

1707. December 26.

JOHN CLEGHORN, late Bailie of Edinburgh, and ALEXANDER CLEGHORN, late Bailie of Portsburgh, *against* AGNES YORSTON, Relict of JAMES INGLIS, Brewer in Edinburgh.

No. 2.

A clause in a bond granted by five persons, obliging them as co-principals and full debtors, sustained to make each liable *in solidum* to the creditor; and after two of them had failed, found to operate in favour of two who had paid the whole debt, relief of a third share from the other solvent *correus debendi*.

ALEXANDER WOOD, James Henderson, James Inglis, John and Alexander Cleghorns, having granted bond as co-principals and full debtors to Sir Robert Chiesly, for 5400 merks, and Alexander Wood and James Henderson having broke and died; John and Alexander Cleghorns paid the money to Sir Robert, from whom they got a discharge of their own proportions, and an assignation to three-fifth parts for their relief, against the other three *correi debendi*, and thereupon pursued Agnes Yorston as representing James Inglis, her husband, for payment of the said three-fifths of the whole sum, in respect the other two principal obligants were *lapsi*.

Alleged for the defender: That she could only be liable *pro rata* of a fifth share of the debt, her husband being but one of five *correi debendi*, who were not bound conjunctly and severally, but as co-principals and full debtors.

Replied for the pursuer: Full debtors are debtors *in solidum*, or *in toto*, in contradistinction to partial debtors, or debtors in part; and *qui totum dicit nihil excipit*: Therefore the *correi* being bound as full debtors, were all liable to the creditor *in solidum*, as if they had been bound conjunctly and severally, and as if they had expressly renounced the benefit of division. Yea, the word full debtor hath been extended to exclude even a cautioner from his *beneficium ordinis*, July 1665, Dunbar *contra* the Earl of Dundee, observed by President Gilmore, No. 38. p. 3584. And *a fortiori* in this case, where all the *correi* are bound as co-principals and full debtors, the defender ought to be liable in the terms of the bond and assignation for three-fifth parts of the sums paid by the pursuers, because the two shares of the insolvent *correi* must burden the defender.

Duplied for the defender: The ordinary clauses of stile, (whereof the due observance is sessionly recommended to the writers by the Lords) are not to be supplied by equivalents; and our law knows no other clause importing debtors to be liable *in solidum*, than when they are bound conjunctly and severally. Nor can the words full debtors import any more, than that all jointly are debtors for the full sum, as if they had granted receipt of all and hail a certain sum, and bound themselves to repay the said hail or full sum. This is cleared from the civil law, L. 11. § 1. and 2. *D. Duobus Reis Constituendis*, Nov. 99, and the opinion of lawyers, *Vinnad Tit. 17. Lib. 3. Instit.* Besides, had it been designed that the debtors should be liable *in solidum*, they had obliged themselves as full debtors each for others; and ambiguous clauses are to be interpreted in favours of the defender.

The Lords found, That the debtors in the bond were all liable to Sir Robert Chiesly the creditor *in solidum*, but that the defender would have been liable in a

fifth part only for the pursuer's relief, had all the *correi* been solvent; but two of them being bankrupt, the defender was found liable in a third share of the debt.

No. 2.

*Fal. Dic. v. 2. p. 377. Forbes, p. 212.*

Fountainhall reports this case :

1707. December 31.—JOHN and Alexander Cleghorns, James Henderson, James Inglis, and Alexander Wood, being tacksmen of the town's impost of two pennies on the pint of ale, they borrow from Sir Robert Chiesly 5,000 merks, to help them to pay the tax-duty. John and Alexander Cleghorns being charged to pay the money, did accordingly make payment, and took a discharge *quoad* their own two parts, and an assignation against the other three, whereof Wood and Henderson being dead, and broke, they pursue Agnes Yorston, relict of Inglis, the fifth obligant, on the passive titles, not only to pay his own fifth part, but also a third part of the two bankrupts who have failed. Alleged, The bond wanting that necessary clause, obliging them all, conjunctly and severally, her husband was only liable *pro rata* for his fifth part, which she was willing to pay. Answered, Though that clause was forgot, yet it bore the equivalent, for it bore them all to be obliged as full debtors, which could admit of no other interpretation, but that all the five were bound *in solidum* for the whole sum; and put the case, when Sir Robert Chiesly craved his money from any one of them, would it have been a good defence against him, I will pay my fifth share, for I am not bound *in solidum*? and if this would have been repelled *quoad* him, why not as to the pursuers, his assignees, *qui utuntur jure auctoris*; and so it was decided, Dunbar *contra* the Earl of Dundee, collected by President Gilmore, No. 38. p. 3584. and though the writers be every session enjoined by the Lords to observe the stiles precisely, and which are a part of our law and forms, and not being done here, it has been left out by warrant from the parties, as is alleged, yet words equally as strong are inserted. Replied, This cannot be supplied by the equipollences, for our fixed stiles ought not to be altered, and they are expressly founded on the common law, L. 11. § 1. 2. *Dig. De Duob. Reis constituendis*, where two stipulating to pay *decema ureos*, they are only liable *in partes viriles*, *quia non est adjectum singulos in solidum spandisse*; and it is farther cleared by the 99th novel, and so Vinnius determines *ad Tit. 17. Lib. 3.* and to assert that all were liable *in solidum* to Sir Robert the creditor is *positio principii*, and the words "co-principal and full debtor," import no more but that he should be fully paid among them, but not by each of them apart, and Stair seems to incline this way, B. 1. T. 17. § 12. and 16. The Lords considering they were in a society, found the words "full debtor" made them all liable *in solidum*, and so repelled the defence.

*Fountainhall, v. 2. p. 409.*