

No 63.

cautioner, after paying the debt, should be allowed to rank as he might have done.

THE COURT were unanimously of opinion, That in the circumstances of this case, where, before any trust-right had been executed by the insolvent cautioner, and where he that continued in good circumstances, had obtained an assignment from the creditor, the ranking ought to go on in the same manner as if no payment had been made.

THE LORDS found, ' That the trustee for the creditors of Sir Robert Maxwell was bound to rank Patrick Heron, and Sir William Forbes and Company, as trustees for him, upon Sir Robert Maxwell's funds for the whole sums due on those debts, in which Mr Heron and Sir Robert Maxwell were jointly bound along with Mr Maxwell of Cargen; but under this condition, that in consequence of their being so ranked, they shall not draw more than one half of the said debts.'

A reclaiming petition for the Creditors of Sir Robert Maxwell was refused, without answers, (on 23d February 1792.)

Reporter, *Lord President* instead of *Lord Gardenston*. For Sir William Forbes and Co.
Solicitor-General, Maconochie. *Alt. Rolland, Abercromby, Honyman*. Clerk, *Home*.

Craigie.

Fol. Dic. v. 3. p. 120. Fac. Col. No 206. p. 433.

The cause was appealed :

June 11. 1794.—THE HOUSE OF LORDS ORDERED and ADJUDGED, That the interlocutor of 8th February 1792 complained of, be, and the same is, hereby affirmed, with the following variations, viz. after the word (for) insert (half,) and after (the) leave out (whole,) and after (Cargen) leave out to the end of the interlocutor, and insert, (each of them having been indebted, as principal, for a moiety thereof, and as security for the other moiety :) And it is further ORDERED and ADJUDGED, That the interlocutor of 23d February 1792, also complained of in said appeal, in so far as repugnant to said interlocutor, varied as aforesaid, be, and the same is, hereby reversed.

1792. November 15.

WALTER SMITON *against* PATRICK MILLER, and Others.

No 64.

A cautioner in a bond of corroboration found only entitled to a proportional relief from the cautioners in the original bond.

ARCHIBALD MILLAR having obtained a credit with the British Linen Company for L. 800, a bond was granted by him, Patrick Millar, John Walker, and other two obligants, whereby they became bound, jointly and severally, to repay to the bank whatever sums should be drawn out by Archibald Millar on that credit.

John Walker died. And the bank having desired another cautioner in his place, a bond of corroboration was granted by the principal debtor and Walter Smiton.

Archibald Millar died bankrupt, and nearly L. 700 in debt to the bank on this credit.

Walter Smiton upon this pursued the cautioners in the original bond for a total relief: None of them appeared but Patrick Millar, who, on the other hand, *contended*, That Smiton must bear an equal share of the loss with them, and

Pleaded: Mr Smiton joined in the bond of corroboration, solely in order to obtain a further indulgence to his friend the common debtor.

Where a person who has granted an obligation with cautioners, renews the same with different cautioners, without referring to the former obligation, the cautioners in the last have no claim of relief, either total or partial, against those in the first: And it appears difficult to find a good reason why the debtor and his new co-obligant, merely by calling the last a bond of *corroboration*, should have it in their power to subject the cautioners in the original bond to so important an obligation as that of relief, especially as the reference to the first bond is commonly that of the creditor, whose object is not to regulate the relief among the parties, but to preclude any presumption that he has passed from the original bond. It seems therefore to be going far enough, to allow the cautioners in the last bond a proportional relief, and to this the granters of the original bond may be held to have consented, as they derive an advantage by having the burden divided among a greater number.

In practice, the Court have sometimes made a distinction between the case where the new cautioner grants the bond of corroboration by himself, and that where he is joined in it by the principal debtor. In the former case, he is held to be cautioner for the original obligants, having right to be totally relieved; in the latter, as an additional cautioner along with the rest, and only entitled to a proportional relief; 18th December 1701, Loch against Lord Nairne; February 1685, Ker against Gordon; 15th December 1722, Murray against Creditors of Orchardton. But in the case, 23d February 1671, Arnold against Gordon, a partial relief only was found due to a cautioner, even where he was joined by none of the former obligants. *See* All these cases *voce* SOLIDUM ET PRO RATA.

Answered: The original obligants were all jointly bound in the first bond for the whole debt, and Mr Smiton did not enter into the second with any view to lessen the extent of their obligation, but merely to grant an additional security to the banking company. He therefore did in fact become cautioner for all of them, and of consequence they are liable *singuli in solidum* to him in total relief. If the new bond had been signed by Mr Smiton only, or if, instead of granting it, he had paid the balance due to the bank and taken an assignment, he would have been entitled to a total relief; and there seems to be no reason why he should in the present case be in a worse situation; Erskine, b. 3. tit. 3. § 69. 1st December 1703, Clarkson against Edgar, *voce* SOLIDUM ET PRO RATA; 14th February 1705, Brock against Lord Bargeny, *IBIDEM*; 10th July 1745, Mirrie against Pollock, No 58. p. 2125.

No 64.

Observed on the Bench: It may be laid down as a general rule, that when there are different cautioners for the same debt, they all stand upon an equal footing as co-cautioners, and are entitled to a proportional relief from one another, whether they are bound in one bond or in separate bonds; unless from circumstances it shall appear, either upon the one hand, that the original bond was meant to be at an end, and the new obligants alone bound; or, on the other hand, that the new cautioners interposed at the desire of the former obligants and to save them from distress, upon the faith of a total relief from them.

THE LORD ORDINARY had found Smiton entitled to a total relief.

THE COURT altered the interlocutor, and found, ' That Millar was only liable to relieve Smiton of a proportional part of the debt due to the British Linen Company, along with the other obligants in the original bond of credit.

A reclaiming petition was refused, without answers, 4th December 1792.

Lord Ordinary, *Henderland.* For Smiton, *Solicitor-General Blair, Wight.*
For Millar, *Rolland, et alii.* Clerk, *Mitchelson.*

R. Davidson.

Fol. Dic. v. 3. p. 120. Fac. Col. No 3. p. 8.

1802. May 20.

MILLIGAN *against* GLEN.

No 65.

A cautioner obtaining security in relief to himself, is bound to communicate the benefit of that security to co-cautioners.

GLEN and Milligan, were co-cautioners for Mouncie in a bond of credit.— Glen obtained for himself an heritable security in relief.

Mouncie became insolvent; and the heritable property over which Glen had security, was sold by trustees appointed by Mouncie. The proceeds were received by Glen, who paid to the bank the half of the sum due by Mouncie upon his cash-account. Milligan, the other cautioner, having been forced by diligence to pay the balance, brought an action against Glen for relief of one half of this balance.

Pleaded for Glen: He had already paid one half of the debt, and could be liable for no part of the other half.

Answered: The sum paid by Glen did not come out of his own pocket, but out of the funds of the bankrupt; and although Glen had obtained an heritable security, *ex facie* to himself only, he was bound to communicate the benefit of it to his co-cautioner.

THE COURT having judged of the cause on informations, decerned against the defender in terms of the libel; thereby deciding, in conformity with opinions delivered on the Bench, that a cautioner obtaining a security in relief to himself, which has the effect of operating payment of the debt out of the funds of the principal debtor, is bound to communicate the benefit of that security to co-cautioners.

Act. Morrison.

Alt. Corbet.

Clerk, Pringle.

See APPENDIX,