

in respect the assignation was made after the bond was quarrelled by reduction and improbation.

No 609.

*Fol. Dic. v. 2. p. 270. Forbes, p. 691.*

1749. November 24.

WILLIAM MILLER *against* JAMES BAIRD and JAMES GRAY.

CHARLES GRAY merchant in Auchingiech, was debtor by bills to William Miller and Company, and conjunctly with James Gray of Wellflat his brother, to James Baird and Company; Baird first, and then Miller arrested a debt due to Charles Gray; and, in the competition, it was *pleaded*, for Miller, that if Baird craved preference, he behoved to assign his other security, to wit, the accepted bill of James Gray.

*Answered*, He cannot be obliged, in equity, to assign; considering he knows with certainty, that James Gray was only a cautioner, and has a plea to be free of the debt, it being paid with the principal's effects; and appearance was made for James Gray, and this *pleaded* in his behalf. A proof was led of his being a cautioner, by the oaths of the Company creditors in the bill.

*Pleaded* for the pursuers; The defenders have no interest to make this objection; if they recover their own payment, they ought to assign any further security; and if James Gray has a defence, it will be competent to him to propose it when he is called.

*2do*, The allegation cannot be proved by witnesses, especially by these defenders, who have so much interested themselves in the question.

*Pleaded* for James Gray, An assignation is a demand in equity, and ought not to be granted when the equity is as strong on the other side.

*2do*, In a question betwixt conjunct acceptors, the evidence of the drawer would be good, to shew the cause of a bill; and this question is betwixt one acceptor and the creditors of the other.

*Observed*, That it was fixed a person having two securities on his debtor's effects, and choosing to draw out of one of them, was bound to assign the other to the creditors, postponed on that out of which he took his payment; but when he had another person engaged, or a subject not belonging to the common debtor, an assignation had been found not due; but if an assignation here were competent, the defence ought to be sustained, as the demand was of equity; and the contrary equity might be shewn by a proof, which would not cut down a legal obligation.

THE LORDS found the creditors not bound to assign.

Reporter, Justice-Clerk. Act. R. Craigie. Alt. H. Home. Clerk, Forbes.

*D. Falconer, v. 2. No 102. p. 117.*

No 610.

A creditor having two persons bound to him, one of whom he knew to be a cautioner, taking his payment out of the principal debtor's effects, to the prejudice of other creditors, found not bound to assign against the cautioner.