was at the time in question at Craichie Mill, which was not in the parish of Carmyllie.

Argued for the respondent—The Sheriff-Substitute was right in his view as to where Malcolm's home was between Whitsunday 1883 and March 1884, and that was the only question here. This case belonged to the class ruled by the cases of *Greig* v. *Miles and Simpson* (sailor), July 19, 1867, 5 Macph. 1132; *Moncrieff* v. *Ross* (fisherman), January 5, 1869, 7 Macph. 331; *Harvey* v. *Roger and Morrison* (farm-servant), December 21, 1878, 6 R. 446; *Beattie* v. *Stark* (invalid), May 23, 1879, 6 R. 956; and especially the recent case of *Deas* v. *Nixon* (man in Australia), June 17, 1884, 11 R. 945.

At advising—

LORD JUSTICE-CLERK—The person whose settlement is here in question went in the spring of 1883 to Craichie Mill, which is in a different parish from that which the Sheriff-Substitute has found liable for the support of his imbecile son. At Whitsunday, after two months' residence at Craichie, he became tenant of the mill, and continued so for some ten months. His view of his own position is quite clear from the desire he expressed that his daughter should come to Craichie and keep house for him, and is not affected by the fact that this proposal came to nothing. It is said that he still retained his settlement in Carmyllie parish because his daughter and his imbecile son were still there, and he stayed over Saturday night with them, and spoke of his daughter's house as his home. There is not much in that expression to guide us here. He had no right to enter the house in Carmyllie without his daughter's consent. In these circumstances it appears to me that an interruption in the residence in Carmyllie parish was caused by the taking of the mill, and that the view of the Sheriff-Substitute is incorrect.

LORD RUTHERFURD CLARK—The question put to us in this case is, where did Malcolm reside between Whitsunday 1883 and March 1884, or as Mr Smith preferred to put it, where was his home. It appears to me that he resided and had his home in the house in which he lived, which was indeed the only house he was entitled to live in, and that we cannot say it was not his home because he paid occasional visits to his daughter and his son.

LORD LEE—It is impossible to say upon the evidence in this case that Malcolm, the father of the imbecile boy, had his residence in the parish of Carmyllie, while he was tenant of Craichie Mill and resided there with the exception of weekly visits to his boy at his daughter's house. Upon that simple ground I think we should reverse the judgment of the Sheriff-Substitute, unless we are to challenge the law laid down in the recent case of *Greig*, 16 R. 18. It is clear that the father of the lunatic here was as much absent from Carmyllie as the person in that case was from Leith during the last six weeks of the five years necessary to the acquisition of a settlement in that parish.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"The Lords . . . Find in fact and in law (1) that the pauper Robert Malcolm has been imbecile from his birth, and incapable of acquiring a settlement for himself, and that the burden of maintaining him falls on the parish of the settlement of his father Robert Malcolm, who was born in the parish of Monifieth in March 1815, and died in March 1888; (2) that the said deceased Robert Malcolm did not reside for five years continuously in the parish of Carmyllie, and did not by residence acquire a settlement in that or any other parish, and that his settlement at his death was in the parish of Monifieth, the parish of his birth: Therefore sustain the appeal; recal the judgment of the Sheriff-Substitute appealed against; decern in terms of the conclusions of the petition against the defender W. B. Spence, as Inspector of the Poor of the parish of Monifieth as representing the Parochial Board of that parish: Assoilzie the defender the Inspector of the Poor of the parish of Carmyllie from the conclusions of the action: Find the defender the Inspector of Poor of the parish of Monifieth liable to him and to the pursuer in expenses in the Inferior Court and in this Court," &c.

Counsel for the Pursuer—Guthrie Smith—Hay. Agent—D. Milne, S.S.C.

Counsel for the Defenders — Sol.-Gen. Darling, Q.C.—Watt. Agent—Wm. Officer, S.S.C.

Friday, December 6.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

YOUNG *v.* THE CLYDESDALE BANK (LIMITED.)

Bank—Overdraft—Cautioner—Fraudulent Misrepresentation — Essential Error — Reduction.

A customer of a bank whose account was overdrawn induced his brother to sign an unlimited guarantee to the bank by representing to him that he was only undertaking a liability of £300 or £400. This misrepresentation was unknown to the bank. The parties met in the bank premises, and the bank agent produced a letter of guarantee for past and future advances without reading or explaining it, and it was signed by the cautioner without any knowledge of its contents, although full opportunity was given to him of examining it. The bank raised an action against the cautioner for £5330.

In an action of reduction of the letter of guarantee by the cautioner against the bank, *held* that the pursuer must accept the consequences of his negligence in signing the guarantee without ascertaining the nature of its contents, and that the bank having advanced money on the faith of the document were not affected by the fraud under which the pursuer was induced to sign it, and for which they were not responsible.

Opinion (*per* Lord Shand) that although there was no legal obligation on the bank agent to read the letter of guarantee to the parties before it was signed, it would have been proper for him to do so, as it was then produced for the first time.

This was an action by David Simpson Young, farmer, Bonnington, North Berwick, against the Clydesdale Bank for reduction of a letter of guarantee addressed by the pursuer in favour of the bank for behoof of his brother Robert Young, cattle salesman, Glasgow.

The pursuer averred that in the course of the years 1884 and 1885 he had granted accommodation bills to his brother to the extent of about £300 or £400 which had all been retired at maturity. In February 1886 he asked him to come to Glasgow, and there explained that he was in want of money, which he could get more cheaply for himself and with less trouble to the pursuer if the latter would sign a document to the defenders. "Condescendence 2.— . . . The pursuer, in the belief and understanding that he was to sign a document to the defenders in which he would be liable only for about a similar amount to what he had granted a bill for on previous occasions—that is, about £300 or £400—agreed to do so."

The pursuer averred that he, his brother, the latter's manager Robert Baillie, and Baillie's brother-in-law William Mathieson, thereupon went to the bank and met the bank agent Mr Junor, who produced a document, and fraudulently represented to the pursuer, who is comparatively ignorant of business, that it was a mere matter of form for the purpose of being shown at the head office of the bank. Relying upon this false and fraudulent statement as to the nature of the said document, and under the essential error induced by the same, the pursuer and the said William Mathieson signed a document which they discovered subsequently to be a letter of guarantee in these terms:—"Gentlemen,—We, David Simpson Young, farmer, Bonnington, and William Mathieson, joiner, Dalrymple, Ayrshire, hereby jointly and severally guarantee you payment of any advances made, and which may hereafter be made, to Robert Young, cattle salesman, Glasgow, whether by way of overdrafts or by bills, promissory-notes, cash orders, or other obligations discounted and held or to be discounted and held by you."

The pursuer averred that the letter was not read over by or to him, and he was unaware of its nature until an action by the bank for £5303 was raised against him. Inquiries had satisfied him that on 22d February 1886 his brother owed the bank £5000. "Condescendence 5.— . . . This was a material fact which it was the duty of the defenders to have communicated in the circumstances to the pursuer, but which was fraudulently concealed from him by them. Mr Junor, the agent for the bank, was personally liable to the bank for the amount of said overdraft." He would not have signed the document if he had known of this debt, or that the obligation in the letter was for past and future advances.

The defenders denied the averments of fraudulent representation, and explained that in accordance with their desire for security Robert Young had submitted the names of his brother and Mathieson. "The defenders accepted them, and when the letter of guarantee, which is expressed in the ordinary terms, was ready for the signatures being adhibited thereto, Robert Young took the sureties to the bank for that purpose. Before the document was signed, it was handed to them by Mr Junor that they might read it and satisfy themselves of its contents. Having done so, they signed the letter of guarantee on the date it bears."

The pursuer pleaded—"(1) The letter of guarantee libelled having been obtained from the pursuer by the false and fraudulent representations of the defenders, as condescended on, should be reduced in terms of the conclusions of the summons. (2) The pursuer is entitled to have the said letter of guarantee libelled reduced, in respect it was granted by him under essential error, induced by the false and fraudulent representations condescended on."

