[11th *March*, 1845.]

JOHN HAMILTON, Bleacher, Paisley, *Appellant*.

JAMES WATSON, Cashier to the Glasgow and Ship Bank Company, *Respondent*.

Cautioner.—A bank requiring security for a cash credit is not bound to disclose voluntarily to the proposed surety the particular application intended to be made of the money to be advanced on the credit.

IN 1835, Peter Elles, merchant in Glasgow, obtained from Carrick, Brown, and Co., carrying on business as bankers in Glasgow under the firm of "The Ship Bank," a cash-credit for 750*l*., on the security of a bond for that amount by himself, David Anderson, Alexander Dewar, and James Elles.

On the 24th March, 1835, the whole of the credit was drawn out. Alexander Dewar having died, the bankers, in December, 1835, wrote Elles, requesting that "the credit might either be "paid up, or renewed with additional security." Some other communications took place in regard to additional security, which went off without anything having been done.

In July, 1836, Carrick, Brown, and Co. made an agreement with the Glasgow Bank Company that the business of the two banks should be merged together, and carried on under the firm of "The Glasgow and Ship Bank Company."

This was accomplished by a deed bearing date the 19th of July, 1836, between Carrick, Brown, and Co., of the first part, and the Glasgow Bank Company of the second part, whereby it was agreed, among other things, as follows:—"In consideration "of the sum agreed to be paid, and obligations undertaken by "the said second party as after specified, the said first party bind "and oblige themselves and their foresaids, to transfer and convey "from them to the said second party, the whole banking business "and establishment of the said first party, and their whole

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" property, bonds, personal and heritable, deposit-receipts, bills,
" notes, and other obligations and securities, (under the exception,
" reservation, and provisions after mentioned,) together also
" with the good-will of their said banking business, and the
" whole rights, privileges, and advantages thereof, as presently
" enjoyed by the said first party as a banking concern, in any way
" or manner whatsoever; all to be henceforth enjoyed and peace-
" ably possessed by the said second party, in terms of the contract
" of copartnership; with full power, warrant, and authority, to
" the said second party to re-issue the bank notes of the said first
" party, so long as they shall judge it expedient so to do, and to
" operate payment of the bonds, bills, and others due to the said
" first party, (under the provision after written,) as fully and
" freely in all respects as the first party could do themselves:
" And the said first party farther bind and oblige themselves and
" their foresaids to hand over the said bonds, bills, and others
" held by them, to the second party, and to indorse and guarantee
" the payment of such of them as the second party shall, within
" one month from the date of these presents, require them to
" indorse and guarantee; and likewise to grant, execute, and
" deliver such dispositions, conveyances, and other writings as
" shall be necessary for divesting themselves of, and for investing
" the said second party in the premises in the most ample manner."

" In consideration of the obligations before-written, and as
" part of the stipulated price, worth, and value of the same, the
" said second party hereby bind and oblige themselves and their
" foresaids, at one and the same time with receiving the indor-
" sations, transfers, and conveyances aforesaid, to grant, assign,
" and transfer to the said Michael Rowand, for himself, and as
" trustee for the other partners of the said company of Carrick,
" Brown, and Company, according to their respective interests in
" the same, as fixed by their present contract of copartnership;
" and failing the said Michael Rowand by death, to Alexander
" Galloway, Junior, accountant to the said Ship Bank Company,

" as trustee for the said partners, 200 shares in the original
" stock of the said Glasgow Bank Company, amounting, at the
" agreed rate of 160*l.* per share, to the sum of 32,000*l.* sterling:
" and it is hereby provided and declared, that the first party
" shall, in their option, have right to draw the dividends payable
" on the said 200 shares of stock to be transferred to them as
" aforesaid, for the six months from the 30th day of June last to
" the 1st day of January next, and in time coming thereafter; or
" if, on or before the expiry of the said six months, the said
" Michael Rowand, failing whom, the said Alexander Galloway,
" Junior, shall intimate the desire of the first party, or any of
" them, to draw their proportions of the said 32,000*l.* in money,
" the second party bind and oblige themselves and their foresaids
" in that event to pay such proportions accordingly to the said
" Michael Rowand, failing whom, to the said Alexander Gal-
" loway, Junior, as trustees foresaid, and that on demand, on the
" expiry of the said six months, with interest thereon at the rate
" of four per centum per annum, from and after the said 30th
" day of June last, and until payment."

" The second party bind and oblige themselves and their
" foresaids, to take up, pay, and retire the whole notes, deposit-
" receipts, and other obligations of the said first party now cur-
" rent, as well as the sums at the credit of the individual partners
" of the said Ship Bank Company in their respective stock
" accounts, the particulars of the said obligations, sums, and others,
" and of the assets placed against the same by the first party,
" being stated in their balance sheet, docqueted by the said Mi-
" chael Rowand and Robert Findlay as relative to these presents."

" If the second party shall decline to accept any of the bonds,
" bills, and other obligations, due and indebted to the first party,
" and to be conveyed by them as aforesaid, at the full value of
" the same, such bonds, bills, and other obligations shall remain
" with the said Michael Rowand, failing whom the said Alex-
" ander Galloway, Junior, as trustee aforesaid, for the period of

"two years from and after the date of these presents, during which "period the said Michael Rowand, failing whom the said Alex-"ander Galloway, Junior, shall be at liberty to exercise his own "discretion in recovering payment of the same, and shall pay to "the second party interest at the rate of three per centum per "annum on the amount thereof, and at the expiry of the said "two years the first party shall be bound and obliged to pay to "the second party the amount of the said bonds, bills, and other "obligations, so retained as aforesaid, on which payment being "made, the said bonds, bills, and other obligations, shall remain "the property of the first party."

Part of this arrangement was, that Rowand, the secretary, and Galloway, the accountant of Carrick, Brown, and Company, should be continued in the service of the united company. The union of the two banks was intimated to the public by an advertisement in the public papers of the 30th July, 1836.

On the 12th of August, 1836, a letter signed by Carrick, Brown, and Company, was sent to Peter Elles in these terms:—

"Sir,—It being deemed necessary, in consequence of the "junction of this bank with the Glasgow Bank, that the bonds "of credit, and other obligations with these respective establish-"ments be either called up, or renewed in the name of the new "firm, I am directed to intimate to you, on behalf of the Ship "Bank, that no farther operations can be allowed on your cash-"credit with them for 750*l.*, and that the balance due by you "under said credit, must be paid up, on or before the 1st Sep-"tember next. Waiting your reply, we are, &c."

Elles answered this letter by proposing to give a new bond with the same sureties, substituting his brother Malcolm Elles, a merchant in Oporto, for Dewar, deceased. On the 25th of August, Elles received a reply in these terms:—"I have sub-"mitted your letter of the 22nd to the bank company, and am "desired to say that they decline at present giving the credit "requested." Elles then proposed the addition of the appellant

to the other sureties offered by him. On the 29th March, 1837, while as yet nothing had been done on this proposition, a letter by Galloway, "pro Carrick, Brown, and Co.," was sent to Elles in these terms:

" Sir,—We beg to inclose statement of your cash-account " with us under credit for 750*l*., balanced of the 24th instant by " 817*l*. 10*s*., in our favour, which we trust will be found correct; " and as we observe that the interest due at last settlement has " not been paid, we desire that it may be attended to, with the " interest due at this time. We are, Sir, your mo. obt. St."

The proposal for giving a bond with the substitution of Elles's brother at Oporto for Dewar, seemed afterwards to have been entertained by the Bank, under the firm of Carrick, Brown, and Co., for on the 2nd May, 1837, a letter from that firm was sent to Elles in these terms:—"Sir, I desire to know whether you " have got back the bond from Oporto, sent there for your brother's " signature. A great deal of delay has taken place in getting " this matter completed. Waiting your answer, we are, &c."

