was not in fact the owner of the estate. But this is denied by the pursuer, and if any effect is to be given to the argument, it can only be after an inquiry into the fact whether in 1804 John Cockburn Ross was or was not owner of the estate of Shandwick—that is, heir of entail in possession of the estate. Now in regard to this, I am very clearly of opinion that it is not a matter which can competently be tried in this action. It is quite out of the question to maintain such a plea *ope exceptionis*. It can only be raised in a reduction of the decree of commutation, because that decree must first be taken out of the way. It was a decree obtained, not in absence, but after a defender had been called and had appeared, in a petition under the statute. Suppose that such a reduction is raised, then I think that the reasons of reduction must be very carefully libelled to set aside a decree after the lapse of so many years since 1804. And there would arise on behalf of the defender in such an action very formidable pleas of which no notice has been given at present—which indeed could hardly be competently referred to in this action. I need not go further than to mention the plea of the negative prescription. In short, the question whether the true owner was called or not is not before us for determination. We have no materials at present to determine either on the one side or on the other.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court repelled the defences, and decerned in terms of the conclusions of the summons.

Counsel for Pursuer (Respondent)—Mackintosh—Dundas. Agents—Mackenzie & Black, W.S.

Counsel for Defenders (Reclaimers)—Guthrie Smith—Blair. Agents—Philip, Laing, & Co., S.S.C.

HOUSE OF LORDS.

Friday, February 11.

(Before Lord Chancellor (Selborne), Lords Blackburn and Watson.)

MACKENZIE *v.* BRITISH LINEN COMPANY BANK.

(*Ante*, June 4, 1879, vol. 17, p. 619, and 7 R. 836.)

Forgery—Bill—Assent to Forged Signature.

Held, upon a proof (*rev.* judgment of the Court of Session) that a person whose signature had been appended by another to a bill had not authorised or assented to that signature.

Forgery—Adoption—Bill—Mere Silence will not Infer Adoption.

Held (*rev.* judgment of the Court of Session) that continued silence on the part of a person whose signature to a bill has been forged, after repeated intimations have been made to him by the bank which has discounted the bill that it has fallen due, will not render him liable for the contents of the bill, unless the position of the bank is thereby prejudiced.

This case was decided in the Court of Session on June 4, 1879, and is reported *ante*, vol. 17, p. 619, and 7 R. p. 836.

The action was brought into Court by Mackenzie in order to have a charge given to him by the British Linen Company Bank suspended; the First Division of the Court of Session (*diss.* Lord Shand) recalled the interlocutor of the Lord Ordinary, and found the charge orderly proceeded; against this interlocutor Mackenzie appealed. The facts out of which the case arose, and the various documents referred to, will be found in the previous report.

At delivering judgment—

Lord Chancellor—My Lords, in this case there are two questions—the first, whether the appellant authorised or assented to the signature of his name as drawer and indorser of the bill of exchange of the 14th April 1879? the second, whether, if he did not, he has nevertheless so acted as to be estopped from denying his liability on that bill in a question between himself and the respondents, the British Linen Company?

If the first of these questions ought to be answered in the appellant's favour, I am clearly of opinion that the circumstances of this case can raise no estoppel against him. He has done nothing from first to last by which the respondents can have been led to act in any way in which they would not otherwise have acted, or to omit to take any step for their own security, or in any sense for their benefit, which they would otherwise have taken—nothing from which the respondents or a court of justice could reasonably infer that he "adopted" or admitted his liability upon this bill.

The merits of the respondents appear to me to be extremely small. They took from John Fraser the first bill for £76 on the 7th February 1879, with the signatures of the appellant and John Macdonald, without any knowledge of these parties or of their handwriting, and without any inquiry whatever. The bill was not one which had been previously in circulation; it was offered by John Fraser to the bank to obtain a loan of money for his own benefit for the purpose of paying for a grocery business which he was then taking up in Inverness. John Fraser had not been their customer before; they knew nothing of him except that he had been in the employment of a respectable merchant who was one of their customers. When this bill became due on Saturday the 12th April 1879, they caused notice to be given to the appellant, and also to Macdonald, both of whom resided and were in employments at some little distance from Inverness. But on the following Monday, before any reply had been or could reasonably have been expected to be received to these notices they gave up this bill to John Fraser in exchange for £6 cash and for another bill which when produced to Mr Williamson was signed in blank with the same names, and was filled up by John Fraser in Mr Williamson's presence for £70, being the bill now in question. It is impossible for the respondents to contend that any conduct or silence

on the appellant's part caused them to take either the first or the second bill, or to abstain on the 14th April from doing anything for their own security which they would otherwise have done.

The respondents on the 14th July 1879 (before the second bill became due), and again on the 18th and 21st July (when it was overdue), gave notice to the appellant; and on the 29th July they were informed that he denied his signature to and his liability upon that bill. There is no principle upon which the appellant's mere silence for a fortnight, during which the position of the respondents was in no way altered or prejudiced, can be held to be an admission or adoption of liability, or to estop him from now denying it. What took place during the interval was unknown to the respondents, and it has in my opinion no tendency to show that in point of fact the appellant then was, or admitted himself to be, or intended to become, liable. He communicated as early as the 18th or 19th July with Mr M'Gillivray, a law-agent, expressly on the footing that his name had been forged, and that he was not liable. It is plain that Mr M'Gillivray was desirous, if possible, to get some settlement made by which criminal procedure might be avoided. The appellant was also quite willing that such a settlement should be arrived at, if it could be done without making him liable. No such settlement, however, was arrived at, and I am unable to discover in the communings which then took place any ground in fact or in law on which the appellant ought to be held to have become liable on the bill by reason of those communings if he was not so before.