The defenders pleaded—"The pursuer's statements are irrelevant and insufficient in law to support the conclusions of the action."

On June 16th 1888 the Lord Ordinary (M'Laren) pronounced this interlocutor—"Finds that the guarantee libelled is *ex facie* valid and regular, and that the summons of reduction does not disclose any valid or relevant objection thereto on extrinsic grounds: Sustains the defence, dismisses the action, and decerns, &c.

"*Opinion.*—This action is instituted for the purpose of reducing a guarantee granted by the pursuer and another person in favour of the Clydesdale Bank, Limited. The instrument purports that the subscribing parties guarantee payment of advances made or to be made by the bank to Robert Young, the pursuer's brother. Two issues are tendered which have reference respectively to the obtaining the deed by means of fraudulent representations and by fraudulent concealment of material facts.

"In support of the first issue it is averred that the bank agent, by whom the guarantee was prepared, fraudulently represented to the pursuer that the document prepared for his signature 'was a mere matter of form for the purpose of being shown at the head office of the bank' (Cond. 3).

"It is not said that these words were used by the bank agent, but I assume that

such is the representation of which proof is offered. Now, there are only two meanings which I can attribute to the words quoted; they mean either that the document was not to have any effect, or that it was not to subject the pursuer to any obligation or pecuniary liability.

"In the first view of the meaning of the representation it seems to have neither relevancy nor substance. In order to entitle a pursuer to relief under an issue of fraudulent representation, there must be a representation untrue in fact made by the one party and believed by the other party. Now, I cannot take it off the hand of a man capable of transacting business that he had signed a deed in the belief that it was to have no effect.

"It is, however, a perfectly intelligible defence that a party to a deed subscribed the deed in the belief that he was signing something which was not to subject him to personal liability. A person, for example, may be requested to sign something as a trustee, and the deed, unknown to him, may contain a clause putting him under personal obligations. Or it may be that a deed altogether different from the one which he agreed to sign is substituted for it by the creditor or grantee, which would be undoubtedly a case of gross fraud.

"I have then to consider whether a circumstantial case of this nature is set forth in the summons, because I conceive it to be a matter of settled practice that such cases are only sent to trial where a circumstantial case is set forth which if supported by evidence would entitle the party to relief by reduction.

"Now, in condescendence 2 the pursuer states explicitly that before going to the agent's office he had agreed to become security to the bank for his brother, and also that this security was not to be given in the way that it had been given on previous occasions, viz., of accommodation bill, but by a 'document.' The only meaning that I can attach to this point of the condescendence is that the pursuer had agreed to give a guarantee for his brother, and that he was going to the bank to sign it. He adds, no doubt, that he expected it would be for about £300 to £400, the amount of his undertaking on previous occasions.

"Now, if the averment had been that the agent put the guarantee before the pursuer representing it to be a guarantee limited to £400, and that the pursuer signed it without reading it, this would have been a case for inquiry. But the representation put forward is that the deed was 'a mere matter of form'—that is to say, the pursuer came to the bank office prepared to sign an obligation for £400, but, instead of doing so, he signed something which he was led to understand created no obligation. No explanation is offered of this altered state of the pursuer's mind as to the nature of the deed he was signing, and it is evident that no explanation can be given. The story is intrinsically incredible. It is very likely that the pursuer did not examine the deed with sufficient care, and did not fully apprehend the extent of the liability that he was undertaking, but he signed the deed knowing that it was a deed of guarantee or security for his brother, and I think it must be taken that he was willing to become security in such terms as the bank might submit for his signature.

"The second issue raises the question whether the deed was obtained by fraudulent concealment of the state of the principal debtor's indebtedness? The answer is that in such cases there is no duty of disclosure incumbent on the creditor.

"In the circumstances of the case I consider this to be a sufficient defence, because the bank agent is not charged with acts of positive concealment. The case against him is merely this—he did not disclose the state of the debtor's account. In practising this reserve, I am of opinion that the bank agent only did his duty to his employers, and that from such non-disclosure no claim of reduction can arise."

The pursuer reclaimed.

On 6th November 1888 their Lordships of the First Division recalled this interlocutor, and remitted to the Lord Ordinary, before answer, to allow parties a proof of their averments.

The pursuer deponed that on the 22nd February 1886 he went, as requested, to his brother in Glasgow, who asked him to sign a document at the bank instead of renewing the bills originally given. He thought the amount would be about the same as before, and he was willing to undertake that liability. "I went with him to the Clydesdale Bank, where I was introduced to Mr Junor, the agent of the bank. One of the tellers brought him to us in the bank office, and then my brother, Mr Junor, and I went into the side-room off the bank. Baillie and Mathieson had followed just behind us, and they joined us after we had been in the room just a minute or so. Before they came nothing had been said about what we had come for. We spoke about the weather and general topics before they came in. There was a paper lying on the table—on a desk in the room. After Baillie and Mathieson came in the paper was produced for signature. Mr Junor produced it. I believe Mathieson made some remarks about the contents of the paper. Mr Junor did not say anything about reading it. Mathieson was wanting it to be read; he said something about reading it. It was not read. (Q) Did you get it into your hands at all?—(A) No, I never was asked to read it or take it into my hand either. (Q) Was any explanation given to you of what were its contents?—(A) Mathieson made some remark, and Mr Junor said it was a mere matter of form—that he would require to show it to the head-office, or words to that effect. (Q) When Mr Junor said that were you quite willing to sign it?—(A) Yes, because I had every confidence; I was quite willing to sign it. I did not ask to have it read or see it, because I was under the idea that I knew what I was going to sign for before I went to the bank. (Q) When Mr Junor used the expression about a matter

of form, what did you understand by that?—(A) It was something like a bill, but only in a different form; instead of being for a noted or dated time, it was to go on running till he would be able to do without the money. When I signed it I understood I was becoming bound to the same extent as the bill—£200 or £300. I had not the least idea what was the state of my brother's account with the bank at that time. I did not ask him a question about that. The banker never spoke about my brother's affairs at all. (Q) If you had known that your brother was due the bank about £5000, would you have signed that document?—(A) Certainly not. (Q) Or if you had known that the document was an unlimited guarantee, would you have signed it?—(A) No."

Mathieson deponed—"I was taken to the Clydesdale Bank in Miller Street. When Baillie and I got there we found the two Youngs and the bank agent in the agent's room. (Q) Did you see any paper lying on the table?—(A) Yes, there were papers lying on the table. (Q) What took place then?—(A) I think Mr David Young signed the paper first, and then I was asked to come round and sign it too; but I wanted to know something about it before I would sign it, and I was going to read it, but I had forgot my specs. and could not read it; and I said to the bank agent that I could not read it, as I had not my specs., and he said he was sorry he could not assist me, for his were for a short-sighted person. He said there was no danger—there was no danger—it was only a mere matter of form, so I thought there was no danger in me signing the paper when I had both Baillie's word for it and his. Baillie said there was no danger either. He said that at Dalrymple when he first wanted me to sign the paper. (Q) And after the bank agent said that you signed it?—(A) Yes. The document was not read over to me. (Q) Can you tell us whether it was before David Young signed or after he signed that the bank agent said that about its being a matter of form?—(A) It was before the thing was signed. (Q) Before it was signed by anybody?—(A) Yes. (Q) When the bank agent said that, did that satisfy you and make you sign it?—(A) Yes, of course; I thought the thing was more sure when he said that. (Q) And after the bank agent had said that, all the parties signed it?—(A) Yes. I think he pointed out to me the place where I was to sign. (Q) Was anything said at this time about how much you were becoming responsible for?—(A) No, there was no sum mentioned. Nothing was said about the amount that Young was due to the bank. (Q) If you had known that he was due £5000 to the bank, would you have signed it?—(A) It is not likely."

