter of guarantee issued by the defender.

The pursuer *pleaded, inter alia*—"1. The defender having guaranteed payment of the said George Renton Fortune's account to the pursuer to the extent of £1600, decree should be pronounced in terms of the first alternative conclusion of the summons."

The defender pleaded, *inter alia*—"4. The action as directed against the defender is wrongly laid, and the defender should be assoilzied. 5. The alleged letter of guarantee not being signed by the defender, *et separatim* not being addressed to the pursuer or delivered to him, the defender should be assoilzied."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (HUNTER), who on 14th December 1916 decerned against the defender in terms of the first alternative conclusion of the summons.

Opinion.—"This is an action to recover loss sustained by the pursuer through giving credit to a Mr George Renton Fortune on the faith of an alleged letter of guarantee issued by the defender.

"The pursuer acts as factor for Mr Rintoul of Lahill, Fifeshire, of which estate the farm of Lahill Craig forms part. During the summer of 1914 the pursuer advertised the said farm to let at the term of Martinmas 1914. Among the inquirers was George Renton Fortune, Herbertshaw, Penicuik, to whom the said farm was ultimately let.

"As the pursuer was not acquainted with the financial position of the said George Renton Fortune he asked him to satisfy him on the point. The said George Renton Fortune accordingly approached the defender and obtained from him a *letter* in the following terms:—'*Penicuik, October* 19, 1914.—The bearer, Mr Fortune, we have known for a long number of years, and have pleasure in testifying as to his good and straightforward character, and guarantee that his financial standing is all in order, in accordance with his statement to the extent of from sixteen to eighteen hundred pounds stg.—JAMES TAIT & Co.' The defender, who wrote and signed the letter, is a partner of the firm of James Tait & Co.

"On its face the letter does not bear to be addressed to anyone, but the defender quite frankly admitted that he granted the letter with a view to its being handed to the proprietor or factor of a farm in Fifeshire, about which George Renton Fortune was negotiating with a view to becoming tenant. That farm was Lahill Craig.

"The pursuer received the letter from George Renton Fortune, and being satisfied from its terms of George Renton Fortune's financial position let him the farm. Some of the stock and crop of the farm were taken over by Fortune at valuation. The remainder was sold by public roup on 20th November 1914. At said roup the pursuer acted as clerk. The accounts due by the purchasers were payable to him, and he guaranteed payment of the purchase price to the seller. George Renton Fortune attended the roup, and was preferred to the purchase of goods amounting in value to £1363, 6s. 8d. The pursuer says, and I believe him, that he allowed the said George Renton Fortune's bids to be accepted in the belief induced by the defender's letter that the said George

Renton Fortune was a man of means who was able to meet the price of said purchases.

"George Renton Fortune had in fact no means, and he was unable to meet the obligations undertaken by him in connection with the stock taken over at valuation, and the purchases made by him at the roup. The pursuer obtained decree against him in the Sheriff Court for £1564, 6s. 3d. on 16th February 1915. Thereafter on 17th March 1915 the estates of George Renton Fortune were sequestrated in terms of the Bankruptcy (Scotland) Act. The pursuer has received a dividend on his claim of 15s. 9d. per £, *i.e.*, £1231, 17s. 11d., leaving a balance of £332, 8s. 4d., which, together with periodical interest, bringing the total up to £380, 8s. 4d., the pursuer seeks to recover from the defender.

"I do not think that the defender fraudulently made the statements as to the financial position of George Renton Fortune contained in the letter founded on. The defender had no personal end to serve by George Renton Fortune receiving credit from the pursuer, and no motive for defrauding the pursuer. He appeared to me to be an honest witness, and I accept the evidence given by him in the witness box as being substantially accurate. He seems to have thought that he was only giving Fortune a certificate of character, and he felt justified from what he knew in testifying favourably. After he had written down to the word character, Fortune suggested his adding the words guaranteeing his own financial standing. Without fully considering the effect of his words, the defender acceded to the request in the belief that he was only vouching for what Fortune had told him. Had he properly reflected at the time I think the defender would have seen that the language which he was employing might mean something very different when read by the proprietor or factor of the farm to whom the letter was to be handed. In my opinion I must construe the language used by the defender according to its natural meaning. So construing it, I think the letter means that the defender guarantees the accuracy of Fortune's statement that the latter's financial standing is all in order to the extent of from £1600 to £1800. Fortune had in reality no means whatever, and the defender had no sufficient ground for holding, far less for expressing, any opinion as to his financial standing. Fortune was a working man who seems to have dressed somewhat better than would be expected, and there was a local rumour that he had been left a fortune. Beyond these circumstances the defender knew nothing. I take it, however, that if A guarantees B's financial position to C, he is liable if credit is given to B by C, no matter what A's grounds were for his belief in the statement which he has made.

