

JOHN BALFOUR and JAMES GIBSON, Appellants.—*Gifford—*
Clerk—Moncreiff—Skene.

No. 31.

WILLIAM BORTHWICK, for the East Lothian Bank, Respondent.
 —*Cranstoun—Lockhart.*

Cautioner.—Cautioners having bound themselves with a Bank agent to be responsible to the Bank for all loss to be sustained through the acts of the agent, but limiting the amount for which they were to be liable to £5000, and the Bank agent having become bankrupt, indebted to the Bank in £15,000, on which a dividend was payable, leaving a balance of more than £5000—Held (affirming the judgment of the Court of Session) that the cautioners were not entitled to insist on the dividends corresponding to £5000 being deducted, and imputed in extinction pro tanto of their debt, or to an assignation to the £5000, so as to draw these dividends.

IN 1810, Thomsons and Company having been appointed agents in Edinburgh of the East Lothian Banking Company, granted, with Messrs. Balfour and Gibson, a bond for the faithful performance of their duty. By that deed Messrs. Balfour and Gibson bound themselves ‘as cautioners, sureties, and full debtors for and with the said Thomsons and Company in manner after mentioned;’ and after reciting that the Bank had appointed Thomsons and Company to be agents for doing all the business which the said East Lothian Banking Company may have to transact in Edinburgh and Leith, by honouring any draughts they may make on us, and negotiating bills payable in London, negotiating and getting payment of bills payable in Edinburgh and other parts of Scotland, and exchanging the notes of the said East Lothian Banking Company with the different Banks in Edinburgh and Leith: And seeing that it was agreed that we should find caution for our intromissions in manner after mentioned,’ therefore Thomsons and Company, and the individual partners, bound themselves ‘to execute faithfully and diligently the trust committed to us as aforesaid,’ and well and truly to account to the said East Lothian Banking Company for all sums of money and notes of the East Lothian Banking Company, or of other Banks, (all which shall be deemed and reckoned sums of money,) which we the said Thomsons and Company shall be intrusted with:—‘And that we shall pay and deliver to the said East Lothian Banking Company &c. all sums of money, or other funds or documents whatsoever, belonging to the said East Lothian Banking Company, in the custody of us, the said Thomsons and Company, when required to do so.’—Then follows this clause: ‘And whatever claim may arise to the said East Lothian Banking Company against us, the said

March 27. 1822.

2^D DIVISION.
 Lord Pitmilley.

March 27. 1822. ‘ Thomsons and Company, or whatever loss, skaith, damage, or
 ‘ expense the said East Lothian Banking Company shall happen
 ‘ to sustain or incur by or through us the said Thomsons and
 ‘ Company, in any manner of way, in the premises, we the said
 ‘ John Thomson and Company as principals, and we the said
 ‘ John Balfour and James Gibson as cautioners, sureties, and full
 ‘ debtors for and with the said Thomsons and Company (hereby
 ‘ renouncing the benefit of discussion) do all and each of us, bind
 ‘ and oblige us, &c. conjunctly and severally, to refund, content,
 ‘ and pay the same to the said East Lothian Banking Company,
 ‘ &c., and that immediately upon such claim arising, or upon
 ‘ their sustaining said loss, damage, skaith, or expense, with in-
 ‘ terest,’ &c. A clause was then introduced in these terms:—
 ‘ But it is hereby provided and declared, that the cautioners be-
 ‘ fore named are and shall be no further bound and liable, by
 ‘ virtue of this present bond of cautionry, than to the extent of
 ‘ £5000 sterling, payable immediately upon the loss, skaith, da-
 ‘ mage, expense, or claim arising, and a demand being made upon
 ‘ them therefor, with interest, &c.; to which sum of £5000 ster-
 ‘ ling, with interest and penalty as aforesaid, the foresaid caution
 ‘ as to them is hereby expressly restricted, without prejudice to
 ‘ the said East Lothian Banking Company, &c. to have recourse
 ‘ against us, the said Thomsons and Company, &c. for the full
 ‘ amount of the whole loss, skaith, damage, expenses, or claim
 ‘ which may be competent to them against us or our foresaids, in
 ‘ any manner of way whatsoever, by virtue of these presents.’—
 The bond then concluded with an obligation by Thomsons and
 Company to relieve their cautioners in the usual form.

In 1814 Thomsons and Company became bankrupt, and executed a trust, when it was found that they were indebted to the Bank in upwards of £15,000. For this sum the Bank ranked on their estate, from which a dividend of 4s. 1d. per pound was payable. Having made a demand on Messrs. Balfour and Gibson for payment of the full sum of £5000, to which the obligation was limited, the latter stated that they were willing to pay that sum, on receiving an assignation to the dividends corresponding to a ranking to that extent. This proposal was declined, and the Bank then raised an action in name of Borthwick, their cashier, stating that, ‘ after applying the dividends received or to be
 ‘ received upon the said debt by the said East Lothian Banking
 ‘ Company, as creditors of the said Thomsons and Company, and
 ‘ individual partners thereof, there will still remain of the foresaid
 ‘ balance upwards of £5000 sterling due to the said East Lothian
 ‘ Banking Company,’—and concluding for payment of that sum.

