Ex parte

Alexander Murray, of Broughton, Esq; - *Appellant*; Case 105.
Kaims, 15 Dec. 1722.

Captain James Butler, Nephew and Heir of Sir George Maxwell of Orchardton, and the Creditors of the said Sir George, - *Respondents.*

21st *March* 1723-4.

Solidum et pro rata.—A debtor grants bond with a cautioner, and afterwards a bond of corroboration with a different cautioner; the money is paid by the cautioner in the corroboration; but he had only relief against the cautioner in the original bond for one half of the sum paid.

IN September 1674, Sir Alexander MacCulloch, and Godfrey his eldest son as principals, and Sir Robert Maxwell of Orchardton as cautioner, executed a bond to Alexander MacGhie for 2000 merks Scots.

After the death of Sir Alexander MacCulloch, the money not having been paid, the said Godfrey, then Sir Godfrey his son as principal, and Alexander Viscount of Kenmure, and Richard Murray of Broughton, (the appellant's father), as cautioners, in October 1679, executed a bond of corroboration to the said Alexander MacGhie, reciting the original bond, and that the creditor was contented to delay payment upon granting to him such corroborative security: therefore the said principal and cautioners, in further corroboration of the said bond, and without hurt or prejudice thereto, or derogation therefrom in any sort, *sed accumulando jura juribus*, bound and obliged themselves to make payment of the said principal sum, with interest from Martinmas 1679, and this bond of corroboration contained an obligation from the principal to the cautioners for their relief and indemnity.

The money not being paid, the creditor brought his action before the Court of Session, against the appellant as son and heir to the said Richard Murray; and the appellant was decreed to pay the principal sum and interest, for which his father had become security. The creditor in the said bonds thereupon assigned the same to him for his relief against the other persons bound.

The appellant brought his action before the Court of Session, for payment of the said sum of 2000 merks Scots, and interest contained in the original bond; to which action the respondent Butler, and some of the creditors of Sir George Maxwell, son and heir of Sir Robert Maxwell, the cautioner in the original bond, became parties. In this action the appellant contended, that he was cautioner or security for the payment of the money due by the original bond, and that as to him, all the persons bound therein were principals; and he having paid the money, was entitled to relief, and to recover his payment from all or any

of the ſaid perſons. On the part of the reſpondents, it was anſwered, that Sir Robert Maxwell was only a cautioner, and that the appellant's father could only have relief of the one half of the ſum he had paid, as he was equally bound for the debt.

The Lord Ordinary, on the 29th of November 1721, "Found "that the appellant could only have relief for the half of the "ſum he had paid to the creditor." And to this interlocutor the Court adhered on the 15th of December 1722, and 18th of June 1723.

Entered, 21 Jan. 1723-4.

The appeal was brought from "an interlocutor of the Lord "Newhall, Ordinary, of the 29th of November 1721, and the "affirmances thereof by the Lords of Seſſion the 15th of De-"cember 1722, and 18th of June 1723."

Heads of the Appellant's Argument.

The very title of the bond of corroboration, as well as the ſtile, expreſs the mind and intention of the parties contracting to have been, and the terms under which they became bound import, that it is granted to the creditor as a further ſecurity of the former bond. The principal and cautioners in the firſt bond became all as principals with regard to the perſons bound as cautioners in the corroboration, who thereby became cautioners to the creditor for them. The firſt bond continued to all intents and purpoſes the ſame as before; and the bond of corroboration was only given as a further ſecurity to the creditor, in caſe the principals and cautioners in the firſt bond ſhould become inſolvent. But in caſe the creditor ſhould compel the cautioners in the bond of corroboration to pay the debt, then they were to be relieved by the perſons for whom they were bound as cautioners, both principals and cautioners in the original bond being bound for their relief. It is certain, that if the cautioners in the firſt bond had paid the debt, they could only have taken an aſſignment for their relief againſt the principals, and could never have had acceſs againſt the perſons bound in the corroboration, who were only cautioners for them. Had the appellant, when he paid the bond, taken any aſſignment in the name of a third party, the reſpondent the heir muſt then, without queſtion, have paid the debt, and had relief only from the principals, for whom his anceſtor was cautioner. So the Court had found in parallel caſes, particularly *Clarkſon againſt Edgar*, 1ſt December 1703, and *Brock againſt Lord Bargeny*, 14th February 1705. This is agreeable both to law and equity; for the bond of corroboration was a tranſaction directly with the creditor, and only for his advantage, without the leaſt intention of any alteration in the firſt bond, or benefit to the parties bound in it, except to procure from the creditor a larger time for them to pay the debt.

Judgment, 21 March 1723-4.

This day having been appointed for hearing the cauſe *Ex parte*,

Counſel for the appellant only attending, they were called in and heard, and withdrew; and after due conſideration and debate had of the merits of this cauſe,

It

It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the ſaid interlocutor, and affirmances thereof, therein complained of, be affirmed.

For Appellant, *Dun. Forbes. Will. Hamilton.*

Charlotta, Marchioneſs Dowager of Annandale, - - - *Appellant*; Caſe 106.

James, Marquis of Annandale, John Baillie, Francis Holliday, and many others, claiming to be Creditors of William, late Marquis of Annandale, deceaſed, - *Reſpondents.*

21ſt *March* 1723-4.

Forum competens—Juriſdiction.—The Marchioneſs of Annandale, reſiding in England, being appointed executrix for behoof of her children, proves the late Marquis's will in England: various perſonal creditors of the late Marquis, arreſt in the tenants' hands, a jointure payable to the executrix out of the Scots eſtates: the Court of Seſſion having ordered her to purge the arreſtments, before ſhe drew her jointure: the judgment is reverſed, and it is ordered that the arreſtments be looſed without caution or conſignation.

AFTER the determination of the appeal relative to the jointure or life-rent of 1000*l.* ſterling, between the appellant, and the reſpondent the marquis, on the 15th of December 1722, the appellant returned to the Court of Seſſion to have that judgment of the Houſe of Lords applied in her favour. What aroſe out of the proceedings had thereupon gave riſe to the preſent appeal.

The late marquis, by a will executed on the 29th of December 1720, but a ſhort time before his death, nominated the appellant his executrix and univerſal legatee in truſt for the behoof of their ſon Lord George, then born, and of any other children that might be procreated between him and the appellant, with a proviſo, that the appellant's right of adminiſtration ſhould continue only during her widowhood, and after her marriage devolve upon ſuch perſons as he ſhould appoint for the ſole uſe of his ſaid children; and it was alſo declared, that the executrix ſhould be bound to pay all his lawful executry and perſonal debts, in which Lord Johnſtone, his eldeſt ſon, was not bound, and which were contracted ſince the 1ſt of April 1690, the date of his tailzie. The appellant proved this will in the prerogative court of Canterbury, and poſſeſſed herſelf of the teſtator's perſonal eſtate to a conſiderable amount. Several of the reſpondents, ſtating themſelves to be creditors of the teſtator for debts contracted in Scotland, ſince April 1690, exhibited their bill in the Court of Chancery againſt the appellant for diſcovery of aſſets, and ſatisfaction of their claims. To this bill the appellant put in her anſwer; and afterwards filed a croſs bill againſt the preſent