The petitioners averred that in September 1897 they had obtained judgment against the Company in the Mayor's Court, London, for £150, and that having sued on a writ of *fieri facias* on this judgment directed to the Serjeant at Mace of the said Mayor's Court, the writ had been returned unsatisfied and the judgment remained still unpaid.

The petitioners craved the Court to appoint as liquidator Mr Henry Charles Wilson, Chartered Accountant, London, or otherwise Mr Thomas Whitson, C.A., Edinburgh.

There was no opposition to the petition.

The petitioners argued that it would be more convenient that the liquidator should be a gentleman resident in London, as it would be necessary for carrying out the liquidation to pay frequent visits there, and maintained that it was competent to appoint a liquidator outwith the jurisdiction of the Court—*Brightwen & Company* v. *City of Glasgow Bank*, November 27, 1878, 6 R. 244; *Robertson*, October 20, 1875, 3 R. 17.

LORD PRESIDENT—I am not disposed to hold it incompetent to appoint a liquidator outside of our jurisdiction. But for manifest reasons it is preferable to have an officer within our jurisdiction, and residing at or near to the registered office, which is the headquarters of the company. I do not think that there are here adequate reasons for departing from what I suppose to be the general practice of the Court, and accordingly I am against the appointment of this liquidator.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court appointed Mr Thomas Whitson as liquidator.

Counsel for the Petitioners — Chree. Agents—A. P. Purves & Aitken, W.S.

Wednesday, February 23.

FIRST DIVISION.

[Lord Pearson, Ordinary.

WALLACE, PETITIONER.

Cautioner—Judicial Factor—Liability for Defalcations of Judicial Factor Prior to Date of Bond of Caution.

The cautioner for a judicial factor bound himself that the factor "shall do exact diligence in performing my duty as judicial factor foresaid, and shall render just and regular accounts of my intromissions and management . . . and make payment of whatever sum or sums of money shall be justly due by me."

Before the date of the execution of this bond of caution the judicial factor had appropriated to his own use money belonging to the trust estate. He appropriated no more after this date, but replaced part of the embezzled funds.

The judicial factor having absconded, the cautioner was called upon to make good the deficiency found to exist in the accounts. He maintained that he was not liable for any defalcations prior to the date of the bond of caution.

Held that on the construction of the bond of caution, read in relation with the duties of a judicial factor, one of which is to give an accounting at the termination of his office, the cautioner was liable for the amount of his defalcations, whether they took place before or after the date of the bond of caution.

Fraud — Misrepresentation and Concealment—Reduction of Bond of Caution.

A cautioner who was called upon to make good the defalcations of a judicial factor maintained that he was not bound by his bond of caution on the ground that it had been wrongly obtained from him. He averred (1) that there had been fraudulent concealment by the factor himself of material facts, viz., of his defalcations; (2) that the agent acting for the beneficiaries had omitted to notify to the Accountant of Court the death of the previous cautioner, though he was aware that it had taken place some years previously and had not been duly reported by the factor, and that he concealed this fact from the cautioner; and (3) that the Accountant of Court had been guilty of neglect of duty in not taking protective measures when he heard of the judicial factor's failure to report the cautioner's death. It did not distinctly appear from the averments that the agent in obtaining the signature of the bond of caution was acting as agent for the beneficiaries, but rather for the factor, nor did it appear that the beneficiaries knew any facts from which it would necessarily be inferred that the factor was misappropriating the trust funds.

Held that the averments did not constitute a relevant defence against the enforcement of the defender's obligations under the bond.

French v. *Cameron*, 20 R. 966, and *Smith* v. *Bank of Scotland*, 7 S. 244, *considered* and *distinguished*.

The trust-estate of Mr George Wallace, who died in 1867, was put under judicial factory in 1868, Mr James Wink being appointed judicial factor. Mr Wink left his residence in Glasgow and was sequestrated, never having received his discharge as factor, but in October 1890 his cautioner obtained warrant from the Court for delivery of his bond of caution after the factor's accounts had been reported on by Mr H. Horsbrugh, C.A.

In succession to Mr Wink, Mr John Rose Kelso was appointed factor on 16th April 1889. He absconded in the end of July 1896. His first cautioner was Thomas Struthers Smith, merchant in Glasgow, who died on 3rd April 1892.

A petition was presented by Miss Melanie Wallace, one of the beneficiaries, craving

for recal of Mr Kelso's appointment, and for the appointment of Mr David Guthrie, C.A., Glasgow, in his place. The petitioner further craved the Court "(3) to remit the accounts of the said John Rose Kelso to the Accountant of Court to examine, audit, and report upon the same; and to decern and ordain the said John Rose Kelso, or any persons representing him, or having possession of the funds, security, writs, documents, and vouchers belonging to said trust-estate, and the said Mrs Margaret Rae Arthur or Smith, as widow and executrix foresaid, and the said Peter M'Kissock junior, as the present cautioner of the said John Rose Kelso, to make payment, each according to her or his respective liability, and delivery respectively, to the said David Guthrie, or other person to be appointed judicial factor as aforesaid, of any balance that may be due upon the said accounts, and of all the title-deeds, security writs, documents, and vouchers of the said trust-estate of the said deceased George Wallace."

The Lord Ordinary (PEARSON) on 11th September 1896 recalled Mr Kelso's appointment, appointed Mr Guthrie, and remitted to the Accountant of Court to examine and audit Mr Kelso's accounts.

