1745. *July* 10.

ELIZABETH MIRRIE, Relict of James Pollock, *against* Sir ROBERT POLLOCK of that Ilk.

No 58.
A cautioner granting a bond of corroboration with a new cautioner, is bound to relieve the new cautioner entirely; not of a proportion.

THOMAS POLLOCK of Balgray, as principal, and Sir Robert Pollock, as cautioner, surety, and full debtor, became bound to Isabel Anderson for the sum of L. 1000 Scots.

Balgray, the principal, having died in bad circumstances, leaving his children under age, when the seven years were upon the point of expiring, the creditor registrated the bond, in order to charge Sir Robert the cautioner. Upon which Sir Robert, and James Pollock, brother to Balgray the deceast principal, granted a bond of corroboration, wherein they narrated the original bond granted by the deceast Balgray as principal, and Sir Robert as cautioner, and after subsuming that the principal sum therein contained, and annualrents from the term therein mentioned were resting, extending to the sum of . . . , and that Isabel Anderson the creditor had, at their request and desire, and for their granting these presents, superseded payment to the term underwritten, they, in corroboration of the said bond, 'become bound to pay the said accumulate sum.'

James Pollock having paid the debt upon discharge and assignation, Elizabeth Mirrie his relict and executrix-creditrix pursued the present Sir Robert Pollock, as representing his father the cautioner, for relief of the whole sum paid. For whom it was *alleged*, That he was only liable in relief of the one half; for that Sir Robert having been only himself cautioner when James Pollock became bound in a bond of corroboration with him, they became conjunct cautioners for the representatives of the principal, and the relief must divide between them, as if they had been both bound in the original bond; that such appeared to have been James Pollock's own notion of the matter, when he provided for no relief in the bond; and that if there was place for extrinsic conjectures, the natural supposition was, that James Pollock had interposed to save his brother's family from diligence.

Nevertheless, the LORDS found, 'That James Pollock was only to be held as cautioner for Sir Robert in the bond of corroboration, and that the pursuer in his right was entitled to a total relief.'

It is no doubt in general true, that the equity on which the relief among cautioners is founded (for as *nullum negotium gestum est* between them there is none in strict law) obtains no less where they are bound in different deeds, and at different times, than where they are bound in the same deed. And so it has been often found, that where the principal granted bond of corroboration with a new cautioner, there was a mutual relief between the cautioner in the original bond, and the cautioner in the bond of corroboration; particularly, 15th December 1722, Murray of Broughton against the Creditors of Orchyardtoun *; from the

* *voce* SOLIDUM ET PRO RATA.

No 58. analogy of which decision, which was affirmed by the House of Peers, though there was only an appearance *ex parte* for reversing the decree, and from the general presumption that the interposition of a new cautioner is on account of the principal debtor, some able Judges were for sustaining the defence in this case; and, it may be admitted, that the general presumption lies that way. But the circumstances of the case, upon which the decision of all questions of this kind depends, appeared to the Court to be sufficient to elude such presumption here; for as the principal debtor was dead, the circumstances of his children incumbered, as there was direct access to diligence against the cautioner, and last of all, as it was become necessary to compel him to pay, as his cautionry-obligation was near expiring, and the bond actually registrated for that end, it was thought the intention of the bond of corroboration could be supposed to be no other than to save the cautioner from diligence.

Accordingly in every case wherein it appeared from circumstances, that the interposition of the new cautioner was on account, or at the desire, of the cautioner in the original bond, the new cautioner has been found entitled to a total relief from the cautioner on whose account he interposed.

Fol. Dic. v. 3. p. 119. Kilkerran, (CAUTIONER.) *No 2. p. 117.*

*** D. Falconer reports the same case:

THOMAS POLLOCK of Balgray, as principal, and Sir Robert Pollock of that ilk, as cautioner, soverty, and full debtor, granted bond for L. 1000 Scots, obliging themselves therefor conjunctly and severally.

On Thomas Pollock's death, James his brother, and Sir Robert Pollock, gave a bond of corroboration, narrating, that the defunct was owing the creditor L. 150 Scots by his holograph note, and that the said sums, with annualrent owing upon them amounted to L. 1290, and seeing the creditor had, at their desire, and for their granting the said bond, superseded payment of the foresaid bond, and of the foresaid holograph note, binding and obliging themselves, *&c.*

James Pollock having paid the debt, or part thereof, Elizabeth Mirrie, his relict and executor, pursued Sir Robert Pollock for relief; and the question was, if that relief should be for the whole, or the half, as conjunct cautioners.

