

bond *unico contextu*, or bound in different bonds at different times; and therefore, that the pursuer, in the right of Sir George co-cautioner, is bound to sustain the one half of the loss, and is only entitled to demand from the defender the other half.

No. 38.

The pursuer, admitting the principle, denied its application to the present case; in which Sir George became cautioner for both the obligants in the original debt, and therefore entitled to relief against both, *actione mandati*. There can be no doubt of the maxim, that if Sir George interposed at the request of both, the *actio mandati* will lie against both *in solidum*. The doubt only can be, Whether both concurred in the mandate, or only Martin, the principal debtor. This doubt is removed by the circumstances of the case, and by the tenor of the bond of corroboration. Both obligants were equally under distress. It does not appear by the bond of corroboration who was the principal debtor: They appear to be equally concerned. They equally consent to Sir George's interposition; and as there is no mention for whose behoof Sir George interposed, the presumption must lie, that it was at the request and for behoof of both equally.

“ The Lords found that relief is competent to Dame Elizabeth M'Kenzie, the pursuer, *in solidum*, against both obligants in the original bond.”

*Sel. Dec. No. 24. p. 27.*

---

## SECT. IX.

SOCII liable IN SOLIDUM OR PRO RATA.—Partner of a Company paying the Debts.—Whether Partners are bound to contribute beyond their Stock.

1665. December 18.

M'LEOD against YOUNG.

HARRY HOPE, Walter Young, and John Govan, merchant in Edinburgh, by their bill of credit given to Peter Clark, and ——— Donaldson, for getting some cows for their use, directed to the Lord Macdonald, or any other, bound and obliged themselves to pay and answer such bills as the said Clark and Donaldson should prove upon them; and the price of the said cows being arrested in their hands, they suspended upon multiplepoinding, that they could not be liable for the sum of £.80 Sterling, drawn upon them conjunctly and severally, but only for their several parts. The Lords found the merchants were all and every one of them liable *in solidum*, and that there was a society of the cows among

No. 39.

No. 39. them; and therefore found that Young and Govan should bear Harry Hope's part, who was *lapsus bonis*.

*Fol. Dic. v. 2. p. 380. Newbyth MS. p. 47.*

\* \* Dirleton reports this case :

1665. *December 19.*—WALTER YOUNG, Harry Hope, and John Govan, having written to the Lord Macdonald, that they had commissioned ——— Donaldson to buy cows for their use, and that for such as should be bought from him, they obliged themselves to pay all such bills as should be drawn upon them; and the said Donaldson having drawn a bill upon the said persons, and any of them;—found, that in respect they were partners, and *socii* as to the bargain, and the Lord Macdonald had upon their letter trusted and sold the cows to the said Donaldson, they ought to be liable *in solidum* conjunctly and severally.

*Dirleton, No. 8. p. 5.*

\* \* Stair's report of this case is No. 36. p. 2282.

---

1683. *March.*

JOHNSTON *against* SIR WILLIAM BINNING and BAILIE NIELSON.

No. 40.

FOUND that the buying of bear by the clerk of a brewery, which came to be brewed there, made the masters of the brewery, who were *socii*, liable *in solidum* for the price of the bear, though the seller had no written receipt from the clerk or maltman; but that it was only proven by witnesses, and acknowledged by the clerk, that the same was delivered and brewed.

*Fol. Dic. v. 2. p. 380. Harcarse, No. 854. p. 243.*

\* \* The like was found February and March 1603, Dionysius Thomson *contra* Penman and others; and the like *contra* Sir James Stamfield, though here the clerk's commission in writ did not extend to the power of buying, which seems hard upon masters.

*Harcarse. Ibidem.*

---

1698. *January 26.*

BAILIE ALEXANDER BRAND *against* WARDEN and BUCHANAN.

No. 41.

WARDEN and Buchanan having employed one to go to Orkney to buy some bear, and their factor having entered into a contract with Bailie Brand, then Steward of Orkney, and having bound his constituents; when they are charged, they suspend, that they can only be liable *pro rata*, because there is a clause of relief-Answered, Your *exercitor* or *institor* was fully by his commission empowered to