

[HEARD 1st March, 1849.—JUDGMENT 9th August, 1850.]

ARCHIBALD BONAR, Esq., Manager, and for behoof of the
EDINBURGH AND LEITH BANK, *Appellant*.

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COLONEL WILLIAM McDONALD, of Powderhall, and others,
Respondents.

Cautioner.—A cautioner, for the discharge of an office by an agent, is freed from his liability, if the principal alter the responsibilities of the agent; although the loss, in respect of which the cautioner is sought to be charged, may not have arisen directly out of the alteration.

EARLY in the year 1839, David Bird was appointed Teller in the Edinburgh and Leith Bank, and on 16th January, 1839, gave a bond of caution for the fulfilment of the duties of his office, by himself, as principal, and by the Respondents, William McDonald, Archibald Torrance, and William Ballantyne, whereby Bird, as principal, and the other parties, “as cautioners, sureties, and full debtors for and with the said David Bird, bind and oblige ourselves, conjunctly and severally, and our respective heirs, executors, and successors, whomsoever, without the benefit of discussion, that, so long as I, the said David Bird, shall continue to hold the aforesaid office of Teller of the said Edinburgh and Leith Bank, in consequence of the said election, or by annual re-election or otherwise, I shall have no other business of any kind, nor be connected in any shape with any trade, manufacture, or mercantile co-partnery, nor be agent for any individual or co-partnery, nor be security for any individual or co-partnery in any manner of way whatsoever, and that I shall carefully

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“ and diligently attend to the business of the said Edinburgh
“ and Leith Bank, and faithfully discharge the duties of Teller
“ foresaid to the best of my skill and ability, and shall well,
“ fully, and truly account to the manager or to the directors
“ of the said Edinburgh and Leith Bank for the time, for
“ behoof of said bank, for all sums of money, whether in specie
“ or bank notes, bills, discounts, debentures, or other securities
“ with which I shall be intrusted from time to time, or which
“ shall come in any way into my hands in the execution of the
“ trust committed to me, and shall pay and deliver to the said
“ manager or directors for the time, all sums of money belong-
“ ing to the said bank in my custody whenever required so to
“ do; and whatever loss, damage, skaith, or expense the said
“ bank shall happen to sustain or incur by or through me,
“ the said David Bird, Teller foresaid, I, the said David Bird,
“ as principal, and we, the said William McDonald, William
“ Ballantyne, and Archibald Torrance, as cautioners, sureties,
“ and full debtors for and with the said David Bird, under the
“ declaration after mentioned, do hereby bind and oblige our-
“ selves, conjunctly and severally, and our respective foresaids,
“ to make good, refund, content, and pay to the said Edinburgh
“ and Leith Bank, or to the manager thereof for the time, or to
“ the directors thereof at Edinburgh for the time, for the use of
“ the said bank, and that immediately upon their sustaining
“ or incurring the said loss, damage, skaith, or expense, with
“ a fifth part more of penalty over and above the payment,
“ and the legal interest of all such loss, damage, skaith, or
“ expense, from the time the same shall be incurred till pay-
“ ment thereof; declaring always, as it is hereby specially
“ provided and declared, that we, the said cautioners, are and
“ shall only be liable by virtue of this present bond of cau-
“ tionary in the sum of one thousand pounds sterling, to
“ which our security is restricted, and to be no further
“ extended.”

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Not many months after the execution of this bond, the bank resolved to appoint Bird their agent for the management of a branch establishment at the town of Dalkeith: and in terms of an arrangement to that effect, he and his cautioners, on 11th and 18th April, and 2nd May, 1839, became parties to a docquet on the back of the bond to this effect. “ We, David Bird, William McDonald, William Ballantyne, and Archibald Torrance, all within designed, “ considering that, since the execution of the within-written “ bond, the said David Bird had been appointed agent at “ Dalkeith for the within-mentioned Edinburgh and Leith “ Bank, on condition of our continuing our cautionary obligation for him, to the extent, and in the manner within- “ specified, we do hereby consent to the said alteration in “ the situation held by the said David Bird, and declare “ that, so long as he shall continue agent as foresaid, the whole “ obligations and stipulations of the within bond shall be “ applicable to, and have full force, strength, and effect, “ and be equally binding on us and ours within-written, for, “ in respect of the said David Bird, as agent foresaid, and “ that in the same manner as if the whole obligations within- “ written were here repeated, any law or practice to the contrary “ notwithstanding.”