The question, therefore, in my judgment, is only one of fact, viz., whether the appellant did or did not authorise or assent to the use made of his name on the 14th April by John Fraser? and it appears to me that the *onus probandi* on this point rests entirely upon the respondents, it being admitted that the signature to the bill of the 14th of April is not in the appellant's handwriting. The question, I think, turns altogether upon what took place when the appellant met John Fraser on that day. If it is shown that he then knew, or had reasonable grounds to believe, that a new bill with his name upon it had been given by John Fraser to the respondents, the conclusion (under all circumstances) would be inevitable that he assented to and became bound by the use so made of his name. On the contrary supposition, it is of course impossible to hold that he assented to that of which he was ignorant, and which he had no reason to believe.

This is in great measure a question depending upon the credit to be given to the witnesses on each side. If John Fraser and his father are believed, the case against the appellant is established. But John Fraser and his father (besides the discredit attaching *prima facie* to a witness acknowledged to have been guilty of forgery, and to one closely related to him and identified with him in feeling and interest) prove more than, in view of the undoubted facts of the case, I find it possible to believe. According to the father, John Fraser told him that the appellant had actually signed both the bills. Macdonald said he had signed the second bill, and the appellant said he had "put the second all right." According to John Fraser himself, the appellant came to him to get the first bill renewed before he (John Fraser) went to the bank about it, and expressly authorised the renewal in his name. If these statements were true, the appellant's signature was subscribed to both bills by his authority, and there was no forgery; nor was there any reason why he should not have signed the second bill himself. I am unable to place any reliance whatever upon the evidence of either of these persons.

The Lord Ordinary, who heard and saw the witnesses, gave credit to the appellant and refused it to the Frasers. Taking the case as it stands upon the evidence of the appellant and of Macdonald, both of them distinctly deny knowledge that a second bill had been given and *a fortiori* that it had been given in their names; the appellant said he was solemnly and positively assured by John Fraser that the first bill had been taken up not by way of renewal but by payment, and the assurances given to Macdonald were that he "had squared it." I cannot but say that some of the circumstances as they appear upon the evidence of these two persons are to my mind suspicious and unsatisfactory. If the burden of proof lay upon the appellant I might perhaps doubt whether he had satisfied it. But the burden of proof is on the respondents; and it is impossible, merely because there are some suspicious circumstances not satisfactorily explained, to hold a man liable upon a bill which he did not sign or authorise, and of the existence of which he swears he was ignorant.

The suspicious circumstances are—(1) That the appellant, after learning on the 14th April that his name had been forged to the first bill, did not communicate with the bank; (2) that he required the acknowledgment to be given him under John Fraser's hand, which is dated the 15th February, and which merely says, "Before the above date Mr Duncan Mackenzie did not sign a bill in my favour;" (3) that when he took away the first bill of the 7th of February he did not destroy it, but gave it to a young man named James Fraser to keep, assigning as his reason "that it might be a warning to him not to do the like; (4) that the interview of the 14th April ended in an adjournment to a public-house, and in a loan of £4 by the forger to the appellant, which, the appellant says, he afterwards repaid by the hand of James Fraser; and (5) that there was the delay already mentioned, in July, before the appellant gave notice to the bank—that is to say, told Mr Williamson that the second bill was a forgery; and that when he did so he blamed Mr Williamson for not insisting "on a further reduction when the first bill became due."

This latter circumstance appears to me to amount to very little or nothing, and after much consideration I think that all the other circumstances admit of explanation upon the hypothesis that the appellant was thinking of the first bill only, and had no idea that a second bill, also bearing his signature, had been given on that 14th of April as easily as, or more easily than they do upon the contrary supposition. Evidently he had no sensitive feeling on the subject of forgery so long as he did not himself suffer by it; he condoned it with great facility to John Fraser; he did not wish to inform against him, he was willing to remain on friendly and familiar terms with him, and perhaps also to squeeze out of him some temporary accommodation as the price of his silence, without regard to the difficulties he might

be under, if he had really himself found the money to take up the first bill. But how that money was found (being himself unwilling to help) the appellant might also not choose to inquire; it might have been borrowed from the uncle William Fraser, or from somebody else, without making it necessary to suspect any second forgery. The document dated the 15th of April (whatever else may be said or thought of it) is inconsistent with the story now told by the Frasers, and confirms (as far as it goes) the appellant's statement that John Fraser did then assure him that there had been no renewal of the first bill, at all events in his (the appellant's) name. The fact of the acknowledged forgery might suggest precautions against future forgeries though there might be no knowledge or belief or suspicion that any such had already taken place. The appellant might not unreasonably consider it a proper precaution against any such possible repetition of the offence to retain the first bill, to admit some persons whom he thought discreet to his confidence about it, and to have under John Fraser's own hand what, in truth, amounted to an admission of the forgery of that document, and to an acknowledgment that he had down to the 15th signed nothing for John Fraser's accommodation. The possession of these papers gave the appellant a strong hold over John Fraser. With the first bill in his own hands he had no longer anything to fear from the notice which he had received from the bank; and he might think it the most prudent course to abstain from making any communication to Mr Williamson which might place him in the dilemma of either having to discover John Fraser's guilt or seeming to admit that he had himself been liable on the bill. I do not say or think that the appellant's conduct, if it is to be thus explained, was commendable or satisfactory; it was not such as might have been expected from a scrupulous man with a strong sense of moral propriety; but it was, on the other hand, by no means such as to require for its explanation that he should have had in his mind any belief or even suspicion that another forgery of his name had taken place on that 14th of April, contrary to the positive assurances which he states that he had received from John Fraser.

The burden of proof is (as I before said) upon the respondents. In my opinion they have failed to satisfy it. I think, therefore, that this appeal ought to be allowed, and I move your Lordships accordingly.

