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VOLUME 15

Cautionary Obligations and Rights of Relief

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Preface

This book is based on a PhD thesis (*The Nature of Rights of Relief Arising from a Cautionary Relationship*), which was undertaken at the University of Aberdeen and submitted for examination in 2018. The opportunity to attempt such a degree is itself cause for gratitude. I doubt I would have embarked on it without the support of my family and the generous sponsorship of both the Clark Foundation for Legal Education and the Robert Nicol Trust. But I was especially fortunate to have had so dedicated and attentive a first supervisor as Robin Evans-Jones. From the drafting of the first chapter to the day of the viva, I had the benefit of Robin's expertise, guidance and encouragement. I also benefited considerably from the insights of John Ford, my second supervisor. Ultimately, it was thanks to both supervisors that I entered the viva with confidence and some measure of what to expect.

In adapting the thesis for publication, I have continued to profit from assistance and advice. Both my internal examiner (Andrew Simpson) and external examiner (Hector MacQueen) had helpful comments on the thesis which I have tried to apply to the drafting of the book. Lewis Walker deserves thanks for his valuable assistance with copy-editing. There are also certain members of staff at the University of Aberdeen to whom I am indebted for encouraging and, at times, exhorting me to submit the final manuscript to the publisher. For that, there are too many persons to thank, but Douglas Bain, Greg Gordon, Roderick Paisley, Andrew Simpson, and my close friends Alisdair MacPherson and Patricia Živković all deserve a special mention. Kenneth Reid also merits thanks for giving so generously of his time and expertise in reviewing and editing the final draft of the book, and for being so patient and understanding prior to receiving it.

On a more general note, I wish to express my gratitude for the University of Aberdeen's School of Law, the Taylor Law Library, and the staff (both academic and administrative) who make both environments so conducive to legal research. It would also be remiss of me not to thank my mum (Jennifer), dad (Alan), brothers (Gordon and Cameron) and friends (inside and outside legal academia) for their enduring support.

I hope that this book is a worthy addition to the *Studies in Scots Law Series*, of which I consider it a privilege to be a part. I hope also that my intellectual debt to those who have previously written on cautionary obligations and rights

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of relief has been sufficiently acknowledged in the chapters below. Of course – and despite the book's focus on pluralities of obligants – responsibility for any errors is mine alone.

The book is dedicated to the memory of my late grandfather.

Euan West
Aberdeen
September 2025

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Abbreviations

APS	T Thomson and C Innes (eds), *Acts of the Parliament of Scotland*, 12 vols (1814–1875)
Balfour, *Practicks*	*The Practicks of Sir James Balfour of Pittendreich* (ed P G B McNeill, Stair Society vols 21 and 22, 1962 and 1963)
Bankton, *Institute*	A McDouall (Lord Bankton), *An Institute of the Laws of Scotland in Civil Rights* (1751–1753, reprinted by the Stair Society vols 41–43, 1993–1995)
Bell, *Commentaries*	G J Bell, *Commentaries on the Laws of Scotland, and on the Principles of Mercantile Jurisprudence* (5th edn, 2 vols, 1826, reprinted by the Edinburgh Legal Education Trust, 2023)
Bell, *Principles*	G J Bell, *Principles of the Law of Scotland* (4th edn, 1839, reprinted by the Edinburgh Legal Education Trust, 2010)
BGB	*Bürgerliches Gesetzbuch* (German Civil Code; translation available at <www.gesetze-im-internet.de/englisch_bgb/index.html>)
C	Justinian's *Codex*
D	Justinian's *Digest*
Edin LR	*Edinburgh Law Review*
Erskine	J Erskine, *An Institute of the Law of Scotland* (1773, reprinted by the Edinburgh Legal Education Trust, 2014)
Forbes, *Great Body*	W Forbes, *A Great Body of the Law of Scotland*, University of Glasgow MS Gen 1246–52 (available at https://www.forbes.gla.ac.uk/)

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Gaius	The *Institutes* of Gaius
Hope, *Major Practicks*	*Hope's Major Practicks 1608–1633* (ed J A Clyde, Stair Society vols 3 and 4, 1937 and 1938)
Hope, *Minor Practicks*	J Spotiswood (ed), *Practical Observations Upon divers Titles of the Law of Scotland, Commonly called Hope's Minor Practicks* (1734).
Hume, *Lectures*	*Baron David Hume's Lectures 1786–1822* (6 vols, ed G C H Paton, Stair Society vols 5¸13, 15, and 17–19, 1939–58)
J	The *Institutes* of Justinian
JR	*Juridical Review*
JLSS	*Journal of the Law Society of Scotland*
Kames, *Principles of Equity* (ed Lobban)	H Home, Lord Kames, *Principles of Equity* (3rd edn, 1778, reprinted with new pagination, ed M Lobban, 2014)
LQR	*Law Quarterly Review*
Mackenzie, *Institutions*	Sir George Mackenzie of Rosehaugh, *The Institutions of the Law of Scotland* (1st edn, 1684)
Nov	Justinian's *Novels*
RPS	*Records of the Parliaments of Scotland to 1707* <https://www.rps.ac.uk/>
SLPQ	*Scottish Law & Practice Quarterly*
Stair	James, Viscount of Stair, *The Institutions of the Law of Scotland* (ed D M Walker, 1981, based on the 2nd edition of 1693)

1 Introduction

PARA

A. BACKGROUND 1-01
B. BENEFITS OF A SYSTEMATIC TREATMENT 1-05
C. SCOPE 1-08
D. STRUCTURE 1-11

A. BACKGROUND

1-01. In Scots law, it is common for one party, known as a cautioner (pronounced 'kay-shun-ar'), to guarantee the performance of another's obligation such that, if the main obligant defaults, the cautioner will be obliged to pay the creditor.[1] For instance, if Denise borrows £100 from a bank, the latter may insist, as a condition of the loan, that a third party also become liable. Accordingly, Denise's friend, Chris, enters into a contract of caution (pronounced 'kay-shun')[2] with the bank, agreeing to repay the £100 if Denise fails to do so. The significance of the arrangement is twofold: (1) If Denise defaults, Chris, the cautioner, will be obliged to pay the bank,[3] and (2) Chris will then be entitled to claim £100 from Denise via a so-called right of relief.[4] It is the latter sort of right, exercised by a cautioner against the principal debtor, with which this book is concerned.

1 For sources on cautionary obligations see, e.g., W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable Including Cautionary Obligations* (1897) chs XIX–XXV; J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) ch 5; E A Marshall, *Scots Mercantile Law* (3rd edn, 1997) ch 8; S C Styles, 'Rights in security', in A D M Forte (ed), *Scots Commercial Law* (1997) 179; S Eden and J T Pretorius, 'Suretyship and cautionary obligations', in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 335; E F West, 'Cautionary obligations', in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2019) (original version by S M Eden and A M Clark); W M Gloag and R C Henderson, *The Law of Scotland* (15th edn, by H L MacQueen et al, 2022) ch 16; M M Combe and A D J MacPherson, *Scottish Commercial Law* (3rd edn, 2023) ch 6; L Macgregor et al (eds), *Commercial Law in Scotland* (7th edn, 2024) ch 8.

2 The contract is also frequently referred to as one of 'cautionry': see, e.g., J M Irvine, 'Cautionary obligations', in Viscount Dunedin and others (eds), *Encyclopaedia of the Laws of Scotland*, vol III (1927) para 325.

3 The bank will not be obliged to pursue Denise before pursuing Chris: Mercantile Law Amendment (Scotland) Act 1856 s 8.

4 Bell, *Principles* § 255.

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1-02. Rights of relief take various forms. Suppose, for example, that Denise's debt of £100 is guaranteed by two cautioners, Chris and Cameron, and that they have become bound to the creditor jointly and severally, such that either may be pursued for the full amount.[5] In the event, the creditor pursues Chris, who becomes entitled to a *pro rata* contribution of £50 from Cameron.[6] This right of relief is particularly useful where the principal debtor is insolvent. Even if Chris is not able to recover £100 from Denise, his right of *pro rata* relief against Cameron ensures that he does not bear the whole burden of the debt.

1-03. The rights described so far involve direct actions by the paying cautioner against the party from whom reimbursement is sought, namely, the principal debtor or a co-cautioner. However, there is a third, less direct, route to relief in the form of a transfer of the creditor's rights. A cautioner who has paid the creditor can require an assignation of the latter's rights against the principal debtor and co-cautioners, along with such attendant benefits as securities over the principal debtor's property.[7] This can prove useful in practice. In the case of Denise's loan, the bank may have demanded not only that Chris and Cameron stand cautioner but that Denise grant a security over her property. In that case, the paying cautioner (Chris) may demand an assignation of the bank's security and claim, thereby, as a secured creditor on Denise's insolvent estate.

1-04. This book examines the nature of rights of relief in a cautionary (pronounced 'kay-shun-ary') relationship, detailing the circumstances in which such rights arise, how much they entitle the cautioner to claim and from whom. Before embarking on that enquiry, it will be necessary to attend to certain matters regarding content and scope, pinpointing what the book concerns and explaining why the subject of rights of relief merits exploration.

B. BENEFITS OF A SYSTEMATIC TREATMENT

1-05. In his first attempt to systematise the English law of unjust enrichment, Peter Birks noted that the motivation for researching any legal area is the quest for clarity; a quest that can be fulfilled only with a 'simple, even an over-simplified, account of how the [relevant subject's] pieces fit together.'[8] This comment continues to resonate, particularly as regards such relatively unplumbed areas as rights of relief. While Scots law has long recognised such rights,[9] and while they feature prominently in such leading works on securities as that of Gloag and Irvine,[10] rights of relief have seldom been regarded as a

5 Bell, *Principles* § 62.
6 Stair I.8.2 and I.8.9; Erskine III.3.74; Bell, *Principles* § 62.
7 Erskine III.5.11; Bell, *Principles* §§ 255 and 268.
8 P B H Birks, *An Introduction to the Law of Restitution* (1989) 1.
9 E.g. in *Lillie v Crawford* (1705) Mor 14655.
10 Gloag and Irvine, *Rights in Security* (n 1).

private law subject in themselves, worthy of treatment on a par with contract, delict or unjustified enrichment. The textbook, Gloag and Henderson, which consigns its main treatment of rights of relief to a chapter describing the whole law of obligations, typifies the Scottish tendency to view such rights as an addendum to the law of obligations, rather than a distinctive legal area.[11] Herein lies the potential utility of this book. There has been no shortage of case law on rights of relief, but more may usefully be done to systematise the subject and to distil certain fundamental principles from it. Without such an effort, the 'mass of cases' relating to relief could 'make for unintelligible law'.[12]

1-06. There are other reasons for exploring this area, besides the relative dearth of modern scholarship.[13] One concerns terminology. The traditional labelling of rights of relief in terms of a legal response (relief) is incongruous in a legal system that classifies obligations according to their causes of action: that is, by the *event(s)* triggering the pursuer's remedy. To cite a familiar example, modern Scots law speaks increasingly of the law of delict (causative event),[14] rather than of the law of reparation (response).[15] The terminological emphasis is significant. To paraphrase Peter Birks,[16] subdividing the law of obligations into 'contract, delict and unjustified enrichment' produces a rational taxonomy, all of whose constituent terms denote causes of action rather than legal responses. Conversely, 'contract, delict, unjustified enrichment and *relief*' is a defective taxonomy because the first three terms refer to causes of action, whereas the fourth refers to a legal response. To avoid such 'logical problems',[17] rights of relief ought to be reconceptualised in terms of their underlying causes of action.

1-07. A further benefit of the book may be to set rights of relief in their private law context. It is clear that some of these rights are non-contractual,[18] but,

[11] Gloag and Henderson (n 1) ch 3.

[12] Birks, *Restitution* (n 8) 2.

[13] Notable exceptions to this trend include the work of Dieckmann and Whitty: J A Dieckmann, 'Scots influence on English law: the guarantor's right to derivative recourse (subrogation)' (2004) 8 Edin LR 329; J A Dieckmann, 'Province of subrogation determined: some corrections – a functional analysis of the guarantor's right to derivative recourse, comprising a critique of the restitutionary thesis' (2012) 20 Eur Rev Private L 989; J A Dieckmann, 'Normative basis of subrogation and comparative law: select explanations in the common law, civil law and in mixed legal systems of the guarantor's right to derivative recourse' (2012) 27 Tul Eur & Civ LF 49; N R Whitty, 'Rights of relief, subrogation and unjustified enrichment' 2019 Acta Juridica 493; N R Whitty, 'Unjustified enrichment', in *The Laws of Scotland, Stair Memorial Encyclopaedia, Reissue* (2022) paras 69–76. See also, the work of the Scottish Law Commission in such publications as *Report on Civil Liability – Contribution* (Scot Law Com No 115, 1988).

[14] As in such leading works as J M Thomson, *Delictual Liability* (6th edn, by G Cameron, 2021) and E C Reid, *The Law of Delict in Scotland* (2022).

[15] For the old use of 'reparation' as a point of classification, see, e.g., Stair I.9.

[16] P B H Birks, 'Restitution: a view of the Scots law' (1985) 38 Current Legal Problems 57 at 60.

[17] Birks, 'Restitution: a view of the Scots Law' (n 16) 60.

[18] Stair says that a co-cautioner who pays the whole debt or more than his share of it is entitled to *pro rata* relief 'although there be no clause of relief': Stair I.8.2. He repeats this point at I.8.9.

beyond that, their classification is controversial. In recent years, the Scottish courts have attributed rights of relief to the supposed unjustified enrichment of the defender at the pursuer's expense.[19] This trend developed in tandem with the modern systematisation of unjustified enrichment in the 1990s,[20] and persists to this day,[21] notwithstanding pervasive criticism from enrichment scholars.[22] There are many reasons for this academic resistance. For instance, while an enrichment analysis of rights of relief reflects English law,[23] it is at odds with such modern civilian systems as Germany.[24] This, coupled with the strong influence of such civilian systems on the Scots law of unjustified enrichment,[25]

[19] E.g. in *Moss v Penman* 1993 SC 300 at 303B per Lord President Hope; *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1141F–H per Lord President Rodger; *Joint Liquidators of Simclar (Ayrshire) Ltd v Simclar Group Ltd* [2011] CSOH 54, 2011 SLT 1131 at paras 19, 20 and 34 per Lord Hodge; *Gillespie Investments Ltd v Gillespie* [2011] CSOH 109, 2011 GWD 25-58 at para 20 per Lord Hodge. The statement in *Christie's Executrix v Armstrong* 1996 SC 295 that rights of relief are based on 'the principle of recompense' (at 298H per Lord Justice-Clerk Ross) may be outdated in its use of the term 'recompense' to refer to a cause of action (*Shilliday v Smith* 1998 SC 725 at 728B–C per Lord President Rodger), but it still illustrates the courts' recent tendency to describe rights of relief in the language of unjustified enrichment.

[20] In large part, this systematisation was effected by three cases: *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SC 151; *Shilliday v Smith* 1998 SC 725; and *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90.

[21] A recent example can be found in *Sweeney, Noter (No 1)* [2020] CSOH 9, 2020 GWD 4-63 at para 30 per Lady Wolffe.

[22] See, e.g., R Evans-Jones and P Hellwege, 'Some observations on the taxonomy of unjustified enrichment in Scots law' (1998) 2 Edin LR 180 at 189; R Evans-Jones, *Unjustified Enrichment* vol 2: *Enrichment Acquired in Any Other Manner* (2013) paras 2.47–2.48 and 2.64; N R Whitty, 'Rationality, nationality and the taxonomy of unjustified enrichment', in D Johnston and R Zimmermann (eds), *Unjustified Enrichment, Key Issues in Comparative Perspective* (2002) 680; Dieckmann, 'Province' (n 13); Gloag and Henderson (n 1) para 3.15; N R Whitty, 'Rights of relief' (n 13). One explanation for the recent association of rights of relief with the law of unjustified enrichment is that, under Stair's scheme of obligations (Stair I,8), rights of relief were grouped under the broader heading 'recompense', a term which became increasingly associated with what would now, uncontroversially, be called unjustified enrichment. As Whitty argues, however, the courts have taken this old classification of rights of relief out of context. It does not follow from the fact that rights of relief were once (centuries before unjustified enrichment was recognised as a subject in Scots law) categorised under the heading 'recompense', and that the term 'recompense' became increasingly associated with causes of action in unjustified enrichment, that rights of relief ought now to be regarded as a form of unjustified enrichment: Whitty, 'Rights of relief' (n 13) 519–520.

[23] For instance, such English law equivalents of relief as 'contribution' are seen to be based on unjust enrichment: see, e.g., A Burrows, *The Law of Restitution* (3rd edn, 2011) 455; R Goff and G Jones, *The Law of Unjust Enrichment* (10th edn, by C Mitchell et al, 2022) paras 19.02–19.03.

[24] German law draws a clear conceptual division between rights of relief and unjustified enrichment: Dieckmann, 'Province' (n 13) 1009–1013.

[25] For instance, it is well established that the general principle (expressed in *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90 at 98H–I per Lord Hope) that an enrichment must be returned only if it is retained without a 'legal ground' is similar to the general enrichment principle set out in the German Civil Code (BGB) § 812(1). This resemblance

casts doubt on the recent Scottish dalliance with an enrichment analysis of relief. While acknowledging the importance of this debate, the author's contribution to which can be found elsewhere,[26] it is not the focus of this book. The main concern is to identify what rights of relief are; it is of secondary importance to identify what (arguably) they are not. It is proposed to show that rights of relief can be usefully viewed as a distinctive area of the law of obligations, rather than as a potential adjunct to, or interloper in, the law of unjustified enrichment.

C. SCOPE

1-08. The examination of rights of relief concerns any scenario in which a cautioner claims against the principal debtor or co-cautioners, and the underlying right is labelled as one of 'relief'. Even within those parameters, the term 'relief' assumes various meanings, the elucidation of which is the object of this book.

1-09. Excluded from this project are the rights of non-cautioners, such as those of insurers, and rights which, though enjoyed by cautioners, are not termed 'rights of relief' in Scottish legal practice: for instance, the traditional right of a cautioner to insist that the creditor pursue and enforce the debt against the principal debtor in the first instance.[27] Those limitations notwithstanding, the book does not ignore neighbouring areas of law. For instance, the rights of an insurer are relevant in so far as they clarify, by analogy, the nature of a cautioner's rights of relief. The same is true of the aforementioned protections enjoyed by a cautioner which, despite not constituting rights of relief, help to contextualise relief as one element in a broader scheme of protection.

1-10. It should be noted that this project's scope is shaped both by a concept, 'caution', and by a word, 'relief'. A chapter is devoted to defining the concept of 'caution', differentiating it from such superficially similar concepts as insurance. In contrast to this technical understanding of caution, the focus on relief is deliberately broad and untechnical. In considering the nature of rights of relief in a cautionary relationship, the book does not restrict itself to a particular *conception* of relief, but rather considers all uses of the *word* 'relief' to describe

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has prompted a reconceptualisation of Scots law along the lines of modern German law. For instance, Evans-Jones' treatment of unjustified enrichment is divided according to the German distinction between enrichment resulting from a deliberate performance and enrichment arising in some other manner: R Evans-Jones, *Unjustified Enrichment* vol 1*, Enrichment by Deliberate Conferral: Condictio* (2003); Evans-Jones, *Unjustified Enrichment* vol 2 (n 22).

[26] E F West, 'The interaction of rights of relief and unjustified enrichment in Scots Law' (2020) 24 Edin LR 202.

[27] Erskine III.3.61. This right is now largely defunct: Mercantile Law Amendment (Scotland) Act 1856 s 8. As to the rights of non-cautioners, an obvious category is that of joint wrongdoers: *Palmer v Wick and Pulteneytown Steam Shipping Co Ltd* (1894) 21 R (HL) 39. See now the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 s 3(1).

a claim by a cautioner against the principal debtor or co-cautioners. To draw the parameters of the book any more narrowly would be circular, in effect defining a book on the nature of rights of relief in terms of a particular conception of such rights.

D. STRUCTURE

1-11. An understanding of rights of relief cannot be achieved without examining their origins. It is for that reason that the book begins by examining the Roman law of suretyship (*adpromissio*), to which so many of the doctrines in the Scots law of cautionary obligations can be traced (chapter 2).

1-12. There follows a definitional chapter (chapter 3). In a book concerning the rights enjoyed by a cautioner, it is important to frame what is meant by a cautionary relationship. It is also important to clarify how one becomes a cautioner: the focus of the fourth chapter. In chapter 5, the discussion turns to the creditor's rights, for it is only against such a backdrop that a cautioner's rights can be understood.

1-13. The remaining chapters form the substance of the book: what is the nature of a cautioner's rights of relief? Following an overview of these rights in chapter 6, the book considers the cautioner's right of *pro rata* relief, in terms of both its fundamental basis (chapter 7) and its content (chapter 8). Next to be examined is the cautioner's right of total relief against the principal debtor (chapter 9). Whereas chapters 7 to 9 focus on rights of relief arising *after* payment of the creditor by the cautioner, chapter 10 considers a form of relief exigible *before* the cautioner has paid anything. The book's conclusions are summarised in chapter 11. Together, these chapters aim to clarify the nature of rights of relief, detailing in what circumstances those rights arise and what they allow a cautioner to claim.

2 The Roman Law of Suretyship

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A. INTRODUCTION

2-01. Before discussing the Scots law of caution, it is necessary to examine its origins in the Roman law of suretyship (*adpromissio*). A Roman surety was, like the Scottish cautioner of today, someone who guaranteed the performance of another's obligation, subject to certain legal protections. This chapter examines how, from the early years of the Roman Republic to the time of Justinian, the law sought to balance the surety's and creditor's respective interests.

2-02. An exploration of the Roman law of suretyship is complicated by the existence of different kinds of suretyship at different times, and by the 'flurry of statutory activity' lavished on this area during the Republic, to say nothing of the procedural innovations of classical law and the reforms under Justinian.[1] Following a chronological overview of these developments, the chapter proceeds to consider the Roman law in detail, examining the constitution of a contract of suretyship and the parties' associated rights and obligations.[2] The chapter concludes with a brief account of Roman law's enduring relevance to the Scots law of caution.

B. CHRONOLOGICAL OVERVIEW

(1) Suretyship (*adpromissio*)

2-03. In most legal systems, creditors can avail themselves of two types of security: real and personal.[3] The significance of real security is that the creditor may, in the event of default, use one of the debtor's assets to satisfy the debt.[4] Personal security, by contrast, consists in a contractual right against a third party, whose duty it is to pay the debt if the principal debtor fails to do so.[5] In Roman law, suretyship (*adpromissio*) was the most important form of personal

1 S Eden and J T Pretorius, 'Suretyship and cautionary obligations', in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 335 at 336.

2 For detailed treatment of the Roman law of suretyship, see: P K Jones Jr, 'Roman law bases of suretyship in some modern civil codes' (1977–1978) 52 Tul L Rev 129; R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) ch 5. Suretyship almost always features in textbooks on Roman private law: R W Lee, *The Elements of Roman Law* (4th edn, 1956) 366–371; B Nicholas, *An Introduction to Roman Law* (1962) 204–207; W W Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (3rd edn, by P Stein, 1963) 232–237; M Kaser, *Roman Private Law* (3rd edn, transl R Dannenbring, 1965) 232–237; J A C Thomas, *Textbook of Roman Law* (1976) 334–339; R Evans-Jones and G MacCormack, 'Obligations' in E Metzger (ed), *A Companion to Justinian's Institutes* (1998) 145–148.

3 P B H Birks, *The Roman Law of Obligations* (ed E Descheemaeker, 2014) 62.

4 Birks, *Roman Law of Obligations* (n 3) 62.

5 Birks, *Roman Law of Obligations* (n 3) 62.

security;[6] indeed, such was its popularity that, until the later period of the Empire, it was used more often than real security.[7]

(2) Different forms of suretyship: *sponsio, fidepromissio* and *fideiussio*

2-04. Over the course of its history, Roman law recognised three types of suretyship: *sponsio*, *fidepromissio* and *fideiussio*. *Sponsio*, the oldest of the three, probably existed before the Twelve Tables, while *fidepromissio* existed by the third century BC.[8] *Fideiussio*, the third type of suretyship and the only one to endure into Justinianic law, originated in the final century BC.[9] The survival of this last form of suretyship can be attributed, at least in part, to a comparative lack of statutory regulation, making it more appealing to creditors.[10]

2-05. Although it was possible to emulate the functions of *sponsio*, *fidepromissio* and *fideiussio* by other legal means (e.g. by a contract of mandate),[11] these three were the only 'true form[s]' of suretyship in Roman law.[12] Though subject to different rules, they were all mechanisms to the same end, allowing one person, the surety, to guarantee another's obligation.

6 Thomas, *Textbook of Roman Law* (n 2) 334–339.

7 Jones (n 2) 129.

8 Thomas, *Textbook of Roman Law* (n 2) 335.

9 Kaser, *Roman Private Law* (n 2) 234; Thomas, *Textbook of Roman Law* (n 2) 335. It has been suggested that *fideiussio* may not have been in use until after the end of the Republic: A Watson, *The Law of Obligations in the Later Roman Republic* (1965) 6; H F Jolowicz and B Nicholas, *Historical Introduction to the Study of Roman Law* (3rd edn, 1972) 299.

10 Jolowicz and Nicholas, *Historical Introduction* (n 9) 300.

11 This was the *mandatum pecuniae credendae*. If S mandated C to lend money to D and D failed to repay C, C could pursue S under the contract of mandate for what D had failed to pay, this loss having been incurred by C in fulfilment of the mandate (*actio mandati contraria*). This mandate-based arrangement was functionally equivalent to 'true' suretyship constituted via a stipulation. Suretyship could also be replicated by means of *constitutum debiti alieni* (an informal promise to pay another's extant debt, which promise could be enforced by a praetorian action) and *receptum argentarii* (a promise made by a banker to pay the debt of a client), the latter of which was eventually absorbed into *constitutum debiti alieni*: Lee, *Elements of Roman Law* (n 2) 367; Kaser, *Roman Private Law* (n 2) 236; Jolowicz and Nicholas, *Historical Introduction* (n 9) 301. In some cases, these suretyship surrogates could be used to circumvent the more rigid rules associated with suretyship proper. For instance, it is likely that even before Justinian's abolition of correality (discussed below at paras 2-37–2-40), it was possible for a creditor under *mandatum pecuniae credendae* to sue the principal debtor without forfeiting his rights against the mandator (i.e. the 'surety'): Kaser, *Roman Private Law* (n 2) 236. Conversely, some of the reforms to the law of suretyship consisted of extending reforms hitherto applicable only to suretyship via a stipulation to suretyship via, say, *constitutum debiti alieni*. For instance, by the time of Justinian, the *beneficium divisionis* (discussed below at paras 2-43–2-45) applied to suretyship via a stipulation, on the one hand, and to *mandatum pecuniae credendae* and *constitutum debiti alieni*, on the other: Lee, *Elements of Roman Law* (n 2) 369; Kaser, *Roman Private Law* (n 2) 236.

12 Thomas, *Textbook of Roman Law* (n 2) 338.

(3) Republican legislation

2-06. Initially, the Roman surety was in a vulnerable position: answerable to the creditor for the principal debtor's obligation, yet, in the absence of a separate contractual arrangement between surety and principal debtor, unable to seek reimbursement. It was to strengthen the position of the surety in such matters that various statutes were introduced during the Roman Republic, most of them applicable to *sponsio* and *fidepromissio*.

(a) Legislation for sponsio

2-07. The first of the Republican statutes was the *lex Publilia*, which originated in either the fourth or third century BC and which applied only to sureties contracted by means of *sponsio* (*sponsores*).[13] If a *sponsor* paid the principal debtor's debt, the principal debtor had six months within which to reimburse him,[14] failing which the surety enjoyed an action against the principal debtor known as the *actio depensi*.[15] Initially this consisted of seizure of the latter's person (*manus iniectio*),[16] but after the *legis actio* system fell away, the surety's remedy became an action for double damages.[17] The *sponsor*'s right actually pre-dated the *lex Publilia*.[18] For simplicity's sake, however, the *lex publilia* is hereinafter used as a shorthand for the Roman surety's right of relief against the principal debtor.

(b) Legislation for sponsio *and* fidepromissio

2-08. The first Republican statute applicable to both *sponsio* and *fidepromissio* (but not to *fideiussio*) was the *lex Appuleia*, introduced in the second half of the third century BC.[19] Like the *lex Publilia*, this conferred a right of relief on a surety who had paid the creditor, but, whereas the *lex Publilia* afforded a right of total relief against the principal debtor, the *lex Appuleia* entitled the paying surety to *pro rata* relief from other sureties liable for the same debt.[20] Thus, if there were three sureties (S1, S2 and S3) for a debt of 300 and S1 paid the whole debt, S1 would be entitled to recover 100 from S2 and 100 from S3.

[13] Johnston suggests the third century (D Johnston, *Roman Law in Context* (1999) 90); Thomas suggests the fourth century (Thomas, *Textbook of Roman Law* (n 2) 336); and Zimmermann suggests the third or fourth century (Zimmermann, *Law of Obligations* (n 2) 132).

[14] Thomas, *Textbook of Roman Law* (n 2) 336.

[15] Gaius III, 127; Thomas, *Textbook of Roman Law* (n 2) 336.

[16] Gaius IV, 22.

[17] Gaius IV, 9; Buckland, *Text-Book of Roman Law* (n 2) 446. For details on what *manus iniectio* entailed and on the *legis actio* system more generally, see Thomas, *Textbook of Roman Law* (n 2) ch VI.

[18] Zimmermann, *Law of Obligations* (n 2) 132–133.

[19] Jolowicz and Nicholas, *Historical Introduction* (n 9) 300; Thomas, *Textbook of Roman Law* (n 2) 336; Johnston, *Roman Law in Context* (n 13) 90.

[20] Gaius III, 122; Thomas, *Textbook of Roman Law* (n 2) 336.

2-09. In the case of *sponsio*, a right of total relief (*lex Publilia*) was clearly preferable, but, where the principal debtor's insolvency rendered that right ineffectual, the *lex Appuleia* ensured that the paying *sponsor* was not saddled with the whole burden of the debt.

2-10. The *lex Furia*, introduced around 200 BC,[21] performed a similar function to that of the *lex Appuleia*, effecting an equal distribution of liability among co-sureties, albeit by more radical means. According to this enactment, the creditor could only sue an individual surety for the total debt divided by the number of sureties alive when it became due.[22] For example, if three sureties were liable for a debt of 300, the creditor had to pursue each one individually for 100.

2-11. In addition to apportioning liability, the *lex Furia* introduced a rule whereby sureties were released automatically from their obligations after two years.[23]

2-12. The *lex Furia* is thought to have caused the *lex Appuleia* to fall into disuse.[24] If a surety could no longer be held liable for more than a *pro rata* share of the debt (*lex Furia*), there was no longer any need for a right of *pro rata* relief among co-sureties (*lex Appuleia*). However, since the *lex Furia* applied only to sureties in Italy,[25] the *lex Appuleia* retained a role in the provinces.[26]

2-13. The third Republican statute relating to *sponsio* and *fidepromissio* was the *lex Cicereia*.[27] This enactment, whose date of origin is unknown,[28] obliged the creditor to declare the amount of the debt and the number of sureties securing it.[29] From this information, a surety would have been well placed to exercise the right of apportionment *vis-à-vis* the creditor (*lex Furia*), or, in the case of sureties outside Italy, the right of recourse against co-sureties *(lex Appuleia*).[30] If the creditor failed to disclose the relevant information within thirty days, the sureties could seek a declaratory judgment (*praeiudicium*) to determine whether the creditor had made the requisite declaration, and if it was found that such a declaration had not been made, the sureties would be released from their obligations.[31] Although the *lex Cicereia* applied only to *sponsio*

[21] Watson, *Law of Obligations in the Later Roman Republic* (n 9) 7; Thomas, *Textbook of Roman Law* (n 2) 336.
[22] Gaius III, 121.
[23] Gaius III, 121.
[24] Zimmermann, *Law of Obligations* (n 2) 120.
[25] Gaius III, 121a; Thomas, *Textbook of Roman Law* (n 2) 336.
[26] Gaius III, 122.
[27] Thomas, *Textbook of Roman Law* (n 2) 336.
[28] Watson, *Law of Obligations in the Later Roman Republic* (n 9) 7; Thomas, *Textbook of Roman Law* (n 2) 336.
[29] Gaius III, 123; Thomas, *Textbook of Roman Law* (n 2) 337.
[30] Thomas, *Textbook of Roman Law* (n 2) 336–337.
[31] Gaius III, 123; Kaser, *Roman Private Law* (n 2) 233; Watson, *Law of Obligations in the Later Roman Republic* (n 9) 7; Thomas, *Textbook of Roman Law* (n 2) 337.

and *fidepromissio*, it was, in practice, observed by creditors in the context of *fideiussio* as well.[32]

(c) Legislation for sponsio, fidepromissio *and* fideiussio

2-14. Of the Republican enactments, only one applied to *fideiussio* (as well as to *sponsio* and *fidepromissio*), namely the *lex Cornelia*, possibly enacted around 81 BC.[33] This provided that a surety could only guarantee the debt of the same debtor to the same creditor in the same year up to the value of twenty thousand *sesterces*.[34] This limitation was relaxed only in certain cases, for instance where someone stood surety for a claim under a will.[35]

(4) Increasing importance of *fideiussio*

2-15. The Republican legislation ensured that the surety was well protected, limiting the extent and duration of the suretyship obligation, and entitling the surety to relief from the principal debtor and co-sureties. However, it possibly 'overshot its mark by reducing too greatly the value of the surety to the creditor'.[36] Because most of this legislation applied to *sponsio* and *fidepromissio* exclusively, suretyship via *fideiussio* became a more attractive option for creditors.[37] Another incentive for using *fideiussio* was its comparative flexibility. Whereas *sponsio* and *fidepromissio* could be used only to guarantee a debt constituted by an oral formula (*stipulatio*), *fideiussio* could be used to guarantee any type of debt.[38] Liability under *sponsio* and *fidepromissio* died with the surety; liability under *fideiussio* would transmit to the surety's heirs.[39]

2-16. In classical law, *fideiussio* had become the most prominent form of suretyship,[40] while *sponsio* and *fidepromissio* were on the wane, falling into total obscurity by the sixth century AD.[41] When compiling the *Corpus Iuris Civilis*, Justinian sought to replace all references to *sponsio* and *fidepromissio*

[32] Gaius III, 123; Thomas, *Textbook of Roman Law* (n 2) 337.
[33] Gaius III, 124; Kaser, *Roman Private Law* (n 2) 234; Jolowicz and Nicholas, *Historical Introduction* (n 9) 300; Thomas, *Textbook of Roman Law* (n 2) 337; Johnston, *Roman Law in Context* (n 13) 90.
[34] Gaius III, 124.
[35] Gaius III, 125; Thomas, *Textbook of Roman Law* (n 2) 337.
[36] Jolowicz and Nicholas, *Historical Introduction* (n 9) 300.
[37] Jolowicz and Nicholas, *Historical Introduction* (n 9) 300; Evans-Jones and MacCormack (n 2) 146.
[38] Gaius III, 119a.
[39] Lee, *Elements of Roman Law* (n 2) 366; Kaser, *Roman Private Law* (n 2) 234.
[40] Evans-Jones and MacCormack (n 2) 146.
[41] Zimmermann, *Law of Obligations* (n 2) 125.

in the classical sources with the word *fideiussio*.[42] He was aware of the older types of suretyship but felt that *fideiussio* was the essence of suretyship; the '*genus* of which *sponsio* and *fidepromissio* were *species*'.[43]

(5) Protections for *fideiussio*

2-17. Although *fideiussio* owed much of its initial popularity to a lack of statutory regulation, it was still subject to a significant degree of reform. In all, there were four major changes to the law of *fideiussio*, three for the benefit of the surety (*fideiussor*) and one chiefly for the benefit of the creditor.

2-18. First among the reforms was the *beneficium cedendarum actionum* (benefit of cession of actions).[44] Dating from either the late Republic or early Empire,[45] this was a procedural device that enabled a paying surety to seek relief from the principal debtor.[46] Although the *beneficium c.a.* was functionally equivalent to the statutory right of relief enjoyed by *sponsores* (*lex Publilia*),[47] the two operated in fundamentally different ways. Whereas the *lex Publilia* allowed a *sponsor* to seek relief directly from the principal debtor after payment of the creditor, the *beneficium c.a.* consisted of a right against the *creditor* exercisable *before* payment.[48] This generally meant that any rights held by the creditor against the principal debtor had to be ceded to the surety.[49]

2-19. The second reform affecting *fideiussio*, namely the *beneficium divisionis* (benefit of division), originated in classical law in a rescript by Hadrian.[50] This allowed a surety who had been sued for the whole debt to demand that it be divided among all the sureties.[51] Thus, if S1, S2 and S3 stood surety for a debt of 300 and S1 was sued for the whole amount, S1 could invoke the *beneficium divisionis* and pay a mere 100. As explored below, this procedural device performed a similar role to that of the *lex Furia*.[52]

2-20. The final benefit for *fideiussores* was introduced by Justinian. He provided that a creditor could only sue a surety if the principal debtor had been

[42] Zimmermann, *Law of Obligations* (n 2) 125. Even the Republican legislation that had been relevant to *fideiussio* fell into obscurity: Buckland, *Text-Book of Roman Law* (n 2) 448.
[43] Thomas, *Textbook of Roman Law* (n 2) 338.
[44] Thomas, *Textbook of Roman Law* (n 2) 337.
[45] Lee, *Elements of Roman Law* (n 2) 368; Buckland, *Text-Book of Roman Law* (n 2) 449; Evans-Jones and MacCormack (n 2) 147.
[46] Thomas, *Textbook of Roman Law* (n 2) 337.
[47] See para 2-07 above.
[48] Thomas, *Textbook of Roman Law* (n 2) 337–338.
[49] Thomas, *Textbook of Roman Law* (n 2) 337–338.
[50] Gaius III, 121.
[51] Gaius III, 121.
[52] One of the various Republican statutes applicable to *sponsio* and *fidepromissio*: see paras 2-10–2-12 above.

sued first.[53] This defence is known as the *beneficium excussionis vel ordinis* (benefit of discussion).[54]

2-21. In contrast to the above three reforms, introduced for the surety's benefit, there was a fourth reform geared primarily towards the protection of the creditor. Before Justinian's time, Roman procedural law imposed severe constraints on creditors' rights and the way in which they were exercised. The problem was that the mere act of suing the principal debtor had the effect of releasing the sureties from their obligation, even if the principal debtor was unable to pay the debt.[55] Justinian abolished this formalistic rule, declaring that suit of the principal debtor did not automatically release the sureties.[56] Of the four reforms to *fideiussio*, this was the penultimate one to be introduced, coming into existence before the *beneficium excussionis vel ordinis*.[57]

C. A CLOSER EXAMINATION OF THE ROMAN LAW

2-22. Thus far, the discussion of Roman law has been chronological, rather than substantive, in its emphasis, tracing the growth of Roman suretyship from the use of *sponsio* in the early Republic to the dominance of *fideiussio*, almost one thousand years later, under Justinian's codification project (*Corpus Iuris Civilis*). It is now proposed to examine this area of law in a more structured manner, considering both the constitutive requirements of a suretyship relationship and its legal consequences. Analysis of the parties' rights begins with those of the creditor against the surety, before turning to the surety's rights against the principal debtor, co-sureties and creditor. For each of those rights, the aim is to present the law as at the time of Justinian, for it was his *Corpus Iuris Civilis* that exerted such a formative influence on the Scots law of caution. However, that will not be to the neglect of earlier periods of Roman law. For instance, it is difficult fully to appreciate the importance of the *beneficium divisionis*, a reform enduring into Justinianic law, without examining its predecessor, the *lex Furia*.

D. CONSTITUTION OF A SURETYSHIP OBLIGATION

2-23. Before analysing the rights and duties of the parties to a suretyship

[53] Nov 4.1.

[54] Zimmermann, *Law of Obligations* (n 2) 129. The word 'discussion' can be taken to refer to the collection or seizure of the principal debtor's property: R Slovenko, 'Suretyship' (1964–1965) 39 Tul L Rev 427 at 447–448.

[55] Zimmermann, *Law of Obligations* (n 2) 125–129.

[56] C 8.40.28.pr and 1.

[57] Zimmermann, *Law of Obligations* (n 2) 125–131.

relationship in Roman law, it is important firstly to consider how such a relationship came into being.

(1) Formalities

2-24. A suretyship obligation was constituted by means of a stipulation (*stipulatio*), the most important type of oral contract.[58] This entailed a specific exchange of words between the creditor and the prospective surety. For the purposes of *sponsio*, the creditor would say, 'idem dari spondesne?' ('Do you solemnly promise that the same will be given?') to which the intending surety would reply 'spondeo' ('I promise').[59] Similar exchanges were required for *fidepromissio* and *fideiussio*.[60] This formality was eventually relaxed in the context of *fideiussio*. While, traditionally, a stipulation had necessitated the exchange of a precise set of words, the *constitutio* of Leo (AD 472) meant that this was no longer essential. On one modern interpretation of this reform, it now sufficed, for the purposes of creating an obligation by stipulation, that the parties' words gave expression to a common understanding.[61]

(2) What obligations could be guaranteed?

(a) Accessoriness

2-25. One constraint on the constitution of a suretyship obligation stemmed from its accessory character: the fact that it was inextricably linked to the obligation that it purported to guarantee. Thus, if the principal debtor's obligation did not exist, no valid obligation of suretyship could exist either.[62] Where a principal debtor promised to pay a sum in the erroneous belief that it was due, and a surety guaranteed that promise, the invalidity of the promise meant that the putative suretyship obligation would also be invalid.[63] In similar vein, if the principal debtor's obligation was invalid through illegality, immorality or impossibility of performance, that would preclude the creation of a valid suretyship obligation.[64] It was, however, possible to stand surety for a natural (i.e. a valid but unenforceable) obligation.[65]

[58] Birks, *Roman Law of Obligations* (n 3) 52.
[59] Thomas, *Textbook of Roman Law* (n 2) 335.
[60] Thomas, *Textbook of Roman Law* (n 2) 335.
[61] Birks, *Roman Law of Obligations* (n 3) 53–57, 63. This reform could only have affected *fideiussio* given that *sponsio* and *fidepromissio* were relics by the fifth century AD: Zimmermann, *Law of Obligations* (n 2) 125.
[62] D 12.6.47.
[63] D 12.6.47.
[64] D 46.1.29; Zimmermann, *Law of Obligations* (n 2) 124.
[65] Gaius III, 119a.

2-26. Another aspect of accessoriness was the rule that the surety's obligation could not exceed that of the principal debtor.[66] Thus, if D's obligation was to pay 50, S could not stand surety for 60. In addition, a surety's obligation could not be stricter than that of the principal debtor.[67] A surety could not, for example, be bound unconditionally if the principal debtor's obligation was conditional.[68] That said, the possibility of guaranteeing a natural obligation seems to have constituted an exception to this rule,[69] exposing the surety to suit where the principal debtor was immune.

(b) Form of the principal debtor's obligation

2-27. For the constitution of a suretyship obligation by means of *sponsio* or *fidepromissio*, the principal debtor's obligation had to be in the form of a stipulation,[70] failing which, it had to be 'recast' in such a form by means of a *novatio* (novation).[71] By contrast, a *fideiussor* could guarantee any obligation, however constituted,[72] but even then the suretyship agreement itself had to take the form of a stipulation.[73]

(c) Lex Cornelia

2-28. There were traditionally limits on the size of obligation that a surety could guarantee. It will be remembered that the *lex Cornelia* provided that, save in certain cases, sureties (including *fideiussores*) could not guarantee the debt of the same debtor to the same creditor in the same year for more than twenty thousand *sesterces*.[74] That said, if someone agreed to stand surety for an obligation exceeding that value, the surety's obligation would be void only as to the excess.[75]

(d) Timing of the principal debtor's obligation

2-29. Although a surety's obligation could not exist unless the principal debtor's obligation also existed (principle of accessoriness), there was flexibility

66 Gaius III, 126; Zimmermann, *Law of Obligations* (n 2) 122.
67 D 46.1.8.7.
68 D 46.1.8.7.
69 Zimmermann, *Law of Obligations* (n 2) 122.
70 Gaius III, 119.
71 Zimmermann, *Law of Obligations* (n 2) 118.
72 Gaius III, 119a.
73 See para 2-24 above.
74 Thomas, *Textbook of Roman Law* (n 2) 337. However, it has been observed that this legislation had 'disappeared' by the time of Justinian: Buckland, *Text-Book of Roman Law* (n 2) 448.
75 Thomas, *Textbook of Roman Law* (n 2) 337.

as to *when* the principal debtor's obligation was constituted. As Jones observes, the principal debtor's obligation 'could be created prior to, contemporaneously with, or after the creation of the suretyship contract'.[76]

(3) Legal capacity

2-30. Another constraint on the constitution of a suretyship relationship related to the class of persons who could stand surety. This issue surfaced in a variety of ways. For instance, *sponsio* applied only to Roman citizens,[77] while the defining feature of *fidepromissio* was its availability to Romans *and* non-Romans.[78] Moreover, under the *senatus consultum Velleianum* (circa AD 46), women were forbidden, subject to certain exceptions, from standing surety and from otherwise undertaking liability for others' debts.[79]

(4) Summary

2-31. Assuming that the requisite formalities had been observed, that the principal debtor's obligation was of the requisite character (e.g. not void), and that the party in question was not part of a class barred from standing surety (e.g. a non-Roman seeking to be a *sponsor*), a suretyship relationship would come into existence. The following section considers the rights flowing from such a relationship, starting with those of the creditor.

E. CREDITOR'S RIGHTS

(1) Circumstances in which the creditor's rights arose

2-32. A surety's obligation to the creditor was based on a promise (*stipulatio*) to pay the same debt as the principal debtor, and that was so whether the promise took the form of *sponsio*, *fidepromissio* or *fideiussio*.[80] By this solemn undertaking, the surety was, in principle, liable to pay the principal debtor's debt to the creditor when it fell due.

2-33. At the same time, the mere existence of a validly constituted suretyship obligation did not afford the creditor *carte blanche* as to when and how to pursue the surety. There were many circumstances in which a suretyship obligation could not be enforced, either because it had been nullified or because the surety enjoyed a defence.

[76] Jones (n 2) 131; J 3.20.3.
[77] Gaius III, 93.
[78] Zimmermann, *Law of Obligations* (n 2) 120.
[79] Lee, *Elements of Roman Law* (n 2) 370; Buckland, *Text-Book of Roman Law* (n 2) 448–449.
[80] See para 2-24 above.

(a) Statutory releases

2-34. Two early examples of rules terminating a suretyship obligation were contained respectively in the *lex Furia*, which provided that all sureties should be released within two years, and the *lex Cicereia*, which liberated sureties from their obligation if the creditor failed timeously to inform them of the extent of their liability.[81] Neither protection extended to *fideiussio*.[82]

(b) Accessoriness

2-35. As already mentioned,[83] a surety's obligation was accessory to that of the principal debtor, meaning that, if the principal debtor's obligation did not exist, no valid obligation of suretyship could exist either.[84] Thus, if the principal debtor paid the debt or if the creditor released the principal debtor from that obligation by means of an *acceptilatio*, the surety too would be released, there being no obligation to guarantee.[85] Similarly, the surety would (along with the principal debtor) be released if performance of the principal debtor's obligation had become impossible, even if that had resulted from the surety's deliberate act.[86] However, in such a case, the surety would be liable to the creditor under an *actio utilis* (policy action) or an *actio de dolo* (action for fraud).[87]

2-36. The term 'accessory' must be deployed carefully. In all likelihood, Roman law did not have a systematic understanding of accessoriness from which the above rules were neatly derived.[88] That said, to a large extent, a surety's obligation ceased to exist if that of the principal debtor ceased to exist.[89]

(c) Correality

2-37. As just mentioned, a surety would be released if the principal debtor paid the debt. However, for a long time in Roman law, the mere act of *suing* the principal debtor by the creditor was enough to release the surety. Academic discussions of this rule are couched in the nineteenth-century terms of 'solidarity', 'correality' and 'simple solidarity',[90] definitions of which will now be provided.

81 Gaius III, 123.

82 Although creditors were wont to adhere to the *lex Cicereia* in the context of *fideiussio* (Thomas, *Textbook of Roman Law* (n 2) 337) failure to observe this practice would presumably not have released a *fideiussor*.

83 At paras 2-25 and 2-26 above.

84 D 12.6.47; Zimmermann, *Law of Obligations* (n 2) 121–125.

85 Zimmermann, *Law of Obligations* (n 2) 124.

86 Zimmermann, *Law of Obligations* (n 2) 124.

87 Zimmermann, *Law of Obligations* (n 2) 124.

88 Zimmermann, *Law of Obligations* (n 2) 121–125.

89 Zimmermann, *Law of Obligations* (n 2) 121–125.

90 To a certain extent, these terms can be traced to Roman law. See, for instance the use of the word

2-38. The term 'solidarity' denotes any relationship wherein two or more persons (e.g. a principal debtor and sureties) are liable in full for one debt.[91] Once this debt has been paid, all the parties liable for it will be released.[92] 'Correality' and 'simple solidarity' are species of solidarity. If the solidary debtors' liability is characterised by correality, merely raising an action against one (e.g. the principal debtor) will automatically release the others (e.g. the sureties), whether or not that suit is successful.[93] With simple solidarity, by contrast, the debtors will be released from their obligation only once the creditor has been fully satisfied.[94] Clearly, the liability of Roman sureties could be described as solidary in the sense that multiple parties, namely the principal debtor and sureties, were liable for the same debt. However, the key question for present purposes is whether that solidary liability was simply solidary or correal.

2-39. Since the time of the *legis actiones*,[95] the principal debtor's and sureties' liability was correal.[96] This rule, based on the idea that no one can come to court twice in the same matter,[97] signified that, if the creditor proceeded against the principal debtor, the sureties would be released as of joinder of issue (*litis contestatio*) in that action.[98] That was so even if the suit of the principal debtor proved, through the latter's insolvency, to be abortive.[99] In short, a surety could be released simply by the operation of a rigid procedural rule. Fulfilment of the principal debtor's obligation, while sufficient to liberate a surety,[100] was not essential.

2-40. This position, which affected all three types of suretyship (*sponsio*, *fidepromissio* and *fideiussio*), persisted into post-classical law and was not altered until the time of Justinian.[101] In his *Code*, Justinian provided that sureties would no longer be released from their obligations simply because the principal

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solidum in Gaius III, 121. Nevertheless, it was not until the nineteenth century that abstract 'theorizing' in terms of solidarity, simple solidarity and correality began (Zimmermann, *Law of Obligations* (n 2) 128–129).

91 R Evans-Jones, *Problems Concerning the Early History of Depositum and the Penal Actio Depositi in Factum* (PhD, University of Edinburgh, 1984) 200.

92 Evans-Jones, *Depositum* (n 91) 200.

93 Evans-Jones, *Depositum* (n 91) 200–201.

94 Evans-Jones, *Depositum* (n 91) 201.

95 For details on the *legis actiones*, see Thomas, *Textbook of Roman Law* (n 2) ch VI.

96 Thomas, *Textbook of Roman Law* (n 2) 335, 337; Zimmermann, *Law of Obligations* (n 2) 126; Evans-Jones and MacCormack (n 2) 145.

97 Zimmermann, *Law of Obligations* (n 2) 126.

98 Thomas, *Textbook of Roman Law* (n 2) 335.

99 Thomas, *Textbook of Roman Law* (n 2) 335.

100 See paras 2-35–2-36 above.

101 Zimmermann, *Law of Obligations* (n 2) 125, 127–128; Evans-Jones and MacCormack (n 2) 145. However, as Zimmermann points out (at 128), the classical jurists had already started to adopt a 'simple solidarity' approach in some areas. This can be seen in D 26.7.18.1.

debtor or a co-surety had been sued.[102] From now on a surety would be liable until the creditor's debt had been satisfied.[103] In the language of the nineteenth century discussed above, the law of suretyship had moved from a position of correality to one of simple solidarity.[104] One of the key mechanisms serving to release a surety (suit against the principal debtor) had been removed.

(d) Beneficium excussionis vel ordinis

2-41. One important issue bearing upon the surety's obligation was the order of suit: that is, whether the creditor had to pursue the principal debtor before pursuing the surety. Before Justinian's time, the creditor could, in theory, sue the surety without first taking any action against the principal debtor.[105] However, in practice, this would have occurred only where the creditor knew that the principal debtor was insolvent. To sue the surety when the debt could as easily have been exacted from the principal debtor was considered an insult, casting the principal debtor's solvency into doubt.[106] The consequent risk of delictual liability to the principal debtor would have provided the creditor with a strong incentive not to sue the surety unless that was necessary.[107] In addition, the existence, until the time of Justinian, of correal liability[108] may have discouraged lawsuits against a surety in certain cases. The scrupulous creditor, knowing that there was only one chance to exact payment by means of suit, would have tried to ensure that the party sued was solvent, whether that party was the principal debtor or a surety.[109]

2-42. When Justinian introduced the *beneficium excussionis vel ordinis*, the practice of suing the surety as a last resort was elevated to legal status.[110] Now a surety could, if sued first, invoke the *beneficium* as a defence, claiming that he could be sued only if suit against the principal debtor had been unsuccessful.[111] If the principal debtor was absent, the surety could ask the judge for time to present the principal debtor before the court.[112] It is worth noting the historical

[102] Zimmermann, *Law of Obligations* (n 2) 127; C 8.40.28.pr and 1.
[103] Zimmermann, *Law of Obligations* (n 2) 127; C 8.40.28.pr and 1.
[104] Evans-Jones and MacCormack (n 2) 145.
[105] Zimmermann, *Law of Obligations* (n 2) 130.
[106] Zimmermann, *Law of Obligations* (n 2) 130.
[107] D 47.10.19.
[108] See paras 2-37–2-40 above.
[109] One solution to the problem of correality and the risk of the surety's being sued unnecessarily was for the surety to promise to pay however much of the debt that the creditor failed to exact from the principal debtor (*fideiussio indemnitatis*) (Lee, *Elements of Roman Law* (n 2) 368; Kaser, *Roman Private Law* (n 2) 235; Zimmerman, *Law of Obligations* (n 2) 137), but, absent such a special undertaking, the surety was still at risk of being sued in the first instance.
[110] Nov 4.1.
[111] Nov 4.1; Zimmermann, *Law of Obligations* (n 2) 129–130.
[112] Nov 4.1; Zimmermann, *Law of Obligations* (n 2) 130.

context of this rule, namely, the fact that it *followed*, rather than preceded, Justinian's abolition of correality in the context of suretyship.[113] Had the *beneficium excussionis vel ordinis* co-existed with correal liability, suretyship would have become 'practically worthless'.[114] The creditor would have been obliged to sue the principal debtor first, yet, as soon as joinder of issue had occurred, the claim against the surety would have lapsed, making it impossible ever to sue the surety.

(2) Content of the surety's obligation

2-43. So far, the focus has been on the circumstances in which a surety's obligation to pay the creditor arose and the circumstances in which the surety would be released from that obligation. The present section concerns the content of the surety's obligation to the creditor, the key question being: where there were multiple sureties for the same debt, how much was each bound to pay?

2-44. A Roman surety undertook liability by means of a stipulation (*stipulatio*), a verbal promise constituted by the exchange of a specific set of words.[115] The creditor would ask whether the surety undertook to pay the same (*idem*) as the principal debtor, to which the prospective surety would reply 'I promise'.[116] All Roman sureties became bound in this way and, consequently, even when multiple sureties approached the creditor together, each would be liable for the whole debt; there was no automatic implication that each would be liable only for a *pro rata* share.[117] The position changed around 200 BC,[118] with the enactment of the *lex Furia*.[119] According to that statute, a surety could be sued only for a *pro rata* share of the debt: that is, the total debt divided by the number of sureties alive when it became due.[120] For example, if three sureties were liable for 300, each could be sued only for 100. If the creditor exacted more from a surety than his proper share, that surety was entitled to *manus iniectio* against the creditor.[121]

[113] Zimmermann, *Law of Obligations* (n 2) 129.
[114] Zimmermann, *Law of Obligations* (n 2) 130.
[115] Birks, *Roman Law of Obligations* (n 3) 52; see para 2-24 above.
[116] For instance, the form of suretyship known as *fideiussio* was constituted by the following set of words: the creditor would ask, 'quod Maevius mihi debet id fide tua esse iubes?' ('What Maevius owes me, do you promise on your honour?') to which the prospective surety would reply, 'fideiubeo' ('I promise'). See Thomas, *Textbook of Roman Law* (n 2) 335.
[117] Bankton I.23.40.
[118] Thomas, *Textbook of Roman Law* (n 2) 336.
[119] See para 2-10 above.
[120] Gaius III, 121.
[121] Thomas, *Textbook of Roman Law* (n 2) 336.

2-45. Significantly, the *lex Furia* applied only to the two older forms of suretyship (*sponsio* and *fidepromissio*),[122] its protection not extending to *fideiussio*.[123] In time, however, a similar protection was introduced for *fideiussio* known as the *beneficium divisionis*: a procedural device that allowed sureties to demand that the debt be divided among them.[124] If, say, S1 and S2 stood surety for 100, S1 could be sued for 50 only. Although the *beneficium divisionis* performed a similar role to that of the *lex Furia*, dividing liability among co-sureties, it differed from its predecessor in two respects. Firstly, being a procedural device, the *beneficium divisionis* had to be invoked by the *fideiussor* when the latter was sued by the creditor; otherwise, the *fideiussor* would be liable in full.[125] In addition, where one or more sureties had fallen insolvent, the *beneficium* afforded the creditor a more generous measure of recovery than did the *lex Furia*. The division effected by the *beneficium* was based on the number of sureties solvent at the time of *suit*.[126] In other words, the division of liability occurred not when the debt fell due, as under the *lex Furia*, but if and when the *beneficium* was invoked at the time of the creditor's action.[127] Suppose that S1, S2 and S3 had been *fideiussores* for 300 and that S3 had, by the time of suit, become insolvent. If S1 and S2 both availed themselves of the *beneficium divisionis*, they would be liable for 150 each (as opposed to 100 each).[128]

(3) Summary

2-46. By the time of Justinian, the creditor's rights against the surety were as follows. (1) Thanks to a reform introduced by Justinian, a creditor could sue the principal debtor without releasing the surety. (2) Again thanks to Justinian, the creditor could sue the surety only if the principal debtor had been sued first (*beneficium excussionis vel ordinis*). (3) If there were multiple sureties, anyone sued for the whole debt could invoke the *beneficium divisionis*, thereby limiting each surety's liability to the amount of the debt divided by the number of solvent sureties.

F. SURETY'S RIGHTS

(1) Surety's rights against the principal debtor

2-47. Turning now to the rights of the surety, a surety who had paid the

[122] Gaius III, 121.
[123] Zimmermann, *Law of Obligations* (n 2) 125; Evans-Jones and MacCormack (n 2) 146.
[124] Gaius III, 121.
[125] Gaius III, 121; Zimmermann, *Law of Obligations* (n 2) 131.
[126] Gaius III, 121; Thomas, *Textbook of Roman Law* (n 2) 338.
[127] Zimmermann, *Law of Obligations* (n 2) 132. See also J 3.20.4.
[128] Zimmermann, *Law of Obligations* (n 2) 132.

principal debtor's debt would, in certain cases, be entitled to relief from the principal debtor. For *sponsores*, such a right existed under a Republican statute (*lex Publilia*).[129] A *sponsor* who paid the debt was entitled to reimbursement from the principal debtor within six months.[130]

2-48. For *fidepromissores* and *fideiussores*, there was no equivalent statutory right of relief against the principal debtor. Even so, if one became a surety at the request of the principal debtor, a contract of mandate would exist.[131] In such cases, the surety could claim reimbursement of the amount paid to the creditor as an expense incurred while performing the mandate (*actio mandati*).[132] Alternatively, even if the surety had not acted under a mandate from the principal debtor, the former might, in certain cases, have had a claim based on *negotiorum gestio* (that is, the unauthorised management of another's affairs).[133]

2-49. In the absence of a mandate (or *negotiorum gestio*) relationship, the surety had no right of relief against the principal debtor. Even so, it eventually became possible to obtain relief by a less direct means: that is, by demanding the benefit of the creditor's rights against the principal debtor (*beneficium cedendarum actionum*). This right is discussed below.[134]

(2) Surety's rights against co-sureties

2-50. For *sponsores* and *fidepromissores*, it was possible to seek *pro rata* relief from other sureties for the same debt. This was thanks to the *lex Appuleia*, which stated that a surety who had paid the debt was entitled to a contribution from the other sureties.[135] Admittedly, the *lex Appuleia* became less significant when the *lex Furia* was enacted.[136] The latter statute effected an apportionment of liability such that sureties could be sued only for their *pro rata* shares of the debt, thus obviating the problem of one surety being sued for the whole amount. It was only in the provinces, where the *lex Furia* did not apply, that the right of *pro rata* relief contained in the *lex Appuleia* maintained a high profile.[137]

[129] Gaius III, 127; Thomas, *Textbook of Roman Law* (n 2) 336.
[130] Gaius IV, 9 and IV, 22; Thomas, *Textbook of Roman Law* (n 2) 336.
[131] Nicholas, *Introduction to Roman Law* (n 2) 205; Birks, *Roman Law of Obligations* (n 3) 63.
[132] Gaius III, 127; J 3.20.6; Lee, *Elements of Roman Law* (n 2) 367; Kaser, *Roman Private Law* (n 2) 236; Birks, *Roman Law of Obligations* (n 3) 63. However, Watson argues that *fidepromissores* could not initially have relied on mandate for their relief seeing as *fidepromissio* most likely predated the *actio mandati*: Watson, *Law of Obligations in the Later Roman Republic* (n 9) 7–9.
[133] Nicholas, *Introduction to Roman Law* (n 2) 205.
[134] See paras 2-52–2-58.
[135] Thomas, *Textbook of Roman Law* (n 2) 336; see para 2-08 above.
[136] As to which see para 2-10 above.
[137] Gaius III, 122.

2-51. By contrast, *fideiussores* did not enjoy an automatic right of contribution among themselves.[138] It has been argued that if the co-sureties had 'acted in concert' they might have enjoyed a right of contribution based on the relationship of partnership (*societas*).[139] However, a more promising basis for contribution among *fideiussores* was that provided by the *beneficium cedendarum actionum*. This consisted of a claim by the paying surety against the creditor, obliging the latter to cede to the former any rights enjoyed against the other sureties (and against the principal debtor).[140] Suppose that S1 and S2 were liable for 100 and that the creditor demanded the whole 100 from S1. By invoking the *beneficium c.a.* and obtaining thereby the creditor's rights, S1 could obtain 50 from S2. Thus, a *fideiussor* was entitled to *pro rata* relief, albeit by an indirect means.

(3) Surety's rights against the creditor

2-52. As discussed immediately above, a surety could, by invoking the *beneficium cedendarum actionum*, obtain an assignation of the creditor's rights against the principal debtor and any co-sureties, although here the term 'assignation' is used loosely.[141]

(a) In what circumstances did the beneficium c.a. *arise?*

2-53. A surety was entitled to an assignation of the creditor's rights if the former invoked the *beneficium c.a.* before settlement of the latter's action, and provided that the surety was willing to make full payment of the debt.[142] This suggests that the cause of action underpinning the surety's claim was the fulfilment of the principal debtor's obligation. However, to allow an assignation on that basis would have been paradoxical. From classical law onwards, performance extinguished an obligation and released any sureties liable for it (*solutio*).[143] Thus, in fulfilling the principal debtor's obligation, the paying surety would have destroyed the very rights that he wished to enforce.[144] Faced

[138] D 46.1.39.

[139] Nicholas, *Introduction to Roman Law* (n 2) 205.

[140] Lee, *Elements of Roman Law* (n 2) 368. See below at paras 2-52–2-57.

[141] The term 'assignation' should here be understood as any formal act on the creditor's part that allowed the paying surety to pursue the principal debtor or co-sureties in relief. There is controversy as to whether Roman law recognised assignation in the modern sense of a creditor transferring rights to a third party, but what is clear is that 'functional equivalents' to what would now be termed assignation did exist: R G Anderson, *Assignation* (Studies in Scots Law vol 1, 2008) paras 4.02–4.16. For instance, there was the notion of *procuratio in rem suam*, whereby a creditor, C, authorised another, T, to represent C in enforcing C's debt against D but also to retain the proceeds of that claim (Anderson, *Assignation* para 4.04).

[142] Thomas, *Textbook of Roman Law* (n 2) 337–338.

[143] Thomas, *Textbook of Roman Law* (n 2) 343.

[144] D 46.1.36.

with this dilemma, the classical Roman lawyers devised a fiction whereby a surety who paid the creditor was seen not to have extinguished the principal debtor's obligation but rather to have 'bought' the creditor's rights.[145]

2-54. The 'sale' fiction might be taken to suggest that the surety's entitlement to the creditor's rights was based on an agreement by the creditor to transfer them, an impression fortified by certain passages in the *Digest*.[146] However, as the law developed, a surety could, before paying the creditor,[147] demand cession of the debt as a matter of law.[148] By Justinian's time, a surety's right to an assignation depended not on a contract (actual or fictitious) between surety and creditor, but on a 'general right'.[149]

2-55. In a judicial context, the right to cession of the creditor's actions was enhanced by Justinian's abolition of correality.[150] As discussed above, this ancient procedural rule meant that suit against one debtor (e.g. a surety) triggered the automatic release of other parties liable for the same debt (e.g. the principal debtor). This could work to the prejudice of a surety who had been sued and who wished to invoke the *beneficium c.a.*, for, as soon as joinder of issue occurred, the creditor's rights would be exhausted, hence unassignable.[151] Consequently, the surety had to demand an assignation *before* joinder of issue. With the eventual abolition of correality,[152] matters became more straightforward for the paying surety, who could now demand an assignation 'any time prior to judgment'.[153]

(b) What was the content of the beneficium c.a.*?*

2-56. Having described the circumstances in which the *beneficium c.a.* was available, it is now briefly considered what benefits it conferred on the paying surety. The creditor's obligation was to assign, by *procuratio in rem suam*,[154] all rights against the other debtors.[155] Those included both the creditor's rights

[145] D 46.1.17; D 46.1.36.
[146] Zimmermann, *Law of Obligations* (n 2) 135; D 46.3.76.
[147] As Zimmermann argues (*Law of Obligations* (n 2) 135), there are some indications that a surety could obtain cession *after* paying the creditor (e.g. D 46.1.36) but, as he also points out, this flexibility is not reflected in the later law. See, e.g., C 8.40.11.
[148] C 8.40.2; Nov 4.1; Zimmermann, *Law of Obligations* (n 2) 135–136.
[149] Zimmermann, *Law of Obligations* (n 2) 136.
[150] See paras 2-37–2-40 above.
[151] Jones (n 2) 134.
[152] C 8.40.28.pr and 1.
[153] Jones (n 2) 134–135.
[154] I.e. the creditor, C, mandated the surety, S, to represent C in enforcing C's debt against the principal debtor, D, but S was also entitled to retain the proceeds of that claim: Thomas, *Textbook of Roman Law* (n 2) 308–309.
[155] Thomas, *Textbook of Roman Law* (n 2) 337.

against the principal debtor[156] and the creditor's rights against the other (non-paying) sureties.[157] Thus, albeit by an indirect means, the surety could obtain relief from the principal debtor and co-sureties.

2-57. By virtue of the *beneficium c.a.*, the surety obtained an assignation not only of the debt but of any real securities held by the creditor in respect of it.[158] Thus, in cases where the principal debtor was insolvent, the *beneficium c.a.* enhanced the surety's prospects of recovery.[159]

(4) Summary

2-58. By the time of Justinian, a surety's main paths to relief would have been: (1) a direct right of total relief against the principal debtor based on mandate (or *negotiorum gestio*), and (2) the right to demand cession (*beneficium c.a.*) of the creditor's rights against the principal debtor and the other sureties. Initially attributed to a fictitious sale, the surety's entitlement to a transfer of the creditor's rights most likely arose as a matter of law by the time of Justinian.

G. CONCLUDING OBSERVATIONS

2-59. The reforms to the Roman law of suretyship can be divided into two broad categories. Firstly, there was a series of Republican statutes, designed to alleviate the onerous responsibilities of the *sponsor* and *fidepromissor*. So effective were the protections conferred by those statutes that *sponsio* and *fidepromissio* became unattractive to creditors, who increasingly sought suretyship by means of *fideiussio*. Although this form of suretyship was initially far less regulated than *sponsio* or *fidepromissio*, there were various reforms to *fideiussio* during the classical period and under Justinian, most of which, again, existed for the surety's benefit. If the protections afforded by the Republican statutes had sometimes been excessive, the various reforms to *fideiussio* arguably offered a more sophisticated approach. Contrast, for instance, the *lex Furia*, which fixed the sureties' liability on the date that the debt fell due and allowed for no adjustments if one of the sureties later became insolvent, with the *beneficium divisionis*, which ensured that the apportionment of liability among the sureties was fixed by the number of sureties solvent at the time of suit. Such nuances might be taken to suggest that the reforms to the law of *fideiussio* were superior to those that had preceded them, achieving a better balance between the interests of the sureties and those of the creditor.

[156] Nov 4.1.
[157] D 46.1.17.
[158] C 8.40.2.
[159] Lee, *Elements of Roman Law* (n 2) 368.

That *fideiussio* did not succumb to obsolescence like *sponsio* and *fidepromissio* seems to speak volumes.

H. THE RELEVANCE OF ROMAN LAW TO SUBSEQUENT CHAPTERS

2-60. Some of the Roman legislation and procedural rules discussed in this chapter are of their time. There is no question, for instance, of women being precluded from becoming cautioners in modern Scots law, as under the *senatus consultum Velleianum*.[160] However, in many other respects, the Roman law of suretyship remains relevant.

2-61. For signs of the Roman origins of the Scots law of caution, one need look no further than the work of the institutional writers: a group of Scottish jurists who wrote from the seventeenth to the nineteenth century and a selection of whose works continues to be cited as primary legal authority before the Scottish courts.[161] In large part, those writers based their treatment of cautionary obligations on Roman law, as their references to such devices as the *beneficium divisionis* make especially clear.[162] The same is true of other Scottish legal writers, notably, the judge, jurist and philosopher, Lord Kames. His treatment of rights of relief, which is of pivotal importance to the substantive chapters of this book, draws expressly on Roman law.[163]

2-62. It should be emphasised that the civilian influence on Scots law was very much a Justinianic one, reflecting what was written in the *Code*, *Digest*, *Institutes* and *Novels* (i.e. the *Corpus Iuris Civilis*). This had the effect of obscuring many of the earlier developments discussed in this chapter, for, in compiling the *Corpus Iuris Civilis*, Justinian focused solely on *fideiussio* to the exclusion of the older forms of suretyship (*sponsio* and *fidepromissio*).[164] It is likely that *fideiussio* was the only form of Roman suretyship of which the institutional writers, at least those living in the seventeenth and eighteenth centuries, were fully cognisant. Modern scholars seem to have become acquainted with *sponsio*

[160] Buckland, *Text-Book of Roman Law* (n 2) 448–449. But cf G L Gretton, 'Sexually transmitted debt' 1997 SLT (News) 195 where the author notes the loose thematic parallels between the doctrine of good faith in *Smith v Bank of Scotland* 1997 SC (HL) 111 and the problems addressed by the *senatus consultum Velleianum*. Of course, one of the key differences between the two is that the *Smith* doctrine, though often associated with, e.g., wives guaranteeing their husbands' debts, exists in principle as much for the protection of men.

[161] For a guide to the institutional writers see D M Walker, *The Scottish Jurists* (1985).

[162] See, e.g., Bell, *Principles* § 268.

[163] H Home, Lord Kames, *Essays upon Several Subjects in Law* (1732) 19–60 ('*Beneficium cedendarum actionum*'); H Home, Lord Kames, *Principles of Equity* (3rd edn, 1778, reprinted ed M Lobban, 2014) 77–81.

[164] Thomas, *Textbook of Roman Law* (n 2) 338; Zimmermann, *Law of Obligations* (n 2) 125.

and *fidepromissio* via Gaius' *Institutes*,[165] a text which had fallen into obscurity by the time of Stair and which was only rescued from that obscurity when a version of it was discovered in the early nineteenth century.[166] This does not render *sponsio* and *fidepromissio* irrelevant. Indeed, as will become apparent as the book progresses, the *lex Furia*, though never formally received into Scots law, is a useful reference-point when discussing the modern law of caution.[167] Even the aspects of Justinian's law that were rejected in early Scots law, and in European legal history more generally,[168] help to set the modern law of caution in context. It will be remembered that a Roman surety became bound by reciting a prescribed set of words (*stipulatio*), although this requirement was relaxed by the fifth century AD.[169] Contrast this with Scots law which, as early as the seventeenth century, considered mere *agreement*, as opposed to a set form of words, to be the source of contractual obligations.[170] In a broad sense, however, Scots law has not wandered far from its Roman ancestor. Formalities sometimes exist for the constitution of cautionary obligations, albeit such formalities consist of requirements of writing.[171]

2-63. For the purposes of this book and its examination of rights of relief in a cautionary context, the above discussion of Roman law raises the following interrelated issues:

(i) Primary/secondary liability
A cautioner is liable on a secondary basis; the principal debtor on a primary basis. For instance, the former's obligation is accessory to that of the latter.

(ii) Risk-management
The law of caution concerns the management of risk, most obviously that posed to the creditor by the principal debtor's insolvency. However, once the creditor has been satisfied, the law seeks to mitigate the risk borne by the paying cautioner, endowing that party with rights of relief against the principal debtor and co-cautioners.

(iii) Prioritisation of the creditor's interests
The law often takes the view that protection of the creditor is of paramount

[165] See generally, Thomas, *Textbook of Roman Law* (n 2) 334–339, where the author makes numerous references to Gaius' *Institutes*.
[166] Thomas, *Textbook of Roman Law* (n 2) 52.
[167] For instance, it acts as a useful reference-point when examining *Morgan v Smart* (1872) 10 M 610, a case discussed in chapter 7; see especially para 7-27.
[168] Note, e.g., the departure of Roman-Dutch law from Roman law's insistence on an assignation being demanded *before* payment of the creditor (Zimmerman, *Law of Obligations* (n 2) 142), or of French law from the Roman position that the creditor was not obliged to preserve securities for the benefit of the *fideiussor* (Jones (n 2) 143 and 146–147).
[169] Birks, *Roman Law of Obligations* (n 3) 53–57 and 63.
[170] Stair I.17.3.
[171] Formalities of constitution are discussed in chapter 4.

importance and that protection of the cautioners is a secondary concern, only to be entertained in so far as it does not impinge upon the creditor's interests.

These are the broad themes that any discussion of rights of relief, whether historical or modern, Roman or Scottish, should take into careful consideration. They will be of recurring relevance to the chapters that follow.

3 Cautionary Relationships in Modern Scots Law

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A. INTRODUCTION

3-01. One of the better-known logical fallacies runs thus: a Scotsman proudly declares that 'no Scot' would commit a certain violent act, and, when confronted with the news that another Scotsman *has* committed the act in question, retorts that 'No *true* Scotsman would do such a thing!'[1] For the purposes of this chapter, which seeks to define a cautionary relationship in modern Scots law, this example is surprisingly instructive. It serves as a reminder that, whether the term under scrutiny is 'Scotsman', 'cautioner' or 'Scottish cautioner', it is important to be consistent with definitions. Cautionary arrangements take a variety of forms. The purpose of this chapter is to highlight what, at a fundamental level, they have

[1] A Flew, *Thinking about Thinking* (1975) 47 (emphasis added).

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in common. Another practical object of this definitional exercise is to distinguish caution from other, superficially similar, legal relationships like indemnity.

3-02. As will emerge from this chapter, there is a degree of flexibility in how one defines a cautionary relationship. The definitions in the case law are not always consistent, with the result that one judge's cautioner might be another's indemnifier or principal debtor. In fact, even one judge's definition of the term 'cautioner' may vary according to the context in which it is used. The notion of caution that, historically, attracted a negative prescriptive period of seven years,[2] is distinct from the notion of caution to which the so-called doctrine of good faith applies.[3] In the light of such variations in meaning, it is probably impossible to provide a single, all-encompassing definition of caution without defining it too narrowly, such as to shut out certain important uses of the term in Scottish legal practice, or too broadly, rendering it overly vague and abstract. This does not mean that a definition should not be provided. On the contrary, the susceptibility of a term to various meanings makes it all the more incumbent on the person using that term to define it precisely.

3-03. Caution denotes a distinctive undertaking by one party, the cautioner, to another, the creditor, as against a set of rights. The mere fact, for instance, that a cautioner who pays the creditor often enjoys a right to an assignation of the debt does not mean that a cautionary relationship is defined by such a right.[4] A relationship giving rise to a right of assignation is not necessarily cautionary, at least not on the definition proposed here;[5] nor do all cautionary relationships confer a right to an assignation in all cases.[6] In short, to define caution in terms of the rights that it begets is no more helpful than defining a Scotsman in terms of his capacity for vice.

B. OVERVIEW

3-04. In describing the nature of a cautioner's undertaking, this chapter takes as its touchstone the definition given by Gloag and Irvine:[7]

2 Cautioners Act 1695 (APS ix 366 c 7, RPS 1695/5/64); *Wilson v Tait* (1840) 1 Rob 137.

3 *Smith v Bank of Scotland* 1997 SC (HL) 111.

4 *Wilson v Tait* (1840) 1 Rob 137 at 148. On appeal to the House of Lords, it was argued by the respondents that the mere fact that an obligant stipulates for the right to an assignation does not necessarily make that obligant a cautioner, a right to an assignation being enjoyed by co-debtors generally.

5 For instance, a right to subrogation, functionally equivalent to assignation, can arise in the context of insurance. See generally *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1132G–1145H per Lord President Rodger.

6 Erskine III.5.11. Here Erskine notes that a right to an assignation will not arise if such an assignation would be to the creditor's prejudice.

7 W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable Including Cautionary Obligations* (1897) 642.

> A cautionary obligation or guarantee is an obligation accessory to a principal obligation, to answer for the payment of some debt or the performance of some duty, in case of the failure of another person, who is himself, in the first instance, liable to such payment or performance [. . .] The person who gives the promise is the cautioner, surety or guarantor; the person to whom the promise is given is the creditor; and the person whose liability is the foundation of the contract is the principal debtor.

3-05. Part of what makes this definition useful is the authors' concentration on the essence, rather than the form, of a cautionary undertaking. As discussed in chapter 2, the Roman definition of suretyship was inextricably tied to the form in which the surety's obligation was constituted: that is, the promise to guarantee another's debt had to be expressed orally via a prescribed set of words (*stipulatio*). In fact, even in nineteenth-century Scotland, the concept of caution was not wholly detached from the form of the cautioner's undertaking, Bell having distinguished caution from guarantees based on the 'looser epistolary form' in which the latter sort of undertaking was cast.[8] Gloag and Irvine, while acknowledging Bell's point that the term 'guarantee' often denoted an informal letter, and 'caution' a formal bond, emphasised that both undertakings were essentially 'cautionary' in nature. Viewed in this light, what differentiates caution from other obligations is not the recitation of formulae, as in Roman law, or the formality of the document in which the obligation is constituted,[9] as historically in Scots law, but rather the nature of the cautioner's engagement.

3-06. In essence, caution consists in an undertaking by one or more parties that another, the principal debtor, will fulfil an obligation to the creditor.[10] Should the principal debtor fail to pay or perform, the cautioner(s) will become liable in that party's stead.[11] What is the purpose of such an arrangement? Most obviously, it exists for the creditor's benefit, increasing the chances of satisfaction should the principal debtor fall insolvent. The arrangement is often termed 'personal security' since, rather than furnish the creditor with a right over an asset out of which the debt can be satisfied ('real security'), caution provides the creditor with an extra person or persons to sue.[12] However, the cautioner's undertaking may also be a valuable asset to the principal debtor as well. For example, a merchant may be reluctant to sell goods on credit

[8] Bell, *Commentaries* I, 370.

[9] That is not to say that formalities do not matter. In fact, cautionary obligations sometimes require to be constituted in writing: see ch 4 for further details. All that is emphasised here is the fact that one can define cautionary obligations independently of the form in which they require to be constituted.

[10] Bell, *Principles* § 245.

[11] Bell, *Principles* § 245.

[12] P B H Birks, *The Roman Law of Obligations* (ed E Descheemaeker, 2014) 62.

unless the prospective buyer obtains a cautioner for the price.[13] It is important to remember that a cautioner is a secondary debtor: a precautionary source of recourse in the event of the principal debtor's default. It is partly for that reason that caution has traditionally been termed an accessory obligation, the existence of which is predicated on the existence of another obligation (i.e. that of the principal debtor).[14] In this respect, the relationship of cautioner and principal debtor can be contrasted with that of co-principal liability, wherein two or more persons undertake liability to the same creditor on an equal footing, each of them liable in the first instance.[15]

3-07. While the distinctive features of caution are clear in theory, they are not always so in practice. The following section explores the criteria for cautionary obligations in more detail, elaborating on the definition provided thus far.

