

No. 9. being *socii et exercitores*, so that the freight might have been paid to one of them; and *eadem ratione*, any one of them is liable, and may be pursued *in solidum*.

Clerk, *Gibson*.

Fol. Dic. v. 2. p. 378. Dirleton, No. 166. p. 68.

* * * Stair reports this case :

SUTHERLAND having by a minute with Grott and Elatt, two owners of a ship, agreed for the freight of some barrels of beef, belonging to Sutherland and his partners, which they were obliged to carry to Leith; and having failed; he pursued them for damage and interest, concluding against both to be liable, conjunctly and severally, for the whole damage. The defenders being absent, and the clerk having advised the relevancy of the libel with the Lords; this occurred to their consideration, whether that member of the libel was relevant, concluding against them both *in solidum*, or whether they were only liable *pro rata*, seeing the minute bears not conjunctly and severally; whereupon some were of opinion, that they were only liable *pro rata*, especially seeing the fact to which they were obliged *principaliter*, viz. to transport goods from one port to another, was divisible; and if it had been performed by the defenders severally, and by several vessels, the pursuer could not have refused the performance was sufficient, much more now when damage and interest was only pursued, for that terminating in a liquid sum, was unquestionably divisible.

The Lords found both the defenders liable *in solidum*, for they found that the damage and interest, albeit it terminate in a sum, yet seeing *subiit vicem facti*, it behoved to be ruled conform to the principal obligation, which being *in facto*, they found, that according to the meaning of parties in trade, who contract most summarily and plainly, it was not to be understood that every owner should only be obliged for his part of the cargo, and thereby oblige the merchant to attend and accept of payment by parts; and though, if all of them had brought their parts at the same day to the Port, and offered them together, the merchant could not challenge any of them for more than his own part, because he had nothing wanting to him; yet that inferred not, that when they all failed, each should only be answerable for his part.

Stair, v. 2. p. 84.

1697. December 24. DICKSON against TURNER and RUTHERFORD.

No. 10.

THE question was about a man whom Ker of Cavers had hired to be his levy-man, to be sent to Flanders, *anno* 1694, whom afterwards the parish of Abbot-rude took on, and put out as their man, and forced Cavers to conduce with another to be his militia man, and pay him £.10 Sterling; so he pursues them for

refunding the damage. Alleged, There were eighteen contributors to furnish the soldier; and we ought not to be singled out but only *pro rata*, for our proportion, which we are willing to pay. Answered, Obligations consisting *in faciendo* are indivisible, *et omnes carrei* in that case *tenentur in solidum*, and you may have your relief against the rest. The Lords found *in præstatione facti*, such as the delivery of a soldier, all were liable *in solidum*, reserving their relief as accords against the rest of the contributors for their fractions.

No. 10.

Fol. Dic. v. 2. p. 378. Fountainhall, v. 2. p. 805.

1721. July 6.

MR. PATRICK GRANT of Elchies, Advocate, *against* MR. PATRICK STRACHAN, Writer in Edinburgh.

WILLIAM ERSKINE, collector of the customs at Stranraer, and Mr. Patrick Grant, gave bond to Sir Edward Eizat for 1000 merks, binding themselves conjunctly and severally to pay the same; and the day thereafter, the said William Erskine, and Mr. Strachan, grant a bond to Mr. Grant, narrating the former bond, and subsuming, "That seeing the said sum was wholly applied for the use of Mr. Erskine, therefore they, the said William Erskine and Mr. Patrick Strachan, bound and obliged them, their heirs and successors, not only to free, relieve, harmless and skaitless keep the said Mr. Patrick Grant, from all payment of the fore-said sum, but to retire the bond or a sufficient discharge." And there is a clause subjoined, whereby the said William Erskine obliges him, to free and relieve the said Mr. Patrick Strachan, by being bound with him in manner above mentioned. Mr. Patrick Grant having paid the sum contained in the bond, charged Mr. Strachan as liable to him in relief; which was suspended upon this head, That Mr. Strachan was not bound conjunctly and severally in this bond with William Erskine; and consequently that he was liable *pro rata*. To which it was answered, That Mr. Strachan, by the conception of the bond, was cautioner for William Erskine; and as such, must be liable for the whole debt.

Accordingly it was pleaded for the charger; it will be sufficient if he shew, that the suspender is by the import and conception of the bond bound as cautioner for Mr. Erskine, though the word cautioner be not expressly mentioned, which is sufficiently plain; for the bond proceeds upon a narrative, "That the money was solely applied to the "use of Mr. Erskine;" which is, in other words, that Mr. Erskine was principal debtor in the charger's relief; and then proceeds "to bind him and the the suspender to relive the charger;" that is, to bind the suspender to perform the deed, for which Mr. Erskine was principally bound; which is as clear an obligation upon him *qua* cautioner, as words could make it, without using the word cautioner itself, which cannot be absolutely necessary. Should the bond be otherwise understood, this consequence must follow, that Mr. Erskine himself as principal, would only be bound for the one half of the money,

No. II.

An obligation to retire a bond found to be such a *factum individuum* as to bind each of many obligants *in solidum*.