The Accountant of Court reported as follows:—"In obedience to the foregoing interlocutor the Accountant of Court has to report—"That he has examined and audited the accounts of the said factor from 16th April 1889, the date of his appointment, to 24th July 1896, and finds them to close with a balance due by the factor of £496, 0s. 7d., or including penal interest to 11th September 1896, £572, 15s. 3d. . . .

"That the law agent in the factory, in calling at the Accountant's chambers on or about 8th May 1896, mentioned he had then ascertained the cautioner was dead, but the date of death was not mentioned, and of that date the Accountant issued a requisition on the factor to find caution of new, and that within one month. After pressure from the Accountant caution was found of new.

"That the first cautioner of the said John Rose Kelso was Thomas Struthers Smith, merchant, or manufacturer and calico printer, Glasgow. He died on 3rd April 1892, and his executrix is his widow Mrs Margaret Rae Arthur or Smith, residing at 31 Ashton Terrace, University Avenue, Hillhead, Glasgow. Delivery of his bond of caution was not obtained. The present cautioner is Peter M'Kissock junior, mason, builder, and contractor, 55 Bath Street, Glasgow. His bond, dated 24th June 1897, was accepted by the Clerk of Court on 26th June 1896. At that date the balance due by Mr Kelso exceeded the above sum of £572, 15s. now due as per state of balances appended hereto. The factor never reported to the Accountant the death of his first cautioner, though it was his duty to do so, and annually added on his accounts the name of said cautioner, thus leading the Accountant to believe he was alive.

"That in the opinion of the Accountant decree may be granted against the said John Rose Kelso for the said sum of £572, 15s. 3d., with all further penal interest due, and that on payment of the said sum of £572, 15s. 3d., and all interest due, being made by the said cautioners in such proportions as may be determined by the Court (there being a conflict between the cautioners as to who is liable for the factor's defalcations) to the new factor, and on production in process of his receipt therefor and for the securities of the trust-estate, warrant may be granted for delivery of the bonds of caution.

"That the Accountant refers to Bell's Commentaries, 5th ed. i. 366, 7th ed. 384, and *Grant* v. *Kennedy*, 17th June 1828, 6 S. 982."

Answers were lodged to this report by Mr Guthrie, making additional claims in respect of failure of duty by Mr Wink; by Mrs Smith, in which she stated that she did not in any way represent her deceased husband; and by Mr Peter M'Kissock.

Mr M'Kissock's answers contained the following statements—"Mr M'Kissock signed the bond of caution for John Rose Kelso, the late judicial factor, under which it is now sought to attach liability to him, on 24th June 1896, and this bond was accepted by the Clerk of Court on 26th June. The previous cautioner for Mr Kelso had died on 3rd April 1892. The Accountant had, on or about 8th May 1896, peremptorily required Kelso to find a new cautioner, and brought pressure to bear on him to make him do so. At this time there was a sum due to the factory estate greater than that now reported by the Accountant as being due at the date of recal. These circumstances Kelso fraudulently concealed from Mr M'Kissock, representing that he was merely required as a matter of course to become cautioner for future intromissions with an estate which was at the time intact. Mr M'Kissock was thereby induced to become cautioner under essential error in regard to the nature and scope of the obligation which he was undertaking." "On 8th May 1896 the Accountant was made aware by the Edinburgh agent of the petitioners that Mr Kelso's cautioner was dead. Even if the exact date of Mr Struthers Smith's death was not mentioned, the said agent was then aware, and apprised the Accountant of Court that the death had happened some time previously. The said agent called upon the Accountant expressly for the purpose of acquainting him with what he had discovered as to the cautioner's death. It was thus brought to the Accountant's knowledge that the judicial factor had been guilty of a failure in performance of the duty laid upon him by section 11 of the Pupils Protection Act 1849 (12 and 13 Vict. c. 51), and section 7 of the Act of Sederunt of 25th November 1857, of giving immediate notice of the death of his cautioner, and it accordingly became the duty of the Accountant, under section 20 of said Pupils Protection Act, to report the facts to the Lord Ordinary in order that the same might be immediately dealt