C. DEFINITIONAL CRITERIA

(1) Accessoriness

3-08. A cautioner undertakes that another will perform an obligation to the creditor. As a concomitant, the cautioner's obligation is subject to the condition that another party, the principal debtor, is liable to the creditor under a valid obligation.[16] The cautioner's undertaking is said to be 'accessory' to that of the principal debtor; it cannot exist unless the principal debtor's obligation also exists.[17] Indeed, some institutional writers expressly classified caution as part of a broader set of accessory obligations.[18]

3-09. From this accessoriness criterion, it follows that caution is distinguishable from an agreement to pay a creditor on an independent basis, that is, without reference to a third party's obligation. For instance, if D Ltd agrees to compensate P in the event that P's house burns down or if P's shares in a certain company decrease in value, that is not a cautionary obligation but an independent obligation of indemnity.[19] Of course, in a loose sense, caution is a form of indemnity: the cautioner agrees to indemnify the creditor against the risk of the principal debtor's default. However, unlike other undertakings to indemnify, a cautioner's undertaking depends on some other person being primarily liable to the creditor. It is for similar reasons that caution can be distinguished from

[13] Hume, *Lectures* II, 215: 'Had it not been for the support of James's caution, John would not have been dealt with or trusted for the price of the lands at all.'
[14] Stair I.17; Erskine III.3.60–73 and III.3.75–82.
[15] Erskine III.3.74.
[16] Bankton IV.45.182.
[17] Stair I.17.
[18] See, e.g., Bankton I.23.
[19] *Milne v Souter* (1868) 6 M 977; *Milne v Kidd* (1869) 8 M 250.

novation, that is, the substitution of one obligation for another.[20] For instance, if Tina is liable to a bank for £100 and her friend, Lewis, persuades the bank to accept him as a new debtor in Tina's stead, then, by definition, Lewis cannot be a cautioner, because he is now the only person liable for the £100. A cautioner's obligation is in addition to, not in substitution for, that of the principal debtor.[21]

3-10. What is the significance of the fact that a cautionary obligation is, by definition, accessory to that of another party? The key point is that, if the anticipated principal obligation never comes into existence, the cautioner will not become liable to the creditor.[22] For instance, if Sarah agrees to pay a bank if John defaults on his obligation to pay that bank £100, but John never becomes bound for such a debt, Sarah's cautionary obligation never comes into existence, it being a clear condition of her agreement to pay that John would be liable to the bank as principal debtor. On the other hand, if Sarah agrees to pay £100 to the bank in the knowledge that John is not liable to the bank for that sum, or that his putative obligation to the bank is invalid, her obligation may be construed as an independent obligation to pay £100 for the very reason that she intended to become bound whether John was bound or not.[23]

(2) A cautioner undertakes to pay on the default of the principal debtor

3-11. For an undertaking to be cautionary, not only must it be made in addition to that of the principal debtor: the cautioner's obligation must also be conditional on the principal debtor's having defaulted. It is best to begin with the simplest examples.

(a) Terminology indicative but not decisive

3-12. The most definitionally straightforward type of caution is that in which 'cautioner', or some derivative of the word, is used to qualify the obligation.[24] If Jill says to a bank, 'I bind myself as a cautioner for Richard's debt to you', that is manifestly a cautionary undertaking. The use of the term 'cautioner' clarifies that Jill intends to be bound only in the event of Richard's default. Short of undertaking liability expressly as cautioner, it is possible to use a synonym or

[20] *Morrison v Harkness* (1870) 9 M 35; Gloag and Irvine, *Rights in Security* (n 7) 652–653.

[21] In this regard, note the ancient contrast between *adpromissio* (the Roman collective term for suretyship) and *expromissio* (a term for the substitution of one debtor for another): J A C Thomas, *Textbook of Roman Law* (1976) 335 and 345–346.

[22] Stair I.17.11.

[23] See *Stevenson v Adair* (1872) 10 M 919 and the analysis of that case in Gloag and Irvine, *Rights in Security* (n 7) 651–652.

[24] See, e.g., *Grant v Forbes and Henderson* (1758) Mor 2081.

closely related word like 'surety'[25] or 'guarantee'.[26] Thus, if the document Jill signs says, 'I guarantee that Richard will pay his debt to you', that will most likely be construed as an undertaking to pay only if Richard has defaulted on his obligation. In short, if it is clear that an undertaking is conditional on the default of another then, provided the other requirements discussed in this chapter are met, it will be a cautionary undertaking.

3-13. *City of Glasgow District Council v Excess Insurance Co Ltd (No 1)*[27] provides an illustration of this fundamental definitional point and its practical importance. An insurance company undertook liability in a performance bond to pay a district council (the creditor) a fixed sum of money should a building contractor fail to perform certain renovation work. The question arose whether this obligation had negatively prescribed. If the insurance company's obligation was deemed cautionary, it would be subject to a five-year prescriptive period; if, on the other hand, the obligation was characterised as an independent, non-cautionary obligation it would, having been constituted in a so-called probative writ, be subject to a twenty-year prescriptive period.[28] The court held the undertaking in the performance bond to be cautionary, the upshot being that, although the insurance company had become liable under the performance bond on the contractor's default, the former's obligation had negatively prescribed after five years.[29] A key factor in the decision was the fact that the insurer's undertaking in the performance bond was conditional on the contractor's default.[30]

3-14. In determining whether a particular obligation depends on the default of another, one should not focus solely on the label by which it is described in

[25] *Grant v Forbes and Henderson* (1758) Mor 2081.

[26] *Stocks v McLagan* (1890) 17 R 1122 at 1125.

[27] 1986 SLT 585.

[28] 1986 SLT 585 at 587F–588C per Lord Ross. This stemmed from the law of prescription as it then stood under the Prescription and Limitation (Scotland) Act 1973. The five-year prescriptive period set out in s 6 was applicable to (among other things) 'any obligation arising from, or by reason of any breach of, a contract or promise' (sch 1, para 1(g)). This general rule did not apply to an obligation constituted or evidenced by a probative writ, which obligation would be subject to the twenty-year prescriptive period under s 7. However, this exception did not apply to cautionary obligations (sch 1, para 2(c) and para 3 (now repealed)). Thus, even if an obligation had been constituted in a so-called probative writ, one could escape the twenty-year prescriptive period if that obligation were cautionary.

[29] *City of Glasgow District Council v Excess Insurance Co Ltd (No 1)* 1986 SLT 585 at 588C–590A per Lord Ross. But see also *City of Glasgow District Council v Excess Insurance Co Ltd (No 2)* 1990 SLT 225.

[30] *City of Glasgow District Council v Excess Insurance Co Ltd (No 1)* 1986 SLT 585 at 588C–590A per Lord Ross. The Lord Ordinary cited passages from Gloag and Irvine that emphasised the fact that a cautioner was liable only on the default of the principal debtor: Gloag and Irvine, *Rights in Security* (n 7) 642 and 644. Often, performance bonds do not create an accessory obligation to pay on the default of another but rather an independent obligation to pay on the presentation of documents: see, e.g., *South Lanarkshire Council v Aviva Insurance Ltd* [2016] CSOH 83, 2016 GWD 21-368 at paras 20–27.

the contract. The question is one of substance rather than of form. For instance, where, as in *Wilson v Tait*,[31] a man 'guarantee[d]' that he would repay a sum that had been lent to another party, '*whenever* the same [was] *demanded*',[32] the House of Lords took the view that this was not a cautionary obligation. Though couched in the language of a guarantee, the obligant's undertaking was to pay in the first instance; hence, he could not be a cautioner.[33] Thus, although words like 'guarantee' and 'cautioner' may indicate cautionary liability, such words are not decisive. There may be other factors, notably an avowed willingness to pay on demand, rather than on the default of another, that render the relevant obligation non-cautionary.[34]

3-15. In distinguishing caution from an obligation to pay in the first instance, judges and commentators often cite the example of a sale in which, to persuade the seller to part with goods on credit, a friend of the prospective buyer guarantees that the seller will be paid.[35] The transaction admits of several interpretations.[36] On one view, the friend's undertaking to see the seller paid may be cautionary, in that the friend proposes to be liable only if the buyer is liable too and, even then, only if the buyer fails to pay. On another view, the friend may be undertaking liability on an independent basis, agreeing to pay the price of the goods whether or not the buyer defaults, perhaps even if the buyer never becomes bound. Deciding into which category the transaction falls may be a delicate question of construction, its resolution as sensitive to the context in which the undertaking was made as to its wording. For instance, where one Forbes wrote a letter to a clothes shop in which he 'guarantee[d] [. . .] payment of the price of such goods as the Countess of Buchan may get from you', this obligation was held to be 'direct' rather than

[31] *Wilson v Tait* (1840) 1 Rob 137.

[32] *Wilson v Tait* (1840) 1 Rob 137 at 138 (emphasis added).

[33] *Wilson v Tait* (1840) 1 Rob 137 at 150.

[34] J McLaren, 'Note on Mercantile Law Amendment Act', in Bell, *Commentaries* (7th edn, by J McLaren, 1870) I, 402 at 405–406; Gloag and Irvine, *Rights in Security* (n 7) 643. In *South Lanarkshire Council v Aviva Insurance Ltd* [2016] CSOH 83, 2016 GWD 21-368, a performance bond was held to give rise to an independent obligation to pay, the obligation arising if the creditor *asserted* that a certain contractor was in breach of contract and presented documents to that effect in a contractually prescribed form, rather than a cautionary obligation conditional on the *actual* existence of a breach of contract by the contractor. The court reached this conclusion notwithstanding the repeated use of the term 'Cautioner' in the guarantee. Relevant factors in construing the contract included the fact that the bond was headed 'performance guarantee bond' and the fact that the bond's commercial purpose (here the provision of a readily available source of funds) would have been frustrated if the creditor had had to prove that a breach had occurred (at paras 20–27 per Lord Doherty). Lord Doherty went so far as to invoke a rebuttable presumption that performance bonds are 'conditioned upon the presentation of one or more documents, rather than upon the actual existence of the facts which those documents assert' (para 24).

[35] J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 304.

[36] Gow, *Mercantile Law* (n 35) 304.

'cautionary'.[37] Given that Forbes' letter bore to be an 'obligation of guarantee',[38] and bearing in mind that 'guarantee' is often synonymous with 'caution',[39] why did the court consider this particular guarantee non-cautionary? To some extent, the decision may have been based on the specific purpose for which the obligation was granted. The case report is terse and does not disclose Forbes' motives in becoming bound to the shop. However, it is possible that the clothes were intended as a gift by him to the Countess. If that was so, his written undertaking perhaps functioned like a modern-day gift voucher, allowing the Countess to choose clothes that both fitted her and suited her tastes. From the shop's perspective, it may have been natural to construe a guarantee granted in this context as an obligation to pay in the first instance.

3-16. *Selkirk (Stevenson's Tr) v Campbell and Sons*[40] is another case in which the non-cautionary character of an agreement to pay is explicable by the circumstances in which it was made. When goods were delivered to Stark, a builder, in connection with a building project, the assurance by Stevenson, that he (Stevenson) would 'see [the sellers] paid'[41] for any goods delivered to Stark was held to be an independent, rather than a cautionary, obligation, and that was partly because Stevenson had taken over the building project following the bankruptcy of Stark, the latter becoming a 'mere servant on wages'.[42]

(b) Proper caution versus improper caution

3-17. Just as words like 'guarantee' do not, by themselves, import the status of cautioner, neither do words like 'jointly and severally' rule it out. If one becomes bound as 'cautioner, surety, and full debtor, with and for' another party,[43] the use of the term 'full debtor' does not preclude the court from characterising that obligant as a cautioner.[44] That is not to say that terminology like 'full debtor' and 'jointly and severally' is unimportant. A cautioner who uses such terms as 'full debtor' and 'jointly and severally' is an improper cautioner, that is, one who lacks the privileges enuring to a proper cautioner.[45] The practical differences are as follows. Traditionally, if someone became bound expressly as a cautioner, and avoided the use of words like 'jointly and severally', that party would be

[37] *Blackwood v Forbes* (1848) 10 D 920 at 920–921. An alternative, more restrictive, reading of the decision is simply that Forbes was a cautioner, albeit an 'improper' one not entitled to the benefit of discussion. The distinction between proper and improper caution is considered below at paras 3-17–3-25.

[38] *Blackwood v Forbes* (1848) 10 D 920 at 920.

[39] See para 3-12 above.

[40] (1896) 33 SLR 503.

[41] (1896) 33 SLR 503 at 503.

[42] (1896) 33 SLR 503 at 504.

[43] See, e.g., *Monteith v Pattison* (1841) 4 D 161.

[44] *Monteith v Pattison* (1841) 4 D 161 at 165.

[45] Bell, *Principles* § 246.

entitled to insist that the creditor pursue the principal debtor in the first instance (benefit of discussion).[46] However, as explained in detail below, this privilege has been largely abolished. The second privilege, which endures to this day, applies where multiple cautioners are liable for the same debt. In such cases, a proper cautioner may insist that the creditor restrict his claim to that cautioner's *pro rata* share of the debt (benefit of division).[47] An improper cautioner has traditionally been denied both privileges, meaning that the creditor could, and today still can, sue such a cautioner for the full debt without having recourse against the principal debtor.[48] In all other respects, however, the undertakings of a proper and improper cautioner are the same: both are seen to undertake liability for another party, the principal debtor, in the event that that party defaults.

3-18. In the nineteenth century, the Scottish courts developed an increasingly liberal understanding of improper caution. It had long been accepted that a person bound 'conjunctly and severally' or 'jointly and severally' with the principal debtor was a cautioner, albeit one who had forfeited the benefits of discussion and division.[49] However, certain cases began to go even further than that. In *Paterson v Bonar*,[50] four parties (Moffat, Carter, Paterson and Williams) were to become bound 'conjunctly and severally' to a bank in a £1500 cash credit to be kept in Moffat's name.[51] Although none of the obligants was described as a cautioner,[52] a majority of the Inner House determined that three of them (Carter, Paterson and Williams) were cautioners for the fourth (Moffat), it being clear from the bond's wording that Moffat was the only party entitled to operate on the £1500 cash credit, the other three becoming liable to the bank on a gratuitous basis.[53] At the same time, these parties were not proper cautioners: bound jointly and severally to the bank, they would not be entitled to insist that the creditor sue Moffat before suing them (benefit of discussion);[54] nor could they insist that the bank pursue each of them for their *pro rata* share of the debt (benefit of division).[55] Given those limitations, it might be asked: what practical benefits did their (improper) cautionary status confer? Every prospective cautioner had signed the bond with the exception of Williams, but the bank still wished to enforce it against all the parties who had signed.[56] Paterson demurred, arguing that, because Williams was named in the bond, he

[46] Stair I.17.5.
[47] Bell, *Commentaries* I, 347.
[48] Stair I.17.5.
[49] Erskine III.3.61 and 63.
[50] (1844) 6 D 987.
[51] (1844) 6 D 987 at 987–988.
[52] (1844) 6 D 987 at 987–988.
[53] See, e.g., the judgment of Lord Murray: (1844) 6 D 987 at 1000–1006.
[54] (1844) 6 D 987 at 1002.
[55] (1844) 6 D 987 at 1002.
[56] (1844) 6 D 987 at 987–989.

had signed in the expectation that Williams would do likewise. This was no frivolous matter for, had Williams signed, Paterson would have been entitled to claim *pro rata* relief from him, thereby lessening his overall risk. The court held that this disappointed expectation that all parties named in the bond would be bound under it, coupled with the fact that Paterson was merely a cautioner, had the effect of freeing him from any liability to the bank.[57]

3-19. According to some commentators, the decision in *Paterson v Bonar* was something of a definitional misstep, serving to obscure the 'true' nature of a cautionary obligation. For instance, John (later Lord) McLaren, writing in the seventh edition of Bell's *Commentaries*,[58] attributed the Court of Session's decision to a misunderstanding of an earlier decision: that of the House of Lords in *Mackenzie v Macartney*.[59] The facts of that case were in some respects similar to those of *Paterson*. Mackenzie and Geddes were both ostensibly co-principal debtors to a bank in respect of a £500 cash credit to be operated in Geddes' name.[60] The House of Lords held that, although bound in the form of a principal debtor, and although not described in the bond as a cautioner, Mackenzie was in effect a cautioner. This was because he had described himself as having become bound 'for' Geddes, Geddes being the only person who would benefit from the £500 cash credit.[61] Because he had become bound in the form of a 'principal obligor', he had waived some of the protections enjoyed by cautioners (e.g. the benefit of discussion), but he still enjoyed others, including the benefit of the so-called giving time doctrine:[62] that is, the bank's decision to grant Geddes three more years in which to pay the sum due under the cash credit, without obtaining the consent of Mackenzie (the cautioner), had the effect of automatically liberating Mackenzie from his obligation.[63] Thus, here, as in the later case of *Paterson v Bonar*, the court treated an obligant as a cautioner simply because he had become bound for another obligant's exclusive benefit.

3-20. In McLaren's view, the correct interpretation of the House of Lords' decision in *Mackenzie v Macartney* was that Mackenzie was not a true cautioner but rather a principal debtor who had been treated *like* a cautioner – what might be termed a 'constructive cautioner'[64] – the House of Lords having granted Mackenzie the benefit of a doctrine usually conferred on cautioners (the prohibition against giving time).[65] According to McLaren, *Paterson v Bonar* carried this idea, namely that a principal debtor's rights may sometimes

[57] See, e.g., (1844) 6 D 987 at 1000–1006 per Lord Murray.
[58] McLaren, 'Note' (n 34) 409–410.
[59] (1831) 5 W&S 504.
[60] (1831) 5 W&S 504 at 511–512.
[61] (1831) 5 W&S 504 at 511–512.
[62] (1831) 5 W&S 504 at 512.
[63] (1831) 5 W&S 504 at 512–515.
[64] For the avoidance of doubt, these particular words were not used by McLaren.
[65] A doctrine discussed in detail at paras 5-55–5-63 below.

resemble those of a cautioner, a step too far in suggesting that Mackenzie was actually a cautioner.[66]

3-21. If the definition of caution in *Paterson v Bonar* is erroneous, responsibility for the error seems to lie at least partly with the House of Lords in the earlier case. The Lord Chancellor in *Mackenzie v Macartney* described Mackenzie as an actual, rather than as a merely 'constructive', cautioner, noting, for instance, that it was 'impossible for any lawyer to read [the bond], and to doubt for a moment that [Mackenzie was a] cautioner only'.[67] In the light of such statements, it is at least understandable why the Court of Session concluded that a party who became bound, as in *Mackenzie*, in the language of a principal debtor, but who also patently became bound for a fellow debtor's benefit, was a cautioner for that debtor.

3-22. Questions of 'blame' apart, McLaren's criticism does raise an important definitional point: the mere fact that one party enjoys a *benefit* typically enjoyed by a cautioner (e.g. the giving time doctrine) does not make that party a cautioner. McLaren's grievance seems to have been that the parties in *Paterson v Bonar* were not cautioners because, even if they perhaps deserved the same favourable treatment as cautioners in certain respects, bound as they were for a borrower on a gratuitous basis, their undertaking was not, on a proper construction, conditional on Moffat's default. They had not used any language to indicate that they were cautioners; indeed, by saying that they had become bound jointly and severally, they could be deemed to have undertaken liability as co-principal debtors. On McLaren's strict definition, these parties were not merely cautioners who had waived certain privileges by becoming jointly and severally liable; rather, they were principal debtors, liable to the bank in the first instance.

3-23. While echoing McLaren's call for clarity and consistency, this book does not adopt wholesale his strict definition of a cautionary obligation. What is proposed is a compromise. The distinctive feature of a cautionary obligation remains that the cautioner engages to pay only on the principal debtor's default. However, because of decisions like *Paterson v Bonar*, the courts are more prepared to draw that inference than they once were.[68] In other words, where

[66] McLaren, 'Note' (n 34) 409–410. See also Lord Medwyn's dissenting judgment in *Paterson v Bonar* (1844) 6 D 987 at 1010–1014.

[67] (1831) 5 W&S 504 at 511.

[68] The distinction between improper caution and the liability of a co-principal debtor is far from straightforward. Some judges (e.g. Lord McLaren in *Morton's Trustees v Robertson's Judicial Factor* (1892) 20 R 72 at 77–78) feel that the accessory and conditional nature of a cautioner's undertaking – that is, its dependence on the principal debtor's having defaulted – arises only in the case of proper caution and not where the parties have become bound jointly and severally. This view, when coupled with the view that caution, by definition, refers to an accessory obligation to pay only if another defaults, compels one to hold that a so-called 'improper cautioner' is not, strictly speaking, a cautioner at all. The other stance, which is the one adopted

at one time parties who became bound jointly and severally as co-principal debtors, without using terms like 'cautioner' or 'surety', could not be deemed cautioners, now they can, so long as some other element of their obligation to the creditor makes its cautionary character clear, and that other element is often the gratuitous interposition of one obligant for another's benefit. Thus, in *Paterson v Bonar*, the Court of Session inferred from the fact that three of the four obligants were non-borrowers that those three obligants intended to be bound as mere cautioners. Likewise, in *Scottish Provincial Assurance Co v Pringle*,[69] five parties appeared to have signed a bond as co-principal debtors, but four of those parties were deemed to be cautioners.[70] One obligant, McLeod, had assigned a life assurance policy to the creditor as additional security for the loan and had made the stipulation that the policy was to be reassigned to him when the debt was repaid, one of several indications that the loan had been obtained for that obligant's exclusive benefit.[71] This reasoning is not confined to the repayment of loans. In *Grant v Fenton*,[72] an obligant undertook to see another party's rent 'regularly paid'.[73] The question arose whether this obligation to the landlord included legal expenses incurred by the latter in pursuing the tenant. For present purposes, however, it should simply be noted that the court viewed this obligant as a cautioner, notwithstanding the absence of such a term from his written obligation.[74] The fact that this obligant, despite being bound in

in this book, is to say that if the law has gone so far as to hold that obligants bound jointly and severally can sometimes be cautioners (as in *Paterson v Bonar*), then that view, combined with the view that cautioners' obligations are, by definition, accessory to that of a principal debtor and conditional on the default of that principal debtor, must mean that those parties' obligations are accessory to that of a principal debtor and that they are liable only on the default of that principal debtor (albeit they have neither the benefit of discussion nor the benefit of division). On that understanding, 'improper cautioners' *are* cautioners in the strict sense and, conversely, obligants whose liability is not contingent on the default of a principal obligant are not even improper cautioners. One might find it counter-intuitive that parties bound jointly and severally can also be deemed liable only on the default of another obligant, but that is not a contradiction, as made clear where, e.g., an insurance company becomes bound jointly and severally with a contractor but expressly makes its liability conditional on the default of that contractor (*City of Glasgow District Council v Excess Insurance Co Ltd (No 1)* 1986 SLT 585).

69 (1858) 20 D 465.

70 (1858) 20 D 465 at 465. It later transpired that one of those signatures had been forged ((1858) 20 D 465 at 465).

71 (1858) 20 D 465 at 467.

72 *Grant v Fenton* (1853) 15 D 424.

73 *Grant v Fenton* (1853) 15 D 424 at 424.

74 *Grant v Fenton* (1853) 15 D 424 at 426–427. Note that, at least as the case is reported, the obligant in this case does not seem to have become bound expressly as a cautioner. It should be noted further that there was some doubt expressed as to the nature of the obligation. For instance, Lord Justice-Clerk Hope refers to a 'cautionary obligation, if it is such' (at 426). For the most part, however, the Lord Justice-Clerk is content to refer to the obligant as a cautioner and his references to a distinct and separate obligation seem simply to mean that the cautioner could not insist on the principal debtor's being pursued in the first instance (i.e. discussed).

the missives of lease,[75] was not the tenant under the lease, would have made it clear to the landlord that he was bound as a mere cautioner. In short, if a non-borrower becomes bound with a borrower to repay the loan, or if a non-tenant becomes bound with a tenant to pay rent, this provides a strong indication that the non-borrower or non-tenant is a cautioner.

3-24. Of course, if it is now easier to construe an obligation as cautionary than it once was, it follows that a creditor must draft the contract more carefully to exclude that inference by, for instance, expressly stating that the obligant is not liable as a cautioner or otherwise making it clear that the obligant is liable to pay the creditor in the first instance and without reference to the default of any other party.[76]

3-25. In short, a contractual obligant will be deemed a cautioner if the undertaking is to pay on the default of the principal debtor. This includes the following scenarios:

Proper caution
Where an obligant becomes expressly bound as a cautioner: e.g. 'I guarantee Richard's debt as a cautioner' or 'I agree to repay Richard's debt if he defaults'.

Improper caution
(i) Where an obligant becomes bound expressly as a cautioner and also jointly and severally with the principal debtor: e.g. 'I guarantee Richard's debt jointly and severally with him and as his cautioner', or

(ii) Cases where an obligant does not become bound expressly as a cautioner but where it is clear from the obligation to the creditor that the obligant's liability is in some sense secondary to that of another obligant, often because only the latter receives a benefit (such as a loan of money or a credit sale): e.g. 'Richard and I bind ourselves jointly and severally to repay the £100 advanced to Richard'.

(c) Abolition of the benefit of discussion

3-26. In spite of what has been argued so far, there is at least one potential objection to the notion that a cautioner's obligation is, by its essence, conditional on the principal debtor's default. The problem relates to the partial abolition of the benefit of discussion (*beneficium excussionis*) in the mid-nineteenth century.[77] Before explaining the significance of that reform, some background information will be furnished on the benefit of discussion itself and its (now largely historical) importance to the Scots law of caution.

[75] *Grant v Fenton* (1853) 15 D 424 at 424.
[76] *Wilson v Tait* (1840) 1 Rob 137.
[77] Mercantile Law Amendment (Scotland) Act 1856 s 8.

3-27. It will be remembered from chapter 2 that one of the benefits enjoyed by sureties in Roman law was the right to insist that the creditor pursue the principal debtor before the surety (*beneficium excussionis*).[78] This rule was received into Scots law, where it became known as the benefit of discussion.[79] Its nature and scope are explored in greater detail in chapter 5. For now, it simply needs to be understood that, before the creditor could sue the cautioner, the former had to have recourse against the principal debtor, and that did not simply entail a perfunctory demand for payment. On the contrary, if the principal debtor had defaulted, the creditor could not take legal action against the cautioner before suing the principal debtor and seizing the latter's assets by appropriate legal means (diligence).[80] In other words, the cautioner could be pursued only as a last resort – only if the creditor had failed, through pursuit of the principal debtor, to obtain satisfaction.[81] While this rule that the principal debtor had to be sued first was a relatively late addition to the Roman law of suretyship, having arrived at the time of Justinian,[82] it has long been viewed as an integral part of the Scots law of caution. For the institutional writers, the benefit of discussion arose quite naturally from the terms of a cautionary obligation. It was, Bell noted, a 'corollary' of an undertaking to guarantee another person's debt.[83] At the same time, this privilege could be waived: if a cautioner became bound jointly and severally with the principal debtor the creditor could proceed against the cautioner without taking legal action against the principal debtor.[84]

3-28. The benefit of discussion was abolished by section 8 of the Mercantile Law Amendment (Scotland) Act 1856, which provided that a cautioner's liability was no longer contingent on discussion of the principal debtor. There were two qualifications to that reform. Firstly, section 8's wording suggests that the benefit of discussion has been abolished only as regards caution for the payment of money.[85] Secondly, the benefit of discussion has been abolished in as much as it is no longer an implied term of a cautioner's undertaking; it is still possible for a cautioner to stipulate expressly that the creditor must first discuss the principal debtor.[86] Even with these qualifications, the reform was still somewhat radical: a rule once deemed so fundamental to a cautionary undertaking as to be a 'corollary'[87] of it was nonetheless jettisoned. Perhaps somewhat counter-intuitively, however, the 1856 Act has not completely altered the definition of a cautionary obligation. As a general rule, the creditor is no

[78] Nov 4.1; see paras 2-41 and 2-42 above.
[79] Erskine III.3.61.
[80] Erskine III.3.61.
[81] Stair I.17.5; Bankton I.23.28; Erskine III.3.61; Bell, *Principles* § 252.
[82] Nov 4.1.
[83] Bell, *Principles* § 252.
[84] Bankton I.23.28.
[85] *Scottish Metropolitan Property Plc v Christie* 1987 SLT (Sh Ct) 18 at 22–23.
[86] Mercantile Law Amendment (Scotland) Act 1856 s 8.
[87] Bell, *Principles* § 252.

longer required to discuss the principal debtor and to establish thereby that the latter's estate is insufficient. Even so, it is still, as under the pre-1856 law, necessary for the principal debtor to have *defaulted* before the cautioner can be sued.[88] In *Mackenzie v Macartney*, the Lord Chancellor provided a neat summary of this distinction:[89]

> [The benefit of discussion] gives the cautioner a right to say, ['']You have not discussed my principal['',] not merely, ['']Y]ou have demanded and been refused['',] but [,'']Y]ou should have gone against him by full diligence['].

3-29. On this understanding, 'default' simply means that the principal debtor has failed, as a matter of fact, to fulfil the obligation; 'discussion' refers to *enforcement* of the principal debtor's obligation. Once that distinction is understood, a point of definitional significance emerges. As McLaren argued, even without the right to insist on discussion of the principal debtor, a cautioner will not be liable to the creditor until the principal debtor has defaulted.[90] This condition is not simply a right associated with caution; it *defines* caution, such that an intention to be bound in the first instance or 'on demand', without reference to the principal debtor's default, precludes one from being a cautioner.[91] Caution is no longer an obligation to pay on condition that the principal debtor *cannot* (benefit of discussion), but it remains an obligation to pay on condition that the principal debtor *has* not (default).

3-30. Not all judges are of this view. For instance, in *Royal Bank of Scotland v Brown*,[92] Lord Justice-Clerk Wheatley implied that, as a result of the abolition of the benefit of discussion in 1856, all cautioners were now liable 'on demand', rather than on the default of the principal debtor.[93] It is submitted that this view of the 1856 Act is misconceived, based as it is on a conflation of default and

[88] McLaren in Bell, *Commentaries* (n 34) I, 364 n 3.

[89] *Mackenzie v Macartney* (1831) 5 W&S 504 at 512.

[90] McLaren in Bell, *Commentaries* (n 34) 364 n 3.

[91] *Wilson v Tait* (1840) 1 Rob 137 at 150. Cautionary obligations are not the only form of security whose enforceability requires default on the obligation secured. For helpful commentary on the relevance of default to security rights more generally, and on the particular difficulties concerning default in the context of standard securities, see Scottish Law Commission, *Discussion Paper on Heritable Securities: Default and Post-Default* (Scot Law Com DP No 173, 2021) ch 4.

[92] 1982 SC 89.

[93] 1982 SC 89 at 99 per Lord Justice-Clerk Wheatley: 'The Lord Ordinary doubted whether the words ['on demand'] had any significance beyond negativing any suggestion that liability was postponed or contingent. [. . .] I find it difficult to believe that almost a century after the passing of [. . .] section 8 [of the Mercantile Law Amendment (Scotland) Act 1856] (which abolished the need first to discuss the principal debtor before going against the guarantor) practitioners were still inserting a provision in a cautionary obligation the sole purpose of which was to achieve what section 8 had enacted.'

discussion.[94] As explained above, the 1856 Act removes the benefit of discussion only; it does not mention default. Bearing in mind the misunderstanding on which Lord Wheatley's analysis appears to rest, it is submitted that McLaren's is the preferable view: someone who undertakes to pay regardless of the principal debtor's default is, by definition, not a cautioner.[95]

3-31. It follows from the above that the modern Scots law definition of caution is narrower and stricter than that of pre-Justinianic Roman law. As was made clear in chapter 2, the Roman surety, whether contracted by means of *sponsio*, *fidepromissio* or *fideiussio*, invariably became bound to pay the same (*idem*) as the principal debtor.[96] The social convention was to sue the surety only if that became necessary, and the creditor risked incurring delictual liability to the principal debtor where the surety was pursued unnecessarily,[97] but the surety's obligation was nonetheless severe. There being no requirement for the principal debtor to have defaulted, the Roman surety effectively operated under an obligation to pay on demand.[98] It was only following Justinian's introduction of the *beneficium excussionis*, the precursor of the benefit of discussion, that the surety's status as secondary debtor, obliged to pay only if the principal debtor could not, was cemented in Roman law. It is interesting to note that Scots law, despite dispensing with the need for discussion, has retained the idea that a cautioner's undertaking is to pay only if the principal debtor defaults. This notion, a comparative afterthought in the Roman law of suretyship, has become an integral part of a cautioner's undertaking – one of the key dividing lines between caution and independent liability.

(3) The principal debtor's obligation is the 'cause or consideration'

3-32. An undertaking to pay if another obligant (the principal debtor) does not is a necessary, but not a sufficient, element of cautionary liability. For the undertaking to be regarded as cautionary, it must not arise from a 'cause or

[94] For another broad (though not unduly broad) reading of the 1856 Act, see the *obiter dictum* of Lord Justice-Clerk Moncreiff in *Morrison v Harkness* (1870) 9 M 35 at 36–37: 'but I cannot read [s 8 of the 1856 Act] as limited to diligence or discussion. The privilege conferred by it on a creditor seems to be to proceed by action against either principal or cautioner.' This was in rejection of counsel's argument that, even after the passing of the 1856 Act, the debt had to be constituted against the principal debtor before the cautioner could be sued.

[95] McLaren in Bell, *Commentaries* (n 34) 364 n 3.

[96] Thomas, *Textbook of Roman Law* (n 21) 335.

[97] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 130; D 47.10.19.

[98] This obligation to pay on demand was, nonetheless, subject to the doctrine of accessoriness. Again, as explored in paras 2-25, 2-35 and 2-36 above, the Roman surety would be liable only if there was a valid principal obligation.

consideration' between the creditor and the party granting the undertaking;[99] in other words, the undertaking must not flow from some separate liability or interest on the part of the granter.[100] This criterion is not always easy to understand, partly because it is not wholly distinguishable from the criterion of accessoriness explored above.[101]

3-33. To begin with a familiar example, if Andrew agrees to guarantee a bank loan of £100 as a favour to his friend, Michelle, Andrew is clearly a cautioner because, among other things, he takes no financial interest in the loan. The *raison d'être* of his undertaking is a borrower-lender relationship to which he is an outsider; or, in McLaren's words, his undertaking is cautionary because it arises from a 'cause or consideration' between Michelle (the borrower) and the bank, rather than a 'cause or consideration' between Andrew (the borrower's friend) and the bank. In short, although Andrew the cautioner is a debtor in as much as he is legally bound to the creditor, he is bound only with a view to guaranteeing *another party's* obligation.[102] Part of what makes this example such a clear-cut case of cautionary liability is the fact that Andrew does not receive any financial reward for his undertaking to the bank. It conforms to the traditional understanding of caution as a purely gratuitous arrangement motivated by friendship. Indeed, it was once deemed immoral (*contra bonos mores*) for a cautioner to accept a financial reward from the principal debtor.[103] In this respect, the development of a more liberal understanding of caution, according to which a cautioner may benefit incidentally by such means as charging a premium,[104] creates a definitional difficulty. If Andrew, the borrower's friend, insists on a financial reward for guaranteeing the debt, can he really be described as a cautioner? Acting gratuitously is a common feature of cautionary obligations, but is it not also an essential feature?

3-34. It is submitted that one may still be deemed a cautioner even if one benefits from the arrangement. However, for the status of cautioner to remain meaningful, it is important to clarify what is meant by that concession. If Andrew charges his friend, Michelle, £10 for helping her to obtain a loan of £100, he can be regarded as a cautioner because the *raison d'être* of his undertaking is still to give effect to a relationship to which he is not a party, namely, that of borrower

[99] McLaren, 'Note' (n 34) 407–409; *Joint Liquidators of Simclar (Ayrshire) Ltd v Simclar Group Ltd* [2011] CSOH 54, 2011 SLT 1131 at para 26 per Lord Hodge.

[100] Gloag and Irvine, *Rights in Security* (n 7) 656. This definition does not exclude the possibility of, say, one becoming bound for one's spouse's or partner's business debts, for, although such a cautioner will have an interest in the success of the spouse's or partner's business, that cautioner is still undertaking liability for a third party's debt: *Braithwaite v Bank of Scotland* 1999 SLT 25 at 30A–F per Lord Hamilton.

[101] See paras 3-08–3-10 above.

[102] Stair I.17.3.

[103] *King v Ker* (1711) Mor 9461.

[104] See, e.g., *Monteith v Pattison* (1841) 4 D 161; *Donaldson v Finlay, Bannatyne and Co* (1860) 22 D 1471.

(Michelle) and lender. However, if it becomes clear that the money lent by the bank was actually placed into Andrew's hands for his own use, he cannot be a cautioner, even if the document he signs describes him as such. In that case, Andrew is in reality a borrower; his relationship with the bank arises from an independent cause between him and the bank.[105]

3-35. In a similar vein, a person will not be deemed a cautioner if the guarantee of another's performance forms part of a broader transaction. An example often used to illustrate this point is that of a *del credere* agent, that is, an agent for a seller who receives a commission for guaranteeing that buyers of the latter's goods will pay the price.[106] While this seems to resemble cautionary liability in certain respects, it is excluded from that definition because the purpose of the *del credere* agent's undertaking is not simply to guarantee others' debts.[107] On the contrary, the guarantee granted by the agent is simply one component of a broader contractual relationship between agent and seller: the more transactions that the agent secures, the higher the payment under the contract of agency.[108]

3-36. A further counterpoint to cautionary liability arises from the law concerning bills of exchange. Suppose that a buyer of goods on credit accepts a bill for £100 (the purchase price) payable to the seller at three months. The buyer is known as the 'acceptor' of the bill (A) and the seller as the 'holder' (H1).[109] As H1 urgently needs the money, he then sells his right to be paid under the bill to a third party (H2) for the discounted sum of £90. H1 does this by signing the bill and passing it to H2, who, as the new holder of the bill, is the party now entitled to sue A for £100.[110] However, because H1 has signed (indorsed) the bill, H2 may be entitled to recourse against him if A fails to pay.[111] Thus, the indorser/initial holder (H1) is in a position somewhat similar to a cautioner because he may become liable to the current holder (H2) if the acceptor (A) defaults on his obligation under the bill. However, even if H1's indorsement of the bill is regarded as a guarantee that A will perform his obligation under it, this guarantee is not cautionary.[112] It is, rather, part of a broader transaction between H1 and H2: H1 is effectively selling the bill to H2 and one component

[105] *Erskine v Cormack* (1842) 4 D 1478; *Union Bank v McMurray* (1870) 7 SLR 596 aff'd (1873) 10 SLR 319.

[106] Gloag and Irvine, *Rights in Security* (n 7) 660.

[107] Gloag and Irvine, *Rights in Security* (n 7) 660.

[108] Gloag and Irvine, *Rights in Security* (n 7) 660.

[109] Bills of Exchange Act 1882 ss 2 and 54.

[110] Bills of Exchange Act 1882 ss 31 and 32.

[111] H1 may also be liable to H2 *qua* drawer of the bill: Bills of Exchange Act 1882 s 55.

[112] *Crawford v Muir* (1873) 1 R 91 at 95. Note that, in the case of a bill that has not yet been accepted by the drawee, the drawer and any indorsers are seen to engage that the bill shall be accepted (1882 Act s 55). This is one of several factors differentiating liability under a bill of exchange from liability under a cautionary obligation: a cautioner does not guarantee *that* the principal debtor will become bound to the creditor but rather that *if* the principal debtor is, or becomes, bound to the creditor, the cautioner shall be liable if that party defaults.

of that transaction, besides the bill (subject-matter) and the price paid for it, is the seller's guarantee that the bill will be honoured.

3-37. In short, a guarantee of another's performance may be granted for a premium and still be regarded as a cautionary obligation. However, if the guarantee of another's performance is simply one element of a broader contractual relationship between the person granting the guarantee and the creditor (e.g. a contract of agency) then the obligation will not be cautionary.

(4) A cautionary undertaking is personal, not real

3-38. Thus far, caution has been defined as a form of personal security in which the creditor's interests are secured by the provision of one or more *debtors* (cautioners).[113] So defined, caution is distinguishable from real security, which affords the creditor a real right over certain *property*, usually owned by the principal debtor, which allows the creditor to claim as a secured creditor if the principal debtor defaults.[114] While this narrow understanding of caution is well established,[115] the term is sometimes used more liberally to refer to real security. Indeed, sometimes 'caution' is used as a collective term for all forms of security: real and personal.[116] Clearly, the latter meaning is too broad for the purposes of this book.

3-39. A more subtle example of loose usage is the use of the term 'caution' to describe real security (e.g. a standard security) in respect of one's spouse's or partner's debts,[117] the most notable example of which is the House of Lords decision in *Smith v Bank of Scotland*.[118] There it was held that Smith, who had granted a standard security over her share of the matrimonial home for a loan to her husband, was entitled to have that security reduced on the ground that the bank had not properly advised her. Details of the so-called doctrine of good faith propounded in that case are furnished in chapter 4. The concern at present is with the House of Lords' apparently broad understanding of caution in this case. It should be noted that the case reports do not present a wholly accurate view of the facts.[119] However,

[113] Gloag and Irvine, *Rights in Security* (n 7) 3.

[114] Birks, *Roman Law of Obligations* (n 12) 62.

[115] See, e.g., *Thow's Trustee v Young* 1910 SC 588 at 595 per Lord President Dunedin.

[116] *Anderson v Shetland Islands Council* [2012] UKSC 7, (2012) 10 EG 89 (CS) at para 11 per Lord Hope; *Centenary 6 v Caven* [2018] CSIH 27, 2018 SLT 423 at para 120 per Lord Glennie (dissenting).

[117] *Braithwaite v Bank of Scotland* 1999 SLT 25 at 30A–F per Lord Hamilton; *Hewit v Williamson* 1999 SLT 313 at 316D–317D per Lord Macfadyen.

[118] 1994 SC 613, aff'd 1996 SLT 392, rev'd 1997 SC (HL) 111.

[119] There is no indication in the case reports that Smith had undertaken *personal* liability: *Smith v Bank of Scotland* 1994 SC 613, aff'd 1996 SLT 392, rev'd 1997 SC (HL) 111. In fact, she *had* undertaken personal liability, and so could be viewed as a cautioner, but again it should be noted that this detail is not apparent from the reported case. Indeed, it only becomes clear that Smith was a cautioner if one has examined a copy of the standard security at the centre

reading the case as it was reported,[120] Smith was regarded as a cautioner not because she had become personally bound to the bank but because she had granted a real security in respect of her property.[121] There is certainly a loose analogy between this arrangement and caution in the strict sense, for, in both cases, a person may be seen to '[expose] himself or his property in security of the debts' of another.[122] However, for the purposes of this book, caution should be understood narrowly to refer to a personal obligation to guarantee another's obligation, rather than to the provision of real security in respect of another's obligation. If caution is to be defined intelligibly and concretely, it cannot be seen to encompass both real and personal security. However, as will become clearer as this book progresses, *Smith v Bank of Scotland* is still relevant to caution even in the strict sense. Although the House of Lords' definition of caution was overly broad, the principle of good faith established in that case is as relevant to caution as to the provision of real security for another's debt.

(5) A contractual relationship exists between creditor and cautioner

3-40. While a cautioner's motive in becoming bound is often to benefit the principal debtor, it should be remembered that the cautioner's obligation is owed to the creditor as a result of a contract between the cautioner and creditor. If, for example, a person undertakes liability to a *debtor* to protect that party against loss incurred in fulfilling the debt, that undertaking is not one of caution but one of indemnity.[123] The facts of *Scott v Mitchell*[124] provide a neat illustration of this distinction. The case concerned two overlapping relationships:

> *Relationship 1*: Scott entered into a contract with the Clydesdale Bank wherein he agreed to see advances to one Wood repaid.[125]

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of the litigation: G L Gretton, 'Commentary: *Hewit v Williamson*' 1998 SCLR 616 at 617; L Macgregor et al (eds), *Commercial Law in Scotland* (7th edn, 2024) para 8-004. In any case, this book discusses *Smith* as it is represented in the case reports because these case reports have had a major (and, at times, confusing) influence on the law. For instance, the notion that the granter of real security for another's debt is a cautioner was affirmed in *Forsyth v Royal Bank of Scotland Plc* 2000 SLT 1295.

120 *Smith v Bank of Scotland* 1994 SC 613, aff'd 1996 SLT 392, rev'd 1997 SC (HL) 111.

121 Note, for instance, the words of Lord Clyde: 'the circumstances of the case [were] such as to lead a reasonable man to believe that owing to the personal relationship between the debtor and the proposed *cautioner* the latter's consent may not be fully informed or freely given': *Smith v Bank of Scotland* 1997 SC (HL) 111 at 121H (emphasis added).

122 *Braithwaite v Bank of Scotland* 1999 SLT 25 at 30B per Lord Hamilton.

123 S Eden and J T Pretorius, 'Suretyship and cautionary obligations', in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 335 at 338.

124 (1866) 4 M 551.

125 (1866) 4 M 551 at 551.

Relationship 2: Mitchell wrote a letter to Scott stating that, as Scott had 'become security' to the Clydesdale Bank for Wood, Mitchell hereby 'guarantee[d]' Scott against 'any loss by [his] so doing'.[126]

3-41. While Scott's obligation was cautionary,[127] consisting as it did of an undertaking to a *creditor* in respect of another's obligation, Mitchell's undertaking was simply a 'guarantee against loss' to a *debtor* (i.e. to Scott, the cautioner).[128] For that reason, Mitchell was not, at least not on the definition adopted in this book, a cautioner for Scott.

3-42. There is a second implication of defining caution solely in terms of a relationship between the cautioner and the creditor, namely that an agreement between *debtors* that one of them is the other's 'cautioner' does not, strictly speaking, create a cautionary relationship. This point was illustrated in *Crosbie v Brown*,[129] where a man and his mother accepted a bill of exchange together.[130] On the face of the instrument, they were both liable as principal debtors.[131] However, having had to pay the bill when it was dishonoured by her son, the mother sought full relief from his estate, on the basis that he was the principal debtor and she a mere secondary debtor.[132] Lord President Balfour held that it was competent to prove that such a relationship existed between the debtors.[133] It was telling, in that regard, that the mother had accepted the bill so that her son could obtain the money and that the latter had received 'the whole proceeds of the bill'.[134] However, it was not held that the mother was a cautioner in the strict sense of being in a cautionary relationship with the *creditor*.[135] As Lord Adam noted, the question in this case was not one of 'caution' but one of 'relief'.[136] Such precision is to be emulated. Clearly, it is possible for D1 to have a right of total relief against D2, or some other mutual understanding that D1 is merely a secondary debtor, without D1's being a cautioner *vis-à-vis* the creditor. Similarly, in *Union Bank v McMurray*,[137] Lord Kinloch remarked that one debtor may enjoy full relief against another debtor, despite lacking the status of cautioner *vis-à-vis* the

[126] (1866) 4 M 551 at 551.
[127] (1866) 4 M 551 at 552.
[128] (1866) 4 M 551 at 552–553. The point of contention was the scope of liability under relationship 2. It was held that, although Scott was liable as a cautioner for advances to Wood under a cash credit account capped at £150 (relationship 1), Mitchell's obligation to indemnify Scott was framed more narrowly to cover a single advance of £150 (relationship 2).
[129] (1900) 3 F 83.
[130] (1900) 3 F 83 at 83.
[131] (1900) 3 F 83 at 86.
[132] (1900) 3 F 83 at 83.
[133] (1900) 3 F 83 at 86.
[134] (1900) 3 F 83 at 86 and 88.
[135] (1900) 3 F 83 at 87.
[136] (1900) 3 F 83 at 87.
[137] (1870) 7 SLR 596 aff'd (1873) 10 SLR 319.

creditor.[138] By all means, if D1 and D2 become bound in a document narrating that money is to be advanced to D2 alone, D1 will be a cautioner in the true sense, the creditor having been apprised of that obligant's cautionary status.[139] However, if D1 and D2 simply have an agreement between themselves that D1 is a 'cautioner', and the creditor does not know of this, far less consent to an obligation from D1 on those conditional terms, D1 will not be a cautioner.

3-43. Admittedly, the term 'caution' is often used to describe the relationship between two debtors, one of whom agrees that the other obligant is a cautioner, hence entitled to relief.[140] However, in order to maintain a definition of caution that is clear and consistent, it will be necessary to dispense with such loose usage. In this book, the description of a particular party as a cautioner can be taken to signify that there is a contractual relationship to that effect between that party and the creditor.

3-44. By the converse token, it is possible for someone to be a cautioner for another even if that party does not enjoy a right of relief against the principal debtor. Thus, if one becomes liable for another's debt but contractually waives any right of total relief that would otherwise arise, or agrees to make that right of relief conditional on, say, the success of the other obligant's business,[141] that party will still be a cautioner *vis-à-vis* the creditor, despite enjoying less extensive rights against the principal debtor than those of an ordinary cautioner. A clear division has to be drawn between the relationship between the cautioner and creditor (the contract of caution) and the relationship (contractual or otherwise) between the cautioner and principal debtor.

D. TO WHAT EXTENT DO DEFINITIONS MATTER?

3-45. In all, five characteristics have been identified as essential to a cautionary relationship:

(1) a cautioner's obligation is accessory to that of the principal debtor;
(2) a cautioner is liable only on the default of the principal debtor;
(3) a cautioner's obligation does not arise from an independent 'cause or consideration' between cautioner and creditor;
(4) caution consists in personal (as against real) security;
(5) a cautioner's contract is with the creditor.

[138] (1870) 7 SLR 596 at 600.
[139] *Paterson v Bonar* (1844) 6 D 987 at 1101–1106.
[140] Gloag and Irvine, *Rights in Security* (n 7) 676: 'though the relation of principal debtor and cautioner subsists between the obligants in virtue of the agreement, yet, *quod* the creditor, the position of the obligants is determined wholly by the quality of the obligation undertaken to him as contained in the deed.'
[141] As in *McMurray v McFarlane* (1894) 31 SLR 531.

3-46. An undertaking that lacks any of those features is not, for the purposes of this book, cautionary in nature. That said, it is sometimes possible to overstate the value of a single concrete definition to the neglect of other important matters.

(1) Different types of caution

3-47. Caution is not a monolith, always taking the same form and giving rise to the same rights and duties. On the contrary, even within the definitional bounds drawn so far, there is considerable room for variation. Without providing an exhaustive account, it is worth examining some of the key sub-categories of caution and explaining why they matter.

(a) The number of parties

3-48. In its simplest form, caution involves three parties: the cautioner, principal debtor and creditor. However, there are often more than three parties, as in the case of multiple cautioners for the same obligation.[142] As regards cases involving multiple cautioners, a further sub-division can be made between those who become bound in concert and those who become bound independently of one another.[143] As will become clear in subsequent chapters, the way in which cautioners become bound can have a marked impact on their rights against one another.

(b) Proper caution versus improper caution

3-49. Reference has been made to the difference between 'proper' caution – so called because the cautioner becomes expressly bound as such – and 'improper' caution, where a person's cautionary status is qualified by being bound jointly and severally with the principal debtor.[144]

3-50. There are at least two forms of improper caution. Firstly, the term is used to designate someone who becomes bound in the language of joint and several liability but who, in the light of other evidence, for instance the fact that only one of the other obligants has benefited from the money advanced by

[142] Bell, *Principles* § 271.

[143] Bell, *Principles* § 271.

[144] See paras 3-17–3-25 above, and also Bell, *Principles* § 246; W M Gloag and R C Henderson, *The Law of Scotland* (15th edn, by H L MacQueen et al, 2022) para 16.02. A proper cautioner is also known as a 'simple cautioner' in the sense that the undertaking is simply one as cautioner and not as a cautioner bound jointly and severally with the principal debtor: *Bell's Dictionary and Digest of the Law of Scotland* (7th edn, by G Watson, 1890, reprinted by the Edinburgh Legal Education Trust, 2012) 151.

the creditor, is deemed bound as a cautioner only.[145] Here the word 'improper' seems to indicate that the cautionary nature of the undertaking is implicit rather than express. Secondly, the term 'improper caution' is used to describe someone who is liable expressly as a cautioner, but who qualifies that cautionary liability by claiming to be liable as a 'full debtor' or 'jointly and severally'.[146]

3-51. In modern law, the distinction between a proper and an improper cautioner remains important in one respect: a proper cautioner enjoys the benefit of division; an improper cautioner does not.[147]

(c) Fixed cautionary obligations and continuing cautionary obligations

3-52. A cautioner may guarantee payment of a fixed sum of money or might instead become bound for an indeterminate set of future obligations, as for the repayment of overdrafts on another's current account.[148]

(d) The nature of the principal debtor's obligation

3-53. Caution can be subdivided according to the nature of the principal debtor's obligation. For instance, a cautioner may guarantee the repayment of a loan,[149] or the payment of rent.[150] Alternatively, the cautioner's obligation may relate to the performance of a service (*ad factum praestandum*).[151]

(e) Gratuitous caution and onerous caution

3-54. It was established earlier that an obligant who charges a premium may still be regarded as a cautioner, so long as that obligant is an outsider to the transaction between the creditor and principal debtor. A traditionalist might object to this, arguing that a cautionary undertaking is, by nature, gratuitous; hence that anyone who receives a benefit for guaranteeing another's obligation is not a cautioner. However, as argued above, it is possible to define caution with sufficient breadth for it to include both gratuitous and onerous (i.e. non-gratuitous) caution without the term becoming overly vague. Further, the mere acceptance of the fact that caution can be onerous does not prevent the law from extending a greater level of protection to cautioners who become bound gratuitously. Conversely, it is conceivable that a cautioner who charges a

[145] *Mackenzie v Macartney* (1831) 5 W&S 504 at 511–512.
[146] *Monteith v Pattison* (1841) 4 D 161 at 161–162.
[147] Erskine III.3.63.
[148] See, e.g., *Caledonian Banking Co v Kennedy's Trustees* (1870) 8 M 862.
[149] *Commercial Bank of Scotland v Sprot* (1841) 3 D 939.
[150] *Grant v Fenton* (1853) 15 D 424.
[151] Bankton I.23.28.

commission does not, and perhaps should not, enjoy exactly the same privileges as one who interposes for nothing. For instance, the doctrine of good faith outlined in *Smith v Bank of Scotland*[152] applies to cautioners (and to persons better described as the providers of real security for another's debt)[153] only if the cautioner (or real-security-provider) becomes bound on a gratuitous basis.[154] Thus, while the notion that caution is inherently gratuitous does not hold sway in modern law, there remains a perception that gratuitous cautioners are in particular need of protection.

(f) Waiver of privileges

3-55. In *Aitken's Trustees v Bank of Scotland*, it was observed that the privileges enjoyed by cautioners may be contractually waived.[155] For instance, a cautioner may agree to remain bound even if the creditor later releases a security held over the principal debtor's property, an act that would otherwise liberate the cautioner at least in part.[156] The sheriff in *Aitken's Trustees* even went so far as to suggest that a cautioner may renounce 'all' cautionary privileges.[157] That holds as a general pronouncement on contractual waiver, but it should be remembered that an obligant who abandons one of the essential incidents of a cautionary relationship identified above can no longer be considered a cautioner. A notable example of this is an agreement to pay the creditor on demand without any reference to another party's default.[158]

(2) Analogous areas of law

3-56. Aside from the rich variety of undertakings *within* the law of caution, it is important to note certain arrangements which, while distinct from caution, are at least analogous to it in that they conform to some but not all of the five criteria mentioned earlier as necessary for a cautionary relationship. Such analogous areas, many of them mentioned in passing already,[159] are relevant to

[152] 1997 SC (HL) 111.
[153] See paras 3-38–3-39 above.
[154] *Royal Bank of Scotland v Wilson* 2004 SC 153.
[155] *Aitken's Trustees v Bank of Scotland* 1944 SC 270 at 277.
[156] *Bank of Scotland v Macleod* 1986 SC 165 at 165.
[157] *Aitken's Trustees v Bank of Scotland* 1944 SC 270 at 277.
[158] See paras 3-11–3-31 above.
[159] E.g. bills of exchange, indemnity, co-principal liability, and real security. Note also that in a recent case, *Buchan Biogas Ltd v BSG Civil Engineering Ltd* [2020] CSOH 42, 2020 GWD 17-244, the Outer House characterised a certain performance bond as 'something of a hybrid', having features of both a 'pure on-demand bond' and a 'pure cautionary or secondary obligation' (at para 25 per Lord Clark). In arriving at this decision, Lord Clark took the view that interpreting the obligation as either a pure on-demand bond or as a pure cautionary obligation would do violence to its wording (see generally paras 17–29). Such reasoning might

this book in so far as they shed light on principles within the law of caution, not least those concerning rights of relief. Thus, although much has been made of the distinctive character of cautionary obligations, many of the principles and rules governing this area are not peculiar to cautionary obligations.

3-57. The old law on contractual formalities affords a useful illustration of this point. Cautionary obligations have long been subject to requirements of writing, an issue discussed in detail in chapter 4. However, some of the older cases on this matter concern the need for writing not in the context of cautionary obligations in the strict sense but in the context of gratuitous indemnities granted to a cautioner by a third party. Such an indemnifier was not, on the definition offered in this chapter, a cautioner because, among other matters, that party's obligation was not a guarantee that a third party would perform but rather a direct obligation of indemnity. Nevertheless, such indemnifiers have sometimes been treated as if they were cautioners, some case reports going so far as to label them, in a particularly loose use of the term, as 'cautioners'.[160] The view may have been that, regarding the formalities required to create legal obligations, the position of a third-party indemnifier of a cautioner was nigh indistinguishable from that of an actual cautioner: the parties merited the same level of protection.

3-58. A similar phenomenon can be observed in the good-faith doctrine in *Smith v Bank of Scotland*,[161] a case in which the granter of a standard security was able to have it reduced as a result of the bank's failure to advise her properly. As noted earlier, there has been a recent judicial tendency to characterise the provision of real security for another's obligation as 'cautionary' or 'quasi-cautionary'.[162] Some judges are all too alive to the distinction between personal security on the one hand (e.g. caution) and real security on the other;[163] others are less attentive. Indeed, it is ironic that arguably the most famous case on

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make one question the sharp definitional distinction traditionally drawn between cautionary obligations and independent obligations. Even so, it is submitted that, for the sake of legal clarity, a bright line between caution and independent liability should be maintained wherever possible and that a 'hybrid' analysis should be used sparingly, if at all. Caution, it has been argued, is a sufficiently flexible concept to accommodate a wide variety of undertakings, including ones where privileges traditionally associated with caution have been contractually waived (see above at para 3-55). Conversely, it is possible to conclude that a given undertaking is not cautionary without denying that it is analogous to caution in some material way, such that similar rights and doctrines apply in certain cases (as explored in paras 3-56–3-59). In short, it is possible to recognise a strict, clear-cut distinction between cautionary obligations and independent obligations without losing sight of the diversity of obligations *within* those categories.

[160] See, e.g., *Manderson v M'inn* (1802) Hume 90; *Brebner Ptr* (1803) Mor 17060; *Miller v Dott* (1814) Hume 105; *Ballantyne v Carter* (1842) 4 D 419.

[161] *Smith v Bank of Scotland* 1997 SC (HL) 111.

[162] *Forsyth v Royal Bank of Scotland Plc* 2000 SLT 1295 at 1303F–G.

[163] *Braithwaite v Bank of Scotland* 1999 SLT 25 at 30A–F per Lord Hamilton; *Hewit v Williamson* 1999 SLT 313 at 316D–317D per Lord Macfadyen.

cautionary obligations in modern Scots law, *Smith v Bank of Scotland*,[164] did not, apparently, concern caution in the strict sense. There is no indication in the reports of the case[165] that Smith had, above and beyond her grant of a standard security for her husband's debts, undertaken personal liability as a cautioner.[166] However, that does not mean that *Smith v Bank of Scotland* is irrelevant to this book. Its definition of caution may be overly broad but the principle espoused in that case still applies, by analogy, to caution in the strict sense. If one who provides a standard security for another's debt is entitled to pray in aid the creditor's bad faith as a means of nullifying that security, then so too is a cautioner in the strict sense.

3-59. Parallels also exist between caution and bills of exchange. By definition, a person who accepts a bill of exchange is not a cautioner, because, even if the acceptor stipulates on the face of the bill that the acceptance is as cautioner only, this will be interpreted as an unqualified acceptance as principal debtor.[167] However, although the mechanical rules concerning bills of exchange preclude such an acceptor from being a cautioner in the strict sense, that person may fulfil, or come close to fulfilling, some of the other criteria for cautionary liability outlined in this chapter. For instance, if a bill has been accepted to allow another party liable under it (e.g. a fellow acceptor) to obtain credit,[168] criterion (3) for a cautionary relationship will be fulfilled.[169] Further, if the creditor (holder of the bill) is or becomes aware of the fact that this acceptor interposed for the other, the former will fulfil, or will come close to fulfilling, criterion (5).[170] Although not a cautioner, such an acceptor occupies a position analogous to a cautioner

[164] 1997 SC (HL) 111.

[165] However, to compound the confusion created by this case, Smith was, in fact, a cautioner, albeit there was no indication of this in the case report: see n 119 above.

[166] The argument that *Smith v Bank of Scotland* did not concern caution in the strict sense is also advanced, somewhat tentatively, by Lord Hamilton in *Braithwaite v Bank of Scotland* 1999 SLT 25 at 30B–C.

[167] *MacDougall v Foyer* 13 Feb 1810 FC. This point was approved in Bell, *Commentaries* I, 399 and in *Walker's Trustees v McKinlay* (1880) 7 R (HL) 85 at 96. See also Bills of Exchange Act 1882 s 28(2).

[168] A so-called 'accommodation bill': Bills of Exchange Act 1882 s 28(1).

[169] Namely, that a cautionary obligation does not arise from an independent 'cause or consideration' between cautioner and creditor: see paras 3-32–3-37 above.

[170] Namely, the criterion that a cautioner's contract of caution is with the creditor: see paras 3-40–3-44 above. If a party becomes bound to a creditor and it is clear to the creditor that that party becomes bound for the accommodation of another obligant, this criterion is fulfilled: the fact that the obligant was becoming bound for the other's accommodation was apparent to the creditor from the outset and can be viewed as a condition to which the obligant's undertaking was subject. If, however, it is only after the obligant has become bound that the creditor becomes aware that that obligant is bound for the accommodation of another, it is not strictly accurate to say that there is a contract of caution with the creditor, but the case where the creditor becomes aware of the circumstances in which the obligant became bound is analogous to the case where the creditor knew of those circumstances from the outset. For discussion of this issue, see Gloag and Irvine, *Rights in Security* (n 7) 678–679 and 925–928.

in several respects, and it is because of such similarities that cases on bills of exchange often shed valuable light on the rights of cautioners. *Hunter v Evans*[171] is but one example. There several acceptors of a bill of exchange claimed to have been released from their liability under it because they 'stood only in the position of cautioners' for other parties primarily liable under that bill and those parties themselves had been discharged. It was held that the parties claiming to be cautioners were entitled to be released provided that it had been 'known' to the creditor (i.e. the holder of the bill) that they had intended to become liable in a secondary capacity only.[172] Thus, while the parties, as acceptors under a bill, could not have been cautioners in the strict sense of the word, they were still deemed to benefit from some of the principles applicable to cautioners. Examining such cases enriches our understanding of caution, throwing into sharp relief why a particular principle operates in the way that it does. Common principles notwithstanding, however, such cases must be read with care. That the law of bills of exchange is sometimes governed by principles similar to those governing caution does not make bills of exchange a form of caution.

E. CONCLUSION

3-60. This chapter does not purport to lay down the ultimate definition of caution with which no judge or jurist could disagree; rather, an attempt has been made to fashion as consistent a definition of the term as the Scottish authorities allow. Sometimes those authorities present difficulties. It was considered, for instance, whether to expand this book's conception of caution to embrace real security granted for another's debt. In deciding against such expansions, the priority has been to ensure that the concept of caution remains unambiguous. Having defined caution, it is next necessary to consider how someone becomes a cautioner.

[171] (1830) 9 S 76.
[172] (1830) 9 S 76 at 76. See also, *Jackson v McIver* (1875) 2 R 882.

4 Constitution of a Cautionary Obligation

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A. INTRODUCTION

4-01. It is trite law that not all undertakings give rise to valid, legally enforceable obligations. A contract concluded by a child will, generally speaking, be void for want of legal capacity.[1] Likewise a party induced into a contract by fraud, undue influence or facility and circumvention may be able to have that contract set aside.[2] This chapter discusses some of the key circumstances in which a cautionary undertaking, compliant with the five definitional criteria identified in chapter 3, may nevertheless fail to create an enforceable cautionary obligation. The focus is confined to constitutive issues with a particular bearing on the law of caution, such as the good-faith doctrine expressed in *Smith v Bank of Scotland*.[3] Such other constitutive issues as legal capacity are not considered, for although legal capacity had a distinctive effect

[1] Age of Legal Capacity (Scotland) Act 1991 s 1(1)(a).
[2] See, e.g., *MacGilvary v Gilmartin* 1986 SLT 89.
[3] 1997 SC (HL) 111.

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on the Roman law of suretyship,[4] it does not have such an effect on the modern law of cautionary obligations. The general rule precluding a child from entering into a contract will doubtless apply to a child who attempts to become bound as a cautioner, but no more forcefully than to a child who tries to buy a house or to enter into an employment contract.

B. ACCEPTANCE

4-02. Suppose that Jill, in an effort to help her friend obtain a £100 loan, signs a guarantee form for that loan and delivers it to the relevant bank. No sooner has Jill done this than she begins to regret agreeing to become a cautioner. The question arises: if the bank has not yet accepted her guarantee, is Jill permitted in law to retract it? Is her written undertaking a promise, which became irrevocably binding as soon as it was communicated to the bank, or is it an offer requiring acceptance?[5] The following section provides a very brief sketch of this problem.[6]

4-03. It might be argued that where, as is typical, the cautioner seeks no reward, cautionary undertakings have a greater propensity to constitute promises than constitute offers. On the other hand, since a cautioner's undertaking often accompanies a request that some benefit be bestowed on the principal debtor, for instance a lease or a loan, it may be natural to view it as a question requiring an answer (e.g. 'Will you lend £100 to my brother if I stand cautioner?') or, in contractual language, as an offer requiring acceptance. In fact, it is probably best to avoid a categorical statement as to whether cautionary undertakings are offers or promises, each analysis having found some degree of support in the case law. Fundamentally, the question is one of intention on the part of the cautioner. In *Allan v Colzier*,[7] for example, an undertaking to stand cautioner was deemed an offer because the cautioner in question had requested intimation of the creditor's acceptance.[8] By contrast, in *Reoch v Young*,[9] where a cautioner guaranteed the fulfilment of a dying woman's gift of £20, the undertaking was seen to constitute a promise. At least one potentially relevant factor in that regard was, to quote the arguments advanced on behalf of the pursuer, the

[4] Note, e.g., the prohibition against women standing surety in the first century AD: W W Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (3rd edn, by P Stein, 1963) 448–449.

[5] That an offer requires acceptance to give rise to an obligation is only one factor distinguishing an offer from a promise. Further, revocation is only one of the means by which an offer may lapse: W W McBryde, *The Law of Contract in Scotland* (3rd edn, 2007) paras 2.20 and 6.36.

[6] For more detailed treatment, see, e.g., W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable Including Cautionary Obligations* (1897) 694–701.

[7] (1664) Mor 9428.

[8] See also *Stewart v Mitchell* (1786) Mor 2157.

[9] (1712) Mor 9439.

fact that the defender had made a 'plain and solemn promise [. . .] to a dying woman; and promises made at such times being most serious and binding are *not revockable*'.[10]

4-04. Sometimes, as in *Allan*,[11] it will be plain whether a cautioner's undertaking is an offer or a promise. In other cases, the matter will be one of construction, as in the House of Lords decision in *Wallace v Gibson*.[12] In brief,[13] the case concerned a partnership which had induced a creditor to lend £7000 to a borrower by saying that the borrower's property was an 'excellent security *apart from our guaranty of principal and interest*'.[14] Upholding the decisions of the Outer House and Inner House, the House of Lords read this loosely worded statement as an offer to guarantee a debt – an offer which, in the view of the majority, gave rise to a binding cautionary obligation as soon as it was accepted in a letter from the creditor.[15] Some judges also emphasised the creditor's having acted in reliance on the partnership's letter, arguing that even if the creditor's acceptance of the offer had not created a binding guarantee, the subsequent advance of £7000 by the creditor to the borrower certainly had.[16] An alternative analysis was proposed by Lord Shand, who felt that the first letter was not so much an offer to guarantee the debt as an offer to grant such a guarantee at some future time, which offer was accepted as soon as the money

[10] (1712) Mor 9439 at 9439 (emphasis added).

[11] (1664) Mor 9428.

[12] (1895) 22 R (HL) 56.

[13] In addition to the question whether the letter expressed an undertaking seriously intended to have legal effect, there also arose a question regarding requirements of writing (discussed below at paras 4-05–4-15) which in turn prompted consideration of the definition of a cautionary obligation: was the partnership granting the so-called 'guarantee' truly a cautioner? The judges in the House of Lords were satisfied that the partnership was a cautioner but, in the Inner House, Lord McLaren, Lord Kinnear and Lord Adam had taken a different view ((1895) 22 R (HL) 56 at 60–64). They felt that the partnership's self-interested motives for granting the 'guarantee' were fatal to its characterisation as a cautionary obligation and that the partnership was in fact the borrower of the money. This notion that, by definition, a cautioner does not become bound on his own account was explored in chapter 3.

[14] (1895) 22 R (HL) 56 at 57 (emphasis added).

[15] E.g. (1895) 22 R (HL) 56 at 62 per Lord Chancellor Herschell and at 65 per Lord Watson.

[16] (1895) 22 R (HL) 56 at 66–67 per Lord Macnaghten and at 62–63 per Lord Chancellor Herschell. Admittedly, the language of promises is sometimes used. E.g. Lord Chancellor Herschell says that even if a guarantee had not been constituted when the 'offer contained [in the letter] was accepted', the letter could still have been regarded as a '*promise* if the loan was made to give a guaranty'; the 'letter amounted *at the least* to such a *promise*'; and 'the money was advanced *on the faith of it*' (at 62–63, emphasis added). However, the fact that the Lord Chancellor treats this as a secondary argument to the one couched in the language of offer and acceptance, coupled with the emphasis on the creditor's reliance on the so-called promise, would suggest that the word 'promise' is not being used here to denote an irrevocable undertaking that becomes binding without acceptance. For a modern application of the 'offer and acceptance' analysis in *Wallace v Gibson* (1895) 22 R (HL) 56, see *Scottish Metropolitan Property Plc v Christie* 1987 SLT (Sh Ct) 18.

was advanced.[17] Lord Watson took the view that there was a 'direct obligation of guaranty', but noted that it did not matter whether the relevant offer was an offer to guarantee or an offer to grant a guarantee: 'Either of these obligations is, in the sense of Scottish law, a "cautionary obligation"'.[18] The key point for present purposes is that, in deciding that a cautionary undertaking had been made, the House of Lords in large part viewed that undertaking as an offer requiring acceptance, which suggests that, pending such acceptance, the offer to stand cautioner could have been withdrawn. At the same time, acceptance can sometimes consist of actings, and such actings may, in certain cases, be effectual despite not having been intimated to the cautioner.[19]

C. FORMALITIES

4-05. The law of caution has had a long, complex relationship with legal formalities to which it is difficult to do justice in the space available. Since at least the sixteenth century, cautionary obligations have required to be expressed in writing.[20] Initially, this requirement applied at common law;[21] later, it was embodied in section 6 of the Mercantile Law Amendment (Scotland) Act 1856;[22] and it endures to some extent in the Requirements of Writing (Scotland) Act 1995,[23] which amended the Scots law of requirements of writing wholesale.[24] Given the deep-rooted, centuries-long perception that a cautioner must, as a general rule, become bound in writing, it is remarkable how obscure and ill-defined this requirement often was.[25] At common law and under the 1856 Act,

[17] (1895) 22 R (HL) 56 at 67–70 per Lord Shand.

[18] (1895) 22 R (HL) 56 at 65 per Lord Watson.

[19] E.g., where a cautioner placed a letter of guarantee for an indefinite sum into a prospective principal debtor's hands, that guarantee was held enforceable, a creditor having extended credit to the principal debtor on the faith of it. The fact that the cautioner had not been informed of this extension of credit was deemed irrelevant: *Ewing v Wright* 2 June 1808 FC.

[20] *Auchinleck v Gordon* (1580) Mor 12382.

[21] (1580) Mor 12382.

[22] The now-repealed s 6 of the 1856 Act stated that: '. . .all Guarantees, Securities, or Cautionary Obligations made or granted by any Person for any other Person, and all Representations and Assurances as to the Character, Conduct, Credit, Ability, Trade, or Dealings of any Person, made or granted to the Effect or for the Purpose of enabling such Person to obtain Credit, Money, Goods, or Postponement of Payment of Debt, or of any other Obligation demandable from him, shall be in Writing, and shall be subscribed by the Person undertaking such Guarantee, Security, or Cautionary Obligation, or making such Representations and Assurances, or by some Person duly authorized by him or them, otherwise the same shall have no Effect.' As Gow sardonically commented, 'About the only certain thing that can be said of this remarkable section of a remarkable statute is that the cautioner need not himself subscribe. No one seems to know what it means, and now no one ever will': J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 305.

[23] As amended by, *inter alia*, the Land Registration etc (Scotland) Act 2012.

[24] Requirements of Writing (Scotland) Act 1995 ss 11 and 14(2), sch 5.

[25] Gow, *Mercantile Law* (n 22) 305.

it was unclear whether writing was required for the cautioner's obligation to exist or whether the requirement was merely evidential.[26] It was also unclear what sort of writing was required. For instance, while the 1856 Act stated that the cautioner had to subscribe the document giving rise to the obligation, it was unclear whether the writing also had to be witnessed and signed by the witnesses (i.e. formally attested).[27] In the late nineteenth-century case of *Paterson v Paterson*,[28] Lord Trayner bemoaned the generally confused state of requirements of writing in Scotland, a problem epitomised by the law governing the 'constitution and proof of cautionary obligations'.[29] The law had remained convoluted for hundreds of years, and it was not until the intervention of the Scottish Law Commission in the late twentieth century,[30] and the eventual passing of the Requirements of Writing (Scotland) Act 1995, that it was delivered from that convolution.[31]

(1) Must all cautionary obligations be constituted in writing?

4-06. As the law now stands, a cautionary obligation must be constituted in writing only if it falls into one of the categories outlined in section 1(2) of the 1995 Act or if some other enactment imposes a requirement of writing.[32] Most commonly, a cautionary obligation will require to be constituted in writing because it is a 'gratuitous unilateral obligation' not undertaken in the course of business.[33] Thus, if someone gratuitously guarantees a friend's debt

[26] *Hylander's Exr v H and K Modes Ltd* 1957 SLT (Sh Ct) 69 at 71.

[27] Mercantile Law Amendment (Scotland) Act 1856 s 6. This provision has now been repealed by the Requirements of Writing (Scotland) Act 1995 s 14(2) and sch 5.

[28] (1897) 25 R 144.

[29] (1897) 25 R 144 at 167.

[30] Most notably in Scottish Law Commission, *Report on Requirements of Writing* (Scot Law Com No 112, 1988).

[31] For detailed treatment of requirements of writing, see D J Cusine and R Rennie, *The Requirements of Writing* (1995); K G C Reid, *Greens Annotated Acts – Requirements of Writing (Scotland) Act 1995* (2nd edn, 2015); M L Ross, J Chalmers and I Callander, *Walker and Walker: The Law of Evidence in Scotland* (5th edn, 2020) chs 22–25.

[32] A cautionary obligation may be subject to the formal requirements prescribed by the Consumer Credit Act 1974 s 105 and the Consumer Credit (Guarantees and Indemnities) Regulations 1983, SI 1983/1556. For details, see L Macgregor et al, *Commercial Law in Scotland* (2024) para 8-008.

[33] Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(ii). There is controversy as to how the words 'gratuitous' and 'unilateral' ought to be construed. Notably, MacQueen argues that a unilateral obligation is invariably gratuitous, whereas Thomson took the view that an obligation might be unilateral without being gratuitous: H L MacQueen, *MacQueen and Thomson on Contract Law in Scotland* (6th edn, 2024) para 3.21. On this matter, the trilateral nature of cautionary relationships raises special considerations. Where a cautioner (C) becomes bound for D's £100 loan and does not receive a reward, it does not seem to matter whether one adopts MacQueen's or Thomson's view, on either of which the cautioner's obligation can be deemed gratuitous. It is true that the creditor has granted a benefit (i.e. the loan) in return for C's

to a bank, the cautioner's undertaking will not be valid unless committed to writing. Conversely, if an insurance company guarantees someone's debt in return for a premium, that obligation need not be constituted in writing for two separate reasons: (1) the obligation is not gratuitous, and (2) it is entered into in the course of business. Thus, in contrast to the now-abrogated requirement of writing under the 1856 Act, which applied to all cautionary obligations because they were cautionary obligations,[34] the modern requirement of writing applies only to some cautionary obligations, notably, to those belonging to a wider class of gratuitous unilateral obligations outwith the course of business. This represents a more principled approach. The purpose of written formalities is partly to provide reliable evidence of an obligant's undertaking, in turn preventing fraud,[35] and partly to imbue legal acts with a degree of solemnity and deliberation; it is more difficult to make rash, impetuous undertakings if they must first be committed to writing.[36] Clearly, the need for such protections is greater where one interposes as a cautioner gratuitously than where one does so for a reciprocal benefit.[37]

(2) Is writing required for constitution or for proof?

4-07. As mentioned already, one of the great uncertainties regarding the old requirements of writing, both at common law and under the 1856 Act, was whether writing was required for the cautioner's obligation to exist (constitution) or simply for the purpose of proving that the cautioner's obligation existed. Although once dismissed as an issue of 'academical interest',[38] it can be of practical importance in certain cases. If a cautioner's obligation requires merely to be proved by writing then, if the cautioner admits to having made an oral cautionary undertaking (thereby obviating the need for written proof),[39] this

undertaking, but it is on D, not C, that that benefit has been conferred. To be distinguished from that simple case is that of a cautioner (C) who receives a reward of, say, £10 in return for becoming bound. It is submitted that, here, Thomson's is the better view: *any* reward received by C ought to prevent C's obligation from being gratuitous. A cautioner who receives a reward, whether from the creditor or from the principal debtor, and whether in the form of a reciprocal undertaking to pay £10 or immediate payment of £10, is less in need of protection via a requirement of writing than one who receives nothing at all. Interestingly, *Royal Bank of Scotland v Wilson* 2004 SC 153 (discussed below at para 4-30) is cited as a case from which '[b]oth sides of the argument might seek support': *MacQueen and Thomson on Contract Law in Scotland* para 3.21 n 2.

34 Mercantile Law Amendment (Scotland) Act 1856 s 6. See Gloag and Irvine, *Rights in Security* (n 6) 717–718. Cf the position at common law, where writing was not always required: *Rhind v Mackenzie* 20 Feb 1816 FC.

35 *Walker's Trustees v McKinlay* (1880) 7 R (HL) 85 at 88 per Lord Blackburn.

36 Scottish Law Commission, *Report on Requirements of Writing* (n 30) paras 2.21 and 2.27.

37 Scottish Law Commission, *Report on Requirements of Writing* (n 30) para 2.24.

38 *Wallace v Gibson* (1895) 22 R (HL) 56 at 66 per Lord Watson.

39 As occurred in *Italian Bank Limited v Olivieri* 1938 SLT (Sh Ct) 27.

obligation can be enforced. However, if the cautioner's obligation requires to be constituted in writing, an oral cautionary undertaking will not bind the cautioner, even if the cautioner later admits in court to having made it.[40] For hundreds of years, this issue remained unresolved, some authorities suggesting that the requirement of writing was constitutive;[41] some suggesting that it was merely evidential;[42] some giving expression to both views;[43] and others shrinking from a firm decision on the matter.[44]

4-08. Thanks to the clear wording of the 1995 Act, the question has been answered. If a cautioner's obligation is gratuitous and entered into outwith the course of business, it must be constituted in, rather than merely proved by, writing.[45] Thus, if Matthew agrees gratuitously to guarantee Erin's debt by saying as much to the lender over the phone, that undertaking will be invalid, even if Matthew later admits to having made it. However, as will become clear below, there is a practical qualification to that constitutive requirement of writing in the form of personal bar.[46]

(3) What sort of writing is required?

4-09. One controversy regarding the requirement of writing for cautionary obligations concerned the requisite level of formality. Was it sufficient for a cautioner simply to sign at the bottom of the obligatory document (subscription), or did this act also need to be witnessed by third parties and signed by the witnesses (formal attestation)? Again, the authorities on this subject made for a fragmented, uncertain picture.[47]

[40] Scottish Law Commission, *Report on Requirements of Writing* (n 30) para 2.2.

[41] For suggestions that the common law requirement of writing was constitutive, see, e.g., *Edmonstone v Lang* (1786) Mor 17057, (1786) Hailes 995; *Church of England Life and Fire Assurance Co v Hodges* (1857) 19 D 414 at 421–422 per Lord Justice-Clerk Hope. For suggestions that the 1856 Act requirement of writing was constitutive, see, e.g., *Field v Thomson and Co* (1902) 10 SLT 261; *Italian Bank Limited v Olivieri* 1938 SLT (Sh Ct) 27.

[42] For suggestions that the common law requirement of writing was merely evidential rather than constitutive, see: Stair I.17.3; Erskine IV.2.20; J McLaren, 'Note on Mercantile Law Amendment Act', in Bell, *Commentaries* (7th edn, by J McLaren, 1870) I, 402 at 403. See also such cases as *Auchinleck v Gordon* (1580) Mor 12382; *Deuchar v Brown* (1672) Mor 12386. For suggestions that the 1856 Act requirement of writing was merely evidential, see, e.g., *Walker's Trustees v McKinlay* (1880) 7 R (HL) 85 at 89 per Lord Blackburn and 98–99 per Lord Chancellor Selborne.

[43] See, e.g., the differing judicial opinions expressed in *Brown v Campbell* (1794) Mor 17058.

[44] *Hylander's Exr v H and K Modes Ltd* 1957 SLT (Sh Ct) 69 at 71.

[45] Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(ii). Note also that the common law evidential requirements of writing were abolished by 1995 Act s 11 (s 11 being itself repealed by the Land Registration etc (Scotland) Act 2012 sch 3 para 18).

[46] Requirements of Writing (Scotland) Act 1995 s 1(3), (4).

[47] With regard to the common law position, see, e.g., *Wallace v Wallace* (1782) Mor 17056; *Church of England Life and Fire Assurance Co v Hodges* (1857) 19 D 414 at 421–422 per Lord

4-10. Under the 1995 Act, it is clear that obligations that require to be constituted in writing need only be subscribed by the obligant or, if there is more than one obligant, by all the obligants.[48] For these purposes, subscription entails signing by the granter 'at the end of the last page' or, if there is more than one granter, as where multiple cautioners become bound in the same document, at least one of those granters signing on the last page and the other granters signing on an additional page.[49] Following amendments to the 1995 Act,[50] it is now also possible for obligations to be constituted in electronic form with an electronic signature acting as a substitute for a wet signature.[51] In any event, in the case of traditional, non-electronic documents, the question that caused so much controversy under the old law has been resolved: where a cautioner's obligation requires to be constituted in writing, there is no need for this writing to be formally attested; rather, a subscription by the cautioner(s) will suffice. Witnessing is necessary only if the creditor wishes the obligant's subscription of the document to attain self-proving status. It is not a dogmatic requirement for formal validity but an 'optional extra'.[52]

(4) Self-proving status

4-11. The 1995 Act has left it in no doubt that witnesses are not essential to the validity of an obligation requiring to be constituted in writing. Mere subscription will suffice. That said, witnessing is always advisable because it renders an obligant's subscription self-proving.[53] In other words, where, in modern law, a document bears to have been subscribed by a cautioner and to have been signed by a witness to that cautioner's supposed subscription,[54] and where the document

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Justice-Clerk Hope. Both cases suggest that formally attested writing was required in addition to subscription by the cautioner. For suggestions that mere subscription was sufficient see, e.g., *Brebner Petr* (1803) Mor 17060; Gloag and Irvine, *Rights in Security* (n 6) 714–715. Regarding the equally conflicted position under the 1856 Act, contrast, e.g., *Wallace v Gibson* (1895) 22 R (HL) 56 at 65 per Lord Watson, where subscription was deemed sufficient, with *BOCM Silcock v Hunter* 1976 SLT 217, where it was suggested that formal attestation may still be necessary.

