

No 62.

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 infefment 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,

would happen if one of two co-cautioners, who, during the solvency of the other, could only insist for a proportional relief, were to be permitted, in consequence of a bankruptcy, to demand payment of the whole.

A cautioner, after the bankruptcy of his co-obligant, cannot enlarge his claim of relief, more than an ordinary creditor can enlarge his claim of debt. And were it allowed to all the creditors, the only consequence would be a nominal increase of the debts, while the fund of division remained the same. Nor could the assignment from the creditor put the cautioner in a different situation; this being only done to facilitate the claim of relief, so far as it is authorised by law.

Neither can the particular form in which the cautioners interposed their security, by granting of joint bonds, affect the present question. The creditor was thus authorised immediately to attach the estates of each *correus* for the whole sums due to him; but the interests of third parties were not thereby in the smallest degree encroached upon; and, on recovering his payment out of any particular estate, the law would imply an assignment to the creditors at large, to the effect of their obtaining from the funds of the other debtors a corresponding relief.

Answered: A creditor in a joint bond may attach and be ranked on the effects of every one of the *correi*, to the effect of recovering what is due to him. This is not, and cannot be disputed. The next object of the law, after the creditor has thus received payment, is to divide the loss equally among the different co-obligants. And for this purpose, the creditor is bound to do every thing that is in his power, although third parties may suffer a consequential loss.

If the effects of the co-obligants, all of them being insolvent, were to be distributed at the same time, the creditor ought certainly to rank on the different estates, so as to draw from each a rateable proportion of the debt. And thus, it is evident, that in the present case, the creditors in the joint bonds must have been ranked on Sir Robert Maxwell's estate for the whole debt, this being necessary for equalising the loss.

Again: Supposing that one of the co-obligants is bankrupt, and the other in good credit, if it were convenient for the creditor to delay his claim till the proceeds of the bankrupt estate come to be divided, the same thing ought to be done. And thus, as in the former case, the obligations of the parties, agreeably to their true meaning, would have a like effect as to all. But surely, although the creditor may find it necessary to ask his money sooner, that circumstance cannot, in the eye of justice, be considered to vary the rights of the parties.

And it is of no consequence, that if all the co-obligants had continued solvent, one of them, having paid the debt, could only sue his co-cautioner for one half. After a bankruptcy, the question is not to what extent the cautioner shall be ranked; but what he is to draw. And if the creditor, by ranking on the estate of the bankrupt cautioner for the whole debt, could have placed the solvent cautioner in the same situation, as if both had been alike able to fulfil their engagements, it is just that in virtue of the assignment from him, the solvent

No 63.

cautioner, after paying the debt, should be allowed to rank as he might have done.

THE COURT were unanimously of opinion, That in the circumstances of this case, where, before any trust-right had been executed by the insolvent cautioner, and where he that continued in good circumstances, had obtained an assignment from the creditor, the ranking ought to go on in the same manner as if no payment had been made.

THE LORDS found, ' That the trustee for the creditors of Sir Robert Maxwell was bound to rank Patrick Heron, and Sir William Forbes and Company, as trustees for him, upon Sir Robert Maxwell's funds for the whole sums due on those debts, in which Mr Heron and Sir Robert Maxwell were jointly bound along with Mr Maxwell of Cargen; but under this condition, that in consequence of their being so ranked, they shall not draw more than one half of the said debts.'

A reclaiming petition for the Creditors of Sir Robert Maxwell was refused, without answers, (on 23d February 1792.)

Reporter, *Lord President* instead of *Lord Gardenston*. For Sir William Forbes and Co.
Solicitor-General, Maconochie. *Alt. Rolland, Abercromby, Honyman*. Clerk, *Home*.

Craigie.

Fol. Dic. v. 3. p. 120. Fac. Col. No 206. p. 433.

The cause was appealed :

June 11. 1794.—THE HOUSE OF LORDS ORDERED and ADJUDGED, That the interlocutor of 8th February 1792 complained of, be, and the same is, hereby affirmed, with the following variations, viz. after the word (for) insert (half,) and after (the) leave out (whole,) and after (Cargen) leave out to the end of the interlocutor, and insert, (each of them having been indebted, as principal, for a moiety thereof, and as security for the other moiety :) And it is further ORDERED and ADJUDGED, That the interlocutor of 23d February 1792, also complained of in said appeal, in so far as repugnant to said interlocutor, varied as aforesaid, be, and the same is, hereby reversed.

1792. November 15.

WALTER SMITON *against* PATRICK MILLER, and Others.

No 64.

A cautioner in a bond of corroboration found only entitled to a proportional relief from the cautioners in the original bond.

ARCHIBALD MILLAR having obtained a credit with the British Linen Company for L. 800, a bond was granted by him, Patrick Millar, John Walker, and other two obligants, whereby they became bound, jointly and severally, to repay to the bank whatever sums should be drawn out by Archibald Millar on that credit.

John Walker died. And the bank having desired another cautioner in his place, a bond of corroboration was granted by the principal debtor and Walter Smiton.