On the 7th of May, 1837, Elles wrote to Galloway, that his brother declined to become the surety, and saying that he could find as good in Glasgow.

On the 10th May, 1837, a letter signed by Galloway, for " Carrick, Brown, and Co." was sent to Elles, in these terms:— " Sir, I have submitted your letter of the 7th to the Bank Co., " and am directed by them to say, seeing that your brother has " declined signing the bond, that they will expect the amount of " your credit to be paid up at the approaching term."

Subsequently, a bond was prepared and sent to Elles, by a letter dated 23rd August, 1837, and signed by Carrick, Brown, and Co., in these terms:—" Sir, We enclose the bond for signa- " ture; please get it signed at the pencil-markings, and, when " finished, hand us a note of the dates of subscription, and desig- " nation of the witnesses. We are, &c."

All the letters from Carrick, Brown, and Co., were written

from the office in which the business of the Glasgow and Ship Bank was carried on.

On the 6th of October, 1837, the bond, which was in favour of "the Glasgow and Ship Bank Co.," was signed by Elles and his sureties, the appellant being of the number. Its recital was in these terms:—"We, Peter Elles, manufacturer, "Glasgow, sole partner trading there under the firm of Elles, "Hutcheson, and Company, manufacturers, Glasgow; David "Anderson, manufacturer, Glasgow; the Reverend James "Elles, minister, Salt-coats; and John Hamilton, bleacher, "Blackland Mills, near Paisley, considering that the company "carrying on business in Glasgow as bankers, under the firm "of the Glasgow and Ship Bank Company, have agreed to "allow us credit on a cash-account, to be kept in the books "of the said bank company at their office in Glasgow, in name "of the said firm of Elles, Hutcheson, and Company, to the "amount of 750*l*. sterling, on our granting these presents." And it bound the parties to pay the sum of 750*l*., "or such part or "parts thereof as shall appear to be due to the said Glasgow "and Ship Bank Company, on the said cash-account to be kept "in their books in name of the said firm of Elles, Hutcheson, "and Company, as aforesaid, upon their drafts or orders on, or "receipts to the said Glasgow and Ship Bank Company, or the "cashier or cashiers, manager, or other officer or officers for the "time acting for behoof of the said banking company, or upon "the drafts or orders or receipts to the said banking company, "or their cashier or cashiers, manager or other officers, of any "person or persons having letter or other sufficient written "authority of the said Elles, Hutcheson, and Company, in virtue "of the aforesaid credit, and also such sum or sums of money "as the said Elles, Hutcheson, and Company shall have become "liable, or stand engaged for, or be indebted, resting, and owing "to the said bank company, by or on account of any bills, "promissory-notes, letters of credit, guarantees or other obliga-

" tions, or in any other manner of way whatsoever, but so as " not to exceed in all the foresaid sum of 750*l.* sterling of " principal, over and above what of the proper cash of the said " Elles, Hutcheson, and Company, may happen to be lodged in " the said cash-account;" and declared, that notwithstanding any change which might take place in the firm of the Glasgow and Ship Bank Company, the obligation should continue in force, " so long as the said Elles, Hutcheson, and Company shall con- " tinue to operate on the said credit, and to transact business " with the said banking company as for the time constituted."

It appeared from evidence not disputed by either of the parties, that the Glasgow Bank Company, in exercise of the option given to them by the deed of arrangement with Carrick, Brown, and Company, had declined to accept of debts and obligations owing to the latter firm to the amount of 349,961*l.* 15*s.* 6*d.*, and one of these debts was the amount owing by Elles upon the original cash-credit obtained by him from Carrick, Brown, and Company. The amount owing upon the credit, stated in Carrick, Brown, and Company's letter of 27th March, 1837, to be 817*l.* 10*s.*, continued owing, and, with the addition of interest to 13th October, 1837, was 838*l.* 7*s.* 1*d.*

On the 13th October, 1837, Elles drew out a draft for 750*l.* upon the credit which he had obtained from the Glasgow and Ship Bank. This draft, together with a sum of 88*l.* 7*s.* 1*d.* in cash, making together the balance due on the original cash-credit, he handed to the teller of the bank-office, in which the business of the Glasgow and Ship Bank was carried on. Entries of the transaction were thereupon made in the books of the Glasgow and Ship Bank, and of Carrick, Brown, and Co. In the former, Elles's account was debited with 750*l.* as drawn out, and in the latter his account was credited with 837*l.* 8*s.* 1*d.* as having been paid. And at the same time the original bond for the cash-credit with Carrick, Brown, and Co. was cancelled and delivered up to Elles.

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In November, 1840, the Glasgow and Ship Bank gave the appellant a charge upon the bond of the 6th October, 1837, for payment of 818*l.* 7*s.* 3*d.*, principal and interest, which was subsequently restricted to 409*l.* 3*s.* 7½*d.*, in consequence of a payment of the same amount from another of the sureties in the bond.

The state of the account by which the balance charged for was brought out, was shown by the following transcript of the account:

Cr. £750.

Dr. Messrs. Elles, Hutcheson, and Co., in Account with the Glasgow and Ship Bank Co. *Cr.*

Date		£	s.	d.	Date		£	s.	d.
1837.					1837.				
Oct. 13.	To cash, per dft.	£750	0	0	Oct. 31.	By cash, .	£200	0	0
Nov. 2.	To . . .	50	0	0	Nov. 1.	By . . .	90	0	0
3.	To . . .	240	0	0	20.	By . . .	40	0	0
21.	To . . .	20	0	0	1838.				
22.	To . . .	20	0	0	April 3.	By . . .	150	0	0
1838.					July 12.	By . . .	400	0	0
April 4.	To . . .	150	0	0	18.	By . . .	60	0	0
July 13.	To . . .	400	0	0	23.	By . . .	90	0	0
19.	To . . .	60	0	0	Sept. 18.	By . . .	170	0	0
24.	To . . .	70	0	0	21.	By . . .	100	0	0
26.	To . . .	20	0	0	Oct. 3.	By . . .	50	0	0
Sept. 19.	To . . .	170	0	0	5.	By . . .	50	0	0
22.	To . . .	90	0	0	Nov. 27.	By . . .	100	0	0
Oct. 9.	To . . .	40	0	0	30.	By balance, .	787	6	7
10.	To . . .	70	0	0					
Nov. 30.	To interest, .	37	6	7					
	To cash, per dft.	100	0	0					
		£2,287	6	7			£2,287	6	7
Nov. 30.	To balance, .	£787	6	7	1839.				
1839.					Jan. 22.	By cash, .	£ 37	6	7
Mar. 5.	To cash, . .	150	0	0	Mar. 4.	By . . .	190	0	0
6.	To . . .	40	0	0	April 19.	By . . .	100	0	0
April	To . . .	100	0	0		By balance, .	818	7	3
Oct. 15	To interest, .	29	6	2					
1840.									
Oct. 15.	To do., . .	39	1	1					
		£1,145	13	10			£1,145	13	10

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The appellant presented a suspension of the charge given him, in which he assigned the following reasons for the relief he asked:

" *Reas.* 14. At the time the complainer was induced to sign " the bond of caution, he was not aware that Peter Elles was " indebted either to the Ship Bank, or the new concern, to any " extent, and he was entirely ignorant that either of them had " claims against him exceeding the amount of the credit for 750*l.*, " which had been long past due, and for which repeated demands " had been made for payment, without effect. Neither was the " complainer aware, at the time he signed the bond, that Peter " Elles's brother had declined to become cautioner for him. " The chargers concealed all those circumstances from the know- " ledge of the complainer; and had he been aware of them, he " would not have become a party to the bond.