Lord Blackburn—My Lords, this case comes before your Lordships by way of appeal from the First Division of the Court of Session against an interlocutor by which the majority, consisting of the Lord President, Lord Deas, and Lord Mure reversed the interlocutor of the Lord Ordinary, Lord Shand dissenting. As the Lord Ordinary (Adam) who tried the cause, saw the witnesses and heard them give their testimony, he had an advantage in so far as regards any question depending on their credibility which neither the Judges of the First Division nor your Lordships possess, and therefore so far as anything turns on the credibility of the testimony, his judgment is not lightly to be overruled. As to the inferences to be drawn from admitted facts, the Lord Ordinary had no advantage over either the Lords of Session or your Lordships. I think, therefore, that though the numbers are three to two, the case comes before this House without any great superiority of authority.

It is not disputed that John Fraser took to the agent of the British Linen Company a bill for £76, dated the 7th February 1879, and payable two months after date, purporting to be drawn by the appellant Mackenzie and a man of the name of John Macdonald, on and accepted by John Fraser, and that the agent discounted that bill—it does not precisely appear when, but about the date of the bill. It was understood between Fraser and the agent that when the bill became due the amount should be reduced and a renewed bill given and discounted for the balance. It is not now disputed that the names of neither of the drawers were in their own handwriting. The agent, who knew neither of them, acted entirely on the faith of John Fraser's representations. The bill became due and was dishonoured on the 10th April 1879. On the 12th April 1879, which was a Saturday, and not before, a notice of dishonour was sent by post to Mackenzie, and it is not disputed that he did receive it on the evening of that day. On Monday the 14th April Fraser came to the agent bringing with him a paper stamped for a bill, and with the names of Mackenzie and Macdonald (apparently in the same handwriting as those on the bill of 7th February) written on it, in the places where the names of the drawers and indorsers should be. Fraser wished the bill to be renewed for the whole amount. The agent declined, but after talking it over it was agreed to be renewed to the extent of £70, and that a larger reduction would be made when the bill was renewed again. It was then filled up as it now is so as to purport to be a bill dated the 14th April 1879, for £70, drawn by Mackenzie and Macdonald on John Fraser, payable three months after date to their order, accepted by Fraser and indorsed by two drawers to the British Linen Company. Fraser paid £6 and the charges. The bill of 7th February was then given up to Fraser, who took it away. The question in the cause is, whether on the facts proved Mackenzie is liable to the British Linen Company on this bill of the 14th April?

Pausing for a moment here in my narrative of the facts not now in dispute, it seems to me clear, though I do not think it is quite admitted, that the agent acted in discounting this bill, as he had acted in discounting the bill of the 7th February, entirely on his faith in Fraser's representations. Having sent off the notice of dishonour so late as the Saturday by post, he had no right to suppose the drawer would be with him so early as the morning of the Monday, and therefore the undisputed fact that Mackenzie had not done anything to deny the genuineness of his signature could not as yet afford any new ground for believing it was genuine. To proceed with the undisputed facts, Mackenzie did not inform the British Linen Company that his signature to the bill of the 7th February was a forgery. On the 14th July 1879 an intimation was sent by post to Mackenzie that "Your bill on John Fraser, Gray Street, Inverness, for £70, is due on the 17th July, and lies at this office for payment." This was received by Mackenzie, who did not come to the bank. On the 17th July the bill was dishonoured, and on the 18th July notice of dishonour was sent, which it is admitted was received by Mackenzie. On

the 21st July, which was a Monday, a notice was sent that if not paid on Friday it would be put into the hands of their law-agent. On the Saturday the 26th July the law-agent Ross wrote, and on Tuesday the 29th July a writer of the name of M'Gillivray, who had been employed by Mackenzie informed Ross that Mackenzie's defence was that his signatures as drawer and indorser were forgeries. That was the first intimation that was given to the bank that the genuineness of the signatures was denied.

The disputed facts depend on the effect given to the testimony, as to the credibility of which there has been a great difference between the Judges below. Mackenzie had not only denied his liability to the bank, but he had charged John Fraser with having forged his signature. If this was a falsehood, it was a very wicked one, and once having pledged himself to it he had every motive to persevere in his falsehood. John Fraser was brought to give evidence from the prison to which he had been committed on Mackenzie's charge, and had a very strong motive to try to fix Mackenzie with responsibility even by a falsehood. It does not, however, by any means follow that he was not fixing him by telling the truth.

The testimonies of these two witnesses, as might be anticipated, are in direct conflict. The Lord Ordinary and Lord Shand believe Mackenzie to swear truly when he says that he never knew or suspected that his name was on the second bill till he got the intimation of the 14th July. The Lord President and Lord Mure believe, directly in contradiction of his testimony, that he was aware of it. The Lord President says—"I am disposed to come to the conclusion that the complainer was perfectly aware, or to say the least of it he had very good reason to believe, that the first forged bill was replaced by the second forged bill, and that he permitted that to be done and acquiesced in the proceeding, and was clearly participant in the fraud that Fraser had committed upon the bank."

