

1778. December 18.

CREDITORS of ANGUS FISHER, *against* The CREDITORS of PATRICK CAMPBELL, and Others.

No 62.

A cautioner having obtained for himself a security in relief, found obliged to communicate the *residue* of the fund of security to co-cautioners.

ANGUS FISHER, merchant in Inveraray, Captain James Campbell, and others, in consequence of a credit allowed them by M'Adam and Co. bankers, to the amount of L. 600, upon a cash account in the name of Fisher, granted their bond, obliging themselves, conjunctly and severally, to repay the Company the whole, or whatever part of this sum should be drawn out by Fisher. This credit was intended solely for behoof of Fisher, and Captain Campbell obtained from him an heritable security over his lands in relief of his engagement, on which he was infest.

Fisher continued to operate on the cash account, until the whole credit was exhausted. Thereafter the Company drew a bill on the obligants in the bond, for the principal and interest, which they accepted.

The Company charged the acceptors with horning; and, as Fisher, the principal debtor, was now insolvent, it became necessary for the remaining co-obligants to take measures for paying up the debt. Accordingly, two of them (Campbell of Knap, and Ochiltree of Lindsaig) paid each into the hands of Captain Campbell, their respective proportions; which, with his own share, being put by him into the hands of his agent, the whole debt was by the agent paid up to the bank, and an assignation taken of the debt from the bank, and of the bond, bill, and diligence thereon, in favour of Captain Campbell.

Several adjudications had been led against Fisher's lands, subsequent to Captain Campbell's infestment. A ranking and sale was afterwards brought, in which Captain Campbell was ranked on his bond of relief for the principal sum of L. 600, or such part of the credit as had been drawn by Angus Fisher, in preference to the adjudging creditors, but with reservation to the creditors, of all objections to his claim until the division of the price. At that time, appearance was made for the Creditors of Knap, and Lindsaig, both then bankrupt, who *insisted*, That they were entitled to the benefit of the heritable security, on which Captain Campbell stood ranked, to the extent of the sums which Knap and Lindsaig had respectively advanced towards payment of the debt to M'Adam and Co. No objection was made on the part of Captain Campbell; but the postponed Creditors of Fisher opposed this claim, and *contended*, That the co-obligants had no right to a communication of the security. In support of this objection,

Pleaded for Fisher's Creditors: Captain Campbell obtained the infestment of relief over Fisher's subjects solely for his own use. The other co-obligants rested on the personal security of Fisher; and Campbell was under no obligation to communicate to them his heritable security. There is no evidence, that, in paying the bank debt, the co-obligants put their money into Campbell's hands, under any concert or stipulation of that kind. Though the money of the two

other co-obligants came through his hands, the debt must be considered as paid up by all the three.

The case is the same, as if the co-obligants had paid in separately their shares of the debt. Each of them continues to have that security for his relief which he originally had, and no other. Knap and Lindsaig remain mere personal creditors of the common debtor in relief. Campbell is entitled to the benefit of his heritable right over the subjects to relieve and secure himself, and, therefore, may avail himself of it, to operate payment, out of them, of what he contributed toward payment of the debt to the bank. But, to this extent alone can his security be of any avail, even to himself. The adjudging creditors of Fisher have, therefore, an interest to object to the co-obligants of Campbell getting the benefit of this heritable security for the shares of the debt paid by them. If the objection is good, the subjects will only be burdened with an heritable security to the extent of Campbell's share of the debt to the bank; and the whole benefit arising from the other co-obligants not obtaining a preference as to their shares upon the heritable security, will accrue to the postponed creditors of Fisher, and not to Captain Campbell.

