[16*th April* 1835.]

JOHN M'TAGGART and others, Appellants.

WILLIAM WATSON, Respondent.—*Sir John Campbell*—*A. M'Niel.*

Cautioner, Liberation of—*Bankrupt.*—Circumstances in which held (reversing the decision of the Court of Session) that the cautioner for the trustee on a sequestrated estate was not liberated by alleged neglect on the part of the commissioners in detecting fraud and malversation on the part of the trustee.

2D DIVISION.
Ld Mackenzie.
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The estates of the Gorbals Spinning Company, and of Alexander M'Kerlie, as a partner, were sequestrated under the bankrupt statute on the 14th September 1815, and William Jeffrey, accountant in Glasgow, was elected trustee. On this occasion he and the respondent, William Watson, granted a bond in these terms:

"I William Jeffrey, accountant in Glasgow, con-
" sidering that the cotton spinning and manufacturing
" company carrying on business in Glasgow and Gor-
" bals, sometimes under the firm of the Gorbals Spinning
" Company, and sometimes under the firm of Alexander
" M'Kerlie, and the said Alexander M'Kerlie as a
" partner and as an individual, with concurrence of
" Messrs. Colin Campbell and Company, merchants in
" Glasgow, creditors to the extent required by law,
" having applied to the Court of Session for a seques-
" tration of their whole estates, heritable and moveable,
" real and personal, in terms of the act of parliament

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" of the fifty-fourth year of the reign of His present " Majesty, intituled ' An act for rendering the payment " ' of creditors more equal and expeditious in that " ' part of Great Britain called Scotland;' the Lord " Ordinary Craigie, officiating on the bills, did, upon " the 14th day of September last, sequestrate the whole " estate and effects of the said cotton spinning and " manufacturing company carrying on business in " Glasgow and Gorbals, sometimes under the firm of " the Gorbals Spinning Company, and sometimes under " the firm of Alexander M'Kerlie, and of the said " Alexander M'Kerlie as an individual, in terms of the " said statute, and appointed a meeting of the said " creditors to be held on Friday the 22d day of Sep- " tember, in the Black Bull Inn Glasgow, to name an " interim factor on the said estate, when I was elected " to that office; and appointed a second meeting to take " place on Tuesday the 10th day of October current, in " the same place, for the purpose of choosing a trustee, " when I was also elected to that office; and having " accepted of that appointment, and offered William " Watson, merchant in Glasgow, as my cautioner to " the extent of 1,000*l.* sterling, for my faithful manage- " ment; with whom as a cautioner the meeting being " satisfied: Therefore I, the said William Jeffrey, as " principal, without limitation, and I the said William " Watson, as cautioner, surety, and full obligant with " and for the said William Jeffrey to the foresaid " extent of 1,000*l.* sterling, hereby bind and oblige " ourselves jointly and severally, renouncing the benefit " of discussion, and our heirs, executors, and successors " whomsoever, that I the said William Jeffrey shall " and will manage the said estate in all respects conform

" to the statute under which the sequestration was " awarded, and that I shall and will hold just compt " and reckoning and make payment to the said cre- " ditors according to their several claims ranked upon " the said sequestrated estate, or the trustees or trustee " that may be afterwards named by the creditors to " succeed me, for my whole management, receipts, and " intromissions as trustee foresaid with the property of " the said estates, or any part thereof, of whatever kind " or denomination, and wherever situated, which may " come into my hands as trustee foresaid, and that from " time to time when required; and we oblige our- " selves to implement these presents under the penalty " of 500*l.* sterling attour performance. And I the said " William Jeffrey bind and oblige me and my foresaids " to free, relieve, and indemnify my said cautioner of " the foresaid cautionary obligation come under by him, " and of all costs," &c.

This bond was executed on the 13th of October and on the 7th of December.

Three commissioners were elected in common form.

It was alleged by the respondents, and the fact was not explicitly denied, that at the meeting for this purpose the trustee did not exhibit a statement of the bankrupts' estate, or an estimate and valuation thereof, as required by the 36th section of the statute; nor was any fault found with him on this account. Nor did he once in every three months thereafter exhibit to the commissioners, or insert in the sederunt book as signed by them, a similar state and estimate or valuation.

The trustee having realized funds sufficient for a first dividend before the statutory period, a meeting of creditors was held on the 16th July 1817 when the

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trustee made a report to this effect, and with the sanction of the creditors he applied for and obtained from the Court of Session permission to pay a dividend, without waiting for the statutory period.

In anticipation of this dividend a state of accounts was made up by the trustee, and submitted to the inspection of the commissioners. On the 2d of August 1816 the commissioners met and audited these accounts. A doquet was attached, subscribed by the commissioners, by which they certified that " they examined the intro- " missions of the trustee on the said estate as above " stated, in terms of the statute." The balance of free funds shown in these accounts as remaining for division was 3,614*l.* 2*s.* 8*d.* It was alleged by the respondent that the commissioners in auditing these accounts failed to compare the sums lodged from time to time by the trustee in bank with the sums received by him, or to examine the sums drawn by him, in terms of the 43d section of the act. That it appeared from the accounts that the trustee had been in the custom of retaining in his hands on different occasions large sums belonging to the estate, above the sum of 50*l.* sterling, and for more than the space of ten days; and, in particular, that on the 2d of August 1816 he was possessed of 94*l.* 13*s.* 4*d.*, which he had kept in his hands from the 12th of July preceding, and that this was the smallest sum which he ever had in his hands at any time from the 23d of March preceding. That the commissioners did not animadvert on these circumstances, nor take any steps with reference to them, but approved of the accounts, and found the balance forming the divisible fund to be as the trustee had stated it. That nothing was done at this time to require an account of the interest

accruing on the sums which had been deposited in bank. A scheme of ranking and division was made up, showing the amount of dividend payable to the creditors, at the rate of 2*s.* per pound, to be 3,602*l.* 9*s.* 11*d.*, and which exhausted the whole of these funds, with the exception of about 12*l.* This dividend (with the exception to be immediately mentioned) was paid, and the creditors granted a discharge in these terms:—" Considering " that since the said trustee was appointed he has col- " lected such funds belonging to the estate of the said " Gorbals Spinning Company, and of the said Alexander " M'Kerlie as an individual partner of that company, " as will pay us a dividend of 2*s.* per pound of our " respective debts, and that, upon an application by the " said trustee to the Lord Ordinary officiating on the " bills, for leave to pay the said dividend in terms of " the said act, the Lord Ordinary appointed the 2d " day of September current for that purpose; and the " said William Jeffrey has since exhibited to us full " and satisfactory statements of his whole intromissions " up to the date of these presents, together with a " scheme of division among the creditors. And now, " seeing that the said William Jeffrey has made pay- " ment to us, for ourselves or those for whom we act " respectively, of the said dividend of 2*s.* sterling per " pound of our respective debts, conformable to said " scheme of division, and of which dividend we do " hereby severally grant the receipt, renouncing all " objections to the contrary: Therefore we, for our- " selves and those for whom we act respectively, do " hereby not only exoner and discharge the said Wil- " liam Jeffrey, as trustee foresaid, of the said dividend " of 2*s.* per pound now paid to us, and of all claims

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" and action competent for the same, but also ratify, " approve, and confirm the whole actings, transactions, " and intromissions of the said trustee and the commis- " sioners on their said estate, in every part of their " management up to this date; and we oblige ourselves " and those for whom we act respectively to warrant " this discharge at all hands and against all mortals, as " law will."

