The case is reported *ante ut supra*, where will be found the Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), sec. 70, and, in the opinion of the Lord Ordinary, a narrative of the facts established by proof.

The Caledonian Railway Company (complainers and reclaimers) appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—This case is one of a class which always has been, and I suppose always will be, of exceptional difficulty, as will every case be in which the decision really depends upon a question of degree.

The principle of the decision in this House in the *Budhill* and *Carpalla* cases seems to me to have been this: The Court has to find what the parties must be taken to have bought and sold respectively, remembering that no definition of "minerals" is attainable, the variety of meanings which the use of the word "minerals" admits of being itself the source of all the difficulty. It must be taken that what the Railway Company intended to get and the landowner intended to give was the land under the line, for the object was to give, not a wayleave, but a support. I say this, speaking generally. Upon the other hand, if anything exceptional in use, character, or value was thereunder, that was reserved, provided it could be included under the word "minerals" as understood in the vernacular of the mining world and the commercial world and the landowner.

Now applying that in the present case, it is not doubted that the substance contained in the lowest seam, at least as to three-quarters of it, was a "mineral" within the vernacular which I have described. It is said that the same persons who used that language also included, not merely the remaining fourth of the lowest seam, but the clay contained in all the other seams. I will assume that it is so. But in fact it is no answer to say that the vernacular has a still wider application than it would have if it were restricted solely to Glenboig fireclay.

The evidence given as to common meaning is evidence given of the common meaning at the present day. I should assume that it was the same at the time of the sale unless sufficient ground was given for coming to a contrary conclusion. The particular seam now being worked, to which alone the present decision of your Lordships will apply, is certainly of an exceptional character as to its properties and value upon the evidence before us; and it is not established in the evidence before us that it is present in such large proportions as to destroy its exceptional character.

It is impossible in my view to give further assistance in ascertaining when a substance is to be treated as a mineral within the Act of Parliament than we have endeavoured to give in the cases already cited, and in any observations which their Lordships may make in the course of the present case.

LORD MACNAGHTEN—I agree.

LORD SHAW—I am of the same opinion.

LORD ROBSON—I am also of the same opinion.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Appellants—Clyde, K.C.—the Hon. W. Watson. Agents—H. R. Buchanan, Glasgow—Hope, Todd, & Kirk, W.S., Edinburgh—Grahames, Currey, & Spens, Westminster.

Counsel for the Respondents—D.-F. Scott Dickson, K.C.—Macmillan. Agents—Craig & Henderson, Glasgow—Morton, Smart, Macdonald, & Prosser, W.S., Edinburgh—Walker, Martineau, & Company, London.

COURT OF SESSION.

Friday, January 27.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

BANK OF SCOTLAND *v.* MORRISON.

Cautioner — Extinction of Obligation — Creditor's Duty toward Cautioner—Suspicions of Principal Debtors' Guilt of Forgery — Obligation to Inform Cautioner.

The cautioner, under an assignation and letter of guarantee, dated 13th June 1899, maintained that the creditor, a bank, knew on 18th December 1906, or at latest in May 1907, that the debtor had forged an acceptance on a bill, and that their failure to disclose to him this knowledge liberated him from his obligations. On 18th December 1906 the bank had become aware that the acceptor of a bill drawn by the debtor had repudiated the signature on the bill, and events occurred such as must have roused their strongest suspicions that the acceptance was forged, viz.—(1) that the debtor, while maintaining that the repudiation was due to misunderstanding, paid on 19th December the bill in full by bank notes; (2) that he promised to bring the alleged acceptor to explain, but failed to do so; (3) that the alleged acceptor's banker informed them the signature must in view of the repudiation be a forgery; (4) that the debtor had used cheques signed by him in the name of his firm to finance his own overdrafts, but under the express condition they were not to be presented for payment. The bank, however, had no legal proof that the alleged acceptance was forged, and it was never so proved, though the debtor was eventually convicted on his own confession of having forged five promissory-notes. No fresh accommodation had been given to the debtor after 18th December 1906, and the account was no worse than at that date.

Held that the bank had no duty to communicate their suspicions to the cautioner, and that they had not by their failure to do so discharged him from his cautionary obligations.

Expenses—Reclaiming Note on Merits and Expenses—Time for Challenging Lord Ordinary's Award—Opening on Separate Question of Expenses.

Observations on the rule laid down in *Clark* v. *Sutherland*, March 18, 1897, 24 R. 821, 34 S.L.R. 555, that when a party reclaiming objects to an interlocutor not only as wrong on the merits, but also as wrong in finding the reclaimer liable in expenses even if right on the merits, he must state his objection as to expenses in opening on the reclaiming note.

The Bank of Scotland, *pursuers*, raised an action against Charles Morrison, 25 Royal Terrace, Edinburgh, *defender*. The first sum sued for was £194, 10s. sterling, being the amount paid by the pursuers on 1st February 1908, in respect of the premiums on two policies of life assurance assigned by John Ayling, printer, Edinburgh, by assignation dated 13th June 1899, with interest at the rate of 5 per cent. from 1st February 1908 till payment, which sum the defender was bound to pay them as cautioner under the said assignation. The assignation was granted in part security of a special advance of £4000 made to Ayling. The second sum sued for was £100, being the amount due by the defender to the pursuers as at 31st December 1907, in respect of a guarantee granted by him in their favour, dated 13th June 1899, by which he guaranteed to the pursuers due payment of all interest then due or which might become due to the pursuers by Ayling on the said special advance of £4000 made to him to an extent not exceeding £100 in any one year.

The defender pleaded, *inter alia*—"(5) The pursuers having by their conduct and actings released the defender of any cautionary obligation undertaken by him, the defender ought to be assoilzied."

On 24th November 1908 the Lord Ordinary (MACKENZIE) repelled the defences and decerned against the defender *de plano*.