THE LORD ORDINARY, 4th July 1744, 'Found that Sir Robert Pollock, by granting the bond of corroboration of the original bond in which he was bound cautioner, soverty, and full debtor conjunctly and severally, became thereby principal debtor for the sum therein contained, and interest due thereon at the date of the corroboration; and found James Pollock, the pursuer's husband, could only be held as cautioner for Sir Robert in the bond of corroboration, and therefore that he was, and the pursuer, now in his right, entitled to a total relief against the defender Sir Robert Pollock; and therefore, found him liable in the sum contained in the bond of corroboration, so far as it extended to the sum and interest due on the original bond.

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Pleaded in a reclaiming bill, That a cautioner is entitled to relief, *actione mandati*, or *negotiorum gestorum*; but, by strict law, there is no relief amongst co-cautioners; this has been introduced by equity, and upon that foundation, obtains, whether the cautioners be bound in the same, or different deeds.

The parties here appear to be both cautioners for Pollock of Balgray; they are equally taken obliged in the bond, and it does not appear by it, that either became bound on account of the other. If the pursuer allege that her husband acceded on Sir Robert's account, and not to serve his brother's family, it must be incumbent on her to prove it, as there is no such thing in the bond; and there is besides this special circumstance in the case, that none of them were antecedently bound in the holograph notes; so that with regard to the sum in it, the relief must certainly be for the one half; and, as the two sums, with annualrents upon them, are accumulated into one capital, the same rule of relief must apply to both.

Answered: The debt corroborated was Sir Robert's, and James acceded thereto, which if he had not done, diligence would certainly have been done upon it; the principal debtor was dead, no ready diligence could be had against his children, to make it be presumed the accession was on their account; and it is affirmed he died bankrupt, so that they will never represent him.

When the principal grants a bond of corroboration, with a new cautioner, there the whole cautioners interpose on his account, and may be entitled to mutual relief, which was the case of Murray of Broughton, 15th December 1722; and yet, in this case it has been differently decided, 1st December 1703, Clarkson *against* Edgar, observed by Fountainhall and Dalrymple; and 14th February 1705, Brock *against* Lord Bargeny, by Dalrymple, (All *voce* SOLIDUM ET PRO RATA.)

Nothing can be inferred from the note being corroborated jointly with the bond, for it being without prejudice of the original writs, they may be governed by different rules, and James Pollock, on payment, might have demanded an assignation of the original bond, and thereon operated his relief.

Even with respect to the note, it may be presumed, Sir Robert would not have obtained a surcease of diligence upon his bond, without giving security for it, and therefore if the note, which is amissing, were found, James Pollock's Representatives would be entitled to a total relief of it, as having corroborated it on Sir Robert's account.

THE LORDS having ordered decisions to be searched for, these were given in, 18th December 1701, Loch *against* Nairn, Fountainhall; Harcus (Cautioner.) February 1685, Ker *against* Gordon; Dalrymple, 3d December 1717, Godfray *against* Quesnoy, (All *voce* SOLIDUM ET PRO RATA.)

THE LORDS adhered.

Act. *A. Macdowall.* Alt. *H. Home.* Clerk, *Forbes.*

D. Falconer, p. 117.

*** Lord Kames also reports the same case:

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Thomas Pollock of Balgray having borrowed L. 1000 Scots from Isabel Anderson, granted bond to her for the same in October 1713; 'And he as principal, and with him Sir Robert Pollock of that ilk, as cautioner, soverty, and full debtor, bound and obliged them, conjunctly and severally, to repay the same.' And the bond further contains an obligation upon the principal to relieve his cautioner. Thomas Pollock of Balgray having died, leaving his children under age, the said Sir Robert Pollock and James Pollock, writer in Edinburgh, brother to the deceased, granted a bond of corroboration to the said Isabel Anderson, containing the following clause: 'And seeing the foresaid sum of L. 1000 Scots, and the annualrents thereof from the 9th of October 1718, are resting owing, and that the said Isabel Anderson hath, at our request and desire, and for our granting these presents, superseded payment of the foresaid sums to the term of payment underwritten; therefore wit ye us, in corroboration of the foresaid bond, to be bound and obliged, conjunctly and severally, to content and pay to the said Isabel Anderson, *&c.*'