Immediately after the sequestration the estate was involved in a variety of disputes with Mr. John M'Taggart of London, who made a claim of ranking to a large amount, and also a preference over the heritable property, in consequence of certain deeds executed by the bankrupt in Mr. M'Taggart's favour. These claims gave rise to law suits, which depended in the Court of Session for several years. A dividend was appropriated to this claim, but being disputed it was set aside to await the result of the litigation. Some occasional meetings were held in relation to this matter between 1816 and 1820, but there being very little other business to attend to, many of the requisites of the statute as to accounts, &c. were not accurately attended to. It was alleged by the respondent that the remissness on the part of the creditors and their commissioners in controling the trustee led him into the course of proceeding which ultimately gave rise to the present question.

The trustee having recovered certain debts and effects belonging to the estate presented to the commissioners, on the 16th of May 1820, a report of his management and intromissions, and also of the state of the whole funds intromitted with by him, from which he stated another small dividend might now be paid. The com-

missioners audited his accounts, and a doquet was signed by two of them in these terms:—" Met the " commissioners on the sequestrated estate of the " Gorbals Spinning Company, who, having examined " the trustee's report and account of intromissions with " the bankrupt estate, engrossed in the ten preceding " pages of this book, find the same correct; and that, " with the proceeds of the household furniture belonging " to Alexander M'Kerlie, the funds on hand will yield " a dividend of sixpence per pound, which they hereby " appoint to be paid on the 5th of July next. They " also fix the trustee's commission at per cent. on " his whole intromissions; and, as the whole tangible " funds are hereby disposed of, it is understood that the " creditors shall refund to the trustee whatever sums " may be required for carrying on the process now in " court, if the funds hereafter to be recovered from the " bankrupt estate shall be found insufficient for that " purpose."

It was alleged by the respondent that the statement in this minute, that the trustee's accounts were correct and the whole tangible funds were thereby disposed of, was false and erroneous, at least if the claim in question was founded in fact. That on the slightest examination of the accounts it would have appeared that the trustee was keeping back and applying to his own use sums of money to a considerable amount. That, in particular, he had substracted a sum of 130*l.* out of the divisible fund, by changing the balance carried forward from 3,614*l.* to 3,484*l.*, as well as a sum of interest consisting of 33*l.* 12*s.* 8*d.*, said to have been obtained from the Royal Bank on the 13th of August 1818; and he had farther to account for the proportion of 169*l.* 8*s.* of

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interest drawn by the Glasgow Bank on the 1st of June 1820. That no investigation as to the drafts upon the bank account was made by the commissioners, nor was the interest on the dividend set aside to meet Mr. M'Taggart's claim taken into account in any of the subsequent auditings. That from the trustee's report it appeared that, besides two sums of 369*l.* 18*s.* 3*d.* and 62*l.* realised by him since the former dividend, he was also possessed of the disputed dividend, and of 1,945*l.* 12*s.* 3*d.*, the balance of sums received by him on account of the prices of the heritable property which had been sold, amounting in all to 3,514*l.* 18*s.* 5*d.*, exclusive of large sums of interest; and that no account of these sums was asked or given, nor was any evidence shown of their being lodged in bank. These statements were not admitted to be correct; and no proof was taken, other than the recovery of documents by a diligence.

On this small dividend being paid, little or nothing was done during the subsequent six years, farther than carrying on the management of the proceedings against Mr. M'Taggart.

On the 17th of May 1826 the trustee made a report to the commissioners on the state of the processes, and at the same time he laid before them a statement of his whole accounts made up to that date, taking up the fund from the statement submitted to them on the 16th of May 1820. On this statement a balance appeared in favour of the trustee of 67*l.* 11*s.* 11*d.* The commissioners signed a doquet in these terms:—"The trustee "produced a report as to the state of the reduction "with Mr. John M'Taggart; also a statement of his "intromissions with the estate. The commissioners

" having examined the state of the trustee's intromis-
" sions with the vouchers thereof find upon the face
" of the account a balance of 67*l.* 11*s.* 11*d.*, which they
" direct him to carry to the credit of his new account
" with the estate; and find the sum charged by the
" trustee for remuneration to be reasonable. The com-
" missioners approve of the trustee's report, and direct
" it to be engrossed in the sederunt book, and also of
" the steps taken in regard to the interest of the cre-
" ditors in the Gorbals property, and hope that that
" long litigated case will speedily be brought to a con-
" clusion. The trustee also laid before the meeting the
" Glasgow Bank receipt for 3,400*l.* being the money
" now in bank belonging to the estate; and they approve
" of its transmission from the Royal to the Glasgow
" Bank, which was done with their knowledge and ap-
" probation at the time the transference was made."

The appellants stated, that at this date (17th of May 1826) there was no defalcation or deficiency in the funds of the estate in the hands of the trustee, but the whole of the funds recovered stood lodged in bank; and of this fact the commissioners satisfied themselves. That there had been recovered from the heritable property 2,235*l.* 7*s.* 6*d.*, and from the general estate 686*l.* 8*s.* 8*d.*, besides the sums of bank interest of 33*l.* 12*s.* 8*d.*, 169*l.* 8*s.*, and 248*l.* 14*s.* 10*d.*, making the whole funds of the estate chargeable against the trustee 3,363*l.* 11*s.* 8*d.* That there was in his deposit account in the Glasgow Bank the sum of 3,400*l.*, and the deposit receipt of the bank for this sum was shown to the commissioners. On the other hand the respondent stated, that the commissioners had audited the accounts in a manner directly in violation of the duty imposed on them by the

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statute. That a proper examination of them and a comparison with the previous accounts would have shown that the trustee was then keeping back a sum of 62*l.*, a fact apparent from the face of the accounts; for in this trustee's report of the 16th of May 1820 he noticed this sum as received by him and as omitted in the account, but the commissioners did not then or afterwards take care to include it in the divisible fund, for which the trustee was to account. That, farther, the commissioners audited the accounts without any reference to the accounts with the bank or the sums of interest accruing on the money deposited. That accordingly the accounts bear that interest was not then taken into view; and the last item (after credit being given to the trustee for 200*l.* of commission) is—"Balance in "favour of the trustee, 66*l.* 11*s.* 11*d.*; interest to be "calculated afterwards:" and this was done; although it was obvious that if interest had been calculated the balance would have been against the trustee to a large amount. That no bank accounts were exhibited or examined or called for, and none have ever been produced. That the account approved of was confused, inconsistent, and unsatisfactory; and any person of ordinary penetration or diligence would have seen from the bank receipt alone and the trustee's statement, that funds to the extent of several hundred pounds were not in bank, and must consequently have been otherwise disposed of by the trustee.

