

No. 25. things than words, according to that rule *plus valet quod agitur quam quod simulate concipitur*; they, in the first bond, are all principals as to me, and therefore they must relieve me of the whole, without deducting of any part, and every one of them is as much bound *in solidum* to relieve me as Cessford was; and on the view of this security and relief, I did the more frankly engage in the corroboration; and though I be engaged conjunctly and severally, and as *correus debendi et promittendi* to the creditor, for his security, which was just; yet, by these words, *hoc non agebatur*, to cut me off from my full relief against the principals in the first bond. Replied, The common law *ex epistola divi Hadrian*: has introduced *inter correos debendi beneficium divisionis*, which privilege and exception is competent, whether they be bound in the same obligation, or in different ones, L. 3, D. De duob. reis, “parvi refert simul spondeant, an separatim promittant, cum hoc actum inter eos sit, ut duo rei constituentur, et ut nulla sit novatio;” neither does it import which of them get the money, L. 4. C. Eodem Tit. and therefore Mr. Black is as much bound as if he had been one of the co-principals *et correi debendi* in the first original obligation, and cannot force Mr. Hart to pay the whole; and the Lords found so in a more favourable case, Arnold *contra* Gordon, No. 19. p. 14641. that a cautioner in a suspension having paid the debt, and recurring against the obligants in the first bond, the Lords found he was bound to deduct his own part. The Lords thinking the case *in apicibus juris*, betwixt equity and strict law, they resolved to hear it argued in their own presence in the beginning of June next.

This case was submitted.

Fountainhall, v. 2. p. 111.

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1701. December 18.

AGNES LOCH, and LORD STRATHALLAN, *against* LORD NAIRN.

No. 26.

The same subject.

JOHN GRAHAM, post-master, and Lord Nairn as cautioner, granted bond to Mr. John Colvill, advocate, for £.1000 Scots. Agnes Loch, as relict and executrix to the creditor, takes out caption against John Graham the principal, who to prevent incarceration, grants a new bond of corroboration, narrating the former bond, and in this Strathallan is cautioner, who at last pays the debt to Loch, and takes a discharge and assignation, and in his cedent's name he pursues Nairn to pay. Alleged, I cannot pay the whole; for, though it be in Loch's name, yet it is for Strathallan's behoof, and that being acknowledged, then he must be considered as a co-cautioner with the Lord Nairn, cautioner in the first bond, and therefore can only have recourse against the other cautioner, deducing his own part. Answered, There was no *negotium gestum* nor society betwixt Strathallan, and the cautioner in the first bond; but I have acquired an assignation, *tanquam quilibet*, and I engaged the more frankly that I saw you antecedently bound, whom I considered as principal to me, and so bound to relieve me. This is nearly the

same case with that marked *supra*, 27th February, 1701, Alison and Black *contra* Hart, No. 25. p. 14643. which was then ordained to be debated in presence, and was afterwards submitted, and the arguments on both sides may be read there; to which was added, that my Lord Stair owned himself to be of the opinion that he could not recur *in solidum*, Tit. 8. Of Recompence, § 8. with a decision from Spottiswood, Libraik against Vaus, No. 47. p. 2116. *voce* CAUTIONER; and Lib. 1. Tit. 17. § 20. Some of the Lords laid hold on this specialty to take it out of the general abstract point, that in the bond of corroboration the Lord Nairn is also mentioned as bound with Strathallan, but does not subscribe; and what if he offered to subscribe it now, in that case the relief would clearly divide, and Strathallan could no trecur *in solidum*. The Lords, by the plurality, found he had not relief *in solidum*, but only *pro rata*. It carried with a struggle.

No. 26.

*Fol. Dic. v. 2. p. 379. Fountainhall, v. 2. p. 130.*

1703. December 1.

CLARKSON in Coldingham *against* RICHARD EDGAR of Newton.

BELL of Belford, and Edgar of Newton, grant bond to one William Logan for 1000 merks in 1664. Logan charging for his money, Belford prevails with David Home to give Logan a bond of corroboration of the debt in 1670. Home being afterwards distressed for the sum, he takes course with it, and on payment obtains an assignation to the first bond where Edgar was bound with Belford; and the right of this comes by progress to Robert Clarkson, who pursues Edgar of Newton for payment. His first defence was, That Home, his author, by granting the bond of corroboration, became upon the matter a co-cautioner with Edgar of Newton, and so can only claim the one half, and he must deduct and allow David Home's part, which makes the other half, seeing cautioners must relieve each other *pro rata*, and suffer equal deduction; and that it has been so decided, 23d February, 1671, Arnold *contra* Gordon, No. 19. p. 14641.; and 18th December, 1701, Agnes Loch and the Viscount of Strathallan *contra* the Lord Nairn, No. 26. p. 14644. Answered, The decisions did not meet with the pursuer's case, for there they were bound as cautioners with the principal who granted the corroboration as well as they; but here Belford, the principal debtor, is not bound in the corroboration, but only David Home. *2do*, In Strathallan's case the corroboration was drawn to have been signed by Nairn likewise, who did not sign, though *intuitu* of his binding Strathallan corroborated. *3tio*, If David Home had paid the debt when he gave the bond of corroboration, and taken an assignation, he would have made Newton pay him the whole, and *perinde est*, that he gave his corroborative security, which can never accresce to Newton, with whom *nullum gessit negotium*. The Lords found this case different from the former decisions, and that Newton could crave no deduction here, but was liable *in solidum*. Then he alleged, *2do*, I must have retention and compensation, because, before ever

No. 27.

A cautioner in a deed of corroboration paying, may recur *in solidum* against the cautioners in the original bond.