COURT OF SESSION.

Friday, November 29.

SECOND DIVISION.

[Sheriff Court at Hawick.

MARSHALL & COMPANY *v.* PENNYCOOK.

Caution—Co-Cautioners — Contribution — Intervention of One Co-Cautioner to Complete Contract — Liability of Other Co-Cautioner to Contribute to Loss in Completion—Release through the Intervention of Funds Otherwise Liable to be Forfeited —Supervision Fees.

A and B, both contractors, were co-cautioners for the due performance of a contract by C, another contractor. One of the general conditions of the contract was that the work should be paid for by monthly payments on certificate by the engineer at the rate of 80 per cent. of the estimated value of the work executed, the remainder half on completion and half on expiry of the period of maintenance, the town council, for whom the work was being done, "always having power to withhold payment on any certificate should the work not be carried on regularly and to their satisfaction." It was also provided that the town council might, should C from any cause be prevented from properly and expeditiously carrying out the work, take the work out of his hands, and "the amount already paid to the contractor shall be deemed to be the full value of the work executed by him up to that time."

The town council being dissatisfied warned A, B, and C, and C thereafter, with A's assistance, was proceeding satisfactorily when he was disabled, bodily and mentally, through illness. A having called on B to assist, which he failed to do, at once intervened and completed the work under his own supervision, and it was proved that his intervention minimised loss. When C was incapacitated a sum had been certified by the engineer and was due, and this with A's permission was paid to parties who had supplied material and money to C for the work, and to whom he had in security assigned his rights.

A having brought an action against B, his co-cautioner, to recover one-half of his loss in completing the work, *held* (1) that A was entitled to recover from B, (2) that the condition on which alone the town council was entitled to retain the sum certified had not been fulfilled, and consequently that that sum could not be set against any loss, and (3) that A was entitled to charge in the loss moderate fees for personal supervision, the time occupied having entailed on him an additional expense in carrying on his own business equal at least to the fees charged.

James Marshall & Company, builders and contractors, Hawick, and James Marshall, sole partner of said firm, as a partner and as an individual, raised an action in the Sheriff Court at Hawick against James Pennycook, builder, Hawick. The pursuers and the defender were co-cautioners for the due performance of a contract for the construction of water-works which was entered into on 13th October 1902 between the Town Council of the Burgh of Selkirk (the first party), and Messrs D. M'Donald & Son, contractors, Hawick, and James Alexander M'Donald, the sole partner of the firm (the second party). The pursuers sought payment of £141, 8s. 2d., being as they averred half the loss incurred by them in completing the contract on the failure of the principal to execute it.

The contract, *inter alia*, provided—"And we (first) Messrs James Marshall & Company, builders and contractors, Hawick, and James Marshall, builder and contractor, Hawick, sole partner of said firm of James Marshall & Company, as such partner and as an individual, and (second) James Pennycook, builder, Hawick, of the firm of Oliver & Pennycook, builders and contractors, Hawick, do hereby bind and oblige ourselves, we the said James Marshall & Company, as a firm or company, and I the said James Marshall, as sole partner thereof and as an individual, and I the said James Pennycook, as an individual, all jointly and severally as cautioners and sureties, for the due performance and execution of the above contract by the said D. M'Donald & Son and James Alexander M'Donald: For which causes and on the other part the first party bind and oblige themselves to make payment to the second party and their heirs and successors of the . . . net sum of £2455, 0s. 6d. as the agreed-on price of the works hereby contracted for; and it is hereby declared and agreed to that the said sum of £2455, 0s. 6d. shall be paid to the second party and their foresaids at the times and in the manner and subject to the conditions set forth in the . . . general conditions and stipulations, and under any reservations therein or herein mentioned, and particularly and without prejudice to said generality, payments shall be made monthly only on certificates of the said engineer, at the rate of 80 per cent. of the estimated value of the work executed by the second party, the remainder being paid, one-half on the date of completion of the work, and the balance on the expiration of the period of maintenance before mentioned, the first party, however, always having power to withhold payment on any certificate should the works not be carried on regularly or to their satisfaction."