Lord Deas, I think, proceeds upon another ground. Before examining the testimony I wish to consider what it was relevant to prove, for I think some confusion has arisen below from not keeping the different points separate. As it is not now disputed that none of the signatures were written by Mackenzie, being in fact all written by Fraser, the acceptor, the burden of proving that he was liable on them rests on the bank. If Mackenzie authorised Fraser to write his name for him, he gave him a mandate to sign, and is of course liable, and there was no forgery on the part of Fraser. This is a question of fact depending on the evidence. If I thought it was satisfactorily proved that Mackenzie, before Fraser altered the bills with his name upon them, knew that Fraser was going to do so, and took no steps to hinder him, I should not have much hesitation in drawing the inference that he did authorise him. But even though it was not made out that the signatures were authorised originally, it still would be enough to make Mackenzie liable if, knowing that his name had been signed without his authority, he ratified the unauthorised act. Then the maxim *omnis ratificatio retrotrahitur et mandato priori equiparatur* would apply. I wish to guard against being supposed to say, that if a document with an unauthorised signature was uttered under such circumstances of intent to defraud that it amounted to the crime of forgery, it is in the power of the person whose name was forged to ratify it so as to make a defence for the forger against a criminal charge. I do not think he could. But if the person whose name was without authority used chooses to ratify the act even though known to be a crime, he makes himself civilly responsible just as if he had originally authorised it. It is quite immaterial whether the ratification was made to the person who seeks to avail himself of it or to another. The Lord President says—"There is another averment which brings out elements of particular importance in this case. This bill was a renewal of a previous bill, with the same names upon it, for the sum of £76. Upon the face of that bill the complainer and Macdonald were drawers and John Fraser was the acceptor, and that bill had been also discounted with the British Linen Company, and this £70 bill, as I have said, was a renewal to the extent of £70 of that previous bill. The averment made is further—'He never intimated to the bank that the signature of his name to the first bill was a forgery, nor did he so intimate to the bank in regard to the second bill until a fortnight after he had received notice from the bank of the bill being due. If he did not draw and endorse the bills himself, he misled the bank into the belief that the signature thereon was his genuine signature, and he adopted them as his, and assumed the responsibility attaching to drawing and endorsing them.' There are two averments here which require to be distinguished. The one is that the complainer was aware that this first bill with his forged name on it as drawer was presented to the bank and discounted by the bank in reliance upon his name being genuine. That means of course that at the time at which it was presented to be discounted the complainer was aware that his signature thereon was a forgery, and if that is established, I think the case is clear indeed, because in that case the complainer would be distinctly *particeps fraudis*, and probably answerable criminally. But the other averment is this, that by his conduct, not silence merely, but silence combined with his conduct, he allowed the bank to rely upon his signature being genuine and so adopted it as his genuine signature."

Now, I cannot but think that he here confuses two separate propositions of law—one to which I fully assent—with another, which is that on which Lord Deas, as I understand him, bases his judgment, to which I do not assent without qualifications which prevent it being applicable to this case. As I have already said, I think if he ratified to anybody or for any purpose the act done by Fraser as professing to be his agent, that for all civil purposes enured to make him liable just as if he had originally authorised that act, and his conduct, and silence combined with his conduct, may prove such a ratification, and if the phrase "adopted it as his genuine signature" is to be understood as meaning that he ratified, I quite agree with what is said.

And I agree that though he did not ratify the act of Fraser, yet he may preclude himself—bar himself by a personal exception—from averring against the bank that the signature was not genuine. Lord Deas says "that a duty lies upon a party whose name is forged not to do or

say anything that may mislead a bank. It is his duty not to say anything that may so far deceive a bank as to enable a forger to escape from justice, and thereby, for anything that he can tell, prevent the bank from recovering from him full indemnity. He is not entitled to speculate upon the consequences that may ensue if the bank is prevented from going immediately against the forger. He is bound to take for granted that the result will be to prevent them from recovering on the bill which otherwise they would." I agree that if he thus leads the bank to believe in the genuineness of the signature till it has lost some opportunity of recovering on the bill, which if the bank had known of the forgery they might have used, it would be a sufficient alteration in the bank's position to preclude him as against the bank. But when Lord Deas says—"In cases of this kind, where he has peculiar means of knowledge whether his signature is forged or not, he is not entitled by saying or doing something to lead his neighbours to think that his signature is genuine to his neighbour's loss"—he goes further than I am inclined to follow in the words "by not saying or doing something." And when he says "There was here not only a moral but a legal duty on the part of the suspender to have informed the bank that his signature to the first bill was a forgery, and if he had done so there would not have been a second bill," I not only doubt his position that there was a legal duty then to have informed the bank, but I deny his conclusion of fact. As I have already pointed out, the second bill was uttered to the bank before Mackenzie with the utmost diligence could have informed the bank that the first was forged. It would be quite a different thing if it was proved that Mackenzie knew that the bank had put the second bill with his name on it to Fraser's credit, and knew that at a time when he had reason to believe that he would be permitted to draw against it. This silence then would certainly prejudice the bank, and would afford very strong evidence indeed that Mackenzie for Fraser's sake thus ratified Fraser's act for a time, and a ratification for a time would, I think, in point of law, operate as a renewal of the ratification altogether. But if Mackenzie (as his case is) first knew that the bank had taken the second bill on the faith of his forged signature, on receiving the intimation of the 19th July he knew that the bank were not going to give further credit to Fraser on the faith of that signature, and that all the mischief was already done. I cannot think that even if Mackenzie had gone so far in his endeavours to shield Fraser from the consequences of his criminal act as to make himself liable to criminal proceedings upon an endeavour to obstruct justice, that would bar him from averring against the bank that the signature was not his. Certainly I think that his not telling the bank on the 15th July, nor till the 29th July, that it was a forgery, and letting them continue in the belief that it was genuine, if he had not endorsed it, could not so preclude him if, as I think was clearly the fact here, the bank neither gave fresh credit in the interval nor lost any remedy which if the information had been given earlier they might have made available.

The principles which I have above assumed to be law have been recognised in England ever since the clear judgment of Mr Baron Parke in *Freeman* v. *Cooke* (2 Welsby, Hurlstone, & Gordon's Exch. Rep. 654.) The Scottish cases cited at your Lordships' bar show that those principles have not been so clearly recognised in Scotland. I leave to my noble and learned friend who is to follow me the task of commenting on the Scottish decisions, which he is much more competent to perform, merely saying that I have read them all, and that everyone I think is perfectly consistent with the principles I have stated, and I think their justice must be acknowledged by all.