Pleaded for the Creditors of the co-obligants: It might have been more beneficial to Fisher's creditors, that every obligant had paid his own share, and only got an assignment to a corresponding part of the debt; for neither Fisher, nor his creditors, had any title to restrain the Company from taking the payment of the whole debt from any one co-obligant, and assigning him to the whole. The transaction, therefore, betwixt Captain Campbell and the Company, must have its full effect, being lawful and permissible to both parties; and, by that transaction, the whole debt became heritably secured, and preferable on the estate of Fisher. Consequently, the postponed creditors of Fisher can never have a title to any thing more than the reversion of the subjects, after the payment of this heritable debt to those who shall be found to have right to it. And the question, whether the co-obligants are entitled to a communication of the security, is entirely *jus tertii* to these creditors.

But, at any rate, the co-obligants would be entitled to insist for a communication of this security, even were Captain Campbell now opposing it. It is evident on the face of the transaction, that it was understood betwixt Captain Campbell and the co-obligants, at the time they put the shares of the debt into his hands, that there should be a communication of the heritable security to them. On this account, Captain Campbell took the assignation from the bank of the whole debt in his own name. Had he been looking only to relief for himself, he would have taken the assignation in his name, to the extent only of his share of the debt.

If Captain Campbell had paid up the whole of this debt with his own money, he might have insisted against any of the co-obligants for payment of their share; but they, upon such payment, would have been entitled to an assignment of the separate heritable security in his person for their relief, to the ex-

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tent of what they paid. It makes no difference, that, in the present case, the money was paid up by the co-obligants to Campbell, before he had made payment to the bank. The transaction is, in substance, the same.

THE COURT found, That, after Captain Campbell himself is secured, there remains a *residuary security* to his co-cautioners, Knap and Lindsaig, on his infefiment in the lands of Auchendryan, and therefore repel the objection to the decret of ranking; and decern.'

Lord Ordinary, *Hales*. For Creditors of Fisher, *Al. Abercromby*. *Alt. W. Craig*. Clerk, *Tait*.
Fol. Dic. v. 3. p. 120. Fac. Col. No 49. p. 87.

1792. February 8.

The CREDITORS of SIR ROBERT MAXWELL, *against* TRUSTEES of
PATRICK HERON.

No 63.
One of two cautioners, paying on an assignment, was found entitled to be ranked on the estate of his co-cautioner for the whole sums due, to the effect of his recovering a rateable part of the debt; but this judgment was varied on appeal, so that the cautioner was ranked for only half.

SIR ROBERT MAXWELL of Orchardtown, Mr Heron of Heron, and Mr Maxwell of Cargen, were jointly bound for large sums of money. But Mr Maxwell was truly the debtor, the other two having interposed as cautioners for him.

Mr Maxwell became insolvent, and soon after Sir Robert Maxwell conveyed his lands to a trustee for the benefit of his creditors. Upon a sale, a very great deficiency appeared.

In the mean while, Mr Heron having been obliged to pay the whole debts, obtained an assignment in the name of Sir William Forbes and Company, as his trustees. In virtue thereof he claimed to be ranked on the proceeds of Sir Robert Maxwell's lands, for the whole sums paid by him, to the effect of his recovering a full moiety of these sums. This was opposed by the other creditors of Sir Robert Maxwell, who

Pleaded: In a question with the creditor, every co-obligant is debtor to the full amount of the debt. And therefore the creditor is at liberty to attach their respective estates to that extent. Care only is to be taken, that he shall not on the whole receive more than is truly due to him.

But in a question between the co-obligants themselves, each of them is debtor only in his due proportion of the debt; and this proportion cannot be increased, directly or indirectly, by any operation of the creditor, or of the co-obligants; Creditors of M'Ghie against Tait, 18th November 1785. *voce* SOLIDUM ET PRO RATA.

In some cases, it is true, a creditor may be ranked for more than is due to him at the time. Thus a creditor, after a sequestration, might, by the bankrupt statute of 1783, be ranked for the whole sums due at the date of the sequestration, although he had afterwards recovered a part from collateral securities; but that could only be done where the bankrupt might have been sued for the whole; a proceeding inadmissible with regard to a co-cautioner. And in no instance could the claim be increased after the sequestration, which, however,