No 33.

are bound in strict law, from the nature of the contract, to assign.——THE LORDS found no necessity upon Johnston to assign the inhibition. *See* APPENDIX.

Fol. Dic. v. 1. p. 225.

1771. *November* 19.

WILLIAM GARDINER of Ladykirk, and JOHN CAMPBELL of Wellwood, Suspenders, *against* ROBERT AGNEW of Sheuchan, Charger.

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Is a creditor bound *de jure* to assign his ground of debt to a co-obligant, who, without having been called upon, before the term of payment, and in particular and unusual circumstances, tendered him payment of his bond? And is such creditor, for having refused to assign, liable in damages to the co-obligant?

MESSRS Gardiner, Campbell, and William Donald, were co-obligants in a bond for L. 1200 to Robert Agnew. Donald having become bankrupt, Gardiner, upon the 11th June 1770, went to Agnew's house at Stranraer, and having offered instantly to pay down the L. 1200 with the interest due, insisted he should accept it, and grant an assignation of the bond, to enable them to operate their relief for Donald's proportion of the debt.

Agnew at first stated objections to receiving the money between terms; yet at length said he was willing to take payment, giving up the bond with a discharge on the back, but would not grant an assignation.

Donald's effects having been carried off by other creditors, Messrs Gardiner and Campbell, upon the ground that they had been prevented from operating their relief against Donald their debtor, by the tortious act of Agnew in refusing to grant an assignation, presented a bill of suspenson; which, after setting forth the *res gesta*, and that they were threatened to be charged with the whole debt, insisted that the charge should be suspended *quoad* a third.

The question having been reported to the Court,

Messrs Gardiner and Campbell, the suspenders, *pleaded*;

1*mo*, It was now an established point in law, whatever it might have been formerly, that a creditor, upon receiving payment from one of several co-obligants, whether cautioners or principals, was bound, for their relief, to assign the debt. Principles of Equity, v. 1. p. 114. 126.; Bankton, v. 1. p. 23.; Ibid. b. 1. tit. 24. § 2.; b. 3. tit. 4. § 8.; Spottiswood's Stiles, p. 212. 249. 511.

Upon some occasions, in the last century, before the law on this point had come to maturity, it had been found that creditors were not obliged to assign. Stair, 10th July 1666, Home, No 4. p. 3347.; Fountainhall, 31st December 1697, Rae, No 12. p. 3356. Yet even then, the obligation to assign had, in some instances, been enforced; Stair, 10th January 1665, Lessly *contra* Gray, No 37. p. 2111.; 15th July 1680, Anderson, No 10. p. 3354.; 25th November 1708, Adamson *contra* Lord Balmerino, No 15. p. 3359.; 19th December 1705, Reid *contra* Man, No 23. p. 3368. In the case, Blackwood against

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Miln's Creditors, &c., No 47. p. 3396., where the point occurred incidentally, the Court ordained the creditor to assign; and a similar judgment in principle was given, 4th March 1757, Maule *contra* Graham, *voce* Diligence.

Instances of assignments of this nature occurred every day in rankings and other competitions of creditors; where a catholic creditor, who chose to take his payment out of one particular subject, was obliged to assign to a secondary creditor who may have affected that subject, and who would otherwise be cut out,—a rule clearly derived from analogy to that maintained in the present instance. An assignation of this nature was a necessary extrajudicial deed; and the question admitted of no distinction, whether the payment had been forced by diligence, or was voluntary; more especially as, in the present case, owing to the bankruptcy of the co-obligant, it was at all events a *necessary* one. L. 17. ff. de Fidejuss.; L. 11. Cod. de Fidejuss.; 21st December 1710, Pitcairn, No 25. p. 3371.; Erskine, b. 2. tit. 11. § 8.

2do, As the suspenders were therefore entitled *de jure* to demand an assignation to the bond, the consequences of the charger's refusal could not admit of a doubt. It was a fixed principle, that wherever a creditor directly or indirectly took any step, by which the relief of the cautioner was either destroyed or diminished, he *eo ipso* was bound to relieve him of his obligation to that extent. 27th July 1708, Creditors of Nicolson *contra* Earl of Balcarras, No 14. p. 3357.; 25th January 1717, Wallace *contra* Lord Elibank, No 38. p. 3389.

Mr Agnew, the charger, *answered*;

1mo, The argument, with respect to cautioners being entitled to assignment of any security in the person of the creditor, did not apply to the present case. An assignment was, no doubt, in some cases, demanded as a matter of right, viz. where collateral or separate securities were to be conveyed; but not where the purpose was only to convey a right already competent *de jure*, and which might be rendered effectual by a process at law. Such was the situation of a cautioner, who, although he had no bond of relief, was enabled, by an action against the debtor, to make his relief effectual; and as an assignment was not necessary, except to save him the trouble of an action, there was no principle or reason why he should be entitled *de jure* to exact it. Stair, 10th July 1666, Home, No 4. p. 3347.; Fountainhall, 31st December 1697, Rae *contra* Panton, No 12. p. 3356.; 12th December 1695, Wood, No 11. p. 3355.

Two or more obligants, bound in a bond as principals, conjunctly and severally, were precisely on the same footing as cautioners. If one paid the debt, he had no occasion for an assignation against the rest; for, *de jure*, he was entitled to relief of them *pro rata*, No 4. p. 3347.

2do, The present case was more unfavourable than any that could well be figured. The charger had not applied for payment of the bond, nor did he even expect or wish it to be paid; on the contrary, the suspenders had pressed the

money upon him at a most unreasonable time, under their own conditions; and, as it could not be said that he had distressed them for payment, there was no claim of relief which they had to operate.

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As the money had been tendered without distress, it was natural, and the charger was entitled to presume that it belonged to all the three co-obligants, and that the purpose of making the payment was to extinguish the debt. In this situation, accordingly, as there might not have been an equitable claim in existence to be relieved from, the charger would have been to blame, had he put into their hands an engine to distress, and perhaps to ruin, the credit of this third obligant.

As the charger therefore had not been *in culpa*, the consequences, whatever they may have been, could not be imputed to him; and the suspenders were themselves to blame in not having taken a bond of relief from their co-obligant; which would enable them to act with whatever diligence they should think necessary.

The Judges were a good deal divided upon this question. Several maintained, That a creditor was obliged to grant an assignation *de jure;* while others held it could only be demanded *ex equitate*. The majority, however, were of opinion, That the charger had not acted improperly; and as the demand made on him rested only upon equitable considerations, it would have been oppressive to punish him for an innocent mistake in law. The circumstances also, in which the demand had been made, were so uncommon, that it was not surprising he should have hesitated; and, in particular, that the suspenders were not entitled to favour, as, by not taking a bond of relief from Donald, they had been themselves to blame.

They accordingly, 19th November 1771, 'repelled the reasons of suspension, and found the letters orderly proceeded.' And thereafter, a reclaiming petition, without answers, was refused.

Lord Ordinary, *Auchinleck*. For Gardiner and Campbell, *Wight, Geo. Fergusson*.
For Agnew, *Ilay Campbell*. Clerk, *Tait*.

R. H. *Fac. Col. No* 108. *p.* 325.