would have been competent to the principal against the cautioner, in the original bond, were competent to him against the cautioner in the bond of corroboration. This case is parallel; for the pursuer having intervened as cautioner for Lewis, if Lewis were pursuing, the defender would allege, that being a co-principal, bound conjunctly and severally, he could not have insisted against the defender but for the one half. No. 30.

It was replied: That the pursuer interposing, as cautioner, in a new and corroborative security, he interposed in contemplation of relief, from all the obligants, in the original bond, as has been several times found.

It was duplied, That a cautioner interposing in a corroboration may recur upon all the former obligants for whom he interposes as cautioner; but he who becomes cautioner for any one, and pays, does only come in place of the person for whom he becomes cautioner.

"The Lords sustained the defence as to the one half, and found that all defences competent against Lewis were competent against the pursuer his cautioner; and the pursuer having reclaimed by a bill, the Lords, on the 11th, adhered."

Fol. Dic. v. 2. p. 379. Dalrymple, No. 186. p. 242.

1722. *December 15.*

ALEXANDER MURRAY, of Broughton, *against* the HEIR and CREDITORS of ORCHYARDTOWN.

No. 31.
Obligation of mutual relief has place amongst cautioners, tho' not bound at the same time, or by the same deed.—See Ker *against* Gordon, No. 21. p. 14641.

IN the year 1674, Sir Alexander Macculloch, and Godfrey his eldest son, as principals, and with them Sir Robert Maxwell of Orchyardtown, as cautioner, became bound to Alexander Macghie of Balmaghie, in a bond of 2000 merks, with an annual-rent from Whitsunday of the same year. In the year 1679, Sir Godfrey the son, as principal, and with him the Viscount of Kenmuir, and Alexander Murray of Broughton, as cautioners, grant a bond of corroboration, reciting the former bond, and subsuming (according to the usual form in such cases) "That Balmaghie was content to supersede execution, upon granting the security aftermentioned; therefore the saids principal and cautioners, in further corroboration of the foresaid bond, bind and oblige them to make payment of the said principal sum allenarly, with the annual-rent from Martinmas 1679." And this bond contains a clause of relief from the principal to the cautioners, and a relief *pro rata* betwixt the two cautioners themselves. Alexander Murray of Broughton having made payment of this sum to the creditor, takes assignation against the principals and cautioner in the original bond; and by reason of the insolvency of the principals and their representatives, insists against the representatives of the cautioner for the whole sums contained in the assignation.

It was alleged for the defenders, That they could only be liable in the half, by reason, that in the construction of law, the cautioner in the first bond, and the cautioner in the bond of corroboration, were co-cautioners, which implied a mutual relief.

No. 31.

It was answered for the pursuer, 1*mo*, That though in the common case, where more cautioners are engaged in the same act obligatory to pay, there arises a mutual relief from the law, and the presumed consent; yet, in this case, where, after the act of cautionry is complete, and the several reliefs settled by law, a new person intervenes, and in corroboration of the original obligement, binds himself to the creditor to perform, there is no relief competent to the original cautioners, against such subsequent obligant. The reason of the difference lies here, that when any number of persons enter into an engagement of cautionry, as they are supposed to know each other's circumstances, are presumed to trust to one another for relief; but when a new man, not concerned in the original engagement, becomes bound *ex post facto*, this circumstance could not have been under the cautioners' view, when they contracted originally; they could have no view of an additional security from such an event: And therefore it is not easy to be conceived, upon what ground of law they can claim any benefit by it. 2*do*, This will the rather appear, if the nature and purpose of the engagement be considered. Mr. Murray became cautioner in the bond of corroboration, he therefore subjected himself to the creditor for his security; but it must be understood that he meant to provide for himself in the second place, by securing a relief against all the persons bound in the former bond. Now, had it expressly been stipulated in the bond of corroboration, that upon payment by the cautioner in the corroboration, the creditor should assign him to a full relief against all the other debtors, there can be no doubt but the cautioner would have been entitled to a full relief; for such might be argued, were the terms of the engagement, without which he would not have acceded. But whatever would be the effect of such a clause, had it been expressed, will be the effect where it is implied, as it certainly is here from the nature of the engagement and design of parties. 3*tio*, The granter of such corroborative security is more properly a cautioner for the original cautioners, than a co-cautioner with them; for the very name of corroboration imports that it is granted in aid of the bond corroborated, with all its qualities and accessories, principal as well as cautionry: And in this view, the principal and cautioners in the first bond became all as principals with respect to the persons corroborating, who, in effect, became cautioners entitled to a full relief.

