[14th June, 1844.]

EDWARD RAILTON, Writer, in Glasgow, *Appellant.*

THOMAS G. MATTHEWS and ROBERT LEONARD, of the City of Bristol, Drysalters, *Respondents.*

Cautioner—Principal and Surety.—Facts, regarding the conduct or circumstances of an agent, occurring prior to the granting of a Bond of Caution for him, which were known to or might have been ascertained by the creditor, but which were not disclosed to the surety, will vitiate the bond as to the surety without regard to the motive from which the non-communication may have arisen.

PRIOR and up to 1834, Rowley and Hickes were the agents at Glasgow of Messrs. Olives and Matthews, of Bristol, for the sale of their goods there. In the month of February, 1834, Rowley and Hickes separated, and each of them applied to be continued in the agency; Rowley enforced his application by representing that in the month of June preceding, Hickes had used the partnership name without his knowledge, by discounting a bill for 350*l.* in favour of a private friend. Olives and Matthews disregarded this representation, and on the 25th of February, 1834, appointed Hickes to be their sole agent. During the agency of Rowley and Hickes, security had not been required from them; but on Hickes alone being made the agent, security was required from him to the amount of 3000*l.* This requisition, though occasionally referred to in the correspondence between the parties, was not enforced until about the month of January, 1835, when a bond in the penalty of 4000*l.* was prepared and executed by Hickes, and the appellant as his surety, but was never completed, another proposed surety refusing to sign it. Whilst this matter was in abeyance a change took place in the firm of Olives and Matthews, which now became that of

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Matthews and Leonard. The new firm continued Hickes as their agent, but insisted upon security; in consequence, a new bond in the penalty of 4000*l.* was prepared and executed in the autumn of 1835 by Hickes, and by the appellant, and Henry W. Hickes as his sureties.

This bond, which was in the English form, recited that Matthews and Leonard had admitted Hickes to their service as their clerk and commission agent, and intended to continue him in those characters on his procuring sureties, and expressed the condition in these terms: "Now the condition of the above "written obligation is such, that if the said George Hickes, "shall and do, from time to time and at all times well and "satisfactorily account for and pay over, and deliver to the said "Thomas Gadd Matthews and Robert Leonard, or to the sur-"vivor of them, their or his executors or administrators, and "other the persons or person who shall or may become partners "or partner with them, or any or either of them, or their or "his executors or administrators, all and every sums and sum "of money, and securities for money, goods and effects what-"soever, which he the said George Hickes, shall receive for "their, any or either of their, use, or which shall at any time "or times be entrusted to his care by them the said Thomas "Gadd Matthews and Robert Leonard, or the survivor of them, "their or his executors or administrators, or other the persons "or person who shall or may become partners or partner with "them, or any or either of them, or their or his executors or "administrators, or by their or any or either of their corre-"spondents or customers, or others to whom they, any or either "of them are, or is, or shall, or may be liable or accountable: "and do not at any time embezzle, make away with, obliterate, "deface, or in any wise injure any of the money, securities for "money, books, papers, writings, goods or effects of them the "said Thomas Gadd Matthews and Robert Leonard, or the "survivor of them, their or his executors or administrators, or

" other the persons or person who shall or may become part-
" ners or partner with them, or any or either of them, or their
" or his executors or administrators, or of their, any or either
" of their correspondents or customers, or others to whom they,
" or either of them are, or is, or shall, or may be or become
" liable or accountable: and also, if the said George Hickes do,
" and shall in all respects faithfully and honestly demean and
" conduct himself, as the clerk and commission agent of the said
" Thomas Gadd Matthews and Robert Leonard, or the survivor
" of them, their or his executors or administrators, or other the
" persons or person who shall or may become partners or part-
" ner with them, or any or either of them, or their or his
" executors or administrators: then, and in such case, the above-
" written obligation to be void and of no effect, otherwise to be
" and remain in full force and virtue."