with. Instead of doing so, he, with the knowledge and approval of the agents for the petitioner, issued a printed requisition on the factor to find a new cautioner. Such requisition contained no indication that it was other than the ordinary formal requisition issued on the death of the cautioner, when the same had been duly and promptly reported. The factor failed to find caution within a month from the date of the requisition, and it thereupon became the duty of the Accountant forthwith to report the circumstances to the Lord Ordinary, the Accountant having no power to prorogate the time, the power of prorogation being, under the Act of Sederunt of 11th December 1849, vested in the Court alone. Immediate report was the more imperative, as it was apparent from the correspondence passing between the Accountant and the agents in the factory on the one hand, and Mr Kelso on the other, that the latter had been in negotiations with a guarantee association and others, and had found difficulty in finding caution. The Accountant and agents in the factory had, moreover, by this time ascertained—if they had not known it before—that the former cautioner had died long before the 8th May 1896, as is apparent from the terms of a letter of 18th June from the Accountant to Kelso, a copy of which is produced. They also knew that Kelso had regularly returned his cautioner as alive, the last return being made so late as 1st August 1895, yet without inquiry or report to the Court, the Accountant continued, with the knowledge of the petitioner's agents, to press for a new cautioner, and on Mr M'Kissock being induced to act, the said agents, at Mr Kelso's request, framed the bond of caution in the ordinary terms, and delivered up the same to Mr Kelso to obtain Mr M'Kissock's signature thereto, thus allowing him to become bound without warning of the foresaid irregularities, which were within their knowledge, and which they were condoning. A copy of the correspondence between the Accountant and the agents and Mr Kelso, so far as forthcoming, is produced and founded on. Upon the cautioner's death becoming known to him, it was the Accountant's further duty, under section 20 of the Pupils Protection Act, to ascertain and report to the Court any claims competent to the factory against the deceased cautioner's estate, in order that the same should be immediately dealt with. An examination of the accounts for this purpose was the more imperative as the factor had frequently incurred on his previous accounts liability for penal interest. Such examination and report was not however made. It is believed and averred that the Accountant's neglect or forbearance was known to and approved of by the agents for the petitioner, who nevertheless, without warning to Mr M'Kissock, went on to act in preparing and completing as aforesaid the said bond of caution. The result was that Mr M'Kissock was not" . . . "informed of the position of matters either by the Accountant or by said agents, but he was allowed to sign the bond, induced thereto by concealment of these material facts. He submits that the fraudulent concealment and misrepresentation on the part of the factor, and the neglect and want of disclosure on the part of the Accountant and the agents of the petitioners, have nullified the bond, or at least have voided his obligation. And he further submits, that even if no fraud should be established, his obligation is voided by the failure above mentioned to disclose the state of affairs. He is prepared, if necessary, to have the bond set aside by process of reduction. He acted in the matter gratuitously, and no change of circumstances prejudicial to the beneficiaries or the estate followed upon his intervention. Were he held liable, the beneficiaries would gratuitously profit from an obligation undertaken by him under essential error induced by fraud. In any event, Mr M'Kissock submits that on a sound construction of the bond of caution, he is only liable for losses to the estate due to intromissions or breach of duty subsequent to his becoming cautioner. In point of fact there were no such losses. As at 24th June 1896, Mr Kelso was indebted to the estate in the sum of £596, 11s. 1d. This sum had been lost to the estate by defalcations on the part of Mr Kelso prior to that date, and Mr Kelso had in his hands at that time no assets of the estate representing this deficiency, nor had he any personal assets which by any diligence of his own or of the cautioner could have been made available to reduce this deficiency further than it was in point of fact reduced before the date of recal. It was further submitted that the principal sum lost to the estate being one for which Mr M'Kissock is not liable, neither is he liable for interest thereupon, the factor never having said sum in his hands as a part of the estate during the period for which the cautioner is alleged to have been bound. In any event, the claim put forward by the present judicial factor for penal interest subsequent to the date of recal falls to be disallowed."

Mr M'Kissock's bond of caution contained the following obligation — "Therefore I, the said John Rose Kelso, as principal, and I, the said Peter M'Kissock junior, as cautioner, surety, and full debtor for and with the said John Rose Kelso, and we both, principal and cautioner, do hereby bind and oblige ourselves and our respective heirs, executors, and successors whomsoever, conjunctly and severally, renouncing the benefit of discussion, that I, the said John Rose Kelso, shall do exact diligence in performing my duty as judicial factor foresaid, and shall render just and regular accounts of my intromissions and management in relation to the premises, and make payment of whatever sum or sums of money shall be justly due by me, as judicial factor foresaid, and that to such person or persons as shall be found to have best right thereto, and that I shall perform every duty incumbent on me as judicial factor foresaid, and in doing so shall observe the rules and instructions prescribed, or that may hereafter be prescribed,

for the discharge of my said office."

The Lord Ordinary on 16th December 1897 pronounced the following interlocutor, by which he found "that the averments of Peter M'Kissock junior as to the circumstances in which the bond of caution was signed by him are not relevant or sufficient to free him from liability under the bond according to its terms." In respect of a joint minute lodged by the judicial factor and Mr M'Kissock, the Lord Ordinary dismissed the petition so far as Mrs Smith was concerned; and he remitted to the the judicial factor to prepare a progressive statement of Mr Kelso's intromissions.

Opinion.—". . . Mr M'Kissock, who was cautioner for little more than a month before Mr Kelso disappeared, maintains that he is entitled to be free of the bond of caution, in respect he was induced to sign it (1) through fraudulent concealment of material facts by Mr Kelso, (2) through neglect of duty on the part of the Accountant, (3) through undue concealment on the part of the law-agents of the petitioner. He avers that if he were held liable on the bond, the beneficiaries would gratuitously profit from an obligation undertaken by him under essential error induced by fraud. If this were relevantly averred, I should probably have allowed him a proof of the averment, following the case of *Wardlaw* v. *Mackenzie*, 1859, 21 D. 940. But the circumstances here exclude the idea that the cautionary obligation was gratuitous in a question with the estate. And while the whole averments on this branch of the case are worthy of careful consideration, I arrive at the conclusion that, if proved, they would not avail the cautioner so as to free him from his bond. I think he is liable according to the tenor of it, whatever liability that may import."