Robert Young, the principal debtor, deponed—"I told him (the pursuer) I required a little accommodation, and asked him to go down to the bank to sign a paper—that I would require a little money the same as usual, and if he signed this paper I would get it cheaper, and not require to have bills always running on. I did not tell him that he was going to sign an unlimited guarantee. (Q) Did you say anything to him about the amount which you were wanting?—(A) I do not think I mentioned the amount, but I made him believe it was the same amount as I was usually getting from him. (Q) And when you told him that, did he agree to do it?—(A) Yes. When my brother and I got to the bank I introduced my brother to Mr Junor. Baillie and Mathieson arrived about a minute after us. I did not observe a document lying on the table when I went in, but after we had introduced one another Mr Junor lifted a document and laid it on the table. It was lying on one of the writing tables, and he put his hand on it and laid it down on the desk. My brother came forward and said to me, 'Is this right?' Mr Junor took the word out of my mouth and said, 'It is just a matter of form,' and after that my brother signed the paper. Mr Junor said, 'It is merely a matter of form, to show to the head office.' (Q) And when Mr Junor had said that, did your brother then sign the paper?—(A) Yes, so far as I remember. Mathieson was there. He came forward also, and, so far as I remember, I think he said to Mr Junor that he would like to know more about it, but he had not his glasses and he could not read it, and Mr Junor said, 'It is all right; it is a matter of form.' I had not read the document myself at that time; I never saw it till that morning. (Q) Who got the document prepared?—(A) I do not know; it was Mr Junor. It was not got by me at any rate. I think it was Baillie who arranged that with Mr Junor. I had never seen Mathieson before. I think I was due the bank about £4000 at that time. . . . . (Q) Did you deliberately keep your brother in the dark as to what he was undertaking?—(A) I did. (Q) You intended to deceive him, and did so?—(A) I would not have deceived him if I had not been hard pressed by Mr Junor to get security. (Q) But, hard pressed or not, you intended to deceive your brother, and did deceive him?—(A) Well, I did deceive him that day."

Baillie deponed—"When Mathieson and I arrived at the bank we went into the agent's room and found the two Youngs and Mr Junor there. I suppose I introduced Mathieson to Mr Junor, but I am not quite sure as to that. There was a paper lying. I am not sure whether it was lying on Mr Junor's desk. Mathieson sat down next to me, and the next was Robert Young, and David Young was standing opposite Mr Junor's desk. A general talk went on at first, and the paper was produced, but whether David Young had it in his hand or not I cannot say. Mr Junor pointed out the place to David Young where to sign when it was lying on the table. Mathieson before the paper was signed said he would like to know more about it. Mr Junor asked if he would read it, and he said no, he could not, because he had not his spectacles with him, and Mr Junor said something about not being able to assist him. Mathieson asked it to be explained, and Mr Junor said it was all right—there was no danger, it was a mere matter

of form, or words to that effect. The document was signed after that. That was said before any of the parties had signed. *Cross.*—I knew the amount of the overdraft. I knew that the security was wanted to cover the overdraft. I did not know it was to cover future advances. (Q) Was the account, as you understood, to be closed when the security was got?—(A) No. (Q) Then was it not to go on, and was not the guarantee asked to enable the account to go on?—(A) Yes. (Q) Did you not understand it was to cover both the existing overdraft and future advances?—(A) I knew it was for that purpose."

The account of what took place at that meeting, as given by Mr Junor, the bank agent, was as follows:—"After the parties came in I went to the accountant in the general office for the document, and brought it back. I handed it to Baillie to satisfy himself and his friends as to what was in the document. That is the usual course I adopt. I do not read such documents; I prefer to hand them to the parties that they may read them for themselves. Baillie took the document, and my impression is that he read it. I stood aloof towards the fire-place, and left the parties with the document to satisfy themselves. (Q) Can you say whether Baillie read it aloud?—(A) He seemed to be reading it. The three of them—David Young, Mathieson, and Baillie—were bending over the paper. After they seemed to have satisfied themselves they handed the document to me. (Q) Did any time elapse before they handed it back to you?—(A) I really cannot say—a minute or two—sufficient to read it and examine it. After they handed it back to me it was taken to the table. I called in Jamieson, the accountant, to witness it, and then it was signed. After it was signed it was witnessed by Jamieson and Baillie. Nothing further transpired. I have told all that passed to the best of my recollection. (Q) Did you at any time during that interview say to Mathieson or David Young or anybody that the document, or the signing of the document, was a mere matter of form?—(A) Never. (Q) Or that there was no danger?—(A) Never. (Q) Or that it was merely something to show to the head office?—(A) Never. (Q) Or words to that effect?—(A) I cannot conceive me saying anything to that effect; of course the idea was not in my mind. (Q) Can you conceive your having said anything of that kind and forgotten it? (A) Well, I cannot tell, when we have had the long printed documents concerning a cash-credit, and when people were beginning to read, I may have said on these occasions—but not on this occasion—'that is the usual formal document of a cash-credit.' (Q) As explaining that the document was in the usual form?—(A) Yes. (Q) But have you any recollection of even having said that on this occasion?—(A) No. This document was all in writing. (Q) Can you think of anything you could have said which might have led anybody to imagine you had said anything of the kind?—(A) No, I cannot think of anything. (Q) And are you positive you did not say anything of the kind?—(A) Yes, I am quite positive; I had no object in saying anything. (Q) Had you any desire to deceive these gentlemen?—(A) Not in the least. (Q) Or any motive for deceiving them?—(A) No, my impression was that they were acquainted with the whole thing from beginning to end. (Q) You assumed that Robert Young had informed his friends what the document was?—(A) Doubtless. . . . Mathieson did not read the document. (Q) Did he hear it read?—(A) Not by me. (Q) It was not read aloud?—(A)—(A) Baillie read it. (Q) Did you see Baillie read it?—(A) I saw them together, and I concluded he was explaining or reading the document. I did not hear him or anybody read it aloud. I did not give any explanation as to its contents to anybody. (Q) Did any person in your presence give any explanation?—(A) Mr Baillie seemed to be explaining. (Q) Did you hear Baillie say anything about that document which you can now repeat?—(A) No, but he was reading it to them as I understood. (Q) Aloud?—(A) Not sufficient for me to hear. I mean he had the attitude of reading the document, and they were leaning over it apparently listening. I was about five or six feet from them. (Q) And if he read it aloud to those people could you have failed to hear it?—(A) It would depend on the tone in which he did it. (Q) Do you suggest he read it in a tone which would prevent you hearing?—(A) It seemed to be so, for I could not hear it. (Q) Can you give any reason for him reading it in a tone which would be audible to them and not audible to you?—(A) I can give a reason now, but I could not give a reason then; if Baillie did not read it aloud, it must have been to keep from them what was in it, as I now understand they did not know what was in it. (Q) Did it not strike you as an odd mode of proceeding that a document of that description should be read in a tone which was inaudible to you?—(A) I did not think anything about it, for I did not suspect any wrong or concealment. I gave the document to the parties, as I thought, in the fairest and justest way to inform themselves, and they came, as I assumed, fully informed of what they were to do."

Correspondence between Junor and Robert Young showed that from September 1884 the bank had been pressing him for security for the overdraft. It was never settled between them what form the guarantee was to take, although in some of Junor's letters he spoke of a cash-credit. On 15th February 1886 he wrote—"The guarantee to the bank by your brother and Mr Mathieson for payment of your overdraft is being prepared. The manager expects, however, that you will get your friend in the north, when he is sufficiently recovered, to take part in this guarantee, or, if failing him, some other responsible party."

On 18th January 1889 the Lord Ordinary (KINNEAR) sustained the defences and assoilzied the defenders from the conclusions of the action.

"*Opinion.*—The pursuer's case is that he was induced by fraud to sign a guarantee, which if it should be enforced would ren-

der him liable for upwards of £5000, in the belief that he was becoming security for £200 or £300 only. It is not maintained, as I understand the argument, that there was any duty on the defender's agent to give information as to the state of the principal debtor's account. But it is said, first, that Mr Junor the agent is chargeable with improper concealment, equivalent to misrepresentation; and secondly, that at the time when the guarantee was executed he was guilty of actual misrepresentation, by means of which he induced the pursuer to sign.

