Wednesday, January 14.

FIRST DIVISION.

[Lord Cullen, Ordinary.

ROYAL BANK OF SCOTLAND *v.* GREENSHIELDS.

Bank — Cautioner — Letter of Guarantee — Bank's Duty to Cautioner — Disclosure of Principal's Indebtedness to Bank — Mercantile Law Amendment (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 60), *sec.* 6.

H.'s account with a branch of the pursuers' bank was overdrawn to the extent of about £300, in addition to which the bank held bills to the amount of £1100 on which he was liable. By letter of guarantee the defender became cautioner for H. to the bank. Before undertaking the cautionary obligation the defender interviewed the local bank agent, who made no mention of the bills. The defender granted the letter of guarantee under the belief that H.'s indebtedness to the bank was confined to the overdraft, and he would not have granted it had he been aware of H.'s further indebtedness on the bills.

Circumstances in which *held* that no misrepresentation had been made by the bank agent, and that nothing had transpired which laid upon him a duty to disclose H.'s total indebtedness to the bank.

Observations (*per* the Lord President and Lord Mackenzie) as to the circumstances in which a duty of disclosure would emerge.

Query—The applicability of the Mercantile Law Amendment (Scotland) Act 1856, sec. 6.

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

The Royal Bank of Scotland, *pursuers*, brought an action against James John Greenshields, *defender*, for payment of £500, due on a letter of guarantee by the defender in favour of the pursuers.

The pursuers pleaded, *inter alia*—"(1) The defender having guaranteed to the extent of £500 and interest, as condescended on, the indebtedness of the said John Hutchison to the pursuers, and in respect thereof being due and resting-owing to the pursuers in the sums sued for, decree should be pronounced as concluded for."

The defender pleaded, *inter alia*—"(1) The defender is entitled to absolvitor, with expenses, in respect that (*a*) the defender having requested from pursuers' agent Allan information respecting John Hutchison's financial position, said agent failed in his duty to make full and fair disclosure to defender of the facts within his knowledge; (*b*) defender undertook the guarantee founded on by pursuers under essential error induced by material misrepresentations on the part of pursuers' said agent; (*c*) defender undertook said guarantee under essential error induced by the fraudulent misrepresentation and concealment of pursuers' said agent."

Proof was allowed and led, the import of which appears from the opinion (*infra*) of the Lord Ordinary (CULLEN), who on 27th September 1912 assoilzied the defender.

Opinion.—"In this action the Royal Bank of Scotland sues Mr James John Greenshields of Kerse, Lesmahagow, for £500 with interest, under a guarantee granted by the latter on 5th November 1908 for the indebtedness to the bank of one John Hutchison, joiner, Lesmahagow.

"Prior to the granting of the guarantee, Hutchison had been a customer of the bank for a number of years. Latterly his account had been unsatisfactory. For some time prior to 3rd November 1908 there had been pressure by the bank. This led to his obtaining accommodation bills from various parties which he discounted with the bank, and the amounts of which were put to his credit in his current and overdrawn account. The amounts of these bills at 3rd November 1908 totalled £1100. At the same period the amount of his overdraft on his current account amounted to about £300. Before 3rd November 1908 Hutchison was told by the bank that he must clear off this overdraft by the end of 1908. He then had an interview with the officials at the head office in Edinburgh, when he said that he would endeavour to get a guarantee from the defender. The defender was regarded as a satisfactory guarantor, and Hutchison was left to get his guarantee if he could.

"Hutchison saw the defender on the subject on the morning of 3rd November 1908. The defender, who knew Hutchison through the latter's father having been at one time gardener at Kerse, was kindly disposed to him and inclined to grant the guarantee. He said, however, that he must first see Mr Allan, the bank's agent at the Lesmahagow office, where the defender had an account.

"The defender on 3rd November 1908 called on Mr Allan, with whom he had a short interview. He then sought out Hutchison, and after some conversation he and Hutchison went together to the bank and saw Mr Allan, when the defender agreed to grant a guarantee for £500, being £200 more than the sum originally suggested by Hutchison. The guarantee was signed on 5th November.

