

Wednesday, July 17.

SECOND DIVISION.

[Lord Fraser, Ordinary.]

HAMILTONS v. FREETH AND OTHERS.

*Cautioner—Relief—Security given by Principal Debtor to Particular Cautioner—Proof of Consent by Co-Cautioner.*

A cautioner who has obtained from the principal debtor a special security for the liability he has undertaken is not bound to communicate to his co-cautioners the benefit of that security if he agreed to be cautioner only on the condition of having the security, and if the co-cautioners, when they entered into the cautionary obligation, knew of and consented to that arrangement.

A shipbuilding firm, and the two individual partners thereof, became cautioners in a cash credit bond along with another co-cautioner. In security of the liability which they had undertaken the partners received a disposition of certain heritable property from the principal debtor. His estate having been sequestrated, the firm and the individual partners, on the demand of the bank, paid the debt due under the bond, and took an assignation thereto.

In an action of relief at their instance against the co-cautioner under the bond—*held* (Lord Lee *diss.*) that the defender was liable to relieve the pursuers of one-fourth of the sum paid by them, and that the pursuers were not bound to communicate to the defender the benefit of the security they had received from the principal debtor, in respect it was proved that the security had been granted to the partners with the knowledge and consent of the defender for their benefit only, and to cover any liabilities incurred by them, either through the firm or as individuals, which it was just sufficient to do.

*Opinion* (per Lord Lee) that where one of several co-cautioners, equally bound by the same deed, avers that he has received from the principal debtor a special security for his own benefit with the consent of his co-cautioners, such consent cannot be proved by parole evidence.

In September 1887 James Pettigrew, proprietor of the Rochsolloch Ironworks, Coatbridge, obtained a cash credit from the Clydesdale Banking Company for £5000. There were along with him in the cash credit bond granted to the bank (bound as full debtors and co-obligants, although only co-cautioners) three other persons, viz., John Hendrie, coalmaster, Edward Mather Bell, of the Coatbridge Tin Plate Company, and Job James Freeth, of the Caledonian Tube Company, Coatbridge. Mr Pettigrew operated on this cash credit till October 1880, when Mr Hendrie having got into difficulties requested to be relieved of his obligations under the bond. The bank then insisted on another cash credit bond being executed with another name or names in place of Hendrie. Accordingly on 18th, 20th, and 25th October 1880 a new cash credit bond was executed, in which there were along with Pettigrew

(bound as full debtors and co-obligants, although only co-cautioners) Edward Mather Bell and Job James Freeth, two of the parties to the former bond, and besides them William Hamilton & Company, shipbuilders, Port-Glasgow, as a company or firm, and the individual partners of that firm William and John Hamilton.

By disposition dated 11th February 1881, and recorded in the Register of Sasines 24th March 1881, Pettigrew, "for certain good causes and considerations," assigned and disposed "to and in favour of William Hamilton and John Hamilton, both shipbuilders in Port-Glasgow, and coalmasters in Glasgow and elsewhere, equally between them, and their respective heirs and assignees whomsoever, heritably and irredeemably," the Rochsolloch Ironworks, and the ground on which they stood.

Pettigrew operated upon the new cash credit down to October 1887, when he became bankrupt, and was sequestrated. By this time the whole sum for which the credit had been granted, viz., £5000, had been drawn out, and there was besides a considerable sum due to the bank for interest. The bank called upon the Messrs Hamilton to pay the sum due upon the cash credit bond, and on 26th October 1887 they paid as the sum due to the bank £5201, 10s. 9d., and took an assignation of the bond in their favour dated 12th November 1887. They afterwards called upon Mr Freeth to pay the proportion due by him under the bond, and on 28th December a letter of guarantee was granted by Thomas Baker, William Jardine, and Robert Pettigrew to William Hamilton & Company in these terms—"Jointly and severally we hereby guarantee to pay to you the proportion payable by Job James Freeth, of the Caledonian Tube Works, Coatbridge, of the sums, principal and interest, paid by you on 26th October 1887, *videlicet*, £4201, 10s. 9d., under the cash credit bond granted by the Rochsolloch Iron Company, Coatbridge, James Pettigrew, William Hamilton & Company, William Hamilton, John Hamilton, Edward Mather Bell, and Job James Freeth, in favour of the Clydesdale Bank (Limited), dated 18th, 20th, and 25th October 1880, for £5000, and interest, including in this guarantee interest on Mr Freeth's proportion of said sums, from the above named date, until the same is repaid to you at bank overdraft rate."