"The fact which Mr Junor is alleged to have improperly concealed is that the guarantee is for 'advances made and to be made to Robert Young,' without limitation of amount. It is said that the arrangement between him and Robert Young, the principal debtor, was that the latter should find security for the actual amount of the overdraft on his account at the time the guarantee was signed; and that nevertheless Mr Junor, without notice to Young, had caused an unlimited guarantee to be prepared, and presented it to the pursuer for signature, as if it were an instrument in exact accordance with the arrangement which had been made.

"It is not suggested that the pursuer knew anything of the antecedent arrangement between his brother and the bank. But it is said that Mr Junor was bound to assume that both of the intending cautioners had been made aware of it, and therefore that it became his duty to inform them of the contents of the document which he had taken it upon himself to draw up, inasmuch as he knew that it created a higher liability than any guarantee which they were prepared to sign. But there is no evidence that any definite arrangement had been made with Robert Young either as to the limits of the guarantee, or as to its terms in any other respect. The bank had been pressing Young to find security for his overdraft, but no definite proposal had been made on either side as to its terms, and nothing had been fixed between them, except that the bank had agreed in the meantime to accept the pursuer and Mr Mathieson as cautioners, and that they should come to the branch office in Miller Street at a certain time, in order to sign the guarantee. There was nothing out of the ordinary course of business in Mr Junor's conduct when in pursuance of that arrangement he caused a guarantee to be prepared at the head office in the form which the bank required, and presented it to the intending cautioners for signature. If he made any false statement as to its meaning or effect by which they were misled, they may be entitled to have it set aside. But if he said nothing on the subject, but gave it to the cautioners that they might read it for themselves, I cannot see that he is chargeable with any improper concealment. It is a perfectly clear and unambiguous document, and no intelligent person could read it without seeing that it was an unlimited guarantee for advances made and to be made. It was not his duty to explain to the cautioners the meaning or legal effect of a document which they read, or ought to have read for themselves, and his silence on the subject cannot, in my judgment, be considered as undue concealment, giving ground for a reduction.

"The question remains whether he was guilty of actual misrepresentation. The pursuer's case upon this point, as it was presented in argument, is that the pursuer had on previous occasions undertaken liabilities for his brother to an amount of between £300 and £400, by signing accommodation bills on his behalf; and that on the morning of the day on which the guarantee was signed, his brother told him that he wanted more money, and asked him to sign a document at the bank; and that he understood from his brother's statement that the effect of the document he was asked to sign was to subject him to the same kind of liability as he had undertaken by the accommodation bills, but in a different form, so as to avoid the expense and trouble consequent upon the frequent renewal of bills. With this understanding, and in the belief that he was about to undertake liability to the extent of two or three hundred pounds, he went to the bank along with his brother, the other cautioner, Mr Mathieson, and Baillie, his brother's clerk. He does not say that his brother told him the amount for which he wished him to become security, or explained the precise form in which the security was to be given; nor does he say that he put any question to his brother or to anybody else upon either of these points. He gives no very satisfactory reason, therefore, for the understanding upon which he says that he acted. But his statement is that he went to the bank in the belief that he was going to sign a document by which he should undertake a liability to the extent of £200 or £300, and no more. In this state of mind he says that he heard, Mr Junor, the bank agent, say in answer to an observation by the other cautioner, Mathieson, that it was 'a matter of form,' and that in reliance upon that statement, which was in accordance with the belief induced by his brother's representations, he signed the guarantee without reading it or asking it to be read.

"I do not understand it to be suggested that in using the words ascribed to him Mr Junor intended them to convey the exact meaning which the pursuer attached to them—that is to say, that the guarantee about to be executed was a mere substitution of a new form of obligation for an old form, which could not subject the pursuer to any higher liability than he had already undertaken. It is hardly possible that this should have been his intention, because he knew nothing of the statement which Robert Young had made to his brother, and he did not even know, and had no reason to suppose, that the bills to which the pursuer was a party were accommodation bills. Nor is it very intelligible why the pursuer should have interpreted the words used by Mr Junor in the way he alleges. They were not addressed to him but to Mathieson, and he had no reason to think that Mathieson

was under any previous obligation to the bank by way of security for his brother. It is not obvious, therefore, why such a statement to Mathieson should be supposed to mean that the pursuer was undertaking no higher obligation than he had undertaken already.

"But the argument is, that with whatever intention the statement was made, it was certainly a false statement, and that a person in the position of a bank agent could not have made it innocently. It was made to one of two intending cautioners in the presence of the other at the moment when they were about to sign a guarantee to the bank. Whatever the bank agent meant by it, he must have intended the cautioners to act upon it, and if they did so act, the guarantee must be held to have been obtained by the false representations of the bank agent.

"I do not think it necessary to consider how far this case could be supported in law, because I am of opinion that it is not proved in point of fact. It is in the highest degree improbable that a bank agent of experience should have used the words imputed to Mr Junor. He had no motive of deceiving the cautioners, and if he had desired to deceive them it is hardly credible that he should have tried to do so by telling them that to sign a guarantee was a mere matter of form. He knew nothing of the pursuer or Mr Mathieson, except that they had been engaged in business, and he could not fail to know that to make such a statement to men of ordinary experience in affairs could have no other effect than to excite their suspicion that something was wrong. He denies most positively that he said anything of the kind, and it is impossible to sustain the charge which is made against him, in the face of his denial, unless it is proved by clear and satisfactory evidence. But I think the evidence adduced is the reverse of satisfactory. Two of the witnesses—Robert Young and his clerk Baillie—are, on their own showing, altogether unworthy of credit. But not only is their evidence valueless in itself; I think it goes to discredit the whole story. I see no reason to impute anything like wilful falsehood to the pursuer, but I think his evidence confused and unsatisfactory. The other cautioner, Mathieson, appeared to be a very respectable person, and I have no doubt an honest witness, and it is impossible to regard the unfortunate position in which he is placed without great commiseration. But I do not think it would be safe to rely on his exactness of observation and distinctness of recollection in such a matter. On the other hand, I think Mr Junor's evidence is entitled to credit. He does not profess to remember all the details of the interview, and it would be somewhat singular if he did. But he is perfectly distinct and positive in his statement that he did not say anything of the kind imputed to him, and it is impossible that he could have done so and forgotten it. The question is one of credibility, and I cannot say I have any hesitation in preferring the evidence of Mr Junor to that adduced by the pursuer.

"I think it is highly probable that the words which Mr Junor is said to have uttered were uttered in fact, but not by him. That Robert Young and Baillie had said something of the kind to the pursuer and Mathieson before going to the bank, there can be no question, and it is very probable that one or other, or both of them, may have repeated it in the back parlour. It is equally probable that the pursuer and Mathieson may have persuaded themselves, or have been persuaded, that Mr Junor used expressions which were really used by another person. But whatever may be the explanation of their testimony I am unable to accept it as sufficient evidence of the very grave charge they make against Mr Junor.

"It is said that Mr Junor did not read the guarantee to the cautioners before signing. It was not his duty to read it, and he could not have done so without undertaking a responsibility which did not properly belong to him. I think he took the proper course in giving them the document to read for themselves. Pursuer had every opportunity of reading it, and he could not have read three lines of it without seeing that it was a guarantee without any pecuniary limit. It is very possible that, relying as he did upon his brother, he may not have read it with sufficient care. But the defenders and their agent cannot be made responsible for his carelessness or his overconfidence."

The pursuer reclaimed.

After a short discussion the Court allowed the pursuer to amend his record, and the defenders to answer.