Hickes continued to act as agent until the month of May, 1837. In that month, one of the partners of Matthews and Leonard came to Glasgow, in consequence of the return of a bill by one of the debtors to the firm, and of his own authority took possession of Hickes's books and papers, and of his counting-house and premises, and shortly afterwards applied to the appellant as one of his sureties for payment of a balance owing by him. This not being complied with, Matthews and Leonard raised action upon the bond of surety against the trustee upon the sequestrated estate of Hickes, whom they had made a bankrupt, and the two sureties in the bond for count reckoning and payment of a balance of 4000*l.*

The sureties, among other defences to this action, pleaded specially the following: "The defendants are relieved as *cau-*
" *tioners* under the bond, in respect, 1. That in taking it the
" pursuers improperly concealed from them the misconduct of
" the *principal*, and the extent of the debt due by him under
" his previous agency. 2. That during the currency of the bond,
" and without notice to the defenders, as *cautioners*, the pur-

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" suers wrongfully neglected to enforce regular remittances from " the *principal*, and in the course of a period of nineteen months " allowed, as they now allege, a large arrear to accumulate in " his hands, of which it is the object of the action to enforce " payment from the defenders; and 3. That by illegally taking " possession of the whole stock, books, and papers of the *prin-* " *cipal*, the pursuers deprived the cautioners of all fair oppor- " tunity of ascertaining the true state of accounts between them " and their agent."

In support of this defence, the appellant also brought a reduction improbation of the bond, upon the ground that it had been obtained " fraudulently by the said defenders, and in " the procurement thereof they were guilty of a fraudulent con- " cealment of material circumstances known to themselves, and " deeply affecting the credit and trust-worthiness of the said " George Hickes; and that although the said George Hickes, " from the date of the said bond down to the period of his " bankruptcy in May, 1837, continued to go on in a constant " course of irregularities and misconduct, by failing to render " weekly accounts, or to make the remittances that were due; " and although there appeared to be on the face of his accounts, " and transactions, large and increasing balances known to the " defenders, and which drew forth continual complaints from " them, yet they fraudulently concealed the said circumstances " and state of accounts from the pursuer, and gave no notice " thereof to him, and totally failed to make any communication " to him on the subject."

The two actions were conjoined, and subsequently an issue was adjusted and sent to trial in these terms: " It being admitted " that, on the 21st day of September and 10th day of October, " 1835, the bond of caution and surety, No. 3 of process, was " subscribed by the pursuer Edward Railton, George Hickes of " the City of Glasgow, and Henry William Hickes of the City " of Worcester; and it being further admitted that the said

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" George Hickes acted as agent for the defenders, Matthews and " Leonard, from the date of the said bond to the month of May, " 1837.

" Whether the pursuer, Edward Railton, was induced to " subscribe the said bond of caution or surety, by undue conceal- " ment or deception on the part of the defenders, or either of " them."

On the trial of this issue, the facts alleged by the appellant in support of his defence, and of his reduction improbation, were sustained by evidence, but the motive imputed was not proved further than as it might be inferred one way or other from the circumstances.

The Judge, (the Lord Justice Clerk,) in charging the jury upon the evidence, expressed himself in these terms: " One part " of the question is, whether as a matter of fact the pursuer " ' was induced' to subscribe the bond of caution by undue con- " cealment or deception, and they must be satisfied that the " undue concealment or deception was the efficient cause of his " signing the bond. But at the same time this was to be under- " stood and applied by them under this qualification, viz.: that " undue concealment may consist wholly in non-communication. " Hence, if a party under such a duty of communication as he " should afterwards explain, in relation to the position of the " defenders, did not make the disclosures which the jury might " think he ought to have done, of matters which, if communi- " cated, might have prevented the pursuer signing the bond, " then the fact of concealment of what might have led the " pursuer not to sign the bond, may be taken to have induced " him to sign, although the immediate motive of his doing so " was a desire to assist a friend: under this issue the conceal- " ment must be, 1st, of things known to the defenders, or which " they had strong and grave ground to suspect; and 2ndly, the " concealment therefore being undue, must be wilful and inten- " tional, with a view to the advantage they were thereby to

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" receive. And in reference to the plea maintained by the pur-
" suer, viz., that under this issue he is entitled to a verdict if
" there was ignorance on the part of the defenders from neglect
" on their part, in inquiring into and not discovering matters
" which might have been discovered by investigations in Glasgow,
" and that the same consequences must fall on the defenders as
" to the nullity of the bond from ignorance in such circumstances
" as from undue concealment of facts known to them. Such
" was not the principle of law applicable to the case, or admis-
" sible under the terms of the issue;—the issue referred expressly
" to undue concealment, and not to any neglect on the part of
" the defenders to discover what it might be shown they might
" have found out before the date of the bond, but the existence
" of which nothing had led to suspect, if the jury are satisfied
" that nothing had occurred to create suspicion on the part of the
" defenders."