Edward Mather Bell died insolvent, and nothing could be recovered from his estate.

The present action was raised by William Hamilton & Company and William and John Hamilton on 18th April 1888 against Freeth and the guarantors for payment of £1408, 18s. 6d., being one-third of the sum paid by the pursuers on 26th October, after deduction of certain contributions from Pettigrew's estate.

The pursuers pleaded—" (1) The pursuers are not bound to communicate the benefit of the disposition referred to, in respect the same was specially taken for the pursuers' security only; *et separatim*, the defenders knew this at the time; *et separatim*, the defenders agreed to this being done."

The defenders pleaded—" (2) The pursuers having received from the principal debtor a security over his estate in relief of their obligations under the cash credit bond, are bound to communicate the benefit of such security to their co-cautioners in all questions of relief against

them. (3) The averments as to the agreement of the defenders to the special security being granted in favour of the pursuers are only provable by writ or oath. (4) Under the circumstances, the liability of Job James Freeth is for one-fourth of the whole sums paid."

The Lord Ordinary (FRASER) allowed a proof. The evidence given was of a contradictory character, but in the opinion of the Lord Ordinary and the majority of the Judges of the Second Division it was established that the Hamiltons had become parties to the cash credit bond of October 1880, on the condition of obtaining the security over the Rochsolloch works granted to them by the disposition of February 1881 to cover any liability which they might incur either through the firm or as individuals, and that this agreement was known to Freeth, and agreed to by him.

The parties put in a minute, by which it was agreed (1) that the letter of guarantee signed by Thomas Baker, William Jardine, and Robert Pettigrew, was obligatory on them, and (2) that the value of the security conveyed by Pettigrew to the pursuers by the disposition already mentioned was £2850.

Upon 18th January 1889 the Lord Ordinary pronounced this interlocutor:—"Finds that the disposition of the Rochsolloch Ironworks granted to the pursuers was a security for their own behoof, and that they are not bound to communicate the benefit thereof to the defenders until their own claim is satisfied: Finds that in settling the liability of the cautioners the defender Freeth and his guarantors are only bound in one-fourth; and with these findings appoints the pursuers within eight days to lodge a state in process, bringing out arithmetical results as to the liabilities of the parties; and reserves all questions of expenses.

"*Opinion.*—James Pettigrew, an iron and coal master at Coatbridge, obtained a cash credit with the Clydesdale Banking Company in the year 1877. There were along with him in the cash credit bond (bound as full debtors and co-obligants, although not co-cautioners) three other persons, viz., John Hendrie, coalmaster, Edward Mather Bell, of the Coatbridge Tin Plate Company, and Job James Freeth, of the Caledonian Tube Company, Coatbridge. Pettigrew operated upon this cash credit from 1877 down to October 1880, when one of the co-obligants, viz., John Hendrie having become somewhat embarrassed in his circumstances the bank insisted upon another cash credit bond being executed with another name or names in room of Hendrie.

"Such a bond was executed on the 18th, 20th, and 25th of October by Pettigrew, the co-obligants being Edward Mather Bell and Job James Freeth, two of the parties to the first bond, and the fresh names were the pursuers of the present action William Hamilton & Company, shipbuilders, Port-Glasgow, and William and John Hamilton, the partners of that firm. Pettigrew proceeded to operate upon this new cash credit, and continued to do so down to the date of his sequestration in October 1887, at which time the whole sum for which the credit was granted, viz., £5000, had been drawn out, and there was, besides, a considerable sum for interest due to the bank. The co-obligant Bell died insolvent, and nothing can be got in the shape of a contribution from his estate. The only two solvent

persons to the bond of 1880 were the pursuers and Freeth. The bank demanded payment from the pursuers, and on the 26th of October 1887 they paid, as the sum due to the bank under the cash credit bond, £5201, 10s. 9d., and took an assignation of the bond from the bank with all rights of diligence against the co-obligants.

