No. 32.

rupt; and Ralston, another of them, paid the whole debt, and took assignation from the creditor, and pursued another *correus* for the three parts, deducing his own fourth.

Alleged for the defender: That he ought to have allowance for a fourth part of the bankrupt's proportion.

Answered: They are not bound conjunctly and severally by the clause of relief, but only for their own parts; and as they would not have been obliged to the creditor for that bankrupt's part, had the principal obligement been so conceived, neither can they be obliged for it to one another, according to the terms of the relief.

Replied: By the clause of relief, they are to bear equal burden with other, which imports an equality of loss by the cautioner; and if the pursuer did not bear as great a part of the loss, by the insolvency of the *correus*, as the defender, there would be an inequality.

The Lords sustained the allegeance and reply.

Fol. Dic. v. 2. *p.* 380. *Harcarse*, (CAUTIONERS), *No.* 237. *p.* 56.

*** A similar decision was pronounced, 26th December, 1707, Cleghorn against Yorston, No. 2. p. 14624.

1683. *February*. LAMBERTON *against* EARL of ANNANDALE.

No. 33.

BY a clause of relief in a bond, my Lord Annandale, Lamberton, and four more, bound therein as co-principals to Craigiehall, being obliged to relieve each other for their own part, without the taxative word allenarly, and Lamberton having, upon distress, paid the debt, pursued my Lord Annandale to relieve him of the half of the debt.

Alleged for the defender: That he could be liable only for a sixth part, they being obliged to relieve him *pro rata*.

Answered: The other four *correi debendi* being absolutely bankrupt, the pursuer, who paid the whole debt, ought to be relieved of the half by the defender.

The Lords, in respect of the notour insolvency of the other four co-principals, decerned the defender to pay half of the whole debt.

Fol. Dic. v. 2. *p.* 379. *Harcarse*, *No.* 239. *p.* 57.

1705. *July* 26. LILLIE *against* CRAWFORD.

No. 34.
One of three cautioners being insolvent, and an-

MR. WILLIAM DUNDAS of Kinkavil, Halbert Gladstains, merchant in Edinburgh, and James Crawford of Mountquhany, being all bound as cautioners for Bonhard, to Robert Halyburton, in a bond of 5,000 merks, Mountquhany paid

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other having paid the debt, upon discharge and assignation, and, for two thirds thereof, adjudged the other solvent cautioner's estate, the Lords restricted the adjudication to the half, and took off accumulations.

the debt, upon a discharge and assignation; and, for two thirds thereof, adjudged the lands belonging to the deceased Halbert Gladstains, upon a decreet *cognitionis causa* recovered against his representatives; William Gladstains, Halbert's son, having disponed his father's lands to his sisters, with the burden of his father's debt, and his own then contracted, upon which disposition an adjudication in implement was led, in the name of one Douglas, (to whom the sisters had assigned their right in trust), and infeftment followed; the Lords, by several interlocutors, found the father's creditors preferable to the creditors of the son, whose debts were contracted after the disposition. John Lillie, a merchant-tailor at the Hague, creditor to William the son, alleged, That Mountquhany's adjudication, though for the father's debt, was led for more than was due; in so far as the estate of Halbert Gladstains, who was but one of the three cautioners, could not *ex natura negotii* be further affected by Mountquhany's diligence than for a third of the sums, if Mr. William Dundas, one of the cautioners, had not broken, according to the decision, 19th June, 1662, Wallace *contra* Forbes, No. 2. p. 3346. *voce* DEBTOR AND CREDITOR; and he having failed, it is only liable for the half; the hazard of the insolvent cautioner dividing betwixt him and Mountquhany. And seeing Mountquhany hath adjudged for two thirds, the adjudication should be restricted to a half; consequently his accumulations must fall. *2dly*, Douglas's adjudication in implement could only make Mountquhany, as creditor to the father, preferable for his principal and annual-rents; and Lillie's adjudication, being year and day prior to Mountquhany's proper adjudication, was a *medium impedimentum*, to hinder and cut off his accumulations to the prejudice of Lillie; for although Mountquhany's debt be considered as a burden affecting the disposition, yet it was not *debitum fundi*, so as the ground might be thereupon poinded and apprized; in which case only a subsequent adjudication is drawn back to its cause; but is like a debt secured by inhibition, or some heritable right, which only hath preference as to principal and annual-rents.

Answered for Mountquhany: Whatever might be said for a cautioner taking simply a discharge, and pursuing a co-cautioner upon the clause of relief, yet, where the distressed cautioner has got assignation to the debt, and pursues as assignee, *utitur jure cedentis*, and as his cedent might insist against any of the three cautioners for the whole, so he, as assignee, might exact the whole from any of the other two, deducing his own third, whereof he was bound to relieve them; Kincaid *contra* Leckie, No. 18. p. 14640. Arnold *contra* Gordon, No. 19. p. 14641. where the Lords found, that one of more cautioners, as assignee, might pursue any of the co-cautioners for the whole debt, deducting his own share; and these two decisions, being plain and pat, do sufficiently over-rule that one, 19th June, 1662, cited for Lillie; for *posteriora derogant prioribus;* or perhaps, there, two cautioners had suspended the third, in which case the Lords very justly suspended *quoad* the charger's third; which agrees with the other decisions. *2dly*, *Esto* it were true, that Mountquhany's adjudication, upon the third cautioner's turning bankrupt, should be restricted to the equal half of the debt paid, yet, seeing he had good

