as the mother's next-of-kin to her share of the goods in communion. The existence of such a right was a sufficient motive for the insertion of this declaratory provision, and I see no reason to doubt that the declaration would have sufficed, in the event supposed, to bar the claim to goods in communion. The claim goes further, because it enumerates "bairn's part of gear," which I take to be synonymous with legitim, as among the claims excluded. There are also words of general exclusion of all claims consequent on the decease of the mother. As to the exclusion of bairn's part of gear, I have difficulty in realising what is meant by the exclusion by name of a non-existing right. On this point I should concur in the observation made by one of your Lordships in the course of argument, to the effect that reasonable people do not exclude rights until they know what they are; and I do not see how there could be an intelligent exclusion of legitim out of the mother's estate when no such claim existed or had been even mooted as a subject of legislation. I can more easily follow the argument that the words of general exclusion of all claims consequent on the mother's decease were intended to include the case of supervenient legislation enlarging the children's rights as against the parental estate, it being the intention of the parties that the children of the marriage should take nothing as of right from the mother if they accepted the provisions secured to them by the contract. But I think the full force of this consideration is best exhibited when taken in conjunction with the statutory legislation which I proceed to consider.

The statutory right of legitim is measured by the corresponding right against the father's estate, and is given "subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, or satisfaction thereof."

Now, if this had been a testamentary instrument disposing of specific estate and leaving a balance of moveable estate undisposed of, I should not, as at present advised, hold that legitim out of the undisposed estate was barred. The two claims would not be inconsistent. The son might say, I make no claim out of the estate which is governed by this instrument except what is given to me by the instrument; but in regard to the estate that is not disposed of, that is left to the operation of law, which in the event that has happened only permits the parent to dispose of one-half of the free estate. But the conditions are not the same when the provision is given by a contract of marriage, because our law supposes that the spouses contract not only with one another, but with and for the issue of the marriage. Also, in settling a contract of marriage the spouses look forward, and generally take care to secure to themselves the unrestricted disposal of so much of their present and future estate as is not settled by the contract itself. Of the intention on the part of Mrs Dunbar to secure to herself the unqualified power of disposal of her unsettled estate there is, I think, unequivocal evidence in the clause which I have quoted. If these words had been used by a father, the son would not even have had an election, because it is settled law that legitim may be excluded by marriage-contract, and that the son must take what he gets under the contract, unless, perhaps, in the case which has never arisen of a purely illusory gift.

But for the purposes of the present case the argument may very well stand on the lower plane of election, because Mr Dunbar Dunbar is not proposing to surrender the benefit which is secured to him by the contract, and yet he makes this claim, contrary, as I think, to the plainly expressed intention of his mother, that all legal claims of whatever nature shall be held to be satisfied ("full satisfaction" is the expression used) out of the provisions made for the children. If the intention to satisfy legal claims is disclosed by the deed, then I think the statute makes that intention effectual, because the right of legitim is in its inception a qualified right, being given subject to the known rules of law in relation to exclusion, satisfaction, or discharge. I am accordingly of opinion that the claim of legitim is not well founded, and on the whole matter that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Reclaimer—H. Johnston, K.C.—Clyde, K.C.—Constable. Agent—Thomas Henderson, W.S.

Counsel for the Respondents—Guthrie, K.C.—Moncrieff. Agents—Stuart & Stuart, W.S.

Wednesday, December 3.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

SNADDON *v.* THE LONDON, EDINBURGH, AND GLASGOW ASSURANCE COMPANY, LIMITED.

Cautioner — Liberation — Negligence of Creditor — Guarantee for Employee — Failure to Intimate Timeously Criminal Conduct.

By bond of guarantee dated 12th May 1897 A became cautioner to an insurance company for B, one of their agents. On 11th August B forged the payee's signature on a cheque sent to him by the insurance company to hand on to one of their clients, and embezzled the money. On 25th September B confessed his crime to the insurance company and was suspended by them. On 8th October B absconded. On 11th October the insurance company gave information of the crime to the police and also to A.

Held that the insurance company had failed to intimate timeously to A the criminal conduct of B, and had consequently forfeited any right to claim against A under the guarantee.

Opinion per Lord Young that if any company of this kind employs an employee whose honesty is guaranteed by another, and if the employee commits a crime such as forgery, and his employers get to know of it, they are not entitled to retain him a day in their employment under the guarantee unless they inform the cautioner and he is prepared to continue the guarantee on the footing that the employee remains in their service.

