[*26th May* 1840.]

GEORGE CREIGHTON, Appellant.[1] (No. 6.)

[*Attorney General (Campbell) — James Anderson.*]

ROBERT RANKIN, Respondent.

[*Lord Advocate (Rutherfurd) — Sir W. Follett.*]

Cautioner. — Circumstances in which held (affirming the judgment of the Court of Session) that a cautioner had not been discharged from his obligation in respect of the conduct of the obligees in reference to the principal; and observed, per Lord Chancellor, "The case of M'Taggart " (1 Sh. & M'L. 553.) is of the highest importance, as it " makes the rule applicable to such cases (i. e. suretyship obligations) " the same in Scotland as in England. Upon " the rule in England there is no doubt. It is familiar to " every lawyer, and I am glad to be able to expound it in " the terms which a judge of the highest authority (Lord " Eldon) has laid it down, and which I think entirely " correct. The rule is this, 'that if a creditor, without " 'the consent of the surety, give time to the principal " 'debtor, by so doing he discharges the surety, that is, " 'if time be given by virtue of positive contract between " 'the creditor and principal, not where the creditor is " 'merely inactive.'" (See p. 133.)

Process — Practice. — A summons before the Sheriff Court stated, that one of the defenders, a cautioner, together with the principal and other cautioners, had been applied to for payment, and had refused, unless compelled, and then omitting the name of the said defender, but stating the

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[1] 16 D., B., & M., 447; Fac. Col., 18th Jan. and 6th Feb. 1838.

2D DIVISION.

Lord Ordinary Jeffrey.

name of the principal and of the other cautioners, concluded "that the said principal and cautioners foresaid" might be decreed to pay. To this summons the said defender appeared, and put in defences, and did not raise any objection to the summons on this ground. After his death his representative sisted himself as a defender, but did not raise the objection, and a decree for payment was pronounced against him. Held (affirming the judgment of the Court of Session in an advocation,) that there was no ground, under the circumstances, for setting aside the proceedings.

Title to pursue.—*Statutes* 4 *Geo.* 4. *c.* 49. *and* 1 *&* 2 *Will.* 4. *c.* 43. (*General Road Acts.*) Held, on construction of the General Road Acts, that when a road is divided into districts assigned to committees of trustees, the clerk appointed for any district is entitled to sue under the 16th section of the statute 1 & 2 W. 4. c. 43.

Title to pursue—Assignation.—Question, Whether, by the law of Scotland, one party can enable another to maintain a suit in his own name, while the property in the subject matter of the suit remains in the party giving the authority to sue. (See p. 128.)

BY the late General Turnpike Road Act for Scotland (4 Geo. 4. c. 49.), the enactments of which are, by section 2., extended to all local turnpike acts, it is, inter alia, provided, under the tenth section, "That "the trustees acting under any turnpike act shall "have power at any general meeting to divide the "roads comprised in such act into districts, to name "committees of their number for the more immediate "direction and management of particular parts of "such roads, and to give such committees (whereof "three may be a quorum) such instructions and such "powers as they shall from time to time think fit and "expedient."

By the eleventh section it is, inter alia, enacted, "That "it shall be lawful for the trustees acting under any "turnpike act, at any general meeting, to appoint a "clerk and treasurer, and also to appoint, if they shall "think fit, a superintendent for all or each or any "part of the roads within their trusts, with remune- "rating salaries; &c.; and that they shall also have "power in their district and committee meetings to "appoint clerks, collectors, treasurers, superintendents, "surveyors, and other officers, with reasonable salaries "or allowances for their trouble."

By the twelfth section provision is made, inter alia, "That the trustees of every turnpike road shall take "sufficient security from the treasurer appointed by "them for the due and faithful execution of his "office."

By the fourteenth section of the act it is enacted, "That all orders and proceedings of the trustees of "every turnpike road, together with the names of the "trustees present at every meeting, shall be entered in "a book to be kept by the clerk to the said trustees for "that purpose, and be signed by the preses of the "meeting at which such orders or proceedings shall be "from time to time made or had."

And by the fifteenth section it is further enacted, "That the trustees of every turnpike road shall direct "a book to be provided and kept by their clerk or "treasurer for the time being, in which book such clerk "or treasurer shall enter true and regular accounts of "all sums of money received and expended on account "of the road for which such clerk shall act, and of the "several articles, matters, and things for which such "sums of money shall have been disbursed;" and

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certain penalties are imposed upon the clerk or treasurer refusing inspection of such book, or otherwise contravening the statutory provisions in regard thereto.

The above statute is repealed by 1 & 2 Will. 4. c. 43., together with other statutes, "in so far as they relate to "turnpike roads and keepers of toll bars," but they are declared to remain in force as to all other roads not being turnpike. The sections above quoted are in substance re-enacted by the 9th, 10th, 11th, 14th, and 15th sections of 1 & 2 Will. 4. c. 43., and by section 16. thereof it is enacted, "That the trustees of every turn-"pike road may pursue and be pursued in all actions "or processes in the name of their clerk or treasurer "for the time being; and that no action or process, "brought or commenced by or against any trustees "of any turnpike road by virtue of this or any other "act of parliament, in the name of their clerk or "treasurer, shall cease by the death or removal of such "clerk or treasurer, or by the act of such clerk or trea-"surer without the consent of the said trustees; but "that the clerk or treasurer for the time to the said "trustees shall always be deemed to be the pursuer or "defender (as the case may be) in every such action or "process: provided always, that all expenses of process "or proceedings so incurred by such clerk or treasurer "shall be reimbursed and paid out of the trust funds of "the turnpike road for which he shall act."

By section 17. it is enacted, "That all such officers "as shall be appointed by the trustees of any turnpike "road shall, as often as required by the trustees, render "and give to them, or to such person as they shall for "that purpose appoint, a true, exact, and perfect "account, in writing under their respective hands, with

" the proper vouchers, of all monies which they shall " respectively, to the time of rendering such accounts, " have received, paid, and disbursed by virtue of this or " any turnpike act, or for or on account or by reason of " their respective offices; and in case any money so " received by any such officer shall remain in his hands, " the same shall be paid to the trustees, or to such per- " son as they shall in writing under their hands autho- " rize and empower to receive the same."

By section 18. it is, inter alia, provided, " That the " trustees of every turnpike road shall and they are hereby " required, either by themselves or some committee of " their number, annually to examine the vouchers, and " audit and settle the accounts of the respective clerks " and treasurers appointed by them, and to examine into " the state of the revenues and debts of the several " roads for which they act, and to make up abstracts of " such accounts, which abstract shall contain a state- " ment of the revenues and debts of the trust, and also " an account of all bonds given by the trustees, &c., " which said abstracts of accounts and statements shall " be signed by not less than three of the trustees."

The 109th section authorizes the procurator fiscal, the trustees, or any person authorized by them, to sue for penalties.

