been urged by the appellant's counsel which he has failed to bring forward. I think he has said all that could be said on behalf of his client.

LORD KINNEAR—I agree entirely with both my noble and learned friends who have preceded me, and I do not think it necessary to add anything to what they have said.

LORD ATKINSON—I also concur. In my view this case does not fall within either of the statutes that have been mentioned, for the reasons already pointed out by my noble and learned friend on the Woolsack.

As to the question of common law, negligence is a breach of duty, and to give a cause of action it must be a duty owed to the plaintiff. Now what is the duty here at common law which the owners of these premises owe to the plaintiff? There is no duty upon them at common law not to keep a house with a door opening on the street, because that door while unopened is a perfectly harmless thing. Neither do I think that there is a duty cast upon them owing to him to prevent any person ever opening the door, because the peculiarity of this case is that there is no proof whatsoever that the person who did open the door was a person for whom the owners of the premises were in any way responsible. So that in order to succeed, inasmuch as this door is perfectly harmless if kept closed, the plaintiff should show that the defendants owed a duty to him never to allow any person to open it on the street so that it would be an obstruction. I do not think the common law attaches any such duty to the owners of the premises. Therefore on those grounds I think there is no cause of action disclosed in these proceedings.

LORD PARKER—I agree.

Their Lordships dismissed the appeal, with such expenses as were allowed in an appeal *in forma pauperis*.

Counsel for Pursuer (Appellant)—Constantine Gallop. Agents—M. Graham Yooll, S.S.C., Edinburgh—W. Drummond Milliken, London.

Counsel for the Defenders (Respondents) the Owners of the Property—Hon. W. Watson, K.C.—F. A. Macquisten. Agents—Hossack & Hamilton, W.S., Edinburgh—Wetherfield, Son, & Baines, London.

Counsel for the Defenders (Respondents) Edinburgh Corporation—D.-F. Clyde, K.C.—Walter Robertson. Agents—Sir Thomas Hunter, W.S., Town-Clerk—Beveridge, Greig, & Company, Westminster.

Monday, April 10.

(Before Earl Loreburn, Viscount Haldane, Lord Kinnear, and Lord Atkinson.)

ROBINSON *v.* NATIONAL BANK OF SCOTLAND, LIMITED, AND ANOTHER.

(In the Court of Session, November 9, 1915, 53 S.L.R. 163, and 1916 S.C. 46.)

Fraud—Caution—Bank—Liability of Bank for Representations as to Customer's Credit.

A cautioner, having had to pay the sum guaranteed owing to the bankruptcy of the principal debtor and two co-cautioners, brought an action of damages against the bank of the co-cautioners, on the ground of false and fraudulent representations as to their financial stability made by the bank's local agent in letters written in answer to inquiries made on his behalf. The Lord Ordinary, and the Superior Courts found no ground to disagree, found that the bank agent had not acted dishonestly.

Held (*aff.* decision of the Second Division) that there being no special duty due toward the pursuer the defenders fell to be assoilzied.

Expenses—Fraud—Bank—Hardship without Legal Remedy.

Circumstances in which the House of Lords allowed the respondents, a bank, no expenses in an action of damages against them on the ground of false and fraudulent representations by their agent, in respect that the pursuer had suffered hardship although he was without legal remedy.

This Case is reported *ante ut supra*.

After counsel for the respondents, the Bank, had been heard for a short time, EARL LOREBURN informed him that their Lordships, as at present advised, thought that there was no special duty on M'Arthur, the bank agent, toward the pursuer; that the respondents were not liable unless his representations were dishonest; that their Lordships had not been satisfied as yet that the representations were dishonest.

EARL LOREBURN further said that the letters of the respondent Bank, dated 14th November and 15th December, accurately estimated the conduct of Mr M'Arthur, and were in the opinion of their Lordships very honourable to the Bank; that under the circumstances the House was prepared to dismiss the appeal, but that they considered the pursuer had been badly treated though he had not any cause of action at law, and that therefore their Lordships were disposed to direct that there should be no costs of the action on either side.

EARL LOREBURN said that counsel might prefer to argue the case further and endeavour to alter these views, but of course he would run the risk of altering their Lordships' views as to the legal responsibility as well as upon the subject of costs.

Counsel (after consulting with his clients)

stated that after this intimation he did not propose to argue the question of costs.