Writ—Bond of Guarantee—Probative or merely Subscribed — Mercantile Law Amendment Act 1856 (19 *and* 20 *Vict. c.* 60), *sec.* 6.

Question—Whether a bond of guarantee not recognised as a privileged writ requires to be probative, or whether under section 6 of the Mercantile Law Amendment Act 1856 all bonds of guarantee are valid if in writing and subscribed by the granter.

In January 1901 David Snaddon, publican, Tillicoultry, raised an action against the London, Edinburgh, and Glasgow Assurance Company for £28, 10s., being the amount payable under a policy of assurance, dated 17th December 1895, granted to him by the defenders on the life of his mother, who died on 17th February 1900.

The defenders, while admitting the pursuer's claim, averred that on 12th May 1897, by bond of guarantee, he became cautioner for David Jack, their agent at Alva; that on 11th August 1897 Jack, while still in their employment, embezzled £25, the contents of a cheque in favour of Elizabeth Bernard, which came into his hands in connection with their business, that thereafter he absconded, and that the pursuer was now liable for the said sum with interest, and the defenders were entitled to set it off against the sum sued for.

In answer to this defence the pursuer pleaded, *inter alia*—(1) that the bond of guarantee was not probative, and (2) that the defenders had by their actings and culpable negligence deprived the pursuer of his rights of relief.

A proof was led before the Lord Ordinary (KYLLACHY), which disclosed, *inter alia*, the following facts:—On 8th May 1897 the defenders appointed David Jack one of their assistant superintendents as from 8th December 1896. On 12th May Snaddon signed the bond of guarantee, whereby he guaranteed the defenders against all loss, cost, charges, and expenses which they might incur by reason of Jack's making default in due payment of all money to the extent of £50 while in their employment. One of the witnesses to this bond was a clerk of the Assurance Company who had neither seen Snaddon sign nor heard him acknowledge his signature. On 11th August 1897 a crossed cheque for £25, payable to Elizabeth Bernard, a widow, was sent by the defenders to Jack to pay a claim due by the company to a Mrs Bernard. Jack forged Mrs Bernard's signature, and received the money from the bank. He sent his employers a forged receipt for the money. On 25th September he confessed the crime to the defenders' Edinburgh manager, who suspended him. On 30th September the general manager of the defenders in London wrote to the Edinburgh manager that he had been ordered by the directors to dismiss Jack, and enclosing notice to terminate his appointment. The Edinburgh manager deponed that after the receipt of this letter he served a notice on Jack terminating his engagement, but no copy of this notice was produced, and there was no further evidence of it having been served. On 8th October Jack absconded. On 11th October the matter was put into the hands of the procurator-fiscal. The defenders' general manager gave evidence that on the same date he intimated by letter to the pursuer that he was liable for over £25 as Jack's guarantor, but the pursuer denied that he had received any such letter, and averred that the first notice of the matter he had received was on 29th October, when a claim for £26, 8s. 1d. against him as cautioner for Jack was sent to him by the defenders.

On 2nd April 1901 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:— "Decerns against the defenders in terms of the conclusions of the summons," &c.

Note.—"In this case the only question is as to the defenders' counter-claim founded on the pursuer's guarantee. It is now admitted that that guarantee is improbative, the signature of one of the instrumentary witnesses having been adhibited by one of the defenders' clerks, who neither saw the pursuer sign nor heard him acknowledge his subscription. The defenders' case, therefore, depends upon proof of *rei interventus*, and having considered that matter I have come to the conclusion that no *rei interventus* has been established.

"The guarantee in question bears to be granted 'in consideration of the defenders appointing David Jack to be a superintendent for their company.' It was asked and obtained from the pursuer in view of Jack being so appointed, and was so asked and obtained on 12th May 1897. It appears, however, that in point of fact Jack had been appointed superintendent so far back as December 1896, and had acted in that capacity from that date. By the terms of his appointment he required to find certain security. But in fact none was at first required. He entered upon his duties, and discharged them without security before the guarantee. And after the guarantee was obtained no change of any kind took place. He simply continued in his position, and it is not alleged that anything else followed.

"In these circumstances, even if it were proved (which I do not think it is), that but for this guarantee Jack would have lost his appointment, and also that this was explained to and understood by the

pursuer, I should have at least great difficulty in affirming that there had been here *rei interventus* in the proper sense—that is to say, any change of circumstances unequivocally referable to the pursuer's guarantee. But in point of fact it is, I think, the result of the evidence that it was represented to the pursuer, and that he understood that, in signing the document put before him on 12th May, he was helping his friend to a proposed promotion, and not merely to the retention of a post he already held. And that being so, it is not I think possible to hold that anything, either positive or negative, followed on the faith of the guarantee which the pursuer knew or was bound to contemplate, and which therefore barred him from resiling from his in law unconcluded engagement.