The defender reclaimed to the Second Division, who on 23rd June 1909 recalled the Lord Ordinary's interlocutor, and before answer allowed the parties a proof of their respective averments, remitted the case to the Lord Ordinary to proceed, and reserved all questions of expenses.

The *facts* of the case are given in the opinion (*infra*) of the Lord Ordinary, who on 19th November 1909, after the proof, pronounced this interlocutor—"Decerns against the defender in terms of the conclusions of the summons: Finds the pursuers entitled to expenses," &c.

Opinion.—"The defence . . . maintained by the cautioner is that he has been liberated from the obligations imposed upon him by the documents set out on record, in consequence of the failure of the bank to communicate to him certain facts regarding the debtor which had come to their knowledge on 18th December 1906. The result of this failure, according to the contention of the cautioner, was that he suffered prejudice.

"The defender was cautioner for John Ayling, who was a customer of the pursuers at their Dalry branch, where he had two accounts,—No. 2 for a special advance of £4000, a dormant account; No. 1 was his current account, to which was debited the interest accruing upon No.2.

"There were bill transactions at the Dalry and also at the Greenside Branches. It is in regard to one of the bills discounted at the Dalry Branch that the present question has arisen. This was a bill for £3000 dated 18th July 1906, bearing to be drawn by John Ayling and accepted by Francis Bennet Goldney, Abbots Barton, Canterbury, Kent. The proceeds were credited to Ayling's account on 4th August 1906. It fell due on 21st December 1906. Shortly before that date Ayling had made proposals to Mr MacBeth Forbes, the agent at the Dalry Branch, for its renewal, and on 17th December the Head Office had instructed Mr Forbes that the bank would agree to the bill being renewed to the extent of £2000. The bill had, however, on the 14th December been transmitted for collection to the Capital and Counties Bank, Limited, at Chippenham. The Capital and Counties Bank, after communicating with Mr Goldney telegraphed on 18th December to the Bank of Scotland that they were informed by their customer that the acceptance for £3000 was not signed by him.

"On receipt of this telegram Sir George Anderson, the treasurer of the Bank of Scotland, sent for Ayling and had a meeting with him on 18th December. Ayling was shown the telegram, and it was pointed out that it was a very serious matter for him; that the inference was that the bill was a forgery, and that he was the forger. Ayling's explanation was that there had been a misunderstanding, and that Goldney would call upon Sir George Anderson about the New Year, and would put it all right. It was arranged on the 18th that Ayling should pay the £3000 next day. He offered to do so. The Capital and Counties Bank were wired on the 18th to return the acceptance, which they did. On the 18th Ayling wrote to Mr Forbes, telling him Goldney had repudiated the bill, that he (Ayling) had promised Sir George Anderson £3000 in exchange for the bill, and was then going to write Goldney for a thorough explanation. On 19th December Sir George Anderson got from Ayling notes for the whole sum of £3000. As Sir George Anderson says, 'It is not usual for customers who have £3000 bills to come and pay them in notes.'

"On the 19th Ayling wrote to Sir George Anderson that 'his friend (that is Goldney) has apologised to me by telephone this afternoon and is writing me and is coming to see me about January 1907, when I will prevail upon him to come up with me to

see you.' On the 19th Sir George Anderson returned the acceptance to Ayling. His position at that date was this, according to his evidence:—'Of course I was suspicious about the circumstances, but Ayling spoke so confidently about a misunderstanding and that he would put it all right, that I kept, as it were, a sort of open mind to see what would come out of it. As at that date I had no knowledge that the bill for £3000 was a forgery, beyond the telegram.' There was, Sir George Anderson says, no occasion for him to make the necessary inquiries to verify whether Ayling was a forger or not. There were, on the 18th of December 1906, bills of Ayling's current at the bank to the amount of £8700 in all, including the Goldney bill. Sir George Anderson thought that, following on the transaction regarding the £3000 bill, there was a good chance of getting rid of these bills, which he did not care about, as they were temporary accommodation bills. These bills were run off after 18th December 1906. According to Sir George Anderson's evidence, if he had verified on or about 18th December that Ayling was a forger, he thinks he would have closed his account right off.

"A few days after the 19th Ayling called again and showed Sir George Anderson a letter which purported to be from Mr Goldney, to the effect that he (Goldney) was to be in Edinburgh about the New Year and would make a point of calling at the Bank of Scotland and explaining the whole circumstances of the case. Mr Goldney did not call. There is no evidence which proves when Sir George Anderson saw Mr Forbes on the matter. The latter says it was not until after the 4th of March 1907. Sir George Anderson thinks he saw him on 18th December. He says his communication with Mr Forbes would be through the inspector of branches. On 28th February 1907 Mr Forbes wrote a letter to Mr Simpson, the manager of the Capital and Counties Bank, with reference to the telegram of December as to the £3000 bill, saying he was anxious to know if the matter had been cleared up, as the bank still had dealings with the drawer; that Ayling informed him (Forbes) that he had seen Simpson and Goldney since the affair in the office of the Capital and Counties Bank; and wanting to know if Goldney still repudiated his signature on the £3000 bill. Mr Simpson communicated with Sir George Anderson on the matter, who had a meeting with him in London the following May. The evidence of Mr Simpson is this—'I saw Sir George Anderson and informed him that there could be no question that the bill was a forgery in view of Mr Goldney's repudiation of the signature,' and also told him that the statement by Ayling (referred to in Mr Forbes' letter to the Capital and Counties Bank) that he had been to the Chippenham Office and had an interview with Mr Goldney and the manager was a falsehood. At this meeting Mr Simpson told Sir George Anderson of certain transactions which Goldney had had with Ayling before, representing very considerable sums, and Sir George Anderson deponed that what Mr Simpson said with reference to the particular bill 'was rather upset by what he told me of those dealings. Sir George Anderson says that the meeting with Mr Simpson left him very much where he was before, 'my suspicion was certainly there, but there was no more certainty about the matter than there had been before.' At the meeting Mr Forbes subsequently had with Sir George Anderson he was not asked his view as to the bill.