The pursuer deleted from Condescendence 2 the words "about a similar amount," and substituted for them the words, "a limited sum to be advanced by the defenders similar in amount." He averred that during 1884 Robert Young's overdraft amounted to about £4000, and that the bank repeatedly urged him to reduce his overdraft or give security for it. "In the autumn of 1884 the defenders, through their said agent, informed the said Robert Young that he must provide some security for his overdraft if it was to continue, and he not having done so, it was in the autumn of 1885 arranged between the said Robert Young and the defenders, through their said agent, that the said Robert Young should give the defenders a bond of cash-credit with co-obligants. A bond of cash-credit imports an obligation for a definite and limited amount." He set out the communications between Mr Junor and his brother as to the security desired, the last of which was the letter of February 15; repeated that Mathieson and he heard of the matter first on the 22nd February; and averred further that "neither the pursuer nor his brother Robert Young, nor any other of the parties present at the said meeting at the bank on the 22nd February, except Mr Junor, had seen the said letter, or knew that it was a guarantee for an unlimited amount. No intimation had been made to the said Robert Young that the security proposed to be granted had been changed

from a cash-credit bond, such as the defenders' agent had been pressing him to grant, to an unlimited guarantee. In these circumstances it was the duty of Mr Junor, when the parties came to the bank on 22nd February, to explain to them that the guarantee which had been prepared by the officials of the bank, and which the pursuer and Mr Mathieson were asked to sign, was not a guarantee for a limited and fixed amount, but for an altogether unlimited amount. Mr Junor, however, failed to perform this duty. He made no explanation as to the nature of the guarantee, and did not even ask the pursuer and Mr Mathieson to read it, and did not read it to them himself. In so acting Mr Junor was guilty of concealment of a material fact, which it was his duty to disclose." The pursuer also averred he was under essential error when he signed the letter of guarantee.

The defenders denied any arrangement as to or application for a cash-credit bond. They averred that Mr Junor was entitled to assume that the pursuer and his co-cautioner had been made aware by the principal debtor of the state of his account, and of the obligation they were about to undertake, and that he had handed them the document to read in order that they might satisfy themselves of its contents.

Argued for reclaimer—As the parties signing this guarantee were not business men, there was a duty on the bank agent to see that they fully understood the liability they were undertaking; the cautioners believed that they were signing for a limited amount, and if the bank contributed to that mistake by concealment they could not take advantage of a deed so obtained; it could be reduced on the ground of essential error—*Smith* v. *Bank of Scotland*, January 14, 1829, 7 Sh. 244, and H. of L. 1 Dow, 272. What the parties thought they were signing was a cash-credit bond, which was an obligation of limited character—Bell's Prin. sec. 299—and not a guarantee for an unlimited amount. The facts disclosed a case of essential error if not fraud—*Railton* v. *Mathews*, January 27, 1844, 6 D. 536, and H. of L. 3 Bell App. 56; Montgomery Bell's Convey., p. 267. The actings of the bank agent enabled the principal debtor to secure this guarantee from the pursuer, and amounted to misrepresentation—*Falconer* v. *North of Scotland Bank*, March 20, 1863, 1 Macph. 704. If there was error in the essentials of the contract, that error could be pleaded although *res non errant integrae.* But error would also void a contract when it was founded on by the party inducing it—*Earl of Wemyss* v. *Campbell*, June 6, 1858, 20 D. 1090. The reason why the bank agent acted as he did was clear; he was personally bound for the overdraft, and he had a direct inducement to relieve himself, and by concealing the true state of matters to get the pursuer to sign the guarantee.

Argued for the respondent—(1) On the question whether there was error from concealment, the pursuer could not plead ignorance as to the rules of business; he was a prosperous farmer carrying on a good business. Besides, the pursuer had failed to prove that the bank agent had done anything in the way of concealing from him the true state of matters. It was no part of the bank agent's duty to read over or to explain the letter of guarantee. He laid it before the parties and left it to them to examine it, and satisfy themselves; for a cash-credit was never arranged, but was merely suggested in correspondence. What the bank wanted was a reduction of or security for the overdraft. (2) If there was no concealment there was no relevant case on record; on the other hand, if the pursuer alleged concealment the facts showed sufficient disclosure.—*Smith* v. *Bank of Scotland, supra*, did not apply, because there there was a duty to disclose, while here there was none. This was an onerous deed—*res non errant integrae*—money had been advanced on the faith of the deed, and in such a case there was no room for essential error. The defenders ought not to be in a worse position than if a limit had been inserted in the guarantee, for the pursuer would have been liable up to that limit. Caution for an overdraft meant security for any balance, which might be standing against the name of the principal debtor in the books of the bank—*Forbes* v. *Dundas*, June 4, 1830, 8 Sh. 865; *Caledonian Banking Company* v. *Kennedy's Trustees*, June 15, 1870, 8 Macph. 863; *Hamilton* v. *Watson*, December 8, 1842, 5 D. 280, 4 Bell's App. 67; *Falconer* v. *North of Scotland Banking Company*, December 19, 1862, 1 Macph. 177.

At advising—

LORD ADAM—This is an action of reduction of a letter of guarantee which is in the following terms—"We, David Simpson Young, farmer, Bonnington, and William Mathieson, joiner, Dalrymple, Ayrshire, hereby jointly and severally guarantee you payment of any advances made and which may hereafter be made to Robert Young, cattle salesman, Glasgow, whether by way of overdrafts or by bills, promissory-notes, cash orders, or other obligations discounted and held or to be discounted and held by you," and so on. That letter of guarantee is dated 26th February 1886. One of the cautioners David Simpson Young is the pursuer of this action, and the parties to whom the guarantee was given are the defenders the Clydesdale Bank. The sum which is sought to be recovered by the bank in another action against Young is £5303, 0s. 9d., with interest from 15th February 1888, so that the sum due is of very considerable amount.

It will also be observed with reference to the pleas maintained in this action that the letter of guarantee is a guarantee without any pecuniary limit, and it is for any advances that may have been made at its date, or that may thereafter be made by the defenders to Robert Young.

Now, I may say at once that upon the evidence I do not doubt that this guarantee was signed both by the pursuer David Simpson Young and by the

other cautioner William Mathieson without any knowledge of it contents—I do not think that that document was ever read over and explained. I think that what David Young says about it is true, that he had previously granted some accommodation bills to his brother to the amount of between £300 and £400, that he was induced when taken to the bank to sign this guarantee—induced by his brother —to believe that he was signing a document which would make him liable to the bank for a sum of a similar amount. He did not know the true nature of the document he was signing, but thought it was a document that would have that effect. I think in that matter he was certainly deceived. He was deceived in the amount for which he was to sign and did sign. I think also that the other cautioner (although we are not concerned with him, and although his liability depends on the result of this case) was in like manner deceived by Baillie, who was Robert Young's cashier. I think Mathieson was also unaware of the contents of the document which he signed. But that being so does not solve the question. The question that remains is, whether if the cautioners were deceived any responsibility lay upon the bank? and that is the question we have to dispose of.

When the case originally came into Court there were, I think, practically two grounds on which reduction was sought. The first was on the ground of fraudulent misrepresentations made by Mr Junor, the agent for the bank at the time the guarantee was signed. The averments upon that matter are these—The pursuer sets forth that he had previously granted accommodation bills, and then he says that "in the belief and understanding that he was to sign a document in which he would be liable only for a limited sum to be advanced by the defenders similar in amount to what he had granted a bill for on previous occasions—that is, about £300 or £400—agreed to do so"—that is, agreed to sign the document. And then in the next article the alleged misrepresentation is set out. On "arrival at the bank they (that is, the pursuer, Mathieson, Robert Young, and Baillie his cashier) saw the said Mr Junor, who produced a document, and fraudulently represented to the pursuer, who is comparatively ignorant of business, that it was a mere matter of form for the purpose of being shown at the head-office of the bank. Relying upon this false and fraudulent statement as to the nature of the said document, and under the essential error induced by the same, the pursuer and the said William Mathieson signed a document which, it now appears, is the letter of guarantee, and is the deed reduction of which is sought in the present action." That was the ground on which it was maintained originally that there had been misrepresentation on the part of the bank? and if that had been so, it might have been a good plea.

