APPENDIX.

PART I.

ACCESSORIUM SEQUITUR PRINCIPALE.

1777. *February* 12.

THE TRUSTEES OF THOMAS BOYD OF PITCON, *against* ALEX. EARL HOME.

No. 1.
Diligence used upon a bond corroborated, found not to save from prescription the relative bond of corroboration.

THE particulars of this case, shortly mentioned No. 20. p. 42. are as follow.

In 1638, James Earl of Home as principal, and William Home of Ayton, George Home, younger of Wedderburn, and others, as cautioners, granted bond to Lawrence Henderson, and failing him by decease, to Janet and Barbara Hendersons, his daughters, equally, their heirs, &c. for 3000 merks.

In the same year, another bond for 4000 merks was granted by the same Earl and others, as cautioners, to the same person; and failing him, to two of his daughters equally, with interest and penalty.

Afterward these bonds were conveyed by Lawrence Henderson to his other two daughters, Isobel and Margaret, equally betwixt them and their heirs.

In 1663, the Earl, as principal, and others as cautioners, granted a bond of corroboration to these two ladies for the 3000 merks, and the by-past interest. And of the same date, the Earl, by himself, granted another bond of corroboration to the same ladies for the 4000 merks, with interest.

No. 1. Margaret married Henry Alcorn, and Isobel married Bryce Boyd of Pitcon.

Letters of inhibition were raised by Isobel and Margaret against the Earl upon the original bond of 3000, and relative bond of corroboration, and they also brought an action against the representatives of some of the cautioners in the original bonds, concluding against them respectively for payment, but without libelling upon or concluding for payment of the contents of the two several bonds of corroboration.

Some steps of process took place in this action, the last of which was in July 1688.

From that time no farther claim was made till the year 1718, when Richard Alcorn, the son of Margaret Henderson, entered a claim before the commissioners of enquiry upon the estates of Home of Ayton and Home of Wedderburn respectively, which had become forfeited for their accession to the Rebellion 1715. His claim recites both the original bonds and bonds of corroboration, and takes notice of the inhibition and the old process. Nothing, however, was done farther till 1723; and during this interval, a claim was made to the estate of Wedderburn, which superseded the bond respecting the 4000 merks.

The bond for the 3000 merks was accordingly alone insisted on in the year 1723. The commissioners of enquiry pronounced a decree, which found, *inter alia*, that the bond of corroboration was prescribed, no diligence having been used upon it, but only on the original bond. At the same time Thomas, John, and Jane Boyds, the representatives of Isobel Henderson, were found entitled to the half of the original bond.

A precept was issued from the Exchequer, in June 1732, in favour of these persons, for which they granted an acquittance. Richard Alcorn, whose claim had been sustained to the other half, and in virtue of which his son or his creditors afterward drew their dividend, brought an action in 1728 against William Earl Home, then an infant, as charged to enter heir to James his great-grand-father, concluding for payment of half of the bond of corroboration of the 4000 merks, and for half of the principal and interest due on the original bond of 3000 merks. In this process, a decree *cognitionis causa*, and afterward a decree of adjudication of the estate of Home, were obtained for the whole amount of his demand.

Richard's son James, having conveyed this adjudication to Ann Yule his mother, she brought a process of mails and duties against the tenants on the estate. The process fell asleep in 1741, but was wakened and transferred in 1758, at the instance of Janet Steel, as an adjudger from James and Ann; and Janet afterwards assigned her right to William Wilson, Writer to the Signet.

In the course of the after proceedings, no person in the right of Isobel Henderson or the Boyds was party, and Richard Alcorn's adjudication was in the end restricted to a security for his half of the debt, principal, and interest, without accumulations. The chief debate was upon the point of prescription, which was pleaded by the Earl against both bonds, but which, in respect of the judi-

cial proceedings in the last century, was over-ruled by the Court, and their judg- No. 1.
ment affirmed upon appeal.

No step during all this time had been taken by Isobel Henderson, the other sister, or any in her right, from the year 1688 down to 1768, when an action was commenced at the instance of Thomas Boyd of Pitcon, as heir general to Isobel his grandmother, and another action at the instance of the said Thomas, and Jane Boyd his sister, as executors decerned to her and their grandfather. The Lord Ordinary decerned in absence in terms of the libel, and afterward adhered.

In a reclaiming petition, the Earl of Home pleaded,

Supposing, though not admitting, the original bond of 3000 merks not to be prescribed, yet the bond corroborating it is cut off by prescription, the effect of which will be to free the defender from paying interest upon that interest. The years of prescription have twice run against this bond, and it must of necessity be prescribed, unless it is saved by any proceedings had upon the original bond corroborated.