The jury delivered a verdict for the defenders, (the present respondents,) whereupon the appellant tendered a bill of exceptions to the charge of the judge. The Court (on the 31st January, 1844) disallowed the bill of exceptions, discharged a rule to show cause why a new trial should not be granted, and refused to grant such trial.

The appeal was against this interlocutor.

Mr. Serjeant Talfourd and Mr. Fleming for the appellant.—The question at issue upon the exception was, in truth, whether fraud in law was sufficient to vitiate the contract, or whether fraud, in fact, was necessary to work that end. The words of the issue were "undue concealment or deception;" undue concealment, therefore, was used differently from deception, and involved considerations apart from any wicked intention, which was implied in deception; absence of thought or reflection would be undue concealment, though it would not be deception. Interpreting the issue in this way, it is framed in consonance with

the established law of the country. In cases of deception, the matter cannot admit of dispute—there fraud is obvious; but where deception is wanting, the fact of mere concealment is sufficient, without reference to the motive from which the concealment may have proceeded,—it may have originated possibly in a laudable motive, or it may have happened without any motive at all,—from mere inadvertence and want of proper reflection,—yet as the consequences are not the less injurious to the surety, and as his protection is what the law is careful of, it absolves him from his liability in such circumstances if there be fraud in law, which improper concealment is, although there may not have been any moral fraud, or fraud in fact,—that this is the law of Scotland is shown by the case of Smith *v.* the Bank of Scotland, 1 *Dow.* 272,—a case in many respects analogous to the present, and in which the remit from this House was to allow the party proof whether the bond had been "unduly obtained by "*concealment or deception.*" In that case, no moral imputation was set up against *the Bank*, and yet the sureties were absolved from liability. The law is the same in England. In Peacock *v.* Bishop, 3 *B.* and *Cr.* 605, it was held, that an agreement between a vendor and vendee, whereby the latter was to pay 10*s.* per ton above the market price, and the amount of this excess in price was to go in liquidation of an old debt due by the vendee to the vendor was held to be void as against a surety for the vendee to whom this speciality was not communicated, as being a fraud upon him, the surety being entitled to a knowledge of every fact likely to affect his responsibility. So in Stone *v.* Compton, 5 *Bing. N. Ca.* 142, it was held that a representation to a surety for a sum about to be advanced on mortgage, that the whole sum in the mortgage had been paid to the mortgagor, whereas the actual payment was minus an old debt previously owing by the mortgagor to the mortgagee, vitiated the surety's liability.

The same principle was recognised in a case of insurance,

which, like suretyship, is a contract of indemnity: in Carter *v.* Boehm, 3 *Burr.*, 1905, Lord Mansfield says, "although the "suppression should happen through mistake, without any frau- "dulent intention, yet still the underwriter is deceived and the "policy is void; the governing principle is applicable to all "contracts and dealings."

Mr. Kelly and Mr. Anderson for the respondents.—The case of the appellant upon the record was one of alleged fraudulent intention; the issue was adjusted from that record, and must be construed with reference to it. The issue is whether the party was "*induced*," that is by influence used in some way, and the question is continued whether that influence was "undue con- "cealment or deception." But the plea which he set up by his bill of exceptions was for a verdict in his favour, if matters of which the respondents were ignorant had been concealed. It is difficult to conceive how their innocent ignorance of improper conduct by their agent could have operated as any inducement upon the appellant to become his security. In short, the plea in the exceptions is at variance with the record, and the proper legal construction of the terms of the issue.

Not only so, but it is opposed to the law, as settled by the cases. With regard to matters occurring subsequent to the concoction of the contract, all the cases which are collected in *Pitman*, 215, show that the concealment must have been wilful and for an object; and with regard to those occurring anterior to the contract, Stowe *v.* Compton, 5 *Bing.*, 162, lays down that any misrepresentation to the surety made with the knowledge or assent of the creditor will vitiate the contract, which plainly implies that any concealment by accident or mistake, or without intention, could not affect the validity. As to the case of Smith *v.* Bank of Scotland, that was manifestly decided on the fraud; it was proved that the directors had accepted the surety bond in the knowledge of large defalcations having previously oc-

curred, and being at the time unliquidated. Cases of insurance cannot support the doctrine contended for, there there is no intermediate party,—the insured is the party asking the contract, and the insurer can know nothing but from his statement; it is, therefore, obvious that the information communicated must not only be true but full, whereas in suretyship the creditor is asking nothing,—it is the debtor who is benefited, and from whom or the creditor the surety may and ought to make himself acquainted with every particular.