"The ground of defence to this action on the guarantee is that the defender was misled into granting it by misrepresentation as to the state of Hutchison's indebtedness to the bank, in respect he was told only of the debit balance of £300 on the current account, and was told nothing about Hutchison's bills for £1100 held by the bank, and that he would not have granted the guarantee had he known that Hutchison was so heavily indebted. The defender maintains that Mr Allan should have informed him of the existence of the bills as well as of the overdraft, and that his omission to do so amounted to a material misrepresentation which disables the bank from holding him to his guarantee.

"That the defender had no knowledge of the existence of the bills; that he signed the

guarantee in the belief that Hutchison's indebtedness to the bank consisted only of the £300 of overdraft; and that he would not have signed the guarantee had he known about the bills, are facts as to which I have no doubt. The question remains whether the bank is responsible for the defender having been imperfectly informed as to Hutchison's liabilities and for the error he was under when he signed the guarantee.

"The defender on record alleges that for some time prior to the guarantee Mr Allan had been aware that Hutchison was financially unsound, and he imputes to Mr Allan a deliberate scheme to obtain Hutchison's debt to the bank fortified by outside security, and an intention to deceive the defender in the matter of his guarantee. A good deal of evidence was directed towards substantiating these allegations. I am of opinion that the defender has not succeeded in making good his case on this aspect of it. It is true that the statements of Hutchison's affairs put forward by him were inflated and would not have stood a proper scrutiny; and Mr Allan seems to have passed them without such attention and scrutiny as might have been expected of him, and as he could have given. That he should have done so is not quite easy to understand. But the evidence does not contain anything sufficient to explain why he should have been willing to be a party to misrepresenting the position of Hutchison's affairs to the head office. I take the case therefore on the footing that in these matters Mr Allan acted in good faith.

"There remains, however, for consideration the alleged specific misrepresentation of which the defender complains—that is to say, the failure of Mr Allan to inform him about Hutchison's bill debts to the bank. If Mr Allan represented, or was a party to representing, to the defender that Hutchison's debt to the bank consisted only of the balance of £300 on the overdrawn account current, while in fact it included also £1100 due on the bills, it appears to me that the defender would be entitled to complain of this as a misrepresentation material to the transaction, and as there is no doubt that he signed the guarantee in the belief that the £300 was the whole indebtedness, that he would be entitled to disclaim his obligation under it. It is, no doubt, true that Mr Allan was originally not under obligation to inform the defender as to the state of Hutchison's liabilities to the bank. But if he chose to give information he was bound to see that it was accurate and not misleading.

"There is considerable variation in the accounts given by the defender and by Allan as to what passed when the defender first called at the bank on the morning of 3rd November, and between the defender, Allan, and Hutchison as to what passed at their subsequent meeting at the bank on the same morning. I place most reliance on the evidence of the defender, who impressed me as a very frank and straightforward witness. It is a salient fact in the history of the transaction that whereas Hutchison had originally asked the defender to grant a guarantee for £300, the defender in the end granted one for £500. What occasioned this increase in the amount of the guarantee is not doubtful. It was a statement made to the defender that a guarantee for £300 might not be of much benefit to Hutchison as the sum in it might be taken by the bank to pay off his overdraft of that amount. On hearing this the defender agreed to give a guarantee for £500, so as to provide a substantial margin over said debt. Now as Hutchison's indebtedness to the bank was not merely the £300, but totalled £1400, it is clear that the defender gave his guarantee under an error as to how Hutchison stood with the bank. He believed that the indebtedness was only £300, and that his guarantee would provide a free margin of £200, whereas the indebtedness far exceeded the sum guaranteed. The defender says that had he known of the additional indebtedness on the bills he would not have signed the guarantee, and I believe him. His error therefore was material, because but for it he would not have contracted as he did.