"On 28th October 1907 there was a meeting in Sir George Anderson's room at the Bank of Scotland, at which were present Mr A. L. Menzies, W.S., agent for the firm of Messrs T. & A. Constable, of which Ayling was a partner, Mr Bogie, manager of the Commercial Bank of Scotland, Limited, Mr Nicholson, manager of the Clydesdale Bank, George Street, Edinburgh, and Mr Goggs, secretary of the Scottish Metropolitan Life Assurance Company, Limited. There was a discussion about Ayling's affairs, and there is a conflict of evidence as to whether Sir George Anderson stated that he knew in December 1906 that the Goldney bill was a forgery. His evidence is that he could not have said so, and did not say so. The other witnesses are unable to speak to the exact words used, but their evidence is sufficient to show that Sir George Anderson did on that occasion use language which conveyed to his hearers the impression that in December 1906, when he received the telegram from the Capital and Counties Bank, he was suspicious, and that his suspicions were confirmed by his subsequent interview with Ayling.

"Ayling's estates were sequestrated on 1st November 1907. He pleaded guilty and was sentenced on 29th November, in respect of the following charges:—(1) uttering as genuine a forged promissory-note for £2000 on 22nd April 1907; (2) uttering a forged promissory-note for £2500 on 24th May 1907; (3) uttering a forged promissory-note for £5250 on 12th August 1907; (4) uttering a forged promissory-note for £1660 on 13th August 1907; and (5) uttering a forged promissory-note for £2000 on 24th September 1907.

"The position of the defender is that when Sir George Anderson learnt on 18th December that Mr Goldney repudiated his signature, he was bound to intimate this fact to him, and that by his failure to do so the bank have forfeited their right to enforce the cautionary obligations. The defender further maintains that Sir George Anderson knew upon 18th December that Ayling was a forger, and was therefore bound to close his account as at that date, and also to inform the cautioner. The argument indeed went further, that Sir George Anderson had the means of knowing on 18th December that Ayling was a forger if he had inquired into his previous banking transactions at the Dalry Branch, and that he is not now entitled to say he did not know. According to the

defence there was at 18th December 1906 no debit balance for which the cautioner was liable, whereas at the date of Ayling's sequestration on 1st November 1907 the amount of his unsecured liability to the bank was £528, 9s.

"Before dealing witht he defender's main contention, it is right I should advert to what is founded on as having taken place at the Dalry Branch prior to December 1906. The pursuers objected to the admission of this evidence on the ground that there is no averment on record that the bank prior to 18th December 1906, suspected Ayling's honesty, but looking to the statements in answer 2 the evidence cannot be held incompetent. It shows that for a considerable period Ayling had had recourse to a variety of methods for raising money. His account was overdrawn, and pressure had been put upon him from the Head Office to reduce the amount of his overdraft; he had on several occasions obtained money from the bank upon cheques signed with his firm's name, which were not put through the books, but retained by the bank's agent until redeemed. On occasions he endeavoured to get acceptances discounted which bore the firm's name, and when he was requested to get his partners' signatures the proposal was dropped; that pressure was put on Ayling by the bank's agent to get payment of one of the bills as the acceptor would 'hate' to get notice of dishonour; and that the explanations given by the bank's agent to the Head Office in regard to Ayling's accommodation bills were not intelligible. As regards these matters, though the way money was raised on the firm's cheques is open to animadversion, the course of dealing was not such as *per se* was necessarily sufficient to raise the suspicion that Ayling was dishonest. The only witness examined on behalf of the defender upon this point, the agent at the Dalry Branch, deponed that he did not, prior to 18th December 1906, suspect him. Sir George Anderson depones that personally he had no knowledge in December 1906, or until October 1907, of the course of correspondence between Ayling and the bank's agent at Dalry. I am unable to see how it can be successfully alleged against Sir George Anderson that there was a breach of duty in failing to disclose facts which, it is said, he might have known had he inquired, but which, in point of fact, he says he did not know.

"The question is whether there was upon 18th December 1906 an obligation upon Sir George Anderson to disclose to the cautioner a fact which was then within his knowledge, viz.—that Mr Goldney had repudiated his signature on the bill. The case must, in my opinion, be so put, although the defenders counsel dwelt on what he called Sir George Anderson's knowledge, and on the obligation there was on him to communicate this knowledge. In the present case what was thus described as knowledge could only be opinion on the facts. Ayling never admitted that Goldney's signature was a forgery. On the contrary, he disputed Goldney's repudiation. Nor has it been proved in this case that Goldney's signature was a forgery.

"The 18th of December, and that date alone, for reasons connected with the state of the bank account, which will be obvious later on, was founded on as the point of time when, it was said, the obligation arose to close the account and intimate to the cautioner. Facts, therefore, which came to Sir George Anderson's knowledge subsequent to 18th December cannot be founded on as imposing upon him the obligation of disclosure as at that date.

"The case for the defender is that at the meeting Sir George Anderson had with Ayling on 18th December 1906 the circumstances arose which put on the former the duty of making intimation to the cautioner. The situation, however, then was that Ayling said Goldney's repudiation was due to a misunderstanding, that he would write to him, and bring Goldney to see Sir George Anderson, and that he would put it all right. The letters written at the time bear out that this was the explanation given. Whatever opinion may be held as to the effect which probably was produced on Sir George Anderson by Goldney's repudiation and Ayling's payment, the question is whether there was a legal obligation upon him to tell the defender, Ayling's father-in-law, that in consequence of the telegram he had received from Chippenham he suspected his son-in-law of being a forger; and to do so although it was not then beyond the region of possibility that an explanation might be forthcoming.