The judicial factor having lodged a statement showing the amount due by Mr Kelso in July 1896 to be £496, with penal interest amounting to £76, Mr M'Kissock put in a minute in which he submitted, in respect that "the said statement shows the whole malversations of the said John Rose Kelso in regard to the factory estate to have occurred prior to 24th June 1896, when the said Peter M'Kissock became bound as cautioner for his intromissions, and that it does not appear that during the period between the said 24th June and the recal of the said John Rose Kelso's appointment, there were any funds which by the exercise of diligence could have been recovered to the estate other than those which the statement shows to have been restored to it," and craved for delivery of his bond of caution and to be assoilzied from the conclusions in the prayer of the petition.

The Lord Ordinary on February 8th pronounced the following interlocutor:—"Finds that on a sound construction of the bond of caution libelled, the respondent Peter M'Kissock junior is only liable for loss to the estate through such wrongful intromission or failure in duty on the part of the factor as occurred subsequent to the said Peter M'Kissock junior becoming cautioner: Allows the parties a proof of their respective averments bearing on the question of such liability."

Opinion.—"Mr John Rose Kelso was appointed judicial factor on the estate of the late George Wallace in 1889. He left Glasgow in July 1896, and is said to have absconded, and his appointment as factor was recalled on 11th September 1896. The Accountant reports a balance due by the factor of £496, 0s. 7d. of principal, exclusive of penal interest.

"Mr Kelso's cautioners were, (1) Mr Thomas Smith, who died on 3rd April 1892, and (2) Mr Peter M'Kissock. Mr M'Kissock's bond of caution is dated 24th June 1896, a week or two before the factor disappeared. It is in ordinary form, binding the factor and the cautioner that the former shall do exact diligence in performing his duty as factor, and shall render just and regular accounts of his intromissions and management, and make payment of whatever sum shall be justly due by him as factor, and that he shall perform every duty incumbent on him as factor.

"The actual defalcations of the factor occurred between 30th June 1894 and 17th June 1896, as shown in the state No. 82 of process. At the latter date they amounted to £596, 11s. 1d., and they remained at that amount at the date of Mr M'Kissock's bond of caution. At the close of the factory they amounted, as I have said, to £496, 0s. 7d., the factor having himself made good £100 of the deficit after the bond of caution was signed.

"The cautioner contends that he is free from liability, the losses having all accrued before the date of his bond, and the estate having been made better and not worse during the currency of his cautionary obligation. On the other hand, the newly appointed factor maintains that the bond obliges the cautioner to make good prior defalcations. For this proposition he relies mainly on the case of *Grant* v. *Kennedy*, 1828, 6 S. 982. That case, however, seems to me to have turned on the fact that the money withdrawn from the bank before the bond of caution was executed was still in the hands of the trustee at that date. In the present case it appears to me that the bond does not infer liability except for losses through default or failure in duty committed during the currency of the obligation.

"But it is not a complete answer to say that the estate improved during the obligation, and that all the actual defalcations were prior to it. While I do not think that by signing the bond the cautioner *eo ipso* incurred liability for a pre-existing deficit, he was cautioner for the performance of duty by the factor; and there was a continuing duty on the part of the factor to restore what he had taken. The cautioner's liability to make that good may be affected by the circumstances under which the factor failed to perform that duty, and among others by the factor's solvency or insolvency. If, as is here alleged, the factor had no private assets from which the deficiency could have been made up, it may

be that no loss can be shown to have accrued to the estate through the factor's default subsequent to the execution of the bond. I think this part of the case must be cleared up by a proof.

The judicial factor reclaimed, and argued —1. *As regards interlocutor of 8th February* —The law of cautionary obligation depended upon the terms of each individual bond, without there being any presumption either way as to the extent of the obligation—Bell's Comm. (7th ed.), i. 384. The terms of the present bond were almost identical with those of the bonds in *Grant* v. *Kennedy*, June 17, 1828, 6 S. 982; *Magistrates of Edinburgh* v. *Gardiner*, 1766, Hailes 109, in both of which cases the obligation was held to cover past as well as future dealings. A judicial factor was under an indivisible obligation to restore the estate at the expiry of his term of office, and accordingly he had a continuing duty all through the time to make good any defalcations, for the due performance of which the cautioner had become liable. The case was quite different from that of a commercial traveller bound to render accounts weekly. Moreover, the terms of the bond in the cases cited by the respondent were quite different from this. 2. *As regards interlocutor of 16th December*—There were here no relevant averments to support the reduction of the cautionary bond. Any concealment by the factor himself was certainly not enough to release the cautioner. Nor had there been any concealment by the beneficiaries of any material fact which they were bound to disclose. The agent had no authority to represent the beneficiaries and disclose to the Accountant of Court the fact of the previous cautioner's death. Nor was that a fact which would lead to the inference that the factor would prove dishonest in money matters. In any view, it was the duty of the cautioner to make inquiries and satisfy himself—*Young* v. *Clydesdale Bank*, December 6, 1889, 17 R. 231, at 240. The case of *French* v. *Cameron*, July 14, 1893, 20 R. 966, cited by the respondent, was on quite a different footing, since the concealment there was of most material facts.