The next ground that was maintained is set out in the 5th and 6th articles. I do not think it was latterly insisted in, but it was that in point of fact Robert Young was indebted to the bank at the time the guarantee was signed in the sum of £5000 and upwards, that Robert Young's cashier was aware of that fact, that it was the duty of the bank before allowing him to sign the guarantee to inform him of this fact of the amount of the bank's overdraft, and the fraudulent concealment alleged against the banker was that he did not disclose that first to the cautioners. I do not propose to return to this plea, and I may say in passing that it is well settled that it is not the duty of a bank to give any information to a proposed cautioner as to the state of accounts with the principal. That is quite settled. If the cautioner desires to know the state of accounts with the principal it is his duty to ask and to inform himself, but no duty lies upon a party seeking security to give any information of that kind, and therefore there is nothing in that plea.

But then the record, after the Lord Ordinary had decided the case, and after it came before us, was amended, and a new statement of facts and an additional plea were added, and I think that is the most important plea that has been maintained in the case. It appears from the new statement of facts that the account of Robert Young with the bank was overdrawn, and that the bank was pressing for security; and then it is averred—"In the autumn of 1884 the defenders through their said agent informed the said Robert Young that he must provide some security for his overdraft if it was to continue, and he not having done so, it was in the autumn of 1885 arranged between the said Robert Young and the defenders, through their said agent, that the said Robert Young should give the defenders a bond of cash-credit with co-obligants. A bond of cash-credit imports an obligation for a definite and limited amount." Then, after setting forth the communications that took place about security, the pursuer says this—"Neither the pursuer nor his brother Robert Young, nor any other of the parties present at the said meeting at the bank on the 22nd February" (that is, the day the guarantee was signed), "except Mr Junor, had seen the said letter, or knew that it was a guarantee for an unlimited amount. No intimation has been made to the said Robert Young that the security proposed to be granted had been changed from a cash-credit bond for a limited amount to an unlimited guarantee. In these circumstances it was the duty of Mr Junor, when the parties came to the bank on 22nd February, to explain to them that the guarantee which had been prepared by the officials of the bank, and which the pursuer and Mr Mathieson were asked to sign, was not a guarantee for a limited and fixed amount, but for an altogether unlimited amount. Mr Junor, however, failed to perform this duty. He made no explanation as to the nature of the guarantee, and did not even ask the pursuer and Mr Mathieson to read it, and did not read it to them himself. In so acting Mr Junor was guilty of concealment of a

material fact which it was his duty to disclose."

Now, if it had been the fact and proved that there had been a fixed and definite agreement that security should be given for a fixed and definite amount, and after giving the parties an opportunity of examining the document, if Mr Junor had obtained the signatures of these cautioners to a document that was not of a limited nature, there might have been ground for this plea. But of course it is a plea which depends upon the facts, and I would now propose to see what these facts are. It appears to me the facts of the case are these—Robert Young had for many years had an account-current with this bank. It appears from the evidence that at least from the year 1884 onwards this account current had been overdrawn to a considerable amount, sometimes the overdraft rising to £6000, varying in amount from time to time. The bank had no security whatever for this overdraft, and it was natural they should be extremely anxious to obtain security. Numerous negotiations, both written and verbal, took place between Junor, the agent for the bank, and Robert Young, and his cashier and manager, Baillie, as to what security should be given. It appears that Baillie had a great deal to do with this transaction, and Robert Young himself says that it was he and Junor who arranged the matter.

Now, I think the first thing that appears from these communications and correspondence is that the cautioners David Simpson Young and William Mathieson would be accepted as securities by the bank, and that they were accepted, for if the bank had not been satisfied with the security of these two gentlemen alone it would have been easy to say that they were desirous of further security, but they did not say so. I think it also appears, both from the written and verbal communications, that nothing was ever distinctly settled either as to the form or terms of the guarantee that was to be given. The bank were insisting for security, and Robert Young was endeavouring to get it, and, as I have said, I do not think that either the terms or form of the security to be granted were ever settled. You will find throughout the correspondence that sometimes a cash credit was spoken of, and if that had been fixed on it would have implied a limited guarantee, which is just what was spoken of, and not a general guarantee that was intended. The last letter upon that subject is the letter of 15th February 1886, which is in these terms—"The guarantee to the bank by your brother and Mr Mathieson for payment of your overdraft is being prepared. The manager expects, however, that you will get your friend in the North, when he is sufficiently recovered, to take part in this guarantee, or, if failing him, some other responsible party. As the success of the arrangement would be seriously affected by your death, the manager would wish you to insure your life for £2000. If you have any policy current this could form part of the amount. Please to make a point to have the advance reduced to £4000 within the week, and as I mentioned to Mr Cuningham that you expected to reduce the advance by £1000 the first year, I hope you will keep this in mind. Could you have the guarantors here this week?" That is the last communication, and it speaks merely of a guarantee, and not of a cash-credit.

Now, as to what the understanding was there is the evidence of Mr Baillie, who, as I have said, is said by Mr Robert Young to have been the party who arranged the matter. He is asked—"Was the account as you understood it to be closed when the security was got?—(A) No. (Q) Then, was it not to go on, and was not the guarantee asked to enable the account to go on?—(A) Yes. (Q) Did you understand that it was to cover both the existing overdraft and future advances?—(A) I knew it was for that purpose." And that seems to have been the state of mind of Mr Robert Young and of Mr Baillie, his cashier and manager, on the 22nd February when they met at the bank to sign the guarantee. They went there for the purpose of signing or becoming cautioners in a guarantee, although there was nothing definitely settled as to the form or the particular terms of the guarantee except that it was to be a guarantee for advances made and to be made to Mr Robert Young.

As to the condition of mind of the two cautioners on 22nd February when they went to the bank I have already said that they had been deceived as to the matter by Robert Young, who allowed his brother, the pursuer, to believe that it was merely a guarantee for £300 or £400, and as to Mr Mathieson, he was to be informed at the bank what he had to sign, and according to his own account he went there prepared to sign a document of which he was apparently ignorant. That appears to me to have been the state of mind of the parties when they went to the bank on the 22nd February. And I may state that up to this time the bank had no communication whatever of any sort or kind with David Young or Mathieson, and that there was no duty on the bank to have any communication with these persons. All the information they had when David Young and Mathieson went to the bank was got from Robert Young and Baillie, and, as I have said, that was false information.

And that being so, the question is, when they went to the bank, what took place at that meeting on the 22nd February when the letter of guarantee was signed? Now, upon that matter I believe Mr Junor's account. The Lord Ordinary implicitly believes Mr Junor's evidence upon that matter, and I entirely agree with the Lord Ordinary in that view of the evidence. If his account is to be relied upon, what took place was this—When these four people arrived at the bank Mr Junor handed this letter of guarantee to Baillie in order that these four parties might read it over and satisfy themselves as to the contents of the document. I have

no doubt that that was what took place upon that occasion. That Baillie read it I do not doubt, and there is as little doubt that he did not read it or explain its contents either to David Young or to Mathieson, and the reason of that is obvious, because if he had done so it would have been perfectly apparent that he and Robert Young would have been guilty of a fraud—for it is no less—upon the two cautioners. If that document had been read I do not believe that Robert Young and Mathieson would have signed it. It would have been known then that it was a very different document from what they were led to believe it was. But that being so, it does not follow that although they did not know what they were signing the bank are to be liable for that. I think every opportunity was given to them by the bank to read and examine it, and it was their duty to do so, and to ascertain the nature of the document they were signing. If David Young, relying upon his brother's statement, chose to sign the document without reading, or without looking at what he was signing in order to ascertain what was in it, the consequences must fall upon himself, the bank relying—as they were entitled to rely—that the cautioner knew perfectly well what he was signing. They gave their money on the faith of this document, and it appears to me that that being so, the bank was not and could not be affected by any fraud or any undue concealment in this matter as far as I can see. Having given money on the faith of the document that had been signed by David Young, David Young must be responsible for the amount.