An action or claim, founded on a bond of corroboration, may with some reason be considered an interruption of prescription, running against the original bond corroborated. This flows from the obvious consideration, that it is impossible for a creditor to claim upon a bond of corroboration, without claiming, at the same time, upon the ground of debt thereby corroborated. The greater and latter security especially refering to the former, must necessarily comprehend it. But the consequence is quite the reverse where the original bond is founded on, and the corroboration totally neglected. The lesser and more early security can never be understood to comprehend the larger and latter one, to which the original security bears no reference, and which must have been totally unforseen when that original security was granted.

The act 1469 expressly requires the party to take document upon the obligation, or security in question, and if he neglect to do so the obligation is cut off. If therefore a party obtains different obligations or securities for the same debt, and if he takes document on one which bears no relation to the other, it follows that the other must suffer prescription, as being totally abandoned and derelinquished.

The ground of the negative prescription is the dereliction of the creditor, from which a discharge or release of the obligation is presumed. A creditor having different securities for his debt, has it undoubtedly in his power to discharge the one and keep up the other. If he can do so directly, he can do so indirectly also, by claiming on the one, and abandoning the other. This bond of corroboration was granted in the year 1663, and yet when the two sisters raised their process in the year 1664, they confined their claim solely to the contents of the two original bonds.

It is of no avail for the pursuers to argue that the bond of corroboration is to be considered as an accessory to the original bond, and that therefore, what-

No. 1. ever can preserve the original bond, must also preserve the bond of corroboration. The principle that *accessorium sequitur principale* applies only to cases where the accessory itself, or the right to it, is equally subsisting and effectual as the principal right. But if the accessory has been cut off and extinguished, either by conveyance, discharge, or prescription, there is no case in which it has been found that the subsistence of the principal right, or documents taken to secure it against prescription, must still have the force of keeping alive, and drawing along with it, the other right which was once accessory of it, although none of those documents did apply to the supposed accessory right, and even although third parties were concerned in the one who were not bound in the other.

It is true, that a document taken against the principal debtor, will preserve the debt against a cautioner, or *vice versa*. But this applies only to the case where the document is taken against one of the obligations upon the very same security or ground of debt in which the other stood bound. In such a case, the document is properly taken by the creditor against one of his debtors upon the obligation itself, which, excluding any presumption of dereliction, saves from prescription. Here no document whatever is taken against any person upon this separate obligation, which may fall to the ground without affecting the validity of the original obligation. If one who is creditor to another in a bond or bill, should afterward get another bond assigned to him in security of it, and yet take no document upon the debt assigned till after the lapse of forty years, the saving his original debt from prescription could not save the accesory debt from being cut off by it. The case of a bond of corroboration is similar, for third parties may corroborate a debt as well as the original debtor, while it would be unreasonable in the extreme should the document taken on the original debt preserve the obligation against all who were afterward bound in the separate bond of corroboration.

It can make no difference that the Earl of Home was bound in both securities. It is only on the footing of an interruption used against a cautioner, that the plea of the pursuers is maintained. And if this plea could not have been good against the cautioner himself, it cannot be effectual against the Earl or any other obligant in the bond. The prescription must be equally available to all the obligants.

If any thing can be accessory to a debt, the diligence raised upon it must be understood to be so. Yet the preserving the debt does not preserve the inhibition upon it, 22d June 1681, Kennoway *contra* Crawford, No. 9. p. 5171. 23d November 1682, Moutray *contra* Hope, No. 367. p. 11187. 1st February 1684, Brown *contra* Hepburn, No. 421. p. 11249. A separate ground of action arises from the one as well as from the other, though still to the same end of operating payment of the same debt, and the preserving the one has therefore not been allowed to have the effect of preserving the other.

Pleaded for the pursuers,

No. 1.

It is an established proposition, that diligence done against a cautioner is sufficient to preserve the debt from being prescribed as to the principal, which can proceed on no other ground but this, that the principal and cautionary obligations are parts of the same indivisible right, which the creditor is understood to follow forth in terms of the statue 1469. Now a cautionary obligation is an additional security, as well as a bond of corroboration. They only differ in this, that ordinarily the obligation in security, though granted at the same time, and in the same bond, is granted by a different person; whereas a bond of corroboration is an additional security granted by the same person, or by different persons at a different time; and when strictly and properly examined, the difference lies only in its being done at a different time. But if this be the only difference, it truly amounts to nothing; for cautioners for the same debt may accede by different obligations or bonds, and at different times; yet in the sense of law they are all equally cautioners; they are all equally bound for the debt; they are all equally entitled to the same privileges of discussion, division, and the *beneficium cedendarum actionum;* which last in our law arises *ex natura negotii* without other connection between the parties, or especial assignment from the creditor.