" *Reas.* 15. By the terms of the bond, the complainer and " the other obligants did not become bound, or intend to become " bound, for the amount of any cash-account or other debt " contracted by Elles previous to its date. On the contrary, the " bond was granted merely as a security for new advances to be " made to Elles by the Bank, to enable him to prosecute his " business; and it was upon this understanding that the com- " plainer was induced to become a party to the bond. The " chargers never informed the complainer of the real object for " which the cash-credit was intended to be applied by them; and " had they made a full and fair disclosure of the nature of their " claims against Elles, and the purposes for which the bond was " to be applied, he would never have signed it.

" *Reas.* 16. All the correspondence and negotiations with " Elles, as to the settlement of the old account, and the granting " of the new credit, were conducted by Mr. Rowand and Mr. " Galloway, and others acting for the new company as well as " the old, in the premises in Glassford-street, where the business " of the new company was carried on. The chargers had ac- " quired right to the old account, and the business of the old " company merged in the new concern.

" *Reas.* 17. Whether the chargers had or had not acquired " right to the old account, they were well aware that the new " credit was to be granted and taken for the purpose of paying " off the old account, of which payment could not otherwise be " got. Accordingly, the chargers at once placed the whole " amount of the new account to the credit of the old account, or " it was so placed with their knowledge and approbation, with- " out the money ever having been paid to Elles. The object of " the chargers in this transaction was to make the complainer " liable, not for any new credit to be granted to Elles, but for " an old debt due by him previous to the date of the bond. This " was done without the complainer's knowledge or consent; and " no intimation of any kind was made to him when the amount " of the credit was exhausted by its being placed to the debit of " the new account, and to the credit of the old. It was not " till Elles had died insolvent that any communication was " made by the chargers to the complainer; and the circum- " stances above condescended on as to the nature of their trans- " actions with Elles have only recently come to the knowledge " of the complainer."

The respondents, while they did not admit the appellant's allegations, did not allege that they had made any communication to him of any kind in regard either to the original cash-credit, or the granting of the new one.

The appellant pleaded the following pleas in law:

" I. As Peter Elles was largely indebted to the bank under a " former cash-account, and had been repeatedly called upon to " make payment without effect, and as it was well known to the " chargers that he was unable to discharge this debt, and that his " brother had refused to become security for him, they were " bound to disclose these circumstances to the complainer at the " time he signed the bond charged on; and not having done so, " he is entirely liberated from his obligation.

" II. By the terms of the bond, the complainer and the

" other obligants only became bound for prospective advances to
" be made to Peter Elles, or Elles, Hutcheson, and Company,
" and not for any debt or cash-account previously contracted; and
" as the balance claimed by the chargers has arisen entirely from
" applying the new credit towards payment of the old cash-
" account, they are not entitled to recover any part of it from the
" complainer.

" III. At all events, as the complainer was induced to sign
" the bond, in the belief that Peter Elles was not indebted to the
" bank, and that the cash-credit was intended to be applied for
" new advances, to enable him to prosecute his business as a
" merchant, and as this was well known to the chargers at the
" time he signed the bond, they were bound to acquaint him with
" the nature of their claims against Elles, and the true purpose
" for which the credit was intended to be applied; and having
" failed to do so, they have no recourse against him.

" IV. The business of the Ship Bank having been merged in
" the new concern, who acquired their debts; and all the corre-
" spondence and negotiations as to the settlement of the old
" account and the granting of the new credit having been con-
" ducted by Mr. Rowand and others, acting on behalf of the
" new company as well as the old, the chargers are bound by
" their proceedings, whether the old account was transferred to,
" or acquired by the new concern or not.

" V. Generally, the claims of the chargers, so far as they are
" directed against the complainer, are illegal and unwarrantable;
" and the charge ought to be *simpliciter* suspended."

The respondents, on the other hand, pleaded as follows:

" I. The complainer, as an obligant in the cash-credit bond
" in question, is bound to repay the respondents whatever sums
" were drawn by Elles, Hutcheson, and Company under that bond.

" II. The sum charged for having been *de facto* drawn by
" Elles, Hutcheson, and Company under the bond in question,
" the complainer is bound in reimbursement thereof.

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"III. The plea stated by the complainer in defence against "the charge, with regard to the *application* of the money after it "was drawn by Elles, Hutcheson, and Company, is irrelevant "and insufficient, inasmuch as this application, whatever it might "be, would not affect the liability of the cautioner for sums "actually drawn under the cash-credit.

"IV. The alleged application of the money is in itself of no "force to affect the complainer's responsibility.

"V. There is no sufficient ground set forth on which the "bond in question can be held to have become void against the "complainer. At all events, any plea going to set aside the bond "as from the first, could only be competently stated in a formal "process of reduction.

"VI. Generally, there is no ground of defence against the "charge given to the complainer, either relevantly stated or "truly existing."

The Lord Ordinary (*Cockburn*), on the 1st March, 1842, pronounced the following interlocutor, adding the subjoined note:

"The Lord Ordinary having heard parties and considered the "process, repels the reasons of suspension; finds the letters "orderly proceeded, and decerns: finds the chargers entitled to "expenses, appoints an account thereof to be given in, and when "lodged, remits to the auditor of Court to tax the same and "report.

"*Note.*—There can be no doubt that the general rule is, that "a creditor obtaining, and still more a creditor seeking caution "for his debtor, is bound to behave fairly to the proposed cau-"tioner. The question is, what is fair behaviour?

"*Quoad* the *original* debt the two banks were perfectly "separate parties at first; and under their contract of union they "remained separate, *in so far as this debt was concerned*, to the "last.

"In this situation the chargers were not bound, before "accepting of the suspender as cautioner, to let him know the

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" fact, *that the acceptor owed 750l. to another bank,* assuming
" them to have known this fact. If creditors were obliged to
" tell every intending cautioner of every debt which they know
" that their debtor owes, banks could scarcely ever take any
" cautioner without some such intimation, for almost every
" applicant for a cash-credit has debts. There is perhaps
" not one cautioner out of a thousand who can require to be told
" this.

" Nor is it any objection that the creditor believes that the
" new loan is taken *in order to pay a pre-existing debt,* and that
" he does not tell this to the cautioner. Can a bank not grant a
" cash-credit without telling the cautioner that the credit is pro-
" bably, or even certainly, taken with the view of diminishing
" the debts of the person who gets it. The creditor has nothing
" to do with the motives of the borrower.

" As little is it an objection that the bank saw the whole sum
" in the credit drawn out, and applied by the borrower, even
" under its own eye, and by a transfer in its own books, to pay
" the former debt. It has no concern with the *use* which the
" borrower may make of his own money.

" These circumstances, taken each by itself, therefore, or all
" jointly, will not liberate the cautioner. Accordingly the
" suspender does not merely state them as so many substan-
" tive facts; but, *in argument,* he employs them as *evidence* that
" the chargers *knew the debtor was greatly embarrassed,* and con-
" cealed *this* to his injury. But no case of such *undue conceal-*
" *ment* is raised on the record. It is stated, (as in Reason 14th,)
" that the chargers failed to communicate certain detached pro-
" ceedings which they knew had taken place between the debtor
" and one of his creditors, viz., the Ship Bank; but there is *no*
" *general charge of concealment of the debtor's being so distressed*
" *that his state should have been disclosed.* Restricted as the
" charge of concealment is, to a failure to communicate the
" *detached facts sets forth,* the Lord Ordinary thinks it insuffi-

"cient. It merely amounts to this, that the chargers, (who did "not *seek* the transaction or its cautioner,) knew, and did not "announce, that the borrower had a previous creditor, for whose "debt his brother refused to become security; that the new loan "was made for the purpose of paying off this prior debt, and that "the money was actually so applied. If these be brought for- "ward as what the chargers should have disclosed, the Lord "Ordinary does not think that they were bound to disclose "them; if, as *evidence* of further concealment, he does not think "that this evidence, (and none other is offered,) is sufficient."