By the subsisting road act for the county of Ayr, passed in 1827, it is enacted, by section 22., " That the " trustees who shall be appointed for the special care " and management of any district or particular roads " shall be subject to the control of the general meetings " of the trustees appointed by this act for their proceed- " ings in the matters committed to them, and shall be " accountable to the said general meetings for their

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"intromissions with the revenues and management of "the affairs of such district or road; and for these pur- "poses they shall, on or before the 31st day of July "yearly, transmit to the clerk of the general meetings "a state of the revenues of such district or road, and of "the expenditure thereon, and an account of all other "transactions for the year ending on the 26th day of "May preceding; also a list of all debts affecting the "same, in order that the same may be laid before the "general meeting on the first Wednesday of August "yearly, under a penalty not exceeding 5*l.* sterling."

And by the twenty-third section of the same act it is enacted, "That all such accounts so laid before "the general meeting shall under their authority be "examined, audited, and reported to a subsequent "general meeting, by whom the same shall be finally "settled; and the clerk to the general meetings of "the trustees appointed by this act shall, on or be- "fore the first Wednesday of November yearly, make "up an abstract from the committee's report of the "whole accounts which shall have been transmitted to "him, showing the revenues of each road, and expen- "diture thereon, the amount of the whole debts affect- "ing the same, and such other particulars as the said "trustees shall from time to time direct; which abstract "shall be laid before the meeting to be held on the "said first Wednesday of November, and shall be open "for the inspection and perusal of the creditors on the "tolls authorized to be levied by this act," &c.

At the first meeting of the trustees under the local act, held at Ayr, 11th July 1827, authority was given to the committees appointed for the management of the different lines of road under the act to continue their

management, taking along with them the new trustees appointed by that act, and recommending to the former conveners to call meetings for the purpose of appointing clerks, cashiers, and collectors. In virtue of this authority a meeting of the trustees for the district of Lochlibo was held at Beith upon the 27th July 1827, when Robert Rankin junior, writer in Irvine, was appointed treasurer of that district; and upon the 2d of August 1827 a bond was granted in the following terms:—

" We, Robert Rankin junior, writer in Irvine, as " principal, and Robert Dunlop, merchant in Irvine, " and Patrick Creighton, tanner in Kilwinning, con- " sidering that in pursuance of an act passed in the " eighth year of the reign of his present Majesty " George 4., intituled ' An act for repairing and " ' keeping in repair the turnpike roads in the county " ' of Ayr; for making and maintaining certain new " ' roads; for rendering turnpike certain parish roads; " ' and for regulating the statute labour in the said " ' county,' the committee of trustees on the road " leading from the road from Irvine to Stewarton at " the Girdle, and passing by, at, or near Doura and " Mountgreenan, and alongst the Lugton, to the " extremity of Ayrshire near Lochlibo, at a meeting " held at Beith on the 27th day of July last, did elect, " nominate, and appoint me the said Robert Rankin " junior to be their treasurer in time coming there- " after during their pleasure, and conditionally that I " should find caution as after mentioned, as a minute " of the date foresaid more fully bears: Now wit ye " us, the said Robert Rankin junior as principal, and " the said Robert Dunlop and Patrick Creighton as

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" cautioners, to have bound and obliged, likeas we, by
" these presents, bind and oblige ourselves, jointly and
" severally, and our heirs and executors, that I the
" said Robert Rankin junior shall not only duly and
" faithfully execute the said office of treasurer, but also
" from time to time, and as often as may be required,
" hold just compt, reckoning, and payment to the said
" trustees, or quorum of them, of my intromissions with
" the funds of the said road, and any other road which may
" be put under the management of the said committee,
" and of all monies that shall be paid over to me, as
" treasurer foresaid, so long as I shall be continued in
" office, and particularly that all monies to be received
" by me shall from time to time be lodged in a bank
" in an account current, to be opened in my name for
" behoof of the said road, and that I shall at no time
" keep in my hand more than 20*l.* for answering con-
" tingencies; all this under the penalty of 200*l.* ster-
" ling attour performance; and I the said Robert
" Rankin junior hereby oblige myself and my foresaids
" to free and relieve, and harmless and skaithless keep,
" my said cautioners of their cautionry obligation for
" me in the premises, and of all damages and expenses
" they may any way sustain or be put to thereanent:
" And we consent to the registration hereof in the books
" of council and session, or other judges books, therein
" to remain for preservation, and that letters of horn-
" ing on six days charge, and all other execution
" necessary, may pass on a decree to be interponed
" hereto in common form."

A general meeting of the county trustees was held at Ayr on the 1st of August 1827, at which the permanent nomination of trustees for the special manage-

ment of districts took place, and the Lochlibo district trustees were appointed to take charge, among others, of the Lochlibo and the Monkredding roads.

Rankin continued treasurer till the beginning of June 1833, when he absconded, having trust funds in his hands to the amount of about 367*l.* 6*s.* 8*d.*, on account of the Lochlibo road.

The annual meeting of the road trustees for the Lochlibo district was held at Beith, 14th June 1833, and the minutes thereof bear that,—" Mr. Brown stated to " the meeting, that Robert Rankin junior, treasurer to " this trust, had absconded from Irvine, with his family, " ten or twelve days ago, without giving up the books and " vouchers belonging to the trust, which are understood " to be in his repositories at Irvine, and moved that the " duties of the office of treasurer be discharged in future " in terms of the act 1 & 2 W. 4. c. 43. s. 12. The meeting having learned that the treasurer's absconding is " matter of notoriety, instruct Robert Rankin, writer in " Irvine, the clerk, to take such measures, judicial or " otherwise, as may be necessary for obtaining possession " of the books, vouchers, and other papers belonging to " the trust which were under the charge of the treasurer. " The meeting also unanimously agree to the motion of " Mr. Brown, and authorize the clerk to uplift and discharge the balance due to the trust by the treasurer; " and to uplift from the bank any funds which may " there be deposited in his name, and if necessary to sue " the treasurer and his cautioners for any defalcation " there may be, also to uplift and discharge all other " monies due and to become due to the trust."

Robert Rankin raised an action before the Sheriff of Ayrshire (6th July 1833), setting forth his title to

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pursue as "clerk of the committee of road trustees for "the Lochlibo district, as representing the said com- "mittee, and duly and specially authorized by a general "meeting thereof, held at Beith on the 14th day of "June 1833, to raise and pursue the action after men- "tioned, conform to certified extract of the minutes "herewith produced, upon and against Robert Rankin "junior, writer in Irvine, as principal, and Patrick "Creighton, tanner in Kilwinning, and Mrs. Mary "Hutchison or Dunlop, relict of the deceased Robert "Dunlop, merchant in Irvine, and Jane Dunlop, re- "siding there, his daughter."

