

LORD YOUNG was absent.

The Court disallowed the issue, and dismissed the action.

Counsel for the Reclaimers—Graham Murray—Boyd. Agents—Tods, Murray, & Jameson, W.S.

Counsel for the Respondents—A. J. Young—Gunn. Agents—Whigham & Cowan, S.S.C.

Wednesday, November 30.

SECOND DIVISION.

[Sheriff of Lanarkshire.

W. E. & A. J. ANNAN v. MARSHALL.

Bankruptcy—Composition Contract—Cautioner—Condition on which Cautioner to Pay Composition.

The creditors of an insolvent person acceded, with three exceptions, to a composition contract, on condition that a person named should become cautioner. This person agreed to become cautioner. The composition was to be paid in two instalments, at two and four months. The cautioner, after the expiry of the two months within which the first instalment became due, sent to a firm of law-agents a cheque to enable them to pay the first instalment, receiving back a letter in these terms:—“The sum handed to us is paid on condition all the creditors named in the list signed by most of them accept the composition on or before the 10th inst., and that we give no preference to any creditor.” The law-agents, after obtaining the accession of the three creditors who had not at first acceded, paid the first instalment, before the 10th, to all the creditors except C, who had originally acceded, but who, three days after the first instalment was due, had written to his debtor intimating that owing to the delay he declined to accept payment except in full. The cautioner thereupon stopped payment of the cheque on the ground that the condition upon which it was sent had not been fulfilled, as C had not accepted the composition. Held that the cautioner was liable to the law-agents for the amount of the first instalment paid by them, in respect (1) that C was not entitled to resile from the contract, and (2) that the condition of payment in the letter above quoted was the acceptance of the offer of composition by all the creditors by the 10th inst., which the agents had in fact obtained by that date.

In January 1885 the affairs of John Rankine, fruit and vegetable dealer in Glasgow, became embarrassed, his liabilities amounting to about £635, his assets being £183. A meeting of his creditors, of whom there were nineteen, was convened on 21st January 1885, and an offer was submitted to them to pay a composition of 5s. per £ by two instalments at two and four months. Sixteen out of the nineteen signed a written acceptance of this offer by which they agreed “to accept 5s. per £ on our respective claims, payable in two instalments of

2s. 6d. each in two and four months (21st March and 21st May), provided James Marshall, Virginia Street, Glasgow, becomes cautioner for the same within one week.” Amongst the signatures was that of William Cairns, whose debt amounted to £43.

On 27th January Marshall wrote to W. E. & A. J. Annan, writers in Glasgow, who were negotiating the matter for some of the creditors, and agreed that “failing punctual payment of the said John Rankine of the said instalments, or any part thereof, I will pay the amount remaining unpaid on being required to do so.”

On 24th March Cairns wrote to Rankine as follows—“As your composition has not been paid when it became due, I will now decline to accept it, and must ask you for an immediate settlement of my account *in full*.”

On 2d April Marshall, Rankine's cautioner, sent to Messrs W. E. & A. J. Annan a cheque for £75 to enable them to pay the creditors the first instalment of the composition which was due. He received back from Messrs W. E. & A. J. Annan the following letter dated 2d April—“Dear sir,—You have to-day handed us your cheque for £75 to enable us to settle the first instalment of the composition of 5s. per £ agreed to be accepted by John Rankine's creditors, the other instalment being payable on 21st May next. The sum handed us is paid on the condition that all the creditors named in the list signed by most of them accept the composition on or before the 10th inst., and that we give no preference to any creditor.” On 2d April the Messrs Annan called a meeting of the creditors in order to get the accession of the three creditors who had not signed the acceptance of 21st January. This accession was ultimately obtained before 10th April. In reliance on the cheque being honoured, the Messrs Annan paid the first instalment of the composition to, and obtained receipts from, all the creditors with the exception of Cairns, who wrote to them on 3d April intimating that he “had now resolved not to accept the composition.”