Many cases have occurred with respect to cautionary obligations, which, from analogy, establish the proposition, that a bond of corroboration and the original bond are inseparable parts of one whole, or of the indivisible relation which exists in the creditor's person, expressed by the terms *right* or *obligation;* and it has been already found in the other branch of this cause, affirmed upon appeal, that in the statute 1469, obligation and right are synonymous. Cautionary obligations, by how many different persons soever granted, or at how many different times soever, are but parts of the same right with the principal obligation. Arnold *contra* Gordon of Holm, 23d February 1671, No. 19. p. 14641. Wallace *contra* Lord Elibank, 25th January 1717, No. 38. p. 3389. The fallacy of the defender's argument consists in maintaining, that a bond of corroboration has no relation to the principal obligation, his major proposition being, that a person doing diligence on the principal obligation takes a document on the one which bears no relation to the other; whereas it is evident, if there be any analogy between cautionary obligations and corroborative obligations, that the relation between the principal and the corroborative obligation is necessary and inseparable; so that no document can be taken upon the one which must not have an effect upon the other.

The individuality of principal and accessory obligations, is established by several decisions, 19th December 1695, Doul and others against Home, No. 11. p. 2077.; 12th February 1712, Scot against Dutchess of Buccleugh, No. 16. p. 3360. Lesley *contra* Gray, January 10th 1665, No. 37. p. 2111.

Besides, by the statute 1661, cap. 62. in terms of which the bonds of corroboration were granted, the obligation to pay up annual-rents is declared by the force and effect of the statute even without a corroborative security. And so

No. 1. standing the law, it is impossible to maintain that the corroborative security in this case was *in duriorem sortem* than the original obligation.

The court at first, of this date (18th June 1776) pronounced the following interlocutor. " The Lords having advised the above-mentioned petition, with " the answers, and heard what is above set forth, they adhere to the Lord Ordi- " nary's interlocutor reclaimed against, so far as concerns the bond for 3000 " merks and bond of corroboration thereof, and refuse the petition and decern." Afterward, upon advising another reclaiming petition and answers, the Court found, " that the bond of corroboration in question is prescribed, sustain there- " fore the defence of prescription as to said bond, and decern."

A reclaiming petition against this interlocutor was refused without answers.

Lord Ordinary, *Auchinleck.* Act. *Solicitor-General Murray, Morthland.* Alt. *Rae.*

J. W.

1802. *December* 7. GILLESPIES *against* MARSHALL.

No. 2.

When no provision is made in a trust-deed, with respect to the interest of a sum, it is accumulated with the principal.

David Sommerville executed a trust-deed, by which he disponed the principal part of his fortune to the children of Janet Watson his niece, the wife of William Gillespie, merchant in Edinburgh, " equally among the whole of " them, share and share alike, and which my said trustees shall pay over to " them upon their respectively attaining the age of twenty-five years, and no " sooner." The trust-deed farther provided, that the share of any child who might die before that age, should accresce to the survivors equally; and, in the event of the whole children dying before their provisions become payable, that the estate should devolve upon the nearest heir of the disponer.

This trust-deed originally seemed to have contained the following clause: " And I hereby declare and empower my said trustees, and their foresaids, to " lay out from time to time, in case they shall see it proper and necessary, " whatever sums they shall judge proper for the education of the children or " grandchildren of the said Janet Watson my niece, of her present or any sub- " sequent marriage, and for putting them to proper businesses, provided their " father shall not be in a situation to afford such expense, or to put them to " such businesses, as my said trustees shall judge right and proper, and what- " ever sum or sums shall be laid out in this manner, shall be deducted from " the share and proportion of my said means and estate falling to the children " or grandchildren, for whose behoof the same is expended." But this clause, though still legible, was deleted; and Gillespie added, that this had been done before signing, " as it is not my intention to give my trust-disponees such " powers as are thereby conferred upon them." The deed farther contained a nomination of the trustees to be tutors and curators to manage the estate and effects of the minors.

Sommerville died in 1798, leaving a considerable fortune. Gillespie brought an action against his trustees, stating, that his income was totally insufficient for