One of the general conditions and stipulations was—"(15) *Bankruptcy.*—If the contractor shall from bankruptcy, insolvency, or any other cause be prevented from proceeding, or neglect to proceed, with the work with the requisite expedition, or at any time fail to perform the same in a proper manner, or to comply with the orders of the engineer, the Council may,

by writing under the hand of their town-clerk for the time being, give notice to him to suspend the works forthwith, when they may take the same either wholly or in part out of his hands, and take possession of and retain, either for their own use or for the use of the parties they may employ, all or any tools, materials, engines, or implements which the contractor may have or leave upon the works, and employ such other workmen by contract, or day work, or otherwise, and procure additional plant and materials, and proceed with the said works or the part thereof taken out of the hands of the contractor, and complete the same. Should a part only of the works be taken out of the hands of the contractor, all expenses incurred in completing such part according to the specification shall be awarded by the engineer, and paid by the contractor, or deducted from the unpaid contract monies in the hands of the Council, but should the Council by such notice take the whole of the works out of the hands of the contractor, on the expiration of such notice this contract shall, at the option of the Council, become void as to the said contractor, but without prejudice to any right of action by the Council to which the said contractor may be subject for any neglect or breach of contract as aforesaid; and in that case the amount already paid to the contractor shall be deemed to be the full value of the works executed by him up to that time when such notice shall have expired, and no further claim shall be made by the contractor for work which may have been done by him up to that time."

The *facts* of the case are summarised in the findings in fact of the Sheriffs.

On 26th July 1906 the Sheriff-Substitute (BAILLIE), after a proof, pronounced this interlocutor—"Finds in fact that M'Donald & Son and James M'Donald, the sole partner, on 13th October 1902 entered into a contract with the Selkirk Town Council for the construction of the Selkirk Waterworks, and that pursuer and defender became bound jointly and severally as cautioners for due execution of the contract; that in May 1904 M'Donald was not implementing said contract expeditiously, and that on 23rd May the Town Council resolved to inform him and his cautioners that if the work was not carried on satisfactorily after an expiry of eight days the contract would be taken off M'Donald's hands and the cautioners held liable for any loss sustained in the completion of the work by the Town Council; that on 24th May the town clerk by letter informed the cautioners of said resolution, and at a subsequent interview with pursuer further explained to him the effect of the Town Council's resolution; that satisfactory progress was with pursuer's assistance made until 13th July, when M'Donald was taken seriously ill and incapacitated from continuing the contract; that pursuer thereupon asked defender to assist him, and, on his refusal, alone took up and completed the contract as cautioner, and has incurred loss thereby. That the half of said loss is . . . computed at £92, 15s. 8d.: Finds in law that pursuer having under said circumstances undertaken the work as cautioner on default of the principal obligant, is entitled to be repaid the half of said loss: Therefore grants decree against defender for £92, 15s. 8d."

On 14th December 1906 the Sheriff (CHISHOLM) adhered to this interlocutor, with the variation that he found half the loss to be £93, 14s. 8½d., for which he accordingly gave decree, and with the further variation that he made this additional finding in fact, viz.—"That the loss to the cautioners would have been greater if the pursuer had not, immediately on M'Donald's incapacity emerging in July 1904, taken up the work and completed it."

One other fact, not pressed in the Sheriff Court, falls to be noted. At the date when M'Donald became incapacitated there was a sum of £400 due to him for payment of which the engineer had granted a certificate. Subsequently the Town Council, with the consent of the pursuer, paid away that money to parties to whom M'Donald, being in financial difficulties, had assigned his rights. One-third of the £400 was paid to Messrs Purdom, solicitors and bank agents, Hawick, who had advanced to M'Donald money required for wages, and the remaining two-thirds to Messrs Stevenson & Co., who had supplied pipes required for the works.

The defender appealed, and argued—(1) There had been no default in the contract. Though the Town Council had threatened to take the work out of M'Donald's hands and complete it themselves, they had not done so. There being no default the Town Council never could have called upon the cautioners to fulfil any obligation, for none had arisen. In any case they never had formally called upon them. The pursuer in carrying on the contract had been acting not as cautioner but as *negotiorum gestor*. (2) Assuming the liability as cautioners had arisen, then so had the right of the Town Council to retain the £400 for which the engineer had granted a certificate. Where a creditor in an obligation paid away any funds held as security for its due performance, that acted *pro tanto* as a discharge of the cautioner—Bell's Prin. secs. 254, 255, and 264; Bell's Com. (M'Laren's ed.) vol. i. pp. 366, 376, and 377; Ersk. Ins. iii. 5, 11; *Sligo* v. *Menzies*, July 18, 1840, 2 D 1478; *Hume* v. *Youngson*, January 12, 1830, 8 Sh. 295; *Calvert* v. *The London Dock Company*, 1838, 2 Keen 638, 44 R.R. 300; *Mayor of Kingston-upon-Hull* v. *Harding*, [1892] 2 Q.B. 494, at p. 507. The right to retain on default the 80 per cent., so far as unpaid, was a security just as much as the right to retain the 20 per cent.—*Ranger* v. *Great Western Railway Company*, 1854, 5 Clark (H.L.) 72, Lord Cranworth, L. Ch., at p. 107. As to the assignations, Stevenson & Company and the bank, the assignees, could be in no better position than M'Donald,—a right of retention existed as much against assignees as against their author—Hudson on Build-