As to the question whether the evidence of Mackenzie is substantially true or not I shall be more brief. The Lord President reads his statement as to the conversation which took place at Abriachan Wood, and draws the conclusion that Mackenzie knew Fraser "could not have a penny to spare." I cannot go so far, but I think that it does show that Mackenzie doubted his solvency; the last inference which I should draw from that is that he would readily become surety for him. Soon after that conversation he received the letter of the 11th February, written, be it observed, after the bill of 17th February had been discounted. He says that he did not go in to see Fraser because he knew that there was no business between them that he (Mackenzie) would lose by not calling on him; but that when he received the notice of 12th April he recollected this letter, and suspected that Fraser had put his name to a bill, and accordingly went into Inverness on the Monday to see Fraser. I can see nothing incredible in this. Then he says that "We went into a back room, where, showing him the notice, I asked him if he had anything to do with this. He said he had, 'but,' he added, 'it is not going to trouble you any more.' I asked him what he meant by doing such a thing? (Q) Doing what?—(A) By forging that bill in my name. He said—'I did not know the danger of it at the time.' I told him I would not pass him, but would give him up to the fiscal at once. He said—'You need not do that; I have the bill here, and it will not meddle with you after this.' He showed me the bill. (Q) Was anything said between you about the renewal of the bill?—(A) Not a word. I told him at the same time—'See that you don't put in another to relieve this one.' And he said upon his soul and body he would not. He told me that he paid it in clear cash. This conversation between us was in Gaelic. I believed him when he said the bill was paid. With the bill he gave me I went up to the shop of Mr James Fraser, No. 1 Ness Walk, who belongs to the same place as I belong to, and I gave him the bill, and he kept it. I never saw Fraser of Greig Street again until I heard about the second bill." Why he gave the bill to James Fraser to keep is never explained. If his story is true I see no motive for it; but if John Fraser's story is true I see as little motive for it.

Then there is what I think the strongest piece of evidence in favour of the bank. It is not brought in as a prominent part of their case, but in cross-examination:—"*Re-cross-examined* (Shown No. 18 letter, dated 15th April)—This letter was written by Fraser when the first bill was got up. He told me he would give me that letter to show that I had nothing to do with it, and that he had cleared the bill with cash. I asked him for a letter to that effect. (Q) Did you say you wanted

to show the letter to your sister?—(A) No. (Q) Did you say your sister had been angry at you for going into the bill?—(A) I could not say that, for I did not go into the bill. I had had no quarrel with my sister about the bill. I told her from the first day that I got any notice of it that it was forged. On the day when I got No. 18 I daresay Fraser and I had a dram together, I think in the Lorne. I was not very long with him. I think he lent me £3 or £4 for two or three days. I was parting with him on the other side of the bridge, and said I had to look for £2 or £3 for a day or two, and he said I will give you that. He gave me £4. That was repaid three or four days after I got it. I sent it to him by James Fraser. (Q) Do you remember meeting John Fraser in Greig Street, near his shop, about the month of February 1879, and asking him how he was getting on with his shop, and whether he would be able to clear the bill? (*Objected to. Objection repelled.*)—(A) I don't mind of that occasion, for it never happened. *By the Court*—(Q) How did Fraser come to give you the first bill that was forged?—(A) When I went to him with the notice I had received from the bank he had the bill settled in the bank before I got to his shop. (Q) Did you ask him for it?—(A) No; he showed it to me to satisfy me that it was fully settled, and gave it to me. I don't know if he told me to take it away. He did not ask it back. (Q) Did you put it in your pocket and go away with it?—(A) Yes. (Q) You told us the first time you spoke to Fraser's father was after the forgery became known in the district; but you said afterwards you spoke to him after you had got the first notice about the bill?—(A) Yes. The forgery was quite current in the district after the first bill. It was known that it had been forged."

John Fraser, who is brought from prison to give evidence, gives, as might be expected, a very different account of the whole transaction. He says that Mackenzie came into him, as he expected he would, to talk about renewing the bill. He is not asked when anything had occurred to make him expect Mackenzie to come for that purpose, but clearly implies that Mackenzie had before that had knowledge that the first bill was discounted, and that it was, when it became due, to be reduced in amount, and renewed as to part, and he distinctly swears, both in chief and in answer to the Lord Ordinary, that Mackenzie before he went to the bank to get the bill renewed authorised him to get Mackenzie's name put on the renewed bill. Why Mackenzie did not write his own name on the blank stamp is never explained.

Then as to the transaction in the public-house he says—"It was £5 or something that he wanted. I did not sign it until he came in, and he went to the Royal Bank to cash it there. I don't remember when I saw Mackenzie after I got the first bill from the bank, but he came to my shop and I showed him the bill. We had gone to a public-house. I had left a boy in the shop. He said his sister and mother were kicking up a row at home against him for giving me the bill. I gave him the bill, or he took it and kept it. (Shown No. 16)—This is the bill I gave him; I think he borrowed £5 from me on that date. We had some drink. I drank lemonade, and he drank whisky. We were alone together for a good long while. (Q) Did you give him that bill, or did he take it?—(A) He took it. As far as I remember he did not say why he wanted it. He wanted to get a note from me that he would show his sister because they were kicking up a row. (Shown No. 18)—(Q) Did he ask you at that time to write a letter, and did you write this letter?—(The Lord Ordinary again cautioned the witness)—(A) I did, in order that he should show it to his mother. (Q) Did he say he wanted it because his sister was making a row about it?—(A) Yes, so that they would not know about it. I think I wrote it in the public-house. I don't remember how much drink I had that day with him. He did not, as far as I remember, say why he wanted the old bill."