The summons then set forth the obligation said to have been contracted by the bond of caution, and concluded that "the said Robert Rankin junior, as prin- "cipal, and Mrs. Mary Hutchison or Dunlop, and "Jean Dunlop, representatives of the said deceased "Robert Dunlop, as cautioners, defenders, ought and "should be decerned and ordained, jointly and seve- "rally, by decree of me and my substitute, to exhibit "and produce in process a full and particular state of "the said Robert Rankin junior's accounts," &c. "and "the said defenders, as principal and cautioners fore- "said, ought and should be decerned and ordained, "jointly and severally, by decree foresaid, to make pay- "ment to the pursuer for behoof of the said committee "of trustees of the sum of 1,000*l.* sterling, or of such "other sum as shall appear in the course of this process "to be the balance due by the said Robert Rankin "junior, as treasurer aforesaid, to the said committee "of road trustees, with the legal interest thereof from "the date of citation to this action, and in time coming "till paid." Then follows a conclusion against "the

"said defenders" for the penalty in the bond, and expenses of process.

Although the name of Patrick Creighton was omitted as above in the conclusion of the summons, the summons was served on him personally.

The summons was also executed at the dwelling house in Irvine of the principal debtor, Robert Rankin junior, which was shut up, the messenger's execution bearing that a copy had been left "in the key hole of the most "patent door of the said Robert Rankin junior's dwel- "ling house in High-street of Irvine," and he was cited on an induciæ of seven days.

Creighton alone lodged defences to the action, stating preliminary objections, (1) as to the title of the pursuer; and (2) want of jurisdiction over the principal debtor; but without noticing the objection in respect of the omission of his own name as a defender in the conclusion of the summons.

Thereafter, 6th July 1833, Robert Rankin raised a supplementary action specially against Patrick Creighton, on the same grounds as in the original summons, and it was also stated, that "by a clerical error in the sum- "mons, the omission of the name of the said Patrick "Creighton in the conclusions, the same was ineffectual "against him for obtaining decree against him as cau- "tioner, and it therefore becomes necessary," &c.

Patrick Creighton gave in defences to the supplementary action, after which the sheriff remitted the supplementary action "to the original action presently "depending in this Court, ob contingentiam." No interlocutor of conjunction was pronounced.

Thereafter the sheriff substitute by interlocutor, adhered to by the sheriff on appeal, repelled the objec-

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tion as to Robert Rankin junior not being properly cited to this action; and also the objection to Robert Rankin's title to pursue.—At that stage of the proceedings, Patrick Creighton having died, the appellant George Creighton, his brother, was sisted as a defender in his place.

A record was thereafter made up, and on 15th December 1835 the sheriff substitute pronounced the following interlocutor, adhered to by the sheriff on appeal:—"Having considered this process, with the "writings produced, finds it averred by the pursuer, "and not denied by the defender, that the treasurer's "accounts were regularly and yearly lodged with the "pursuer, as district clerk of the road trustees, from "his appointment in 1827 until the year previous to "his elopement in the end of May, or beginning of "June 1833, and that the same were examined and "docqueted by the trustees, and afterwards by a committee appointed by the general meeting, by whom "the same were passed from year to year: finds that "the cautioners were bound, with the treasurer Robert "Rankin junior, that he should not only duly and "faithfully execute the said office of treasurer, but also "from time to time, and as often as might be required, "hold just compt and reckoning and payment to the "said trustees, or quorum of them, of his intromissions "with the funds of the road mentioned in the extract "bond produced, and any other road which might be "put under the management of the said committee, "and of all monies that should be paid over to him as "treasurer foresaid, so long as he should be continued "in office, and particularly that all monies to be "received by him should from time to time be lodged

" in a bank in an account current to be opened in his " name, for behoof of said road, and that he should at " no time keep in his hands more than 20*l.* for answer- " ing contingencies: finds, therefore, that it was the " duty of the cautioners to see that the said Robert " Rankin junior duly and faithfully executed the " duties of his office of treasurer by accounting for his " intromissions, and complying with the terms of the " bond which they came under: therefore repels the " defences for the compearer and defender George " Creighton, as to his liability as representative of the " original cautioner and defender Patrick Creighton, " and ordains him to give into process, within fourteen " days from this date, any objections which he may " have to the states, Nos. 1. and 2. of inventory of pro- " ductions, and vouchers therewith produced."

The amount of the treasurer's intromissions, for which he and his cautioners were found liable, was afterwards fixed at 367*l.* 6*s.* 8*d.*, for which sum, with interest and expenses, decree was pronounced by the sheriff.

Creighton, the appellant, advocated, and pleaded, inter alia,—The respondent had no title to sue as clerk to district road trustees: It is only either the clerk or the treasurer to the general road trustees of the county that is authorized to sue and be sued for behoof of or as representing his constituents (1 & 2 Will. 4. c. 43.; Williamson v. Goldie, 2d March 1832): The directions which a meeting of the committee of the district road trustees are said to have given to the respondent merely amounted to an authority to bring an action otherwise competent and legal, and did not vest any right or title in the respondent himself to pursue at his own instance: There were no termini habiles for pro-

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nouncing decree against the advocator, under the conclusions of the original action: The supplementary action afterwards brought by the respondent had not the effect of making the advocator a party to the original action, or of validating the procedure against him, in respect these actions never were conjoined; and, separatim, previously to the date of the decree the supplementary action was asleep: The advocator's brother, in the circumstances appearing on the record, was liberated from his cautionary obligation, in respect that the trustees who took the security violated their duties towards the cautioners under the bond, statutes, resolutions, and directions of the general road trustees; (2d) in respect of their gross negligence and connivance with the principal debtor, in retaining the trust funds and otherwise, as appearing from the record and productions; (3d) in respect of their not having intimated the deviations and omissions of the principal debtor to the cautioners, or required them to cause the monies retained to be deposited, till long after the principal debtor had become bankrupt and absconded: The obligation of the advocator's brother, as cautioner, did not, under the species facti of the case, extend to the claims of the respondent sought to be enforced.