48 Requirements of Writing (Scotland) Act 1995 s 2(1).

49 Requirements of Writing (Scotland) Act 1995 s 7(1), (3).

50 The modern law stems from amendments effected by the Land Registration etc (Scotland) Act 2012.

51 Requirements of Writing (Scotland) Act 1995 ss 1(2) and 9B; Electronic Documents (Scotland) Regulations 2014, SSI 2014/83, reg 2.

52 Scottish Law Commission, *Report on Requirements of Writing* (n 30) para 4.19.

53 Requirements of Writing (Scotland) Act 1995 s 3. Note that an unattested subscription can be made self-proving via court proceedings: see 1995 Act s 4. The term 'self-proving' is not used in the 1995 Act itself, but see, e.g., the use of the term in Scottish Law Commission, *Report on Requirements of Writing* (n 30) ch 5 and in the Electronic Documents (Scotland) Regulations 2014, SSI 2014/83, reg 3 (as amended) (see n 56 below).

54 A witness must be someone other than a granter named in the obligatory document. Thus, if there are two cautioners, C1 and C2, and C1's signature has been witnessed by C2, C1's signature is not self-proving: Requirements of Writing (Scotland) Act 1995 s 3(4)(b).

specifies the witness's name and address, the document is presumed to have been subscribed by the party named as cautioner in the document, meaning that the creditor will not have to prove that it was subscribed by that party.[55] It is also possible for an electronic document to attain self-proving status, albeit not by witnessing but by means of a 'qualified electronic signature', which means, among other things, that it has been certified by a third party.[56]

(5) The role of personal bar

4-12. It is possible to overstate the practical drawbacks of the old law on requirements of writing for, hazy as that law was, it provided at least some safeguards for the unwary creditor. One such was the doctrine of *rei interventus*. If a cautionary obligation took the form of an informal writ such as an unwitnessed letter, the question might arise whether this informal undertaking was binding on the cautioner. However, in many cases, the court did not need to decide whether the document was sufficiently formal because, even if the document was not sufficiently formal, this defect could be treated as cured if the creditor had relied on the document in a certain way. For example, if a creditor had, in reliance on an informal cautionary obligation, delivered goods to a buyer on credit, the cautionary obligation would be enforceable.[57] Likewise, if a landlord entered into a lease in reliance on a third party's informal written undertaking to guarantee the rent, that undertaking would be enforceable on account of the landlord's reliance.[58]

[55] Requirements of Writing (Scotland) Act 1995 s 3(1). Besides relieving the creditor of an evidentiary burden, self-proving status serves as a prerequisite for the registration of a traditional document (whether or not the obligation expressed in that document requires to be constituted in writing in terms of the 1995 Act s 1) in the Books of Council and Session or in sheriff court books (1995 Act s 6(1)). Registration of the document allows the obligation to be enforced without a court decree (summary diligence): S Cowan, *Scottish Debt Recovery: A Practical Guide* (2nd edn, 2019) para 6.09. Where the document has been granted by more than one party, as by several cautioners, registration of that document will be competent so long as one of those parties' signatures is self-proving: 1995 Act s 6(2)(b).

[56] Requirements of Writing (Scotland) Act 1995 s 9C; Electronic Documents (Scotland) Regulations 2014, SSI 2014/83, reg 3 (as amended), the current wording of reg 3 having been introduced by the Registers of Scotland (Digital Registration, etc) Regulations 2022, SSI 2022/65, reg 4(3). Certification in the context of electronic documents is the 'equivalent of attestation in traditional deeds': G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018) para 18.31. As with traditional documents, electronic documents can be made self-proving via court proceedings: 1995 Act s 9D. As to registration of electronic documents for preservation and execution see: 1995 Act s 9G and the Electronic Documents (Scotland) Regulations 2014, SSI 2014/83, reg 8, as introduced by the Registers of Scotland (Digital Registration, etc) Regulations 2022, SSI 2022/65 reg 7(3).

[57] *Balfour v Thomson* (1806) Hume 94.

[58] *Grant v Grant* (1827) 5 S 317.

4-13. A similar approach now applies under the 1995 Act. Although a cautionary obligation must be constituted in writing if it is a gratuitous unilateral obligation granted outwith a business context, this requirement will not apply in certain cases involving reliance by the creditor on the cautioner's undertaking.[59] In this respect, the 1995 Act has replaced the old law on *rei interventus* with near-equivalent statutory rules.[60] Suppose that a mother orally guarantees her daughter's rent payments in the presence of a prospective landlord. The landlord then agrees to let the property. According to the 1995 Act, such an oral obligation, though formally invalid, may be treated as enforceable by virtue of personal bar: that is, the fact that the landlord granted the lease in reliance on the mother's informal undertaking; that the mother knew of and acquiesced in that reliance; that the landlord has been affected to a material extent; and that the landlord would be materially prejudiced if the mother were allowed to renege on a technicality.[61] Of course, the onus would be on the landlord to prove that the cautioner had made the informal undertaking.[62]

4-14. In short, even if a cautioner's undertaking fails to conform to the formalities prescribed by the 1995 Act, it may still be enforced if the creditor has acted in reliance on it.

(6) Summary

4-15. The 1995 Act has greatly clarified the formalities that must be observed for a cautionary obligation to be constituted. If, as is often the case, a cautionary obligation amounts to a gratuitous unilateral obligation outwith the course of business, it must be constituted in writing, to which end writing subscribed by the cautioner is adequate. If a witness signs the writing and is suitably designated with name and address, the document will become self-proving. However, such attestation is not necessary for the deed to attain formal validity. Finally, even a lack of formal validity is not necessarily fatal to a claim against a cautioner where the creditor has acted in reliance on the putative obligation. In the latter regard especially, the modern law is very similar to the old.

[59] Requirements of Writing (Scotland) Act 1995 s 1(3), (4).

[60] Requirements of Writing (Scotland) Act 1995 s 1(5); Cusine and Rennie, *The Requirements of Writing* (n 31) paras 3.03–3.09.

[61] Requirements of Writing (Scotland) Act 1995 s 1(3), (4).

[62] To which end parole evidence would be adequate. Again, see Requirements of Writing (Scotland) Act 1995 s 11, which abolished the common law rules requiring *proof* of obligations by means of written evidence.

D. THE NEED FOR ALL CO-CAUTIONERS TO SIGN

(1) The position at common law

4-16. If multiple cautioners become bound together in the same document, each of their obligations to the creditor is subject to the implied condition that even those who have signed the document are not bound unless all the others sign as well. The leading authority is *Paterson v Bonar*,[63] a decision of the whole Court of Session, although the principle that one party to a contract will be liberated because another party has not acceded did not originate in that case.[64] In *Paterson*, only two of the three cautioners named in a bond had actually signed it, the third having refused.[65] It was held by a majority of the Court of Session that Paterson, one of the cautioner signatories, was not bound.[66] A similar rule was later held to apply where one of several cautioners' signatures had been forged.[67]

4-17. The decision in *Paterson v Bonar* related to the risk that Paterson, in signing the bond, thought that he was undertaking.[68] Because co-cautioners

[63] (1844) 6 D 987.

[64] Nor is the principle confined to the law of caution. See, e.g., *York-Buildings Company v Baillie* (1724) Mor 8435, in which two tenants who had signed a lease were able to resile from it because a third tenant named in the lease had refused to sign. The broader principle is that where there is a shared pre-contractual understanding that parties D1, D2 and D3 are to become bound in a contract with P, and D3 refuses to sign, all the other parties (including P) have a right to resile because of the implied condition that D1, D2 and D3 would all become bound to P: see generally W M Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland* (2nd edn, 1929) 201–202. For a time, parties who became bound jointly and severally under a cash credit to be operated on by one of their number did not benefit from this protection. The creditor in such a cash credit was entitled to rely on the fact that the parties had become bound jointly and severally and could enforce the bond against those who had signed it even if one or more of the prospective obligants had not: *MacDonald v Stewart* 5 July 1810 FC. *Paterson v Bonar* reversed this position in an important context, recognising that parties bound jointly and severally with a borrower could be cautioners even if they had not used the term 'cautioners', and so helped to set the principle that no cautioner will be bound unless all others are bound on a firmer footing. Gloag describes *MacDonald v Stewart* as a case that was distinguished and effectively overruled in *Paterson v Bonar* (Gloag, *Contract* 202), although it is interesting to note that in *Craig v Paton* (1865) 4 M 192, the Lord Ordinary held that the obligants in question were not cautioners but co-principals and so fell within the principle in *MacDonald v Stewart*, rather than that set out in such cases as *Paterson v Bonar* and *Scottish Provincial Assurance Co v Pringle* (1858) 20 D 465. The Inner House upheld the Lord Ordinary's decision, but proceeded mainly on the basis of personal bar: the parties who had signed had done so in the presence of the obligant who had refused to sign and so the parties who had signed could not rely on the incompleteness of the document.

[65] (1844) 6 D 987 at 987–989.

[66] See, e.g., the judgment of Lord Murray: (1844) 6 D 987 at 1000–1006. Lord Medwyn dissented: 1010–1014.

[67] *Scottish Provincial Assurance Co v Pringle* (1858) 20 D 465. But this rule was not applied in a similar case involving caution in a judicial context: *Simpson v Fleming* (1860) 22 D 679.

[68] *Paterson v Bonar* (1844) 6 D 987 at 1003 per Lord Murray.

enjoy a right of *pro rata* relief against one another, there will naturally be a desire to maximise the number of cautioners with whom one becomes bound. As Lord Ivory noted: 'It is one thing to be one of four joint obligants, with rateable relief against the other three, and a totally different thing to be one of three – or it may be of only two joint obligants, with proportionally diminished relief as the number decreases.'[69] Nor is this a purely numerical matter. One might conceivably become bound anticipating that certain persons, named in the obligatory document, will also become bound. John may be happy with Hannah and Michael as his co-cautioners but may not wish to become bound with Hannah and Andrew, because he feels Andrew to be unreliable. Indeed, it was noted that Williams, the cautioner who refused to sign in *Paterson v Bonar*, was a 'solvent and prudent person'.[70] Both those factors – the total number of co-cautioners and their identities – affect the calculus of risk for a prospective cautioner.[71]

4-18. *Paterson v Bonar* is not without difficulties. It might be asked why, in a case concerning prejudice to rights of *partial* relief, all the cautioners were liberated in full. However, it must be remembered that *Paterson* is concerned not simply with rights of relief but with contractual expectations. The law treats the number and identity of co-cautioners named in a document as fundamental to the decision whether to become bound. That, coupled with the essentially binary nature of a decision whether to do anything,[72] offers some explanation for the 'all-or-nothing' nature of the doctrine, as well as the tight constraints on its scope. The doctrine applies specifically to a case where a prospective cautioner expects certain other cautioners to become bound in a common obligation, as where their names are contained in the same document. It is inapplicable where, say, two prospective cautioners are ignorant of one another's existence or where one cautioner signs in the knowledge that the other cautioner named in the document has already decided not to sign.[73] Cautioners who sign in those circumstances have no expectations as to *pro rata* relief, far less disappointed expectations. Also important are the expectations of the creditor. A bank that has drafted a guarantee form naming three cautioners, Clive, Theo and Angela,

[69] (1844) 6 D 987 at 1008.

[70] (1844) 6 D 987 at 1003.

[71] Also important is the amount for which a co-cautioner is expected to become bound. English law provides a vivid illustration of the point. In *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75, four parties were to become bound as sureties (i.e. cautioners) for the same principal debtor. Two of those parties intended to limit their liability to £50 each and the other two intended to limit their liability to £25 each. However, after three of the four sureties had signed, the remaining one, whose liability had been anticipated to be limited to £50, added the words '25l. only' to his signature. This alteration led to the liberation of the first three sureties who had signed and their liberation, in turn, led to the liberation of the one who had written '25l. only'.

[72] I.e. one may decide either to become bound under a certain contract of caution or not to become so bound.

[73] *Craig v Paton* (1865) 4 M 192.

can reasonably be expected to know that each relies on the presence of the other two in deciding whether to become bound. However, if all the cautioners do sign, Clive cannot withdraw on the basis that he also wanted Edith, a party not named in the document, to sign as well. If Clive had wanted Edith to be bound, he should have expressly provided for that in the contract. In short, *Paterson* has not altered the fundamental principle that a creditor may usually rely on a document which appears to be complete.[74]

4-19. A further complication relates to timing. In broad terms, the rule expressed in *Paterson v Bonar* is straightforward: the cautioner's obligation to the creditor is subject to the condition that all the other cautioners named in the bond will become bound. However, in pinpointing when, exactly, a contract of caution comes into existence, the decision admits of at least two interpretations:

(a) The condition is suspensive as to constitution
Let it be supposed that Paterson was not bound under a valid contract of caution until all his fellow cautioners had signed the bond. On this reading, the need for all cautioners to sign the bond related to the *constitution* of the contract of caution.

(b) The condition is suspensive as to enforceability and resolutive as to constitution
On a more restrictive reading of the decision, Paterson became bound under a valid contract of caution as soon as he signed the bond. Paterson would, however, be liberated from his obligation if it became clear that one or more of his fellow cautioners had refused to sign (a resolutive condition). On this reading, the need for all cautioners to sign the bond related to the *enforceability* of Paterson's cautionary obligation, rather than to its *constitution*.

4-20. Although the Court of Session did not need to address this particular issue directly, it is arguable, based on the language used by the judges, that the condition on Paterson's liability was suspensive as to constitution, not merely as to enforceability. Note, for instance, Lord Murray's statement that the bond was 'not valid'.[75] This raises an important question: might a cautioner revoke his signature simply on the ground that, until his fellow cautioners sign, there is no contract of caution at all? On one view, such a right to revoke a signature would be excessive. It would certainly not be necessary for the protection of the signatory's expectations of *pro rata* relief. Even so, such a rule would have the virtue of clarity: the cautioner who has signed is not left in suspense as to

[74] To which extent it can be reconciled with *MacDonald v Stewart* 5 July 1810 FC. The cases simply reflect very different understandings of what a completed document is.

[75] (1844) 6 D 987 at 1006. See also Lord Wood's statement that Paterson was 'not bound till they were all bound' (*Paterson v Bonar* (1844) 6 D 987 at 1007). Lord Jeffrey noted (at 1015) that 'none are bound until all have subscribed'. Lord Ivory added (at 1008, emphasis added) that there could not be a '*completed* contract till the bond was signed by all'.

whether the others will follow suit. The creditor and principal debtor, for their part, will be incentivised to ensure that everyone signs as soon as possible, as for example by gathering all the named obligants for a signing ceremony or, if that is impracticable, by execution in counterpart.[76] Whatever the merits of a right to revoke one's signature, however, the existence of such a right is doubtful. Even if all cautioners must sign for their cautionary obligations to be constituted, it may still be said that each signature creates a sort of irrevocable contingent liability – that is, a liability contingent on the other cautioners signing – and therefore that, in the interim period during which one or more cautioners has yet to sign, no signature may be revoked.

(2) The position under the Requirements of Writing (Scotland) Act 1995

4-21. The rule in *Paterson v Bonar* now has a statutory equivalent. As discussed above, the Requirements of Writing (Scotland) Act 1995 imposes a requirement of writing wherever a cautioner becomes bound for no reward and outwith the course of business.[77] If multiple cautioners falling into that category are named in a document, their respective obligations will not be constituted until all have signed:[78]

> No traditional document required by section 1(2) of this Act shall be valid in respect of the formalities of execution unless it is subscribed by the granter of it or, if there is more than one granter, by *each* granter, but nothing apart from such subscription shall be required for the document to be valid as aforesaid.

4-22. This statutory requirement that all obligants sign before anyone is bound gives rise to a suspensive condition as to constitution. As discussed earlier, wherever a cautionary obligation requires to be expressed in writing, the requirement is constitutive: the obligation does not exist until expressed in the form prescribed by the 1995 Act.[79] The upshot is that, where a cautioner becomes bound gratuitously and outwith the course of business, the cautionary obligation requires to be constituted in writing, and, if there is more than one cautioner, all must sign before the obligation of any one cautioner is constituted. Again, it does not necessarily follow from this that a cautioner who has signed will be free to withdraw his signature at any time prior to the other cautioners signing, but such an argument is slightly stronger when based on the 1995 Act than when based on cases such as *Paterson v Bonar*. This is because the 1995

[76] Legal Writings (Counterparts and Delivery) (Scotland) Act 2015; Scottish Law Commission, *Review of Contract Law – Report on Formation of Contract: Execution in Counterpart* (Scot Law Com No 231, 2013) para 2.16.

[77] Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(ii).

[78] Requirements of Writing (Scotland) Act 1995 s 2(1) (emphasis added).

[79] Requirements of Writing (Scotland) Act 1995 s 2(1).

Act makes it particularly clear that a fully signed document is required not only for enforceability but for constitution.

(3) Comparing the common law and statutory rules

4-23. As just explained, there are two rules, the one statutory, the other arising from the common law, to the effect that, until all cautioners named in an obligatory document have signed, none is bound. It should not be assumed, however, that these rules always operate in the same way. Indeed, in a given case, one rule might be more relevant than the other. Arguably, the 1995 Act is particularly useful if a cautioner wishes to demonstrate that the condition that all must sign is suspensive as to constitution of the contract, that is, where the other cautioner has not yet signed but has also not yet refused to sign. At the same time, arguably the scope of the 1995 Act is more limited than that of the principle expressed in such cases as *Paterson v Bonar*. The 1995 Act applies only to cautionary obligations that *require* to be written, usually on account of their gratuitous character. Such considerations can be illustrated thus:

Example 1
C1 and C2 intend to become cautioners for a loan to the same principal debtor. Because both cautioners plan to become bound gratuitously and outwith the course of business, there is a requirement that their obligations be written. Accordingly, a document is drafted with both their names and spaces for their signatures. C1 signs but C2 has yet to do so. In the interim, C1 decides to withdraw from this obligation on the ground that C2's signature is a suspensive condition as to the existence of a contract of caution between C1 and the creditor. C1 may wish to invoke the 1995 Act, which makes it clear that, until C2 signs, C1's obligation does not exist. A similar argument might credibly be advanced on the basis of *Paterson v Bonar*.[80] In either case, however, C1 will struggle to argue that, simply because his obligation does not yet exist, he has a right to revoke his signature until such time as C2 signs. The better view is probably that C1 may not revoke his signature.

Example 2
As in the previous example, C1 and C2 intend to become cautioners for a loan to the same principal debtor. However, because they have charged a fee to the principal debtor, their obligations do not require to be constituted in writing under the 1995 Act. In any case, the creditor insists that they become bound in writing, and so a document is drawn up with their names and spaces for their signatures. The implicit understanding is that there will be no contract until the agreement has been committed to a written document signed by

[80] As discussed above at paras 4-16–4-20.

both cautioners.[81] In the event, C1 signs but C2 has yet to do so. It might be argued that the parties, in agreeing to use writing, are also agreeing to be bound by the rules under the 1995 Act. However, assuming that the 1995 Act does not apply to this scenario, C1 has no option but to invoke the doctrine in *Paterson v Bonar* if C1 wishes to escape liability.

The latter example shows that, functional overlap notwithstanding, the requirement for all obligants to sign imposed by the 1995 Act is not merely a statutory restatement of the doctrine in *Paterson v Bonar*.[82] In fact, these rules have subtly distinct concerns, as two further examples should illustrate.

Example 3
Two cautioners plan to become bound gratuitously in the same document. C1 signs the document but C2 does not sign. The creditor then advances money to the principal debtor. Here C1 is free to resile, notwithstanding the reliance placed by the creditor on C1's signature. The 1995 Act's provisions on personal bar exist to cure a defect of form; they will not avail a creditor where there is also a lack of consent on the part of C2.[83] Here *Paterson v Bonar* is instructive: a creditor cannot hope to rely on an incomplete deed simply by virtue of having advanced money to the principal debtor.[84] One might be forgiven for viewing the case simply as one about incomplete documents.[85] In fact, the case also addresses a more fundamental deficiency: the fact that a co-cautioner has not even agreed to become bound.

[81] As in *Gordon's Exrs v Gordon* 1918 1 SLT 407. As that case illustrates, parties entering into an agreement not requiring to be constituted in writing may intend their agreement to be enforceable immediately and any subsequently executed document to be a mere record of that agreement, in which case it will not be fatal to the contract's validity if not every party has signed the document. Alternatively, the parties may intend their agreement to be constituted in writing such that there is no contract until the written document has been signed by all parties. Whether an agreement falls into one category or the other depends on the intention of the contracting parties.

[82] (1844) 6 D 987.

[83] Requirements of Writing (Scotland) Act 1995 s 1(3), (4).

[84] Lord Murray stated that the 'bank could not [. . .] without the consent of those who subscribed upon that faith, convert [the obligation] into a bargain with only three cautioners [*sic*], and advance money upon it': *Paterson v Bonar* (1844) 6 D 987 at 1005. Lord Wood (at 1006) noted that the bank was 'not entitled to advance money on the bond until all the obligants had signed it; and that having made advances before the bond was so completed, and it not ever having been afterwards completed, no claim can lie upon the bond against [the cautioner who has signed]'. Lord Ivory (at 1008) stated that till all signed, 'no credit whatever could be given'.

[85] Especially if one follows Gloag's treatment of the case: 'In cautionary obligations, where the signature of the cautioner is a prerequisite of liability, an argument based on an underlying agreement is not maintainable, and the rule is well established that if several persons have agreed to become cautioners those who have signed are free if the signature of the others is not obtained': Gloag, *Contract* (n 64) 201–202. Gloag, of course, was writing at a time when cautionary obligations, as such, required to be expressed in writing by virtue of the Mercantile Law Amendment (Scotland) Act 1856 s 6, but that is no longer the case: see above at paras 4-05–4-15.

Example 4
To modify example 3, suppose that C1 signs the joint guarantee form. C2 is currently abroad and so decides to become bound informally by telephone. C1 claims to be content with this modification of the arrangement and the creditor, in reliance on C1's assurance to that effect, advances money to the principal debtor. Here, assuming the requirements as to personal bar under the 1995 Act have been satisfied,[86] C1 will not be free to resile simply because C2 has not signed the document. *Paterson v Bonar* is, it is submitted, less relevant in these circumstances, the defect being purely one of form.

E. GOOD FAITH

4-24. It has been stated, often in somewhat vague, amorphous terms, that the creditor in a cautionary obligation is obliged to act fairly *vis-à-vis* the prospective cautioner. There must, as Gloag and Irvine remarked, be 'perfect fairness of representation'.[87] On occasion, this notion of good faith has been associated not only with cautionary obligations but with the law of contract as a whole.[88] Forte made a pronouncement to that effect, arguing that the law of contract is underpinned by a general 'substratum' of good faith.[89] However, without elaboration, the notion of good faith is an ambiguous concept, arguably raising more questions than it answers. The relevance of good faith to the law of contract remains understandably controversial.[90]

4-25. At its most straightforward, good faith simply denotes a duty not to deceive the intending cautioner. It is well established that if one party was induced to become bound by the misrepresentation of the other contracting party, the contract will be voidable, a rule no less applicable to the law of caution than to the wider law of contract.[91] If the creditor in a cautionary obligation induces the cautioner to become bound by, for instance, saying or implying that the principal debtor is in a better financial position than the latter actually

[86] Requirements of Writing (Scotland) Act 1995 s 1(3), (4).
[87] Gloag and Irvine, *Rights in Security* (n 6) 706.
[88] Note, e.g., *Smith v Bank of Scotland* (1829) 7 S 244 at 253 per Lord Pitmilly, who in turn draws on the famous English insurance case, *Carter v Boehm* (1766) 3 Burr 1905. Broad parallels notwithstanding, caution has long been distinguished from insurance on the basis that the former does not constitute a contract of the utmost good faith: Gloag and Irvine, *Rights in Security* (n 6) 706. Incidentally, even within insurance law itself, the duty of utmost good faith has been somewhat eroded: see L Macgregor et al (eds), *Commercial Law in Scotland* (7th edn, 2024) para 6-008.
[89] See generally, A D M Forte, 'Good faith and utmost good faith: insurance and cautionary obligations in Scots law', in A D M Forte (ed), *Good Faith in Contract and Property* (1999).
[90] See, e.g., H L MacQueen and S O'Byrne, 'The principle of good faith in contractual performance: a Scottish-Canadian comparison' (2019) 23 Edin LR 301.
[91] See, e.g., *Royal Bank of Scotland v O'Donnell* [2014] CSIH 84, 2015 SC 258 at para 25.

is, or by giving a distorted or incomplete picture of the truth,[92] the cautionary obligation can be set aside.[93] A misrepresentation may be fraudulent,[94] but even a negligent or completely blameless misrepresentation can warrant reduction of a contract.[95] The only further significance of a misrepresentation's being negligent or fraudulent is that, as well as allowing for the reduction of the contract, it may give rise to a claim for damages.[96] Whatever the precise character of the misrepresentation, it cannot be used to reduce the cautionary contract unless it was made by, or is imputable to, the creditor, for it is with that party that the cautioner contracts.[97] Thus, the mere fact that the cautioner has been deceived by the principal debtor,[98] or by a co-cautioner,[99] does not serve to invalidate the cautionary obligation to the creditor.

4-26. To the undemanding duty not to mislead a prospective cautioner, the notion of good faith adds certain positive duties, dereliction of which will prevent an otherwise valid cautionary obligation from arising. As a general rule, a creditor is not required to take active steps to inform or advise an intending cautioner of the risk associated with his undertaking.[100] However, there are certain cases in which the creditor must, exceptionally, take such steps, notably where there is a so-called intimate relationship between the cautioner and the principal debtor.[101]

4-27. Earlier, reference was made to *Smith v Bank of Scotland*,[102] a decision of the House of Lords which has attracted significant levels of academic attention, much of it critical.[103] Smith granted a standard security to the Bank of Scotland

92 *Royal Bank of Scotland v Ranken* (1844) 6 D 1418.

93 *Falconer v North of Scotland Bank* (1863) 1 M 704; *Young v Clydesdale Bank* (1889) 17 R 231; *Royal Bank of Scotland v Greenshields* 1914 SC 259; *Bank of Scotland Plc v Forbes* [2011] CSIH 23, 2011 GWD 12-270.

94 *Sutherland v W M Low and Co* (1901) 3 F 972.

95 *Royal Bank of Scotland v O'Donnell* [2014] CSIH 84, 2015 SC 258 at para 25.

96 [2014] CSIH 84, 2015 SC 258 at para 34.

97 *Sutherland v W M Low and Co* (1901) 3 F 972. That the cautioner and principal debtor will often have a contractual relationship does not detract from this, for it is the contract with the creditor that the cautioner seeks to have set aside.

98 *Young v Clydesdale Bank* (1889) 17 R 231 at 240–243 per Lord Adam; *North of Scotland Bank v Mackenzie* 1925 SLT 236 at 239–240 per Lord Blackburn.

99 *Whiteaway Laidlaw Bank v Green* 1994 SLT (Sh Ct) 18 at 21–22 per Sheriff Principal D J Risk.

100 *Young v Clydesdale Bank* (1889) 17 R 231 at 240 per Lord Adam; *Royal Bank of Scotland v Greenshields* 1914 SC 259 at 266–267 per Lord President Strathclyde.

101 See also the doctrine of undue concealment relating to fidelity guarantees in such cases as *Smith v Bank of Scotland* (1813) 1 Dow 272, (1829) 7 S 244 and *French v Cameron* (1893) 20 R 966.

102 1997 SC (HL) 111, discussed in chapter 3. This case should not be confused with its nineteenth-century namesake, *Smith v Bank of Scotland* (1813) 1 Dow 272, (1829) 7 S 244, which also happens to focus on the issue of good faith in the context of a cautionary relationship.

103 See, e.g., G L Gretton, 'Sexually transmitted debt' 1997 SLT (News) 195; L Macgregor, 'The House of Lords "applies" *O'Brien* north of the border' (1998) 2 Edin LR 90; S Eden,

over her share of the matrimonial home as security for her husband's business debts. As she took no direct financial interest in the arrangement, Smith was considered to be in 'the position of a cautioner'.[104] In chapter 3 it was noted that simply granting a standard security for another's debt does not make the granter a cautioner.[105] However, again for reasons given in chapter 3, *Smith v Bank of Scotland* is relevant to the law of caution in the strict sense of the word because Smith was in a position highly analogous to that of a cautioner for her husband's debts. The House of Lords held that the standard security granted by Smith could be reduced on account of two related factors: firstly, she had been the victim of misrepresentations by her husband, who had told her that her assets would not be placed at risk if she signed the standard security; secondly, Smith had not received any warnings or advice from the bank as to the risks and dangers associated with the arrangement.[106] As Lord Clyde stated in the leading judgment, a creditor in cases like this was bound to advise a prospective cautioner wherever 'the circumstances of the case [were] such as to lead a reasonable man to believe that owing to the personal relationship between the debtor and the proposed cautioner the latter's consent may not be fully informed or freely given'.[107]

4-28. This decision was, to a large extent, prefigured and informed by another decision of the House of Lords, made a few years earlier, in the English case of *Barclays Bank Plc v O'Brien*.[108] However, while the basis for the creditor's duty to warn in that case was constructive notice, a doctrine of English law, the duty in *Smith v Bank of Scotland* was expressly rooted in the notion of good faith.[109] One consequence of this doctrinal difference is that, in Scots law, the creditor's duty is relatively light: the creditor need only warn the prospective cautioner of the dangers associated with a cautionary undertaking and advise the cautioner to seek independent legal advice.[110]

'Cautionary tales – the continued development of *Smith v Bank of Scotland*' (2003) 7 Edin LR 107. The *Smith v Bank of Scotland* 1997 SC (HL) 111 doctrine was applied in *Cooper v Bank of Scotland* [2014] CSOH 16, 2014 GWD 6-126, on which see C Anderson, 'Cautionary wives again: *Cooper v Bank of Scotland*' 2014 SLT (News) 185.

[104] *Smith v Bank of Scotland* 1997 SC (HL) 111 at 113D per Lord Jauncey.

[105] Note also, however, that the case reports are misleading: Smith did, in fact, grant a cautionary obligation: see chapter 3, para 3-39 n 119. Nevertheless, *Smith* is discussed here according to the factual account given by the case reports.

[106] 1997 SC (HL) 111 at 116F.

[107] 1997 SC (HL) 111 at 121G–H.

[108] [1994] 1 AC 180.

[109] See *Smith v Bank of Scotland* 1997 SC (HL) 111 at 121D–G per Lord Clyde and 113F–H per Lord Jauncey and the references to Bell, *Principles of the Law of Scotland* (10th edn, W Guthrie ed, 1899) § 251 and Gloag and Irvine, *Rights in Security* (n 6) 706.

[110] *Royal Bank of Scotland v Wilson* 2004 SC 153 at paras 33–36 per Lord Justice-Clerk Gill and at paras 51–55 per Lord Osborne, rejecting the more prescriptive approach favoured in *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773. See also *Clydesdale Bank Plc v Black* 2002 SC 555.

4-29. Several points bear noting regarding the scope of the doctrine in *Smith v Bank of Scotland*. For a start, it does not apply only where the principal debtor is the cautioner's spouse.[111] The parties may be in some other intimate or personal relationship such as that of cohabiting partners,[112] or parent and child.[113] The doctrine applies wherever the intimate relationship is such as to make the creditor 'reasonably suspect' that there might be 'factors bearing on the participation of the cautioner which might undermine the validity of the contract'.[114]

4-30. The tendency of the post-*Smith* case law has been to limit the scope of the 'intimate relationship' doctrine, *Royal Bank of Scotland v Wilson*[115] being a key authority in that regard. Here Wilson and her husband had granted a standard security to secure a loan for the purchase of their house. The security contained an 'all sums' element, whereby Wilson undertook personal liability for any debts incurred by her husband to the Royal Bank of Scotland and her husband assumed a mirror liability for any debts incurred by his wife to the bank.[116] As a result of this clause, Wilson later became liable as a cautioner for her husband's business debts. It was held that there was no question of the 'intimate relationship' doctrine's being applied to the wife's cautionary undertaking, which had been granted in consideration of a like undertaking by her husband in respect of any debts that she incurred.[117] Having derived a benefit from becoming a cautioner, she was not deemed as deserving of protection as a cautioner who had become bound gratuitously.

4-31. Finally, for the *Smith v Bank of Scotland* doctrine to apply, the cautioner must have been the victim of the principal debtor's misrepresentation, of facility and circumvention, or of some other 'actionable wrong'.[118] Even if the creditor has neglected to provide proper advice, the cautionary obligation will stand unless the cautioner has actually been misled or prevailed upon by the principal debtor.

[111] *Smith v Bank of Scotland* 1997 SC (HL) 111 at 121G–122A per Lord Clyde.

[112] 1997 SC (HL) 111 at 116A–B per Lord Jauncey.

[113] *Wright v Cotias Investments Inc* 2001 SLT 353 at para 20 per Lord Macfadyen; *Broadway v Clydesdale Bank Plc* 2003 SLT 707 at para 41 per Lord Macfadyen.

[114] *Smith v Bank of Scotland* 1997 SC (HL) 111 at 121F per Lord Clyde.

[115] 2004 SC 153.

[116] 2004 SC 153 at paras 1–4. The case was equally concerned with Mr Wilson's brother and his brother's wife, also called Mr and Mrs Wilson, who had granted an 'all sums' standard security for similar reasons.

[117] 2004 SC 153 at paras 23–24 per Lord Justice-Clerk Gill and para 59 per Lord Osborne. For a less dismissive view on the question of gratuitousness, see para 80 per Lord Hamilton.

[118] *Braithwaite v Bank of Scotland* 1999 SLT 25 at 33A–D per Lord Hamilton; *Wright v Cotias Investments Inc* 2001 SLT 353 at para 15 per Lord Macfadyen; *Royal Bank of Scotland v Wilson* 2004 SC 153 at paras 25–27 per Lord Justice-Clerk Gill; *Cooper v Bank of Scotland* [2014] CSOH 16, GWD 6-126 at para 30 per Lord Tyre.

F. CONCLUSION

4-32. This chapter has outlined some of the key constitutive issues affecting cautionary obligations. The plurality of parties involved in even the simplest cautionary relationship creates complexities that do not arise under other contracts and is arguably one root of the mischief in such cases as *Smith v Bank of Scotland* and *Paterson v Bonar.* The often-gratuitous character of cautionary undertakings is another factor which, especially in the context of requirements of writing, often seems to warrant special protection.

4-33. Having clarified how a person becomes a cautioner, the book now considers the rights flowing from a cautionary relationship, starting with those of the creditor. From there, the cautioner's rights of relief are examined in detail.

5 Relief in Context – The Creditor's Rights

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A. INTRODUCTION

5-01. It is difficult to understand a cautioner's rights of relief without examining the creditor's rights against the cautioner. There are several reasons for this. Firstly, and perhaps most obviously, a cautioner's need to be relieved by the principal debtor and co-cautioners arises only because the cautioner has incurred liability to the creditor. Otherwise stated, one should not embark on an analysis of a cautioner's rights of relief without considering from what the cautioner seeks to be relieved. Secondly, the creditor's rights merit attention in as much as rights of relief constrain them: a creditor might forfeit recourse against a cautioner by impairing the latter's ability to seek relief later on. Thirdly, an understanding of the creditor's rights clarifies the overall 'pecking order' to which a cautionary relationship gives rise. Far from existing in the void, rights of relief belong to a wider system of risk-distribution in which the creditor's interests take precedence over the cautioner's interests, which, in turn, take precedence over those of the principal debtor. This chapter does not attempt an exhaustive treatment of the creditor's rights; rather, the aim is to adumbrate the creditor's rights and to clarify the extent to which restrictions on those rights exist to protect rights of relief.

B. OVERVIEW OF THE CREDITOR'S RIGHTS

5-02. It bears reiterating that the creditor's rights against the cautioner are based on a contract between those parties. Various principles govern the construction of that contract. Firstly, the doctrine of accessoriness dictates that the cautioner's obligation, existing as it does only to secure the performance of the principal debtor's obligation, cannot exist if the principal debtor's obligation does not also exist. As Bankton remarks, 'there can be no superstructure without a foundation'.[1] Secondly, there is a principle that cautionary obligations must be construed strictly,[2] with the result that contractual ambiguities tend to be resolved in the cautioner's favour. Thirdly, and most pertinently for the purposes of this book, the creditor is usually barred from increasing the risk to which the cautioner is exposed,[3] a principle often directed to protecting the cautioner's prospects of relief. In defining the scope of the creditor's rights, these three principles will be of recurring relevance.

1 Bankton IV.45.182.
2 J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 312.
3 See, e.g., *Sligo v Menzies* (1840) 2 D 1478.

C. THE SCOPE OF THE CAUTIONER'S OBLIGATION

5-03. Cautionary obligations are not immune to interpretative difficulties. Suppose that David sends the following letter to Sandra: 'As you have agreed to finance John's business, I hereby guarantee repayment of all sums lent by you to him to the extent of £100.' The scope of this guarantee is patently limited in several respects: the identity of the creditor (Sandra),[4] the identity of the principal debtor (John), and the cautioner's maximum liability (£100). In other respects, the scope of the cautioner's obligation may be less obvious. Is David, the cautioner, liable for a single advance of £100 or for John's ultimate liability under a continuing credit facility capped at £100, and must the credit relate to John's business for it to be covered by the guarantee? There is also the question of duration: for how long is this guarantee, which specifies no time limit, intended to run? The present section offers an overview of such issues and how they are addressed.

(1) The identity of the parties

5-04. In identifying the parties to a cautionary relationship, namely the cautioner(s), principal debtor and creditor, there is often little room for doubt. Where ambiguities do arise, the law adopts a strict interpretation of the cautioner's obligation. In *Bowie v Watson*, *MacNight and Co*,[5] a letter of guarantee was addressed to a particular firm, Watson and Co. The cautioner agreed to 'guarantee [. . .] payment of any yarns' that that firm supplied to Blackburn.[6] The cautioner gave the letter to Blackburn, who, instead of delivering it to the firm named in the letter, which had been dissolved, delivered it to a new firm called Watson, MacNight and Co.[7] It was held that this new firm could not enforce the letter of guarantee, notwithstanding that the new firm consisted of the two partners from the old firm (with the addition of a third partner), conducted the same business as the old firm, and did so on the same premises.[8] The court's decision was based on the notion that a cautioner

[4] Of course, the identity of the creditor will be less important if the guarantee is expressed in an open-ended form or if it is competent for the guarantee to be assigned to a different creditor. The latter question is one of construction of the guarantee: *Promontoria (RAM) Ltd v Moore* [2017] CSOH 88, 2018 SCLR 299. There are at least two other issues regarding the effect of an assignation on a security for the debt assigned: (1) how properly to construe the assignation itself (i.e. whether a given assignation of a debt should be construed as importing an assignation of a security for that debt); and (2) whether the assignation of the debt should, in any case, be deemed to import an assignation of the security *simply by operation of law*: *McKinlay v Avellierie Ltd* [2025] SAC (Civ) 6, 2025 GWD 12-110. See now the Moveable Transactions (Scotland) Act 2023 s 16.

[5] (1840) 2 D 1061.

[6] (1840) 2 D 1061 at 1061.

[7] (1840) 2 D 1061 at 1061–1062.

[8] (1840) 2 D 1061 at 1063–1067.

may be willing to become bound to one creditor but not to another.[9] It was significant that the cautioner claimed not to have known, at the time of granting the guarantee, of the old firm's dissolution.[10] Had he been aware of this, he may have been held bound to the new firm, misnomer notwithstanding.

5-05. A cautioner becomes bound not only to a particular creditor but for a particular principal debtor. The importance of precision in that regard is demonstrated by *Wright's Trustees v Hamilton's Trustees*.[11] Here a cautioner was liable for the payment of interest under a bond. Eventually, the principal debtor's creditors consented to a trust deed (to which the cautioner also acceded) under which they agreed to desist from diligence against him.[12] A factor who had been authorised to collect rents for the satisfaction of those creditors lost some of the money that he had collected.[13] It was held that credit should be allowed to the cautioner (or rather his representatives, the cautioner having died) for the proportion of the lost rents that would have gone to the reduction of his liability under the bond. He was liable simply for the payment of interest under the bond, and a proportion of the money paid to the factor had gone towards the reduction of that debt; the cautioner had not, above and beyond his obligation under the bond, become bound for the factor's intromissions.[14]

(2) Fixed or continuing

5-06. A cautioner in a fixed guarantee becomes bound for a specific obligation, such as to repay a loan or to pay rent under a lease. By contrast, a continuing guarantee entails an indefinite liability arising from a continuous course of dealing between the principal debtor and creditor, such as an obligation to guarantee repayments under a credit account. If a dispute arises, it will often be in a cautioner's interest to argue that the guarantee is for a fixed sum only. If a cautioner's obligation relates to a single loan of £200 and the principal debtor repays it, the cautioner's liability for that loan will be extinguished. By contrast, in the case of a guarantee of repayments under a credit facility capped at £200, the principal debtor might borrow £200, repay the same and borrow another £200 without extinguishing the cautioner's potential liability.

5-07. Often, it will be obvious whether a cautioner's obligation is fixed or continuing, but, for more difficult cases, there are various indicia to which the courts may have recourse. In *Caledonian Banking Co v Kennedy's Trustees*,[15] a

[9] (1840) 2 D 1061 at 1066.
[10] (1840) 2 D 1061 at 1067.
[11] (1835) 13 S 380.
[12] (1835) 13 S 380 at 380.
[13] (1835) 13 S 380 at 380–383.
[14] (1835) 13 S 380 at 380–383.
[15] (1870) 8 M 862.

cautioner wrote to a bank and stated that, as the bank had allowed his nephew to 'overdraw his account-current with them . . . to the extent of [£400]', he undertook to 'repay the same when requested so to do'.[16] The question arose whether this guarantee referred to a single loan of £400 or to a continuing credit facility capped at £400. Both the Outer House and Inner House favoured the latter reading of the cautioner's obligation, concluding that he had granted a continuing, rather than a fixed, guarantee. In reaching that decision, the court emphasised the fact that the guarantee had no 'limitation in regard to time' or in the 'number of transactions or operations to take place on the faith of it';[17] that the guarantee was intended to help the nephew in his business;[18] and that the guarantee related to an 'account-current', and so appeared to anticipate 'repeated drafts' by the cautioner's nephew.[19]

5-08. A similar approach was adopted in *Calder & Co v Cruikshank's Trustee*.[20] There a cautioner granted two letters of guarantee to a firm of distillers, the first of which guaranteed payment for 'any goods which you may sell or cash you may advance to Messrs M'Laren & Co' to the extent of £5000, and the second of which guaranteed repayment of 'credit' granted by the firm to the principal debtor to the extent of £2000.[21] The Lord Ordinary construed the guarantees as 'continuing' because they did not relate to a 'specific supply of goods or advance of money', a decision that was upheld by the Inner House.[22]

5-09. By definition, a continuing guarantee does not concern one particular transaction, but it will still be subject to constraints. Often, the cautioner's potential liability will be capped at a certain amount, as in *Calder & Co v Cruikshank's Trustee*,[23] where the cautioner's total liability under two continuing guarantees was limited to £7000. There may also be limits as to when credit can be advanced. Thus, in *Tennant v Bunten*,[24] a cautioner became liable for the price of purchases made by the principal debtor 'not exceeding the amount [£200] in all' within 'four months' of his granting the guarantee.[25] Sometimes a continuing guarantee will specify no time limit, in which case the cautioner will be able to withdraw at will.[26]

16 (1870) 8 M 862 at 863.
17 (1870) 8 M 862 at 865.
18 (1870) 8 M 862 at 867–868.
19 (1870) 8 M 862 at 868–869. The claim against the cautioner failed for different reasons. See below at paras 5-43 and 5-57.
20 (1889) 17 R 74.
21 (1889) 17 R 74 at 74–75.
22 (1889) 17 R 74 at 77.
23 (1889) 17 R 74.
24 (1859) 21 D 631.
25 (1859) 21 D 631 at 631–632.
26 See below at paras 5-39–5-40.

(3) Nature of limit on cautioner's liability

5-10. A cap on the cautioner's potential liability to the creditor rendering it lower than that of the principal debtor gives rise to an important question of construction. If Hilda owes a total of £100 to Norman, and her friend, Jean, grants a guarantee under which her liability is limited to £80, one interpretation of Jean's obligation is that she is guaranteeing an £80 debt and has no concern with the additional £20.[27] On a different view, Jean is guaranteeing the whole amount owed by Hilda (£100), subject to a limit of £80 on what she (Jean) can be made to pay.[28] The distinction matters.[29] It is to the creditor's advantage if the cautioner's liability is for the whole £100 rather than a mere £80 because, while Jean can be compelled to pay £80 only, she can obtain relief from Hilda's insolvent estate only if Norman receives the full £100. If Jean were allowed to rank on Hilda's insolvent estate for relief before the whole debt had been paid, she would be allowed to rank in competition with the creditor in respect of the guaranteed debt. In short, the amount guaranteed (£100) may exceed the amount for which the cautioner can be sued (£80), but it is important, marking as it does the extent to which the cautioner's interests have been subordinated to those of the creditor.

(4) Scope of the principal debtor's obligation(s)

5-11. The principle of accessoriness dictates that the cautioner's obligation cannot exceed that of the principal debtor.[30] It follows that a key factor in limiting the scope of the cautioner's obligation is the scope of the principal debtor's obligation. This is made clear by a number of cases, including *Paisley Union Bank v Hamilton*.[31] Here a cautioner guaranteed that a bank agent (principal debtor) would account to the bank (creditor) for his intromissions. The cautioner became bound in 1808, but when, in 1813, one of his co-cautioners died, he granted a new bond.[32] Under the 1808 bond, one of the principal debtor's obligations was to pay bills for which his customers became liable, but his obligation did not extend to bills discounted with the bank by certain companies, including the Omoa Company.[33] The 1813 bond (together with a supplementary bond granted in the same year) imposed no such restriction on the bank agent's dealings and so it was held that the cautioner, in signing this new bond, had consented to an

[27] As in *Veitch v National Bank of Scotland Ltd* 1907 SC 554.
[28] As in *Harvie's Trustees v Bank of Scotland* (1885) 12 R 1141.
[29] It is especially relevant to the discussion at paras 9-63–9-77 below.
[30] W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable Including Cautionary Obligations* (1897) 760.
[31] (1831) 9 S 488.
[32] (1831) 9 S 488 at 488–489.
[33] (1831) 9 S 488 at 488–489.

extension of his liability to cover bills discounted for the Omoa Company.[34] Contrariwise, in *Bonar v MacDonald*,[35] another case involving a bank agent, cautioners who had guaranteed that the bank agent would fulfil his duties were held to have been liberated because of a new bond executed by the bank agent and the bank, to which the cautioners were not parties, rendering the bank agent liable for losses stemming from discounted bills. In terms of the bond that the cautioners had signed, the bank agent was to have no such responsibility. In a majority decision of the Inner House,[36] later upheld by the House of Lords,[37] Lord Mackenzie remarked that the cautioners' obligations had anticipated the duties of a mere salaried agent or employee of the bank, which, if performed honestly and diligently, would pose minimal financial risk. By contrast, liability for discounted bills entailed considerable risks; it was a burden more befitting of a 'partner' in the bank.[38]

(5) Summary

5-12. The preceding paragraphs instance certain issues regarding the scope of a cautionary obligation. Firstly, there are questions of identity: to whom and for whom does the cautioner become bound? Next one must determine the particular obligation(s) that the cautioner guarantees. There may be further limiting factors, such as a time limit for a continuing guarantee. Together these considerations draw the parameters of a cautionary obligation, determining the level of risk that the cautioner is prepared to assume.

D. CONDITIONS FOR ENFORCEABILITY

5-13. Once the scope of the cautionary obligation has been defined, the next question to consider is that of enforceability, that is, what must happen before the creditor can compel performance of the cautionary obligation?

(1) The principal debtor's obligation must fall due

5-14. A cautioner's obligation is accessory to that of the principal debtor,[39] with the result that the cautioner cannot be sued until the principal debtor's obligation has fallen due. The doctrine of accessoriness also signifies that, where decree has been pronounced against the principal debtor in the cautioner's absence, the

[34] (1831) 9 S 488 at 497.
[35] (1847) 9 D 1537 aff'd (1850) 7 Bell App 379.
[36] *Bonar v MacDonald* (1847) 9 D 1537.
[37] *Bonar v MacDonald* (1850) 7 Bell App 379.
[38] *Bonar v MacDonald* (1847) 9 D 1537 at 1550.
[39] Bankton IV.45.182.

cautioner may rely on defences that were available to the principal debtor but which the latter failed to invoke.[40]

(2) The (now largely defunct) requirement to sue the principal debtor

5-15. Aside from the need for the principal debtor's obligation to be due, there was traditionally a requirement that the principal debtor be sued before the cautioner was sued. The rule was based on the *beneficium excussionis vel ordinis*, whereby a Roman surety could, as a defence, insist that the principal debtor be sued in the first instance. Only if the creditor failed to obtain payment by that means could the surety then be sued.[41] In Scots law, this rule was known as the benefit of discussion.[42] Traditionally, the cautioner could not be sued until the principal debtor had been 'discussed'.[43] Discussion did not consist simply in a demand by the creditor that the principal debtor fulfil the principal obligation; it entailed diligence proceedings to enforce that obligation.[44] The principal debtor's assets had to be seized by such means as poinding, arrestment and forthcoming, or adjudication (as appropriate), and applied to the payment of the debt.[45] In short, to discuss the principal debtor was to determine whether there were sufficient assets in the latter's estate to satisfy the creditor; if there were, there would be no need to proceed against the cautioner. There were limits to the cautioner's right to insist on discussion. The defence would not be available if the principal debtor was bankrupt or absent from the 'realm', but, in the latter case, the principal debtor had not merely to be 'abroad', but to have 'no estate or effects' in Britain.[46] In contrast, the cautioner would not lose the benefit of discussion simply because the principal debtor had died,[47] for there would, in such cases, still be property with which to satisfy the principal debtor's obligation. Also, although the benefit of discussion applied as a default rule in a proper cautionary contract where the cautioner was expressly bound as such, it could be waived where the cautionary contract was improper. In other words, cautioners could renounce the privilege either expressly, or implicitly by becoming bound 'conjunctly and severally' or as 'full debtors for and with the principal [debtor]'.[48] In such cases, the cautioner was said to be liable *in solidum*, a phrase which here describes the circumstances in which the cautioner was liable, as opposed to the amount for which the cautioner was liable.[49]

[40] Erskine III.3.64; Bell, *Principles* § 251. But cf *Mackenzie v Mackenzie* (1842) 5 D 151.
[41] Nov 4.1.
[42] Erskine III.3.61.
[43] Stair I.17.5; Bankton I.23.28; Erskine III.3.61; Bell, *Principles* § 252.
[44] Erskine III.3.61.
[45] Stair I.17.5; Erskine, III.3.61.
[46] Bankton I.23.30; *Wishart v Wishart* (1837) 2 Sh & MacL 564 at 583–584.
[47] (1837) 2 Sh & MacL 564 at 583.
[48] Bankton I.23.28.
[49] Erskine III.3.61.

5-16. The benefit of discussion was abolished by section 8 of the Mercantile Law Amendment (Scotland) Act 1856. Of course, it is still possible for a cautioner to stipulate that the creditor must first discuss the principal debtor,[50] but that right is no longer automatically implied into contracts of caution. Section 8 is in the following terms:

> Where any person shall, after the passing of this Act, become bound as Cautioner for any Principal Debtor, it shall not be necessary for the Creditor to whom such Cautionary Obligation shall be granted, before calling on the Cautioner for Payment of the Debt to which such Cautionary Obligation refers, to discuss or do Diligence against the Principal Debtor, as now required by Law; but it shall be competent to such Creditor to proceed against the Principal Debtor and the said Cautioner, or against either of them, and to use all Action or Diligence against both or either of them which is competent according to the law of Scotland: Provided always, that nothing herein contained shall prevent any Cautioner from stipulating in the Instrument of Caution that the Creditor shall be bound before proceeding against him to discuss and do Diligence against the Principal Debtor.

5-17. As a result of this provision, it is no longer necessary for the principal debtor to be pursued in a judicial process or for the debt to be enforced against him by diligence; rather the creditor may proceed directly against the cautioner.[51] On that view, the 1856 Act has introduced an approach akin to that of classical Roman law, where it was possible to proceed directly against the surety.[52]

5-18. However, the right to insist on suit of the principal debtor in the first instance has not been abolished completely. Given that section 8 of the 1856 Act refers to the cautioner's liability for payment of a debt, it has been suggested that the reform does not apply where the cautioner undertakes that the principal debtor will perform a certain act (caution *ad factum praestandum*), such as the completion of a building project.[53] The Inner House's decision in *Municipal Council of Johannesburg v Stewart*[54] lends some credence to that view. There cautioners became bound to the Municipal Council of Johannesburg for the completion of various infrastructure projects by a Scottish firm, the cautioners facing liability for damages if the firm failed.[55] However, the Inner House held that the Council could not pursue the cautioners without first suing the principal obligant and establishing that it had breached its contract. As Lord McLaren noted, until failure on the part of the principal obligant was established by a 'competent process in a Court of law or Court of arbitration', no claim would

[50] Mercantile Law Amendment (Scotland) Act 1856 s 8.
[51] *Morrison v Harkness* (1870) 9 M 35 at 36–37.
[52] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 130.
[53] *Scottish Metropolitan Property Plc v Christie* 1987 SLT (Sh Ct) 18 at 22–23.
[54] 1909 SC 860.
[55] 1909 SC 860 at 867.

arise against the cautioners.[56] The House of Lords overruled the Inner House's decision,[57] not because it disputed that court's statement of Scots law (a matter on which the House of Lords expressly reserved judgment), but because of an issue relating to private international law. Thus, as a statement on the Scots law of caution, the Inner House decision in *Municipal Council of Johannesburg v Stewart* is at least somewhat instructive.[58]

5-19. In sum, in cases involving caution for monetary debts, the cautioner can no longer insist that the principal debtor be sued in the first instance and that diligence be done against his estate. However, as regards caution *ad factum praestandum*, there may still exist a need to sue the principal obligant in the first instance to establish, by judicial decree, that he has failed to perform his obligation.

(3) The enduring requirement of default by the principal debtor

5-20. In spite of section 8 of the Mercantile Law Amendment (Scotland) Act 1856, it is still necessary for the principal debtor to have defaulted on the principal obligation before the cautioner becomes liable to the creditor, and that requirement applies as much to caution for monetary debts as to caution *ad factum praestandum*. As explained in chapter 3, caution is, by definition, an undertaking to pay on the condition that the principal debtor has failed. In that regard, Lord McLaren's words in *Morton's Trustees v Robertson's Judicial Factor*[59] are particularly instructive:[60]

> In the case of a proper cautionary obligation, the surety only undertakes to pay in case of the failure or default of the principal debtor, and although by statute the discussion of the principal debtor is no longer necessary, the other equities of a cautioner remain.

5-21. In short, while the 1856 Act dispenses with the requirement to sue and do diligence against the principal debtor before pursuing the cautioner, it does not dispense with the need for the principal debtor to have defaulted on the principal obligation. The very essence of a cautioner's obligation is to pay in the second instance. The requirement of default also pinpoints when the cautioner becomes liable to the creditor, hence the date from which negative prescription starts to run.[61]

[56] 1909 SC 860 at 879.
[57] 1909 SC (HL) 53.
[58] See also Erskine III.3.62, which suggests that, long before the 1856 Act, caution *ad factum praestandum* called for distinctive treatment as regarded questions of 'discussion'.
[59] (1892) 20 R 72.
[60] (1892) 20 R 72 at 77.
[61] *City of Glasgow District Council v Excess Insurance Co Ltd (No 1)* 1986 SLT 585 at 587–590.

5-22. At the same time, it is important not to overstate the importance of the requirement of default, as it will often be easily satisfied. As explored in the previous section, a cautioner for an obligation *ad factum praestandum* might be entitled to insist on a decree being obtained against the principal obligant to the effect that the latter has defaulted. However, as regards caution for monetary debts, whether the principal debtor has defaulted will be a mere question of fact and the cause of the default irrelevant.[62] If the principal debtor, though solvent, chooses not to pay the creditor simply because it would be inconvenient, that will still amount to default for the purpose of triggering cautionary liability.

(4) Additional conditions

5-23. The above summarises the main conditions for a cautioner's obligation to become prestable. However, as with any other contractual undertaking, it is open to the cautioner to stipulate further conditions in the contract. In accordance with the principle that cautionary obligations are to be construed strictly – that is, in the cautioner's favour – there is a tendency to enforce conditions on the cautioner's liability to the letter. In one case,[63] a cautioner agreed to make good the shortfall on a bill after the creditor had ranked on the insolvent estates of the two acceptors.[64] The creditor neglected to rank on one of those estates, but argued that this was of no consequence for, owing to preferential claims on it, that estate would have yielded nothing in satisfaction of the bill. It was held that the cautioner had been liberated on account of the creditor's failure to fulfil the express condition to which his liability was subject and that, as this was a 'strict' cautionary obligation, it was irrelevant whether the cautioner had actually suffered prejudice.[65]

E. CONTENT OF THE CAUTIONER'S OBLIGATION

5-24. Once it is established that a cautioner's obligation is enforceable, the next question to consider is its content. In other words, what must the cautioner do to fulfil the cautionary obligation? Naturally, the content of a cautionary obligation depends on the express terms of the contract and how those terms are to be construed: issues with which this chapter has already engaged.[66] However, specific questions of construction apart, there are certain fundamental rules affecting the content of nearly all cautionary obligations.

[62] Gloag and Irvine, *Rights in Security* (n 30) 789–790. For a modern affirmation of the point, see *Scottish Metropolitan Property Plc v Christie* 1987 SLT (Sh Ct) 18 at 22–23.
[63] *Drummond v Rannie* (1836) 14 S 437.
[64] (1836) 14 S 437 at 442.
[65] (1836) 14 S 437 at 442–443.
[66] At paras 5-03–5-12.

(1) Mode of performance

5-25. Cautionary obligations sometimes take the following form: 'I (C) guarantee that D will pay you £100' or 'I guarantee that D will repair your car'. On a literal reading, the cautioner (C) seems to be saying that, if necessary, the principal obligant (D) can be impelled by C to fulfil D's obligations to the creditor. Perhaps unsurprisingly, however, that is not how a cautioner's obligation is construed. If C guarantees that D will pay £100, that is really an obligation to pay £100 if D fails; likewise, a guarantee that D will repair the creditor's car means simply that, if D fails to repair it, the cautioner will either do so instead or make good the loss arising from D's non-performance.[67] To say that one guarantees that another will pay or perform is something of a linguistic flourish.

5-26. As to the content of a cautioner's obligation, *Wishart v Wishart*[68] offers some insight. The case concerned an obligation *ad factum praestandum*, the principal debtor having undertaken to invest £1500 in land (among other assets) for the benefit of his wife and children. The principal debtor's brother agreed to become a cautioner in that connection, and so obliged himself, in the event of his brother's failing to 'secure' the £1500 in the requisite manner, to pay 'legal interest' on this sum to the wife and children and eventually the principal sum of £1500 as well.[69] In other words, the cautioner did not word his obligation as a guarantee that his brother would perform his obligation under the marriage contract; rather, he undertook to pay a certain sum if his brother failed to fulfil that obligation. In emphasising that this was a cautionary obligation, Lord Brougham made the following comment:[70]

> If it be said that the bond [. . .] is not properly a cautionary obligation, inasmuch as A. Wishart does not bind himself that J.H. Wishart shall invest the money, but only that he, A. Wishart, shall pay the interest, and eventually the principal, in the event of J.H. Wishart's failing to make the investment, – then it must be answered that this is only an expanded form of stating what is meant, and indeed what alone can be meant, by the more ordinary form of one person binding himself for the performance of a given thing by another person: all that the one can do is to make good the other's deficiencies – , to pay, if he does not pay, or to perform what he has undertaken [. . .] every cautionary obligation *ad factum praestandum* comes or may come within the same description. It is to make up the loss arising from nonperformance of the principal; and surely the obligation is not the less of a cautionary nature because the damages are as it were liquidated in the bond of caution.

5-27. Two points should be emphasised. Firstly, a guarantee that someone else will pay or, in the case of caution *ad factum praestandum*, perform, should not

[67] Erskine III.3.62.
[68] (1837) 2 Sh & MacL 564.
[69] (1837) 2 Sh & MacL 564 at 568–569.
[70] (1837) 2 Sh & MacL 564 at 582–583.

be construed as an obligation to 'force' that person to pay or perform; rather, it signifies an obligation to 'make good the other's deficiencies'.[71] Secondly, as regards caution for an obligation *ad factum praestandum*, there are two ways in which one can make good the principal obligant's deficiencies: one can (1) pay a sum compensating the creditor for the loss associated with the principal obligant's non-performance, or (2) perform the obligation in the principal obligant's stead. The first option tends to be favoured over the second. Thus, if a cautioner guarantees that D will complete a building project, the usual mode of fulfilling the cautionary obligation will be to compensate the creditor for D's default, as by bearing certain additional costs stemming from the need to hire another builder. However, it may be that the cautioner is able to complete the project, and, if that course is chosen by the cautioner and approved by the creditor, and the work successfully completed, the cautioner's obligation will be fulfilled. That is what happened in *Marshall & Co v Pennycook*.[72] A town council entered into a contract with a builder for the construction of waterworks, and cautioners became bound jointly and severally 'for the due performance and execution' of that contract.[73] The principal obligant fell seriously ill, whereupon one of the cautioners, with the consent of the town council, saw to the completion of the building project himself.[74] It was held that, as a general rule, cautioners need only pay 'damages for any loss sustained by the [creditor] in the event of the contract not being duly performed', but that if a cautioner were 'able and willing to step in and complete the work', that would be a valid means of fulfilling his cautionary obligation.[75]

(2) Amount

5-28. Where, as is usually the case, a cautionary obligation is fulfilled by means of a payment to the creditor, the question arises how much the cautioner can be made to pay. Where multiple cautioners are bound in the same obligation, they may be deemed liable either for the whole debt (*in solidum*) or for their individual *pro rata* shares.[76] It should be noted that, for these purposes, the term *in solidum* refers to the amount that each cautioner has to pay, as against the circumstances in which that cautioner must pay.[77]

[71] (1837) 2 Sh & MacL 564 at 582–583.
[72] 1908 SC 276.
[73] 1908 SC 276 at 277.
[74] 1908 SC 276 at 278.
[75] 1908 SC 276 at 282.
[76] Stair I.17.3.
[77] As a description of the circumstances in which a cautioner is obliged to pay, the term *in solidum* means that the creditor may proceed against the cautioner without first pursuing the principal debtor: paras 5-15–5-19 above.

5-29. In Roman law, the liability of sureties was originally *in solidum*. Sureties would become bound to the creditor using a prescribed set of words known as a stipulation (*stipulatio*),[78] invariably promising to pay the same (*idem*) as the principal debtor.[79] Thus, even where multiple sureties became bound at the same time in the same obligation, each could, owing to the rigid phrasing of his undertaking, be sued for the whole amount. In time, sureties were allowed to limit their liability to the creditor. For the two older types of suretyship (*sponsio* and *fidepromissio*), there was the *lex Furia*, which effected an automatic *pro rata* division of liability based on the number of sureties alive when the debt fell due.[80] Similar protection was later extended to *fideiussio* in the form of the *beneficium divisionis*.[81] While functionally equivalent to the *lex Furia*, the *beneficium divisionis* was less favourable to sureties because (1) a *pro rata* division did not apply automatically but had to be demanded at the time of suit, and (2) that division was based on the number of solvent sureties.[82] If one or more sureties had become insolvent by the time of the creditor's action, it was by the solvent sureties, not the creditor, that the shortfall must be borne.

(a) Proper cautioners bound together

5-30. The principle that liability is to be divided equally among sureties has long formed part of the Scots law of caution, but the rule has been justified in different ways. For instance, Bankton's approach serves as an interesting foil for the approaches of Stair, Erskine and Bell.

5-31. Stair wrote that cautioners who become 'obliged together' are liable to the creditor for what is 'wanting' by the principal debtor and the other cautioners;[83] a rule somewhat similar to the *beneficium divisionis*. Given that each is liable for what is 'wanting' from the others, the solvent cautioners' respective shares will increase if the other cautioners become insolvent.[84] For instance, if three cautioners (C1, C2 and C3) are liable for £120, and C1 falls insolvent, then, on Stair's approach, £40 is 'wanting' from C1, meaning that C2 and C3 will each become liable for an additional £20. This approach has traditionally applied only to proper cautioners, expressly bound as such and not

[78] P B H Birks, *The Roman Law of Obligations* (ed E Descheemaeker, 2014) 52.

[79] For instance, the form of suretyship known as *fideiussio* was constituted by the following set of words: the creditor would ask, 'quod Maevius mihi debet id fide tua esse iubes?' ('What Maevius owes me, do you promise on your honour?') to which the prospective surety would reply, 'fideiubeo' ('I promise'). See J A C Thomas, *Textbook of Roman Law* (1976) 335.

[80] Gaius III, 121.

[81] Gaius III, 121.

[82] Gaius III, 121.

[83] Stair I.17.12.

[84] Stair I.17.12.

qualifying their status as cautioners with the words 'conjunctly and severally' or 'jointly and severally'.[85]

5-32. Stair's approach can be contrasted with that of Bankton, who, despite agreeing that cautioners would be liable only for their *pro rata* shares, dismissed the *beneficium divisionis* as a relic of Roman formalism. It was only because sureties were invariably bound, via their respective stipulations, for the whole debt that a special procedural device was required to limit their liability.[86] According to Bankton, Scots law had never felt an equivalent need: cautioners who became bound to the creditor in concert were, from the outset, liable only for their *pro rata* shares. This approach had important practical ramifications for the creditor's measure of recovery. Bankton maintained that, because the cautioners' respective shares of liability were fixed from the outset, they would not increase if one of their number fell insolvent. In placing the risk of a co-cautioner's insolvency on the creditor rather than on the other cautioners, Bankton's approach loosely resembled that of the *lex Furia*, even though he was most likely unaware of that Republican statute. Modern scholars seem to have become acquainted with it via Gaius' *Institutes*,[87] a text which had fallen into obscurity by Bankton's time and which was not rescued from that obscurity until long after his death.[88]

5-33. To some extent, Erskine adopted a similar view on the matter of apportionment, rejecting the *beneficium divisionis* for much the same reasons as those stated by Bankton.[89] He contended that cautioners, by the very 'nature' of their obligation, will be liable only for their *pro rata* shares of the debt; hence there was no need for the *beneficium divisionis*. However, Erskine went on to acknowledge that, although cautioners' respective obligations are limited, from the outset, to their *pro rata* shares of the debt, their liability can increase if one or more of the other cautioners falls insolvent: each cautioner 'is liable only for his own share, except in so far as through the insolvency of the other obligants, the creditor cannot recover payment from them'.[90] Thus, although Erskine rejected the need for a procedural device to redistribute liability (*beneficium divisionis*), he adopted an approach to apportionment that was, to all practical intents and purposes, reminiscent of that device.[91] It is submitted that this view, which seems to have prevailed in modern law,[92] has more to commend it than

[85] Stair I.17.12.

[86] Bankton I.23.39–40.

[87] See, e.g., Thomas, *Textbook of Roman Law* (n 79) 336 nn 76–77, where he relies on such passages of Gaius' *Institutes* as Gaius III, 121.

[88] Gaius' *Institutes* were rediscovered in the early nineteenth century: Thomas, *Textbook of Roman Law* (n 79) 52.

[89] Erskine III.3.63.

[90] Erskine III.3.63. This also reflects Stair's position: Stair I.17.12.

[91] See also, Bell, *Commentaries* I, 347–348. Bell, however, seems more comfortable with using the term 'benefit of division' to describe Scots law.

[92] Gloag and Irvine, *Rights in Security* (n 30) 795–796.

that propounded by Bankton. One can acknowledge the redundancy of the *beneficium divisionis* as a Roman procedural device, but retain a functional equivalent based on a flexible, creditor-friendly apportionment of liability: the Scottish benefit of division.

(b) Improper cautioners

5-34. The benefit of division can be, and often is, waived by cautioners. Those who become bound jointly and severally with one another will be liable *in solidum*.[93] It is cautioners of this sort (improper cautioners) who are most strongly associated with the right of *pro rata* relief.[94] If C1 and C2 become bound jointly and severally for £100, and C1 is sued for the whole amount, C1 will be entitled to £50 in relief from C2.[95]

(c) Cautioners who become bound separately

5-35. According to Stair, if cautioners become bound in separate documents for the same obligation, each is liable to the creditor *in solidum*, whether or not they use such words as 'conjunctly and severally'.[96] It is, however, difficult to tell whether this position holds in modern law. While the issue is seldom confronted directly,[97] the benefit of division tends to be presented as enuring to all proper cautioners in the same debt, with no emphasis on how the proper cautioners came to be bound. Further, in one case where two cautioners became bound in relation to the same debt, but in separate documents, and in the knowledge of one another, it was presumed that each was becoming liable for half the debt only.[98] If Stair's position has any credibility, it is where cautioners become bound not simply in separate documents but without any reference to, or reliance on, one another. His reasoning might be seen to reflect a contractual logic: cautioners bound together are liable only for what is wanting by the other cautioners not because of some special procedural device, as under Roman law, but because *pro rata* liability is of the essence of various cautioners becoming bound together. Stair is not alone in favouring such a justification of *pro rata* liability,[99] but he seems to carry the point further: if the benefit of division depends on a certain interpretation of each cautioner's contractual undertaking

[93] See, for example, Bankton I.23.40; Erskine III.3.63.
[94] Stair I.8.9.
[95] Stair I.8.9.
[96] Stair I.17.12.
[97] For an express challenge to Stair's view, see Hume, *Lectures* II, 212–213.
[98] *Alexander v Scott* (1827) 6 S 150. Cf *Whiteaway Laidlaw Bank Ltd v Green* 1994 SLT (Sh Ct) 18 in which cautioners who had become bound in separate documents for a company's debt were held liable for that debt *in solidum*.
[99] Erskine III.3.63.

to the creditor, it follows that such a benefit cannot enure to cautioners who become bound in mutual ignorance, each having no less undertaken liability for the full debt than a Roman surety who became bound to pay 'the same' (*idem*) as the principal debtor. Nor does the general presumption in Scots contract law that liability for the same debt is joint (*pro rata*) rather than joint and several (*in solidum*)[100] seem to resolve the matter.[101] While Stair's approach might appear harsh, it is tempered by the comparative flexibility of rights of relief.[102] One can recognise that cautioners bound separately do not enjoy the benefit of division in a question with the creditor but at the same time recognise that such cautioners enjoy a right of *pro rata* relief.

5-36. Rejecting Stair's position, Hume argues that the benefit of division is enjoyed by all proper cautioners. He sees the basis for the benefit of division as equitable rather than contractual; hence, it may be invoked by two (or more) proper cautioners for the same debt even if they became bound for that debt independently.[103] One might add that it is reasonable to give two such cautioners the benefit of division even if each thinks he is the only cautioner. It is easier for the creditor, who knows of both cautioners, to ask the cautioners to waive this benefit in the contract of caution, than for the cautioners, each of whom thinks he is the only cautioner, to stipulate for it.

5-37. In short, the benefit of division potentially applies even in the case of proper cautioners who become bound separately. If it does, arguably this stems not so much from a contractual principle (i.e. that cautioners bound together generally intend to be bound *pro rata* only) as from a general policy desire to protect cautioners.

F. TERMINATION

5-38. Thus far, this chapter has explored the scope of a cautioner's obligation, when it can be enforced, and what can be claimed: factors shaped by the terms of the contract of caution and how they are construed. The present section considers circumstances that will release the cautioner from liability under this contract or, at least, reduce the extent of cautionary liability. As will become

[100] *Coats v Union Bank of Scotland* 1928 SC 711 rev'd 1929 SC (HL) 114.

[101] It might be argued that, in cases of doubt, the presumption should be, as it usually is, one in favour of *pro rata* liability and that, in line with that presumption, proper cautioners bound separately for the same debt should be held liable *pro rata* only. One might also point to the fact that, among the exceptions typically listed to the general rule of joint (*pro rata*) liability, one does not tend to find a reference to whether the parties became bound in reliance on one another: see W M Gloag, *The Law of Contract* (2nd edn, 1929) 198–202.

[102] Stair I.8.9.

[103] Hume, *Lectures* II, 212–213.

clear, a reduction in or elimination of the cautioner's liability often results from a prejudicial act by the creditor.

(1) Right of withdrawal from continuing guarantees

5-39. In the case of a continuing guarantee – that is, one for a particular course of dealing between the creditor and principal debtor – the cautioner may have stipulated the date on which the guarantee will come to an end. Where no end-date has been specified, the guarantee will be terminable at the cautioner's option. Consider, in that regard, *Reid v Hart*,[104] where a man granted a promissory note for £150 payable one day 'after date'.[105] The creditor admitted that, contrary to the note's wording, it was actually intended as a continuing guarantee for the borrowing of Messrs Gibb and Co to the extent of £150.[106] It was held that the promisor could terminate this guarantee at any time by intimating his desire to withdraw from it. The result was that, although he would be liable for any borrowing by Messrs Gibb and Co prior to his withdrawal, he would incur no further liability thereafter.[107] Likewise, in *Nicolsons v Burt*,[108] it was emphasised that a cautioner under a continuing guarantee not subject to a time limit could withdraw at 'any time'.[109]

5-40. In fact, even where the guarantee is concluded with reference to a certain period, albeit one of indefinite length, such as the duration of an office to be held by the principal obligant, the cautioner may be free to withdraw before that period has run its course. This point is illustrated in *Taylor and Wright v Adie*.[110] A number of parties became cautioners for a bank agent, agreeing to account for his intromissions 'during the whole time of [. . .] the said [agent] continuing in [that office]'.[111] Having remained bound under this guarantee for seven years, it was held competent for the cautioners to withdraw from it. They had helped the bank agent to secure his job and allowed him to retain it for a number of years, but they were not expected to remain bound indefinitely.[112] At the same time, Hume's report of this case emphasises the need for a cautioner wishing to terminate his obligation not to 'act capriciously'; rather, the cautioner must intimate his desire to withdraw in advance of the relevant date, giving the principal obligant and creditor time to find another cautioner.[113]

[104] (1868) 6 SLR 255.
[105] (1868) 6 SLR 255 at 255.
[106] (1868) 6 SLR 255 at 256.
[107] (1868) 6 SLR 255 at 256–257.
[108] (1882) 10 R 121.
[109] (1882) 10 R 121 at 125.
[110] Hume (1818) 114.
[111] Hume (1818) 114 at 114.
[112] Hume (1818) 114 at 115.
[113] Hume (1818) 114 at 115.

(2) Satisfaction of the principal debtor's obligation

5-41. The doctrine of accessoriness dictates that a payment in satisfaction of the principal debtor's obligation will release the cautioner,[114] the latter's obligation being parasitic on that of the former.

5-42. In determining whether the principal debtor's obligation has been satisfied, difficulties can arise if the principal debtor has incurred multiple debts to the same creditor, some of which are not covered by the cautioner's obligation. Suppose that a debtor owes two debts of £100, debt 1 and debt 2, to the same creditor, and that a cautioner guarantees payment of debt 1 (only). If the debtor pays the creditor £100 without specifying to which debt the payment relates, the payment may be appropriated as the creditor sees fit. In this example, the creditor will probably wish to use the money to extinguish debt 2, then pursue the cautioner for debt 1.[115] The rule admits of exceptions. If, for example, the guaranteed debt forms part of a current account of the sort existing between a bank and its customer, there is a presumption that payments not appropriated by the principal debtor will extinguish the debit entries in the order in which they arose.[116] Thus, in the example just given, if the two debts were part of a current account, debt 1 (the guaranteed debt) having been incurred before debt 2 (the non-guaranteed debt), the payment of £100 would be applied to debt 1, hence to the extinction of the cautioner's liability.[117] But in the absence of such a presumption as that attaching to current accounts, the general rule prevails, that is, the creditor will be free to apply indefinite payments by the principal debtor to indebtedness not covered by the guarantee.[118]

5-43. The above notwithstanding, the creditor is not permitted to appropriate payments in bad faith. In that regard, the facts of *Caledonian Banking Co v Kennedy's Trustee*s merit consideration. The case concerned the death of a cautioner, hitherto liable to a bank for his nephew's operations on a current account.[119] At the principal debtor's request, one of the trustees on the cautioner's estate, who was also an agent of the bank, paid £600 to the principal debtor in partial satisfaction of a legacy in the principal debtor's favour. The

[114] Stair I.8.9; Bankton IV.45.182; Bell, *Principles* § 258.

[115] The Scots approach to this problem is based on English law, most notably the cases of *Devaynes v Noble* (1816) 1 Mer 572 and *Cory Brothers & Co v Owners of the 'Mecca'* [1897] AC 286. For further details on the influence of these cases, see *Thomas Love & Sons v AM Carmichael Ltd* 1953 SLT (Sh Ct) 46 at 47–48.

[116] *Thomas Love & Sons v AM Carmichael Ltd* 1953 SLT (Sh Ct) 46 at 47–48.

[117] There are various ways in which this scenario might arise. Suppose that a cautioner is bound to the extent of £100 under a credit account. This being a continuing guarantee, the mere fact that the principal debtor pays £100 into the account does not prevent the cautioner from being liable for the ultimate balance. However, it may be that the cautioner is liable only for such advances as are made in a year. If, after one year has elapsed, £100 is due but the principal debtor subsequently pays in £100, the £100 debt guaranteed by the cautioner will be extinguished.

[118] 1953 SLT (Sh Ct) 46 at 47–48.

[119] *Caledonian Banking Co v Kennedy's Trustee*s (1870) 8 M 862 at 868.

bank then applied the £600 legacy in satisfaction of an unsecured portion of the principal debtor's indebtedness. It was only later that the bank apprised the cautioner's trustees of the guarantee's existence. It was held that the payment of £600, originating as it had from the cautioner's estate, should be applied to the cautioner's liability and that the bank had been in 'bad faith to receive it on any other footing'.[120]

(3) Discharge of the principal debtor's obligation

5-44. If the creditor discharges the principal debtor, the cautioner will be released automatically – a rule often attributed to the doctrine of accessoriness. As Lord McLaren remarked in *Morton's Trustees v Robertson's Judicial Factor*,[121] a cautioner becomes bound on the condition that another (the principal debtor) has failed to fulfil his obligation. There can, accordingly, be no 'guarantee of a principal obligation which has ceased to exist'.[122] One way in which a creditor might discharge the principal debtor's obligation, hence also that of the cautioner, is via novation, whereby the original contract between the principal debtor and creditor is altered or superseded by a new one.[123] In such cases, the cautioner will be released, provided that he became bound by reference to the principal debtor's original contract.[124] In that regard, continuing guarantees can prove problematic. They may refer to a course of dealing between the principal debtor and creditor rather than to a specific contract.

5-45. In *Nicolsons v Burt*,[125] a man entered into a contract of employment to act as a traveller 'for the sale of [his employer's] wine and spirits', his father becoming bound in a separate bond of caution for his 'defalcations'.[126] The traveller's contract stipulated a mutual notice period of one month, but that was not mentioned in the bond of caution. After the first three years of employment, the creditor renewed the contract such that it was no longer terminable at a month's notice.[127] While the Lord Ordinary held this to be a sufficiently 'substantial alteration' of the principal debtor's obligation to warrant liberation

[120] (1870) 8 M 862 at 868 per Lord Justice-Clerk Moncreiff. This case marks an exception to the rule that liability under a continuing guarantee does not terminate on the cautioner's death until it is withdrawn by the deceased cautioner's representatives and that the creditor is not obliged to give notice of the guarantee to the cautioner's representatives: L Macgregor et al (eds), *Commercial Law in Scotland* (7th edn, 2024) para 8-033.

[121] (1892) 20 R 72.

[122] (1892) 20 R 72 at 77.

[123] Stair I.18.8.

[124] *Nicolsons v Burt* (1882) 10 R 121.

[125] (1882) 10 R 121.

[126] (1882) 10 R 121 at 121.

[127] (1882) 10 R 121 at 123.

of the cautioner,[128] his decision was overturned by the Inner House. As the Lord President remarked:[129]

> [Where] the cautioner is a party to the original contract [between the principal debtor and the creditor] there is no doubt that the cautioner is entitled to see that the terms of the contract are carried out, and that all its stipulations are implemented and not innovated upon [. . .] But when the cautionary obligation is altogether apart and separate from the original contract, it appears to me that the same rule of law does not apply.

5-46. *Nicolsons v Burt*[130] can be contrasted with *Bonar v MacDonald*,[131] in which the cautioners for a bank agent's intromissions became bound in the same bond as the bank agent. In terms of that bond, the principal debtor agreed to have 'no other business of any kind, nor be connected in any shape with any trade, manufacture, or mercantile copartnery, nor be agent for any individual or copartnery, nor be security for any individual or copartnery, in any manner of way whatsoever'.[132] The creditor and principal debtor later entered into a new agreement, to which the cautioners were not parties, in which the principal debtor undertook liability for discounted bills.[133] Although he stopped short of reaching a final decision on the matter, the Lord Ordinary took the view that, as a consequence of the new agreement between the creditor and principal debtor, the cautioners had been liberated.[134] This new contract, having been entered into without the cautioners' consent, was seen to have superseded the old contract in reliance on which they had become bound. Nor did it matter that the sum that the bank sought to recover from the cautioners had not arisen from discounted bills. It sufficed that the new contract, by expanding the principal debtor's liability beyond what had been anticipated in the original bond, had increased the risk of his defaulting on his duties under that bond, and of his later lacking the resources with which to relieve the cautioners if they were sued for his default. The Lord Ordinary's view was ultimately upheld both by a majority of the Inner House and by the House of Lords.[135]

5-47. In short, so long as the cautioner becomes bound in, or by reference to, a specific contract between the principal debtor and creditor, the corresponding cautionary obligation will cease to exist if that contract is supplanted by a new one.