The appellant reclaimed against this interlocutor, and on the 8th December, 1842, the Court pronounced the following interlocutor:

"The Lords having advised the reclaiming note for John "Hamilton, the suspender, against the interlocutor of Lord Cock- "burn, dated the 1st day of March last, together with the addi- "tional documents since produced, and heard parties procurators "thereon,—refuse the reclaiming note, and adhere to the inter- "locutor reclaimed against and decern: find the chargers entitled "to the additional expenses incurred by them."

The following opinions were delivered by the Judges at pronouncing this interlocutor:

"LORD JUSTICE-CLERK.—The first matter in this case is to "ascertain what are exactly the questions which are raised.

"These questions appear to me to be,—1. Whether the trans- "action for obtaining the new bond was managed by those for "whose conduct the United Bank are in the circumstance liable, "and whose knowledge must be regarded as the knowledge of "the United Bank? 2. Whether the true object of granting "the new bond was not solely a device to obtain payment of the "old debt, by getting the name of a new cautioner? and whether "the bank *sought* the transaction, (to use a phrase of the "Lord Ordinary,) in order to obtain payment of a bad debt? "3. Whether, on the part of the debtor, the old cautioner and

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" the bank, it was not perfectly understood that the sum was " not to be at the command of Elles, to be drawn out in any " way he chose, but was to be drawn out solely to pay the old " debt,—so that the bond was required, and the credit was " given, exclusively for that object? 4. Whether, it being the " interest of those acting for the bank, and of part of the partners " of the bank, so to pay off the debt, by obtaining a new cau- " tioner, it was fair, honest, and righteous dealing on the part of " the bank, to take the obligation from the cautioner, such being " their object and interest, without communication of the pur- " pose to him,—that question involving the point, whether the " fact was one material for the cautioner to know, and for the " interest of the bank to conceal? I think these questions are " all raised by the record, and the averments of parties, especially " of the bank.

" I regard these as proper Jury questions. There have been " many cases so disposed of in regard to the duties of creditors " and cautioners. One extremely analogous to this was the " case between General Duff and the trustees of the late Henry " Erskine, sent to a Jury by Lord Mackenzie, as to the origin of " the bond of caution granted to them by General Duff, which " he averred was solely to pay off an existing debt,—the question " between the cautioners for an officer of a Montrose bank, and " the bank, as to negligence or concealment. There are various " other instances. One and all of the four questions which I " have stated are to be decided by inferences from facts,—from " the conduct and acts of parties, their relative position, and " motives and interests,—and, above all, on the view of what " was just, honest, and fair in the dealings between the parties. " On these matters, I think a Jury will come to a better conclu- " sion than we can do, especially on the question, whether the " conduct of the bank was fair and honest? I think the impor- " tance of so dealing with these questions arises eminently from " the superior fitness of a Jury to say, whether the acts com-

" plained of in such a case were fair and honest dealing between
" the parties. Here it is that I think the element of the judg-
" ment and opinion of a Jury is so important. Their estimate of
" what is fair and honest between man and man is always more
" direct, plain, and simple than the views of Courts of Justice,
" who are apt to give too much weight to unsubstantial distinc-
" tions as to the position of parties,—to notions of what men of
" experience would have inquired into, and of the precautions
" they would have taken, and to the effect of separate entries in
" separate books and accounts, when the parties truly are all
" one. Practically, and in plain language, I look on this as just
" a question, whether, taking advantage of the names and un-
" substantial distinction of the two banks, wholly unsubstantial
" in *this* case, this was not just a juggle on the part of the bank
" officers, with the knowledge and aid of the debtor, and of the
" old cautioners, to entrap Hamilton into an obligation to pay
" off Elles's old debt,—a juggle in which the real object and
" manifest device ought to be kept solely in view, not the forms
" and names of two establishments, two bonds, two apparent
" credits, and operations in figures in two different accounts.

" I think the common sense and feelings of right and wrong
" of a Jury will lead them in such a case to the truth much more
" safely than we are likely to arrive at it.

" But I must repeat, that their estimate of, and judgment on
" the case, I regard as a most important element in the right
" administration of justice in such a cause. In an action on the
" bond, this must have gone to a Jury in England, as Lord
" Ellenborough said to Lord Eldon, in the course of the case of
" Smith *v.* the Bank of Scotland; and I shall regret if the same
" course is not taken here. If it is thought that we are to decide
" it, I must look at the facts and conduct of parties as a jury-
" man, and judge for myself in the best way I can. Attending,
" then, to the facts so far as disclosed, it appears to me,—1. That
" the bank knew that Elles could not pay the debt under the

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" first bond, and had just reason to dread whether the cautioners
" could pay, or had reasons for not pressing the cautioners.
" 2. That that was perfectly known very soon after the union of
" the two banks, when the officers of each became the officers of
" the United Bank, and to parties acting for the United Bank.
" 3. That, accordingly, the debt was rejected by the United
" Bank, as one which they would not take, but which one por-
" tion of the partners thereby became bound to pay to the others.
" The suspender seemed to think it was for his interest to shew,
" that the United Bank took the debt on themselves. I think
" the fact is far more important for him that they rejected it as
" a bad debt, after examination into the assets of Carrick, Brown,
" and Company. 4. That the knowledge of the officers, mana-
" gers, and secretaries at the two offices after the union, and
" their acts, must be taken to be the knowledge and acts of the
" officers of the United Bank, for such they all were; and that
" the separation of chambers is merely part of the juggle they
" are playing off. 5. That, accordingly, so early as 12th August,
" 1836, at the one office, and in the name of Carrick, Brown,
" and Company,—but, in truth, with the sanction and authority
" of the United Bank,—the following letter is written to Elles:—
" 'It being deemed necessary, in consequence of the junction of
" 'this bank with the Glasgow Bank, that the bonds of credit,
" 'and other obligations with these respective establishments, be
" 'either called up, or renewed in the name of the new firm, I
" 'am directed to intimate to you, on behalf of the Ship Bank,
" 'that no farther operations can be allowed on your cash-credit
" 'with them for 750*l.*, and that the balance due by you under
" 'said credit must be paid up on or before the 1st September
" 'next. Waiting your reply, we are,' &c. This renewal in
" the name of the new firm did not mean solely another paper
" signed by the same parties, that is plain; for, on the two pre-
" ceding pages, there was the demand for a new cautioner, and
" proposals for a new obligant,—and so the answer shews that

" Elles perfectly understood it. 6. That in writing this letter,
" these officers acted in their real character, with the powers of
" the Old and New Bank, and uniting these two for their own
" interest, *i. e.*, for the interests of the partners of the Old, now
" one half of the New Bank. 7. That the proposal originated
" with the bank officers, and must be taken as the joint act of
" the Old and New Bank; the latter lending themselves to the
" former, just in respect of the plain interest they had to relieve
" their own partners of the necessity of paying this debt.
" Carrick, Brown, and Company were no longer entitled to
" carry on any banking business. The new bond which, by
" letter in their name, was proposed, was for a credit with the
" new company, and in Rowand's character as manager for the
" new company, in order to pay off what one half of the new
" company owed to the other half. 8. That the plan was one
" to pay the old debt; not to give new and additional credit.
" 9. That it was a plain part of that plan on the part of the
" bank to get a new *cautioner*,—for they declined to give the
" credit till they got a new cautioner,—knowing Elles to be
" worth nothing, and doubting the old cautioners. 10. So fully
" was the matter understood, that neither Elles nor the bank
" ever dreamt of *attending to the names of the New Bank as*
" *separate from the Old*, even as to the new credit. *The bank* is
" used even when the New Bank was in view. 11. The whole
" thing is managed in the name of Carrick, Brown, and Com-
" pany; nay, the letter, sending the bond for a new credit with
" the New Bank for signature, is in the name of Carrick, Brown,
" and Company, though that was the act of the New Bank, if
" the difference between the two establishments had in truth, in
" substance, been attended to, or had been of practical mate-
" riality in the case. 12. Elles had made no proposal to the
" United Bank, nor received any letter agreeing to give new
" credit from that New Bank, on the theory that they were
" separate. 13. Then there are only two suppositions: (1.) That