On 10th April Marshall countermanded the cheque, and this action was raised by the Messrs Annan for payment of the amount of the cheque, viz., £75, or alternatively for the sum of £70, 16s. 4d., which was the sum they had paid the creditors as the first instalment of the composition. In defence Marshall maintained that he had only handed the cheque to the pursuers on the distinct understanding and condition that it was not to be used unless all the creditors accepted payment of the composition on or before 10th April, and that no preference should be granted, all as expressed in the letter of 2d April; that Cairns had declined to accept, and further, that notwithstanding the knowledge of these facts and in breach of the conditions of their instructions from the defender and without his authority, the pursuers had paid away the sums to the creditors.

The pursuers pleaded—“The pursuers being the onerous holders of said cheque granted by the defender, and the same not having been paid, decree should be granted as craved. And (additional plea)—The pursuers having so far fulfilled the purpose for which the said cheque was handed them, and being prepared to fulfil the same entirely, are entitled to decree as craved.”

The defender pleaded—“(1) The pursuers having been the agents of the defender, were bound to observe and comply with his instructions, and having failed to carry out the same, they are not entitled to sue. (2) The said cheque having been handed to them on the conditions before averred, and the latter not having been observed and complied with, the pursuers were not entitled either to present or demand payment of said cheque, or to pay any of said creditors. (3) The pursuers not having been authorised or instructed by defender to make the alleged payments, they are not entitled to sue him therefor. (4) The composition contract having been broken, and the offer not having been accepted by all the creditors within a reasonable time, the defender was entitled to withdraw therefrom, and is not bound thereby.”

A proof was led, but it is unnecessary to consider its import further than to notice that on Rankine's sequestration, his trustee intimated by letter of 9th June 1886 to Messrs Annan that he was willing to accept the composition offered.

The Sheriff-Substitute (LEES) on 30th June 1886 pronounced this interlocutor—(After findings in fact in accordance with the above narrative) . . . “Finds that the defender has failed to justify his conduct in stopping the cheque: Finds in law that the pursuers, having, on the employment of the defender, expended the sum of £70, 16s. 4d., and to that extent discharged on his behalf the obligations he had come under as cautioner, are entitled to obtain decree against the defender for payment of this sum: Therefore repels the defences; decerns against the defender for payment to the pursuers of the sum of £70, 16s. 4d.”

On appeal, the Sheriff (BERRY) on 25th May 1887 adhered.

“*Note.*—The argument on this appeal turned for the most part on the construction of the document in which the pursuers state the conditions under which the cheque for £75 was handed to them by the defender on 2d April 1885. These are said to be, ‘that all the creditors named in the list signed by most of them accept the composition on or before the 10th inst., and that we give no preferences to any creditor.’ It was contended for the defender that those conditions required the pursuers to obtain from Cairns, one of the creditors who had signed the agreement of composition, but had afterwards intimated his withdrawal, a fresh assent to the composition, and again, that the expression ‘accept the composition’ meant acceptance of payment of the first instalment for which the same cheque for £75 was given. I do not think that either of these contentions can be supported. On a fair construction of the document it seems to me that what was required of the pursuers was that they should obtain the acceptance of those creditors named in the list who had not already signed the agreement for a composition, and that the expression ‘accept the composition’ meant accept the offer of composition, and not the money which was to be paid as the first instalment. I think, therefore, that in proceeding as they did to pay the creditors, the pursuers carried out the conditions imposed upon them, for there is no doubt that those creditors who had not signed did in fact by their actings accept the composition. Taking this view, I

think that the further contention of the defender fails, that the pursuers, having assumed the position of the defender's agents, failed in their duty of disclosing the declinature of Cairns to accept the first instalment. All that the pursuers undertook on behalf of the defender is, I think, expressed in their letter of 2d April, and beyond that I do not think they lay under any obligation to him. They have applied the funds, which the cheque given was intended to supply, for the purposes for which it was intended, and I think, therefore, that they are entitled to recover from the defender the sum they now claim.”