[128] (1882) 10 R 121 at 123–124.
[129] (1882) 10 R 121 at 125.
[130] (1882) 10 R 121.
[131] (1847) 9 D 1537.
[132] (1847) 9 D 1537 at 1541.
[133] (1847) 9 D 1537 at 1541–1542.
[134] (1847) 9 D 1537 at 1540–1544. For reasons on which it is unnecessary to elaborate here, the Lord Ordinary (at 1540) purported to '[report] the case without a judgment', and to describe the 'present inclination of his opinion' on the issues raised by the case.
[135] (1847) 9 D 1537 aff'd (1850) 7 Bell App 379.

(4) Prejudicial acts of the creditor

5-48. In one sense, the creditor is permitted to act prejudicially to the cautioner's interests. It has been observed already that, where a creditor has two debts, only one of which is guaranteed, and the debtor makes a payment without specifying to which debt it relates, the creditor will not usually be obliged to apply that payment in reduction of the guaranteed debt.[136] In fact, it is only certain types of prejudicial conduct that are prohibited, a notable example being prejudice to the cautioner's rights of relief.

5-49. A vivid example of the harm that a creditor can cause to a cautioner's relief is provided by *Lawson v Coldstream*.[137] A curator *loco absentis* was appointed for David Lawson, a soldier who had gone abroad, and a third party was appointed as the curator's cautioner.[138] Lawson never returned to Scotland and, as the years drew on, there was a mounting suspicion that he had died. In the meantime, the curator endeavoured to enforce a debt against one Ebenezer James Lawson, David Lawson's nephew, who was liable to his uncle for interest on a heritable bond. Before long, Ebenezer became suspicious of the curator, accusing him of embezzlement and threatening to initiate an inquiry into 'the application of the money' already received by him if he did not desist from demanding payment of the interest. The men reached a compromise: in return for the nephew not calling the curator to account for his intromissions, the curator would cease to press the nephew for payment of the debt due to the absent party and, moreover, would grant him possession of his uncle's heritable property 'without account'. When the curator fell bankrupt some fourteen years later, the absent party's nephew sued the cautioner for the curator's intromissions, but the claim was rejected. As the Lord Ordinary noted, the nephew and curator had concluded 'an illegal agreement [. . .] to the prejudice of the cautioner' which had the effect of discharging him from his cautionary obligation.[139] Apart from the illicit character of the agreement between the nephew and curator, the court placed considerable stress on the consequent prejudice to the cautioner's relief. At the time of the agreement, the curator had been solvent; when, years later, the nephew tried to enforce the cautioner's obligation, the curator had become insolvent.[140] It is in cases like this that the link between the automatic discharge of a cautioner and the protection of the cautioner's rights of relief is especially apparent.

[136] As discussed above at paras 5-41–5-43.
[137] (1837) 15 S 930.
[138] (1837) 15 S 930 at 934.
[139] (1837) 15 S 930 at 934–935.
[140] (1837) 15 S 930 at 934–935.

(a) Discharge of the principal debtor to the prejudice of relief

5-50. It has been mentioned already that the creditor's voluntary discharge of the principal debtor will usually liberate the cautioner, assuming that is done without the cautioner's consent. Although this outcome can be explained in terms of accessoriness,[141] there exists a further explanation for it: discharge of the principal debtor damages the cautioner's prospects of relief. If the cautioner were held liable to the creditor in spite of the principal debtor's liberation, and in spite of the fact that the liberated principal debtor would therefore have no obligation of relief, the cautioner would be prejudiced, in effect assuming ultimate liability for what was formerly the principal debtor's obligation.[142] Each explanation (accessoriness and prejudice to relief) is sufficient on its own to account for the cautioner's liberation where the principal debtor has been discharged.

5-51. In determining whether the cautioner has been liberated owing to the discharge of the principal debtor, a key question is whether the creditor intended by his agreement with the principal debtor an absolute discharge of the latter's obligation. In the absence of such an intention, the mere fact that the creditor has entered into a new agreement with the principal debtor will not, without more, liberate the cautioner. For instance, in *White v Robertson*,[143] a creditor's title to certain securities over the principal debtor's property was challenged by the trustee on the principal debtor's estate, and, to persuade the trustee to refrain from that challenge, the creditor paid him £210. This compromise was held not to liberate the cautioner. The payment of £210 was not a complete settlement of accounts between the creditor and the principal debtor's trustee, whereby the former abandoned all right to claim against the principal debtor's estate, but rather a settlement of one particular issue.[144] There was nothing in the creditor's agreement with the trustee to undermine the cautioner's prospects of relief.

5-52. In a similar vein, a distinction should be drawn between an absolute discharge of the principal debtor, whereby the cautioner's right of relief will undoubtedly be compromised, and a mere agreement not to sue the principal debtor (*pactum de non petendo*). In the latter case, the cautioner's right of relief against the principal debtor will be preserved. Suppose that Delilah owes the creditor, Ian, a £100 debt, for which Claudia stands cautioner. After receiving £80 from Delilah, Ian purports to discharge her. If the discharge is absolute, Delilah will no longer have any liability in respect of the debt. Thus, if the cautioner, Claudia, pays the remaining £20, she will have no right to claim that sum in relief from Delilah. Because of this prejudice to Claudia's right of relief, her

[141] *Morton's Trustees v Robertson's Judicial Factor* (1892) 20 R 72; Gow, *Mercantile Law* (n 2) 319.
[142] Gow, *Mercantile Law* (n 2) 321.
[143] (1864) 2 M 553.
[144] (1864) 2 M 553 at 553.

cautionary obligation will be extinguished by operation of law.[145] Alternatively, if the discharge granted to Delilah is regarded as a mere 'agreement not to sue', it will bind only the creditor, Ian, and so it will not release Delilah from her liability to Claudia in relief. Because it will still be competent for Claudia to claim relief of £20 from Delilah, Claudia's cautionary obligation to pay the balance of £20 will be intact.[146] In short, it is only if the creditor's discharge of the principal debtor is such as to undermine the cautioner's right of total relief that the latter party will be released. The potential theoretical drawbacks of that outcome are discussed below.

5-53. Though clear in the abstract, the distinction between a complete discharge and a mere agreement not to sue (*pactum de non petendo*) can become a delicate question of construction. Consider, for instance, *Crawford v Muir*,[147] a case which, despite not concerning caution in the strict sense of the word, provides a useful example of a *pactum de non petendo* in the analogous context of bills of exchange. The creditor under a bill stated that the acceptors (i.e. the principal debtors) had been 'discharged', but he also reserved 'entire' his rights against any of the other obligants under the bill, including the indorser (i.e. a party analogous to a cautioner).[148] Affirming the decision of the Inner House,[149] the House of Lords held that the discharge granted by the creditor was a mere agreement not to sue the acceptors, effecting no release of the indorser.[150] The express reservation of the creditor's rights against the other obligants under the bill, including the indorser, was taken to mean that the indorser's right of relief against the acceptors had remained intact. Similarly, in *Smith v Ogilvies*,[151] the creditors in a bond acceded to the principal debtor's composition contract but expressly reserved 'recourse' against his cautioner.[152] This was held by both the Inner House and the House of Lords to be a mere agreement not to sue the principal debtor rather than a complete discharge.[153]

5-54. There is a theoretical clumsiness to the above outcomes. The prospect of a creditor waiving his right to sue the principal debtor but reserving the right to sue the cautioner sits uneasily with the doctrine of accessoriness, which affords another basis – separate from that concerning prejudice to relief – for the automatic release of a cautioner following the voluntary release of the principal debtor. As the Lord Justice-Clerk noted in *Crawford v Muir*,[154] it

[145] *Crawford v Muir* (1875) 2 R (HL) 148 at 149 per Lord Cairns, LC.
[146] (1875) 2 R (HL) 148 at 149 per Lord Cairns LC.
[147] (1875) 2 R (HL) 148.
[148] (1875) 2 R (HL) 148 at 148.
[149] *Crawford v Muir* (1873) 1 R 91.
[150] (1875) 2 R (HL) 148.
[151] (1821) 1 S 159.
[152] (1821) 1 S 159 at 159.
[153] (1821) 1 S 159 aff'd (1825) 1 W&S 315.
[154] (1873) 1 R 91.

'seems anomalous that the obligation of the surety should subsist to a greater degree than that of the principal'.[155] The difficulty is that, if the cautioner can still be sued but the principal debtor cannot, the former is bound under a more onerous obligation than that of the latter. The principal debtor remains liable in a sense. However, in a question with the creditor, his obligation is akin to a natural obligation, having 'all the effects of full obligations except the right of producing an action'.[156]

(b) 'Giving time'

(i) Function of the doctrine

5-55. Sometimes the creditor, short of discharging the principal debtor once and for all, will agree to payment at a later date, a practice known as 'giving time'. Somewhat counter-intuitively, this slackening of the principal debtor's obligation may effect a complete liberation of the cautioner, partly on account of prejudice to the latter's right of relief. If, for instance, a cautioner guarantees a debt of £100, payable on 1 October, the cautioner will have a right, after paying £100 on that date, to seek relief from the principal debtor. However, if the creditor shifts the due date to 1 November, the cautioner will no longer be able to seek relief from the principal debtor on 1 October, but will instead have to wait till 1 November. What might appear a trivial inconvenience in one case could make a significant difference to the cautioner's prospects of recovery in another. Suppose that the principal debtor becomes insolvent on 15 October. If (contrary to the legal position) the cautioner remained liable to the creditor, he would be obliged to pay the debt on 1 November, and only then could he seek relief from the now-insolvent principal debtor. In this way, if the creditor were allowed to postpone the due date with impunity, the cautioner's right of relief would be compromised. The giving time doctrine heads this potential prejudice off at the pass by releasing the cautioner as soon as the creditor grants the delay.

5-56. The giving time doctrine is a specific application of the principle that a creditor cannot unilaterally discharge the principal debtor without forfeiting his recourse against the cautioner.[157] As Gloag and Irvine explain:[158]

> The discharge of a cautioner by the creditor giving time to the debtor is merely a particular application of the general principle that an alteration of the original contract liberates the cautioner. To 'give time' means to extend the period at which, by the contract between them, the principal debtor was originally liable to pay his

[155] (1873) 1 R 91 at 94–95.
[156] Erskine III.1.4.
[157] As discussed at paras 5-50–5-54 above.
[158] Gloag and Irvine, *Rights in Security* (n 30) 887.

debt to the creditor, – the extension being the result of a new contract between the [principal debtor and creditor], to which the cautioner does not assent.

5-57. Thus, many of the previously mentioned considerations regarding an absolute discharge of the principal debtor are also relevant to the giving time doctrine. On one view, the cautionary obligation is extinguished because it is accessory to the principal debtor's original obligation, which came to an end when it was replaced with an obligation to pay at a later date. In addition, as already mentioned, the giving time doctrine is often accounted for in terms of prejudice to the cautioner's right of relief. In *Caledonian Banking Co v Kennedy's Trustees*,[159] the creditor's decision to postpone the due date of the principal debtor's debt was deemed to have put the 'whole available assets of the [principal] debtor [. . .] beyond the reach of the cautioner's relief',[160] and so the cautioner was liberated. The link between relief and giving time was also made manifest in *Forsyth v Wishart*,[161] where a creditor's agreement to a delay was seen to undermine the cautioner's right of relief, depriving him of the 'power' to pay the debt and then to 'have recourse against the principal debtor in the same way as he might otherwise have proceeded'.[162]

(ii) What Constitutes giving time?

5-58. Giving time has a technical meaning. It signifies that the creditor has entered into a contract with the principal debtor to postpone the due date of the latter's obligation, thereby preventing the cautioner from paying at the original due date and seeking relief immediately thereafter.[163] A mere omission by the creditor to enforce the principal debtor's obligation will not amount to giving time. So long as the due date of the debt has not been changed, it will be open to the cautioner, come that date, to pay the creditor and obtain relief from the principal debtor in the usual way.

5-59. *Hay and Kyd v Powrie*[164] illustrates the law's strict definition of giving time. One party, who can be referred to loosely as a cautioner,[165] became bound

[159] (1870) 8 M 862.
[160] (1870) 8 M 862 at 868.
[161] (1859) 21 D 449.
[162] (1859) 21 D 449 at 452.
[163] *Creighton v Rankin* (1840) 1 Rob App 99 at 131–135; *Johnston v Duthie* (1892) 19 R 624 at 628–629. Alternatively, the creditor might tie his hands by entering into a contract with a third party for the principal debtor's benefit (*ius quaesitum tertio*): *Forsyth v Wishart* (1859) 21 D 449 at 451–452. With regard to third-party rights in contract, see now the Contract (Third Party Rights) (Scotland) Act 2017.
[164] (1886) 13 R 777.
[165] He was not a cautioner in the strict sense of the word because he became liable as the co-acceptor of a bill of exchange. Thus, he was liable whether or not the buyer of the goods (his fellow acceptor) defaulted: Bills of Exchange Act 1882 s 28(2). For further details on the differences between caution and bills of exchange, see paras 3-36 and 3-59 above.

for his tenant's purchase of cattle on credit. The cautioner did so by accepting bills to help the purchaser obtain the desired credit and by accepting 'renewal bills' whenever further credit was needed. The understanding was that if, when the first bill fell due, the buyer was unable to pay the full amount due to the creditor under it, he would pay as much as he practicably could and then grant a new bill, payable at a later date, for the balance.[166] This arrangement soon went awry. On three occasions when one of the bills fell due, the purchaser received his renewal bill signed by the cautioner as intended, but the purchaser failed to pay the difference between the renewal bill and the original bill. Neither the purchaser nor the creditor intimated to the cautioner that the difference had not been paid on the three bills, and so the cautioner was led to believe that the purchaser had paid more than he had. Even so, when the purchaser later became bankrupt, it was held that the creditor could still pursue the cautioner for the full amount due under the original bills.[167] In the court's determination, the creditors had not given time to the principal debtor because, although they had not informed the cautioner of the principal debtor's failure to pay the difference between the renewal bills and the original bills, and although they had not sought immediate payment, at no point had they entered into a private contract with the principal debtor for the balance to be repaid at some later date. It was, in the court's view, incumbent on the cautioner to see to the retiral of the original bills by the principal debtor.[168] Given the cautioner's seemingly genuine belief that the original bills had been retired as planned, the inapplicability of the giving time doctrine to this case seems somewhat harsh.

5-60. *Hamilton's Executor v Bank of Scotland*[169] provides a further example of the law's strict definition of giving time. Cautioners guaranteed a debt owed by a company to a bank. The bank chose to refrain from enforcing the debt, this being in their interests as a shareholder in that company. Although the company was solvent, the bank did not want to sue it until a sale of it could yield a fifty per cent dividend for its shareholders. When the company subsequently went into liquidation, the bank had recourse against the cautioners. In response, the cautioners claimed that, in omitting to enforce the debt earlier, when the company would have been able to pay it in full, the bank had occasioned them prejudice and had forfeited thereby their rights under the guarantee. However, both the Outer House and Inner House held the bank's omission to sue the company to be a legitimate course of action. There was nothing in this omission to prevent the cautioners from paying the debt and obtaining relief from the company while it remained solvent.[170]

[166] (1886) 13 R 777 at 778.
[167] (1886) 13 R 777 at 778–779.
[168] (1886) 13 R 777 at 782.
[169] 1913 SC 743.
[170] 1913 SC 743 at 748–750.

5-61. So far, the meaning of giving time has been considered in the context of caution for fixed monetary debts, in which the cautioner becomes bound with a specific due date in mind and so anticipates a specific date on which his right of relief will arise. However, the doctrine applies also where the cautioner has become bound in a continuing guarantee. In such cases, the question whether time has been given depends upon the reasonableness of the period of credit extended to the principal debtor, and the touchstone by which reasonableness has often been measured is the ordinary custom of the relevant trade. In *Griffith v Wylie*,[171] a cautioner granted a letter of guarantee for the payment of the price of umbrellas sold to a merchant, but this did not stipulate a specific term of credit. It was held that the grant of an additional ten months' credit did not release the cautioner because it was not 'unusual' in that particular trade.[172] Similarly, it was held in *Prest v Hotson*[173] that where the principal debtor's obligation does not have a precise due date, the creditor will be free to grant additional credit to the principal debtor so long as it is not 'excessive' or 'contrary to mercantile usage'.[174]

5-62. Much has been said, thus far, of the prejudice that would be occasioned by giving time if the cautioner were not automatically released, but there are conceivably cases in which giving time would operate to the cautioner's advantage, notably, where the cautioner, no less than the principal debtor, desires a delay. In any case, the giving of time is not certain to harm the cautioner's prospects of relief, which raises the question: must the cautioner show actual, rather than merely theoretical, loss or prejudice if the giving time doctrine is to be invoked? This question has repeatedly been answered in the negative. As Lord Wood stated in *Forsyth v Wishart*,[175] giving time serves to liberate the cautioner 'irrespective altogether of the results that may be produced by the change'.[176] It is, in the words of Lord Cowan, a matter of 'strict law'.[177] Thus, for the purposes of liberation by giving time, it suffices that there has been an increased risk to the cautioner's prospects of relief, even if that risk would have come to nothing in the end.

(iii) The effect of consent by the cautioner

5-63. A key answer to the charge that the creditor has released the cautioner by giving time to the principal debtor, besides the previously discussed concept

[171] (1809) Hume 96.
[172] (1809) Hume 96 at 96.
[173] (1809) Hume 97.
[174] (1809) Hume 97 at 97–98.
[175] (1859) 21 D 449.
[176] (1859) 21 D 449 at 452.
[177] (1859) 21 D 449 at 452–453.

of a *pactum de non petendo*,[178] is that the cautioner consented to the giving of time and so is barred from relying on it as a ground for liberation. Often, such consent takes the form of an express waiver in the contract of caution. For instance, in *Hamilton's Executor v Bank of Scotland*,[179] the cautionary obligation stated that, 'you [the creditor] may at any time or times at your discretion grant to the said [principal debtor] [. . .] any time or other indulgence, and compound with them [. . .] without discharging or satisfying the liability of us'.[180] On other occasions, consent to giving time may be inferred from the cautioner's words or conduct when time is given. For instance, in *Bowie v Watson*, *MacNight and Co*,[181] a cautioner's plea that he had been liberated by the creditor's accession to a composition of the principal debtor's debts was rejected, partly because this cautioner had, himself, acceded to the offending composition, and had agreed to be a cautioner for its 'due implement'.[182] Having tacitly consented to the giving of time, the cautioner was barred from raising an objection later on. Notwithstanding those points, the cautioner must do or say *something* to indicate consent to the giving of time. Mere knowledge on the part of the cautioner that time has been given is not equivalent to acquiescence.[183]

(c) Relinquishing a security

5-64. It has long been established in Scots law that a cautioner who fulfils the principal debtor's obligation is entitled to an assignation from the creditor of the latter's rights against the principal debtor.[184] This right is rooted in the *beneficium cedendarum actionum* of Roman law.[185] Importantly, the cautioner's right to an assignation encompasses not only the creditor's claim against the principal debtor but also the benefit of any attendant real securities held by the creditor over the latter's property. Lord Moncreiff neatly states the law as follows:[186]

[178] See paras 5-50–5-54 above.
[179] 1913 SC 743.
[180] 1913 SC 743 at 747.
[181] (1840) 2 D 1061.
[182] (1840) 2 D 1061 at 1065. See also *Wright's Trustees v Hamilton's Trustees* (1834) 12 S 692.
[183] *Allan, Buckley Allan and Milne v Pattison* (1893) 21 R 195.
[184] *Ewart v Latta* (1865) 3 M (HL) 36 at 40.
[185] For an express reference to the *beneficium c.a.*, see, e.g., the arguments advanced for the cautioner in *Wallace v Elibank* (1717) Mor 3389 at 3389.
[186] *Sligo v Menzies* (1840) 2 D 1478 at 1486 per Lord Moncreiff. This statement of principle was made in one of several dissenting judgments in the Inner House, in which Lord Moncreiff rejected a cautioner's argument that her interest in the creditor's security could inhibit the creditor's conduct in relation to the security subject. Even then, Lord Moncreiff did not 'in the least doubt the general doctrine of law' that a cautioner who pays the debt is entitled to the benefit of the creditor's securities. The decision of the majority in *Sligo* is discussed at para 5-66 below.

> [W]here a loan is made, and in security of it the creditor receives at once a heritable bond from the principal debtor, and a personal obligation by a cautioner, whether in the same bond or by a separate writing, and whether for the whole debt or for the interest only, such cautioner, on making payment of the debt, is in equity entitled to the benefit of the real security, and to an assignation to that right, in so far as this can take place without prejudice to the lawful rights of the creditor.

5-65. The cautioner's right to securities after paying the creditor has a significant impact on the creditor's rights against the cautioner before any payment has been demanded: that is, if the creditor voluntarily surrenders his security rights over the principal debtor's property, the cautioner will be liberated from the cautionary obligation at least to the extent that the loss of the security rights has caused him loss.[187] This applies not only to the voluntary relinquishment of an extant security right but to the omission to complete a security right which the creditor, expressly or impliedly, undertook to complete. This is exemplified by the House of Lords decision in *Fleming v Thomson*.[188] There various cautioners became bound in respect of a debt that was also secured over the principal debtor's heritable property. However, although the bank had received a disposition of the property in security, it had failed to complete its title to it. Overturning the decision of the Inner House, the House of Lords held that the cautioners had been liberated from their obligation: they had become bound 'on the faith' of the principal debtor's property being conveyed in security to the bank and the bank's failure to achieve this had cost it its rights against the cautioners.[189] A similar, but more extreme, decision was reached in *Storie v Carnie*,[190] where it was held that, if a cautioner became bound in the expectation that the creditor would obtain a certain security, named in the obligatory document, the cautioner would be liberated if the creditor failed to obtain that security. Whereas in *Fleming v Thomson*, the cautioner's obligation had been subject to an express condition, here the creditor's obligation to obtain a particular security had been 'implied'.[191]

5-66. Sometimes the cautioner's right to protection of the creditor's securities appears to clash with the creditor's own rights over them, a tension much to the fore in *Sligo v Menzies*.[192] A debtor owed two debts to the same creditor,[193] for one of which (debt 1) the debtor granted a security over his heritable property. In addition to this security, a third party called Menzies stood cautioner for

[187] *Sligo v Menzies* (1840) 2 D 1478 at 1486; Bankton I.23.46; Erskine III.3.66. See also, H Home, Lord Kames, *Principles of Equity* (3rd edn, 1778, reprinted with new pagination, ed M Lobban, 2014) 86.
[188] (1826) 2 W&S 277.
[189] (1826) 2 W&S 277 at 290–293.
[190] *Storie v Carnie* (1830) 8 S 853.
[191] (1830) 8 S 853 at 857.
[192] (1840) 2 D 1478.
[193] (1840) 2 D 1478 at 1478. The facts have been simplified slightly. There were, in fact, three debts. However, only two of those debts were relevant to the case.

payment of interest on debt 1. Later, the debtor granted a second security over his heritable property for another debt (debt 2), which the cautioner did not guarantee. When the principal debtor became insolvent, the question arose in what order the first and second securities should be ranked.[194] The creditor argued that he was entitled to satisfy debt 2 by using the second heritable security, and that he could then sue the cautioner for debt 1.[195] The cautioner maintained that the securities ought to be ranked in the order in which they had been granted, failing which she would be released from her obligation.[196] This argument was accepted by a majority of the Inner House, which held that the creditor could not rank ahead of the cautioner in the manner proposed.[197] There are limits, therefore, to the principle that the creditor's interests trump those of the cautioner.[198]

5-67. As a general rule, the doctrine whereby a cautioner is liberated by the creditor's relinquishment of a real security results only in a partial discharge of the cautioner's obligation.[199] If, say, a cautioner is liable for a debt of £100 and the creditor relinquishes a security over the principal debtor's property worth £80, the cautioner will be discharged only to the extent of £80 and will consequently remain liable for £20. To obtain liberation at all, however, it must be shown that the creditor's relinquishment of the security was to the cautioner's detriment. This point is exemplified by *Paisley Union Bank v Hamilton*,[200] which concerned the creditor's arrestment of funds in the principal debtor's bank account.[201] The question was whether the creditor, in relinquishing this arrestment to a certain extent, had liberated the cautioner to the same extent. It was held that the cautioner had not been liberated at all for, even after the arrestment had been 'loosed', the funds remaining in the creditor's hands were still more than sufficient to cover the debt for which the cautioner was liable.[202] The need for actual loss makes the doctrine relating to discharge of security rights less severe than that relating to giving time, which, as explored above, effects total liberation of the cautioner based on a mere increase in risk to the cautioner's right of relief against the principal debtor.[203]

5-68. In short, not only is a cautioner entitled to stand in the creditor's shoes on fulfilling the cautionary obligation, to the effect of obtaining any security rights held by the creditor over the principal debtor's estate in respect of the

[194] (1840) 2 D 1478 at 1479.
[195] (1840) 2 D 1478 at 1479.
[196] (1840) 2 D 1478 at 1479.
[197] See especially (1840) 2 D 1478 at 1488–1493 per Lord Mackenzie.
[198] See also *Fothringham v Scott* (1859) 21 D 737.
[199] *Sligo v Menzies* (1840) 2 D 1478 at 1489 per Lord Mackenzie.
[200] (1831) 9 S 488.
[201] (1831) 9 S 488 at 493.
[202] (1831) 9 S 488 at 496–497.
[203] The giving time doctrine is discussed at paras 5-55–5-63 above.

guaranteed debt,[204] the cautioner may also insist that the creditor take good care of those shoes in the meantime, not doing anything to weaken the cautioner's potential security interests.

(d) Discharge of a co-cautioner

5-69. If a creditor discharges one or more cautioners in the same obligation, that will often operate to the others' prejudice, and that is so whether the cautioners are proper cautioners or improper cautioners.[205] To combat that prejudice, the Mercantile Law Amendment (Scotland) Act 1856 provides that the effect of the discharge is the automatic release of all the other cautioners except any cautioners who agreed to the discharge.[206] Similar protection exists at common law.[207] Before exploring these regimes, it is worth considering how cautioners would be affected if the creditor were able to discharge one of their number with impunity. If there are three improper cautioners (C1, C2 and C3) jointly and severally liable for a total of £300, C1 will, on paying the creditor, be entitled to *pro rata* relief from C2 and C3 totalling two thirds of the debt (£200).[208] However, if C2 is voluntarily discharged by the creditor and (contrary to the legal position detailed below) C1 and C3 nonetheless remain bound, C1 will be entitled to *pro rata* relief from C3 amounting to a mere one half of the debt (£150) and nothing from C2.[209] In short, if a creditor were able unilaterally to liberate one cautioner but to sue the remaining cautioners for the full debt, those cautioners would be forced to pay a larger amount overall.

(i) Common law protection

5-70. Before the 1856 Act, the release of one cautioner generally had the effect of decreasing the liability of the others.[210] Suppose that there are three

[204] The notion of standing in the creditor's shoes can be found, for example, in the case of *Joint Liquidators of Simclar (Ayrshire) Ltd v Simclar Group Ltd* [2011] CSOH 54, 2011 SLT 1131 at para 10.

[205] An improper cautioner becomes bound to the creditor jointly and severally: Bell, *Principles* § 246.

[206] Mercantile Law Amendment (Scotland) Act 1856 s 9.

[207] Bell, *Principles* § 269; *Smith v Harding* (1877) 5 R 147; *Morgan v Smart* (1872) 10 M 610 at 615 per Lord Cowan.

[208] Stair I.8.9.

[209] A similar point can be made with regard to a debt of £300 guaranteed by three proper cautioners, one of whom the creditor decides to release. The benefit of division is of greater use if the debt is divided among three cautioners rather than between two.

[210] Bankton I.23.44; Erskine III.3.68; *Wallace v Elibank* (1717) Mor 3389; *Paterson v Bonar* (1844) 6 D 987 at 1001–1006; *Morgan v Smart* (1872) 10 M 610 at 615. A similar principle applies to the release of one of several co-principal obligants: *Primary Healthcare Centres (Broadford) Ltd v Humphrey* [2010] CSOH 129, 2010 GWD 35-730 at paras 22-23 per Lord Hodge.

cautioners (C1, C2 and C3), all liable for £300, and that the creditor releases C1. According to the common law rule of partial release, C2 and C3 are now liable to the creditor for a total of £200 rather than for the original £300. To preserve the original distribution of ultimate liability (£100 per cautioner), the liability of C2 and C3 has been reduced in amount. Otherwise stated, C2 and C3 are released to the extent that their rights of relief have been prejudiced.

5-71. If, exceptionally, there is no right of *pro rata* relief between two cautioners, the creditor's release of one does not effect even a partial liberation of the other. In *Morgan v Smart*,[211] a principal debtor owed £105 to the creditor, and two cautioners became bound in separate documents for specific portions of that sum: £70 and £35 respectively.[212] When the creditor released one of the cautioners, it was held by the Inner House, overturning the decision of the Outer House, that the obligation of the other was unaffected. The cautioners had become bound for separate sums and so were not regarded as enjoying rights of relief against one another:[213]

> [T]he [creditor] is entitled to prevail in this action to the extent of the proportion of the remaining balance, for which the [undischarged cautioner] had no claim for contribution [i.e. *pro rata* relief] against the other cautioner, who has been discharged.

5-72. This case raises fundamental questions about the nature of rights of relief. For now, what should be noted is that the common law doctrine that the release of a cautioner effects a partial release of a co-cautioner applies only in so far as there has been harm to that co-cautioner's prospects of relief. If, as in *Morgan*, there were never any such prospects, the creditor's act of discharging one cautioner is not seen to have a prejudicial effect on the other, who therefore remains liable to the creditor in full.[214]

5-73. It is once again important to distinguish an absolute discharge of a cautioner from a mere agreement not to sue that cautioner (*pactum de non petendo*), for only in the former case will the law intervene.[215] Thus, if a creditor, Brian, discharges Robert but reserves his recourse against Donna and Michael, this may be interpreted not as an absolute discharge, such as to shield Robert from claims for *pro rata* relief by Donna and Michael, but rather as a mere agreement that Brian will not sue Robert. If Robert obtains his discharge after

[211] (1872) 10 M 610.

[212] (1872) 10 M 610 at 611.

[213] (1872) 10 M 610 at 615 per Lord Justice-Clerk Moncreiff.

[214] The reason why there was not deemed to be a right of relief in this case is explored in chapter 7.

[215] For examples of *pacta de non petendo* in cases involving co-cautioners and analogous cases concerning co-principal debtors, see, e.g., *Gilmour v Finnie* (1832) 11 S 193 at 194; *Church of England Life and Fire Assurance Co v Wink* (1857) 19 D 1079; *Morton's Trustees v Robertson's Judicial Factor* (1892) 20 R 72. The difference between an absolute discharge and a *pactum de non petendo* is discussed above at paras 5-50–5-54.

paying his *pro rata* share of one third, the natural reading of that discharge is that the creditor deems Robert's payment sufficient and will seek the remaining two thirds from Donna and Michael; it does not exclude the possibility that Robert will be pursued for relief later on if Michael becomes insolvent and Donna has to pay more than her *pro rata* share of the debt.

(ii) Statutory protection

5-74. Further to the protection at common law, section 9 of the Mercantile Law Amendment (Scotland) Act 1856 provides for the following rule:

> [W]here Two or more Parties shall become bound as Cautioners for any Debtor, any Discharge granted by the Creditor in such debt or obligation to any One of such Cautioners without the Consent of the other Cautioners shall be deemed and taken to be a Discharge granted to all the Cautioners; but nothing herein contained shall be deemed to extend to the Case of a Cautioner [*sic*][216] consenting to the Discharge of a Co-cautioner who may have become bankrupt.

5-75. The common law rule of partial release remains important in cases not governed by the statutory regime, notably the release not of a cautioner but of a co-principal debtor. More problematic is the scope of the 1856 Act *within* the law of caution. Are there any scenarios in which a cautioner whose co-cautioner has been voluntarily released would be protected at common law but not under the 1856 Act? Clearly, cautioners who enjoy no right of relief against one another are not protected under either regime,[217] but the question remains whether the 1856 Act otherwise applies to all cautioners. If two cautioners become bound for the same sum of £100 in separate documents, it is clear that they enjoy a right of mutual relief,[218] but it does not follow from this that they also enjoy the protection of the 1856 Act. In *Morgan v Smart*,[219] Lord Cowan stated that section 9 of the 1856 Act applies only to cautioners who become bound jointly and severally in the same document,[220] or to those whose obligations are at least 'substantially conjunct'.[221] Clearly, then, the 1856 Act's protection extends to the case of cautioners who become bound jointly and severally for £100 either in the same document or, short of signing the same document, in the knowledge of, and in reliance on, one another. However, if those cautioners become bound not simply in separate documents but in mutual ignorance,

[216] This is most likely a drafting error. As Gloag and Irvine suggest, the phrase is probably supposed to be, '. . . Case of a *Creditor* consenting to the discharge of a Co-cautioner' (Gloag and Irvine, *Rights in Security* (n 30) 912).

[217] *Morgan v Smart* (1872) 10 M 610.

[218] Stair I.8.9.

[219] (1872) 10 M 610.

[220] That said, there is nothing in the wording of section 9 of the 1856 Act to restrict its scope to cautioners bound jointly and severally.

[221] (1872) 10 M 610 at 615 per Lord Cowan.

arguably their obligations are not even 'substantially conjunct', which would suggest that they do not enjoy the protection of the 1856 Act. In fact, there are at least some indications that a broader view of the 1856 Act's scope ought to be taken, such that, so long as the cautioners are bound in the same debt, and hence entitled to *pro rata* relief from one another, their obligations may be regarded as substantially conjunct.[222] This would suggest that, as far as cautioners are concerned, the 1856 Act has superseded the common law, with the result that in any case where a creditor releases a cautioner, and the other cautioners would have enjoyed a right of relief against that cautioner, those others will be released in full. All that matters is that they are cautioners and that they were bound in the same obligation.

5-76. One might question the merits of the statutory protection, and the severity with which it operates. Why, if only one cautioner has been discharged, should the others be released completely when, at common law, they would have been released only to the extent to which their rights of relief had been impaired? It is submitted that total release is justifiable where cautioners have become bound in the same document (or otherwise in concert or by reference to one another), on analogy with the doctrine of total release in such cases as *Paterson v Bonar*.[223] If three prospective cautioners (C1, C2 and C3) are named in a document for an obligation of £300, but C1 does not sign, the law does not simply decrease the total amount guaranteed by C2 and C3 to £200; rather, it liberates C2 and C3 completely.[224] C2 and C3 anticipated that C1 also would become bound, and their liability to the creditor was conditional on that expectation being met. Perhaps, as in *Paterson v Bonar*, C1 was a 'solvent and prudent person'[225] to whom C2 and C3 particularly trusted for their relief. Nor is the prospect of relief the only factor that might inform one cautioner's willingness to become bound. In that regard (and although his decision on the facts was reversed),[226] the Lord Ordinary (Lord Kinloch) in *Simpson v Fleming*[227] expressed an important point: 'the privilege of co-cautioners is not merely mutual relief, but mutual reliance. They depend on each other for their attestation to the debtor's solvency, and their watchfulness over the debtor's proceedings.'[228] This is another subtlety to

[222] Gloag, *Contract* (n 101) 217, in reference to *Morgan v Smart* (1872) 10 M 610 at 615 per Lord Cowan. See also Gow, *Mercantile Law* (n 2) 322. However, see also the *obiter dictum* of Lord President Clyde in *Union Bank of Scotland v Taylor* 1925 SC 835 at 841 to the effect that cautioners who are bound separately and between whom there may be rights of relief do not enjoy the protection of the 1856 Act. This is discussed below at para 7-109.

[223] (1844) 6 D 987.

[224] (1844) 6 D 987. This rule is explored in greater detail at paras 4-16–4-23 above.

[225] (1844) 6 D 987 at 1003.

[226] (1860) 22 D 679. The Lord Ordinary's decision was reversed on appeal to the Inner House because the decisions in *Paterson v Bonar* (1844) 6 D 987 and *Scottish Provincial Assurance Co v Pringle* (1858) 20 D 465 were deemed inapplicable to cautioners bound in a judicial context (judicial cautioners).

[227] (1860) 22 D 679.

[228] (1860) 22 D 679 at 680–681.

which a purely quantitative analysis of co-cautioners' risk (that is, an analysis based solely on the number of cautioners) cannot do justice. In considering whether to become bound as a cautioner, the calculus of risk is as sensitive to the identity of one's would-be co-cautioners as to their number. It is therefore for good reason that all cautioners are liberated in full if even one prospective co-cautioner does not become bound.

5-77. Returning, then, to section 9 of the 1856 Act, let it be supposed that three cautioners, Nicholas, Adriana and Joanna, become bound in the same document and that, in deciding to become bound, Nicholas trusts particularly to Adriana's creditworthiness and solvency, and places considerably less reliance on Joanna. When such qualitative considerations are borne in mind, the fact that section 9 effects a complete release of Nicholas and Joanna if Adriana is released is arguably more appropriate than a simple reduction in the extent of Nicholas' and Joanna's respective liabilities. That Nicholas wished to become bound with Adriana is treated almost as an implied condition on his obligation to the creditor, the violation of which releases him completely.

5-78. If, however, the 'total liberation' scheme[229] under the 1856 Act owes its credibility to the notion that each cautioner becomes bound on condition that the others remain bound, arguably its applicability outside that context is excessive. Where two cautioners become bound for the same debt in mutual ignorance, it is difficult to see why the release of one should effect a total release of the other. Neither cautioner contracted on the understanding that another would be bound as well. Far easier to defend, in point of principle, is a rule of partial release such as applies at common law: that is, a creditor who releases one of two cautioners does needless harm to the other's right of relief, and that is so even if the cautioners became bound in mutual ignorance. There is therefore an argument that the other cautioner ought to be liberated, but only to the extent that his prospects of relief have been harmed.[230]

5-79. In sum, the release of one cautioner may effect a release of the others, but there are variations in the extent of the release and (arguably) the reasons for which it is granted:

A common law rule of (typically) partial release
If C1 is released voluntarily, C2 is released automatically to the extent that his right of relief against C1 has been prejudiced. As will become clear in chapter 7, the justification for this right to be released can be seen to flow from the same equitable basis as that for the right of relief itself.[231]

A statutory rule of total release
To some extent, this is the mirror image of the doctrine in such cases as *Paterson*

[229] (1872) 10 M 610 at 615 per Lord Justice-Clerk Moncreiff.
[230] This issue is explored further at paras 7-106–7-109 below.
[231] Again, see paras 7-106–7-109 below.

v Bonar.[232] Just as there is a suspensive condition that all must sign before any cautioner is bound, so there is a resolutive condition whereby a cautioner ceases to be liable if a co-cautioner is released. This can be thought of in contractual terms: cautioners who become bound in reliance on the presence of other cautioners should, in a question with the creditor, be liberated in full if any one of those cautioners is released. However, the 1856 Act seems to go beyond that contractual logic and to release cautioners in full in all circumstances, provided that they enjoy rights of relief against one another. To that extent, the statute goes beyond what is justifiable in contract (protection of expectations) and in equity (harm to relief) to serve a broader policy of protecting cautioners as a class. It has been submitted that it would be more appropriate, where cautioners become bound for the same debt but in mutual ignorance, to leave their protection to the common law regime of partial release.

(e) Duties of disclosure

5-80. As mentioned above, the doctrine of giving time does not usually extend to the case of a mere omission to sue; rather, if the cautioner is to be released, there must be a positive contract between the creditor and principal debtor to the effect of granting the latter a delay. To that general rule, there exists at least one exception.

5-81. If a cautioner guarantees that an employee, agent or other person in a position of trust will fulfil his role honestly, that is known as a 'fidelity guarantee'.[233] One speciality of these cautionary relationships is a duty of disclosure on the part of the creditor, both as a prerequisite to the constitution of the cautioner's obligation,[234] and as a duty arising during the currency of the cautioner's obligation.[235] For instance, if the employer (creditor) discovers that the employee (the principal obligant) is embezzling money, or committing some other breach of the duty to act faithfully and honestly, the cautioner for the employee must be apprised of that breach of duty, failing which he will be released from his cautionary obligation.

5-82. *Snaddon v London, Edinburgh and Glasgow Assurance Co*[236] provides a neat illustration of this duty of disclosure. A man became bound to an insurance company as a cautioner in respect of the conduct of one of their agents. The agent embezzled money on 11 August 1897, a date subsequent to the constitution of the cautionary obligation. He confessed his crime to the creditors on 25 September but had absconded by 8 October. It was not until

[232] (1844) 6 D 987.
[233] E A Marshall, *Scots Mercantile Law* (3rd edn, 1997) para 8.54.
[234] *French v Cameron* (1893) 20 R 966.
[235] *Snaddon v London, Edinburgh and Glasgow Assurance Co* (1902) 5 F 182.
[236] (1902) 5 F 182.

11 October that the cautioner was informed of the agent's wrongdoing. The cautioner argued that he had been prejudiced by the creditor, whose dilatoriness had allowed the principal debtor to abscond, and thus escape his obligation to relieve the cautioner.[237] This plea was accepted by the Inner House, which held the cautioner to have been liberated from his obligation.[238] Lord Moncreiff even remarked that the creditor had given time to the principal debtor,[239] an unusual use of a term, which, as explored above, almost never refers to a mere omission.[240] The need for the creditor to inform the cautioner of the principal debtor's breach was also emphasised in *Nicolsons v Burt*,[241] again in the context of a fidelity guarantee.

5-83. The reason for releasing the cautioner in cases like these relates, fundamentally, to the right of total relief. Like any other cautioner, the cautioner in a fidelity guarantee may, once the principal debtor incurs liability to the creditor and once the cautioner has paid the creditor, demand relief from the principal debtor. As made clear by such cases as *Hay and Kyd v Powrie*,[242] the onus is usually on the cautioner rather than on the creditor to ensure that the principal debtor performs his obligation. In such cases, the cautioner will often have as sound a measure of the principal debtor's financial state as has the creditor, especially where the cautioner interposes as a friend of the principal debtor; consequently, it is not necessary for the creditor to inform the cautioner of any arrears.[243] However, in a fidelity guarantee, where the cautioner guarantees the fulfilment of the duties of an agent or employee, the creditor will have 'opportunities of judging [the agent or employee's conduct] which the cautioner has not'.[244] Thus, if the creditor learns of embezzlement (or of some other infraction) on the principal debtor's part, it is imperative that the cautioner be informed immediately, failing which he will be released. Were a cautioner not released in these circumstances, he would be deprived of the opportunity to terminate the guarantee and to seek relief.

G. CONCLUSION

5-84. In outlining the creditor's rights under a contract of caution, this chapter has sought to clarify the risks that the cautioner is expected to bear. Of course,

[237] (1902) 5 F 182 at 185–186.
[238] (1902) 5 F 182 at 185–187.
[239] (1902) 5 F 182 at 186.
[240] Giving time is discussed at paras 5-55–5-63 above.
[241] (1882) 10 R 121 at 126–127.
[242] (1886) 13 R 777.
[243] *Bank of Scotland v Morrison* 1911 SC 593 at 601.
[244] 1911 SC 593 at 601. See also *Patrons of Cowan's Hospital v Robertson* (1832) 11 S 81 at 86 per Lord Ordinary, where it was stated that the cautioner in a fidelity guarantee 'has not the same means of information' as the creditor.

risk is inherent in a cautionary undertaking. By agreeing to guarantee the fulfilment of another's obligation, the cautioner assumes the risk of that party's non-performance – a risk that would otherwise fall on the creditor. At worst, a cautioner will face the prospect of suit by the creditor, followed by an abortive attempt to obtain relief from the principal debtor's insolvent estate. From those harsh consequences the law will not rescue the cautioner, for the very reason that they are self-imposed. Ultimately, it is a person's choice whether or not to become a cautioner. The same might be said of the more specific features of a cautioner's undertaking. It is a cautioner's choice whether to become bound with two co-cautioners rather than three, and whether to insist on such privileges as the benefit of division or to waive them. Admittedly, many of the risks undertaken will be outwith the cautioner's control. The principal debtor, though solvent when the cautioner becomes bound, may subsequently fall on hard times. Again, the cautioner will not be able to plead liberation. On the contrary, the risk of the principal debtor's insolvency is what the cautioner's obligation is designed to combat. What the law will not tolerate, however, is an increase in the cautioner's risk resulting from nothing more than the creditor's conduct. It is for that reason that such actions as giving time to the principal debtor or the discharge of a security over the principal debtor's property may lead to a reduction in, even the destruction of, the cautioner's liability.

5-85. This chapter has surveyed the key features of a creditor's rights against a cautioner, examining issues relating to the scope of the cautioner's obligation, the circumstances in which it must be performed, and the circumstances in which the creditor will forfeit his rights against the cautioner. All of this has been done with a view to putting the cautioner's rights of relief into context. Certain points deserve particular emphasis. Firstly, the *raison d'être* of rights of relief is the risk of having to fulfil another's obligation, and so an attempt has been made to clarify in what circumstances a cautioner may be compelled to do that. Secondly, a cautioner's rights of relief have a direct bearing on the creditor's rights under the contract of caution. The rule that the creditor's abandonment of a real security over the principal debtor's property will lead to a reduction in the cautioner's liability is explicable only in a legal system that recognises rights of relief. Thirdly, this chapter has sought to show that rights of relief are part of a wider system of liability and risk distribution. The creditor's interests take priority over those of the cautioner yet, in so far as the creditor's interests are not prejudiced, the cautioner will be entitled to protection in the form of rights of relief. Anything tending to undermine such rights the creditor does at his peril.

6 Overview of Rights of Relief

PARA

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A. INTRODUCTION

6-01. The present chapter provides an overview of the substantive chapters to follow (chapters 7-10), the aim being to identify certain recurring themes and to clarify certain terms.

B. RECURRING THEMES

(1) Towards a unitary treatment

6-02. Thus far an attempt has been made to present the law regarding rights of relief in its simplest form, with a consequent emphasis on causes of action over forms of action, and on principle over the ephemera of policy and procedure. To revert to an example from the previous chapter, Erskine both dismissed the applicability of the *beneficium divisionis* to Scots law and acknowledged the existence of a functional equivalent. In other words, he retained the substance of the *beneficium divisionis* (*pro rata* liability depending on the number of solvent cautioners) but dispensed with the form that this had assumed in Roman law (a special procedural device).[1] In now turning to rights of relief, this book aims

[1] Erskine III.3.63.

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to proceed in a similar manner, identifying anachronisms without losing sight of the fundamental principles underpinning the rights.

6-03. Historically, the Scots law of rights of relief has been something of a conceptual maze, containing no shortage of circuitous paths and logical cul-de-sacs. Among the supposed bases for a cautioner's relief are mandate,[2] *negotiorum gestio*,[3] equity,[4] partnership[5] and, more recently, unjustified enrichment.[6] Some such explanations raise more questions than they answer. For instance, Gaius stated that sureties benefiting from a statutory right of *pro rata* relief (*lex Appuleia*) were in a position akin to that of partners,[7] but it does not follow from this that their right of relief was *based* on a contract of partnership. Kames dismissed reasoning of this kind as 'arguing in a circle: [the cautioners] resemble a society [i.e. a partnership], because the loss must be equal, and the loss must be equal because they resemble a society'.[8] One might also hazard that the appeal of partnership as an explanation for relief would have been stronger in Roman law than it is now. Artificial though it was, perhaps partnership was the best (contractual) explanation for sureties' relief that the closed number (*numerus clausus*) of Roman contracts had to offer. However, that is no reason for adopting the 'partnership' analysis of relief now. To avoid confusions of this kind, an attempt has been made to separate rights of relief from other areas of law (e.g. partnership and mandate) in so far as the Scottish authorities permit. Only then will it be possible to set rights of relief on their own distinctive footing in the wider law of obligations.

6-04. The desirability of a distinctive attribution may not be self-evident. After all, if rights of relief can be explained in terms of some other, more established, body of law (e.g. contract or unjustified enrichment), the quest for a distinctive attribution arguably falls foul of Ockham's Razor. Though a legitimate concern, this should not be overstated. Firstly, as will become clear in the chapters that follow, a contractual analysis cannot account for all rights of relief, to which extent a non-contractual account must be provided. Secondly, to ask whether a non-contractual right can be analysed in terms of, say, unjustified enrichment, entails a far more complex exercise than one focusing solely on rights of relief. That is not to say that the 'unjustified enrichment' issue does not matter: only

2 W Burge, *Commentaries on the Law of Suretyship* (1847) 363.
3 *Mirrie v Pollock* (1745) Mor 2125 at 2127.
4 *Thow's Trustee v Young* 1910 SC 588 at 596 per Lord President Dunedin.
5 Bankton I.23.42; *Humble v Lyon* (1792) Hume 83 at 85.
6 *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1141 per Lord President Rodger; *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* 1988 SLT 33 at 42 per Lord President Emslie.
7 Gaius III, 122.
8 H Home, Lord Kames, *Principles of Equity* (3rd edn, 1778, reprinted with new pagination, ed M Lobban, 2014) 101. For an example of the analysis to which Kames' critique was directed, see Bankton I.23.42.

that, to engage with it before analysing rights of relief on their own is to put the cart before the horse.

(2) Complexities regarding assignation

6-05. One impediment to legal clarity regarding rights of relief is the interaction between the concepts of relief and assignation. Here several points bear noting:

(a) A cautioner's right of relief, whether total or *pro rata*, does not usually depend on a formal assignation of the creditor's rights, and so the principal debtor and co-cautioners may be pursued directly.[9]

(b) Even so, a cautioner's right of relief may, as well as entitling him to claim directly against the principal debtor or co-cautioners, allow him to demand a formal assignation of the creditor's rights.[10] This has certain practical benefits, most notably entitlement to securities held by the creditor over the principal debtor's estate.[11]

(c) Sometimes a cautioner's right of relief is given effect by an implied, rather than a formal, assignation of the creditor's rights to the cautioner, meaning that the cautioner can claim directly against the party from whom relief is sought.[12]

6-06. These three broad principles, all of which find support in Scottish case law and juristic writings, can lead to confusing, seemingly paradoxical, results. For instance, the claim of a cautioner for *pro rata* relief does not depend on a formal assignation (the first principle), yet the notion of an implied assignation is sometimes used, almost as a metaphor, to explain why the cautioner enjoys that right (the third principle). Apparent paradoxes of this sort will be addressed in subsequent chapters.

C. STRUCTURE

6-07. The definition of any legal right can be seen to resolve into two main questions: in what circumstances does the right arise and what is its content? This book confronts both questions. In the chapters that follow, consideration is paid first to the most familiar, well-established examples of rights of relief. Thereafter, attention turns to cases which depart from the paradigm relief cases. From those unusual examples it becomes clear that relief assumes various

[9] Bell, *Principles* § 268.
[10] *Sligo v Menzies* (1840) 2 D 1478 at 1486.
[11] *Sligo v Menzies* (1840) 2 D 1478 at 1486.
[12] *Villaswan Ltd v Sheraton Caltrust (Blythswood) (in liquidation)* 1999 SCLR 199.

meanings, both in point of the circumstances in which rights of relief arise and the legal responses that they entail, which prompts the further question: do the various meanings of 'relief' cohere with one another? Do they give expression to some broader, scientifically coherent principle that in circumstance X a cautioner is entitled to response Y; or is 'relief' a nebulous term, a convenient label for disparate rights?

6-08. At a certain level of abstraction, the use of the term 'relief' is not especially meaningful. Sometimes, for example, it is used to describe any scenario in which one person terminates, or resiles from, a putative obligation. For instance, in *Scottish Provincial Assurance Co v Pringle*,[13] it was stated that a principal debtor's forgery of one of several cautioners' signatures effected 'the relief' of those who had signed.[14] Here the word 'relief' was used to refer to the cautioners' right to resile from an invalid obligation: the lack of a signature from one of the cautioners named in the bond had rendered the signatures of those who had signed a nullity. Such loose uses of the word 'relief' can be discounted as irrelevant to this book, which focuses on relief as a right existing under a *valid* cautionary relationship, as against a right to question the validity of that cautionary relationship. However, even within those confines, relief is a chameleonic response, varying in severity and nature according to when, and from whom, it is demanded. There are at least two broad points of classification, namely: (1) total relief versus *pro rata* relief, and (2) corrective relief versus pre-emptive relief.

6-09. It should be clear from previous chapters what is meant by total relief and *pro rata* relief. Typically, total relief is demanded from the principal debtor and *pro rata* relief from co-cautioner(s). As for the corrective/pre-emptive dichotomy, this is a question of timing: either a cautioner will demand relief *after* paying the creditor, the response sought being corrective in character, or the cautioner will demand relief pre-emptively, asking that the principal debtor or a fellow cautioner pay the creditor, so that the cautioner making the demand need not. Examples can be provided of each:

(1) Corrective relief

Pro rata relief
Two cautioners (C1 and C2) guarantee a debt of £100 jointly and severally. C1 pays £100 to the creditor and seeks £50 from C2 in relief.

[13] (1858) 20 D 465.

[14] (1858) 20 D 465 at 472. See D O Dykes, 'Relief', in J Chrisholm (ed), *Encyclopaedia of the Laws of Scotland* vol X (1913) 217: 'In its widest acceptation the word relief is applied to any claim to indemnification for expenditure incurred, or obligations undertaken, on behalf of, or through the fault of, the person against whom indemnification is sought. In this comprehensive sense the term is made to cover claims and legal relations which have *no common jural element*.' (Emphasis added.)

Total relief
C1 pays £100 to the creditor, then claims £100 from the principal debtor (D) in relief. Even though sometimes the right to total relief has been presented in terms of a right, prior to paying the creditor, to demand that the creditor assign his rights to the cautioner,[15] the right is still a corrective one because, once the principal debtor has been made to pay the cautioner, it will be in respect of money that the cautioner has actually disbursed.

(2) Pre-emptive relief

Pro rata relief
C1 and C2 owe £100. C1 pays £50 to the creditor, and demands that C2 relieve him of his remaining liability by paying the balance (£50) to the creditor.

Total relief
C1 has not yet paid anything to the creditor but demands that D relieve him of his liability by paying £100 to the creditor.

6-10. Thus, at its most modest, relief entails a *pro rata* contribution by the defender towards a payment made by the pursuer; at its strongest, an entitlement to demand that the defender pay the creditor in full, that the pursuer might be prevented from having to pay anything. The following chapters address those rights in ascending order of severity, beginning with the corrective right of *pro rata* relief exercised against co-cautioners (chapters 7 and 8); next turning to the corrective right of total relief, usually exercised against the principal debtor (chapter 9); and concluding with an examination of pre-emptive relief (chapter 10).

D. TERMINOLOGY

(1) Caution

6-11. In the interests of simplicity, almost all hypothetical examples referring to cautionary obligations in subsequent chapters should be presumed to concern caution for payment of a monetary debt, except where the context clearly indicates otherwise. None of this should be taken to imply that caution invariably involves guarantees of monetary debts in practice.

(2) Relief

6-12. For ease of reference, the word ‘relief’ can be taken to signify corrective

[15] See the discussion of the *beneficium cedendarum actionum* at paras 2-52–2-58 above.

relief, except where the context (e.g. the use of the term 'pre-emptive relief') clearly indicates otherwise.

(3) Obligation

6-13. When it is stated that a principal debtor and cautioners are bound in respect of a common 'obligation', that can be taken to refer to the obligation of the principal debtor and, more precisely, to the maximum amount that the creditor is entitled to receive from any or all of the obligants. It should not be forgotten, however, that, in a narrower sense, each of the obligants has an obligation to the creditor. For instance, if one principal debtor and two cautioners become bound for the repayment of a £100 loan, all three parties are, in a sense, liable in respect of a common obligation, namely, the principal debtor's obligation to pay £100. If the creditor receives payment of £100, then neither the principal debtor nor the cautioners can be pursued further. In another sense, three obligations are at play: that of the principal debtor and the two accessory obligations of the cautioners.[16]

(4) Insolvency

6-14. Wherever the word 'insolvent' (or some derivative of it) is used in a hypothetical example, it can be taken, unless stated otherwise, to signify that the insolvent party has no assets with which to satisfy unsecured creditors. This is done in the interests of arithmetical simplicity. For instance, if three cautioners (C1-C3) are liable for £300 and C2 becomes insolvent, the remaining solvent two (C1 and C3) will bear an ultimate loss of £150 each. It is presumed, for the purposes of this example, that there are no assets in C2's insolvent estate; hence, if C1 pays the whole debt, the only person from whom he can seek *pro rata* relief is C3. None of this is to deny that, where an insolvent party from whom relief is sought does have assets, the cautioner seeking relief may rank on that party's estate for a dividend, provided that the creditor has not already ranked on it.[17] Specific matters relating to bankruptcy will be addressed as and when they become relevant.

[16] For insight into the difficulties that can arise in defining a common obligation, see S Meier, 'Plurality of parties', in N Jansen and R Zimmermann (eds), *Commentaries on European Contract Laws* (2018) 1567–1568.

[17] This rule is based on the broader principle in the law of bankruptcy that there cannot be multiple rankings on the same estate for the same debt: see, e.g., *Anderson v Mackinnon* (1876) 3 R 608. For discussion of the rationale, see H Goudy, *A Treatise on the Law of Bankruptcy in Scotland* (4th edn, by T A Fyfe, 1914) 561–563; D W McKenzie Skene, *Bankruptcy* (2018) para 16.68.

(5) Equity

6-15. Below, frequent reference is made to 'equity' as a ground for relief. In Scots law, the term has often been treated with 'suspicion or hostility',[18] partly on account of its distinctive meaning in English law.[19] Another problem is that, when the word 'equity' is used in a broader, less technical sense, it can become difficult to distinguish it from such abstract notions as fairness and justice. In the following chapters, the term is used neither in a technical sense nor in the broader sense of fairness or justice; rather, it can be taken to refer to a specific non-contractual basis for relief which often happens to be cast in the language of 'equity'.[20] On that understanding, equity is simply a convenient shorthand for a cause of action.

[18] D J Carr, *Ideas of Equity* (Studies in Scots Law vol 5, 2017) para 1.03.

[19] For an overview of the historical complexities associated with equity in Scots law, see Carr, *Ideas of Equity* (n 18) ch 2.

[20] *Thow's Trustee v Young* 1910 SC 588 at 596 per Lord President Dunedin.

7 *Pro Rata* Relief: Causes of Action

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A. INTRODUCTION

7-01. The existence of a legal obligation from one party to another often depends upon some special connection between them, such as a contract, the breach of a delictual duty of care, or the unjustified enrichment of one at the other's expense. These are but some of the factors that can transform the relationship of two mere friends, relatives, acquaintances, even erstwhile strangers, into that of obligant and obligee respectively. Of course, not all connections are of the requisite character to ground legal obligations. As Lord Atkin famously observed,[1] the moral duty to love one's neighbour, which holds without limitation, must be distinguished from the legal duty not to harm or injure one's 'neighbour'.[2] In the latter context, an obligation is owed only to those 'so closely and directly affected' by one's acts that one 'ought reasonably to have them in contemplation as being so affected'.[3] As with the duty of care enquiry, the present chapter concerns a connection between persons as a prerequisite for legal rights and obligations between them, albeit here the relationship is not one between wrongdoer and victim, but rather that between co-cautioners. The key rule is as follows: if two cautioners are bound jointly and severally and one is sued for the whole debt, that cautioner will be entitled to demand half the amount paid from the other cautioner in relief. Here it will be examined on what basis cautioners are entitled to such relief: what is the nature of the connection between them, and to what extent do their rights differ according to how they became bound? In some cases, cautioners become bound to the creditor at the same time and in the same document; in others, cautioners become bound separately, at different times and in different documents. While some cautioners may be friends or acquaintances, others may never have met, despite having a mutual contact in the principal debtor. The extent to which such variations matter, in point of limiting entitlement to relief, is of recurring relevance to this chapter. In fact, sometimes it is cases where the connection between cautioners is less obvious that are apt to elucidate the basis for relief in all cases involving cautioners, whether intimately connected or, at the other extreme, strangers: cautioners who 'from opposite sides of

[1] *Donoghue v Stevenson* 1932 SC (HL) 31.
[2] 1932 SC (HL) 31 at 44.
[3] 1932 SC (HL) 31 at 44. Of course, the law of delict has moved on from that relatively simple state of affairs. See, notably, *Caparo Industries Plc v Dickman* [1990] 2 AC 605; *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736.

great gulfs, have [. . .] been very curiously brought together' by their shared liability.[4]

7-02. The present chapter focuses on the circumstances giving rise to a right of *pro rata* relief, but not totally to the neglect of the content of that right. To refer again to familiar examples, contracts confer, among other rights, a right to performance of the terms of the contract; breach of a delictual duty of care causing loss triggers a right to compensation; unjustified enrichment entitles the impoverished party to restitution, and so on. What, then, is the content of *pro rata* relief? Broadly stated, it consists in the pooling of risk and the sharing of resources among co-cautioners. Of those twin functions, the present chapter offers a mere sketch, leaving the more complex issues regarding the content of *pro rata* relief to be addressed in the next chapter.

B. STRUCTURE OF THE CHAPTER

7-03. Following a survey of *pro rata* relief in the simplest case, this chapter progresses to scenarios that deviate from that paradigm, the aim being to clarify the basis (or bases) for *pro rata* relief in all cases. Thereafter, consideration is paid to the broader implications of cautioners' rights among themselves and to the relationship between those rights and assignation.

7-04. It bears emphasising that this chapter is concerned with a cautioner's rights against other cautioners, as opposed to a cautioner's rights against the principal debtor, which is the focus of chapter 9. Rights against the principal debtor are mentioned only in so far as they bear upon, or clarify the nature of, the right of *pro rata* relief among cautioners. On a similar note, although most of the cases discussed concern cautioners, reference is also made to cases involving co-principal debtors, for many of the principles governing their rights against one another apply with equal force to cautioners.

C. THE PARADIGM RELIEF CASE

(1) Requirements for relief

7-05. Suppose two cautioners, C1 and C2, become bound jointly and severally in the same document and at the same time for a debt of £100. Later, C1 (alone) is sued by the creditor for £100. In these circumstances, C1 enjoys a right of relief against C2, which entitles C1 to claim half of what was paid to the creditor (i.e. £50).[5]

[4] C Dickens, *Bleak House* (S Gill ed, 1998) 235.
[5] Stair I.8.2 and 9.

(2) Content of relief

7-06. The content of C1's right of relief against C2 is reimbursement of the amount paid to the creditor in excess of C1's proper share of the debt (£50).[6] Even if the principal debtor is unable to pay anything by way of total relief, once C2 has paid C1 £50, the cautioners will have borne the burden of £100 equally.

(3) Relief and assignation

7-07. In examining cautioners' mutual relief, various questions may be asked regarding the role of assignation. Does cautioners' relief depend, as it often did in Roman law,[7] on an assignation of the creditor's rights? If an assignation is not necessary for a right of relief to exist, can one be demanded in any case? If so, what benefit does such an assignation confer that is not already afforded by a direct claim?

7-08. It is well established that a cautioner need not demand an assignation of the creditor's rights against the other cautioners in order to seek *pro rata* relief from those cautioners.[8] But in other respects, the role of assignation in the context of mutual relief has sometimes proved controversial. According to Erskine, not only was an assignation unnecessary for a cautioner's right of *pro rata* relief to exist; a cautioner did not even have the right to demand one.[9] By Bell's time, however, an assignation could be demanded notwithstanding that it was not essential to the pursuit of *pro rata* relief.[10] Perhaps most puzzling is the view of Kames, who appears to root the right of *pro rata* relief in an assignation of the creditor's rights, only later to suggest that an actual assignation is unnecessary.[11]

7-09. The interaction between *pro rata* relief and assignation is explored below. For now, it is worth noting that their relationship can be complex. The effect of an assignation on a cautioner's measure of recovery, itself a source of controversy,[12] is examined in the next chapter.

6 *Murray v Heir and Creditors of Orchyardtown* (1722) Mor 14651 at 14652.
7 C 8.40.2.
8 Bankton I.23.42; Erskine III.3.68; Bell, *Principles* § 268.
9 Erskine III.3.68.
10 Bell, *Principles* § 268. He cites *Erskine v Manderson* (1780) Mor 1386 as embodying the modern approach.
11 H Home, Lord Kames, *Principles of Equity* (3rd edn, 1778, reprinted with new pagination, ed M Lobban, 2014) 77–81.
12 Contrast, e.g., the approach favoured in Erskine III.3.74 with that adopted in *Anderson v Dayton* (1884) 21 SLR 787.

(4) Deviations from the paradigm case

7-10. In the paradigm case of *pro rata* relief, two cautioners, C1 and C2, become bound jointly and severally for the same debt (£100), and C1 is sued by the creditor for the whole amount. The following sections (D-G) examine cases that differ from that example and explore the extent to which those differences affect cautioners' rights among themselves.

D. THE WAY IN WHICH C1 AND C2 BECOME BOUND

(1) Bound for the whole debt in separate documents

(a) The extent to which relief can be based on an implied contract

7-11. The obligatory connection between two cautioners (as between any two persons in a private law context) is most obvious when rooted in an express contract between them. There is nothing to prevent C1 and C2 agreeing to 'bear [an] equal burden' should one be compelled to pay the whole debt.[13] Even so, the connection between cautioners tends to consist not in express undertakings between them but simply in their having become bound for the same debt in the same obligatory document. It is well established that such cautioners are entitled to *pro rata* relief,[14] and one explanation for that right is the existence of an implied contract under which each cautioner agrees to relieve the others *pro rata*.[15] Bankton adopted such an analysis when he stated that multiple persons bound for the same debt constitute a 'kind of society', such that each must share the burden of the debt equally.[16] Similarly, Erskine described cautioners bound in the same document as 'mutually connected with one another', and suggested that it is from that mutual connection that their rights of relief arise.[17] Hume's view of the matter is worth quoting in full:[18]

> [W]here all cautioners bind in one instrument at the same time in the knowledge of and with relation to each other, here so natural and so salutary to all concerned is an agreement for mutual relief that it may fairly and without violence be held as a matter of tacit compact among them. It is what none of them could or would object to if proposed and it may reasonably be held as implied and conditioned for, though not set down in the document of debt.

[13] *Muire v Chalmers* (1682) Mor 14654 at 14655. See also *Creditors of Cunningham v Montgomerie* (1739) Mor 109.

[14] Stair I.8.9; Bankton I.9.45.

[15] For these purposes, an implied contract is to be distinguished from a fictitious contract. When it is said here that cautioners' rights of relief may arise from an implied contract, what is meant is that there is an actual contract based on an actual agreement between the cautioners but that it comes into operation otherwise than by express undertakings by the cautioners.

[16] Bankton I.23.42.

[17] Erskine III.3.68.

[18] Hume, *Lectures* II, 219.

7-12. In short, where C1 and C2 become bound together for the same debt in the same document, their rights of mutual relief may be seen to stem from an implied contract between them. By the term 'implied contract' is not meant a fictitious contract arising in the absence of an agreement, but rather an actual contract based on an agreement inferred from the cautioners' having become bound together.

7-13. The existence of an implied contractual term governing the rights of cautioners among themselves was questioned by Kames, who argued that, if cautioners became bound jointly and severally in the same document, yet omitted to include an express clause obliging them to relieve one another, it could not be assumed that they had intended such a right to exist: 'where an obvious clause is left out of a deed, it is natural to ascribe the omission to design rather than to forgetfulness'.[19] He regarded the notion that cautioners were partners or, as Bankton expressed it, in a sort of 'society',[20] as artificial and circular.[21] One may share this reluctance to view cautioners as partners without accepting Kames' broader conclusion, that *pro rata* relief cannot generally be ascribed to an implied agreement. More convincing is Hume's view, quoted above,[22] that the most natural inference from multiple cautioners becoming bound in the same document is that each agrees impliedly to relieve the others *pro rata*, and becomes bound on the faith of a reciprocal undertaking from each co-cautioner. To hold otherwise is to say that C1 and C2, on becoming bound jointly and severally for a debt of £100, consent to a lottery whereby one might ultimately pay £100 and the other pay nothing.

7-14. To the extent that a right of relief is based on an implied contract between C1 and C2, the scope of each party's rights must be understood in contractual terms. There are at least three cases, however, in which such an agreement-based right will not exist, cease to exist or succumb to alteration:

Express waiver
Most obviously, C1 and C2 may agree expressly that, in spite of being bound jointly and severally for the same debt, neither will have any right of relief (*pro rata* or otherwise) against the other. Less extreme cases may be envisaged, as where C1 agrees to bear sixty per cent of the burden, leaving a mere forty per cent to C2.

Creditor releases a cautioner
There is a second, somewhat counter-intuitive, limit to a right of relief based on tacit agreement. As discussed in chapter 5, if two cautioners (C1 and C2) are bound for the same debt, and the debt has yet to be paid, it is generally in

[19] Kames, *Principles of Equity* (ed Lobban) 78–79.
[20] Bankton I.23.42.
[21] Kames, *Principles of Equity* (ed Lobban) 101.
[22] Hume, *Lectures* II, 219.

the creditor's power to release C1 from *any* liability for that debt, including such liability as might later have arisen in relief;[23] yet this the creditor does at his peril: for the release of C1 automatically liberates C2 because the creditor has deprived C2 of a potential right of relief.[24] It is the mischief addressed by C2's automatic right of liberation – namely, the creditor's power to release C1 *completely*, even in a question of relief with C2 – that throws into doubt an implied contractual theory of relief: how can C2's right of *pro rata* relief be rooted in an implied contract between C1 and C2 if a third party to that contract (the creditor) has the power to release C1 from his liability under it? To that theoretical problem there exists at least one solution. Where rights of *pro rata* relief arise from an implied contract, the meaning of that contract is not simply, 'I agree to relieve you *pro rata* of whatever you pay to the creditor', but rather, 'I agree to relieve you *pro rata* of whatever you pay to the creditor *so long as we both remain liable for this debt*'. In other words, to the extent that cautioners' mutual rights of relief stem from an implied contract between them, the rights and obligations under that contract depend on those cautioners remaining liable to the creditor. Were that not so, there would be far less utility in the statutory rule that the voluntary release of one cautioner without the others' consent serves to release those others automatically.[25] If C1's and C2's implied agreement to relieve one another were unconditional, C1's liability to relieve C2 *pro rata* would persist even after the creditor had released C1 from his cautionary obligation. It seems more credible to say that C1's liability to relieve C2 based on an implied contract between C1 and C2 is conditional on C1 and C2 remaining liable for the same debt. That said, it is partly because the notion of an implied agreement subject to an implied condition is conceptually unwieldy – and the reasoning used to infer such an implied condition somewhat tortured – that this chapter gives more attention to a non-contractual analysis of relief.

Cautioners become bound separately

Where cautioners become bound for the same debt but in separate documents and without reference to one another, there is no question of a right of *pro rata* relief rooted in contract. How can cautioners enter into a contract with one another without even a tacit agreement between them?

7-15. In sum, there are limits to a theory of relief based on a contract between cautioners. Of the three examples used to draw those limits, the last is particularly

[23] Where a creditor grants an 'unqualified discharge' to one of several obligants for the same debt, that obligant 'shall not only be discharged in a question with his creditor, but shall also be discharged of his liability to contribute in a question with other co-obligants'; this can be contrasted with a mere agreement by the creditor not to sue an obligant (*pactum de non petendo*), which does not remove that obligant's liability to co-obligants in relief: *Morton's Trustees v Robertson's Judicial Factor* (1892) 20 R 72 at 77–78 per Lord McLaren.

[24] Mercantile Law Amendment (Scotland) Act s 9.

[25] Mercantile Law Amendment (Scotland) Act s 9: see paras 5-69–5-79 above for further details.

important, for, whereas relief is excluded in the first two examples,[26] a non-contractual right of *pro rata* relief may still exist in the third. The next section examines the basis for such a right.

(b) Non-contractual relief

7-16. It is well established that cautioners need not have become bound in the same document, or at the same time, to enjoy a right of mutual relief.[27] Note, in that regard, the following pronouncement from *Mirrie v Pollock*:[28]

> It is no doubt in general true, that the equity on which the relief among cautioners is founded (for as *nullum negotium gestum est*[29] between them there is none in strict law) obtains no less where they are bound in different deeds, and at different times, than where they are bound in the same deed.

7-17. To like effect, *Smiton v Millar*[30] expresses the general rule that cautioners may claim 'proportional relief from one another, whether [. . .] bound in one or in separate bonds'.[31] That cautioners' relief does not depend on their having become bound to the creditor in concert is significant, serving to confirm that rights of relief do not depend on an agreement between cautioners. What, then, is the basis for these non-contractual rights? In *Murray v Heir and Creditors of Orchyardtown*,[32] a Court of Session decision later upheld by the House of Lords,[33] the mutual entitlement of cautioners to relief was justified thus:[34]

> [W]here there is a common obligation, to which all are equally subjected, it ought not to be in the power of the creditor, arbitrarily to load any of the debtors he pleases with the debt; and therefore, though for the ease of the creditor, each may be made liable for the whole, yet since they are all *in pari casu*, that rule of equity dictates, whatever is advanced towards the discharge of the obligation by any of them, more than his share, may be recovered off the rest, to preserve that original equality which is their common interest to preserve.

7-18. According to this decision, entitlement to *pro rata* relief flows from a particular conception of equity, one which demands that each cautioner bear an equal share of the common burden. A striking feature of this equitable principle

[26] In the first example, a right of relief may also be altered or limited, rather than excluded.
[27] *Ker v Gordon* (1685) Mor 14641; *Wallace v Elibank* (1717) Mor 3389; *Union Bank of Scotland v Taylor* 1925 SC 835 at 841; Bell, *Principles* § 271.
[28] (1745) Mor 2125 at 2125.
[29] This Latin expression means that the cautioners are 'unconnected' with one another: W Ross, *Lectures on the Practice of the Law of Scotland in Two Volumes* (1792) vol 1, 223–224.
[30] (1792) Mor 2138.
[31] (1792) Mor 2138 at 2140.
[32] (1722) Mor 14651.
[33] (1724) 1 Rob 465.
[34] *Murray v Heir and Creditors of Orchyardtown* (1722) Mor 14651 at 14652.

is its emphasis on the *creditor's* interests. If two cautioners are jointly and severally liable for £100, the creditor has multiple options for exacting payment. The most equitable course is to demand £50 from each cautioner. However, the cautioners being bound jointly and severally, the creditor may, for convenience, exact the whole £100 from either of them. To that extent, the law will suffer arbitrariness on the creditor's part. What the creditor may not do, however, is lay the *ultimate* burden of £100 on one of the cautioners only: hence the paying cautioner's right to a partial contribution of £50. The law thereby achieves a compromise between, on the one hand, the creditor's interest in prompt payment and, on the other, the preservation of equality among cautioners. It is a short step from such reasoning to the conclusion that cautioners need not have become bound in the same document, or at the same time, to enjoy mutual rights of relief. Whether the cautioners became bound together or not, they have a common liability, and so the problem of one paying more than his proper share must still be addressed.

7-19. The above justification for relief was developed by Kames in such works as *Principles of Equity*.[35] Echoing the reasoning in *Murray v Heir and Creditors of Orchyardtown*, a case reported by him,[36] Kames attributed rights of *pro rata* relief to the cautioners' relationship with the creditor. If one of two cautioners, C1, paid the whole debt (£100), C1 would be entitled to an assignation of the creditor's rights to the extent that the payment exceeded C1's *pro rata* share (£50), for, competent though it was to exact full payment from either cautioner, it behoved the creditor to treat them equally as regards the ultimate burden. The duty to grant an assignation arose because this benefited C1, allowing that cautioner to obtain partial compensation, yet was of no detriment to a creditor who had received full payment.[37] At the same time, an assignation was not a prerequisite for relief. Kames argued that, even if the creditor failed to assign his rights against the other cautioners, the law would 'interpose and hold an assignation as granted, because it ought to be granted'.[38] On this view, assignation functions less as a dogmatic requirement than as an explanatory tool: an illustration that cautioners' entitlement to *pro rata r*elief depends on their all being connected via the same creditor, and on that creditor's not being prejudiced. In other words, even if no assignation of the creditor's rights has been granted, one *ought* to be granted because the creditor no longer

[35] See generally, Kames, *Principles of Equity* (ed Lobban) 77–81. See also H Home, Lord Kames, *Essays upon Several Subjects in Law* (1732) 19–60 (on '*Beneficium cedendarum actionum*'). The importance of equity is evident in the case law: see, e.g., *Stirling v Forrester* (1821) 3 Bligh 575 at 596 per Lord Redesdale. The particular importance of Kames' principle of equity can be seen in such cases as *Palmer v Wick and Pulteneytown Steam Shipping Co Ltd* (1894) 21 R (HL) 39 at 44 per Lord Watson.

[36] The Morison's Dictionary report is based on a report from Kames' *Remarkable Decisions*: (1722) 1 Kam Rem 74.

[37] Kames, *Principles of Equity* (ed Lobban) 79–80.

[38] Kames, *Principles of Equity* (ed Lobban) 79.

has an interest in those rights, still less in preventing an equal distribution of loss among the cautioners. As with the justification for relief in such cases as *Murray v Heir and Creditors of Orchyardtown*,[39] that favoured by Kames yields an important insight: if relief exists to ensure parity among co-cautioners, and to prevent one of their number from being arbitrarily saddled with the whole debt, the right to such relief applies no less when the cautioners become bound separately than when they become bound together.

7-20. When *pro rata* relief is rooted in equity, the requirements for such relief can be summarised thus:

(1) Two cautioners, C1 and C2, are liable for the same debt on an equal footing.

(2) C1 pays the amount owed by the principal debtor or at least more than his (C1's) *pro rata* share of that amount.

(3) It would be arbitrary for the creditor, having been paid, not to grant an assignation to C1 and thereby enable C1 to obtain *pro rata* relief from C2.

If those criteria are satisfied, and whether or not the creditor has granted an assignation, C1 will have a right of *pro rata* relief against C2.

(c) The relative importance of contract and equity

7-21. Thus far, two theories of *pro rata* relief have been posited, each drawing on a different sort of connection between cautioners, namely: (1) a contract (express or implied) between the cautioners; and (2) the principle that a creditor should not be allowed arbitrarily to saddle one co-cautioner with ultimate responsibility for the whole debt (equity).

7-22. It is submitted that the second justification for relief (equity) is more important than the first (contract). As discussed already, the contractual justification can seem overly complex and tortured. Further, that theory accounts for rights of relief only where the cautioners have entered into an express agreement or have at least become bound to the creditor in concert. It is a key strength of equity, as a ground for relief, that it explains what a contractual theory cannot: why even cautioners who have never met, and between whom there is consequently no question of a contractual relationship, are entitled to mutual relief. There are also other reasons why Kames' equitable theory is particularly important and why it receives more attention in this chapter than does its contractual counterpart. As will become increasingly clear, the equitable theory of relief, in stressing the need for the creditor not to

[39] (1722) Mor 14651.

act arbitrarily *vis-à-vis* co-cautioners, serves both as the basis for much of the established law regarding rights of relief and as a touchstone in difficult cases. Building on the work of Dieckmann, who extols the virtues of Kames' principle in a comparative context,[40] the following sections discuss why that principle is not only theoretically appealing but also of practical value.

7-23. One might question whether, of the non-contractual justifications for relief that might be considered, equity is particularly deserving of attention. After all, the recent judicial trend has been to analyse rights of relief in terms of unjustified enrichment – an increasingly prominent source of non-contractual obligations in Scots law.[41] It is submitted that the equitable theory, in prohibiting a certain sort of arbitrariness on the creditor's part, is uniquely well placed to explain certain rules concerning rights of relief, notably those according to which the creditor may forfeit his rights against the cautioners if he endangers their prospects of relief.[42]

(2) Not bound jointly and severally

7-24. In the example given at the beginning of the chapter, two cautioners become bound jointly and severally, meaning that the creditor may sue either for the whole debt. This section examines cases where the cautioners are not bound jointly and severally, beginning with that of two cautioners guaranteeing the same debt, or at least becoming bound for the same principal debtor, but dividing their liability into separate shares.

(a) Cautioners bound for separate amounts

7-25. In *Morgan v Smart*,[43] a purchaser was liable for £105 and two cautioners (C1 and C2) guaranteed payment of the price to the extent of £35 and £70 respectively. The cautioners became bound in separate documents. When the creditor attempted to enforce C1's guarantee, C1 argued that he was no longer liable, given that the creditor had discharged C2 without his (C1's) consent.[44] In so arguing, C1 relied on section 9 of the Mercantile Law Amendment (Scotland) Act 1856, which states that the discharge of one cautioner without the others' consent operates a complete discharge of those other cautioners.[45]

[40] J A Dieckmann, 'Normative basis of subrogation and comparative law: select explanations in the common law, civil law and in mixed legal systems of the guarantor's right to derivative recourse' (2012) 27 Tul Eur & Civ LF 49 at 76–79.

[41] *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1141 per Lord President Rodger.

[42] As explored in chapter 5 above.

[43] (1872) 10 M 610.

[44] (1872) 10 M 610 at 611–612.

[45] (1872) 10 M 610 at 612.

This argument, which was upheld by the Outer House, was dismissed by the Inner House.[46] It was held that the cautioners had effectively been bound for separate debts and so, there being no right of mutual relief between them, the creditor had done nothing to prejudice C1 by releasing C2. As Lord Justice-Clerk Moncreiff noted:[47]

> [It was] certain that the cautioners were not [. . .] bound for the *same debt at all*, and one of them might have paid up his share, and obtained his discharge, without in any way affecting the obligation of the other. They were bound for two separate sums; and although, by payments by the principal debtor, it may be that one of the cautioners remained bound for the whole balance, while the other was bound for a portion of it, the separate nature of the obligation in its inception is not thereby altered. It was still open to the creditor, on receiving his proportion from one of the cautioners, to discharge him entirely without affecting the liability of the other, and therefore the obligation is not one to which the principle of total liberation introduced by the Act can apply. I am therefore of opinion that the [creditor] is entitled to prevail in this action to the extent of the proportion of the remaining balance, *for which [C1] had no claim for contribution against [C2]*, who has been discharged.