To the first, it was replied, That the relief here arises without any consent express or tacit, from this plain principle of equity, "That where there is a common obligation, to which all are equally subjected, it ought not to be in the power of the creditor, arbitrarily to load any of the debtors he pleases with the debt; and therefore, though for the ease of the creditor, each may be made liable for the whole, yet since they are all *in pari casu*, that rule of equity dictates, whatever is advanced towards the discharge of the obligation by any of them, more than his share, may be recovered off the rest, to preserve that original equality which is their common interest to preserve." If this rule had not place amongst us, many hardships would follow: Let us suppose, for one example, a third party corroborating a bond, and after that another corroboration granted by the principal

debtor, and others bound cautioners for hin; is it to be believed that those cautioners for the principal debtor would have relief of the whole from the first corroborator? and yet upon the pursuer's principles that must follow: for *nullum negotium gerebatur* between these cautioners and the corroborator: Let us supose that ten different people had by themselves granted bonds of corroboration, some of them with cautioners; is it reasonable the creditor should have it in his power to make any of them pay the debt without relief, all of them being bond *in solidum?* Surely it cannot be thought: Wherefore the rule must be without regard to the dates of their bonds; and the cautioners in the same obligation, they are liable in mutual relief; and the cautioners granted by them, must be liable according to the proportion of their principal. And still in all these cases, there is no tacit paction of relief; they may probably not so much as know of one another: The proposition is, that relief has its rise from the several cautioners being bound *in solidum*, in the same sum for the same principal debtor; and the interval of time or place makes no difference in equity. Nor is the rule of equity confined to this case; it is upon the same principle, that a creditor having a catholic preferable infeftment for the same debt in different subjects, cannot arbitrarily draw his whole claim out of any one of the subjects, to the exclusion of the creditors that have the less preferable rights in that subject, but must draw out of each proportionally, that all may be burdened equally; or if he choose to draw his whole out of one subject, he must assign to the creditors thereby excluded, proportoinally against the creditors upon the other. To the *second* argument, replied: Since the clause argued upon was not expressed, it affords an argument that Mr. Murray had no view to bind himself otherwise than simply as a cautioner, relying upon the relief provided him by the law: For a clause of this nature will never be implied, these clauses only are implied, without which the contract cannot have its course and effect; never these, in abstracting from which, the contract is consistent and effectual. Thus, because Mr. Murray bound himself as an additional security to the creditor, it is not therein necessarily implied, that the creditor upon payment is obliged to assign, further than the law otherwise obliges without any such implication. It is a perfectly consistent transaction, that one should become a cautioner, make payment to the creditor, recover a proportion off the other cautioners by a legal relief; and all without any express or implied obligation upon the creditor to assign to him upon payment. If a cautioner, therefore, acceding to a bond of corroboration, is resolved not to rest upon the legal relief, but declares, as a provision in his becoming cautioner, that he will have full relief off all the former debtors, and, for that end, the creditor shall be obliged to assign to him upon payment, such a clause must be expressed; for it will never be implied. It is true, that upon the creditor who has got payment from a cautioner, an obligation arises, not from an implied consent, but *ex bona æquo*, to assign him for his relief; but then the question returns, how far? against the principal debtor, no doubt, *in solidum*; but against the co-cautioners, who are *in pari casu*, for the reason above given, it

No. 31.

No. 31. is still thought this obligation *ex bona æquo*, can never extend to an assignation further than *pro rata*.

Replied to the *third*: That, as the circumstances of this case stand, it seems impossible to affirm, that Broughton was cautioner for cautioners, seeing he himself did not corroborate, but became cautioner for the principal debtor corroborating: This principal debtor did not, by the corroboration, surely, take upon him the obligation of his own cautioners; but his former obligation, by a second consent, was confirmed and established; and, for the performance of that obligation so undertaken, Broughton became his cautioner: How then can it be said, that he was cautioner for the former cautioners? The defenders therefore conceive, that the corroborating of the first obligation is so far from being an argument for Broughton, that it is directly against him. If a new bond had been granted by the principal for the said sum, without a corroboration of the former, it might, with more reason, been pretended, that Broughton did not accede as cautioner to the first obligation: But where the first bond is corroborated, and he becomes cautioner, there he plainly accedes as cautioner to the first obligation, and is not only bound for the same sum, but truly, in the eye of the law, is bound as if his name had been in that first obligation; so that, upon consideration of the whole, the creditors cannot find any specialty, arising from the form of the writings, that favours Broughton, but rather otherwise; and so the decision must go upon the common rules of law and equity.

"The Lords found, That Broughton, the petitioner's father, cautioner in the corroboration, could only have relief as co-cautioner."

Fol. Dic. v. 2. *p.* 379. *Rem. Dec. v.* 1. *No.* 37. *p.* 77.

*** See p. 6997. *voce* INHIBITION; where it is said this case was affirmed upon appeal.

SECT. VII.

If any of the CORREI prove insolvent.—When several Persons have been found liable IN SOLIDUM, whether passing at the Bar from one of them extinguishes his Part of the Obligation, or if it falls on the rest.

1682. *February* 2.

MUIRE of Glanderston *against* CHALMERS of Gadgirth.

No. 32.

FOUR persons in a bond for money being bound conjunctly and severally to the creditor, and each of them, in the clause of relief, being to pay for their own part, and bear equal burden with other, one of the four *correi* became bank-