Subsequently, on the 3rd April, 1840, an alteration was made in the terms of Bird’s appointment, whereby his salary was raised, and the liability was imposed upon him of one-fourth of the losses from discounts to customers—and the following letter upon the subject was addressed to him by Kerr, the accountant for the bank, on the 14th May, 1840: “ In consequence of the alteration in the terms on which you “ hold your appointment, you now being liable for a certain “ part of the loss arising from discounts, it will be necessary “ that you execute a new bond. I have not intimated it to “ your cautioners, as it will be better for you to do so

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“ yourself; but I will be glad that you take an early opportunity of advising me whether I shall re-extend your bond by the same parties.”

Bird, on the 15th May, wrote the Appellant, “ I have this morning received Mr. Kerr’s letter regarding the alteration of the terms on which I hold my appointment, being liable for a certain loss arising from discounts, and that I will require to get executed a new bond, holding the sureties liable for any loss that may be sustained, I beg to say in answer, that I really think the directors are pressing the thing too hard; and if I was asked by any person to become their security on the same terms, I certainly would decline; and, on the same principle, I regret to say that I could not go forward to ask my present securities on these terms; but as far as I am personally concerned, I shall have no objections to sign any letter of guarantee or bond you may wish to that effect, by way of holding me liable for a fourth of the loss, and would thank you to impress upon the directors the unpleasant step they are wishing to enforce upon me. I believe none of the agents here are liable for any loss, and hold a great deal higher salaries; and I can assure you, if the directors establish this system, they will injure their branch business very much.”

On the 22nd of May, 1840, the manager read this letter to the Directors of the Appellants’ Company, and their minute, after giving the import of the letter, concluded thus,—“ with which the Board declared themselves satisfied.”

In the year 1844 the Appellants brought an action against the Respondents, the cautioners in the bond granted by Bird, the summons in which set forth that, in the month of November, 1840, Bird communicated to the Appellants a proposal by Moffat to open a cash account with Bird’s agency at Dalkeith, giving Carter and Paterson as his securities; that while this offer was under consideration, Bird wrote the

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Appellants that Moffat further offered Williams as his security. That, upon this additional offer, Moffat's proposal was accepted, and a bond for a cash credit of 1,500*l.* was prepared, and sent to Bird, to be executed by Moffat, Carter, Paterson, and Williams. That the bond was executed by Moffat, Carter, and Paterson in the month of February, 1841. That Williams delayed executing the bond, and finally, in March, 1841, wrote Moffat that he would not execute it, and this letter Moffat delivered to Bird at the time. That, after the bond had been executed by Moffat and Carter alone, Bird allowed Moffat to overdraw upon a previous deposit account to the extent of 1,249*l.* 13*s.* 6*d.*, and transferred this sum of 1,249*l.* 13*s.* 6*d.*, from the debit of the deposit account, to that of the cash account, and further allowed Moffat, before the bond had been executed by Paterson, to make further drafts whereby the sum he owed the Appellants was increased to 1,496*l.* 4*s.* 4*d.* That after the bond was executed by Paterson, Bird allowed Moffat to continue operations on the cash account, until his bankruptcy and the sequestration of his estates, in March, 1841, at which time, the debt due by Moffat to the Appellants had been increased to 2,005*l.* 11*s.* 2*d.* That during all this time, Bird retained the bond by Moffat and his cautioners in his possession, and never communicated to the Appellants that Williams had refused to execute, and never had executed it, and that this did not become known to the Appellants, until the occurrence of Moffat's sequestration. That the Appellants, after intimation to the Respondents and reservation of their recourse against them, gave Paterson a charge upon the bond by Moffat and him, for payment of the 1,500*l.* covered by it, but that the Court suspended the charge, holding that Paterson was not liable in respect of the irregularities which had been committed by Bird in omitting to procure the signature of Williams, and making advances to Moffat before the bond had been executed by Paterson.—The summons, therefore, concluded against Bird for payment of the debt owing by Moffat, and

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against the Respondents to the extent of the 1000*l.* covered by their bond for Bird.

The Respondents pleaded in defence *inter alia*:

“ I. The bond and subsequent relative obligation to which the Defenders were parties do not support the present action, in respect these deeds were not intended or framed so as to cover the liability now sought to be brought within them.”

“ II. The Defenders are free from their cautionary obligation, in respect that the bank, without the consent or knowledge of the Defenders as his cautioners, altered the contract between them and the agent, so as to increase the liability of the latter.