Argued for respondent—It was important to keep in view the distinction existing between a cautionary obligation for the payment of money and one for the performance of duties. The latter only extended to future acts, and was not a guarantee of solvency, which would not lightly be presumed. This principle was applied to the terms of a bond similar to the present one in *Napier* v. *Bruce*, February 11, 1840, 2 D. 556, *aff.* 1842, 1 Bell's App. 78; Bell's Comm. i, 391; *Dykes* v. *Watson*, June 3, 1825, 4 S. 69; *Smith* v. *Bank of Scotland*, January 14, 1829, 7 S. 244; Bell's Pr. sec. 289. In the case of *Magistrates of Edinburgh* v. *Gardiner* there was a strong dissent, and it was clearly decided on the specialities of the case; and there were also very special circumstances in *Grant* v. *Kennedy*. The true construction of the bond was that if money had been lost before its date, the cautioner would not be liable, and this was borne out by the use of the future tense in the wording of it. (2) There had been fraudulent concealment by the factor, which was sufficient for the reduction of the bond—*Wardlaw* v. *Mackenzie*, June 10, 1859, 21 D. 940. There had also been concealment of a material fact, viz., the death of the late cautioner, and the case was accordingly ruled by *Smith* v. *Bank of Scotland*, and *French* v. *Cameron*, *supra*.

At advising—

LORD PRESIDENT — The extent of the liabilities of this cautioner must be determined by the terms of the bond out of which these liabilities arise. It is maintained by the cautioner that he is not liable for the failure of the factor to make forthcoming moneys belonging to the estate which he *de facto* had applied to his own uses prior to the date of the cautionary bond. I am unable to find in the terms of the bond any such limitation. It is true that the obligations which the cautioner guarantees are obligations to be performed by the factor in the future, and that the word "shall" is applied to each of the verbs expressing the duties to be performed. But then when we come to close quarters with the words out of which this question really arises, we find that what the factor undertakes he shall do is, among other things, to "render just and regular accounts of my intromissions and management in these premises, and make payment of whatsoever sum or sums of money shall be justly due by me." Now, we have to consider what are the occasions of rendering accounts and making payments which would present themselves to this factor in the ordinary course of his office, and it is quite certain that a factor who, be it observed, is entrusted with the *corpus* of the factory estate, has to render just and regular accounts of his whole intromissions annually and when called upon by the Accountant of Court, but the ultimate account and the one which gives rise to most questions is that which is rendered at the termination of his office. Now, acceding to the suggestion of Mr Jameson that the obligation of payment is relative to the obligation of presenting an account, this is quite certain—that the main accounting and the main payment which this factor undertakes is that which occurs at the end of his office. He presents those accounts of his whole intromissions with the whole of the estate, capital and interest, and he, in terms of this bond, obliges himself to make payment of what is brought out in these just and regular accounts, that is to say, he undertakes to make such payment, and the cautioner, echoing these words in the bond, binds himself to all that the factor undertakes to do.

It seems to me, therefore, that it is quite immaterial whether the factor has appropriated to his own uses part of the estate before or after the cautioner becomes bound, because the factor's duty is to make forthcoming the whole estate whether he has applied it to his own uses or not, and

the cautioner obliges himself that that shall be done and that just and regular accounts shall be rendered and payment made of whatever is brought out on the face of that just and regular account. That being the clear import of the bargain, I find it unnecessary to consider what has been held in different litigations to be the result of different expressions applied as it may be to different duties. What I have said is not in the smallest degree inconsistent with a fair construction of bonds, expressed in appropriate terms, where the undertaking is that from a certain date the principal shall account for the moneys entrusted to him — not, observe, vested in him, but received by him in the course of his daily or weekly performance of duties, whether as bank agent or as commercial traveller. My judgment is given entirely upon the terms of this bond, applied, it is true, to the nature of the vocation of the person who undertakes these duties, but resting solely upon, not the strict, but the fair and necessary construction of the instrument.

Now, there is another question raised in this case of a different kind. It assumes the construction of the deed which I ascribe to it, and then the cautioner goes on to say —"But I am not bound by the bond on grounds extrinsic to it. I show that it was wrongly obtained from me, and that I am not now bound by it." In short, this is such a case as in the ordinary forms of process would be presented under a reduction. It seems to me that in the averments made in support of that case there are two very distinct and different classes of statements. The first consists of an attack upon the good faith of the factor. It is said that he, knowing that he had robbed the estate, fraudulently represented to his proposed cautioner that he would incur no liability, that this was all a matter of course, and that all was right. If the fraud of the factor were relevant in a case for liberation from the obligation of the bond of caution, then I should say these were distinctly sufficient averments. It is a case of fraud well enough averred. But then the case is settled surely beyond dispute that the cautioner takes his chance of what is told him by the person whose solvency or responsibility or conscientious acting he proposes to guarantee, and accordingly, while these averments may be relevant if the fraud of the factor would suffice, I think the fraud of the factor does not suffice to liberate this gentleman from the liabilities undertaken primarily to the beneficiaries and the Accountant. The second class of averments relates to the beneficiaries. But is there a good averment here in this sense, that the charge of concealment—for here we are out of the region of fraud and in that of concealment—that the charge of concealment is made against the beneficiaries? I take in the meantime what is said about the gentleman who is called the agent of the petitioner. The mere fact that he is the solicitor of the beneficiaries does not in itself show that what he did on this occasion was done on behalf of those clients, and it would rather appear that this gentleman was the agent of the factor as well as the petitioners upon whose petition the factory was obtained, and that the preparation of this bond and the negotiations leading up to it were undertaken by him in his character of agent in the factory rather than as agent for the beneficiaries. At least in a case of this kind it ought to have been pointedly averred that he was acting on behalf of the beneficiaries in the matter which is now attacked. But passing from this, whoever he was acting for, what is said about him is merely this, that he knew that the factor had omitted to certify the Accountant of Court of the death of his previous cautioner, or even had rendered his accounts upon the statement that the cautioner was still alive. That may have been a violation of his duty, but this was not a matter which the beneficiaries were bound to communicate to the cautioner on the occasion of his being proposed as accepting that liability. It could only be the duty of the beneficiaries to disclose that if they apprehended or clearly inferred that the man was a defaulter as regards the estate. Now, the fact of his not certifying the death of his cautioner, or representing him to be alive, might lead to that inference or it might not. The cautioner here does not even allege that the beneficiaries drew that inference for themselves, and for aught that appears they may never have connected the two things at all. It would rather appear, so far as the averments go, that they were in perfect tranquility about the safety of the estate, and did not draw any such malignant inference of failure on the part of the factor. When I turn to what was said by Lord Eldon in the case of *Smith*, and repeated more recently in the Second Division in the case of *French*, I find nothing to support the view that, irrespective of the nature or quality of the information withheld, the withholding of any information at all, important or unimportant, by the beneficiaries has the effect of vitiating the engagements entered into by the cautioner. It is for him to inquire into matters of that kind unless they are within the knowledge of the beneficiaries, and being directly relevant to the solvency or responsibility of the person he engaged for, are withheld.