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" these officers of the United Bank acted for the latter as well
" as for the old throughout, so that, for their conduct, acts, and
" and knowledge, both are equally responsible; or, (2.) That
" the form was gone through of Carrick, Brown, and Company,
" saying to the United Bank,—Here you have rejected this debt
" of Elles,—he cannot pay,—we doubt, or don't wish to press
" his cautioners,—it may fall on us, who are you; now, will
" you, being us in a different character, take a new bond with a
" different obligant, who shall know nothing of the matter, and
" so let us pay the debt by carrying it at once to his account?
" Either supposition makes the chargers answerable for the con-
" duct of those who carried through the transaction. 14. That no
" additional obligation for Elles was undertaken by the old cau-
" tioner; and that he knew perfectly that the amount of this
" new bond was to be applied to pay off the old to his own relief,
" and to the account of the new cautioner; and would not have
" signed on any other footing, or have incurred a second obliga-
" tion for other 750*l.* Hence, as to him, the transaction consti-
" tuted a form, a mere form, but one by which he knew that he
" would at once be relieved of half his existing obligation.
" 15. That the bank would not have given Elles the money in
" any other way, or for any other purpose; and would have
" broken faith with Anderson if they had, even if their own
" interest had not coincided with his. This is, I think, an im-
" portant point of fact,—so the bank felt by their statement on
" the record; and, I own, my inferences from the whole charac-
" ter of the facts is, that the bank would have laughed Elles to
" scorn if he had proposed anything else. 16. That the officers
" and partners of the United Bank,—all who had been of
" Carrick, Brown, and Company, and the others indirectly, as
" interested in relieving the former,—had an interest in paying off
" the old debt by the name and obligation of Hamilton, and, in
" fact, were paying their own debt; and, even on the most
" favourable view, that the New Bank, knowing the fraud, lent

" themselves to the deception practised on Hamilton. 17. That " they had an interest to conceal the character and object of the " transaction, and the end in which alone the plan of the new " bond originated. 18. That the fact so concealed, and which " the bank had an interest to conceal, was a material fact for " Hamilton to know, as I am confident he would not have " signed the bond if the fact had been disclosed. These eighteen " propositions, in fact, I think, are made out fully to my satis- " faction; as a juryman, I should so specially find.

" Then look to the result. As soon as the bond is signed, an " operation goes on simultaneously in the books of the two banks, " wiping the debt out of the one, and entering it in another " account in the name of the New Bank against Hamilton, for " whose obligation alone the whole thing was gone through. Is " this honest? Is this fair and righteous? I think not. I think " Hamilton was, by an act to which the New Bank were parties, " of which, through their officers, they were cognizant, and in " which a large portion of their partners had an interest, unfairly " entrapped by undue concealment into a transaction, which, if " he had not been deceived, he would not have entered into, and " of which he ought to be relieved. As to the duty of com- " munication, I apprehend the principle, so far as it need be " stated for this case, is very simple: That wherever there is, on " the one side, an interest to conceal; wherever there is the " knowledge of an unfair end by parties with whom the creditor " is either identified, or whom he desires and has an interest to " aid and favour,—there is also the duty of communication; " and, on the other side, the right to expect such communication. " The duty of communication is an obligation in point of fair- " ness and honesty. That is its legal test in such a case as the " present.

" I give no opinion on a variety of cases put to us, as to what " might be competent as to paying off other debts by operations " on new accounts. 1st, These cases are not before us. 2nd, The

" slightest variation in the facts may take such cases wholly out
" of the character which belongs to this transaction; in particu-
" lar, whether the bank sought the transaction? The Lord
" Ordinary says they did not. Now, they actually proposed it,
" and used demands for payment in order to obtain it. I think
" they sought it. 3rd, The question in all such cases will still
" be,—1. Whether the transaction is honest? 2. Whether it is
" in the usual course of business? And that, as in the important
" case of Blincow, in this Court, is a proper Jury question.

" This leads me to advert to the point, much pressed upon
" us, as to the frequency among bankers of transactions said to
" be the same as the present. 1. I see no averment on record as
" to any practice of bankers on the subject; and it would have
" been very strange if there had. 2. If relevantly made, that
" ought to be the subject of trial, and cannot competently be
" introduced into the case in any other way. I think the whole
" matter is plainly irrelevant. The practice of bankers may be
" material as to the rules of business, the ordinary course of
" settling transactions, and many other questions, where they
" have no interest except perhaps that of convenience and regu-
" larity in business.

" But in a question as to the obligation by those taking such
" a bond towards cautioners, I deny that any practice could be
" appealed to in support of a transaction unfair in point of actual
" dealing and open conduct with the particular individual in
" question, or could affect the issue raised in the case.

" In such a case as this, I must regard as wholly inadmis-
" sible in judicial consideration, any practice, or rather I should
" say, practices of bankers. It would be most hazardous to
" admit questions of this character to be influenced by what
" bankers *may do* for their own interest, and to avoid loss. They
" have a great deal in their power in circumstances similar to
" the present: the parties are greatly under their control,—they
" run such risks that the temptations they are exposed to are

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" very great to get the means of covering themselves against " loss; and the reported cases we have had as to what *will* be " done, seemingly as matter of course, in many such cases of " undue concealment or gross fraud, *e. g.*, Smith *v.* Bank of Scot- " land, the Leith Bank cases, the Montrose Bank, the Perth " Bank, and many others, shew how little dependence can " possibly be placed on the practices of bankers. This matter, " then,—not raised on the record, and which if it had, and had " been relevant, must have been duly investigated,—I hold it to " be quite incompetent to refer to. If it were proved to me that " there were five hundred cases where banks had, in circum- " stances similar to the present, got new cautioners involved in " obligations in order to pay off bad debts, which the banks " could not otherwise recover, I should only say it was high " time that courts of justice should correct the morality of " bankers.

" I am very well aware that there was great room for the " observation, in the House of Lords, that the Scotch Courts had " mistaken some of the original observations made in that House " as to the duties towards cautioners; and that some judgments " had been pronounced which relieved the cautioner from the " responsibility which he undertook, in truth, in the very cases " for which his cautionary obligation was undertaken, viz., con- " tinued misconduct, negligence or embezzlement by the obligant.

" But the original case in the House of Lords, Smith against " the Bank of Scotland, gave no countenance whatever for the " mistake that certainly was fallen into; for Lord Eldon in " that case, with his usual caution and great discrimination, " drew the distinction most pointedly between the facts which " occurred before the bond was granted, and during the period " to which it applied. In that case he held it to be relevant, " that, though the bond applied to past transactions, yet it " *was truly intended* to apply to a debt previously due and known " to the bank, but not stated to the cautioners.

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" It is said that there is a great difference between this case
" and that of a bank dealing with the cautioners for a bank
" agent. I see none as to the *principle* applicable to the case,
" though great distinction in the facts that may prove a case
" *against* the bank. Wherever it is the interest on one side to
" conceal facts material for the other to know, and where, owing
" to such conduct, the party is led into an obligation which he
" would not otherwise undertake; *there* I think was the duty
" and necessity of communication, and there also was undue
" concealment.