"Freeth upon being applied to for payment of his share was unable to meet the demand, but he got certain of his friends (the other defenders in the action) to grant a guarantee in the following terms:—"Jointly and severally, we hereby guarantee to pay to you the proportion payable by Job James Freeth, of the Caledonian Tube Company, Coatbridge, of the sums, principal and interest, paid by you on 26th October 1887, *vide* *libet*, £5201, 10s. 9d., under the cash credit bond granted by the Rochsolloch Iron Company, Coatbridge, James Pettigrew, William Hamilton & Company, William Hamilton, John Hamilton, Edward Mather Bell, and Job James Freeth, in favour of the Clydesdale Bank (Limited), dated 18th, 20th, and 25th October 1880, for £5000 and interest, including in this guarantee interest on Mr Freeth's proportion of said sums from the above-named date until the same is repaid to you at bank overdraft rate.' This action is now brought against Freeth and the guarantors, and certain questions have arisen as to the amount (for liability is not disputed) of the contribution which must be made by Freeth or on his behalf.

"The first question has relation to a demand made by the defenders to the effect that the pursuers shall communicate to them the benefit of a disposition which the pursuers obtained from Pettigrew of property belonging to the latter. The property consisted of the Rochsolloch Ironworks, the business of which was carried on in the name of the Rochsolloch Iron Company, Coatbridge, of which Pettigrew was the sole partner. The disposition, which is absolute in its terms, is admitted to have been a security. By this deed, dated the 11th of February 1881, Pettigrew, for 'certain good causes and considerations,' assigns and disposes to William and John Hamilton, both shipbuilders in Port-Glasgow, and their respective heirs and assignees whomsoever, heritably and irredeemably, all and whole the Rochsolloch Ironworks, with all the steam-engines, boilers, rolling-mills, &c., in and upon the ground, and specified in an inventory. This disposition was duly recorded in the Division of the General Register of Sasines applicable to the county of Lanark, and the pursuers William and John Hamilton now stand invested with the apparent absolute ownership of the works.

"The defenders contend that any collateral security of that kind obtained by one cautioner cannot be appropriated for the covering of his own liability. It is certainly law that where co-sureties are equally bound by the same deed, and one of them obtains a separate security or advantage from the principal, he is bound to communicate the benefit of it equally with them. For this doctrine there are several express decisions which are noted in Bell's Principles (section 270), and the general rule cannot be disputed. But then this general rule must be taken with its qualifications. There is nothing wrong in a surety stipulating, before he under-

takes the obligation of cautionary, that he shall obtain a collateral security so as to cover himself, and if he takes the proper precautions of making his co-sureties perfectly aware of what he is doing, and they acquiesce in it, then there can be no call upon the cautioner who has so obtained the separate security for his own behoof to communicate the benefit of it to his co-sureties. Professor Bell, in his Commentaries (Bell's Comm. i. 349), makes the following observations:—'As to the cautioner, who alone has stipulated for security, it is more difficult to determine whether he shall, to his own prejudice, be obliged to communicate the benefit of that security. A near relation or confidential friend may not think himself entitled to require security, while a stranger may be well justified in refusing to engage without it. And there seems to be no equity in obliging the latter to communicate the benefit of his precaution to one who would not himself have stipulated for it. At least, where such a difference has been openly made between cautioners, and with the knowledge of each other, it is probable that the Court would not communicate the security. But where, the cautioners being originally equal, one gets an advantage over the rest on the demand being likely to arise, or where the security to one is secret, the principal which rules the case is, that the co-cautioners are bound to act, or held to have acted, for the general benefit, so that what is given for the relief of one is to be communicated for the benefit of all.' Here Professor Bell deals with the case of an open avowed obtaining of the security by one of the cautioners for his own behoof, and indicates his own opinion very plainly as to how it would be decided, which it does not seem to have hitherto been. Now, this is the very case disclosed by the proof here. It is proved not merely that Pettigrew called upon the pursuers, beseeching and entreating them to become cautioners in room of the retiring Mr Hendrie, but also the defender. Freeth did so. He denies this, but the Lord Ordinary does not believe him, nor does he believe the statements on this subject by Pettigrew, who seemed to give his evidence very much at random. Freeth repeatedly urged the Hamiltons to be cautioners, using as an argument the fact that they would get sufficient security in the Rochsolloch Ironworks, so as to protect them against loss; urging further, that he Freeth had no security of his own and did not want it, and could not demand it because he and Pettigrew and Bell were all mixed up in bill accommodations. He was very much afraid that if the Hamiltons did not come forward and give the additional name demanded by the bank that he, Freeth, would be called upon to pay up, and this he could not do because all his capital was embarked in his works. Freeth never took up the notion that the disposition (the existence of which he professed not to know anything about until a recent period) was one in which he could claim any interest until this was put into his head by Pettigrew, just when Pettigrew's bankruptcy was impending. 'I became bankrupt,' says Pettigrew, 'about the middle of October 1887. I told Mr Freeth in May 1887 about my having granted the security over the ironworks, because I was trying at that time to carry through a cash credit which subsequently fell through. I was wanting

