

same case with that marked *supra*, 27th February, 1701, Alison and Black *contra* Hart, No. 25. p. 14643. which was then ordained to be debated in presence, and was afterwards submitted, and the arguments on both sides may be read there; to which was added, that my Lord Stair owned himself to be of the opinion that he could not recur *in solidum*, Tit. 8. Of Recompence, § 8. with a decision from Spottiswood, Libraik against Vaus, No. 47. p. 2116. *voce* CAUTIONER; and Lib. 1. Tit. 17. § 20. Some of the Lords laid hold on this specialty to take it out of the general abstract point, that in the bond of corroboration the Lord Nairn is also mentioned as bound with Strathallan, but does not subscribe; and what if he offered to subscribe it now, in that case the relief would clearly divide, and Strathallan could no trecur *in solidum*. The Lords, by the plurality, found he had not relief *in solidum*, but only *pro rata*. It carried with a struggle.

Fol. Dic. v. 2. p. 379. Fountainhall, v. 2. p. 130.

1703. December 1.

CLARKSON in Coldingham *against* RICHARD EDGAR of Newton.

BELL of Belford, and Edgar of Newton, grant bond to one William Logan for 1000 merks in 1664. Logan charging for his money, Belford prevails with David Home to give Logan a bond of corroboration of the debt in 1670. Home being afterwards distressed for the sum, he takes course with it, and on payment obtains an assignation to the first bond where Edgar was bound with Belford; and the right of this comes by progress to Robert Clarkson, who pursues Edgar of Newton for payment. His first defence was, That Home, his author, by granting the bond of corroboration, became upon the matter a co-cautioner with Edgar of Newton, and so can only claim the one half, and he must deduct and allow David Home's part, which makes the other half, seeing cautioners must relieve each other *pro rata*, and suffer equal deduction; and that it has been so decided, 23d February, 1671, Arnold *contra* Gordon, No. 19. p. 14641.; and 18th December, 1701, Agnes Loch and the Viscount of Strathallan *contra* the Lord Nairn, No. 26. p. 14644. Answered, The decisions did not meet with the pursuer's case, for there they were bound as cautioners with the principal who granted the corroboration as well as they; but here Belford, the principal debtor, is not bound in the corroboration, but only David Home. *2do*, In Strathallan's case the corroboration was drawn to have been signed by Nairn likewise, who did not sign, though *intuitu* of his binding Strathallan corroborated. *3tio*, If David Home had paid the debt when he gave the bond of corroboration, and taken an assignation, he would have made Newton pay him the whole, and *perinde est*, that he gave his corroborative security, which can never accresce to Newton, with whom *nullum gessit negotium*. The Lords found this case different from the former decisions, and that Newton could crave no deduction here, but was liable *in solidum*. Then he alleged, *2do*, I must have retention and compensation, because, before ever

No. 26.

No. 27.

A cautioner in a deed of corroboration paying, may recur *in solidum* against the cautioners in the original bond.

No. 27. David Home assigned this bond to Clarkson, I was bound cautioner for the said David to Mr. John Veitch, minister at Foulstruther, and sundry others his creditors, and he was expressly bound to free and relieve me of the same, and since that time I have been distressed on these cautionries, and forced to make payment. Answered, His being cautioner before the date of the assignation *non relevat*, to afford him either compensation or retention, unless he had been distressed and made payment before the intimation, as was found, Wallace *contra* Edgar, No. 26. p. 837. *voce* ASSIGNATION; and Stair, 4th July, 1676, Rolla *contra* Alexander Brownly, No. 121. p. 2653. *voce* COMPENSATION, where the Lords found a debtor taking assignation to his creditor's debts could not compensate, unless it was intimated before his debtor was denuded by assignation, otherwise there was no *concursum debiti et crediti* before intimation. Replied, The case of the decisions cited was, where assignations were taken to extrinsic debts, where the creditors, whose bonds were assigned, could know nothing thereof till intimation was made to them; but here David Home, when he assigned Edgar's bond to Clarkson, he knew very well that he was standing debtor to him by clauses and obligements of relief to free Edgar of his cautionries for him; in which case the Lords have always found such a cautioner, even before distress and payment, had right to seek retention and compensation even against a singular successor and an assignee for an onerous cause, as was decided, 24th December, 1690, betwixt the Lord Ballanden and the Lord Sinclair, and Sir James Cockburn, (not reported,) and since that time, betwixt Sir Patrick Scott of Ancrum and Walter Porterfield, No. 24. p. 14643. about a debt of James Scott's of Bristo. Some thought, if one be engaged as fidejussor or expromissor for another in a bond, and if that other afterwards become cautioner for him again, that here his *jus retentionis* may be well founded even before distress, because I considered they cannot in law compel me to pay till they first relieve me of my cautionry, and I will have *jus retentionis* till then; but the Lords thought there was no difference which was first, but sustained the compensation, especially seeing he has now made payment of the same.