ing Contracts, 3rd ed., pp. 646 and 661. The pursuers were in a dilemma, for the condition which gave rise to the right of retention was the same on which the emergence of the cautioners' liability depended, *i.e.*, failure in due performance. Had the £400 been retained there would have been no loss on the contract. (3) In any case the fee charged by the pursuer of £75 for his superintendence of the work was inadmissible. A cautioner was not entitled to charge his co-cautioner for his superintendence any more than a trustee could charge a beneficiary.

Argued for the pursuer (respondent)—When it came to the knowledge of a cautioner that the principal obligant was unable to perform his contract, he was entitled to step in before any formal requisition was made by the creditor. Section 15 of the General Conditions conferred merely a discretionary right on the creditor; it conferred no right on the debtor or the co-obligants. Even if the Town Council were bound to exercise this discretionary right when it arose, the state of matters in which alone it could arise had never occurred, for the pursuer's intervention had prevented any stoppage in the proper and expeditious execution of the works. The ground on which cautioners were freed was alteration or evasion of the contract, as by giving time—*Fleming* v. *Wilson*, May 24, 1823, 2 Sh. 336 (new ed. 296)—or giving up security funds—*Calvert* v. *The London Dock Company* (*cit. sup.*). Here the £400 was not a security fund, and there was no right or obligation as there had been in *Calvert* to retain it. In any case abstention from exercising a right of retention was not a positive act such as was required to liberate a cautioner, any more than refraining from exercising a landlord's right of hypothec as figured by Lord Pitmilly in *Hume* v. *Youngson* (*cit. sup.*). The evidence showed that pursuer intervened because he was cautioner, and that he did the work as such, and not as *negotiorum gestor*, for M'Donald. It further showed that by his intervention he had lessened the loss. He was entitled to be relieved of one half of the loss,—*Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514. The fee of £75 for superintendence was very moderate, and was really an outlay, for the supervision had entailed expense on the pursuer in carrying on his own business. Had he not supervised the work himself it would have been necessary to have got someone to do so.

At advising—

LORD LOW—A cautionary obligation for the due performance of a contract for the construction of works generally, I imagine, results in a payment of damages for any loss sustained by the employer in the event of the contract not being duly performed. If, however, upon the failure of the contractor, the cautioner is able and willing to step in and complete the work, I see no reason in principle why he should not implement his cautionary obligation in that way, especially if, as in the present case, the creditor in the obligation consents to his doing so.

Upon the evidence I think that there is no doubt that the pursuer intervened and carried on M'Donald's contract because he was cautioner, and as cautioner, and it seems to me also to be proved that that was the best course to follow in the interests of the cautioners, because the pursuer's witnesses, whose evidence is uncontradicted, say that if, when M'Donald became incapacitated the pursuer had not carried on the contract, but the Town Council of Selkirk had been forced to do the work themselves, the loss would have been much greater.

If that be so, then the action of the pursuer was for the benefit of the defender, because if the Town Council had been compelled to take up the work the defender would undoubtedly have been liable for any loss which was incurred.

The defender denies that he was aware that the pursuer had taken up the contract as cautioner, and although he admits that the pursuer asked him to go to Selkirk and assist with the work, he says that he understood that he was asked to do so merely in the capacity of a friend and not as co-cautioner. I regret to say that I cannot regard the defender's evidence as being at all trustworthy. I am satisfied that he knew perfectly well that the pursuer was taking up the work as cautioner. and it is also proved that he was pressed both by the pursuer and Mr Purdom to co-operate, but that he refused to do anything or to express any opinion upon the course which ought to be adopted. My impression is that he hoped that by refusing to say or do anything, while the pursuer completed the work, he might ultimately escape liability altogether.