Now, if I could see my way to thinking it proved, as the Lord President does, that Mackenzie knew that Fraser was in such want of money that he could not possibly have met the bill in cash, and had £3 or £4 over to lend, I should think that his borrowing £3 or £4 from him then would go very far to show that he knew that Fraser had renewed the bill with Mackenzie's name on it, and either had, as John Fraser swears, expressly authorised his doing so, or at all events then ratified it. And though it is imputing to Mackenzie that he not only committed perjury for the purpose of defeating the just claim of the bank, but had committed the far more wicked crime of giving information to the fiscal, leading to the making of a charge of forgery against Fraser, when he, Mackenzie, well knew that Fraser had not committed forgery at all—yet no doubt that may be true. But I cannot think there is enough evidence to justify me in finding such a very serious charge proved. I think the evidence that Mackenzie must have known that Fraser could not have had such command of money by the aid of his friends or otherwise to be able to pay £76 in cash is insufficient, and the evidence as to the loan itself is brought in so much by the way (not striking the Lord Ordinary who tried the cause as of importance, so that no opportunity was given to explain it) that I cannot rely upon it.

John Fraser's evidence is, I think, on the face of it, so improbable that I cannot trust it. And it is distinctly in conflict with that of Macdonald. John Fraser, the father, no doubt says—"I went to the bridge and my son came past me, and I followed him. I asked him how he had got on. He said to me—'The bill is all right.' I did not speak to Duncan Mackenzie that day, but when I was repairing the road 150 yards from his house I saw him one day and he said—'I am sure John would tell you about the bill.' I said—'Yes.' He said—'Well I have put it all right now.' This was after the bill was due in April. Mackenzie said—'The bill is in my possession now.' He tapped his breast as he said so. (Q) Did he speak to you about the second bill?—(A) He said the second bill was in before he got the first one out. I cannot say that he said that, but he meant that the second was in the bank before he got the first out. (Q) Did he say how much the second bill was for?—(A) He said there was too much in the first bill—that there was £76 in it, but that £6 had been taken off. I am quite certain he said that about that time." This, if accurately remembered and truly reported, would show an admission by Mackenzie. But I cannot trust the accuracy of this evidence.

As to what happened afterwards I have no doubt that Mackenzie would have been quite content to say nothing about the forgery if John Fraser or John Fraser's sons took up the bill and freed him from responsibility. And I have no doubt that he delayed making the charge of forgery from the time when he received the intimation till the 29th July in hopes that they would do so, but, as I have already said, I do not think that he thereby made himself liable to the bank unless the bank was in some way prejudiced by that delay, which in this case it was not. I therefore agree in the motion which the noble and learned Lord made that the interlocutor should be reversed.

Lord Watson—My Lords, the process of suspension in which the present appeal is taken was raised by Duncan Mackenzie, the appellant, in order to obtain a stay of summary diligence which the respondents were proceeding to use against him on a bill of exchange at three months for the sum of £70 sterling, and bearing date the 14th April 1879, upon which his name appears as that of a drawer and endorser along with another person of the name of John Macdonald.

The sole ground of suspension stated for the appellant is that the signatures upon the bill charged on bearing to be his are forgeries. The respondents on record denied that allegation, but the Lord Ordinary, who gave judgment in the appellant's favour, held that its truth was established by the evidence. In the Inner House the respondents do not seem to have impeached the soundness of that conclusion; and the Lord President accordingly states that "although originally the chargers denied that allegation, it must now be taken that the complainer's signature certainly is a forgery."

The majority of the First Division of the Court of Session, consisting of the Lord President, Lord Deas, and Lord Mure, gave judgment against the appellant upon these two grounds—(1) That the appellant was, to use the language of the Lord President, "perfectly aware," or at least "had very good reason to believe, that the first forged bill was replaced by the second forged bill," and that the appellant "permitted that to be done and acquiesced in the proceeding;" and (2) that assuming such knowledge and acquiescence on the part of the appellant not to be established, he must nevertheless be held to have adopted the bill charged on by reason of his failure to give information to the respondents that his signatures were forged after receipt of the notice sent by them in July 1879.

The first ground of judgment assigned by the learned Lords constituting the majority appears to me to negative the idea of forgery. I cannot believe that John Fraser, the drawer of the bill, by whom the signatures of the appellant were admittedly written, can be held thereby to have committed the crime of forgery according to the law of Scotland if these signatures were written and used by him, as their Lordships hold it to be proved that they were, with the permission and acquiescence of the appellant. And it does seem a strange thing that in the interlocutor under appeal the respondents are found entitled to costs, but "subject to deduction of any expense that may have been caused to the complainer (appellant) by the respondents' denial of the averment of forgery."

But it is unnecessary to dwell upon these matters, because I agree with your Lordships that neither of the views taken by the learned Judges is well founded, and consequently that the judgment of the First Division must be reversed.

Since the conclusion of the argument at your Lordships' bar I have carefully perused the whole proof led by the parties, and the opinion which I have formed upon the facts of the case is precisely the same with that which has been already expressed in the Court below by Lord Adam (the Lord Ordinary) and by Lord Shand. The real question arising upon the proof appears to be, whether the account given by the appellant on the one hand, or that given by John Fraser, the forger, and his father on the other, is to be accepted as true. In estimating the relative weight of their conflicting statements it is of course necessary to take into account the whole facts and circumstances of the case established by evidence independent of the testimony of these three witnesses, and also to consider the degree of probability attaching to their respective statements, giving due effect to these considerations. I have come to the conclusion that the account given by Duncan Mackenzie, the appellant, is to be believed, and that the contradictions of his statement which are to be found in the evidence of the forger and his father John Fraser senior are unworthy of credit. When testimony is directly conflicting, and the question at issue depends upon the credibility of certain witnesses, it is undoubtedly advantageous to have an opportunity of noting the demeanour of these witnesses whilst they are under examination; and the Lord Ordinary had that advantage in the present case. At the same time I should not be inclined to accept the opinion of the Lord Ordinary on that account, unless the opposing testimony came to a very even balance. In the present case the weight of testimony appears to me, irrespective of the Lord Ordinary's opinion on that point, to be on the side of the appellant; but it is nevertheless satisfactory to my mind that the judge before whom the witnesses were examined expressed his unhesitating belief that the appellant gave a "substantially true account of the various transactions which took place with reference to the bills."