The defender appealed, and argued—The letter of 2d April 1885 was unequivocally expressed, and the condition in it under which alone the cheque was handed to the pursuers was that all the creditors should “accept” the composition. If the writers had meant the payment (as the Sheriff held) to depend on the condition of “accepting the offer” of composition, they would have said so. Further, the pursuers were acting as the defender's agents, and they were guilty of a breach of duty in not intimating the declinature of Cairns to accept the first instalment. It was unnecessary, then, to go behind a document which clearly and unequivocally expressed the terms on which the parties concerned were dealing with one another. But if it was necessary, then, as matter of law, it was a condition implied in every composition contract between a debtor and his general creditors that all the creditors should concur, which they had not done here.—2 Bell's Com. (7th ed.), p. 400; Goudy on Bankruptcy, p. 481.

The pursuers replied—All the creditors, including Cairns, acceded to the composition arrangement with the exception of three. In order to obtain their accession, the letter of 2d April was written, and in this light it was perfectly clear that the words “accept the composition” meant “accept the offer of composition.” The meaning of the letter was that the cheque was handed to the pursuers on condition that all the creditors accepted the offer of composition by the 10th inst. This condition was in point of fact fulfilled, and the pursuers were entitled to cash the cheque and apply it in payment of the first instalment. As regarded the statement of law in Bell's Commentaries concerning a cautioner's obligation where all the creditors do not accede, the authorities cited in support of the *dictum* did not bear it out. The cautioner's obligation was one quite independent of the rights vested in creditors—*Freeland v. Finlayson*, June 11, 1823, 2 S. 389; *Muir v. Scott*, Dec. 2, 1825, 4 S. 252; *Thomson & Craig v. Latta*, June 12, 1863, 1 Macph. 913.

At advising—

Lord Young—The facts of this case are few and simple, and the question presented by them lies within a narrow compass. A Mr Rankine got into pecuniary difficulties, his liabilities amounting to about £635, his assets only being £183. At a meeting of his creditors held in January 1885 a composition of five shillings in the pound was offered. Most of his creditors were present, and they signed a written acceptance of the offer, the composition to be payable in two instalments of two shillings and sixpence each, and it was a condition of the whole matter that James Marshall should become cautioner for

the same within the week. Marshall did actually within the week become cautioner for the same, undertaking the obligation by letter dated 27th January, in which he agreed and undertook that "failing punctual payment by the said John Rankine of the said instalments, or any part thereof, I will pay the amount remaining unpaid on being required to do so." All the creditors who signed the acceptance received payment of the first instalment, and discharged the debt, with the exception of one named Cairns, who was a creditor for the not large amount of £43, and who, before anyone was put in funds to pay the first instalment, withdrew, and substantially said "This debt has not been paid within the two months of acceptance of the office of cautioner by Marshall, and therefore I am entitled to be relieved, although I hold the cautioner bound in the event of Rankine's failure to pay." Cairns' right to take up this position is the whole foundation of the defence here, and in my view that must fail, because I am very clearly of opinion that he had no such right. Assume that instead of the great majority of the creditors signing the acceptance it had been the whole who did so, and that all but Cairns took payment of the first instalment when it was offered, while he refused, and said, "All very well, but you are a few days too late, and I am entitled in consequence to be off." This question with Cairns presents itself, in my opinion, just exactly as it would have done had the whole of the creditors signed the acceptance at first, and I think that plainly shows that Cairns had no right to take up the position maintained on record, and apparently that position is not maintained by his trustee in bankruptcy.