Mr Freeth to become cautioner for me again. (Q) And as an inducement to him to do that he was secured on the other bond? (A) No; I told him that if I could not obtain this credit I would have to collapse, and he said he had paid one cash credit and he could not pay this. I then told him that he was quite safe—that the works were secured to the cautioners. That appeared to be news to him; I knew it was because I had never told him before. He was relieved a bit when I told him that.' Now, Freeth being saved by the intervention of the Hamiltons from being obliged in the year 1880 to stop his works and pay up the cash credit debt which neither Pettigrew nor the other co-obligants with him could do turns round and pleads the general rule of law against the carrying out of a fair bargain. Pettigrew untruly represents the Hamiltons as being very willing at once to become cautioners, whereas the real state of the case was that it was with the utmost reluctance they did so, and upon the distinct understanding and condition that they were to have, for themselves alone, the benefit of the security so far as it would go in repaying any moneys they required to disburse as debtors under the bond.

'The second point in this case is as to whether, Bell being dead and bankrupt, there are here only two co-obligants or four. The obligation in the bond is very explicit. It runs as follows:—'We, the Rochsolloch Iron Company, Coatbridge, as a company or firm, and James Pettigrew, Cairnhill, by Airdrie, the sole partner of said firm, as such partner and as an individual; William Hamilton & Company, shipbuilders, Port-Glasgow, as a company or firm, and William Hamilton and John Hamilton, both shipbuilders there, the individual partners of said company or firm, as such partners and as individuals.' These are the words which were made the subject of construction in the case of *Macbride v. Clark, Grierson, & Company, &c.* 24th November 1865, 4 Macph. 73, and the Lord Ordinary is unable to distinguish the two cases. The obligation of the firm was held to have had superadded to it the obligation of each of the partners as individuals, and such being the case, the defenders here can only be liable for one-fourth. The firm of William Hamilton & Company is one person, William Hamilton is another person, and John Hamilton is the third person; the defender Freeth making the fourth.'

Upon 1st February the Lord Ordinary having considered the state which had been lodged, and decreed against the defenders for £1070, 0s. 10d., found them liable in expenses.

The defenders reclaimed, and argued—It was not competent to prove by parole evidence that the security taken by the pursuers was for themselves alone. The liability of the cautioners rested on the cash credit bond. The rule of law was that any benefit of a security must be communicated to the co-cautioners. Assuming, however, that it was competent, it must be admitted that sureties or co-cautioners might in some cases obtain securities for themselves which they were not bound to communicate to the other sureties, but the proof of this must be very strong to overcome the presumption of the ordinary rule of law. Further, it was quite clearly laid down in the passage from Bell's Commentaries, quoted in the Lord Ordinary's

note, that any security to be valid for the protection of one person alone must be granted to him with the full knowledge and agreement of his co-cautioners. That was not the case here. No doubt the Hamiltons deponed that at a certain meeting they had insisted on this security being granted to them as a condition of their becoming Pettigrew's cautioners, but Pettigrew and Freeth denied it, and the facts showed that it was not so, as the disposition was not granted until some months after the date of the bond. Again, supposing that the Hamiltons were not bound to communicate the benefit of the security to their co-cautioners, the firm of Hamilton & Company could not take any benefit from it, but only the individual partners. The Lord Ordinary has found the number of co-cautioners was four, and that was understood to be admitted by the pursuers. The sum in the security was much larger than the sum necessary to cover the obligations of the two Hamiltons, and the surplus ought to be divided equally between Freeth and the company. Freeth's liability would thereby be considerably reduced—*Steel v. Dixon*, March 29, 1881, L.R., 17 C.D. 825; *Bailey on Securities*, p. 311; *Humble v. Sym*, February 8, 1872, Hume's Dec. 83.