Rankin, on the other hand, pleaded,—The title to pursue libelled on in the summons was justly sustained by the sheriff, especially having regard to the terms of the bond upon which the action is laid, and the provisions of the road acts: The decree pronounced on the merits against the advocator was in all respects regular, and no well-founded objection exists to that decerniture, either upon the ground of want of conjunction of the supplementary with the original pro-

cess, or upon any other formal or technical ground: The supplementary action having been remitted to the original action ob contingentiam, and having been thereafter held and recognized by the parties as part of the proceedings in the cause, and more especially the advocator's predecessor having entered on the merits, and gone to issue with the pursuer, and the advocator himself having afterwards sisted himself as defender, in room of his brother, deceased, any objection otherwise competent, on the ground of there having been no formal or express conjunction of the actions, is not now pleadable by the advocator: At any rate, in the state of the pleadings, and in the whole circumstances, no such objection can now be maintained; the two actions, being both advocated and in this court, may yet be conjoined, if necessary, or at all events further procedure ought to be sisted till the objection in form has been effectually remedied: There are not termini habiles for the objection pleaded by the advocator, that the supplementary summons was asleep before decree was pronounced; Ferrier v. Ross, 7th March 1833; or for the objection that all parties are not duly called: The advocator was justly held liable for the intromissions with the road funds of Robert Rankin junior, in manner and to the extent found by the sheriff's interlocutors, which are in all respects just and well founded: No sufficient or relevant defence in law has been stated, or exists in the facts of the case, to liberate the advocator from his obligation as representing his brother, the original defender, on the ground either of violation of duty, negligence, want of due intimation, or mora on the part of the road trustees.

The Lord Ordinary, after hearing parties on the

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closed record, ordered cases, with which his Lordship made avizandum to the Court, adding to his interlocutor the subjoined note.[1]

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[1] "*Note.*—The Lord Ordinary thinks this case attended with some "difficulty, both as to the preliminary points and the merits; and as the "cases are already printed with an obvious view to an ultimate judgment "of the Court, he thinks it best to put it in the way of such a decision, "with as little delay and expense as possible. He has not of course "formed any decided opinion, but shall state generally the views which "have occurred to him.

"As to the respondent's title to pursue as a district clerk under the "general road act, the Lord Ordinary is rather inclined to support the "title, on the grounds stated at p. 10 et seq. of Rankin's case. The "case of Williamson, however, he thinks was rightly decided in the cir-"cumstances which there occurred; and though the opinions ascribed to "the judges in the printed report appear to go upon a more general "view, he has a strong impression that they should be understood as "referring to these circumstances. As it is very important, however, "that the point should be finally settled, the doubt which he humbly "entertains as to the larger application of these opinions would of itself "have determined him to report the cause without a decision.

"The Lord Ordinary is also inclined to support the pursuer's title, on "the special mandate or authority contained in the minute of the trustees "of 14th June 1833, by which he is expressly empowered and directed "'to uplift and discharge any balance due by the treasurer, and, if "'necessary, to sue him and his cautioners for the amount.' The advo-"cator represents this as a mere mandate to a law-agent to raise an action "for his employers; in which, of course, the only competent pursuers "would be the employers, and not the agent; and from the want of any "express direction to sue in his own name, the matter is no doubt "attended with some difficulty. The Lord Ordinary, however, must "observe, 1st, That the authority is plainly given to the respondent, "not as a law agent, or with a primary view to litigation, but as their "clerk or attorney, and in order that he might himself act on "their delegated authority; and, 2d, That there is accordingly an "express power, not only to require payment of the balance, but to "discharge it, which of course he could only do by a receipt signed by "himself as commissioner and attorney, or per procuration of the "trustees; and consequently that the alternative authority to sue, if "payment could not be obtained extrajudicially, must be held to have "been granted in the same character. The parties may look upon this "point to the cases of Wilson, 8th February 1822 (1 Shaw, 304); "Gemmel, 19th November 1830 (9 Shaw, 33); Low, 1st June 1826 "(4 S. & D. 651); and Oswald, 17th February 1827 (5 Shaw, 381).

"As to the alleged nullity of the whole proceeding, in respect of the "omission of Creighton's name in the conclusion of the original action.

At the advising before the Inner House, (counsel having left the cause upon the argument in the printed cases), the Lords of the Second Division, 18th January 1838, pronounced the following interlocutor: — "The "there is also very considerable difficulty; but the Lord Ordinary, on "the whole, and chiefly on the strength of the decision in the case of "Boyd, 20th January 1832 (10 Shaw, 213), and on the grounds stated "in Lord Glenlee's opinion in that case, would have been disposed to "overrule that objection. As things now stand, he is of opinion that "the respondent can get no aid from the supplementary action, though "it may still be competent for him to waken it, and advocate ob con-"tingentiam.

"On the merits the Lord Ordinary is disposed, though with great "hesitation, to go into the views of the advocator. The omission of the "trustees to require the treasurer to lodge the money drawn by him "regularly in the bank might not perhaps have been sufficient to liberate "the sureties; but what weighs with him is their neglecting, at the "successive audits, either to require actual payment to themselves of the "growing balances in his hands, in terms of the 17th section of the act, "or at least to direct and enforce the application of these balances, after "reserving what might be immediately necessary for outlay on the road "towards payment of the heavy accumulating interests on the large debts "with which they were burdened, and which they had been urgently "required by the general body to keep down by such an application. "The Lord Ordinary does not adopt the advocator's construction of the "17th section to the full extent of holding that every farthing in the "hands or bank account of the treasurer must have been paid over at "every audit, although the necessary outlay on the road might have "required the greater part of it to be instantly paid back to him. He "thinks, on the contrary, that a reasonable sum for meeting current "expenses might and indeed ought always to have been left. But if "the statements at the bottom of page 34 and top of page 35 of "Creighton's case are at all correct (and from any view the Lord Ordi-"nary has been able to take of the account in process he is disposed to "think they are so), he apprehends that under the true meaning of that "section, as well as by the express direction of the general trustees, the "district committee was bound to have taken out of the hands of their "treasurer by far the greater part of what they improperly left with him; "and that in so conducting themselves they violated both an express "injunction of the statute, and a very plain and obvious duty as at com-"mon law; and therefore, and without questioning the authority of any "thing said or decided in a higher quarter in the recent case of M'Tag-"gart's trustees, the Lord Ordinary must think that they have given the "cautioners a fair ground for maintaining that they have been relieved of "their responsibility."

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Judgment of Court, 18th Jan. 1838.

"Lords having advised the cause, and heard counsel "for the parties, repel the objection to the title of the "pursuer, and the other objections stated by the advo- "cator to the regularity of the proceedings in the "inferior court; and on the merits, before answer, "allow the advocator within eight days to lodge a "minute, and state in figures the amount of the balance "at the last audit of the treasurer's accounts in the "year 1832; and allow the respondent to answer the "same, if necessary, within eight days thereafter."

A minute and answers having been lodged, their lordships thereafter (6th February 1838) pronounced the following interlocutor:—"The Lords having advised "the cases for the parties, and whole process, and heard "counsel for the parties, repel the reasons of advocation, "adhere to the interlocutor of the sheriff submitted to "review, remit simpliciter to the sheriff, and decern; "find expenses due; allow an account to be given in, "and remit the same, when lodged, to the auditor to "tax and report."

The defender appealed.

Appellant's Argument.

Appellant.—1. The respondent must, in support of his title to pursue, necessarily found either upon the provisions of the general and local road acts, or on the terms of the minute of his appointment. The instance cannot be supported on statutory authority, (and accordingly it is not so put in the summons), inasmuch as it has been decided by the Court in Williamson v. Goldie[1], "that the provision in the Turnpike

[1] 10 S., D., & B., 413.