Well, on the 2d of April, Marshall, the cautioner, sends a cheque for £75 to the pursuers to enable them to pay the first instalment of the composition. They were selected for that office by Marshall because—and only because—they represented the leading creditors of the estate, and were the gentlemen who on their behalf had confirmed the composition arrangement. But the cheque was sent on the condition expressed in the pursuers' letter to Marshall of the 2d of April, as follows:—"The sum handed us is paid on the condition that all the creditors named in the list signed by most of them accept the composition on or before the 10th inst., and that we give no preference to any creditor." Now, I am quite of opinion that that condition was effectual in favour of Marshall, and was binding upon Messrs W. E. & A. J. Annan, and I proceed to consider the import and meaning of it. Mr Balfour contended it meant that payment should be received and acknowledged by all the creditors on or before the 10th instant; actual payment, that is, as distinguished from an agreement to accept payment. I agree with the Sheriff in thinking that that is not the meaning. The meaning is, I think, that all the creditors should agree to the composition and become bound to accept payment of the composition as in full of their debts on or before the 10th inst., and in that sense and meaning the condition was fulfilled. All the creditors had in fact on or before the 10th inst. agreed—and it is not disputed that they did—to accept the composition, and the first instalment of the composition was paid to them all on or before the 10th, excepting

Cairns, who declined to take it under the circumstances to which I have already referred.

I am therefore of opinion that the condition on which the pursuers received the money was, according to its true meaning—which I think is expressed in the Sheriff's note, and which I have repeated—fulfilled, and that Marshall was not justified in drawing back on the ground that Cairns sought to be released in respect the instalment for which he, Marshall, had become cautioner, was not paid on the very day it was due. The argument on that point for the cautioner is, that the composition arrangement was at an end, so far as he was concerned. That, I think, is not tenable, and it would require a very strong case to bring me to the conclusion that in this case Marshall was, as cautioner, entitled to be released from his obligation when all the creditors had acceded to the composition and been actually paid the first instalment, and were only waiting for the second, Cairns being the only creditor who had not accepted payment. I therefore think the Sheriff's judgment right, and that it should be affirmed.

LORD CRAIGHILL—I am of the same opinion. There may be room for doubt as to the interpretation of the letter, but even assuming there is, it would require a very strong case to induce me to adopt the defender's contention. That there was a composition contract entered into on the 21st of January by sixteen out of nineteen creditors is certain. Three did not sign, and those three, up to the 2d of April, when the cheque was put into the pursuers' hands, remained uncommitted. It was necessary therefore that they should be asked to accept, and then was written the letter of 2nd April quoted by Lord Young. Its meaning is this—"All the creditors have agreed to the composition contract except three. Nobody, however, is to be paid unless all agree; therefore unless the three who have not accepted signify their acceptance on or before the 10th inst. the money handed to us is not to be paid away at all." That therefore which was to be got by means of this letter was the agreement of all to the arrangement, and as the three outstanding creditors gave way, and that by the 10th inst., it appears to me that all the creditors did agree, and the money therefore may now be distributed. The only person who had given any difficulty was Cairns, who after his signature of the 21st January wanted to be relieved, and on the 24th March did draw back. But he was bound. He had put his name to the agreement, and was included among those who in the language of the letter had agreed to accept the composition. He cannot be allowed to draw back. I am therefore of opinion that the pursuers are entitled to decree.

LORD RUTHERFURD CLARK—I am also of opinion that the Sheriff's judgment should be affirmed. There was a composition contract to which all the creditors have acceded. At one time there was a question whether Cairns had withdrawn or not. That is at an end, because his trustee in bankruptcy accedes to the contract, and is willing to take the composition. The result therefore is, that we have a composition contract to which all the creditors have acceded. For the composition the defender Marshall became

liable. The money sued for has been paid by the pursuers in satisfaction of the creditors' claims under the contract, and therefore I have no hesitation in saying that the pursuers are entitled to decree for the sum so paid.

LORD JUSTICE-CLERK—I have found this case, I confess, attended with difficulty, and for a considerable period of the debate the impression in my mind was adverse to the views propounded by your Lordships. But I am not disposed to place my impression in opposition to those views, nor do I desire formally to dissent from the result at which your Lordships have arrived. I think that the matter, so far as it depends on written evidence, has been left in a very ambiguous condition, and I think it is not wonderful that a different meaning has been placed on it by the two parties concerned. But I do not want to say anything which may add strength to the defenders' interpretation, which your Lordships have negatived. I am quite clear that the agreement of all to a composition contract would be a most material part of the obligation if it were expressed, but whether it is or is not in the present case, is a question which in my view is doubtful, and at all events is not sufficiently clear to induce me to dissent.