"In my opinion the pursuer is entitled to recover the amount sued for unless there is a good objection to the letter as a binding guarantee, or to his title to recover in whole or in part the amount sued for.

"The defender maintained that the letter of guarantee did not comply with the requirements of section 6 of the Mercantile Law Amendment (Scotland) Act (19–20 Vict. cap. 60), which provides that all guarantees and representations as to trade or dealings of any person for the purpose of enabling that person to obtain credit must be in writing, and subscribed by the person giving the guarantee or making the representation. No authority was cited to me and no argument was presented to me different from that submitted in the Procedure Roll. In allowing proof I rejected this argument, and I think that the first branch of plea 5 for the defender falls to be repelled.

"The circumstance that the letter of guarantee is not addressed to anyone appears to me to create much more difficulty. This point also I considered in the Procedure Roll. In the note which I then issued I refer to certain cases which were founded on by the pursuer. With reference to these cases I may note that in *Ewing* v. *Wright*, F.C., 2nd June 1808, the fact that the address was filled in by the person to whom the letter was handed was not held to be a fatal objection. In *Balfour, Junor, & Company* v. *Russell*, F.C., 8th March 1815, the writer of a letter testifying to financial position was held liable where the writer's correspondent produced the letter to another who was induced thereby to give credit although the recipient of the letter had no authority to communicate it. The defender at the proof relied upon the case of *Williams* v. *Lake*, 29 L.J., Q.B. 1, where it was held that under the Statute of Frauds a letter of guarantee blank as to the name of the person in whose favour it was granted was invalid. Section 4 of that statute provides that the names of both contracting parties and of the subject-matter must appear on the writ. The Statute of Frauds is not applicable to Scotland. As the evidence has established that the defender granted the letter to Fortune to show to the factor or proprietor of the farm for the tenancy of which he was negotiating, I think that I must repel this plea.

"In the last place the defender maintained that the pursuer could not sue for the value both of the goods purchased at the auction and of the goods taken over by him at valuation. It appears that of the amount for which the pursuer obtained decree against Fortune in the Sheriff Court, £200, 19s. 7d. was the value of the subjects taken over. All the goods, however, were in reality the property of Mr Rintoul, the proprietor of the farm of Lahill Craig, and that gentleman has granted to the pursuer an assignation of his rights. It appears to me therefore that the plea to title of the pursuer also falls to be repelled. I therefore grant decree for the amount sued for."

The defender reclaimed, and argued—The letter of guarantee was not a valid document under the Mercantile Law Amendment (Scotland) Act (19 and 20 Vict. cap. 60), sec. 6. That section enacted that the obligation must be subscribed by the person who undertook the guarantee. Accordingly the letter, to be of any effect, should have been signed "Robert Young" and not

"Tait & Co." The firm had not authorised the subscription of the firm's name, nor had the reclaimer personally granted the guarantee, signed as it was by the firm's signature. Accordingly neither the firm nor the reclaimer were bound thereby—*Salton & Company* v. *Clydesdale Bank, Limited*, (1898) 1 F. 110, *per* Lord Trayner at p. 118, 36 S.L.R. 119. The letter was not addressed to anyone and therefore could not be founded upon by the respondent to justify his reliance thereon—*Williams* v. *Lake*, (1839) 29 L.J., (Q.B.) 1. The Statute of Frauds (29 Car. II, cap. 3) was equivalent to the Mercantile Law Amendment (Scotland) Act 1856, and treated it as an implied condition that the document should be addressed to someone. Even if the guarantee could be considered a good one, the question remained who was entitled to take advantage of it. The document was in blank and might be handed about.