7-26. In brief, because C1 and C2 became bound for specific sums (£35 and £70 respectively) instead of becoming bound jointly and severally for the same sum (£105), they were held to have no rights of mutual relief. In the paradigm case, a right of relief acts as a corrective to the creditor's decision to sue one cautioner for the whole debt. Where a cautioner becomes bound only for a specified portion of the principal debtor's indebtedness, there is no question of his being liable for the whole indebtedness; hence, at first blush, there is no need for *pro rata* relief.

7-27. This outcome is not as harsh as it might appear. If two cautioners become bound for £35 and £70 respectively, their respective obligations to the creditor are capped at those sums. There being no question of the creditor's suing either cautioner for the whole £105, each cautioner's circumstances are, to some degree, insulated from the other's. The benefit here is loosely akin to the *lex Furia* of the Roman Republic, whereby the liability of multiple sureties was divided into fixed shares that did not increase on the insolvency of one of their number.[48] Conversely, if C1 and C2 are jointly and severally liable for £105 and C2 falls insolvent, C1 will have to pay the whole £105, with limited prospects of obtaining relief from C2. Prospective co-cautioners face a choice: they might become jointly and severally liable for a single sum, pooling their risk via mutual rights of relief; alternatively, the cautioners may become liable for separate sums. The decision will turn on the level of risk that each prospective

[46] (1872) 10 M 610 at 614–615.
[47] (1872) 10 M 610 at 615 (emphasis added).
[48] Gaius III, 121.

cautioner is willing to bear. If C1 deems C2 to be unreliable, C1 may insist on becoming bound for a smaller sum on his own rather than for a larger sum with C2. If C1 and C2 become bound for fixed sums of £35 and £70 respectively and C1 later pays the whole £105, to the extent of £70 C1 has paid a sum for which he could not have been sued. This scenario seems, therefore, to fall outside the scope of Kames' equitable principle.

7-28. In spite of what has been said so far, cautioners who become bound for the same debt, albeit in separate shares, are still connected in certain respects and enjoy rights of relief by virtue of that connection. The complex issues that can arise in that regard are explored below.[49] For now, suffice it to say that there is a critical distinction between two cautioners becoming bound for different debts of £35 and £70 respectively, as in *Morgan v Smart*, and two cautioners becoming bound for the same debt of £105 but limiting the amount for which they can be sued to £35 and £70 respectively.

(b) Cautioners who enjoy the benefit of division

7-29. The paradigm case of cautioners bound jointly and severally (*in solidum*) to the creditor may also be contrasted with that of cautioners bound for the whole debt but who enjoy the benefit of division. If such a cautioner waives this privilege by paying the whole debt, does he have a right of *pro rata* relief?

7-30. The benefit of division has been discussed in previous chapters. It arises where C1 and C2 become bound expressly as cautioners for the whole debt (£100) and without undertaking joint and several liability to the creditor (proper caution).[50] The consequence is that the cautioners may be sued only for their respective *pro rata* shares of the debt, which are based on the total amount due divided by the number of solvent cautioners (£50).[51] Bell and Gloag were of the view that a cautioner who enjoys this benefit, but who nevertheless decides to pay the whole debt, is entitled to *pro rata* relief from the other cautioners.[52] On

[49] At paras 7-78–7-95 below.

[50] Bell, *Principles* § 246.

[51] Bell, *Principles* § 267.

[52] Bell, *Principles* § 62; W M Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland* (2nd edn, 1929) 208 n 1. Regarding the passage from Bell's *Principles* (§ 62), two points should be noted. Firstly, Bell was discussing co-obligants in general rather than co-cautioners in particular. Secondly, he was not considering the benefit of division in the context of proper caution but rather the analogous status of joint (as opposed to joint and several) liability, whereby one joint obligant could insist on the others being called before the court before having to pay anything to the creditor. In Bell's treatment, joint liability resembles the benefit of division enjoyed by proper cautioners: joint liability applies only to the extent that the joint obligants remain solvent. Bell remarked of such an arrangement that a joint obligant who paid the whole debt before the other joint obligants had been called (and before any of them had fallen insolvent) was entitled to *pro rata* relief from those obligants. By the same logic, a cautioner who can limit his liability to his own *pro rata* share subject to the

the other hand, Lord President Dunedin in *Thow's Trustee v Young*[53] stated that a cautioner's right of relief against the principal debtor and co-cautioners depends 'without exception' on all of those parties having become 'bound *in solidum* in the original obligation'.[54]

7-31. Bell's and Gloag's seems to be the sounder view. Of course, often the right of *pro rata* relief arises where cautioners have become bound jointly and severally (*in solidum*).[55] In such cases, the rights of the cautioners among themselves are based on a combination of (1) the creditor's power to exact the whole debt from one cautioner, and (2) the need for an ultimately equal distribution of liability. It might be argued that a cautioner who enjoys the benefit of division, but who decides to waive that privilege by paying the creditor in full, has paid more than his *pro rata* share in the knowledge that he could not have been compelled to do so, and thus that such a cautioner lacks a right of *pro rata* relief. However, it can also be said of such a cautioner that he has paid a debt for which he might, had his fellow cautioner later fallen insolvent, have *become* liable in full. As Bell noted, even cautioners who enjoy the benefit of division are 'each *ultimately* liable to the creditor for the whole debt'.[56] To that extent, the scenario described here differs from *Morgan v Smart*.[57] If, as in that case, two cautioners become bound for separate debts, the insolvency of one will not increase the other's liability to the creditor.

7-32. The contrast between fixed and flexible shares can be illustrated with the following examples:

Fixed shares
C1 is liable for a £50 debt; C2 for a £50 debt. C1 can never be liable for more than £50 and so if C1 pays £100, C1 is not entitled to reclaim £50 from C2 in relief.

Flexible shares
C1 and C2 are liable for £100. Because they have become bound expressly as cautioners and because they have not become bound jointly and severally, they enjoy the benefit of division. Consequently, so long as both cautioners remain solvent, C1 and C2 may be sued for a maximum of £50 each. However, if C2 becomes insolvent, C1 will become liable for the whole. As such, even if C1 pays £100 while C2 is still solvent, to the extent that C1 pays C2's share of £50, C1 is paying an amount for which he *could* have become liable.

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subsequent insolvency of co-cautioners (the benefit of division), but who pays the whole debt anyway, is entitled to *pro rata* relief.

53 1910 SC 588.

54 1910 SC 588 at 596.

55 Stair I.8.9.

56 Bell, *Principles* § 267 (emphasis added).

57 (1872) 10 M 610.

(3) Bound on an unequal basis

(a) One cautioner becomes bound for another

7-33. Thus far, it has been taken for granted that cautioners are bound on an equal footing to the creditor, hence ultimately entitled to *pro rata* relief among themselves. However, the notion that cautioners should be treated equally is simply a presumption, rebuttable in the face of contrary evidence.[58] In extreme cases, that evidence may serve to deny a cautioner *pro rata* relief. Suppose that one cautioner, Charlotte, guarantees a debt of £100. When the debt falls due, Charlotte is unable to pay it and so asks the creditor for more time. The creditor agrees to give Charlotte three more months in which to pay the debt but makes that delay conditional on another cautioner (Bruce) becoming bound with her. Bruce duly becomes bound jointly and severally with Charlotte in the renewed obligation. The significance of this arrangement is that if, come the due date, the creditor sees fit to sue Charlotte (the original cautioner) for the whole debt, that party will have no right of relief against Bruce (the new cautioner). Alternatively, if the creditor decides to sue Bruce (the new cautioner) for the whole debt, that party will be entitled to sue Charlotte (the original cautioner) for *total* relief (£100), as opposed to mere *pro rata* relief (£50). Thus, although Charlotte and Bruce are both cautioners *vis-à-vis* the creditor, their relationship with one another is akin to that of principal debtor and cautioner. Bruce became bound at Charlotte's behest and for her benefit, and it is for that reason that (1) Charlotte is not entitled to any relief from Bruce, and (2) Bruce is entitled to total relief from Charlotte. There is a fundamental difference between being bound *with* another cautioner on an equal footing (the legal presumption) and being bound *for* another cautioner (as in the exceptional case described here).

7-34. There are many illustrations of this distinction. In *Mirrie v Pollock*,[59] it was held that someone who had become a cautioner to 'save' an extant cautioner 'from diligence', was entitled to full, rather than *pro rata*, relief from that party.[60] Likewise, in *Wallace v Fleming and Cunningham*,[61] a cautioner in a second suspension (C2) was held entitled to full relief from a cautioner in the first suspension (C1), the second suspension having been granted at the desire of the cautioner in the first.[62] In those cases, no less than in the hypothetical example given above, the significance of being a cautioner for, rather than with, another cautioner is twofold. If C1 is a cautioner *for* C2, C1's payment of the

[58] *Smiton v Millar* (1792) Mor 2138 at 2140.
[59] (1745) Mor 2125.
[60] (1745) Mor 2125 at 2126. See also *Mckenzie v Mckenzie* (1775) Mor 14661.
[61] (1685) Mor 14642.
[62] (1685) Mor 14642 at 14642. Cf *Arnold v Gordon* (1671) Mor 14641, where a cautioner in a suspension was held entitled to mere *pro rata* relief from the cautioners in the original bond. This was most likely because only the principal debtor (as opposed to the original cautioners) had 'suspended' in this case; hence the cautioner in the suspension was acting for the benefit of the principal debtor only.

debt will entitle C1 to full relief from C2. Contrariwise, if C2 pays the debt there will be no right of relief against C1, just as a principal debtor has no right of relief against a cautioner.[63]

7-35. The exceptional rule described here should not be stretched beyond its confines. It does not mean that in any case where C1 becomes bound to the creditor after C2, C1 will be entitled to full relief from C2. On the contrary, where a 'new' cautioner joins an 'old' cautioner in the same obligation, the only person for whom the 'new' cautioner is presumed to act is the principal debtor.[64] In that regard, it is worth noting the following statement from *Smiton v Millar*: [65]

> It may be laid down as a general rule, that when there are different cautioners for the same debt, they all stand upon an equal footing as co-cautioners, and are entitled to a proportional relief from one another, whether they are bound in one or in separate bonds; unless from circumstances it shall appear, either upon the one hand, that the original bond was meant to be at an end, and the new obligants alone bound; or, on the other hand, that the new cautioners interposed *at the desire of the former obligants* and to save them from distress, *upon the faith of a total relief from them*.

7-36. Thus, in the absence of contrary evidence, cautioners are deemed liable on an equal footing, hence entitled to *pro rata* relief among themselves. In many cases, there will also be positive evidence to suggest that the new cautioner became bound for the principal debtor alone. In *Murray v Heir and Creditors of Orchyardtown*,[66] for example, it was held that a cautioner in a bond of corroboration was entitled only to *pro rata* relief from a cautioner in the original bond because the new cautioner had intervened to persuade the creditor to 'supersede execution' against the *principal debtor*, not to save the old cautioner from diligence.[67] Also illustrative of this point is *Lennox v Campbell*,[68] where one of two cautioners in a cash credit died. The bank agreed to continue the cash credit, but only because an 'additional party' became bound in the deceased's stead. It was held by the Court of Session that this new cautioner was a mere co-cautioner *vis-à-vis* the surviving cautioners in the original bond, and hence entitled to mere *pro rata* relief. Again, apart from the presumption that the new cautioner had interposed for the benefit of the principal debtor only, there was strong evidence to that effect, the bond of corroboration narrating that, in consideration of the new cautioner's becoming bound, the bank was 'willing to

[63] For instance, an 'old' cautioner was denied *pro rata* relief from a 'new' cautioner in *Inglis v Bethune* (1798) Hume 87.

[64] *Mirrie v Pollock* (1745) Mor 2125 at 2126.

[65] (1792) Mor 2138 at 2140 (emphasis added).

[66] (1722) Mor 14651.

[67] (1722) Mor 14651 at 14654 (aff'd *Murray v Heir and Creditors of Orchyardtown* (1724) 1 Rob 465).

[68] 18 May 1815 FC.

continue' the cash credit.[69] Thus, the main beneficiary of the new cautioner's obligation was the principal debtor. Likewise, in *Thorburn v Howie*,[70] where a new cautioner became bound to take the place of 'one John Risk',[71] a cautioner in the original bond who had since become bankrupt, it was determined that he had granted his bond 'solely at the request and for the accommodation of the [principal debtor] as opposed to the other cautioners in the original bond'; hence the new cautioner and the old cautioners were liable on the same footing.[72]

7-37. In clarifying the circumstances in which one cautioner might be entitled to full relief from another, it should be noted that the mere fact that C1 became bound as a cautioner with C2 because C2 asked C1 to do so does not, of itself, entitle C1 to full relief from C2. The cases in which total relief has been granted tend to conform to the following pattern: one cautioner is already bound to the creditor and the intervention of an additional cautioner alleviates the burden on the original cautioner, affording that party more time in which to pay the debt. In such cases, the additional cautioner, who has hitherto had nothing to do with the original cautioner's obligation, acts for the latter's benefit. It is for that reason that the additional cautioner is entitled to full relief from the original cautioner, in a manner loosely analogous to the more familiar right of a cautioner against the principal debtor. Distinct from this is the case of a prospective cautioner, C1, informing the principal debtor that he (C1) will become bound only if another cautioner (C2) agrees to do so as well. If C2 accedes to C1's request, C2 will be interposing not for the benefit of C1 but for that of the principal debtor, even though the request for C2's interposition was originally made by C1. C1 is becoming bound, first and foremost, for the principal debtor's benefit (for example, to help him obtain a loan or a lease). C1 has asked C2 to become bound as well in order to dilute the risk associated with that undertaking: in other words, C1 does not want to be the only cautioner. To hold that C2, by acceding to C1's request, becomes entitled to full relief from C1, would undermine the purpose of the request, namely, to have someone to sue for *pro rata* relief in the event of the principal debtor's insolvency. In the language of *Smiton v Millar*,[73] C2 does not, in such cases, become a cautioner 'upon the faith of [. . .] total relief' from C1.[74]

7-38. A questionable treatment of one cautioner in relation to a newly bound co-cautioner features in *Inglis v Bethune*.[75] Braidwood (C1) was bound as a

[69] 18 May 1815 FC.
[70] (1863) 1 M 1169.
[71] (1863) 1 M 1169 at 1169.
[72] (1863) 1 M 1169 at 1171 per Lord Ordinary (Lord Mackenzie). This decision was upheld on appeal to the Inner House: (1863) 1 M 1169 at 1171–1172.
[73] (1792) Mor 2138.
[74] (1792) Mor 2138 at 2140.
[75] (1798) Hume 87.

cautioner in a cash credit.[76] When he left for England, the bank demanded that the principal debtor find a new cautioner resident in Scotland. Accordingly, the principal debtor obtained a letter from Bethune (C2), wherein the latter became bound 'jointly and severally with [C1]'. When, years later, the credit was exhausted and C1 had been made to pay a substantial portion of the indebtedness, he sought *pro rata* relief from the new cautioner, C2. It was held that C2 was not liable even for *pro rata* relief because he had become bound to the creditor long after C1 and because he had intended only to become 'an additional security to the bank'; he had not also intended to lighten C1's burden by becoming a co-cautioner with him.[77] Hume is critical of this decision.[78] He notes that it was owing to C2's interposition that the principal debtor's 'cash account was continued' and, indeed, C2 'interfered for that very purpose'.[79] In other words, it was for the principal debtor, rather than for C1, that C2 became a cautioner. One might add that to stress that C2 had not *intended* to lighten C1's burden was to ignore the orthodoxy, explored above, that cautioners' rights of mutual relief do not depend on a contract.[80]

7-39. In sum, there is a rebuttable presumption that cautioners for the same debt are bound on an equal footing, hence entitled to *pro rata* relief. The presumption stems from the notion that a cautioner becomes bound to the creditor for the benefit of the principal debtor, and not for that of a co-cautioner; hence it is usually to the principal debtor alone that cautioners may look for total relief. If, however, there is clear evidence that one cautioner (C1) became bound for the benefit of another (C2), then: (1) if the creditor sues C1 for the full debt, C1 will be entitled to full relief from C2; and (2) if the creditor sues C2 for the full debt, C2 will not be entitled to any relief from C1.

(b) An agreement between the cautioners

7-40. As discussed in chapter 3, the relationship of two obligants *vis-à-vis* the creditor can be distinguished from the relationship of the obligants between themselves. If two cautioners become bound for the same debt, the natural inference, in the absence of any other information, is that they are liable to the creditor on an equal footing, hence entitled to *pro rata* relief from each other.[81] However, there may be evidence external to the obligatory document granted to the creditor that casts the cautioners' relationship in a different light. For example, in *Clark and Highgate v Wilson*,[82] two cautioners were liable in a cash credit

[76] (1798) Hume 87.
[77] (1798) Hume 87.
[78] (1798) Hume 87 at 87–88.
[79] (1798) Hume 87 at 87.
[80] See paras 7-16–7-23 above.
[81] *Smiton v Millar* (1792) Mor 2138 at 2140.
[82] (1830) 8 S 1025.

bond, ostensibly on an equal footing, but one of the cautioners also granted to the other a 'letter of total relief'.[83] In effect, while both cautioners were entitled to full relief from the principal debtor, one was also entitled to full relief from his fellow cautioner. The typical regime of equality between cautioners, hence of mutual obligations of relief, had been altered by an express contract.

7-41. At common law, an agreement regulating cautioners' relief among themselves may be established by parole evidence,[84] except in so far as that evidence contradicts a written obligation to the creditor. This point was illustrated in *McPhersons v Haggarts*.[85] Four cautioners (C1-C4) became bound for the repayment of a loan. C4, who was a minor at the time, ratified his obligation as soon as he reached majority. Two of his fellow cautioners (C1 and C2) argued that when the principal debtor, 'applied to them for their guarantee he informed them that they were to be cautioners only *ad interim* till [C4] came of age . . . and that they were to be freed as soon as [C4] granted the cautionary obligation for the said sum of £500'.[86] They also alleged that the bank 'consented and agreed to the loan being given on these terms'.[87] Those arguments were dismissed. The court took the view that C1 and C2 were attempting to contradict the terms of their written obligations to the creditor (which gave the impression that all four parties were co-cautioners) with parole evidence of a different arrangement.[88] Had C1 and C2 argued that C4 had agreed to relieve them completely of their obligation once he came of age, the existence of that agreement could have been proved because it would not have contradicted the terms of the obligation to the creditor. That is not what C1 and C2 attempted. It is also worth noting that, while a modern statute makes it possible for a cautioner to aver additional terms (written or oral) extrinsic to a contract contained in writing,[89] that statute has not abolished the rule that extrinsic parole evidence cannot be pled to *contradict* a cautioner's written obligation to the creditor.[90]

7-42. In short, although it is competent to use parole evidence to show that one cautioner undertook to relieve an ostensible co-cautioner completely, such evidence cannot be used to impugn the latter's written obligation to the creditor.

[83] (1830) 8 S 1025 at 1025.
[84] *Hamilton & Co v Freeth* (1889) 16 R 1022 at 1027.
[85] (1881) 9 R 306.
[86] (1881) 9 R 306 at 315.
[87] (1881) 9 R 306 at 316.
[88] (1881) 9 R 306 at 316–317.
[89] Contract (Scotland) Act 1997 s 1. The statute applies to contracts in general, not just to contracts of caution.
[90] M L Ross, J Chalmers and I Callander, *Walker and Walker: The Law of Evidence in Scotland* (5th edn, 2020) paras 26.7.1–26.7.3 and (with specific regard to co-obligants, co-cautioners etc) para 26.14.2.

(4) Summary

7-43. The manner in which C1 and C2 become bound plays a key role in shaping their rights against one another, indicating as it does the burden that each is willing to bear. In the paradigm case, C1 and C2 undertake joint and several liability for, say, £100. Provided that both cautioners remain solvent, and disregarding what might be recoverable from the principal debtor, C1's and C2's ultimate shares of liability will be £50 each. The creditor can sue either for £100, but whoever pays that amount will have a right to recover the excess beyond his share. At the same time, both cautioners, in becoming bound in this way, expose themselves to the risk of ultimate liability for the whole £100 in the event that the other cautioner becomes insolvent. The above section has considered several variations on this paradigm case, examining, at each turn, what effect those variations have on the availability of *pro rata* relief. From that survey, the following conclusions may be drawn:

(1) Becoming bound in separate documents does not impair cautioners' rights of relief among themselves provided that they have become bound for the same debt.

(2) Although the paradigm relief case involves cautioners who become bound jointly and severally, even cautioners who do not become bound in that way might be entitled to mutual relief. Whether they are so entitled will depend on the circumstances.

   (a) Proper cautioners bound for £100 enjoy a right of relief against one another where one pays more than his share of £50. Such cautioners stand in a position akin to those liable jointly and severally in as much as either could have been sued for £100 had the other fallen insolvent.

   (b) By contrast, cautioners who become bound for separate debts (e.g. £50 each), rather than jointly and severally for a single amount (e.g. £100), do not, in point of principle, enjoy a right of relief in the sense of a *pro rata* contribution for the excess above the payer's debt of £50, and that is because the creditor could never have sued the paying cautioner for that excess. However, as will be explored below, a crucial distinction falls to be drawn between cautioners bound for a £100 debt in fixed £50 shares, on the one hand, and cautioners who each become bound for a separate debt of £50, on the other. In the former case, the cautioners are entitled to a sort of *pro rata* relief, albeit one that does not depend on the creditor's being able to sue either cautioner for more than his *pro rata* share of £50.

(3) Cautioners are usually liable to the creditor on an equal footing, hence their entitlement to *pro rata* relief among themselves. However, the

presumption that cautioners are to be treated equally in a question of relief can be rebutted either by an agreement between them or by evidence that one became bound for the benefit of the other.

E. THE MANNER IN WHICH THE CAUTIONARY OBLIGATION IS FULFILLED

(1) Payment or performance without being sued

7-44. In the paradigm case, C1 pays the whole £100 debt not because he has volunteered to do so, but because he has been sued. C1 and his co-cautioner (C2) are jointly and severally liable to the creditor for £100 and the creditor has decided, in exacting the whole debt from C1, to make the most of that joint and several liability. The following section considers cases where C1's payment is not the product of such compulsion.

7-45. A cautioner who pays the debt when it falls due, but before the creditor either sues or threatens to sue him, is as entitled to *pro rata* relief as a cautioner who has been sued.[91] As much may be extrapolated from the paradigm *pro rata* relief case: whether or not the cautioner has been sued for the whole debt, there is a risk of such suit – a risk that the cautioner, in paying the debt once it has fallen due, seeks to pre-empt.

7-46. It is for similar reasons that a cautioner who enjoys the benefit of division, but who decides to pay the full debt anyway, is entitled to *pro rata* relief.[92] Again, there was a risk of that cautioner's later becoming liable for the full debt if his fellow cautioner(s) had fallen insolvent. The status of a cautioner who enjoys the benefit of division is analogous to that of a cautioner bound jointly and severally (*in solidum*) in as much as the former's liability may, if all other cautioners fall insolvent, effectively become liability *in solidum*.

7-47. A right of relief arises from a payment pursuant to an obligation that could have been enforced against either the paying cautioner or the cautioner from whom relief is sought.[93] In that regard, it is necessary to distinguish two sorts of case:

Cautioners liable for distinct debts

If two cautioners become bound for distinct debts, a view favoured in *Morgan v Smart*,[94] a cautioner who pays both will not be entitled to relief from the other.[95] There is no analogy between this case and the paradigm of joint and

[91] *Moss v Penman* 1993 SC 300.
[92] See discussion at paras 7-29–7-32 above.
[93] *Henderson v Paul* (1867) 5 M 628.
[94] (1872) 10 M 610.
[95] (1872) 10 M 610.

several liability for the whole amount. If two cautioners (C1 and C2) are bound for separate debts of £50, owed by the same principal debtor to the same creditor, each cautioner is liable for a maximum of £50. Should one of the cautioners (C1) decide to pay the whole £100 owed by the principal debtor, half of that payment will satisfy C1's own cautionary obligation. To the extent that C1 pays his own £50 debt, C1, as the sole cautioner for that debt, will not have fulfilled any more than his proper share of it (£50), and so will have no entitlement to relief from C2; nor will C1 have a right of relief as regards the payment of C2's debt of £50, given that this was not a sum for which C1 could ever have been sued. If C1 wishes to recover the excess £50, some alternative cause of action must be adduced, for instance one based on unjustified enrichment.[96]

Cautioners liable for the same debt but in fixed separate shares

The case of C1 and C2 guaranteeing separate debts of £50 each falls to be distinguished from that of C1 and C2 guaranteeing the same debt of £100 but restricting their respective liabilities for that sum to £50 each. To the extent that neither cautioner can be compelled to pay more than his £50 share, even if the other one becomes insolvent, this scenario resembles that of cautioners bound for separate £50 debts, suggesting that there is no entitlement to relief. In fact, as discussed below, cautioners bound for the same £100 debt but up to fixed limits of £50 each do enjoy rights of relief. However, such rights must be understood differently from those in the paradigm case, where the creditor may compel one cautioner to pay more than his proper £50 share: where the cautioners are bound up to fixed limits of £50, the creditor has no such power.

(2) Cautioner performs an obligation *ad factum praestandum*

7-48. *Marshall & Co v Pennycook*[97] is of recurring relevance to this book. For

[96] If C1 pays the excess £50 in the erroneous belief that C1 owes it to the creditor, the *condictio indebiti* will allow C1 to recover that excess: *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SC 151. On the other hand, even if C1 pays in the knowledge that C1 did not owe the excess £50, C1 may still be entitled to recover this amount from C2 on the ground that C1 has enriched C2 by extinguishing C2's debt. See, in that regard, *Reid v Ruthven* 1917 2 SLT 238 aff'd 1918 2 SLT 8, (1918) 55 SLR 616 and the 'unjustified enrichment' analysis propounded in H L MacQueen, 'Payment of another's debt', in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 470; R Evans-Jones, *Unjustified Enrichment* vol 2: *Enrichment Acquired in Any Other Manner* (2013) paras 6.52–6-54. This reflects the approach adopted in German law: B S Markesinis, W Lorenz and G Dannemann (eds), *The Law of Restitution: A Comparative Introduction* (1997) 373; E von Caemmerer, 'Bereicherung und Unerlaubte Handlung', in *Festschrift für Ernst Rabel* (1954) vol 1, 333, as cited in R Zimmermann and J du Plessis, 'Basic features of the German law of unjustified enrichment' (1994) 2 RLR 14 at 25.

[97] 1908 SC 276.

present purposes, the case demonstrates two important points: firstly, although performance of a cautionary obligation usually takes the form of a payment to the creditor, it need not always take that form; secondly, and relatedly, entitlement to relief does not depend on the cautioner's having fulfilled the cautionary obligation by the simplest, most minimalistic, route. *Marshall & Co* concerned two cautioners (C1 and C2) who became bound for the completion of a construction project for a town council. When the principal obligant fell ill, one of the cautioners (C1) decided to complete the project himself. The question arose whether C2, who had refused to assist C1 in his completion of the project, was obliged partially to relieve C1 of the expenses that he had incurred. C2 argued that his and C1's cautionary obligation was limited to paying the creditor if the principal obligant failed to complete the project; in no respect were they obliged to complete the project themselves. Having intervened nonetheless, C1 had acted not as a cautioner but as a *negotiorum gestor* for the principal obligant, and so was not entitled to *pro rata* relief from C2.[98] Rejecting this argument, the Court of Session held that C1 *was* entitled to relief from C2. While it was acknowledged that, usually, a cautioner *ad factum praestandum* need only pay 'damages for any loss sustained by the [creditor] in the event of the contract not being duly performed', and that he could not be compelled to perform the principal obligant's obligation himself, a cautioner could nevertheless choose to fulfil his cautionary obligation in that way, especially where the creditor had consented to such a course of action.[99] To hold otherwise would have been anomalous. C1 had completed the building project not as a *negotiorum gestor* but in fulfilment of a shared cautionary obligation. In so doing, he had incurred more than his proper share of the relevant loss. At the same time, C1's intervention had saved both him and his co-cautioner (C2) significant expense. As Lord Low noted,[100]

> it seems to me [. . .] to be proved that [C1's intervention] was the best course to follow in the interests of the cautioners, because [C1's witnesses] whose evidence is uncontradicted, say that if when [the principal obligant] became incapacitated [C1] had not carried on the contract, and the Town Council of Selkirk had been forced to do the work themselves, the loss would have been much greater.

7-49. It is not clear what the outcome would have been if C1's intervention had occasioned him greater expense than if he had simply bided his time, allowed the principal obligant to default, and paid compensation to the creditor when it was demanded. It is at least arguable that, even here, C1 ought to have a claim against C2, for C1 could still be deemed to have fulfilled his cautionary obligation to the creditor, incurring loss thereby. Hindsight may later show that loss to be higher than the loss that would have arisen from a payment of

[98] 1908 SC 276 at 280.
[99] 1908 SC 276 at 282 per Lord Low.
[100] 1908 SC 276 at 283.

damages for non-completion, but it does not follow from this that the loss was incurred unreasonably. In any case, to the extent that C1's losses were incurred unreasonably, his measure of recovery against C2 ought, in principle, to be capped.

F. AMOUNT PAID BY EACH CAUTIONER

7-50. In the simplest case, the cautioner claiming relief has paid the whole debt and C2 has paid nothing. Matters are not always so simple. C1 may, for example, have paid less than the full amount. The following section examines some of the more unusual scenarios that can arise in that regard.

(1) C1 and C2 each pay half

7-51. If C1 and C2 are jointly and severally liable for £100 and each has paid £50 to the creditor, there is no need for relief between themselves so far as relief concerns the redistribution of loss to be borne by the cautioners (here £100). The loss that a right of relief exists to redress, namely one cautioner's having paid more than his share of the debt, has not occurred.

7-52. Suppose that C1 has paid his share of the debt and that C2 has not yet paid his share. C1 has no right to demand payment from C2 because C1 has not paid more than his own share.[101] A right of relief crystallises when a cautioner pays more than his share. It is not a right to demand that, simply because a cautioner has paid *something* towards the debt (e.g. £10 towards a debt of £100), the other cautioner must make a 50 per cent contribution to that something.

7-53. What happens if a cautioner pays more than his share (here £50) but less than the full debt (£100)? Suppose that he pays £70. Here the cautioner is entitled to relief from his co-cautioner to the extent that his payment exceeds his share (£20). To allow such interim relief does not prejudice the creditor, who has received payment of £70 and who is free to exact the balance of £30 from either or both cautioners.

(2) Creditor ranks on C1's insolvent estate

7-54. While the notion that cautioners are ultimately liable in equal shares is simple in theory, it can become complicated in cases where the paying cautioner is insolvent. The insolvency-related issues discussed here would benefit from further exploration elsewhere, ideally as part of a broader study of insolvency

[101] He might, however, have a right to insist that C2 pay his share, as explored in chapter 10.

in the context of rights of relief.[102] However, even apart from such a holistic study of relief and insolvency, it is necessary to explore the case of the insolvent cautioner, raising as it does fundamental questions about the basis for, and limits of, rights of relief.

7-55. In the paradigm case, C1 pays the whole debt (£100) and obtains relief of £50 (being the amount by which C1's payment exceeds his share of the debt). If, however, C1 is insolvent, he will be unable to pay the whole £100 and so, even if the creditor ranks on C1's estate for the full debt, the creditor will have to pursue C2 for the balance. In such cases, the question arises whether the insolvent cautioner (C1) is entitled to *pro rata* relief from C2. Suppose that C1's estate yields a dividend to the creditor of £70: is C1 entitled to claim half of that amount from C2 (i.e. £35), or is C1 entitled to claim only to the extent that the dividend exceeded his (C1's) share of the debt in real terms (i.e. £20)? Bell takes the view that C1 is entitled to £35 rather than £20, on the ground that the creditor has ranked on C1's estate for the full debt and that C1 is entitled to half of what was paid under that ranking.[103]

7-56. The question arises sharply where the dividend realised from C1's insolvent estate is less than C1's proper share of the whole debt. If the creditor ranks on C1's estate for the full £100 but obtains only a dividend of £30, C1 will have paid less than his proper share of the debt (£50). If the creditor then pursues C2 for the balance of £70, is C1 entitled to relief from C2 to the extent of £15? In *Cranstoun v M'Dowal*,[104] this question was answered in the negative. Here two parties, M'Farlane and M'Dowal, were liable for the same debt.[105] The creditors ranked on M'Farlane's insolvent estate for the whole debt but the dividend exacted was, as in the hypothetical example just given, less than half the total debt.[106] The issue arose whether M'Farlane (or rather the trustee for his creditors) was entitled to relief from M'Dowal for the amount paid out of M'Farlane's estate. The Inner House assoilzied M'Dowal from this claim because the dividends realised from M'Farlane's estate did not 'exceed the proportion' of the debts for which the latter was liable.[107]

7-57. Bell is critical of this decision.[108] To hold that the amount paid by C1 should, even in the case of C1's insolvency, be more than half the debt is prejudicial to the other unsecured creditors claiming on C1's estate. Whether the dividend is £30 or £70, the fact remains that there has been a ranking on C1's estate for the full debt; hence – so runs the argument – C1 is entitled to

[102] For insight into such difficulties, see, e.g., Bell, *Commentaries* I, 355–356.
[103] Bell, *Commentaries* I, 354–355.
[104] (1798) Mor 2552.
[105] (1798) Mor 2552 at 2552.
[106] (1798) Mor 2552 at 2553.
[107] (1798) Mor 2552 at 2557.
[108] Bell, *Commentaries* I, 354–355.

half of that dividend from C2. There is an intuitive appeal in this criticism. The creditor's choice of suit produces a lottery at least loosely akin to that in the paradigm case of *pro rata* relief, where the lottery consists in the creditor's exacting full payment from the less fortunate of two solvent cautioners: in each scenario, the creditor obtains full payment but this may involve treating the cautioners unequally. However, arguably the question whether one cautioner has paid more than his share is logically prior to the question whether the creditor has, or could have, acted arbitrarily in the sense of having multiple paths to full payment of the debt. On this view, it is more significant that C1 has paid less than his share than that C1's payment was the product of a ranking for the full debt and that the creditor might instead have pursued C2 for the full debt. In the simple case involving two solvent cautioners, by definition only one (if either) can have paid more than his share. Here that cautioner is C2. In principle, therefore, it is C2 who enjoys a right of relief against C1, not vice versa. While the rule against double rankings will prevent C2 from ranking on C1's estate for relief after the creditor has ranked on C1's estate for the full debt,[109] it is important to remember that if both cautioners had been solvent, and if C1 had paid £30 and C2 had paid £70, C2 would have been able to claim relief from C1 to the extent of £20.

7-58. In sum, if C1 seeks relief from C2, in the sense of a partial contribution towards what C1 has paid,[110] C1 must show that he has paid more than his *pro rata* share and may claim only to the extent of that excess. Without denying the complexities to which the insolvency of a cautioner can give rise, it is submitted that Bell's criticisms of *Cranstoun v M'Dowal* are misplaced.

(3) C1 and C2 pay collectively less than the full debt

7-59. It should, for the sake of completeness, be noted that the creditor may, in claiming against one or both cautioners, accept less than full payment in satisfaction of the debt. This raises complex issues, better addressed in the section below. A discount or 'ease', as it is sometimes termed, relates to a broader issue: to what extent are cautioners obliged to share benefits and pool resources?[111]

[109] See, e.g., *Anderson v Mackinnon* (1876) 3 R 608.

[110] The mere fact that C1 has paid less than his own share does not mean that he has no rights against the other cautioner. As will be explored in greater detail below (at paras 7-60–7-95), C1 may have a right to share in benefits from the principal debtor's estate or in the benefit of a discount granted by the creditor.

[111] Eases are discussed below at paras 7-66–7-77.

G. SHARING OF BENEFITS

(1) Benefits from the principal debtor

7-60. As mentioned above, where two cautioners are jointly and severally liable for £100 and each has paid £50, there is no claim of relief between them, each having paid no more than his proper share of the debt. However, both will also desire total relief from the principal debtor, and a cautioner who has received a benefit in that regard will be obliged to share it with his co-cautioner(s). Here the language of benefits denotes not a profit or enrichment but a specific type of compensation: the right of total relief usually requires the principal debtor to provide *equal* compensation to the cautioners who have been made to pay, and so any cautioner who has received an unequal share of that compensatory benefit must share it with the others. While total relief is the focus of chapter 9, the following section considers the interaction of that right with cautioners' rights among themselves.

7-61. In *Milligan v Glen*,[112] two cautioners, Glen and Milligan, were liable in a bond. When Glen received a 'heritable security in relief' over the principal debtor's property, the question arose whether he was bound to share that benefit with Milligan. When the principal debtor fell insolvent, Glen and Milligan paid their respective halves of the debt. Milligan then brought an action against Glen in relief. It was held that 'a cautioner obtaining security in relief to himself, which has the effect of operating payment of the debt out of the funds of the principal debtor, is bound to communicate the benefit of that security to co-cautioners'.[113] Likewise, in *Creditors of Fisher v Creditors of Campbell*,[114] there were three co-cautioners liable for a debt of £600. One of those co-cautioners (Captain Campbell) had received a heritable security from the principal debtor over his property. Captain Campbell collected the *pro rata* shares due by the other cautioners then paid the whole debt.[115] It was held that, although the real security had been granted to Captain Campbell, his co-cautioners were entitled to the residue of that security once he had been fully relieved of what he had paid.[116] Thus, although Captain Campbell was under a duty to communicate the benefit of the security to his co-cautioners, he was only obliged to do so once he himself had been fully relieved. This meant that, if the security subjects had been insufficient on their own to relieve Captain Campbell, his co-cautioners would have received nothing.

[112] (1802) Mor 2140.
[113] (1802) Mor 2140 at 2140.
[114] (1778) Mor 2134.
[115] (1778) Mor 2134 at 2135.
[116] (1778) Mor 2134 at 2136.

7-62. Other cases favour a more equitable approach to the sharing of benefits. In *Humble v Lyon*,[117] two cautioners, Humble and Lyon, became bound for a £119 debt, which represented the price of certain goods purchased by Arnot (the principal debtor). Later, several weeks after the price had fallen due, the purchaser, 'who . . . was in some [financial] difficulties', granted a deed to one of the cautioners, Lyon, in which he 'assign[ed] and dispone[d]' certain goods.[118] The deed authorised Lyon to sell those goods with a view to 'operating relief of the cautionary obligations'. It was held that, although the goods had been placed into the hands of one cautioner only, the proceeds of sale had to be shared by both cautioners equally for their relief.[119] Likewise, in *Hamilton & Co v Freeth*,[120] Lord Rutherfurd Clark declared that 'where 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, [that] cautioner is bound to communicate the benefit of the security *equally to all*'.[121] These cases suggest that, even if the principal debtor appears to provide a benefit for one cautioner's relief, the recipient must communicate a proportional amount of that benefit to the other cautioners.

7-63. Is there ever a justification for *unequal* sharing of benefits from the principal debtor's estate, assuming that the cautioners are bound on an equal basis?[122] What is the law where the principal debtor expressly intends to make a payment, or to grant a security, for the exclusive benefit of one cautioner? There are some indications that such preferential treatment may be allowed. For instance, though an equal distribution was favoured in *Humble v Lyon*,[123] a case in which the principal debtor delivered goods to one of two cautioners and authorised him to sell those goods for the purposes of his relief, the Court of Session did not discount the permissibility of special treatment by the principal debtor. It was noted that, 'the case of an infeftment of relief on the debtor's heritable estate' would have been treated differently from a transfer of moveables, for such 'a security may be given without inferring any obligation [on the part of the cautioner] to communicate'.[124] Placing goods into one cautioner's hands with a power of sale was deemed equivalent to the payment of money by the principal debtor in reduction of the debt, which automatically went to the benefit of both cautioners.[125] The implication seems to have been that, because the granting of a security did not automatically reduce the principal debtor's liability to the creditor, the principal debtor was free

[117] (1792) Hume 83.
[118] (1792) Hume 83 at 83.
[119] (1792) Hume 83 at 85.
[120] (1889) 16 R 1022.
[121] (1889) 16 R 1022 at 1026 (emphasis added).
[122] Cautioners bound on an unequal basis are discussed in chapter 8.
[123] (1792) Hume 83.
[124] (1792) Hume 83 at 85.
[125] (1792) Hume 83 at 85.

to decide to what extent each cautioner benefited from it. Other expressions of the 'benefit sharing' principle leave no room for such partiality. The Lord Ordinary in *Scott v Young*[126] stated that the 'principal debtor's estate [must not] be diminished by deducting any part of it and giving it as a security to one of the cautioners. If that is done there is no question that that cautioner has got to communicate his security to his co-cautioner.'[127] This emphasis on the principal debtor's 'estate', as opposed to his presumed intent, suggests that it is not in his power to effect unequal treatment of the cautioners. Indeed, there is much to commend an approach that bars the principal debtor from favouring one cautioner over another as regards their right of total relief if both cautioners are, *vis-à-vis* the principal debtor, co-creditors. On that understanding, any amount received by one in satisfaction of the common right to total relief ought to be shared equally with the other. It is only where a cautioner *consents* to some alteration of this position that an unequal distribution will be tolerated. Thus, in *Hamilton & Co v Freeth*,[128] where a new cautioner, Hamilton & Co, received a real security from the principal debtor in relief of its cautionary obligation, it was held that this new cautioner was not obliged to communicate the benefit of the security to a cautioner bound in the original bond (Freeth). Although support was expressed for the 'general doctrine' that cautioners were bound to share such benefits 'equally' among themselves,[129] the Inner House held that effect would be given to an unequal arrangement if it could be shown that the other cautioners had consented to it. Hamilton & Co led evidence to the effect that Freeth had agreed to its having the sole benefit of the security.[130] In holding this agreement to have been proven, the court placed particular stress on the fact that Hamilton & Co was a new cautioner, having become bound after the credit had been advanced and only because Freeth (a cautioner already bound) was in financially embarrassed circumstances. It was suggested that it would have been very 'natural' for the real security to have been furnished for the sole benefit of the incoming cautioner, who may have needed some special inducement to become bound in relation to an extant, rather than a prospective, obligation.[131] In short, the general rule is that a cautioner who receives a security is required to share that security with the other cautioners, subject to the contrary agreement of those cautioners.

7-64. The rule of equal distribution applies only to benefits derived from the principal debtor's estate. If a cautioner receives a security for his relief from a third party, he has no duty to share that benefit with his co-cautioners.

[126] 1909 1 SLT 47.
[127] 1909 1 SLT 47 at 49.
[128] (1889) 16 R 1022.
[129] (1889) 16 R 1022 at 1026.
[130] (1889) 16 R 1022 at 1026.
[131] (1889) 16 R 1022 at 1027.

In *Scott v Young*,[132] a security was granted to a cautioner over the property of the principal debtor's wife. The Lord Ordinary held that the cautioner who had received this security was 'not bound to communicate' the benefit of it to his fellow cautioners.[133] He noted that had there been any evidence that the wife had intended this for both cautioners' benefit this evidence would have been relevant, but, there being no such evidence, the security was presumed to enure exclusively to the benefit of the cautioner to whom it had been granted.[134] Thus, while it is not in the power of the principal debtor to discriminate between two cautioners as regards their total relief, it is justifiable for a third party, in no way beholden to either cautioner in total relief, to favour one's interests over the other's.

7-65. In short, C1's rights are not confined to reimbursement of whatever has been paid in excess of C1's *pro rata* share; C1's rights also include the sharing of benefits received by C2 (e.g. a real security provided by the principal debtor) associated with their conjoined rights of total relief against the principal debtor.

(2) Benefits from the creditor

7-66. Another benefit that one cautioner may be obliged to share with another is known as an 'ease', that is, a voluntary deduction in the amount claimed by the creditor from one or more cautioners.[135] If C1's and C2's liability is for £100 and the creditor claims £50 from C1, the creditor will have exacted no more from that cautioner than his share of the debt. It would seem, accordingly, that C1 has no right of relief against C2. However, if the creditor then accepts £40, rather than £50, from C2, and discharges that cautioner, C2 will have received an effective reduction in liability to the creditor. In principle, whether C1 is entitled to share in that benefit depends upon its purpose.

7-67. There are two helpful cases on this issue, discussed together by Lord Kames, albeit separately from his main discussion of rights of relief.[136] In the summaries that follow, hypothetical figures have been given for ease of comparison. In *Nisbet v Lesly*,[137] C1 and C2 were liable for a debt of £100. C1 was sued for £90 by the creditor. Having paid that amount, C1 pursued C2 for £50. C2 countered that C1 had received an ease of £10 and that he was obliged

[132] 1909 1 SLT 47.

[133] 1909 1 SLT 47 at 48.

[134] 1909 1 SLT 47 at 48–49.

[135] The term 'ease' is not always used in that way. For instance, Bell says that a co-obligant 'making payment of the debt is bound, in claiming relief, to communicate the benefit of any deduction or ease (as it is sometimes called) which he may receive at settling, or *which may accrue from the funds of insolvent co-obligants*.' See Bell, *Principles* § 62 (emphasis added). In this book, by contrast, the term 'ease' is used simply to refer to a discount granted voluntarily by the creditor to one or more paying cautioners.

[136] Kames, *Principles of Equity* (ed Lobban) 101–102.

[137] (1664) Mor 3392.

to share that ease with him: in other words, C2 was obliged to pay C1 only £45 in relief. However, it was held that C2 was bound to relieve C1 for half of the whole debt (£50).[138] In other words, the ease of £10 was seen to enure exclusively to the benefit of C1, the cautioner to whom it had been granted. The other relevant case is *Brodie v Keith*,[139] which concerned the same problem as *Nisbet v Lesly*, only this time the Court of Session held that the ease of £10 was not a benefit enuring to C1 exclusively; rather, it had to be shared with C2.[140]

7-68. In comparing these decisions, it is natural to question why an ease such as that in *Nisbet v Lesly*[141] could be deemed to belong to one cautioner only, such as to deprive the other cautioner of a right to share in it. Erskine might have answered the question thus: although a cautioner must, as a general rule, 'communicate' an ease received from the creditor 'upon payment', there was no such obligation if the creditor intended the ease for that cautioner's exclusive benefit.[142] This view can also be found in the writings of Mackenzie,[143] Kames[144] and Hume.[145] By contrast, both Stair and Bell give the impression that eases invariably have to be shared between cautioners,[146] an approach echoed by Gloag and Irvine.[147] While there is an intuitive appeal in the latter position, it is submitted that Mackenzie's, Kames', Erskine's and Hume's is the sounder approach in point of principle. Of course, it might be asked: if the creditor is not usually permitted to discriminate between cautioners as regards their relief, sometimes on pain of losing his contractual rights against them,[148] why should the law suffer partiality on the creditor's part in the case of eases? In

[138] (1664) Mor 3392 at 3392.
[139] (1672) Mor 3393.
[140] (1672) Mor 3393 at 3393.
[141] (1664) Mor 3392.
[142] Erskine III.3.70.
[143] Mackenzie, *Institutions* III, 3 at 250–251: '...they [i.e. the cautioners] must communicate to their *Co-cautioners*, what ease they get by way *of Transaction* from the *Creditor*; but if they get the said ease by a meer *Ratification* [*sic*], as by *Donation*, &c. then they are not bound to communicate what ease they get; for a *Creditor* may justly gratifie one of his *Cautioners* as his Friend, or Relation, without being obliged to gratifie the rest' (italics as in the original text).
[144] Kames, *Principles of Equity* (ed Lobban) 101–102.
[145] Hume, *Lectures* II, 220.
[146] Stair I.17.13; Bell, *Principles* §§ 62, 270. In this book, references to Stair's *Institutions* are generally to the sixth edition by D M Walker (1981), which is heavily based on the second edition (the last for which Stair himself was responsible). For a different approach to the question of eases, see, e.g., the fifth edition by J S More: Stair, *Institutions* (5th edn, 1832) I.17.13.
[147] W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable Including Cautionary Obligations* (1897) 821.
[148] See paras 5-69–5-79 above. At common law, the release of one cautioner effected a partial release of the others based on the prejudice to their relief that would have occurred had they remained liable for the full debt (Erskine III.3.68). Now, the release of one cautioner has the effect of releasing the others *completely*: Mercantile Law Amendment (Scotland) Act 1856 s 9; *Morgan v Smart* (1872) 10 M 610 at 615 per Lord Cowan.

fact, far from being mutually exclusive, arguably the usual approach to relief and the approach to eases outlined here are two sides of the same coin. Relief, it will be remembered, is characterised by Kames as an equitable corrective to the creditor's pursuit of one cautioner for the whole amount. One aim of that principle is to combat arbitrariness on the creditor's part.[149] The creditor can, if the cautioners are bound jointly and severally, exact the whole debt from one, but must allow that cautioner to seek partial compensation from the other cautioners. To do something to defeat or impede such a right would be arbitrary. The creditor has obtained full payment; it occasions him no prejudice to allow the paying cautioner to obtain relief from the others:[150]

> Utility concurs to support this equitable claim: no situation with regard to law would be attended with more pernicious consequences, than to permit a creditor to oppress one cautioner and relieve [i.e. release] others: judges ought to be jealous of such arbitrary powers, which will generally be directed by bad motives; often by resentment, and, which is still worse, more often by avarice.

7-69. It is worth remembering that the section of *Principles of Equity* in which Kames discusses cautioners' relief is entitled, 'Connections that make benevolence a duty *when not prejudicial to our interest*'.[151] Here Kames discusses not only cautioners' rights among themselves but such analogous rights as those enjoyed by co-principal debtors (*correi debendi*) among themselves and the right of a secondary creditor to an assignation of a security held by a catholic creditor.[152] In all of these scenarios, the underlying principle is the same: one party, X (e.g. a creditor in a cautionary relationship), has a duty to act fairly and equitably *vis-à-vis* certain other parties connected with him, Y1 and Y2 (e.g. cautioners), because: (1) to do so in no way impairs X's own interests; and (2) not to do so has a prejudicial effect on Y1 and Y2. Throughout this section of *Principles of Equity*, reference is made to the need to 'act impartially' and to avoid 'arbitrary measures.'[153]

7-70. Bearing that principle in mind, there is a stark contrast between (1) the case where a creditor tries both to obtain full payment of the debt and to saddle one of two cautioners with a disproportionate share of the ultimate burden, and (2) the case where the creditor grants an ease or deduction to one cautioner but

[149] Kames, *Principles of Equity* (ed Lobban) 79–80.

[150] Kames, *Principles of Equity* (ed Lobban) 79–80.

[151] Kames, *Principles of Equity* (ed Lobban) 77–88 (emphasis added).

[152] In other words, if one creditor (the so-called catholic creditor) has a security over Asset 1 and a security over Asset 2, and another creditor of the same debtor (the so-called secondary creditor) later obtains a security over Asset 2, and both assets are more than adequate to satisfy the catholic creditor's debt, the latter has an equitable duty to satisfy the debt out of Asset 1 so that the other creditor can satisfy the debt out of Asset 2. Alternatively, if the catholic creditor does decide to exact payment out of Asset 2, that creditor must assign his interest in Asset 1 to the secondary creditor; see Kames, *Principles of Equity* (ed Lobban) 81.

[153] See, e.g., Kames, *Principles of Equity* (ed Lobban) 82.

not to the other. In granting such a benefit, the creditor necessarily makes a sacrifice to that extent, and so where the creditor intends that benefit wholly for one particular cautioner, effect should, in principle, be given to that intention. In essence, the £10 is a gift to the favoured cautioner. The creditor could, to the same end, have accepted full payment from the cautioners, then paid one of them £10 immediately thereafter. If the creditor's duty to treat cautioners impartially arises from the fact that it is not prejudicial to his interest to do so, the creditor's ability to discriminate between cautioners in dispensing eases stems from the fact that eases necessarily *are* prejudicial to his interest.

7-71. There remains the question: why, in an apparent departure from the approach just propounded, was the paying cautioner (C1) in *Brodie v Keith*[154] held obliged to share his ease with C2? According to C2, the creditor had granted this ease because the debt for which he and C1 were liable was 'very old'; there was some speculation as to whether it had already been paid by the principal debtor.[155] As such, the creditor was willing to settle for a reduced amount. This is significant: the ease related to the debt for which the cautioners were liable. It was, consequently, reasonable to infer that it had been granted for both cautioners' benefit.[156] Indeed, if a creditor grants an ease, the reasonable assumption, in the absence of evidence to the contrary, is that he intends it to be shared equally between the cautioners.

7-72. As chapter 5 made clear, a creditor is not permitted to release one cautioner and simultaneously throw the whole burden of the debt on the other. This would allow the creditor both to (1) increase the burden that one cautioner has to bear by depriving that cautioner of *pro rata* relief, and yet (2) exact full payment of the debt. Simply put, the creditor in such a case would be 'having his cake and eating it'. However, a creditor who grants an ease to one cautioner only is: (i) lessening the burden that that cautioner has to bear, the other cautioner's share remaining static; (ii) doing so in a way that necessitates a sacrifice on the creditor's part, for, by granting an ease, the creditor surrenders a portion of the debt that could otherwise have been claimed; and (iii) not doing anything to imperil either cautioner's prospects of *pro rata* relief should either be made to pay more than his *pro rata* share.[157] It is thought that all these points cohere

[154] (1672) Mor 3393.

[155] (1672) Mor 3393 at 3393.

[156] This approach may also be analysed in the following way. If relief is based on one cautioner's having paid more than his *pro rata* share of the debt, and the creditor has recognised that the total debt is actually £90 rather than £100, the cautioner (C1) who paid £90 has paid more than his share of that debt (£45); hence the paying cautioner is entitled to relief of £45 from C2. While this provides a neater explanation of the outcome in that case, it is arguably better, for the sake of more complex cases, to analyse the question whether C1 has paid more than his share and the question of allotment of eases separately.

[157] For his own sake, the creditor should not grant an absolute discharge to the cautioner who has been granted the ease before pursuing the other cautioner: Mercantile Law Amendment (Scotland) Act 1856 s 9.

with Kames' justification for cautioners' rights of relief.[158] The doctrine applies where it costs the creditor nothing not to undermine an equal distribution of liability;[159] conversely, in so far as the creditor's own interests are prejudiced, preferential treatment is arguably in the latter's gift.

7-73. Assuming that the creditor, in granting an ease, does not intend to favour one cautioner over another, and that the value of the ease should therefore be shared equally between the cautioners, it does not, in principle, matter how the ease was granted. That might not be immediately obvious. Sometimes the institutional writers characterise the sharing of an ease as a partial defence to a cautioner's claim for relief, rather than as a claim in itself.[160] Their comments are geared towards the following sort of scenario: C1 claims relief of £50 from C2, but C2 argues that C1, having paid only £90 to the creditor rather than the full £100, may in turn claim only £45. Evidently, however, the principles that regulate eases in that scenario (i.e. where an ease is a partial defence to a right of relief) extend to the case where one cautioner demands a portion of an ease from another, that is, where C1 pays £40 and C2 pays £50, and C2 seeks to claim £5 from C1 (i.e. half of the ease). To hold that different rules apply in those scenarios would produce a lottery: the cautioners' respective shares of the burden would depend on whether the creditor had sued one for £90 or each of them for £50 and £40 respectively. That is exactly the sort of arbitrariness that rights of relief are intended to combat.[161] As Bell noted, albeit in a different context, it is undesirable if, 'according as the creditor may think fit to proceed, very different results to the parties arise'.[162]

7-74. So far, it has been argued that an ease granted to one cautioner must usually be shared with the other cautioner(s), but not always. As to the allotment of an ease, a creditor may discriminate between cautioners without being deemed to act arbitrarily, and that is because an ease is, by definition, prejudicial to the creditor. Against this, one might argue that a creditor who grants an ease in favour of one cautioner but not another arbitrarily alters the *proportions* of the debt to be borne by each, but that is not the case. The question whether one cautioner should take the benefit of an ease must be considered *after* the question whether that cautioner has paid more than his share of the debt. Suppose that three cautioners (C1, C2 and C3) are bound for a debt of £120 and the creditor, after receiving a mere £80 from C1, grants all the cautioners a discharge. At the same time, the creditor makes it clear that the discount of

[158] Even if allowing the creditor to discriminate as to the distribution of an ease is not *compelled* by Kames' principle, this approach is consistent with Kames' principle. It might be said that Kames' principle that a creditor ought not to discriminate where his own interest is unaffected is silent on the question whether an ease ought to be distributed equally.

[159] See generally Kames, *Principles of Equity* (ed Lobban) 77–88.

[160] See, e.g., Stair I.17.3.

[161] See, e.g., *Murray v Heir and Creditors of Orchyardtown* (1722) Mor 14651.

[162] Bell, *Commentaries* I, 354.

£40 is for C1's sole benefit. If C3 has become insolvent, two questions must be posed in the following order:

(a) Has C1 paid more than his *pro rata* share of the debt? The mere fact that C1 has been granted an ease does not detract from the equal basis on which C1 and C2 became bound. The creditor cannot, by granting an ease, throw the burden of C3's insolvency solely onto C2's shoulders. As a result of C3's insolvency, C1's and C2's shares of the debt have risen to £60 each. C1, having paid £20 more than his share of £60, may seek £20 from C2 in relief.

(b) It is only after considering how much C1 has paid above his *pro rata* share that the question of eases can be considered. The creditor has granted an ease of £40. Does C1 have the right to claim the full benefit of that ease from C2? Arguably, C1 does have such a right. The ease is a benefit granted by the creditor for C1's own benefit and that benefit is necessarily prejudicial to the creditor's own interest. It is therefore for the creditor to decide how the ease should be distributed. C1 can therefore pursue C2 for a further £40, such that C1 and C2 have, in effect, paid £20 and £60 respectively.

7-75. As in the case of benefits from the principal debtor's estate, the language of sharing of benefits must be deployed with care as regards eases: the benefit is simply a special type of compensation to be distinguished from the more familiar right to a *pro rata* contribution towards what was paid. The right to the exclusive benefit of an ease may reduce the paying cautioner's overall loss to nought, but it cannot confer a profit. To the extent that the ease exceeds a cautioner's *pro rata* share, it must be shared with the other cautioners.[163] Thus, where a creditor seeks only £40 of a £100 debt from one of two cautioners, and intends to grant the whole benefit of the ease of £60 to the cautioner who paid £40, that cautioner may claim only £40 from the other cautioner, who will then take the benefit of what remains of the discount (£10).[164] In effect, the cautioner who paid the creditor will have paid nothing and the other cautioner will have paid £40.

7-76. It has been argued that the equitable principle on which non-contractual rights of relief are based does not preclude a creditor from discriminating as to the ultimate allotment of a discount. However, one may still object to such unequal treatment where co-cautioners are connected not simply by equity but by contract. Where a contract exists between two cautioners by virtue of their having become bound to the creditor in concert, it is of the essence of such a contract that each agrees to relieve the other of whatever was paid above that other's share. Whether there exists, in addition, an implied agreement that any

[163] Hume, *Lectures* II, 220.
[164] Hume, *Lectures* II, 220.

discount granted to one cautioner must be shared equally with the other is a separate matter. Does the argument that a creditor is free to discriminate as to the apportionment of an ease, hence that the favoured cautioner does not always have to share that ease, run counter to the agreement, express or implied, that each cautioner will relieve the other of what he has been made to pay? Kames rejected an explanation of rights of mutual relief based on an implied contractual obligation among cautioners, but the unconvincing argument mounted in support of that stance might indicate a wider agenda.[165] Perhaps Kames wished to make his equitable principle not only a sufficient condition for equal sharing of losses and benefits among cautioners but also a necessary condition, such that where this equitable principle was not engaged, there was no basis (contractual or otherwise) for benefit-sharing rights among cautioners. Kames was certainly at pains to avoid analogies between the rights of cautioners among themselves and those of partners among themselves, and this becomes crucially important in his discussion of eases and his argument that they do not require to be shared equally in all cases.[166] In any case, it is submitted that, even where cautioners become bound together, the existence of an implied agreement that each cautioner is entitled to an equal share of discounts granted by the creditor is far from obvious. If two cautioners become bound together on a joint and several basis, there is a strong argument for saying that each intends to relieve the other of what he paid beyond his *pro rata* share and becomes bound on the faith of a reciprocal undertaking; to deny such a right would be to say that each cautioner agrees to a lottery under which the amount ultimately paid by one ranges from the whole debt to nought. Discounts granted by the creditor have a different status. They are analogous to a benefit granted by a third party which, it is well established, cautioners are not obliged to share.[167] If C1 and C2 are bound for £100, and, each of them having paid £50 to the creditor, C1's grandmother decides to pay £50 to C1, there is no reason, in terms of the contract between C1 and C2, why C1 has to share that benefit with C2. That C1 is fortunate to have such a generous grandmother has nothing to do with the contract between him and C2. It is submitted that, by analogy, if C1's good fortune takes the form of a £50 discount from the creditor, and it is clear that the creditor intends to favour C1 alone, there is nothing in the contract between C1 and C2 to compel the sharing of the benefit.

7-77. In sum, while it is easy to conflate benefits from the creditor and benefits from the principal debtor's estate,[168] these call for differential treatment.

[165] Kames, *Principles of Equity* (ed Lobban) 78–79. That argument is discussed above at para 7-13.

[166] Kames, *Principles of Equity* (ed Lobban) 101–102. Cf the observation by the court in *Humble v Lyon* (1792) Hume 83 at 85 that 'Co-cautioners are in a manner *socii* [i.e. partners], to the effect of turning the principal debtor's estate to the benefit equally of all engaged. The doctrine of eases rests on the like foundation.'

[167] *Scott v Young* 1909 1 SLT 47.

[168] It is possible that Gloag and Irvine do this when they discuss the right to share benefits from

As regards benefits from the principal debtor's estate, the principal debtor's intention to benefit one cautioner more than another is irrelevant: each cautioner, as a co-creditor in total relief, is here entitled to equal treatment. But in the case of a discount granted by the creditor, the creditor's intention is the crucial factor in determining whether the discount is to be enjoyed by both cautioners equally or by one exclusively. It is true that, ordinarily, a discount will have to be shared equally between cautioners, but that is only because the creditor will often intend as much or can be presumed to intend as much. In the unusual case where a creditor indicates that the benefit of a discount is to enure to one of the cautioners exclusively, effect ought, in principle, to be given to that intention, no less than to the intention of, say, a testator who leaves an invidious bequest of everything to one sibling and nothing to another.

(3) Benefits where the cautioners' shares are fixed

7-78. There has already been some discussion of cautioners bound for different debts and of the fact that one who pays another's debt does not enjoy a right of relief against the other(s). If, as in *Morgan v Smart*,[169] two cautioners, C1 and C2, are each bound for separate debts owed by the same principal debtor to the same creditor, and C1 pays both his and C2's debts, C1 will have no right of relief against C2. It is difficult to distinguish this scenario from that in which C1 and C2 are bound for the same debt but up to specified limits of, say, £50 each, for here neither can be compelled to pay more than £50. However, to say that such parties have no rights of relief is an oversimplification.

7-79. One rather questionable decision on the subject is *Lawrie v Stewart*,[170] in which a number of cautioners became bound in a composition for a number of specific amounts, totalling £2500. The case concerned four of those cautioners, whose shares were as follows: Lawrie (£500), Stewart (£1000), Menzies (£300)

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the principal debtor and the right to share discounts granted by the creditor, seemingly basing those rights on the same principle: Gloag and Irvine, *Rights in Security* (n 147) 819–821. As the authors note at 819, '[c]autioners [...] have a right to benefit by any security, ease, or relief which may have been obtained by any of their number from the person for whom they intervened. It is equitable, seeing that there is an equality of the burden, that there shall be also an equality of the benefit.' Later in the same section (at 821) they note that, 'if one of several cautioners has compounded for the debt with the creditor, he can claim from his fellow-cautioners only a proportional share of the sum actually paid by him.' Taken together, these passages might be seen to suggest that because there ought to be equality as regards benefits from the principal debtor's estate, there ought also to be equality as regards benefits granted by the creditor. Whether or not Gloag and Irvine meant to say this, it is submitted that any such argument would be a distortion of the principle of equity on which rights of relief are based – a principle concerned not with inequality in the abstract but with inequality arising from the creditor's arbitrariness.

[169] (1872) 10 M 610; see para 7-25 above.

[170] (1823) 2 S 368 (NE) 327, 6 June 1823 FC. For criticism, see, e.g., G Brodie, 'Supplement', in Stair, *Institutions* (4th edn, by G Brodie, 1831) vol II, 943 note c.

and Langmuir (£300).[171] The cautioners were liable for a common obligation, namely the principal debtor's payment of the last instalment of his composition. However, they had made a concerted effort to separate their respective portions of liability, repeatedly stating in their bond to the creditor that each would be liable only for his stipulated share and that none was bound *in solidum* with the others. While those facts may put one in mind of *Morgan v Smart*,[172] *Lawrie v Stewart* concerned a subtly distinct issue. The principal debtor entered into a number of arrangements with three of the cautioners (Stewart, Menzies and Langmuir) whose effect was to relieve them pre-emptively from their obligations, ensuring that they did not have to pay the creditor. Lawrie did have to pay his £500 share and received no relief from the principal debtor. Naturally, therefore, he sought to claim from his three fellow cautioners a proportional contribution (that is, one based on the specific amounts for which each had become bound) of the relief that they had obtained from the principal debtor. It was held that, because the cautioners were not bound *in solidum*, it was not incumbent on Stewart, Menzies and Langmuir to share the benefits that they had received from the principal debtor's estate with Lawrie, an argument upheld by the Inner House of the Court of Session by a majority of three to two.

7-80. It was mentioned at the beginning of the chapter that, in order to determine the circumstances in which rights of relief arise, it is necessary to understand the precise nature of the cautioners' relationship: essentially, it must be asked, 'What connects C1 and C2 such that each has rights against the other?' On this, *Lawrie v Stewart* is of particular interest. Though the cautioners in that case had attempted to separate their respective liabilities, having refused to become bound *in solidum* for a single sum, they were connected in another sense, all having undertaken liability for a common obligation: that of the principal debtor. This nuance is reflected in counsel for the pursuer's arguments before the Inner House. He submitted that a cautioner is 'bound to communicate benefits or payments obtained by him individually', and that this 'right of relief' exists whether cautioners are bound *in solidum* or 'for different sums'.[173] Where cautioners were bound for specific sums, the 'only difference' to their rights was that 'the extent of the relief [was] varied'.[174] In substantiating this right of relief, counsel for the pursuer invoked the following connection:[175]

> The present was a joint bond granted for a joint purpose for the same debtor to the same creditors. The cautioners were in a very different situation from what they would have been had there been individual and distinct bonds. The whole cautioners were intimately connected with one another, and in their obligations and relief cannot be separated.

[171] *Lawrie v Stewart* 6 June 1823 FC.
[172] (1872) 10 M 610.
[173] *Lawrie v Stewart* 6 June 1823 FC at 275–276.
[174] *Lawrie v Stewart* 6 June 1823 FC at 276.
[175] *Lawrie v Stewart* 6 June 1823 FC at 276.

7-81. The question in *Lawrie v Stewart* was whether cautioners who had received relief from the principal debtor's estate were obliged to communicate that benefit to a co-cautioner, but the arguments advanced by counsel for the defender seem to have been directed to a different matter, namely the rule that cautioners bound for separate shares are not liable to the creditor for the solvency of their co-cautioners: 'The cautioners here were not bound *singuli in solidum*, as in ordinary bonds of caution. Their obligations were limited; and no liability for the solvency of each other was incurred'.[176] In fact, whether cautioners are bound jointly and severally – and thereby bear the risk of each other's insolvency in a question with the creditor – is irrelevant to the question of benefits from the principal debtor's estate and whether they should be shared among the cautioners. It is perhaps because *Lawrie* obscures that point that the soundness of the majority's decision in that case has been called into question by juristic writers.[177] More credible are the views of the minority. Echoing the pursuer's argument, the dissenting judges concluded that, although the cautioners had become bound for separate shares, they were still 'engaged in a commune negotium, – being cautioners for the same person, the same debt, and to the same creditors; and therefore, were truly joint cautioners, and, as such, bound to communicate the benefit of any separate relief'.[178] This reasoning seems better attuned to the issue raised by the case: whether benefits obtained from the principal debtor's estate must be shared.

7-82. *Lawrie v Stewart* can be contrasted with *Stirling v Forrester*,[179] a case concerning various bankrupt parties (here referred to collectively as the principal debtor) who were liable to the Bank of Scotland under a number of bills.[180] Four parties guaranteed the payment of those bills, each of them indorsing a separate promissory note for £2000. While collectively, those four indorsers (hereinafter referred to as cautioners) became bound for a maximum of £8000, the sum for which the principal debtor was liable exceeded £8000. As the due date for the cautioners' promissory notes approached, the Bank of Scotland entered into a compromise with three of the cautioners, agreeing to replace their promissory notes with new ones falling due three months later than the original ones. However, one of the cautioners, Mackenzie, was not party to this arrangement, having died before he could consent to it. The question arose whether his representatives were liable under the £2000 promissory note that he had originally granted and, if so, to what extent. The Lord Ordinary held that Mackenzie's representatives were still liable in full under his £2000 promissory note,[181] and concluded that the Bank of Scotland had not given any

[176] *Lawrie v Stewart* 6 June 1823 FC at 276.
[177] See, e.g., Gloag, *Contract* (n 52) 207.
[178] This dissenting judgment receives a slightly more detailed treatment in the two Session Cases reports. See especially *Lawrie v Stewart* (1823) 2 S (NE) 327 at 328–329 (the other report is (1823) 2 S 368).
[179] (1821) 3 Bligh 575. See also (1821) 1 Shaw App 37 and (1821) 6 Pat 817.
[180] (1821) 3 Bligh 575 at 576.
[181] (1821) 3 Bligh 575 at 581–583.

of Mackenzie's co-cautioners preferential treatment over him.[182] This decision was affirmed by the Inner House,[183] but overturned on appeal to the House of Lords, where it was held that the bank, having released three of the four cautioners, had prejudiced the fourth one's prospects of relief: accordingly, it was concluded that the bank could demand from Mackenzie's representatives a mere quarter of the balance that it could otherwise have claimed in respect of the principal debtor's indebtedness.[184] For instance, if the dividends realised from the principal debtor's estate had reduced the relevant indebtedness to £4000, Mackenzie could have been sued for a maximum of £1000 under his (£2000) promissory note. Thus, notwithstanding the fact that the cautioners had become bound to the creditor for separate amounts, the House of Lords was willing to recognise that they were bound in relief among themselves and that, Mackenzie's right of relief having been imperilled, there had been a diminution in what the creditor could claim from his estate. In an important dictum, Lord Redesdale explained the equitable basis for rights of relief:[185]

> At the bar it was contended, that the rights and obligations of co-sureties are founded upon a supposed contract between them; and that in this transaction they entered into the obligation without communication with each other. The question depends upon equity, not upon contract; and in this case a contract is to be implied. The decision in *Deering* v. *Lord Winchelsea*[186] proceeded on a principle of law which must exist in all countries, that where several persons are debtors, all shall be equal. The doctrine is illustrated in that case by the practice in questions of Average, &c. where there is no express contract, but equity distributes the loss equally. On the prisage of wines, it is immaterial whose wines are taken; all must contribute equally: so it is where goods are thrown overboard for the safety of the ship; the owners of the goods saved by that act must contribute proportionally to the loss. The duty of contribution extends to all persons who are within the scope of the equitable obligation.

7-83. The decision of the House of Lords in *Stirling*, though of higher authority than that of the majority of the Inner House in *Lawrie*, must be read with care. One difficulty is the precise respect in which the cautioners in *Stirling* were connected. The Lord Chancellor, Lord Eldon, stated that the four promissory notes could be 'considered as one transaction of suretyship', for, though 'separate in form', the 'effect in equity, as to the obligation of the parties, was such, that the creditors were bound to act as if all the notes formed one transaction of suretyship'.[187] In other words, the cautioners were liable for the same overall indebtedness. Also, as the Lord Chancellor remarked slightly earlier in his judgment, if the promissory notes had been 'in effect separate',

[182] (1821) 3 Bligh 575 at 582–583.
[183] (1821) 3 Bligh 575 at 583–584.
[184] (1821) 3 Bligh 575 at 595–598.
[185] (1821) 3 Bligh 575 at 596.
[186] More properly, *Dering v Earl of Winchelsea* (1787) 1 Cox Eq Cas 318, 2 Bos & Pul 270, 29 ER 184.
[187] (1821) 3 Bligh 575 at 594.

each cautioner would have 'had nothing to do but with his own'.[188] On a loose reading, one might understand the Lord Chancellor to have been saying that the four cautioners, having become bound together for the same purpose, were responsible for each other's shares, such that if one had paid more than his £2000 share to the creditor (e.g. £2300), he would have been entitled to relief from the others for the excess (here £300). However, that would be to misinterpret the Lord Chancellor. If each cautioner was liable for a fixed share of £2000, there was no question of any becoming liable to the creditor for more than that share. Though collectively, the four cautioners were potentially liable for £8000, individually their maximum liability was for £2000 each.[189] To redeploy reasoning from an earlier section of this chapter regarding cautioners bound for separate debts, it could be argued that a cautioner here who paid more than £2000 would have been paying a sum for which he was not liable; hence that he should not have been entitled to relief.[190] What, then, did the House of Lords understand by rights of relief in this case? It is clear that the cautioners were all connected in some sense and consequently entitled to relief among themselves, but the precise character of the relevant connection merits closer consideration. Of particular interest is the apparent tension between this case, in which the release of several fixed-share cautioners led to the (partial)[191] release of their fellow cautioner, and *Morgan v Smart*,[192] in which a creditor was able to release one of two fixed-share cautioners for different debts without losing his rights against the other. The text that follows explores that tension by, once again, having regard to Kames' principle of *pro rata* relief.

(a) Fixed shares

7-84. To refer to an example broadly similar to *Morgan v Smart*,[193] suppose that two cautioners (C1 and C2) are each bound for a separate debt of £50 and that each debt is owed by the same principal debtor to the same creditor. If the principal debtor pays £20 without appropriating it to either debt, the creditor may decide, as is his prerogative,[194] to appropriate the whole £20 to debt 1. Is C2 entitled to a share of this benefit? The answer, in principle, is 'No', and part

[188] (1821) 3 Bligh 575 at 592.

[189] (1821) 3 Bligh 575 at 581.

[190] See discussion at paras 7-24–7-32 above. At the same time, a cautioner may wish to pay the full amount of the guaranteed debt even where that exceeds the amount for which he could be sued if that allows him to obtain an assignation of the creditor's rights or to rank on the principal debtor's sequestrated estate: see chapter 9, and especially paras 9-63–9-77.

[191] In modern law, cautioners falling within the compass of the Mercantile Law Amendment (Scotland) Act 1856 enjoy even more extensive protection: where one of their number is released, the others will be released *completely*: 1856 Act s 9.

[192] (1872) 10 M 610.

[193] (1872) 10 M 610; see para 7-25 above.

[194] As discussed at paras 5-41–5-43 above.

of the reason for that relates to the creditor's legitimate interest in appropriating the £20 as he sees fit. Perhaps, for example, the creditor has a greater desire for debt 1 to be paid than for debt 2 to be paid. Perhaps also the creditor entertains genuine doubts as to C1's ability to pay. In any case, whatever the creditor elects to do comes at a potential price. In deciding to appropriate the £20 to debt 1, the creditor loses his cautionary recourse against C1 to that extent – that is, C1 is now liable for a debt of £30. Hindsight may later reveal that it would have been wiser to appropriate the £20 to debt 2 rather than to debt 1, perhaps because C2 ultimately proves less reliable than C1. Be that as it may, the decision to appropriate the £20 to C1's debt is one of which the creditor will bear the consequences, good or ill, and while C2 may consider himself unfortunate at the time the appropriation is made, his is a different sort of misfortune from the sort that might befall a co-cautioner. In the case of two cautioners jointly and severally liable for £100, the creditor has the power to act arbitrarily because there are multiple routes to the same outcome (obtaining payment of £100). However, a creditor who is owed two separate debts of £50 has, as regards the cautioners for each of those debts, only one route to full payment, namely to sue each cautioner for £50, and so Kames' principle involving arbitrary conduct on the part of a creditor is not engaged. Thus, in the example involving two cautioners, C1 and C2, bound for separate debts of £50, and the appropriation of a benefit in reduction of C1's debt, C1 has no obligation to share that benefit with C2.

7-85. To pursue this line of reasoning further, suppose that, in an extreme case of good fortune for C1 and misfortune for C2, the creditor decides (perhaps after tossing a coin) to discharge C1 in respect of debt 1 and to sue C2 for debt 2. Although this may seem like the sort of arbitrary, capricious conduct to which Kames' equitable principle is directed, it is important to remember that the creditor has, by discharging C1, not done anything to increase the sum for which C2 is bound (debt 2). Also, the creditor has made a sacrifice, having effectively surrendered £50 that could otherwise have been claimed from C1. Because the debts were separate, the creditor had only one means of obtaining full satisfaction of them in a question with the cautioners, namely to sue each one for £50. By discharging C1, the creditor has, in a sense, deprived himself of £50. Again, Kames' principle regarding arbitrary conduct on the part of the creditor is not engaged.

7-86. These hypothetical examples should demonstrate why cases like *Morgan v Smart* fall outwith the scope of the principle that the creditor must maintain equality among his cautioners when that is 'not prejudicial to [his] interest'.[195] If C1 and C2 guarantee separate £50 debts and C1 pays both his and C2's debt,

[195] As explained earlier, Kames rationalises cautioners' mutual relief in a section entitled 'Connections that make benevolence a duty when not prejudicial to our interest': Kames, *Principles of Equity* (ed Lobban) 77–88.

C1 does not have a right of relief against C2. That C1 may be able to reclaim the £50 paid towards C2's debt on such alternative grounds as unjustified enrichment does not detract from this,[196] nor would the recognition of such a right in unjustified enrichment have altered the outcome in *Morgan v Smart*.

(b) Fixed but overlapping shares

7-87. Turning now to a situation somewhat analogous to *Stirling v Forrester*[197] and to *Dering v Earl of Winchelsea*,[198] an English case on which the House of Lords in *Stirling* placed considerable reliance, suppose again that a principal debtor owes £100 and that C1 and C2 are liable in fixed shares for any amount that the principal debtor fails to pay to the extent of £50 each. On this occasion, the principal debtor pays £20 before falling insolvent. C1 and C2 are still liable for any shortfall to the extent of £50 each, but the shortfall is now a mere £80. The significance of this, for present purposes, is that now the creditor has multiple options for exacting the balance from the two cautioners. If he acts equitably, the creditor will ask each cautioner to pay £40. However, it is also in the creditor's option to exact £50 from C1 and £30 from C2, for both cautioners undertook liability up to £50. As a result, the cautioners, despite doing their utmost to avoid joint and several liability by becoming bound for separate shares, are now in a position highly analogous to joint and several liability. That is because their shares of the debt, though fixed, overlap with one another to the extent of £20. As regards that overlap, the creditor is able to treat the cautioners unequally without suffering any loss. Thus, the principle stated by Kames, forbidding a creditor to act arbitrarily in relation to his cautioners, becomes relevant once again, at least to the extent that the cautioners' fixed shares overlap (£20). To rectify the effect of the creditor's decision to sue C1 for £50 and C2 for a mere £30, the law should, on the strength of Kames' principle, afford C1 relief against C2 to the extent of £10. That is, admittedly, an extension of the paradigm relief case in two senses. Firstly, C1 has not, in this scenario, paid any more than the amount of the debt for which C1 originally undertook ultimate responsibility in a question with C2 (£50). Here the focus is rather on the fact that the creditor has upset the equal proportions for which the cautioners became bound (one half each) when he could have exacted the same total amount without upsetting those equal proportions. Secondly, C1 and C2 did not become bound jointly and severally (or in any other way that could have led to their becoming liable for one another's £50 share of the debt). However, if the fundamental principle underpinning relief concerns the correction of a creditor's arbitrary decision to the cautioners' prejudice, the case for relief is as credible here as in the paradigm case.

[196] See above at n 96.
[197] (1821) 3 Bligh 575; see para 7-82 above.
[198] (1787) 1 Cox Eq Cas 318, 2 Bos & Pul 270, 29 ER 184.

7-88. Most likely, this was the nature of the right of relief recognised in *Stirling v Forrester* and which the creditor in that case, by releasing some of the cautioners, was deemed to have placed in jeopardy. This right of relief did not concern a cautioner paying more than his proper share of the debt but rather a potential benefit (the principal debtor reducing the debt below the amount collectively guaranteed) of which all cautioners were entitled to an equal share. It is along those lines that the decisions of the Inner House in *Morgan v Smart* and the House of Lords in *Stirling v Forrester* may be reconciled. The principle in *Morgan v Smart* applies to cautioners whose shares of liability will never overlap, the key example being that of cautioners bound for separate debts. The recognition of a right of relief in a case akin to *Stirling v Forrester* makes particular sense where it is clear that the cautioners' guarantees do not have to be used to their full extent because, for instance, the principal debtor has already paid part of the debt and the creditor now has various means of exacting payment from the cautioners liable for the shortfall. That *Stirling* involved such an understanding of relief is made clear by the English authority on which the House of Lords in *Stirling* relied: *Dering v Earl of Winchelsea*. It is perhaps because *Dering* concerned a claim for contribution (*pro rata* relief) rather than an attempt by a surety to extricate himself from his obligation because of prejudice to such a right of contribution, that the notion of fixed shares that may overlap comes through more clearly in that case. In any event, in Scots law, the significance of such a case can be readily grasped if one considers Kames' principle based on a creditor's arbitrary conduct. Besides clarifying that the decisions in *Stirling* and *Morgan* are correct, Kames' equitable principle also exposes the fallacy at the heart of *Lawrie*: the idea that simply because cautioners are bound for fixed shares means that they have no rights among themselves.

(c) Fixed shares which may later overlap

7-89. It remains, for the sake of completeness, to consider an intermediate scenario: the case in which it is uncertain whether both cautioners' guarantees will have to be used to their maximum extent if the creditor is to receive full payment. Suppose the due date of the debt is four months away and there is a prospect, as against a certainty, of the principal debtor's paying some portion of the debt or even, say, of some benevolent third party's paying a portion of the debt and expecting nothing by way of reimbursement. In the light of Kames' principle, can such cautioners be regarded as having rights of relief and, a closely related question, should the creditor be able to release one of two cautioners with impunity (as in *Morgan v Smart*) or should the creditor's release of one cautioner serve to erase or diminish his rights against the other (as in *Stirling v Forrester*)? The decision in *Stirling v Forrester* suggests that the mere fact that cautioners' shares *may* later overlap is sufficient. For instance, if two cautioners are liable in fixed shares of £50 for the same £100 debt, it suffices

that they are liable for the same debt for the voluntary release of one of them to lead to the automatic release of the other, formerly to the extent of £50 (at common law) and now, thanks to the Mercantile Law Amendment (Scotland) Act 1856, completely.[199] Even so, it is worthwhile to consider whether such a right to be released is correct in the light of Kames' principle.