"Now while the defender, Mr Allan, and Mr Hutchison vary in their accounts of the meetings at the bank, I think it is proved that the statement as to the overdraft debt swallowing up a guarantee for £300, which misled the defender, was either originally made by Mr Allan or was endorsed by him, and it must have been evident to him that the defender, when he agreed to £500, was proceeding on the footing that by guaranteeing that increased amount he was providing Hutchison with a free margin above the bank's claim against him. The defender's action in the matter was susceptible of no other meaning. And this being so, I think it was the duty of Mr Allan to dispel the error under which the defender was proceeding by informing him that the overdraft did not represent the whole of Hutchison's indebtedness, but that there were the bill debts as well. Mr Allan may have thought that the bill debts were sufficiently secured to the bank by the other names on the bills. But Hutchison was the true debtor in them, as Mr Allan knew, and had he disclosed their existence to the defender, there is, in my opinion, no doubt that the defender would not have undertaken the guarantee. I am accordingly of opinion that the defender signed the guarantee under a material error, and that this error was induced by the failure of Mr Allan to disclose the existence of the bill debts under circumstances which laid on him a duty of disclosure, and that the pursuers accordingly are not entitled to enforce against the defender the guarantee so obtained from him."

The pursuers reclaimed, and argued—A bank agent had no duty to make any disclosure to a proposed cautioner as to the financial position of their debtor. He was entitled to assume that the intending cautioner had full information as to the debtor's circumstances—*Young* v. *Clydesdale Bank, Limited*, December 6, 1889, 17 R. 231, 27 S.L.R. 135. All he was bound to do was to answer truthfully any questions that were asked. No doubt if a bank agent

volunteered a statement he was responsible for its truth. In the present case the bank agent did not volunteer any information. Even assuming that the bank agent had made a representation as to Hutchison's financial position, such a representation not being in writing would have no legal effect —Mercantile Law Amendment (Scotland) Act 1856 (19 and 20 Vict. cap. 60), section 6; *Clydesdale Bank, Limited* v. *Paton*, May 12, 1896, 23 R. (H.L.) 22, 33 S.L.R. 533.

Argued for the defender (respondent)—A bank agent was bound to make a full and fair disclosure in reply to questions put to him by an intending guarantor—*Hamilton* v. *Watson*, December 8, 1842, 5 D. 280, *aff.* March 11, 1845, 4 Bell's App. 67; *Royal Bank of Scotland* v. *Ranken*, July 20, 1844, 6 D. 1418; *Falconer* v. *North of Scotland Banking Company*, March 20, 1863, 1 Macph. 704; *Young* v. *Clydesdale Bank, Limited* (*cit. sup.*); *Brownlie* v. *Miller, &c.*, June 10, 1880, 7 R. (H.L.) 66, 17 S.L.R. 805; *Railton* v. *Matthews and Another*, 3 Bell's App. 56. Here the disclosure was only partial, with the result that the information given was in fact misleading. In any event where it was apparent to the bank agent that the intending guarantor was under a misapprehension as to the principal debtor's position, a duty of disclosure emerged—*Brownlie* v. *Miller, &c.* (*cit. sup.*), *per* Lord Blackburn at p. 79. Here it must have been obvious to Allan that the defender thought the overdraft represented Hutchison's total indebtedness to the bank, and it was therefore his duty to disclose Hutchison's further liability on the bills. The Mercantile Law Amendment (Scotland) Act 1856, section 6, did not apply. The class of case which it contemplated was where in consequence of a representation by A as to B's credit, B was able to get goods, &c. from C, whereby C suffered loss. If the section was to receive the interpretation for which the pursuers contended it would trench upon the rule of law that a man cannot profit from his own fraud. In any event section 6 only limited the mode of proof, and not having been pleaded must be held to be waived—*Simpson* v. *Stewart*, May 14, 1875, 2 R. 673; *Kerr's Trustees* v. *Ker, &c.*, November 16, 1883, 11 R. 108, 21 S.L.R. 89. Counsel also referred to *Wallace* v. *Gibson*, March 19, 1895, 22 R. (H.L.) 56, 32 S.L.R. 724; *Walker's Trustees* v. *M'Kinlay*, June 14, 1880, 7 R. (H.L.) 85, 17 S.L.R. 806; *Maddison* v. *Alderson* (1883), L.R., 8 A.C. 467; *Lyde* v. *Barnard*, 1836, 1 M. and W. 101.

At advising—

LORD PRESIDENT—Along with your Lordships I have found it unnecessary to consider and decide whether or no the 6th section of the Mercantile Law Amendment (Scotland) Act of 1856 applies to this case. On that question I desire expressly to reserve my opinion, for having in view the condition of the pleadings and the course and conduct of this action in the Outer House it appears to me to be preferable to follow the path which has been taken by the Lord Ordinary.