Argued for the respondent—The document plainly showed that it guaranteed that the person mentioned in it was a man of substance. Section 6 of the Mercantile Law Amendment (Scotland) Act 1856 did not require that the granter should sign his own individual name, but only that he must sign the document. The reclaimer was bound as if he had signed his own name. It was not necessary that the document should be addressed to anybody. If the bearer used it as it was intended to be used, then the respondent had a right to sue on it. The reclaimer had admitted that the letter was written with a view to its being shown to the respondent, and he accordingly was entitled to sue on it. Counsel cited *Ewing* v. *Wright*, June 2, 1808, F.C.; *Balfour, Junor, & Company* v. *Russell*, March 8, 1815, F.C.; *Kembles, Masterman, &c.* v. *Mitchell*, 1831, 9 S. 648; *Robinson* v. *National Bank of Scotland, Limited*, 1916 S.C. (H.L.) 154, 53 S.L.R. 390.

Lord Justice-Clerk—I think the Lord Ordinary has arrived at the right conclusion. When the case was formerly brought before us we thought it was desirable, before giving judgment upon the merits of the cause, that we should follow the course which the Lord Ordinary had taken and allow the parties a proof before answer. Accordingly, while we repelled a preliminary plea, we adhered to the Lord Ordinary's interlocutor granting such a proof, and we have now the proof before us. There is no difference between the parties now upon the effect of the proof.

There were in the record averments of fraud against the defender. The Lord Ordinary has found that these averments have not been proved, but that, on the contrary, the defender seems to have been perfectly honest and straightforward in the matter though mistaken in his view as to his legal position, and I entirely agree in that finding. In these circumstances we have to consider what the legal positions of the parties are.

Several points have been maintained for the defender. In the first place it was said that this document is merely a testimonial, and that it is not in point of fact a guarantee or a cautionary document. I cannot accept that view. From the terms of the document itself it is, I think, plain, and if it were necessary to be made more plain I think the evidence makes it abundantly clear, that the defender having given what was a perfectly good testimonial was asked if he could not say something more, and he accordingly added the words "and guarantee that his financial standing is all in order, in accordance with his statement to the extent of from sixteen to eighteen hundred pounds stg." I cannot read that as amounting to anything else than a very clear, distinct, and specific guarantee to the extent of from sixteen to eighteen hundred pounds. The suggestion that it merely meant that the would-be tenant had stated that he was worth that is futile, because, as was put to the defender in cross-examination, what would be the use of such a document as showing what the funds of Renton Fortune were or what he was worth. Obviously it would be of no use whatever. Therefore upon the first question as to the construction of the document I have no hesitation in agreeing with the Lord Ordinary.

Then it is said that the document should have been signed by the defender Robert Young, whereas it is signed "James Tait & Co." It appears, however, that the defender was a partner of James Tait & Company, the other partner being a man named Tait. It is not suggested that this cautionary obligation was within the scope of the business of the firm, but on the other hand the document appears to be in the plural. It bears to run, "We have known" and "we guarantee." Therefore while I agree that if it had been sought to make the firm or the partner other than the one who signed the firm-name liable there might have been a good defence, I think it is no defence at all when an action is brought against the man who actually signed the firm-name. A partner who signs an obligatory document outwith the scope of his copartnery does not bind the firm but he undoubtedly binds himself. Therefore in this case I think it is quite clear in law that the defender, while he did not bind his copartnery, did bind himself by signing this document. The document complies in every respect, as it seems to me, with the requirements of the Mercantile Law Amendment Act. It is a document in writing, and it is subscribed by someone. The person who adhibited the signature to the document was the defender Young, and though it was signed in the name of the firm in my opinion that makes no difference.

Then it is said that the document does not bear the name of the creditor or the party entitled to found upon it, and therefore is bad. The only ground upon which that contention is supported is the construction of the English Statute of Frauds. In the first place that statute does not apply to Scotland, and in the second place the case of *Williams* v. *Lake*, 29 L.J., Q.B. 1, which is referred to, is based upon reasoning which does not apply in the present case at all, because this is not *ex facie* an agreement.

It is a unilateral obligation, and apparently so far as we can discover by a reference to the English cases on points arising under the statute the contention would not have been sound there. Taking the law as it stands in Scotland, I think we have plenty of Scottish authority to show that a cautionary obligation such as this is quite good although the name of the party who is entitled to found upon it does not appear on the document.

