

1671. *February 23.*ARNOLD of Barncaple *against* GORDON of Holm.

THERE being four cautioners in a bond, and the principal debtor having suspended, and found a cautioner in the suspension; who having been distressed, and paid the debt, and having gotten assignation from the creditor, charges one of the cautioners in the first bond, Gordon of Holm; who suspends, on this reason, that payment being made by the cautioner in the suspension, he can only have recourse against him for whom he was cautioner, but not against his cautioners in the principal bond; for, as to them, it is all one as if the principal debtor had paid; *2dly*, Though the cautioner in the suspension could have access against the cautioners in the principal bond, yet, all of them being cautioners for the same principal, they must bear equal burden, and so he must allow his own fifth part, in the same manner as cautioners in a bond of corroboration bear equal burden with the cautioners in the principal bond.

The Lords found, That the cautioner in the suspension had access against the cautioners in the principal bond, he always deducting his own fifth part.

Fol. Dic. v. 2. p. 379. Stair, v. 1. p. 728.

No. 19.

What claim has the cautioner in a suspension against the cautioners in the principal deed?

1684. *March.* WILLIAM SMEITON *against* LAIRD of KININMOND.

FIVE or six persons having put out a caper, and a prize being recovered by the stranger-owner, after it was adjudged, and they all decerned *in solidum*; one of them being distressed for the whole, paid it, and took assignation for his relief; and thereon pursued another of the owners of the caper, who alleged, That he could be liable but for his own share.

Answered: Though a cautioner pursuing upon the clause can distress only effecting to the relief, yet a cautioner, procuring assignation of the whole debt, may pursue any one of the co-cautioners for the whole, allowing his own share; and the pursuer is in a much stronger case than of a cautioner, viz. one of a society, where is *equalis contributio lucri et damni*.

The Lords found, That the pursuer, having an assignation, might pursue the defender for the whole, with the deduction of the pursuer's own share, and of the shares of the notourly insolvent co-partners.

Fol. Dic. v. 2. p. 379. Harcarse, (CAUTIONERS) No. 241. p. 57.

No. 20.

Effect of assignation obtained by one of a number of cautioners?

1685. *February.* ANDREW KER *against* WILLIAM GORDON, Advocate.

BAILIE RIDDEL, as principal, and Andrew Ker, as cautioner, being bound to Isobel Chatto for a debt, which was afterwards corroborated by Riddel,

VOL. XXXIII.

79 X

No. 21.

Cautioner in a bond of corroboration.

No. 21. as principal, and William Gordon, as cautioner, Ker paid the debt, upon distress and assignation from the creditor, and pursued William Gordon for the half.

Alleged for the defender: That the pursuer ought to relieve him, who, as cautioner in the bond of corroboration, was, in effect, cautioner for Ker, the cautioner in the first bond; and though Ker be cautioner, in respect of relief from Riddel, he must be considered as principal, in respect of the defender, as well as of the creditor; *2dly*, By a clause in the bond of corroboration, it was to be null and void, upon payment of the debt, by virtue of the obligation in the first bond.

Answered for the pursuer: That cautioners in corroborations, and cautioners in suspension of the debt, are looked upon as co-cautioners with those in the principal bond, and ought to relieve one another *pro rata*.

The Lords found the defender liable for the half; and found, That the first clause in the bond of corroboration was only a provision against double payment.

Fol. Dic. v. 2. p. 379. Harcarse, (CAUTIONERS) No. 243. p. 58.

1685. February 27.

HUGH WALLACE, Merchant in Edinburgh, *against* FLEMING and CUNNINGHAM of Barns.

No. 22.

A bond being suspended by the principal and cautioner, the cautioner in the suspension was found entitled to a total relief.

HUGH WALLACE is pursued by Fleming and Cunningham, as he who had become cautioner for Mr. John Wilky, in a second suspension. He alleged, The principal suspender, and the cautioner in the first suspension, were bound to relieve him, "et quem de evictione tenet actio eundem agentem repellit exceptio." Answered, He could recur against the cautioner in the first suspension only *quoad* the half, they being, in the construction of law, as co-cautioners, and cited a decision in Stair, Arnold *contra* Gordon, No. 19. p. 14641. where it was so found. Replied, The first cautioner is a principal to the second, and, in contemplation thereof, the second engaged; L. 27. § 4. and L. 43. D. De fidejuss. "The Lords, on Kemnay's report, found the first cautioner bound to relieve Hugh Wallace, the second, *in solidum*; and therefore assoilzied him."

Fol. Dic. v. 2. p. 379. Fountainhall, v. 1. p. 344.

* * Harcarse's report of this case is No. 4. p. 9450. *voce* PACTUM DE NON PETENDO.