"In this view it is unnecessary to decide the other points raised in the case. There is a serious question whether, when the defenders discovered Jack's defalcations, they were not in the very special circumstances bound to give the pursuer immediate notice. I express no opinion on that question. I refrain also from entering upon another matter which was also argued, viz., the defenders' duty before claiming against the pursuer to exhaust their remedies against the Union Bank. The defenders have, in my judgment, failed to make good their counter-claim, and the result is that the pursuer must have decree in terms of his summons, and with expenses."

The defenders reclaimed, and argued—(1) Under section 6 of the Mercantile Law Amendment Act 1856 the law of Scotland was assimilated to that of England founded on the Statute of Frauds. Bonds of guarantee did not require to be probative writs, but were valid if in writing and subscribed by the person undertaking the guarantee—Bell's Prin., 10th ed., sec. 249; *Walker's Trustees* v. *M'Kinlay*, June 14, 1880, 7 R. (H.L.) 85, opinion of Lord Blackburn, 89; *Wallace* v. *Gibson*, March 19, 1895, 22 R. (H.L.) 56, opinion of Lord Watson, 65, 32 S.L.R. 724. (2) Even if a guarantee required to be a probative writ, there had been here *rei interventus*. (3) Notice of Jack's offence had been sent to the pursuer on 11th October. This was timeous notice. There had been no undue delay. Mere giving time to a debtor was not enough to discharge the cautioner, there must be a positive contract on the part of the creditor not to sue within a certain period, whereby the cautioner was prevented having his remedy—Bell's Prin., 10th ed., secs. 262 and 263; *Orme* v. *Young*, 1815, Holt's Nisi Prius Reports, 84.

Argued for the pursuer—(1) The Mercantile Law Amendment Act, sec. 6, only dealt with obligations *in re mercatoria*. This was not an obligation of that sort, and therefore the bond of guarantee required to be probative—Bell's Prin., 10th ed., sec. 249a; Bell's Comm., 7th ed., 404; Dickson on Evidence, Grierson's ed., sec. 603. (2) This improbative writ had not been made effectual by being followed by *rei interventus*. (3) The company had not given the pursuer timeous intimation of Jack's fault. On the defender's own showing they had given the cautioner no intimation of his offence till 11th October although they were made aware of the crime on 25th September. Further, they did not inform the police till 11th October, and thus Jack was permitted to escape with the embezzled funds. They had thus prevented the pursuer from any recourse he might have had against Jack, and prejudiced his position. In such circumstances the pursuer was liberated as cautioner—*Thistle Friendly Society of Aberdeen* v. *Garden*, June 17, 1834, 12 S. 745; *Haworth & Company* v. *Sickness and Accident Assurance Association, Limited*, February 26, 1891, 18 R. 563, 28 S.L.R. 394; *C. & A. Johnstone* v. *Duthie*, March 15, 1892, 19 R. 624, 29 S.L.R. 501.

At advising—

LORD JUSTICE-CLERK—We have heard a long debate in this case, but I think it can be disposed of on a very simple ground, and I hardly agree with the Lord Ordinary in the ground upon which he has proceeded. Upon that ground the question would be whether this document, which was subscribed by the cautioner in the presence of one witness, the other witness having neither been present nor heard the cautioner's signature acknowledged, can be held to be a sufficient guarantee. That may be a difficult question, and I abstain from giving a direct opinion upon it. The question of *rei interventus* could only arise if the case were to be decided upon the document. But assuming it to be a good document, in my opinion the defenders' case must fail, as I do not think the company here dealt with the cautioner as they should have done. The dates bring out that they allowed ten days to elapse after being certiorated of the fact by Jack himself before any intimation was sent to Snaddon. I think that was not dealing fairly with Mr Snaddon. We cannot go minutely into the facts to find out what the cautioner might have done, but I think most certainly he was entitled to get timeous information from the company, and that he did not get it. One of course can quite understand why they did not disclose the facts which had come to their knowledge, but I think the fact that they did not make a timeous disclosure is sufficient to free the cautioner.