The respondents argued—it was competent to have parole proof here to explain the circumstances under which the disposition was granted, for the pursuers averred that this disposition had been granted to them as a security for themselves only, and the defender, while admitting that the disposition was granted to them in security of the bond, averred that it was for the benefit of all the cautioners. If parole proof was not competent the defenders had no case, because the deed was *ex facie* an absolute conveyance. As regarded the question whether the deed was granted for the Hamiltons' security alone, the Lord Ordinary had found it proved that it was so. The evidence could be read no other way. All the pursuers' witnesses were consistent, and the Lord Ordinary did not believe the evidence of the defenders. It was admitted that the number of cautioners was four, and that the firm must be taken as one, but the security was given not for the benefit of the Hamiltons as individuals only, but also of their firm. That was proved by the evidence. The disposition no doubt did not say it was for the firm, but that was merely due to a conveyancing difficulty, as the firm could not hold heritable property. On the whole matter the defenders were liable to pay one-fourth of the debt paid by the Hamiltons to the bank, and were not entitled to have the benefit of the security communicated to them.

At advising—

LORD RUTHERFURD CLARK—I need not resume the facts of the case. They are fully and clearly stated by the Lord Ordinary.

The first question is, What is the proportion for which each of the solvent cautioners is liable under the cash credit bond? The Lord Ordinary has held that there are four cautioners, on the ground that the firm of Hamilton & Company is to be counted as one in addition to the partners. In this finding the pursuers acquiesce, and therefore we may take it as fixed that the liability of each cautioner is for a fourth of the entire debt.

The pursuers hold a security over certain

heritable property which belonged to Pettigrew, the principal debtor. It is in the form of an absolute disposition in favour of William Hamilton and John Hamilton, the sole partners of Hamilton & Company. Though the disposition is absolute the pursuers admit that it is a security only. But this admission is under the qualification that it was granted to cover any liability which they might incur under the cash credit bond. They further aver that they would not have become parties to the cash credit bond unless they had obtained this security, and that Pettigrew and Freeth agreed that they should have it.

The pursuers have paid the whole debt due to the bank. They propose to apply the security to cover their share of it, and it is just sufficient for that purpose. At the same time they have raised this action to recover the share due by the defender Freeth which has been guaranteed to them by the other defenders.

In answer the defenders maintain two propositions—first, that the pursuers are bound to communicate to them the benefit of their security so that it shall be applied in the reduction of the total debt, with the effect that they shall be liable for no more than a fourth of the balance; and second, that at least it shall be applied only to cover the liability of William and John Hamilton as individuals to the exclusion of the company. In the latter view they claim that the balance of the security should be applied in equal portions to the reduction of the share due by Hamilton & Company and by Freeth.

I do not doubt the general doctrine that when co-cautioners are equally bound under the same deed, and when one of them obtains a separate security over the estate of the principal debtor, such cautioner is bound to communicate the benefit of the security equally to all. Nor did the pursuers dispute this proposition. Their case is that they are not within the rule, inasmuch as it was agreed between them on the one hand, and Pettigrew and the defender Freeth on the other, that they were to have the sole benefit of the security in so far as requisite to cover their liability.

The defenders have stated a plea that an agreement for such a special security can only be proved by writ or oath. If that plea was well founded they should have opposed any allowance of proof. But they did not do so, nor did they offer any argument in support of their plea. On the contrary, they admitted in the most precise terms that if in the opinion of the Court the agreement was proved by the oral evidence their case necessarily failed.

In my opinion the defenders were quite right in making this admission. The parole evidence is not adduced for the purpose of contradicting or altering the conditions of any written document, but to prove a separate agreement which was acted on, and which was the condition of the pursuers becoming parties to the cash credit bond. An agreement so made and so acted on can in my opinion be proved by parole.

The obligation to communicate the benefit of such a security does not arise from the deed by which the co-cautioners are bound, which does nothing more than fix the proportions of the debt for which they are respectively liable. It depends on an equity to which the Court in the

absence of agreement to the contrary will give effect. But the rule cannot be applied so as to defeat a special agreement.

I do not pursue this topic. It is sufficient for me that the defenders did not maintain the plea to which I have referred, and, as I have said, I think that they were right in not offering any argument on it.

The question then comes to be, whether the agreement has been proved? In this inquiry it is material to observe that the cash credit bond on which this action is founded was not the first to which Pettigrew and the defender Freeth were parties. There was a previous bond which the bank would have enforced owing to the embarrassed circumstances of one of the cautioners unless the present bond had been granted. In becoming parties to the new bond the pursuers were guaranteeing an already existing debt for which Freeth was liable. The form in which the bond is expressed debars them from taking benefit from this circumstance, nor indeed do they desire to do so. But they found on it as showing that it was natural that they should stipulate for a special security, and that Freeth should be willing that they should have it. So far, it seems to me that they are right. The alleged agreement was in the circumstances a very natural and reasonable arrangement.

