

SECT. V.

If the Subscription of one of the Obligants be null, or not adhibited.

1593. June 2.

SCOTTS against JAMESON.

No. 15.

Found, that two parties being mentioned conjunctly in an obligation, one of them not subscribing, the other was bound only for the half.

IN an action pursued by Barbara Scott, and Robert Scott of _____, her husband, for his interest, against one A. B. in Aberdeen, and one Jameson, in Kirkaldy, his cautioner, for payment of certain sums contained in an obligation, as for the price of certain cloth, it was alleged by the said man of Aberdeen, That he should be assoilzied from the summons, because, albeit the obligation bore that he and his colleague had bought such cloth at such a price, yet he was not bound by the words of the obligation to pay the said sum, but only his cautioner, who, by the obligation, became full debtor for the whole sum, and had obtained, for that cause, a discharge of the like sum, which the said cautioner was owing to this defender. Which allegiance the Lords repelled. Farther, he alleged, that he could only be decerned to pay one half of the said sum, because the obligation bore, that he and another man of Aberdeen had bought the said cloth, and he could only be decerned to pay, or to relieve his cautioner, of the half of the said sum. Which allegiance the Lords found relevant. Last, he alleged, that he ought to be assoilzied, because this Barbara Scott, pursuer, being *præposita negotiis mariti*, promised never to crave this defender for his part of the sum, but only the cautioner. It was answered, That she could not make *conditionem viri deteriore* by her paction, unless it had interviened *in ipso actu*, and had been inserted in the obligation. Which reply the Lords admitted, and would not suffer the said exception to be proved by the witnesses inserted in the obligation, for it was thought perilous to receive the witnesses inserted to destroy the obligation whereto they are witnesses.

Fol. Dic. v. 2. p. 378. Haddington MS. No. 192.

1624. February 13.

SINCLAIR of Airth against LAURENCE SINCLAIR of Burgh.

No. 16.

SINCLAIR of Airth pursued Laurence Sinclair of Burgh for payment to him of 20 angel nobles, as heir to his father, who was bound by his obligation for

the same. The defender alleged, That he should be assoilzied from the one half, because his father was bound conjunctly with Jean Bruce, and she had not subscribed the bond. The Lords decerned the defender in the whole, because he ought to have provided for his own relief.

No. 16.

Fol. Dic. v. 2. p. 378. Spottiswood, (CONTRACTS) p. 62.

* * * Durie reports this case :

ONE Sinclair, in Orkney, pursues another Sinclair for payment of a sum contained in a bond ; against which the defender alleged, That he could not be subject, but in the equal half of the sum contained in the bond, in respect that, by the express tenor thereof, the defender, and another person therein named, are obliged conjunctly to pay the sum, which imports, that every one of the two are allenarly subject to pay the equal half ; and albeit that the other person named in the bond with the defender hath not subscribed the bond, yet, seeing the bond is drawn up and conceived of that tenor, that they are bound therein conjunctly, the defender's subscription cannot bind him to any greater quantity than is expressed and set down in the tenor and body of the bond. This allegiance was repelled, and the action sustained for the whole sum against the defender, who only subscribed the bond, albeit the tenor bore two to be bound ; which, if it had been subscribed by both, the sum would have divided equally ; but being subscribed by one only, the subscriber was bound for all, and who should have sought and provided for his relief of the other half when he subscribed the bond.

Act. Baird.

Clerk, Gibson.

Durie, p. 109.

* * * Haddington also reports this case :

A BOND, bearing Janet Burne, and Sinclair, her son, to be obliged to pay to Sinclair 28 merks, neither binding them conjunctly nor conjunctly and severally, but only these words, " We bind us, our heirs," &c. and the bond not being subscribed by Janet Burne, nor any notary for her, it was sustained against Sinclair, her son, for the whole.

Haddington MS. No. 3007.