

singuli in solidum, they are in no worse situation than if Mr. Hamilton had never been made a party; besides, he had it also in his choice, after obtaining decret, to force payment of the whole from any one; and, as at the time of his passing from Mr. Hamilton, he had not got payment of a sixpence of what was found due to him, it is ridiculous to consider his passing from that gentleman, in order to avoid further litigation, as importing a discharge of any part of the sum; especially, as the defenders, in their joint reclaiming petition, endeavoured to shew, that Mr. Hamilton was less guilty than any of the other two.

“The Lords refused the bill of suspension, reserving to the defenders action of relief against James Hamilton of Hutchison, together with the defences against the same, as accords.”

Act. *Montgomery, Walter Stewart, and Wright.*
Reporter, *Barjarg.*

Alt. *Lockhart and Burnet.*
Clerk, *Home.*

A. W.

Fol. Dic. v. 4. p. 296. Fac. Coll. No. 220. p. 241.

No. 35.

SECT. VIII.

Relief Competent to a Cautioner against the Principal Debtors.

1622. November 13.

MUCHAL against FORBES.

No. 36.

RELIEF of cautionry by two principals found to be *in solidum*, albeit they were not obliged conjunctly and severally, but only in these terms, “obliges us and our foresaids.”

Fol. Dic. v. 2. p. 380. Kerse MS. fol. 52.

* * Durie reports this case :

Two Forbeses, viz. the father and the son, as principals, and with them the Laird of Muchal and some others as cautioners for them, being all obliged, conjunctly and severally, in sums of money to a creditor; and the same two principals, by the same obligation, being bound for relief of the cautioners, by the which clause of relief, the said two principals were not obliged conjunctly and severally, as the cautioners were all obliged to the creditor, but only after this manner; viz. the said ——— Forbes, and ——— Forbes, his son, obliged them to relieve their said cautioners; the Lords found, that this clause resolved not in a conjunct obligation, by the which every one of the said two principals should be allenarly

No. 36. subject in the relief of the cautioners, each one of them for their own parts, but declared that thereby they were obliged conjunctly and severally, seeing that clause behoved to be ruled by the tenor and course of the rest of the obligation, wherein the cautioners, and principals, being obliged conjunctly and severally to the creditor, equity craved, that the two principals should stand after this same manner obliged to the cautioners, notwithstanding of the words of the clause of relief inserted in the bond, bearing as is above written.

Act. Hope & Nicolson.

Alt. Aiton & Stuart.

Clerk, Gibson.

Durie, p. 35.

* * * Haddington also reports this case :

1622. November 14.—ALEXANDER FORBES of Bombie, and ——— Forbes, his eldest son, as principals, and the Laird of Muchal and others, as cautioners for them, were bound, conjunctly and severally, for the sum of 4,000 merks, and Alexander Forbes and his son bound for the cautioners' relief. Muchal charges the said Forbes, son to to Bombie, to relieve him. Forbes suspends, that he should only relieve Muchal of the half of the sum, because in the clause of relief he was not bound conjunctly and severally to relieve, and so he behoved to be reputed only bound conjunctly and for the one half. It was answered to the reason, that he should relieve the whole, because all the parties being bound for payment of the whole sum to the creditor conjunctly and severally, the clause of relief being general behoved to be of the nature of the principal obligation, and receive interpretation from the same. Next, since Alexander Forbes and his son were bound conjunctly and severally to the principal creditor, they behoved to be obliged that same way to the cautioners for their relief. Farther, if no provision of relief had been contained in the bond, the law would have given action *in solidum* to the cautioners against every one of the principal parties. *Lastly*, if the principal parties being bound conjunctly and severally to the creditors, if, by their not payment of their debt, their cautioners should be distressed, and the cautioners being forced to pay should only have relief against every one of the principals for the half of the sum, the debtors should report advantage *ex suo dolo vel mora* to the prejudice of their cautioners, which was unjust. In respect whereof, the Lords found the letters orderly proceeded for relieving Muchal *in solidum* of the whole sum, albeit by the clause of relief contained in the bond, Alexander Forbes and his son were mutually bound, which, not making mention of conjunctly and severally, was by common interpretation thought to be a conjunct bond divisible by equal portions betwixt the parties obliged.

Haddington MS. No. 2665.