In 1827 one of the commissioners resigned and another was called in his place, and in 1829 the other one having also retired, a meeting of creditors was held on the 12th of January, when two others were chosen, and the trustee was directed to exhibit a state of the funds

then in his possession or in progress of being recovered, distinguishing the funds drawn from the personal estate and those from the sale of the heritable property, and also from dividends unclaimed or unpaid; and the new commissioners were instructed, in terms of the act of parliament, to audit these statements and to see that the funds were deposited in bank agreeably to the statute.

It was stated by the appellants that the new commissioners applied to and repeatedly urged the trustee to make up the state of accounts thus ordered, and as to the amount of money deposited in bank; and after great delay a report of the state of the funds was produced to the commissioners in the beginning of May 1829. The funds of the estate had, by direction of the former commissioners, been lodged in the Glasgow Bank, which was not a chartered one; but on the 18th of May the new commissioners required the trustee to lodge the whole funds in the Royal Bank. The amount in the Glasgow Bank was 2,425*l.*, and there was in the British Linen Company's Bank 700*l.*, making in all 3,125*l.* On or about the 25th of May the trustee transferred the money lying in the Glasgow Bank to the Royal Bank, and he intimated this to one of the commissioners on the 27th of May, by a letter from Edinburgh, in which he also stated, "On my return on Friday or Saturday I will get the whole completed, when I will show you the deposit receipts," meaning that he would also transfer the funds from the British Linen Company's Bank, so as to make up the sum in the Royal Bank to 3,125*l.*

In apparent consistency with this promise the trustee exhibited to the same commissioner a bank deposit

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receipt of the Royal Bank, dated the 25th of May 1829, for 2,425*l.*; and afterwards, in answer to a letter from that commissioner dated the 23d of June, inquiring whether the remainder of the funds had been lodged in the Royal Bank, he exhibited an additional deposit receipt of the Royal Bank for 700*l.*, dated the 9th of June 1829.

In point of fact, although pretending to deposit the sum of 700*l.* in the Royal Bank, additionally to the sum of 2,425*l.* already there, he did not in reality do so. He had merely drawn out from the Royal Bank on the 8th of June a sum of 700*l.*, which he relodged on the following day, and exhibited the deposit receipt then granted as if it had been a new deposit, while in reality it was only part of the 2,425*l.* drawn and relodged. Instead of transferring the sum of 700*l.* which was lying in the British Linen Company's Bank, as he had been instructed, to the Royal Bank, he drew that sum, and applied it to his own individual purposes. He soon thereafter became bankrupt and resigned his office, when Mr. Kerr was elected in his place. It was then discovered that he had embezzled the following sums:—1st, the above sum of 700*l.* on the 2d of May 1829, lying in the British Linen Company's Bank, together with 5*l.* 8*s.* 5*d.* of interest thereon; 2dly, after making the deposit of 2,425*l.* in the Royal Bank on the 25th of May 1829, he drew out secretly various sums, amounting to 195*l.*, of which he only applied 25*l.* to the purposes of the estate, appropriating the remaining 170*l.* to his own purposes; 3dly, he also drew a variety of other smaller sums in a clandestine manner, which he appropriated similarly; the whole of these being so drawn after the last doquet by the commissioners on his ac-

counts certifying them to be ex facie correct. The total deficiency amounted to 1,008*l.* 12*s.* 2*d.* For payment of this sum Mr. Kerr brought an action against the respondent founding on the bond of caution. Mr. M'Taggart and others were thereafter admitted as pursuers, in the character of assignees of Mr. Kerr, the trustee. In defence, the respondent pleaded that he was liberated by the conduct of the commissioners in not observing the rules of the statute and exercising a direct control over the conduct of the trustee.

The Lord Ordinary pronounced this interlocutor (12th Nov. 1833):—" Sustains the defences, assoilzies the " defender, and decerns; finds him entitled to his ex- " penses, of which appoints an account to be given in; " and the Lord Ordinary thinks, that in various respects, " but, in particular, in respect to the money falling to " be in bank, there was a gross failure by the commis- " sioners to observe the regulations of the statute pro- " vided to control the trustee; and the Lord Ordinary " further thinks, that, in all probability, this neglect of " duty was the cause of the embezzlement which pro- " duced the loss. The trustee Jeffrey did not snatch " the money and run off; even at the end he seems " to have taken the use of it in the hope of replacing it " before it was missed; a hope encouraged in him by " the want of any examination of his accounts with the " banks, and indeed of keeping or exhibiting any ac- " counts with the banks at all."

A reclaiming note was presented by the appellants to the Lords of the Second Division, who referred it on the 24th of January 1834.[1]

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[1] Shaw and Dunlop, B. P.

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M'Taggart and others appealed.

Appellants.—1. The court below altogether overlooked or did not give sufficient weight to the fact, that the respondent was himself surety that those very things should have been done which he complains were not done, and was not therefore entitled to complain of their omission or neglect.

This plea involves a principle most material to be borne in mind in estimating the liabilities of a surety situated like the respondent, but which has been very much thrown out of view by the court below, not only in deciding the present action, but also in some of the other cases founded on as precedents. These decisions, in themselves not very consistent, were not submitted to the review of this house, and therefore the whole principles applicable to the case of a cautioner in a bond like that in question are open for discussion.

The bond in express terms contains two several obligations. The first is, " that the said William Jeffrey " shall and will manage the said estate in all respects " conform to the statute under which the sequestration " was awarded." The second obligation, which is distinct from and additional to the first, is, " and that I " shall and will hold just count and reckoning, and " make payment, &c., for my whole management, receipts, " and intromissions, as trustee foresaid." Besides the obligation to make payment of any pecuniary balance which Jeffrey might be owing to the estate, there is here a most distinct and unequivocal obligation on the respondent, binding him to guarantee that Jeffrey should do all those things in discharge of his office which the statute requires to be done.

The necessary inference is, that both these obligations being in the bond, both are to be enforced against the obligant. Yet what the appellant has to complain of in the court below is, that they altogether failed to enforce, and apparently refused even to recognise as valid, one of these obligations, viz., that by which the respondent became bound that the trustee should perform all the statutory duties; for the result to which the court came was, that the obligation to see that the trustee discharged these duties lay entirely with the creditors and commissioners, and not with the respondent at all. Their judgment proceeds on the assumption, that the respondent was so completely free from any obligation to see the statutory duties rightly performed, and that this obligation lay so exclusively on the other side, that they held the supposed omission on the part of the creditors and commissioners to perform this obligation sufficient to discharge the respondent. They completely reversed the obligation in the bond, making that which is an obligation against the respondent operate as an obligation on the other side in his favour; or, at all events, they entirely struck out and rendered a mere dead letter the express obligation on the respondent to warrant the trustee's discharge of the statutory duties, and confined the respondent's liability to the mere payment of the pecuniary balance owing by the trustee; and this too, only provided the creditors and commissioners had made good to him a rigid exaction from the trustee of the whole statutory requisites.