"The defender's contention involves the proposition that there is an obligation upon every creditor, not only at the inception of the contract of caution, but throughout its duration, to communicate to the cautioner any fact coming to his knowledge which materially adds to the risk. No authority was cited to support so wide a proposition as this. The passage in More's Notes to Stair i, 107, refers to the duty of disclosure before the contract is entered into. The only cases relied on by the defender were those which relate to fidelity guarantees, of which *Smith* v. *Bank of Scotland*, 7 S. 224, 1 Dow 272, and *Snaddon* v. *London, Edinburgh & Glasgow Assurance Company*, 5 F. 182, 40 S.L.R. 164, are examples. It was contended that there was no distinction in principle between those cases and the present; that in each case the contract of caution was renewed *de die in diem*, and that there was in each case involved a representation that the creditor had no material fact to disclose. The argument is in my opinion unsound. In the one case, that of a fidelity guarantee, what the cautioner guarantees is the faithful discharge of duty, though, no doubt, if there is a failure in duty, the solvent is money. In the other case, which is the present, the cautioner guarantees the credit of the debtor that he will pay a sum of money of fixed amount. The cautioner for payment of a money debt can

at any time, by paying the amount for which he is liable, free himself as in a question with the creditor. He can then sue the debtor upon the assigned contract. He is master of the situation. Accordingly there is not the same obligation towards him on the part of the creditor that there is in the case of a fidelity guarantee. A cautioner for the faithful discharge of an office cannot himself perform the contract. He cannot by paying up the sum engaged for discharge his obligation and take the debtor in his own hand. The representation and understanding therefore as to the trustworthiness of the servant on which the contract was originally founded continues to its end. The cautioner for payment of money guarantees the credit of the debtor which depends on many considerations other than the state of the account, and of which the cautioner is presumably better able to judge than the creditor. In the case of a fidelity guarantee the cautioner guaranteed the dealings between the servant and his master, and of these the master has opportunities of judging which the cautioner has not. The difference between the two classes is pointed out in Bell's Com. i. 380, and this passage shows that the considerations applicable to fidelity guarantees do not apply to guarantees for payment of money. The defender's counsel founded on Bell's Prin., sec. 251, but the authority for the proposition there stated is *Owen* v. *Homan*, 4 H.L. Ca. 997, a case in which the bank were guilty, art and part with the debtor, of fraud. Once the contract of cautionry has been entered into, the law is averse to put the obligation upon a creditor of volunteering information to the cautioner. Passive inactivity is not enough to discharge the cautioner. There must be some positive act on the part of the creditor, or such negligence as to imply connivance and amount to fraud—*M'Taggart* v. *Cowan*, 1 S. and M'L. 553; *Black* v. *Ottoman Bank*, 15 Moo. P.C. 672; *Mayor, &c., of Durham* v. *Foster*, 22 Q.B.D. 394. The law upon this point is the same in Scotland and in England. In addition to the cases cited, reference may be made to *Hamilton* v. *Watson*, 5 D. 280, 4 Bell's App. 67; *North British Insurance Company* v. *Lloyd*, 10 Exch. 523; and *Wythes* v. *Labouchere*, 3 De G. & J. 593. The defender has, in my opinion, failed to prove sufficient to liberate him from his obligation.

"Further, if the defender had received intimation of the repudiation upon 18th December, I do not think it is proved he would have been in any better position. The unsecured debit balance on Ayling's account as at the date of the sequestration on 1st November 1907, was £528, 9s.; as at 31st December 1906, after interest had been debited, the nett unsecured indebtedness was £590, 14s. 11d. This is brought out by deducting the surrender value of the policies held by the bank, £3900, from the liabilities, which (excluding bills) at that date amounted to £4490, 14s. 11d. It was argued that if the account had been closed as at 18th December there was a balance then at Ayling's credit of £1068, 5s. 11d. I do not think that figure can be taken alone. The sum of £1046, 8s. 6d. was paid in upon the 18th, and, as Mr Laird explains, the account ought not to be credited with that figure without taking into account the debit entry of £1040 which appears the following day as being drawn out in order to meet Goldney's bill. In like manner the credit of £250, which appears upon the 19th, is a cross entry to the extent of one half to meet a bill for £500 due in London on that date.

"The way in which counsel for the defender sought to state the account as at 18th December 1906 was this—Liability on bills £8700, on No. 2 account £4000, total £12,700, deduct credit balance on No. 1, £1068, 5s. 11d., leaves nett liability £11,631, 14s. 1d.; total amount of the bills which were paid was £8700, deducting this from the nett liability of £11,631, 14s. 1d., leaves to be paid £2931, 14s. 1d.; the surrender value of the policies held by the bank was £3900, showing a surplus of over £1000 as at 18th December 1906. It was then argued that between 18th December 1906 and 1st December 1907 the bank allowed Ayling to draw out over £1000, which they should not have done; had they not done so there would have been no debit balance at the date of the sequestration, and the present action would not have been rendered necessary.

"This, as it appears to me, involves a fallacy. According to this way of stating the account it is assumed that the £8700 to meet the bills was supplied *aliunde*—in point of fact, it was to the extent of £1040 provided out of the credit balance of £1068, 5s. 11d., which, according to the defender's statement of the account, has already been deducted in order to bring out the net indebtedness. This is, in effect, to use the same £1040 twice over. Counsel then maintained that even if it was not correct to say there was a surplus as at 18th December, at any rate the account was square. This is not so, because the cross entry of £250 must be taken into account, and interest on the overdraft debited, which brings out the total indebtedness at the figure above given. Further, the amounts drawn out during the period 18th December 1906 to 1st November 1907 cannot be regarded without considering the amounts paid in. Mr Laird's evidence is that the amounts paid in were £1208, 17s. 7d., while £1207 was drawn out.

"I am of opinion that the defender has failed to prove he has suffered prejudice owing to his not having received intimation on 18th December 1906 that Goldney repudiated his signature on the bill.

"I am accordingly of opinion that the pursuers are entitled to decree as craved, with expenses."