In substance, although not in form, this is an action for the reduction of a letter of guarantee, dated 5th November 1908, addressed to the Royal Bank of Scotland by a Mr Greenshields, the original defender in the action, who died since the proof was taken, and whose representatives have been sisted in his stead. The ground on which Mr Greenshields sought release from the obligation contained in the letter of guarantee is very succinctly stated in his first plea-in-law to the effect that the "defender undertook the guarantee founded on by pursuers under essential error induced by material misrepresentations on the part of pursuers' said agent." That plea, which at once puts the defender in the position of pursuer of the issue, rests upon the following statement set out in his defence:—An interview took place between Mr Allan, agent for the bank, and the defender Mr Greenshields, on 3rd November 1908, in Mr Allan's private room at pursuers' branch bank at Lesmahagow," and at that interview, in answer to defender's questions as to Hutchison's position, Mr Allan represented to and assured the defender that Hutchison's total indebtedness to the pursuers was less than £300. That was the vital question which was remitted to probation.

Now the law applicable to this case is well settled. A bank agent is entitled to assume that an intending guarantor has made himself fully acquainted with the financial position of the customer whose debt he is about to guarantee, and the bank agent is not bound to make any disclosure whatever regarding the customer's indebtedness to the bank. But if he does, either voluntarily or in answer to a question put, make any representation which turns out to be erroneous or untrue, then the guarantor who has relied upon that statement is entitled to liberation from his obligation. That is the law as laid down in the case of *Young* v. *Clydesdale Bank, Limited* (17 R. 231) and some prior authorities to which we were referred, and is accepted by both parties as applicable to this case.

Now it is certain that at the date when the letter of guarantee was signed, the customer was indebted to the bank, not only in respect of an overdraft amounting to close on £300 sterling, but also in respect of certain promissory-notes amounting to, in round figures, £1100. It is equally certain that the existence of that indebtedness in the promissory-notes was well known to the bank agent and was not known to Mr Greenshields, and that the latter would not have signed the letter of guarantee had he been aware of the indebtedness on the promissory-notes. And the question, therefore, which at once emerges is this—Did the bank agent at the interview prior to the date when the letter of guarantee was signed represent to the intending guarantor that Hutchison's (the customer's) total indebtedness to the pursuers was less than £300? On that vital issue—as I take it the only issue in fact in the case—the evidence of the defender Mr Greenshields is as follows: He is speaking of the first interview that took place on the 3rd November between him and the bank agent, and he says—"I then went on to the bank and saw Mr Allan. I was shown into

his private room. I told Mr Allan that Hutchison had applied to me for a guarantee for £300, and I asked him Hutchison's position. I am perfectly clear that I put that question. Mr Allan's reply was that Hutchison's position was a good one; that he had a contract for reseating the church; and that he was making money. He said that Hutchison wanted the guarantee to carry on his business to better advantage." Then further on in his evidence he says—"All that was disclosed to me was an overdraft, which Mr Allan said was under £300? From what I now know there was concealment. (Q) Was this statement which was made to you such as induced you to believe that there was no indebtedness to the bank over £300?—(A) From the statement made to me I thought the risk was a perfectly good one; I knew nothing else. From the bank agent's statement I considered that Hutchison was perfectly solvent at the time, and would be able to repay anything that was advanced on my guarantee. From the statement made by Mr Allan at the time I inferred that Hutchison's indebtedness to the bank was under £300. (Q) In view of what you now know as regards his actual indebtedness at the time, would you say there was misrepresentation on the part of Mr Allan?—(A) Well, it looks on the face of it misrepresentation; it is concealment; I would not quite call it misrepresentation." And then a little further on he is asked this question—"Did you ask Mr Allan anything about Hutchison's business?—(A) I said to Mr Allan, 'What is Hutchison's position?' and I thought that that question would cover everything. By his position I meant whether he owed the bank, or whether he was a man that I could give a guarantee to." And then finally he says in answer to this question—"Are you sure that you asked any questions of Mr Allan beyond the state of Mr Hutchison's account at the bank?—(A) I asked him his position. (Q) Did you say the position of his account?—(A) I did not; I said, 'What is Mr Hutchison's position?' (Q) You are quite sure you did not ask, as you came in, 'What is the position of Mr Hutchison's account at the bank?'—(A) I did not. (Q) Did you ask any question of Mr Allan which plainly applied to Hutchison's total indebtedness, and not merely to the state of his current account at the bank?—(A) I think asking his position covered that; it covered the whole case; I expected to be told in what position John Hutchison was, and from what Mr Allan said I believed him to be solvent." That is the whole evidence given by the defender Mr Greenshields upon this the vital issue in the case. It is contradicted by Mr Allan, who says in his evidence-in-chief regarding the interview to which I have just referred—"He (Mr Greenshields) was not more than two minutes there. He asked me no questions whatever as regards Mr Hutchison's financial position. In particular, he did not use the expression, 'What is John Hutchison's position?'" And further on, in cross-examination, he says—"When Mr Greenshields came in he told me that Mr Hutchison had been down at Kerse and had asked him if he would become cautioner for him for £300. Mr Greenshields did not put the question to me, 'What is Hutchison's position?' nor 'What is Hutchison's position at the bank?' He did not put any such question to me. He did not ask me anything at all about Hutchison's affairs. He did not ask anything about the extent of the risk involved. He never asked me such questions."

