

No. 7.

WILLIAM INGLIS, Appellant.—*Spankie.*ANDREW WALKER, Respondent.—*Dundas.*

Cautioner.—Where each of A and B, two distressed cautioners, granted to the creditor a bill for one-half of the debt; and each indorsed the bill of the other; and C, interposing as cautioner, put his name as indorser on A's bill, and as joint acceptor on B's; and A retired his bill, but C was obliged to pay B's bill;—Held, (affirming the judgment of the Court of Session), that C was entitled to relief against A.

March 3. 1830.

1ST DIVISION.
Lord Eldin.

HENRY INGLIS and Thomas Aitken were cautioners, to the Commercial Banking Company of Scotland, for the faithful discharge of the duties of James Wilson, the bank agent at Cupar.

Soon after Wilson's appointment, he fell in arrear to the Bank, and the cautioners were called upon for payment. With a view to obtain time to meet this balance, their agent, Mr Kyd, proposed to the Bank a settlement by bills, stating that 'the cautioners would wish each instalment divided into two bills, and Mr Aitken's cautioner and he would accept the one set, and Mr Inglis would be the drawer of that set, and Mr Inglis's set would be reversed. The meaning of this is, that Mr Inglis has got a cautioner for the one-half, and Mr Aitken the other.' The Bank answered, 'We have no objections to take the bills divided and crossed in the manner you propose, provided the names of Mr Aitken and Mr Inglis, and their two friends, be on each bill; that is to say, that all the four gentlemen are to sign each bill, either as drawer, acceptor, or indorser.'

In pursuance of this arrangement, the following notes were granted. 'L. 1373. 2s. 10d. Cupar, 21st December 1815. Against the 11th day of September next we promise, conjunctly and severally, to pay to Mr Thomas Aitken, or his order, at the Commercial Bank's office in Edinburgh, L. 1373. 2s. 10d. sterling. (Signed) Henry Inglis, William Inglis. (Indorsed) Thomas Aitken, Andrew Walker.'

'Cupar, 21st December 1815. L. 1373. 2s. 10d. Against the 11th day of September next we promise, conjunctly and severally, to pay to Mr Henry Inglis, or his order, at the Commercial Banking office in Edinburgh, L. 1373. 2s. 10d. (Signed) Thomas Aitken, Andrew Walker. (Indorsed) Henry Inglis.' The former bill and part of the latter were paid. Henry Inglis and Aitken died. The Bank charged Walker to pay the balance

of the latter bill, and he claimed relief against William Inglis, the brother and representative of Henry. March 3. 1830.

William Inglis resisted, on the ground, that by the two bills the responsibility had been divided, he being cautioner for Henry, and Walker for Aitken; consequently, Henry's bill having been paid, his liability had been extinguished.

The Lord Ordinary decerned against him, with expenses; and the Court, on the 3d May 1827, adhered.*

Inglis appealed.

Appellant.—Cases of the present kind are questions of mere intention. The rule no doubt is, that where (as in the present instance) a secondary cautioner interposes at the desire of the primary cautioners, the secondary cautioner is entitled to total relief from all the primary cautioners. But here there are circumstances which shew, that it was the intention of all the parties under obligation to the Bank, that each of the primary cautioners was to be liable in relief to his individual co-obligant alone. For that purpose the sum was divided into two parts; but the part for which Henry Inglis was primary obligant has been paid. The conduct of parties, and the writings by which the transaction was completed, establish that there was a divided responsibility. Had the case been sent to a jury, the verdict must have been, that the parties intended that the responsibility was to be divided; the appellant to be protected and indemnified by Henry Inglis, and the respondent by Thomas Aitken. This would have been placed beyond all doubt, if Kyd had been examined.

Respondent.—The rule of law is fixed and admitted, that where a secondary cautioner interposes at the desire of distressed primary cautioners, they are quoad the secondary cautioners principal obligants, and liable in total relief. It is admitted, that the respondent interposed at the desire of Aitken and Henry Inglis, the distressed cautioners. It is not disputed, that, in consequence, the respondent was liable for the whole amount of both bills to the Bank; and the result must follow, that he has relief against the primary cautioners, or their representatives. There are no traces of any other intention in the circumstances of the case. The form which the obligation was allowed to assume

* 5. Shaw and Dunlop, No. 341. p. 726.

March 3. 1830. proves nothing adverse to the respondent's claim. Kyd's testimony never could have been admitted to affect the respondent, who did not employ or authorize him to propose to the Bank any divided responsibility.

LORD CHANCELLOR.—In this case, each secondary cautioner was made responsible to the Bank for the whole amount. It lies therefore on the appellant to divide the responsibility as far as relates to the individuals; and it appears to me, that the evidence to prove that is very scanty. The materials seem to me to afford only a conjecture or a guess, and do not establish a distinction between the parties in respect of responsibility. It is said, that if the case had gone before a jury they must have found that distinction. Speaking for myself I would say, that the facts certainly would not have been sufficient, as they are stated in the papers before the House, to lead me to the conclusion that there was ultimately a division of the responsibility: I should have come to the same conclusion that the Court have done. The statement in the report of the case is very short; but I infer from it, that the Court were of opinion that the facts were not sufficient, nor sufficiently established, for the purpose of getting rid of the general liability which the law casts on the primary cautioners. It has been urged, that if Kyd had been examined as a witness he would have proved the case. It is impossible for me to say what his examination would have brought out. Your Lordships must take the case as it stands; and, as it stands, I do not think that there is sufficient evidence to enable your Lordships to come to the conclusion, that the responsibility was divided.—I should, therefore, if your Lordships concur with me in that opinion, move that the judgment be affirmed, without costs.

The House of Lords ordered, that the interlocutors complained of be affirmed.

Appellant's Authorities.—3. Ersk. 3. 68.; 1. Stair, 17. 30. Mirrie, July 10. 1745, (2125.) Smiton, Nov. 15. 1792, (2138.); and other cases under 'Cautioner,' and Solidum et pro Rata.

Respondent's Authorities.—1. Bell, p. 351. Wallace, Feb. 27. 1685, (14,642.) Mirrie, July 10. 1745, (2125.); and other cases under 'Cautioner,' and Solidum et pro Rata.

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