Two or three cases are referred to by the Lord Ordinary. The last case of all—the recent case of *Robinson*, 1916 S.C. (H.L.) 154—seems to me to apply in terms here. The only point which is not covered by that decision is that which Mr Moncrieff made, namely, that this is a document granted in the first place for behoof of the landlord, and that there is an attempt made to found upon it for two purposes, namely, first to save the landlord, and secondly, to save the factor, who came in as cautioner in respect of the sale. But the document was granted, as the defender himself says in his evidence, because Renton Fortune wanted to get a farm in Fifeshire, and the defender contemplated that the letter would be shown to the people who would be letting the farm to Renton Fortune. He says—"That was the purpose for which I wrote it." He was asked—"In point of fact isn't it the truth that you knew perfectly well and wrote it for the purpose of its being shown to the factor—(A) Oh, yes;" and later on he says—"I knew quite well that it was to be given to the factor. I also knew quite well that it was to be given to him so that he might know about Fortune's financial position." Therefore according to his statement there it was given in order that the factor might know Fortune's financial position, and it is impossible to suggest that it was not also given that the landlord might know what the financial position was. I think the case falls within what Lord Loreburn said in the case of *Robinson*—"A subordinate point was raised in this case, namely, whether or not the respondent M'Arthur intended to induce and did induce the pursuer to act upon the incriminated letter. In my opinion that letter was intended to convey the opinion that the two Messrs Inglis were in good credit, and the writer meant to influence those persons who should be interested in providing the contemplated loan. The pursuer was such a person, and he was undoubtedly induced by the letter to give his name as surety. He was none the less induced by the letter that it was not in fact either addressed to or seen by him, for its effect was accurately stated to him in pursuance of the writer's intention, and he acted upon it." In this case while the pursuer was only the factor, the landlord was in the position of being landlord and occupant of the farm, and, of course, as is a matter of almost universal, if not entirely universal, practice in Scotland when a farmer leaves his tenancy there is a way-going sale, and there was that here. The landlord of the farm was therefore entitled to rely upon the terms of the letter so far as the rent was concerned, and as he was also the owner of the stock and the crop, when he came to sell these he was in my opinion entitled to rely upon that letter to the effect that the defender by signing it intimated to him that Renton Fortune, whether he was tenant or purchaser of the stock on the farm, was good up to £1600 or £1800. The factor, who was the actual recipient of the document, was also, I think, entitled to rely upon it. Therefore this latter point which Mr Moncrieff made also fails. I think the case is governed so far as this liability is concerned by what was said in the House of Lords in *Robinson's* case.

For these reasons I think the Lord Ordinary's judgment is right, and his interlocutor should be adhered to.

LORD DUNDAS—I agree with all that has been said by your Lordship in the chair. I think it is impossible to read this letter as being a mere testimonial as to character. The first sentence no doubt is so, but what follows is plainly a guarantee. Nor can I read the latter as a mere intimation that Mr Fortune has stated to the writer that his financial standing is so-and-so. The letter I think is very clearly a guarantee that the financial standing of Mr Fortune is good to the extent of from £1600 to £1800. As regards the point mainly argued for the defender to the effect that the letter does not bear to be addressed to anybody, I need only say that that point seems to fail, looking in the first place to the evidence at the proof, and in the second place to what was said in the House of Lords in the recent case of *Robinson*, 1916 S.C. (H.L.) 154.

LORD GUTHRIE—I agree. On the first question of this letter being a mere testimonial I think the evidence shows quite clearly what took place. The defender was only asked at first to grant a testimonial, and he did so. Then he was led on by Renton Fortune to add the clause of which he did not, unfortunately, at the time appreciate the meaning and importance. But the mere fact of his *bona fides* in the matter will not affect the legal result.

As to the document not being signed by the defender, and therefore not being within the words of the Mercantile Law Amendment Act, it seems to me that he might have signed any other firm name or any individual name, say John Smith, and the result would have been the same. The document being signed by him, whatever name he chose to take, he is responsible for it.

As to its not being addressed to the pursuer, the Lord Ordinary's answer is sufficient—namely, that the defender knew that it was meant for the pursuer.

I agree with your Lordship that even if the defender had not been so frank and had denied all knowledge of what was going to be done with the document there is enough in the cases referred to by the Lord Ordinary, and especially in the case of *Robinson*, 1916 S.C. (H.L.) 151, to dispose of that point. *Robinson's* case in the House of Lords directly raised the question, because their Lordships differed from the view taken by us in this Division. As to

credit not being given on this letter, that is negatived by the evidence in regard to both sums, and the result is not affected by the pursuer's evident desire not only to have this guarantee but additional security, which is perfectly natural, for he knew nothing about the defender or his firm. Therefore I think the Lord Ordinary has come to the right conclusion.

