

1705. February 14.

BROCK *against* The LORD BARGAINY.

No. 28.

A cautioner in a bond of corroboration found to have relief *in solidum* against the cautioner in the debt corroborated.

FRANCIS LORD GLASSFORD, and John Lord Bargainy, granted a bond of £.1000 to Helen Scott. Robert Brock having, of the same date, granted a bond of corroboration, and being obliged afterwards to pay the debt, he pursues William Lord Bargainy, as representing his father, for payment and relief.

The defender alleged: That the pursuer and his father being both co-cautioners for the Lord Glassford, he had *beneficium divisionis*, and was only liable for the half.

It was answered: The defender's father was indeed cautioner for Glassford the principal, but the pursuer declined to be bound with them, and did secure the creditor by a corroboration apart, and thereby was on the matter cautioner for both.

It was replied: Both pursuer and defender were to be considered as cautioners for my Lord Glassford, and it was the same thing, whether they interposed in the same or in a separate writ; and so it was found, 1671, Arnold *contra* Gordon, No. 19. p. 14641. where a debtor finding a cautioner in a suspension, and his cautioner in the principal bond having paid and taken assignation, recurs against Arnot, cautioner in the suspension. "The Lords found, that Arnot the cautioner was obliged to deduct his own share." The like was found lately in the case, the Viscount of Strathallan against the Lord Nairn, No. 26. p. 14644..

It was duplied: *1mo*, The decision 1671 is single, and is not agreeable to the analogy of law; for all accessory obligants, by separate or corroborative securities, have access against the principal obligants *in solidum*, whatever relief be competent amongst themselves; yet there was a speciality, that the suspension was only raised by the principal debtor, and thereby the cautioner in the suspension might be considered as co-cautioner for him. In Strathallan's case, there was a bond of corroboration framed, wherein the cautioners in the first bond were inserted, and one more added; he signed; the former cautioners being already bound, did not sign again; but the new cautioner having interposed *intuitu* of concurring cautioners with him, he was found to have the benefit of a proportional abatement. But in that decision the Lords were divided, and have determined otherwise since; and it is reasonable that there should be now a fixed and known rule agreeable to the analogy of law.

"The Lords found the Lord Bargainy liable *in solidum*.

Fol. Dic. v. 2. p. 379. Dalrymple, No. 60. p. 76.