LORD YOUNG—I am of the same opinion. I think that the ground of judgment stated by your Lordship, and with which I agree, is sufficient to sustain the Lord Ordinary's decision. On 25th September the person whose conduct was guaranteed by the pursuer confessed to his employers the defenders that he had been guilty of the crime of forgery. That there was an obligation at common law upon the defenders to inform the cautioner of such an offence is clear. If they meant to proceed against the cautioner it was their duty to communicate their knowledge of the offence

to him the moment they became aware of it. This they did not do, but gave no intimation to the pursuer till October 11th. That is a good answer to their claim for set-off.

I should go the length of saying that on the general rules of law if any company of this kind employs an employee whose honesty is guaranteed by another, and if the employee commits a crime such as forgery, and his employers get to know of it, they are not entitled to retain him a day in their employment under the guarantee unless they inform the cautioner and he is prepared to continue the guarantee on the footing that the employee remains in their service.

LORD TRAYNER—It does not appear from the interlocutor of the Lord Ordinary whether his attention had been directed to the terms of section 6 of the Mercantile Law Amendment Act, or the cases decided in reference to that section. Having that section of the Act in view, I am not prepared to say that a guarantee to be effectual must have been executed in accordance with the requirements of the Act of 1681. But in the view I take of this case it is not necessary at present to decide that question, and I abstain meanwhile from offering any opinion upon it.

I will assume, in the defenders' favour, that the guarantee they found on is a good guarantee, and sufficient to bind the pursuer without any *rei interventus*. But assuming that, I think the defenders have forfeited any right the guarantee gave them by reason of their failure to intimate timeously to the pursuer the criminal conduct of their agent, a failure which prevented the pursuer taking those measures by which he might have protected himself against loss. I concur in the result at which the Lord Ordinary has arrived, although I cannot at present concur in the grounds on which he has proceeded.

LORD MONCREIFF—I am prepared to affirm the Lord Ordinary's judgment, but not upon the ground he gives. I assume, in the defenders' favour, that there was here a good guarantee not requiring *rei interventus*. In this view it is not necessary to consider whether *rei interventus* has been proved. But I think that the defenders did not do what they were bound to do, namely, tell the pursuer of the misconduct of Jack—that he had committed this forgery and embezzled £25. Instead of informing the cautioner of these facts they gave Jack time, and not until 11th October did they intimate to the pursuer what had happened. I could have understood the defenders' position—and I thought this was to be their case—if it could have been shown that the pursuer was well aware of what had happened although he got no notice from the defenders. But in the argument the credibility of Mr Snaddon was not attacked, and we must hold that no notice whatever was given to him. In these circumstances the defenders have forfeited any right they had under the guarantee.

The Court adhered.

Counsel for the Pursuer and Respondent — M'Lennan — Strain. Agent — Thomas Liddle, S.S.C.

Counsel for the Defenders and Reclaimers —A. S. D. Thomson — Irvine. Agents — Clark & Macdonald, S.S.C.

Thursday, December 4.

SECOND DIVISION.

[Sheriff Court at Glasgow.

CROSSAN *v.* CALEDONIAN RAILWAY COMPANY.

Expenses — Taxation — Witnesses' Fees—Skilled Witness—Medical Man—Certification.

The pursuer in an action of damages for personal injury, who had been successful and had been found entitled to expenses in both Sheriff Court and Court of Session, in his account of expenses entered a fee of £10, 10s. to a medical man, who had been his only medical witness at the proof. This witness had examined the pursuer and made a written report, and he had been certified by the Sheriff-Substitute. The Auditor taxed off £3, 3s. On a consideration of objections to the Auditor's report, the Court (*diss.* Lord Young) further reduced the fee to £5, 5s. in all, being £2, 2s. for attendance as a witness, and £3, 3s. for preparation.

Process—Note of Objections to Auditor's Report—Note of Objections must State Amount of Reduction Desired — Expenses.

Defenders who had been found liable in expenses objected to the Auditor's report on the pursuer's account of expenses in respect of the amount of a fee of £7, 7s. allowed to a certified witness.

The Court *sustained* the defenders' objections to the extent of £2, 2s., but refused to give them the expenses of the discussion, because the note of objections did not state the sum to which he claimed that the fee should be reduced.

John Crossan, Rutherglen, raised an action of damages against the Caledonian Railway Company for injuries received by him on 25th April 1901 through falling out of a workmen's train travelling between Clydebank and Rutherglen.

After proof the Sheriff-Substitute (STRACHAN) on 17th March 1902 found that the injuries were sustained by the pursuer through the fault of the servants of the defenders in not having properly secured or fastened the door of the compartment, therefore found the defenders liable in damages, and assessed them at £100, and found the defenders liable in expenses.