Counsel for the Defenders (Respondents), Livingstone-Learmonth's Trustees — Macfarlane, K.C. — Chree. Agents — Elder & Aikman, W.S.

Counsel for the Defender (Respondent), William Forbes — Cooper, K.C. — Chree. Agents — Graham, Johnston, & Fleming, W.S.

Tuesday, January 5, 1909.

FIRST DIVISION.

(SINGLE BILLS.)

M'CUAIG *v.* M'CUAIG.

Process—Title to Sue—Dominus Litis—Expenses—Caution for—Assignation to Law Agent in Security of Charges and Outlays—Motion to Sist Agent as Party to Cause.

In the course of proceedings in the Sheriff Court for service as heir in certain property, the petitioner (whose claim was disputed) assigned to his law agent his whole interest in the subjects in question in security of the latter's business account and outlays. The assignation, which was absolute in its terms, was qualified by a back-letter stating that it was really in security of the agent's advances, and that the security was limited to £400. The value of the property was about £5000. In an appeal at the instance of the petitioner, whose claim had been repelled, the respondent lodged a note craving that the agent should be sisted as a party to the cause, or otherwise that the appellant should be ordained to find caution.

Held that as the appellant was not suing for behoof of another, but was himself the true *dominus litis*, there was no ground for making his agent a party to the cause, or for ordaining the appellant to find caution, and note *refused*.

John M'Cuaig, Drumleach, Kintyre, Argyllshire, brought a petition in the Sheriff Court at Glasgow for service as heir in special to his deceased brother Angus M'Cuaig in certain subjects in Glasgow. A competing petition was presented at the instance of Donald M'Cuaig, Germiston, South Africa, a nephew of the said Angus M'Cuaig. The Sheriff-Substitute having upheld the claim of Donald M'Cuaig, John M'Cuaig appealed. On 5th January 1908 the respondent presented a note to the Lord President, in which he stated, *inter alia*—"It has come to the respondent's knowledge that in or about the month of August 1908 the appellant in the course of the said proceedings assigned to Mr John Macalister, writer, 81 Bath Street, Glasgow, his law agent, his whole interest in the heritable and moveable estate of the said deceased Angus M'Cuaig, including his whole interest in the subjects to which in the said proceedings he sought to obtain himself served as heir in special, and that the assignee thereafter duly intimated the assignation to the executrix-dative of the said deceased Andrew M'Cuaig. The appellant is a labouring man in humble circumstances, and the respondent believes and avers that he is not possessed of any means beyond his interest in the estate of the said deceased Angus M'Cuaig, which he has assigned in favour of the said John Macalister."

The prayer of the note was as follows:—"May it therefore please your Lordship to move the Court to appoint the said John Macalister to sist himself as a party to the appeal, or alternatively to ordain the appellant to find caution for the respondent's expenses therein."

It was stated and admitted at the bar that the assignation referred to was qualified by a back-letter dated 11th November 1908, declaring that the assignation was in security of advances and of any business account and outlays incurred to the assignee, not exceeding in all the sum of £400. The value of the subjects in question was £5000.

Argued for respondent—The appellant had divested himself of all interest in the subject-matter of the action in favour of his agent Macalister, and, accordingly, he was not entitled to sue without finding caution for expenses. The person who had the real interest was Macalister, and that being so he should be ordained to sist himself. The respondent was not bound to litigate with a person who had no interest, and against whom therefore no effectual judgment could be obtained. *Esto* that the appellant had the reversion, the principle on which a party would be compelled to sist himself did not depend on whether or not he had the reversion, but on whether he was or was not likely to benefit by the litigation—*Fraser* v. *Dunbar*, June 6, 1839, 1 D. 882; *Walker* v. *Kelty's Trustee*, June 11, 1839, 1 D. 1066. The person who would really benefit here was Macalister. He was the true *dominus litis*.

Argued for appellant—The appellant had clearly the real interest in the litigation. The assignation was qualified by a back-letter declaring that it was really in security of a sum which in any event could not exceed £400, whereas the value of the property in question was more than ten times that amount. The appellant and not Macalister was the true master of the litigation, for he had command of it. The mere fact that Macalister was supplying the funds did not make him the *dominus litis*. The test of the matter was this—"Was the appellant acting not as principal but as agent?"—*Fraser* v. *Malloch*, February 8, 1896, 23 R. 619, *per* Lord Kyllachy at 625, 33 S.L.R. 594. The facts here showed that the appellant was acting as principal, and that being so the respondent was not entitled either to have Macalister sisted or to have the appellant ordained to find caution.