But this is a mode of interpretation of the bond which is not admissible.

In electing a trustee the creditors are of course

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desirous to have security that he should do his duty, and that the estate should not suffer loss from his negligence or culpability. They are enabled under the statute to attain this end in two different ways, perfectly compatible with each other, and indeed plainly intended by the statute itself to form concurrent checks. The one of these is the appointment of the statutory commissioners under authority of the 34th section of the statute, which empowers them to "name any three of the creditors as "commissioners, for the purpose of auditing the trustee's "accounts, settling his commission, concurring with "him in submissions and compromises, and giving their "advice and assistance to him in any other matters "relative to the management of the bankrupt estate, "subject always to the control of general meetings;" coupled with the provision of sec. 35, "that it shall "and may be lawful for such commissioners to meet at "any time they think fit for the purpose of ascertaining "the situation of the bankrupt estate, and of examining "the acts and transactions of the trustee, and to make "such reports as they, or any one of them, may think "proper to make from time to time to a general meet-"ing of the creditors." But, over and above the check afforded by the appointment of these officers, the statute also sanctions another and an additional security,—the personal obligation of a surety, binding himself that the trustee "shall and will manage the said estate in all re-"spects conform to the statute." The security gained by this obligation can never, with the least propriety, be held to be superseded by the appointment of commissioners; on the contrary, it is a security additional to that derived from the control of these officers, and

which cannot be held affected by the manner in which they may have discharged their duty. If that duty is rightly performed, the creditors have both the statutory checks in full operation. If one of these checks fail them, by a negligence on the part of the commissioners, this affords no sort of reason why the other should become entirely inoperative. On the contrary, the less faithfully the duty of the commissioners is performed, the more necessity there is for the enforcement of the obligation on the cautioner; inasmuch as upon that obligation the safety of the creditors just so much the more depends. It is utterly to mistake the whole intendment of the statute, to assume that the diligence of the commissioners is to be the measure of the cautioner's liability, and that their negligence must form his liberation. The intention of the statute, on the contrary, is to give the creditors something more than the mere contingent diligence of the commissioners; it is to give them the personal security of one whose pecuniary interest is involved in the discharge of his obligation, to which security the creditors may have certain recourse, in whatever way the commissioners may discharge their duty.

The force of these considerations will appear the stronger, if there be considered the extreme inexpediency, and, indeed, almost absolute necessity, of securing the estate by an obligation of this description, altogether independent of the check afforded, either by the watchfulness of the creditors themselves or of the official commissioners. In having a cautioner bound in all circumstances for the right management of the trustee, there is just that responsibility devolved on a single individual, which is more available than any responsibility can ever

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be which is divided; and this, too, a responsibility which, from the deep pecuniary interest the individual has at stake, is almost sure to be accompanied by a faithful discharge of the obligation. It is widely otherwise, either with the general body of creditors, or with the commissioners. It is out of the question to expect any efficient superintendence from the general mass of creditors, who are very commonly scattered far and wide over the country,—and many of whom are in no situation so attend to their interest,—occupied in their own concerns,—abroad,—lunatics,—minors. With regard again to the commissioners, they are gratuitous officers, and, therefore, to a very large extent, irresponsible; because it would require something very nearly approximating to actual fraud to subject them in pecuniary liability. The demand which the respondent makes against the commissioners on bankrupt estates is one which it is utterly impossible, with any degree of reason, to make against men acting gratuitously, and fully occupied with their own concerns; for it would imply a devotion to the business of the bankrupt estate, almost equal to that of the hired trustee himself, and, at all events, a minute and accountant-like examination into details, most unreasonable to expect from individuals so circumstanced. To say, therefore, that the cautioner is liberated by the negligence of creditors or commissioners is to maintain a proposition at variance with the whole policy of the bankrupt act, which intends, in addition to all other securities, to give the sequestrated estate the security of this individual obligation, on which the general body of creditors may always have a certain hold, whatever negligences may occur in other quarters.

It is said that the commissioners are the representa-

tives of the creditors, and that any negligence on their part implies a breach of contract with the cautioner. But the commissioners are, in no legal sense, representatives of the creditors. They are special officers, who act for their behoof in discharge of particular duties. They are, no doubt, appointed by and for behoof of the creditors, and their negligence may be, and no doubt often is, very prejudicial to the creditors, in the same way with the negligence of any other persons in the creditors employment. But it is an altogether different thing, and quite unwarranted by any legal principle, to maintain that their negligence is not only to have this effect in itself, but also to have that of depriving the creditors of the benefit of a collateral security, expressly intended by the statute to supply the defects created by a want of diligence in these very commissioners. But even supposing that the commissioners could be regarded as in some sense the representatives of the creditors, it is altogether a mistake to regard any negligence on their part as being in the light of a breach of contract with the cautioner, for this plain reason, that any diligence in the matter was, by the contract, not laid on the creditors and commissioners, but on the cautioner himself. There is no diligence stipulated for in the contract to be used by the commissioners or creditors. The diligence is all engaged for on the side of the cautioner, who becomes bound unlimitedly that the trustee " shall " and will manage the said estate in all respects con- " form to the statute." He stipulates for nothing whatever from the other side, and cannot therefore, complain that nothing was given. No breach of contract can be alleged; for no contract takes place. He pledges

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his liability unqualifiedly, and in all circumstances. And in doing so, he only follows out the design of the statute, which was to give an additional security, in this unlimited personal obligation, over and above all the other statutory checks.

But the judgment of the court below puts the case in the same position, as if on the one hand there had been no obligation at all by the cautioner for the trustee's faithful fulfilment of the statutory requisites, and on the other side, as if there were an express obligation on the creditors to warrant this to the cautioner. If this had been truly the case, the argument of the respondent might apply. But there is no obligation on the subject in favour of the cautioner, on the contrary, there is an express obligation laid on him.

Had the contract been silent and laid no obligation either on the one party or the other, there would have been more plausibility in the respondent's argument. In such a case, there might have been some room for the plea, which is the whole prop of his defence, that the cautioner was entitled, as by a sort of implied contract, to expect on the side of the creditors and commissioners an exaction of all the ordinary statutory duties from the trustee. But the state of things is entirely altered by the fact of an express clause occurring in the contract, by which the cautioner takes on himself the obligation that the trustee " shall and will manage the estate in " all respects conform to the statute."

This therefore is not the case which the respondent has set forward in the Court below, and which the court has evidently assumed it to be in their judgment, viz., a case where the contract being altogether silent, the cau-

tioner was entitled to rely on an enforcement of the statutory requisites from the trustee on the part of the creditors and commissioners.

