

The case being debated *in presentia*, the decret *in foro* was obtruded, and that it was just upon the matter, seeing as to not delivery, it appeared by his oath, that he was trusted to the behoof of the pursuer, and was in effect a depositar, so that he could not cancel the bond without consent of the pursuer. To which it was *answered*, That the decret was extracted as said is, and that immediately upon the pronouncing of the same, he had applied to the Lords to the effect foresaid, and it cannot be said, that he had any trust from the pursuer, but only from her father; and though he could be thought to be a depositar, the manner and quality, and terms of the depositions, could not be proved otherways, but *scripto* or *juramento*.

THE LORDS notwithstanding thought they were concerned to adhere to the decret, being *in foro*, least their decreets should be obnoxious to that prejudice, that even when they are *in foro*, they may be questioned and altered. Some of the LORDS were of opinion, that the great consideration the Lords should have, is to do justice, and that the party having omitted nothing upon his part, neither before nor after pronouncing of the same, and upon the matter, the reason of suspension as to the point of justice and law being unanswerably relevant, it was hard that a party should be grieved upon a pretence of form, there being a singularity in this case upon which the honour of the Lords may be saved, viz. that the said decret was extracted with too much precipitation.

*Dirleton, No 225. p. 105.*

1676. January 18. CUNINGHAME *against* BROWN.

ANDREW CUNINGHAME pursued Brown as heir to his father, for fulfilling a bond of his father's, obliging him to relieve the pursuer of all cautionries for which he was obliged for Robert Cuninghame, and particularly of a bond granted by the said Robert and Andrew Cuninghames to Captain Lavrock in England, after the English form of a double bond. The defender *alleged*, That this English bond did not prove Andrew Cuninghame to be cautioner for Robert, because they are thereby bound as conjunct principals. It was *answered*, That in English bonds, the person first exprest is always understood principal, and the others but as cautioners.

THE LORDS found the allegiance relevant, and for proving thereof, granted commission to the Judges of the Common Pleas, to declare what was their law in the case.

No 93.

The law of England, whereby the first person named in bonds, as co-principal, is understood as principal, and the rest as cautioners, found probable by the attestation of the Judges of the common pleas.

*Stair, v. 2. p. 401.*