

No. 1. It had been contended by the creditors that this letter did not make the least difference, as the letter had evidently been written by Mr. M'Intosh not recollecting the nature of the obligation, and he could never mean by writing this letter to engage himself more deeply than he was by the original bond; nor indeed could he do so to the prejudice of his creditors. The Court, however, seemed to think that the letter expressed what Mr. Robert M'Intosh understood was the nature of the obligation, and as his acknowledgment to that purpose would render him liable, his letter ought certainly to have the same effect.

Lord Reporter, *J. Clerk.*

For M'Intosh's Creditors, *Ilay Campbell, A. Elphinstone.*

For the Bank, *W. Nairne.*

*D. C.*

1802. *May 20*

*MILLIGAN against GLEN.*

No 2.

A cautioner must communicate to his co-cautioner the benefit of any separate security he may have obtained from the debtor.

ROBERT MILLIGAN of Nithbank, and David Glen writer in Dumfries, jointly subscribed a bond (25th June 1781) for a cash credit for £300. Sterling, along with John Ogilvie and John Muncie: The account to be kept in the name of Muncie. Glen likewise received a joint letter from Muncie and Ogilvie, acknowledging that he was only cautioner for them. Glen, besides this, advanced to Muncie £100.

Muncie's affairs having gone into disorder, he executed a deed (12th August 1785), for David Glen's "better security and more sure payment of the aforesaid sum of £100. Sterling penalty obliged for the same, and annualrent that may be due thereupon, in the first place, and for his being freed and relieved of and from payment of the aforesaid sum of £300. Sterling penalty obliged for the same, and interest that may become due thereon, in the second place; wit ye me, without hurt or prejudice to my personal obligation above-written, the above-mentioned bond granted to the bank of Scotland, or to a missive letter granted by the said John Ogilvie and me, of the date of last-mentioned bond, to the said David Glen, but in further corroboration thereof, *veluti accumulando jura juribus*, to have sold and disposed that large tenement," &c. This disposition is declared redeemable upon repayment of the above sums and penalties. On 17th December 1786, the subject conveyed was sold for £511. 11s. and Glen paid £150 as his share towards extinction of the cash-account; the balance of which £87. 5s. 11d. Milligan was forced by diligence to pay. (18th February 1789).

He brought an action against Glen, as co-cautioner, for £43. 11s. 11½d. being one-half of the above loss, as well as for the expenses of diligence used against him.

Informations were ordered by Lord Stonefield (3d February 1801.)

Milligan Pleaded:

The utmost extent of Glen's obligation was not to pay one half of the bond only; for he was bound with the others, conjunctly and severally, to pay the

whole. Of this sum he has yet paid nothing, for what he has already paid was from the debtor's funds. He must be, therefore, liable for half of the balance which was paid by the only other solvent cautioner.

Whatever be recovered by separate security from the debtor's estate, must go to extinguish the debt *pro tanto*; and cautioners, in their action of relief, must restrict their claim to what they have really paid from their own funds, communicating to each other every advantage they may have received in settling their joint concern; Ersk. B. 3. Tit. 3. § 68. and 70.; Brodie against Keith, 27th July 1672, No. 44. p. 3393.

In the Creditors of Fisher against Campbell, 18th December 1778, No. 62. p. 2134; it was in effect found, that there was a common interest among co-cautioners; although there the question was not between the co-cautioners, but between them and the other creditors of the common debtor, and it was not necessary for the Court to go beyond the demand made by the co-cautioners. In Campbell of Clochombie against Campbell of Duntroon, (18th July 1775, No. 60. p. 2132.), the principle of the co-cautioners being *correi*, engaged in a society, and bound to relieve each other proportionally, was expressly laid down as the ground of that decision.

Answered: The heritable security for relief of the cautionary engagement, was intended solely for the defender; it is so *ex facie*; and the several powers it expresses are confined to his will, and could only be exercised by him: But this it is said the law does not allow; that co-cautioners are formed into a sort of society, and that all their rights and obligations must be equal; so that what is acquired by one must be for the interest of the whole. But co-obligants in the same deed have distinct interests, each having the interest of being relieved; and consequently the power of explicating these interests, and securing themselves from loss, must be within their power, equally as creditors, no otherwise connected than through the same debtor. As cautioners, they are only debtors in their respective proportions; and it is only a specific stipulation of being bound conjunctly and severally, and not the quality of the obligation itself, that allows the creditor to come against one for payment of the whole debt, when the rest are solvent. Mackenzie, B. 3. Tit. 3. § 27.; Bank. Vol. I. p. 464.; and Princ. of Equity, B. 1. p. 1. C. 3. concur in laying it down, that the debtor may confer a gratification upon a cautioner, and that he will not be obliged to communicate it to the other cautioners. Glen has applied the whole money he has recovered from the security to the extinction of the debts due to him; he has retained none of it in his own hands, and therefore nothing more can be claimed from him.

The Court (20th May) repelled the defences.

It was observed from the Bench, That the decision in Creditors of Maxwell against Heron, 8th February 1792, No. 63. p. 2136. carried the relief to the co-cautioner too far; for the cautioner who had paid the debt, and had got an

No. 2. assignation to a separate security from the creditor, was by the Court here found entitled to his full relief. But it was decided on appeal, that he could only rank for half the sums, each of the two cautioners having been indebted as principals for a moiety thereof, and as security for the other moiety.

Lord Ordinary, *Stonefield*.  
Alt. *Corbet*.

Act. *Maxwell Morison*.  
Agent, *Arch. Douglas*.

Agent, *Jo. Morin*.  
Clerk, *Pringle*.

F.

*Fac. Coll. No. 40. p. 82.*

\* \* \* Prior to the publication of the above report by the Collector for the Faculty, the Editor had given a short account of the same case, No. 65. p. 2140.