The defender reclaimed, and argued—The pursuers were in breach of the implied agreement between them and the defender in respect that they did not let him know in December 1906 that the bill had been repudiated. There was a contract between them in this sense, that the creditor must

deal fairly with the cautioner. There were really joint-obligations between them. The pursuers had at that time and afterwards known, or very strongly suspected, that the debtor was a forger. They did not—as they were bound to do—disclose their information to the defender, who was therefore relieved from his cautionary obligation, and if they did not know, they were wilfully blind, and wilful ignorance was equivalent to knowledge—Bell's Prin., 251; *Owen and Gutch* v. *Homan*, 1853, 4 H.L. Ca. 997 (Lord Chancellor Cranworth at 1034); *Jones* v. *Gordon*, 1877, 2 App. Cas. 616 (Lord Blackburn at 628-9 and Lord Gordon at 635); *Dawson* v. *Lawes*, 1854, 23 L.J. Ch. 434 (Wood, V.-C., at 441); *Williams* v. *Bayley*, 1886, L.R., 1 E. & I. App. 200 (Lord Chancellor Cranworth at 208-9, and Lord Westbury at 220-22). There was no distinction between what it was necessary to disclose at the commencement of the cautioner's obligation and during the course of its subsistence. The obligation was a continuous one throughout the duration of the guarantee. Accordingly, if the creditor at any time acquired knowledge he must put the cautioner in position of being able to take steps with a view to relieving himself of his obligation—More's Notes on Stair, i, cvii; *Phillips* v. *Foxhall*, 1872, L.R., 7 Q.B. 666; *Paterson* v. *Bonar*, March 9, 1844, 6 D. 987 (Lord Murray at 1001); *Hamilton* v. *Watson*, March 11, 1845, 4 Bell's App. 67 (Lord Campbell at 103); *Smith* v. *Bank of Scotland*, June 9, 1813, 1 Dow 272, and January 14, 1829, 7 S. 244; *M'Taggart and Others* v. *Watson*, April 16, 1835, 1 S. & M. 553 (Lord Ordinary's note at 565); *Mayor of Durham* v. *Fowler*, 1889, 22 Q.B.D. 394; *Burgess* v. *Eve*, 1872, 13 Eq. 450. The only difference between cautionary and fidelity guarantees was that the Court was less ready to assume duty on the part of the creditor than on the part of the master. The reason for that was that in the case of a fidelity guarantee the master had greater means of knowledge and would have to disclose certain things to a cautioner that a creditor would not. But in both cases failure to give information would relieve the guarantor. The motive for concealment did not matter, it might be perfectly innocent but that would not relieve the creditor. The defender was really in the same position as a debtor in a bond. Such variation of his rights had been made as to discharge him—*Polak and Another* v. *Everett*, 1876, 1 Q.B.D. 669. The giving of time to the debtor released the cautioner—*Johnstone* v. *Duthie*, March 15, 1892, 19 R. 624, 29 S.L.R. 501; *Swire* v. *Redman*, 1876, 1 Q.B.D. 536. It was not necessary for the defender to show that he had suffered prejudice by the bank's failure to inform him of what they knew. At the same time he had as matter of fact proved prejudice. The contract of guarantee was void, because a fact materially affecting the nature of the obligation was not communicated to the defender—*Pidcock* v. *Bishop*, 1825, 3 B. & C. 605 (Bayley (J.) at 610, and Holroyd (J.) at 611). The statement of the law made in Bell's Com. i, 380, which was relied on by the Lord Ordinary, had been altered by *Phillips* v. *Foxhall* (*cit. sup.*).

The pursuers were not called on.

At advising—

LORD JUSTICE-CLERK—In this case we had the benefit of a very clear and complete argument from Mr Smith Clark, and after consultation, with its aid, the conclusion your Lordships have arrived at, and in which I concur, is that the defender has not made out a case sufficient for his success. His position is that of a cautioner to the pursuers the Bank of Scotland for John Ayling, who had two accounts with their Dalry Branch, one for a special advance of £4000, and the other a current account, in which the interest on the advance was debited.

There were numerous bill transactions, and among others a bill for £3000 bearing to be drawn by Mr Goldney, of Canterbury, and the proceeds of which were credited to Ayling's account in August 1906. It fell due in December of that year. Before falling due, Ayling proposed to Mr Forbes, the agent at Dalry, that it should be renewed, and a renewal to the extent of £2000 was sanctioned by the Head Office.

It so happened, however, that the bill had been sent to Mr Goldney's bank at Chippenham for collection, and that bank informed the Bank of Scotland on 18th December that Mr Goldney repudiated the signature upon the bill.

The defender maintained that at that date the Bank of Scotland was bound to disclose the matter to the cautioner and to close Ayling's account. It seems to me to be quite impossible to hold that to be a sound contention. The officials of the bank did what it naturally lay upon them to do, by calling Ayling's attention at once to the matter and giving him an opportunity to explain. He gave the assurance that there was a misunderstanding and that the matter would be put all right, and it was arranged that the bill should be paid next day, Ayling offering to do so. The bill was got back from the Chippenham bank, and the sum in the bill was paid by Ayling on the following day, Ayling on the same day writing to the bank treasurer, Sir George Anderson, and saying that his friend Goldney had apologised to him by telephone and that he would bring him to see Sir George in January.

Now it appears to me that the question whether anything had occurred which would free the defender from his cautionary obligation must be something which is to be found in the history of matters at that distinct time of 18th and 19th December. The bill was paid, which in the ordinary course of business was all that the bank was interested in, and unless it can be shown by the facts then occurring that the bank was in such a state of knowledge as to bring home to its officials that if they took payment they were conniving at a fraud, it is difficult to see that there was any duty to volunteer information.

If there was not, then I cannot hold that mere passivity—apart from knowing connivance—can be held to free the cautioner. The cases quoted by the Lord Ordinary seem to me to establish this clearly.