"Act, that the road trustees may legally sue or be sued "in name of their clerk, is not applicable to district "clerks, but only to the clerk under the general trust," and that decision has since been approved by the Court in the present case. The respondent, then, who was not the clerk to the general body of the road trustees, could not assume statutory powers. The minute of June 1833 does not warrant an action being brought in the respondent's own name, as representing the committee of trustees, for a debt which was vested in those trustees, and which they had not assigned to him; and no such title as that of assignee, either absolutely or in trust, had been conferred by the trustees upon the respondent. The cases referred to by the Lord Ordinary[1] are not adverse to, but rather support, these views. In the case of Low v. Lord Arbuthnot[1] the action was brought by some of a committee of trustees forming a quorum, and even there the objection was repelled as having been taken too late.

2. The omission of Patrick Creighton's name in the conclusions of the summons, although it might have proceeded from clerical mistake, could only be remedied by a supplementary process, if duly conjoined with the original; and where no such conjunction takes place, by abandonment of the former action, on paying costs, and bringing a new process.[2] The supplementary action, although narrated in the advocation, was not and could not have been advocated, an amend-

[1] Wilson v. Kippen, 8th Feb. 1822, 1 S. & D. 304; Kippen, &c. v. Wilson, &c., 7th June 1823, 2 S. & D. 378; Low v. Arbuthnot, 1st June 1826, 4 S. & D. 651; Oswald v. Lawrie, 17th Feb. 1827, 5 S. & D. 381 Lawson v. Gordon, 7th July 1810, Fac. Coll.

[2] 6 Geo. 4. c. 120. s. 10.

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ment by minute or by supplementary process being incompetent after the record is closed.[1] The compearance of the appellant in the original action in place of a party not called by the summons in that action cannot obviate the difficulty. The objection was not waived by Patrick Creighton appearing and pleading on the merits.[2] In Boyd v. Lang[3], relied on by the respondent, no objection had been taken to the competency of the decerniture against Boyd, who had appeared as in right of another, and joined issue with Lang in the action, and did not even in his additional pleas in law, or until the advising in the Inner House, take the objection.

3. Farther, in respect of the principal debtor not being duly cited, the original as well as supplementary actions were inept, through the want of jurisdiction in the sheriff, the Court of Session being the only competent forum.[4] The act of sederunt, 14th December 1805, referred to by the respondent, only applied where a doubt existed as to the residence, and had reference to the then existing bankrupt act, which has expired, and so has the act of sederunt. Here the fact of Rankin junior being furth of the kingdom was notorious, and required not to be proved.

4. The obligation of the cautioners, under the bond of caution of August 1827, did not attach to the claim sought to be made effectual, because the cautioners were liberated from that obligation by the acts and omissions

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[1] M'Indoe v. Lyon, 7th Dec. 1826, 5 S. & D. 94; Lyle v. Balfour, 17th Nov. 1830, 9 S. & D. 22; Stewart v. Gloag, M'Le. & Rob. 738.

[2] Wedderburn v. Town of Dundee, 4th Jan. 1740, Mor. 11986.

[3] 20th Jan. 1832, 10 S., D., & B., 213.

[4] Burn v. Purvis, 13th Dec. 1828, 7 S. & D. 194.

of the trustees,—1. In respect the trustees so conducted themselves as to alter the condition and risk of the cautioners, as stipulated, or provided for, or contemplated, when the bond of caution was granted; 2. In respect the trustees violated or failed to observe the duties and obligations incumbent upon them by the road acts, and which formed conditions precedent to the enforcement of the cautionary obligation; 3. In respect the trustees not only suffered the treasurer to act in opposition to the rules and regulations of his office, but connived with and encouraged him in their violation, and otherways conducted themselves towards him with gross negligence.[1] It has been said that the dealings of the treasurer with another road, viz. the Monkredding road, have been kept out of view; but the balances in the treasurer's favour on the Monkredding road cannot relevantly be blended or taken into computation with the account of the Lochlibo road in the present question; the Monkredding road was under the management of the Lochlibo district trustees when they took the bond, and it cannot be held to be one of the "roads which may be put under the management of "the committee." The respondent admits the accuracy of the appellant's statement of the balances, and so the extent of the loss incurred through their negligence is beyond dispute. This was a cautionary obligation for the due performance of an office, and not for the payment of a specific sum. The committee of trustees had certain statutory duties to attend

[1] Dict. per V. C., Eyre v. Bartrop, 3 Mad. 221; per C. B. Richards, in Bowmaker v. Moore, 7 Price, 231; per Lord Ellenborough, C. J., in Bacon v. Chesney, 1 Stark. N. P. C. 192. Dick v. Nisbet, 30th Nov. 1697, 1 Fount. 798, Mor. 2090; University of Glasgow v. E. of Selkirk, 18th Nov. 1790, Mor. 2104; Straton v. Rastall, 2 T. R. 370.

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to and enforce, through the neglect and non-enforcement of which the loss accrued on the Lochlibo road accounts. In obligations like the present it is the duty of the principal to "superintend and watch over the conduct of "the principal debtor in a proper and rational man-"ner."[1] The correct doctrine, with reference to the cases on both sides, is, that if there has been nothing more than a mere omission or delay the sureties are liable; but if there has been a positive act whereby the risk of the sureties has been increased, then they are not liable. On principle, independently of specialties, the case of M'Taggart in the House of Lords does not derogate from the authority of prior cases.[2]

Respondent's Argument.

Respondent.—1. The action was brought by the respondent as representing the committee of trustees. Those district trustees could in their own name have sued, being the creditors in the bond. Hence they can authorize a third party to sue in their name, as in Low's case (supra, p. 117.), where a committee was held to have been duly authorized by district trustees, and the authority of which case was recognized by the Lord Justice Clerk (Boyle) in the subsequent case of Oswald. [LORD CHANCELLOR.—Rankin sues in his

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[1] Per Lord Balgray, in Forbes, 10th June 1829, 7 S. & D. 732; Bell's Princ. s. 287. and 288; Fell on Guarantee, 157; Duncan v. Porterfield, 12th Dec. 1826, 5 S. & D. 102; Mein v. Hardie, 19th Jan. 1830, 8 S., D., & B., 346; Smith v. Bank of Scotland, 1 Dow. 296; Thomson v. Bank of Scotland, 11th June 1824, 2 Sh. App. 316; Linlithgow Commissioners of Supply v. Menzies, 10th Feb. 1831, 9 S., D., N., & B., 434; Thistle Friendly Society of Aberdeen v. Garden and Knox, 17th June 1834, 12 S., D., & B., 745; Pringle v. Tate, 10th July 1834, 12 S. & D. 918; Montague v. Tidcombe, 2 Vern. 518; Fell on Guarantee, 180.