I think it must be obvious that this, which is the whole evidence in the case upon the vital issue, is quite insufficient to sustain the defence and to cut down this formal letter of guarantee. Even on the assumption that Mr Greenshield's evidence was to the effect that the misrepresentation charged had actually been made, the evidence would have been insufficient because unsupported, not only unsupported but contradicted by Mr Allan. No doubt the Lord Ordinary says that he prefers Mr Greenshield's evidence to Mr Allan's, not, I gather, on the ground of its greater candour but of clearer recollection. Be it so, nevertheless the unsupported although uncontradicted evidence of one reliable witness deeply interested in the case is not sufficient, in my opinion, to prove the whole case and to destroy this formal deed. But on the assumption that Mr Greenshield's evidence is to be accepted as it was given, and to be considered as supported, it falls very far short of establishing the defender's case, because the expression of a personal opinion that a man's financial position is good is not equivalent to a statement that his total indebtedness does not exceed a certain sum. An honest opinion may be entertained that a man's financial position is sound although his indebtedness at the time may be considerable. The Lord Ordinary, I observe, has fully acquitted Mr Allan of any intention to deceive. I think his Lordship was quite right, and that the general opinion which he expressed regarding Hutchison's position was quite honestly given and honestly entertained.

I reach, therefore, without any hesitation, the conclusion that the evidence given is inadequate to sustain the defence. The Lord Ordinary has reached a different conclusion, not because he finds that a misrepresentation was made—he finds no misrepresentation—not because he finds that a question was asked which ought to have elicited the answer that the total indebtedness of Hutchison to the bank was less than £300—for no such question was put and no such answer was given—but the Lord Ordinary's judgment in favour of the defender is rested on this ground, that the defender signed the guarantee under a material error, and this error was induced by the failure of Mr Allan to disclose the existence of the bill debts under circumstances which laid on him a duty of disclosure. So that the Lord Ordinary's judgment does not proceed upon the assumption that the defender has proved that misrepresentation was made regarding the amount of the customer's indebtedness. His judgment rests upon a failure to disclose on the part of the bank agent. Now it is well-settled law, as

I have already pointed out, that the bank agent was entitled to assume that the intending guarantor was fully conversant with the financial position of the customer, and was not bound to make any disclosure whatever to the intending guarantor. And the only circumstances in which I can conceive that a duty of disclosure would emerge and a failure to disclose would be fatal to the bank's case would be where a customer put a question or made an observation in the presence and hearing of the bank agent which necessarily and inevitably would lead anyone to the conclusion that the intending guarantor was labouring under a misapprehension with regard to the state of the customer's indebtedness. Nothing short of that, in my opinion, would do.

