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 correi* 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.

No. 11.
An obligation to retire a bond found to be such a *factum individuum* as to bind each of many obligants *in solidum*.

WILLIAM ERSKINE, collestor 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 skaithless keep the said Mr. Patrick Grant, from all payment of the foresaid 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. 11. whieh he acknowledges came wholly to his own use; for if the one be not cautioner, the other cannot be principal, the one term always implying the other. Now, as it would be a plain absurdity for Mr. Erskine here to plead, that he were not principally bound, it seems no less so for the suspender to plead, that he is not cautioner.

Answered for the suspender, It is acknowledged that he is in effect cautioner, for so the clause of relief without further imports; but then the question returns, How far this obligation of cautionry does extend? For though it is a common rule in law, that *obligatio fidejussoria* cannot be larger than that of the principal, nothing hinders a cantioner to be bound in less. Now Mr. Strachan conceives this to be the present case, in regard he is bound with William Erskine to relieve Mr. Grant, but not conjunctly and severally; and therefore it was understood at granting thereof, that it was only *pro rata*. If indeed the form of the obligation had run in this manner, That the said William Erskine as principal, and the said Mr. Strachan as cautioner, had bound themselves to relieve, &c. then indeed both would have been liable *in solidum*, though the words conjunctly and severally had not been found, because there had been two different kinds of obligations, one principal and another accessory: But the case alters, when another form of contracting is chosen, namely, that both of them bind as principals, but not conjunctly and severally; there the rule of law must take place, that the co-obligant is only bound *pro rata:* Now here there are not two distinct obligations, one principal, another accessory; the two co-obligants are bound together in the same individual obligation, "Therefore I, the said William Erskine, and Mr. Patrick Strachan, bind and oblige us," &c. nay in the same clause, and in one breath, one not before or after the other: And it is nothing to the purpose, that, in the truth of the matter, the money was applied wholly to one of them, because it is not the receipt of money, but the form of the words, by which we are to judge of the obligation; besides, that the receipt of the money, though it makes an alteration in the circumstances of the co-obligants, as to one another, makes none at all as to the creditor: And thus in the present case, Mr. Strachan is in effect as cautioner, with relation to William Erskine his co-obligant, both because the money was applied to William Erskine's use, and because of the clause of relief; but from the conception of the obligatory clause, it appears without doubt, that with relation to the creditor, he stands as a co-principal, jointly with William Erskine, and consequently liable only *pro rata;* and it admits of as little doubt, that the same defence would even be competent to William Erskine, though he got the money; and upon a second reflection, the charger will not find this at all absurd.

There was a separate argument insisted on for the charger, That whether the suspender be a cautioner or not, he is still liable *in solidum*, in regard he is bound *ad factum præstandum*, viz. the retiring the bond, or a sufficient discharge thereof, which obligation does not admit of a division into parts; for one cannot retire half of a bond.

Answered for the suspender: Seeing the fact to be performed is the retiring of the bond, which in other words is nothing else but paying the debt, it can make no alteration, because it is not *factum individuum*, consisting only *in faciendo*: And undoubtedly in all reliefs whatever, the retiring of the obligment, for which the relief is granted, is ever implied: So that in truth the obligation here is to pay, and the performance could only be made by payment; and the clause obliging to retire the bond, is a clause of style, and makes no manner of alteration. No. 11.

Replied, That this is not barely a clause of style, but has its effects; and it appears certain from it, though William Erskine and Mr. Strachan had actually paid the money to Dr. Eizat, they still failed in performance of this obligement to Mr. Grant, till they delivered him the retired bond itself, or a discharge; and there was good reason for the clause, because till one or other of these was performed, Mr. Grant lay still open to a pursuit.

"The Lords found the suspender liable to relieve the charger *in solidum*."

Fol. Dic. v. 2. *p.* 378. *Rem. Dec. v.* 1. *No.* 26. *p.* 57.

SECT. IV.

If an Obligant bound conjunctly only, should become insolvent.

1668. *February* 22. CAPTAIN STRACHAN *against* MORISON.

No. 12.
Three persons wrongously intermeddled with a ship. One of them found liable *in solidum*, the others being insolvent.

CAPTAIN STRACHAN pursues the heirs of umquhile George Morison, before the Admiral, for a ship and goods meddled with wrongously, by George and others, *in anno* 1638. They raise reduction, on this reason, that there was no probation, but one witness, and Captain Strachan's oath taken in supplement.

The Lords, having considered the probation, in relation to the ship, found it sufficiently proved, that Captain Strachan was an owner of an eight part of the ship; but found, that the value thereof was not proved; and seeing Morison and the other partners sold the ship, after they had long made use of her, without Strachan's consent, they found, that Strachan's oath *in litem* ought to be taken as to the value, and would not put him to prove the same, after so long time; and, for the profits thereof, ordained him annual-rent since he was dispossessed. This question arose to the Lords, whether, there being three partners beside Captain Strachan, who all meddled, whether Morison should be liable *in solidum*, or only for his third part? in which the Lords found the ship being *corpus indivisible*, and all the partners in a society, and that Captain Strachan being absent, in the King's