LORD COTTENHAM.—My Lords, this is an appeal from a judgment of the Court below. Entertaining an opinion against the judgment pronounced there, if I had felt any doubt upon the subject, or had considered it a case which required more investigation of the facts than it has received, I certainly should have been unwilling to dispose of it without taking time for further consideration, but the facts are so simple, and the points are so free from doubt, that I see no reason why the House should not at once dispose of the case.

My Lords, the real question is, whether the way in which the learned Judge put this case to the jury, and described to them the duty they had to perform, was or was not consistent with and properly applicable to the question, and the issue raised for their consideration. The issue, in my opinion, very clearly describes the point which the Court wished to have investigated. The terms of the issue must of course be construed as they stand, but it is not immaterial to look to the points raised in the pleadings for the purpose of construction. If there were any doubt upon the meaning of the terms used I would look to the summons for the reduction of the instrument of suretyship, and I find several facts appearing as having passed between the party who was the subject of the suretyship, and those by whom he had been previously employed, and I find the matter stated in these terms, "That the parties totally failed to communicate

" the said circumstances, or either of them, or the existence of " any balance on the agency accounts standing against the said " George Hickes, to the pursuer, or to the said Henry Williams " Hickes; and on the contrary, while they accepted and took " possession of the said bond they fraudulently suppressed and " concealed the said whole facts and circumstances regarding the " conduct and irregularities of the said George Hickes."

There is an imputation made of direct fraud, a fraudulent intention influencing the acts of the parties; and there is a direct statement of concealment.

It has not been contended, and it is impossible to contend, after what Lord Eldon lays down in the case of Smith *v.* The Bank of Scotland, that a case may not exist in which a mere non-communication would invalidate a bond of suretyship. Lord Eldon states various cases in which a party about to become surety would have a right to have communicated to him circumstances within the knowledge of the party acquiring the bond, and he states that it is the duty of the party acquiring the bond to communicate those circumstances, and that the non-communication, or, as he uses the expression, the concealment of those facts would invalidate the obligation and release the surety from the obligation into which he had entered.

Now, when the issue in this case was tried, such being the points raised between the parties, we have nothing to do with the evidence in the cause or the facts proved, or the conclusion to which the jury might or might not have come, under the circumstances, but with the question whether the charge which was made to them was such a charge as we conceive ought to have been made to them. The issue for their consideration was, as a matter of fact, " whether the pursuer, Edward Railton, was " induced to subscribe the bond of caution or surety by undue " concealment or deception on the part of the defenders, or " either of them," raising these two propositions which were

raised in the pleadings in the cause, either of which, if found in the affirmative, would lead to the conclusion of the cause.

The question, looking at the terms in which the matter was left to the jury, and the mode in which the learned Judge informed the jury they ought to perform their duty, is whether there may not have been a case brought before the jury for their consideration, of improper and undue concealment, which I understand to mean a non-communication of facts which ought to have been communicated, which would lead to the relief of the surety, although the non-communication might not be wilful and intentional, and with a view to the advantage which the party was thereby to receive. That which I find here extracted from the charge of the learned Judge, I understand to be one proposition. The learned Judge lays it down distinctly, that the concealment to be undue must be wilful and intentional, with a view to the advantage they were thereby to receive. In my opinion there may be a case of improper concealment, or non-communication of facts which ought to be communicated, which would affect the situation of the parties, even if it was not wilful and intentional, and with a view to the advantage the parties were to receive; the charge, therefore, I conceive was not consistent with the rule of law, I think that it narrowed the question for the consideration of the jury beyond the limits which the rights of the parties required to have submitted to the consideration of the jury.

Without going further into the law which regulates the rights of these parties than that which was stated by Lord Eldon in the case of Smith *v.* The Bank of Scotland, we find that in a judgment of this House, in the case of an appeal from Scotland, and therefore one peculiarly valuable in the case now under consideration, that has been declared to be the law. The terms used by the learned Judge in directing the jury having limited the question for their consideration much more than the rule of

law would justify, it appears to be quite clear that this case has not been properly tried, that the exceptions were properly taken, and that this House is bound to pronounce such a judgment as ought to have been pronounced by the Court of Session.