“ III. The bank is barred from founding on the alleged misconduct of Bird in making the over advances to Moffat under both accounts, in respect the same were known, sanctioned, and acquiesced in by the bank, or at least ought to have been discovered by the bank.”

The Lord Ordinary (*Wood*), after ordering cases by the parties, made avizandum with them to the Inner House, which, on the 16th of July, 1847, pronounced the following interlocutor: “ Sustain the defence set forth in the second plea in law for the Defenders, the cautioners of David Bird; assoilzie the said Defenders from the whole conclusions of the action, and decern.”

Mr. Turner and *Mr. Anderson*, for the Appellants.—I. The supplementary obligation endorsed upon the bond of caution does not contain any condition as to the mode in which the Appellants were to deal with Bird. There is no provision that he is not to discount bills or undertake any responsibility on that account; and the stipulation in the original bond that Bird should not have any other business nor be connected in any way with trade or manufacture was a stipulation in favour of the Appellants and not of Bird or his cautioners. So far, therefore,

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the case is clear. It was not necessary to consult the cautioners, for the original obligation contained no provision as to the mode of dealing between the bank and their agent; and the increase of responsibility thrown on Bird might reasonably have been in the contemplation of all parties from the first.

II. Bird having, in violation of his duty, made over advances out of the funds of the bank, his cautioners are bound to make good the deficiency to the extent of their bond.

III. The enlargement of Bird's responsibilities did not increase the chance of his malversation or neglect of duty, for which alone the sureties were to be answerable.

Mr. Bethell and Mr. Charles Baillie for the Respondents.—The bond and subsequent obligation did not cover the advances in question. But at any rate, the cautionary obligation is discharged by the alteration of the original agreement and the enlargement of the original liability without notice to the Respondents. The rule in England is, that any variation in the agreement, made behind the back of the surety, will liberate him. *Evans v. White*, 5 *Bing.* 485, 1 *Mood. & Malk.* 468; *Eyre v. Bartropp*, 3 *Madd.* 221; *Archer v. Hale*, 4 *Bing.* 464; *Whitcher v. Hall*, 5 *Barn. & Cress.*, 269, 8 *Dowl. & Ryl.* 22. The law of Scotland is the same, *Railton v. Matthews*, 1 *Bell's App. Cases*, 359; *Hamilton v. Watson*, 4 *Bell's App. Cases*, 67; *Bell's Principles, Prop.* 259; and *Bell's Commentaries, Vol. I. p. 359.*

Moreover, in the present case, the Appellants were deficient in the necessary care which was incumbent on them to prevent the negligence or dereliction of Bird in his office.

Mr. Turner replied.

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LORD BROUGHAM.—My Lords, this case was heard last year by the late Lord Chancellor (*Lord Cottenham*) and myself. Three parties became what are called in Scotland cautioners, for the faithful discharge of the duties of his office by a bank agent, who was moreover bound in a bond “to have no other
 “business of any kind, nor be connected in any shape with any
 “trade, manufacture, or mercantile copartnery, nor be agent
 “for any individual or copartnery, nor be security for any indi-
 “vidual or copartnery in any manner, or way whatsoever.” Those were the terms of the cautionary obligation.

The bank thereafter entered into an agreement with the agent, whereby he became liable for one-fourth of the losses arising from discounts, and his salary was in consequence increased, but the cautioners were not informed of this agreement. The Court below held, that in respect of the innovation made by the bank on his position, the cautioners were not liable in loss caused by the misconduct of the agent, and this notwithstanding that the loss sought to be recovered did not arise in consequence of any transaction under the new agreement.

Now, my Lord Cottenham, with whom I entirely agree, has sent me this note of his opinion upon the subject, which I will read to your Lordships as part of my statement; but it is from my noble and learned friend, who is now absent:—

“The Court of Session decided this case in favour of the
 “Defenders, upon the grounds raised by the second plea in
 “law, ‘that the bank, without the consent or knowledge
 “of the Defenders, the cautioners, altered the contract be-
 “tween them and the agent, so as to increase the liability of
 “the latter.’ *Supra*, p. 384. Concurring as I do with their
 “opinion, it is unnecessary for me to observe upon the other

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“ grounds discussed by the Lord Ordinary. By the bond entered into by Bird the agent, and the respondents his cautioners, with the Edinburgh and Leith Bank, for the due performance by Bird of the duties of the office of teller of the bank, it was stipulated that he should have no other business of any kind, nor be connected in any shape with any trade, manufacture, or mercantile copartnery, nor be agent for any individual or copartnery, nor be security for any individual or copartnery in any manner or way whatsoever.