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action in law for two thirds, though the same might have been elided by the exception of the cautioner's insolvency, that exception being *res facti*, and not proponed, his adjudication was justly led; and therefore he ought not to fall from his accumulations. Yea, albeit the Lords should allow the other creditors as yet to propone the same, and should restrict Mountquhany's adjudication to one half, yet his accumulations effeiring to that half must subsist; seeing he adjudged only for what was due, and ought not to be punished for the defender's neglect to make exceptions *in facto*. 3. As to the allegeance, That Lillie's adjudication is a *medium impedimentum*, hindering Mountquhany's accumulations—It is answered, That his debt being the father's, and preferable by Douglas' adjudication in implement, the accumulations are but accessory thereto. And, in the next place, Mountquhany having paid as a distressed cautioner, he has good action against the co-cautioner and his estate, not only for the principal sum, annual-rents, and penalty paid out, but also for the annual-rents of these annual-rents and penalty as damages, whereof he, by the clause of relief, must bear an equal share, as was expressly found in the case of Kincaid against Leckie: And Mountquhany's accumulations afford him no more, so that he hath no additional right by his proper adjudication.

Replied for Lillie: 1. Co-cautioners are bound to relieve one another of cost, skaith, and damage, through their becoming cautioners, whether the damage happen by the breaking of the principal, or of the co-cautioners, even though there were no express clause of relief, Monteith *contra* Rodger, No. 7. p. 3351. *voce* DEBTOR and CREDITOR, and therefore Mountquhany ought not only to have deducted his own third, but also the half of the loss sustained by the insolvent cautioner, whose condition was notour before the adjudication, by long imprisonment in Edinburgh, or absconding in the Abbey. As to the decisions adduced by Mountquhany, they are nothing to the purpose; because that betwixt Kincaid and Leckie doth not mention the debate that gave occasion to the interlocutor, nor does it appear that there was a broken cautioner in the case, but only two solvent cautioners pleaded the *beneficium divisionis*. And in the next place, although the cautioner was found to have right to pursue as assignee, in the same manner as the cedent or principal creditor; yet these are not alike *in omnibus*, otherwise the former needed not to have deducted his own part of the principal sum. 2. Relief among cautioners is considered so narrowly, that a co-cautioner transacting an old debt and taking assignation to his own behoof in a third person's name, was found to have right to no more, but a proportion of what was truly paid; since relief never goes beyond disstress and payment, Brody *contra* Keith, No. 44. p. 3393. *voce* DEBTOR and CREDITOR. And it is offered to be proved by Mountquhany's oath, that he did not pay the whole sums, principal, annual-rents, and penalty to the creditor; consequently having adjudged for more than he paid, the adjudication is null in that repect. 3. Mountquhany's decreet of constitution and adjudication being both in absence and *periculo petentis*, and the exception of the third cautioner's insolvency notour, though not judicially opponed; he ought for his own security to

No. 34. have deducted the half of his proportion. 4. Mountquhany cannot found his preference for the accumluations upon Douglas's adjudication in implement; for that adjudication doth not accumulate, being only led for implement of, and to complete the disposition; and as a distressed co-cautioner he can only accumulate the sum truly paid, upon which he must depone.

The Lords restricted Mountquhany's adjudication to the half, and cut off his accumulations; and ordained him to assign Lillie, upon payment of the said half, to a proportionable relief out of Bonhard the principal debtor's estate.

Fol. Dic. v. 2. *p.* 380. *Forbes*, *p.* 37.

1763. *January* 11.

JAMES HAY, Tenant in Garbet, *against* The Honourable CHARLES ELPHINSTON, and JOHN GRAY of Condorrat.

No. 35.
The passing at the bar, at the moving of a reclaiming petition, from one of three defenders, who were made liable conjunctly and severally by a former interlocutor, found not to relieve the other two of any part of the sum decreed.

JAMES HAY brought an action against the said Charles Elphinston and John Gray, and also against James Hamilton of Hutchison, concluding for damages and expenses, on account of their having wrongfully adjudged him to serve as a soldier during the subsistence of the press acts in the year 1757 and 1758.

The Court, by interlocutor of the 6th of August, 1762, found the whole defenders conjunctly and severally liable in £. 200 of damage and expenses.

The defenders having reclaimed by a joint petition, which came to be moved upon the last day of the session, it was refused as to Mr. Elphinston and Mr. Gray; but, as some of the Judges seemed to be of opinion, that Mr. Hamilton was not equally guilty, the pursuer, in order to be free of any further litigation, agreed at the bar to pass from that gentleman; upon which he was assoilzied.

The pursuer having extracted the decreet, and charged Mr. Elphinston and Mr. Gray with horning, a bill of suspension was offered in their name; in which, besides repeating the arguments pleaded for them in the original cause, they further insisted, That, in respect of the pursuer's passing from the other defender Mr. Hamilton, they could only be liable in two thirds of the sum charged for.

This bill of suspension having come to be advised in the vacation by three Ordinaries, they refused it as to two thirds of the sums charged for; but made avisandum to the Lords as to the other third, and ordered both parties to give in memorials.

Pleaded by the complainers: As, by the interlocutor of the 6th of August, all the three defenders were condemned, conjunctly and severally, to pay both the damages and expenses, and as Mr. Hamilton was thereafter assoilzied upon the charger's consent, it must have the same effect as if the charger had granted him a discharge; in which case he could not have exacted more than two thirds of the sum decerned for from the other defenders.

Answered for the charger: He had it in his power to insist either against any one, or against all of the defenders; and as the complainers were found liable