Now when I turn to the Lord Ordinary's reasoning in the note appended to his interlocutor, I find that the particular circumstance which in his judgment caused a duty of disclosure to emerge was that a statement was made to the defender that a guarantee for £300 might not be of much benefit to Hutchison, as the sum in it might be taken by the bank to pay off his overdraft to that amount. On hearing this the defender agreed to give a guarantee for £500 so as to provide a substantial margin over said debt. In my opinion if that statement was made — we shall see in a moment in what form it was made — it would fall very far short of an expression of view on the part of the intending guarantor which ought to have elicited a full disclosure of the amount of the customer's indebtedness by the bank agent. The Lord Ordinary himself expresses some doubt as to the circumstances under which and the person by whom that statement was made, and that of itself would be sufficient I think to displace the ground of judgment, because the circumstances must be, as I think, plainly and unequivocally proved. But turning to the evidence, I think it will be found that the evidence of the bank agent upon this topic, which has bulked so largely in the Lord Ordinary's view, is perfectly clear and distinct. He says—"After the call of Mr Hutchison that I have referred to" (that was the call made earlier on the morning of the 3rd November), "Mr Greenshields called at the bank. He was shown into my private office. I asked him to be seated and he said no, he had not time, because he had a friend waiting outside for him, and then he said that John Hutchison had called that morning and had asked him to become security for him, but after that he said that John had been down there that morning and he wanted about £300 to pay some tradesmen's accounts. At that time I told him that I did not think that £300 would assist John to pay tradesmen's accounts, because it would be taken up by the bank, but I said, 'Mr Greenshields, that is purely a matter between you and Mr Hutchison.' Mr Greenshields replied that seeing that was the case he had better see John before doing anything else, and he left the office thereafter." He is asked—"Was it only because he said that Hutchison wanted the money to pay tradesmen's accounts that you thought it necessary to inform him of the overdraft at the bank?—(A) Yes. Of course I did not mention the overdraft at the bank; I told him it would be taken up by the bank. He did not ask what I meant by being taken up by the bank. I am quite sure that I made that statement at the first visit that Mr Greenshields paid; and I told him distinctly that it was purely a matter between him and John Hutchison at the time. I said that because I make it a point never to advise my customers to become security for anybody." And he substantially repeats the same statement in cross-examination. That is to say, the bank agent himself, without any question put or without any observation made by others, volunteers the statement that a guarantee for £300 might not be of much use to enable the customer to carry on his business in respect that it might be taken by the bank. That Mr Allan's account of what took place is correct I think is clear when one turns to the evidence of the customer himself, Hutchison, who says—"Then we" (that is to say, he and Mr Greenshields, the intending guarantor) "talked about the overdraft, and Mr Greenshields said that there was just a danger of the bank seizing that, and it was then that I asked him kindly to make it £500 instead of the £300. It was either Mr Greenshields or I who mentioned the overdraft." "It was I," he says further on—alluding to what occurred at the subsequent meeting in the bank—"who led off; I said, addressing Mr Allan, that I thought Mr Greenshields would kindly consent to make it £500 instead of £300, and then Mr Greenshields said that a hundred or two was neither here nor there seeing that everything was satisfactory, or words to that effect." Now Mr Greenshields denies that anything of the kind took place at the first interview, and he says that the overdraft was mentioned at the second interview, but under circumstances by no means so favourable to himself as the circumstances stated by Mr Allan in the evidence I have just read.

It appears to me that to say that £300 might not go very far, and that it might be taken by the bank or would be taken by the bank in respect of an overdraft, falls very far short of a distinct representation to the effect that the total indebtedness of the customer was less than £300, and is quite compatible with the view that the customer's indebtedness upon other obligations might amount to a very much larger sum. But that is the sole circumstance on which the Lord Ordinary founds when he says that there was a duty of disclosure laid upon the bank which they failed to discharge. I think there was no duty of disclosure laid upon the bank by anything that was said in the presence and hearing of the bank agent either by Mr Greenshields himself or by the customer, and accordingly that his Lordship's judgment cannot be supported.

I move your Lordships therefore to recal

the interlocutor of the Lord Ordinary and to give the pursuers decree in terms of the conclusions of the summons.