[2] M'Taggart v. Watson, 16th April 1835, 1 Sh. & M'L. 566.

own name, not in the name of the trustees.] So did the committee in Low's case. [LORD CHANCELLOR.—In Low's case the pursuers were some of the proper parties; the objection was that all the proper parties, pursuers, were not in the field.] But in Low's case the pursuers were held entitled to sue as persons authorized by the trustees to sue. Here, the clerk founds upon the express authority to bring the action as good authority at common law, as holding delegated power from trustees entitled to pursue, and assigning to another their full right to do so. [LORD CHANCELLOR.—Can it be stated as a general principle of law that a party appointed officially with statutory powers can delegate his power to sue; the assignment of all right and interest in a party to another is different; but can a party alone entitled to sue delegate his statutory powers to another?] With reference to the sections of the acts quoted, if the general and local acts authorize the trustees to divide themselves into district committees, and if district committees have power to appoint clerks and treasurers, the district trustees must have the benefit of the 16th section, to the effect of enabling their clerk to sue. District trustees have, by those statutes, the widest powers of the general body of trustees given to them. A question may, no doubt, arise as to the extent of the power given in any particular case to any clerk or officer appointed by district trustees; and so in Williamson v. Goldie (supra, p. 111.) it may have been that the district clerk had not authority to bring the action, and therefore it would seem not to apply; and even if it did, it cannot be held a good decision, and the Lord Ordinary thinks that it

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was decided on the circumstances.[1] [LORD CHANCELLOR.—That case certainly pressed harder on the judges in the Court of Session than it can do on this House.]

2. The omission of Patrick Creighton's name, per incuriam, in the conclusion of the summons, in which he is previously mentioned throughout, is in itself no objection, and at all events was cured by the supplementary action. In any view Patrick Creighton's citation and appearance, and pleading to the action, answers the objection; and for the same reason his acquiescence till after decree bars him from stating it.[2]

This was the view sanctioned in the recent decision of Boyd v. Lang.[3] In course of certain proceedings in the inferior court, a party sisted himself as defender, and litigated the case on its merits with the pursuer till judgment was pronounced against him. The cause was then advocated; and the only difference between it and the present case was, that the objection of the original libel having no conclusions against him was not stated in the note of additional pleas upon which the case was argued in the Outer House, but was argued only at the bar of the Inner House. This, however, does not at all affect the principle of the decision, and the competency of holding a party to have waived the form of executing

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[1] Cases of Low and Oswald, ut sup., p. 117; Mackenzie v. Walker, 25th June 1831, 9 S., D., & B., 801; Bauchope v. Cox, 6 Dec. 1832, 11 S., D., & B., 175; Rocheid's Trustees v. Balfour, 19th Dec. 1834, 13 S., D., & B., 220; Barclay's Law of the Road, p. 57; Bow, 6th Dec. 1824, 4 S. & D. 276.

[2] Hallyburton v. Blairs, 1 June 1836, 14 D., B., & M., 859; Elliot v. Johnston's Trustees, 1 S. & B., 54 & 218, and 2 Sh. Ap. 461.

[3] 20th Jan. 1832, 10 S., D., & B., 213.

the summons against him so as to justify a decerniture by which he shall be bound.

The earlier case of Wedderburn[1], to which the appellant refers, was peculiar, inasmuch as the party there had merely sisted himself specially for his interest, and only to see that the question of astriction in which he was interested was fairly argued with the party properly called and appearing as the defender in the cause. A compearance merely for his interest was held not to justify a personal decerniture. This is entirely different from such a case as the present, where the advocator's appearance as a defender led to the whole litigation which ensued, there being defences lodged for no other party but himself, and where there could be no other issue to that litigation but a personal decerniture against him, or decree absolvitor. Moreover this case of Wedderburn was under the view of the Court when they decided the more recent case of Boyd.

3. A party is not considered furth of the kingdom until after forty days from the time of his leaving his domicile.[2]

4. Taking the accounts of the two roads of the district to which the management of the treasurer applied, and having reference to the sums in the bank account, (the bank account being kept in the treasurer's name, and not in that of the trustees,) the fact is unquestionable, that in 1828, 1829, and 1830, in place of there being large balances in the treasurer's hands, as represented by the appellant, a balance was due to him by the road trust. At the audit in the year 1831 there appears indeed to have remained with the treasurer 183*l.* 13*s.* 4½*d.*,

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[1] 4th Jan. 1740, Mor. 11986.

[2] Act of Sederunt, 4th Dec. 1805; Ersk. b. i. t. 2. s. 16. note.

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but this sum was speedily exhausted in payments on account of the roads; and at the last audit in 1832, as has been stated, the sum of 77*l.* 8*s.* 11*d.* remained with the treasurer. So far, in regard to those two years, there was, at the time of the audits, more money in the hands of the treasurer than there ought to have been, had he faithfully complied with his obligation to lodge the sums in his hands in the bank accounts. But beyond this the state of the facts does not admit of the plea on the ground of negligence, raised by the cautioners, being maintained. There are two capital errors committed by the appellant in all the views given by him of the accounts; the one lies in leaving out of sight the intromissions of the treasurer with the funds of the Monkredding road, and the other, in stating the gross balances appearing in the road accounts, without deducting the sums which were at the moment deposited in the bank, as provided by the bond of caution. Effect being given to those two errors, the statements of the appellant are at once reconcileable with the truth, and with the view of the accounts the respondent has just given.

The ground of objection, as regards its merits, is difficult to be discovered; for it has never been held, either in Scotland or in England, that where a treasurer for road trustees enters into a bond with sureties, and absconds with a balance in hand, it is any answer to an action against the cautioners, that a balance was, through neglect of the trustees, left in the party's hands. Even if there had been neglect in the present instance it would not have been sufficient to relieve the cautioners. The principle is, that there must be fraud, or giving time, or so conducting matters with the debtor as to disarm the

cautioner, and thus entitle him to be relieved. Such is the settled rule in England, in the Trent Navigation Company v. Harley [1], Eyre v. Everett [2], and London Assurance Company v. Buckle.[3]

Respondent's Argument.

While there is a duty on the part of the trustees, there is an equal obligation on the part of the officer to pay, and the sureties are obtained for the purpose, among others, of seeing that the money is paid over. The cases of Duncan and of Mein (supra, p. 120.) lay down extraordinary rules, which have been corrected by a judgment of the House of Lords, temp. Lord Brougham, Chancellor, in M'Taggart v. Watson [4], which, with the cases of Smith and of Thomson, was decided on correct principles.[5]

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, the pursuer in this case is described in the summons as "clerk of the "committee of trustees of the Lochlibo district," and "as representing the said committee, and duly and "specially authorized by a general meeting thereof." If, therefore, the pursuer can maintain his title to pursue in either character, the first preliminary objection must fail. Lord Jeffery, the Lord Ordinary, was inclined to support the pursuer's title upon both grounds. I do not understand the other judges to have expressed any opinion upon the first ground, viz. the title to pursue under the statute. This is to be regretted, as both points are of considerable importance, and of general application.