" Accordingly, both Lord Eldon and Lord Redesdale decided
" the case of Smith on the broad ground of honest and fair deal-
" ing. And so, when it came ultimately before this Court on
" the last occasion, on the facts allowed to be proved by the first
" judgment of the House of Lords, in 1813, the Court proceeded
" upon the general ground I have stated, and not on the pecu-
" liarity that the bond was for an officer of the bank. The Lord
" Justice General held, that if the bond was truly *intended* for a
" past debt, it was relevant to inquire if that material fact was
" concealed. So also, in a very instructive opinion by Lord
" Pitmilly, he rests his judgment wholly on the principle I have
" stated. He says,—' The legal principles which must guide us
" ' in such a case, are very briefly and emphatically described in
" ' the judgment of the House of Lords. Is the bond liable to
" ' reduction, as "unduly obtained by concealment or deception?"
" ' understanding by " concealment," (as explained in the speech
" ' of the Lord Chancellor,) the concealment of facts which, with
" ' a view to the transaction in question, it would be for the ad-
" ' vantage of the one party that the other was ignorant of. Let
" ' these principles be applied to the present case.' And in an-
" other part of his opinion, he quoted the well-known judgment
" of Lord Mansfield, in the insurance case of Carter *v.* Boehn, as
" stating the extent and nature of the duty of communication.
" No one is disposed to go farther than I am in holding, that,

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" after the bond is granted, the cautioners are bound to inquire
" as to the conduct of the party for whom they undertook,
" although even then there are certain duties to be observed by
" the creditor; and I could not have concurred in the judgment
" in the case of M'Taggart, afterwards reversed, and some others,
" the principle of which must be held to be subverted by the
" remarks of Lords Brougham and Cottenham. But the ques-
" tion as to the *manner of obtaining the bond* is perfectly distinct,
" and remains on the principles settled by the case of Smith.

" Whether there has been negligence on the part of the
" creditor, even after the bond was granted, and undue conceal-
" ment of facts known to him during the currency of the obliga-
" tion, which he ought to have communicated, may be very much
" an inference in point of law as to his duties and legal obliga-
" tion. Yet, even *that* question, a much more delicate one than
" any which arises here, has been sent to be tried, as in the case
" of Hill *v.* Birnie, and other cases.

" But the question, whether the bond was at first unduly
" obtained by concealment or deception, is the most purely Jury
" question I can conceive, and one which I think a Jury are
" much better judges of than the Court. That question has been
" frequently entertained in a suspension.

" I am of opinion that this bond was unduly obtained from
" the reclaimer, by concealment or deception, to which the
" chargers were parties, and for which they are in law respon-
" sible."

" LORD MEDWYN.—The view taken of this case by your
" Lordship makes it a most important case indeed. The facts
" are these.—(*His Lordship recapitulated the facts of the case*).—
" The first bond obtained by Elles from Carrick, Brown, and
" Company, is delivered up; the balance under it is paid; there
" can be no longer any claim under it, and the objection that the
" last bond was not to cover any prior debt, but that it was for

" future contractions, and moreover that it should not have been
" paid by the new firm to discharge the debt due to Carrick,
" Brown, and Company, applies as much to Anderson as to his
" co-obligant the suspender.

" These two are the defences urged in the suspension against
" payment, and they must be disposed of according to their own
" merits, and not according to the private view taken of them by
" a party who may be in the same situation as the suspender.
" Now, it is not alleged that the new company insisted upon this
" sum being drawn out and applied to pay the sum due under
" the former bond. It is true that Carrick, Brown, and Com-
" pany had applied to have the amount paid up, and afterwards
" renewed the cash-credit upon getting the additional security of
" the suspender for the new firm, the debtor apparently not being
" able to pay it up. But was there anything objectionable in Elles
" making this draft, and applying it to discharge the old debt?
" I cannot see that there was. It was said that the obvious
" meaning of such a transaction is to apply to future transactions
" for the benefit of the debtor, to be used by him as a fund of
" credit, which may enable him to carry on his business, and by
" his success in his future dealings, to afford the means of dis-
" charging the debt contracted under the cash-credit; and that a
" cautioner is entitled to presume that this will be the course of
" dealing under it. Now, I do not apprehend that there is any
" such understanding as to the use to be made of the credit
" obtained under such a cash-bond, that the party cannot apply
" the sum he may draw to pay off an old debt, or that it is illegal
" for him to do so, even if it be to pay an old debt to the
" bank who grants the credit, or if applied to pay a debt to a
" party connected with, or identified with the bank. If the
" cautioner wished to limit the application of the money obtained
" under such a bond, he would have to stipulate this with his
" principal, and secure himself by some private obligation or
" penalty against failure to comply with it. For I hold that the

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" bank is neither bound nor entitled to inquire into the applica-
" tion of the drafts made upon a cash-credit which they may
" have granted; that the party is the best judge of how he ought
" to apply his cash-credit, and that, having granted the credit, the
" bank is bound to answer the draft without inquiry. In like
" manner they cannot be called upon to refuse payment if he
" wishes to apply it in paying a debt due to themselves. This
" may be the most judicious use to make of it. The bank might
" charge upon the bond, and so affect the debtor. The bank
" may be the only creditor who has diligence ready. It may be
" of the utmost consequence to get this creditor's interest removed
" out of the way. This may be the only obstacle to his carrying
" on a lucrative trade. In fact, in this case, it was intimated,
" by a letter of 12th August, 1836, that the new bond being to
" be substituted for the old one, it was to be delivered up, and
" the old account closed, and this must be done whenever cash
" cannot be immediately paid by an operation in the books of the
" bank, debiting the new account with the amount, and crediting
" the old account with the same, and so closing the former
" account. This is the ordinary course of dealing even when
" both bonds are to the same bank, and where the old is no
" longer to be operated on, but delivered up to the obligants in it.
" It was exactly what was done here; and I see nothing in this
" operation on the part of the bank which the cautioner can
" object to.

" But, again, it is said, that the bank did not give the sus-
" pender all the information they should have done; that they
" should have mentioned the particulars of his debt under the
" former bond. Now, with great submission, I do not hold that
" the bank was bound, or entitled even, to give such information
" to the proposed cautioner. A banker does not, and ought not
" to hold himself at liberty to give information of the state of any
" customer's transactions to any inquirer. And if any person
" should come to a bank, and state that he had been applied to

" by such a person to be cautioner for him to the bank, and " that he wished to know how his account stood, or whether he " was regular or otherwise in his dealings with the bank, the " banker would not feel himself entitled to give this information, " without due authority from the party; and he would desire the " proposed cautioner to bring this authority to him, and he would " then be bound to furnish all the information in his power, and " a failure to do so correctly would unquestionably liberate the " cautioner. It is easy to see how easy it would be for any one " who would wish to obtain information as to the credit and " dealings of a trader, to pretend that he was to be cautioner for " him, and the disclosure might be most prejudicial. It is not " alleged that, in the present case, the suspender applied for any " such information, or ever made any inquiry even at the prin- " cipal, still less ever came in contact with the bank, during the " negotiation with the debtor, which resulted in his undertaking " to be bound in this cash-credit bond. The transaction was just " the ordinary one—the bank called upon their debtor to pay up " the balance due, or find additional security. He chose the " latter alternative, and proposed the suspender,—he is accepted, " —and the debtor gets the bond subscribed by him without the " bank ever having any communication with him. The cau- " tioner is presumed to have made all the inquiries he thought " necessary of his principal, because he requests none from the " bank, and the bank is entitled to rely that this is so, and is safe " in answering the draft of the principal on the cash-account, and " in applying it in the manner he desires.