LORD JOHNSTON—Although I have had considerably more difficulty in the case than I think your Lordship has, I am now quite satisfied that the judgment which your Lordship proposes is the right one. One cannot of course avoid sympathising with anyone in the position of the late Mr Greenshields, who is ultimately responsible under a guarantee of this sort, because one sees clearly that in this case Mr Greenshields was misled. But he was misled, I think, partly by want of caution and full inquiry on his own part, and partly by unquestionable suppression of facts on the part of Hutchison, who is now bankrupt. But one's sympathy with the guarantor cannot affect the question of liability, and that, I think, is clear, unless one can follow the line of judgment which was taken by the Lord Ordinary. I thought that there was very great strength in what the Lord Ordinary says on this subject, and it was only on the explanations which your Lordship has given, and which I know are concurred in by my colleagues, that I see that the Lord Ordinary, though perfectly right in his reasoning and therefore in his conclusion if he is justified by the facts, is not so justified. I think that what he says in his judgment really amounts to this—Mr Allan was not bound to give any information whatever, but if he did give information, that information must be full. What I think the Lord Ordinary means when in this connection he uses the words "under circumstances which laid on him a duty of disclosure" is that Mr Allan was not bound to mention the overdraft at all, but if he did touch upon anything of the sort, he was bound to touch upon everything of the sort. If Mr Allan had said in answer to a question, "the indebtedness of Hutchison is £300 on overdraft," he would have undoubtedly been bound to add "but that is not all his liability." But when one comes to examine the evidence one finds that Mr Allan does not give this information in answer to a question. Of course there is great dubiety as to what really happened, but taking the case at the worst for Mr Allan, his reference to the overdraft is only an incidental remark, and I cannot hold with the Lord Ordinary that an incidental remark dropped in the way in which this one was, and not in answer to any question, imposed upon Mr Allan the responsibility which the Lord Ordinary has laid upon him. But apart from that view of the case, the evidence on the subject is very unsatisfactory. It is a crucial point in the case—there are only three witnesses, Mr Greenshields, Mr Hutchison, and Mr Allan. They none of them agree, and certainly neither of the latter two agrees with Mr Greenshields.

Mr Greenshields seems to suggest that his first meeting with Mr Allan led him to decide mentally that he would guarantee the £300, that then he went out, saw Hutchison, and that Hutchison hinted at an overdraft. I should say that if Hutchison had hinted at an overdraft in the interim, then when Mr Greenshields went to the second meeting he was bound in his own interest to inquire, "What does this overdraft mean, and is this Hutchison's full liability to the bank?" But then he says that he himself volunteered that a little more or less might be of some use. "Whether I mentioned the sum of £500 or Mr Allan mentioned it I could not swear, but directly after that Mr Allan said that he thought £500 was a very suitable amount, because the bank might come down on Hutchison for his overdraft. That was the first time that an overdraft was mentioned." If, then, it was the first time the overdraft was mentioned between Greenshields and Allan, Greenshields himself says that he comes to that meeting knowing about the overdraft. "That was the first time that an overdraft was mentioned. I was sitting down at the time—I got up and said, 'If there is an overdraft £500 is no good at all.' Mr Allan said 'Oh, the amount of the overdraft is under £300, and £500 will make everything right.'"

If that latter statement had been proved, it would have been a different story, but when one comes to Messrs Hutchison and Allan, one finds a totally different account given. Now I think that in a case of this sort if a guarantor is to avoid liability under his guarantee he is bound to prove his case, and at the best the case here is left in such doubt on the statement of the three witnesses—none of the other two corroborating this last and important statement of Mr Greenshields—that the verdict on the question must be one of not proven.

There is only one other point which I think right to refer to. Mr Greenshields in his record says that the "defender was a customer of pursuers, and expected to receive full and correct information as to Hutchison's financial position, and to get every consideration and perfect fairness in the inquiries he was about to make." And I think there is running through Mr Greenshields' evidence a sort of impression upon his part that because he was a customer he was entitled to different treatment on the part of the bank agent from the treatment that would be given to an outsider. I do not think that is sound. I think it is quite true, particularly in country banks, that there is a great deal of coming and going between customers and the bank agent, who really does a great deal in the way of advising them in regard to their business. But that is not the true position of the bank to its constituents. You notice that Mr Greenshields talks of himself as a customer of the bank, and that is quite correct; he is a customer and not a client. And to impose upon the bank the responsibility of advising and caring for the interests of a customer as you would impose upon a law agent the duty of caring for the interests of his client would be to place upon the bank responsibilities quite outside the lines of its business. I do not think that a banker has any more obligation to protect his customers from entering into a bad guarantee obligation than he has to protect them against

entering into a bad investment. He is bound, as your Lordship has said, to give information—full and accurate information—when asked, but nothing more.