I am therefore of opinion that this plea of the pursuer must fail.

Now, the only other thing that remains to be noticed is the plea which was the first plea in the original record, having reference to fraudulent misrepresentation on the part of the bank. This plea is founded on the statement which Junor is alleged to have made at the time when the document was signed, that it was a mere matter of form for the purpose of being shown to the head-office. Now, upon that matter I have very little to say. I entirely concur with the Lord Ordinary in his view of the evidence on this point. The Lord Ordinary is of opinion that it is not proved that Junor made any such statement, and I concur with his Lordship also that it is exceedingly improbable that a bank agent should have made such a statement, and if he had made it, I think it somewhat more than possible that David Young would not have believed it. He thinks he was brought to the bank to sign a document, although he might be mistaken that it was to make him liable for a sum of money less or more to the bank. To say that he should believe that it was a mere form, and act upon such a belief, is not at all what I can believe. I agree with the view taken by the Lord Ordinary that it is not proved that Junor made any such statement, and that being so, I think it is unnecessary to say more.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

Lord Shand—The case that was stated on the record as this action was originally brought, and as it was tried on the proof before the Lord Ordinary, was founded upon this statement, that in the first place the bank having a large claim against Robert Young required that he should find guarantors, and that when these guarantors appeared to sign the document, which has been read by my brother Lord Adam, the bank gave the guarantors no information, as they ought to have done, as to the extent of the debt for which they were undertaking liability. That was put forward as a ground in law for reducing the document on the view that the bank were under an obligation to disclose the state of the account.

The second point that was maintained on the record, and made the subject of inquiry in the proof, was that Mr Junor, the bank agent, had before the parties signed the document made the observation that it was a mere matter of form, and that the pursuer understood by this that he was merely signing an obligation for a comparatively small sum—somewhere between £400 and £500—his reason for so thinking being that for a considerable time before this guarantee was taken he had been at intervals cautioner for his brother on bills signed by him to about that amount. He states that it was his understanding, although the obligation he was to sign was in a different shape from the bills, it was really an obligation for the same amount as the bills, and therefore it was a mere matter of form.

After the proof, and after the judgment of the Lord Ordinary, an amendment was made on the record to present a case of another kind, to which I shall afterwards revert, and which has been latterly referred to by my brother Lord Adam.

In regard to the case as it was originally presented, I have come to the conclusion without difficulty that the defenders are entitled to absolvitor. I may say that I believe each of the parties having interest in the decision of the case, Young the pursuer, the guarantor Mathieson, who was unfortunately in the same position, and Junor the bank agent, have spoken truthfully according to the best of their recollection of the events which occurred at the important interview on the 22nd of February 1886, when this guarantee was signed. I see nothing to lead me to think that either of these parties has not honestly stated what occurred at that time. At the same time, they are speaking after a considerable interval of time, and it is not surprising that there is to some extent a difference of recollection as to the incidents of that meeting.

But, in the first place, with reference to the ground maintained by the pursuer that the bank agent was under an obligation to disclose the state of accounts or to make any representations to the cautioners at that time, it is, I think, clear that that ground of action fails. There can be no

ground of complaint because of concealment by the bank agent, for nothing is better settled than this, that a bank agent is entitled to assume that the cautioner has informed himself upon the various matters material to the obligation he is about to undertake. The agent is not bound to volunteer any information or statement as to the accounts, although if information be asked he is bound to give it, and to give it truthfully.

In regard to the misrepresentation which is said to have been made, it is of this nature. The parties say that when they were at the bank a document which they certainly had never seen before, and the terms of which were unknown to them, was produced, and that Mr Junor made an observation, when there was some talking about it, that it was a mere matter of form. Differing from the Lord Ordinary and the view which Lord Adam has taken of the evidence, my impression of the evidence as a whole is that Mr Junor has forgotten that he did make some observation of that kind. Each of the other parties, four in number, say that he did. But then each of them accompany it with this, that the remark was part of a statement, which shows it was not calculated in any way to mislead the person to whom it was made. The observation according to each of these witnesses was that there was no danger, that it was a mere matter of form, meaning plainly—it is well known to us all that Mr Young is a man in good circumstances, and in a large business, so that no one need have fear; "there is no danger, and it is a mere matter of form." Each one of the witnesses who was examined says that he was of opinion that Robert Young was a man of wealth and means. He had a large cattle business, but had a difficulty in getting in his accounts promptly, and so he required from time to time to get credit till he could obtain payment of his accounts from the persons to whom he had sold his cattle. He was in good financial condition; there was no difficulty about his means. Mr Junor makes that extremely clear from his evidence. He says—"I thought Robert Young was a good man according to the figures shown to me, and my belief was that he would get out of his difficulties. I did not give expression to that belief in the course of the interview when the guarantee was signed. I would have been quite ready to express that belief if anyone had asked me." It is quite clear that that was Mr Junor's view, and the pursuer says the same thing. Accordingly I think it would not have been an unlikely remark for the bank agent to make with reference to his belief that this was a mere matter of form, and that there was no danger in granting this document. I see no evidence leading me to assume that the statement was invented, and I see nothing in the evidence to lead to the conclusion that it was one of the other parties who made the observation. I think the observation was made by Mr Junor. But there was nothing in his observation taken as a whole that was fraudulent or misleading, for its meaning was merely that Young was believed to be a man in good circumstances; that nothing of the nature of fraudulent representation can attach to it for the reason that I have just expressed, that nobody believed it. I think the observation is one that cannot be founded upon as a ground for reducing the guarantee granted, and therefore on that branch of the case also I am of opinion that it fails.

There is no doubt that the pursuer and Mr Mathieson were most grievously deceived in the transaction. The pursuer's brother says that he deceived his brother by getting him to sign an obligation on the idea that it was for the same amount as the bills on which his name previously was—that is, for £400 or £500—and that he took advantage of his brother by leading him to sign an obligation for a much larger amount. But Mr Junor had not the least idea of a fraud of that kind in his mind, and any observation which he made as to the document being a mere matter of form must be taken with reference to the state of his own mind, and was made quite honestly so far as he was concerned.

But after the proof was led, and after its effects had been discussed to a certain extent on the reclaiming-note, a change was made on the record and a case of this kind was presented. It was said that it had been arranged with Robert Young, the principal obligant for the debt, that the document which was to be signed by the guarantors was to be one for a limited amount, the limit being the actual amount of the overdraft as it stood at the time that the obligation was granted. Now, if it had been proved upon the evidence that Mr Junor upon the one hand, and Robert Young on the other, had arranged that the guarantors were to sign an obligation for an overdraft limited to the amount which was overdrawn on that day, I should have been of opinion that the pursuer was entitled to the decree of reduction he asks, because it appears that the document which was presented for signature was not a guarantee for the overdraft as it stood at that date, but for the amount then due, or which would become due from time to time without any limit. On the assumption I am now making, that would have been undoubtedly a different document from that which the principal had agreed to sign. It would have been a different document from that which he had agreed to bring the guarantors to sign, and I should hold without difficulty that the bank agent in such circumstances would have been bound to disclose to the parties the true nature of the document he was about to present to them. It would be no answer to my mind to say that the parties did not apply to him to read over the document. I think in such circumstances the bank agent would be bound to warn the parties by telling them that this was not the document which it had been arranged they should sign, but was one for a much larger amount, and to ask them if they were still willing to sign it. If he had made no such

explanation I think the parties would have been entitled to sign it on the faith that it embodied the arrangement come to, and that it did not subject them to further liability than the overdraft at that date. That, I think, is really the only difficulty that arises in the case—Whether the arrangement between Junor and Robert Young was not really to this effect, that Young was to bring guarantors who were to sign a guarantee for the overdraft, meaning the overdraft as it then existed—an overdraft at least limited to that amount. I have no doubt that it was quite understood that the guarantee was to cover future and continuing transactions—that it was to cover the current account—although it was maintained that the understanding was that the guarantee was to be limited to the amount which was then due. There are no doubt parts of the evidence, and not a few expressions in the correspondence, which seem to support the pursuer's view, but taking the proof as a whole I have come to the conclusion that the arrangement made was really an arrangement to give a guarantee not only for the overdraft but for future transactions without any limit in amount.