There only remains the averment as to the Accountant having been lax in not insisting for a new cautioner at an earlier date. But here again the cautioner has got hold of the wrong person upon whom to fix responsibility, if responsibility there be. Even the clearest negligence of the Accountant in performing his statutory duties antecedent to the bond could have no effect on the liability of the cautioner under that bond. And the case before us does not amount to such an accusation.

Upon the whole matter I think that the Lord Ordinary in his earlier interlocutor is right in holding the averments inferring the reduction of the bond to be irrelevant; that he has gone wrong in his construction of the bond; and that the cautioner is liable for the failure of the factor to make

in the end forthcoming the whole of the estate, whether the defalcations causing that failure took place before or after the date of the bond.

LORD ADAM—As your Lordship has said, there are two questions in this case. The first is whether or not the cautioner is liable to make payment of the deficiency in the account of the factorial estate made up at the close of the factorship. That question depends entirely upon the construction of the bond of caution, and very little light is thrown upon it by decisions of the Court on bonds expressed in different terms and intended to meet totally different circumstances. The object of a bond of caution for a factor is always that the full amount of the factorial estate should be made forthcoming at the end of the factory, and if it is expressed in terms different from the obligations of a cautioner in a cash-credit to a bank, that is very natural and necessary. Accordingly what we have to do with is a bond in the terms which we have here and no other. Now, it is clear that the obligation to make payment of whatever sums should be justly due by the factor is to be made good when the "just and regular" accounts of the factory are made up, and the fact here is that, the factor's accounts having been made up, he is not able to pay the deficiency, and it therefore falls upon the cautioner to meet the deficiency. I have no doubt at all on this question of the construction of the obligation undertaken by the cautioner.

The second point arises on the second finding of the Lord Ordinary's interlocutor of 16th December 1897. In his opinion relative to that interlocutor the Lord Ordinary states the grounds on which the cautioner maintains that he was entitled to be free of his bond to be that he was induced to sign it (1) through fraudulent concealment of material facts by Mr Kelso the factor; (2) through neglect of duty on the part of the Accountant of Court; and (3) through undue concealment on the part of the law-agents of the petitioner. These are the three grounds upon which the cautioner maintains that he is not bound by the terms of his bond, and upon which he would maintain, if this were an action of reduction, that the bond should be reduced. Now, as has been said, a bond of caution is peculiar in some respects, and for the reason that its terms are entirely adjusted between the factor and the Clerk of Court, and that the beneficiary has nothing to do with the matter. The duty lies on the factor to procure a cautioner, and on his producing one, if the Clerk of Court is satisfied with his solvency, that is sufficient without the intervention of the beneficiaries at all; and if that is so, the case is not a favourable one for the application of the principle that concealment on the part of the beneficiaries can be a ground of reduction of a deed.

As regards the averment that there was fraudulent concealment of material facts by the factor, I agree with your Lordship that, however much the factor may have by fraud or concealment deceived the cautioner, that can not be a good ground for reducing the bond of caution. That was settled in the case of *French*, 20 R. 966, and I am therefore of opinion that there is no relevancy in that averment.

The second averment is that there was failure of duty upon the part of the Accountant of Court; but I confess I am quite unable to see how the cautioner can be relieved by the alleged breach of duty on the part of the Accountant.

Lastly, it is said that there was undue concealment on the part of the agent for the petitioner. All that is said is that the previous cautioner for the factor had been dead for some time, but was still returned as alive in his report, and that this was known by the petitioner's agent, and not communicated. On that matter, as I said before, I do not see what the agent of the beneficiaries had to do with the preparation of the bond of caution at all.

I agree on the whole matter that the averments of the cautioner are not sufficient to entitle the cautioner to be released from his obligation.

