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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.

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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-

No 59. der to the pursuer. It was *replied*, That the compulsion provided by common law, though sufficient in common cases, cannot be effectual in the present, or rather there can be no such compulsion in the present case, peers being privileged against captions by the articles of union; and escheats upon denunciations for civil causes being taken away by the late statute. This point being new and singular, was taken to report, and the topics urged for the pursuer, were what follow.

In point of fact she premised, *1mo*, The causualties of single and liferent escheat, incurred by horning and denunciation for civil causes, are taken away and discharged for ever, by act 20th Geo. II. entituled, 'Act for taking away 'the tenor of ward-holding in Scotland,' *&c.* And that not only when the horning proceeds upon a liquid ground of debt, but also when it is for performance of obligations; for so the act declares. The denunciation then upon a charge of horning for a civil cause, is rendered by this statute *brutum fulmen*, no better than a simple charge of horning, or than a decree without a charge. *2do*, Peers being, by the articles of union, privileged against personal attachment, the compulsion by caption cannot take place against them. And *lastly*, The defender's estate being strictly entailed, and the debts in question not being effectual against the entail, the defender's death will reduce the pursuer and her children to beggary, if she obtain not relief from the defender himself.

Thus stands the pursuer's case; and even abstracting from her peculiar circumstances, the case in general well merits the attention of the Court. The strongest compulsion for performance of *facta præstanda*, viz. the penal consequences of a denunciation, are taken away with regard to all the lieges; and peers, who are a numerous body, are not subjected to caption. The compulsion of the common law being thus removed, it is the province of the Court of Session, as a court of equity, to provide another remedy; and can one more proper be invented, than to decern the debtor to pay to his cautioner, in order that the cautioner may relieve himself by making payment to the creditor. This very thing ought to be the consequence of the interlocutor obtained by the pursuer. By that interlocutor, the defender stands bound to relieve her: The next step is, to assign him a day for performance; and if he fail, the last step is to decern him to pay to the pursuer herself: These different steps naturally follow one after another, in order to fulfil the bond of relief.

This power of the Court, as a court of equity, gave existence to adjudications *cognitionis causa*, to adjudications in security, and to many other diligences which have no foundation in common law; and no case calls louder for a remedy than the present. Let an adjudication in implement be attended to in particular. This process was invented by the Court of Session, to make effectual minutes of sale and dispositions of land not containing procuratory nor precept. Yet a remedy in these cases was much less necessary than in the present; for when an adjudication in implement was introduced, the compulsions of denunciation and caption were in full vigour.

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The remedy introduced by the act of sederunt 1582, to enforce performance of decrees for liquid sums, is not less remarkable. Before that period, no execution was competent upon liquid debts, other than poinding, apprising, and arrestment; but the Court observing, that defenders did often secret their effects, in order to disappoint their creditors obtaining decrees against them for liquid sums, did enact, that letters of horning as well as of poinding, should be directed upon such decrees. The Court will also have it in their eye, that when our Peers were exempted from personal execution by the union, whereby a second diligence against them as witnesses was rendered ineffectual, a remedy upon that occasion was invented, which is to appoint them to appear under a penalty; and this remedy, though extremely rational, was an act of power as great, if not greater, than that now contended for.

It shall only be added, to enforce the present demand, that the pursuer is in a more favourable case than ever again can exist. After the ward-act, it is the cautioner's own fault if he provide not to himself a clause in his bond of relief, obliging the debtor to pay the money to him, in order to relieve himself; which is a most rational precaution, where the remedy provided at common law is taken away. But in the present case, William Hay became cautioner at a time when the law provided him a compulsion to force the principal debtor to pay the debt, for he died before the ward-act had a being; and if the remedy competent to him and his representatives be taken away by statute, it is but common justice that another be put in its place.

It was suggested in behalf of the defender, that the pursuer had a remedy in her power, which was to apply her own funds for payment of the debts, and to take assignments upon which she can proceed to execution. But in the *first* place, this is no remedy at all to enforce performance of a *factum præstandum:* It is not a remedy that obliges the principal debtor to pay, in order to relieve the cautioner: It is the quite contrary; it is saying to the cautioner, he is to have no relief as cautioner, but must pay the debt in order to claim as creditor. And in the *next* place, it is frequently difficult, and in the present case impracticable, to use this remedy; for the pursuer has neither credit nor funds sufficient.

The pursuer concluded with the following observation, that in borrowing money, the cautioner has indeed an opportunity to demand a bond, obliging the principal debtor to make payment to him for his relief; but in many cases there is no such opportunity; as, for example, where a decree is taken against an heir for a moveable debt. This question therefore is of general importance.

This question was delayed through hopes of an accommodation; and perhaps the pursuer will not have occasion to demand the judgment of the Court. *See* PEER.

Fol. Dic. v. 3. p. 121. Rem. Dec. v. 2. No 130. p. 282.