Fol. Dic. v. 2. p. 379. Fountainhall, v. 2. p. 195.

* * Dalrymple reports this case :

ADAM BELL, as principal, and his son and George Edgar, as cautioners, grant a bond of 1000 merks to Logan. The creditor dying, his relict confirms; and, having used diligence against the principal and cautioners, David Home grants a bond of corroboration; whereupon he being distressed, pays the debt, and takes assignation against the principal and cautioners in the bond corroborated.

Robert Clarkson, as having right by progress from David Home, pursues Richard Edgar, as representing one of the cautioners in the bond; for whom it was alledged; That David Home becoming bound in the corroboration, is upon the matter a cautioner; and there being two cautioners in the bond corroborated, he ought to deduct a third part as his proper share; as was found in the like case,

23d February, 1671, Arnold against Gordon, No. 19. p. 14641. where a cautioner in a suspension, paying the debt, and taking assignation against the principal and four cautioners, in a former bond, it was found, that he ought to deduct a fifth part, as if he had been a co-cautioner in the first bond. The like was found in the case of the Viscount of Strathallan against the Lord Nairn, No. 26. p. 14644. where John Graham, as principal, and the Lord Nairn, as cautioner, having granted a bond, and the said John Graham, as principal, and the Viscount of Strathallan, as cautioner, granting a corroboration, the Lord Nairn's heir being pursued at the instance of the creditor or his representative, for the behoof of the Viscount of Strathallan, cautioner in the corroboration, "The Lords found the Viscount was obliged to deduct his share, as if he had been co-cautioner in the bond corroborated."

It was answered: That bonds of corroboration are granted as additional securities to the creditor, and those who become bound in such corroborations do not intend any relief or ease to the former cautioners; but, when they pay, may lawfully take assignation, and recur against the principal, and all former obligants, without deduction; for there is neither law nor reason, nor the presumed intention of any of the parties, contracting to ease the former cautioners, by the accession of new ones; for the former cautioners have no concern or dealing in such corroborations; nor is the debtor or principal concerned; much less can it be interpreted the design of the new cautioner to ease the former cautioners, or to lay any further burden upon himself, than to secure the creditor. And as to the practise Arnold against Gordon, it is a single decision, no ways agreeable to the analogy of law, nor intention of parties.

As to the case of the Viscount of Strathallan, there was a speciality in it, which moved the Lords, viz. the corroboration was framed to have been granted by the principal and cautioners in the former bond, and the Viscount of Strathallan as a further cautioner added; and albeit the former cautioners being already bound, did not sign, because the creditor was not solicitous to have them; yet the Viscount having signed a bond in which they were inserted, it was sufficiently clear, that he was willing to be a co-cautioner with them; and, even in that case, the Lords were not unanimous; but the foresaid speciality was particularly insisted on, and the motive of the decision.

2do, et separatim, This case differs from both the former; for in these the principal was bound, as well as a new cautioner; but here David Home interposes alone, both for principal and former cautioners; and so is no ways as a cautioner, but adhibited to prevent the creditor's rigorous diligence.

The Lords repelled the defence, and found, That the pursuer was not obliged to grant any allowance for David Home his cedent's being bound in the corroboration."