In defence it was pleaded, that as the Bank had already ranked on the estate of Thomsons and Company for the full amount of their debt of £15,000, Balfour and Gibson were not bound to pay the £5000, except on condition that the dividends effecting to that sum (if already received) should be deducted and imputed in extinction pro tanto of the claim against them, with a general assignation to the £5000, so as to operate their relief; or if the dividends had not been received, they were entitled not only to the general assignation, but to a special assignment of the dividends. To this it was answered, that, by the terms of the bond, Balfour and Gibson were bound for the loss which might be sustained by the Bank, subject only to the provision that the demand against them should not exceed £5000;—that the total loss was greatly more than that sum, even after giving credit for the dividends, and therefore they had no right to insist that they were liable only for the difference between the £5000 and the amount of these dividends. Lord Pitmilley repelled the defences, and decreed in terms of the libel, ‘ In respect the bond libelled on, after
‘ the clause expressing an obligation on the principal debtors to ac-
‘ count to the Bank at all times when required, takes the defenders
‘ bound as sureties, along with the principal debtors, for whatever
‘ claim, loss, skaith, damage, or expense, in general terms, may
‘ accrue to the Bank, it being only provided by a subsequent clause
‘ that the cautioners shall not be bound, in fulfilling the above-
‘ mentioned obligation undertaken by them, to a greater amount
‘ than £5000 sterling,—and in respect it is not denied that the
‘ loss sustained by the Bank, or balance due to them on occasion
‘ of the bankruptcy of the principal debtors, when the obligation
‘ of the defenders the cautioners attached, exceeded the said sum
‘ of £5000: That the defenders are not entitled, in discharging
‘ their cautionary obligation, to demand deduction of the divi-
‘ dend on the bankrupt estate corresponding to a debt of £5000, to
‘ the effect of shifting the loss, to this extent, from themselves to the
‘ pursuers, and of altering the nature and extent of their cau-
‘ tionary obligation: That the dividend must be imputed towards
‘ extinction of the balance due at the bankruptcy, and that the
‘ bond imposes on the defenders a cautionary obligation for the
‘ claim, loss, skaith, and damage remaining due, it being only pro-
‘ vided that the amount of the sum to be paid by them should not
‘ exceed £5000.’—To this interlocutor the Court adhered on
26th November 1817, and 29th January 1819.*—Balfour and

* See Fac. Coll. Jan. 29. 1819, where it is stated (without giving the opinions of the Judges) that the decision was unanimous

March 27. 1822. Gibson then appealed to the House of Lords on the ground, 1. That the judgments were contrary to the ordinary principles which regulate cautionary obligations, by which a cautioner is entitled, upon paying the sum for which he is bound, to insist for an assignation to the debt, and to all the means of relief which are in the hands of the creditor;—2. That this right of relief is not discharged by the bond, and therefore must be held effectually to subsist; and that the right could not be affected by the circumstance of the Bank having a further claim against Thomsons and Company. To this it was answered, that the general principle was excluded by the terms of the bond,—1. Because by that deed the cautioners were bound, not for any one species or class of transactions, but for the whole conduct of Thomsons and Company in the performance of their agency;—2. Because it provides that the sum which the cautioners are to make good is a sum of loss, skaith, damage, or expense, and that the loss actually sustained exceeded £5000;—and, 3. Because full recourse for the whole loss upon the estate of the principal debtors was reserved to the Bank,—a right of which they could not avail themselves, if they were compelled to assign their claim to the cautioners. The House of Lords ‘Ordered and adjudged that the interlocutors ‘complained of be affirmed.’

Appellants' Authorities.—Rusforth, 10. Ves. 409; Baillie, 12. Ves. 435.

Respondent's Authorities.—Maxton, Jan. 17. 1777, (No. 1. Ap. Cautioner.)

J. CAMPBELL,—C. BERRY,—Solicitors.

(Ap. Ca. No. 14.)

No. 32. ROBERT CARGILL, Appellant.—*Greenshields—Moncreiff.*
CRAIGIE, Respondent.—*Cranstoun—Henderson.*

Sale.—A party having sold an heritable property, on condition, inter alia, that the purchaser should procure him an Ensigny in the army, and pay a debt affecting the property, and it having been afterwards ascertained that the heritable debt exceeded the sum specified, and that inhibitions had been executed; and the purchaser having refused to procure the Ensigny till the property was relieved of these incumbrances—Held (reversing the judgment of the Court of Session)—1.—That the purchaser was liable only for interest on the price of the Ensigny, and not for the pay and emoluments thence arising; and,—2.—That he was entitled to insist, before payment, that discharges of the real burdens should not only be produced, but that they should be duly recorded.

April 1. 1822. CRAIGIE, the proprietor of a house and garden in Dunkeld, agreed to dispoise them to Cargill, subject to an heritable debt of £90, on condition that Cargill should procure for him a commis-

2^d DIVISION.
Lord Robertson.