In the first place, the point does not seem to have been presented on the record as originally prepared, as I think it would have been if it had been true.

In the second place, I find from the evidence which Lord Adam read from Baillie's statement that he admits that the document was just in the terms he thought it would be, and I do not think Robert Young says seriously that this obligation was an enlargement of what he understood had been arranged, and I have come to the conclusion that the expressions which were used in the correspondence in regard to the overdraft really meant that the cautioners should undertake responsibility for the amount of the overdraft as it might be from time to time on the current account in which that overdraft might vary.

There is a passage in Mr Junor's evidence in which he no doubt says—"I did not arrange with anyone that it was to be a guarantee for an unlimited amount;" but he subsequently states that the document as prepared was in the terms arranged, and on the whole I think that this new contention of the pursuer must also fail.

There is one observation made by the Lord Ordinary with which I cannot agree. It occurs at the close of his note, where he says—"It is said that Mr Junor did not read the guarantee to the cautioners before signing. It was not his duty to read it, and he could not have done so without undertaking a responsibility which did not properly belong to him." I concur with the Lord Ordinary in thinking that Mr Junor was under no legal obligation to read the document, but I do not agree with him in thinking that the bank agent if he had read it to the parties would have undertaken any responsibility which did not properly belong to him. I can conceive of no responsibility that a bank agent in such circumstances would incur if he read over such documents to people about to sign them in order that they should understand what they were doing. This was not a case in which the guarantee had been transmitted by the bank days before to the people who were to sign it. It was a case in which the document was brought from the next room to be signed by the parties who had never seen it, and who were involving their whole fortunes, for it was a document entirely unlimited in the extent of its obligation. The parties were not certainly acute men of business; one was a farmer, not in a large way of business, and the other, Mr Mathieson, seems to have had very little business experience from what we see of him. In my opinion it would have been right in the circumstances—although there was no legal obligation on the bank agent to do so—to read that document to the parties. If it had been so read I think the bank would have been saved this action, and the Court would have been saved the necessity of enforcing an obligation the unlimited extent of which the parties did not know. If it had been read over they would have known what was in it. I do not think there was any purpose to conceal its contents from them, but still if it had been read over they must necessarily have become aware of what was in it, and if they signed it then they could not thereafter have said that they had done so in ignorance. The chances are, as Lord Adam has said, that they would have declined to sign it, and no doubt the result would have been that the bank would not have got these cautioners for their debt, but there would have been a more just result, for it would have been a more desirable result that the bank did not obtain the security they wanted than that the guarantors should have been involved to an extent which exceeds their whole means through ignorance of the unlimited nature of the obligation they undertook.

Lord President—On the record and proof as presented to and considered by the Lord Ordinary I am of opinion that his Lordship came to the right conclusion in assoilzieing the defenders, and as your Lordships have expressed an opinion to the same effect as the Lord Ordinary upon that aspect of the case, I do not think it necessary to say anything in addition to what has fallen from your Lordships.

But an alteration was made upon the record since the reclaiming-note was presented which gives a different aspect to the case now from what it had in the Outer House, and I desire to state very shortly the grounds upon which I am unable to sustain the new plea of essential error embodied in the amendment on the record.

I do not doubt that the pursuer was under an error—and a very important error—as to the essence of the document which he subscribed. It is not enough to entitle him to a reduction of this obligation that that error was produced either by outside influence, for which the bank is in no way responsible, or by the negligence of the pursuer himself. I think the error was brought about by

both of these means. I think, in the first place, that the pursuer was deceived—and grossly deceived—by his brother and his brother's cashier or clerk. The representations made by them were, I think, of a fraudulent character, and if the bank had been in any way answerable for these representations I should have been inclined to pronounce judgment against them. But there is no evidence whatever that the bank were in the least degree aware of anything that had passed between the pursuer and his brother and his brother's clerk. All that was unknown to the bank.

But I think the pursuer himself was also guilty of great negligence in signing a document of this kind without reading it, or without making himself master of its contents. This is precisely what he did. If he had read the document he never would have made any mistake about its import. It is a very clear and simple document, and anyone in the position of a man who transacts business at all could not have made any mistake or error as to what the meaning and effect of the document was. But the pursuer relied entirely upon the representations made to him by his brother and by the man Baillie, his brother's clerk, and chose to sign that document without reading it, or otherwise ascertaining what its contents and nature of its obligations were.

Now, for the error so brought about nobody can be answerable but the pursuer himself and those who deceived him as to the nature of the obligation he was about to contract. On that short ground I am of of opinion that the reasons of reduction added to the record since it came here cannot be sustained, and that the interlocutor of the Lord Ordinary must be adhered to.

The Court adhered, with additional expenses.

Counsel for the Pursuer—Johnston—Low—Morison. Agent—Alex. Morison, S.S.C.

Counsel for the Defenders—R. V. Campbell—Sir C. Pearson—Readman. Agents—Ronald & Ritchie, S.S.C.

Saturday, November 30.

WHOLE COURT.

DELAURIER & COMPANY *v.* WYLLIE AND OTHERS

Ship — Carriage — Charter-Party — Negligence Clause—Bill of Lading—Conditions—Contract—Effect of "Contract c.i.f."—Delivery—Principal and Agent—Insurance.

Delaurier & Company, Rochefort, France, bought through Stevenson & Company, Glasgow, who acted as agents, 30 tons of pig-iron at £57, 5s. 11d. They also bought directly from Stevenson & Company 1056 tons of coals at the price of £541, 4s., which included, cost, insurance, and freight. On May 11th Stevenson & Company chartered a vessel in their own names to transport the cargo. The charter-party gave them the option of sending the ship to other ports besides Rochefort, and contained a clause excepting perils of the sea, &c., "even when occasioned by negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowners." Stevenson & Company insured the cargo by declaring the value thereof on a running policy for a large amount which they had with certain insurers at the time, the premium for the iron being charged against the consignees in the invoice, the premium for the coals being included in the price c.i.f. The bill of lading for the coals contained a clause—"The act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted," and undertook delivery on being paid freight at a certain rate, "all other conditions as per charter dated 11th May 1877." On May 20th the bills of lading for the coals were endorsed by Stevenson & Company to Delaurier & Company. The vessel sailed with the cargo, and was lost on the voyage through the negligence of the master and crew. Stevenson & Company recovered under their insurance, and credited the consignees with the invoice prices, and kept the balance of the amount recovered.

Delaurier & Company raised an action against the shipowners for the loss arising from the failure of the defenders to deliver in terms of their contract of affreightment. It was admitted that the pursuers sued really on behalf of the underwriters, who had paid the claims on the policy.

With regard to the coal, *held* by a majority of the whole Court, that the defenders were liable for the value thereof. The Lord President, Lord Justice-Clerk, Lords Mure, Shand, Adam, Rutherfurd Clark, M'Laren, Kinnear, Trayner, Wellwood, and Kyllachy *held* (1) that the clause in the bill of lading, "all other conditions as per charter, dated 11th May 1877," did not incorporate the negligence-clause of the charter-party, but only imported into the bill of lading such conditions in the charter-party as affected and fell to be performed by the consignees; (2) that in a contract c.i.f. the additional obligations undertaken by the seller as to insurance and freight had no reference to the delivery of the goods, which was not suspended until the arrival of the cargo at the port of discharge, but was completed by delivery on board ship along with endorsation and delivery of the bill of lading, and that the pursuers being vested with the property of the coals at the time of the loss were entitled to sue for their value.

Diss. Lords Young and Lee. Lord