7-90. Again, the matter is best considered in terms of hypothetical figures. To tweak the previous example, suppose that two cautioners (C1 and C2) are liable for a debt of £100 to the extent of fixed limits of £50 each. This time, however, the principal debtor has not yet paid anything to reduce the £100. The creditor decides to release C1 completely. When considering whether the law ought to release C2, one must consider what would happen if, contrary to the position in such cases as *Stirling v Forrester*, C2 remained liable in full to the creditor. There are at least two possible outcomes.

7-91. *Outcome (1): the creditor is prejudiced; there is no effect on C2*. If the principal debtor pays nothing, the creditor will only have a claim against C2 for £50. It cannot therefore be said that, in the equitable language employed by Kames, this is a matter not affecting the creditor's interest: the creditor has, through a gamble, effectively sacrificed £50. Also, C2 cannot, here, be said to have been prejudiced because C2 would, but for the release of C1, have paid his (C2's) full share of £50 anyway (on account of the principal debtor's failure to pay anything to the creditor) assuming that the creditor had sought full payment.

7-92. *Outcome (2): the creditor is not prejudiced; C2 is prejudiced*. Suppose that the principal debtor pays £60 to the creditor. In this scenario, the remaining debt will be £40, and C2 will, in theory, have to pay £40 (C1 having been released by the creditor). This scenario falls within the compass of Kames' principle, for here the creditor's discharge of C1 has, through sheer good fortune, not affected his own interests. At the same time, it can be said that C2 has, through the discharge of C1, been prejudiced in a rather subtle way: that is, C2 has been deprived of a benefit that he would otherwise have enjoyed. If C1 had not been released, both cautioners would have been liable to the extent of £50 each. When the principal debtor paid £60, the cautioners would then have been liable for a total amount of £40. Even if the creditor had exacted this £40 from C2 only, that cautioner would have been entitled, for reasons already given,[200] to *pro rata* relief from C1, with the result that C2 would effectively have paid £20 rather than £40. In other words, the creditor's gamble (releasing C1) has effectively increased C2's loss from £20 to £40.

[199] Mercantile Law Amendment (Scotland) Act s 9; see discussion at paras 5-69–5-79 above. A loose reading of *Morgan v Smart* (1872) 10 M 610 seems to suggest otherwise, but if that case is regarded as one involving cautioners liable for different *debts*, it can be distinguished from the scenario described here.

[200] See paras 7-87–7-88 above.

7-93. In short, if the creditor releases C1 when it is unclear whether the principal debtor will pay anything to reduce the debt, the creditor engages in a sort of lottery. If the creditor loses that lottery because the principal debtor pays nothing to reduce the debt, it would arguably make sense to apply the approach adopted in *Morgan v Smart*: C2, having suffered no loss by virtue of C1's discharge, should not be released. On the other hand, if C2, the remaining cautioner, suffers loss as a result of the creditor's gamble, it makes sense to release C2 to the extent of that loss.

7-94. Both of those approaches necessitate consideration of the outcome of the lottery and its actual effect on the cautioner who was not voluntarily discharged. As the law stands, however, a creditor who endangers a cautioner's right of relief by discharging one of several cautioners forfeits his rights: partially at common law and now in full in terms of the Mercantile Law Amendment (Scotland) Act 1856.[201] The creditor, merely by putting C2's relief at risk, ultimately loses his rights against C2. This is a strict approach, based, much like the 'giving time' doctrine,[202] not on actual loss to C2 but on the exposure of C2 to an increased risk.

(4) Conclusions

7-95. In the familiar case, a cautioner seeking relief simply desires reimbursement of whatever he has paid beyond his own *pro rata* share. However, relief may consist also in the equitable sharing of a benefit among co-cautioners. In the latter context, even cautioners bound in fixed shares (as opposed to cautioners bound jointly and severally) are entitled to relief in as much as all their obligations are, by definition, accessory to the same obligation: that of the principal debtor. As a general rule, cautioners are entitled to share in benefits (such as eases from the creditor or security rights from the principal debtor) on an equal basis. There are two caveats: (1) cautioners may contractually waive their rights to equal distribution; and (2) in so far as the creditor grants a benefit contrary to his own interest (e.g. an ease), he is, in principle, entitled to favour some cautioners over others.

H. SUMMARY: WHEN IS *PRO RATA* RELIEF AVAILABLE?

7-96. In Scots law, the term 'relief' performs various conceptual roles. The focus here has been on the use of the term to describe the right of one cautioner to demand a contribution from another following a payment to the creditor

[201] Mercantile Law Amendment (Scotland) Act s 9; see discussion at paras 5-69–5-79 above.
[202] For discussion of giving time, see paras 5-55–5-63 above.

by the former. The sum demanded consists in compensation (usually partial) for the loss suffered by the paying cautioner and/or in the communication of a benefit received by a co-cautioner.

7-97. Kames' equitable theory, that a creditor should not be allowed arbitrarily to load one of several cautioners with a disproportionate share of the debt, provides a strong explanation as to why the paying cautioner may claim a contribution from the others. Where cautioners become bound in the same document, it is credible to infer a sort of implied agreement among them that if one is made to pay more than his share, the others will be obliged to compensate him. However, without denying the significance of an agreement in other respects,[203] it is difficult to conceive of a case in which such an agreement will confer a right of relief on the paying cautioner more readily than will the mere circumstance of being bound for a common debt. Arguably, to the extent that there exists an implied agreement between the paying cautioner and the other cautioners, that agreement simply duplicates certain consequences of Kames' principle regarding cautioners bound for the same debt (notably those regarding the pooling of risk) and is otherwise silent (notably as regards the sharing of benefits from the creditor or a third party). That being so, the key justification for cautioners' rights of relief remains Kames' equitable principle. If that principle is not engaged, that will provide a strong, probably decisive, ground for denying a claim for relief. It is true that, in such a case, the paying cautioner may be able to invoke some alternative ground for compensation, such as *negotiorum gestio* or an express contract, but, unlike Kames' equitable principle, such grounds do not inhere in the status of co-cautioner.

7-98. From the preceding survey of rights of *pro rata* relief, certain conclusions may be drawn as to their scope.

(1) Pooling of risk

7-99. A cautioner (C1) is entitled to relief from a co-cautioner (C2) to the extent that C1 has been compelled to pay more to the creditor than his (C1's) *pro rata* share of the debt. The creditor has a legitimate interest in payment but cannot object to C1's and C2's bearing their burden equally. From that justification, the broad scope of rights of relief becomes clear:

(a) Although cautioners are often bound together, it does not matter, for the purpose of establishing a right of relief, whether C1 and C2 became bound in separate documents and in mutual ignorance, for the mischief to which Kames' principle is directed (a creditor's being able to exact more than C1's *pro rata* share from C1) can arise in either case.

[203] Especially as regards pre-emptive relief, the focus of chapter 10 below.

(b) Although cautioners are often bound jointly and severally, such liability is not a prerequisite for a right of relief:

(i) A right of relief may exist even where C1 and C2 enjoy the benefit of division against the creditor, because if either cautioner later becomes insolvent before the creditor exacts payment from him, it will be possible for the creditor to sue the one who remains for the full amount. The mischief to which Kames' principle is directed could thus still come into play.

(ii) Cautioners bound for the same debt but in separate shares may be entitled to relief from one another in terms of Kames' equitable principle, because those separate shares may (later) overlap and produce an effect analogous to joint and several liability. In that sense, the creditor may have the power to act arbitrarily (see the discussion of sharing of benefits, immediately below). For instance, if two cautioners are bound for a £100 debt up to separate £50 limits and the principal debtor pays £20, the creditor may exact £50 from C1 and £30 from C2. It is in keeping with Kames' principle that C1 then has a right to recoup £10 from C2.

(c) The loss from which the paying cautioner, C1, seeks to be partially relieved was not incurred voluntarily, but because the paying cautioner was contractually compelled to pay. Compulsion may, but need not, consist of a lawsuit:

(i) There is no requirement for C1 to have been sued by the creditor in order to enjoy a right of relief against C2, provided that C1 has fulfilled an obligation which is common to C1 and C2 and which has fallen due. When the debt falls due, the creditor will have the power arbitrarily to exact the whole amount from C1. It is in anticipation of that power that C1 pays the creditor.

(ii) Even where the principal obligant's obligation is to perform a service, C1's loss will usually consist of a payment of damages for non-completion. However, in some cases, C1 may fulfil the cautionary obligation by performing the principal obligant's obligation and then seek a *pro rata* contribution to his expenses from C2. In so electing, C1 seeks to obviate a claim for damages by the creditor.

7-100. The following clarifies when a right of relief is *not* available. A right of relief depends on paying more than one's proper share of the debt. Consequently:

(a) Where two cautioners, C1 and C2, become bound for the same debt, the presumption is that they are bound on an equal footing, hence C1's entitlement to relief if C1 pays the whole debt. However, if C2 became a cautioner for C1's benefit, it is possible that C1 has no right of relief against C2 because, in a question of relief between C1 and C2, C1's

proper share of the debt is 100 per cent and C2's is zero. It is impossible for C1, in a question with C2, to pay more than his proper share of the debt, and so Kames' principle based on payment of more than one's proper share is not engaged.

(b) Where C1 demands a contribution to an amount that he (C1) paid, C1 must have paid more than his *pro rata* share of that sum. For those purposes, a dividend resulting from a ranking for the full debt on C1's estate will not necessarily amount to payment of more than C1's share. Kames' principle comes into play only where the creditor's decision to rank for the full debt on C1's estate leads to C1's estate incurring a loss exceeding C1's *pro rata* share.

(c) Rights of relief between two obligants depend on the creditor's having the power to act arbitrarily in a question with those obligants. It follows that cautioners bound for separate debts have no rights of relief among themselves because the creditor has no power to act arbitrarily with regard to them. If C1 and C2 are bound for the same principal debtor but for separate debts of £50 each, the creditor has no power to act arbitrarily as between C1 and C2. Kames' principle is not engaged. If C1 pays the £50 debt for which he is not bound, he cannot be said to have paid a sum for which the creditor could have sued him.

(2) Sharing of benefits

7-101. The above discussion concerns the right of C1 to recoup a payment exceeding his share to the extent of that excess. Broadly speaking, C2 has an obligation partially to compensate C1 for losses incurred by the latter in fulfilment of the shared cautionary obligation. However, C1's right may also extend to the partial communication of benefits received by C2. Those benefits are, in fact, simply another form of compensation: the benefits consist in a reduction in the overall loss suffered by the cautioners. The following rules govern the sharing of such benefits. If C2 receives a benefit from the principal debtor in satisfaction of the latter's obligation of total relief, C2 will be obliged to share that benefit with C1. The right of total relief is itself premised on Kames' equitable principle: even if the creditor sues C1 for the whole debt, the creditor cannot object to C1's obtaining total relief from the principal debtor; nor, in so far as the principal debtor's insolvency bars C1 from total relief, can the creditor object to C1's and C2's sharing both the benefit of what the principal debtor can pay in total relief and the shortfall equally.

7-102. The following clarifies when a cautioner may demand that a co-cautioner communicate a benefit:

(a) The manner in which the principal debtor provides the relevant benefit is largely irrelevant:

(i) It does not matter, for the purpose of benefit-sharing, whether the principal debtor intended to favour C2 over C1.

(ii) C1's entitlement to a share of the benefit provided by the principal debtor to C2 arises when C1 is made to pay some or all of the debt, and that entitlement arises whether the principal debtor provided the benefit to C2 in advance of the debt falling due or after the debt fell due. It also does not matter whether the benefit was provided by the principal debtor to C2 in advance of C1 paying the creditor or after C1 paid the creditor. Supposing that the principal debtor is able to pay £20 of a £100 debt, it is clear that C1 and C2 should bear an ultimate burden of £40 each. That C1 may be saddled initially with far more than £40 is the product of the creditor's ability to act arbitrarily coupled with the possibility that the principal debtor might direct a payment of £20 to C2 rather than to the creditor. Neither possibility detracts from the correctness of the principal debtor effectively paying £20 and of C1 and C2 effectively paying £40 each. Note that where the benefit from the principal debtor's estate takes the form of a payment to the creditor, the line between a cautioner claiming a contribution to a payment above his share and demanding communication of a benefit from the principal debtor's estate becomes blurred.[204]

(b) Typically, cautioners become bound jointly and severally in the same document for the same debt. However, that is not a prerequisite for a duty to communicate benefits from the principal debtor's estate:

(i) A cautioner's right to share in benefits received by a co-cautioner from the principal debtor's estate does not depend on an agreement between the cautioners; nor, for these purposes, does it matter whether either or both cautioners have a contract with the principal debtor. The mischief towards which Kames' principle is directed applies in any case because the cautioners are liable for the same debt. The creditor cannot object to the cautioners' obtaining full relief from the principal debtor and to their bearing equal shares of such burden as remains.

(ii) In principle, it does not matter whether the cautioners are bound up to specified limits of, say, £50 each or £40 and £60 respectively, so long as they are bound for the same debt, albeit the particular limits will affect the cautioners' measure of recovery.[205] The creditor cannot object to the cautioners bearing the ultimate burden equally or according to their proper proportions. To the existing criticisms

[204] See para 7-99 above, point (b)(ii).
[205] This issue is explored in chapter 8 below.

of *Lawrie v Stewart*,[206] Kames' equitable theory provides substantial reinforcement.

(c) When one discusses the mutual right of cautioners to share in a benefit, the benefit in question consists typically of a payment from the principal debtor's estate. The right to equal sharing of such a benefit arises from Kames' equitable principle and not from the intention of the principal debtor. However, a cautioner may be obliged to communicate a benefit received from a party other than the principal debtor if that party intended the benefit to be shared equally between the cautioners:

(i) Notably, a creditor who dispenses a discount to one cautioner may be presumed to have intended that discount to enure to both cautioners equally. Note that this right to equal sharing of a benefit arises not from Kames' principle, which is not engaged to the extent that the creditor surrenders a portion of the debt, but from the creditor's presumed intention. Given that the right to share in eases flows, in principle, from the creditor's presumed intention, it might be added that whether or not C1 has a right to share in eases with C2 does not depend on whether C1 and C2 are bound jointly and severally or up to fixed limits so long as they are bound for the same debt and there is no evidence that the creditor intended to favour one cautioner over the other as regards the allotment of the discount.

(ii) Further, even if it cannot be presumed that the party granting the benefit intends for it to be enjoyed by both cautioners equally, that party may indicate that he intends as much. For instance, a third party, T, may pay £100 to C1 but make it clear that the £100 is intended to benefit C1 and C2 equally.

7-103. The following clarifies when a right to share in benefits does *not* arise:

(a) If C2 receives a benefit from a third party, T (i.e. a party who is not the creditor, the principal debtor or a cautioner bound for the same debt), C2 has no obligation to share that benefit with C1. Kames' equitable principle is not engaged because the parties against whom the creditor is able to act arbitrarily are the principal debtor, C1 and C2. The creditor has no right of action against T. Any benefit that T provides to one of the cautioners is outside the creditor's control and, accordingly, beyond the reach of Kames' equitable principle.

(b) If the creditor grants a discount (ease) to C2, C2 will usually be obliged to share that benefit with C1, the presumption being that the creditor intended to distribute the benefit equally. However, if C2 can demonstrate that the creditor intended the discount for him alone, he has

[206] (1823) 2 S 368 (NE) 327, 6 June 1823 FC.

no obligation to share it with C1. This last proposition is controversial, but there is nothing in Kames' equitable principle to require C2 to share this benefit with C1. The creditor cannot, in such cases, be deemed to act arbitrarily. If, as has been argued in this chapter, the right to share in eases arises from the creditor's presumed intention in granting them, it follows that any evidence of a contrary intention on the creditor's part must be given effect.

7-104. If C1 and C2 are bound to the same creditor but for separate debts, an ease granted to C2 need not usually be shared with C1 because the creditor cannot be presumed to have intended this. However, where cautioners are bound for the same debt, arguably the right to share in a discount arises not from equity but from the creditor's presumed intention in granting the discount and, although such an intention cannot be presumed in the case of cautioners bound to a creditor for separate debts, that intention might conceivably be proven. In other words, there may exist positive evidence that the creditor intended an ease actually granted to C2 to be for the joint benefit of C1 and C2, in which special case the fact that C1 and C2 were bound for separate debts would not, in principle, prevent C1 from demanding a share of the ease granted to C2. Such a scenario is unlikely to arise in practice; it is mentioned only for the sake of completeness.

7-105. The above serves as a summary of the circumstances in which one cautioner will be entitled to claim *pro rata* relief from another based on Kames' principle. Naturally, any such entitlement will yield to an express agreement to the contrary.

I. WIDER RELEVANCE OF KAMES' EQUITABLE PRINCIPLE

7-106. Thus far, it should be clear: (1) that a cautioner's right of relief may be justified in terms of the equitable theory that a creditor should not be allowed arbitrarily to saddle one cautioner with ultimate liability for the whole debt; and (2) that this principle can be used both to compel the granting of relief in some cases and to exclude such a right in others.[207]

7-107. What should likewise be clear is that Kames' theory explains not only why cautioners are entitled to relief among themselves but also why the creditor's rights are affected by the cautioners' rights of relief, such that anything

[207] However, even if Kames' principle of relief is not engaged, there may be some separate basis on which one cautioner is obliged to pay another. For instance, where one cautioner (C1) obtains compensation from a third party (T), C1 is not obliged, in terms of Kames' equitable principle, to share that benefit with C2. However, C1 may yet be obliged to share that benefit with C2 if he entered into an express contract with C2 to that effect.

that the creditor does to prejudice those rights leads to a diminution in his rights against the cautioners. There is, in a sense, a symbiotic relationship between the cautioners' rights among themselves, and the rights of the creditor against the cautioners. For instance, if two cautioners (C1 and C2) become bound for £100, at common law the creditor's decision to release C1 from the cautionary obligation effected an automatic partial liberation of C2.[208] Now, by statute, the voluntary release of C1 serves to liberate C2 completely,[209] and even in the absence of that statute, C2 would at least be released to the extent to which his right of relief had been prejudiced (£50).[210] Thus, even before a cautioner has paid the creditor, the cautioner is afforded certain rights which, though not rights of relief in themselves, are geared towards the protection of a potential right of relief. In fact, those supplementary protections stem from the same distinctive rationale as justifies the right of relief itself, namely, the notion that a creditor should not be allowed to act arbitrarily *vis-à-vis* his cautioners.[211] According to Kames' approach, a cautioner's non-contractual right of relief is rooted not simply in the fact that that cautioner has paid the creditor but in the fact that other cautioners are liable for the same debt – a state of affairs that pre-dates any payment to the creditor. It is for that reason that a cautioner's prospects of reimbursement are protected from the moment that the cautionary obligation is undertaken, not simply once the cautioner has paid the creditor.

7-108. Kames' principle also explains why this limitation on the creditor's rights applies even as regards cautioners who know nothing of one another when they become bound to the creditor. Consider *Wallace v Elibank*,[212] where a creditor's discharge of one of two cautioners (Spot) was held to release the other (Elibank) to the extent of half the debt, for that was the extent of the 'damage sustained' by Elibank through the creditor's arbitrary act.[213] It is significant that Elibank was bound in the original bond and Spot in a bond of corroboration. One might have argued that, since Elibank did not become bound on the faith of another cautioner's becoming bound with him, the creditor should have been able to release Spot with impunity. That was not the view taken in the case. That the creditor had acted arbitrarily to Elibank's prejudice was enough to warrant his release to the extent of that prejudice.

7-109. It is not every case or judicial pronouncement that lends itself to this analysis. In *Union Bank of Scotland v Taylor*,[214] the Lord President (Lord Clyde)

[208] Erskine III.3.68.
[209] Mercantile Law Amendment (Scotland) Act 1856 s 9.
[210] For details, see paras 5-69–5-79 above.
[211] Kames, *Principles of Equity* (ed Lobban) 77–81.
[212] (1717) Mor 3389.
[213] (1717) Mor 3389 at 3389. To be precise, the creditor consented to the relaxation of diligence against Spot, in effect surrendering goods out of which Spot's half of the debt could have been paid.
[214] 1925 SC 835.

noted, *obiter*, that where cautioners become bound separately, the creditor may 'discharge or deal with one of them without discharging the others, because in that case there is no contractual relation whatever between the various obligants, each of whom stands by himself'.[215] At the same time, he argued that such cautioners as remain bound to the creditor enjoy a right of mutual relief which depends on an equitable principle where 'one of several persons indebted pays the debt' and the creditor is bound to assign his rights against the others.[216] This dictum is potentially misleading, at least to the extent that it obscures the normative connection between two long-established legal doctrines: the entitlement of a cautioner to relief and the (traditionally partial) liberation of a cautioner if the creditor released a co-cautioner. Once it is appreciated that cautioners' rights against one another arise from the creditor's duty not to act arbitrarily to their prejudice, as Lord Clyde probably appreciated given his reference to equity, then, in principle, a creditor is prohibited from arbitrarily discharging one of several cautioners on pain of forfeiting his rights against the others. Even in the absence of a statutory provision effecting total release, there is, at common law, a rule of partial release and that rule can be justified by the same equitable principle as that grounding the right of relief itself. If two cautioners are bound in separate documents but for the same £100 debt, and neither knows of the other, the fact that there is no contractual relationship between them does not make the creditor's act of discharging one any less arbitrary or the effect on the other's right of relief any less damaging.

J. THE ROLE OF ASSIGNATION

7-110. The creditor's duty to assign his rights is a key feature of the equitable theory of *pro rata* relief. It is by explaining why the paying cautioner is entitled to an assignation that Kames accounts for that cautioner's rights against his fellow cautioners. In spite of this, and although the creditor may be compelled to grant an assignation to aid the pursuit of relief, an assignation is not a prerequisite for the right of relief itself. Leaving to one side the amount that the paying cautioner may demand,[217] the present section discusses the role and limits of assignation in the context of *pro rata* relief.

(1) Principle and machinery

7-111. Where the creditor grants the paying cautioner an assignation, its impact is governed by the rights of relief to which it gives effect. As the Lord Ordinary

[215] 1925 SC 835 at 841.
[216] 1925 SC 835 at 841.
[217] This is discussed in chapter 8 below.

(Lord Skerrington) explained in *Thow's Trustee v Young*,[218] a cautioner may use 'an assignation' only to 'operate his own relief to the extent to which the rules of equity and the true relations of the parties entitle him to do so'.[219] While an assignation is 'a useful piece of machinery' for exercising a right of relief, such machinery is secondary to the equitable principle on which that right is based.[220] That it is the cautioners' rights among themselves that determine the effect of an assignation, not vice versa, continues to be affirmed.[221]

7-112. A neat illustration of the distinction between principle and machinery is provided by *Ledingham v M'Kenzie*.[222] Here a debt was paid by a third party, T, who obtained an assignation and pursued C1, one of two solvent cautioners, for the full amount. It was held that, as T was acting on behalf of the other solvent cautioner, C2, T's claim must be restricted to one half of the debt. The creditor had assigned the whole debt to T, and that assignation was the machinery by which T sought payment from C1. However, T's rights against C1 were limited to what C2 could, as a matter of principle, have claimed from that party in relief.[223]

(2) Assignation as an explanatory tool versus assignation as a sometime-dogmatic requirement

7-113. Despite the subordination of the machinery of assignation to the principle underpinning rights of relief,[224] the relationship between them has sometimes been complex. In the context of *fideiussio*, the most influential form of Roman suretyship, a surety who had paid the whole debt could demand that the creditor 'assign'[225] his rights against the other sureties.[226] In such cases, a right of *pro rata* relief arose not directly from the relationship between the sureties: rather, the paying surety's rights were 'derivative' of the creditor's.[227] On one view, this

[218] 1910 SC 588.
[219] 1910 SC 588 at 592.
[220] 1910 SC 588 at 594.
[221] *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1138 per Lord President Rodger; *Joint Liquidators of Simclar (Ayrshire) Ltd v Simclar Group Ltd* [2011] CSOH 54, 2011 SLT 1131 at para 18 per Lord Hodge.
[222] (1824) 3 S 113.
[223] (1824) 3 S 113 at 113.
[224] *Thow's Trustee v Young* 1910 SC 588 at 594.
[225] The word 'assign' is used loosely. Whether Roman law recognised assignation, in the modern sense of a creditor transferring rights to a third party, is controversial, but it is clear that 'functional equivalents' to what would now be termed assignation did exist, most notably *procuratio in rem suam*: R G Anderson, *Assignation* (Studies in Scots Law vol 1, 2008) paras 4.02–4.16.
[226] D 46.1.17.
[227] Regarding the notion of 'derivative recourse', see J A Dieckmann, 'Scots influence on English Law: the guarantor's right to derivative recourse (subrogation)' (2004) 8 Edin LR 329 at 332–334.

creditor-centric conception of relief remains relevant. As contended throughout this chapter, rights of relief arise because a creditor should not be allowed to act arbitrarily, encumbering one cautioner with a greater ultimate share of the debt than that to be borne by the others.[228] From this it follows that a cautioner who pays more than his proper share of the debt is entitled to proportional relief from the others. Arguably, this reasoning, and the logical link that it forges between the creditor's contractual rights and the cautioners' rights among themselves, provides a convincing justification both for a co-surety's right to demand an assignation under Roman law and for a co-cautioner's right to demand one under modern Scots law.

7-114. It is a separate question whether a co-cautioner's rights derive from those of the creditor in a formal sense. In Scots law, it has long been established that cautioners' rights among themselves do not depend on an actual assignation of the creditor's rights. One need but consider Stair's bald pronouncement that cautioners are entitled to *pro rata* relief, not because they have obtained an assignation, but rather because of a direct non-contractual ('obediential') obligation among themselves.[229] That an assignation is not necessary for rights of relief to arise has been reiterated in various other juristic writings.[230] Again, however, a particularly interesting account is to be found in the work of Kames. In contrast to Stair, Kames initially seems to predicate cautioners' rights of relief on an assignation from the creditor:[231]

> [T]he claim of mutual relief among co-cautioners can have no foundation other than the obligation upon the creditor to assign upon payment. This assignment [. . .] in the case of several [cautioners] must be *pro rata*; because the creditor is equally connected with each of them.

7-115. But what might appear a reversion to Roman law, and its insistence on a formal act by the creditor as a prerequisite for relief, is promptly qualified:[232]

> The only difficulty is, that at this rate, there is no mutual relief unless an assignment be actually given. But this difficulty is easily surmounted. We have seen above, that such assignment may be granted *ex post facto*: hence it is the duty of the creditor to grant the assignment at whatever time demanded; and if the creditor prove refractory, the law will interpose to hold an assignation as granted, because it ought to be granted. And this suppletory [i.e. supplementary] or implied legal assignment is the true foundation of the mutual relief among co-cautioners, which obtains both in Scotland and England.

[228] *Murray v Heir and Creditors of Orchyardtown* (1722) Mor 14651 at 14652.
[229] Stair I.8.2 and I.8.9. 'Obediential obligations' are defined as those that arise not from 'contract or consent' but from 'the authority and command of God and that obedience we owe thereto by the law written in our hearts' (Stair I.7.1).
[230] Erskine III.3.68; Bell, *Principles* § 268.
[231] Kames, *Principles of Equity* (ed Lobban) 79.
[232] Kames, *Principles of Equity* (ed Lobban) 79.

7-116. Thus, although Kames' conception of relief was based on the creditor's treating all cautioners equally, he did not consider an assignation indispensable to that end. *Pro rata* relief may, but need not, stem from an assignation of the creditor's rights. Hume makes a similar point, remarking that a cautioner who pays comes 'substantially' into the 'place of the creditor', even if the 'form [. . .] of an assignation' is absent.[233]

7-117. Much of the Roman insistence on an assignation of the creditor's rights can be ascribed to the peculiarities of its own law of suretyship and the way in which that law developed. The Roman surety's right of relief via an assignation from the creditor (*beneficium cedendarum actionum*) was predated by a functionally equivalent right. Under the two older forms of suretyship (*sponsio* and *fidepromissio*), sureties enjoyed a right of relief simply by virtue of the fact that one of their number had paid more than his share of the debt.[234] The existence of that right, contained in a Republican statute known as the *lex Appuleia*,[235] serves as a reminder that there is no inherent need for rights of relief to be granted via an assignation; indeed, the ancient system of law in which assignation-based relief originated had previously favoured a statutory right of relief which may have been directly enforceable. Although Gaius does not expressly describe the right as directly exercisable against co-sureties, there is, equally, no indication that this right depended on a formal transfer of the creditor's rights. Eventually, however, the right of relief did take that form. The two older forms of suretyship, *sponsio* and *fidepromissio*, were supplanted by *fideiussio*,[236] which was not, in contrast to its functional forerunners, laden with statutory protections for the surety.[237] Of this regulatory dearth, the unavailability of the statutory right of relief (*lex Appuleia*) was a key example.[238] Even so, while later Roman law did not afford a right of relief by means of statute, such a right was eventually provided in the form of a procedural device requiring the creditor to transfer his rights against the sureties who had not paid to the one who had (*beneficium cedendarum actionum*).[239] In short, to fill at least some of the legislative void that had made *fideiussio* so appealing to creditors, Roman law developed the same sort of protection as that afforded by the *lex Appuleia* (*pro rata* relief) but by non-statutory means. That the new right of relief took a more convoluted form, requiring the paying surety to demand a transfer of the creditor's rights, is at least partly attributable to broader trends in the Roman law of suretyship and the apparently piecemeal efforts at reform.

[233] Hume, *Lectures* II, 219.
[234] Gaius III, 122; J A C Thomas, *Textbook of Roman Law* (1976) 336.
[235] It was introduced in the second half of the third century BC: Thomas, *Textbook of Roman Law* (n 234) 336; D Johnston, *Roman Law in Context* (1999) 90.
[236] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 125.
[237] H F Jolowicz and B Nicholas, *Historical Introduction to the Study of Roman Law* (3rd edn, 1972) 300.
[238] Gaius III, 122.
[239] Thomas, *Textbook of Roman Law* (n 234) 337.

7-118. In Scots law, there is no need, as there once was in Roman law, for a formal transfer of the creditor's rights in order for a right of *pro rata* relief to exist. The cautioner's right of relief may be enforced directly against the other cautioners. While the creditor's rights are inextricably linked to the rationale for cautioners' relief, no less in Scots law than in Roman law, to characterise rights of relief as depending on an assignation would be anachronistic.

K. CONCLUSION

7-119. In exploring what connects two co-cautioners such as to ground rights of relief between them, an obvious starting point is that of joint and several liability. However, rights of relief may arise even where the cautioners have eschewed such liability, so long as they are liable for the same debt. Here the relevant connection is not so much between the cautioners themselves as between the cautioners and the creditor; it is, in Kames' words, a connection that makes 'benevolence a duty when not prejudicial to [the creditor's] interest'.[240] On this picture, rights of relief form part of a hierarchy, at the top of which sits the creditor. It is only after that party has been satisfied that the law attends to the cautioners, ensuring that their burden is shared equally.

7-120. From this understanding, certain consequences follow regarding the scope of rights of *pro rata* relief. It becomes clearer, for instance, why cautioners bound separately may still claim relief among themselves; clearer also why, in principle, discounts granted by the creditor need not always be shared equally. In each case, it is centrally important whether the creditor's interest in having the debt paid will be prejudiced: if so, there is a bar to relief; if not, a strong reason for granting it.

[240] Kames, *Principles of Equity* (ed Lobban) 77–88.

8 *Pro Rata* Relief: Content and Measure of Recovery

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A. INTRODUCTION

8-01. The previous chapter concerned the circumstances in which cautioners will be entitled to mutual relief, but it should also have gone some way towards illustrating the content of that entitlement. In the simple case of two cautioners (C1 and C2) jointly and severally liable for £100, C1's payment of £100 to the creditor will entitle C1 to £50 from C2 (that is, the amount exceeding C1's *pro*

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rata share of the debt). There can, nevertheless, be more complex issues bearing upon the content of a right of relief, particularly where there are three or more cautioners. Firstly, questions arise as to the amount that can be claimed from each co-cautioner. Secondly, although a right of relief does not depend on an assignation, the question sometimes arises whether such a right is enhanced by an assignation. The purpose of confronting such questions is to illuminate the content of *pro rata* relief as a distinctive legal response. While the concern here is with cautioners and the principles shaping their rights, it should be clear from the references below to co-principal debtors and insurance that those principles apply more generally.

B. ULTIMATE RELIEF AND IMMEDIATE RELIEF

8-02. On one view, the term '*pro rata* relief' refers to the ultimate distribution of liability among cautioners in the same obligation. As was noted in *Murray v Heir and Creditors of Orchyardtown* in 1722,[1] a cautioner who pays 'more than his share' of the guaranteed debt is entitled to recover the excess from 'the rest' to ensure that all cautioners have borne an equal share of the common burden.[2] Thus, if there are three cautioners (C1-C3) for a debt of £120, and C1 pays the whole amount, C1 may recover a total of £80 from C2 and C3, such that all have effectively paid an equal amount (£40 each). Thus conceptualised, the response known as relief describes the proportions of liability that cautioners ought ultimately to bear: the product of a simple calculation based on the cautioners' shared liability (£120) divided by the number of solvent cautioners (three). However, sometimes the term '*pro rata* relief' refers not only to the final proportionate distribution of liability among cautioners but also to what is immediately exigible from any one of them. While it is plain, in the example just given, that C1 can demand a total of £80 from C2 and C3, there remains the question how much C1 can claim from *each* party and when. Can C1 exact the whole £80 from C2, leaving C2 to recover £40 from C3, or must both C2 and C3 be pursued for £40 each? As was observed in the context of South African law: 'the final result is that each co-debtor shall have paid his own share of the debt, but this result can be attained in various ways.'[3]

8-03. The distinction between these conceptions of relief – what might be termed 'ultimate relief' and 'immediate relief' respectively – will be of recurring relevance to the present chapter. If ultimate relief entails the distribution that the law sets out to achieve, immediate relief concerns the *way* in which that distribution is achieved. These understandings of relief give rise to subtly distinct issues. As the equitable principle underpinning *pro rata* relief makes

1 (1722) Mor 14651.
2 (1722) Mor 14651 at 14652.
3 J E Scholtens, 'Recourse of a surety against his co-sureties' (1955) 72 SALJ 355 at 355.

apparent,[4] the need for equal treatment of cautioners is of central importance to ultimate relief. However, when it comes to determining *how* that ultimate relief is to be effected (immediate relief), the principle of equality of burden may be tempered by other, more pragmatic, considerations.

C. ULTIMATE RELIEF

8-04. Ultimate relief demands that all cautioners effectively pay the same amount as a result of their shared obligation.[5] The following section considers certain elaborations on, and departures from, that general rule.

(1) Uneven distribution of liability

(a) Cautioners liable for different amounts

8-05. In the simplest case, a right of *pro rata* relief effects an equal distribution of liability. A right of relief arises on payment of more than one's proper share of the debt and, in cases involving multiple cautioners, that share is calculated typically by dividing the debt by the number of solvent cautioners.[6] Naturally, however, the presumption that co-cautioners bear an equal burden in a question of relief may be rebutted,[7] as where one cautioner (C1) becomes bound to the creditor for £60 and another (C2) becomes bound for £40 of the same £100 debt. Suppose that the principal debtor pays £55 and that C1 pays the balance of £45. What, in a question of relief from C2, is C1's proper share of the £45 burden? Assuming equal sharing to be inappropriate,[8] there remain several

[4] I.e. the principle that the creditor should not be allowed to load one of several cautioners with a disproportionate share of the debt. This equitable principle was discussed at length in chapter 7 above.

[5] (1722) Mor 14651 at 14652.

[6] *Buchanan v Main* (1900) 3 F 215; *Henderson v Skinner* 1990 SLT (Sh Ct) 24; *Primary Healthcare Centres (Broadford) Ltd v Humphrey* [2010] CSOH 129, 2010 GWD 35-730 at para 18 per Lord Hodge.

[7] It is a separate, and usually more straightforward, question whether the cautioners are bound on an equal or unequal basis *in a question with the creditor*. If the cautioners have become bound in fixed shares, those mark the limits up to which the creditor may sue them. Cautioners bound simply as such (proper cautioners) can insist on an equal division of liability among themselves (benefit of division); improper cautioners, who are bound jointly and severally, can be sued by the creditor for the whole debt.

[8] Under this approach, C1 would claim £22.50 from C2 such that both cautioners would have effectively paid the same amount. Whatever may be said of the alternative approaches (e.g. the so-called maximum liability approach) and their relative merits, it is clear that equal sharing in a question of relief will usually be inappropriate. In the example just given, equal sharing would attach no significance to the specific limits up to which the cautioners had become bound.

credible alternatives. According to the so-called 'maximum liability' approach,[9] C1 will be entitled to £18 from C2, such that the loss ultimately borne by C1 and C2 respectively will mirror the proportions of the debt that each undertook.[10] Another mode of apportionment, known as the 'independent liability' approach,[11] is to divide the burden between C1 and C2 in such proportions as mirror what C1 and C2 would have borne had either been bound as the only cautioner, which here would entitle C1 to £21.18 from C2.[12] A third possible approach, outlined in Brodie's *Supplement* to Stair's *Institutions*, is to divide the debt so that, up to the lower limit of £40, C1 and C2 bear the burden equally, but beyond that limit, C1 bears the burden exclusively.[13] That would allow C1 to claim £20 in relief from C2.[14]

8-06. Although there is a dearth of Scottish authority on the matter,[15] commentators tend to advocate the maximum liability approach, which has long found favour under the English law of suretyship.[16] In *Ellesmere Brewery*

[9] J Philips and J O'Donovan, *The Modern Contract of Guarantee* (4th edn by W Courtney, 2020) para 12.218; J Birds and K Richards, *Birds' Modern Insurance Law* (12th edn, 2022) para 18-07.

[10] This entails consideration of the 'proportion which each guarantor's limited liability bears to the total of the guarantors' limited liabilities': Philips and O'Donovan, *Modern Contract of Guarantee* (n 9) para 12.218. Here C1 became bound for three fifths of that total and C2 became bound for two fifths. According to that division of liability into three fifths and two fifths, C1 should effectively pay £27 and C2 should effectively pay £18 of the £45 shortfall.

[11] Birds and Richards, *Birds' Modern Insurance Law* (n 9) para 18-07.

[12] I.e. if bound as the only cautioner, C1 would have had to pay £45; if bound as the only cautioner, C2 would have had to pay £40. Thus, C1 must bear nine seventeenths (45/85) of the burden, which comes to £23.82, and C2 must bear eight seventeenths (40/85), which comes to £21.18.

[13] G Brodie, 'Supplement', in Stair, *Institutions* (4th edn by G Brodie, 1831) II, 943.

[14] I.e. C1 and C2 share the first £40 equally such that C1 pays £20 and C2 pays £20. The remaining £5 is borne by C1 alone. Consequently, C1 may claim a mere £20 from C2.

[15] For that dearth, the much-criticised decision in *Lawrie v Stewart* (1823) 2 S 368 (NE) 327, 6 June 1823 FC (discussed at paras 7-79 ff above) may bear some responsibility. There a majority of the Inner House rejected a claim by one cautioner to share in the benefits from the principal debtor's estate granted to other cautioners bound in the same obligation but for distinct fixed sums. It is perhaps telling that, immediately after advocating a certain mode of apportionment for the purposes of cautioners' rights among themselves, Brodie mounts an attack on *Lawrie* for its rejection of such rights in a certain context: Brodie, 'Supplement' (n 13) 943, note c. In criticising that decision, and in affirming that cautioners bound for separate sums ought, in principle, to be entitled to share in benefits from the principal debtor's estate, Brodie may have been particularly minded to address *how* those benefits ought to be distributed. That said, however convincing one finds his critique of *Lawrie*, it does not follow that one should adopt his approach to apportionment (described above at para 8-05).

[16] W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable Including Cautionary Obligations* (1897) 817. For a helpful discussion of both approaches, see L Macgregor et al (eds), *Commercial Law in Scotland* (7th edn, 2024) para 8-016. Somewhat confusingly, Gloag and Irvine 817 n 3 refers approvingly not only to the maximum liability approach and to such cases as *Ellesmere Brewery Company v Cooper and others* [1896] 1 QB 75, but also to Brodie's mode of apportionment (discussed above at para 8-05).

Company v Cooper and others,[17] the question arose because one of four prospective sureties, each of whom was to become bound in the same document but up to their own specified limits, scored out his original limit of £50 and added the words '25*l*. only' to his signature. This alteration of the document led to the automatic release of the three sureties who had signed up to the limits of £50, £25 and £25 respectively, on the ground that their rights of contribution (i.e. *pro rata* relief) had been prejudiced.[18] In seeking to have the guarantee upheld, the creditor argued that the sureties had not been prejudiced for, in a question of contribution, the burden of the debt was to be divided equally,[19] and so it did not matter that one of their number had assumed responsibility for a lesser amount.[20] That argument was rejected. It was held by the Queen's Bench Divisional Court that there had been a material alteration of the document such as to release all four sureties. In a question of contribution, the sureties were to bear the burden not in equal shares but in shares proportionate to the limits up to which each had become bound. There was therefore a material difference, as regards the ultimate distribution of liability, between (1) two sureties becoming bound up to £50 each and the other two becoming bound up to £25 each (the original arrangement),[21] and (2) three sureties becoming bound up to £25 each and the fourth becoming bound up to £50 (what would have been the new arrangement had the sureties been held liable).[22] The case lends support to the maximum liability approach, suggesting that *pro rata* relief is directly tied to the proportions of the debt for which each party became bound.[23] While the

[17] [1896] 1 QB 75. See to similar effect such cases as *Pendlebury v Walker* (1841) 4 Y&C Ex 424 at 441 per Alderson B and *Steel v Dixon* (1881) 17 Ch Div 825 at 830 per Fry J.

[18] It also led to the automatic release of the surety who had altered the document because, although he had signed the document in its amended state, the three sureties with whom he thought he would be sharing the burden were not bound.

[19] This argument was qualified: the burden would be divided equally but no surety would pay more than the amount up to which he had limited his liability: [1896] 1 QB 75 at 76.

[20] Here £48 was owed by the principal debtor. According to the creditor, the sureties would, in a question of contribution, have effectively paid £12 each, whether they had been held bound under the original version of the document or under the amended version. Consequently, the alteration of the document – so ran the argument – had not been prejudicial.

[21] Had the sureties become bound according to the original limits (S1 up to £50, S2 up to £25, S3 up to £25 and S4 up to £50), then, under the maximum liability approach, the £48 due by the principal debtor would have been borne in the following proportions: S1 would have paid £16; S2 would have paid £8; S3 would have paid £8; and S4 would have paid £16. The relevant calculations are set out in [1896] 1 QB 75 at 81–82 per Lord Russell CJ.

[22] Had the sureties been held liable under the document as amended by S4 (i.e. to make S4 bound up to £25 only), then, following the maximum liability approach, the £48 due by the principal debtor would have been borne in the following amounts (here given as decimalised figures for ease of comparison): S1 would have paid £19.20; S2 would have paid £9.60; S3 would have paid £9.60; and S4 would have paid £9.60. As such, if the three sureties who had signed the document before it was altered had been held liable under the document after it was altered, they would have borne a heavier burden in terms of *pro rata* relief.

[23] [1896] 1 QB 75 at 79–82 per Lord Russell CJ.

independent liability approach would have led to the same outcome,[24] it was on the maximum liability approach that the court relied.[25]

8-07. Even under English law, the question whether the maximum or independent liability approach is to be favoured is not always straightforward. That there is more than one credible means of apportioning liability in a question of *pro rata* relief can be seen from the analogous context of contribution between liability insurers of the same risk but up to distinct limits, where the independent liability approach is favoured.[26] Further, although the maximum liability approach tends to apply in the context of suretyship, arguably it does not apply in all cases.[27]

8-08. Whether the maximum liability approach is to be preferred to the independent liability approach is a question fraught with difficulty, and would benefit from more detailed consideration elsewhere. Sometimes light can be shed on a problem concerning rights of relief by considering why such rights are granted in the paradigm case.[28] However, where the difficulty concerns how liability is to be apportioned, the principle of equity enunciated by Kames affords limited guidance.[29] While the need to counteract the creditor's arbitrariness demonstrates why payment in excess of one's proper share of the debt triggers a right of relief, the principle is silent as to what that share should be. On the side of the independent liability approach, it has been said that it has the benefit of

[24] *Commercial Union Assurance Co Ltd v Hayden* [1977] QB 804 at 814 per Cairns LJ. Had the sureties become bound according to the original limits (S1 up to £50, S2 up to £25, S3 up to £25 and S4 up to £50), then, following the independent liability approach, the £48 due by the principal debtor would have been borne in the following proportions (given here in decimalised form): S1 would have paid £15.78; S2 would have paid £8.22; S3 would have paid £8.22; and S4 would have paid £15.78. Had the sureties been held liable under the document as amended by S4 (i.e. to make S4 bound up to £25 only), then the independent liability approach would have apportioned the burden thus: S1 would have paid £18.73; S2 would have paid £9.76; S3 would have paid £9.76; S4 would have paid £9.76. Thus, had the court adopted the independent liability approach rather than the maximum liability approach, it would still have been able to conclude that the alteration of the document would be prejudicial if the other sureties were held liable for their original shares.

[25] [1896] 1 QB 75 at 79–82 per Lord Russell CJ.

[26] *Commercial Union Assurance Co Ltd v Hayden* [1977] QB 804. At the same time, some of the considerations militating against the maximum liability approach in that context relate to the peculiarities of insurance practice, such as the fact that the premium charged for liability insurance does not tend to vary in proportion to the insurer's maximum liability: *Commercial Union Assurance Co Ltd v Hayden* [1977] QB 804 at 814F–815B per Cairns LJ. Such a consideration has no obvious parallel in the context of caution wherever, as is common, the cautioners become bound gratuitously.

[27] See, e.g., Philips and O'Donovan, *Modern Contract of Guarantee* (n 9) paras 12.214–12.237.

[28] For instance, in chapter 7 it was argued, in the light of the equitable principle underpinning rights of relief, that discounts (or 'eases') granted by the creditor to one cautioner need not always be shared equally with the others: see paras 7-66–7-77.

[29] As to that principle, see paras 7-68–7-69 above.

sharing 'the burden of the principal debt as it is, not as it might have been'.[30] One might add that, in line with the presumption of equal sharing where cautioners do not limit their respective liabilities to specific sums,[31] where cautioners do so limit their liabilities, there is sense in an approach that both recognises that the cautioners have become bound for different sums and so creates some disparity between their respective burdens based on those sums, and yet minimises that disparity of burden. To those ends, the independent liability approach is ideally suited.

8-09. It is subject to such qualifications that this book tentatively favours the maximum liability approach, which, at least in English law, remains the 'dominant' mode of apportioning liability.[32] Short of being the only credible approach, still less one that ought necessarily to apply in all cases, that based on maximum liability is defensible as a general rule. If C1 and C2 become bound for a £100 debt up to the limits of £60 and £40 respectively, it can be inferred from C1's willingness to assume a higher risk than C2 that the law should impose on C1 a higher share of the loss, and one credible means of doing so is to make that share of the loss directly proportional to the £60 figure stipulated by C1. The approach has a certain simplicity and intuitive appeal,[33] tied as it is to limits to which the cautioners expressly agreed. It should not come as a surprise to cautioners who limited their liability to £60 and £40 respectively that, in a question of *pro rata* relief, the burden is to be apportioned according to those precise figures.[34]

[30] Philips and O'Donovan, *Modern Contract of Guarantee* (n 9) para 12.226.

[31] An approach that can be tied back to the idea that 'equality is equity': N R Whitty, 'Rights of relief, subrogation and unjustified enrichment' [2019] Acta Juridica 493 at 508.

[32] Philips and O'Donovan, *Modern Contract of Guarantee* (n 9) para 12.218.

[33] The simplicity derives not only from the fact that a calculation under the maximum liability approach does not involve a radical counterfactual of the sort, 'What if only one cautioner were liable?', but also from the fact that the proportions to be borne under that approach will be the same regardless of how much the principal debtor fails to pay.

[34] Admittedly, this reasoning is most convincing where C1 and C2 become bound in the same document. However, similar reasoning can be deployed where C1 and C2 know nothing of one another but become bound for the same debt up to the limits of £40 and £60 respectively. If the principal debtor fails to pay £40 and C1 pays that amount, C1 will, on learning of C2's existence, clearly be entitled to relief from C2 for the reasons discussed in chapter 7. Would it come as a surprise to C1, on learning that there was another cautioner bound up to a different limit, that the proportions to be borne by each were based simply on the limits up to which each had become bound (two fifths and three fifths) and that those proportions would have been the same however much the principal debtor had failed to pay? Thus, even where cautioners become bound in mutual ignorance, the maximum liability approach retains a certain intuitive appeal, albeit one which must be viewed with the benefit of hindsight, that is, in the newly acquired knowledge that there was in fact another cautioner bound up to a specified limit.

(b) Total relief

8-10. Sometimes a cautioner will be entitled to total, rather than mere *pro rata*, relief from a co-cautioner. The basis for such a claim has been addressed already.[35] If Tom and Ursula are cautioners liable for £100, Tom may be entitled to £100 in relief from Ursula if it can be shown that he became bound for her benefit. Perhaps Tom became a cautioner in order to persuade the creditor to give Ursula, who was already bound, more time in which to pay.[36] As with a cautioner's right against the principal debtor, Tom's entitlement *vis-à-vis* Ursula is to total relief because he acted for her benefit – a different circumstance from that grounding *pro rata* relief.[37]

8-11. More obviously, a claim for total relief against a cautioner may exist where the latter expressly agrees to such liability: if, for instance, C2 grants a 'letter of total relief' to C1.[38] Again, the basis for total relief here is distinct from that for *pro rata* relief in the ordinary case. Usually, co-cautioners enjoy a right of *pro rata* relief arising from a certain conception of equity; here C1 enjoys a right of total relief rooted in an express contract.

(2) Insolvency

8-12. In calculating a cautioner's ultimate entitlement to *pro rata* relief, the total debt must be divided by the number of *solvent* cautioners. Thus, if one or more cautioners falls insolvent, each of the solvent cautioners must bear an equal share of the resultant loss.[39] This principle was the focus of *Buchanan v Main*,[40] where two of five cautioners, C1 and C2, paid a substantial portion of the guaranteed debt, before pursuing C3 for one third (i.e. one sixth each) of that amount. Their claim succeeded, it having been 'fairly established' that the other two cautioners, C4 and C5, were insolvent.[41] In other words, although there were five cautioners, only three were solvent; hence, the amount paid to the creditor had to be divided into thirds rather than fifths.[42]

[35] See paras 7-33–7-42 above.
[36] See, e.g., *Mirrie v Pollock* (1745) Mor 2125.
[37] *Mirrie v Pollock* (1745) Mor 2125.
[38] See, e.g., *Clark and Highgate v Wilson* (1830) 8 S 1025.
[39] Of course, these solvent cautioners may, besides obtaining *pro rata* relief among themselves, rank on the insolvent estates of the other cautioners for further relief, provided that the creditor has not already ranked on those estates: Bell, *Commentaries* I, 354–356. As to the limitations of such a ranking, see *Keith v Forbes* (also known as *Maxwell's Creditors v Heron's Trustees*) (1792) Mor 2136 rev'd (1794) 3 Pat 350.
[40] *Buchanan v Main* (1900) 3 F 215.
[41] *Buchanan v Main* (1900) 3 F 215 at 221.
[42] *Buchanan v Main* (1900) 3 F 215 at 221.

8-13. If cautioners' rights of relief call for an equality of burden,[43] the insolvency of one must, as a matter of principle, prejudice each of the solvent cautioners equally. But for this insistence on equality, matters could take a different, more arbitrary, course. Suppose that Tilda, Lionel and Andrew are liable for a debt, which Tilda pays in return for an assignation. Andrew is insolvent. In seeking relief from Lionel, Tilda might argue that, having taken the initiative to pay the creditor and having obtained an assignation, she should bear no part of the loss arising from Andrew's insolvency. *Muire v Chalmers*[44] involved such a fallacious line of argument in the context of co-principal debtors (*correi debendi*). Here four co-debtors (D1-D4) were bound jointly and severally in the same bond with a clause of mutual relief. D1 paid the debt and, with the aid of an assignation, sought to claim the whole amount minus his quarter share from D3, notwithstanding the fact that one of the debtors (D2) had become bankrupt. This claim was found to be excessive. The clause of relief imposed on each of the solvent debtors (D1, D3 and D4) an 'equal burden', one part of which was the loss occasioned by D2's insolvency.[45] In a question of ultimate relief, the mere fact that D1 had paid the whole debt and that he had acquired an assignation did not entitle him to privileged treatment *vis-à-vis* his co-obligants.

8-14. Conversely, the need for equality among cautioners debars those from whom relief is sought from attempting to shield themselves from a co-cautioner's insolvency. This was the – again fallacious – line of argument pursued in *Lamberton v Annandale*.[46] The case involved six co-principal debtors (D1-D6), four of whom (D3-D6) became insolvent. When D1 paid the debt and pursued D2 for relief, the latter argued that he was liable only for his 'sixth part', the implication being that his share of the burden had not increased simply because D3-D6 were insolvent.[47] This argument was rejected. It was held that D2, as the only remaining solvent co-debtor, was obliged to pay D1 half of the original debt.[48]

8-15. In short, by virtue of the principle that cautioners must bear an equal share of the loss arising from their common obligation, the loss occasioned by the insolvency of one of their number must be borne equally by those who remain solvent.

[43] *Murray v Heir and Creditors of Orchyardtown* (1722) Mor 14651 at 14652.

[44] (1682) Mor 14654.

[45] (1682) Mor 14654 at 14655. See to similar effect in the context of co-cautioners: *Lillie v Crawford* (1705) Mor 14655.

[46] (1683) Mor 14655.

[47] (1683) Mor 14655 at 14655.

[48] (1683) Mor 14655 at 14655. This was consistent with the wording of the clause of relief, which did not restrict the obligation of mutual relief to each obligant's one-sixth share of the debt by use of the word 'allenarly' (i.e. 'only') (at 14655).

(3) Additional losses

8-16. The paying cautioner's claim for *pro rata* relief tends to reflect the amount by which his payment exceeded his proper share of the debt, that share typically consisting of the total debt divided by the number of solvent cautioners. However, the relevant loss does not always take that form. In *Marshall & Co v Pennycook*,[49] the cautioner seeking relief did not purport to have paid anything to the creditor. The case concerned a guarantee by two cautioners that a building project would be completed. When the principal obligant fell ill, one cautioner, who happened to have building expertise, set himself to complete the project, for, had he not done so, he and his co-cautioner would have been obliged to compensate the creditor. It was held that the 'builder' cautioner was entitled to a contribution from his co-cautioner, who had made no effort to expedite completion of the project, for half the expenses that he had incurred.[50] This unusual case underlines that, although a cautioner's claim for relief often stems from a payment to the creditor, it is, viewed more broadly, a claim for the alleviation of loss suffered in fulfilling a shared cautionary obligation. The reasonableness of the loss is important. In *Marshall & Co*, emphasis was placed on the fact that the 'builder' cautioner had, in taking the initiative and completing the project himself, pursued the 'best course [. . .] in the interests' of himself and his co-cautioner.[51] Although he had incurred loss in completing the project, he had averted a potentially greater loss in the form of a compensatory payment to the creditor.

8-17. A claim against one's co-cautioners may extend also to expenses which, short of arising from fulfilment of the common obligation, are still intimately connected with the pursuit of relief.[52] Thus, in *Anderson v Dayton*,[53] a cautioner

[49] *Marshall & Co v Pennycook* 1908 SC 276. This case has already been discussed at paras 5-27 and 7-48–7-49 above.

[50] *Marshall & Co v Pennycook* 1908 SC 276 at 282–283.

[51] *Marshall & Co v Pennycook* 1908 SC 276 at 283. *Trades House of Glasgow v Ferguson* 1979 SLT 187 serves as another useful illustration, albeit one not involving cautioners, of the fact that a right of relief allows one party to be 'relieved of part of the expense which [the party seeking relief was] obliged to incur' (at 192). Whitty places emphasis on the decision of the Inner House in that case, and on an *obiter dictum* from *Ross, Harper & Murphy v Banks* 2000 SC 500 (at para 14 per Lord Hamilton), as demonstrating that the measure of recovery under a right of relief is the pursuer's loss rather than the defender's enrichment at the pursuer's expense: Whitty (n 31) 518–519.

[52] The use of the term 'relief' to describe the content of relief may seem to court circularity. In fact, the term 'relief' is here used as a shorthand to describe relief in the ordinary sense. A cautioner who incurs an expense intimately connected with the pursuit of relief in the ordinary sense of a contribution (full or partial) to the amount paid to the creditor, may also claim relief in the sense of a contribution (full or partial) to an *expense* intimately connected with seeking relief in the ordinary sense, such as the expense of obtaining an assignation.

[53] (1884) 21 SLR 787.

was entitled to demand from each of his two co-cautioners one third of the expenses incurred in obtaining an assignation of the debt from the creditor.[54]

(4) Unreasonable conduct

8-18. Although cautioners must usually bear the loss arising from their common liability equally,[55] this does not apply in so far as the loss was caused by the paying cautioner's unreasonable act. To give a clear-cut example, suppose that C1 and C2 are liable for £100 and that C1 pays the whole £100. C1 expressly waives his right to immediate payment from the principal debtor and agrees instead to payment within three months. By the time that period has elapsed, the principal debtor has become insolvent and C1 is unable to exact anything by way of total relief. In principle, any subsequent claim against C2 for partial relief (£50) will be rejected because the loss for which C1 seeks compensation was caused by C1's prejudicial act, here giving time to the principal debtor.[56] Had C1 simply claimed £100 from the principal debtor when the latter was solvent, there would have been no need for recourse against C2.[57] Here it is significant that the benefit surrendered by C1 was provided by the principal debtor, rather than by a third party.[58]

8-19. Similar logic has been said to extend to co-cautioners. If C1, C2 and C3 are liable for £120 and C1 pays the whole £120, C1 will have a right of relief against C2 and C3 for a total of £80. However, if C1 decides to grant C2 a delay, allowing the latter to slide into insolvency in the meantime, C3 may be able to argue that C1 alone must bear the resultant loss. That approach has been said to apply even where C1, short of granting C2 more time to pay, omits for an unreasonable period to pursue C2.[59] That a loss caused unreasonably by C1 should be borne by C1 alone is clear in principle, but determining whether a given omission to sue C2 was unreasonable may prove difficult in practice. It also sits awkwardly with the argument, set out below, that the law should encourage cautioners to be proactive both in the pursuit and provision of *pro rata* relief.[60]

54 (1884) 21 SLR 787 at 787.

55 *Henderson v Skinner* 1990 SLT (Sh Ct) 24.

56 This hypothetical example is a simplified version of *Hume v Youngson* (1830) 8 S 295. Although this example involves prejudice to a co-cautioner, the 'giving time' doctrine can apply even in the absence of such prejudice. See discussion of the doctrine at paras 5-55–5-63.

57 This is not to preclude the possibility, in the ordinary case, of the paying cautioner obtaining *pro rata* relief of £50 first and then pursuing the principal debtor for total relief of the remaining £50 (and of the co-cautioner seeking £50 in total relief as well). Of course, total relief is more desirable than *pro rata* relief, but there is no requirement that the paying cautioner pursue ('discuss') the principal debtor for total relief before seeking *pro rata* relief from a co-cautioner.

58 *Scott v Young* 1909 1 SLT 47. This case is discussed at para 7-64 above.

59 Bankton I.23.45; Hume, *Lectures* II, 220.

60 In this example, C3's solution would be to pay £60 to C1 immediately. Thereafter, C3 could seek £20 from the still-solvent C2. C1's dilatoriness in seeking relief from C2 need not prejudice C3. For details on this approach to measure of recovery, see below at paras 8-29–8-45.

(5) Effect of an assignation

8-20. It is when one considers the effect of an assignation on cautioners' mutual rights of relief that the importance of ultimate relief, in the sense of an ultimate equality of burden, becomes especially apparent. In Scots law, it is well established that an assignation of the creditor's rights does nothing to upset the law's ultimately equal treatment of co-cautioners. A neat illustration of this principle is provided by *Lillie v Crawford*.[61] Here one of three cautioners, C1, paid the whole debt and sought, via an assignation, two thirds of that amount from C2. This was not allowed. Because C3 had fallen insolvent, only two solvent cautioners (C1 and C2) remained; hence, C1 was entitled only to half of what he had paid to the creditor from C2. That C1 had obtained an assignation from the creditor did nothing to increase his measure of recovery.[62]

8-21. A more extreme attempt to subvert ultimate relief with an assignation can be observed in *Monteith v Rodger*,[63] where one cautioner paid the debt, obtained an assignation from the creditor, and sought to use that assignation to exact full payment of the amount paid to the creditor from his co-cautioner on the ground that there was no clause of mutual relief between the cautioners. This reasoning was rejected and the existence of a non-contractual right of mutual relief affirmed.[64] The paying cautioner could use the assignation to obtain half of the debt only.

8-22. None of this is to deny the general rule that an assignee is ultimately entitled to full payment from the obligants in the rights assigned. At issue is the assignee's identity. If the assignee is a third party, as against an erstwhile obligant in the rights assigned, the assignation will confer the same rights as those hitherto enjoyed by the cedent (i.e. the creditor). If, however, the assignee is a cautioner in the rights assigned, the effect of that assignation on the other cautioners will be circumscribed. Suppose that there are two cautioners (Jack and Jill) jointly and severally liable for £100. A third party (Tim), who has hitherto had nothing to do with this debt, tenders payment to the creditor in return for an assignation of the creditor's rights. The creditor accepts this offer. In these circumstances, Tim effectively stands in the shoes of the creditor, and can use the rights assigned to him to exact the full £100 from the principal debtor, from either cautioner, or from some combination of the three.[65] Conversely, if Jack pays £100 and obtains an assignation from the creditor, Jack cannot use this assignation to obtain the full £100 from Jill, and that is because he is a cautioner for that debt. Jack's entitlement *vis-à-vis* Jill is based on the

[61] (1705) Mor 14655.
[62] (1705) Mor 14655 at 14658. See also *Craigie v Graham* (1710) Mor 14649.
[63] (1675) Mor 3351.
[64] (1675) Mor 3351 at 3352.
[65] This is what happened, for instance, in *Campbell v Campbell* (1775) Mor 2132.

amount by which his payment exceeded his proper share of the debt (£50).[66] An assignation is simply 'a useful piece of machinery';[67] it cannot be used to obtain 'any larger measure of indemnity' than that to which the paying cautioner is already entitled.[68]

(6) Benefits already received by the paying cautioner

(a) Relief from the principal debtor

8-23. As explored in the previous chapter, a cautioner may be obliged to share certain benefits with co-cautioners, with a consequent diminution in what may be claimed from those co-cautioners overall. For instance, if there are two cautioners (C1 and C2) and the principal debtor places money into C1's hands by way of total relief, C1 will be obliged to share half of that payment with C2.[69] Likewise, in a case involving three cautioners (C1-C3),[70] the one who had paid the whole debt, C1, was entitled to *pro rata* relief from C2 and C3 but, in return, had to grant to each of those parties one third of the dividends already obtained in total relief from the principal debtor's sequestrated estate.[71]

8-24. Clearly, the presumption is one of equal (or proportionate)[72] sharing of benefits from the principal debtor's estate. However, there are exceptions to that rule. As established in the previous chapter, a cautioner may consent, expressly or tacitly, to a co-cautioner's having the sole benefit of a security granted by the principal debtor for the purposes of relief.[73] Also, the general rule of equal sharing obtains only in so far as cautioners are bound in the *same* principal obligation, a rule inextricably linked with the equitable principle on which *pro*

[66] Stair I.8.9.

[67] *Thow's Trustee v Young* 1910 SC 588 at 594.

[68] *Thow's Trustee v Young* 1910 SC 588 at 592; see paras 7-111–7-112 above.

[69] *Humble v Lyon* (1792) Hume 83.

[70] *Anderson v Dayton* (1884) 21 SLR 787.

[71] *Anderson v Dayton* (1884) 21 SLR 787 at 788. See also *Lillie v Crawford* (1705) Mor 14655 and *Finlayson v Smith* (1827) 6 S 264. In the latter case, the paying cautioner agreed, in return for half of what he had paid to the creditor, to share with his co-cautioner half the value of an insurance policy obtained from the principal debtor.

[72] Usually, cautioners will become bound for equal shares and so they will have an equal entitlement to benefits from the principal debtor's estate. However, if cautioners become bound in unequal shares then, assuming the 'maximum liability' approach to be appropriate, their entitlement to share in benefits from the principal debtor's estate will be commensurate with the proportions of the debt for which each became bound. Thus, if two cautioners (C1 and C2) become bound for a £100 debt in shares of £40 and £60 respectively, and the principal debtor pays £20 to C1, C1 will take the benefit of this payment to the extent of £8 and will be required to pay £12 to C2: see *Ellesmere Brewery Company v Cooper and others* [1896] 1 QB 75 at 80–81 per Lord Russell CJ and, more generally, the discussion regarding unequal apportionment at paras 8-05–8-09 above.

[73] See, e.g., *Hamilton & Co v Freeth* (1889) 16 R 1022.

rata relief is based.[74] In *Campbell v Campbell*,[75] the principal debtor owed a debt for which C1 and C2 were bound as co-cautioners (here labelled debt 1). C1 paid debt 1 and all other debts owed by the principal debtor (here collectively labelled debt 2), and obtained an assignation of the debts and a heritable security which the principal debtor had granted for them. When C1 pursued C2 for half of what he had paid of debt 1, C2 countered that C1 was obliged to share the proceeds of the heritable security with him. It was held that, so far as debt 2 was concerned, C1 could make full use of the heritable security in seeking total relief from the principal debtor, to which end he was free to apply the whole security proceeds in the first instance. Only to the extent that C1 used the heritable security to obtain total relief for debt 1 was he obliged to share the proceeds with C2: it was for that debt alone that C1 and C2 were co-cautioners.[76]

(b) Eases

8-25. Another benefit tending to affect one's claim against a co-cautioner is known as an ease: that is, a voluntary deduction in the amount claimed by the creditor.[77] As a general rule, a paying cautioner who receives a discount is obliged to communicate it to the other cautioners,[78] with the result that each cautioner benefits from the discount equally (or proportionately).[79] Although the matter

[74] See generally chapter 7 above. As to benefits from the principal debtor's estate, see paras 7-60–7-65. If cautioners (C1 and C2) are bound in the same £100 debt, the creditor has various means by which to exact payment and thus is able to act arbitrarily *vis-à-vis* the cautioners. Attentiveness to the cautioners' interests would entail exacting as much of the debt from the principal debtor as possible, then exacting any shortfall from each cautioner in equal amounts. However, the creditor might, for the sake of convenience, choose to exact the whole debt from C1. That choice, both to sue a cautioner instead of the principal debtor, and to sue one of the cautioners rather than both, triggers a right of *pro rata* relief for C1 and a right of total relief for C1 and C2. Because the cautioners are co-creditors in total relief, any security granted by the principal debtor, whether to the creditor or directly to one of the cautioners, must enure to the benefit of both. Contrast this with the case where C1 and C2 are bound for separate debts of £50. Although each debt is owed by the same principal debtor to the same creditor, the latter's power to act arbitrarily is more constrained. As to the first debt, the creditor has the option of pursuing the principal debtor or of pursuing C1; as to the second, the creditor has the option of pursuing the principal debtor or of pursuing C2. If the creditor favours the second option in each case, C1 and C2 will each have a right of total relief, but those rights will be *distinct*. C1 and C2 will not be co-creditors in total relief. Consequently, if C1 happens to have obtained a security from the principal debtor for total relief, C1 will not be obliged to share the proceeds of it with C2. Any argument that C1 should be compelled to share the security proceeds on the ground, e.g., that C1 and C2 are in a sort of partnership is specious: see *Campbell v Campbell* (1775) Mor 2132 at 2132.

[75] (1775) Mor 2132.

[76] (1775) Mor 2132 at 2133.

[77] These are discussed in greater detail at paras 7-66–7-77 above.

[78] *Brodie v Keith* (1672) Mor 3393.

[79] Usually, cautioners will become bound on an equal footing and so, if the creditor does not intend to favour one over the other, each cautioner will be entitled to an equal share of the

is not free from controversy,[80] arguably the rule of equal distribution admits of an exception where the creditor intended the discount for one cautioner alone.[81] Thus, if Brandon and Phillip are liable to Rupert for £100, but Brandon is sued for a mere £80, the presumption is that Brandon may claim only £40 from Phillip.[82] The claim comprises two elements: (1) what Brandon paid above his *pro rata* share (£30), and (2) one half of the discount conferred by the creditor (£10). Alternatively, if it can be shown that Rupert granted the discount of £20 for Brandon's sole benefit, the latter will, in principle, be entitled to demand £50 from Phillip: (1) what Brandon paid above his *pro rata* share (£30), and (2) the full benefit of the discount conferred by the creditor (£20).[83]

8-26. Whatever power a creditor enjoys here, it is constrained in at least the following respect: to the extent that an ease exceeds the paying cautioner's share of the debt, it must be communicated to the other cautioner.[84] Suppose, to alter the previous example, that Rupert sues Brandon for a mere £30, rather than for the full debt of £100. Here the ease granted by the creditor (£70) exceeds Brandon's proper share of the debt (£50), and so Brandon's claim against Phillip will be restricted to £30.[85] If Brandon were entitled to claim more than £30 from Phillip, he would effectively be making a profit at the latter's expense.[86] This ties back to the fundamental nature of an ease, which does not, contrary to appearances, alter the proportions of the debt for which each cautioner is properly bound. Here it is only after defining Brandon's and Phillip's proper

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ease. However, if cautioners become bound in unequal shares, but the creditor still wishes the ease to benefit the cautioners equally, then, adopting the 'maximum liability' approach to apportionment, the cautioners will share the ease according to the proportions of the debt for which they became bound. Thus, if two cautioners (C1 and C2) become bound for a £100 debt in shares of £40 and £60 respectively, and the creditor grants an ease of £20 for the equal benefit of each cautioner, C1 will take the benefit of the ease to the extent of £8 and C2 to the extent of £12. See discussion of unequal apportionment at paras 8-05–8-09 above.

80 See discussion at paras 7-66–7-77 above.

81 There are other conceivable possibilities. For example, the creditor may have intended the discount for both cautioners but unequally. Thus, if C1 and C2 are equally liable for £100, the creditor might choose to grant £15 of a £20 ease to C1 and £5 of that ease to C2.

82 *Brodie v Keith* (1672) Mor 3393.

83 On a simpler, but possibly less instructive, analysis, Brandon is able to claim £50 from Phillip because he is not obliged to deduct the ease of £20 from his claim for relief and that, in turn, is because Rupert, the creditor, is free to discriminate as to the allocation of a benefit necessarily to his own prejudice. On such an analysis, Brandon's claim against Phillip is still notionally based on his loss, albeit the ease is artificially discounted from the calculation of that loss. It is as if Brandon had paid the full £100 to Rupert, then received an unrelated gift of £20 from Rupert immediately afterwards.

84 Hume, *Lectures* II, 220.

85 Having been sued for a mere £30, Brandon has already taken the benefit of the ease to the extent of £20 and so £30 is all that Brandon needs to claim from Phillip if he (Brandon) is to enjoy the portion of the ease that equals his share of the debt (£50). Phillip benefits from the portion of the ease that exceeds Brandon's share, namely £20.

86 Hume, *Lectures* II, 220 n 94.

shares, and after considering whether Brandon has paid more than his own, that the allotment of a voluntary discount can be considered. It is for that reason also that a discount granted to benefit one particular cautioner cannot have the effect of shielding that cautioner from the others' insolvency.[87]

(7) Summary

8-27. The response known as *pro rata* relief is a function of various factors, notably:

(a) the number of solvent cautioners;

(b) the amount due to the creditor;

(c) agreements by and/or among the cautioners affecting their respective shares;

(d) the loss suffered by the paying cautioner;

(e) the extent to which the paying cautioner's loss was incurred unreasonably;

(f) the extent to which the paying cautioner's rights may be offset against, or augmented by, benefits received from the principal debtor and/or creditor.

8-28. It is by reference to such factors that the ultimate allotment of liability among co-cautioners is determined.

D. IMMEDIATE RELIEF

(1) The issue and the extent to which it matters

8-29. Once it is clear how much can be claimed from co-cautioners in the aggregate (ultimate relief), the question remains how much can be demanded from each co-cautioner and when. This is the problem of immediate relief.[88] If C1 pays £120 and there are two other solvent cautioners (C2 and C3), C1 should be able to recover a total of £80 in *pro rata* relief. However, there are various conceivable means by which that amount might be exacted. Perhaps C1 may claim the whole £80 from either C2 or C3; alternatively, perhaps C1 may claim only £40 from C2 and £40 from C3.

[87] Suppose that there are three cautioners, C1, C2 and C3, bound for £120. The creditor grants an ease of £40 to C1 alone. It does not follow from this that C1's share of the debt has become zero, such that C1 does not have to share the risk of C3's insolvency with C2. The starting point is that if C3 has become insolvent, C1's and C2's respective shares of the debt have effectively increased to £60, and it is not in the creditor's power to throw an ultimate burden on C2 which exceeds £60. That is not to prevent the creditor from making a genuine sacrifice, and here that sacrifice happens to consist of an ease of £40 granted to C1. In effect, C1 pays £20 and C2 pays £60.

[88] See above at paras 8-02–8-03.

8-30. One might question whether it matters exactly how much C1 can claim from each co-cautioner. Often the sensible course will be to call both parties (C2 and C3) in the same action. Further, even if C1 pursues C2 and C3 individually, will this make any difference to the amount that C1 receives? So long as the destination (ultimate relief) is clear, does the route (immediate relief) actually matter? Yet while the amount exigible from a given co-cautioner may, for the reasons given, often be of merely academic interest, the matter is not entirely without importance. On the contrary, in cases involving insolvent co-cautioners, the amount exigible from any one co-cautioner at any given time could be very important, affecting not only how quickly payment is obtained but also how much is ultimately paid.[89] Further, even where none of the co-cautioners is, or becomes, insolvent, there is always value in prompt payment. Where multiple contractual obligants become bound jointly and severally, part of the *raison d'être* of their joint and several liability is to afford the creditor the convenience of exacting the entire debt from any one of them.[90] If creditors feel that it is worth stipulating for such joint and several liability, if only for the sake of receiving payment promptly, it is worth considering whether a similar advantage attaches to cautioners' rights among themselves. One might add that, academic as the question of immediate relief might seem, it is, viewed in another light, the sort of straightforward question to which the law ought to have a correspondingly straightforward answer: how much can the paying cautioner claim from a given co-cautioner? The next sections identify three potential answers to that question and the extent to which those answers are vouched by authority. Thereafter, it is considered which approach has the most to commend it in point of principle.

(2) Three approaches

8-31. If C1 has paid £120 and there are two other solvent cautioners (C2 and C3), there are three conceivable means by which C1 might exact the £80 owed by C2 and C3 in *pro rata* relief.

(a) The 'individual share' approach

8-32. On one view, a cautioner seeking relief must 'run the circuit of all the fellow co-cautioners'.[91] In the hypothetical example under consideration, this

[89] To which extent, matters of immediate relief may seem to overlap with those of ultimate relief. To take a hypothetical example (not involving relief), suppose that one party owes another £60 but that only £40 is due now, and that the debtor falls insolvent after paying the £40 but before the balance of £20 falls due. There is a material difference between that scenario and one in which the whole £60 is exigible while the debtor is still solvent.

[90] *Murray v Heir and Creditors of Orchyardtown* (1722) Mor 14651 at 14652.

[91] H Home, Lord Kames, *Principles of Equity* (3rd edn, 1778, reprinted with new pagination, ed M Lobban, 2014) 80.

would mean that C1 could exact no more than £40 from C2 and £40 from C3. Despite occasioning C1 inconvenience, this approach does not upset the ultimate distribution of loss that the law sets out to achieve. If, after C1 has claimed £40 from C2, C3 falls insolvent, C1 will be able to claim a further £20 from C2. That is because, as explored above, ultimate relief is based on the amount paid by C1 (£120) divided by the number of solvent cautioners (two).[92]

(b) The 'whole amount' approach

8-33. Under an alternative approach, C1 would, having paid £120 to the creditor, be able to claim £80 from C2, who, in turn, could seek relief of £40 from C3. Again, this approach would make no difference to the ultimate distribution of liability: all three cautioners would, in effect, have paid £40. However, in this case, C1 would only have to pursue one cautioner (C2) for *pro rata* relief. The 'whole amount' approach is, therefore, more expedient for C1 than the 'individual share' approach. As with the previous approach, the 'whole amount' approach applies subject to the subsequent insolvency of a co-cautioner. In other words, if C2 pays £80 to C1 and C3 later falls insolvent, C2 will be able to reclaim £20 from C1, for now there are only two solvent cautioners (C1 and C2).

(c) Kames' approach

8-34. Between these poles Kames attempts to steer a middle course, arguing that C1 may claim half the debt (£60) from C2, whereafter C1 and C2 may pursue C3 for £20 each.[93] The outcome is the same as that under the previous two approaches, all three cautioners having effectively paid £40 each.[94] At the same time, Kames' approach produces certain interesting results. Firstly, it ensures that, whenever an individual cautioner pays another in relief, all cautioners who have paid thus far (including the cautioner(s) who paid the creditor) have effectively paid the same amount. To that extent, the approach 'preserves equality'.[95] Once C1 has obtained £60 from C2, C1 and C2 will both

[92] See generally paras 8-04–8-28 above.

[93] Kames, *Principles of Equity* (ed Lobban) 80.

[94] C1 has paid £120 minus the £60 obtained from C2 and minus the further £20 received from C3; C2 has paid £60 to C1 minus the £20 received from C3; and C3 has paid £20 to C1 and £20 to C2.

[95] Kames, *Principles of Equity* (ed Lobban) 80. Complexities will arise in cases where equality of distribution is not the ultimate goal, as where the cautioners become bound in unequal proportions. Suppose that Kevin, Laura and Hannah are bound for £120 up to specified limits – £40 (Kevin), £20 (Laura) and £60 (Hannah) – and that Kevin pays the whole debt. Under Kames' approach, how much should Kevin be able to seek from Laura in relief? In principle, Kevin may seek such an amount from Laura as ensures that Kevin has effectively paid twice as much as she has. So Kevin should be able to recover £40 from Laura so that he has effectively paid £80. Laura will effectively be paying her own share of £20 plus her share of Hannah's share of £60 (£20) in the event that Hannah falls insolvent.

have effectively paid £60.[96] Moreover, once C1 has pursued C2 for £60, those parties will never have to look to one another for further relief should C3 fall insolvent.[97] It is sometimes said of this approach that C2, by paying £60 to C1, is paying C2's own share (£40) and advancing half of C3's (£20).[98] By forcing C2 to advance an additional £20, Kames' approach pre-empts the risk of C3's insolvency: should C1 and C2 turn out to be the only solvent cautioners, the debt will have already been divided between them equally.

(3) Authority for each approach

8-35. All three of the above approaches have, to varying degrees, found support in Scottish case law and juristic writings. For instance, Erskine states that a co-obligant who has paid the debt and obtained an assignation from the creditor will be 'entitled to sue any one of the co-obligants for the whole, leaving to that one his action of relief against the others; deducting nevertheless his own share, and those of the other co-obligants who [have] become notoriously insolvent'.[99] This approach is also favoured by Hume, who explicitly applies it to a paying cautioner,[100] and it has also enjoyed some judicial backing. In one old case, it was held that a cautioner could, having paid the whole debt and received an assignation, 'seek payment of the [whole] sum, [less] his own proportion'.[101]

8-36. By contrast, this 'whole amount' approach was expressly rejected by the Outer House in *Anderson v Dayton*.[102] Here a cautioner paid the whole debt, obtained an assignation from the creditor, and sought a joint and several decree against his co-cautioners for two thirds of the amount paid. In other words, he wanted decree pronounced such that, if necessary, he could claim all his *pro rata* relief from either co-cautioner. It was held by the Outer House that the paying cautioner could only pursue the other two cautioners for their individual shares (i.e. one third each), subject to a right to claim a further contribution from one of those two cautioners if the other were unable to pay his share.[103] Erskine's statement that one obligant could, having obtained an assignation from the creditor, claim the whole debt minus 'his own proportion' from any one

[96] C1 has effectively paid £60 because of the £120 paid to the creditor minus the £60 received from C2; C2 has paid £60 to C1.
[97] Kames, *Principles of Equity* (ed Lobban) 80.
[98] See, e.g., *Finlayson v Smith* (1827) 6 S 264 at 264–265.
[99] Erskine III.3.74. Although Erskine uses the language of co-principal debtors, it is likely that he also had in mind a paying cautioner.
[100] Hume, *Lectures* II, 220.
[101] *Kincaid v Leckie* (1665) Mor 14640 at 14640.
[102] (1884) 21 SLR 787.
[103] (1884) 21 SLR 787 at 788–789.

co-obligant,[104] was dismissed.[105] The decision has been criticised for denying the 'full effect of an assignation'.[106]

8-37. It remains to consider the authority for Kames' approach. Bell endorses it expressly in his *Commentaries*,[107] as does Hume in his *Lectures*, although in the latter work support for Kames' approach is confined to the case of a cautioner seeking relief without an assignation.[108] Kames' approach has also found judicial support. Reference has already been made to *Buchanan v Main*,[109] in which two of five cautioners (C1 and C2) were allowed to claim one third of the debt from C3 on account of the alleged insolvency of C4 and C5. In large part, the issue in that case was one of ultimate relief, pertaining as it did to the equal distribution of liability among three solvent cautioners, but the case is also relevant to immediate relief. In delivering the opinion of the Inner House, Lord Trayner noted that he was convinced that C4 and C5 were, as C1 and C2 had alleged, insolvent; hence C1, C2 and C3 each had to bear one third of what had been paid to the creditor. However, Lord Trayner went on to state that, whether or not C4 and C5 were insolvent, C1 and C2 would still be able to claim one third of the debt from C3. This he based on the fact that C1, C2 and C3 were liable on an equal footing and that they must therefore 'share' the same 'burden, with the same rights and the same risk [. . .] of obtaining relief from [C4] and [C5]'.[110] Implicit approval of Kames' approach can also be found in *Finlayson v Smith*.[111] Here repayments under a cash credit were guaranteed by several cautioners. By the time that one of those cautioners, C1, paid the debt to the creditor, there were two other solvent cautioners (C2 and C3) from whom C1 desired relief. It was held that C1 could claim *half* the amount paid to the creditor from C2.[112] In other words, C1 was able to claim so much from C2 as would ensure that they had effectively paid the same amount overall.