“ Upon Bird’s appointment by the bank to be their agent for the branch at Dalkeith, a supplementary obligation was entered into, by which the cautioners conceded that their former obligation and all its provisions should be applicable to Bird’s agency at Dalkeith. Whatever may be the usual duties and liabilities of an agent of a branch bank as to the discount of bills, it is clear, that as between Bird and his principals it was not considered that he was to have anything to do with the business as agent of the Dalkeith branch, so as to impose any liability upon him, because a new arrangement was afterwards entered into between him and his principals, by which it was agreed that his salary should be raised to 130% per annum, he being responsible for one-fourth of the losses sustained by his discounts. This alteration in the contract between the principals and the agent, is the ground relied upon by the second plea in law, and upon which the judgment is founded; and so sensible were the bank that this affected the liability of the cautioners, that we find their agent writing to Bird thus:—‘ In consequence of the alteration of the terms upon which you hold your appointment, you now being liable for a certain part of the loss arising from discounts, it will be necessary that you execute a new bond. I have not intimated it to your cautioners, as it will be better for you to do so yourself; but I will be glad that you take an early

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“opportunity of advising me whether I shall re-extend your
 “bond by the same parties.” Bird objected to apply to his
 “cautioners, and nothing more was done, they remaining in
 “ignorance of, and certainly not being parties to, this altera-
 “tion in the contract between Bird and his employers.” The
 “loss sought to be recovered against the respondents as cau-
 “tioners does not appear to have arisen from the discounting
 “business, but to consist of a balance due from a customer of the
 “branch bank, who was permitted to overdraw his account to
 “an unusual and unreasonable extent without security; but if
 “the arrangement as to the discounts altered the subsisting
 “contract between the bank and their agent, so as to increase
 “the liability of the latter, his securities may be discharged for
 “all purposes. Such is the law of this country, and the law of
 “Scotland is the same. The rule, as extracted from the Eng-
 “lish authorities,—*Evans v. White*, *Eyre v. Bartrop*, *Archer*
 “*v. Hale*, and *Whitcher v. Hall*,—is, that any variation in the
 “agreement to which the surety has subscribed, which is made
 “without the surety’s knowledge or consent, which may preju-
 “dice him, or which may amount to a substitution of a new
 “agreement for a former agreement, and though the original
 “agreement may, notwithstanding such variation, be substan-
 “tially performed, will discharge the surety. And as to Scot-
 “land, in Bell’s Principles the rule is laid down that the cau-
 “tioner is freed ‘by any essential change consented to by the
 “‘creditor on the principal obligation or transaction without
 “‘the knowledge or assent of the cautioner.’ And this doctrine
 “is supported by the authorities referred to.

“The only question, therefore, is, was the arrangement as
 “to discounts an essential change in the principal obligation?
 “This the parties have themselves decided; for in stipulating
 “that Bird should remain free from any engagement or surety-
 “ship for any other person, they admitted that his doing so

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“ would be injurious to the other parties to the contract; and,
 “ it would not be less so because the engagement and surety-
 “ ship was for the benefit of the bank, being, as it was, to the
 “ prejudice of the cautioners. This stipulation precludes the
 “ pursuers from contending with success, that the arrangement,
 “ as to discounts was immaterial to those interested in the
 “ suretyship, or was collateral to, and independent of it; and
 “ these are the only grounds upon which they rely.

“ I am for these reasons of opinion, that the interlocutors
 “ appealed from were right, and that the appeal ought to be
 “ dismissed, with costs.”

My Lords, agreeing entirely with the view of my noble and
 learned friend, I move your Lordships that the interlocutors
 appealed from be affirmed, with costs.

“ all purposes. Such is the law of this country, and the same
 “ Scotland is the same. The rule, as extracted from the Eng-
 “ Interlocutors affirmed accordingly, with costs.

“ J. DODDS—A. DOBIE, Agents.
 “ v. Hale, and W. Hall & Co. Agents.

“ agreement to which the surety has subscribed, which is made
 “ without the surety's knowledge or consent, which may prej-
 “ dice him, or which may amount to a substitution of a new
 “ agreement for a former agreement, and though the original
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 “ creditor on the principal obligation or transaction without
 “ the knowledge or assent of the cautioner. And this doctrine

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 “ to discounts an essential change in the principal obligation?
 “ The parties have themselves decided; for in stipulating
 “ that they should remain free from any engagement or surety-
 “ ship for any other person, they admitted that his doing so