When I turn to the proof I cannot doubt that the agreement is established. The Lord Ordinary is clearly of that opinion, and I agree with him. I do not think it necessary to examine the proof. If the evidence of the pursuers is believed the case is clear. The Lord Ordinary has believed it, and has not believed the evidence of the defenders. On a mere question of credibility I should in any case have great hesitation in differing from him. In this case my opinion entirely coincides with his.

There remains the question whether under the agreement the benefit of the special security was limited to William and John Hamilton as individuals, and did not extend to their firm. Again I have no difficulty. I think that it is plain that the Hamiltons stipulated that they should have the benefit of the security to cover any liability which they might incur under the bond either through their firm or individually. Any other interpretation would defeat the evident purpose of the agreement.

LORD LEE—1. I think that the questions raised in this case are attended with more difficulty than the Lord Ordinary appears to have felt, and I desire to explain the view upon which I am unable to reach the same conclusion.

The general rule of law is well stated by the Lord Ordinary, "Where co-sureties are equally bound by the same deed, and one of them obtains a separate security or advantage from the principal, he is bound to communicate the benefit of it equally to them."

This rule is founded on principles of equity which are too obvious to need explanation, and it implies that no one who undertakes a suretyship jointly with others, and by a deed which binds them all in like terms, is entitled to obtain from the principal debtor, and therefore to the prejudice of his co-obligant's rights of relief, a collateral security for himself alone, unless he does so with the consent of his co-cautioners.

The opinion of Professor Bell, to which the Lord Ordinary refers, appears to me to be to this extent clear. His only hesitation appears to be as to the efficiency of an unequal arrangement though "openly made between cautioners." Upon that point I see no reason to doubt that if the arrangement is clear, and is proved by competent evidence, it must receive effect. For there is nothing unlawful in an arrangement whereby one of the cautioners with the consent of all concerned shall receive a special security.

I must, however, give it as my opinion that the consent of the co-cautioners to an arrangement which is so greatly at variance with the ordinary obligations and rights of relief among cautioners, cannot be proved by parole evidence. It is said that the plea on this subject was not maintained to the effect of excluding proof. But the interlocutor shows that proof was only allowed after the discussion in the procedure roll before answer. And when I asked a question on the subject during the discussion, it was stated by counsel that the point was not given up, although it seemed to be thought unnecessary to argue it. Such proof was disallowed in the case of *Macphersons v. Haggart*, 9 R. 306, where the allegation was that a cautioner who had become bound by a separate obligation subsequently to the other cautioners had interposed for relief of two of the original cautioners who were alleged to have granted their obligation as matter of arrangement merely until the new cautioner should attain majority and undertake for himself. This decision proceeded on the view that the effect of the documents was to make them all co-cautioners, and on that assumption I think that the judgment stands on a clear principle. In the Outer House I had taken a different view of the documents, and had allowed a proof, which was set aside.

I think that the question of evidence in this case arises much more directly. For the pursuers here did not come in by any separate obligation. They interposed by becoming parties to a new bond by which they along with the principal debtor and two of the parties to the old bond all bound themselves, conjunctly and severally, in like terms for the cash credit.

The legal import and effect of the bond in this case was in my opinion to put all the parties, other than the principal debtors, *in pari casu*. Each has a claim of total relief against the principal debtor, and among themselves those who were truly cautioners have presumably the ordinary rights of relief and the ordinary duties of contribution—that is to say, each is liable in a question with his co-sureties only *pro rata*.

Such being the legal position of the cautioners towards each other, I think it incompetent to prove by parole evidence that one of them renounced or discharged his claims of relief in favour of another, and in the present case I think it incompetent to admit parole evidence to show that the defender agreed that the security subsequently obtained by the Hamiltons under the *ex facie* absolute disposition should be granted to them for their own behoof alone to the exclusion of their co-cautioners.