Having arrived at that conclusion, I do not think it necessary to criticise the evidence in detail. For reasons, some of which appear in the opinion of Lord Shand, and others of which have been assigned by your Lordships to-day, I am quite unable to concur in the view of the facts which was taken by the Lord President, as I understand with the approval of his brethren Lord Deas and Lord Mure.

I therefore pass at once to the second ground of judgment—the alleged adoption of the forged bill by the appellant. The facts material to this part of the case which I hold to be instructed by the evidence, and which the majority of the First Division assumed as the alternative of their own view being negatived, appear to be these:—

(1) That on the 14th April 1879 the appellant came to know that his signature as drawer and endorser of a bill for £76 had been forged by John Fraser, grocer, Inverness, the drawer, and discounted with the respondents' bank; that the forged bill was then delivered to him for the forger; and that the appellant was informed and believed that the bill had been paid in cash.

(2) That the bill had not been so paid, but was retired by the forger paying £6 in cash and handing the bill charged on to the bank.

(3) That on 14th July 1879 written notice was sent to the appellant that the £70 bill drawn by him on John Fraser would mature on the 17th, and lay at the bank office for collection; and that on the 18th July a further notice was sent giving the particulars of the bill and intimating that it had been protested for non-payment.

(4) That on 21st July 1879 the local agent of the respondents wrote to the appellant intimating that unless the bill was forthwith paid by him it would be placed in the hands of their law-agent, and that on 25th July the law-agent intimated by letter to the appellant that proceedings would be taken against him if he did not pay the bill before the 28th July.

(5) That on the receipt of the first notice of 14th July the appellant had good reason to know, and was in point of fact aware, that his signature had been again forged by John Fraser, and that on receipt of the second notice he went to Inverness, informed Mr M'Gillivray, a solicitor there, of the fact, and instructed Mr M'Gillivray to take steps to protect him against the consequences of the forgery.

(6) That on the 29th July 1879 Mr M'Gillivray informed Mr Ross, the law-agent of the bank, that the appellant's signature was forged, and that two days thereafter the appellant and John Macdonald, whose name was also on the bill as a drawer and endorser, called together upon Mr Williamson, the respondents' branch agent, and told him that their signatures were forged.

It is not suggested that there was any change in the position of the bank betwixt the date of the first notice given to the appellant on the 14th July and the 29th July, when the respondents were informed of the forgery, and it cannot therefore be alleged that the respondents have sustained any loss or prejudice by his silence during that period. But the three learned Judges composing the majority of the First Division have nevertheless held that such silence is in the circumstances above narrated sufficient according to the law of Scotland to infer adoption of the forged bill by the appellant. I am unable to concur in that judgment, it being my clear opinion that the right view of the case was taken in the Court below by Lord Shand and the Lord Ordinary.

The question whether a forged bill has or has not been adopted by the person whose signature is forged is in reality an issue of fact and not of law. Still, adoption of a bill may be matter of legal inference from certain ascertained facts, and in the present case the inference which has been drawn by the Court below adversely to the appellant appears to depend upon the fact that after he came to know in July that the second bill had been discounted with the bank, he (the appellant) kept silence, or at least did not inform the bank of the forgery of his own name until a fortnight or thereby had elapsed. The only reasonable rule which I can conceive to be applicable in such circumstances is that which is expressed in carefully chosen language by Lord Wensleydale in the case of *Freeman* v. *Cooke*. It would be a most unreasonable thing to permit a man who knew the bank were relying upon his forged signature to a bill to lie by and not to divulge the fact until he saw that the position of the bank was altered for the worse. But it appears to me that it would be equally contrary to justice to hold him responsible for the bill because he did not tell the bank of the forgery at once if he did actually give the information, and if when he did so the bank was in no worse position than it was at the time when it was first within his power to give the information.

I do not think the Scotch cases which have been cited at the bar bear out the proposition that silence in circumstances such as occur in the present case is *per se* sufficient to imply adoption of a forged bill. I shall now, before concluding, shortly refer to those cases in the order of their dates.

Maiklem v. *Walker*, Nov. 16, 1833, 12 Sh. 53, was a case in which two brothers, who lived together, were in the year 1828 charged jointly to make payment of a bill upon which both their names appeared. A considerable time after the charge was given the goods of A, one of the brothers, were arrested, whereupon A immediately brought a suspension of the charge and diligence, alleging then, for the first time, that his signature to the bill had been forged by his brother B, who in the meantime had absconded. The Court held that A had made himself liable to pay the forged bill, and refused the suspension, Lord Gillies observing—"Is he to be allowed to acquiesce until the proper debtor makes his escape out the country, and then to come forward and allege he has incurred no liability to the holder of the bill?"

In *Findlay* v. *Currie*, Dec. 7, 1850, 13 D. 278, the question was one of relevancy, and all that the Court decided was that the charger had made averments sufficient to entitle him to a counter issue of adoption in order to meet the issue of forgery taken by the suspender. The substance of the charger's averments was that after notice to him of the bill said to be forged, and a demand for payment, the suspender had an interview with the charger's agents, when he was shown the bill, and did not deny his signature; that at a subsequent interview the suspender did not deny his signature, but "begged for time to see the bill," which was granted. In the meantime his brother, the alleged forger, absconded, and he then for the first time denied the authenticity of his subscription to the bill.

