the most liberal interpretation, because it tends to introduce a *pari passu* preference. If Wright was once made bankrupt, there is no law which obliged the creditor to make him again bankrupt.

KAIMES. My difficulty is not *there*. But the question is, Whether the execution of search is sufficient to make the debtor a bankrupt? Every word of the execution may be true, yet the man may at that moment have been walking at the cross of Glasgow. When we consider the proof, we see that he was not in Glasgow; but we also see that he had told the very person who had the diligence, that he was to be from home on the Saturday, the day on which the search was made: How can I say that Wright, in such circumstances, absconded?

COVINGTON. This deed falls under the statute 1696. Stevenson, Wright's clerk, says, "that, long before the execution, Wright acknowledged to him that he was harassed by creditors, and would be obliged to leave Glasgow for some time."

[This seems to allude to a more distant period by a year.]

COALSTON. The evidence from the execution is good evidence, *prima facie*, of absconding. Yet still it may be redargued; and I remember, some years ago, a case from Perth, where such evidence was redargued; but there is no such proof here.

PRESIDENT. This is a favourable case, for the creditors only ask a *pari passu* preference. At first sight it may seem odd that the caption was executed, when the person employed to do diligence knew that the debtor was to be from home; but it will be observed that the time pressed, for that was the 58th day after the granting of the deed under challenge, and if the diligence had not been executed then, it could not have been executed till Monday, the very last day on which the debtor could have been rendered bankrupt effectually.

MONBODDO. The Carron Company might have proved that Wright did not abscond; but this they have not done.

On the 4th July 1775, The Lords reduced the deed on the statute 1696; adhering to Lord Monboddo's interlocutor.

Act. W. B. M'Leod. *Alt.* R. Blair.

1775. *July* 18. NEIL CAMPBELL of Dunoon *against* DAVID CAMPBELL of Clochombie.

CAUTIONER.

A distressed cautioner, when coming against his co-cautioner for his share of the debt in which they were jointly bound, found compellable to communicate to him an heritable security upon the debtor's estate, made over to himself by the person who had interposed for the debtor's relief.

[*Faculty Collection, VI.* 349; *Dictionary*, 2132.]

KAIMES. I do not understand any principle of law which makes a society of

co-cautioners. It is a rule in equity that a creditor must deal with candour among cautioners, so as to assign, that each may pay a proportion, and be proportionally relieved. If a cautioner has got a security, upon the same principle, he is bound to assign to co-cautioners, that they may be relieved. But equity goes no farther, for no man is bound to sacrifice his own interest: thus one being a catholic creditor is not bound to assign a secondary security. If such is the case of the original creditor, he may assign to a stranger; and if to a stranger, why not to a cautioner?

[HAILES. In the Dictionary, where the case of *Brodie* is quoted from Lord Stair, it is said that co-cautioners are *as partners in a society*. It has been observed, for Clochombie, that this is no more than an argument or an illustration used by one of the parties. The better answer would have been, that there is no such expression in the argument as recited by Lord Stair; so that this is at best an illustration by the author of the Dictionary. I do not understand the nature of the copartnery for which Dunoon pleads. It is a *commune negotium*, of which he may take the benefit or not, as he pleases; from which he may at his pleasure draw benefit without incurring loss; and of which, by splitting it, he may take a part and leave a part. If Clochombie does not communicate to Dunoon, Dunoon will be just as he was, while the debt remained in Colonel Campbell. If Clochombie does communicate, he himself may be a loser. All this happening in a society is beyond any notion that I have of a society.]

COALSTON. I think that the interlocutor must be varied in part. In determining this cause, it is not necessary to determine the general point of law, how far a cautioner, acquiring a security, is bound to communicate it. But that is not the question here: the question is concerning a separate security obtained by a creditor, and assigned to a distressed cautioner. I think that the cautioner is bound to communicate. Colonel Campbell is creditor in three different debts. This cause must be determined as if there had been three separate securities. Colonel Campbell was entitled to retain the whole security till all was paid. Clochombie is entitled to retain until payment of the debt in which Balnair is bound, and until payment of the debt in which he himself is bound. The debt in which Clochombie and Dunoon are bound, is the only debt to be judged of. When a creditor has an heritable security and a cautioner, on the cautioner's paying, he must assign the heritable security. Upon payment of their respective shares, the cautioners are entitled to have the debt made over to them. A private transaction between a creditor and one cautioner cannot hurt the other cautioner. Clochombie is obliged to assign a proportional part of the security, but under this quality, that he himself be not hurt as to the other two debts.

MONBODDO. Both parties have properly resorted to the Roman law. It was said that there was a society among cautioners. I see nothing of that in the Roman law, nor in ours. Parties may be bound as cautioners without knowing one another. The relief given is founded on the *actio negotiorum gestorum* by the Roman law. Our law has gone further, and has given the same action, not against the debtor only, but also against the co-cautioners. Hence a cautioner paying the whole debt has an action against the co-cautioner *actione negotiorum gestorum directa*. He is also obliged, *actione contraria*, to commu-

nicate the benefit. Suppose that Mr Lockhart had not been satisfied with his security, and had taken an heritable bond, he would have been obliged to assign the heritable security on receiving payment. The same is the case as to Colonel Campbell, and would have been although the debt had gone through an hundred hands. There are other debts to the extent of L.3300 sterling, with additional security: what difference does that make? The co-cautioner was entitled to have demanded an assignation to the L.700 on payment. And if this was competent to Clochombie, it must be competent to Dunoon.

COVINGTON. Of the opinion last given. The principle of the interlocutor is just among creditors not connected, but there is a difference as to co-cautioners. *There* there is a *bona fides*, which requires equality. They who are bound in the L.700 are entitled to a proportional share of the security. All are co-principals with regard to the creditor. The counsel for Clochombie said that it was hard to establish a connexion between co-cautioners who know nothing of each other. I see no hardship in that. The Roman law was full of subtleties on this point. This was a *verborum obligatio*, and certain words were required for constituting it. If the *correi debendi* acceded at different times, it was understood that there were different debts. This was afterwards altered on principles of justice. I think that cautioners are *correi debendi*, and bound in relief to one another. If this were not the case, injustice might be introduced. Here the co-cautioners were originally bound equally. The intervention of Colonel Campbell makes no difference when Colonel Campbell assigns to Clochombie: How can Clochombie divest himself of this cautionary obligation?

PRESIDENT. Lord Coalston's proposal seems to have much equity in it. The other opinions go on this principle, that Colonel Campbell was entitled to the whole benefit of his security, and not obliged to assign a proportional part. If so, How can the person who steps into his shoes be in a worse situation?

ALEMORE. Equality is the thing in my view. How would the case have stood as to Colonel Campbell? Upon his heritable security he was safe, as far as the estate went. As for the residue, he must have recurred against the cautioners. What more had the cautioners to say? In the case that has happened, Clochombie must assign after having secured himself as to the other debts.

KAIMES. If Clochombie once gets payment of the debt, in which he alone is bound, he must communicate *quoad ultra*.

GARDENSTON. Colonel Campbell was not bound to assign in part, nor was any stranger. I see no difference as to the case of a cautioner.

PRESIDENT. It comes to this, that a co-cautioner should not do any thing by which a co-cautioner may be hurt.

On the 18th July 1775, The Lords found that Clochombie cannot be obliged to assign as to the 1st and 2d debts; but as to the 3d, in which Dunoon was his co-cautioner, found that any loss on it must be suffered equally by Clochombie and Dunoon; varying Lord Auchinleck's interlocutor.

For Clochombie, J. M'Laurin, Ilay Campbell. *Alt.* A. Rolland, R. M'Queen.