To allow such proof is to allow parole proof in contradiction of the obligations arising under the bond. For nothing in my opinion can be more inconsistent with the obligations incurred by co-

cautioners towards each other, or more prejudicial to the defender's right of relief against the principal debtor than to allow parole proof that the principal debtor granted with the defenders' consent the *ex facie* absolute disposition of his property in favour of the pursuers and for their sole benefit.

2. The next question is, if the parole evidence is competent whether it is sufficient? I have examined it oftener than once, and I can only say that in my opinion it is unsatisfactory.

The Hamiltons appear to have been in partnership with the principal debtor in the Springhill Coal Company, and they must have known his position as well as any body. If they stipulated for a security to themselves alone over the Rochsolloch Ironworks, and Mr Freeth agreed to this, nothing could have been simpler than to get a letter to this effect before signing the bond. In point of fact, the disposition was not granted for six months after the bond, and bears no reference to it. If their statement is correct that it had been stipulated for before the new bond of credit was granted, it would have been natural to expect, that Freeth's written consent should have been asked to a conveyance whereby the principal debtor liable to him in relief divested himself of his whole property in the Rochsolloch Ironworks in favour of the Hamiltons. I cannot say that it is clearly proved that there was such a stipulation.

The fact that the pursuers did not examine the agents, or produce any of the correspondence which is said to have passed with relation to the disposition, is to me very strange. For I do not think that any intelligent and respectable agent who was informed that the deed was granted in fulfilment of a stipulation assented to by the other cautioners would have prepared the deed without making it clear that the co-cautioners were consenting parties and acknowledged the stipulation.

To hold the pursuers' allegation proved, in the face of a denial both by the principal debtor and by the co-cautioners, is in my opinion far from satisfactory.

3. Another question was raised as to the application of the surplus. The pursuers William and John Hamilton do not now maintain that there are fewer than four cautioners. In answer to a question they declined through their counsel to dispute the soundness of the Lord Ordinary's view. But they contend that they are entitled to apply the surplus towards extinction of the liabilities of their firm (the fourth cautioner), and to withhold it entirely from the defender.

My opinion is that there is no more difficulty in holding it proved that the security was stipulated for the benefit of the firm than there is in holding it proved to have been for their own benefit exclusively. If the stipulation is proved at all, I see no reason why it should not be sustained to this effect also.

LORD JUSTICE-CLERK—I concur in the opinion of Lord Rutherford Clark. I do not think that there is any question as regards the kind of proof on the point whether the co-cautioners renounced or discharged their right to share in the security given to the pursuers.

This is a case where a bargain was made before the cautioners entered into the cash credit, and

as a condition that the pursuers should become cautioners. I think it is sound law that where several persons become co-cautioners in a bond, and some security is afterwards given to one of them, he becomes bound to share it with his other co-cautioners. But I think there is no ground for holding that where a security has been given to one of the co-cautioners with the knowledge of the others, to protect himself, he is bound to communicate it to his co-cautioners. This is a strong case as an example of that rule, because in this case the Hamiltons had entered into this cash credit bond for the benefit of Freeth to prevent his business being ruined by having to pay up the debt which Pettigrew owed to the bank. There was nothing contrary to that view decided in the case of *Macpherson* which was cited to us. It was not proposed here by the evidence to contradict the bond or to change the conditions upon which the bond was granted. In the case of *Macpherson* the evidence was disallowed because it was intended to direct it with the object of altering the conditions attaching to the cautioners in the bond. There is nothing of that kind here. This is a case such as is referred to by Professor Bell in the passage quoted by the Lord Ordinary in his opinion—that is to say, such a difference as is spoken of there is alleged to have been here made between the cautioners with the knowledge of each other, namely, that the pursuers should be protected by this security against any evil results happening from the failure of Pettigrew, so that they need not communicate the benefit of the security to their co-cautioners. I think there is nothing to prevent us holding that such a condition might be made between the co-cautioners if it is proved.

Well then, has that condition been proved to have been made by the pursuers? I very distinctly concur in the expressions of the Lord Ordinary when he says that he believes the evidence of the Hamiltons, and does not believe the evidence of Freeth and Pettigrew, and I therefore think that the pursuers have proved that this condition was made.

As regards the other question, I do not think it necessary to add anything to what has been said by Lord Rutherford Clark, that the advantage of the security was given to the firm as well as to the individual members.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuers—M'Kechnie—Low.  
Agent—William B. Glen, S.S.C.

Counsel for the Defenders—Jameson—Watt.  
Agents—J. & A. Hastie, S.S.C.