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[1] 10 East, 34. [2] 2 Russ. 381. [3] 4 Moore, 153. [4] 1 Sh. & M'L. 566.

[5] See also Hamilton v. Calder, 18th June 1706, Mor. 2091; Wallace v. Sanders, 20th Feb. 1708, Mor. 2096; Eadie v. How., 3d Feb. 1829, 7 S. & D. 356.

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I have thought it my duty to look into the general road act, for the purpose of forming my opinion. The 9th section authorizes trustees acting under any general turnpike act to divide the road comprised in any turnpike act into districts, and to name committees of their number for the more immediate direction and management of such road or any particular parts thereof, and the regulations above enacted are to apply to and affect all such committees. The 11th section of 4 Geo. 4. c. 49. gives to the trustees in their district or committee meetings full power to appoint clerks and collectors, and treasurers, with salaries; but the 1 & 2 W. 4. c. 43. s. 10. gives the power to trustees acting under any turnpike act, in which the district committees clearly are included. The 11th section of the last-mentioned act directs the trustees of every turnpike road to take security from every treasurer to be appointed by them. By the 10th section the district trustees were to appoint a treasurer. The security directed by the 11th section must be by the treasurer so to be appointed, and to be given to the district trustees who are so to appoint him. The 13th, 14th, and 15th sections contain regulations for the conduct of the trustees, in which they are described as trustees of every turnpike road; and the 16th, using the same description, enacts that the trustees of every turnpike road may sue or be sued in the names of their clerk or treasurer, and provides that his costs shall be paid out of the trust funds of the road for which he shall act. The 17th section provides, that all such officers as shall be appointed by any trustees of any turnpike road shall account with them, and in default the sheriff is to act on the application of the said trustees; and by the 18th section the trustees of every turnpike road are, by them-

selves or some committee of their number, annually to examine, settle, and audit the accounts, and make an abstract of them.

The result of those several provisions appears to me to be, that when the road under any turnpike act is divided into districts, and a part assigned to a committee of the trustees, that committee are the trustees for the purposes of that part of the road so assigned, and as such have all the powers and authorities given by the act, though subject to the direction and control of the general body; and that they have the power of appointing the clerk and treasurer of such road; that they are to take security from such clerk and treasurer; and that the clerk so appointed is under the 16th section, when necessary, the proper person to sue, upon the security so given by the treasurer to such committee of trustees.

I certainly am not able to reconcile the expressions, attributed to some of the judges in Williamson v. Goldie (ante, p. 116), with this construction of the statute. That case was not brought to this House, and Lord Jeffery thinks, that from the circumstances of that case, it is not necessarily a decision adverse to this construction. Be that as it may, it cannot in this House operate against our adopting a construction of the statute which appears to be the correct one, and which is necessary for the due operation of its several provisions. The particular road or part of a road being assigned to a committee, they are to appoint the officer for such road, or part of a road; they are to take security, and to audit his accounts; and they to whom the security is given are, by their clerk so appointed by them, to enforce against the security the payment of the balance so

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found due from the treasurer appointed by them, upon the examination and audit of his accounts:

If this be the right construction of the statute, the pursuer's title to sue is established, without the necessity of considering the other ground, upon which it appears to have been principally supported by the judges of the Inner House. I certainly feel relieved by not being under the necessity of expressing any conclusive opinion upon this subject, a question purely of practice which has been thought free from difficulty below, and as to which from that cause probably we are without any reasons given for that opinion. Upon a question of practice, the rule of the Scotch courts constituting as it does the law of Scotland must prevail, and upon such a subject your Lordships would be most unwilling to disturb a deliberate judgment of the Court of Session. If any case should come before this House calling for a decision upon that point, your Lordships will be anxious to be informed more fully as to the practice of the courts of Scotland upon the subject, and as to the grounds upon which any decision upon it may be founded. No such practice exists in this country, and if, by the law of Scotland, a party having himself a right to sue can, by such directions as were given in this case, enable another to maintain a suit in his own name, it will be necessary to consider many consequences which may flow from such a rule. In that case, the usual provision in acts of parliament that companies or other bodies may sue by their officer will be unnecessary in Scotland; and if the power exists only to enable a company to authorize a person to maintain a suit, and does not render the company liable to be sued in the name of the same person, it would appear that consequences

may follow which are not consistent with obvious principles of justice. Here I must be understood as speaking of transactions which do not amount to assignments of the subject matter of the suit, but which leave the property in such subject matter, and therefore the fruits of the suit, in the party giving the authority to sue. These and many other considerations will, no doubt, receive all due examination by the Court of Session in any case in which a similar question may be raised.

I will only further observe, that the 109th section does not aid the proposition contended for, because if that section enables any person authorized by the trustees to sue for the penalties, that authority is conferred by the statute, whereas the argument in this case assumes a right of delegating the power to sue independently of any statutable provision.

As to the objection that Creighton was not named in the conclusion to the summons, I cannot but express my satisfaction that the learned judges of the Court of Session have not found any thing in the practice of that Court to compel them to give effect to such an objection. The summons does not in its conclusions name Patrick Creighton, but it states that Rankin, the principal, and Creighton and others, as cautioners, had been applied to for payment, and had refused, unless compelled; and then omitting the name of Patrick Creighton, but stating the name of the principal and of the other cautioners, concludes "that the said prin-"cipal and cautioners foresaid" might be decreed to pay. To this summons Patrick Creighton appeared, and put in defences, but did not raise this objection. After his death, his representative, the present appellant, sisted himself as a defender in this process in his place,

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but did not raise this objection, and the suit proceeding against him without this objection being made in the sheriff court, a decree for payment was pronounced against him. It would have been much to be regretted if, under such circumstances, the whole proceedings could have been set aside by the mere omission of the name of Patrick Creighton in the conclusion of the summons.

In Capel v. Buller[1] the Vice Chancellor (Sir John Leach), refused to permit a party who had appeared at the hearing, and consented to be bound by the decree, afterwards to object that he had never been served with process, or appeared to the suit.

As to the objection that the principal-debtor had never been properly made a party to the suit in the sheriff court, the service of process having been at his dwelling house, which was within the county, but which service it was contended was not regular, he having left the county some time before,—the summons states that on the——day of June 1833, he left the country without having rendered his accounts, and the action it appears was commenced on the 6th July 1833. This statement does not necessarily show that there was any irregularity in the proceedings as against him, or that he was not properly subject to the jurisdiction of the sheriff, and there does not appear to have been any proof of the facts upon which this objection is founded. This point does not appear to have been adverted to by any of the judges, and your Lordships have no means of knowing, whether they thought the act of sederunt of 14th December 1805 applicable to it or not; in

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[1] 2 Sim. & St. 462.

the state of the facts as they appeared on record it seems to me to be impossible to give effect to this objection.