If there were nothing else in the case I should have no hesitation in agreeing with the learned Sheriffs, but there was one point argued before us which does not seem to have been stated in the Court below, and which requires careful consideration.

In the contract for the execution of the works it was provided that monthly payments should be made to the contractor "only on certificates of the said engineer, at the rate of 80 per cent. of the estimated value of the work executed by the second party, the remainder being paid, one-half on the date of the completion of the work, and the other on the expiration of the period of maintenance before mentioned, the first party, however" (and these are the important words) "always having power to withhold payment on any certificate should the works not be carried on regularly or to their satisfaction."

Now when, on the 13th of July 1904, M'Donald was seized with an illness which incapacitated him bodily and mentally, there was a sum of £400 due to him, for payment of which the engineer had granted a certificate. Subsequently the Town Council, with the consent of the pursuer, paid that sum partly to a Glasgow firm who had supplied to M'Donald the pipes required for

the works, and partly to a bank, which had advanced the money required for wages, M'Donald having assigned his right to these parties. The defenders argued that the Town Council ought to have exercised the right given to them by the clause which I have quoted, and withheld payment of the £400, which would have been more than sufficient to cover the loss sustained by the pursuer in completing the works; and that as the Town Council chose to pay away the fund, and thereby deprive the defender, as cautioner, of a security to the benefit of which he was entitled, he was freed from his obligation, and neither the Town Council nor the pursuer, who consented to the payment, had any claim against him.

In considering that argument I think that it is necessary to read, along with the clause in the contract upon which the defender founds, certain provisions in the general conditions and stipulations which were appended to and formed part of the contract.

By the 15th of these conditions it was provided that if the contractor should from bankruptcy, insolvency, or any other cause, be prevented from proceeding with the work with the requisite expedition, or fail to perform the same in a proper manner, the Town Council might, after written notice to the contractor, take the whole works out of his hands and complete them themselves, in which case the contract should, at the option of the Council, become void as to the contractor, and "the amount already paid to the contractor shall be deemed to be the full value of the work executed by him up to that time, and no further claim shall be made by the contractor for work which may have been done by him up to that time."

Now, if the pursuer had not intervened, it seems to be certain that the result of M'Donald's illness would have been that the work would have come to a standstill, because M'Donald had no means and no one to carry on the contract for him. The position of matters contemplated by the 15th condition would therefore have arisen, and the Council would have been compelled to take the work into their own hands or to employ another contractor. In that event I do not doubt that they would have been entitled to retain, and probably, in a question with the cautioners, would have been bound to retain, the £400 in question. But the occasion never arose for the Council to consider whether or not they would put an end to the contract and do the work themselves, because the pursuer stepped in and carried on the contract in M'Donald's name, and there was never any failure to carry on the work with the requisite expedition, or to perform the same in a proper manner. And it seems to me that the pursuer gives very good reasons for taking up the contract at once and not allowing any interruption or delay to take place. He had for some time been visiting the work every day and keeping M'Donald up to the mark, and he knew exactly what the position of matters was. It appears that the pipes were being laid near the river Ettrick, and below the level of the river, and during the very week in which M'Donald took ill the pipe trench had been flooded, and it was very important that the damage thereby caused should be put right at once, as delay would apparently have resulted in increased damage and greater expense. Then there was a squad of men employed who knew the work, and the pursuer desired to retain their services, because if he had not done so there might have been considerable delay in getting another set of workmen together, and in the meantime the works would have been stopped and the Council might have exercised their powers under the 15th condition, which according to the evidence would have resulted in greater loss to the cautioners. It therefore seems to me that the pursuer by his prompt action did what was best in the interests of all concerned—of the cautioners as well as of the Town Council.

The circumstances, therefore, never having arisen in which the Town Council were entitled to put in force the powers of the 15th condition, Were they entitled (and therefore bound in the interest of the cautioners) to withhold payment of the £400 in terms of the clause in the contract?

Now, under that clause the Council are authorised to withhold payment only "should the works not be carried on regularly and to their satisfaction." As matter of fact that condition of matters did not exist, because, owing to the intervention of the pursuer both before and after M'Donald's illness, the works had been and were being carried on regularly and to the entire satisfaction of the Council. No doubt the Council knew that what had induced the pursuer to carry on the contract was the fact that he was cautioner, but I do not think that that is of any importance as regards the present question. What is of importance is that M'Donald's contract was carried on without interruption, and in a satisfactory manner. That being so, the Council had no right to withhold payment of a sum which had been certified as due and payable to M'Donald. In like manner, the pursuer could not have required the Council to withhold payment of the money, because by virtue of the right to intervene which his position as cautioner gave him, he had simply stepped into M'Donald's place, and was carrying on the contract for and in the name of the latter.