The distinction betwixt the case where the contract either lays the obligation expressly on the creditor, or is silent, and the case where the enforcement of the duty is laid on the cautioner himself, is one which is quite familiar to the law of Scotland in regard to the contract of suretyship. It was recognized in the cases of Hamilton v. Calder, Wallace v. Lauders, British Linen Company v. Nisbett, and Eadie v. How.[1]

The decision in the case of Wallace contains within itself an explanation of a case sometimes quoted on the other side, viz., Dick v. Nisbett.[2] In that case there were two discriminating circumstances. 1st, the obligation was expressly laid on the creditor in favour of the cautioner; for the report bears, "there was a clause "that Nisbett should make up his accounts quarterly "with Sir James, his master, to be exhibited to the "cautioner. 2d, the cautioner required Sir James to "do so, and protested to be free for his not counting."

Therefore, without admitting the negligence and omissions alleged by the respondent, but assuming the whole of his statements to be correct, they are met by the general answer, that the terms of his own obligation exclude his founding on these any plea of liberation. If he says that the trustee omitted to render regular accounts, and was not compelled to do so, the appellant's

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[1] Hamilton v. Calder, 18th June 1706 (Mor. 2091); Wallace v. Lauders, 20th Feb. 1707 (Mor. 2096); British Linen Company v. Nisbett, 17th June 1773 (5 Brown's Sup. p. 409); Eadie v. How, 3 Feb. 1829 (7 S. & D. p. 356).

[2] Dick v. Nisbett, 30th Nov. 1697 (Mor. 2070).

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answer is, that the respondent himself became bound to see these given; and it is his own fault that they were not rendered. If it is said that the money was not rightly deposited in bank, and suffered to lie there, on account of the estate, in due and regular form, the appellants answer, that the respondent was himself bound to see done the very thing which he complains was not done. If it is said that the commissioners might have known, and ought to have known, the precise state and condition of the trustee's transactions, it is replied, that the same means of information were open to the respondent; and if it is added that the creditors and commissioners were bound not only to have been aware of, but to have informed the respondent of the improper proceedings of the trustee, so as to enable him to put a period to his cautionary obligation, the answer is, that the respondent was bound himself to know these proceedings; and if he desired to get free, to intimate these to the creditors, and protest for his liberation, and not doing so, must be held to have acquiesced in the trustee's proceedings, or, at least, is not entitled to complain of these being allowed to go on.

2. But even if there were any foundation for the argument in defence generally, it would be altogether irrelevant and inapplicable, in so far as regards the sum of 700*l.*, feloniously abstracted from the bank by the trustee; for reimbursemeut of which to the estate the respondent must, in any view, be held liable.

It is important to attend to the very particular way in which, to a considerable extent, the trustee became debtor to this estate. This may materially affect the question of his cautioner's liability, even on the principles of the respondent himself; because, giving every

weight to the plea of negligence, it is quite obvious that there may be a great many improper proceedings on the part of the trustee, which no diligence whatever could prevent, and to which, therefore, this plea of negligence is quite inapplicable.

Now, the facts as to the sum of 700*l.* are there taken possession of by the trustee in the month of May 1829, the funds of the estate, amounting to 3,125*l.*, were lying fully deposited in bank,—2,425*l.* in the Glasgow Bank, and 700*l.* in the bank of the British Linen Company. Mr. Jeffrey was required to transfer the whole sum into one account, to be kept, according to the statute, with the Royal Bank of Scotland. He did transfer the sum of 2,425*l.* from the Glasgow to the Royal Bank accordingly. But in place of doing the same thing with the sum of 700*l.* in the bank of the British Linen Company, he took this money, and appropriated it to his own purposes, whilst, at the same time, to conceal the depredation, he played off the ingenious manœuvre of drawing from the Royal Bank, and relodging, the next day, 700*l.* of the money there deposited, so as to get a separate deposit receipt for this sum of 700*l.*, to be exhibited to the commissioners as if it were the proceeds of the money in the British Linen Company Bank regularly transferred. In this way, by exhibiting two deposit-receipts of the Royal Bank—the one for 2,425*l.* the other for 700*l.*—without, of course, disclosing any thing of the intermediate draft of 700*l.*, which enabled him, by immediately relodging the money, to get the second voucher,—the commissioners were deceived into the belief that the whole 3,125*l.* was safely deposited in that bank, whilst, in truth, only 2,425*l.* was so, and the 700*l.* which had been in the bank of the British

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Linen Company had been abstracted and appropriated by Jeffrey himself.

This was not only an act of culpability, but an act of gross and criminal swindling. It was not merely the accumulation of a balance allowed to remain in the trustee's hands through negligence. It was a direct theft or depredation. It had in it the essence of a crime.

Even were the principles on which the respondent founds his argument indisputable, they are altogether inapplicable to a case like this. There was an act committed by the trustee, which no precaution could prevent, and no ingenuity anticipate. No man could possibly suspect, that Mr. Jeffrey was about to act the part of little better than a common thief. No one could have prevented the theft from being perpetrated. There might be negligence in discovering the depredation, or, in afterwards applying a remedy; but no conceivable diligence could have operated as an obstacle against the trustee's stealing this money, any more than against his stealing any goods from the bankrupt's warehouse, which equally lay open to his depredations.

But farther, at the time this depredation was committed, the commissioners and creditors, so far from showing any negligence, were engaged in the most diligent and active administration of the estate. And it cannot be pretended that any undue delay occurred in the discovery of the depredation, nor that after the occurrence of the depredation, there was a single thing done on the part of the creditors or commissioners, tending, either directly or indirectly, to sanction or cover the proceedings of the trustee, or to mislead the cautioner in regard to them. There was, as just stated,

no audit, and of course therefore no docquet certifying or approving of his accounts. There was no commission awarded on him, nor any discharge ratifying or approving of his proceedings; and the moment it was discovered, the cautioner was made fully cognizant of it, and steps taken to effect the removal of Jeffrey from his office, which was completed before the month of November of the same year.

The only way in which the respondent attempts to maintain his plea is by founding upon misconduct on the trustee's part long prior to the date of this abstraction; and to contend that these involved so much impropriety as to have called upon the creditors and commissioners to remove him from his office; by which means, it is said, the subsequent peculation might have been prevented. It is alleged that the trustee was in the habit of making an improper use of the money of the estate, by drawing it out when the estate did not require it,—and it must have been used for his private purposes; he only taking care again to deposit the money before each audit, so as to present at each of those periods the appearance of the whole funds of the estate being safely in bank. It is pleaded that this was a breach of duty on the trustee's part, which ought to have led to his removal by the creditors, long previously to the date in question.

But these allegations are not admitted.

The respondent does not aver that the creditors and commissioners knew of its existence. All that is said is, that they ought to have known. But to this proposition, the appellants demur.