LORD SALVESEN was not present.

The Court adhered.

Counsel for the Pursuer (Respondent)—J. A. Christie—E. O. Inglis. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defender (Reclaimer)—Moncrieff, K.C.—M. P. Fraser. Agents—J. & R. A. Robertson, W.S.

Friday, October 19.

SECOND DIVISION.

[Sheriff Court at Kirkcaldy.

YOUNG *v.* WATERSON.

Succession — Friendly Society — Insurance — Life Assurance — Benefits Payable to Nominee on Death of Member — Deed of Nomination—Holograph Will.

A member of a mutual assurance association, which did not come under the Friendly Societies Acts, signed a nomination form in favour of his sister. He died leaving a holograph will whereby he bequeathed one-half of his property to his sister and the other half to his fiancée. His sister having, under the nomination in her favour, received payment of the sum of £45, his fiancée brought an action for payment to her as executrix of that sum, averring that it formed part of the estate which according to the deceased's will fell to be equally divided between them. *Held*, on a consideration of the rules of the association, that the nomination only entitled the nominee to collect the money payable in respect of the member's death, but that the property could not be disposed of otherwise than in accordance with the terms of the will.

Mary Young, *pursuer*, brought an action in the Sheriff Court at Kirkcaldy against Mrs Helen Tarrant or Waterson, *defender*, whereby she craved for an order for payment of the sum of £45 with interest to herself as executrix-dative *qua* legatee of the deceased David Tarrant, a private in the 1st Battalion, Cameron Highlanders, and a brother of the defender, the sum in question having been paid on his death by the Police Mutual Assurance Association.

The pursuer *pleaded*—"4. The said sum of £45 being part of the deceased's estate carried by his said holograph will, the pursuer as executrix is entitled to decree therefor with expenses."

The defender pleaded—"5. The sum in question not being part of the deceased's estate, and in any case not being carried by his will, the pursuer has no claim for the amount sued for, and the action should accordingly be dismissed, with expenses. 6. In any event the female defender is, under the will founded on by pursuer, entitled to one-half of the amount sued for."

The *facts* of the case are set forth in the Sheriff-Substitute's note as follows:—"The material facts of the present case are simple, and are, I understand, admitted. The late David Tarrant, private in the 1st Battalion of the Cameron Highlanders, was for some time in the Edinburgh Police Force. About the same time as he became a member of the police force (29th April 1913) he also joined the Police Mutual Assurance Association. The rules of the latter, *inter alia*, provide—'That every member of every police force in England, Wales, and Scotland, whose age does not exceed thirty years, may be admitted a member of this association on his submitting his name and that of his nominee in writing to the authorised officer of the force to which he belongs.' On joining the association in Edinburgh the deceased there signed a nomination form in favour of his sister, the female defender. He paid certain weekly contributions, and a sum of £45 was payable on his death, which took place on 29th September 1914 from wounds received in action. David Tarrant left a holograph will, dated 13th August 1914, by which he left his property equally to the pursuer and his sister, the female defender, who in the interval had duly intimated her brother's death and received payment of the £45. The question for decision is—Whether the sum of £45 forms part of David Tarrant's estate to be divided in terms of the will, or is the defender entitled to retain possession of it?"

The *rules* of the Police Mutual Assurance Association provide, *inter alia*—"XII. That as early as possible after the death of any member of the association, the chief or authorised officer of the force with which the deceased was connected at the time of his death shall forward to the secretary the succession number, name, rank, certificate of death, length of police service, time the deceased was a member of the association, the name and address of the nominee, and the last nominee form signed by the deceased member. The secretary shall give notice of the death in the next issue of the *Police Chronicle*, and shall, as early as possible after the death has been duly authenticated to him, send a cheque, with two receipt forms, to the authorised officer of the force with which the deceased was connected for the amount due to the nominee; the amount so forwarded shall be paid to such nominee, who shall give a receipt in duplicate; one of such receipts shall be filed and the other returned to the secretary. The secretary shall, as early as possible, publish his receipt in the *Police Chronicle*, and this publication shall be a sufficient receipt for the amount so forwarded. (*a*) That in case any nominee be insane or dead at the time when the money directed to be paid shall become due, the committee may pay the same to or amongst the relations or friends of the