It therefore seems to me that the pursuer, having adopted the course which he did there could be no question of withholding payment of the £400. Accordingly, the defender cannot found upon payment of that sum as freeing him from his obligation. If he is freed from his obligation it must be because the pursuer was not justified in adopting the course which he did, and that his having done so has been to the defender's prejudice. I have already said that, in my opinion, so far from that being the case, the course adopted by the pursuer was the best which he could have followed in the interests of the cautioners; and accordingly the defender is in my judgment

bound to relieve the pursuer of one-half of the loss which has been incurred.

Some English authorities were quoted for the purpose of showing that payment by an employer in a contract such as the present, to the contractor, of money which the employer was entitled to retain as security for the due completion and maintenance of the work, had the effect of freeing the contractor's surety or cautioner, at all events to the amount so paid. These authoties would have been directly applicable to the present case had the Town Council of Selkirk paid away the 20 per cent. which under the contract they were entitled to retain—one-half till the completion of the work and the balance till the expiration of the period of maintenance, but in my judgment they have no application to the £400 in question, which was not a security fund under the contract, but a sum which, although it had been certified as due and payable to the contractor, the Council would have been entitled to retain if a condition of matters had arisen which in fact never did arise.

The only other question is in regard to one item in the account lodged by the pursuer, bringing out the loss sustained in completing the contract. That item is a charge of £75, being fee for superintending the work for nine months. It is proved that if a fee for superintendence is allowable at all the amount charged is moderate. I am of opinion that the charge must be allowed. It was necessary that someone should superintend the work, and if the pursuer had not done so himself he would have required to employ and pay someone else. I think, however, that the pursuer was quite right to supervise the work himself, because the attitude taken up by the defender had placed him in a very delicate position, and he was bound to see that the work was conducted as economically and efficiently as possible. To superintend the work, however, took up time which the pursuer would otherwise have devoted to his own business, and caused him additional expense in carrying on that business to an amount apparently, at all events, equal to the fee charged.

Upon the whole matter I am of opinion that the appeal should be dismissed and the interlocutor of the Sheriff affirmed.

LORD JUSTICE-CLERK—That is the opinion of the Court (the Lord Justice-Clerk, Lord Stormonth Darling, Lord Low, and Lord Ardwall).

Counsel for the Pursuers (Respondents)—Hunter, K.C. — Jameson. Agents—Fyfe, Ireland, & Co., S.S.C.

Counsel for the Defender (Appellant) — Morison, K.C. — Macmillan. Agents — P. Morison & Son, S.S.C.

Wednesday, December 4.

SECOND DIVISION.

[Lord Dundas, Ordinary.

LIQUIDATOR OF JAMES DONALDSON & COMPANY, LIMITED v. WHITE & PARK.

Company—Winding-up—Production of Documents—Lien—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 115.

On a note for the official liquidator of a company in liquidation, the company's law-agents may be ordered, under section 115 of the Companies Act 1862, to produce all books, title-deeds, and other documents relating to the company, without prejudice, however, to their lien for their account.

The judgment of Lord Hatherley in *South Essex Estuary and Reclamation Company*, L.R., 1869, 4 Ch. Ap. 215, *followed.*

Opinion per Lord Dundas (Ordinary) that the mere production and inspection of the documents by the liquidator will not, *per se*, impose any liability upon him for payment of the law-agent's account.

The Companies Act 1862 (25 and 26 Vict. cap. 89) enacts:—Section 115—"The Court may, after it has made an order for winding up the company, summon before it any officer of the company, or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company; and the Court may require any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company; and if any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, having no lawful impediment (made known to the Court at the time of its sitting and allowed by it), the Court may cause such person to be apprehended and brought before the Court for examination; nevertheless in cases where any person claims any lien on papers, deeds, writings, or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to such lien." Section 117—"The Court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before them in manner aforesaid concerning the affairs, dealings, estate, or effects of the company. . . ."

Messrs Thomas White & Park, W.S., Edinburgh, were the law-agents of James Donaldson & Company, Limited. The company went into liquidation, and James Maxtone Graham was appointed officia.