Here in this case there may have been elements of considerable suspicion. But there was certainly no knowledge. Ayling denied that Goldney's signature was a forgery, and it certainly is a most unsatisfactory circumstance in this case that the matter is left upon mere suspicion to this day, for there has been no evidence led to prove that any forgery was committed at all. Ayling himself was not examined as a witness for either side, neither is Mr Goldney. Most likely there was a forgery, but there is no proof of it. It is said that Mr Goldney was in bad health at the time the proof was taken. But that being the fact, his evidence could have been taken on commission, yet no motion was made to the Lord Ordinary to grant such a commission, and therefore the whole case on this bill is left to mere inference, based on the fact that after the time when this bill ran its course and was paid, Ayling was proved by his own confession to be a forger. But it appears to me that, even if such an inference could be drawn without any direct evidence at all, it could not aid the defender's case, for the inference is attempted to be drawn from what was discovered many months later, and how that can be founded on—however strong it might be—to support the contention that the creditor was bound to give information to the cautioner on 19th December I am quite unable to understand.

The defender endeavoured to strengthen his case by calling attention to suspicious circumstances occurring before December, such as that Ayling adopted several expedients to raise money, and among other things signed bills in his firm's name and when requested to get the signatures of the individual partners did not proceed with the bills. Further, that he raised money at the Dalry Branch by cheques signed by him in the firm's name, which were not put through the books, but kept aside till redeemed. It is said that Sir George Anderson if he had inquired might have known these facts. But I see no ground for holding that he had anything before him to cause him to make inquiries at that time. He did not inquire, and he did not know. And even if he had inquired, the facts above quoted, although they may have a certain aspect in the light of what has been discovered since, would not necessarily raise any serious suspicion of criminal fraud. Mr Forbes of the Dalry Branch, to whom they were known, did not have any suspicion of actual fraud till the repudiation of the Goldney acceptance.

But, further, I am unable to find in the authorities any ground for holding that the fact that suspicious circumstances come to the knowledge of a creditor, and are not communicated at once to the cautioner, is a ground for holding the cautioner freed from his obligation. The defender founded on numerous cases, but these were practically cases of fidelity guarantees, and between such cases and those of caution to a creditor for debt there is a marked and obvious distinction. The Lord Ordinary has very fully and clearly stated the distinction between the two classes of cases, and I entirely agree with the views he has expressed.

I agree also with the Lord Ordinary in the analysis he has made of the position of the accounts as at the time when it is said intimation should have been made to the cautioner, and in which it is brought out that had the intimation been made at the time he says it ought to have been made the defender would have been in no better position. I do not think it necessary to go over the figures, which seem to me to bring out accurately what the state of matters was, and to show that no benefit could have accrued to the cautioner if what he maintains should have been done had in fact been done.

I would therefore move your Lordships to adhere to the interlocutor of the Lord Ordinary.

LORD ARDWALL—I agree. I may say that I am so thoroughly satisfied with the clear and exhaustive opinion, both on the facts and on the law, delivered by Lord Mackenzie on 19th November 1909, that I feel I cannot usefully add anything to what is there said, but I may add that I have had the privilege of reading the opinion about to be delivered by Lord Salvesen, and I concur with what he has said on the subject of the authorities referred to at the debate. Accordingly I concur with the Lord Ordinary's opinion, and with the additional matter in Lord Salvesen's opinion. I think it is quite unnecessary for me to add anything.

LORD DUNDAS—[*Read by the Lord Justice-Clerk*]—I think the interlocutor reclaimed against is right, and am content to express my entire concurrence in the opinion delivered by the Lord Ordinary.

LORD SALVESEN—In this case the defender argued that on 18th December 1906, or at latest in May 1907, it was the duty of the bank to have communicated to him, as cautioner under the two guarantees of 13th June 1899, the information which they possessed with regard to Ayling. As regards the earlier date, all that the bank or their treasurer knew was that the acceptor of a bill for £3000, which had been discounted by Ayling with the bank, had repudiated his signature—a fact no doubt serious enough, but one from which they could not safely infer that the signature had been forged by Ayling. Following upon this, however, there were various circumstances which tended to confirm the bank's suspicions. In the first place, although Mr Ayling stoutly maintained that Goldney's repudiation of his signature was due to misunderstanding, he paid the amount of the bill in full to Sir George Anderson in bank notes; then he did not, as he promised, bring Mr Goldney to the bank to explain how the alleged misunder-

standing arose; and again in May Sir George had a meeting in London with Mr Simpson, the manager of the bank with which Goldney dealt, at which he ascertained Mr Simpson's very distinct opinion of the affair. In addition to all this the bank knew that Ayling had been using cheques signed by him in the name of his firm in order to secure his overdrawn accounts at the Dalry Branch, but under the express condition that the cheques were not to be presented for payment. These irregular transactions showed that Ayling was in straits for money, and was not overscrupulous how he obtained temporary accommodation, for it might easily have been inferred by the Dalry agent that the cheques which he drew in the name of his firm were not authorised by his copartners. While, therefore, the bank's suspicions that Ayling had forged the acceptance to the bill for £3000 amounted to a moral certainty, they had no legal proof, and such proof has not even yet been supplied. Ayling was convicted on 29th November 1907 on his own confession of having forged five promissory-notes, but he was not charged with having forged the acceptance here in question, and the defender has led no evidence on the subject. It is true he cited Goldney to attend the proof, but on that gentleman sending a medical certificate that he was unable to attend as a witness in Edinburgh owing to ill-health, he closed his proof without asking for an adjournment to enable him to have Goldney examined on commission, and without obtaining any admission from the bank that Goldney's signature had in fact been forged. Very little evidence would in the circumstances have amounted to legal proof of the alleged forgery, but none such has been forthcoming; and I confess to being surprised that the defender should have closed his case without having established a fact so vital to his success.

In the circumstances it is impossible to affirm that the bank, through their treasurer, knew that a forgery had been committed by Ayling, or that the defender can urge anything more than that the circumstances were such as to have roused the strongest suspicions as to Ayling's guilt. So taking it, the question of law which we have to consider is whether the bank owed a duty to the defender, as was strenuously maintained on his behalf, to communicate their suspicions to him, and whether by their failure to do so they have discharged him from his obligations.