More particularly they maintain that the respondent himself, as the trustee's cautioner, was at least

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equally bound to know the whole of these prior proceedings by the trustee, and either did, in point of fact, know and acquiesce, or must be held in law to have known and acquiesced in them. It is entirely untenable to plead with effect that the creditors and commissioners ought to have been acquainted with the whole prior proceedings of the trustee, and that the trustee's cautioner must he held all the while justifiably ignorant of them. His own obligation necessarily implied a continual watchfulness on his part in regard to the trustee's proceedings; as, without such watchfulness, it was, of course, impossible to fulfil the obligation. It was the duty of the respondent, not merely to know the character of the trustee's transactions, but, if he conceived that this was such as to make his obligation a hazardous one, to intimate this to the creditors, and call on them to interfere to check the proceedings, on pain of losing the benefit of his bond of caution. Not doing this, he must be held barred from maintaining the plea that the conduct of the trustee was such as to render it dangerous that he should continue in office, or as entirely altered or increased the risk which he consented to run; because the continuance in office of the trustee must be held to have been with the perfect acquiescence of the respondent himself, knowing, or held in law to have known, the whole character of these proceedings.

Respondent.—The principles applicable to a cautionary obligation of the description of the one in question are not different from those which obtain in other contracts of this class. But in considering the situation of cautioners generally a very important distinction requires to be attended to; in some cases, where a cautioner becomes bound, the creditor is not called upon

to take any active steps against the principal debtor; and he is entitled to remain passive and quiet, and to take his own time for enforcing payment against the cautioner, on the failure of the principal. Thus, in the ordinary case of a cautioner for a debt or an account, the creditor is not bound to use any diligence, or to make any exertions to recover payment from the principal obligant; in such cases of cautionary mere omission will not liberate the cautioner, though an express arrangement for giving the principal debtor time, or a material change in the manner of dealing with him, will set the cautioner free.

But there is another class of cautionary obligations, when the creditor, obtaining the benefit of the caution, does become bound to do certain things on his part for the benefit of himself and the cautioner; and when that is the case, the creditor, by omitting to perform his part of the contract, will liberate the cautioner from his counter obligation. Thus, where a person becomes cautioner for rent, the landlord is not bound to exercise his hypothec in order to recover payment, as was found in the case of M'Queen v. Fraser.[1] But, on the other hand, if the landlord engages to use his hypothec for the relief of the cautioner, then, by his omission to do so, the cautioner will be discharged. The case of Mactavish v. Scott[2], as reversed in this House, is an express authority on this point; and a direct and important analogy on this subject may be obtained from the English case of Montague v. Tedcomb.[3]

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[1] M'Queen v. Fraser, 11th June 1811, F. C.

[2] Mactavish v. Scott, 7th Dec. 1830, 4 W. & S. 410.

[3] Montague v. Tedcomb; 2 Vernon, 518; Fell on Guarantee, 2d Edition, p. 180.

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The question, therefore, whether mere omission will liberate a cautioner, depends entirely on the previous question, whether the contract entered into belongs to one or other of the classes just mentioned; whether, at entering into the contract, any thing was or was not stipulated to be done on the part of the creditor for the protection of the cautioner. In the one case, mere negligence and omission may be of little importance; in the other, if it be in a material point, it must be destructive of the creditor's claim.

But the cautionary obligation which the respondent entered into plainly belongs to that class in which certain counter engagements are undertaken by the creditors, the neglect and violation of which will have an important effect on the cautioner's situation. The contract is strongly assimilated to the case where a cautioner for a servant obtains a stipulation, that there should be a periodical settlement of accounts with the employer. Here, it is true, nothing on this subject is expressly contained in the bond of caution; but that bond is not the whole or the only contract between the parties on either side. The caution is required by the sequestration statute; the office for which it is interposed is the creature of that statute, and the bond is granted under the statute, and has an express reference to the statutory provisions. The case is, indeed, the same as if the statute had been narrated at full length in the obligation; and its enactments are as much the law, and the contract of parties, as if they had been made matter of express stipulation. They regulate the duties of the trustee, and the obligations of the cautioner on the one hand; and, in like manner, on the other, they fix the privileges of the cautioner, and the office and duties of the creditors and their representatives.

The present question, therefore, is to be considered on the footing of the respondent having become cautioner for the due discharge of the office of trustee, under a contract and understanding that the constituents of the trustee should, on their part, observe the requirements of the statute, and, above all, that they should attend to those safeguards which have been provided for securing the fidelity and integrity of the trustee's management in his intromissions with the funds of the estate.

It is true that the proposition now maintained must be taken under qualification, and with reference to ordinary notions of sound discretion. The statute has laid down a number of provisions for the guidance of the trustee, which it is almost impossible, and which it would not be very expedient, always to observe in a literal and judicial manner; and certainly the respondent does not argue that a trustee's cautioner would be liberated in consequence of every slight or trivial deviation from the letter of the statute, even though sanctioned by the commissioners, or actually committed by themselves. Such strictness is not to be enforced, just because it would be practically inconsistent with those very principles on which a strictness is required to be observed on more material points. This question, like the others, is to be regulated with reference to what should be held to be the contract of parties. As matters are managed in actual business, it cannot be supposed that the cautioner for a trustee counts upon the observance of every minute regulation, or anticipates that inconsiderable deviations from the statute are to dissolve his obligation. But, on the other hand, legally and practically speaking, it is impossible not to conceive that he does calculate on a compliance with the main provisions of the statute,

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and expects that, if the creditors and commissioners permanently and totally neglect the course of duty imposed by the statute on them, for the common safety of both parties, they are not to be allowed to make a claim on him for the consequences of their own misconduct.

Now, of the various duties imposed upon the commissioners, none is more anxiously pointed out in the statute, and none is of more importance in its operation, than that of checking periodically and strictly the state of the trustee's intromissions and bank operations. This duty is imposed on them by the statute, in words as positive and express as occur in any of its enactments, and it is manifest that the existence of this obligation on the part of the commissioners, must be one of the most material elements to which a cautioner looks, in undertaking this hazardous obligation. There would be the widest difference between entering into a contract in which the constituents took upon themselves the duty at certain intervals of examining and comparing the trustee's bank accounts, and seeing that he never improperly retained or used the trust funds, and entering into a contract where the constituents declined any such task, and made no provision for exercising any control over the trustee's proceedings in this respect. Many persons would enter into the one compact as cautioners, who would think it imprudence or madness to engage in the other.