Their Lordships then delivered judgment as follows:—

EARL LOREBURN—This is an action for false and fraudulent representation. In such an action the pursuer cannot succeed unless he proves dishonesty. There is another kind of action known to the law, namely, for some breach of duty arising out of the relations between the parties, as, for instance, where a solicitor is sued for failure to exercise diligence. That class of case was referred to in *Nocton* v. *Lord Ashburton*, [1914] A.C. 932. It is, however, quite a different proceeding and has nothing to do with fraud, though at one time the word "fraud" was used occasionally in regard to that form of action also. It is to be hoped that so grave an expression will be confined to cases where the charge involves moral delinquency.

I may say a very little about a subordinate point that was raised in this case, namely whether or not the respondent M'Arthur intended to induce and did induce the pursuer to act upon the incriminated letter. In my opinion that letter was intended to convey the opinion that the two Messrs Inglis were in good credit, and the writer meant to influence those persons who should be interested in providing the contemplated loan. The pursuer was such a person, and he was undoubtedly induced by the letter to give his name as surety. He was none the less induced by the letter that it was not in fact seen by him, for its effect was accurately stated to him in pursuance of the writer's intention and he acted upon it.

All therefore depends upon the question whether the letter was dishonest and conveyed what was in fact false. Taking what it said and what it omitted to say together, any ordinary person would understand it to mean that these two gentlemen, the Messrs Inglis, were in good credit. That is the general impression that this letter would undoubtedly convey, though it imposed a limit upon the sum for which they could be safely trusted. Coming from the general effect of the letter to its particular contents there are two features of it which require notice. The first is a statement that the Bank was collecting certain dividends for these two gentlemen, which was not true. The second feature is that, while purporting to deal with the credit of the Messrs Inglis, it withheld the fact that the Messrs Inglis were overdrawn at the respondent Bank. Now if Mr M'Arthur knew that the statement about the dividends was untrue, or if (which is the same thing) he had no knowledge whatever on the subject, and took upon himself to make the assertion knowing that he had no foundation for it, that would be dishonest; but if he believed it, however foolishly, then the withholding of the fact that the Messrs Inglis' accounts were overdrawn would not be reprehensible, for in the circumstances of this case he might naturally consider them still to be solvent people. It is quite a possible view to take on the evidence that Mr M'Arthur though culpably careless was not fraudulent. That was the view taken by the learned Judge at the trial. I attach great importance to the opinion of the learned Judge who saw the witness in cases like this where conduct and motive are in question. I accept his opinion. It seems to me that M'Arthur believed the loan would be repaid and could be repaid out of the resources of the sons, that he relied upon the statements they made to him, and that he accepted, though without proper inquiry, what the previous bank manager had told him in regard to the dividends collected by the Bank for their accounts. As I have already said, I believe that the respondent Bank estimated accurately Mr M'Arthur's conduct in their letter of November 14. That is a frank letter, very honourable to the Bank. It is all the more honourable to them that they were not only just in their description of his conduct, but also merciful towards the man who had made the mistake.

At the same time it is impossible not to feel that though the pursuer has no remedy in law he has been ill-treated. I think it is hard upon him that he has not been recompensed. In my opinion this House ought to mark its sense of this by saying that there should be no costs on either side from the issue of the writ onwards. This course is, I am aware, exceptional. It is a course that your Lordships would not, I am sure, entertain if the appeal were merely an appeal as to costs, but only in cases where there is a substantial and meritorious ground of appeal though unsuccessful, and where there is a marked case of hardship. In my opinion this is such a case. Accordingly I move that the appeal be dismissed, but that there be no costs on either side of this action from its commencement.

VISCOUNT HALDANE—I entirely agree with what has fallen from my noble and learned friend on the Woolsack. As to the costs I will only say this, that, as he does, I regard what your Lordships have intimated about costs as arising out of the view which we have taken of the merits in an appeal in which we have all the materials before us in the same fashion as the Courts below had these materials before them. But for this I should be unwilling to make a modification in the order which might be said to operate as though this appeal were one for costs only. I think it is more than that, and is really a question of the merits, and for that reason I concur with the view that has been expressed.

There is only one other point about which I wish to say anything, and that is the question which was argued by the appellant, as to there being a special duty of care under the circumstances here. I think the case of *Derry* v. *Peek* (1889), L.R., 14 A.C. 337, in this House has finally settled, in Scotland as well as in England and Ireland, the conclusion that in a case like this no duty to be careful is established. There is the general duty of common honesty, and that duty of course applies to the circumstances of this case as it applies to all other circumstances. But when a mere inquiry is made