A large number of authorities were cited by Mr Smith Clark in his full and able argument for the defender. I have since had an opportunity of reading and considering these carefully, but am unable to find that any of them support his main contention. In the case of *Owen*, 94 R.R. 516, the circumstances were totally unlike what have occurred here; and all that was eventually decided was that they did not justify the appointment of a receiver on the estate of the defendant. The observations of the Lord Chancellor, beginning at the foot of page 39, were specially founded upon. He said—"Without saying that in every case a creditor is bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, it may safely be stated that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence, he is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask and did not ask any questions on the subject. In some cases wilful ignorance is not to be distinguished in its legal consequences from knowledge." These observations related to the case of a bank discounting a bill on the faith of the signature of a party to it, which signature it had reason to believe had been obtained by fraud, a very different situation from that with which the Court is now dealing, where there is no suggestion that the guarantees signed by the defender were improperly obtained. The case of *Jones* v. *Gordon* (L.R., 2 A.C. 616)—a leading authority which I have had occasion to apply in somewhat similar circumstances—establishes that the holder of a bill of exchange, who has acquired it under circumstances which cast upon him the *onus* of proving that he gave value *bona fide*, does not discharge this *onus* by simply saying that he had no knowledge of what was wrong about the bill, when he suspected that there was something wrong and for that reason refrained from making any inquiry—in short, that wilful ignorance may, under certain circumstances, have the same effect as actual knowledge. *Dawson* v. *Lawes* (101 R.R. 612) decided that "a surety for an accounting debtor is not discharged from his liability by the creditor's negligence in omitting to compel the debtor to render regular accounts, unless the creditor has actually connived at the debtor's improper retention of money"—a decision which has no bearing whatever on the topics under consideration here. *Williams* v. *Bayley* (L.R., 1 H.L. 200) is even more remote, as it concerns the enforcement of a promissory-note signed by a father on behalf of his son in order to stifle a prosecution for forgery against the son. *Burgess* v. *Eve* (L.R., 13 Eq. 450), so far as the decision was concerned, is not in point, but was cited for some observations of Sir R. Malin, V.C., on p. 460, to the effect that where a man has given a general guarantee to a bank for a person who by his conduct turns out to be unworthy of confidence, he may withdraw that guarantee on the terms of paying all that may be due under it at the time of giving notice of withdrawal. I do not doubt the soundness of these observations, or the defender's right (which indeed was not disputed), on ascertaining the forgeries committed by Ayling, to cancel the guarantee for the payment of interest on his overdrawn account; but neither the case nor the observations relate to the discharge of a cautioner because of the failure of the creditor to disclose some matter which came to his knowledge and affected the debtor's financial position. *Polak* v. *Everett*

(12 Q.B.D. 669) had reference to the discharge of a cautioner owing to the debtor and the creditor having agreed to vary the arrangement under which the cautioner became bound, and so as to make it impossible that the agreement could be carried out in its original form. The decision in *Swire* v. *Redman* (12 Eq. 536) applied the same principle where the creditor had agreed to give time to the debtor without the cautioner's assent—a principle which has been given effect to in various Scotch cases, of which *Johnstone* v. *Duthie* (19 R. 624) is a good illustration. In *Snaddon* v. *London and Glasgow Assurance Company Limited* (5 F. 182) the Second Division held that in the case of co-fidelity insurance it was the duty of the creditors to intimate to the cautioner the fact, which had come to their knowledge, that the employee assured had embezzled money entrusted to him, and that their failure to communicate their knowledge of the offence, as soon as they became aware of it, freed the cautioner from liability; and probably the principle of this decision would apply to the case of a bank making further advances on the credit of a secured account after knowledge that the person to whom the advances were made had become insolvent, or had been guilty of dishonesty. Such a proceeding might well be characterised as unfair dealing towards the cautioner, and sufficient to free him from responsibility for the advances made on his credit after the debtor's misconduct had been disclosed to the bank. The principle, however, has no application whatever to the case of a guaranteed advance to which no valid objection could be taken at the time when it was made, which is the case with which we are here concerned.

On a review of the decisions cited, it appears, therefore, that there is no authority for the view that it is the duty of a bank whenever it becomes aware of any circumstance seriously affecting the credit of a customer to at once communicate with any of that customer's friends who may have signed cash credits on his behalf or guarantees for his pecuniary obligations. Nor do I know of any principle upon which the contention can be supported. On the contrary, I think it would, to a large extent, destroy the confidential relation that exists between a banker and his customers if it were held to be the duty of the banker to disclose to the cautioners any fact which seriously affected the latter's credit, for the suspicion that Ayling had committed a forgery was only material as bearing on the financial embarrassment in which it might be inferred that he had become involved before resorting to so desperate an expedient. It might have been otherwise if the bank had subsequently given fresh accommodation so as to increase the cautioner's obligations, but nothing of the kind can be alleged against the present pursuers. On the contrary, their suspicion of Ayling's conduct led them to refuse further accommodation, and even if they had made fresh advances it could not in any way have affected the defender, at all events so far as regards the guarantee for payment of the premiums of assurance. As regards the other sum of £100, it is sufficient to say that a sum largely in excess of the amount guaranteed was due to the pursuers on 19th December 1906, so that here, too, the defender's liability could not be increased by the pursuers' failure to disclose what they had ascertained at that date. It was argued that the pursuers refrained from making known their suspicions as to Ayling's conduct in reference to the Goldney bill, as that would inevitably have had the effect of driving him into bankruptcy, and that they acted as they did in the hope that he would meet other liabilities due to them, and it was pointed out that in the interval between 18th December 1906 and 30th October 1907 bills to the value of £8700 to which Ayling was a party, and which had been discounted by the pursuers, were duly met, and that this might not have been the case had the bank been precipitate. Whether this be so or not, I think it is always legitimate for a creditor to consider whether his interests will be best promoted by allowing his debtor time to run off his obligations, or by taking steps to have his affairs sequestrated, and to act as he thinks most prudent in the circumstances. In the present case the interests of the pursuers and the defender did not diverge, and I see no reason to suppose that the defender, had he been communicated with, would have suggested any other line of conduct. I have therefore come to the same conclusion as the Lord Ordinary, and substantially on the same grounds.