The Court dismissed the appeal and affirmed the judgment.

Counsel for the Appellant—Balfour, Q.C.—Ure. Agents—Fodd, Simpson, & Marwick, W.S.

Counsel for the Respondents—Jameson—Dickson. Agents—Henry & Scott, S.S.C.

Wednesday, November 30.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

CAMPBELL v. CAMPBELL AND OTHERS.

Succession — Marriage-Contract — "Means and Estate," whether intended to include Heritage.

By an antenuptial marriage-contract the husband, after giving to his wife, if she should survive him, his whole household furniture and plenishing, a life-rent of his house, and an annuity payable out of the rents of other heritable subjects, gave her a power to dispose by *mortis causa* deed of his "whole means and estate," in the event of his leaving no settlement disposing thereof, and "to that end" he appointed her his executrix "with power to give up inventories of my estate, and all other powers competent to an executrix; and I hereby leave and bequeath my whole means and estate to her as executrix foresaid." There was no issue of the marriage, and the husband predeceased his wife, leaving no will. He was survived by a son of a previous marriage. *Held*, in a question between the widow and the son of the previous marriage, that the words "means and estate" were not intended to operate as a bequest in her favour of the heritable estate.

By antenuptial marriage-contract entered into between Donald Campbell and Ann Fraser, dated

and recorded 7th January and 18th April 1882, it was provided that in contemplation of the marriage the said Donald Campbell "hereby gives, assigns, and disposes to the said Ann Fraser, if she shall survive him, the whole household furniture and plenishing, including silver plate, china, books, and wines that shall belong to him at the time of his death, wherever the same may be situated; and further, the said Donald Campbell hereby assigns and disposes to the said Ann Fraser, in case she shall survive him, the life-rent use and enjoyment of the cottage in which he at present resides, called Lorne Cottage, with full power to her to uplift and receive the rents payable from any portion thereof, during all the days and years of her life, or to retain the same in her own possession; and it is hereby declared that as the cottage was built upon a piece of ground belonging to me, on which houses had already been erected, and no allocation of the ground has taken place, it is hereby declared that one-half of the garden ground at the back shall belong to and be life-rented by the said Ann Fraser, along with Lorne Cottage; and further, the said Donald Campbell hereby binds and obliges himself, his heirs, executors, and successors whomsoever, without the necessity of discussing them in their order, to content and pay to the said Ann Fraser, in the event of her surviving him, for and towards her aliment, a free life-rent annuity of £15 sterling, and that in equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas that shall happen after the death of me the said Donald Campbell, and the next term's payment at the first term of Whitsunday or Martinmas thereafter, and so forth half-yearly, termly, and continually thereafter, and which annuity of £15 a-year before provided to the said Ann Fraser shall be payable and upliftable by her out of and from the rents of the shop and bakehouse situated in the property belonging to me in Main Street, Callander; and the said Donald Campbell hereby further gives to the said Ann Fraser full power and liberty by *mortis causa* deed to test upon and divide and apportion among my lawful children, whether by my first or this intended marriage, and my friends, in such shares as she may think proper, my whole means and estate in the event of my death without having left any settlement regulating the disposal thereof, and to that end I hereby appoint the said Ann Fraser to be my executrix, with power to give up inventories of my estate, and all other powers competent to an executrix; and I hereby leave and bequeath my whole means and estate to her as executrix foresaid, and which provisions above written, conceived in favour of the said Ann Fraser, she hereby accepts in full satisfaction of all terce of lands, legal share of moveables, and every other thing that she, *jure relicte* or otherwise, could ask, claim, or demand from the said Donald Campbell, or his heirs, executors, and representatives, by and through his death, if she shall survive him; and the said Donald Campbell hereby for ever renounces and discharges his *jus mariti* and right of administration over any estate presently belonging or that shall hereafter belong to the said Ann Fraser: And both parties consent to the registration hereof for preservation and execution," &c.

There was no conveyance of property by the wife to her husband.