" The case of a bank agent is quite different from the present, " and the principles which have been applied to that state of " facts, and that relation between the parties, must not be held " to regulate such a question as this. The bank agent is the " servant of the bank, and in all the cases which have occurred " where the cautioner has been liberated, the misconduct of the " agent has been such that the bank ought to have dismissed

" him. If the obligation in the bond is unlimited, as is often
" the case, the debt allowed to be incurred has arisen from gross
" negligence on the part of the bank, and to an extent far beyond
" what could have been contemplated; and even when the obli-
" gation is limited, the excess of debt beyond this sum has
" always been so great as to preclude all hope of the agent being
" able to retrieve his affairs. This has always been an element
" in these cases, and a most important element, as greatly affect-
" ing the risk and responsibility of the co-obligant; and, accord-
" ingly, in such a case it has been held that the bank ought to
" have given information as to how the agent stands with the
" bank, and the course of his management, which requires this
" additional security, otherwise that the bank does not act fairly
" with the co-obligant, and the contract binding him shall be
" void. The agent will not be disposed to expose his delin-
" quencies, and perhaps is not entitled to lay open so much of
" the bank's affairs. The bank, on the other hand, is held bound
" to explain the state of their agent's transactions in their busi-
" ness. It is their own account, and they betray no confidence
" in explaining it to the proposed cautioner before he becomes
" bound for malversations, which the negligence perhaps of the
" bank has permitted to a great amount, and of which it would
" be unjust if the bankers would relieve themselves by involving
" an innocent party, by concealing facts which would certainly
" have prevented the obligation being incurred where a hopeless
" undertaking for many thousand pounds, lost irretrievably, is
" incurred. All this plainly distinguishes such a case from the
" present, where the obligation is for a very limited extent;
" where it must be seen that the principal requires credit to that
" extent; and where no inquiry is made except of him, it must
" be presumed that the cautioner chooses to trust his represen-
" tation, that this sum will be useful to him, and leaves it to him
" to apply it in the manner he thinks most beneficial, either in
" discharging an old claim against him,—thus saving his credit

" and enabling him to continue his business unembarrassed with
" it,—or in using it as a direct fund of credit to operate upon in
" future. I am, therefore, for adhering to this interlocutor."

" LORD MEADOWBANK.—This opinion confirms the one which
" I before held. I cannot doubt that the interlocutor ought to
" be adhered to. Nothing can be more prejudicial than to upset
" the practice of traders as to matters of this sort. And I have
" not a doubt that, in ninety-nine cases out of a hundred where
" a bank credit is renewed, new co-obligants are never informed
" of the state of the principal's previous credits. Many traders
" never suppose that they are entitled to receive such informa-
" tion. When a bank writes to a customer that they will not
" allow him to draw further unless he grants a new bond, in
" most cases it is understood that this is for the purpose of pay-
" ing up the old bond. It would have made no alteration in my
" mind in the present case if it had been the same bank all
" along."

" LORD MONCREIFF.—I will not say that there may not be
" ground for hesitation in this case, from the peculiar position of
" the parties. But I am of opinion that the interlocutor of the
" Lord Ordinary is right in principle, and that there would be
" great danger in departing from that principle.

" The case is that of a simple bond of caution to a bank for a
" cash-credit. It is proposed to the bank that they should grant
" a credit to Elles and Company, upon certain security to be
" found. That bank, the new establishment of the Glasgow and
" Ship Bank, were asking nothing of Elles, but certainly nothing
" of Mr. Hamilton, the party here. He is proposed to them as
" a cautioner, or rather a co-obligant, by a third party, over
" whom they have no control, and they agree to accept of him,
" having no occasion to have any communication with or on
" account of him, except to ascertain that his credit is sufficient.

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" Elles is no servant or agent of the bank, over whose proceed-
" ings they are bound to exercise a superintendence. He is a
" stranger customer, who has happened to do business with one
" of the former companies, and who desires to have a credit with
" the united company.

" The whole theory of the suspender was on the assumption
" that, in such a case, it was the duty of the bank specially to
" communicate with him, and to inform him of every difficulty
" in the circumstances of his principal, Elles. There is a radical
" fallacy in this reasoning. The bank had nothing to do with
" the suspender till he was proposed to them as a cautioner or
" co-obligant, and then it lay with him, not with them, to ascer-
" tain the state of his own friend, Elles, and if he saw cause, to
" make inquiry into his circumstances and his dealings with the
" bank. He was a stranger to the bank. But so was Elles in
" any legal sense, being no servant of the bank.

" I understand it not to be disputed, that the circumstance of
" the bank, or any of its partners, knowing that the person
" asking the credit has other debts, or even that he is taking the
" credit merely for the purpose of liquidating or managing them,
" would be no objection to the validity of the cautioner's obliga-
" tion, though no communication had been made of the existence
" of such debts. The presumption is, that he inquires and is
" informed of all that is necessary for his guidance by the gentle-
" man who tenders him as his cautioner. It would put an entire
" end to this branch of trade if such necessity were imposed on
" the bank. He is an adverse party negotiating with them, and
" in direct connexion with the principal obligant, and ought to
" satisfy himself of every such matter: and indeed it is obvious
" that the bank, imperfect as its information of the circumstances
" may be, would commit a great irregularity if it were officiously
" to intrude a communication on the subject on the friends of
" their customer, at least where no inquiry is made of them. If
" it were made, I doubt if they could without the consent of the
" principal.

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" As this case stands, this is the real state of the matter.
" For it is quite clear, as matter of fact, that the prior debt, for
" paying which it is said this credit was asked, was not due to
" the new bank, the only party here, but to the Ship Bank, as a
" separate concern, and was never assumed as a debt by the
" United Bank ; and it really evinces the consciousness of the
" defender of the importance of this fact, that, throughout the
" record, he tries to withhold any admission of it, and to insinu-
" ate that the debt was fully adopted, although it is now quite
" clear that it was not.

" But would it make any real difference if it were the case of
" a debt due to the bank itself? I think that it would make an
" important difference in the argument, as rendering the plea
" against the bank more plausible or probable. But I am far
" from thinking that, even in that case, it would be sound or
" conclusive; for I believe it to be not a very uncommon occur-
" rence for a bank, who have gone on for a time giving credit to
" a customer, to require security before going further; and it
" would appear a strange thing to me that they should be made
" to forfeit the benefit of any security voluntarily tendered to
" them, merely because they do not ultroneously force upon the
" cautioner proposed a disclosure of all the dealings of his own
" friend, whose condition he is bound to know when he asks
" the bank, on his security, to give the credit asked. This is
" totally and fundamentally different from the case of an officer
" or servant of the bank itself. If such an officer has miscon-
" ducted himself in a way which they know cannot be ascer-
" tained by other parties, they cannot, in dealing with others in
" regard to his responsibility, deceive them by the shew of con-
" fidence in still retaining him in their employment and credit.
" But in the other case, they are merely dealing with a customer
" in apparently solvent circumstances, and it lies with those who
" think him worthy of such trust and credit as to join in solicit-
" ing for him the aid of a bank for the time, to satisfy themselves

" as to the use which he may make of the credit to be given, and " of his general correctness in trade or business.

" The thing which was transacted in the present case is " thought to be very extraordinary. It is no doubt a little pecu- " liar, from the circumstance of the union of the banks, and " the identity of some of the partners of the Ship Bank with " those of the United Bank. But in itself—in its elements—it " is a very ordinary case.

" To judge of this correctly, it is necessary to look closely " to the record. There is no averment of fraud or deception. " Not even that Elles was laid under any obligation to apply " the money to be drawn on credit in any particular manner. " Neither is it averred that Mr. Hamilton had any personal com- " munication with the bank ; that they made any positive repre- " sentation to him, or that he made any inquiry of them. The " utmost of the statement is in Articles 14, 15. In so far as " these articles consist of proper statements of fact, they just " amount to this, that the defender was ignorant that Elles " owed a debt to the Ship Bank, and that the New Bank did " not communicate the fact to him. There is indeed an addi- " tional averment, that the bank did not inform him that Elles's " brother had declined to be cautioner. This appears to me to " render the plea altogether extravagant. The bank would, in " my apprehensien, have done a very improper thing if they had " made any such communication. Mr. Elles was still in good " credit, and carrying on an extensive trade, notwithstanding " that he had not found it convenient to withdraw so much of " his capital from the trade as to pay up the sum due to the Ship " Bank. Was it for the bank to publish to the world what " they might know of this frieud or that, of such a trader, having " for his own private reasons, (perhaps originating in his own " circumstances, and not in any distrust of Elles,) declined to " become security in such a credit? But above all, were they " under a legal obligation to make such a communication under

" pain of forfeiture of their bond, to another friend of Elles who " voluntarily offered his security, and who must be presumed to " have obtained from him all the information which was neces- " sary to guide his judgment? It seems to me that, to suppose " such an obligation would be an entire inversion of the relative " position of the parties. Even on the facts appearing, it was " an account which went on with debit and credit for a very " considerable time. Between the date of the bond and the " 12th July, 1838, 1250*l.* were paid in. What is the case but a very " ordinary one, of a cautioner or co-obligant in such a bond, after " the bankruptcy of the principal and a balance ensuing, object- " ing because he did not know of all his friend's difficulties? " True no credit was given beyond 750*l.*, and there was no " cautioner beyond that. But the credit went on to that amount " till October, 1840. In the case of insurance, the obligation " is the other way. The proposal is by the insured, the obliga- " tion by the insurer."