The case then remains to be considered upon its merits. The appellant is sued as the representative of Patrick Creighton, who became bound to the committee of trustees of the Lochlibo road as security for Robert Rankin junior, who had been appointed by them treasurer of that road, and that he would faithfully execute his office, and from time to time and as often as required account for and make payment to the road trustees of his intromissions with the funds of the road, and of all monies that should be paid to him as such treasurer. It was also provided that all monies to be received by the treasurer should be lodged in the bank in his name, and that he should at no time keep in his hands more than 20*l.* to answer contingencies.

The conduct of the trustees, the parties assured, is made the ground on which the liability of the security is rested. And as a most learned and distinguished judge, Lord Jeffery, has expressed an opinion, although accompanied with much doubt, that the cautioners had thereby been discharged, and as it is of much importance that the rule of law in Scotland upon this subject should not remain in doubt, I think it right to go into some consideration of the subject, although the four judges of the Second Division agreed in opinion that the security was not discharged, — in which I entirely concur.

The ground upon which Lord Jeffery thought that the cautioner was discharged, was that the trustees had neglected at the annual audit to require actual payment of part of the balance in the treasurer's hands, and to

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direct the application of such part of the balance, being of opinion that there was no impropriety in there being in his hands part of such balances to meet the current expenses, and therefore thought that the cautioner might upon that ground be relieved, notwithstanding the decision in the case of M'Taggart.[1] In that case the defence was that the commissioners had neglected the duty prescribed by the statute, in not calling the trustees to account from 1826 to 1829, and upon that ground the Court of Session thought the cautioner relieved; but when the case came to this House, the learned Lord (Brougham), who advised the House, observed truly, that many dangerous doctrines upon suretyship obligations appeared to be suggested in some of the cases in Scotland; the interlocutors appealed from were reversed, and the sureties were declared to be liable. That case is of the highest importance, as it removes the authority of some early cases in Scotland, which are not consistent with it, and makes the rule applicable to such cases the same in Scotland as in England. Indeed, it has not been contended at the bar that the rule in the two countries is different.

Upon the rule in England there is no doubt. It is familiar to every lawyer, and I am glad to be able to expound it in the terms which a judge of the highest authority (Lord Eldon) has laid it down, and which I think entirely correct. In the case of Samuell v. Howarth[2] Lord Eldon says, "the rule is this, that if a "creditor, without the consent of the surety, give time "to the principal debtor, by so doing he discharges the "surety, that is, if time be given by virtue of positive

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[1] 1 Sh. & M'L. 553.

[2] 3 Meriv. 278.

" contract between the creditor and principal, not " where the creditor is merely inactive; and in the " case put, the surety is held to be discharged for the " reason, because the creditor by so giving time to the " principal has put it out of the power of the surety to " consider whether he will have recourse to his remedy " against the principal or not; because he in fact can- " not have the same remedy against the principal as he " would have had under the original contract.

In Eyre v. Everett[1], a delay of five years, during which the obligee had not sued the principal, was urged as an exoneration of the surety, but the same learned judge held the surety liable; and this rule of law is so well understood in this country, and so well explained by Lord Eldon, that it is not necessary to enter into an investigation of any other cases.

What then are the facts of this case, with reference to this rule? The accounts were regularly examined and audited, and it may be assumed that it was the duty of the trustees not to leave more money in the hands of the treasurer than might be necessary for the current expenses of the road; and that in fact more was left in his hands than was necessary for that purpose; but there is no evidence of any alteration in the terms of the contract to which the surety was a party,— nothing that could have precluded the trustees from requiring payment of the balance found due. There was therefore nothing more than an omission to require payment; and although this might be a neglect of the duty imposed upon the trustees by the act, it does not for that reason operate more strongly in favour of

[1] 2 Russ. 384.

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the surety, than a similar neglect of the course of proceeding, which the cautioner might, from the usual course of business, or the routine of trade, or the nature of the transaction, have been led to expect would take place. Such neglect can only be urged in his favour, as placing him in a different situation and exposing him to greater risk than he had intended; and this effect is produced by every omission in keeping the principal punctual to his payments; but such omission cannot be pleaded as an exoneration of the surety.

It was truly said that the trustees had improperly sanctioned the treasurer's applying the balances in his hands for the Lochlibo road to defray the expenses of the Monkredding road; and this I think appears to be the case, for I cannot think that the Monkredding road can be considered as included in this bond; but that does not appear to me to be material as the facts arise in this case. If indeed the attempt had been to make the surety repay balances from the Lochlibo trust, which the treasurer had, with the consent of the trustees, applied in repaying to himself balances due to him upon the Monkredding road; a question would arise, whether such application of the Lochlibo balances was not equivalent to payment to the trustees, for the purpose of relieving the sureties from a claim to so much of the balances as were so applied; but no such case arises. The appellant (see his revised case, p. 22), states the annual balances of the Lochlibo trust, and brings out 367*l.* 6*s.* 8*d.* as the ultimate balance on 4th June 1833, and (same page) the effect is shown of including the Monkredding account, which does not materially affect the balance, as indeed it could not,—the balance due to

him on the Monkredding road in June 1833 being only 10*l.* 15*s.* 2½*d.*; and the appellant's minute (p. 29), shows that the appellant has not, in the sum he has been decreed to pay on account of the Lochlibo trust, been prejudiced by the manner in which that account has been blended with the account of the Monkredding road. It would indeed from that minute appear, that a small part of the sum the surety has been decreed to pay consists of a balance due from the treasurer in respect of Monkredding road to 26th of May 1833; but in page 22, he states 10*l.* 15*s.* 5½*d.* to have been due to the treasurer on that account on 4th June 1833. I have not been able to reconcile these two statements, but the difference if any must be very small, and no case is made for the appellant upon any such error in the account. I am, however, satisfied that the interlocutors appealed from are correct. I would therefore move your Lordships, that they be affirmed with costs, for although the Lord Ordinary threw out an opinion upon the case, he came to no judgment upon it, but made avizandum to the Second Division, and the judgment of the Inner House was unanimous.

In the other appeal[1] with respect to the Irvine trust the circumstances do not appear materially to differ from those of the present. I therefore move your Lordships, that the interlocutor in that case also be affirmed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and the same is hereby dismissed this House, and that the said interlocutors therein complained of

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[1] There was another appeal betwixt the same parties, involving similar points, and heard at the same time.

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26th May 1840.

Ld. Chancellor's Speech.

be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

MACDOUGAL and UPTON—DEANS and DUNLOP, Solicitors.