It is obvious again, that where this duty is undertaken, and forms a part of the mutual contract, the failure to discharge it properly and conscientiously must make an entire change on the situation of parties. Nothing can be more dangerous to the integrity of a trustee than to

allow him, without check or control, to intromit for years with hundreds and thousands of pounds belonging to a sequestrated estate, and thereby tempt him to engage in expenses and speculations calculated to end in bankruptcy and ruin. The respondent will not say that every slight irregularity on the part of the commissioners, even in this matter, will liberate the cautioner,—though, for instance, the auditing of the accounts should not always take place precisely at the statutory interval, or though the trustee should appear in the accounts to have occasionally kept a few pounds longer in his hands than he should have done. These circumstances might not be enough to deprive the creditors of their ultimate claim. But where, during the whole progress of the sequestration, the statutory check is never once put in force or never sufficiently put in force; where years are allowed to elapse between one auditing and another; where, in the meantime, the trustee appears, on a comparison of his account of intromissions with the bank account, to be drawing out large sums belonging to the estate, which ought to kept sacred, and which are not required for the purposes of the sequestration; where the trustee is permitted for years to take the use of 2,000*l.* or 3,000*l.* of the deposited money, and merely puts it again into the bank account on the eve of the next settlement; where, after all these palpable and open irregularities, the trustee's accounts are audited and passed, and the approbation of the commissioners given to his conduct by the unequivocal mark of awarding him a large commission, it is surely impossible to say, that such a gross violation of the most vital provisions of the statute can be suffered to take place, without liberating the cautioner, whose condition would otherwise be so

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entirely changed for the worse by such a mode of proceeding. Above all, if this course of conduct is allowed to continue for a period of fourteen years, so long beyond the natural life of a sequestration, during which not a whisper of complaint is heard against the trustee, nor any communication held with the cautioner, it would be the height of injustice, were he to be subjected, after so long a perseverance in a line of conduct so injurious to his interests. Accordingly these principles were sanctioned and given effect to by both divisions of the court in the cases of Duncan v. Porterfield[1], where it was held, that " cautioners for the trustee on a bankrupt estate " were relieved by the gross negligence of the commis- " sioners and creditors in superintending and controlling " the conduct of the trustee;" of Mein v. Hardie[2], where the cautioner was found to be liberated by the misconduct of the commissioners, which consisted in the very matter now complained of—their neglect to see that the money of the estate was deposited in bank; and Dalziel v. Menzies.[3] In this case, " where commis- " sioners of supply, on electing a collector of cess, " minuted a resolution that he should produce a dis- " charge from the receiver-general annually, and cau- " tioners bound themselves for his intromissions for that " year and each year of his re-election; and the " collector was re-elected thrice without being required " to produce the receiver general's discharge, and in- " curred arrears before the first re-election, and also " afterwards; and no notice was given to the cautioners " till nearly a twelvemonth after his resignation: Held

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[1] Duncan v. Porterfield, 13th Dec. 1826, 5 S. & D.
[2] Mein v. Hardie, 19th Jan. 1830, 8 S., D., & B. 346.
[3] Dalziel v. Menzies, 15th Feb. 1831, 9 S., D., & B. 434.

" that they were liberated, although special reference " was not made to the minute in their bond."

Now, what are the facts in the present case? Under the express terms of the 43d section of the statute, it is competent to the commissioners at all times to examine the trustee's bank transactions, and they are expressly required to do so at certain periods fixed by the statute. The way also in which they are to check the trustee's bank transactions is specially pointed out. The trustee is to keep an account in a bank, and the commissioners are to compare the sums lodged by him from time to time with the sums received by him, and to examine the sums drawn by him from such bank, and disbursed by him on account of the bankrupt estate. An examination of this kind must infallibly discover any irregularities on the part of the trustee; and the habitual use of it would deter the trustee from attempting to withdraw a single shilling of the funds from its proper purpose, while, on the other hand, the negligent and defective observance of this precaution, or the total omission of it, must afford the strongest encouragement to the trustee to tamper with the trust money, and apply it to his own ends from time to time. But although the sequestration was awarded in 1815, and Jeffrey, the trustee, continued in office until he was allowed to resign in 1829, a period of fourteen years; yet, during all this time, the documents that are in process prove, beyond a doubt, either that the commissioners never audited the trustee's accounts at all, in terms of the statute, though they occasionally attested that they had done so, or else that, when they did audit them, they countenanced and connived at a system of gross misconduct and misapplication of the funds on the part of the trustee by the

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ultimate operation of which the estate was deprived of the large sum now said to be due by the trustee. The contract therefore with the respondent has been violated both in spirit and substance, and he is consequently discharged. The distinction attempted to be taken as to the 700*l.* is not maintainable. The commissioners by their late conduct gave free scope to the frauds of Jeffrey, and neither they nor those whom they acted for can be entitled to insist for payment from the respondent of money embezzled, if not with their connivance, at least by their gross and culpable negligence.

LORD BROUGHAM.—My Lords, the case of Watson, one of the defendants in the Court below, is now alone before your Lordships. He had become surety for William Jeffrey, the trustee on the sequestrated estate of the Gorbals Spinning Company, and had given the usual bond for Jeffrey's conduct and accounting as such trustee. By the Scotch forms of proceeding the bond is not given to any individual as obligee, but it is an obligation to the extent of 1,000*l.* by the trustee and his cautioner jointly, and in which both are principal obligors. As the condition is, that William Jeffrey shall faithfully and regularly discharge his office of trustee, and as the creditors afterwards choose three commissioners to act for them,—we may say, in a sense, to represent them in their dealings with the trustee, and in some sort to control, or at least to superintend his proceedings, we may allow it to be held that those creditors, and, it is said, the commissioners thus appointed by them, and acting on their parts, are the obligees; and that their acts, for example, in releasing the principal obligor, William Jeffrey, would discharge William Watson his

surety; that any connivance at Jeffrey's misconduct, and any act otherwise injurious to the rights and equities of the surety Watson, and done behind his back, would release him as much as if the bond had been given to them, instead of being left indefinite as to the person of the obligee. We are thus making the most favourable suppositions possible to the respondent, for we are not only assuming the creditors to be represented and bound by the commissioners, but we are allowing Watson to be a surety only, whereas he is a principal, being a joint and several obligor. William Jeffrey, by a series of irregular proceedings, and by various contrivances, amounting to fraud, in respect to the sequestrated estate, was found in arrear in his accounts to the amount of 1,000*l.*; and the appellant (the trustee who succeeded him) put the bond in suit against Watson, who defended himself by accusing the commissioners of great neglect in their superintendence of Jeffrey,—of conniving at his misconduct,—of concealing from him the several matters which they knew; and of generally failing to discharge their duties under the Bankrupt Act towards the creditors, which the respondent considers as also their duties towards him in his capacity of William Jeffrey's surety. Almost all of these charges, in point of fact, are denied by the appellants, the trustee, and the commissioners. They deny all knowledge or suspicion of Jeffrey's frauds, which were indeed for the most part so cunningly devised as to escape even a pretty close scrutiny. They deny all laches or negligence in the discharge of their own office. They only admit that their meetings were not held as often or as regularly as the act directs; and they also allow that a sum lodged in the Royal Bank by Jeffrey,