LORD M'LAREN—The first question in this case is the question of the true meaning of the cautionary obligation—what is the extent of the obligation the cautioner has undertaken? I do not think there is much difficulty in the construction of the bond, but of course in construing it we have to look at the subject-matter of the obligation as well as at the obligatory terms of the bond. Now, there are different occasions on which cautionary obligations are undertaken. Sometimes they are undertaken to ensure repayment of a loan or advance of money, sometimes as a continuing guarantee, and sometimes the obligation is intended to secure against loss arising from the default of a person in a position of trust, and an obligation of that nature is always intended to make good the balance due at the the closing of the account or the period to which the obligation applies. The latter is obviously the nature of Mr M'Kissock's undertaking. Passing over some general expressions of obligation that the factor should do his duty, which are not very material, the important words are that the factor "shall render just and regular accounts" of his intromissions, "and make payment of whatever sum or sums of money shall be justly due" by him. Now, when one considers that the person for the performance of whose duty Mr M'Kissock became cautioner was an officer of Court charged with the administration of trust-estate, I must say that I regard these words as importing an indivisible obligation on the part of the factor and his cautioner to restore the estate entrusted to the factor with the interest accrued thereon from investments, and that a just and true account would be one stating as assets all sums received by the factor and for which he is liable to account. I do think it is impossible to place any other construction on the obligation than that the cautioner

undertook to see paid whatever sum should appear to be due by the factor on a true account of the capital and income of the funds which had passed through his hands. It is not strange that such should be the nature of the obligation. Indeed, I think it may be safely affirmed that the Accountant of Court would not accept a lesser obligation, and that the Court would not approve of a form of security which did not cover the full value of the trust-estate. When a cautioner dies it is not always easy to ascertain precisely the position of the factor in regard to his responsibilities and his ability to meet them. It may be necessary in the course of the administration of his trust that the factor should withdraw substantial sums from the estate, and he may have substantial payments to make, and the liability must always be taken up where it was left by the previous cautioner. If the liability of the new cautioner were anything less than this, it would be necessary that on the death of a cautioner an account of the factor's intromissions should be made up and a new account opened, just as is done on the recal of a factory and the appointment of a new factor.

On the second branch of the case, the objections raised by the cautioner to the enforcement of his obligation, I have little to say. It goes without saying that a cautionary obligation cannot be reduced or annulled on the ground that the debtor has made false statements as to his solvency in order to induce a friend to support him, because to affect the creditor by an act of fraud it must be shown that the fraud is his own. But taking a wider view, if the fraud of the principal debtor were sufficient to set aside the cautionary obligation, it would be impossible ever to secure a debt by caution, because no sensible creditor would accept a bond of caution which was liable to be set aside on intrinsic grounds of which he knew nothing, and which he had no power to control. It is said, however, that if there were not misrepresentation, there was concealment by the beneficiaries, who are the principal creditors in the obligation undertaken by the cautioner. Now, I think that a bond of caution is a bond undertaken to the Court, because no creditor is mentioned, and it is a security given to the Court by the cautioner that he will see paid the amount found due as the result of an official investigation. But I agree that if the person for whose benefit the bond is obtained should interfere actively, and make misrepresentations to induce the cautioner to come forward, then he would be disentitled to sue on the bond, or to take benefit from an obligation obtained by his fraud. This proposition would no doubt apply to studious concealment of facts which it was the duty of the creditor to disclose, though it is difficult to figure a case where the beneficiaries under a trust could be said to have a duty to come forward and interfere in the appointment of a cautioner for the judicial trustee.

But the chief interest of this point is with reference to Lord Eldon's dictum in *Smith* v. *Bank of Scotland*, which has been quoted as the criterion of liability, and is referred to in *French* v. *Cameron*. Now, I do not read Lord Eldon's observations as being intended to formulate a definition or criterion of responsibility on the part of persons looking out for a cautioner, who keep back facts within their knowledge, but rather as intended to point out that there are facts within the knowledge of an employer seeking for a guarantee of his servant's fidelity which he is bound to disclose. The significant word is "trustworthy," and if the employer has reason to suppose that the servant is not trustworthy, and does not disclose the fact, such an employer would have no rights under a bond of caution. On the other hand, it is well settled that a bank manager has no duty of disclosing the state of a customer's account to a person guaranteeing a cash-credit, if it be merely a question of the amount of the customer's indebtedness. If the question is asked, he is entitled and bound either to give a true statement or to refuse to answer.

There is a clear distinction in principle between the case of obtaining a cautionary bond for the fidelity of a servant who has already proved himself untrustworthy, without disclosing such untrustworthiness, and the keeping secret of facts which do not amount to proof of untrustworthiness, but which render it necessary or desirable for security that the bond should be obtained. Such a bond of fidelity is in the nature of an insurance against acts of dishonesty or irregularity, and where such obligations are undertaken for a premium they are treated as a species of insurance. We know that in other cases of insurance if the person wishing to effect an insurance knows that the risk is already determined, that the ship is lost, or the house burnt down, or that the person whose life is assured has died, and conceals the fact, the insurance will be bad. But he is not bound, unless required to do so as a condition of the contract, to furnish information as to the age of the ship or the person, or the condition of the premises. I cannot help thinking that Lord Eldon's observations must be taken with reference to the subject-matter with which he was dealing—the concealment of essential facts affecting the risk. In the present case the facts concealed appear to be altogether non-essential, because the averment amounts only to this, a failure to disclose to the Accountant of Court the fact of the death of the previous cautioner. This no doubt was an irregularity, but one which by no means warrants the inference that the factor would be dishonest in his pecuniary transactions, nor has it been said that such inference was drawn by anyone.