8-38. To what extent, if any, can the decision of the Outer House in *Anderson v Dayton*, which appears to endorse the 'individual share' approach, be reconciled with the decisions of the Inner House in *Finlayson v Smith* and *Buchanan v Main*? It is submitted that *Anderson v Dayton* ought to be read not so much as an endorsement of the 'individual share' approach as a rejection of the 'whole amount' approach. It is perhaps telling that, in pointing to a lack of authority for Erskine's 'whole amount' approach, the Lord Ordinary (Lord

[104] Erskine III.3.74.
[105] *Anderson v Dayton* (1884) 21 SLR 787 at 788.
[106] S Eden and J T Pretorius, 'Suretyship and cautionary obligations', in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 335 at 359.
[107] Bell, *Commentaries* I, 355.
[108] Hume, *Lectures* II, 219–220. See also Gloag and Irvine, *Rights in Security* (n 16) 836 n 4.
[109] (1900) 3 F 215.
[110] (1900) 3 F 215 at 221.
[111] (1827) 6 S 264.
[112] (1827) 6 S 264 at 264–265.

Kinnear) refers to a passage of Bell's *Commentaries* which expressly endorses Kames' measure of recovery.[113] In any case, it is possible to view *Anderson* as concerning a different set of questions from those confronted in *Buchanan* and *Finlayson*. In *Anderson*, both co-cautioners were before the court and the question was whether an assignation could form the basis for a joint and several decree against them. The decision, which consisted of rejecting Erskine's 'whole amount' approach, led to each of the co-cautioner defenders being held liable for no more than his own *pro rata* share. In *Buchanan* and *Finlayson*, both of which involved co-cautioners not all of whom were before the court, the question, 'How much can one cautioner claim from the other cautioners in *pro rata* relief?', was brought more sharply into focus than in *Anderson*. It must be admitted that, in *Buchanan*, that question would have been brought still more sharply into focus had Lord Trayner not been satisfied that the other two cautioners were insolvent.[114] Arguably, his statement that 'the same result follow[ed]'[115] whether or not the other two cautioners were insolvent was *obiter*. Even then, the decision comes closer than that in *Anderson* to addressing the problem of suing only some solvent co-cautioners, to say nothing of the fact that *Anderson* was decided by a lower court.

(4) Evaluating the approaches

8-39. In deciding among the three approaches just described, care should be taken not to conflate the concepts of ultimate relief and immediate relief. Consider, in that regard, the Outer House's decision in *Anderson v Dayton*.[116] At certain points in his judgment, the Lord Ordinary (Lord Kinnear) couches his treatment of immediate relief in language more befitting of ultimate relief, as where he refers to Stair's statement that payment by one co-obligant 'for more than his own share, doth oblige all the rest *pro rata*'.[117] From this, Lord Kinnear concludes that a cautioner could not use an assignation to claim from one of two co-cautioners 'more than [that cautioner's] rateable share' of the debt (i.e. one third).[118] At least some of his concerns relate specifically to the demand for a

[113] *Anderson v Dayton* (1884) 21 SLR 787 at 788. Based on the page number citation given by Lord Kinnear ('i. 350 *et seq*'), he seems to have been referring to the fifth edition of Bell's *Commentaries* of 1826 (reprinted by the Edinburgh Legal Education Trust, 2023).

[114] I.e. if it is clear that that none of the co-cautioners absent from the court is solvent, the amount that can be claimed from the cautioners who have been sued is one of ultimate relief: how should the burden be divided among the remaining solvent cautioners? The question is one of principle and the answer is 'equally'. By contrast, where any of the cautioners not before the court is, or may be, solvent, the question whether the co-cautioners before the court must immediately share the risk of that co-cautioner's potential insolvency is one of immediate relief.

[115] (1900) 3 F 215 at 221.

[116] (1884) 21 SLR 787.

[117] (1884) 21 SLR 787 at 788. Lord Kinnear was referring to Stair I.8.9.

[118] *Anderson v Dayton* (1884) 21 SLR 787 at 788.

joint and several decree. Lord Kinnear notes that, even if Erskine's doctrine that a cautioner could demand the whole debt minus his own share were accepted, it would not support an action for a joint and several decree: 'if decree were given in terms of that conclusion, and one of the defenders should turn out to be unable to pay his share, the other would have to bear the whole loss, and would have no means of recovering any part of it from his pursuer.'[119] As to ultimate relief, Lord Kinnear's pronouncements are instructive: once all rights of relief have been exercised, all cautioners should, in effect, have paid no more than their respective *pro rata* shares of the debt. Further, it is crucial that the insolvent cautioners' shares be divided equally among the solvent cautioners. However, it does not follow from those points (regarding ultimate relief) that the amount that any one cautioner owes to the paying cautioner in relief ought to be limited to the former's *pro rata* share (a question of immediate relief). The problems identified by Lord Kinnear regarding ultimate relief do not inhere in the 'whole amount' approach. As discussed above, it is conceivable that, having paid £120, C1 might be able to exact £80 from C2, who may then exact £40 from C3, the upshot being that all three cautioners effectively pay equal shares of the debt (£40). It is no less conceivable that, should C3 become insolvent after C2 pays £80 to C1, C2 should be able to exact £20 from C1, ensuring that the loss arising from C3's insolvency is borne equally by C1 and C2. In principle, therefore, the 'whole amount' approach need not, at least not usually,[120] upset the equal distribution that the law sets out to achieve; it simply makes C1's pursuit of relief simpler and more convenient.[121] To the extent that Lord Kinnear seems to dismiss the 'whole amount' approach as if it were untenable even in theory, his conclusions are overstated.

8-40. Bearing in mind that immediate relief is at least partly a question of expediency, which of the three approaches detailed above is the most appropriate?

[119] *Anderson v Dayton* (1884) 21 SLR 787 at 788.

[120] If C1 exacts £80 from C2 only for C3 to become insolvent, C1 will, under the 'whole amount' approach, owe £20 to C2. However, suppose that C1 also becomes insolvent. Because C1 was able to exact the full £80 from C2, the latter will be prejudiced.

[121] A similar point can be made regarding the argument concerning circuity of actions: *Anderson v Dayton* (1884) 21 SLR 787 at 788; R J Pothier, *Obligations* (W D Evans transl, 1839) § 281. That argument may be presented thus. If there are three cautioners, Julius, Diane and Henry, and Julius's right of relief is based on the payment of an amount exceeding his share of the debt, then if he sues Diane for the whole debt minus his share, Diane will be placed in a position wherein she has paid more than her share of the debt and so, by parity of reasoning, she should be able to sue Julius for the whole debt minus her share; and so on. This argument demonstrates that one cannot rely *simply* on the fact that one has paid more than one's share and on the fact that one now stands in the creditor's shoes in support of the 'whole amount' approach, but it does not follow from that that the 'whole amount' approach is inherently unworkable. The example given here simply points to the need for a special rule to prevent circuity of actions by granting Diane a right of relief against Henry *only* (unless and until Henry becomes insolvent, in which case Diane may have recourse against Julius for his share of the loss arising from Henry's insolvency).

Clearly, the 'individual share' approach prejudices the cautioner (C1) who paid the creditor, as it forces C1 to pursue each co-cautioner in turn. Although, in most cases,[122] this should not affect the ultimate distribution of liability, it will occasion C1 inconvenience. By contrast, the 'whole amount' approach ensures that C1 need only pursue one cautioner (C2), who in turn may pursue another (C3), for *pro rata* relief. In some respects, this approach seems fairer than the 'individual share' approach: the burden of seeking relief is not borne by the paying cautioner (C1) alone. In another respect, this approach favours C1 over the other cautioners. If C1 pays £120 and is able to obtain £80 from C2, then, at that stage, C1 will have effectively paid £40 (C1's proper share) and C2 will have effectively paid £80 (C2's own proper share and C3's proper share). While C2 still has a right of relief against C3 for £40, it could be argued that it is unfair that C1 is able, albeit only temporarily, to saddle C2 with a greater proportion of the debt than that now borne by C1. Even so, and imperative though it is that C1, C2 and C3 reach the same destination (bearing one third of the debt each), it does not necessarily matter which cautioner reaches that destination first. One might hazard that a certain amount of arbitrariness in that regard inheres in the cautioners' undertaking. If C1, C2 and C3 become jointly and severally liable to the creditor for £120, each voluntarily assumes the risk of being pursued for that amount. Does it not follow that each would also tolerate the risk of being pursued for some lesser sum (e.g. £80)?

8-41. The third approach, propounded by Kames, is a compromise between the two just discussed. It ensures that, once C1 has sued C2, those parties will effectively have paid the same amount; and that, once C1 and C2 have claimed against C3, all three parties will effectively have paid the same amount; and so on. In that respect, the cautioners resemble the protagonists of the *Wizard of Oz*: not only are they bound for the same destination (an equal distribution of loss), they must also travel there together. Suppose that Dorothy, the Scarecrow, the Tin Man and the Cowardly Lion are liable as cautioners for a debt of 300. Dorothy pays 300 to the creditor (the Wicked Witch of the West) and sets off down the Yellow Brick Road in search of *pro rata* relief. First to be pursued is the Scarecrow, who pays Dorothy 150. At this stage, Dorothy and the Scarecrow have effectively paid 150 each. Dorothy and the Scarecrow then travel further down the road, and, happening upon the Tin Man, pursue him for 50 each. At that stage, Dorothy, the Scarecrow and the Tin Man have all effectively paid 100. By the time they meet the Cowardly Lion and each claim 25 from him, all four parties have effectively paid an equal amount (75). However, besides reaching the same destination, the parties have travelled there at the same pace, bearing an equal share of the common burden in the immediate, as well as the long, term.

[122] Suppose that C1 exacts £40 from C2 and that it transpires that C3 is insolvent. C1 then proceeds to exact £20 from C2, but C2 has since become insolvent. Here the 'individual share' approach leads to C1 bearing a higher ultimate burden of £80.

8-42. Kames' approach is not without difficulties. While its emphasis on equality is appealing and seemingly correct in point of principle,[123] it is arguably an impracticable and cumbersome method of redistributing loss.[124] It may further be argued that, in seeking to eliminate inequality of one kind, Kames' approach creates inequality of another. In the example just given, Dorothy may legitimately resent the fact that, because she had the misfortune to be pursued by the Wicked Witch for the whole debt, she must pursue three parties individually for *pro rata* relief. She may likewise resent the fact that the Tin Man has to pursue only one party (the Cowardly Lion) and that the Cowardly Lion, again through sheer fluke, has had to pay only his own share (75). To that criticism, it might be countered that Kames' approach caters to an extreme scenario in which one cautioner insists on pursuing the others separately. If Dorothy wishes to exact payment quickly, her most practical course is to call the other parties together in a single lawsuit. If, alternatively, she chooses to engage in a protracted quest for relief, approaching the Scarecrow, Tin Man and Cowardly Lion individually, that is her prerogative and the attendant inconvenience hers to bear. Viewed in this light, Kames' approach creates a powerful incentive for Dorothy to call all co-cautioners in one action, rather than pursue each of them individually. At the same time, Kames' approach encourages the Scarecrow and the others to see Dorothy paid as soon as possible, to the potential obviation of legal disputes. An 'individual share' approach, whereby the Scarecrow and associates only ever had to pay their own shares (75 each), would foster apathy on their part: they could simply bide their time and wait for Dorothy to pursue them because, once Dorothy had pursued, say, the Scarecrow for his share, the latter would not have to seek further relief from the Tin Man or Cowardly Lion. However, if the Scarecrow, Tin Man and Cowardly Lion all knew that they were at risk of being pursued for 150, depending on whom Dorothy chose to approach first, none would have an incentive for biding his time. Not only would each party wish to pay Dorothy as soon as possible, he (e.g. the Scarecrow) would also want to ensure that the other two parties (the Tin Man and Cowardly Lion) were in a position to pay her. Consequently, all four cautioners (including Dorothy) would have an interest in the efficient redistribution of loss.

[123] Of the three approaches discussed, Kames' is the best equipped for addressing the scenario, discussed above at nn 120 and 122, in which one co-cautioner is insolvent and another becomes insolvent. Suppose that C1 pays £120 to the creditor and is then, on Kames' approach, able to exact £60 from C2. It later emerges that C3 is insolvent. C2 then becomes insolvent as well. In such a case, C1 is not prejudiced by C2's insolvency because all that could have been obtained from C2 in relief has already been obtained. By the same token, if C1 becomes insolvent after obtaining £60 from C2, C2 will not be prejudiced by C1's insolvency.

[124] See, in this regard, the criticisms advanced by Walter Ross shortly after Kames' death: W Ross, *Lectures on the Practice of the Law of Scotland in Two Volumes* (1792) vol I, 223–228. Ross argued that, although Kames' 'method may be very equitable', it would 'be found next to impossible in practice, where the cautioners themselves were not willing to contribute in this manner' (227).

8-43. To summarise, when considering how much Dorothy should be able to claim from each co-cautioner, it is possible to favour her or to favour the co-cautioners. In doing neither, Kames' approach could be seen to accelerate, rather than stymie, the overall process of relief. The strength of his proposed measure of recovery lies not simply in what it achieves (immediate and sustained equality among cautioners until all have contributed) but also in the pro-active, co-operative conduct that it encourages.

8-44. One other point in favour of Kames' approach is its prevention of a multiplicity of claims between the *same* cautioners. To revert to the *Wizard of Oz* example, suppose that Dorothy, having paid 300 to the creditor, pursues the Scarecrow for 150. The Tin Man and Cowardly Lion then fall insolvent. In this scenario, there is no need for further payment. Dorothy and the Scarecrow (the cautioners who remain solvent) have already paid an equal amount (150 each). This can be contrasted with an 'individual share' approach. If Dorothy claims against the Scarecrow for his individual share of 75, and the Tin Man and Cowardly Lion later fall insolvent, Dorothy will be entitled to sue the Scarecrow for a further 75. Here ultimate relief is achieved via two claims (and so possibly two lawsuits). Thus, while Kames' approach may seem to create more litigation in theory, in some cases it will be more efficient than the other two approaches.

(5) An exception

8-45. Even accepting Kames' approach in principle, its strengths do not carry to the case of proper cautioners, that is, cautioners for the same debt who do not become bound jointly and severally and who, in consequence, may insist that the creditor pursue each of them for their individual shares only. In the previous chapter, it was contended that a cautioner who waives this so-called benefit of division is still entitled to *pro rata* relief from the other cautioners.[125] Thus, if C1, C2 and C3 are liable as proper cautioners for £120, and all three cautioners are solvent, the mere fact that C1 can be pursued by the creditor only for £40 does not preclude C1 from paying £120, then pursuing C2 and C3 for relief totalling £80. However, in principle, C2 and C3 continue to enjoy the benefit of division *vis-à-vis* C1, just as they would have enjoyed it against the creditor. In other words, C1 should be able to exact only £40 from each of them.[126] It would be anomalous if C1 could exact more individually from C2 and C3 in relief than the creditor could have exacted from them under the contract of caution. Further, the inconvenience for C1 of having to pursue C2 and C3 for their individual shares is self-inflicted: it would not have arisen if C1 had not waived the benefit of division in a question with the creditor. To that extent, the argument that Kames' is the most compelling approach to immediate relief must be qualified.

[125] This position finds support, e.g., in Hume, *Lectures* II, 219 n 91.
[126] Subject to a right to exact £60 from C2 should C3 become insolvent.

(6) Effect of an assignation on immediate relief

8-46. Although the right of *pro rata* relief does not depend on an assignation of the creditor's rights, a cautioner is still entitled to demand an assignation from the creditor,[127] that the co-cautioners might be pursued more expeditiously. It will now be considered whether an assignation affects, or ought to affect, the content of relief. It has been argued already that, of the three possible approaches to immediate relief, Kames' is the fairest and most efficient, but is that still the case where the paying cautioner obtains an assignation?

(a) Authorities

8-47. One traditional benefit associated with an assignation is that of efficiency: that is, accelerating the process by which relief is obtained.[128] By standing in the creditor's shoes and enforcing the debt as the creditor might have done, the cautioner can obviate tortuous legal proceedings in which the right of relief would have had to be established afresh:[129]

> [O]n receiving payment from the cautioner the creditor is obliged even to be active in some measure for his benefit and to assign him his claim, and grounds of debt to the end he may operate the more readily and advantageously for his relief, against either co-cautioners or principal debtor. I say more readily, for the assignment enables him to do diligence upon the document straightaway; without it he must first call his co-cautioner in a process of relief and have decree to that effect against him.

8-48. A neat summary of the procedural and evidential benefits of an assignation was also provided in the Outer House's decision[130] in *Reid v Ruthven*:[131]

> The advantage of obtaining an assignation [. . .] is [. . .] obvious. By its terms it instructs the fact of payment, and furnishes the [payer] with a title, probative and instantly verifiable, to sue for payment.

8-49. The issue considered here, however, is measure of recovery. Does an assignation, besides obviating court proceedings, entitle one to exact the whole debt, minus one's own *pro rata* share, from any co-cautioner?

[127] Bell, *Principles* § 268.
[128] Hume, *Lectures* II, 218.
[129] Hume, *Lectures* II, 218. One advantage of having an assignation of the debt itself is the potential availability of summary diligence. In other words, the document of debt may have been registered in the Books of Council and Session or sheriff court books for execution, such that the creditor may be able to enforce it without a court decree; hence, so too might the paying cautioner now standing in the creditor's shoes. For helpful background information on summary diligence and the circumstances in which it is available, see, e.g., Macgregor et al (eds), *Commercial Law in Scotland* (n 16) para 9-010.
[130] The decision of the Outer House was upheld by the Inner House: (1918) 55 SLR 616.
[131] (1918) 55 SLR 616 at 618 per Lord Anderson.

8-50. It should first be acknowledged that this matter has been the cause of controversy in case law and institutional writings. In his discussion of co-principal debtors (*correi debendi*), which follows his treatment of cautioners' relief, Erskine seems to suggest that where the paying obligant raises an action of relief, without the aid of an assignation, that action is limited to the relevant co-obligant's *pro rata* share ('individual share' approach), although his wording is also consistent with Kames' approach.[132] Erskine goes on to say that, should the paying obligant receive an assignation from the creditor, that obligant should be entitled to claim the whole debt minus 'his own share' from any one co-obligant.[133] Thus, if there are three debtors liable for £120 and one, having paid £120, obtains an assignation, that debtor should be entitled to claim £80 from either co-debtor. Although Erskine makes this argument in the context of co-principal debtors, it is likely, given the proximity of his treatment of the subject to his treatment of caution, and the fact that he does not discuss this specific matter of measure of recovery in relation to caution, that he would have deemed his reasoning here applicable to co-cautioners as well. Hume also thought that an assignation could be used to enhance one's position in a question of immediate relief. In the absence of an assignation, Hume favoured Kames' equitable measure of recovery.[134] However, Hume argued that C1 could, on obtaining an assignation from the creditor, pursue C2 for £80, after which C2 could claim £40 from C3 ('whole amount' approach).[135]

8-51. The notion that one may use an assignation to increase the amount exigible from any individual cautioner has enjoyed some judicial backing. In *Kincaid v Leckie*,[136] for instance, it was held that a cautioner, having paid the debt and received an assignation, may 'seek payment of the [whole] sum, except his own proportion, just as the principal creditor might do, though the cautioners be obliged to relieve others *pro rata* only'.[137] However, this view was challenged in the case of *Anderson v Dayton*,[138] where the Outer House held that, even if the paying cautioner had obtained an assignation from the creditor, he was not entitled to a joint and several decree against the other two cautioners such as to render each liable for the whole amount paid minus the paying cautioner's share. The upshot of the decision was that the paying cautioner had to exact one third of the amount paid to the creditor from each of his co-cautioners rather

[132] Erskine III.3.74: 'One of several *correi debendi*, who hath paid the whole debt, is intitled, even without an assignation from the creditor, to a proportional relief against the rest; which proportion must in every case be so stated, that the loss shall fall equally on all the obligants who continue solvent.'

[133] Erskine III.3.74.

[134] Hume, *Lectures* II, 219–220.

[135] Hume, *Lectures* II, 219–220.

[136] (1665) Mor 14640.

[137] (1665) Mor 14640 at 14640. See also *Smeiton v Kininmond* (1684) Mor 14641.

[138] (1884) 21 SLR 787.

than two thirds from either one.[139] In large part, Kames also supported a unitary approach. For him, a cautioner who had obtained an assignation and a cautioner who had not should be afforded the same measure of recovery in a question of *pro rata* relief,[140] at least where relief could be directly obtained.[141]

(b) Evaluating the different approaches

8-52. In considering whether an assignation should be capable of increasing a cautioner's entitlement to immediate relief, a few points should be emphasised. It has already been argued that some of the reasoning in *Anderson v Dayton* is questionable or, at least, misleading.[142] Contrary to what Lord Kinnear appears to suggest, the use of an assignation to exact two thirds of a debt from one cautioner is not tantamount to saddling that cautioner with an ultimate share of two thirds. One might argue, further, that a cautioner who has gone to the trouble and expense of obtaining an assignation should be able to obtain all his *pro rata* relief from any one co-cautioner. At the same time, it should be remembered that the legal expenses associated with an assignation are one of the very losses for which a cautioner is entitled to *pro rata* relief from co-cautioners.[143] Accordingly, it does not follow merely from the fact that a cautioner has obtained an assignation that another cautioner should be saddled with the whole debt minus the paying cautioner's share, if only in the immediate term.

8-53. In spite of the criticisms levelled against *Anderson v Dayton* thus far, there is perhaps something to be said for the unitary measure of recovery favoured in that case, whereby a paying cautioner who obtains an assignation may claim no more from a given co-cautioner than may one who does not obtain an assignation. This accords with the fundamental distinction between principle and machinery.[144] Once it is established that a cautioner who has paid a £120 debt may claim £60 from any other cautioner in relief, that is, in principle, the

[139] (1884) 21 SLR 787 at 787–789.

[140] Kames, *Principles of Equity* (ed Lobban) 78–80.

[141] Kames qualifies his approach when discussing the scenario in which a cautioner is 'put to the trouble of adjudging for his relief'. Kames argues that, in such cases, the 'assignment is a legal title to lead an adjudication for the whole debt', albeit naturally only to the effect of drawing out what the co-cautioner would otherwise have been bound to pay: Kames, *Principles of Equity* (ed Lobban) 80–81. However, see the decision of the House of Lords in *Keith v Forbes* (also known as *Maxwell's Creditors v Heron's Trustees*) (1794) 3 Pat 350 to the effect that one of two cautioners could rank for only half the debt on the other cautioner's insolvent estate notwithstanding that the paying cautioner had acquired an assignation of the whole debt. The insolvency of a co-cautioner gives rise to complexities to which it is not possible to do justice in this book. For insight into those difficulties, see, e.g., Bell, *Commentaries* I, 355–356.

[142] See above at para 8-39.

[143] This was part of the paying cautioner's claim for *pro rata* relief in *Anderson v Dayton* (1884) 21 SLR 787.

[144] *Thow's Trustee v Young* 1910 SC 588 at 594.

maximum amount that that cautioner should be allowed to claim from a given co-cautioner, and an assignation from the creditor is simply the machinery by which the paying cautioner may enforce that right. On that view, an assignation does not increase the cautioner's measure of recovery (£60); it simply facilitates enforcement of the claim, as by summary diligence.[145] There is something of this unitary approach in the German Civil Code (BGB), which makes provision both for a direct right of *pro rata* relief enjoyed by co-cautioners and other co-obligants (BGB § 426(1)) and a right of *pro rata* relief arising from an assignation by operation of law of the creditor's rights to the payer (BGB § 426(2)). Crucially, for present purposes, the latter right does not yield any greater measure of recovery than does the first.[146] In other words, the debtor or surety who pays the creditor is seen, to the extent of the relevant right of relief, to have obtained an assignation of the creditor's rights. This assimilation of relief as a direct right and relief as a right deriving from the creditor's rights makes for an interesting contrast with the somewhat fragmented state of Scots law. Historically, relief has been couched in terms of both a direct right against co-cautioners and a right to an assignation from the creditor, which may lead one to suggest, as did Erskine and Hume, that some cautioners should be treated more favourably than others in a question of measure of recovery. It is arguably more coherent to say that the content a cautioner's right is the same whatever the machinery used to enforce it; hence the paying cautioner's measure of recovery should not be enhanced by an assignation.

E. CONCLUSION

8-54. In arguing that rights of relief ought not to be classified as a branch of the law of unjustified enrichment, Whitty remarks that:[147]

> The law on rights of relief and subrogation has to grapple with some difficult issues. It has not been shown that the rules of unjustified enrichment would help to solve them.

One source of such difficult issues is the question: 'How much can the paying cautioner claim from the other cautioners?' On that, Kames' equitable principle of relief, and the associated notion of an equitable redistribution of loss among multiple parties, would appear a more suitable guide than would concepts relating to unjustified enrichment.

8-55. A right of *pro rata* relief ensures that, ultimately, a cautioner does not pay more than his own *pro rata* share of the debt, that is, no more than the total

[145] Hume, *Lectures* II, 218. See above at n 129.

[146] For a helpful discussion of the German approach to contribution (relief), see C Mitchell, 'Claims in unjustified enrichment to recover money paid pursuant to a common liability' (2001) 5 Edin LR 186 at 193–197.

[147] Whitty (n 31) 527.

debt divided by the number of solvent cautioners. The content of this right will vary according to several factors. For instance, where there are two cautioners, and the creditor settles for £80 when the total debt was actually £100, the paying cautioner's right of *pro rata* relief may, depending on the purpose of the discount granted by the creditor, be restricted to £40. Crucially, however, the fact that a cautioner has obtained an assignation from the creditor of the whole debt has no effect on the content of the underlying right of relief.

8-56. Once a cautioner's ultimate entitlement has been ascertained, the question remains as to how that relief is to be exacted. It has been suggested that the best approach is that propounded by Kames, namely, that, in a question with any one co-cautioner, the paying cautioner should be entitled to claim so much as will ensure that all solvent cautioners (including the paying cautioner) have effectively paid the same amount in respect of their shared liability. As to the effect of an assignation on immediate relief, support has been expressed for a unitary approach to cautioners' measure of recovery against co-cautioners. As between cases where there is an assignation and cases where there is no assignation, a cautioner's measure of recovery should be the same.

9 Total Relief

PARA

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A. INTRODUCTION

9-01. A cautioner's entitlement to total relief from the principal debtor is said to rest on 'two grounds', one contractual, the other non-contractual.[1] Firstly, in becoming bound to the creditor at the principal debtor's behest, a cautioner has traditionally been seen to act under a contract of mandate, and, if made to pay the debt, is entitled to recover the amount paid from the principal debtor as expenses arising from that mandate.[2] Dieckmann dubs this the cautioner's 'original right of recourse',[3] rooted as it is in a contract between the cautioner and principal debtor. In contrast, the second ground for a cautioner's relief cannot be rationalised otherwise than by reference to the cautioner's relationship with the creditor. Often it takes the form of the cautioner demanding that, in return for paying the principal debtor's debt, the creditor assign the debt so that the cautioner can obtain relief. This Dieckmann refers to as 'derivative recourse',[4] because, although ultimately the assigned rights are exercised by the cautioner against the principal debtor, those rights 'derive' from the creditor's rights rather than from some direct contractual relationship between the cautioner and principal debtor. The present chapter examines both of these distinctive rights, assessing to what extent they can be streamlined into a single, unified theory of total relief.

B. STRUCTURE AND CONTENT

9-02. The chapter begins by examining the paradigm 'total relief' case. There follows a discussion of the role of assignation in this context. As in chapter 7, a significant portion of the present chapter is devoted to unusual cases that deviate

1 Bell, *Principles* § 255.
2 Erskine III.3.65.
3 J A Dieckmann, 'Scots influence on English Law: the guarantor's right to derivative recourse (subrogation)' (2004) 8 Edin LR 329 at 332–334.
4 Dieckmann (n 3) 332–334.

from the paradigm case, the aim being to test the boundaries of the cautioner's right of total relief and to elucidate its fundamental basis. The chapter concludes with some brief consideration of the content of a right of total relief.

9-03. Two broad points should be noted. Firstly, for simplicity's sake, almost all the hypothetical examples used in this chapter involve a single cautioner and a single principal debtor, except where more complex examples shed light on the right of total relief. Secondly, just as the chapters on *pro rata* relief referred to the analogous (if non-cautionary) status of co-principal debtors bound jointly and severally, this chapter refers to the rights of insurers, which, though fundamentally different from a cautioner's rights in certain respects,[5] are similar as regards relief.[6]

C. THE PARADIGM 'TOTAL RELIEF' CASE

(1) Requirements for total relief

9-04. At their most basic, the circumstances giving rise to a cautioner's right of total relief are as follows. Dennis requests a loan of £1000 from his father (Frank) as start-up capital for his bar business, but Frank refuses to advance the money unless a third party guarantees its repayment. To that end, Dennis asks his friend, Charlie, whether he will become his cautioner. Charlie agrees, thus inducing Frank to lend the money to Dennis. When the principal debtor (Dennis) becomes insolvent, the creditor (Frank) has recourse against the cautioner (Charlie). Charlie may then claim £1000 from Dennis in relief. Like the paradigm '*pro rata* relief' case, the paradigm 'total relief' case is susceptible to both a contractual and a non-contractual analysis.

(a) Contractual basis for total relief

9-05. The traditional justification for Charlie's right of total relief is that he, in becoming bound to the creditor, acted under a mandate from Dennis; hence, Charlie is entitled to reclaim the £1000 paid to the creditor as reasonable expenses arising from that mandate.[7] On that view, a right of total relief is based on the contractual relationship between the cautioner and principal debtor. In spite of that traditional explanation, one should not read too much into the

[5] For instance, a cautioner's obligation will cease to exist if the principal debtor is no longer liable to the creditor: *Morton's Trustees v Robertson's Judicial Factor* (1892) 20 R 72 at 77 per Lord McLaren. In contrast, an insurer's obligation has an 'independent' existence: *Laird v Securities Insurance Co Ltd* (1895) 22 R 452 at 459–460 per Lord McLaren.

[6] *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* 1988 SLT 874 at 882 per Lord Jauncey; *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1139 per Lord President Rodger.

[7] This rationale has existed since the time of Roman law: see, e.g., J 3.20.6.

'rather [. . .] awkward and artificial' notion that, whenever a cautioner becomes bound at a principal debtor's behest, there is a contract of mandate between them.[8] In modern law, the cautioner's right is better characterised in terms of a generalised contractual condition – one that arises whenever a prospective cautioner is asked by a prospective principal debtor to guarantee the latter's debt. As Hume argued, the 'very nature and substance' of a transaction in which one person is asked to stand cautioner for another is that the cautioner 'never meant to make the debt absolutely and ultimately his own' and so 'interposed in the faith and under the condition of being indemnified and relieved'.[9] The word 'mandate' is used simply as a shorthand for such an implied contractual condition rather than as a literal description of the cautioner's and principal debtor's legal relationship.

(b) Non-contractual basis for total relief

9-06. Alternatively, Charlie's right to claim £1000 can be analysed in non-contractual terms. In its most familiar form, this claim consists in a demand that Frank (the creditor) assign his rights against Dennis (the principal debtor) so that the cautioner can seek £1000 from him.[10] Charlie's right to demand this assignation arises on a non-contractual basis. On receiving payment from Charlie, Frank is obliged to assign to him his rights against Dennis, together with such attendant benefits as securities over Dennis' property.[11]

9-07. As to why Frank is obliged to assign his rights, Scots law offers at least two explanations: the equitable theory of relief propounded by Kames[12] and, more recently, a theory based on unjustified enrichment.[13] As in the chapter concerning *pro rata* relief, it is submitted that Kames' theory better reflects the law in difficult cases, and that again stems from its emphasis on the protection of the *creditor's* interests as a prerequisite for relief.[14] The utility of this equitable theory will become clearer in due course.

8 Hume, *Lectures* II, 214.
9 Hume, *Lectures* II, 214.
10 Bell, *Principles* § 255.
11 Erskine III.3.68: 'the creditor may be compelled to assign to the cautioner all separate securities obtained by him for the debt after its constitution; because the cautioner cannot plead upon these, without a formal conveyance.'
12 H Home, Lord Kames, *Principles of Equity* (3rd edn, 1778, reprinted with new pagination, ed M Lobban, 2014) 77–81.
13 See, e.g., *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1141 per Lord President Rodger. The longstanding entitlement of a cautioner (and of co-obligants more generally) to an assignation is also recognised by statute: see, notably, the Bankruptcy (Scotland) Act 2016 s 206(4).
14 As in *Ewart v Latta* (1863) 1 M 905 rev'd (1865) 3 (HL) 36, discussed below at paras 9-63–9-77.

(2) Content of total relief

9-08. There are two ways of conceptualising the content of total relief. To the extent that Charlie's rights are based on a contract of mandate with Dennis, his claim for £1000 represents expenses reasonably incurred in the fulfilment of that mandate (*ex mandato*).[15] If, on the other hand, Charlie's right is seen to flow from Kames' equitable principle, its content will be based on the fact that Dennis, being primarily liable for the debt of £1000, is ultimately meant to bear the whole burden.[16]

(3) The relative importance of contract and equity

9-09. For the most part, this chapter focuses on the non-contractual explanation for relief. There are several reasons for this. Firstly, it caters to a richer variety of scenarios, explaining why a cautioner is entitled to securities from the creditor, and why cautioners not falling comfortably within the 'mandate' paradigm may still be entitled to total relief.

9-10. Another benefit of the non-contractual analysis is that it bridges the gap between *pro rata* and total relief, demonstrating that these rights are species of the same genus. While the notion of mandate is often useful for understanding a right of total relief, capturing the essence of many 'cautioner-principal debtor' relationships, it cannot account for the right of *pro rata* relief among co-cautioners. Conversely, Kames' non-contractual explanation for relief can be seen to cut across the total/*pro rata* divide. Certain scenarios in which a contractual right of relief may lead to different results from a non-contractual one are discussed in chapter 10.

D. THE ROLE OF ASSIGNATION

9-11. Once it is established that a cautioner is entitled to total relief, it remains to consider by what means that right will be enforced. While Scots law has long recognised the cautioner's entitlement to an assignation of the creditor's rights, on analogy with the Roman *beneficium cedendarum actionum*, it has also made it clear that the cautioner's right of relief against the principal debtor exists independently of such an assignation.[17]

9-12. To understand this nuance, it is worth reiterating the distinction, sometimes drawn by the Scottish courts in cases concerning relief, between

[15] Erskine III.3.65.
[16] *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1141.
[17] *Erskine v Manderson* (1780) Mor 1386.

'principle' and 'machinery'.[18] Into the category of principle fall questions concerning both the circumstances in which one enjoys a right of relief and the content of that right. For instance, if a cautioner (C) pays D's debt of £100, C may, in point of principle, be entitled to relief of £100 from D because the circumstances in which C paid the creditor conform to a recognised cause of action (e.g. one based on Kames' theory of relief).[19] Questions of machinery, by contrast, do not concern the circumstances and content of C's right but rather the way in which that right is brought into effect. Thus, to return to the hypothetical example, C's right to £100 may be satisfied by various means, including, but not limited to: (1) a demand that the creditor assign to C his rights against the principal debtor; or (2) a direct action against the principal debtor conducted in C's own name. Otherwise stated, the cautioner enjoys a right (principle), which right may be enforced by means of certain actions and remedies (machinery). The distinction is important. As this chapter seeks to show, certain points of confusion regarding total relief have arisen from a failure to disentangle questions of principle from questions of machinery – a failure to appreciate, for example, that a right may be based on the creditor's duty to act equitably (principle) without requiring to be exercised via an assignation (machinery).

9-13. In spite of the foregoing, it is not possible wholly to separate questions of principle from questions of machinery.[20] An understanding of the basis for a cautioner's right of relief such as this chapter sets out to achieve (principle) is impossible without some appreciation of the machinery by which that right is given effect. Accordingly, an overview is provided of: (1) the various types of machinery used to grant total relief; and (2) certain difficulties, both theoretical and practical, associated with that machinery.

(1) Types of machinery

(a) Assignation and subrogation

9-14. In Scots law, 'derivative recourse'[21] takes two main forms: assignation and subrogation. They differ in the following ways:

(i) An assignation consists in a formal transfer of the creditor's right to the debt and attendant benefits (e.g. securities) to the cautioner.[22] Having

[18] *Thow's Trustee v Young* 1910 SC 588 at 594; *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1138 per Lord President Rodger; *Joint Liquidators of Simclar (Ayrshire) Ltd v Simclar Group Ltd* [2011] CSOH 54, 2011 SLT 1131 at para 18 per Lord Hodge.

[19] Kames, *Principles of Equity* (ed Lobban) 77–81.

[20] For instance, the 'sale fiction' raises issues relevant to both. Here it is impossible wholly to separate what the cautioner does to earn his relief from what that relief consists of. See discussion below at paras 9-25–9-27.

[21] Dieckmann (n 3) 332–334.

[22] Erskine III.3.68.

obtained the creditor's rights, the cautioner can pursue the principal debtor in his (the cautioner's) own name.

(ii) Subrogation, like assignation, allows the cautioner to stand in the creditor's shoes *vis-à-vis* the principal debtor. However, subrogation does not entail a transfer of the creditor's rights to the cautioner; rather the cautioner is clothed with the authority to exercise the creditor's rights against the principal debtor so long as the cautioner does so in the creditor's name.[23] This has its roots in the Roman concept of *procuratio in rem suam*.[24]

9-15. Despite these theoretical differences, the practical effects of assignation and subrogation will often be nigh indistinguishable:[25]

> [S]ubrogation and assignation, as nowadays understood, are just different techniques which the law uses to achieve the purpose of putting one person into the place of another so that he can exercise particular rights.

(b) Direct action

9-16. When a cautioner relies on assignation or subrogation, it is clear that the cautioner's rights 'derive', in a formal sense, from those of the creditor.[26] In such cases, the cautioner is able to step into the creditor's shoes, either by obtaining a transfer of rights against the principal debtor (assignation), or by suing the principal debtor in the creditor's name (subrogation). However, a right of relief may be pursued instead via a direct action against the principal debtor, without any formal resort to the creditor's rights. As Lord President Rodger explained in an analogous context:[27]

> in Scots law at least, there is no inconsistency in holding that an insurer which indemnifies the assured has in theory two methods of recovering its expenditure from another indemnifier who is meant to bear the ultimate liability for indemnifying the assured. The insurer can rely on its right of total relief from the indemnifier and raise an action of relief in its own name. Alternatively, it can seek in substance to work out its right of relief by bringing proceedings in the name of the assured against the indemnifier on the basis of the contract or clause of indemnity [i.e. subrogation].

9-17. It is significant that Lord Rodger made these points in relation to indemnity insurance. If someone negligently burns down an insured person's

[23] *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* 1988 SLT 33 at 43; *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1138–1141.

[24] *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1138–1141.

[25] *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1140 per Lord President Rodger.

[26] Dieckmann (n 3) 332–334.

[27] *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1145 per Lord President Rodger.

house, and the insurer, having indemnified the insured, seeks relief from the wrongdoer, such a right cannot be based on a contractual relationship between the insurer and wrongdoer; rather, the insurer is seen to step into the insured's shoes *vis-à-vis* the wrongdoer, availing itself of the insured's right in delict. While that right may be exercised by means of subrogation or assignation, it may instead be enforced by means of a direct action against the wrongdoer. This produces a surprising result: one's right may be 'derivative',[28] in that it is based on one's relationship with the creditor/insured (principle), but one may, in certain cases, exercise that right via a direct action against the person liable without demanding anything from the creditor (machinery).

9-18. Logically, the same reasoning applies to cautionary obligations.[29] Even where a cautioner's right of relief is founded on Kames' equitable principle, that right need not be exercised via assignation or subrogation. Ultimately, the machinery of the cautioner's right will depend on the benefits demanded. In many cases, for instance, the cautioner will desire an assignation of the creditor's rights because it is only through such a formal transfer that the cautioner will be able to avail himself of the creditor's securities.[30] Part of this is for the sake of publicity: the need to ensure that the transfer of a security from the creditor to the cautioner is obvious to the principal debtor's singular successors.[31] As argued below, however, there exist cases in which it may be helpful to view the cautioner's claim not in terms of assignation or subrogation but rather as one pursued against the principal debtor directly.[32]

9-19. Where a cautioner claims directly against the principal debtor in his own name, there are at least two explanations for this claim's machinery, namely implied assignation and no assignation. Each is discussed below.

(c) Implied assignation

9-20. In some cases where the cautioner is able to claim relief without demanding an assignation from the creditor and without claiming in the creditor's name (subrogation), the creditor's rights are seen to pass automatically to the cautioner when the cautioner pays.[33] This can be of practical value. In

[28] Dieckmann (n 3) 332–334.

[29] In fact, this reasoning applies *a fortiori* to caution. Whereas an insurer's claim for relief must always be based on its relationship with the creditor, and the equitable duty arising from that relationship, a cautioner will often enjoy both an equitable right based on the cautioner's relationship with the creditor and a direct right based on the cautioner's contractual relationship with the principal debtor.

[30] *Villaswan Ltd v Sheraton Caltrust (Blythswood) (in liquidation)* 1999 SCLR 199 at 210.

[31] *Villaswan Ltd v Sheraton Caltrust (Blythswood) (in liquidation)* 1999 SCLR 199 at 210.

[32] *Ewart v Latta* (1863) 1 M 905 rev'd (1865) 3 (HL) 36.

[33] Note Kames' remark that, 'if the creditor prove refractory, the law will interpose to hold an assignation as granted, because it ought to be granted': Kames, *Principles of Equity* (ed Lobban) 79.

Villaswan Ltd v Sheraton Caltrust (Blythswood) (in liquidation),[34] a number of companies were jointly and severally liable for VAT. One of those companies, Blythswood, paid the whole amount to the Crown and then sought to rank on Villaswan's estate for their share of the tax liability. Crucially, Blythswood sought to rank as a preferential creditor – that is, ahead of Villaswan's secured creditors – their argument being that, as soon as they paid the total amount due to the Crown, they received an automatic transfer of the debt and, with it, the Crown's status as preferential creditor. The Lord Ordinary (Penrose) upheld the claim, holding that, as soon as Blythswood had paid the tax, the Crown's debt and preference transferred automatically so that Blythswood could seek relief from Villaswan. In that regard, it was immaterial that Blythswood had not obtained an assignation from the Crown.[35] The Crown's rights were transferred automatically to Blythswood and the preference was included in that transfer because, unlike, say, the subjects of a security, the preference had no 'substance divorced [from the Crown's rights]'.[36] That said, Lord Penrose was careful to point out that an assignation would be important in other contexts. If, for example, the person seeking relief desired the benefit of a security (as against a preference) held by the creditor over the principal debtor's estate, that could be achieved only via an assignation. As Gloag and Irvine explain:[37]

> That the cautioner should [. . .] be put in the place of the creditor may be a necessary step in order to enable him effectually to work out his relief against the principal. Accordingly, the cautioner not only has transferred to him *de jure* the right to sue the principal debtor for relief, but also is entitled to demand from the creditor an assignation of the debt itself, of any available diligence or remedy, and of all securities for the debt, which are in the hands of the creditor.

(d) No assignation

9-21. In some cases, it is helpful to treat the notion of the creditor's rights passing to the cautioner as nothing more than a metaphor, used to show that the creditor, having been satisfied in full, no longer has any use for rights against the principal debtor.[38] If the cautioner does not actually wish to avail himself of such benefits as securities (assignation) or preferences (assignation/implied assignation), then there may be no need to argue that the creditor's rights have literally passed to the cautioner. In fact, in certain cases, a literal transfer may be undesirable. It is worth noting, in this regard, that a cautioner's

[34] *Villaswan Ltd v Sheraton Caltrust (Blythswood) (in liquidation)* 1999 SCLR 199. For commentary, see R G Anderson and S Eden, 'Transfer of preferences on payment: Villaswan Ltd v Sheraton Caltrust (Blythswood) Ltd' (2003) 7 Edin LR 398.

[35] *Villaswan Ltd v Sheraton Caltrust (Blythswood) (in liquidation)* 1999 SCLR 199 at 206–215.

[36] *Villaswan Ltd v Sheraton Caltrust (Blythswood) (in liquidation)* 1999 SCLR 199 at 213.

[37] W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable Including Cautionary Obligations* (1897) 803–804.

[38] Kames, *Principles of Equity* (ed Lobban) 77–81.

right of relief arises on payment of the creditor, and it is from that point that negative prescription begins to run.[39] Conversely, there is an argument that a right based on assignation may sometimes be disadvantageous if the date from which prescription starts to run is that on which the 'creditor could have raised an action against the principal debtor'.[40] In such cases, direct action may be preferable.

(e) Summary

9-22. Whereas a right of relief will often be effected by assignation or subrogation, there is a certain extent to which this right takes effect automatically, such that nothing need be demanded from the creditor. In other contexts, however, formal assignation remains important, as where the cautioner desires one of the creditor's securities over the principal debtor's estate.

(2) Matters concerning machinery

(a) Machinery is less important than principle

9-23. Thus far it should be clear that mechanisms like assignation and subrogation are different means to a common end: allowing the cautioner to benefit from the creditor's rights.[41] Once that is appreciated, another important point comes into view: the means by which a right of relief is given effect (machinery) is secondary to the right of relief itself (principle). For example, if a cautioner becomes liable for a debt of £100 but has to pay only £60 to the creditor, the principal debtor having paid £40, the cautioner may demand an assignation to the extent of £60 only, based on the amount actually paid. As Lord Hodge observed in a modern case, an assignation of 'the debt and securities [. . .] avails only to the extent that the secondary or accessory debtor is entitled to relief'.[42]

9-24. If the legal machinery used to enforce a right of relief is subordinate to principle, why does it matter whether a right of relief is enforced by assignation, subrogation or some other means? As explored already, the preferability of one type of legal machinery over another depends on the particular benefit sought. For the cautioner to avail himself of the creditor's securities, he will, as

[39] *Smithy's Place Ltd v Blackadder & McMonagle* 1991 SLT 790.

[40] S Eden and J T Pretorius, 'Suretyship and cautionary obligations', in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 335 at 349.

[41] *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1140 per Lord President Rodger.

[42] *Joint Liquidators of Simclar (Ayrshire) Ltd v Simclar Group Ltd* [2011] CSOH 54, 2011 SLT 1131 at para 34.

discussed above, require an assignation.[43] It is also worth noting that the precise nature of a cautioner's right (principle) will determine what machinery is most appropriate in the circumstances. There may be cases where the cautioner's right of relief simply entitles him to payment from the principal debtor but does not entitle the cautioner to demand the benefit of the creditor's securities.[44] In such cases, the most appropriate machinery will be a direct action against the principal debtor. Thus, the nature and extent of the cautioner's right of relief may influence the machinery used to enforce that right.

(b) The 'sale' fiction

9-25. Although questions of principle and machinery are conceptually separable,[45] there is at least one theoretical problem that cannot be discussed without reference to both. In principle, entitlement to relief arises when the cautioner pays the debt owed by the principal debtor. However, as discussed above, the legal machinery used to implement that right often consists of a transfer of the creditor's rights to the cautioner (assignation) or of subrogation to those rights. This appears to create a paradox. How is it that the cautioner can demand the benefit of the creditor's rights against the principal debtor if those rights have been extinguished by the cautioner's payment? As explained in chapter 2, Roman law devised a solution to this problem, suggesting that the cautioner paid not with a view to extinguishing the debt but rather to 'purchase' the creditor's rights against the principal debtor.[46]

9-26. This legal fiction (the 'sale fiction') has found support in Scots law,[47] and was recently reaffirmed in the Inner House decision in *Caledonia North Sea Ltd v London Bridge Engineering Ltd*.[48] The case arose from the Piper Alpha disaster, where an explosion on a North Sea oil platform led to the loss of 167 lives. In the wake of the tragedy, the owners of the platform faced a number of claims by victims and their relatives, which risk had been mitigated by two separate means: (1) an indemnity provided by various contractors working on the platform, and (2) insurance policies. The insurers fulfilled their obligations to the owners by satisfying the various claims raised by the victims and relatives. They then sought to reclaim this amount – via subrogation – from

[43] *Villaswan Ltd v Sheraton Caltrust (Blythswood) (in liquidation)* 1999 SCLR 199 at 210.

[44] As in *Ewart v Latta* (1863) 1 M 905 rev'd (1865) 3 (HL) 36, discussed below at paras 9-63–9-77.

[45] The matter is discussed at paras 9-11–9-13 above.

[46] D 46.1.36.

[47] See Kames, *Principles of Equity* (ed Lobban) 77–78, and the express invocation of his argument by counsel in *Cranstoun v M'Dowal* (1798) Mor 2552 at 2555. Bell adopts similar reasoning, albeit without recourse to a 'sale' metaphor. He states that the cautioner's payment of the debt will 'take away the right of the creditor but will not extinguish the debt of the principal obligant': Bell, *Principles* § 558.

[48] 2000 SLT 1123 aff'd [2002] UKHL 4, 2002 SC (HL) 117.

the contractors, on the ground that it was they who were primarily liable to the owners. One defence mounted by the contractors was that the very right to which the insurers wished to be subrogated no longer existed. The insurers had, in fully compensating the insured, extinguished any claim that the latter might have had under the contractors' indemnity.[49] Lord President Rodger was unmoved by this argument. It was, he observed, well established that an insurance payout did not have the effect of extinguishing claims payable to the insured by third parties. If, say, a wrongdoer, T, negligently destroyed another's property, the mere fact that the victim had been compensated by an insurer would not extinguish T's liability in delict. Once the victim had been compensated by the insurer, he could no longer claim against T because he was no longer suffering the relevant loss. However, the insurer could, by virtue of its right of relief, avail itself of the victim's delictual claim by means of subrogation.[50] According to Lord Rodger, the same principle applied to the case under consideration, its force undiminished by the fact that here T's liability to the insured took the form of a contractual indemnity rather than delictual liability.[51] Once they had compensated the insured, the insurers were entitled to claim against the contractors, who were, as a result of their indemnity, primarily liable to the insured. This outcome, argued Lord Rodger, was compelled by a policy in the law of insurance that the insurer should not bear ultimate responsibility for the insured's loss.[52] He acknowledged the paradox which this outcome seemed to create, seemingly vesting the insurer with rights that it claimed to have extinguished, but then noted that a solution had existed to this problem for nigh two thousand years.[53] According to the 'ingenious, if somewhat tortured' reasoning of Roman law, the person seeking relief should be seen, in paying the creditor, not to have extinguished the debt, but to have purchased the creditor's rights against the main debtor.[54]

9-27. The sale fiction underscores an important point about the interaction of principle and machinery. Although usually the two can be compartmentalised, there is at least one respect in which they come into direct conflict, thereby threatening the law's coherence. Even so, the importance of the sale fiction should not be overstated. It uses the notion of a sale to reconcile the seemingly conflicting characteristics of the principle underpinning a cautioner's relief and the machinery sometimes used to give effect to it. However, this should not be taken to suggest that a cautioner's right of relief is *based* on a contract of sale with the creditor. Were 'sale' an accurate description of the basis for a cautioner's relief, there would be no need to dub it a fiction. A cautioner pays the creditor not because of a contract of sale but rather to fulfil his obligations

[49] See the arguments at 2000 SLT 1123 at 1131 and 1143.
[50] 2000 SLT 1123 at 1134.
[51] 2000 SLT 1123 at 1134–1135.
[52] 2000 SLT 1123 at 1134–1135.
[53] 2000 SLT 1123 at 1143–1145.
[54] 2000 SLT 1123 at 1143. Lord Rodger referred, in that regard, to D 46.1.36.

to the creditor under a contract of caution;[55] the creditor grants an assignation to the cautioner, not because of an agreement to sell his rights against the principal debtor, but because of an obligation to do so on a particular conception of equity.[56] Indeed, one of the practical dangers of literalising the sale metaphor is to suggest that a right arising as a matter of law depends, like a contract of sale, on an agreement. Whether or not the creditor agrees, expressly or impliedly, to assign his rights on receiving payment, he will be obliged to do so in equity.

E. DEVIATIONS FROM THE PARADIGM

9-28. Having outlined the paradigm 'total relief' case, this chapter moves on to consider the law in cases which, though designated by the courts as involving total relief, depart from the paradigm case in some way. This is with a view both to identifying recurring themes in this area of law and to testing the limits of a cautioner's right of total relief. The issue will be examined under three heads, namely: (1) the cautioner's relationship with the principal debtor;[57] (2) the manner in which the cautioner fulfils his obligation to the creditor;[58] and (3) the amount paid by the cautioner.[59]

F. CAUTIONER'S RELATIONSHIP WITH THE PRINCIPAL DEBTOR

9-29. In the paradigm case, the cautioner acts under a sort of mandate from the principal debtor, helping the latter to obtain a lease, a loan, a credit sale or some other benefit that would otherwise be out of reach. However, certain cautionary relationships fall outwith that paradigm:

(a) A cautioner (C) becomes bound in respect of a loan granted to two principal debtors: the cautioner's friend (D1) and someone whom the cautioner has never met (D2). The cautioner seeks total relief from D2.[60]

[55] That is so even where the cautioner pays the creditor before being sued because, even in that case, the cautioner pays a debt that has fallen due: see *Gray v Thomson* (1847) 10 D 145 and the discussion below at para 9-61.

[56] Kames, *Principles of Equity* (ed Lobban) 77–81.

[57] See paras 9-29–9-53 below.

[58] See paras 9-54–9-62 below.

[59] See paras 9-63–9-77 below.

[60] This may have been the case in *Ewart v Latta* (1863) 1 M 905 rev'd (1865) 3 M (HL) 36. Note the argument advanced by the creditor to the effect that the cautioner only interposed for the benefit of *one* of the two principal debtors: (1863) 1 M 905 at 908.

(b) D borrows money using a cautioner (C1), and the liability of that cautioner (C1) is, in turn, guaranteed by another cautioner (C2). C2 seeks relief from D, even though C2 and D have no contractual relationship.[61]

(c) A borrower (D) asks a cautioner (C) to guarantee his liabilities to a bank to the extent of £100. C sends a letter to the bank agreeing to guarantee D's liabilities to the extent of £150, and so, to the extent of £50, exceeds the bounds of the mandate from D.[62] When, later, C is sued for £150 by the bank, C seeks to reclaim that amount from D in relief.

9-30. While such unusual cases have sometimes been analysed in terms of *negotiorum gestio* or unjustified enrichment,[63] it is submitted that an explanation already lies within the law of rights of relief itself. For instance, in relation to scenario (a), Bankton had no hesitation in saying that, where there were multiple principal debtors for the same debt, the cautioner could claim total relief from any one of them.[64] Similarly, in an old case very similar to scenario (b), a claim by a cautioner against his principal debtor's principal debtor was characterised as one for relief.[65] What is the basis for relief in such cases? It is submitted that the answer lies, once again, in Kames' equitable theory.

9-31. As explained in chapter 7, Kames used a particular notion of equity to show why one cautioner may claim *pro rata* relief from another.[66] Militating in favour of such a right, argued Kames, was the principle that the creditor should not be allowed arbitrarily to load one of several cautioners with the whole burden of the common debt. If, say, there were two cautioners (C1 and C2) jointly and severally liable for £100, the creditor may, for expediency's sake, exact £100 from C1 and nothing from C2. However, the creditor was obliged, in return for C1's payment of £100, to grant that party an assignation of his rights

[61] *Reid v Ruthven* 1917 2 SLT 238 aff'd 1918 2 SLT 8, (1918) 55 SLR 616.

[62] D 17.1.33.

[63] See *Reid v Ruthven* 1917 2 SLT 238 aff'd 1918 2 SLT 8, (1918) 55 SLR 616. A cautioner was held entitled to claim from his principal debtor's principal debtor (D) on the basis that: (1) the cautioner had, in paying D's debt, acted as a *negotiorum gestor* for D; and (2) the cautioner had, in paying D's debt, acted as a volunteer 'with no intention of [donation]' (1917 2 SLT 238 at 241). The latter part of the decision has come to be analysed in terms of unjustified enrichment: H L MacQueen, 'Payment of another's debt', in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 470; R Evans-Jones, *Unjustified Enrichment* vol 2: *Enrichment Acquired in Any Other Manner* (2013) paras 6.52–6.54. In suggesting that this case should have been analysed differently, there is no attempt to impugn the existence of a right based on unjustified enrichment where a volunteer pays a third party's debt. All that is suggested is that, where a cautioner (i.e. someone who pays not as a volunteer but because there is a contractual obligation to do so) pays the creditor, the former's claim for reimbursement from the party (or parties) primarily liable for that debt is based on a non-contractual right of relief.

[64] Bankton I.23.41.

[65] *Librack v Vaus* (1636) Mor 2118. But cf *Reid v Ruthven* 1917 2 SLT 238 aff'd 1918 2 SLT 8, (1918) 55 SLR 616.

[66] Kames, *Principles of Equity* (ed Lobban) 77–81.

against C2 to the extent of £50. Ensuring that C1 and C2 ultimately bore an equal share of the debt was, Kames argued, a fair outcome, the more so as it had no prejudicial effect on the creditor.

9-32. Similar logic applies where a cautioner seeks total relief from the principal debtor. If a principal debtor and cautioner are bound for the same debt, the creditor knows that the principal debtor is the party primarily liable for it and that the cautioner is liable on a secondary basis. Of course, it is open to the creditor, in the event that the principal debtor defaults, to pursue the cautioner instead. However, once the creditor has received full payment, it occasions him no prejudice to grant an assignation of the debt. Admittedly, most of Kames' discussion of this equitable principle focuses on *pro rata* relief from a co-cautioner rather than total relief from the principal debtor. However, it is clear from Kames' wording that he deemed his reasoning to apply equally to both scenarios.[67] Consequently, a cautioner may, by the same equitable token as warrants *pro rata* relief among co-cautioners, claim total relief from the principal debtor. Indeed, the notion that total relief is rooted in a certain 'principle of equity' has been,[68] and continues to be,[69] emphasised in Scottish case law and academic writing. The key point of principle regarding relief and equity is neatly encapsulated in *Erskine v Manderson*:[70] a creditor who has been paid in full no longer has any use for his rights, and so is bound in equity to assign them.[71]

9-33. Based on Kames' equitable theory, the non-contractual claim against the principal debtor may be broken up into the following elements:

(i) one of two parties liable for the same debt is secondarily liable (e.g. as a mere cautioner) for the other party (the principal debtor);

(ii) the cautioner has paid the full amount owed by the principal debtor;

(iii) it would be arbitrary of the creditor, having been paid, not to grant an assignation to the cautioner, affording the latter relief from the party primarily liable.

[67] For instance, he notes, in the midst of his discussion of the equitable basis for *pro rata* relief, that, where there is only one cautioner, the *whole debt* must be assigned to that cautioner for relief. This can have no other meaning than that the equitable basis for *pro rata* relief can also be used to justify total relief from the principal debtor. See Kames, *Principles of Equity* (ed Lobban) 79.

[68] See, e.g., J M Irvine, 'Cautionary obligations', in Viscount Dunedin and others (eds), *Encyclopaedia of the Laws of Scotland* vol III (1927) para 395.

[69] See, e.g., *Villaswan Ltd v Sheraton Caltrust (Blythswood) (in liquidation)* 1999 SCLR 199 at 206 and 213.

[70] *Erskine v Manderson* (1780) Mor 1386.

[71] *Erskine v Manderson* (1780) Mor 1386 at 1386–1387: 'When a debt is discharged by a *correus* [here the co-acceptor of a bill for the benefit of another], it is certainly just that the creditor thus satisfied, should communicate to him a right, which he himself can no longer exercise.'

9-34. Crucially, this justification for relief applies whether or not the cautioner and principal debtor have a contract. Indeed, even if the cautioner and principal debtor are strangers, it can still be said that they are connected by their common liability to a common creditor and by the fact that, from the creditor's perspective, one is secondarily liable behind the other, hence entitled to relief. However, despite explaining why total relief does not depend on a contract, Kames' principle belies a complexity: on what basis can the liability of one obligant be deemed secondary to that of the other obligants such as to entitle the former to full relief from the latter? In the paradigm case, it is clear that a cautioner acting under a mandate from the principal debtor is liable to the creditor on a secondary basis, hence not expected to bear ultimate responsibility for the debt. However, in cases departing from that paradigm, the designation of two debtors as 'primary' and 'secondary' respectively may not be so straightforward. It might be the case that the debtors are liable on an equal footing, meaning that, instead of one owing the other full relief, there is a mutual obligation of *pro rata* relief. As the paragraphs below explain in greater detail, one obligant's obligation might be deemed secondary to that of another because of a direct (benefit-based and/or contractual) relationship between those obligants or, if the obligants know nothing of one another, because it was clear to the creditor that one of those obligants was liable only on a secondary basis.

(1) Where the obligants know of one another

(a) One party becomes bound for the benefit of another

9-35. The most straightforward example of primary and secondary liability as between two obligants is where a cautioner becomes bound for the benefit of the principal debtor. As Gloag and Irvine note, '[w]herever the relation of principal and cautioner subsists' the 'right of relief subsists'.[72] That is so even where the cautioner does not become expressly bound as a 'cautioner'. In *Paterson v Bonar*,[73] it was held that three of the four parties named in a cash credit bond were merely cautioners for the fourth, not because they expressly identified as cautioners but because, according to the terms of the bond, only the fourth party was to have the benefit of the cash credit.[74] However, in considering who benefits from a particular transaction for the purposes of relief, reality will trump any contrary impression created by the terms of the written obligation to the creditor. Thus, if one party appears, on the face of a bond, to be a mere cautioner for another party, but the money is actually applied for the benefit of the putative cautioner, the putative principal debtor will be entitled to total relief from the putative cautioner, on the ground that it was the latter who

[72] Gloag and Irvine, *Rights in Security* (n 37) 797.
[73] (1844) 6 D 987.
[74] (1844) 6 D 987 at 1001–1006.

actually benefited from the money.[75] As Lord Fullerton remarked in *Erskine v Cormack*,[76] 'it is not enough', for the purposes of a claim of 'total relief', that '*ex facie* of the bond' the party claiming relief 'appears to be a cautioner, if it be shown that in substance he had a higher interest'.[77]

9-36. Sometimes a cautioner's relationship with the principal debtor is more complex than their common obligation to the creditor makes apparent. In *McMurray v McFarlane*,[78] a man offered to lend his nephew £5000 to help finance a newspaper that the latter had founded but agreed that his nephew would not be obliged to repay him if the newspaper failed. The uncle struggled to advance the whole £5000 and eventually suggested that he would rather become the nephew's cautioner in respect of a bank loan for the same amount. The nephew assented to this new arrangement. When the newspaper failed, the uncle repaid the £5000 bank loan and sought full relief from his nephew. Both the Outer House and Inner House held that the uncle's original promise had not been superseded by the cautionary undertaking; hence the condition that the nephew would incur no liability to the uncle if the newspaper failed was deemed effective.[79]

9-37. As explored in chapter 7, a scenario analogous to that of the paradigm 'total relief' case arises where a cautioner (C1) becomes bound for the benefit of another cautioner (C2) in the same debt, with the result that C1 is entitled to total relief from C2.[80] This serves to alter the general presumption that cautioners are bound on an equal footing, hence entitled only to *pro rata* relief.[81] For instance, if Heather becomes a cautioner for Tom to help him obtain credit, Heather is a secondary debtor in relation to Tom because she became bound for his benefit. However, if, after Tom defaults, Heather struggles to pay the debt, and a third party, Rachael, agrees to stand cautioner in consideration of a delay for Heather, Rachael will, having acted for the benefit of Heather, be regarded as a secondary debtor in relation to Heather (and Tom), hence entitled to total relief from her. Cases like this make it clear that 'secondary debtor' and 'primary debtor' are relative terms. For a single debt, the same person might be a secondary debtor *vis-à-vis* one party and a primary debtor *vis-à-vis* another.

9-38. On a related note, one person may become bound for another's benefit without being a cautioner in the strict sense of the word. If a creditor advances £100 to D1, and both D1 and D2 become liable for repayment of that sum, D2

[75] *Erskine v Cormack* (1842) 4 D 1478.
[76] *Erskine v Cormack* (1842) 4 D 1478.
[77] *Erskine v Cormack* (1842) 4 D 1478 at 1481.
[78] (1894) 31 SLR 531.
[79] (1894) 31 SLR 531.
[80] *Clarkson v Edgar* (1703) Mor 14645; *Pollock v Lockhart* (1745) 1 Elchies 89; *Mckenzie v Mckenzie* (1775) Mor 14661.
[81] *Murray v Heir and Creditors of Orchyardtown* (1722) Mor 14651 aff'd (1724) 1 Rob 465; *Mirrie v Pollock* (1745) Mor 2125.

may, as regards the creditor, so word his obligation as to preclude any inference that he is a cautioner, or at least waive many of the privileges associated with that status.[82] For instance, D2's undertaking may be seen to create an independent obligation to pay the £100 on demand rather than an accessory obligation to pay £100 on D1's failure to do so.[83] Even so, in a question of relief between the obligants, D2's liability may still be regarded as secondary to that of D1, given that D2 became liable to the creditor for the benefit of D1. On that account alone, D2 may be considered a secondary debtor entitled to full relief from D1, the primary debtor.[84] Similarly, if two parties are jointly and severally liable to a creditor under a bill of exchange accepted by both, there is a presumption that, as between themselves, they are entitled only to *pro rata* relief, but that presumption is rebuttable by parole evidence that one became bound for the benefit of the other.[85] Even those who adopt a particularly strict definition of cautionary obligations acknowledge that it is not only cautioners in the strict sense who are entitled to total relief. Consider, in that regard, Lord Medywn's dissenting judgment in *Paterson v Bonar*:[86]

> Viewed in relation to the bank the other obligants bind themselves as principals, they are the *correi debendi* of the Roman law, having neither the *beneficium divisionis*, nor *beneficium ordinis*; but viewed in relation to the party operating on the credit and to each other, they are merely cautioners, and I have no doubt 'they would describe themselves as cautioners for him', as in fact they are, although they are not so in relation to the bank. They are entitled to full relief from the party they bind themselves for, and expect to be so relieved; and hence they view themselves as cautioners only.

9-39. In short, although the simplest example of primary and secondary liability for the same debt is that of a principal debtor and cautioner, there are analogous cases in which one person, short of becoming bound as a cautioner *vis-à-vis* the creditor, still becomes bound for the benefit of a co-obligant, such that, as between them, the one who benefits is considered a primary obligant and the other a secondary obligant.

(b) Agreement

9-40. It is trite law that an obligation of full relief may spring from an express undertaking.[87] Thus, if D1 and D2 receive an advance of £100, D1 may agree

[82] For instance, the rule that the discharge of the principal debtor automatically releases the cautioner: *Aitken's Trustees v Bank of Scotland* 1944 SC 270.

[83] *Wilson v Tait* (1840) 1 Rob 137.

[84] *Erskine v Manderson* (1780) Mor 1386; *Crosbie v Brown* (1900) 3 F 83.

[85] *Crosbie v Brown* (1900) 3 F 83 at 86.

[86] *Paterson v Bonar* (1844) 6 D 987 at 1011–1012. See also McLaren's comments on co-principal debtors: J McLaren, 'Note on Mercantile Law Amendment Act', in Bell, *Commentaries* (7th edn, by J McLaren, 1870) I, 402 at 409–410.

[87] *Kennedy v Elliot* (1704) Mor 2147.

to relieve D2 of all the consequences of D2's liability to the creditor, regardless of who benefits from the money. An agreement to relieve may also be tacit. Indeed, the paradigm 'relief' case may be analysed in such terms. Where the principal debtor asks the cautioner to become bound for him, an implied term of that 'mandate' is that the principal debtor will relieve the cautioner in full.[88]

9-41. *Union Bank v McMurray*[89] offers a somewhat complex example of primary and secondary liability, possibly arising from an implied agreement. The salient facts are as follows.[90] D & Sons (hereinafter 'D') purchased a mill from M by means of a £47,500 loan from the Union Bank. For the most part, D undertook sole responsibility for repayment of the loan, but, as regards a £5000 portion of it, D and M granted a promissory note to the bank; the amount represented M's profit from the sale. It was held that, in a question with the bank, M was not to be treated as a cautioner; rather, both M and D were liable as co-principal debtors, the practical significance of which was that the bank could give time to D without losing its rights against M. However, although M was not a cautioner *vis-à-vis* the creditor, he was still considered, in a question with D, a mere secondary debtor entitled to full relief. Those findings reflected the implied terms of (1) the bank's agreement with the debtors, and (2) the debtors' agreement between themselves. The starting point was that, on the face of the promissory note, both M and D were bound as co-principal debtors and so the onus was on M to prove that he was a mere cautioner in relation to the bank. There was a specious logic in M's argument that he was a cautioner: viewed from a distance, his obligation seemed to relate to the repayment of money advanced to D alone. However, on closer inspection, it became clear that he was not a cautioner. While D was the recipient of the bank loan, that loan was to be applied for both D's and M's benefit: the loan had been granted for the specific purpose of purchasing M's mill and the amount owed by M under the promissory note corresponded to his £5000 profit under the transaction. As the sale could not have occurred but for the bank loan, the bank viewed both M and D as co-principal debtors.[91] In short, this case defies analysis in terms of one debtor benefiting from a transaction and the other debtor receiving nothing. At the same time, the Inner House acknowledged that, as between M and D, M was a secondary debtor entitled to full relief.[92] While the court was not explicit as to the basis of this right of relief, it may be deemed to have stemmed from

[88] Erskine III.3.65.

[89] (1870) 7 SLR 596 aff'd (1873) 10 SLR 319.

[90] There was another issue in this case with which the present chapter is not concerned. M's purchase of the property had been financed by a loan from the same bank. M argued that the bank's loan to D had superseded their loan to him, meaning that he was no longer liable to pay them. This argument was roundly rejected by the Court of Session. The loans to D and M existed independently of one another, and the fact that they had been granted by the same bank did nothing to alter that position: (1870) 7 SLR 596 at 599–600.

[91] (1870) 7 SLR 596 at 600–601.

[92] (1870) 7 SLR 596 at 600 and 603.

a tacit agreement between the debtors regarding the ultimate distribution of liability. Indeed, one might say that D's status as primary debtor and M's status as secondary debtor (between themselves) was one component of a broader transaction. M was willing to sell the mill at a £5000 profit; D was willing to buy it so long as M helped him to obtain the requisite credit from the bank; M was happy to do so by granting the £5000 promissory note to the creditor, but, to the extent that M later had to pay anything in respect of that debt, he would be entitled to full relief from D.

(2) Where the obligants do not necessarily know of one another

(a) Commercial practice

9-42. Sometimes the existence of primary and secondary liability can be seen to arise mechanically, as under a bill of exchange.

9-43. If the acceptor of a bill fails to pay it, the current holder of the bill may, subject to certain conditions, pursue any other party who has signed the bill, that is, the person who asked the acceptor to accept the bill (the drawer) and any former holder of the bill who signed it and sold the right arising from the bill to a third party (an indorser).[93]

9-44. As under the law of caution, once the creditor (holder) is satisfied, the law turns to questions of relief among the relevant obligants. By virtue of a well-established mercantile custom,[94] the obligant who pays the bill is entitled to full relief from any obligant under it who can, in relation to the paying obligant, be characterised as a primary obligant. The acceptor of the bill, like the principal debtor in a cautionary relationship, is regarded as a primary obligant *vis-à-vis* all other obligants under the bill, namely, the drawer and any indorsers. Similarly, as regards the drawer and indorsers, any prior party under the bill is regarded as a primary obligant *vis-à-vis* any subsequent party.[95] For instance, the drawer of the bill is a primary obligant *vis-à-vis* the indorsers; the first person to indorse the bill is a primary obligant *vis-à-vis* the second indorser and any subsequent indorsers; and so on. In short, any obligant under a bill can usually be labelled either a 'primary obligant' or a 'secondary obligant' relative to any of the other obligants. Significantly, this hierarchy of liability exists whether or not the obligants have met or are aware of one another, meaning that it cannot be ascribed to an implied agreement. Nor is a benefit-based analysis[96] of explanatory use in this context. An indorser tends to become bound on his own account and not on that of an acceptor.[97] In such cases, there is no question

[93] Bills of Exchange Act 1882 s 55.
[94] Now enshrined in the 1882 Act ss 55 and 57.
[95] 1882 Act ss 55 and 57.
[96] See paras 9-35–9-39 above.
[97] *Crawford v Muir* (1873) 1 R 91 at 95.

of the indorser's benefiting the acceptor in the way that a cautioner tends to benefit the principal debtor. If, say, a borrower accepts a bill for repayment of a loan and the lender decides to indorse the bill for value, in effect selling his right to be paid to a third party, the lender will be liable to the new holder of the bill if the borrower defaults.[98] While this obligation resembles a cautionary obligation, entailing as it does a guarantee that another will pay a certain sum, the context out of which it arises is fundamentally different from that of a typical cautionary obligation. In this example, the lender's indorsement of the bill does nothing to benefit the borrower. What, then, is the lender's motive for indorsing the bill? The indorsement of the bill can be viewed as one part of a larger transaction, namely the 'sale' of the bill by the lender to the new holder. The new holder will have a far higher chance of payment if the lender has guaranteed that the bill will be honoured. On what basis, then, is the indorser regarded as a 'secondary obligant' *vis-à-vis* the acceptor, hence entitled to full relief? The reason relates to a mercantile custom whereby the signing of a bill by multiple persons in a certain order creates a hierarchy of liability. The system is mechanical and predictable. For instance, the acceptor of a bill knows, or is deemed to know, of his potential liability in relief to whoever later indorses it.

9-45. Notwithstanding the above, substance may supersede form. When determining who is liable to whom in a question of relief under a bill, the reality of the obligants' mutual relations will take precedence over the order in which they signed.[99] Where it can be proved that an acceptor signed a bill in order to help the drawer to obtain credit, the former will, in an inversion of the ordinary rules regulating bills of exchange, be regarded as a secondary obligant entitled to total relief from the drawer.[100] Such an acceptor's position resembles that of a cautioner seeking total relief from the principal debtor. Similarly, if there is an express or implied agreement between some of the parties to the effect of altering their relations under the bill, it is that agreement, rather than the bill, by which the obligants' relations will be defined.[101] Thus, the previously mentioned notions of benefit and agreement remain relevant in the context of bills of exchange. However, in the absence of such considerations, the law relating to bills of exchange imposes a default hierarchy of liability, and that hierarchy determines, as between any two obligants under the bill, whose liability is primary and whose secondary.

[98] Bills of Exchange Act 1882 s 55.
[99] *Crosbie v Brown* (1900) 3 F 83.
[100] *Crosbie v Brown* (1900) 3 F 83.
[101] *Crosbie v Brown* (1900) 3 F 83.

(b) Logical inference

9-46. In some cases, the conclusion that one debtor is primary and another secondary is prompted by logic. Suppose that D is liable for £100 and that C1 is D's cautioner for repayment of that sum; C2, in turn, is C1's cautioner in respect of the £100 debt.[102] C2 and D have no direct relationship. However, from the two direct relationships that do exist between the debtors (D-C1 and C1-C2), it can be inferred that C2 is a secondary debtor relative to D. In other words, if C1 is a secondary debtor *vis-à-vis* D, and C2 a secondary debtor *vis-à-vis* C1, it follows that C2 is a secondary debtor *vis-à-vis* D, even if those two parties have never met.

(c) The basis on which the obligants became bound to the creditor

9-47. One of the most insightful discussions of primary and secondary liability in Scots law is that of the Inner House in *Caledonia North Sea Ltd v London Bridge Engineering Ltd*.[103] Insurers were liable to the owners of an oil platform, as were the contractors working on the platform, who had granted indemnities to the owners. The insurers sought to argue that their liability was secondary to that of the contractors, hence that they were entitled to total relief. The contractors countered that they and the insurers were liable to the owners on an equal footing, meaning that, at most, there was a right of *pro rata* relief between them. The insurance policies could not, they maintained, be regarded as secondary to the indemnities given that these created essentially the same type of obligation.[104] Both the contractors and insurers had agreed to indemnify the owners of the platform for the same risk: suit by the contractors' employees for death and personal injury.[105] Moreover, both parties had done this for a reciprocal benefit: the contractors granted their indemnities as part of a broader commercial arrangement between them and the owners, and the insurers granted their policies to the owners in return for a premium.[106] Accordingly, argued the contractors, it was difficult to see why theirs was the primary liability and the insurers' secondary.

9-48. In most cases involving an insurer's right of relief, it will be clear that the insurer's liability is secondary to that of any other parties liable to the insured. As Lord President Rodger remarked, there is a policy against an insurer bearing ultimate responsibility for the insured's loss.[107] It is because of this that, if an

[102] This example is modelled on the facts of *Reid v Ruthven* 1917 2 SLT 238 aff'd 1918 2 SLT 8, (1918) 55 SLR 616.
[103] *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 aff'd [2002] UKHL 4, 2002 SC (HL) 117.
[104] 2000 SLT 1123 at 1135.
[105] 2000 SLT 1123 at 1132–1133.
[106] 2000 SLT 1123 at 1135.
[107] 2000 SLT 1123 at 1135.

insurer compensates the insured and it emerges that some other party, T, is also liable to the insured for the relevant loss, the insurer will almost always be deemed secondarily liable behind T. The merits of such an approach are obvious where T is delictually liable to the insured. There is an intuitive justice in a blameless insurer recouping its loss from the party who, wilfully or negligently, caused the insured's loss. *Caledonia North Sea Ltd* concerned a more difficult issue: the respective statuses of two highly similar contractual obligations to indemnify the same person for the same loss. To complicate matters further, there was a superficial resemblance between the facts of this case and one of double insurance, wherein two insurers happen to have insured the same person for the same risk. It is well established, in such cases, that the insurers are entitled to *pro rata* relief from each other,[108] just as two co-cautioners are entitled to *pro rata* relief.[109] Were the insurers and contractors in *Caledonia North Sea Ltd* to be regarded in the same way, liable to the insured on an equal footing?

9-49. The Inner House held that this was not a case of double insurance; rather, the insurers' liability was to be deemed secondary to that of the contractors. For Lord Rodger, it was significant that the totality of the insurers' legal relationship with the owners was the obligation to indemnify them against a certain risk. In contrast, the indemnities granted by the contractors were but one facet of a complex legal relationship between them and the owners, a relationship to which the insurers were 'external'.[110] He also argued that, if the contractors were correct to maintain that they and the insurers were liable on an equal footing, the contractors' ultimate share of liability would be halved. According to Lord Rodger, this would be an untenable result, allowing the contractors to benefit incidentally from an insurance policy that had never been intended to benefit them and for which they had not paid the premiums.[111] It is submitted that the latter argument is not especially convincing as a reason for holding the insurers secondarily liable. The mere fact that the owners intended, in obtaining the insurance policies, to benefit themselves rather than the contractors did not, on its own, preclude the possibility of a *pro rata* division of liability between the insurers and contractors. One could, by the same logic, deprive co-cautioners of *pro rata* relief simply on the ground that the creditor did not intend them to have that benefit. More convincing is Lord Rodger's argument that the insurers were 'external' to a broader contractual arrangement between the owners and contractors.[112] On a superficial analysis, there was little to distinguish the

[108] *Sickness and Accident Assurance Ltd v General Accident Insurance Corporation Ltd* (1892) 19 R 977.

[109] *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1181 per Lord Sutherland.

[110] *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1135.

[111] *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1135.

[112] *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1135.

contractors' and insurers' respective obligations: both consisted of contractual indemnities to the owners relative to the same risk and undertaken for monetary consideration. Those similarities notwithstanding, it was clear to Lord Rodger that the primary legal relationship in this case was the contract for services between the owners and contractors, and that the insurers were at one remove from that relationship, theirs being an obligation to indemnify and nothing more.[113]

9-50. *Caledonia North Sea Ltd* makes it clear why a person may be deemed a secondary obligant *vis-à-vis* another obligant even if the person does not intend to benefit, or have a direct legal relationship with, that other obligant. It is implicit in an insurer's undertaking that the insurer will be secondarily liable behind whoever else is liable to the insured, except where that other person also happens to be an insurer. The case also demonstrates that the mere fact that a cautioner (or insurer) has benefited from the transaction in question, as by charging a premium to the creditor, does not preclude the finding that his liability is secondary to that of the other obligant. This explanation of secondary liability does not depend on the nature of the obligants' relationship with each other – indeed, the obligants may have no direct relationship – but rather on the obligants' respective relationships with the creditor, and the creditor's understanding of the terms on which they became bound.

(3) Summary

9-51. If one debtor (D1) wishes to claim total relief from another debtor for the same debt (D2), it must be established that D1's liability is secondary to that of D2. In the simplest cases, a primary obligant/secondary obligant relationship can be established by an agreement between the obligants or by the fact that one of them became bound for the other's benefit. However, if D1 and D2 know nothing of one another, a primary/secondary relationship must be found to exist by some other means, for instance, by showing that it was clear to the creditor that D1 became bound on a secondary basis.

9-52. What does this demonstrate about relief in the context of caution? A key point to note is that the status of secondary obligant, and the associated entitlement to total relief, may arise from various, sometimes overlapping, factors. In the paradigm case, the secondary nature of the cautioner's obligation stems from the fact that the cautioner assumed the role in fulfilment of a mandate from the principal debtor. More generally, a cautioner may be viewed as a secondary debtor if it is clear that the principal debtor is the party benefiting from the transaction, whether or not there was a mandate. Alternatively, the

[113] Similar arguments were advanced by the other Inner House judges. See, e.g., Lord Sutherland's judgment (2000 SLT 1123 at 1181–1184) and that of Lord Coulsfield (2000 SLT 1123 at 1202).

cautioner's secondary status may be attributed to an express or implied contractual undertaking, as where the principal debtor grants the cautioner a bond of relief. However, at a greater level of abstraction, a cautioner's liability is secondary for the same reasons as render an insurer's secondary: because it is clear to the creditor that the cautioner intends to become liable only if his liability is secondary to that of the other party bound for the debt. The latter explanation is particularly relevant to cases where the more obvious indications of secondary liability are absent.

