

1713. June.

PATRICK BUCHANAN, Merchant in Glasgow, against JOHN FRENCH, Merchant there.

WILLIAM THOMSON, John Story, and John French, as principals, and Patrick Buchanan, as cautioner for them, having granted bond conjunctly and severally for 1,000 merks to John Acheson, wherein the three principals obliged themselves to relieve one another *pro rata*, and to relieve the cautioner in general terms, without mentioning either *pro rata*, or conjunctly and severally; in a process at the instance of Patrick Buchanan the cautioner, who paid the debt upon distress, and took assignation from the creditor for his relief, against John French, one of the co-principals;

The Lords found John French liable to relieve Patrick Buchanan *in solidum*, and not *pro rata* for his own third part only; albeit the co-principals stood not obliged in the bond to relieve him conjunctly and severally, but only to relieve him in general; in regard, the co-principals being bound to the original creditor conjunctly and severally, were also bound so to the cautioner, who interposed conjunctly and severally for them, and by payment upon the assignation, came in place of the creditor; for the cautioner's relief must be equal to his obligation.

Fol. Dic. v. 2. p. 380. Forbes, p. 682.

1775. November 30.

ELIZABETH M'KENZIE against M'KENZIE of Blackhill.

MARTIN and M'Kenzie of Blackhill granted bond, conjunctly and severally, to Urquhart. On this bond diligence was raised, and a caption taken out against both the obligants. Sir George M'Kenzie became bound with them, conjunctly and severally, in a bond of corroboration; which bond proceeds on the recital of the former one, and of the diligence done upon it.

Sir George M'Kenzie paid the debt, and took an assignation to the original bond of corroboration and diligence. Elizabeth M'Kenzie his executrix pursued Blackhill for a total relief.

Blackhill produced a bond of relief granted to him by Martin; from which it appeared, that he had been cautioner only to Martin in the first bond; and he pleaded, That Sir George and he were co-cautioners, and that cautioners are liable to each other in a proportional, not total relief: That it matters not whether all the cautioners become bound in the same, or in separate deeds; and so it was found, 15th December, 1722, Murray *contra* the Creditors of Orchardtown, No. 31. p. 14651.

Answered for the pursuer: A cautioner must be entitled to a total relief from all those for whose benefit he interposed. In this case, caption had been taken out

No. 37.

Extent of cautioner's relief from co-principals.

No. 38.

A cautioner for two persons who were *ex facie* co-obligants in a bond entitled to a total relief against both, though it appeared, by a separate deed, that one of them was only cautioner for the other.

No. 38.

against both Blackhill and Martin; Sir George joined with both in the bond of corroboration, and from that bond it does not appear who was the principal debtor. It must therefore be presumed, that Sir George interposed at the desire of both Martin and Blackhill, and had both of them in view for his relief. When a new cautioner grants singly a bond of corroboration, he is entitled to a total relief from the former cautioners, 1st December, 1703, Clarkson *contra* Edgar, No. 27. p. 14645. and the equity here is still more apparent. The case is different where the principal alone becomes bound with a new cautioner; for that the presumption then is, that the new cautioner relied on the principal alone for a total relief; and to this the decision of Murray *contra* the Creditors of Orchardtown relates.

“ The Lords found relief competent to Elizabeth M^cKenzie *in solidum*, against both the obligants in the original bond.”

Act. Fraser.

Alt. Hamilton-Gordon.

Reporter, Milton.

Fol. Dic. v. 4. p. 294. Fac. Coll. 168. p. 249.

* * * Lord Kaimes reports this case :

IN the year 1741, M^cKenzie of Blackhill, and Martin of Inchfuir, granted bond of borrowed money, for the sum of £.100 Sterling, to Urquhart of Brealangwell, obliging them, conjunctly and severally, to pay the same, with annual-rent and penalty at the term of Martinmas next. This bond being assigned to Leonard Urquhart, clerk to the signet, he prosecuted diligence against both the obligants, charging them with horning, denouncing them rebels, and taking out a caption.

The execution of this caption was prevented by a bond of corroboration, in which Sir George M^cKenzie of Granville became an obligant. The bond of corroboration, after narrating the original bond and assignation, with the diligence done by the assignees, proceeds thus: “ And seeing the said Leonard Urquhart, for and upon account of our granting to him the corroborative security underwritten, which we are most willing to do, is content, and agrees to supersede the payment of the said sums until the term after-mentioned; therefore, we, the said Sir George M^cKenzie, John Martin, and Daniel M^cKenzie, do hereby, without prejudice to, or derogation from the bond, assignation, and diligence, above narrated; but, in corroboration and further security thereof, bind and oblige us, our heirs, &c. jointly and severally, to make payment to the said Leonard Urquhart,” &c.

Sir George having paid this debt, took an assignation to the original bond of corroboration and diligence. After his death, Dame Elizabeth M^cKenzie, his relict and executrix, insisted for payment against Blackhill, the other obligant being in shattered circumstances. For the defender was produced a bond of relief from the other obligant to him, which, for the first time, showed that he was only cautioner. This fact founded him in the following defence, That cautioners are entitled to mutual relief, whether bound in the same

bond *unico contextu*, or bound in different bonds at different times; and therefore, that the pursuer, in the right of Sir George co-cautioner, is bound to sustain the one half of the loss, and is only entitled to demand from the defender the other half.

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The pursuer, admitting the principle, denied its application to the present case; in which Sir George became cautioner for both the obligants in the original debt, and therefore entitled to relief against both, *actione mandati*. There can be no doubt of the maxim, that if Sir George interposed at the request of both, the *actio mandati* will lie against both *in solidum*. The doubt only can be, Whether both concurred in the mandate, or only Martin, the principal debtor. This doubt is removed by the circumstances of the case, and by the tenor of the bond of corroboration. Both obligants were equally under distress. It does not appear by the bond of corroboration who was the principal debtor: They appear to be equally concerned. They equally consent to Sir George's interposition; and as there is no mention for whose behoof Sir George interposed, the presumption must lie, that it was at the request and for behoof of both equally.

“ The Lords found that relief is competent to Dame Elizabeth M'Kenzie, the pursuer, *in solidum*, against both obligants in the original bond.”

Sel. Dec. No. 24. p. 27.

SECT. IX.

SOCII liable IN SOLIDUM OR PRO RATA.—Partner of a Company paying the Debts.—Whether Partners are bound to contribute beyond their Stock.

1665. December 18.

M'LEOD against YOUNG.

HARRY HOPE, Walter Young, and John Govan, merchant in Edinburgh, by their bill of credit given to Peter Clark, and ——— Donaldson, for getting some cows for their use, directed to the Lord Macdonald, or any other, bound and obliged themselves to pay and answer such bills as the said Clark and Donaldson should prove upon them; and the price of the said cows being arrested in their hands, they suspended upon multiplepoinding, that they could not be liable for the sum of £.80 Sterling, drawn upon them conjunctly and severally, but only for their several parts. The Lords found the merchants were all and every one of them liable *in solidum*, and that there was a society of the cows among

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