I do not say anything on the subject of the alleged prejudice which it was maintained for the defender that he had suffered through the pursuers' conduct, except to say that I think he has entirely failed to prove such prejudice, and that I am quite satisfied with the careful analysis of the evidence which the Lord Ordinary has made on this branch of the case.

The pursuers moved for expenses.

The defender opposed the motion, and argued—The pursuers ought not to get the expenses of the first reclaiming note, in which they were unsuccessful. The interlocutor of the Second Division of 22nd June 1909 reserved all questions of expenses. The defender had been allowed a proof and had proved his averments, though the Court had held that they did not entitle him in law to relief. The defender was not debarred from taking this objection because expenses had not been opened on. If he had been successful he would have got all his expenses, including reserved expenses, without their being opened upon. If a party was successful in the Inner House the presence of a reclaiming note was enough to carry expenses; it should not therefore be necessary where a party was unsuccessful to open on expenses. In any event the expenses of the first reclaiming note should be modified.

Argued for the pursuers—It was true that the defender had got a proof, but he had failed in it. It was settled that a general award of expenses covered expenses that were reserved as in this case—*Gardiners* v. *Victoria Estates Company, Limited*, October 27, 1885, 13 R. 80 (*per* Lord President Inglis), 23 S.L.R. 55; *Caledonian Railway Company* v. *Chisholm*, March 19, 1889, 16 R. 622, 26 S.L.R. 489; *Macfie* v. *Blair*, December 12, 1884, 22 S.L.R. 224; *Alston & Orr* v. *Allan*, 1910, S.C. 304, 47 S.L.R. 255. The defender was too late in making the objection. He should have raised the question before the Lord Ordinary, or, at latest, in opening the reclaiming note—*Clark* v. *Sutherland*, March 18, 1897, 24 R. 821, 34 S.L.R. 555. This was a substantive ground for reclaiming, with which the Court could not deal unless it was opened on. *Glasgow and South Western Railway Company* v. *Magistrates of Ayr*, December 21, 1910, 48 S.L.R. 211, and *Lauderdale* v. *Wedderburn*, 1911 S.C. 4, 48 S.L.R. 3, were also referred to.

LORD JUSTICE-CLERK—On the question of general interest argued by counsel I do not think it necessary to express an opinion, having heard Mr Cooper on the merits, and being clear that there is no ground for interfering with the Lord Ordinary's interlocutor. Of course this does not interfere with the ordinary powers of the Auditor as to disallowing certain expenses in certain circumstances should he see ground for doing so.

LORD ARDWALL—Having heard counsel on the merits, I am clear that we should not interfere with the Lord Ordinary's interlocutor.

With regard to the question that was argued to us, viz., whether a party reclaiming must necessarily open upon the question of expenses if he challenge the Lord Ordinary's interlocutor upon that point, even if his decision be right on the merits, I express no opinion. It is unnecessary to do so, as the Court is unanimously of opinion that the pursuer has no valid ground for attacking the Lord Ordinary's finding as to expenses, assuming that it is open to him to do so. If that question came up for decision I confess I should like to reconsider the case of *Clark* v. *Sutherland* (1897), 24 R. 821. In the meantime, however, counsel will do well to comply with the rule laid down in that case and open on the question of expenses, unless they intend to attack the Lord Ordinary's judgment on that point even if they should fail in their attack upon it on the merits.

LORD SALVESEN—I concur with your Lordship in the chair. I see no reason however why, notwithstanding our decision, the Auditor should not deal with the pursuers' account of expenses on the footing that he may consider some part of that account was unnecessarily incurred. I shall only add that I think junior counsel should in the meantime follow the rule laid down in *Clark* v. *Sutherland* (24 R. 821), and open on any separate question of expenses.

LORD DUNDAS was absent when the question of expenses was discussed and advised.

The Court adhered, and found the pursuers entitled to additional expenses.

Counsel for the Pursuers (Respondents)—Morison, K.C.—Hon. W. Watson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender (Reclaimer)—Cooper, K.C.—Smith Clark. Agents—Cowan & Stewart, W.S.

Saturday, January 28.

SECOND DIVISION.

THE SUMMERLEE IRON COMPANY, LIMITED *v.* CALEDONIAN RAILWAY COMPANY.

(Reported *ante*, vol. xlvi, p. 383.)

Process—Amendment—Act of Sederunt of 20th March 1907, sec. 2 (g)—Different Remedy—Competency.

The Act of Sederunt of 20th March 1907 provides—Section 2 (*g*)—"It shall be competent for the Court or Lord Ordinary to allow any amendment of the summons or other writ which may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties, notwithstanding that, in consequence of such amendment, a larger or different remedy than that originally concluded for is thereby sought."

The S. Co., Ltd., brought an action against the Caledonian Railway for declarator that the defenders were bound to make and maintain a level-crossing by railroad or cart across their railway where it passed through the pursuers' lands, and for decree ordaining the defenders to construct and maintain such level-crossing. On 5th February 1909 the Second Division found that the defenders were bound to make and maintain a level-crossing for the pursuers' use, and with this finding continued the cause in order that the matter might be laid before the Board of Trade, and the approval of that Board obtained to the construction by the defenders with a view to its use of the level-crossing in question, together with all such catch-points, signals, stock blocks, or other adjuncts or appliances as the Board of Trade might prescribe as necessary to secure the safety of the public and of the traffic on the railway. On 25th March 1910, Y., an official of the Board of Trade, sent the defenders a report in which he stated that as no safety catch-points had been inserted,