On these grounds I concur in the result at which your Lordship has arrived.

LORD MACKENZIE — I agree with your Lordships and upon the same grounds.

There is a branch of the case to which I think it right to call attention, because we heard an argument to the contrary of the view taken by the Lord Ordinary, and that is the branch of the case which the Lord Ordinary deals with first and says—"The defender on record alleges that for some time prior to the guarantee Mr Allan had been aware that Hutchison was financially unsound, and he imputes to Mr Allan a deliberate scheme to obtain Hutchison's debt to the bank fortified by outside security, and an intention to deceive the defender in the matter of his guarantee." Now the Lord Ordinary goes on—"But the evidence does not contain anything sufficient to explain why he should have been willing to be a party to misrepresenting the position of Hutchison's affairs to the head office. I take the case, therefore, on the footing that in these matters Mr Allan acted in good faith." I am of opinion, after having heard an argument against that view, that the Lord Ordinary's conclusion is entirely right, and that it is the only one which is justified upon the facts of the case.

As regards that part of the Lord Ordinary's opinion which your Lordships have already discussed, I have really nothing to add to what has been already said. It is well-settled law that there is no obligation upon a bank agent to disclose the position of his customer's account unless he is asked a specific question which imposes that obligation upon him, or unless circumstances emerge which put upon him the duty of making a full disclosure. The circumstances may be either that he volunteers a statement which is only half the truth, in which case the cautioner is entitled to say—"I was misled; I was entitled to assume that you were disclosing the whole truth," or—and this would be a case of ordinary fraud—if the intending cautioner make a statement, to him or in his presence, which plainly shows that he is entering into a transaction in an entire misapprehension of the facts of the case, then the bank agent equally would be under an obligation, arising out of the circumstances of the case, to prevent the cautioner from being misled.

Now in the present case no specific question was put which imposed a duty on the bank agent to disclose the financial position of his customer. That is the only possible view upon the facts, and if I recollect aright it was not even attempted to be argued that there was a specific question imposing that duty. But then the view which the Lord Ordinary has taken is, that in consequence of statements made during the interview, there was an obligation on the bank agent to disclose that there was a possible indebtedness of £1100 upon outstanding bills.

I keep in view that in his cross-examination Mr Allan goes a little further than he did in the passage which has been already read from his examination-in-chief. His evidence amounts to this—he said he did not think £300 would benefit Hutchison by paying tradesmen's accounts, because it was very likely to be swallowed up by the overdraft. That was not a statement made in the course of an inquiry by the cautioner as to what the position of Hutchison was. It was a comment by the bank agent on what the parties wished him to carry out. I am unable to find it proved that Mr Greenshields, in the presence and hearing of Mr Allan, the bank agent, made any statement to the effect that he believed that the bank overdraft was the whole amount of the possible liabilities of Hutchison who asked the guarantee.

Accordingly I am of opinion, with your Lordship, that the Lord Ordinary's interlocutor should be recalled.

LORD SKERRINGTON—I concur with your Lordship.

The Court recalled the Lord Ordinary's interlocutor and decerned against the defender for £500.

Counsel for Pursuers (Reclaimers)—Blackburn, K.C.—Hon. W. Watson. Agents—Dundas & Wilson, C.S.

Counsel for Defender (Respondent)—M'Lennan, K.C.—Keith. Agents—J. Miller Thomson & Company, W.S.

HIGH COURT OF JUSTICIARY.

Friday, February 6.

(Before the Lord Justice-General, Lord Dewar, and Lord Hunter.)

JOHN LENG & COMPANY, LIMITED *v.* MACKINTOSH.

Justiciary Cases — Statutory Offences — Betting-house — Skill Competition on Football Results — Office of Newspaper Conducting Competition — Betting Act 1853 (16 *and* 17 *Vict. cap.* 119), *sec.* 1.

The Betting Act 1853, section 1 (applied to Scotland by the Betting Act 1874) enacts—"No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof or any person using the same . . . betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by