Elizabeth Mirrie, in the right of her husband James Pollock, brought a process against the Representatives of the principal debtor, and against Sir Robert Pollock the co-cautioner, concluding against both a total relief. There was no compearance for the Representatives of the principal debtor. But for Sir Robert Pollock the following defence was made, that James Pollock and the defender, by granting the bond of corroboration, became conjunct cautioners for the representatives of Balgray; that neither of them had a total relief against the other; and therefore, that the pursuer, in the right of her husband James Pollock, can only have relief against the defender for the half.

Upon this defence, the Lord Drummore Ordinary, pronounced the following interlocutor: 'Finds, that Sir Robert Pollock, by granting the bond of corroboration to Isabel Anderson of the original bond due to her, in which he was bound cautioner, soverty and full debtor, conjunctly and severally, became thereby principal debtor for the sums therein contained. And finds James Pollock, the pursuer's husband, can only be held to be cautioner for Sir Robert, in the bond of corroboration; and therefore, that the pursuer, now in her husband's right, is entitled to a total relief against the defender Sir Robert Pollock.'

The substance of a reclaiming petition for Sir Robert is as follows: *1mo*, Mutual relief among co-cautioners, unknown at common law without a clause in the bond agreeing to that mutual relief, is established without such a clause, on the most solid grounds both of justice and of expediency. Justice requires, that parties who are all equally subjected to one common burden, ought to bear that burden equally; and expediency requires, that a creditor should not be permitted to deal arbitrarily by relieving one cautioner at the expence of another.

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And these reasons both of them take place equally, whether the cautioners be bound in the same, or in different bonds. 2*do*, Where a cautioner grants a bond of corroboration singly, the presumption is, that he interposes at the desire only of the principal debtor; unless the contrary be expressed. And *lastly*, where a cautioner in the original bond joins with a new cautioner in a bond of corroboration, without qualifying at whose desire or request, or for whose behoof, this bond of corroboration is granted, the presumption is, that the interposition is at the request of the principal debtor, or for his behoof. And the foundation of this presumption is, that, if either had a view to a total relief, he would not have failed to provide it to himself by a clause of relief, or at least to narrate the true *res gesta*, viz. that he interposed at the other's request.

'THE LORDS adhered to the Lord Ordinary's interlocutor.'

The President urged this topic in favour of the interlocutor, that it is to be considered *cujus negotium geritur*. Here, James Pollock not being antecedently bound, and the principal debtor being dead, the presumption must lie, that James Pollock gave his credit to relieve Sir Robert from diligence. Tinwald said, that, by this argument, a new cautioner should have a total relief in every case against the cautioners in the original bond; for, by interposing his credit, which of course supersedes execution against all the obligants, it may be said, that *eorum negotium gessit*. Elchies was violently against the judgment.

Rem. Dec. v. 2. *No* 71. *p.* 110.

1752. MARGARET FAIRLIE *against* EARL of ROTHES.

No 59.
What compulsion against the principal, is competent to the cautioner for obtaining relief?

MARGARET FAIRLIE, in the right of her deceased husband William Hay, who had become bound in great sums as cautioner for the Earl of Rothes, insisted in a process against the Earl for relief, and obtained an interlocutor from the LORD ORDINARY, 'decerning the defender to free and relieve her of the whole 'debts contained in a list amounting to L. 4029 Sterling of principal; and for 'that end, to make payment to the respective creditors, so as the pursuer may 'obtain her husband's bonds and bills retired, or a sufficient discharge thereof.' The pursuer thereafter insisted, that the defender should be decerned to pay to her the sums contained in the foresaid list, that she might apply the same for her relief. It was *answered* for the defender, That an obligation of relief is a *factum præstandum*; to perform which, there can be no other compulsion but a charge of horning, denunciation and caption; that it is not in the power of this Court to substitute any compulsion in place of what is provided by common law; and that the demand of paying the sum to the pursuer, in order that she may relieve herself, is not founded on the obligation of relief granted by the defen-