Boyd v. *The Union Bank*, Dec. 12, 1854, 17 D. 159, was a decision upon the record holding the charger's allegations of adoption to be irrelevant. The only allegation of the charger was to the effect that although the bill was during its currency intimated to the suspender, he kept silence, and did not inform the bank that his signature was a forgery. In that case the Lord President (Lord Colonsay) said—"When a party is shown a bill and makes no objection, and allows the creditor to remain in the belief that it is his signature, he has incurred a ground of liability through the loss incurred by that adoption. That principle might apply even though he was not shown the bill which is the subject of discussion. If he had allowed the matter to lie over, and through his silence the whole was lost, an obligation might be incurred through that silence."

The case of *Warden* v. *The British Linen Company*, Feb. 13, 1863, 1 M. 402, is a decision to precisely the same effect as the preceding. The Court

there refused to grant a counter-issue of adoption by two co-acceptors, both of whom alleged that their signatures to the bill were forged, upon the bare averment that they had taken no notice of a letter addressed to them by the bank informing them of the existence of the bill before it was due.

In the next case, that of *Brown* v. *The British Linen Company*, May 16, 1863, 1 M. 793, the Court sustained the relevancy of the charger's averments and allowed a counter issue of adoption. These averments were that the bill was intimated during its currency to the person alleging forgery; that thereafter his agent, acting under his instructions, called at the bank and examined the bill; that the agent did not state that his employer's signature was forged, but, on the contrary, requested that the bank should send him an intimation when the bill fell due; and, moreover, gave the bank-agent to understand that if the bill was not paid at maturity by Walker (the alleged forger) his client wished it to be renewed.

None of these decisions appear to me to give the least support to the doctrine that mere silence after intimation, or even after demand for payment, of a forged bill necessarily implies adoption of a bill by one whose subscription to the bill is a forgery; and accordingly the Solicitor-General for Scotland, towards the close of his argument, mainly relied upon the case of *Urquhart* v. *The Bank of Scotland*, which was decided by the First Division of the Court in the year 1872.

The case of *Urquhart* v. *The Bank of Scotland* is not noticed in the regular reports, and is only to be found in the Scottish Law Reporter (vol. 9, p. 508). The facts established by the proof in that case, as they are detailed in the report, were somewhat peculiar. It was proved that the suspender's signature to the bill charged on was forged, but it was also proved that notice of protest of the bill for non-payment was received by him on or about the 2d of August 1871, and that he wrote to the bank on the 23d August that his signature was a forgery, his friend and intimate, the forger, having in the meanwhile absconded. It was no doubt proved that the forger was subsequently tracked out and apprehended under a criminal warrant; and it was also proved that the suspender knew, or had good reason to know, that the forger had for some years previously been in the habit of forging his name upon bills, and that in June 1870 he had given the forger money to retire one of those bills known by him to be forged. It is no doubt the case that the terms of the Lord Ordinary's interlocutor, and of the judgment of the Inner House, as reported, lay great stress upon the silence of the suspender as warranting their decision, which was against him. But there were obviously many grounds for the decision other than his silence, and I think it must be assumed that the judgment proceeded upon the whole circumstances of the case, and not upon silence alone. My Lords, all I can say is, that if these grounds were in the view of the Court the case was in my opinion well decided. But if it was intended by the Court to rest their judgment upon the mere silence of the suspender apart from other circumstances, which I greatly doubt, then, whilst agreeing in the result at which their Lordships arrived, I should be of opinion that the decision was not only unnecessary but erroneous and contrary to precedent.

Interlocutor appealed from reversed and interlocutor of the Lord Ordinary restored.

Counsel for Complainer (Appellant)—Brand—Rhind. Agents—William Officer, S.S.C.—R. Beveridge, S.S.C.

Counsel for Respondents — Solicitor-General (Balfour, Q.C.)—Chitty, Q.C. Agents—Mackenzie & Kermack, W.S.—W. A. Loch.

Thursday, February 17.

(Before the Lord Chancellor (Selborne), Lords Blackburn and Watson.)

CALEDONIAN RAILWAY COMPANY *v.* NORTH BRITISH RAILWAY COMPANY.

(*Ante*, July 16, 1880, vol. 17, p. 777, and 7 R. 47.)

Statute—Construction—Railway—Period of Payment of Dividends on Amalgamation of Two Railways.

The preamble of an Act of Parliament whereby a certain line of railway was transferred from the company to which it had hitherto belonged to a new company made up of that company and another, declared that it was expedient that the companies "should have equal rights and powers, and be subject to equal liabilities," in respect of the line transferred; by the said Act it was provided that the new company should pay to the company that formerly owned the railway, from and after the vesting period, half-yearly on 1st March and 1st September, a sum equal to one-half of the dividends, interests, and rents for which the former owners had been liable to the shareholders, creditors, and owners of lines in connection with their own respectively. The vesting period was 1st February 1880, the dividends accrued from profits earned in the period of six months preceding the 1st of February and were payable in March, the interests were payable half-yearly at Whitsunday and Martinmas, and the rents were payable annually on 1st February. *Held* (*aff.* judgment of the Court of Session), in a question as to whether the payments of dividends imposed upon the new company were to be made on 1st March or 1st September 1880, that on a fair construction of the terms of the statute they did not fall to be made till 1st September, the payments due before that date having to be met out of funds that had accrued before the period of vesting, and the object of the section of the Act under construction being to settle the proportionate liability of the parties in the new undertaking for the period after it should fall under their joint ownership.

This case was reported in the Court of Session of date July 16, 1880, *ante*, vol. 17, p. 777, 7 R. p. 1147.

The Caledonian Railway Company appealed. The terms of the Act of Parliament which was