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as the act requires, was, with their privity and consent, transferred to a Glasgow bank, of which one of themselves, a large creditor of the bankrupt, was a partner, but which was perfectly solvent, and by which no loss whatever has accrued to the estate. Upon this latter fact admitted I have to observe, that it was most irregular in the commissioners to allow the transfer of the fund from one of the three banks expressly named in the statute without the consent of their constituents, the creditors, and the more to be blamed, that one of themselves, or his banking house, was to profit by the operation. Had any loss occurred by the proceeding, not only would Watson have been discharged from all liability in respect of it, but the commissioners would have been accountable for the whole amount of it to the body of the creditors at large. But no loss having occurred, and William Jeffrey having done no act of malversation, or even of neglect, up to the date of that transaction, I am clearly of opinion that Watson is not, at least by this transfer, discharged from his obligation in respect of Jeffrey, as regards his subsequent proceedings. The Court below having assoilzied the defender in respect of the neglect and irregular conduct of the commissioners, which their Lordships held to operate Watson's discharge, the present appeal is brought from that decree, and we are now to see upon what grounds it rests; and, first of all, I have to remark, that here, as in so many of the Scotch cases, we find extremely little attention paid to the facts, hardly any care being taken to ascertain what these are, by examining which of the statements on either side is admitted, and which denied, or not admitted by the other. The matter of fact is thus too often passed over as of little moment, in order

to get at the matter of law, on which all the pains both of the bar and the bench are bestowed. But on the fact every thing must depend, and it is to be noted in this case that the fact is assumed,—assumed too all one way, and against the appellants, in the face of their positive denial, and in the absence of proof. The Court take for granted that the commissioners acted with gross negligence in the performance of their duty, though this is denied; and they assume that out of their negligence arose the malversations of Jeffrey, or the opportunities for committing them,—opportunities which, but for the laches of the commissioners, he could not have had; and yet not only is this denied, but upon all the circumstances, as they appear in the case, I really do not think, even morally speaking, and to say nothing of legal evidence, that the fact is so. But another thing, if possible still more important, has been equally overlooked,—the frame of the bond itself, the whole ground of the action. The obligation is, that "William Jeffrey shall manage "the estate in all respects conform to the statute, under "which the sequestration was awarded," as well as that he shall "hold just compt and reckoning, and make "payment to the creditors according to their several "claims." Compt and reckoning for what? "For my "whole management, receipts, and intromissions as "trustee, with the whole estate." Now, the main reliance of the respondent, and in which view the Court fully shared, is upon the supposed fact of the commissioners having been careless in calling on William Jeffrey to render accounts, and in other respects to perform his duty under the statute. They say, that it was the office of the commissioners to see that he did perform his duty; that the cautioner, Watson, relied on their per-

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forming that office; and that their non-performance creates a case which he never contemplated, and to which his suretyship cannot apply. Was it of no moment to observe, that the performance of the statutory duties by Jeffrey was one of the very things for which the obligation bound his surety? Assuredly it is no argument against my being answerable for a man's doing a certain thing, that the party to whom I gave this obligation did not see that he did the thing. I had myself undertaken for his doing it, and it is no discharge of my voluntary obligation, that the other party, the obligee, did not see to his proceedings. The statute and the bond in truth have, the very object of giving the creditors a double security against malversation,—the superintendence of the commissioners and the obligation of the surety. The argument for the respondent, and which has swayed the Court below, at once cuts off one of these securities and leaves the creditors only protected by the other. The duty incumbent on the commissioners as a pledge to them continues; but that security they had without the bond; and I do not see how the bond can avail them at all, or why it was to be taken if this argument prevails. The defective state of the facts in this case to support Watson's defences renders it unnecessary for me to enter upon many of the legal questions, raised on little or no foundation, and discussed with no profit, because with no application to the case at bar. I may, however, observe, that very dangerous doctrines on suretyship obligations appear to be ventilated in some of the cases in Scotland (cases which have never been appealed to your Lordships). The language of the learned judges is calculated perhaps to convey, as reported in the books, a meaning far stronger

than their Lordships intended. They are really made to speak more of the obligee's duties than of the obligor's covenants; of the duties towards the surety, which a person indemnified and guaranteed is bound to perform, rather than of the obligation which that surety has incurred towards him. A closer watch is thus kept over the conduct of the party who has taken an indemnity than over the liability of him who has given it. Now, that the obligee may, by his conduct, release a surety in certain cases, no one can doubt. The holder of a bill, giving time to the acceptor, discharges the indorser from his suretyship liability even at law, and so in any other guarantee by simple contract: and in equity, the obligee in a specialty may do so, by giving time, or otherwise injuring the recourse of the surety or co-obligor; and all this upon the ground that the surety has a right to stand in the place of the creditor, holder, obligee, or other party indemnified, and must not have his rights or equities voluntarily cut down by the acts of that party. But while at law the surety in a bond is not at all discharged, even by a long neglect of the obligee to demand payment or account from the principal, nay, where the latter has become insolvent, during the time thus suffered to elapse, as was decided in the Trent Navigation Company v. Hardy[1], the courts of equity have never, to my knowledge, given a discharge to the surety merely on the ground of the creditor—the obligee—not having called on the debtor so early as he ought, or not having given early notice of his failure or nonpayment to the surety. The case of Mr. Law, Mr. Tierney's surety in Calcutta, at the Rolls in 1799, gave rise to much discussion, and an

[1] 10 East, R. 34.

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elaborate judgment by Lord Alvanley; it is reported in 4 Vesey, 824; but there were other circumstances very different from such laches to govern that judgment, and especially the payment of a balance to the representatives of the debtor by the party's (East India Company's) servants, which was justly held to be an acknowledgment, to the benefit whereof the surety was well entitled. It is, however, undeniable that the courts of equity will look narrowly to every thing in the conduct of the obligee, which has a direct tendency to wrong the surety, and worsen his rights and equities, and will, as Lord Loughborough said, in Rees v. Berington, "lay hold "of such errors to release him." The error, however, in the present case arises in supposing that any want of care on the party's side in making the trustee do that which the surety had covenanted that he should do, was like a postponement of the sureties, equities, or diminution of his rights at law. However, we need not discuss such questions in this case, nor deal with the English decision in Vernon of Montague v. Treadcroft, which was that of a positive and express covenant given to the surety by the obligee; neither are we called upon to dispute the doctrine of the Court below here laid down, and in Mein v. Hardy, in 8 Shaw, 346, that where any one gives security for the conduct of another in a certain office which brings him in contact with persons also in the office, he has a right to expect that these persons will, in all things affecting the surety, conduct themselves according to law, and discharge their duties. All this may be generally true, and yet it cannot avail to discharge a surety who has expressly bound himself for a person's doing certain things, unless it can be shown that the

party taking the security has, by his conduct, either prevented the things from being done, or connived at their omission; or enabled, and clearly enabled the person to do what he ought not to have done, or leave undone what he ought to have done; and that but for such conduct this omission or commission would not have happened. The present is any thing rather than such a case; the facts are not here to ground any such conclusion; and therefore I am of opinion that the surety, Robert Watson, was not discharged. I have therefore to move your Lordships that the decree appealed from be reversed, and that you remit to the Court below, with instructions to decree, in terms of the second conclusion of the libelled summons, that is, the conclusion relating to Watson, the only party here before your Lordships.

The House of Lords ordered and adjudged, That the interlocutors, so far as complained of in the said appeal be, and the same are hereby reversed: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, with instructions to decern against the respondent William Watson, in terms of the second conclusion of the libelled summons, and to do further in the cause as shall be just and consistent with this judgment.

MONCRIEFF and WEBSTER—ALLISTON, SMITH, LOCK, and ALLISTON—Solicitors.