LORD CAMPBELL.—My Lords, this case has been very satisfactorily argued on both sides with great brevity, but everything has been urged which could be for the advantage of the clients, or the assistance of your Lordships; and having listened to all which has been urged on both sides very attentively, I, without the smallest hesitation, come to the conclusion that the Bill of Exceptions ought to be allowed, and that there must be a new trial.

The question really is, what is the issue which the Court directed in this case; "whether the pursuer, Edward Railton, "was induced to subscribe the said bond of caution or surety by "undue concealment or deception on the part of the defenders, or "either of them." The material words are "undue concealment "on the part of the defenders." What is the meaning of those words? I apprehend, my Lords, the meaning of those words is, whether Railton was induced to subscribe the bond by the defenders having omitted to divulge facts within their knowledge, which they were bound, in point of law, to divulge. If there were facts within their knowledge, which they were, in point of law, bound to divulge, and which they did not divulge, the surety is not bound by the bond: there are plenty of decisions to that effect, both in the law of Scotland and the law of England. If the defenders had facts within their knowledge which it was material the surety should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts—the undue concealment of those facts—discharges the surety; and whether they concealed those facts from one motive or another, I apprehend, is wholly immaterial. It certainly is wholly immaterial to the interest of the

surety, because, to say that his obligation shall depend upon that which was passing in the mind of the party requiring the bond, appears to me preposterous, for that would make the obligation of the surety depend on whether the other party had a good memory, or whether he was a person of good sense, or whether he had the facts at the moment in his mind, or whether he was aware that those facts ought to be disclosed. My Lords, the liability of a surety must depend upon the situation in which he is placed, upon the knowledge which is communicated to him of the facts of the case, and not upon what was passing in the mind of the other party, or the motive of the other party. If the facts were such as ought to have been communicated,—if it was material to the surety that they should be communicated, the motive for withholding them, I apprehend, is wholly immaterial,

Then we come to the direction given by the learned Judge. The learned Judge says, "The concealment, therefore, being "undue, must be wilful and intentional, with a view (that is, "with reference to the motive) to the advantage they were "thereby to receive." Now, according to my notion of the issue, that is an entire misconception of it. According to this direction, although the parties acquiring the bond had been aware of the most material facts, which it was their duty to disclose, and the withholding of which would avoid the bond, if they did not wilfully and intentionally withhold them—that is to say, if they had forgotten them, or if they thought, by mistake, that, in point of law or morality, they were not bound to disclose them; then, according to the holding of the learned Judge, it would not be concealment. But the learned Judge does not stop there, but he goes on "with a view to the advan-"tage they were thereby to receive," introducing those words conjunctively, and in effect saying that it was not an undue concealment, unless they had their own particular advantage in view. That appears to me a misconception. I will suppose that their motive was kindness to Hickes to keep back from those

who it was material to him should continue to have a good opinion of him, the knowledge of those facts, that it was from pure kindness on their part to prevent those parties entertaining a bad opinion of him, and not from any selfishness this concealment took place. Although that might be the motive, yet the fact that he was in arrear, and had been guilty of fraudulent conduct, and that he was a defaulter, were facts which it was most material for the surety to be acquainted with. If these were held back, merely from a kind motive to Hickes, and not at all from any selfish motive on the part of those to whom the bond was to be executed, the effect, in point of law, would be the same as if the motive were merely the personal benefit of the parties to receive the bond. It appears to me, therefore, that the learned Judge has misunderstood the meaning of the issue, and that having told the jury that a concealment to be undue must be wilful and intentional, with a view to the advantage which the parties were thereby to receive, that was a mis-direction, and that it had a tendency to mislead the jury; that it was wrong in point of law, and that the exception to that direction ought to be allowed.

Ordered and adjudged, That the Interlocutors complained of in the appeal be reversed; and it is further ordered and adjudged, that the bill of exceptions referred to in the said Interlocutor of the 31st of January, 1844, be allowed, and that a new trial be granted; and it is also further ordered, that the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

G. PARSONS—DEANS, DUNLOP and HOPE, Agents.