

1680. February 4. SOPHIA JOHNSTON *against* MURRAY of ROMANO.

A CAUTIONER in a bond is pursued for the principal sum, and the annualrents of it for thirty years past.

ALLEGED, for the cautioner,—*1mo*, That he could be bound for no more *nec in ampliozem summam* than the principal; but *ita est* the bond will only subsist against the principal for £100 Scots, because it is only subscribed by one notary for him: *ergo*, I can be liable in no more, though I have subscribed for myself.

Yet there are cases in law where the principal may be free, and yet the cautioner bound, and the cautioner farther bound than the principal; *viz.* where the principal is bound *obligatione naturali tantum*, he is free of any civil exaction; such as a pupil, a wife, &c. yet cautioners for them are civilly liable.

The Lords demurred on this point: and, though they did not decide it at this time, yet they were of opinion, that, the cautioner being bound conjunctly and severally, and so being *correus debendi*, he was liable for the whole.

The Lords afterwards found the cautioner bound for the whole, though the principal was only liable for £100 Scots; because the cautioner, when he subscribed, should have so far considered his own security as to see two notaries subscribe; or he might have caused distress the principal in his own lifetime, when the debt was probable by his oath, and so not have lost his relief.

The second defence was,—I can be decerned for one year's annualrent only; for the bond is taxative, and provides no more but one year's annualrent of it; and the *mora* of the principal debtor, in not paying you the principal sum, (which you should have charged for, or denounced him, and then, *vi statuti*, it would have borne annualrent,) cannot infer against the cautioner *obligationem usurarum*. Though the paying of a year's annualrent, where there was none due, infers *etiam pro futuro*: Dury, 2d December 1628, Yair.

This being taken to interlocutor, on the 11th of Feb. the Lords found, since the bond bore, “with annualrent to the term of payment,” and without mentioning annualrent after the term, yet he, being *in mora* of paying the principal sum, he behoved to pay annualrent; and that clause, “with annualrent after the term of payment,” was presumed to be the meaning of the parties, and only by negligence omitted.

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1680. February 4. MARY KINCAID *against* JOHN ELLIS.

In their competition, the Lords find Elieston's right being only subscribed by the husbands, and not by Duke Hamilton's daughters, it can extend to no heritable right, but only to moveables which fall under the *jus mariti*; and the husband's obligation to cause the Ladies subscribe is only personal. As also found, the back-bond granted by Mary Kincaid to Sir James Cockburn, who first bought the lands of Wariston, equivalent to an intimation of their rights, and which was prior to Elieston's intimation of his right of assignation to James Gray, who thereafter acquired these lands of Wariston from Cockburn.

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