Accordingly, I am of opinion that these objections fail, and that the cautioner should be held liable for the amount due by the judicial factor.

LORD KINNEAR was absent.

The Court pronounced the following interlocutor:—

"Adhere to the said interlocutor of 16th December 1897: Recal the interlocutor of 8th February 1898: Find that the respondent Peter M'Kissock is liable for the whole amount due to the estate of John Rose Kelso, and decern: Find the reclaimer entitled to expenses since 8th February 1898, the date of the last-mentioned interlocutor," &c.

Counsel for the Reclaimer—Ure, Q.C.—C. K. Mackenzie. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Respondent—Jameson, Q.C.—Christie. Agents—Clark & Macdonald, S.S.C.

Wednesday, February 23.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

CORPORATION OF GLASGOW *v.* WATSON JUNIOR.

Arrestment—Competency of Arrestment—Arrestment in Hands of Corporation—Act 1540, *c.* 75—*Sheriff Court Act* 1876 (39 *and* 40 *Vict. cap.* 70), *sec.* 12, *sub-sec.* 5.

Held that an arrestment used in the hands of a city corporation was well executed by being delivered to a servant of the corporation within the city chambers—*diss.* Lord Trayner, who was of opinion that in order to make the service effectual a copy of the schedule should also have been posted to the corporation at the city chambers in terms of section 12, sub-section 5, of the Sheriff Court Act 1876.

An action of multiplepoinding was raised for the purpose of determining the persons entitled to a sum of £209, 4s. 9d. due by the nominal raisers, the Corporation of the City of Glasgow, acting under the Glasgow Corporation Waterworks Acts 1855 to 1895, to the common debtor, George Watson junior, builder, Glasgow. Claims for a ranking *primo loco* were lodged by four creditors of George Watson junior, who had used separate arrestments in the hands of the Corporation, viz., Sir Archibald Edmonstone, who claimed £80; James Rankin, who claimed £16, 17s. 8d.; the Garscube Brick Company, Limited, who claimed £20, 12s. 7d.; and Henry Campbell, who claimed (a) £51, 1s. 4d., with interest thereon from 20th August 1896 till paid, and (b) £7, 15s. 11d. A claim was also lodged by Dugald M'Alister, accountant, Glasgow, as trustee on the sequestrated estates of George Watson junior, in which he admitted the claim of Sir Archibald Edmonstone, but questioned those of the other three claimants, on the ground that their arrestments were invalid and had attached nothing.

The nature of the arrestments and the contentions of the parties are fully set forth in the note to the Sheriff-Substitute's interlocutor.

On 11th November 1897 the Sheriff-Substitute (BALFOUR) pronounced the following interlocutor:—"Repels the claim for Henry Campbell, the Garscube Brick Company, Limited, and James Rankin: Ranks and prefers the claimant Sir Archibald Edmonstone *primo loco* on the fund *in medio* for £80, in terms of his claim; and *secundo loco* ranks and prefers the claimant Dugald M'Alister to the balance of the fund *in medio;* and authorises the Clerk of the Court to pay over said fund accordingly: Finds no expenses due."

Note.—"In this multiplepoinding questions arise among the competing claimants as to the validity of the arrestments used in the hands of the arrestees against the common debtor. The common debtor (George Watson junior) had a contract with the Corporation of the City of Glasgow, acting in execution of the Glasgow Corporation Waterworks, and it is the balance due under that contract which the claimants have sought to arrest in the hands of the Corporation. There are three arrestments to which objections have been taken. There is a fourth arrestment, at the instance of Sir Archibald Edmonstone, but it seems to be conceded on all sides that that arrestment is valid, and it affords a remarkable contrast to the other arrestments, and illustrates the defects in them. That arrestment is laid in the hands of the Corporation of the City of Glasgow, and Robert Wilson, their treasurer, and it has been executed by leaving for the Corporation in the hands of their treasurer, within their place of business in Corporation Buildings, a copy of the arrestment directed for them for their behoof, and by sending a copy of the arrestment to the Corporation in a letter addressed to them to their place of business, and by delivering a copy to Robert Wilson personally. This appears to me to be an unassailable arrestment.

"The other three arrestments are somewhat like one another. The first is at the instance of Henry Campbell, and it is laid in the hands of the Lord Provost, Magistrates, and Council of the City of Glasgow, Water Department, City Chambers, Glasgow, and it is executed by leaving a copy in the hands of a servant within the business place of the arrestees in City Chambers, and by transmitting a duplicate contained in a postal letter addressed to the arrestees at their business place.

"The second arrestment is at the instance of the Garscube Brick Company, Limited, and it is laid in the hands of the Corporation of the City of Glasgow, acting under the Corporation Water Trust, and it is executed by leaving a copy with a servant within the arrestees' place of business in the Municipal Chambers, George Square, Glasgow, town clerk's office, and by posting a copy to the arrestees to their said place of business; and the execution contains an intimation that the arrestment is meant to attach all funds due to George Watson junior, under a contract executed by him, for work done at the Hydraulic Power Station, High Street, Mr Gale engineer.

"The third arrestment is at the instance