LORD PRESIDENT—This is a case in which there is a competition as to the right of

succession in heritable property of considerable value in Glasgow. The party who has been unsuccessful in the litigation, so far as it has yet proceeded, and has brought this appeal is in humble circumstances, and with a view to his having his case carried on he has executed an assignation of any rights he may have in the property in favour of his agent, who is prepared to supply the funds necessary for the action. On the face of it this assignation is absolute, but in point of fact it is qualified by a back-letter which has been produced in Court. By that back-letter it is declared that the assignation shall be good only to the extent of the sum due, or that may become due, to the agent, and in any case the security is limited to the sum of £400. In these circumstances the respondent in the appeal has moved that the agent should be sisted as a party to the case, or otherwise that the appellant should be ordained to find caution. In support of that motion the cases of *Fraser* v. *Dunbar* and *Walker* v. *Kelty's Trustees* have been cited. I do not think that the present case is on all fours with those cases. In both of these cases it was found as a fact that the true interest in the litigation enured to the assignee of the claim in the litigation, and that the nominal pursuer had no longer any true interest in the success or failure of the case, and I have no doubt that on the facts on which these cases proceeded the decisions are quite sound.

The underlying principle on which the Court proceeds in making a person party to a cause against his will, so as to render him liable in expenses, is well explained by Lord Kyllachy in *Fraser* v. *Malloch*. As Lord Kyllachy points out, the question in such cases is always whether the nominal party to the cause is suing for his own behoof or is suing as the agent of another. And if he is found to be really suing as an agent, then he is acting for an undisclosed principal, and it is quite right that that principal should be brought into the suit. But it must be shown that the party who is to be brought into the suit has the true interest in the cause, and by true interest I mean the entire interest, using that term not in an absolute sense but as denoting the whole interest for all practical purposes.

In the present case I cannot hold that the agent has the true interest in the suit. If the case is successful the agent will get at the most, under the assignation, £400, whereas the appellant will obtain the whole estate, which we are told is, roughly speaking, over £5000, minus what is due to the agent. Accordingly the agent's interest seems to me to be merely incidental, and an incidental interest does not make a party *dominus litis* even although he may also be supplying the funds required for the action. The true test of whether a party is or is not *dominus litis* is probably whether he has or has not the power to compromise the action. Judged by that test I do not think that the agent here can be held to be *dominus litis*.

On the whole matter, and treating the question as depending on the facts of the case—and a question of this nature must always depend upon the particular facts of each case—I am of opinion that the respondent's motion should be refused.

LORD M'LAREN—I agree with your Lordship that there is no ground for making the agent a party to the action. His only interest in the case is that he holds a security for £400 over the property in dispute. Now the value of that property is more than ten times that of the security, and it cannot therefore be said that the agent has the real interest in the suit.

On the question as to whether caution should be found, I think that the respondent's argument, if carried to its logical conclusion, would lead to the strange result, that a proprietor who had granted a bond over his lands could not litigate without first finding caution. It was said, however, that this case was peculiar in respect that the security was in favour of the agent. But that fact can make no difference, because the principle on which a litigant is ordained to find caution is that there is no substantial interest in the property remaining in the party after deducting the debts. I think that this is a clear case for refusing what, after all, must always be an exceptional remedy.

LORD KINNEAR—I agree.

LORD PEARSON was absent.

The Court refused the note.

Counsel for Appellant—D. P. Fleming. Agents—M. J. Brown, Son, & Company, S.S.C.

Counsel for Respondent — Macmillan. Agents—H. B. & F. J. Dewar, W.S.

Thursday January 7.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

MACKENZIE *v.* MACALLISTER AND OTHERS.

Process — Summons — Defenders Sued Jointly—Dismissal as against Some only of Several Defenders Sued Jointly—Competency—Accounting.

An action of accounting against several defenders sued jointly was dismissed as irrelevant against two of the defenders.

Held that the action might competently proceed against the remaining defenders.

Murdo Mackenzie, Lombard Street, Inverness, brought an action against T. S. Macallister, hotel-keeper, Inverness, W. Macallister, wine merchant there, Robert Brown & Company, wine and spirit brokers, Glasgow, and Robert Brown, merchant, Glasgow, the sole partner of that firm, as such partner and as an individual, in which he sought decree (1) that the defenders should