9-53. An important consequence of the above is that the status of secondary obligant is not co-extensive with that of cautioner. By definition, a cautioner is liable only if the principal debtor is liable, and, even then, only if the principal debtor has defaulted.[114] However, while someone who waives those benefits will not, strictly speaking, be a cautioner, that person may still be regarded as a secondary debtor, entitled to total relief from the primary debtor. This nuance is particularly obvious in the law of insurance. An agreement to insure someone against the risk of that person's house burning down differs from a cautionary obligation in that, among other matters, the insurer's liability does not depend on there being some other person liable to the insured.[115] Even so, if a fire occurs and a third party is held delictually liable, the insurer's liability to compensate the insured will be regarded as secondary to that of the wrongdoer such that, once the insured has been compensated, the insurer will be entitled to claim total relief from the wrongdoer. In short, even if one is not a cautioner in the strict sense of the word or if, despite being a cautioner, one has waived certain privileges associated with that status, one may still be deemed a secondary obligant for the purposes of claiming total relief.[116]

G. THE MANNER IN WHICH THE CAUTIONER FULFILS HIS OBLIGATION TO THE CREDITOR

(1) Cautioner pays a debt that is not due

9-54. Whether a cautioner's claim is for *pro rata* relief or total relief, it must always be established that there is an obligation for which both the cautioner and the defender in relief are liable, and that the cautioner has fulfilled that obligation. It follows from this requirement that a cautioner cannot claim total relief from the principal debtor if the principal debtor's debt was not due at the time of payment, or if the principal debtor could have invoked a defence which the cautioner failed to plead on the debtor's behalf.[117] This point is illustrated

[114] *Morton's Trustees v Robertson's Judicial Factor* (1892) 20 R 72 at 77 per Lord McLaren.
[115] *Laird v Securities Insurance Co Ltd* (1895) 22 R 452 at 459–460 per Lord McLaren.
[116] *Joint Liquidators of Simclar (Ayrshire) Ltd v Simclar Group Ltd* [2011] CSOH 54, 2011 SLT 1131 at paras 17, 18, 20 and 25 per Lord Hodge.
[117] Stair I.17.13.

by *Maxwel v Nithsdale*.[118] A man was obliged to pay 5000 merks as a penalty for returning to Britain without the 'King's licence', for which obligation Lord Herries became bound as his cautioner. When the principal debtor later returned to Britain without the requisite licence, the cautioner paid 5000 merks to the King in accordance with his cautionary obligation. According to the principal debtor, however, this payment was unnecessary because the cautioner could have invoked a defence based on 'compensation': that is, the principal debtor's obligation to pay 5000 merks could have been set off against a larger debt owed to him by the King.[119] It was held that the cautioner, in failing to plead this defence and in failing to notify the principal debtor of the King's action against him, was not entitled to relief.[120] This is consistent with the notion that a cautioner, in paying the creditor, steps into the latter's shoes *vis-à-vis* the principal debtor.[121] If the principal debtor could have invoked a defence against the creditor, it follows that the same defence can be invoked against the cautioner claiming in the creditor's right.

9-55. The need for the principal debtor's debt to have fallen due before the cautioner may claim relief accounts, in part, for certain doctrines explored in chapter 5, whereby a cautioner is automatically released if the principal debtor is discharged or given more time to pay. Suppose that the due date of a guaranteed debt is 18 October and that the creditor enters into a new contract with the principal debtor whereby the original obligation is discharged, and replaced with an obligation to pay on 15 December. If the cautioner remained bound, he would, on paying the debt on 18 October, be unable to seek relief until 15 December. As the Lord Chancellor, Lord Cairns, observed in *Crawford v Muir*:[122]

> [In determining whether the principal debtor has been completely discharged by the creditor, hence whether the cautioner should be liberated from his obligation] the test which has been applied to all cases is this: Has that which has been done towards the principal debtor been a transaction of this character, that it will entitle the principal debtor, if he should be sued for [relief] by the [cautioner], to come to the creditor and say, – 'You have discharged me completely and entirely from the debt, but I am now sued by a person who was [cautioner], and that is inconsistent with the discharge which I have received from you?' If, on looking at the discharge, you find that there is nothing inconsistent in it with a proceeding by the [cautioner] afterward against the principal debtor, then the [cautioner] is not in any way discharged.

9-56. In other words, all decisions espousing the automatic discharge of a cautioner following the voluntary release of the principal debtor, in so far as

[118] (1632) Mor 2115.
[119] (1632) Mor 2115 at 2115.
[120] (1632) Mor 2115 at 2115.
[121] *Joint Liquidators of Simclar (Ayrshire) Ltd v Simclar Group Ltd* [2011] CSOH 54, 2011 SLT 1131 at para 10.
[122] (1875) 2 R (HL) 148 at 149.

they are rationalised in terms of the cautioner losing his right of relief against the principal debtor, serve as a reminder that a cautioner's right of relief depends on the principal debtor's obligation to the creditor having fallen due.

9-57. That said, a cautioner may waive defences peculiar to the cautionary obligation, such as the benefit of division, and still claim relief from the principal debtor. This point can be illustrated with examples

9-58. *Example 1: the cautioner forfeits his right of relief***.** A cautioner becomes bound for a debt of £100. A number of years later, by which time the principal debtor's obligation has negatively prescribed, the creditor demands payment of the £100, and the cautioner pays this sum in the erroneous belief that it is still due. Here the cautioner cannot seek relief against the principal debtor because, standing in the creditor's right, he is vulnerable to any defences that the principal debtor could have pled against the creditor: in this case, the fact that the debt has prescribed. That said, the cautioner may be able to reclaim the £100 from the creditor in unjustified enrichment.[123]

9-59. *Example 2: the cautioner is still entitled to relief.* Two proper cautioners (C1 and C2) become bound for a debt of £100. C1 pays the whole debt and seeks relief from the principal debtor. However, being a proper cautioner, C1's payment could have been restricted to a *pro rata* share of £50 if the benefit of division *vis-à-vis* the creditor had been invoked. Even so, the principal debtor is obliged to relieve C1 in full because, although C1 could have invoked a defence in a question with the creditor, this was not a defence that the principal debtor could ever have invoked; hence, the principal debtor cannot pray it in aid when the cautioner claims in the creditor's right.

9-60. There is at least one conceivable scenario in which a cautioner might squander a defence proper to himself, and thus forfeit his right of relief, namely, if the cautioner pays a debt not covered by the cautionary obligation. For instance, suppose that a cautioner becomes liable for a debt of £100 and that the principal debtor owes a separate debt of £200 to the same creditor. If the cautioner pays the whole £300, only £100 can be reclaimed in relief because it is only for this sum that both the cautioner and the principal debtor are liable. The cautioner may be able to claim the £200 from the principal debtor in unjustified enrichment, on the ground that the cautioner has, to that extent, extinguished a third party's debt.[124] However, that ground for reimbursement differs from a right of relief. As mentioned a number of times already, the mischief to which a right of relief is directed is the creditor's ability to act arbitrarily without harming his own interest. In the example just given, the creditor has no opportunity to act arbitrarily save as to the debt for which the cautioner is liable (£100). The

[123] *Carrick v Carse* (1778) Mor 2931.

[124] For further details on such a claim, see para 7-47 n 96 above.

cautioner is at risk of being sued by the creditor for £100 only; hence, on the basis of Kames' equitable principle, the cautioner is entitled to £100 only in total relief.

(2) Cautioner pays before suit

9-61. The mere fact that a cautioner pays the principal debtor's debt without being compelled to do so does not deprive him of a right of relief. In *Gray v Thomson*,[125] a cautioner became liable for the sufficiency of a heritable security, guaranteeing that the amount realised by selling the subjects would satisfy the creditor in full. The debt having remained unpaid for around sixteen years, the cautioner (or rather his representatives, for he had since died) demanded that the principal debtors obtain a discharge of his cautionary obligation by paying their debt, which they refused to do. The cautioner then obtained an 'onerous assignation to the bond' with a view to selling the subjects and obtaining relief: that is, he paid the creditor money in order to obtain the heritable security for his relief. To this, the principal debtors objected, arguing that the cautioner had never been distressed for payment by the creditor, and so he was acting capriciously in paying the debt and suing the principal debtors now. The Inner House held that the cautioner had acted within his rights in obtaining the assignation.[126] So long as the principal debtor's obligation has fallen due, the cautioner is at risk of being sued by the creditor, which is why the cautioner is free to pay that debt immediately and pursue the principal debtor for relief.

9-62. At the same time, a cautioner should take care not to pay or perform before the principal debtor's obligation becomes enforceable against the principal debtor. In *Owen v Brysson*,[127] a cautioner became bound in a composition by indorsing several bills due on different dates. He retired some of those bills before they fell due and so was not able to obtain relief for those bills. The case report does not suggest that he lost his right of relief by paying early, only that the principal debtor had a valid ground of suspension against him on that date. Indeed, when the creditor applies the early payment to the fulfilment of the principal debtor's obligation, not yet due but otherwise valid, it would seem reasonable to say that the cautioner does not lose his right of relief against the principal debtor: its existence is simply postponed until the due date of the debt.

[125] (1847) 10 D 145.
[126] (1847) 10 D 145 at 146.
[127] (1833) 12 S 130.

H. THE AMOUNT PAID BY THE CAUTIONER

(1) The general rule

9-63. There is an understanding in Scots law that, if a cautioner wishes to obtain an assignation from the creditor, the creditor must first receive full payment of the debt.[128] Thus, if the debt is for £100 and the cautioner pays £60, the latter cannot, as a general rule, claim an assignation from the creditor *to any extent* until the creditor has received the balance of £40.

(2) Principled justifications for the general rule

9-64. The law's insistence on full payment is intimately linked to Kames' equitable theory of relief, which dictates that a secondary debtor should be entitled to redress from the person primarily liable provided that this does not prejudice the creditor. That being so, there can be no plainer entitlement to relief than that of a cautioner who has paid the whole debt. The creditor having been satisfied in full, what interest of his could be served by denying the cautioner redress from the principal debtor? In cases of partial payment, matters are not so straightforward, and that is especially so where one or more of the debtors is insolvent.[129] Suppose that a creditor is owed £100, but that both the principal debtor and the cautioner for that debt are insolvent. For simplicity's sake, let it also be assumed that the principal debtor's and the cautioner's assets are worth £20 and £60 respectively, and that neither party has any other debts save the £100 owed to the creditor. The cautioner's trustee in sequestration pays £60 to the creditor and then attempts to rank for full relief on the principal debtor's estate, hoping to obtain a dividend of £12.[130] If the law tolerated that position, the creditor would be able to rank on the principal debtor's estate for a mere £40, and so would draw a dividend of £8.[131] In the end, the creditor would obtain only £68. In fact, the law does not allow the cautioner's relief to tread on the creditor's rights; rather, where both the cautioner and principal debtor are insolvent, the creditor can rank on both their estates for the full debt, although naturally the creditor may do so to the effect of obtaining 'payment of his debt, and no more'.[132] So, as the law stands, the creditor can exact £20 from the principal debtor and £60 from the cautioner, thus obtaining £80 in all. In this example, the merits of the 'full payment' rule are clear: the creditor

[128] Gloag and Irvine, *Rights in Security* (n 37) 832.

[129] As Lord Hunter observed in *Mackinnon's Trustee v Bank of Scotland* 1915 SC 411 at 424, a cautioner, 'cannot claim as of right an assignation from the creditor of any portion of the debt unless the whole is paid'.

[130] I.e. £20 (assets)/£100 (debts) x £60 (the amount supposedly owed to the cautioner) = £12.

[131] I.e. £20 (assets)/£100 (debts) x £40 (the amount supposedly owed to the creditor) = £8.

[132] Bell, *Commentaries* I, 350.

receives £80 rather than £68 in satisfaction of his debt. The rule accords with the broader principle that, as regards the risk of the principal debtor's insolvency, the creditor's interests take precedence over those of the cautioner. Indeed, it is precisely to shield himself from the risk of the principal debtor's insolvency that a creditor obtains a cautioner.

9-65. The merits of a 'full payment' rule are also particularly obvious in cases involving securities. Clearly, if a cautioner desires the benefit of a security held by the creditor over the principal debtor's estate, the whole debt for which that cautioner became bound must be paid. Thus, a cautioner who owes £100 cannot demand any portion of a security held by the creditor until the full £100 is paid; the cautioner cannot pay £60, then demand an assignation of the security to the extent of £60. As in the insolvency scenario described above, this scenario is easily explicable in terms of Kames' equitable principle: a creditor retains a legitimate interest in securities until the full debt has been paid. Even if the value of the security subjects is currently more than sufficient to cover the balance due to the creditor (£40), they may later fall in value.

(3) Policy justifications for the general rule

9-66. It might be questioned to what extent the 'full payment' rule applies in other, less extreme, cases. Does it apply, for instance, where both the cautioner and principal debtor are solvent, and where the cautioner simply desires repayment of the sum paid rather than a premature share of the creditor's securities? In such cases, one might argue that the 'full payment' rule is based less on principle than on considerations of policy. When a cautioner pays £60 when the amount owed is £100, there is, on the strength of the equitable principle propounded by Kames, a right to reclaim that £60 from the principal debtor in relief. Having been paid £60, what legitimate objection could the creditor have to the cautioner's obtaining relief to that extent? However, even in the absence of a principled objection to such a claim, there may be practical reasons why a creditor should not be made to grant an assignation until the whole debt has been paid. Arguably, the creditor should not be put to the inconvenience of granting multiple assignations depending on how much of the debt has been paid thus far. In addition, the requirement of full payment incentivises the cautioner to pay the full debt as soon as possible, for it is only by doing so that the desired assignation can be obtained. Thus, even where a solvent cautioner claims relief from a solvent principal debtor, there may be practical reasons for denying the cautioner a right to an assignation until the creditor has been satisfied in full. The more difficult question remains: is a blanket 'full payment' rule defensible in principle? Is insistence on full payment in all cases a corollary of the equitable theory discussed thus far, or the blunt instrument of policy?

(4) A difficult case: *Ewart v Latta*[133]

(a) Facts

9-67. *Ewart v Latta* brings into sharp focus many of the complexities and conundrums regarding full payment and the extent to which it is necessary. The case concerned two principal debtors and a cautioner. The principal debtors, Mounsey (D1) and M'Alpine (D2), were liable under a £1000 promissory note to Ewart. Having repeatedly pressed D2 for payment, Ewart agreed to grant D2 more time in which to pay the bill, in return for D2 becoming liable with a cautioner, Christie, in a new promissory note. When the cautioner later became bankrupt, he was able to pay only a dividend of £375,[134] but his trustee argued that, in return for paying this dividend, the cautioner was entitled to an assignation of the creditor's rights against D1 and D2 under the first promissory note, along with insurance policies on the lives of D1 and D2, held in security by the creditor, that he might more easily obtain relief.[135]

(b) Holding

9-68. The Lord Ordinary dismissed the claim, holding that the cautioner could demand an assignation of the creditor's securities only following payment of the whole debt.[136] The Inner House overturned this decision, holding that the cautioner was entitled to demand an assignation provided that it did not prejudice the creditor,[137] which finding was, in turn, reversed by the House of Lords.[138] The Lord Chancellor, Lord Westbury, began by stating the familiar principle that, where a cautioner had paid the debt, there was an entitlement 'under certain circumstances' to 'stand in the shoes of the creditor and to be placed in possession of all the rights possessed by him against the debtor'.[139] He went on to say, however, that such a right was contingent on the cautioner's having paid the whole debt, for which purpose a mere *ranking* for the whole debt was insufficient:[140]

[133] *Ewart v Latta* (1863) 1 M 905 rev'd (1865) 3 M (HL) 36.

[134] This figure is based on the dividend mentioned in the case report: '7s. 6d. per pound' ((1863) 1 M 905 at 906).

[135] (1863) 1 M 905 at 909–910.

[136] *Ewart v Latta* (1863) 1 M 905 at 907–908.

[137] *Ewart v Latta* (1863) 1 M 905 at 909–910.

[138] *Ewart v Latta* (1865) 3 M (HL) 36.

[139] *Ewart v Latta* (1865) 3 M (HL) 36 at 40.

[140] *Ewart v Latta* (1865) 3 M (HL) 36 at 41. Cf *Lowe and Burns v Greig* (1825) 3 S 543 at 543, which indicates that cautioners liable for the payment of interest 'were entitled to an assignation to the creditor's heritable security, to the extent of the sum paid by them'. The case was distinguished in *Ewart v Latta* (1865) 3 M (HL) 36 as involving the payment of the full amount that had fallen due *thus far*. As the Lord Chancellor explained (at 41) a cautioner who had paid the full amount currently due would be 'entitled to the benefit of the [creditor's] security *pro tanto*'. For a helpful discussion, see R G Anderson and S Eden, 'Transfer of

> [T]he question is, whether a [cautioner] who has not paid his debt has any right to make any disposition of the securities, or to interfere with the conduct of his creditor? The Lord Ordinary said 'no,' and according to natural justice, it is a very reasonable proposition that a [cautioner], so long as his debt is undischarged, should have no right to prescribe terms, or dictate conditions to his creditor. The creditor is to be left in the full possession of every remedy competent to him, and is to be left unfettered as to the mode in which he shall pursue those remedies. He is not to be called upon to put any limitation upon his remedies by any person occupying the position of his [cautioner], unless the debt is completely discharged [. . .] [O]n what ground, my Lords, can a creditor in the position of the appellant be required to part with his securities and his right to sue, and to transfer them to another person, and that other person his own debtor [i.e. the cautioner]?

9-69. In many respects, the import of the House of Lords' decision is clear. A creditor should not have to divest himself of securities until full payment of the guaranteed debt has been received, which is simply an expression of the broader principle that a creditor should not be obliged to assign to his own prejudice.[141] However, even once the cautioner's demand for an assignation was dismissed, the question remained: did the cautioner, at all events, have a right of relief against the principal debtors? Ultimately, this issue did not need to be addressed by the House of Lords: the legal dispute in the case was between the cautioner and the creditor, rather than between the cautioner and principal debtors. However, it is still possible to assess, partly by reference to *obiter* comments from this case, on what basis the cautioner may have been entitled to relief from D1 (and D2).

(c) Was there a right of relief in principle?

9-70. Of the two principal debtors, D1 and D2, only the former was solvent. One would suppose, then, that the cautioner might have wished to pursue D1 directly. However, his primary relationship seems to have been with the insolvent principal debtor (D2), as it was to obtain a delay for that party that the cautioner became bound. The cautioner does not seem to have had a similarly direct relationship with D1. There is no indication that his intention in becoming a cautioner was to benefit *both* D1 and D2. If one has a strong contractual basis on which to claim from the principal debtor (e.g. a contract of mandate) and that principal debtor is solvent, there is much to be said for suing the principal debtor directly. It may have been the perceived lack of such a contractual claim that motivated the cautioner in *Ewart v Latta* to demand an assignation from the creditor instead. There are various indications to that effect. For instance, when

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preferences on payment: Villaswan Ltd v Sheraton Caltrust (Blythswood) Ltd' (2003) 7 Edin LR 398 at 399–401.

[141] Erskine III.5.11. See also C 8.40.2.

the case came before the Inner House, the creditor argued that the cautioner had not become bound for D1 but only for D2,[142] the implication being that the cautioner did not enjoy a direct right of relief against D1 based on contract. At the same time, there were some *obiter* indications that the cautioner, short of being entitled to an assignation from the creditor, enjoyed a right of relief against D1 to the extent that he had paid the creditor. The Lord Ordinary (Lord Barcaple) opined that, '[e]ven without an assignation [the cautioner's trustee] may probably be in a position to demand relief of the dividend from the solvent debtor'.[143] Similarly, when the case reached the House of Lords, the Lord Chancellor suggested that the cautioner had a 'right of action' against *both* D1 and D2, for, although only the cautioner and D2 became liable in the new promissory note, this clearly related to the same debt for which D1 and D2 had become bound under the first promissory note, meaning that D1 and the cautioner stood 'as much in the relationship of principal and [cautioner] to each other as [did D2 and the cautioner]'.[144] The Lord Chancellor seems to have been suggesting that, even if the cautioner did not become bound with the intention of benefiting D1, he was, as a matter of logic,[145] a secondary debtor in relation to D1, hence, in principle, entitled to full relief.

9-71. There is, consequently, a tension in this case. It was acknowledged that the cautioner may have had a right of relief, but, for reasons already given, it would most likely have been artificial to base this right on a contractual relationship; nor, given the House of Lords' holding, could such a right be effected by an assignation from the creditor. It is submitted that the cautioner's right of relief is best understood in terms of Kames' equitable principle, albeit the cautioner was not entitled to give effect to that right via an assignation of the creditor's securities. On that understanding, as soon as the cautioner paid the dividend of £375, he became entitled to reclaim an equivalent amount from the principal debtor in relief, notwithstanding that he could not demand an assignation of the creditor's securities. One might regard this as a sort of automatic transfer of the creditor's right to claim £375 to the cautioner.[146] Such a right of relief could have been explained in terms of Kames' equitable principle. The creditor had multiple persons from whom to exact payment of the £1000. The cautioner had paid £375. As a result, the creditor could now claim only £625, as against the original £1000, from the principal debtor. So long as the principal debtor remained solvent, the creditor would be occasioned no prejudice if the cautioner sought payment of £375 from the principal debtor in the meantime.

[142] *Ewart v Latta* (1863) 1 M 905 at 908.
[143] *Ewart v Latta* (1863) 1 M 905 at 908.
[144] *Ewart v Latta* (1865) 3 M (HL) 36 at 40–41.
[145] In other words, if D2 was a primary obligant *vis-à-vis* the cautioner, and D1 and D2 were liable on an equal footing then, logically, D1 too was a primary obligant *vis-à-vis* the cautioner. See para 9-46 above.
[146] Kames, *Principles of Equity* (ed Lobban) 79.

9-72. On the subject of a lack of prejudice to the creditor, it bears noting that *Ewart v Latta* concerned the very sort of arbitrary, invidious conduct that Kames' principle seeks to combat. Mounsey (D1) was still solvent. Why, then, did the creditor rank on the cautioner's insolvent estate when he could simply have sued D1 for the whole debt? Even then, one might question why the creditor, having obtained £375 from the cautioner's estate, did not then sue the solvent principal debtor, D1, for the balance of £625. The answer possibly lay in the fact that D1 was the creditor's brother-in-law, and so the creditor did not want to sue him unless it was absolutely necessary. Indeed, the cautioner's trustee in bankruptcy went so far as to accuse the creditor of 'shield[ing]' his relative from liability and of attempting to burden the cautioner with as much of the £1000 debt as possible.[147] In such scenarios, Kames' principle marks the limit of the creditor's power to act partially and arbitrarily. While the creditor may sue the cautioner for any portion of the guaranteed debt, the cautioner cannot be saddled with *ultimate* responsibility in a question with the principal debtor. Here the cautioner had paid £375 and, being a secondary obligant, was entitled to have that burden shifted onto the principal debtor's shoulders. The creditor could not stand in the way of that right: having been paid £375 by the cautioner, he would not be prejudiced if, in the meantime, his solvent principal debtor paid £375 to the cautioner.

9-73. Matters are different if the cautioner pays a portion of the debt *after* the principal debtor becomes insolvent. In such cases, the cautioner may not claim any relief from the principal debtor's estate until the creditor receives payment of the balance. The cautioner's interests cannot be allowed to undermine those of the creditor as regards payment of the guaranteed debt, and this becomes especially important in cases where the amount for which the cautioner can be sued is less than the amount of the guaranteed debt, as where a cautioner guarantees a debt of £100 but has limited the amount for which he can be sued to £60. As the Lord President stated in *Harvie's Trustees v Bank of Scotland*,[148] a cautioner who has not 'fulfilled the whole of his obligation [. . .] is not entitled to come into competition' with the creditor's right to payment of the guaranteed debt.[149] Thus, in the hypothetical example just given, a cautioner who has paid

[147] *Ewart v Latta* (1863) 1 M 905 at 906–907, (1865) 3 M (HL) 36 at 39.

[148] (1885) 12 R 1141.

[149] (1885) 12 R 1141 at 1145. Whether the guaranteed debt has been paid in full, hence whether the cautioner is entitled to rank on the principal debtor's estate, can become a delicate question of construction. In the case just mentioned (*Harvie's Trustees v Bank of Scotland* (1885) 12 R 1141), a cautioner guaranteed repayment of the principal debtor's borrowings from a bank to the extent of £1500. It was held that, although the cautioner had paid £1500, he could not rank for that amount on the principal debtor's insolvency because the debt whose payment he had guaranteed was the *full extent* of the principal debtor's liability to the bank. Thus, although the cautioner had paid all that he could be made to pay (£1500), he could not rank on the principal debtor's estate for that amount until *all* of the principal debtor's borrowings had been repaid in full. Cf *Veitch v National Bank of Scotland Ltd* 1907 SC 554, where a cautioner's

the full amount for which he can be sued (£60) cannot rank on the principal debtor's estate for relief or demand an assignation of any portion of the debt from the creditor so long as the balance of that guaranteed debt (£40) remains unpaid. On one view, this limitation on the cautioner's right of relief springs from Kames' equitable principle that a non-contractual right of relief depends on the creditor's not being prejudiced; on another view, the approach is simply the logical consequence of the creditor's power to rank for the full debt due at the time of sequestration coupled with the rule against double rankings of the same debt on the same estate. In any case, a distinction must be drawn between that sort of case and one in which a cautioner has paid a portion of the debt *prior* to the principal debtor's sequestration. In such cases, the creditor's interest in the debt has been extinguished to the extent of that payment, to which extent also the cautioner acquires a right of total relief. When the principal debtor is sequestrated, the creditor may rank only for the amount due to him at the time.[150] In a sense, the creditor could still be regarded as prejudiced if the cautioner exercises his right of relief because this will reduce the overall dividend that the creditor may claim. However, the law does not seem to take that view. Once a cautioner's right of total relief has arisen (i.e. to the extent of the payment made by the cautioner before the principal debtor's sequestration), it is not retrospectively removed simply because this would afford the creditor (and any other unsecured creditors) a more favourable dividend.[151]

9-74. The approach outlined here, whereby a non-contractual right of total relief may arise as soon as, and to the extent that, the cautioner has paid the creditor, is broadly akin to that of the German Civil Code (BGB), which states that, to the extent that the creditor has been paid by a surety, the creditor's rights *vis-à-vis* the principal debtor pass automatically to that surety. At the same time, this right is caveated with the rule that the transfer of the creditor's rights must not be 'asserted to the disadvantage of the creditor'.[152]

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obligation was construed more restrictively. There it was held that the cautioner had guaranteed repayment of *only* a portion of the principal debtor's borrowings from a bank. In such cases, on paying the guaranteed portion, the cautioner will be entitled to an assignation of the creditor's right to rank on the principal debtor's insolvent estate because the guaranteed portion of the principal debtor's borrowings is, in effect, a completely separate debt from the non-guaranteed portion of the principal debtor's borrowings.

[150] See, e.g., *Hamilton v Cuthbertson* (1841) 3 D 494; *Mackinnon's Trustee v Bank of Scotland* 1915 SC 411.

[151] Note the *obiter dictum* in *Thomson v Latta* (1863) 1 M 913 at 920 per Lord Cowan: 'If the cautioner had paid before his sequestration any of the instalments of the composition [i.e. the composition arrangement for which he was bound as cautioner], then, as a creditor of the principal debtor, the trustee on the cautioner's [now bankrupt] estate may, to that extent, rank on the debtor's estate.'

[152] BGB § 774(1). See J A Dieckmann, 'Province of subrogation determined: some corrections – a functional analysis of the guarantor's right to derivative recourse, comprising a critique of the restitutionary thesis' (2012) 20 Eur Rev Private L 989 at 1010.

(d) The machinery of this right of relief: direct action

9-75. As explored earlier in this chapter, a right of relief need not consist of a formal assignation of, or subrogation to, the creditor's rights; it may consist instead of a direct action by the cautioner.[153] Ultimately, the machinery by which a cautioner enforces a right of relief will vary according to the particular benefits sought. If a cautioner desires the benefit of securities, an assignation must be demanded. However, if a cautioner wishes simply to claim payment from a solvent principal debtor, the cautioner may prefer to raise a direct action against that party. As argued above, at least one explanation for this machinery is that an automatic assignation of the creditor's rights occurs when the cautioner pays the creditor.[154] Thus, if, as in *Ewart*, the cautioner has paid £375 of a £1000 debt, the creditor no longer has the right to claim that amount from the principal debtor; hence the creditor's right to claim that amount can be seen to have flowed automatically to the cautioner following payment.

(e) Conclusion

9-76. Regarding *Ewart v Latta*, it may seem odd to conclude both that (1) the cautioner was not entitled to an assignation of the promissory notes and securities, and also that (2) the cautioner had, as soon as he paid £375 to the creditor, obtained a right of relief against the principal debtors to that extent based on the same equitable principle that usually confers a right to an assignation. Certainly, in the paradigm 'total relief' case, the cautioner's claim consists, if not of a contractual claim against the principal debtor, of a demand for an assignation from the creditor. However, as emphasised at various junctures already, a distinction must be drawn between the principle underpinning relief and the machinery used to effect it.[155] There may be cases where one enjoys a (non-contractual) right of relief but where the creditor may legitimately object to the particular machinery demanded for the exercise of that right.

(5) Implications of the foregoing

9-77. In the paradigm case, a cautioner pays the full debt in return for an assignation. However, there are a number of scenarios in which a cautioner does not pay the full debt, but where there is still an entitlement to relief of some description:

[153] *Villaswan Ltd v Sheraton Caltrust (Blythswood) (in liquidation)* 1999 SCLR 199.
[154] *Villaswan Ltd v Sheraton Caltrust (Blythswood) (in liquidation)* 1999 SCLR 199.
[155] See the discussion at paras 9-11–9-27 above.

The cautioner pays £60 of a £100 debt and the principal debtor pays the balance (£40).
The cautioner is entitled to an assignation of the creditor's rights to the effect of operating his right of relief against the principal debtor for recovery of £60. The key point is that the full debt has been paid, regardless of the fact that the cautioner paid only a portion of it.

The cautioner pays part of the debt (£60); the balance has not yet been paid; the principal debtor is solvent.
The cautioner is not entitled to a formal assignation of the creditor's rights and securities. However, the cautioner is still, to the extent of the amount that the creditor has been paid by the cautioner, entitled to relief from the principal debtor in the form of a direct claim for the amount paid to the creditor (£60).

The principal debtor is insolvent. The cautioner pays part of the debt (£60); the balance has not yet been paid.
The cautioner is not entitled to recover anything from the principal debtor's estate via Kames' equitable principle. The creditor may rank in the principal debtor's sequestration for the full debt, and the principal debtor's other unsecured creditors are protected from any further ranking in respect of that debt. To allow the cautioner to rank for £60, and to restrict the creditor's ranking to £40, would be to allow the cautioner's interests to conflict with those of the creditor as regards the guaranteed debt.

The cautioner pays £60 while the principal debtor is solvent. Later, the principal debtor becomes insolvent.
On paying £60, the cautioner acquires a right of relief because, to the extent of £60, the creditor's interest in the debt is seen to transfer to the cautioner. On sequestration, the cautioner may rank for £60 and the creditor may rank only for the balance of £40.

I. CONTENT OF TOTAL RELIEF

9-78. The chapter having examined some of the more unusual cases in which a cautioner is entitled to total relief, the following section considers certain variations in the content of that right.

(1) Additional costs for which a cautioner can claim

9-79. In the paradigm case, a cautioner pays the total debt to the creditor and reclaims that amount from the principal debtor. However, a right of relief can also encompass additional expenses relating to the debt, such as interest

on the sum paid to the creditor,[156] the cost of obtaining an assignation,[157] and compensation for other losses arising from the principal debtor's default, such as the cost of defending litigation.[158]

9-80. At the same time, the expenses recoverable under a right of total relief must be reasonable.[159] For instance, to the extent that the defence of the litigation is reckless, the expenses of litigation will be irrecoverable, although the courts will be slow to reach that conclusion where the principal debtor, having been apprised of the litigation by the cautioner, refused to participate.[160]

(2) Claim capped at actual loss

9-81. A cautioner's claim for relief is based on the loss actually incurred in fulfilling the obligation to the creditor. Thus, even if a cautioner obtains an assignation from the creditor by which to operate his right of relief, the amount which the cautioner may claim from the principal debtor's estate is 'restricted to the loss actually sustained' by the cautioner as a result of the principal debtor's failure to fulfil the primary obligation to the creditor.[161] Thus, if the cautioner pays £60 of a £100 debt and the principal debtor pays the balance, the cautioner may claim only £60 in relief.

9-82. Similarly, if a cautioner pays less than the whole debt because the creditor has granted a voluntary discount or ease, the cautioner may claim only the actual amount that he paid to the creditor even if the creditor intended that ease for the cautioner's sole behoof. In other words, if the original debt was £100 but the creditor accepted the lesser sum of £90 as full payment, £90 is all that the cautioner can claim from the principal debtor in relief. To hold otherwise would be to allow the cautioner to profit at the principal debtor's expense.[162] As explored in chapter 8, an equivalent rule applies in the context of co-cautioners, whereby, to the extent that an ease exceeds a co-cautioner's *pro rata* share of the debt, that ease must be applied for the common benefit.[163] In a question with the principal debtor, a cautioner's proper share of the debt is zero, and so any ease (even one of £1) is certain to exceed it.

[156] *Inglis and Weir v Renny* (1825) 4 S 113.
[157] *Inglis and Weir v Renny* (1825) 4 S 113.
[158] *Straiton Estate Co Ltd v Stephens* (1880) 8 R 299 at 317–318.
[159] Bankton I.23.41; Erskine III.3.65.
[160] *Carrick v Manford* (1854) 16 D 410 at 412–413.
[161] *Inglis and Weir v Renny* (1825) 4 S 113 at 114. See also *Joint Liquidators of Simclar (Ayrshire) Ltd v Simclar Group Ltd* [2011] CSOH 54, 2011 SLT 1131 at para 34.
[162] Bankton I.23.42.
[163] See discussion at paras 8-25–8-26 above.

J. CONCLUSION

9-83. On a fundamental level, a cautioner's rights of total relief and *pro rata* relief are based on the same principle, namely, that, wherever multiple obligants are liable for the same debt, whether as cautioners or principal debtors, the creditor should not be allowed arbitrarily to saddle one of those parties with a burden exceeding his proper share. If, in a question with a given party, a cautioner's proper share is zero, the cautioner will be entitled to total relief, and thereby hangs a tale. As *Caledonia North Sea Ltd v London Bridge Engineering Ltd*[164] makes clear, it can be difficult to ascertain whether one of several obligants is entitled to *pro rata* or total relief, and the further one ventures from the familiar, clear-cut case of a cautioner becoming bound at the request of a friend or relative, the more difficult the question becomes. Kames' equitable principle demonstrates why a right of total relief need not be rooted in a contract between the paying cautioner and the person from whom relief is sought. Accordingly, a right of total relief can be justified in unusual cautionary cases where there is no contract between the cautioner and principal debtor, as where a cautioner sues a principal debtor whom he has never met, and beyond in such analogous contexts as on-demand guarantees, bills of exchange and insurance.

[164] 2000 SLT 1123.

10 Pre-emptive Relief

PARA

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A. INTRODUCTION

10-01. Chapters 7 to 9 concern what might be termed 'corrective' relief. As should now be clear, this form of relief arises where a cautioner pays the debt, or some portion of it, then seeks total or partial compensation from the principal debtor or co-cautioners respectively. However, sometimes the term 'relief' denotes a different sort of legal response, namely, the right of a cautioner to insist that the principal debtor (and sometimes even a co-cautioner) pay the creditor whatever remains due, thus obviating the need for that cautioner to pay. The present chapter explores this 'pre-emptive' right of relief and how it differs from corrective relief as regards both its content and the circumstances in which it arises.

B. PARADIGM CASE

10-02. Suppose that Glenn borrows £100 from George, a loan that he is able to obtain only because his friend, Rita, has guaranteed its repayment. The debt

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falls due, but Glenn fails to pay it, and now George is threatening to sue Rita for the whole amount. Glenn's failure to pay has nothing to do with his means: he recently won several thousand pounds in a game of roulette. By contrast, Rita, who eschews gambling of all kinds, is in dire financial straits and cannot practicably pay the debt. In this case, a right of pre-emptive relief is of great practical value, allowing Rita to demand that Glenn pay his debt so that she need not.

(1) Cause of action

10-03. Traditionally, this right has been seen to depend on an express contractual undertaking by the principal debtor to relieve the cautioner,[1] or, failing that, on a contract of mandate between those parties.[2] Thus, in the above example, even though Glenn has not expressly undertaken to relieve Rita, it can still be said that Rita became bound to the creditor in fulfilment of a mandate from Glenn. In these circumstances, the principal debtor is seen tacitly to undertake that he will pay his debt when it falls due:[3]

> [S]uppose that James becomes cautioner for the price of lands bought by John and signs a bond for the price payable at Martinmas 1816. John, the buyer of the lands, is bound to relieve James of his engagement by paying the price himself at Martinmas 1816 as covenanted, and James is entitled to say that such is the faith and condition of his engagement. Had it not been for the support of James's caution, John would not have been dealt with or trusted for the price of the lands at all. But having received this favour at James' [*sic*] hands, and through his risk [. . .] John is bound, if possible, to protect James from being [. . .] troubled for the price which he can only do by paying it at Martinmas 1816 himself.

10-04. Whilst, hitherto in the book, the relevance of mandate has been downplayed in favour of a broader, non-contractual basis for relief, the same cannot be done for pre-emptive relief. At the very least, the notion of a mandate serves as a useful analytical starting point, demonstrating that a right to pre-emptive relief is most normatively defensible when rooted in a contract between the cautioner and principal debtor.

10-05. For insight into pre-emptive relief, *Cunningham v Montgomerie*[4] is of particular interest. Although that case concerned the rights of trustees rather than those of cautioners, certain of the pronouncements made there were in relation to both. The Inner House affirmed that wherever one party (a cautioner or trustee) incurs liability to a creditor for the benefit of another (the principal

1 *Kennedy v Elliot* (1704) Mor 2147; *Fairlie v Earl of Rothes* (1752) Mor 2129.
2 *Mirrie v Pollock* (1745) Mor 2125. This explanation continues to receive support in modern law: see, e.g., *Smithy's Place Ltd v Blackadder & McMonagle* 1991 SLT 790 at 794–795.
3 Hume, *Lectures* II, 215.
4 (1879) 6 R 1333.

debtor or the beneficiaries of the trust), that party is entitled to pre-emptive relief (from the principal debtor or trust estate, as appropriate). As Lord Deas noted, a 'cautioner is entitled to relief out and out – he is not bound to become bankrupt if the party from whom he is entitled to relief is able to relieve him'.[5] Such a right makes particular sense where the cautioner becomes bound at the principal debtor's request. Where a cautioner has an implied agreement with the principal debtor (itself arising from the cautioner's having acted at the latter's behest), not only may the cautioner seek reimbursement from the principal debtor after paying the debt, but the cautioner may also, before being made to pay the debt, demand that the principal debtor do so. The alternative to this legal position would be to insist that until the cautioner pays, that party is afforded no protection *vis-à-vis* the principal debtor. Arguably, that would lead to 'practical absurdity', putting an impoverished cautioner in a worse position than that of a wealthy one.[6] The absurdity would only be compounded if the person for whom the cautioner had become bound (the principal debtor) could easily pay the creditor once the debt was due. Such an alternative position – that is, one *against* a right of pre-emptive relief – was advanced in *Fairlie v Earl of Rothes*,[7] where the widow of a deceased cautioner enjoined the principal debtor to pay the guaranteed debts – something that he had expressly undertaken to do in a bond granted to the cautioner – or to pay her money so that she could pay the debts herself. This the principal debtor refused to do, arguing that it was open to the widow to 'apply her own funds to the payment of the debts', then to obtain an assignation of the creditor's rights against him for relief.[8] The widow replied that this was not feasible for she lacked the money or credit by which to pay the creditor.[9] While, for reasons with which this book is not concerned, the court did not reach a definite conclusion on the widow's claim,[10] the arguments advanced on her behalf demonstrate the importance of pre-emptive relief. Granting that a cautioner is entitled to reimbursement from the consequences of her undertaking to the creditor (corrective relief), it is difficult to see why she is not also entitled to pre-emptive indemnification from the principal debtor, the more so where it is the cautioner, not the principal debtor, who is financially embarrassed.

10-06. Although a traditional explanation for the cautioner's right to pre-emptive relief is a contract of mandate with the principal debtor, this notion of mandate should be understood loosely in the modern law.[11] Where a cautioner becomes bound at the principal debtor's request, the use of the word 'mandate'

5 (1879) 6 R 1333 at 1339.
6 (1879) 6 R 1333 at 1338.
7 *Fairlie v Earl of Rothes* (1752) Mor 2129.
8 *Fairlie v Earl of Rothes* (1752) Mor 2129 at 2131.
9 *Fairlie v Earl of Rothes* (1752) Mor 2129 at 2131.
10 *Fairlie v Earl of Rothes* (1752) Mor 2129 at 2131.
11 Hume, *Lectures* II, 214.

is a convenient shorthand for their contractual relationship; it does not denote a wholesale assimilation of that contractual relationship to the law of mandate. In requesting another to guarantee his debt, the principal debtor implicitly undertakes to indemnify that other against the consequences of becoming a cautioner.[12]

(2) Content

10-07. In the example above, pre-emptive relief requires Glenn (the principal debtor) to pay his debt, thereby satisfying both his own obligation and Rita's potential obligation as cautioner. On that understanding, a right of relief obliges the principal debtor not only to pull the cautioner out of the 'mire' – the function of corrective relief – but to 'prevent' the cautioner from 'being tumbled therein' in the first place.[13] Details on the content of this right are furnished further below.

(3) Distinction between pre-emptive relief and the benefit of discussion

10-08. In earlier chapters, and especially chapter 5, reference was made to a now largely defunct rule whereby a creditor was required to pursue the principal debtor before pursuing the cautioner.[14] One might think that the cautioner's right to pre-emptive relief is simply the benefit of discussion by a different name, but that would be incorrect. In the example above, George, the creditor, may still proceed directly against Rita as soon as Glenn has defaulted. Pre-emptive relief simply empowers Rita, in a question between her and Glenn, to compel Glenn to pay the creditor.[15]

C. DEVIATIONS FROM THE PARADIGM

10-09. The present section examines cases that differ from the paradigm described above, thereby clarifying the scope of the cautioner's right to pre-emptive relief and the timescale in which it operates. Consideration of such cases will serve also to highlight the fundamental differences between the non-contractual basis for relief propounded by Kames and the contractual basis considered here.

[12] Hume, *Lectures* II, 214.

[13] *Kennedy v Elliot* (1704) Mor 2147 at 2148.

[14] The so-called benefit of discussion: Erskine III.3.61. This defence was abolished in large part by the Mercantile Law Amendment (Scotland) Act 1856 s 8.

[15] W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable Including Cautionary Obligations* (1897) 802.

(1) The need for potential prejudice to the cautioner

10-10. The principal debtor's obligation to relieve the cautioner by preventing the latter from tumbling into the proverbial 'mire'[16] is a restricted one, sensitive to the timing of the cautioner's request and the circumstances in which it is made. In essence, whether a cautioner's request for pre-emptive relief is valid depends on the existence of actual or potential prejudice. Relevant factors include: (i) whether the cautionary obligation is fixed or continuing; (ii) whether the cautioner is at risk of being sued for payment; and (iii) whether the principal debtor is verging on insolvency (*vergens ad inopiam*).

(a) Indeterminate liability

10-11. Where the cautioner is bound under a continuing guarantee, as for an indeterminate amount or time, relief may be demanded even before the principal debtor incurs liability to the creditor. Here relief is sought not from an obligation to pay a particular sum but from liability that may arise under the cautionary obligation. Thus, in *Taylor and Wright v Adie*,[17] it was held that several cautioners, liable for a bank agent's intromissions for the duration of the latter's employment and having been bound for seven years, were entitled to relief from their obligation, even though the creditor had not yet demanded payment from them; indeed, the bank agent had not yet failed to account to the bank in the requisite manner.[18] This decision was based on the notion that cautioners are not expected to remain in an 'unlimited state of responsibility for future damage'.[19] So long as they acted reasonably, and gave the agent sufficient time to find a new cautioner, or the bank sufficient time to find a new agent, the cautioners were entitled to demand that the principal debtor deliver their bond of caution 'cancelled'.[20]

10-12. Similarly, in *Kinloch v M'Intosh*,[21] a number of cautioners guaranteed a tax-collector's duty to account for his intromissions. Their obligation was to last 'so long as' the tax-collector remained in that 'office'.[22] Several years later, the cautioners demanded that the principal debtor relieve them, 'either by cancelling the bonds, or in some other way'.[23] Although the principal debtor conceded that certain arrears were due, he argued that he was obliged to relieve the cautioners only if one of the following were present: an express bond granted by the principal debtor to the cautioners wherein he undertook to relieve them of their

[16] *Kennedy v Elliot* (1704) Mor 2147 at 2148.
[17] (1818) Hume 114.
[18] (1818) Hume 114 at 114–115.
[19] (1818) Hume 114 at 114–115.
[20] (1818) Hume 114 at 114–115.
[21] (1822) 1 S 491.
[22] (1822) 1 S 491 at 491.
[23] (1822) 1 S 491 at 491.

obligation; legal action by the creditor against the cautioners; or evidence that the principal debtor was verging on insolvency and so might soon be unable to pay the arrears.[24] Although no such factor was present, the cautioners were held entitled to relief from their obligation on account of its indefinite nature. As the Lord Ordinary observed:[25]

> [T]he obligations for performance of which the security was granted [namely a tax-collector's obligation to account to the 'King's revenue' for the money collected] may be continuing and increasing every day, and whatever arrears may be due upon the first collections, for which the [cautioners] are liable [. . .] have been due for many years [. . .] [The cautioners] are [therefore] entitled to insist, at common law, that their obligation shall not any further be extended and that they shall be relieved therefrom.

10-13. Finally, in *Doig v Lawrie*,[26] a cautioner became bound under a cash credit for advances capped at £6500, with the express stipulation that his guarantee would cease to operate once recalled in writing. It was held that, as soon as the cautioner intimated his desire to terminate his obligation, the principal debtor became bound to pay what was owed under the guarantee and to obtain a discharge from the bank of the cautioner's liability, provided that he was given a reasonable amount of time to do so.[27] As in the previous cases, the potential prejudice from which the cautioner sought relief was (besides the liability already incurred under the cash credit) the indeterminate liability that he might later incur if he remained bound under it. As the Lord Ordinary noted:[28]

> It must therefore be taken that the obligation undertaken by the [cautioner] was gratuitous, and its duration was indefinite and unlimited. I do not think that the [cautioner] is in such circumstances bound to continue his obligation longer than is convenient for him to do so.

(b) Fixed guarantees

10-14. As the paradigm case discussed above makes clear, a cautioner for a fixed sum of money due on a certain date is entitled to pre-emptive relief from the principal debtor. However, such a cautioner must aver a risk from which relief is sought.

[24] (1822) 1 S 491 at 491.
[25] (1822) 1 S 491 at 492.
[26] (1903) 5 F 295.
[27] (1903) 5 F 295 at 297–299.
[28] (1903) 5 F 295 at 297.

(I) THE DEBT HAS FALLEN DUE

10-15. In the context of caution for payment of a fixed sum (e.g. repayment of a loan) the most clear-cut case warranting pre-emptive relief arises where the principal debtor's debt has fallen due and where the cautioner has been distressed for payment. Here 'distress' can be taken to mean 'any legal step' taken by the creditor against the cautioner with a view to 'obtaining payment'.[29]

10-16. In that regard, it is worth considering *Kennedy v Elliot*,[30] a case concerning relief albeit not from a *cautionary* obligation. Simply stated, Hadden was obliged under a bond to relieve Kennedy of any tack-duty for which the latter became liable and of all associated costs and damage. While Kennedy acknowledged that an express obligation to relieve someone usually entitled the obligee to relief only if he had been distressed for payment, he argued that he was, in this case, entitled to relief before distress, given that Hadden had undertaken to 'free, relieve and skaithless keep' him.[31] This argument was upheld by the court, which held that the charge 'on a bond of relief, though before distress, was nowise unwarrantable and unjust'.[32] Here the right of pre-emptive relief was rooted in an express obligation worded in a particular way. As Kennedy had argued, a bond to 'free, relieve and skaithless keep' the grantee imported an onerous obligation on the granter, requiring him not only to pull the grantee out of the 'mire' if he fell in, but to 'prevent' him from 'being tumbled therein' in the first place.[33]

10-17. While an express bond of relief is especially beneficial, arguably the associated duty to prevent someone from tumbling into the mire has a broader significance: such a protective duty is the very essence of the relationship between cautioner and principal debtor.[34] As Hume states, the mere fact that a cautioner has become bound at the principal debtor's behest and for his benefit, entitles the cautioner to protection from the proverbial 'mire' as soon as the debt falls due.[35] At the same time, in the case of relief from a continuing guarantee, the principal debtor is to be permitted a reasonable time in which to pay the creditor. As was noted by the Lord Ordinary in *Doig v Lawrie*,[36] a principal debtor may be 'perfectly solvent, and yet it might be very [financially] embarrassing for him to be ordained to pay so large a sum as over £6000'.[37]

[29] Erskine III.3.65.
[30] (1704) Mor 2147.
[31] (1704) Mor 2147 at 2148.
[32] (1704) Mor 2147 at 2148.
[33] (1704) Mor 2147 at 2148.
[34] Hume, *Lectures* II, 214–216.
[35] Hume, *Lectures* II, 214–216.
[36] (1903) 5 F 295.
[37] (1903) 5 F 295 at 297.

(II) THE DEBT HAS NOT YET FALLEN DUE

10-18. Even if the principal debtor's debt has not yet fallen due, pre-emptive relief may be granted in certain exceptional circumstances. In *Spence v Brownlee*,[38] cautioners became bound for the regular payment of an annuity, which was to endure for eleven years or for the rest of the principal debtor's life, whichever period was shorter. Two years after the annuity had been granted, one of the cautioners demanded that the principal debtor relieve him completely of his obligation under it. While the Court of Session did not dispute the cautioner's right to be relieved with every instalment of £100 that fell due under the annuity, he was held not entitled to relief in respect of instalments yet to fall due.[39] A cautioner could demand relief before the term of payment in exceptional cases only: for instance, if the principal debtor were verging on insolvency or in the face of some similar 'alteration of circumstances'.[40] In denying the existence of such exceptional circumstances, the court emphasised the fact that the principal debtor had already paid the first two instalments of the annuity and that the heritable security with which he had furnished the cautioner had not diminished in value.

10-19. A similarly strict approach was adopted in *Murray v Hogarth*,[41] a case concerning a deceased partner's liability for a lease entered into by the partnership during his lifetime. The deceased's representative demanded that the remaining partners relieve him fully and immediately of all liability under the lease, or, failing that, that they 'find security' for his relief. While the remaining partners did not dispute their obligation to relieve the representative of the deceased as the rent fell due, they disputed both his avowed entitlement to immediate relief of all liability under the lease and also his avowed entitlement to immediate security for a future right of relief. They argued that the representative would be able to demand security 'to be relieved' of future rent obligations only if they, the surviving partners, were verging on insolvency.[42] Those objections were upheld by the Court of Session.[43] In Lord Glenlee's view, it was incumbent on the surviving partners to 'free and scaithless keep' the deceased partner's representative only at each term when the rent fell due. While this case did not concern caution in the strict sense, the representative's right of pre-emptive relief against the surviving partners was, by the Lord Ordinary's admission, akin to a cautioner's right of relief against the principal debtor.[44] Much like a cautioner, the deceased partner's representative had an obligation relating to a lease from which he did not benefit. It was deemed an implied term of the

[38] (1834) 13 S 199.
[39] (1834) 13 S 199 at 199–201.
[40] (1834) 13 S 199 at 199–201.
[41] (1835) 13 S 453.
[42] (1835) 13 S 453 at 455.
[43] (1835) 13 S 453 at 456–460.
[44] (1835) 13 S 453 at 456–457.

arrangement that the deceased partner's representative would be entitled to full relief from the parties who did benefit from the lease, namely the surviving partners.[45] To the extent of that analogy, the case sheds valuable light on the limits of a cautioner's right of pre-emptive relief.[46]

(2) The party from whom pre-emptive relief is claimed

10-20. The paradigm pre-emptive relief case involves a cautioner becoming bound for the principal debtor's benefit under a mandate. This raises at least two questions:

(a) Does pre-emptive relief apply where there is no contractual relationship between the cautioner and principal debtor?
(b) Can pre-emptive relief be claimed from a co-cautioner?

Both questions are now examined.

(a) No contract between the cautioner and the principal debtor

10-21. As chapters 7 and 9 explored, there are certain cases in which a cautioner may claim corrective relief from another party (either total or *pro rata* relief) even in the absence of a contractual nexus between them. However, it is submitted that pre-emptive relief does not arise by the same logic.

10-22. By definition, corrective relief concerns a redistribution of what has been paid to the creditor, such that (1) the party primarily liable bears the whole burden or as much of it as he can bear, and (2) any parties liable on a secondary footing (notably, co-cautioners) bear in equal amounts whatever burden remains. While in addition a cautioner is entitled to supplementary protections in anticipation of corrective rights of relief,[47] the rights of relief themselves do not arise until the cautioner has suffered actual loss by paying the creditor,[48] whereupon the cautioner may stand in the latter's shoes and claim against the

[45] (1835) 13 S 453 at 458.

[46] However, one should be wary of drawing comparisons between the relationship of a cautioner acting on behalf of a principal debtor, on the one hand, and the relationship between an erstwhile (e.g. deceased or retired) partner and the remaining partners, on the other. See, in this regard, *Roughead v White* 1913 SC 162 at 167–172, where the position of a retired partner was expressly distinguished from that of a cautioner, such as to deprive the retired partner of an implied right to pre-emptive relief from various debts incurred by the partnership while he was a partner.

[47] For instance, the Mercantile Law Amendment (Scotland) Act 1856 s 9.

[48] One practical consequence of this is that prescription begins to run on a right of corrective relief once payment has been made to the creditor, and no sooner: *Smithy's Place Ltd v Blackadder & McMonagle* 1991 SLT 790 at 794–796. For further details on the circumstances in which corrective rights of relief arise, see generally chapters 7 and 9.

principal debtor and co-cautioners. It is on payment of the creditor that, to the extent of the payment, the creditor's interest in the debt lapses and the cautioner acquires rights of relief. As explored in chapters 7 and 9, a prerequisite for these non-contractual, equitable rights of relief is that the creditor not be prejudiced by their exercise. In that regard, at least where the principal debtor is solvent, the creditor will not be prejudiced by a redistribution between the cautioner and principal debtor of what has already been paid. It is difficult to carry such equitable reasoning, based on the creditor's no longer having an interest in some or all of the guaranteed debt, to the case where none of the debt has been paid. There, equity does not seem to furnish a ground for pre-emptive relief. If all that connects the cautioner and principal debtor is liability for a common debt, that connection alone does not provide a strong normative ground for pre-emptive relief. What does seem to militate in favour of such relief is a direct contractual relationship between the cautioner and principal debtor. If a cautioner acts at the behest of the principal debtor, helping that party to obtain credit or some other benefit, an implied term of the contract between them is that the principal debtor will satisfy the debt once it has fallen due.

10-23. Arguably, one scenario in which the distinctive character of pre-emptive relief becomes particularly important is where the cautioner owes a debt to the principal debtor completely separate from his cautionary obligation. In such instances, the cautioner can, before making any payment to the creditor, set off any debt he happens to owe to the principal debtor against the principal debtor's liability to him in relief. *M'Pherson v Wright*[49] provides a good illustration of this principle. Here one party, Sinclair, owed a debt of about £34 to M'Pherson (debt 1), whereas Wright owed a separate debt of about £25 to Sinclair (debt 2). Wright alleged that he was also Sinclair's cautioner for Sinclair's overdraft with the Union Bank of Scotland (debt 3). In attempting to enforce the debt of £34 (debt 1), M'Pherson sought to arrest the £25 owed by Wright to Sinclair (debt 2). The arrestment failed for procedural reasons concerning the warrant for the arrestment but, as to the merits of the case, two of the three judges opined that if Wright was indeed a cautioner then he had a right to retain against his principal debtor until relieved of his cautionary obligation in relation to debt 3. To that extent, Sinclair would not be able to enforce his debt for £25 (debt 2) against Wright, hence neither could the creditor seeking to arrest £25 in Wright's hands.[50] As Lord Young remarked:[51]

> a cautioner is entitled to retain against the party for whom he is cautioner till relieved of his obligation, assuming it to be a cautionary obligation for a due debt. If it is future and contingent there is no right of retention except in special circumstances,

[49] (1885) 12 R 942.

[50] (1885) 12 R 942 at 944. For further information on the notion that an arrester cannot enjoy a higher right *vis-à-vis* the arrestee than the 'common debtor' enjoys against the arrestee, see *Brodie v Wilson* (1837) 15 S 1195.

[51] *M'Pherson v Wright* (1885) 12 R 942 at 944.

such as where the principal is *vergens ad inopiam*, – but in the case of a due debt there is, in my opinion, a right to retain.

10-24. In short, a right of pre-emptive relief signifies that, as soon as the principal debtor's obligation falls due, another obligation arises to relieve the cautioner in full by paying that debt, and one consequence of that obligation is that the cautioner is entitled to retain what he happens to owe to the principal debtor until relieved.[52] What is interesting about a right of relief of the sort discussed in *M'Pherson v Wright* is that it can arise against the interests of a creditor. There the principal debtor owed relief to the cautioner even before the cautioner had paid the creditor in the guaranteed debt (debt 3), as a result of which right of relief the cautioner was entitled to retain money owed to the principal debtor under a separate debt (debt 2), to the consequent prejudice of a creditor under yet another debt (debt 1) seeking to arrest money that the cautioner owed to the principal debtor in terms of debt 2. Conceivably, this reasoning might extend to a case in which the person seeking to arrest funds in the cautioner's hands is the creditor in the guaranteed debt. Suppose for instance, that Sam guarantees John's debt to Claire (debt 1) and Claire, in enforcing that debt against John, seeks to arrest money owed by Sam to John under a separate debt (debt 2). If Sam's right of relief relating to debt 1 allows him to retain against John so far as debt 2 is concerned, in principle Sam should also be able to retain against Claire should she seek to enforce debt 1 against John via an arrestment of funds in Sam's hands. If pre-emptive relief is best viewed as arising from a contractual relationship, express or implied, between cautioner and principal debtor, and not from an equitable principle based on, among other things, a lack of prejudice to the creditor in the guaranteed debt then such an outcome is at least defensible in principle.

(b) Pre-emptive relief from a co-cautioner

10-25. Thus far, pre-emptive relief has been discussed in the context of a cautioner demanding that the principal debtor provide relief from the cautionary obligation by paying the creditor. However, another important question is whether a similar right exists against a *co-cautioner*. Suppose that C1 has paid his proper share of a debt of £100 (i.e. £50) but C2 has not paid anything. Can C1 demand that C2 pay his own share of £50 to the creditor?

10-26. In *Low v Farquharson*,[53] C1 and C2 were co-cautioners in a cash credit for £500. When the credit was exhausted, the principal debtor fled the country and the bank threatened to enforce this debt against C1. That cautioner paid his own share of the debt, then raised an action against C2, demanding that

[52] See also *Boswell v Montgomerie* (1836) 14 S 554.
[53] (1831) 9 S 411.

he be 'ordained to pay up his share of the bond'.[54] The sheriff dismissed this claim as premature: C1 had not 'paid the whole of the debt to the bank'.[55] The Lord Ordinary likewise rejected the claim because C1 did not aver that he had paid 'any part of the sum of which he claims to be relieved'.[56] This decision was overturned by the Inner House. In a terse judgment, Lord Glenlee declared that:[57]

> matters had come to that state which entitled [C1] to say to his co-cautioner, Pay your proportion and I'll pay mine. I never understood that there was no claim of relief until the whole debt had been paid, or until legal diligence had commenced. I think there was here sufficient distress.

10-27. The right of relief upheld in this case was fundamentally different from the corrective right of *pro rata* relief discussed in chapters 7 and 8. Here C1's right of relief was pre-emptive; he was able to claim against C2 in spite of the fact that C1, himself, had not (yet) paid more than his own *pro rata* share of the debt. What was the justification for this right? Although the case report offers little by way of explanation, it is submitted that the basis for this pre-emptive right is, as in the case of a cautioner claiming pre-emptive relief from the principal debtor, best viewed in contractual terms. As discussed in chapter 7, where co-cautioners become bound in the same document, there may be inferred a tacit agreement among those cautioners that, so long as they all remain liable, each will relieve the others *pro rata*.[58] Arguably, it is from such an implied agreement that the right of pre-emptive relief emanates. Of course, it is necessary to be wary of transplanting an analysis usually used to justify pre-emptive relief against the principal debtor into the context of *pro rata* relief among co-cautioners. It would be artificial, for instance, to say that cautioners who become bound in the same document at the same time do so under various mandates to and from one another. However, one might still say that cautioners who become bound in the same document for the same debt tacitly undertake that each will pay his share when the debt falls due. To borrow language from a case concerning a different legal issue,[59] the right of relief in *Low v Farquharson* could perhaps be explained by the fact that C1 and C2 had become bound to the creditor in 'mutual reliance',[60] each party tacitly undertaking to pay his own share on the faith of the other doing likewise. If that analysis is correct, it seems credible that the right of pre-emptive relief sanctioned in *Low v Farquharson* is available only between cautioners who, short of making an express undertaking to relieve one another, become bound together.

[54] (1831) 9 S 411 at 411.
[55] (1831) 9 S 411 at 411.
[56] (1831) 9 S 411 at 411.
[57] (1831) 9 S 411 at 411.
[58] Hume, *Lectures* II, 219.
[59] *Simpson v Fleming* (1860) 22 D 679.
[60] *Simpson v Fleming* (1860) 22 D 679 at 680–681.

10-28. In determining the nature and scope of the right of relief in *Low v Farquharson*, the second point to note is that Lord Glenlee felt that there had been 'sufficient distress' in this case for C1 to demand that C2 pay his share.[61] This suggests that, even if bound in the same document, a cautioner (C1) can demand pre-emptive relief from a co-cautioner (C2) only if the former is at imminent risk of being sued by the creditor for C2's share. At the same time, Lord Glenlee also made it clear that the creditor did not need to have commenced diligence proceedings against C1 for this right of relief to arise.[62]

10-29. Thirdly, and perhaps most importantly, C1's right in this case was clearly dependent on his having paid, or being about to pay, his own share. As Lord Glenlee noted, the *quid pro quo* at play here consisted in one cautioner saying to another, 'Pay your proportion and I'll pay mine'.[63] This point was also made in *Alston v Denniston*,[64] where one cautioner (C1) had paid nothing, and so was held incapable of demanding that his co-cautioner (C2) pay his share to the creditor.[65] This accords with the earlier suggestion that pre-emptive relief is based on 'mutual reliance':[66] C1 cannot expect C2 to pay if C1 refuses to lead by example.

10-30. For the avoidance of doubt, it should be noted that the existence of a right of pre-emptive relief among cautioners does not in any way impinge upon the joint and several liability of improper cautioners. A clear distinction must be drawn between the creditor's rights against such cautioners (the right to sue any one for the whole debt) and the cautioners' rights among themselves (the right of one cautioner to insist that the others pay their respective *pro rata* shares of the debt, at least in certain circumstances).

D. CONTENT

10-31. Pre-emptive relief entails not merely 'reimbursement of money' but 'relief of obligation', such that the principal debtor (or co-cautioner) is obliged to 'stand between' the creditor and the cautioner.[67] The obligation assumes various forms. Firstly, and most obviously, the principal debtor may be required to pay the creditor the amount currently due under the guaranteed obligation.[68] Alternatively, the principal debtor may make an equivalent payment to the

[61] *Low v Farquharson* (1831) 9 S 411 at 411.
[62] *Low v Farquharson* (1831) 9 S 411 at 411.
[63] *Low v Farquharson* (1831) 9 S 411 at 411.
[64] (1828) 7 S 112.
[65] (1828) 7 S 112 at 115.
[66] *Simpson v Fleming* (1860) 22 D 679 at 680–681.
[67] This statement was made in *Cunningham v Montgomerie* (1879) 6 R 1333 at 1337–1338 per Lord President Inglis in relation to the analogous right of a trustee to pre-emptive relief.
[68] *Doig v Lawrie* (1903) 5 F 295.

cautioner, which payment can, in turn, be used to satisfy the creditor in the guaranteed debt.[69] In this, the content of pre-emptive relief resembles that of corrective relief, consisting as it does of an obligation to pay money. However, even where pre-emptive relief consists of the principal debtor paying money, the obligation has sometimes been termed *ad factum praestandum*:[70] that is, it has been characterised as an obligation to perform an act as opposed to an obligation to pay money. A principal debtor stated as much in *Fairlie v Earl of Rothes*,[71] in the context of an argument relating to the law of diligence. In brief, an obligation *ad factum praestandum* could, at the time of the decision (1752), be enforced only by 'a charge of horning, denunciation and caption',[72] but such diligence was incompetent in this case for a number of reasons, among them the fact that peers were 'privileged against captions'.[73] The issue arose whether, the diligences at common law being incompetent, it was open to the Court of Session 'as a court of equity' to devise a new, exceptional diligence for the cautioner, namely one whereby the principal debtor would be 'decern[ed]' to 'pay to his cautioner, in order that the cautioner may relieve himself by making payment to the creditor'.[74] When the principal debtor argued that the cautioner could pay the debt with her own funds, then seek relief from him (corrective relief), the cautioner retorted that this would make nonsense of his obligation of relief. If relief were truly an obligation *ad factum praestandum*, then the onus was on the principal debtor to pay the debt for the cautioner and not merely to offer to repay the cautioner if the latter paid the debt.[75]

10-32. The characterisation of pre-emptive relief as an obligation *ad factum praestandum* makes particular sense in the context of a continuing guarantee. If the principal debtor has yet to incur any liability to the creditor, clearly the obligation of relief cannot consist of an obligation to pay money to the creditor; rather, it consists of any step sufficient to release the cautioner from potential cautionary liability in the future. For instance, the principal debtor might find a new cautioner to replace the cautioner who no longer wishes to be bound.[76] The obligation tends to be couched in broad terms. In *Kinloch v McIntosh*,[77] for example, cautioners for a tax-collector's intromissions asked that the tax-collector relieve them 'either by cancelling the bonds, or in some other way'.[78] The court upheld this claim and ordered the principal debtor to show that his arrears had been discharged and also to show 'how he proposed to relieve

[69] *Fairlie v Earl of Rothes* (1752) Mor 2129 at 2130.
[70] *Fairlie v Earl of Rothes* (1752) Mor 2129 at 2130.
[71] (1752) Mor 2129 at 2130.
[72] (1752) Mor 2129 at 2130.
[73] (1752) Mor 2129 at 2131.
[74] (1752) Mor 2129 at 2130.
[75] (1752) Mor 2129 at 2131.
[76] *Taylor and Wright v Adie* (1818) Hume 114 at 115.
[77] (1822) 1 S 491.
[78] (1822) 1 S 491 at 491.

the [cautioners] of their future liability'.[79] Clearly, then, the particular mode by which the principal debtor relieves the cautioner is unimportant, provided that the cautioner is released from the cautionary obligation to the creditor *completely*. In that regard, simply offering to find more cautioners, and thus lessening the present cautioner's risk, is not the same as relieving him.[80]

10-33. Finally, as discussed above, one of the scenarios in which a cautioner is entitled to demand 'pre-emptive relief' is where the principal debtor is verging on insolvency.[81] In such circumstances, the cautioner may attach the principal debtor's assets by means of diligence, so that the cautioner has a fund of relief from which to draw.[82] Of course, if the principal debtor is co-operative, there is nothing to stop him from fulfilling his obligation of pre-emptive relief before the cautioner has recourse to diligence. For instance, in *Humble v Lyon*,[83] the principal debtor placed goods into one of his cautioners' hands and authorised him to sell those goods for the purposes of obtaining relief. Whatever benefit the cautioner accepts in satisfaction of the principal debtor's obligation of relief, he must take care not to squander, a point illustrated vividly by *Lyon v Lizars*.[84] The case concerned a cautioner liable under a lease. The tenant's business having failed, he abandoned the property before any rent had fallen due and allowed the cautioner to take his place as the *de facto* tenant. With a view to securing relief for a half-year's rent yet to fall due, the cautioner took matters into his own hands, sub-letting the property to a third party as a means of paying the rent under the main lease. This did not go to plan. Through his negligence, the cautioner failed to do diligence against the sub-tenant, who was able to abscond. There were several enforcement measures open to the cautioner which, if pursued, would have enabled him to receive payment under the sub-lease, hence to obtain relief from his cautionary obligation under the main lease.[85] The Court of Session held that the cautioner, having negligently failed to do diligence against the sub-tenant, could not now pursue the principal debtor for payment of the half-year's rent.[86] The cautioner had 'assumed the whole management' of the principal debtor's tenancy and had lulled him into a false sense of security that he (the cautioner) would thereby be able to obtain relief.[87] The case is instructive for two reasons. Firstly, it demonstrates, once again, that pre-emptive relief need not consist invariably of payment by the principal debtor. At the same time, the case demonstrates that, if a cautioner squanders, through negligence, the particular means of relief with which the

[79] (1822) 1 S 491 at 492.
[80] (1822) 1 S 491 at 491–492.
[81] (1822) 1 S 491 at 491–492; Bell, *Principles* § 255.
[82] Erskine III.3.65.
[83] (1792) Hume 83.
[84] (1848) 10 D 1366.
[85] (1848) 10 D 1366 at 1371.
[86] (1848) 10 D 1366 at 1368–1371.
[87] (1848) 10 D 1366 at 1370–1371.

principal debtor has furnished him, the cautioner cannot subsequently claim relief in some other form. This analysis could even be applied to the simple case where the principal debtor pays the cautioner. If the cautioner negligently loses the money, it is obvious that he cannot claim the same amount from the principal debtor again. In a way, *Lyon v Lizars* is simply a more elaborate variation on that example.

E. CONCLUSION

10-34. Even within the restricted context of a cautionary relationship, the term 'relief' denotes a variety of legal responses, and nowhere is this variety more apparent than in the fundamental division between corrective and pre-emptive relief. This book has focused mostly on the cautioner's right to demand reimbursement of money paid to the creditor (corrective relief), either in full or *pro rata*. The present chapter on pre-emptive relief concerns a fundamentally different right, allowing a cautioner to require that a fellow obligant (either the principal debtor or a co-cautioner) pay what is still owing to the creditor.

10-35. Given the desirability of such a right, it should come as little surprise that it exists in a more restricted set of circumstances than does corrective relief. It has been argued that pre-emptive relief applies only if there is a contractual relationship, express or implied, between the cautioner and the person from whom such relief is sought. Secondly, although, by nature, a right of pre-emptive relief does not depend on the cautioner's having suffered actual loss, there must be at least some imminent threat of loss, the most obvious example being that the principal debtor's debt has fallen due and the creditor is threatening legal action.

11 Conclusions

PARA
A. CONTRIBUTION OF THIS BOOK
(1) Summary of chapters 11-02
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11-01. The book began by reiterating Peter Birks' argument that there is value in a simplified account of the law even if that account is 'over-simplified'.[1] It seems fitting, by way of conclusion, to summarise the book's contribution to legal knowledge and to identify further avenues of research, which, owing to limitations of space, could not be explored in the foregoing chapters.

A. CONTRIBUTION OF THIS BOOK

(1) Summary of chapters

11-02. An exploration of rights of relief in a cautionary relationship inevitably prompts certain preliminary questions, among them: What is a cautionary relationship? In what contexts does one find the terminology, 'rights of relief'? And why, practically speaking, does the nature of such rights merit attention? The purpose of chapters 2 to 5 was to confront such questions. After a survey of the Roman origins of the law of caution (chapter 2), chapter 3 defined a modern cautionary relationship, thereby clarifying the book's scope. Thereafter, consideration was paid to the constitution of a contract of caution (chapter 4) and to the rights of a creditor under such a contract (chapter 5).

11-03. Chapters 6 to 10 formed the substance of the book, namely, the nature of rights of relief in a cautionary relationship. After consideration of certain issues relevant to all rights of relief (chapter 6), the book proceeded to examine the right of *pro rata* relief among cautioners, as regards both the circumstances in which that right arises (chapter 7) and its content (chapter 8). Chapter 9 conducted a similar analysis of total relief. Finally, chapter 10 examined rights

[1] P B H Birks, *An Introduction to the Law of Restitution* (1989) 1.

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of pre-emptive relief, which, unlike the rights of relief discussed in the preceding chapters, may arise before the cautioner has paid the debt.

(2) Conclusions

11-04. As chapters 6 to 10 make clear, the nature of rights of relief cannot meaningfully be expressed in a statement that, in circumstance X, a cautioner will be entitled to legal response Y. Sometimes, the term 'relief' refers to the total or partial compensation of the cautioner (corrective relief); in other cases, relief allows the cautioner to compel a fellow obligant (usually the principal debtor) to pay what is owing to the creditor (pre-emptive relief). As for the cause of action, a cautioner's right may, depending on the circumstances, be contractual or non-contractual, with differing consequences in each case. It is only by acknowledging such variations, and by recognising that the cautioner's rights are governed by several relief principles, rather than by a monolithic relief principle, that those rights may be properly understood.

11-05. Systematic treatment of rights of relief, as of any other legal issue, hinges on the identification of the relevant legal questions. To advise a cautioner regarding rights of relief, it is first necessary to determine what sort of relief the cautioner desires, and from whom. If the cautioner has paid the whole debt or at least more than his proper share of it, he will seek corrective relief. Alternatively, before the cautioner has paid the creditor, he may seek pre-emptive relief. Turning to the second question, whether the desiderated right is available, much will depend on the circumstances of the case. For example, it was argued in chapter 10 that a claim for pre-emptive relief is best understood as arising from a contract between the cautioner and the party from whom it is sought,[2] which throws into doubt whether such relief is or should be recoverable from a stranger. By contrast, corrective relief does not depend upon a contract.[3] The third question is that of content and measure of recovery: how much is the cautioner entitled to claim and from whom? For instance, as explored in chapter 8, the extent of a cautioner's claim against a given co-cautioner will most likely be affected by the solvency of the other co-cautioners. Fourthly, having established that a right of relief exists and having determined what that right entitles the cautioner to claim, it remains to consider by what means, or 'machinery',[4] the cautioner may exact that relief. As explored throughout the book, various routes may present themselves to a cautioner seeking relief. Whether the cautioner raises a direct action (e.g. against the principal debtor) or demands an assignation of the creditor's rights will depend on the circumstances. Most obviously, if a cautioner desires a transfer of the creditor's securities

[2] Hume, *Lectures* II, 214–215.
[3] Stair I.8.2 and I.8.9.
[4] *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1138.

over the principal debtor's property, assignation will be the legal machinery of choice, but in cases where that machinery is unavailable,[5] the cautioner may still exact relief by means of a direct action.

11-06. The book's examination of relief began with the corrective right of relief among cautioners, that is, the right of the paying cautioner to claim from the other cautioners a *pro rata* contribution for what was paid to the creditor. Where the cautioners become bound together, this right may be rooted in an agreement, express or implied, among them. However, there is another explanation for *pro rata* relief, more powerful than a contractual one, which applies with equal force to cautioners who become bound together and to those who become bound separately. As Kames argues, that the creditor is allowed to exact full payment from one cautioner should not allow him to saddle that cautioner with sole liability for the debt; rather, because the cautioners are bound to the creditor on an equal basis, the cautioner who paid is entitled to a *pro rata* contribution from the others. While Kames' emphasis on equality among cautioners is important, it is his emphasis on the creditor's interests, and the duty on that party not to act arbitrarily, that makes this notion of equality distinctive. Kames' principle is fundamentally important, serving as the common root of various well-established principles regarding rights of corrective relief, and as a touchstone in difficult cases. Indeed, to consider the potential relevance of Kames' principle to certain issues regarding rights of relief, and to identify certain cases where that principle might usefully be considered, is one of the main contributions of this book. It is thanks to Kames' principle: that cautioners are entitled to *pro rata* relief even if they are not bound in the same document;[6] that the creditor must take care not to damage the cautioners' rights among themselves by voluntarily discharging one of their number;[7] that the creditor is free, arguably, to dispense discounts for the exclusive benefit of one co-cautioner;[8] and that cautioners bound in fixed shares are entitled to relief in certain cases,[9] but not in others.[10]

11-07. A similar pattern can be observed regarding rights of total relief. Although such rights may be justified on contractual grounds, Kames' equitable principle demonstrates that total relief is no more dependent on a contract than is *pro rata* relief. In each case, relief is granted to prevent the creditor from acting arbitrarily to the paying cautioner's detriment. What distinguishes total from *pro rata* relief is that the former is granted only where the person from whom relief is sought was bound to the creditor on a primary basis relative to the cautioner. The grounding of relief in equity is especially important where the cautioner desires an assignation of the creditor's securities over the principal debtor's

5 *Ewart v Latta* (1865) 3 M (HL) 36.
6 See, e.g., *Smiton v Millar* (1792) Mor 2138 at 2140.
7 See, e.g., *Wallace v Elibank* (1717) Mor 3389.
8 *Nisbet v Lesly* (1664) Mor 3392.
9 *Stirling v Forrester* (1821) 3 Bligh 575.
10 *Morgan v Smart* (1872) 10 M 610.

estate. It also helps to explain, in cases where there is no contract between the principal debtor and cautioner, why total relief may still be available.

11-08. The principal focus of this book has been on Kames' equitable principle, accounting as it does for both total and *pro rata* rights of corrective relief. However, it is worth noting that the existence of a contract between the cautioner and the person from whom relief is sought (e.g. the principal debtor) may warrant relief where equity does not. This was the focus of chapter 10, where a right of pre-emptive relief was characterised as flowing from a contractual relationship between the cautioner and the person asked to provide such relief (e.g. the principal debtor).

11-09. As to the amount that may be claimed in relief, complications arise where one cautioner seeks corrective *pro rata* relief from two or more co-cautioners. In chapter 8, it was argued that such issues cannot be addressed unless a line is drawn between the distribution among cautioners that the law strives ultimately to achieve (ultimate relief) and the amount which can, in the immediate term, be claimed from any one co-cautioner (immediate relief). Whereas ultimate relief is determined by relatively clear-cut considerations of what is fair and equitable, there are various approaches that a legal system might reasonably adopt to the question of immediate relief. Of the three such approaches considered in chapter 8, a preference was expressed for that advocated by Kames.[11]

B. FUTURE RESEARCH

11-10. This book does not purport to have examined rights of relief in exhaustive depth. On the contrary, there is still much for which the present study serves, if at all, as a mere foundation.

11-11. One of the first issues to be mentioned in chapter 1 was the interface between rights of relief and unjustified enrichment, and the extent to which the former might be deemed a branch of the latter. It is hoped that this book, in considering a distinctive basis for rights of relief, may assist future exploration of the 'enrichment' theory. Future research could examine the practical implications, benefits and pitfalls of characterising relief as a response to the supposed unjustified enrichment of the principal debtor or co-cautioners, and the extent to which an 'enrichment' analysis is compatible with Kames' equitable explanation for relief.

11-12. There is also greater scope for comparative analysis of the Scots law pertaining to rights of relief, focusing, for example, on such modern civilian systems as German law. The most obvious benefit of such an exercise would

[11] H Home, Lord Kames, *Principles of Equity* (3rd edn, 1778, reprinted with new pagination, ed M Lobban, 2014) 80.

be a deeper insight into Scots law. Conversely, a comparative exercise may demonstrate what Scots law has to offer on the international stage. Both points are borne out by Meier's recent comparative survey of, among other matters, the rights and obligations of contractual co-obligants, including sureties.[12] Among the issues discussed is the extent to which a surety enjoys a right of *pro rata* relief after paying only part of the common debt.[13] While this book has addressed such cases as where the creditor grants a discount,[14] or where a paying cautioner is insolvent,[15] consideration of the issue in a comparative setting may cast the Scottish 'part-payment' cases in a new light. As for insights that Scots law might have to offer, it is worth noting that Kames' distinctive approach to measure of recovery finds no obvious equivalent in Meier's comparative survey, in spite of the wide range of legal systems considered.[16]

11-13. Although this book has made much of Kames' equitable principle, an attempt has also been made to identify certain issues regarding rights of relief on which that principle is silent,[17] and areas where it is apt to be taken out of context.[18] A principle usually so effective in its regulation of the rights of cautioners, principal debtors and creditors may not be so effective where one or more of those parties is bankrupt. Such cases raise peculiar difficulties, not the least of which is how to reconcile high-minded notions of equity with the reality that, where one or more of the parties to a cautionary relationship is bankrupt, certain 'substantial rights' may be shaped by 'the creditor's caprice'.[19] This tension – between rights of relief, on the one hand, and principles of bankruptcy law, on the other – deserves to be explored further, but this would require systematic treatment of issues which this book has been able to mention only in passing.[20]

11-14. Though seemingly theoretical, the projects instanced above would be ultimately practical in character, the aim of each being to clarify the law and to identify potential flaws in it. Theory, however interesting, is less deserving of attention if it cannot be turned to some practical use for clients, practitioners and law reformers, and if the terminology of 'causes of action' and 'responses' cannot, where necessary, be recast in the more accessible language of 'what?', 'when?' and 'how much?'. It is hoped that such an ethos is reflected in this book.

[12] S Meier, 'Plurality of parties', in N Jansen and R Zimmermann (eds), *Commentaries on European Contract Laws* (2018) ch 10.

[13] Meier (n 12) 1581–1582.

[14] *Nisbet v Lesly* (1664) Mor 3392.

[15] *Cranstoun v M'Dowal* (1798) Mor 2552; *Ewart v Latta* (1865) 3 M (HL) 36.

[16] Kames, *Principles of Equity* (ed Lobban) 80.

[17] Notably, apportionment of liability among cautioners bound in unequal shares: see paras 8-05–8-09 above.

[18] See discussion of *Cranstoun v M'Dowal* (1798) Mor 2552 at paras 7-50–7-59 above.

[19] Anon, 'Securities held by cautioners' (1914) 30 SLR 152 (an article concerning the Bankruptcy (Scotland) Act 1913 s 61; see now Bankruptcy (Scotland) Act 2016 s 206).

[20] E.g. at paras 7-50–7-59 above.

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