

1687. July. BROOMHALL *against* GEORGE GOVAN and MR. JOHN FRANK.

No. 23.

THE cautioner in a bond suspended decerned against with the principal in the decret of suspension, found liable to relieve the cautioner in the suspension (who had paid the debt, and was assigned thereto) *in toto*, though the principal debtor only subscribed the bond of caution, containing the clause of relief.

Harcarse, (CAUTIONERS) No. 247. p. 59.

1694. January 10.

WALTER PORTERFIELD *against* SIR PATRICK SCOTT of Ancrum.

No. 24.

SIR PATRICK SCOTT being charged on a bond granted by him to James Scott of Bristo, and assigned by him to the said Walter, he suspended, on this reason, that he stood cautioner in sundry debts for the said James, and had his bond of relief, and so behaved to have retention. Answered, He was not distressed, and had a distinct security for relief of these sums. The Lords, remembering they had granted retention to my Lord Sinclair against Sir James Cockburn's creditors on this ground, they sustained Sir Patrick Scott's reason of suspension, and allowed him to retain for his own relief, he always assigning the charger to all the collatera securities he had for these debts.

Fountainhall, v. 1. p. 590.

1701. February 27. ALISON and BLACK *against* MR. JAMES HART.

No. 25.

THOMAS CESSFORD, the said Mr. James, and another, having granted bond to one Handyside for 1,000 merks, and the creditor afterwards craving farther security, Cessford did prevail with Black to bind with him in a bond of corroboration. Cessford being broke, Handyside distresses Black, and causes him pay the whole, and takes an assignation in one Alison's name to the first bond, and thereon causes charge Mr. James Hart; who suspends on this reason, that William Black, the charger's cedent, standing bound in a bond of corroboration as co-principal with Cessford, who was indeed the principal debtor, Black is as much co-principal as if he had been in the first original bond, and so must deduct his own part, and can only insist against Mr. Hart for his proportion *pro rata*, his security being only *accumulando jura juribus*. Answered for Black, That though I be bound conjunctly and severally, yet, *ex natura rei*, I am only a cautioner, and the very bond carries, that Cessford, the co-principal, had received the money before, and so I only *accessi ejus obligationi*, which is the definition of a cautioner; and law looks more to

Cautioner in a
bond of cor-
roboration.

No. 25. things than words, according to that rule *plus valet quod agitur quam quod simulate concipitur*; they, in the first bond, are all principals as to me, and therefore they must relieve me of the whole, without deducting of any part, and every one of them is as much bound *in solidum* to relieve me as Cessford was; and on the view of this security and relief, I did the more frankly engage in the corroboration; and though I be engaged conjunctly and severally, and as *correus debendi et promittendi* to the creditor, for his security, which was just; yet, by these words, *hoc non agebatur*, to cut me off from my full relief against the principals in the first bond. Replied, The common law *ex epistola divi Hadrian*: has introduced *inter correos debendi beneficium divisionis*, which privilege and exception is competent, whether they be bound in the same obligation, or in different ones, L. 3, D. De duob. reis, “parvi refert simul spondeant, an separatim promittant, cum hoc actum inter eos sit, ut duo rei constituentur, et ut nulla sit novatio;” neither does it import which of them get the money, L. 4. C. Eodem Tit. and therefore Mr. Black is as much bound as if he had been one of the co-principals *et correi debendi* in the first original obligation, and cannot force Mr. Hart to pay the whole; and the Lords found so in a more favourable case, Arnold *contra* Gordon, No. 19. p. 14641. that a cautioner in a suspension having paid the debt, and recurring against the obligants in the first bond, the Lords found he was bound to deduct his own part. The Lords thinking the case *in apicibus juris*, betwixt equity and strict law, they resolved to hear it argued in their own presence in the beginning of June next.

This case was submitted.

Fountainhall, v. 2. p. 111.

1701. December 18.

AGNES LOCH, and LORD STRATHALLAN, *against* LORD NAIRN.

No. 26.

The same subject.

JOHN GRAHAM, post-master, and Lord Nairn as cautioner, granted bond to Mr. John Colvill, advocate, for £.1000 Scots. Agnes Loch, as relict and executrix to the creditor, takes out caption against John Graham the principal, who to prevent incarceration, grants a new bond of corroboration, narrating the former bond, and in this Strathallan is cautioner, who at last pays the debt to Loch, and takes a discharge and assignation, and in his cedent's name he pursues Nairn to pay. Alleged, I cannot pay the whole; for, though it be in Loch's name, yet it is for Strathallan's behoof, and that being acknowledged, then he must be considered as a co-cautioner with the Lord Nairn, cautioner in the first bond, and therefore can only have recourse against the other cautioner, deducing his own part. Answered, There was no *negotium gestum* nor society betwixt Strathallan, and the cautioner in the first bond; but I have acquired an assignation, *tanquam quilibet*, and I engaged the more frankly that I saw you antecedently bound, whom I considered as principal to me, and so bound to relieve me. This is nearly the