Mr. G. Turner and *Mr. James Anderson*, for the Appellant.— I. The partners and managers of Carrick, Brown, and Co. became partners and managers in the United Bank. These parties were cognisant of how the original credit had been acted upon, of the demand for payment on additional security, and that the brother of the debtor had refused to become such security.

Moreover the business, including the winding up of Carrick and Co.'s affairs, was conducted in one and the same premises. For all purposes, therefore, the New Bank must be held to have been cognisant of what had passed in regard to the original credit from Carrick and Co., and of the application intended to be made with the money to be advanced upon the new credit. If this were otherwise doubtful, it is made certain by the letters addressed in the name of Carrick and Co., which ask for a renewal of the security for the new firm, and otherwise treating the old and the new firm as having one interest.

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II. The transaction to which the appellant was a party, was giving Elles a cash credit for the carrying on of his business, but the dealings between him and the bank show that this was neither done nor intended, and that the true object of the parties was to pay off what was owing on the original cash credit. The facts, in short, show a precontract between the Glasgow and Ship Bank and Elles, that the money advanced on the credit should be applied to payment of the pre-existing debt due by Elles to Carrick, Brown, and Co. Such a precontract was a perversion of the liability come under by the appellant and ought to have been communicated to him, that he might judge for himself whether he would be a party to it, but no such communication was made to the appellant.

[*Lord Chancellor.*—There is no averment on the record of any agreement as to the particular application of the money.]

The averments are not very precise, but they are equivalent to such an averment; and the facts are proved from which such an agreement is to be deduced. On the 13th October, Elles drew a cheque for the whole amount of the new credit; that cheque he handed to the teller of the Glasgow and Ship Bank, through whom the amount of it was passed to the credit of Elles in the books of Carrick, Brown, and Co. It is impossible to suppose that the Glasgow and Ship Bank could have been ignorant of the intended application. Neither can it be said that they had no interest in the particular application; for looking at the very large amount of obligations which they had an option to adopt or reject as part of the assets of Carrick, Brown, and Co., the amount of which they had given credit for in account, it is evident that they had a very material interest to see to the realization of these liabilities; accordingly, Rowand, who was the manager of the new, as he had been of the old concern, asks a renewal of the security in the name of the new firm. It is proper, therefore, at least, that an inquiry should be allowed, to ascertain how far there was fraud in obtaining the new security

without making the surety aware either of what had previously passed, or of what was intended. But the judgment below was made without any such inquiry, in the face of the existing evidence, which shews that the Bank refused the new credit until they found their hopes of realising payment of the debt on the original credit to be desperate, when, and not till then, they gave the new credit. The injury to the appellant by the course adopted is evident; for in all probability, had he obtained the knowledge which was withheld, he would have refused to give his liability; or, at all events, he might have obtained an assignation to the previous bond under which he could have had recourse against Dewar's representatives; whereas, by the course which was adopted, they had been allowed to go free.

In Pidcock *v.* Bishop, 3 *Bar.* & *Cr.* 605, it was found that a stipulation, that part of the price of a sale should be applied to the discharge of a debt, owing by the purchaser to one of the vendors, vitiated the obligation of a surety for payment of the price. In the present case, assuming the two banks to be separate bodies, the new credit was for the purpose of paying off the debt of some of the partners. In Stone *v.* Compton, 5 *Bing. N. C.* 142, it was held that a surety for payment of a sum to be advanced on mortgage, was liberated by the fact, that part of the money was, without his knowledge, retained by the lender in payment of a pre-existing debt; and upon the ground that, but for the misrepresentation that the whole money had been advanced, the surety would never have made himself liable; so here, if the appellant had known that his liability was not to benefit Elles in the carrying on of his business, which might or not be profitable, which was all that appeared on the face of the bond, but merely to enable him to pay off an old debt, *non-constat* that the appellant would have put his name to the bond. The principle is, that the surety must have an opportunity of judging for himself; and that in that view, it is immaterial whether the facts not communicated are of importance or not.

That was ruled in Bonsor *v.* Cox, 4 *Bea.* 379, and was still more conclusively recognised in a case lately decided in this House, Railton *v.* Matthews, 3 *Bell*, as it had previously been in Smith *v.* Bank of Scotland, 5 *W.* & *Sh.* 703.

[*Lord Campbell.*—The case of an agent can have no application here.]

LORD CHANCELLOR.—My Lords, I have already stated during the argument, that I considered that there was no averment as to the mode in which the money was intended to be applied; and I have stated the substance of the opinion which I entertain upon this point, that the mere circumstance of the parties supposing that the money was intended to be applied to a particular purpose, and that it was evidently intended to be so applied, does not appear to me to vitiate the transaction at all. If there was a stipulation that it was to be so applied, and these were the conditions upon which the money was advanced, it might have affected the transaction. But in order to raise that question, there should have been an averment upon the record that such an agreement had been entered into. In the absence of any such averment, I think the parties are not in a condition to rest their case upon such an agreement; and therefore I think the judgment ought to be sustained.

LORD BROUGHAM.—My Lords, I am of the same opinion, and I have never entertained any doubt from the beginning. It is neither averred, nor supposed to be averred, nor put so, and the party, the real creditor, the bank, in these circumstances was not bound to volunteer a disclosure of any transaction that passed between them and the other party.

LORD CAMPBELL.—My Lords, I am of the same opinion. Your Lordships must particularly notice what the nature of the contract is. It is suretiship upon a cash-account. Now, the

question is, what upon entering into such a contract ought to be disclosed, and I will venture to say, if your Lordships were to adopt the principles laid down and contended for by Mr. Anderson at the bar here, that you would entirely knock up those transactions in Scotland of giving security upon a cash-account, because no bank would rest satisfied that they had a security for the advance they made, if, as it is contended, it is essentially necessary that everything should be disclosed by the creditor that is material for the surety to know. Then it would be indispensably necessary for the bank, to whom the security is to be given, to state how the account has been kept, whether the debtor was in the habit of overdrawing, whether he was punctual in his dealings, whether he performed his promises in an honourable manner; all these things are extremely material for the surety to know. But unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretiship is to be given, to make any such disclosure. A I should think that this might be considered as the criterion, whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor to the effect that his position shall be different from that which the surety might naturally expect. And if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires. Now, in this case, assuming that there had been the contract contended for, and that had been concealed, that would have vitiated the suretiship. There is no proof that there was any such contract, and there is no allegation that there was any such contract. Therefore there is neither allegation nor proof, and what does it rest

upon? It rests merely upon this, that at most there was a concealment by the bank of the former debt, and of their expectation that if this new surety was given it was probable that the debt would be paid off. It rests merely upon non-disclosure or concealment. And if you were to say that such a concealment would vitiate the suretiship given, on that account, your Lordships would utterly destroy that most beneficial mode of dealing with accounts in Scotland.

LORD BROUGHAM.—I am not at all clear, (though it is quite immaterial,) that the surety would have acted differently if he had known of it. That has been taken for granted all the while.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

DEANS, DUNLOP, and HOPE—GRAHAME, MONCREIFF, and WEEMS, Agents.