

1775. July 18.

DAVID CAMPBELL of Clochombie, *against* NEIL CAMPBELL of Duntroon.

## No 60.

A distressed cautioner, when coming against his co-cautioner, for his share of the debt in which they were jointly bound, found compellable to communicate to him an heritable security upon the debtor's estate, made over to himself, by the person who had interposed for the debtor's relief.

JOHN CAMPBELL of Clochombie, now deceased, and James Campbell of Balinaby, were bound with Major Donald Campbell of Castlesween, in a bond to the Bank of Scotland, for L. 650 Sterling.

Mr Campbell of Duntroon, and David Campbell now of Clochombie, became bound with the Major, in another bond of L. 700 Sterling, to Mr Lockhart.

The Major being called upon to pay these and other debts, to the amount altogether of L. 4000 Sterling, Colonel Donald Campbell, in order to relieve him, paid the debts to the bank, and to Mr Lockhart, and took assignments to them, and likewise advanced the remainder of the L. 4000; and he at the same time got from the Major an heritable security upon his estate. And some time afterward, the Colonel having received payment of his whole sums advanced, from Clochombie, he assigned in his favour the debts and securities, in the same way as they stood in his own person. And Clochombie now claiming from Duntroon one half of the L. 700 bond, in which they were joint cautioners for Major Campbell, it was

*Pleaded* on behalf of Duntroon: That he was not obliged to make payment of any part of the debt, without being assigned to a proportional part of the heritable security: That co-cautioners are considered in the eye of law, as so many *socii* or co-partners, so that, whatever loss may in the issue accrue from the joint obligation, it must fall equally upon all; in the same way as in a society, whatever loss there is at the winding up of the co-partnership concern, it divides equally among all the co-partners.

*Answered*: That Clochombie was willing to assign the debt to the extent of the half which Duntroon was to pay, if he desired such an assignation, in order to enable him to operate his relief against the principal debtor Major Campbell; but that he was not bound to convey the heritable security, which stood in his person for the whole of the above debts, at least he was not bound to convey it to his own prejudice, or so as to enable any other person to compete with him; but he had no objection to convey it, reserving a preference to himself for the whole sums due to him; and he apprehended he could not be obliged to assign in any other terms, being entitled to keep up the security for his own behoof, till the last shilling of the sums due to him was paid; for that the principle contended for, of an alleged co-partnership or society among cautioners, has no solid or legal foundation in the case of a security obtained by one of the cautioners, for his own relief.

THE COURT did not adopt Duntroon's doctrine of a society here, but rather viewed Clochombie in the light of a *negotiorum gestor*, and the following judgment was pronounced:

' THE LORDS find, That Clochombie is entitled to apply said heritable security for relief and payment of the first and last of these debts, (viz. the debt to the bank, and balance advanced by Colonel Campbell,) and in so far is not bound to communicate it, or any part of it, to the petitioner. But as to the debt originally due to Mr Lockhart, find, he must communicate said heritable security to the petitioner, to the effect that any loss on that debt may be borne by him and the petitioner proportionally, but not to compete with the respondent as to the other two debts.'

Act. Hay Campbell.

Act. Rolland.

Clerk, Tait.

Fac. Col. No 182. p. 102.

No 60.

1777. January 17. MAXTON against CREDITORS OF M'INTOSH.

ANTHONY FERGUSON being appointed agent for the Perth Banking Company, granted a bond, along with certain others, as his cautioners, narrating, that the said Anthony Ferguson bound himself for the whole sum that should at any time be due by him to the said Company; and they, the other obligants, bound themselves and heirs for the sum of L. 1000 each, as cautioners to that extent for the said Anthony Ferguson. Among these co-obligants, was Mr Robert M'Intosh, who became bound in the following terms: ' Mr Robert M'Intosh, advocate, for, and in name of, and having full power and authority from, and taking burden on me, for John M'Intosh, my brother.' Anthony Ferguson having stopt payment, it appeared that the balance due by him to the Company was L. 5056 Sterling, and they drew a dividend from his estate, amounting to L. 1287 Sterling. Thereafter the bank pursued the cautioners; and, *inter alia*, adjudged the estates both of Robert and John M'Intosh.

In the ranking of Robert M'Intosh's creditors, two *objections* were stated to the Bank's interest: 1st, That Robert was not bound personally, but only for his brother, *factorio nomine*: 2dly, That supposing Robert personally bound, each of the cautioners were creditors to Anthony Ferguson, in relief of the L. 1000 for which they were bound, and were entitled to draw a proportional part of the whole dividend on the total sum paid to the Bank; whereas the bank had applied that dividend solely to the extinction of the balance, for which they had no cautionary obligation.

On the *first* objection the Court at first found Mr Robert M'Intosh liable only *factorio nomine* for his brother; but afterwards, in consideration of a letter produced from Robert M'Intosh to his agent, in which, speaking of this debt, he says, ' so far as relates to me, as surety in virtue of the bond to that effect, signed ' by me for myself, and in name of my brother,' they altered and found him personally liable.

THE COURT repelled the *second* objection to the Bank's interest in the ranking.

Fol. Dic. v. 3. p. 117.

No 61.

Several parties were cautioners to a certain extent each, for a person's intromissions as agent for a bank. The bank were found not bound to communicate to the cautioners any part of a dividend recovered out of the agent's bankrupt estate; but were allowed to employ the whole towards extinction of a balance, not secured by the cautionary obligation.